

# BEYOND THE NEW FEDERALISM—REVENUE SHARING IN PERSPECTIVE

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*In 1972 Congress added General Revenue Sharing to the list of federal grant-in-aid programs for states and localities. President Nixon had recommended Revenue Sharing, as a part of his "New Federalism," because it would foster local autonomy by minimizing federal restrictions on the grants. When General Revenue Sharing was renewed in 1976, Congress made no changes in the formula, leading some commentators to minimize the significance of those changes which were made.*

*Professor Brown argues that the 1976 renewal amendments to the Revenue Sharing Act are an example of "interventionist federalism," a new form of federal influence over state and local governments. The federal government, while not specifying how Revenue Sharing funds must be spent, places on recipients strict conditions meant to promote such policies as non-discrimination and open access to state and local decision-making bodies. Thus the 1976 amendments, while enhancing local autonomy in spending decisions, enable the federal government to affect state administration in a potentially broader way than in the past.*

## *Introduction*

Prompted by decisions such as *National League of Cities v. Usery*<sup>1</sup> and *Younger v. Harris*,<sup>2</sup> lawyers are accustomed to viewing the courts as the forum in which the great controversies of federalism are settled. In fact, however, it is Congress—not the courts—which makes most major decisions

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1 426 U.S. 833 (1976). *Usery's* resurrection of the Tenth Amendment has generated numerous analyses of the decision itself, as well as a renewal of interest in federalism generally. See, e.g., Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977).

2 401 U.S. 37 (1971).

concerning the allocation of power within the federal system; and, increasingly, Congress exercises this choice when it shapes the contours of federal grant-in-aid programs. Federal grants to units of state and local government now total approximately \$85 billion annually.<sup>3</sup> At the heart of every grant-in-aid debate is the issue of which level of government will have the power to determine how the funds are spent.

Enactment of the State and Local Fiscal Assistance Act of 1972<sup>4</sup> (Revenue Sharing) marked a dramatic turning point in the American federal system.<sup>5</sup> By guaranteeing state and local governments \$6 billion annually, the legislation constituted the largest domestic aid program ever enacted by Congress. At the same time this legislation contained few strings to control the recipient's expenditure of the funds. Former President Richard Nixon adopted Revenue Sharing as the cornerstone of his "New Federalism" policy. The objective of this policy was to return to state and local governments certain powers which had allegedly drifted away from these units over the years and accrued to the federal bureaucracy.<sup>6</sup>

But Revenue Sharing today is different from what it was in 1972. January 1, 1977, marked the effective date of a set of amendments to the original Act<sup>7</sup> which may be indicative of future grant-in-aid changes. Given the outpouring of studies on the 1972 Revenue Sharing Act, the lack of scholarly interest in the renewal amendments is surprising. The only major study to date—*Revenue Sharing: The Second Round*, by the Brookings Institution—describes the renewed Revenue Sharing program as reflecting predominantly the "Ford Administration's status quo position . . ."<sup>8</sup> Brookings concludes that

3 U.S. Office of Management and Budget, Executive Office of the President, Special Analyses Budget of the United States Government Fiscal Year 1979 175 (1978).

4 State and Local Fiscal Assistance Act of 1972, Pub. L. No. 92-512, 86 Stat. 919 (1972) [hereinafter cited as Revenue Sharing Act].

5 Nathan, *Federalism and the Shifting Nature of Fiscal Relations*, 419 ANNALS 120, 121 (1975) [hereinafter cited as Nathan].

6 See President's Message to the Congress Proposing a Program for the Sharing of Federal Revenues With the States, 5 WEEKLY COMP. OF PRES. DOC. 1143 (Aug. 13, 1969).

7 State and Local Fiscal Assistance Amendments of 1976, Pub. L. No. 94-488, 90 Stat. 2341 (1976) [hereinafter cited as Revenue Sharing Amendment].

8 R. NATHAN AND C. ADAMS, JR., *REVENUE SHARING: THE SECOND ROUND* 23 (1977 (Brookings Institution) [hereinafter cited as SECOND ROUND].

the amendments simply deal with "process issues . . ."<sup>9</sup> In fact, however, the renewal amendments represent both a significant change in Revenue Sharing itself and the possible emergence of a new approach to federal-state power relationships.

This article analyzes the renewal amendments, and particularly their implementation by the Office of Revenue Sharing (ORS), as an example of what might be called "interventionist federalism." As used here, the term refers to the national government's use of grants to gain broad leverage over the organization and behavior of state and local governments, while allowing these units substantial discretion in the actual use of grant funds. This concept of federal-state relations differs both from Nixon's New Federalism and from the system of categorical grants which preceded it. It offers Congress the opportunity to institute changes far beyond those it can achieve through direct "regulation" of state and local governments. Thus, for example, new federal programs such as the proposed "National Urban Policy" are likely to involve interventionist uses of the grant system in order to further national goals for urban areas and preserve a degree of sub-national autonomy.<sup>10</sup>

The article also focuses on Congress' increased use of citizen recourse to federal administrative and judicial processes as a means of enforcing grantee compliance with program strings and of redistributing political power at sub-national levels. This congressional policy of opening up federal forums to those who may have been excluded from state and local decisionmaking comes, paradoxically, at the height of a judicial view of federalism which takes precisely the opposite approach.<sup>11</sup> In focusing on interventionist federalism and the use of federal forums to enforce Revenue Sharing strings, the article examines both the future of federal grant programs

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9 *Id.* at 166.

10 The Carter Administration has studied one proposal for its national urban policy, which would increase allotments of Revenue Sharing funds to states that aid their depressed municipalities. These increases would be funded by cutting allotments to states which do not provide such aid. *See*, N.Y. Times, Feb. 12, 1978, at 1, col. 5.

11 *See* Note, *Stone v. Powell and the New Federalism: A Challenge to Congress*, 14 HARV. J. LEGIS. 152, 157-61 (1976).

and the broader issues concerning the role of federal institutions as overseers of state and local governments.

## I. REVENUE SHARING IN THE CONTEXT OF THE GRANT-IN-AID SYSTEM

Despite the enactment of Revenue Sharing, other grant-in-aid programs have remained fixtures of the federal government's efforts to transfer funds to state and local governments. In order to understand fully the impact of Revenue Sharing and its 1976 amendments on federal-state relations, it is important first to consider grant-in-aid programs and their theoretical underpinnings.

### A. *The Grant Programs—A System?*

A basic text on state and local finance describes grants as "an essential mechanism for federalism."<sup>12</sup> Although estimates of the number of grants have varied widely, it appears that there are between 400 and 500 different programs of financial assistance from the national government to state and local units.<sup>13</sup> In Fiscal Year 1979, federal grants will total approximately \$85 billion, continuing a trend dating from the mid-1960's during which the increase in grant funds far outstripped the overall rate of growth of the federal budget.<sup>14</sup> Programs range in size from several billion dollars annually to the hundred thousand dollar level. Given the extraordinary variety of grant programs, it is questionable whether one can speak of a grant-in-aid "system" at all.<sup>15</sup>

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12 J. MAXWELL & J. ARONSON, *FINANCING STATE AND LOCAL GOVERNMENTS* 63 (3d. ed. 1977) [hereinafter cited as MAXWELL & ARONSON].

13 Stanfield, *Will New Federalism Live On?* 9 NAT'L J. 1242 (Aug. 6, 1977); *Fiscal Relations in the American Federal System: Hearings Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Government Operations*, 94th Cong., 1st Sess. 74-75 (1975) (statement of David B. Walker) [hereinafter cited as Walker].

14 See U.S. Office of Management and Budget, Executive Office of the President, *Special Analyses Budget of the United States Government Fiscal Year 1979* 175 (1978). From FY 1967 to FY 1977 the average annual increase in grants was 16.2 percent, while total federal outlays grew by 9.8 percent annually.

15 See M. DERTHICK, *THE INFLUENCE OF FEDERAL GRANTS* 3-8 (1970) [hereinafter cited as DERTHICK].

An examination of the substantial body of academic literature on grant programs reveals that four distinct lines of analysis have developed which purport to serve as explanations of, and justifications for, grant programs.<sup>16</sup> It may well be that no single explanation offers convincing proof that the multiplicity of programs does constitute a system. However, the recurrence of certain interrelated themes, both in the academic literature and in the political debates, suggests that Congress' \$85 million expenditure for the grants is based on more than a series of *ad hoc* decisions.

The first line of analysis might be called the "interest group approach." Professor Philip Monypenny describes grants as a mechanism through which interest groups seeking a particular good or service from state or local governments can influence national political processes to induce the lower levels to act in the desired way.<sup>17</sup> This line of analysis suggests that it is easier to forge coalitions at the national level than to do so in thousands of state and local jurisdictions. It also suggests that the national government may be more responsive to demands for additional governmental activity, particularly if "public interest" programs such as income transfers and social services are involved.<sup>18</sup>

A closely related line of analysis might be called the "centralist vs. decentralist" approach.<sup>19</sup> The grant-in-aid device has appealed to many who advocate a strong federal role in setting domestic priorities, but view the national government as limited in its authority, either by the Constitution or by tradition.<sup>20</sup> Spending grant funds in accordance with specific federal conditions contained in the grant statute or implementing regulations, the state and local governments act essentially as "agents" or "subdivisions" of the national govern-

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16 See F. MICHELMAN & T. SANDALOW, GOVERNMENT IN URBAN AREAS 984-1002 (1970) [hereinafter cited as MICHELMAN & SANDALOW].

17 Monypenny, *Federal Grants-in-Aid to State Governments: A Political Analysis*, 13 NAT'L TAX J. 1, 13-16 (1960).

18 M. REAGAN, THE NEW FEDERALISM 84-86 (1972) [hereinafter cited as NEW FEDERALISM].

19 See MICHELMAN & SANDALOW, *supra* note 16, at 991-92.

20 See Susskind, *Revenue Sharing and the Lessons of the New Federalism*, 8 URB. L. ANN. 33, 64, 68-69 (1974) [hereinafter cited as Susskind].

ment.<sup>21</sup> At the same time, however, advocates of decentralization have focused on the grant device as a mechanism for enhancing the priority-setting and allocational role of state and local governments by increasing the fiscal resources available to them.<sup>22</sup> Not surprisingly, the decentralists would minimize the number of federal "strings" attached to any given program. The two views outlined under this category are not as diametrically opposed as might appear to be the case. Of course, the centralists would like to see the national government act without restraints, while the decentralists would like to see state and local governments left to their own devices. Yet each group regards the grant programs as being infinitely preferable to the policy most desired by the other.<sup>23</sup> Although the types and extent of "strings" attached to the grants are still in issue, the seeds of legislative compromise are present.

A third approach draws upon public finance theories to justify federal grants. Proponents of this view believe that if state and local governments are left to their own devices they might not provide the "correct" level of public goods and services.<sup>24</sup> Federal grants are viewed as a means of inducing the correct allocation of resources by compensating lower levels of government for benefits which "spill over" from their activities into the society at large.<sup>25</sup> This analysis is often used to justify fiscal assistance in specific program areas.<sup>26</sup>

A fourth, and more general, approach is the "fiscal federalism" or "fiscal mismatch" justification for grants. The federal government has preempted<sup>27</sup> the most productive revenue sources (personal and corporate income taxes), but service demands and responsibilities are concentrated at the lower

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21 MAXWELL & ARONSON, *supra* note 12, at 65.

22 *See id.* at 74-75.

23 Grants also provide "centralists" a mechanism for achieving national minimum standards in the provision of basic services.

24 "Correct" in this context is defined from the perspective of the national marketplace for public goods and services. G. BREAK, *INTERGOVERNMENTAL FISCAL RELATIONS IN THE UNITED STATES* 71-77 (3d ed. 1967).

25 *Id.* at 71-77.

26 *Id.* at 77; MAXWELL & ARONSON, *supra* note 12, at 65.

27 Susskind, *supra* note 20, at 39 n.13.

levels of government. The financial resources of state and local governments thus are not equal to the tasks for which they are responsible. Federal grants can help alleviate this imbalance. A corollary of the fiscal federalism argument is the proposition that grants permit the national government to recognize differences in fiscal capacity *among* state and local units (as well as *between* those levels and the national level) and to "equalize," or reduce, those differences by providing proportionately more funds to the poorer jurisdictions.<sup>28</sup>

Revenue Sharing itself—defined, for the moment, as a program of general purpose federal aid to state and local government—furnishes a good example of how the above approaches can overlap. The "fiscal federalism" rationales for such a program are obvious and were a principal argument of the program's major academic proponent, Walter Heller.<sup>29</sup> The concept also had strong appeal for "decentralists," particularly the Republican architects of the "New Federalism."<sup>30</sup> Finally, the pressure for Revenue Sharing can be explained in political terms, although the configuration of forces represented a variant on Monypenny's model. It was the state and local governments themselves, through their elected officials, who asked the federal government for the increased fiscal resources which, presumably, the local political processes would not provide.

#### B. *How Much Federal Power?—the Question of Strings*

This week, I am sending to Congress for its approval for Fiscal Year 1971, legislation asking that a set amount of Federal revenues be returned annually to the States to be used as the States and their local governments see fit—without Federal strings.—President Richard M. Nixon.<sup>31</sup>

28 *Id.* at 67-71. Much of the current debate between the so-called "Sunbelt" and "Frostbelt" states focuses on whether formulas which measure need by state per capita income levels or by uniform measures of poverty which fail to account for regional differentials in cost do, in fact, allocate federal resources on an equalizing basis. *See, e.g.*, 122 CONG. REC. H6996 (daily ed. June 29, 1976) (remarks of Rep. Harrington).

29 W. HELLER, *NEW DIMENSIONS OF POLITICAL ECONOMY* (1966) [hereinafter cited as HELLER].

30 R. NATHAN, A. MANVEL, & S. CALKINS, *MONITORING REVENUE SHARING* 351-55 (1975) (Brookings Institution) [hereinafter cited as *MONITORING REVENUE SHARING*].

31 President's Message, *supra* note 6, at 1144.

Discussions of federal grant programs are replete with references to terms such as federal "conditions," "strings," "controls," "sanctions," and "supervision."<sup>32</sup> These different terms are not always defined with great precision, yet they are frequently heard in debates over individual grant programs, as well as in debates over large-scale alterations of the system, such as President Nixon's ill-fated proposals for "Special Revenue Sharing."<sup>33</sup> This section will explain these terms as they are used in the context of grant programs.

As a starting point, one should recognize that Congress enacts a grant program in order to further a perceived national purpose through action by the grantee.<sup>34</sup> Since Congress in every case wants the grantee to do something—even if only to spend the money, in the hypothetical case of "pure" revenue sharing—the legislation, as well as any implementing regulations by the disbursing federal agency, will contain directions prescribing grantee activities with the funds. These directions constitute federally-imposed requirements on grantee governments, the observance of which is a condition to initial or continued receipt of the funds.

Federal strings may cover much more than the uses to which particular grant funds are put. Although many classifications of strings have been suggested,<sup>35</sup> this article

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32 *E.g.*, BREAK, *supra* note 25, at 79; DERTHICK, *supra* note 15, at 7; MICHELMAN & SANDALOW, *supra* note 16, at 1199-1200; NEW FEDERALISM, *supra* note 18, at 12.

33 See Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 URB. L. ANN. 189, 191-200 (1975).

34 Such action might take different forms, *e.g.*, distribution of the funds to individuals, regulatory programs, or planning.

35 For example, the National Science Foundation developed the following system of classifying program strings:

fiduciary strings, which are intended to prevent any irresponsibility or misappropriation in the handling of funds; policy strings, which are intended to advance national objectives; and constitutional strings, which are intended to assure that essential commitments of the federal government are honored.

National Science Foundation, General Revenue Sharing Research Utilization Project 69-70 (Vol. 4, 1975). See also Tomlinson & Mashaw, *The Enforcement of Federal Standards in Grant-in-Aid Programs: Suggestions for Beneficiary Involvement*, 58 VA. L. REV. 600, 603-05 (1972).



will refer to four categories which are particularly applicable to grant programs.<sup>36</sup>

The first category consists of "program expenditure strings." These govern the functional uses to which the particular grant funds may be put. For example, Title I of the Housing and Community Development Act of 1974 listed thirteen "eligible activities."<sup>37</sup>

The second category consists of "fiduciary-administrative strings." These include the administrative framework which the grantee must utilize, for example, a requirement that a single state agency administer the funds granted, requirements concerning accounting procedures and the observance of applicable state laws, and prohibitions on political activities by those administering grant funds.<sup>38</sup> The goal of such

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<sup>36</sup> These categories are based in part on the National Science Foundation's analysis of General Revenue Sharing.

<sup>37</sup> The first four are as follows:

- (1) the acquisition of real property (including air rights, water rights, and other interests therein) which is (A) blighted, deteriorated, deteriorating, undeveloped, or inappropriately developed from the standpoint of sound community development and growth; (B) appropriate for rehabilitation or conservation activities; (C) appropriate for the preservation or restoration of historic sites, the beautification of urban land, the conservation of open spaces, natural resources, and scenic areas, the provision of recreational opportunities, or the guidance of urban development; (D) to be used for the provision of public works, facilities, and improvements eligible for assistance under this title; or (E) to be used for other public purposes;
- (2) the acquisition, construction, reconstruction, or installation of public works, facilities, and site or other improvements—including neighborhood facilities, senior centers, historic properties, utilities, streets, street lights, water and sewer facilities, foundations and platforms for air rights sites, pedestrian malls and walkways, and park, playgrounds, and recreation facilities, flood and drainage facilities in cases where assistance for such facilities under other Federal laws or programs is determined to be unavailable, and parking facilities, solid waste disposal facilities, and fire protection services and facilities which are located in or which serve designated community development areas;
- (3) code enforcement in deteriorated or deteriorating areas in which such enforcement, together with public improvements and services to be provided, may be expected to arrest the decline of the area; [and,]
- (4) clearance, demolition, removal, and rehabilitation of buildings and improvements (including interim assistance and financing rehabilitation of privately owned properties when incidental to other activities); . . .

<sup>42</sup> U.S.C.A. § 5305 (West Supp. 1977).

<sup>38</sup> See, e.g., *Oklahoma v. Civil Service Comm'n*, 330 U.S. 127 (1947).

strings might be summarized as more efficient administration, both within the particular programs and in general.

The third category consists of "political process-public participation strings." These include requirements of public hearings, citizen or expert advisory committees, and specified roles for the grantee's chief executive and legislative body.<sup>39</sup> These strings may be directly related to the program (e.g., Judicial Advisory Committees to plan for court reform under the Omnibus Crime Control and Safe Streets Act) or may advance more general values such as "revitalizing" local government.

The fourth category consists of "general policy strings," applicable to a broad range of federal grant programs. Their source may be statutory or constitutional. Examples are prohibitions on racial, age or sex discrimination, and the requirements of the National Environmental Policy Act.<sup>40</sup> These strings embody generalized policies of the national government, although they may also be directly relevant to the policies of a particular grant program, such as non-discrimination in federally-aided education.

### C. *Enforcing Program Strings—The Concept of Controls*

Congress must provide enforcement mechanisms to ensure that the federal strings attached to each grant program are observed. This article will use the term "controls" to describe those mechanisms.<sup>41</sup>

#### 1. Administrative Controls

The federal administrative process constitutes the principal set of controls which Congress utilizes to enforce federal strings.<sup>42</sup> Every grant program requires an administering

39 *E.g.*, 16 U.S.C. § 1455 (c)(3)-(5) (Supp. 1974). *See also* 24 C.F.R. § 570.303(e)(4) (1977).

40 *See, e.g.*, *Carolina Action v. Simon*, 389 F. Supp. 1244 (M.D.N.C.), *aff'd* 522 F.2d 295 (4th Cir. 1975).

41 *See* DERTHICK, *supra* note 15, at 7-8, 68. This terminology differs from that of some analysts who use "control" to refer to direct federal power over grantees, as distinguished from indirect, limited federal "influence." *E.g., id.* at 68.

42 As Derthick's study of *The Influence of Federal Grants* stated, "the pursuit of federal objectives through the grant system is a task that falls to federal administrators." *Id.* at 11.

agency, even if only to disburse the funds. In fact, grantor agencies do much more, often fulfilling the traditional administrative law functions of rule-making and adjudication.

Detailed regulations to implement statutory mandates are a standard feature of grant administration,<sup>43</sup> just as they are in regulatory programs. The promulgation of regulations by administrative bodies facilitates law-making by allowing Congress to compromise on broad goals without becoming enmeshed in detailed regulation for which it has neither the resources nor the expertise.<sup>44</sup> The factors pushing for a strong administrative role in the regulatory context may be even more compelling in the case of grant-in-aid legislation. The very decision to enact a grant represents a compromise between performing a function through federal agencies and leaving the matter entirely in state and local hands. Too much legislative specificity would destroy the essential "halfway-house" quality which makes grant programs politically attractive. Thus it falls to the grantor agency to "fill in the gaps" through regulations and guidelines. Administrative elaboration of general legislative strings thus is an important form of federal control.

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43 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, BLOCK GRANTS: A ROUNDTABLE DISCUSSION 17-19 (1976) [hereinafter cited as BLOCK GRANTS].

44 In the context of regulatory programs Professor Stewart offers the following analysis:

... [T]here appear to be serious institutional constraints on Congress' ability to specify regulatory policy in meaningful detail. Legislative majorities typically represent coalitions of interests that must not only compromise among themselves but also with opponents. Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy. Detailed legislative specification of policy would require intensive and continuous investigation, decision, and revision of specialized and complex issues. Such a task would require resources that Congress has, in most instances, been unable or unwilling to muster. An across-the-board effort to legislate in detail would also require a degree of decentralized responsibility that might further erode an already weak political accountability for congressional decisions. These circumstances tend powerfully to promote broad delegations of authority to administrative agencies. Moreover, quite apart from these factors, one may question whether a legislature is likely in many instances to generate more responsible decisions or questions of policy than agencies.

Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695-96 (1975) [hereinafter cited as Stewart].

Apart from policy amplification, grantor agencies undertake a broad range of other activities in order to implement their programs and enforce the relevant strings. Most of these activities concern the disbursement of funds. The grantor agency has substantial leverage to ensure observance of federal strings because, with few exceptions, federal grant programs require some form of grantor approval prior to receipt of the funds.<sup>45</sup> Before receiving its share of the funds, a recipient must first submit, and obtain agency acceptance of, a "plan" showing how the funds will be used and specifying how federal strings will be observed. In her study of welfare administration, Professor Derthrick noted that a plan is "like a contract between the two governments: the state agrees to do what the plan says, and the federal government agrees to give grants as long as the state lives up to its plan, or more precisely, to those elements of its plan that come within the federal purview as defined by Congress."<sup>46</sup> Approval is required even in the case of programs, such as the Omnibus Crime Control and Safe Streets Act, which compute a recipient's "entitlement" through a formula.

The grantor agency has substantial discretion in reviewing plans, but in theory, it is limited to ascertaining adherence to the statutory strings. Judicial review of a plan's rejection is frequently available, but the grantee may not wish to pursue this avenue for fear of jeopardizing its on-going relationship with the grantor agency. Congress, of course, can relax this administrative control by establishing a presumption in favor of the grantee, and limiting the conditions under which the grantor agency can disapprove a plan. The leading example is Title I of the Housing and Community Development Act of

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45 General Revenue Sharing and so-called "Counter-Cyclical Revenue Sharing" (42 U.S.C. § 6721) are the principal exceptions.

46 DERTHICK, *supra* note 15, at 22. The requirement of plan submission illustrates nicely the difficulty of drawing a clear distinction between "strings" and "controls." In which category does the submission requirement belong? On the one hand, it is a condition precedent to receipt of the funds. Thus it might be viewed as a "string." On the other hand the submission requirement is not a limitation on the actual use of the funds, although living up to the promises made in it is. On balance it seems more accurate to view the requirement of plan submission as part of the administrative control mechanism rather than as a string.

1974.<sup>47</sup> Even with such provisions, however, an activist grantor agency can exert significant leverage.<sup>48</sup>

The paradigmatic case of congressional use of the administrative process as a control on grantee activity is the so-called "project grant." These constitute more than two-thirds of all grant programs, but represent only 25 percent of all grant funds.<sup>49</sup> "Project grants . . . are not necessarily spread among the states on the basis of any formula. Discretion is conferred upon the responsible administrators to determine whether a particular proposal qualifies under the federal program and, if grant applications exceed available funds, to select from among competing applications."<sup>50</sup> It is in connection with project grant programs that charges of "grantsmanship" are most frequently heard, especially the accusation that grantor agencies develop, somewhat on their own, rigid notions of what the federal strings are, and award funds only to grantees who accept those notions.<sup>51</sup>

Use of the administrative process as a control on grantee observance of federal strings is not limited to initial funding or periodic re-funding decisions. Grantor agencies may conduct investigations to verify grantee compliance, as well as receive and determine third party complaints about non-

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47 42 U.S.C.A. § 5304(c) (West Supp. 1977). The original Act provided that "the Secretary shall approve an application" from a community which is entitled to funds under the formula unless—

- (1) on the basis of significant facts and data, generally available and pertaining to community and housing needs and objectives, the Secretary determines that the applicant's description of such needs and objectives is plainly inconsistent with such facts or data; or
- (2) on the basis of the application, the Secretary determines that the activities to be undertaken are plainly inappropriate to meeting the needs and objectives identified by the applicant pursuant to subsection (a) of this section; or
- (3) the Secretary determines that the application does not comply with the requirements of this [title] or other applicable law or proposes activities which are ineligible under this [title].

48 For example, the Carter Administration's policy at H.U.D. is to enforce the Act's Housing Assistance Plan requirement much more vigorously than in the past. *See, e.g., Boston Globe*, Nov. 2, 1977, at 10, col 1. H.U.D.'s monitoring of grantee performance may also be a significant source of agency leverage.

49 Walker, *supra* note 13, at 75.

50 MICHELMAN & SANDALOW, *supra* note 16, at 1004.

51 MAXWELL & ARONSON, *supra* note 12, at 63.

observance of federal strings.<sup>52</sup> In sum, the management of intergovernmental relations through the exercise of controls over grantee uses of federal funds is a significant function of the federal administrative process which supplements the traditional role of regulation of private conduct.<sup>53</sup>

## 2. Legislative Controls

Congressional oversight of federal programs already on the books usually involves the regulatory activities of federal agencies.<sup>54</sup> Nonetheless, legislative oversight also plays an important role in implementing grant programs<sup>55</sup> and may serve as a control on grantee observance of program strings. For example, during its field monitoring of the early years of General Revenue Sharing, the Brookings Institution found that some local officials feared that Congress would not renew the program if it disapproved of recipients' uses of the funds.<sup>56</sup>

Most grant programs are enacted for a limited number of years. One significant legislative control device is the hearings which precede congressional reauthorization, which examine the performance of the grantor agency and the grantees. Committees delight in focusing the legislative spotlight on misuses or "frivolous" uses of grant funds, such as the construction of bike-paths and golf courses in wealthy neighborhoods.<sup>57</sup> Hearings provide an important opportunity for those who may be frozen out of the local political processes to raise issues of grantee non-observance of federal strings, especially

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<sup>52</sup> See text accompanying notes 193-208 *infra*.

<sup>53</sup> W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 52-53 (6th ed. 1974) [hereinafter cited as GELLHORN & BYSE]. It is not yet clear whether traditional administrative law "doctrine" does or should recognize a sharp distinction between these two uses of the administrative process. The dissatisfaction with regulatory agencies which Professor Stewart has perceptively analyzed, see Stewart *supra* note 43, may have an intergovernmental counterpart in the frequent criticisms of grantor agencies both by "public interest" critics and by grantee governments.

<sup>54</sup> *E.g.*, Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEGIS. 593 (1976).

<sup>55</sup> See MICHELMAN & SANDALOW, *supra* note 16, at 1122-33.

<sup>56</sup> MONITORING REVENUE SHARING, *supra* note 30, at 219-20.

<sup>57</sup> *E.g.*, *Community Development Block Grant Program: Hearings Before the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. (1976).

those pertaining to discrimination.<sup>58</sup> These hearings often serve as a catalyst for changes in the grant program. For example, Congress might revise the strings by making them more explicit, or it might alter the administrative enforcement mechanism.

Most grant programs are subject to the annual appropriations process which provides another opportunity for legislative review of grantee activities. Indeed, many congressional critics of General Revenue Sharing wanted the program subject to the appropriations process for precisely this reason.<sup>59</sup>

### 3. Judicial Controls

The role of the federal courts in the network of inter-governmental relationships<sup>60</sup> which the grant system creates is frequently minimized or ignored by analysts of that system.<sup>61</sup> Nonetheless, there is a substantial volume of federal grant litigation, and it appears to be increasing.<sup>62</sup> The federal judicial process represents a significant control mechanism to ensure grantee compliance with grant program strings.

The most frequent example of judicial control occurs in "third-party" suits attacking a grant award because the use of funds does not comply with applicable strings.<sup>63</sup> Plaintiffs often represent local grant opponents who believe that the proposed use will harm them, or that alternative uses are preferable.<sup>64</sup> In other cases, particularly those involving allega-

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<sup>58</sup> *Id.*; *Civil Rights Aspects of General Revenue Sharing: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975).

<sup>59</sup> See text accompanying notes 293-297 *infra*.

<sup>60</sup> See, e.g., *Rosado v. Wyman*, 397 U.S. 397, 422-23 (1970).

<sup>61</sup> E.g., *Wright, Revenue Sharing and Structural Features of American Federalism*, 419 ANNALS 100 (1975).

<sup>62</sup> See generally *Kushner, Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974*, 11 URB. L. ANN. 37 (1976).

<sup>63</sup> E.g., *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975); *Mathews v. Massell*, 356 F. Supp. 291 (N.D. Ga. 1973). Attacks by welfare recipients on the adequacy of state "plans" are a frequent example of third party suits. E.g., *Bourgeois v. Stevens*, 532 F.2d 799, 807 (1st Cir. 1976).

<sup>64</sup> E.g., *Western Addition Community Organization v. Weaver*, 294 F. Supp. 433 (N.D. Cal. 1968).

tions of discrimination, plaintiffs may not dispute the functional area of the expenditure, but rather they object to conditions within the grantees' direct control. For example, when a police department receiving grant funds maintains discriminatory hiring practices, suits to cut off the funding would be aimed at eradicating discrimination.<sup>65</sup> Once the department stopped discriminating, plaintiffs probably would not object to federal assistance to local law enforcement agencies. Although the distinction is not always clear-cut, such suits might be termed "general leverage suits," as opposed to "particular project opposition suits." In every case, of course, violation of grant program strings is at issue.

Many third-party suits are brought against the federal officials charged with disbursing the funds. Whether Congress regards such litigation as a component of the grant condition enforcement process is far from clear. Plaintiffs frequently seek "non-statutory review" of the grant award, there being no specific review provision in the grant statute nor any applicable general statutory provision authorizing review of agency action.<sup>66</sup> Previous lower court holdings that section 702 of the Administrative Procedure Act constitutes a grant of general statutory review are now overruled by the Supreme Court's decision in *Califano v. Sanders*.<sup>67</sup> Third-party suits against grantor agencies based on non-discrimination strings may, however, fall under the heading of specific statutory review.<sup>68</sup> Non-statutory review—review based on the general jurisdictional provisions of Title 28—is greatly facilitated by the 1976 Amendments to the Judicial Code which removed the jurisdictional amount requirement in suits against federal officials "arising under" the laws of the United States.<sup>69</sup> Even before this liberalizing amendment, Professors Michelman and San-

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65 *E.g.*, *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977).

66 On the differences among "specific statutory review," "general statutory review," and "non-statutory review" see GELLHORN & BYSE, *supra* note 53, at 145-67.

67 97 S.Ct. 980 (1977).

68 See 42 U.S.C.A. § 3766(c) (West Supp. 1977) (right to challenge discriminatory use of Safe Streets Act funds). It is not clear whether this statute permits an action to be brought against the grantor agency. The issues raised are similar to those concerning citizens suits under the Revenue Sharing statute.

69 Pub. L. No. 94-574, 90 Stat. 2721 (1976).



dalow had detected a "veritable explosion" of third-party suits.<sup>70</sup> Despite questions whether courts are "likely to be able to make a useful contribution to issues of the type which arise before agencies dispensing grants,"<sup>71</sup> suits against federal officials seem to have posed few institutional problems for the courts. Judges apparently view them as not unusual examples of administrative law disputes.<sup>72</sup> Plaintiffs have won a number of victories, even though delay of the grant rather than outright invalidation may be the result.<sup>73</sup>

In a number of cases, third parties have brought suit in federal court directly against the grantee or its officials to enjoin expenditure of grant funds allegedly in violation of program strings, rather than against the grantor agency to review its disbursement of the funds.<sup>74</sup> Although some of these suits have been successful, they may present difficult "threshold" questions of jurisdiction, and the existence of an "implied right of action" based on the grant-in-aid statute.<sup>75</sup> Such direct suits also pose institutional questions concerning the proper role of the federal courts. To some extent the judicial process is being invoked as a substitute for the administrative process which normally plays the dominant role in grant program enforcement, rather than as a mechanism to review the administrative process.

A role for the federal courts in the grant system which is

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70 MICHELMAN & SANDALOW, *supra* note 16, SUPPLEMENT 275 (1972); see Tomlinson & Mashaw, *supra* note 35, at 630.

71 MICHELMAN & SANDALOW, *supra* note 16, at 1111.

72 *E.g.*, *City of Hartford v. Hills*, 408 F. Supp. 889, 903 (D. Conn. 1976), *rev'd. sub nom.* *City of Hartford v. Town of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977) (en banc), *cert. denied*, 98 S. Ct. 766 (1978).

73 *Id.*

74 *Schreiber v. Lugar*, 518 F.2d 1099 (7th Cir. 1975); *Mathews v. Massell*, 356 F. Supp. 291 (N.D. Ga. 1973).

75 *E.g.*, *Schreiber v. Lugar*, 518 F.2d 1099, 1101-1105 (7th Cir. 1975); see generally MICHELMAN & SANDALOW, *supra* note 16, SUPPLEMENT 276-78 (1972). But see *Lau v. Nichols*, 414 U.S. 563 (1974); *Lloyd v. Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977). The jurisdictional and right of action obstacles are encountered only in suits against grantees and their officials, and only in non-civil rights cases. Plaintiffs may be able to overcome these obstacles by suing federal defendants and joining state or local officials. *E.g.*, *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975). The latter might be viewed as "pendent parties." But see *Aldinger v. Howard* 427 U.S. 1 (1976).

close to the judiciary's traditional reviewing function is conferred by a number of statutes which authorize the grantee to seek judicial review of grantor agency decisions denying or terminating assistance.<sup>76</sup> Here the courts act not as a control mechanism on grantee observance of program strings, but as a check on the administrative process. Such statutory provisions might be viewed either as typical provisions for judicial review of administrative action to ensure agency adherence to legislative directions, or as an attempt to increase grantee leverage against the grantor agency in order to enhance grantee power in the allocation decision.<sup>77</sup> In designing grant programs Congress has frequently shown an awareness of the tension between a desire for respect of the allocation decisions of elected state and local officials and the need for recourse to non-elected federal administrators to "police" those decisions when the funds being allocated come from the federal treasury. The National Land Use Planning Act, which passed the Senate in 1973, went so far as to provide that any decision by the Secretary of the Interior to deny funds to a state would be subject to review by an "arbitration panel" composed of one governor, a federal official from another cabinet department, and a private citizen.<sup>78</sup> The proposal was never enacted, and judicial review of negative agency decisions seems Congress' preferred institutional route for reconciling the tension.

It seems fairly clear that the federal judicial process can serve as an important control mechanism in the operation of federal grant programs. Whether it should may "depend upon the assumptions one makes concerning the character and intensity of the interests" present in a particular allocation of federal funds,<sup>79</sup> the proper allocation of roles among the legislative, administrative and judicial branches, and the results, including available remedies, of judicial intervention.<sup>80</sup>

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76 *E.g.*, 42 U.S.C. § 3759 (1970).

77 See MICHELMAN & SANDALOW, *supra* note 16, at 1107-14.

78 S. 268, 93d Cong., 1st Sess. § 305(a) (1973).

79 MICHELMAN & SANDALOW, *supra* note 16, at 1110; see Tomlinson & Mashaw, *supra* note 35, at 634-37 (questioning utility of grant litigation).

80 One result, of course, may be delay. As for remedies, the sanctions available to

D. *The Grant-in-Aid Spectrum—From Categoricals to General Revenue Sharing*

1. The Spectrum

Over the years, scholars have developed several different approaches to classifying federal grants by program structure. The emergence in recent years of "block grants" and Revenue Sharing has led analysts to classify grant programs primarily according to the relative flexibility which the authorizing statute accords to grantees in their expenditure of the funds. An example is Reagan's distinction between categorical and block grants:

categorical grants are by and large those for specifically and narrowly defined purposes, leaving very little discretionary room on the part of a recipient government as to how it uses the grant, while block grants are broader in scope and although tied to a clearly stated area (such as health, or elementary education, or community facilities development) they do not specify the exact objects of permitted expenditure and hence create much larger zones of discretion on the part of the receiving government or agency.<sup>81</sup>

This classification is helpful, as far as it goes. However, one can further hypothesize that a relaxation of grantor-imposed strings will be accompanied by a relaxation of grantor controls as well, since it is the strings which necessitate the recourse to controls. A classification based on the extent of strings and controls can be seen in David Walker's criteria for distinguishing block grants from categorical:

Conceptually, . . . a block grant is supposed to embody five basic differentiating traits. These are:

—it authorizes Federal aid for a wide range of activities within a broad functional area;

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the courts are generally similar to those available to grantor agencies. Thus a court may invalidate a particular use of grant funds, or suspend it until program strings are complied with. *See generally* United States v. City of Chicago, 549 F.2d 415 (7th Cir. 1977).

81 NEW FEDERALISM, *supra* note 18, at 59.

—it gives recipient jurisdictions fairly wide discretion in identifying problems and designing programs to deal with them;

—its administrative, fiscal reporting, and other federally-established program requirements are geared to keeping grantor intrusiveness to a minimum, while recognizing the need to ensure that broad national goals are accomplished;

—it is distributed by formula, which narrows grantor administrative discretion and provides some sense of fiscal certainty for grantees; and

—its eligibility provision is fairly specific, relatively restrictive, and tends to favor general purpose governments, elected policy officials, and administrative generalists.<sup>82</sup>

Using this approach, one can identify three relatively clear points on the grant-in-aid spectrum: categorical grants, block grants, and Revenue Sharing. Categorical grants are for relatively narrow program purposes, and grantee observance of strings is ensured by strict grantor (especially administrative) controls.<sup>83</sup> Block grants afford the grantee greater flexibility in fund allocation decisions and do not permit the grantor to retain much power over those decisions. Revenue Sharing represents a step beyond block grants. In its "pure" form, Revenue Sharing might consist of a guaranteed annual distribution to grantees based on a formula, but without strings and control mechanisms. However, Revenue Sharing as enacted by Congress never has conformed to the "pure" model.<sup>84</sup>

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82 D. Walker, *The Changing Pattern of Federal Assistance to State and Local Governments* 10 (July 29, 1976) (on file with the author).

83 *Id.* at 8.

84 General Revenue Sharing is discussed more fully in subsection E, *infra*. At this point it may be helpful to distinguish that program from "Special Revenue Sharing," a concept which President Nixon advocated repeatedly, but without success. Special Revenue Sharing represents a point on the spectrum somewhere between block grants and General Revenue Sharing. Grantee expenditures would be limited to one relatively broad area such as "law enforcement," and there would be very few grantor level controls. Federal agency approval of a "plan" prior to distributing the funds would not be required. See, e.g., Fishman, *supra* note 33, at 195-96. Some analysts have suggested that Special Revenue Sharing was little more than another name for block grants. BLOCK GRANTS, *supra* note 42, at 20. The Advisory Commission on

## 2. The "Changing Pattern" of Federal Grants<sup>85</sup>

Strings and controls present Congress with a number of structural options in designing a grant program. Yet, as recently as the mid-1960's, virtually all federal grants to units of state and local government took the form of categorical programs. With the development of block grants in the late 1960's, the pattern began to shift. The enactment of General Revenue Sharing intensified this shift. While in Fiscal Year 1972, categoricals still accounted for more than 97 percent of grant funds, by Fiscal Year 1976 the respective percentages were, approximately: categoricals, 75 percent; block grants, 12 percent; and, general support (primarily Revenue Sharing), 12 percent.<sup>86</sup>

There is every indication that this tripartite system will continue, and that Congress will continue to experiment with different combinations along the spectrum of federal strings and controls.<sup>87</sup> The non-categorical programs have demonstrated their staying power, although at least one observer has detected signs that the federal government is reducing the scope of state discretion in the renewal of block grants.<sup>88</sup> The Ford Administration advanced an unsuccessful proposal for consolidating a large number of categorical programs into block grants.<sup>89</sup> The Carter Administration reportedly has considered converting the Omnibus Crime Control and Safe Streets Act into a form of Special Revenue Sharing.<sup>90</sup> At the

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Intergovernmental Relations felt that the absence of any matching requirement was an important factor differentiating "Special Revenue Sharing" from block grants. *Id.* at 19. In any event, Congress has not been receptive to the particular mix of strings and controls which the Special Revenue Sharing proposals represented.

85 See generally D. Walker, *The Changing Pattern of Federal Assistance to State and Local Governments* 10 (July 29, 1976) (on file with the author).

86 See Walker, *supra* note 13, at 75.

87 The "counter-cyclical" aid programs represent the latest variations on the traditional forms.

88 *E.g.*, NEW FEDERALISM, *supra* note 18, at 101.

89 See BLOCK GRANTS, *supra* note 43, at 19.

90 Department of Justice, *Restructuring the Justice Department's Program of Assistance to State and Local Governments for Crime Control and Criminal Justice System Improvement* 16-18 (June 23, 1977) (on file with the author). See, N.Y. Times, Dec. 13, 1977, at 17, col. 2. (Attorney General Bell proposes abolition of Law Enforcement Assistance Agency and changes in program to "increase the program

same time, the number of categorical programs has continued to grow, a trend which was unaffected by the Nixon Administration.<sup>91</sup> The exact future of the changing pattern of federal aid cannot be predicted, but one thing seems likely. General Revenue Sharing marks the outer boundary of congressional willingness to renounce federal strings and controls.

### E. *The Revenue Sharing Controversy and the 1972 Act—New Federalism Triumphant*

#### 1. The Debate

The concept of unrestricted federal aid to states and localities has generated intense controversy from the moment it initially surfaced in press accounts of the so-called Heller-Pechman plan. The plan, which was prepared for President Johnson during the 1964 election campaign, proposed sharing a fixed percentage of federal income tax revenues with the states. At the time, proponents of the plan envisioned it as a primary means of reducing fiscal drag.<sup>92</sup> However, because the proposal engendered immediate and heated opposition, the President decided to delay its release. When subsequent expenditures for the Vietnam War and Great Society categorical grants absorbed more and more federal revenues, "[r]evenue sharing did not surface again as a serious policy alternative under President Johnson."<sup>93</sup> Yet debate over the concept went on, culminating in enactment of the State and Local Fiscal Assistance Act of 1972. The controversy produced a plethora of arguments and counter-arguments.<sup>94</sup> The two

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flexibility of state and local governments and strengthen their priority setting roles and responsibilities").

91 Walker, *supra* note 13, at 63.

92 "If the long run elasticity of tax yield with respect to GNP [Gross National Product] exceeds unity, federal revenues will increase over time more rapidly than GNP . . . [t]hus the budget imposes a restraint on desirable economic expansion, and this is the phenomenon . . . called 'fiscal drag.' [T]he drag of the budget [can] be converted into a 'fiscal dividend' which could take the form of new or enlarged government programs or of reduced tax burdens." T. DERNBURG D. McDOUGALL, *MACROECONOMICS* 403-04 (4th ed. 1972).

93 MONITORING REVENUE SHARING, *supra* note 30, at 350.

94 *E.g.*, Stolz, *Revenue Sharing—New American Revolution or Trojan Horse?* 58 MINN. L. REV. 1, 5-12 (1973) [hereinafter cited as Stolz].

main areas of disagreement were the fiscal wisdom of revenue sharing and the impact of any such program on the federal system.

The fiscal debate centered on several issues, including whether a "fiscal crisis" existed at the state and local levels; the relative superiority of national over sub-national revenue raising capability; and the possibility of constructing an equitable distribution formula that could reflect the disparities in need among thousands of governmental units.

In the context of this article, however, the debate over the program's impact on the federal system was far more significant, for many participants recognized that what was at stake, at least in the short run, was a major shift in decision-making power from national to local hands.<sup>95</sup> This ideological debate matched proponents of Nixon's "New Federalism" against supporters of the existing pattern of "cooperative federalism" based on the categorical grants.<sup>96</sup> Defenders of cooperative federalism rested their case primarily on the superiority of national decision-making over state local decision-making, and, secondarily, on the greater degree of competence among federal administrative personnel. Both are recurrent themes in American federalism debates, especially the belief that Congress takes a broader view of the "public interest," particularly the rights of minorities, whether because of the national legislature's relative insulation from the vicissitudes of "faction," or because national officeholders are less likely than their sub-national counterparts to be dominated by the views of state and local elites.<sup>97</sup> Those who adhere to the

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95 Reagan, *The Pro and Con Arguments*, 419 ANNALS 23, 27 (1975).

96 NEW FEDERALISM, *supra* note 18, at 89-132.

97 Cole, *Revenue Sharing: Citizen Participation and Social Service Aspects*, 419 ANNALS 69 (1975).

The following comment by Michael Reagan epitomizes both the substance and the rhetoric of this "centralist" view.

Perhaps the most basic group of arguments in favor of specific grants-in-aid as the means the federal government uses to help states and localities financially—and equally the most basic set of arguments against general revenue sharing—revolves around the ideas that there are a number of identifiable national objectives to be obtained through domestic public policies; that the concept of national citizenship establishes an intellectual

Advocates of the "New Federalism" challenged the centralist premise of national superiority, and articulated the advantages of decentralizing decisions about the disposition of grant funds. The New Federalists maintained that state and local officials were also capable of making valid decisions about state and local matters, and might, in fact, make better decisions since they were "closer" to the problems and "to the people." Furthermore, the New Federalists argued, state and local governments could be "revitalized" if given more resources since the increased allocational power would call forth greater citizen interest and participation in how it was exercised.<sup>99</sup> Although many of the New Federalist arguments were conservative, both in their tone and their sources, at least one prominent liberal, Walter Heller, believed in revitalizing state and local units. Writing in 1966, he contended that the service functions of state and local governments are inherently redistributive and, therefore, consistent with the centralist view of the public interest.<sup>100</sup>

The New Federalists' faith in the virtue of decentralization and their de-emphasis of national priority-setting led to a vision of the grant system relatively free of federal strings and the controls to enforce them.<sup>101</sup> They opposed federal strings and controls not only on ideological grounds, but also because cooperative federalist stand favor a grant-in-aid system characterized by extensive strings of all four types described above,<sup>98</sup> and strict controls, especially administrative enforcement.

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and ethical base for national criteria of equity in the provision of public services and a national minimum standard of living; that nationally raised funds should not be utilized without some accountability to national criteria; and that proven inefficiency of state and local governments and proven lack of concern of middle class political majorities for the needs of ethnic minorities and the poor require that the national government use financial leverage if equity is to be attained and national social responsibility is to be served. All of these reasons together constitute a very strong argument against simply handing out money with no strings attached.

Reagan, *supra* note 108, at 29.

98 See text accompanying notes 31-40 *supra*.

99 See generally Susskind, *supra* note 20, at 35-37, 42-44.

100 HELLER, *supra* note 29, at 132-44.

101 See Fishman, *supra* note 33, at 190.



experience had shown these mechanisms to be unworkable and counterproductive. Horror stories of red-tape and overlapping bureaucracies were buttressed by fiscal analyses which indicated that grantee budgetary decisions were "distorted" away from local priorities in order to "buy into" available categorical grants.<sup>102</sup> Lurking in the background was the academic criticism that some categorical grant programs had proven to be antidemocratic. These critics argued that alliances which developed between grantor and grantee agencies had usurped the power over spending priorities once exclusively wielded by elected public officials.<sup>103</sup>

Although the New Federalists vigorously challenged the categorical grants, they did not seek initially to scrap the existing system but to supplement it by the addition of General Revenue Sharing and block grants. After a protracted congressional battle, they won a major victory in 1972 with the enactment of General Revenue Sharing.<sup>104</sup>

## 2. The State and Local Fiscal Assistance Act of 1972

The original Revenue Sharing Act provided for distribution of approximately 30 billion dollars over a period of five years. The recipients of the money were the 50 state governments themselves and all "units of general government" within the states, including counties, municipalities and townships.<sup>105</sup> State governments were to receive one-third of the funds, and the remainder was allocated to local units. Funds were distributed to state areas in accordance with either of two formulas, the applicable formula being the one which yielded the greatest amount of aid to a given state. The Senate formula was based on population multiplied by tax effort and per capita income, while the House formula was based on population, per capita income, urbanized population, income tax effort and general tax effort.<sup>106</sup> The program was exempt from the annual congressional appropriations process. Thus reci-

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102 Stolz, *supra* note 94, at 19-23.

103 See Wright, *supra* note 61, at 109-115.

104 See generally MONITORING REVENUE SHARING, *supra* note 30, at 355-72.

105 Revenue Sharing Act, *supra* note 4, § 108(d)(1).

106 *Id.* § 106. For discussion of the formula, see Stolz, *supra* note 94, at 33-59.

pipients could count on a predictable amount of funds for a known period of time, just as they could estimate collections from their own revenue sources. This certainty was finite, however, since grantees could not count on renewal of the program upon its expiration in 1976. Although referred to as a "no strings" program, the General Revenue Sharing legislation contained numerous strings as well as a control mechanism to enforce them.

a. Program-Expenditure Strings

Congress imposed no functional limitations on expenditures by state governments. Local governments, however, could only expend Revenue Sharing funds within nine "priority expenditures" categories:

(1) ordinary and necessary maintenance and operating expenses for

(A) public safety (including law enforcement, fire protection, and building code enforcement),

(B) environmental protection (including sewage disposal, sanitation, and pollution abatement),

(C) public transportation (including transit systems and streets and roads),

(D) health,

(E) recreation,

(F) libraries,

(G) social services for the poor or aged, and

(H) financial administration; and

(2) ordinary and necessary capital expenditures authorized by law.<sup>107</sup>

In addition, no recipient could use directly or indirectly Revenue Sharing funds to satisfy the "matching" requirements of other federal grant programs.<sup>108</sup>

Whether these limitations were illusory, especially the "priority" categories, has been discussed frequently.<sup>109</sup> The Act contained no "maintenance of effort" provision requiring

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107 Revenue Sharing Act, *supra* note 4, § 103(a).

108 *Id.* § 104(a).

109 *E.g.*, Stolz, *supra* note 94, at 59-71. Stolz believes the limitations were illusory.

expenditures within the categories to remain at previous levels, and thus raised the possibility of a problem referred to as "fungibility." This problem occurs when a local government applies its Revenue Sharing money to an eligible activity, e.g., public safety, reduces its contribution of its own funds to that activity by an equivalent amount, and transfers the "freed-up" money to an ineligible category, such as education.<sup>110</sup> Nonetheless, these priority categories were part of the legislation and proved to be enforceable, at least in extreme cases.<sup>111</sup>

#### b. Fiduciary-Administrative Strings

The Act contained several strings designed to ensure that recipients actually spent the money, that they acted at least as honestly and efficiently as they would with their own funds, and that the federal government knew what they had done. From the grantee perspective, perhaps most significant was the requirement that a recipient expend Revenue Sharing funds "only in accordance with the laws and procedures applicable to the expenditure of its own revenues. . . ."<sup>112</sup> This provision prevents the grantee's executive branch from treating the funds as a "blank check" free from legislative authority, and it also triggers the considerable body of state controls over local finance.<sup>113</sup>

The reporting requirements of the former section 121 seem designed primarily to facilitate federal monitoring of grantee activities, although they may also enhance citizen participation in allocation decisions. This section required periodic submission to the Secretary of the Treasury (grantor agency) of reports outlining the "planned" use of Revenue Sharing funds, and reports "setting forth the amounts and purposes for which funds received . . . have been spent or obligated." Given

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110 SECOND ROUND, *supra* note 8, at 75-80.

111 *Mathews v. Massell*, 356 F. Supp. 291 (N.D. Ga. 1973).

112 Revenue Sharing Act, *supra* note 4, § 123(a)(4). Technically this provision only required that a recipient make *assurances* that it would follow these "laws and procedures." However, the O.R.S. has always interpreted it as a requirement that the assurances be followed.

113 See text accompanying notes 223-224 *infra*.

the "fungibility" problem discussed above, the accuracy of these reports is open to debate.<sup>114</sup>

c. Political Process—Public Participation Strings

Proponents of Revenue Sharing had claimed that the program would increase citizen participation in state and local political processes. Yet the Act "differ[ed] from the major federally funded domestic programs of recent years in that, as approved by Congress in 1972, [it] require[d] absolutely no citizen input in the expenditure of funds."<sup>115</sup> One observer has stated that "the intent of the Congress" to encourage citizen participation "seems fairly clear,"<sup>116</sup> but such clarity is not evident from a careful reading of the text of the 1972 Act. Section 121(c) did require recipients to publish, in a newspaper of general circulation in their area, the Planned Use and Actual Use Reports described above. The Act also required recipients to "advise the news media" of the reports' publication. Since the Act thus ensured some public awareness of Revenue Sharing allocation decisions, one can infer that Congress did, indeed, favor public participation in those decisions. However, Congress left the form and extent of such participation, *if any*, in the hands of state and local officials. In this respect, the Act's requirement that recipients spend Revenue Sharing funds "only in accordance with the laws and procedures" applicable to the expenditure of their own revenues is important. Such "laws and procedures" might require citizen input through public hearings, advisory committees and other mechanisms. Moreover, state and local officials were free to provide special participation mechanisms for Revenue Sharing allocation decisions.<sup>117</sup>

d. General Policy Strings

The principal string of this nature was the prohibition against grantee discrimination "on the ground of race, color, national origin, or sex" in "any program or activity funded in

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114 SECOND ROUND, *supra* note 8, at 78-80.

115 Cole, *supra* note 97, at 68.

116 Lief, *Revenue Sharing and Citizen Participation*, in GENERAL REVENUE SHARING AND DECENTRALIZATION 92 (N. Scheffer ed. 1975).

117 MONITORING REVENUE SHARING, *supra* note 30, at 266-67.

whole or in part . . ." with Revenue Sharing funds.<sup>118</sup> The extent to which the Revenue Sharing program is subject to other general policy strings, contained in statutes purportedly applying across the board to federal assistance programs, has been an area of uncertainty. One could argue that Revenue Sharing funds are *different* from other grant monies because the basic allocation decision is local, not federal. Moreover, the virtual absence of federal involvement justifies exemption from general congressional directives. In *Carolina Action v. Simon*, the Fourth Circuit adopted this view by holding that the requirements of the National Environmental Policy Act did not apply to projects funded by Revenue Sharing.<sup>119</sup>

#### e. Administrative Controls

Since the Revenue Sharing Act did contain strings, an enforcement mechanism (or mechanisms) was necessary. To some extent the Act resembled other grant programs in that a federal agency, the Department of the Treasury, was to play a substantial role in disbursing funds and ensuring compliance. Thus the Secretary of the Treasury delegated his authority to the Office of Revenue Sharing and was responsible for promulgating regulations, computing grantee entitlements under the formula, and monitoring grantee compliance.<sup>120</sup>

However, the principal administrative control which Congress utilizes in grant programs—federal agency approval of grantee uses and related activities *prior* to disbursing the funds—was not included in the Act.<sup>121</sup> Recipients must, it is true, make general *assurances* that they will comply with specified requirements, but this is a far cry from submission, subject to approval, of a plan. The absence of this key administrative control constitutes one of the major differences between Revenue Sharing and virtually all previous forms of federal domestic assistance. This difference reflected the desire of Congress and, especially, the Nixon Administration to reduce the influence of federal administrators over local allo-

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118 Revenue Sharing Act, *supra* note 4, § 122(a).

119 522 F.2d 295 (4th Cir.), *aff'g* 389 F. Supp. 1244 (M.D.N.C. 1975).

120 Revenue Sharing Act, *supra* note 4, §§ 105, 123, 142.

121 *Id.* § 123(a).

cational decisions. The absence of this federal administrative control also increased the power of local elected officials by preventing the development of powerful "alliances" between grantor officials and their *administrative* counterparts at the state and local levels.<sup>122</sup>

#### f. Other Controls

The 1972 Act contained virtually no legislative controls, as that term is used in this article. Revenue Sharing was exempt from the annual appropriations process. There was no provision for periodic congressional review.<sup>123</sup> However, legislative control is never totally absent from a grant program, since Congress remains free to amend or terminate it, if only at the expiration date. In the case of Revenue Sharing, state and local officials were acutely aware of the specter of non-renewal, and this awareness affected their spending decisions.<sup>124</sup> As for judicial controls, the 1972 Act was silent on the subject of "third-party" suits to enforce its provisions. But it did authorize grantees to seek judicial review of administrative sanctions.

## II. NEW FEDERALISM AT BAY—THE RENEWAL DEBATE AND THE 1976 AMENDMENTS

### A. *The Monitoring-Research Efforts*

Federal grant programs, once enacted, usually achieve a permanent status. The beneficiaries (both recipient governments and particular constituencies) represent a vested interest in continuation, and the opponents go off to fight other battles. This was not the scenario with Revenue Sharing, however. "[P]ublic, academic and professional interest in the program exceeded that of almost any previous domestic policy . . .,"<sup>125</sup> and it soon became clear that this intense scrutiny was providing powerful ammunition for those who wanted to

122 Wright, *supra* note 61.

123 See, e.g., 42 U.S.C.A. § 5306(I) (West Supp. 1977) (special report to Congress on operation of Community Development Block Grant formula).

124 MONITORING REVENUE SHARING, *supra* note 30, at 219-20.

125 CAPUTO & COLE, REVENUE SHARING 1X (1975).

terminate Revenue Sharing when the authorization ran out in 1976.<sup>126</sup> When the question of renewal did arise, of course, the terms of debate shifted away from issues of how Revenue Sharing would work to issues of how it had worked or had not worked.<sup>127</sup> In the debate those who had conducted "objective research" which demonstrated the program's "results" enjoyed considerable advantages.

Two separate but interrelated streams of monitoring and research began almost immediately after enactment. The first was what might be called the "public interest" monitoring. This effort consisted of research spearheaded by the League of Women Voters, the National Urban Coalition, the Center for National Policy Review and the Center for Community Change. The second set of monitoring research activities, can be conveniently labelled the "academic" efforts. This work was carried out by academic and research institutions (especially the Brookings Institution) with substantial support from the National Science Foundation.<sup>128</sup>

Beyond ascertaining which jurisdictions got how much money, most aspects of Revenue Sharing monitoring and research turned out to be unexpectedly complex and difficult. The academic literature contains extensive discussions of the methodological problems presented by efforts to determine *how* the money was spent, for example.<sup>129</sup> Moreover, many of the monitoring research efforts, especially those of the "public interest" groups, appeared to be "programs of research that reflected strongly held values."<sup>130</sup> One analyst found "a particularly disconcerting intermingling of value judgment and fact" in much of the research, and warned that "[t]here is nothing new about programs being misevaluated due to faulty data and undue speed with Congress . . . accepting the evaluations and stopping or changing programs before they have

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126 See SECOND ROUND, *supra* note 8, at 1.

127 Reagan, *supra* note 95, at 24.

128 See SECOND ROUND, *supra* note 8, 7-10.

129 E.g., Lovell, *General Revenue Sharing and Categorical Grants*, GENERAL REVENUE SHARING AND DECENTRALIZATION 115 (N. Scheffer ed. 1975).

130 Rosenthal, *Policy Analysis and Political Action: Advice to Princelings*, REVENUE SHARING 149 (Caputo and Cole eds. 1975).

been really tried.”<sup>131</sup> Despite such strictures, however, it seems fairly clear that the output of both sets of research played an important role in congressional debates over renewal, and led to many of the changes in the program contained in the renewal amendments.

## B. *Major Areas of Controversy in the Act's Operation*

### 1. Actual Uses of Revenue Sharing Funds

How recipients were actually using Revenue Sharing funds, and whether these uses were “desirable” constituted the principal area of controversy during the four years between enactment and renewal. Researchers disagreed among themselves over how to determine the actual uses. Approaches included working with the Actual Use Reports submitted to the Office of Revenue Sharing, sending observers into the field to conduct case analyses, and utilizing survey techniques to determine how grantee officials *thought* (or would say) they had spent the money.<sup>132</sup> The “fungibility” problem posed serious obstacles to any approach which asked “how was the money spent?” The Brookings Institution and other researchers directed considerable attention to net fiscal effects by posing this question: “how would expenditure and revenue policies be *different* in the absence of general revenue sharing funds?”<sup>133</sup>

Despite the methodological difficulties, a number of generally accepted conclusions about the first four years seem to emerge from the research literature. First, Revenue Sharing generated substantial new capital spending activities, especially by smaller and relatively wealthy units of government. The Brookings Institution’s monitoring effort showed an eventual drop in the “new capital spending” percentage of local government decisions, but this category still represented by far the largest percentage of identifiable spending decisions.<sup>134</sup> A second general conclusion is that financially troubled units of government, especially central cities, used Revenue Sharing

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131 Lovell, *supra* note 129, at 117, 121-22.

132 See Wright, *supra* note 61, at 107, 115.

133 SECOND ROUND, *supra* note 8, at 27, 28 (emphasis added). See also *id.* at 24-42.

134 *Id.* at 31 (Table 2-1).



funds "simply to hold the line fiscally."<sup>135</sup> Finally, to the extent that direct expenditures could be measured, a relatively small percentage of Revenue Sharing funds were allocated to social service programs.<sup>136</sup> For example, one analyst found "a miniscule response on the part of local governments to the needs of the poor and aged."<sup>137</sup>

All three of these conclusions figured prominently in the renewal debate, but the issue of Revenue Sharing's failure to help the disadvantaged was uppermost in the controversy over uses.<sup>138</sup> Some congressmen argued that the needs of the disadvantaged and elderly constituted a first order national priority, and that Revenue Sharing, in actual operation, had proved unresponsive to this priority.<sup>139</sup> Counter-arguments were not lacking. It may be, for example, that the elderly value increased police protection as much as direct expenditures on their behalf. Property tax stabilization may be beneficial to low income people.<sup>140</sup>

The spending "results" clearly put Revenue Sharing advocates on the defensive. It became apparent that the most likely remedies were either more congressional direction in the establishment of eligible activities, or efforts to utilize Revenue Sharing to alter the processes of local governments as a means of increasing the power of those who were not benefitting from the program.

## 2. The Extent of Citizen Participation in Revenue Sharing Decisions

Some supporters of the initial Revenue Sharing Act believed that "by providing greater discretion to generalist officials [it] would stimulate a more competitive environment within which state and local budgets are decided, at least for that portion of the budget affected by intergovernmental

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<sup>135</sup> *Id.* at 106.

<sup>136</sup> *Id.* at 70-71.

<sup>137</sup> Susskind, *supra* note 20, at 49 (commenting on an analysis of General Revenue Sharing allocations prepared by the Comptroller General).

<sup>138</sup> SECOND ROUND, *supra* note 8, at 70.

<sup>139</sup> *E.g.*, 121 CONG. REC. H6274 (daily ed. June 26, 1975) (remarks of Rep. Drinan).

<sup>140</sup> Lovell, *supra* note 129, at 142.

grant revenues."<sup>141</sup> Thus monitors of Revenue Sharing closely analyzed the extent of citizen participation in fiscal decisions, and the extent to which the program could be associated with *increased* citizen influence on the budgetary process. Based on the program's first two years, the Director of the Office of the Revenue Sharing cited a "rekindling of citizen interest and participation in local government [which] gives new meaning to the concept of local accountability. . . ."<sup>142</sup> This panglossian view was not universal. A "public interest" spokesman concluded from the monitoring and research efforts that "by and large . . . citizen involvement is neither broad nor deep."<sup>143</sup> A major congressional critic went so far as to state that the record showed "that citizen participation in the expenditure of revenue sharing funds has been *virtually nil* to date."<sup>144</sup>

In fact, the research findings on this issue are somewhat mixed. There is some agreement that small governments exhibited less tendency to open up the appropriations process than large governments.<sup>145</sup> However, one of the leading analysts of the participation issue concluded that "the most surprising finding of the available research is that citizen interest in revenue sharing allocations is intense and that many cities have encouraged or allowed some degree of citizen input."<sup>146</sup>

Even a mixed record on this issue was enough to put Revenue Sharing advocates on the defensive, especially given the exaggerated preenactment claims of what the program would do. Substantial evidence of "the unwillingness of local officials to open up the budgetary process to the public or to urge citizen participation in the allocation of revenue sharing funds"<sup>147</sup> jeopardized the chances for renewal.

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141 SECOND ROUND, *supra* note 8, at 108.

142 Watt, *Reaffirming the Federal Compact: General Revenue Sharing and the Federal System*, GENERAL REVENUE SHARING AND DECENTRALIZATION 81 (N. Scheffer ed. 1975).

143 Lief, *supra* note 116, at 101.

144 H.R. REP. NO. 94-1165, Part I, 94th Cong., 2d Sess. 91, 92 (1976) (supplemental views of Rep. Drinan) (emphasis added) [hereinafter cited as 1976 H. REP.].

145 Sokolow, *Small Community Policy Making and the Revenue Sharing Program*, REVENUE SHARING 6 (Caputo & Cole eds. 1975).

146 Cole, *supra* note 97, at 68.

147 Susskind, *supra* note 20, at 47.

### 3. Discrimination in the Uses of Revenue Sharing Funds

One of the major domestic roles of the federal government has been the protection of minorities, especially racial minorities, against discrimination by state and local governments. That such a role is both proper and necessary is a fundamental tenet of American federalism. Therefore, the widespread assertion that Revenue Sharing, in fact, perpetuated and encouraged discriminatory practices by local governments posed a serious threat to the program's renewal. Critics were concerned not only with the practices of recipients, but also with the enforcement activities of the federal government.

"Discrimination" means different things to different people. Conduct which does not violate the Constitution may, nonetheless, run afoul of anti-discrimination statutes.<sup>148</sup> Whether the term refers solely to intentional deprivations or more broadly includes the failure to remedy past intentional deprivations is, of course, a major legal and political issue. Although section 122 of the Revenue Sharing Act authorized the Secretary of the Treasury to enforce its anti-discrimination provision, studies detected substantial discrimination by local governments in both senses. Critics focused on the employment practices of local governments and on the provision of services.<sup>149</sup> The employment discrimination accusations, both "active" and "passive," involved exclusion of racial minorities and women. The provision of services issue involved lower levels of service to "poor and minority areas."<sup>150</sup> According to one congressional critic, "the United States Civil Rights Commission, the National Urban League, and other organizations which have investigated . . . General Revenue Sharing have documented thousands upon thousands of cases in which local governments have used . . . funds in ways that discriminate against politically vulnerable groups. Employment discrimination has been the most prevalent form."<sup>151</sup>

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148 See *Washington v. Davis*, 426 U.S. 229 (1976).

149 P. BLAIR, *GENERAL REVENUE SHARING IN AMERICAN CITIES: FIRST IMPRESSIONS* 13-14 (1974).

150 *Id.* at 14. The employment practices of local government contractors were also cited.

151 1976 H. REP., *supra* note 144, at 87 (supplemental views of Rep. Conyers).

The inclusion of the anti-discrimination provision in the Revenue Sharing Act did not guarantee its vigorous enforcement. Rarely has a federal agency charged with enforcing grant program strings come under such widespread condemnation. The Office of Revenue Sharing's (ORS) "laxity" was said to have "paralyzed civil rights enforcement under the act . . . ."<sup>152</sup> The ORS apparently was unsure of the extent of its authority to terminate funding and complained, somewhat justifiably, of a lack of manpower.<sup>153</sup> However, the ingrained habits of 38,000 jurisdictions—including a belief by many that they did not discriminate—and the ORS' view that its primary mission was to pay out money constituted the core of the problem. Both phenomena were, of course, closely linked to the program's underlying premises.

#### 4. Formula Issues—Did the Act put the Money Where the Needs Were?

In 1975 Senator Edmund Muskie predicted "rough sledding" for the renewal of Revenue Sharing and emphasized the desirability of rewriting the distribution formula in order to channel funds to those jurisdictions with greatest needs.<sup>154</sup> Thirty-eight thousand jurisdictions were receiving funds. Congressmen and other policymakers learned the identity of the beneficiaries under the existing formula and developed ideas for possible changes.

The principal issue was whether the 1972 formula was successful in matching federal resources to state and local needs. A grant distribution formula may utilize measures of need for a particular aid program (*e.g.*, counting the number of poor children in distributing education funds), or may attempt to reflect differentials in recipients' fiscal capacity (*e.g.*, allocating distributions inversely with per capita income).<sup>155</sup> The latter approach is generally referred to as "equalization." The 1972 formula attempted to measure program need through

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<sup>152</sup> *Id.* at 90, 94, 95 (supplemental views of Rep. Drinan).

<sup>153</sup> See generally SECOND ROUND, *supra* note 8, at 8-9.

<sup>154</sup> Muskie, *Revenue Sharing and Counter-Cyclical Assistance*, REVENUE SHARING AND DECENTRALIZATION 68, 70 (N. Scheffer ed. 1975).

<sup>155</sup> See MICHELMAN & SANDALOW, *supra* note 16, at 1005-21.

such factors as population and urbanized population, and also attempted to equalize for fiscal capacity differences through the use of income factors. The formula's attempt, through a "tax effort" factor to reward those jurisdictions which were actually using their capacity, seemed closely allied to equalization goals.

Analysis of the Revenue Sharing formula must consider both how it distributed funds *among* states, and how these funds were, in turn, distributed to local governments *within* states. The Brookings study concluded that, on an interstate level, the formula succeeded in targeting funds to "low-capacity, high-effort states," but did not succeed in helping the highly urbanized states.<sup>156</sup> As for the intra-state distribution to localities, Brookings concluded that "large metropolitan central cities" fared reasonably well, but that for other jurisdictions the conclusion depended on whether Revenue Sharing was evaluated in isolation, or in comparison with "the pre-existing financial scale of local government. . . ." Comparative analysis suggested that the formula tended to benefit "small towns and rural places."<sup>157</sup>

Any attempt to change the formula could have, of course, jeopardized the entire program by splitting the coalition of states and localities which initially had secured its enactment. Despite this risk (or perhaps, in some instances because of it) two principal methods for changing the formula emerged. The first one suggested that Revenue Sharing go much further in channeling funds to the large cities.<sup>158</sup> Since large cities have high proportions of service dependent persons, their need for general support funds (the expenditure of which is likely to assist these persons directly or indirectly) is greater than their population differential *vis à vis* other communities. This approach led to a search for new measures of "program need," especially the use of a formula factor which reflected the number of poor people in a jurisdiction.<sup>159</sup>

The Brookings Institution proposed a second method in

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156 MONITORING REVENUE SHARING, *supra* note 30, at 92.

157 *Id.* at 132-34.

158 *E.g.*, Reagan, *supra* note 95, at 29.

159 1976 H. REP., *supra* note 144, at 83, 84 (supplemental views of Rep. Fascell).

light of general criticism that the formula's "equalizing impact is relatively limited."<sup>160</sup> Analyses suggested that per capita income was not an adequate measure of fiscal capacity. Jurisdictions with relatively low average incomes may have an abundance of other resources available for taxation. High per capita income jurisdictions frequently are also urbanized areas with a bi-modal income distribution—large numbers of well-off individuals along with large numbers of poor. Thus Brookings urged the development and utilization of alternative measures of fiscal capacity in the Revenue Sharing formula.<sup>161</sup>

##### 5. Revenue Sharing as an Inducement to Structural Reform of Local Government

Some of the earliest Revenue Sharing proposals linked federal assistance to the "reform" or "modernization" of state and, especially, local governments.<sup>162</sup> These proposals included changes in internal structure to increase accountability, fiscal reforms to decrease reliance on "regressive" taxes, and the creation and strengthening of metropolitan area units. In both its structure and operation, however, the 1972 Act was generally unreflective of the "reformist" approach. The major "gain" appears to have been the increased citizen participation in some local budgeting processes.<sup>163</sup> Any movement towards "metropolitanism" was blunted in three ways: first, the Act served to "prop-up" smaller units, reducing incentives towards consolidation; second, the A-95 provisions for review of federally funded local projects by an areawide "clearing house" do not apply to Revenue Sharing expenditures; and third, regional planning commissions are not able to directly receive Revenue Sharing funds.<sup>164</sup>

Any federal intervention into the structures and policies of state and local governments runs counter to the traditional

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160 SECOND ROUND, *supra* note 8, at 162.

161 MONITORING REVENUE SHARING, *supra* note 30, at 168.

162 *E.g.*, Humphrey, *Foreword* to H. REUSS, REVENUE SHARING at xi (1970).

163 See Stenberg, *Revenue Sharing and Governmental Reform*, 419 ANNALS 55 (1975) [hereinafter cited as Stenberg].

164 *Id.* at 59-60.

conception of Revenue Sharing which stresses freedom from all strings. However, the notion that the national government should only share revenue with units of government whose structure and powers corresponded to national standards, proved to have surprising vitality in 1976.<sup>165</sup>

*C. The Dynamics of the Renewal Amendments—The  
Emergence of Interventionist Federalism*

When the 1972 Revenue Sharing Act came up for renewal in 1976 it had the strong support of the Ford Administration, Republicans in Congress, and organizations of state and local government officials. At the same time the existing Revenue Sharing program was subject to mounting criticism from congressional liberals and civil rights organizations who argued that revenue sharing failed to aid minorities, the poor and the aged.<sup>166</sup> Only a few congressmen were irrevocably opposed to renewal in any form, largely on the grounds that Revenue Sharing constituted an abdication of congressional sovereignty over national tax revenues.<sup>167</sup> The Senate was fairly certain to favor renewal in more or less the 1972 form. The House Democratic liberals held the balance of power and faced a choice between attempting to terminate the program or attempting to restructure it. They chose the latter course, perhaps out of reluctance to hand the Republicans a major issue in a presidential election year, perhaps out of recognition that terminating Revenue Sharing funds would hurt the large cities most of all.<sup>168</sup>

Alternatively, these House members may have recognized the renewal debate as an unusual opportunity to achieve goals which had hitherto been regarded as impossible—an across the board change in the nature and activities of American local governmental units. While any federal grant constitutes intervention into the recipient's operations, if only through low-

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165 See 1976 H. REP., *supra* note 144, at 17. See text at notes 290-292, *infra*.

166 SECOND ROUND, *supra* note 8, at 4-5.

167 *E.g.*, 1976 H. REP., *supra* note 144, at 80 (dissenting views of Reps. Brooks and Moss). These opponents also voiced the "Trojan Horse" view of Revenue Sharing; that localities would become unduly dependent on the funds.

168 See, *e.g.*, 1976 H. REP., *supra* note 8, at 87, 88 (supplemental views of Rep. Conyers).

ering the "price" to it of engaging in a particular activity, the renewal of Revenue Sharing presented the possibility of attaching strings in order to achieve goals which were only indirectly related to the programs for which the funds were spent. Such a strategy might be called "interventionist federalism"—that is, use of the leverage which the grant award carries with it to achieve a change in the recipient's organization or behavior which has substantial effects on matters *other* than the specific programs for which the grant funds are expended.<sup>169</sup> Such intervention might reflect a perceived national interest in state and local governments' political processes, their organization, structure and boundaries, and even their overall policies and programs.<sup>170</sup>

The change in the pattern of federal aid to the states from categorical grants to block grants and Revenue Sharing may have enhanced opportunities for interventionist federalism in two distinct ways: first, recipients may have become dependent upon the flow of funds from block grants and Revenue Sharing and thus stood in a relatively weak position to resist the imposition of additional strings;<sup>171</sup> second, the national government could contend that increased deference to the expenditure choices of state and local governments with respect to federal funds justified increased federal supervision of those levels of government.<sup>172</sup>

Those House members who favored restructuring the Act

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169 This definition would cover effects both within the same overall functional area as the grant, *e.g.*, "education" and other areas. The concept of interventionist federalism rests on the possibility of drawing a distinction between strings primarily related to the purposes behind a particular grant and strings which, while related to those purposes, reflect other national purposes *and* attempt to achieve them broadly. To illustrate further, consider the differences between: 1) a prohibition on partisan political activity by state employees administering a particular grant; 2) a prohibition on partisan political activity by all state employees working in that grant's functional area; and 3) a prohibition on partisan political activity by all state employees as a condition of receiving the grant.

170 Both the concept of interventionist federalism and attempts to implement it are by no means new. *See* Nathan, *supra* note 5, at 127-28. The concept can be seen at work in the numerous federal efforts to encourage metropolitan planning and institutions. *See generally* Stenberg, *supra* note 163, at 51-52. *See also* NEW FEDERALISM, *supra* note 18, at 163-64 (concept of "permissive federalism").

171 NEW FEDERALISM, *supra* note 18, at 103-05.

172 *Cf.* Stolz, *supra* note 94, at 117-18.



had four main goals during consideration of the renewal amendments: strengthening the Act's anti-discrimination provisions and enforcement mechanism; mandating citizen participation in Revenue Sharing decisions; forcing greater expenditures on social services; and, changing the formula, primarily to aid large cities. They were successful only in the first two goals. Their successes and failures show the extent to which the Ninety-fourth Congress was willing to move beyond the New Federalism's fundamental tenet of taking state and local governments more or less as they are when entrusting them with substantial expenditure responsibilities. Congress accepted the legitimacy of intervention, through the grant device, to ensure that the rules of the allocation "game" at the sub-national level are fair and that no groups are excluded from playing, but de-emphasized direct national influence over the outcome of that game, except discriminatory outcomes.

#### D. *The Renewal Amendments*

Late in the 1976 session, after protracted legislative maneuvering, Congress enacted the State and Local Fiscal Assistance Amendments of 1976.<sup>173</sup> Revenue Sharing was renewed for three and three-quarters years at an annual funding level of \$6.85 billion. Although one report states that the amendments reflected a "status quo position,"<sup>174</sup> the changes enacted could have a potentially sweeping effect on recipient governments.

##### 1. The Anti-discrimination Provisions

There are three significant aspects of the new section 122. First, the grounds of prohibited discrimination are broadened to include age, handicapped status and religion.<sup>175</sup> The handicapped provision could be of particular significance, if the Department of Health, Education and Welfare attacks such forms of discrimination aggressively.<sup>176</sup>

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<sup>173</sup> Revenue Sharing Amendment, *supra* note 7.

<sup>174</sup> SECOND ROUND, *supra* note 8, at 23.

<sup>175</sup> 31 U.S.C.A. § 1242(a)(1) (West Supp. 1977).

<sup>176</sup> See Statement of Secretary Joseph A. Califano, Jr. (April 28, 1977) (on file with

The second significant change attempts to prevent fungible expenditure of Revenue Sharing funds from hiding discriminatory practices. Under the old Act, recipients who were engaging even in overt discriminatory practices would apparently suffer no loss of Revenue Sharing funds unless the discrimination emanated from a program or activity directly funded with Revenue Sharing money.<sup>177</sup> During the renewal debate, liberals led by Rep. Robert Drinan proposed a ban on *all* discriminatory practice by recipients, regardless of whether Revenue Sharing funds were involved.<sup>178</sup> The final version of section 122(a)(1) does, on its face, bar discrimination in "any program or activity of a [recipient] . . ." But, section 122(a)(2) allows recipients to avoid the Act's sanctions if, in administrative proceedings, they can demonstrate "by clear and convincing evidence that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with [Revenue Sharing] funds. . . ."<sup>179</sup> While arguably this clause reintroduces the fungibility problem by exempting discriminatory activities financed with freed-up funds,<sup>180</sup> the amendments at least appear to alter the burden of proof with respect to use of Revenue Sharing funds in discriminatory practices, and suggest that the mere filing of a use report will not satisfy that burden.

The third change is a direct attack on ORS' alleged "laxity" in enforcement of anti-discrimination provisions. There was wide agreement on the need to "send the Office of Revenue Sharing a message" on enforcement practices.<sup>181</sup> The amendments mandate precise procedures and specific time limits within which the ORS (technically, the Secretary of the

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the author). Even if the O.R.S. does not interpret this guarantee as broadly as H.E.W., O.R.S. could still find itself obliged to enforce H.E.W. "holdings" of discrimination based on handicapped status. See text accompanying notes 181-184 *infra*.

177 Revenue Sharing Act, *supra* note 4, § 122(a). See 1976 H. REP., *supra* note 144, at 12. But see SECOND ROUND, *supra* note 8, at 8 (revised enforcement policy under old Act in area of employment discrimination).

178 H.R. 8329, 94th Cong., 1st Sess. §§ 10, 122 (1975).

179 31 U.S.C.A. § 1242(a)(2)(A) (West Supp. 1977).

180 SECOND ROUND, *supra* note 8, at 167-68.

181 1976 H. REP., *supra* note 144, at 108, 111 (supplemental views of Rep. Horton).

Treasury who delegated his authority to the ORS) must carry those procedures out.<sup>182</sup> The key elements of the new enforcement provisions are two "trigger mechanisms" which are intended to *force* the ORS to begin the compliance proceedings outlined below. The triggers are either a "holding" by a federal or state court or a federal administrative law judge that a recipient government has engaged in discrimination as defined by the Act, or a "finding" by the ORS that "it is more likely than not" that a recipient is discriminating.<sup>183</sup> There are two important restrictions on the ORS' discretion. First, it *must* accept the "holding" that a discriminatory practice has occurred, unless that "holding" is reversed by an appellate tribunal, presumably in the process of appeal from the original proceeding which led to the "holding." Second, the Office is not free to delay its own "findings" through inaction on complaints. Section 125 is a new provision (discussed more fully below) which requires the ORS to establish time limits, not to exceed 90 days, for investigation and *initial resolution* of discrimination complaints.

Either trigger—a "holding" or a "finding"—sets off administrative proceedings which can lead to suspension or termination of Revenue Sharing payments. The ORS sends the recipient a "notice of noncompliance" within 10 days of the trigger, and the recipient has 30 days to respond. If the recipient contests the issue, it may "informally present evidence" to the ORS in support of its position. At this point the distinction between a "holding" and a "finding" is critical. A recipient may not collaterally attack a "holding" of discrimination, but can only attempt to prove that Revenue Sharing funds are not involved. However, an ORS "finding" of discrimination is subject to full re-examination in this informal proceeding. Within this 30-day period the Office must either (1) secure a "compliance agreement," (2) make a "determination" of compliance or (3) make a "determination" of non-compliance. Either of the first two results appears to end the matter, subject to judi-

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<sup>182</sup> As a matter of convenience, this Article will use "O.R.S." instead of the "Secretary of Treasury" when speaking of the administration of Revenue Sharing.

<sup>183</sup> 31 U.S.C.A. §§ 1242(b)(1), 1242(c)(1) & 1242(c)(4) (West Supp. 1977).

cial challenge by a third party.<sup>184</sup> "Determination" of non-compliance requires the office to suspend funding within 10 days. At this point the recipient may either enter into a compliance agreement or challenge the "determination."

Any such challenge, which blocks the suspension, takes the form of a "hearing" before an administrative law judge. Section 122 does not specifically invoke the adjudication provisions of the Administrative Procedure Act (APA). However, in view of that section's reference to a "record," and the provisions of section 143 for review on the record in a Court of Appeals, use of the adjudication provisions may be mandatory.<sup>185</sup> In any event, the Office of Revenue Sharing's new Regulations incorporate the key APA procedures.<sup>186</sup> The hearing can result either in exoneration, a compliance agreement, suspension, or termination. Suspension can be lifted more easily than termination, which requires reversal of the administrative law judge by an appellate tribunal.<sup>187</sup> Both suspension and termination are subject to judicial review at the circuit court level under section 143.<sup>188</sup>

Although it is not as stringent as some reformers wished, the new section 122 reflects interventionist goals. It has the potential to alter widespread local government practices, especially employment practices which may not violate *constitutional* standards of non-discrimination.<sup>189</sup> It could also have an effect on the provision of services.

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184 Any such suit would be brought in accordance with the new § 124.

185 *But see* United States v. Florida East Coast Ry., 410 U.S. 224 (1973).

186 31 C.F.R. §§ 51.50-51.62 (1977).

187 31 U.S.C.A. § 1242(e)-(f) (West Supp. 1977).

188 31 U.S.C.A. § 1263(a) (West Supp. 1977). It is interesting to note that a "holding" of discrimination, which triggers O.R.S. proceedings, cannot be attacked collaterally in those proceedings. § 122(c)(2). This provision could cause interagency difficulties if O.R.S. disagreed with H.E.W.'s interpretation of anti-discrimination statutes under its jurisdiction and incorporated into § 122(a). Section 122(h) authorizes cooperative agreements between the Secretary of Treasury and other federal and state agencies for joint investigations and notification to the Secretary of "any actions instituted by such agencies against a state government or a unit of local government alleging a violation of any federal civil rights statute or regulations issued thereunder." However, a decision by a state *agency* is not a holding as § 122 uses that term. Such a provision was deleted during the legislative process.

189 *See* 6 Revenue Sharing Bull., No. 3, at 1 (Jan. 1978) (increased volume of cases

Section 122's actual impact will depend, of course, on whether the Office of Revenue Sharing zealously enforces the new provisions. The interim regulations set forth broad prohibitions on employment discrimination, including conduct "perpetuating the results of past discriminatory practices."<sup>190</sup> Anti-discrimination enforcement appears to be much more vigorous than in the past. According to one analysis,

state and local governments are realizing that merely eliminating any *intentional* discrimination against women and minorities is no longer sufficient to comply with the nondiscrimination provisions of the Revenue Sharing Act. Discrimination today is measured by 'effects' as well as 'intent,' and to simply prohibit discrimination is not enough to secure equal employment opportunities—a prerequisite for not losing revenue sharing funds.<sup>191</sup>

It is not clear whether a Revenue Sharing recipient could claim an exemption from the anti-discrimination provisions if the only department which utilized Revenue Sharing funds *was* in compliance with affirmative action standards while the recipient's overall employment pattern was not. The ORS appears to take the position that as long as Revenue Sharing funds go to pay any salary, the recipient's overall employment of personnel is a funded "program or activity" and thus must, as a whole, be in compliance with the anti-discrimination provisions.<sup>192</sup>

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enforcing anti-discrimination provisions). Section 122 does not stand alone, of course. The same goals are furthered by Title VII of the Civil Rights Act of 1964. (42 U.S.C. § 2000e(a) (Supp. IV 1974). *See generally* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Title VII is within the regulatory power of Congress). Thus it might seem unnecessary to utilize the interventionist approach in order to achieve broad changes in state and local employment practices. However, the sanctions available under the Revenue Sharing Act may be more effective than those available under Title VII. *Cf.* MICHELMAN & SANDALOW, *supra* note 16, at 1083.

190 31 C.F.R. § 51.52(b)(2)(ii) (1977).

191 5 Revenue Sharing Bull., No. 11, at 3 (Sept. 1977); *see* 5 Revenue Sharing Bull., No. 8, at 1 (June 1977) ("Recipients in trouble over nondiscrimination provisions") 6 Revenue Sharing Bull., No. 8, at 1 (Dec. 1977) ("More recipients in violation of civil rights requirements").

192 *But cf.* Board of Pub. Instruction v. Finch, 414 F.2d 1068 (1968) (narrow interpretation of Title VI of Civil Rights Act of 1964). Even under Revenue Sharing

## 2. The Citizen Participation Provisions

As with the non-discrimination amendments, the question was not whether Congress would enact citizen participation requirements, but how extensive they would be. Liberal critics of the 1972 Act's operation felt that opening up the budgetary process was the key to changing local political systems. The question was what mechanism to use.

The most sweeping proposals for change were contained in Congressman Drinan's bill, H.R. 8329. At the local level, it mandated "a series of public hearings" prior to adoption of a planned use report, and appointment of a broadly based "citizens advisory committee" to oversee and recommend the expenditure of Revenue Sharing funds.<sup>193</sup> Large local governments—defined, essentially, as those that received more than one million dollars annually—would have to "provide for the selection and appointment of a local citizen's advocate . . ." with general supervisory authority over Revenue Sharing funds, and the ability to conduct "investigations, audits, and studies . . ."<sup>194</sup> As for all other local governmental units, each state would have to establish "an office of citizen advocacy, which shall perform, to the extent possible and feasible, the function of citizen advocate. . . ."<sup>195</sup> The local "citizens' advocate" proposal, which seems a cross between an ombudsman-watchdog and a shadow government, may well mark the outer boundary of suggested federal intervention into local governmental structures through grant program strings.

The final legislation relies essentially on the public hearing as the mechanism for citizen participation. Two hearings are required. The first is held by the governmental authority responsible for preparing the budget and deals with "possible uses" of Revenue Sharing funds.<sup>196</sup> The second hearing is to be

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there would remain the hypothetical possibility of a recipient which applied all its funds to uses, such as capital expenditures, which did not involve the payment of salaries, thus exempting its employment practices from § 122.

193 H.R. 8329, 94th Cong., 1st Sess. § 9 (1975).

194 *Id.*

195 *Id.*

196 31 U.S.C.A. § 1241(b)(1) (West Supp. 1977).

held by the governmental entity which enacts the budget. The "budget hearing" is not limited solely to consideration of Revenue Sharing funds but must include the opportunity "to ask questions concerning the *entire* budget *and* the relation thereto of [Revenue Sharing] funds. . . ."<sup>197</sup> Congress' concern with *who* participates in subnational political processes—in addition to the openness of those processes—was underscored by a provision requiring recipients to take steps to ensure participation in budget hearings by senior citizens.<sup>198</sup> Although the amendments do not compel state and local governments to follow suggestions made by citizens, the Brookings Institution concluded that "the hearing requirements could have an important effect on state and local political processes."<sup>199</sup> Such an impact would represent a victory for interventionist federalism.

However, the implementation activities of the ORS will again play a crucial role in determining just how significant this effect is. The Amendments authorize the ORS to promulgate regulations *waiving* both hearings. The proposed use hearing may be waived "if the cost of such a requirement would be unreasonably burdensome in relation to the [recipient's] entitlement. . . ."<sup>200</sup> The budget hearing may be waived if "the budget processes required under applicable state or local law or charter provisions assure the opportunity for public attendance and participation . . . and a portion of such process includes a hearing on the proposed use of [Revenue Sharing] funds in relation to its entire budget."<sup>201</sup>

On January 10, 1977, the ORS promulgated "Interim Regulations" which appeared to reflect a policy of "granting extensive waivers of the hearing requirements."<sup>202</sup> The regulations eliminated the proposed use hearing for four classes of reci-

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197 *Id.* § 1241(b)(2).

198 *Id.* § 1241(g).

199 SECOND ROUND, *supra* note 8, at 168.

200 31 U.S.C.A. § 1241(b)(3) (West Supp. 1977).

201 *Id.*

202 42 Fed. Reg. 2196 (Jan. 10, 1977). The assessment of the policy is taken from SECOND ROUND, *supra* note 8, at 168, and refers to the initial "proposed regulations" issued in October of 1976.

pipients: governments (such as the commission form) for which a budget is not presented by an executive authority to a legislative body; governments receiving less than \$10,000 annually in Revenue Sharing funds; governments for which the unavoidable expense of holding the hearing would exceed 5 percent of their Revenue Sharing funds; and, governments which provide more feasible and less costly "alternative means of public participation."<sup>203</sup> The budget hearing was waived for those recipients who were not required under applicable law to enact a single budget or to adopt a formal budget, provided that alternative means of public participation in the budget process were available.<sup>204</sup>

In response to highly critical public comment, the ORS has backtracked substantially on waiving the hearing requirements.<sup>205</sup> New "proposed regulations" delete all exemptions from the proposed use hearing except exemption based on unavoidable expense. The ORS may grant a waiver if "unavoidable" hearing expenses exceed 15 percent of Revenue Sharing funds.<sup>206</sup> The exemption from the budget hearing is deleted, although the proposed regulations do contemplate permitting utilization of "an alternative budget hearing process."<sup>207</sup> These changes will have a substantial impact. For example, the Revenue Sharing Bulletin, which originally estimated that the first ORS proposals would exempt up to 75 percent of local governments below the county level from proposed use hearings, now reports that "virtually all governments will be required to hold proposed use hearings. . . ."<sup>208</sup>

### 3. The Citizen Complaint Provision<sup>209</sup>

The amendments concerning non-discrimination and citi-

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203 Proposed 31 C.F.R. § 51.13, 42 Fed. Reg. 2197 (Jan. 10, 1977).

204 Proposed 31 C.F.R. § 51.14, 42 Fed. Reg. 2197-98 (Jan. 10, 1977).

205 See 42 Fed. Reg. 34336 (July 5, 1977).

206 Proposed 31 C.F.R. § 51.13, 42 Fed. Reg. 34236-37 (July 5, 1977).

207 Proposed 31 C.F.R. § 51.14(e), 42 Fed. Reg. 34337 (July 5, 1977). The provision permitting the budget hearing to be held before a committee of the enacting body is retained.

208 5 Revenue Sharing Bull. No. 9, at 1 (July 1977).

209 For a general discussion of the role of citizen complaints in grant enforcement, see Tomlinson & Mashaw, *supra* note 35, at 637-38.



zen participation add substantial strings to the original Revenue Sharing program. New strings, of course, raise the question of whether the existing control mechanisms are adequate. In the case of most grant programs, Congress would probably rely almost exclusively on enforcement by the grantor agency, through its periodic "plan" reviews and other oversight activities. However, Congress took a different approach with Revenue Sharing by relying on citizen impetus as a primary means of setting the administrative controls into motion.<sup>210</sup>

There are two reasons for this departure. First, Revenue Sharing is different from other grant programs in that it contains no plan approval mechanism. The legislative history of the renewal amendments shows a second reason for Congress' different approach: lack of confidence in the Office of Revenue Sharing's willingness to enforce strings against state and local governments. In a sense, the ORS found itself subject to the same criticism levelled against many *regulatory* agencies. Critics argued that since the agency was "too close" to, and in sympathy with, those it was supposed to regulate, the administrative process had to be opened up to "private attorneys general."<sup>211</sup> Most of the criticism focused on the Office of Revenue Sharing's handling of discrimination complaints; and the legislative history suggests that Congress regarded the new citizen complaint provision as part of the strengthened anti-discrimination mechanism.<sup>212</sup>

The new section 125 ("Investigations and Compliance Reviews") covers *any* "possible violation of the provisions of [the] Act." The key provision is a requirement that ORS promulgate regulations (by March 31, 1977) establishing "reasonable and specific time limits (in no event to exceed 90 days)" within which it shall conduct an investigation and "*make a finding*" after receiving a citizen complaint.<sup>213</sup> Although the Act retains requirements for notice and hearing prior to the

210 *E.g.*, §§ 121, 125.

211 *See generally* Stewart, *supra* note 44, at 1682-83.

212 *E.g.*, 1976 H. REP., *supra* note 144, at 14-15.

213 31 U.S.C.A. § 1245 (West Supp. 1977). The same time limits apply to receipt of other information concerning violations of the Act, including determinations by state and local agencies. Section 125 also contemplates that the Secretary of the Treasury

imposition of sanctions, the amendments do not specify whether sanctions are to be imposed if the investigation leads to a finding of violation.<sup>214</sup> But the regulations resolve this dilemma by guaranteeing a "finding" within 90 days of the filing of a formal administrative complaint of any violation of the Act, and by treating this finding as a trigger mechanism for adjudicatory procedures which *must* be followed prior to imposition of any sanction.<sup>215</sup> These procedures take the form of a complaint against the recipient, filed and prosecuted by the ORS before an administrative law judge, who conducts a "hearing . . . pursuant to section 7 of the Administrative Procedure Act (5 U.S.C. 556)."<sup>216</sup> Either party may appeal the administrative law judge's decision to the Secretary of the Treasury, and the Secretary's decision (or the administrative law judge's, if not appealed) is then subject to judicial review by the Circuit Court of Appeals.<sup>217</sup>

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will conduct his own audits and compliance reviews, and requires him to establish time limits for these activities, without specifying a maximum period. Apparently, such reviews can be triggered by "allegations" of violation, which are less formal than the "complaints" which trigger 90-day investigations.

214 Section 123(b) presents an interesting ambiguity. Apart from the anti-discrimination provisions, it is now the only authority for the Secretary to withhold payments. Presumably the Secretary can withhold if recipients violate any assurances made of compliance with strings, as well as for failure to make them. Otherwise, the assurances requirement and the sanction to enforce it would be meaningless. However, the statutory grounds for withholding do not, apart from § 122, extend to all violations of the Act, but only the assurances requirement of § 123(b) and regulations "prescribed thereunder." Yet the regulations state that the sanctions process will be triggered "whenever the Director has reason to believe that a recipient government has failed to comply with *any* section of the Act. . . ." 31 C.F.R. § 51.02 (1977) (emphasis supplied). It appears that Congress failed to specify that funds could be withheld for violation of the citizen participation requirements. See e.g., Revenue Sharing Act, *supra* note 4, § 104(b).

215 31 C.F.R. §§ 51.3(b), 51.200-23 (1977).

216 31 C.F.R. § 51.212 (1977).

217 31 C.F.R. §§ 221-22, 225 (1977). Although the administrative action would then be "final," the regulations track § 123(b) in providing for a 60-day grace period for the recipient to take "corrective action" before funds are withheld. 31 C.F.R. § 51.3(b). The sanctions provisions of the regulations appear to limit the administrative law judges to imposing penalties commensurate with the amount of Revenue Sharing funds expended in violation of the Act. 31 C.F.R. 51.218(a)-(c) is specific on this point. Subsection (d) refers to a reduction in entitlement, without specifying how it is to be computed. In the case of an across-the-board violation, such as failure to follow the citizen participation provisions, the proper penalty would presumably be the

The renewal amendments and implementing regulations will generate a substantial volume of enforcement activity.<sup>218</sup> Much of this activity will stem from citizen complaints alleging violations of the Act, including the anti-discrimination provisions. The Act is not clear on the role, if any, of the citizen complainant after a finding of violation has been made. Neither the Act nor the regulations provide for third party intervention in the adjudicatory proceedings before an administrative law judge, which must take place prior to imposition of any penalty to remedy a violation.

At the very least, the original complainant appears to have a right under section 555(b) of the Administrative Procedure Act to "appear" in the proceeding before the administrative law judge. Moreover, the complainant may well have a right to intervene under decisions such as *National Welfare Rights Organization v. Finch*<sup>219</sup> and *Office of Communication of United Church of Christ v. F.C.C.*<sup>220</sup> To the extent that the right of intervention in administrative proceedings is coextensive with standing to seek judicial review of those proceedings, the argument for intervention is bolstered by the Renewal Amendment's provision for judicial review in federal or state court by any "person aggrieved."<sup>221</sup> To the extent that the criterion should be "the contribution that a prospective intervenor can make . . .,"<sup>222</sup> local residents may have both greater knowledge and motivation than the enforcement agency. Certainly, allowing intervention furthers Congress' obvious intention to rely heavily on citizen enforcement of the Revenue Sharing Act's strings.

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withholding of *all* payments. 31 C.F.R. § 51.3(b) so provides specifically, although it refers to the *Director* (of O.R.S.) imposing this sanction rather than to the judge or Secretary. It is important to note that the regulations permit the administrative law judge to order *repayment* of Revenue Sharing funds, even though the only explicit statutory provision contemplating repayment (the former § 123(a)(3)) was repealed. Cf. Susskind, *supra* note 20, at 95.

218 See, e.g., 5 Revenue Sharing Bull. No. 10, at 1 (August 1977).

219 429 F.2d 725 (D.C. Cir. 1970).

220 359 F.2d 995 (D.C. Cir. 1966); see Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 726, 766 (1968) (difference between "appearance" and intervention).

221 See GELLHORN & BYSE, *supra* note 53, at 723-26.

222 Shapiro, *supra* note 220, at 767.

The Act and its amendments also do not indicate to what extent the ORS in the complaint process is to get involved in overseeing state and local government activities. Complaints under section 125 can relate to *any* "possible violation of the provisions of [the Act]. . . ." Complaints can include alleged violations of "the laws and procedures applicable to the expenditure of [the recipient's] own revenues. . . ." Thus, the ORS may be forced to investigate and resolve essentially state law questions. There is a large volume of state court litigation involving issues such as the violation of competitive bidding<sup>223</sup> and conflict of interest statutes.<sup>224</sup> If the volume of complaints becomes too great, or if experience suggests that the ORS has little to contribute to such issues, it might be desirable for future amendments to limit the complaint mechanism to violation of provisions such as anti-discrimination and citizen participation sections in which there is a strong federal interest.

Imposing the requirement that federal administrative procedures be exhausted before state proceedings can be commenced is troublesome as well. Supported by the doctrine of *Testa v. Katt*,<sup>225</sup> Congress may have the power to compel state courts to hear Revenue Sharing claims and to require exhaustion of a federal administrative remedy beforehand.<sup>226</sup> Again, however, if the claim is based upon the state's own "laws and procedures," it is not clear that the administrative proceedings would be of much assistance to the state court. And if federal adjudicatory proceedings have led to a finding in the grantee's favor, it is difficult to predict how subsequent state judicial proceedings will weigh the finding.<sup>227</sup> Omitting questions of state "laws and procedures" from the complaint mechanism would also remove the exhaustion requirement

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223 *E.g.*, *McMichael v. Van Ho*, 8 Ohio Misc. 281, 219 N.E.2d 831 (1966).

224 *E.g.*, *Conley v. Town of Ipswich*, 352 Mass. 201, 224 N.E.2d 411 (1967).

225 330 U.S. 386 (1947).

226 *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 567-71 (2d ed. 1973).

227 *Cf. id.* at 429-31. Since the Revenue Sharing statute has, in effect, "incorporated" state law, state decisions on "laws and procedures" would presumably be authoritative.

affecting such disputes. This is probably a desirable result.

#### 4. The Citizen Suit Provision

Congress' intention to rely on citizen enforcement of the Revenue Sharing Act's strings is also clearly visible in the renewal legislation's provision for citizen suits. A new section 124 provides that "whenever a State government or a unit of local government, or any officer or employee thereof acting in an official capacity, has engaged or is engaging in any act or practice prohibited by this chapter, upon exhaustion of administrative remedies, a civil action may be instituted by the person aggrieved in an appropriate United States district court or in a State court of general jurisdiction."<sup>228</sup>

This remarkable provision for a general "citizen suit" sparked little opposition, or even interest during the 1976 legislative debate. The original Act generated a substantial volume of litigation between its enactment and 1976. Many congressmen, including members of the House committee with jurisdiction over the bill, read the cases to support the proposition that courts would entertain suits to remedy violations of the Act's strings.<sup>229</sup> However, a closer analysis of the cases decided under the old Act reveals that this was not entirely true and that the availability of a judicial forum might depend on the violation asserted.

In one category of classes the situation was relatively clear: victims of discriminatory practices by recipients could bring suit in federal district court.<sup>230</sup> The jurisdictional and remedial statutes concerning civil rights actions facilitated suits against recipients,<sup>231</sup> while suits against the ORS could be brought in any circuit where section 702 of the Administrative Procedure Act was viewed as a general grant of jurisdiction.<sup>232</sup> Major procedural issues remained unresolved, including the extent to which a complainant had to exhaust any

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<sup>228</sup> 31 U.S.C.A. § 1244(a) (West Supp. 1977).

<sup>229</sup> 1976 H. REP., *supra* note 144, at 30.

<sup>230</sup> *E.g.*, *Johnson v. City of Greenwood*, Civ. No. GC-75-131-K (N.D. Miss. 1975).

<sup>231</sup> *E.g.*, 42 U.S.C. §§ 1981, 1983 (1970).

<sup>232</sup> *Robinson v. Schulz*, Civ. No. 74-248 (D.D.C. 1974).

available remedies with the ORS before suing,<sup>233</sup> and whether the grantee was an indispensable party in a suit against the ORS.<sup>234</sup> Standing was also a potential obstacle in non-discrimination suits.<sup>235</sup>

Litigants also had little difficulty initiating proceedings against recipients in *state* courts to restrain violations of the Act's program expenditure strings and fiduciary—administrative strings.<sup>236</sup> This result simply may have been an application of the principles of *Testa v. Katt* concerning state courts' obligations to enforce federal law.<sup>237</sup>

At the point of the renewal debate, the major unresolved question was whether the federal courts were open to plaintiffs alleging violations of the Act other than discriminatory practices. Such suits probably could have been brought against the ORS under general principles of third party challenges to administrative action.<sup>238</sup> In the case of third party suits against the grantee, the federal courts were split. The Seventh Circuit's decision in *Schreiber v. Lugar* raised two major obstacles for any third party plaintiffs.<sup>239</sup> First, the plaintiff must satisfy the \$10,000 amount in controversy requirement of 28 U.S.C. section 1331. In *Schreiber*, a challenge to a \$4.4 million expenditure for a sports facility, Judge (now Justice) Stevens held that the amount had to be computed from the point of view of an individual plaintiff's own damages, that claims could not be aggregated, and that based on those criteria no single plaintiff met the \$10,000 requirement.<sup>240</sup> A second potential obstacle alluded to but not resolved was whether any cause of action in favor of third parties against grantees could be implied from the Revenue Sharing Act at all.<sup>241</sup>

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233 Taylor, Sklar & Zehner, *Legal Issues in Revenue Sharing*, 7 NAT'L CL'H'SE FOR LEGAL SERV., CL'H'SE REV., 18, 19 (1974).

234 See *United States v. City of Chicago*, 395 F. Supp. 329 (N.D. Ill. 1975), *aff'd* 549 F.2d 415 (7th Cir. 1977).

235 See *Committee for Full Employment v. Simon*, Civ. No. 76-0467 (D.D.C. 1976).

236 E.g., *Mackey v. McDonald*, 255 Ark. 978, 504 S.W.2d 726 (1974).

237 330 U.S. 386 (1947).

238 See text accompanying notes 61-75 *supra*.

239 518 F.2d 1099 (7th Cir. 1975).

240 *Id.* at 1101-04.

241 *Id.* at 1104-05, n. 16. See, *Michigan Dist. Council No. 77 of A.F.S.C.M.E. v. City*

If *Schreiber* represents the prevailing view under the old Act, the renewal amendments expand greatly the availability of judicial controls to ensure grantee observance of program strings. Section 124 appears to constitute both the establishment of a "right of action" and an exemption from the \$10,000 jurisdictional amount.<sup>242</sup> The Senate and House were initially split over whether a citizen suit should be limited to violations of the non-discrimination provisions. The Senate's position was that the suits should be limited in this fashion.<sup>243</sup> The House bill originally reported by the Committee on Government Operations made *no* provision for citizen suits because the Committee assumed they were already authorized.<sup>244</sup> Those Committee members who recognized that *Schreiber* might be a problem dealt with it by "disapproving" the opinion in a footnote.<sup>245</sup> The House Committee did provide for attorneys' fees and intervention by the United States Attorney General in private civil actions. Section 124 became part of the House bill when the full House reversed the Committee and substituted for its reported bill the legislation first reported by the Subcommittee on Intergovernmental Relations.<sup>246</sup>

Apart from removing any jurisdictional and right of action obstacles to a citizen suit, section 124 is important in two respects. First, it clarifies the exhaustion issue by requiring "exhaustion of administrative remedies," and "deeming" them to be exhausted 90 days after filing a complaint with the ORS unless the matter is resolved, at least initially, in the complainant's favor.<sup>247</sup> Second, section 124(e) authorizes the court to award attorneys' fees.<sup>248</sup>

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of Detroit, 436 F. Supp. 858 (E.D. Mich. 1977) (no implied cause of action under Public Works Employment Act).

242 At times, Congress has provided specifically for citizen suits "without regard to the amount in controversy." 42 U.S.C. § 1857(h) (2) (Supp. 1976) (Clean Air Act).

243 S. REP. NO. 94-1207, 94th Cong., 2d Sess. 3 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5151, 5153.

244 1976 H. REP., *supra* note 144, at 14, 102.

245 *Id.* at 102 n.2 (additional views of Rep. Drinan).

246 122 CONG. REC. H5634 (daily ed. June 10, 1976).

247 31 U.S.C.A. § 1244(d) (West Supp. 1977).

248 *Id.* § 1244(e). *See* Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. , 90 Stat. 2641 (1976). The Attorney General is also authorized to intervene in Revenue Sharing citizen suits.

Despite the apparent simplicity of section 124, the provision raises a number of potentially complex procedural and related issues which will be briefly reviewed here in the context of suits in federal court.

a. Standing

By limiting standing under section 124 to any "person aggrieved" by violations of the Act, Congress seems to have avoided any constitutional prohibitions against grantors' standing and spared courts the task of applying the "zone of interests" test.<sup>249</sup> Even so, courts will be confronted with some difficult standing issues.

The standing of *municipal* and *state* taxpayers to bring section 124 challenges against *federal* Revenue Sharing is particularly likely to pose problems. In an analogous context, at least one federal district court has held that municipal taxpayers do not have standing to challenge grant awards.<sup>250</sup> Since Revenue Sharing funds are not *local* tax revenue but federal receipts, a literal reading of *Frothingham v. Mellon* might suggest a denial of standing.<sup>251</sup> On the other hand, illegal use of Revenue Sharing funds can affect local taxes by diverting the funds away from other uses which might reduce those taxes, or be of greater benefit to taxpayers, and might lead to the loss of future Revenue Sharing funds.<sup>252</sup> Thus, the case for taxpayer standing to challenge Revenue Sharing expenditures seems fairly strong. But it is not clear whether local taxpayer standing, if allowed, would extend to violations of the Act other than expenditures, such as inadequate citizen participation. Such a suit might not be viewed as a "good faith" pocketbook action.<sup>253</sup> The taxpayer could frame a com-

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249 See, *Rhode Island Comm. v. General Serv. Admin.* 561 F.2d 397 (1st Cir. 1977) (denying standing to plaintiffs not within the "zone of interests").

250 *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (E.D. Tenn. 1975).

251 262 U.S. 447 (1923). However, the Court did state that "the interest of a taxpayer of a municipality in the application of *its moneys* is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate." *Id.* at 486 (emphasis supplied).

252 See *Mathews v. Massell*, 356 F. Supp. 291, 296 (N.D. Ga. 1973) (emphasizing provision for repayment of 110% of certain illegal expenditures). Predicating standing on the danger of any administrative sanction may be somewhat tautological. No citizen



plaint about insufficient participation in adopting the budget as a challenge to *all* expenditures of Revenue Sharing funds. Additional standing problems might include whether *other* jurisdictions or their residents can challenge a recipient's use of funds.

#### b. Suits Against the ORS

Since section 124(a) only refers to illegal acts by recipients and their officials, one might infer that suit can only be brought against them, and not against the ORS. However, section 124(e) does provide that the United States shall be liable for fees and costs, indicating that suit can be brought against the ORS.<sup>254</sup> General "federal question" jurisdiction would presumably remain available to support a suit against the agency. Thus third parties now have the option in federal courts of suing either the grantee or the ORS. If they choose the latter course, the question arises whether the grantee is an "indispensable party." The question has a good deal of practical significance, since the answer may determine whether suit can be brought in the District of Columbia federal courts, or only in districts where the grantee can be joined. The grantee may be a person who "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may as a practical matter impair or impede his ability to protect that interest. . . ."<sup>255</sup> The grantee certainly has a vital stake in the proceedings and it may be in a better position to argue about local facts and circumstances than is the ORS.

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suit can be brought until administrative remedies within the O.R.S. have been exhausted. However, that agency would have vindicated the grantee—otherwise there would be no suit—thus, apparently, eliminating the risk of any sanction concerning the violation in question.

<sup>253</sup> See *Doremus v. Board of Education*, 342 U.S. 429 (1952).

<sup>254</sup> The matter is not clear. Attorney fees are only awarded in Section 122 suits, and the Attorney General may intervene in such cases. Congress may not have intended to have one branch of the federal government suing another. Furthermore, Section 124 allows attorney fees to a prevailing *party*, not just a prevailing plaintiff. See 42 U.S.C.A. § 3766(c)(4)(A) & (B) (West Supp. 1977). Perhaps this language contemplates awarding fees to the grantee, and makes the United States liable if it intervenes. Whatever the ambiguities, it is doubtful that Congress intended to take away, by Section 124, the right of third parties to sue the O.R.S.

<sup>255</sup> FED. R. CIV. P. 19(a).

The district court's opinion in *United States v. City of Chicago*, a decision which pre-dates section 124, accepts this analysis, even though it did not apply it in the complicated fact situation presented.<sup>256</sup> On the other hand, it would appear that the ORS is *not* an indispensable party in a section 124 suit against the grantee, since injunctive relief against the recipient would be effective in bringing its violations to an end.<sup>257</sup>

c. Suit in District Court as Review of Administrative Action  
or De Novo Proceeding?

Section 124 raises a basic institutional question of whether a court should merely review the ORS' response to the complaint, or whether it should play an independent role in resolving disputes between citizens and their governments.<sup>258</sup> Section 124 can be interpreted to support both roles. It does not refer to a citizen suit as an "action to review" administrative proceedings, but it does require "exhaustion" of administrative remedies. A broadly interventionist view of that section would lead to the conclusion that Congress meant to give disgruntled citizens a maximum number of opportunities to challenge local decisions. On the other hand, reading sections 124 and 125 together suggests that Congress intended to give those who might be excluded at the state or local levels *one set* of federal remedies: guaranteed access to an administrative forum, with judicial review available as a check to ensure that the grantor agency was not "captured" by the grantees.

Under the 1976 amendments federal jurisdiction to review Revenue Sharing compliance disputes will be split between the district courts and courts of appeal depending on who initiates judicial action. If the outcome of administrative proceedings is adverse to the *grantee*, section 143 permits it to seek "on the record" review at the circuit court level. If, however, the grantee wins at the administrative level, the third party complainant who initiated the administrative proceed-

256 395 F. Supp. 329, 340 (N.D. Ill. 1975), *aff'd* 549 F.2d 415 (7th Cir. 1977).

257 See *Rosado v. Wyman*, 397 U.S. 397, 428 (1970) (Douglas, J., concurring).

258 See *Stewart*, *supra* note 44, at 1756 n. 412.

ings would have to sue in district court under section 124. Although this division of "review" may be an undesirable allocation of judicial resources,<sup>259</sup> it seems inevitable under the current statute.

For complaints brought in the district court, a question remains as to what effect is to be given to the agency's resolution of the complaint. The answer should not turn on the identity of the defendant. If the suit is brought against the ORS, the court may look to section 706 of the APA,<sup>260</sup> but that provision leaves open the question of when *de novo* review of facts is appropriate. Although stating that there is a presumption against *de novo* review, the Supreme Court in *Chandler v. Roudeshush* held that federal employee sex discrimination claims should be tried *de novo*, after the exhaustion of administrative remedies.<sup>261</sup> *Chandler* may govern section 124 proceedings as well. The Court emphasized, for example, that the private suits in question were not labelled "actions to review."<sup>262</sup>

Another means of determining the proper scope of review in Revenue Sharing suits against grantees or the ORS would be to examine how the ORS has proceeded with a case. If the agency has simply conducted an investigation and made a "finding" of compliance, *de novo* review may be appropriate to ensure at least one full-scale hearing by an entity of the federal government of the grantee's observance of program strings. If, however, an initial "finding" of non-compliance has triggered adjudicatory proceedings which vindicate the grantee, there seems little reason to give the third party a broader scope of judicial review than the "on the record" review which would be available to the grantee in a circuit court if those proceedings had come out the other way.<sup>263</sup> This con-

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<sup>259</sup> See generally, Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

<sup>260</sup> See, e.g., *City of Hartford v. Hills*, 408 F. Supp. 889, 903 (D. Conn. 1976), *rev'd sub nom.* *City of Hartford v. Town of Glastonbury*, 561 F.2d 1032 (2d Cir. 1977), (en banc), *cert. denied*, 98 S. Ct. 766 (1978).

<sup>261</sup> 425 U.S. 840 (1976).

<sup>262</sup> *Id.* at 862 n.37.

<sup>263</sup> But see *id.* at 861 (rejection of varying standard in Title VII cases).

clusion would be strengthened if the third party had had the opportunity to intervene at the administrative level, since he would have participated in making the record.

#### d. State Law Questions in Federal Court

Challenges to local expenditures are frequent in state court systems. These challenges are based on constitutional requirements such as the "public purpose" doctrine, and the plethora of state statutes regulating local finance.<sup>264</sup> Such matters rarely arise in federal courts.<sup>265</sup> However, if a recipient fails to follow the "laws and procedures applicable to the expenditure of its own revenues," it arguably violates section 123(a)(4).<sup>266</sup> If section 123(a)(4) is violated a private civil action may be brought to remedy "any act or practice" prohibited by the Revenue Sharing Act.

Given the expertise and availability of state courts, it is questionable whether federal judicial or administrative resources should be expended to resolve such state law disputes.<sup>267</sup> On the other hand, federally created "procedures" affecting Revenue Sharing funds, such as the participation provisions, present a stronger case for the availability of a federal forum. Federal court jurisdiction under section 124 should be narrowed to allow federal review only where a federally created interest exists.<sup>268</sup> Such a dichotomy would be consistent with the interventionist interpretation of the amend-

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264 *E.g.*, *Barnes v. City of New Haven*, 140 Conn. 8, 98 A.2d 523 (1953) (public purpose); *Hilliard v. City of Seattle*, 63 Wash. 2d 401, 387 P.2d 536 (1963) (statute regulating bidding).

265 See MICHELMAN & SANDALOW, *supra* note 16, at 110.

266 The argument would be that § 123(a)(4) requires Revenue Sharing recipients to honor as well as to give assurances that they will comply with the "laws and procedures applicable to the expenditure of its own revenue."

267 It is possible that federal courts would "abstain" from resolving such disputes until a state court had resolved any unclear state law questions. See C. WRIGHT, *LAW OF FEDERAL COURTS* 224-27 (3rd ed. 1976).

268 Whether Congress should narrow the scope of federal jurisdiction with respect to § 124 is a matter of policy rather than constitutional requirements. There seems to be no bar in Article III to a federal court deciding state law cases involving Revenue Sharing funds. The jurisdiction is not merely "protective," since Congress has created a federal right to have federal funds expended in accordance with state law. See generally C. WRIGHT, *LAW OF FEDERAL COURTS* 77-79 (3rd ed. 1976).

ments, since the federal forum remains available to help bring about the changes which Congress wished to effectuate.

To summarize, section 124 constitutes a substantial departure from past congressional practice in the design of grant-in-aid programs. Potentially, it thrusts the federal courts into a major role in the enforcement of grant program strings. Moreover, the provision for a general citizen suit, as well as the administrative complaint section, strengthens the interventionist interpretation of the renewal amendments. Congress increased the leverage of those who may be excluded from the local political processes, by affording them an additional forum within which to challenge the conduct and the outcome of those processes. Thus sections 124 and 125 serve not only as control mechanisms to ensure grantee observance of program strings, but also as means of redistributing power at state and local levels.

#### 5. Elimination of the "Priority Categories"

The renewal amendments' major "substantive" change in the Revenue Sharing program was the elimination of the "priority expenditure" categories for local governments. Congress incorporated these program expenditure strings into the original Act in an effort to limit recipient discretion. The inclusion of these strings reflected the underlying centralist distrust of decision-making by local governments. At one point during the renewal process, centralists sought to *strengthen* the priority categories by narrowing the eligible activities, requiring specific percentages of expenditure within these categories, and making the categories meaningful by requiring that the recipient maintain its own source funding at prior levels in addition to Revenue Sharing outlays.<sup>269</sup> However, the final amendments simply eliminated the priority expenditure categories. There are at least four reasons why Congress deleted these categories.

First, decentralists reasoned that imposition of any such program expenditure strings meant that the program was not true Revenue Sharing at all. To some extent, the renewal

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269 H.R. 8329, 94th Cong., 1st Sess. § 7 (1975).

amendments' legislative history reflects acceptance of this position.<sup>270</sup>

A second, though often overlooked reason for eliminating the categories may have been their adverse effect on Revenue Sharing funds used for tax relief or tax stabilization. Such "substitutive" uses were *not* included as "priority expenditures." In *Mathews v. Massell*, the court held that Revenue Sharing funds could not be used to reduce city water rates.<sup>271</sup> This holding casts doubt on the legality of using such funds for tax relief or stabilization.<sup>272</sup> Yet urban spokesmen, such as Mayor Kenneth Gibson of Newark, insisted that such uses were the major reason for renewing the program.<sup>273</sup> The issue was not new, of course. Whether any Revenue Sharing program should permit the substitution of federal tax monies for state and local receipts had been a major controversy since the 1960's.<sup>274</sup> The renewal amendments resolve the issue squarely in favor of allowing Revenue Sharing funds to be used for tax relief.

Third, all sides could agree to eliminate the categories because evidence indicated that they were virtually meaningless. As the House Committee stated, "since revenue sharing funds are fungible with other State and local government revenues, it is impossible in many cases to determine for what purposes the funds are actually being used."<sup>275</sup> Studies by the Brookings Institution and others had demonstrated the extent to which the priority categories limitation could be satisfied by "accounting adjustments," leaving the freed-up funds for other uses.<sup>276</sup>

Finally, some legislators supported removal because they

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270 See, e.g., *Hearings on General Revenue Sharing Before the Subcomm. on Revenue Sharing of the Senate Comm. on Finance*, 94th Cong., 1st Sess. 10 (1975) (statement of Sen. Brock).

271 356 F. Supp. 291 (N.D. Ga. 1973).

272 See Stolz, *supra* note 94, at 66-71.

273 *State and Local Fiscal Assistance Act: Hearings on H.R. 6558 Before the Subcomm. on Intergovernmental Relations and Human Resources of the House Comm. on Government Operations*, 94th Cong., 1st Sess. 376 (1975).

274 See, e.g., HELLER, *supra* note 29, at 152.

275 1976 H. REP., *supra* note 144, at 9.

276 SECOND ROUND, *supra* note 8, at 170.

reasoned that such a move would maximize recipients' discretion over uses of the funds and thus increase their responsibility to account for those uses. According to this line of reasoning, the ultimate result is a truer picture of the effect of Revenue Sharing funds on a locality's budget.<sup>277</sup> Removal of the priority categories might also have been a step toward strengthening federal leverage over discrimination, since *all* local expenditures could then be treated as involving Revenue Sharing funds.<sup>278</sup> However, the final language of section 122 reduces this possibility by permitting a showing that "the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part with [Revenue Sharing] funds. . . ."<sup>279</sup>

Whether the elimination of priority categories will have a significant effect on the operation of Revenue Sharing is difficult to predict. This change may increase grantee flexibility. While there is no doubt that the elimination of priority categories represents at least a symbolic reduction of federal intervention, this action may also be viewed as a trade off for the passage of amendments which were oriented toward interventionist goals.

## 6. Other Changes

The renewal amendments introduced four other changes in the program which are potentially significant.

### a. Elimination of Anti-Matching Prohibition

The 1972 Act prohibited use of Revenue Sharing funds "as a contribution for the purpose of obtaining Federal funds under any law of the United States which requires . . . a contribution in order to receive Federal funds."<sup>280</sup> Decentralists opposed the provision with the same philosophical argument they expressed concerning the priority categories. They maintained that Revenue Sharing funds were just like local tax receipts, and therefore should be as freely allocable. The liberal critics

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<sup>277</sup> *Id.*

<sup>278</sup> Cf. 1976 H. REP., *supra* note 144, at 94 (supplemental views of Rep. Drinan).

<sup>279</sup> 31 U.S.C.A § 1242(a)(2) (West Supp. 1977).

<sup>280</sup> Revenue Sharing Act, *supra* note 4, § 104(a), 86 Stat. 920 (1972).

were troubled by evidence that recipient participation in federal social programs was the principal casualty of the anti-matching string. Thus the removal of this unpopular provision was welcomed by all sides.

### b. Reporting Requirements

The renewal amendments continue the Act's requirement that recipients submit annual use reports to the ORS.<sup>281</sup> This provision may play a key role in the enforcement of the citizen participation guarantees by the ORS. Section 121(a) requires that any use report "identify differences between the actual use of funds received and the proposed use of such funds."<sup>282</sup> Since the recipient must make this report available for public inspection, the reporting mechanism may provide local citizens' groups with important information on the effect of their participation in the proposed use hearing and the budget hearing.<sup>283</sup>

### c. Audit Requirements

The original act required the Secretary of the Treasury to "provide for such accounting and auditing procedures, evaluations and reviews as may be necessary. . . ." The renewal amendments go somewhat further in requiring each recipient to have "an independent audit" every three years, and the ORS has already issued regulations interpreting this requirement.<sup>284</sup> This "fiduciary-administrative string" represents a watered down version of the House Committee's bill which included a requirement that audits be made public.<sup>285</sup> Even in this form it appears that the new audit requirements are having a substantial impact on local fiscal practices. One expert on the operation of the new amendments has stated, "This provision is causing a major revolution in state-

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281 31 U.S.C.A. § 1241(a) (West Supp. 1977).

282 *Id.*

283 See SECOND ROUND, *supra* note 8, at 170-71.

284 31 U.S.C.A. § 1243(c)(1) (West Supp. 1977).

285 1976 H. REP., *supra* note 144, at 16.



local finance. The key element is the requirement for an audit of all the recipient's funds, not just revenue sharing."<sup>286</sup>

#### d. Annual Report to Congress

As discussed above, one technique for legislative oversight of grantor agency enforcement of program strings is the requirement of specified reports on how a grant program is operating. The pendency of any such report may also constitute an indirect legislative control over grantees, since they will be concerned with how Congress perceives their performance. The 1972 Act required only an annual report on the "operation and status" of the Revenue Sharing Trust Fund during the preceding fiscal year.<sup>287</sup> The renewal amendments broadened this provision to require an annual report on recipients' observance of the nondiscrimination provisions, their fiscal practices, and their expenditure of Revenue Sharing funds.<sup>288</sup> One critic was explicit in describing this report as "an incentive to the Office of Revenue Sharing to enforce the provisions of the Act in a timely and forthright manner."<sup>289</sup> Since these reports must include recommendations for any necessary changes in the Act, they are likely to play a key role when Revenue Sharing is reconsidered by the Ninety-sixth Congress.

### 7. The Unsuccessful Amendments

The changes discussed above represent significant victories for the liberal critics of Revenue Sharing as enacted in 1972. They were successful in adding new strings on recipients as well as new federal controls to enforce those strings. However, the outcome of the renewal debate should not necessarily be interpreted as a total victory for the centralist approach to federal grant programs. The defeat of proposals designed to

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286 Letter to author from Richard E. Thompson, Executive Director of Revenue Sharing Advisory Service (February 9, 1978) (on file with author). See 6 Revenue Sharing Bull. 1 (Nov. 1977) (reporting violations of the new requirements).

287 Revenue Sharing Act, *supra* note 4, § 105(a)(2).

288 31 U.S.C.A. § 1241(f) (West Supp. 1977).

289 1976 H. REP., *supra* note 144, at 94 (supplemental views of Rep. Drinan).

modernize state and local units and subject Revenue Sharing to the annual appropriations process shows the continuing vitality of decentralist values. Moreover, liberal reformers did not succeed in altering the distribution formula, one of their principal legislative goals.

a. Proposed "Modernization" of State and Local Government

A major surprise of the renewal debate was the House Government Operations Committee's adoption—by a one vote margin—of a proposal to tie Revenue Sharing funds to the "modernization" of state and local government.<sup>290</sup> The so-called Rosenthal amendment differed from earlier proposals which sought to achieve reform either by making recipients (usually states) draw up modernization plans in order to receive any Revenue Sharing funds or by offering additional funds to recipients who did. The proposed new section 120 would have required each state to submit an annual report to the ORS outlining any steps it had taken to "modernize" state and local governmental institutions and practices. Beyond filing the report, however, states were not required to do any modernizing at all. The amendment "establishes as a *goal*" the preparation and development of "master plans" and "timetables" for reform.<sup>291</sup> The items which these plans might contain amounted to a sweeping laundry list of proposals for state and local governmental change: for example, reduction of special districts; "adequate" home rule powers; revised state aid formulas; metropolitan zoning; and encouragement of metropolitan government. The Committee stressed, however, that this goal was "not mandatory." The Rosenthal amendment was eliminated when the full House restored the original subcommittee bill. The proposal had little broad-based support and was the target of violent opposition by Committee members of both parties. They charged it was "a death-dealing blow to the whole concept of a federal system of government . . .," which would convert "our States into provinces and our local governments into administrative precincts

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<sup>290</sup> *Id.* at 17, 54-56.

<sup>291</sup> *Id.* at 17 (emphasis supplied).

molded and run by a powerful central government in Washington.”<sup>292</sup>

Needless to say, state and local officials opposed the Rosenthal amendment strongly. Its defeat helps put the entire renewal debate in perspective. Many of the same legislators who opposed it were strong supporters of the new citizen participation provisions and other changes. The reason such congressmen refused to seize the opportunity to use Revenue Sharing as a lever for even broader changes in sub-national institutions seems to be that the concept of interventionist federalism has not yet been stretched to the limits of its logic. Through the renewal amendments, federal intervention into local political *processes* has been extended, but the *outcome* of those processes, except discriminatory outcomes, and the basic structure of sub-national institutions largely are left untouched.

#### b. Subjecting Revenue Sharing to the Annual Appropriations Process

During the early stages of the renewal debate, liberal critics lobbied to bring the program under the annual appropriations process.<sup>293</sup> Two distinct arguments could be made in favor of such a step. First, Revenue Sharing, like most other federal expenditure programs, should compete on an annual basis for available funds. Second, this step would provide an additional legislative control mechanism over grantee observance of program strings as well as enhancing legislative oversight of the grantor agency.<sup>294</sup> Such proposals garnered little support in the actual legislative debate.<sup>295</sup>

The explanation for the death of these proposals does not appear to be attributable to congressional hostility to increased federal controls *per se*. Congress balked at diminishing the predictability of the Revenue Sharing funds, a result which would have followed from subjecting them to the ap-

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<sup>292</sup> *Id.* at 106, 107 (additional views of Rep. Levitas).

<sup>293</sup> H.R. 8329, 94th Cong., 1st Sess. § 4 (1975).

<sup>294</sup> See, e.g., 1976 H. REP., *supra* note 144, at 95-96. (supplemental views of Rep. Drinan).

<sup>295</sup> See, e.g., 122 CONG. REC. S15,713 (daily ed. Sept. 13, 1976).

appropriations process. Predictability is essential if recipients, especially local governments, are to be able to anticipate and budget Revenue Sharing funds just as they would their own source revenues.<sup>296</sup> Maintaining this similarity probably maximizes local flexibility in allocation of Revenue Sharing funds since they can be allocated to on-going uses. Removing the element of predictability might bias recipients toward "one-shot" allocations, especially capital projects.<sup>297</sup>

### c. A Note on the Formula Battle

Although some battles in the continual formula controversy have centered on the differing values of centralists and decentralists, the principal formula issue in the renewal debate was *where* the money was going. The adequacy of funding to communities with large numbers or percentages of service dependent residents was of particular concern to Congress. In the House, for example, a concerted effort developed to change the formula by basing distribution of part of the funds on a factor which measured the severity of poverty within a jurisdiction.<sup>298</sup> But all efforts to change the formula failed. Some congressmen undoubtedly believed the existing formula was adequate, while others feared that any significant change would jeopardize ultimate passage of the bill. The inability to secure any change in the formula represents the biggest setback for the liberal critics of Revenue Sharing, who, by and large, emerged from the renewal debate with a significant record of achievement.

## III. THE AMENDMENTS IN PERSPECTIVE—BEYOND THE NEW FEDERALISM

As one who believes strongly in the need for local government to be as strong and independent as possible, I can only watch in sorrow and wonderment as officials of these communities struggle and strain to tug this Trojan Horse inside their city gates. — Congressman Jack Brooks on the renewal amendments.<sup>299</sup>

296 See 1975 Senate Hearings, *supra* note 270, at 9 (testimony of Sen. Brock).

297 Cf. MONITORING REVENUE SHARING, *supra* note 30, at 204.

298 See 1976 H. REP., *supra* note 144, at 7-8.

299 *Id.* at 80, 81 (dissenting views of Rep. Brooks).

A. *The Effect of the Amendments—Mere “Status Quo”?*

Given the interest in original Revenue Sharing legislation, the renewal amendments have attracted surprisingly little attention. The only major study to date is *Revenue Sharing: The Second Round*, by the Brookings Institution. It describes the renewed Revenue Sharing program as reflecting predominantly the “Ford administration’s status quo position. . . .”<sup>300</sup> Brookings downplays the amendments as simply dealing with “process issues. . . .”<sup>301</sup> This analysis, however, may reflect an emphasis on the *fiscal* aspects of Revenue Sharing. Since Congress did not change the formula, it is only a short step to conclude that Congress did not change the program.<sup>302</sup>

But emphasis on what Congress failed (or chose not) to do should not obscure the significance of the changes which it did enact. Taken together, the renewal amendments constitute far more than incremental tinkering with an existing program. Congress seized upon the renewal of Revenue Sharing as an opportunity to exercise substantial leverage over the processes and programs of state and (primarily) local governments and placed entities of the federal government in a direct supervisory role over those processes and programs.

For the first time, the Act contains citizen participation strings; and these provisions cover not only Revenue Sharing funds, but the recipient’s “entire budget” (section 121). Congress increased local flexibility, at least symbolically, through elimination of the priority categories. At the same time, however, Congress clarified and strengthened the federal prohibition against discrimination in the outcomes of state and local political processes (section 122). Through the complaint mechanism and citizen suit provision, Congress buttressed the federal enforcement apparatus in a way which not only ensures observance of federal strings, but helps redistribute power at sub-national levels by opening up federal forums to those who have been excluded from, or simply dissatisfied with, the state

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300 SECOND ROUND, *supra* note 8, at 23.

301 *Id.* at 166.

302 The Brookings study does not go this far, but treats the renewal amendments as essentially status quo “on the principal issues. . . .” SECOND ROUND, *supra* note 8, at 23.

and local decision-making process (sections 124 and 125). In sum, the primary responsibility for choosing particular bundles of goods and services remains with state and local units. But the national government will intervene to ensure that these 38,000 sub-national units adhere to standards of fairness in distributing the funds and that the results do not run afoul of national values.

The dominant force in the renewal debate was the congressional centralists who have always been ambivalent about the desirability and wisdom of any Revenue Sharing program. On one hand, they have viewed the concept as ceding too much allocational authority to sub-national units. On the other hand, however, they have always recognized the enormous interventionist potential of any such program. The renewal amendments may prelude changes far beyond the reach of Congress' regulatory power over state and local governments.

Richard Nathan has stated that "despite the overall aim of New Federalism to avoid intervention by the federal government in the structure of state and local government, there is growing evidence that in the next decade the great issue of American domestic government will be precisely this question."<sup>303</sup> The renewal amendments stop short of the "new Structuralism" which Nathan describes, at least if one defines structure as pertaining to "organizational arrangements."<sup>304</sup> But the amendments do reach deeply into the practices and procedures of state and local governments. Since changes in the Revenue Sharing statute may be precursors of changes in *other* grant programs, perhaps one can redefine Nathan's "great issue" as follows: given the fact that state and local dependency on federal grants is liable to be greatest in the case of the growing volume of multi-purpose grants which become similar to own-source revenues, to what extent will the federal government utilize this relatively new form of leverage to secure broad changes in state and local processes, structures and allocational decisions?

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<sup>303</sup> Nathan, *supra* note 5, at 128.

<sup>304</sup> *Id.*

B. *The Amendments as Precedent-Implications for the Future?*

One element which supports the conclusion that the Revenue Sharing amendments may be a model for future federal intervention into the affairs of state and local governments is the ever increasing dependence of these governments on federal aid. A recent New York Times survey of 20 cities reported that public officials, economists, and labor and business leaders "could not foresee a time when the economy in the aging cities would improve to such an extent that they would not have to depend on Federal subsidies to pay the salaries of municipal workers."<sup>305</sup> Detroit's budget director went so far as to say, "There is no way we could maintain our services without these Federal programs."<sup>306</sup> For *all* state and local units the magnitude of federal grants as a percent of own source revenues has increased steadily from 15.8 percent in Fiscal Year 1961 to over 35 percent in Fiscal Year 1977.<sup>307</sup>

The second element which will determine whether Congress will seek to exercise the leverage which this increasing dependency brings with it is how well the "new" Revenue Sharing program is operating. For example, whether citizen participation in budgetary decisions has increased and whether it has any real influence upon such decisions will be key issues not only in the next renewal debate, but also in the structuring of other grant programs.

Current public policy issues provide more specific illustrations. Consider the possible implementation of the "dispersal approach" to the urban problem in the administration of the Community Development Block Grant program. H.U.D., for example, may make awards of funds to suburban jurisdictions, contingent upon their willingness to use *other* funds, and their regulatory powers to assume a "fair share" of the metropolitan housing burden. As another example, Congress might enact a program of "Special Revenue Sharing" for education, which conditioned a state's receipt of funds upon its

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305 N.Y. Times, Nov. 6, 1977, at 66, col. 1.

306 *Id.*

307 A Fiscal Note, 3 *Intergovernmental Perspective* No. 2, at 20 (1977).

adoption of an equalization program of aid to local school districts. In the case of Revenue Sharing itself, Congress could adopt the Brookings proposal to condition state eligibility on establishment of "some form of independent or quasi-independent state advisory commission on intergovernmental relations or commission on local government."<sup>308</sup> In each case, the federal intervention bears less directly on the expenditure of the particular grant funds than on the underlying practice and procedure of state and local government.

Interventionist federalism, as discussed in this article and found in the renewal amendments, is different from both the New Federalism and the categorical system advocated by some of the New Federalism's critics. The logic of the New Federalism dictates that the national government take the practices and procedures of state and local units more or less as it finds them. Interventionist federalism rests on the legitimacy of action by the national government to change those practices and procedures. A categorical grant system mandates the *outcomes* of those procedures, *e.g.*, "X" amount of spending for "Y" form of education. The interventionist approach leaves outcome choices in state and local hands, although it will forbid nationally undesirable outcomes. The renewal amendments illustrate this point nicely. Far from engaging in "hardening of the categories," Congress *removed* the priority categories and the anti-matching provision. At the same time, it strengthened the anti-discrimination provisions of the Revenue Sharing program.

National policymakers are not likely to preach "interventionist federalism" because it smacks too much of a powerful central government which would convert "our States into provinces and our local governments into administrative precincts . . ." But they are very likely to practice it as they move beyond the New Federalism. Moreover, the Supreme Court seems likely to take a benign attitude towards interventionist uses of the grant device to secure changes in state and local

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308 SECOND ROUND, *supra* note 8, at 176. Governor Michael S. Dukakis (D-Mass.) has proposed a "bonus payment on general revenue sharing funds" to induce states to draw up comprehensive urban economic development plans. *Boston Globe*, Nov. 30, 1977, at 32, col. 5.



governments which Congress could not mandate directly.<sup>309</sup> Where Congress draws the line will determine whether the New Federalism's successor is, in fact, federalism at all.

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309 See *National League of Cities v. Usery*, 426 U.S. 833, 852 n.17 (1976).