DOCUMENT RESUME

ED 224 139 EA 015 228

AUTHOR Clune, William H., III
TITLE The Deregulation Critique of the Federal Role in Education.
INSTITUTION Stanford Univ., Calif. Inst. for Research on Educational Finance and Governance.; Wisconsin Center for Education Research, Madison.
SPONS AGENCY National Inst. of Education (ED), Washington, DC.
REPORT NO IFG-PR-82-A11
PUB DATE Apr 82
GRANT NIE-G-79-0183; NIE-G-81-0009
NOTE 79p.; Prepared for the IFG Seminar on Law and Education.
AVAILABLE FROM Publications, Institute for Research on Educational Finance and Governance, School of Education, CERAS Building, Stanford University, Stanford, CA 94305 ($1.00).
PUB TYPE Viewpoints (120)

EDRS PRICE MF01/PC04 Plus Postage.
DESCRIPTORS Block Grants; *Compliance (Legal); *Educational Objectives; Elementary Secondary Education; Federal Government; Federal Programs; *Federal Regulation; *Government Role; Legal Problems; Program Effectiveness
IDENTIFIERS *Deregulation

ABSTRACT

The deregulation critique of the federal role in education asserts that education can be as productive with less federal intervention. This critique can be broken down into three groupings of separate criticisms. The first group denies the value or feasibility of federal goals. These criticisms insist either that federal goals are not worthwhile or not properly federal or that federal programs are unnecessary or ineffective. The second group of criticisms addresses the basic forms of federal intervention and implies the need for different means or policy instruments. Reduction not of aid but of the strings attached, through block grants, is one implication of such criticism, as is the suggestion that the federal role emphasize assistance in reaching goals rather than the monitoring of legal compliance. Finally, the third group of criticisms seeks to reduce "legalisms" in the techniques of federal intervention. However, not all legalisms are wasteful and some are as unrestrictive as possible, so wholesale "delegalization" may reduce programs' effectiveness. To benefit from deregulation without reducing effectiveness, deregulation at the levels of goals, forms, and techniques must be selective, reordering some federal priorities, maintaining conditional grants, and specifying contexts for the reduction of legalisms. (Author/RW)

IFG

Institute for Research on Educational Finance and Governance

SCHOOL OF EDUCATION STANFORD UNIVERSITY

Project Report No. 82-A11

THE DEREGULATION CRITIQUE OF THE FEDERAL ROLE IN EDUCATION

William H. Clune III*

April 1982

*William H. Clune is a professor at the University of Wisconsin-Madison Law School.

This paper will be published as part of a volume of readings edited by David Kirp, tentatively entitled, School Days, Rule Days: Regulation and Legalization in American Education (publisher under consideration). Other contributors to the volume include Eugene Bardach, Charles Benson, Richard Elmore, Lawrence Friedman, Robert Kagan, David Kirp, Paul Peterson and David Tyack.

This paper was prepared for the IFG Seminar on Law and Education. The research for this paper was supported by funds from the National Institute of Education under Grant No. NIE-G-79-0183 and Grant No. NIE-G-81-0009 to the Wisconsin Center for Educational Research. Travel expenses to attend the Law and Education Seminar of the Law Program of the Institute for Research on Educational Finance and Governance were provided by IFG. The analyses and conclusions do not necessarily reflect the views or policies of these organizations.

INSTITUTE FOR RESEARCH ON EDUCATIONAL FINANCE AND GOVERNANCE

The Institute for Research on Educational Finance and Governance is a Research and Development Center of the National Institute of Education (NIE) and is authorized and funded under authority of Section 405 of the General Education Provisions Act as amended by Section 403 of the Education Amendments of 1976 (P.L. 94-482). The Institute is administered through the School of Education at Stanford University and is located in the Center for Educational Research at Stanford (CERAS).

The research activity of the Institute is divided into the following program areas: Finance and Economics; Politics; Law; Organizations; and History. In addition, there are a number of other projects and programs in the finance and governance area that are sponsored by private foundations and government agencies which are outside of the special R&D Center relationship with NIE.

ABSTRACT

The deregulation critique of the federal role in education asserts that as much or more education can be produced with less federal intervention. This paper unpacks or disaggregates the critique into a series of separate "criticisms."

The criticisms which imply the most drastic reduction of the federal role tend to be denials of the value or feasibility of federal goals in education, rather than indications of more efficient means of achieving existing goals. In this sense, "deregulation" in education is a misnomer, masking a fundamental reevaluation of national education policy.

Those criticisms which do suggest different means, or policy instruments, are problematic. A switch from categorical to block grants moves in the direction of non-additive, general aid. For this reason, block grants are inconsistent with another goal of the deregulation movement: a carefully defined, limited and supplemental federal role.

Reducing the degree of "legalism" in federal programs also turns out to be less promising than expected. While wasteful legalisms do exist, some legalisms serve valuable purposes and have been carefully designed to be as unrestrictive as possible. Hence, deregulation must be selective--it cannot be presumed beneficial in any particular context. The hectic deregulation achieved by the Reagan Administration in the summer and fall of 1981 probably did not capture the theoretical benefits of the deregulatory philosophy. Regulatory costs were erratically reduced; but so, almost certainly, was program effectiveness.

In a section called, "A Deregulation Sensitive Federal Role for the Eighties," this paper concludes by recommending a number of strategies designed to capture the benefits of deregulation without sacrificing educational effectiveness.

ACKNOWLEDGMENT

Presentation of an earlier (and different) paper to the IFG Law and Education Seminar, and collaboration with its participants, were extremely helpful in developing the ideas for this paper. Equally beneficial was discussion of an earlier version of this and other papers at a conference on "Modern Federalism and School Governance," sponsored by the Aspen Institute for Humanistic Studies and the Wisconsin Center for Education Research, Aspen, Colo., Sept. 14, 1981.

Table of Contents

Page

Introduction 1

I. Criticisms Going to the Goals of Federal Intervention . . . 6

A. Federal Goals Are Not Worthwhile 7
3. Federal Programs Are Not Effective 10
C. Federal Programs Are Not Unnecessary 14
D. Federal Goals Are Not Properly Federal 18

II. Criticims Going to the Basic Form of the Intervention . . . 21

A. Some Educational Effect With Reduction of Strings Only 22
B. Assistance vs. Compliance Orientation 30

III. Criticisms Going To The "Technique" Of Intervention: The Search For Less Legalism 35

A. The General Characteristics of Legalistic and Nonlegalistic Interventions 36
B. The Possibilities for Wholesale Oelegalization or Oeregulation 40

IV. A Deregulation Sensitive Federal Role for the Eighties . . . 53

A. Deregulation at the Level of Goals: Reordering Federal Priorities 54
B. Deregulation at the Level of Form: The Continued Vitality of Conditional Grants 56
C. Oeregulation of Technique: A Multitude of Contexts 58

Conclusion 63

Notes 64

List of Tables

Table		Page
1	Basic Regulatory Options in the Federal-State Relationship	23
2	Dimensions of Legalism	37

INTRODUCTION

This paper is an analysis of the "deregulation critique" of the federal role in education. The deregulation movement began as a criticism of government regulation of business. In that context, less government regulation was recommended as a means of achieving more efficient production of the regulated good while at the same time reducing regulatory costs. (Thus, money saving deregulation of the airlines supposedly also would result in lower fares and better service).[1] While there is no systematic, published deregulation analysis of education,[2] recent political discussion, particularly that emanating from the Reagan administration, has dwelt on little else.[3] By "deregulation critique," I refer to the broad group of criticisms of the federal role in education which share the basic thesis of deregulation.

The deregulation thesis in education may be briefly stated as follows: it is possible to reduce the number and intensity of legal obligations on educational organizations without decreasing the quantity or quality of education in any respect. In education, as with other "service delivery systems," deregulation has a characteristic emphasis or slant. Legal intervention, with its categorical rules and sanctions, is said to be incompatible with the adaptive, flexible, social interaction of teaching and learning. Education, especially,

is not the place for "going by the book."[4]

The word "critique" is something of a reification, however. Deregulation criticisms of education are not sharply defined or organized. In political debate and popular journalism, distinct criticisms are confounded with each other, making clear thinking very difficult. The principal purpose of this paper is to "unpack" the largely political debate over deregulation into distinct analytical parts, or separate "criticisms." Orderly analysis of deregulation issues has at least two advantages for policymaking: (1) When the precise "regulatory problem" is identified, more realistic evaluations of the need for change are possible; (2) When the costs and benefits of the "reform" implied by each type of criticism are understood, it is possible to be more exact in the design of remedies. In addition, I believe that careful thinking about the deregulation critique tends to discredit it (thereby strengthening the case for the law as it stands). This is because, when separate criticisms are considered, the case for deregulation always seems more problematic than when the criticisms are merged in a general orientation or point of view. It is much easier to accept the desirability of "getting the government off the backs of the people" in the abstract than it is to accept the repeal or relaxation of a particular provision for a specified reason. Because the legislative and judicial processes are sensitive and responsive to the claim of

unnecessary regulation, the possibility of deregulation usually has been taken account of in existing laws. Thus, when policy choices are examined in detail, they do not seem as mindlessly intrusive as political rhetoric would suggest.

On the other hand, there is something important to learn from almost every deregulation criticism. Regulatory interventions are frequently ill-conceived and almost always clumsy. Rethinking the premises and mechanisms of legal intervention is likely to be salutary.

An important conclusion of this paper is that, while many deregulatory type adjustments may be possible and desirable, the idea of costless wholesale deregulation is almost exclusively associated with criticisms of the goals of federal intervention rather than with means. In that sense, deregulation is a myth. Deregulation in education does not give us the same results with less regulation. Deregulation in education represents a fundamental reexamination of policy. Policy goals that once seemed desirable and possible are now widely considered undesirable, infeasible, or both. Unfortunately, the deregulation critique tends to conceal policy judgements with a rhetoric of legal mechanics. In order to counter this tendency, my primary purpose in this essay is to ascertain the "range" of benefits that might be expected from deregulatory initiatives of various kinds and disentangle objections to goals from objections to means.

The rest of this article is organized as follows: (1) Criticisms of the Goals of Federal Intervention; (2) Criticisms of the Form of Federal Intervention; (3) Criticisms of the Technique of Federal Intervention; (4) A Deregulation Sensitive Federal Role for the Eighties; (5) Conclusion. The distinction between goals, form and technique is meant to reflect descending scope or latitude for deregulation. That is, the greatest possible relaxation of legal requirements is possible at the level of goals, the next at the level of "form," and the least at the level of "technique." Put differently, "regulatory" policy decisions at "higher" levels of generality constrain the amount of deregulation which is possible by adjustments at lower levels. This idea of levels of deregulation is itself mildly incompatible with the possibilities for radical deregulation because much of the most heated deregulation criticism addresses itself to the lowest level of generality (technique).

In conclusion of the introduction, a word needs to be said about limitation of discussion to the federal role. Public schools are primarily creatures of state and local law; they are literally constituted, saturated and pervaded with state and local legal requirements (consider: school finance, teacher certification, collective bargaining, powers of school boards, minimum competency testing). It would be perfectly legitimate to discuss federal deregulation separately even if the

deregulation critique was directed at all levels of government. However, politically speaking, the deregulation critique is practically synonomous with protestations of the federal role. Although state and local requirements can easily be challenged by deregulation theory, usually they have not been. Why? The answer seems to be either in the nature of federal goals (they being especially unpopular), in the position of the federal government as an "outsider" responding to different groups than those represented in the states, with limited leverage on local policy and limited "hassle credits," or in the comparatively tenuous status of the federal role in education.

I

CRITICISMS GOING TO THE GOALS OF FEDERAL INTERVENTION

This part of the paper considers objections to the goals of federal educational interventions. As a logical matter, objections at the level of goals are especially powerful because they assert that, regardless of how well legal means are designed and administered, there are no net benefits from intervention. Distinct consideration of goals is also important because there is a tendency to evade the topic in political debate. In the United States, substantive issues frequently are discussed in procedural terms. Objections to the racial desegregation of schools, for example, frequently takes the form of objections to judicial activism, even though it is doubtful that legislatively mandated desegregation would be more acceptable. (That is, the objection really is more to the activism than the agency of the activism).

Criticisms of the goals of the federal government in education seem to fall into four categories, each of which will be discussed separately: federal goals are not worthwhile; federal programs are not effective; federal programs are unnecessary; federal goals are not properly federal.

A. Federal Goals Are Not Worthwhile

A strong, though often latent, theme in the deregulation critique is that the goals of federal intervention are not worthwhile. The criticism is strongly associated with and perhaps limited to civil rights type interventions (where equality is the principal concern). Beneath a variety of articulations, the touchstone of the criticism seems to be a perceived tension between "equality" and "quality." Equality may be seen as so preoccupied with relative advantage and disadvantage that the absolute values of education are ignored. Civil rights may be viewed as a type of "jealousy," seeking to make people more equal without producing any other benefit, and, sometimes, actually damaging the educational process.

The "equality vs. quality" theme in the anti-civil rights position has strong and weak versions. The strong version asserts a sharp distinction between equality and quality and holds the goal of equality to be worthless. Some criticisms of school desegregation, holding it a "disaster," are of this variety.[5] The weak version suggests the problem is one of maldistribution of resources (too much for the civil rights claimants, too little for the "mainstream").

There are two problems with the strong version of the quality versus equality criticism. First, the overall worthiness of the goal is not affected by the particular type

of goal being pursued. Even if it were true that there is a sharp distinction between goals of equality and educational goals, the goals of equality may be worth pursuing. Unequal treatment of racial minorities or females is a wrong worth eliminating, even if the more equal treatment lacks "educational" value. Second, a sharp distinction is not really justified. In the area of racial discrimination, historically, black Americans have usually thought that educational systems will provide worse education under conditions of racial isolation. Many of the claims for equal treatment by female students under Title IX are in fact claims for educational opportunities (athletics, shop classes, college preparatory counseling). Bilingual and special education present the clearest cases of a breakdown of the quality versus equality distinction. In those situations, the right to equal treatment is synonomous, at least in theory, with the right to an effective education. Both bilingual and special education originated in situations of almost total exclusion from the educational process of the underserved group. Thus, to a large extent, claims for equality by underserved groups really are claims for quality education for those groups.[6] In this sense, there is an equality versus quality conflict only when viewed narrowly from the perspective of the nonblack, nonfemale, English speaking majority student.

The weak version of the anti-civil rights criticism recognizes the problem with making a sharp equality versus quality distinction. Instead of saying that one is quality and the other equality, this criticims claims that too much emphasis has been given to the needs of previously underserved groups at the expense of mainstream groups. The problem is one of resources. Federal programs mandating equal rights have not made sufficient resources available to implement the rights. If state and local taxes do not increase, at a certain point the quality of education for mainstream groups must begin to pay for the better treatment of previously underserved groups. If the improved treatment were merely equal, the result would be unfortunate for the mainstream children but not really objectionable. However, there is a claim by many school administrators and others that the education provided to underserved groups far excells the education available to mainstream groups, at least in a resource sense.[7] Compensatory services for the handicapped and disadvantaged, for example, may be much more expensive than the education of nonhandicapped and nondisadvantaged children. If the budgets of school districts remain constant, resources may have to be redistributed from mainstream to special services.

The weak version of the anti-civil rights criticism deserves serious consideration, but it is important to examine carefully exactly what the objection is. Objections to merely

equal treatment cannot be taken seriously, even if we are sympathetic to the fiscal problems of school districts. The remedy for inadequate athletic budgets surely is not to go back to a situation of offering limited opportunities to females, for example. When special education services are much more expensive than mainstream services, the problem is less easy to resolve. One has the impression that judicial and legislative concern for excluded groups may not have been sufficiently tempered with a understanding of limited resources. The question of the right of the handicapped to an appropriate education, for example, was perhaps not sufficiently balanced against the right of the nonhandicapped to an appropriate education. Again, one would be reluctant to retreat from newly won rights as a means of solving the resource difficulty. Perhaps the ultimate difficulty is the historical inability of the legal process to claim a greater share of public and private resources. Court decrees requiring more resources for a particular purpose usually do not specify where the resources should come from. The political response to a decree often is reduction of other public services rather than an increase in taxes.

B. Federal Programs Are Not Effective

One of the basic elements of the recent conservative movement in politics is a loss of faith in the efficacy of idealistic social programs initiated in the 60s and 70s. In

the educational context, it is believed that one cannot legislate learning, one can't produce change in local education with grants or laws from Washington, and one can't do anything about class-linked achievement patterns. Skepticism about the potential for government intervention is part of the neoconservative mindset.[8]

Taken literally, as a broad scale assertion that nothing has happened, this criticism cannot be taken seriously. In the first place, federal programs have been responsible for an enormous amount of change in educational programs and administration. In practically every area--desegregation, special education, Title I, Title IX--significant reallocations of resources or highly identifiable programs are visible. The common criticism of social programs that little or nothing happens at the ground level does not seem to apply to federal interventions. The criticism does not seem to be primarily one of no program activity, however. The main criticism, as with Title I, is that long run educational results cannot be demonstrated. Undercutting that criticism, however, is the seeming fact that federal programs and state and local programs are subjected to different standards of performance. It is very difficult to demonstrate the effectiveness of discrete educational interventions of any kind, regardless of the level at which they are initiated. In areas of uncertain technology, it is reasonable to require a well planned and administered

program, rather than demonstrable results and that appears to be the standard for state and local interventions. Federal interventions apparently must satisfy a more difficult standard.

Actually, one of the problems with criticisms of federal program effectiveness is precisely that the standards for success are quite unclear. Consider, for example, the right of parents to veto placement in special education programs under PL-94-142.[9] It is sometimes said that this provision has failed because education systems often succeed in diminishing the effective participation of parents (by professional intimidation, by obtaining prior consent, etc.).[10] However, it is also clear that many parents do participate effectively; and it is at least arguable that the availability of the veto right for parents who become concerned enough to exercise it ought to be the primary standard of success. In that case, the availability of the right would itself be a measure of success.

Although in gross terms the criticism cannot be taken seriously, as with most of the deregulation criticisms, there is an element of truth which must be taken quite seriously. Both the standards of program effectiveness and our knowledge about what constitutes an effective program need to be reviewed. Marshall Smith has suggested the following "rules of thumb" about what federal programs are known historically to

have been effective:[11] (1) Programs giving educational access. One of the few research findings about education that has withstood analysis is that some education is better than no education and more education tends to be better than less.[12] Accordingly, federal programs which increase access to education tend to be successful. Examples are Headstart, which provided preschool education to youngsters who had none, the GI Bill and student loan programs, which made higher education more available, and remedial language instruction, to the extent it offered some services where none existed before (that is, wholly aside from which brand of remediation is appropriate). Many civil rights claims are essentially claims for access. Claims by females to vocational education and claims by the handicapped not to be excluded from the system are obvious examples. (2) Major gaps in technology. Occasionally, educators in one segment of the profession learn how to teach a subject in a way drastically superior to previous practice. In that situation, centrally sponsored reform has a good chance of success. Federally sponsored reforms in the area of physics and mathematics fall under this category.[13]

Although it would be a double standard not applied to state and local programs, it would not be unreasonable to hold federal programs to the standard that they have a high probability of success. The cost would be all hopes for

success where technology is uncertain. For example, if compensatory education is to remain a goal at any level of the system, we are probably stuck with muddling through in the best way we can find. Smith does not recommend nonintervention in areas of uncertain technology. Rather, he suggests leaving program design up to localities under those circumstances.

C. Federal Programs Are Unnecessary

A common deregulatory criticism is that federal programs are unnecessary in the sense that state and local governments would meet the need if the federal government did not. This is a different criticism than a related one which argues that the states are just as competent as the federal government at deciding whether or not to offer a program. If the states decide to scrap a program, federal sponsorship obviously was necessary. Hence, as observed by many commentators, allowing the states to abandon programs clearly seems to be a softening of federal support for programatic goals. The deregulation thesis to be evaluated here is that states and localities will offer essentially the same programs for a lower cost. The lower cost might result from fewer levels of administration, greater flexibility in matching programs to local needs, or simply a reduced sense of control from Washington. I will accept the thesis of lower costs as given, although arguments for "new federalism" usually neglect to consider the possible

efficiencies of national administration (e.g., letting Washington take the blame for tough decisions, avoiding fifty versions of legislation, regulation and administration; note that, at the state level, school consolidation was advocated as promoting efficiency). What, then, can be said about the idea that federal programs would be replicated by the states?

One plausible basis for the idea is that many causes espoused by the federal government began in one or more of the states. There does seem to be a tendency for the national government to "jump on the bandwagon" of an educational reform and nationalize it. Few would assert that change would happen as quickly in the absence of federal intervention; but, if the change occured more slowly without federal intervention, the delay might well be worthwhile, because it would occur in the absence of coercion, costly federal regulation, and the like. The criticism seems ridiculous applied to the area of racial equality; but the strong need for a federal presence in the race area may have been mistakenly generalized to other areas. It is argued, for example, that the Massachusetts model of special education or the California model of compensatory education may well have spread throughout the states by a gradual process of emulation.

The criticism is appealing but ultimately unconvincing, at least to me. The fact that many programs begin in the states does not mean that they will spread very far. Most federal

programs, whether picked up from the states or not, are not politically popular in a great many states. The most straightforward reason is that federal programs often demand a redistribution of resources toward groups which were previously underserved. The requirement to redistribute resources is a painful one; and the fact that groups have been historically underserved, if it does not indicate outright discrimination, at least suggests that these groups are not likely to be high on the list in the painful process of redistributing resources.

Moreover, the speed and scope of change may be extremely important. Even with the maximum amount of federal pressure, the desegregation of southern schools took fifteen to twenty years.[14] How long would it take for education of the handicapped, sexual equality, and bilingual education to spread of their own accord? While it is possible to admire the majestic pace of history, it is worth remembering that the entire education of most children takes ten to fifteen years. Once an idea has proved to be a good one, and workable in one or more states, perhaps it is the optimal role for the federal government to seek national enactment. Federal sponsorship of new ideas may be seen as especially unintrusive when the sponsorship is in the form of new federal money for these purposes rather than uncompensated legal requirements.

The weaker version of the criticism that federal programs are unnecessary is that, once the federal government has sponsored changes and they are in place for a number of years and established, it is time for the federal government to withdraw. In other words, many people recommend a cyclical model of federal intervention in education. The federal government should play the role of an innovator but should not sponsor educational programs indefinitely.

Obviously, this criticism has its greatest appeal in situations where the federal innovation actually does seem to have been adopted by the states on a wide scale. Vocational education is probably a good example. Unfortunately, when programs become widely adopted, they also develop strong constituencies.[15] Therefore, when the federal role is least needed because it has become popular, the political difficulty of terminating the program may be very great. It is probably the programs whose objectives are still politically unpopular that receive the most vociferous criticism. In other words, while the idea of the federal government as an innovator in education sounds attractive in the abstract, practically speaking the role may involve the federal government in perpetually unpopular actions.

Thus, always innovating is difficult on two fronts. Innovation tends to be unpopular at first because it is unfamiliar or is designed to benefit politically weak groups.

Once the innovation becomes established, and therefore is no longer innovation, constituencies have developed and termination of the program is unpopular. This "tar baby" aspect of federal initiatives actually is one reason that leads some people to be generally conservative on such matters.

D. Federal Goals Are Not Properly Federal

The idea here, often expressed by President Reagan, is that education is a matter of state and local concern, so that even if federal goals are worthwhile, can be effective, and are supplementary to state and local action, they should not be done, under a proper understanding of federalism. Strictly speaking, this criticism is not of the deregulatory variety, because it does not assert the basic deregulatory thesis of the same or greater education with fewer legal requirements. However, in a colloquial rather than a logical sense, the idea of no federal role is one of the strongest elements of the deregulation critique.

Moreover, it is highly instructive to consider the federalism position in light of the other deregulation criticisms. If we imagine that all the other criticisms are unjustified; namely, that federal intervention is worthwhile in a normative sense, effective, and necessary in the sense that the program will not be taken up by the states, it would take a strong principle indeed to prohibit the possibility of federal

intervention. Historically speaking, the logic of federal roles has tended to work in the opposite direction. If an outcome is worthwhile, the government can meet the underlying need, and the states are incapable, that is frequently considered a sufficient justification for federal intervention.[16]

As with most of the deregulatory criticisms, there is some merit to the one that asserts a lack of federal role. Federal intervention in education is relatively recent and sporadic. There is no strong theory of why national intervention is needed, such as there is for national defense or interstate commerce. Also, it is clear that, regardless of the existence of national programs, the most important part of the educational process must always be local--the interaction between teachers and students and the maintenance of effective educational organizations. There has been no national crisis, such as the depression, which served to justify national interventions in many areas that were previously considered exclusively the province of state and local governments, or not the function of government at all. As a consequence of all of these factors, federal legislative roles have tended to be ancillary to noneducational goals, such as civil rights, national defense, the health of the economy, and a concern for equal educational opportunity.

Even if they are not very clear, the arguments for a federal role are surprisingly tenacious. Although education is not itself a federal purpose, and the connection between education and other purposes is often unclear, a connection is almost certain to be urged on a regular basis. The role of the federal government in maintaining and improving economic productivity is well accepted, and the role of education in economic productivity is likewise established. For this reason, and because the market for employable skills is essentially national, it will be difficult for the federal government to resist all efforts to improve the stock of human capital (as economists would call it). A second strong function of the federal government related to education is the function of immigration and naturalization. Many of our most severe educational problems originated with immigration of unschooled or foreign speaking peoples (including the forced immigration and subsequent mistreatment of black Americans). Rapid and large scale immigration tends to place an unbearable strain on state and local capacities. At a certain point in the failure of the educational process, the minimum requirements of citizenship are not met. If hundreds of thousands or even millions of inner-city youth cannot exercise the basic functions of citizenship, or hold a job in an increasingly technological economy, the philosophical idea that education is exclusively a matter of state and local concern is likely to seem too thin for sustenance.

II

CRITICISMS GOING TO THE BASIC FORM OF THE INTERVENTION

This part of the paper asks whether there is some radically different way to structure the relationship between the federal government and the states to make it less regulatory or legalistic and more cooperative. Since the question of abandoning federal goals has already been discussed, the question for discussion here is whether, assuming the federal government maintains various goals, these goals can be achieved in a relationship almost completely devoid of the requirements that characterize existing federal interventions. There seem to be two main avenues that have been suggested for achieving this kind of radical "delegalization": first, that within the existing framework of federal grants, specific requirements simply be relaxed, in favor of something like block grants coupled with precatory purposes; second, that binding legal requirements be relaxed and replaced, not with mere legal exhortations, as recommend by the block grant approach, but with an intense administrative relationship of "assistance" or "adaptation." The first kind of proposal suggests, in effect, that federal controls are unnecessary, while the second recommends that a discretionary administrative interaction replace the legal requirements. Each of these ideas will be examined in turn.

A. Same Educational Effect With Reduction of Strings Only

The thesis of the consolidation movement is that the federal government can achieve its educational goals just as well and at a lower cost by merely reducing the number of legal requirements or strings attached to existing grants.[17] In other words, at face value, the consolidation movement does not suggest replacing existing requirements with any other sort of intervention, rather proposing that states and localities will achieve the federal goals on their own, through mechanisms of poltical accountability. The idea seems to be that groups benefitted by the federal controls will be able to insist upon allocative patterns and educational services approximating the formerly mandated patterns and services; except that, since the services will be more adjusted to local conditions, they will be more efficient.

As background for considering the consolidation thesis, it is helpful to review the various degrees and kinds of legal requirements that have been imposed by the federal government. Table 1 suggests categories of such requirements from most to least mandatory, that is, from least to most discretion for the states.

Category A in the table is regulation, that is, mandatory requirements without the compensation of federal assistance. Intervention of this kind has been associated with civil

Table 1

Basic Regulatory Options
in the Federal-State Relationship

(From top down: More to less federal regulation;
less to more state and local discretion.)

Category	Examples
A. Regulation (Mandatory requirements)	1. Court decrees
	2. "Civil rights type" statutes
B. Categorical or conditional (Grants)	1. "Any grantee" type (e.g., § 504, Title IX, Buckley)
	2. Service regulations plus compensation (94-142)
	3. Effective strings on use of funds (e.g., Title I)
	4. Ineffective strings on use of funds (Vocational education)
	5. Block grants with precatory purposes
C. General aid	

rights, either judicially declared and enforced, as in the case of desegregation, or legislatively mandated, as in the case of many civil rights type statutes modeled on the court decrees.[18] It is interesting that unassisted regulation by the federal government in eduction has apparently been restricted to civil rights type situations. The idea seems to be that, if we can assume the violation of a basic right by the states or localities, it is fair to ask them to remedy the situation without federal assistance. In fact, of course, financial assistance has been provided in some civil rights contexts.[19]

The next least restrictive category is categorical or conditional grants. The most fundamental element of discretion allowed under the conditional grants is the ability of the grantee to turn down the money, thereby escaping the legal requirements. In this respect, the first kind of categorical grant, referred to as "any grantee" type in Table 1, does not realistically allow this sort of discretion, and therefore is probably closer to regulation.[20] Laws like Title IX,[21] Executive Order 11,246,[22] and the Buckley Amendment[23] apply to all federal contracts or grants. Therefore, in order to escape the conditions enacted by such laws, educational institutions would have to decline all federal support. While this is a theoretical possibility, and has actually been done by institutions receiving very little federal support, the

price is too great for most institutions to consider as a realistic possibility.

The next least intensive or intrusive type of intervention is referred to in the table as service regulations plus compensation. The model is PL-94-142. The conditions on this type of grant are not limited to the use of federal monies but rather are direct service requirements which apply if the federal monies are accepted at all. Relatively few conditions attach to the use of federal money as such; but the federal grant pays for only a fraction of the required services. The reason that this type of grant is more restrictive than conditions which apply only to the use of money is that the amount of the federal compensation is not necessarily sufficient to defray the cost of compliance.[24] States and localities accept this type of relationship and continue in it either because of local pressure groups, which are able to insist upon, in effect, a type of matching aid by the states, or because, for some other reason, the states would have allocated as much or more resources to the general purpose without the federal aid.[25]

The next least restrictive form of legal intervention is referred to as "effective strings on the use of funds." Title I is given as an example. Effective strings are less restrictive than direct service requirements because the only restriction is on the use of federal funds. In effect, there

is no matching aid required of the states. (In the case of Title I, there is a requirement with a matching effect, the comparability requirement.)[26]

The term "effective" requires explanation. An effective grant in these terms is "additive," that is, it produces substantial extra state and local educational services for the federally approved purpose.[27] For example, a dollar of aid for compensatory education under Title I actually produces some substantial amount of state and local spending, say at least sixty cents, for compensatory education. Achieving this stimulative effect is not as easy as it may sound. In the case of Title I, it took years of planning and experimentation to design the exact set of legal conditions which achieved some additivity. There are many requirements, such as that the funds be used for a federal purpose, which seem to guarantee extra spending but which do not. If the states and localities would spend a significant amount on the federally sponsored purpose in the absence of federal aid, it is common for these agencies to use federal aid as a substitute for state or local funds. Under those circumstances, the federal aid has the effect of releasing state and local resources for other governmental purposes or for tax relief, rather than increasing the amount of the intended educational services.

The term effective does not necessarily mean a program which works, however. Additional spending is a necessary but

not a sufficient condition of program effectiveness. Indeed, as we shall see in part IV, conditions which are specific enough to produce additional spending may interfere with program effectiveness.

Although political debate suggests a sharp distinction between categorical grants and general aid, the next three types of federal intervention may be grouped together in terms of restrictiveness. It is generally conceded that many types of federal aid are accompanied by what may be called ineffective strings. If the ratio of federal funds to state funds is too low and very careful fiscal targeting is absent, aid which is categorical in the sense of having restricted purposes in fact operates as general or unrestricted aid.[28] Vocational education is an example. Because the states spend many times the federal contribution from their own resources on vocational education, the federal contribution does not produce much extra state and local spending. If this conclusion is valid in the case of aid with strong limitations on the use of federal funds, like vocational education, it is true a fortiori with respect to both block grants with precatory purposes and, of course, general aid. The Reagan Administration has been moving in the direction of block grants with precatory purposes. Under this type of grant, one or more purposes for the spending are recited in the law, but realistic restrictions on the use of federal money are not provided.[29]

The basic point of view contained in Table 1 and the argument just presented is that without effective strings states and localities will use federal money for their own purposes and these will not correspond to federal purposes to any great extent. For this reason, categorical or conditional grants are the least restrictive form of traditional legal intervention consistent with achieving federal purposes effectively. Above effective strings in Table 1, we find a better deal for the federal government in terms of cost effectiveness, in the sense that, at least superficially, more of the desired state and local conduct is obtained for a lower investment of federal resources. (The cost of enforcing regulations effectively is assumed to be relatively small compared to the cost of fully funding requirements.) Below effective strings in Table 1, the only purpose achieved by the federal intervention is general aid. There are, of course, legitimate purposes for general aid, such as the relief of state and local taxes. However, most widely accepted conceptions of the federal role in education, and certainly the conservative ones, assume limited, specified and supplementary federal roles. General finance of education is not such a role.

In other words, the argument of this section has been that there is a clear internal contradiction in the deregulation philosophy as applied to the federal role in education. One

part of that philosophy insists that federal intervention occur under limited circumstances and for limited purposes. The other part, objecting to federal requirements, insists upon the consolidation of categorical grants. However, when effective strings are dropped, categorical aid becomes general aid and the limited purpose of federal intervention is lost. The only escape from this contradiction is the suggestion that the states and localities will spend federal aid for the federally declared purposes without mandatory requirements that they do so. This flies in the face of all available research on the subject.[30] The problem is not, as some in the new administration would have it, that the federal government "distrusts" state and local governments; or that state and local officials are assumed to be "dishonorable." The ineffectiveness of block grants is based simply upon the fact that state and local governments have somewhat different priorities for spending than the federal government. If this is not the case, if the priorities are so similar that local spending will completely track federal purposes, then the aid program fails to meet another requirement of the conservative philosophy of the federal role in education, that the federal government act only when state governments are incapable of doing so. In other words, the idea of a nonredundant federal government is obviously inconsistent with the idea of identical federal and state preferences. It may be theoretically

possible to define some carefully designed position which reconciles these various contradictions. However, it is the impression of this author that no such fine crafting integrates the conservative philosophy. Rather, the inexperience of the conservatives as outsiders to the policymaking process allows them to maintain a variety of attractive philosophical goals which are impossible to reconcile in practice. Even the one goal which is most logically cohesive, the complete absence of a federal educational role, is probably simply impractical in the long run (for the reasons discussed in Part I, D).

B. Assistance vs. Compliance Orientation

The second way sometimes suggested to remove virtually all legal requirements from the federal-state relationship is to establish what Elmore calls a relationship of pure "assistance" or what Berman calls "adaptive implementation."[31] Under such a relationship, the agent of change (here, an agency of the federal government) does not impose any rules and regulations. Instead, broad goals (such as the education of disadvantaged children) are articulated by the outside agency; more precise goals and means are worked out jointly through discussion and experimentation; and the role of outside agency is to provide financial, technical, organizational and professional assistance. The prototype of this kind of outside change agent would seem to be the organizational development or management

consultant. In the relationship between consultant and client, rules and regulations seem obviously out of place; yet the potential for change, even painful change, is significant.

This type of inervention may be grossly underutilized by a federal government caught in a regulatory mindset. Federal sponsorship of creative change efforts does seem to lag far behind the business equivalent, for example.

It is much easier to construct attractive imaginary cameos of the assistance relationship than it is to picture the existence of a program on a large scale, however. If "assistance" is to be administered by anything other than a tiny, elite, closely controlled group of consultants, solutions to a number of fundamental difficulties need to be suggested.

First, many federal programs, especially of the civil rights variety, require states and localities to do things that they do not want to do, at least initially. The Reagan Administration is committed to "negotiation" rather than "confrontation" in such matters. Negotiation has always been an important part of civil rights enforcement, of course. Indeed, experienced civil rights lawyers regard the threat of litigation and even court decrees primarily as means of forcing completely uncooperative defendants to begin serious negotiations. But historical experience is contrary to the idea that deeply entrenched behavior can be altered without the meaningful threat of coercion. (And "coercion" is not as bad

as it sounds. There usually are many in school systems who welcome the excuse to change.)

Even if the confrontational era of race and sex discrimination is tapering off, there are problems of recalcitrance (or "divergent preferences") even in relatively noncontroversial programs. School districts do not object to expanding services for the poor and handicapped in the same way t at they resist racial desegregation. But the issue of budgetary priority is almost invariably painful. Even when the federal government brings new money, school districts usually have a long list of unmet needs, including tax relief, which they regard as more important than the federal priorities. Experience suggests that objective standards of accountability and some enforcement structure are necessary to change existing budgetary priorities.

Second, it seems doubtful that the pure assistance type of intervention can produce rapid change on a nationwide basis. Objective standards are efficient because they simplify the tasks of compliance and monitoring of compliance. They are inefficient in a different sense because compliance with the objective standards often does not achieve underlying program objectives. It may be quite legitimate for the federal government to seek unartfuly rapid, broad scale change at the cost of frequent missteps. More refined interventions have a higher probability of success, but they would seem to be

limited in the scope and pace of change. (Big programs probably operate best on Paul Berman's philosophy that "some things work sometimes."[32])

Third, strong political and legal forces work against "pure assistance." Advocacy groups representing the underserved are distrustful of purely negotiated arrangements because of their secrecy and accommodation to majoritarian values. Political and fiscal conservatives are suspicious of costly programs with a "do good" mandate and no performance standards. States and school districts may protest the "arbitrariness" and "excessive discretion" which are counterparts of a free wheeling, standardless federal intervention. ("Why am I getting all the pressure?" "Why are they getting all the money?")

Fourth, "assistance" is not necessarily consistent with the spirit of deregulation or even very different in substance from regulation. The prototype of the assistance relationship involves an agency of the federal government working closely with schools over a long period of time. There may even be a complicated agreement through which school authorities commit themselves to the performance of cooperatively developed goals.[33] While the coerciveness and clumsiness of regulation may be absent from such a relationship, the absolute level of federal involvement in the details of local administration is probably greater than in regulation. The objective standards of regulation allow a sort of distance--we call it "arms'

length."

All in all, the wholesale replacement of federal "regulatory-type" programs (including categorical grants) with pure assistance programs does not seem plausible. There is much that is attractive about the assistance model. However, since assistance and regulation seem to be good for somewhat different purposes, they should not be regarded as substitutes.

A different conclusion applies to <u>combinations</u> of regulation and assistance, such as assistance with compliance. This part of the paper has been concerned with more or less pure deregulatory forms. Mixed forms are considered in the next part.

III

CRITICISMS GOING TO THE "TECHNIQUE" OF INTERVENTION: THE SEARCH FOR LESS LEGALISM

Much of the criticism of regulation concerns what may be called "technique." If the validity of goals is presumed (as discussed in Part I), and a fundamental regulatory form accepted, whether through regulation or categorical grants (as discussed in Part II), the search for deregulation becomes a search for less "legalism." "Legalism," which here could be called "regulationism," refers to the unpleasant rigid, formalistic qualities of legal intervention: universally applicable specific standards, procedures, paperwork, compliance-orientation, and so on. Even among those who acclaim the net benefits of legal intervention, legalisms are assumed to be costly, undesirable by-products. For example, even the most ardent proponents of affirmative action in employment do not recommend filling out reports as a good thing in itself. Given the almost universal distaste for legalisms, much thought naturally is given to having less of them. Couldn't the law be more "reasonable"?[34] Trying to relax the legalistic aspects of regulatory intervention without sacrificing program effectiveness is what is meant here by "technique."

Tracts can be written about marginal adjustments in each particular dimension of legalism, for example, about more effective control of administrative discretion, the proper use of due process, or how to reduce paperwork. My purpose here is to assess the possibilities of wholesale deregulation, of a systematic "deregulation" of federal law at the level of technique. Is it possible to restructure federal regulatory interventions in education to make them radically less legalistic and more reasonable?[35] That seems to be the implication of at least the more arduous denunciations of legal stupidity.

To focus discussion, it is helpful first to arrange some of the separate dimensions of legalism according to regulatory and deregulatory options. That is done in Table 2.

A. The General Characteristics of Legalistic and Nonlegalistic Interventions

The general characteristics of legalism, and the source of its objectionable status, are the measureable, the standardized, and the obligatory. When legalistic interventions are justifiable (net beneficial), it is because measurability, standardization, and obligation are functional. The opposites of these characteristics which so often seem attactive, are the subjective, communal, idiosyncratic, and discretionary.

Table 2

Dimensions of Legalism

Dimension	Regulatory	Deregulatory
A. GENERAL CHARACTERISTICS	measurable, standardized, obligatory	subjective, communal, idiosyncratic, discretionary
B. ORGANIZATIONAL ACTIVITY		
1. Planning or policymaking	procedures--rulemaking, PPBS, school improvement plans, etc.	spontaneous interaction, muddling through
2. Influence or efficaciousness of client	due process, rights	"politics"
3. Reliability in administration		
a. How obligations are defined	standardization and standards, monitoring, paperwork	loosely defined goals exceptions
b. How compliance with obligations is obtained	enforcement	exhortation, professionalization, assistance, trust

The general characteritics of legalism/nonlegalism are found or realized in separate aspects of organizational activity. That is, ror each of several important types of activities in organizations, there is a legalistic mode, a nonlegalistic mode, and many alternatives in between. (The nonlegalistic is called "deregulatory" in Table 2). The same type of analysis probably could be made of the "regulation" of individuals. In this paper, however, I am concerned with the relationship between government and "educational institutions" (including not just schools but the other organizations which make educational policy--state legislatures, school boards, etc.).

Within each dimension of organizational activity (B.1, 2, & 3 in the table), in moving from the legalistic to the deregulatory mode, two kinds of changes occur: first, there is less supervision by the external, lawmaking agency; and, second, to the extent supervision and interaction remain, the style (or mode) is more flexible, spontaneous, innovative, discretionary, and so on. (No wonder nonlegalism is emotionally appealing!)

Consider each organizational dimension in turn. In the area of planning or policymaking (B.1), the legalistic mode is formal procedures, including everything from rational decision making models like PPBS, to regular meetings of school boards with agendas. The deregulatory mode is spontaneous

interaction, muddling through, etc. The next area (B.2) is "influence or efficaciousness of client." By this, I mean the avenues which are available to the clients of organizations to be heard and be influential, e.g., parents and schoolchildren attempting to influence educational institutions. The legalistic mode establishes formal mechanisms of influence, such as administrative hearings and litigation rights. The deregulatory alternative relies upon unstructured personal influence--what I have called "politics." (Politics in this sense exists when a parent sets up an appointment with the principal to talk about a problem).

The third organizational activity I have called "reliability in administration." This refers to the means by which an external, supervisory agent seeks to effect the continued implementation of any policy in the day-to-day life of an organization. One aspect of reliability is the definition of obligations (B.3.a)--how is it determined that "noncompliance" exists. Here, the legalistic mode relies upon standardization and standards (which also imply monitoring and paperwork). The nonlegalistic mode is to work with loosely defined goals rather than standards and freely grant exceptions. The other aspect of reliability is obtaining compliance with the obligatory policy. Legalistically, this is done by enforcement--the definition of sanctions for noncompliance of varying degrees of seriousness, the imposition

of sanctions, and so on. The nonlegalistic mode is to "professionalize" (inculcate policy-supportive values and habit structures), lend assistance, and rely upon trust.

B. The Possibilities for Wholesale Delegalization or Deregulation

Equipped with a definition of legalism or "regulationism" at the level of technique, it is now possible to evaluate the deregulation criticism at that level. Here, an important distinction must be made. There frequently are a host of discrete deregulatory options, all perfectly sensible and productive, along all of the dimensions of Table 1. Almost all that is productive about deregulatory initiatives consists of marginal adjustments in particular dimensions of legalism in specific contexts. Careful analysis might reveal, for example, that much of the paperwork associated with IEP's in special education could be dispensed with. That type of context-specific, marginal adjustment is not what I take to be the message of the deregulation critique.

In its strong form, the deregulation critique tends to assert (1) that across all dimensions of legalism, and in all regulatory contexts, it is most consistent with underlying policy, and, least costly, to move as far in the direction of nonlegalism as possible, and (2) that practically all actual regulatory programs undertaken by the federal government are

strongly and unnecessarily legalistic in character.

In other words, an impression exists that, because legalisms seem all that is unreasonable--quantitative, rigid, formal, standardized, punitive--they are invariably bad. As the juristic version of the "authoritarian personality," in order to make things better, legalistic interventions should be made less legalistic. The tendency to be "authoritarian" is understood to be deeply ingrained, so that a shift rightward in Table 2 may be difficult and unlikely; but, to many people, the desirability of such a shift is obvious from the intrinsically undesirable nature of legalism.

This is what I take to be the thesis of the wholsale deregulation critique; and I would like to demonstrate here that the thesis is wrong. Sometimes the deregulatory alternative is better, but not always. The generalization that legalisms are always undesirable probably originates in the true perception that legalisms are always more costly and unpleasant than voluntary (unregulated) action toward the same end. However, in this part of the paper, and often in real life, it is given that an agency outside the local organization must play the role of stimulating change, if change is to occur at all. Under those circumstances, the question of what technique of intervention will best promote the underlying policy, at the least cost, is problematical and depends upon a close analysis of the particular context. Whether the least

costly intervention is nevertheless unjustifiably costly compared to the benefits involves the evaluation of goals as discussed in Part I. Assessment of the net benefits of the intervention is, of course, logically dependent upon how far the costs of intervention may be reduced. To that extent, the general conclusion in this part, that there is no policy-effective wholesale method to reduce the costs of legalism, affects the overall cost-benefit analysis of legal interventions. Conservatives are right in sensing that regulation always carries a high price tag, and right in concluding that ill-conceived and low-return regulatory interventions are almost never worthwhile. (On the other hand, a lot depends on from whose point of view the value of the return is to be assessed.)

In general, great confusion seems to prevail about the operation and evaluation of legalisms. Loose generalizations are the order of the day. I believe it may be a significant contribution, therefore, to develop a series of valid generalizations. Although these generalizations normally could not settle any particular policy question about the desirability of a specific deregulatory option, they should be useful in providing a framework and sense of proportion about the legitimacy of various arguments.

The rest of this part, therefore, is organized according to a series of propositions and subpropositions about the

relationships between legalistic and nonlegalistic techniques. The discussion is structured in light of the relationships displayed in Table 2, and frequent references will be made to that table.

1. All real examples of legal interventions are mixtures of legalistic and nonlegalistic techniques.

The foundation for an understanding of legalism is the appreciation that all government interventions lie on a continuum somewhere between the purely legalistic and purely nonlegalistic forms. Furthermore, the relevant policy question about any particular type of intervention usually concerns changing the mixture of legalistic and nonlegalistic elements, thereby "moving" the "position" of an intervention to the left or right along the dimension of Table 2. For example, the question would rarely be whether all paperwork could be eliminated but, rather, how much of the paperwork really is necessary to effectuate the underlying policy.

Consider the right of parents to disapprove or veto the placement of their children in special education. A veto right is a legalistic technique (B.2, in Table 2); yet in practice, the operation and effectiveness of the right is determined by political/organizational patterns. How passive and unwilling to exercise the right are parents? Does the system obtain the prior routinized consent of the parents? How prepared are parents to contradict findings of experts influenced by

perceptions about the availability and nonavailability of appropriate remedial resources?

At the other extreme, relationships considered to be pure assistance have legalistic elements. An effort to enhance the bilingual capability of a school, for example, may translate into the obligatory attendance by teachers at a series of inservices.

A corollary of the proposition is that legalistic techniques are almost never adequate "in themselves" to effectuate a social policy. Someone must do something organizationally with the legal device. Remedial orders about the racial mixture of schools must be translated not only into attendance lists and transportation services but into a process of education for the new, racially mixed student bodies.

2. Legalisms are always costly and inefficient compared to voluntary action directed at the same end.

The formal and external nature of legalism inevitably creates costs and inefficiencies compared to equivalently intended voluntary action. Being required to do <u>anything</u> and especially being required to something <u>specific</u> cannot match the effectiveness of internally motivated, adaptive behavior directed at the same underlying end.

Manifestations of the cost and inefficiency of legalism appear endlessly in the study of government programs. Some costs and inefficiencies are so common that they may be expected to occur. Among such universal problems are the following:

(a) Compliance uses scarce resources, such as personnel time for filling out reports.

(b) Specific legal requirements against a background of divergent preferences almost always produce goal displacement; that is, organizations figure out how to comply with the literal requirement while to some degree maintaining their own contrary substantive purposes.

(c) Mandatory requirements create unfavorable organizational morale, including dissimulation, resentment and loss of self-esteem rooted in occupational autonomy.

(d) Because of their formality, legalisms often interfere with the very policy the law is trying to promote, as when the requirements of fiscal allocation in Title I interfere with integrated educational offerings.

(e) Legalisms tend to conflict with each other, especially when a variety of lawmaking authorities and programs regulate the same institution. An example is the complex resolution used to determinine the "elibibility" of students who qualify for both Title I and special education services.[36]

3. In spite of the costs and inefficiencies, legalisms often are the only or best means of achieving social policy, because they also provide characteristic benefits.

Despite the illogic involved, deregulatory type criticisms frequently assume that the presence of any signficant legalistic cost or inefficiency implies that the overall governmental intervention is not worthwhile. Strictly speaking, if, as I have said, legalism exists in any governmental intervention, no governmental intervention could withstand scrutiny under that standard. More importantly, the value of the intervention obviously depends on the benefits compared to the costs, rather than on the costs considered in

isolation.

In that regard, it is essential to realize that, just as legalisms are associated with characteristic costs, they tend to provide characteristic benefits. Functionally, legalisms are beneficial because they operationalize, give specific meaning to, or objectify policy. Specification is helpful in several kinds of situations.

First, there may be many possible specific ways to pursue a particular goal, but the different ways are inconsistent with each other, and one (or a limited set) must be selected in order to accomplish anything.

Desegregation is an example. Once it is decided to have racially integrated schools, in an outcome sense, a numerical definition of "racially balanced" must be chosen. Various definitions would be reasonable but one, or a permissible range, is necessary for coherent policy. Another example is the federal compensatory education program (Title I). The concept of "poverty schools" must be operationalized. Many definitions are possible. Indeed, so many considerations are involved that every solution seems somewhat arbitrary. Yet, again, one coherent approach is necessary for good policy.

Another example is less obvious but nonetheless valid. In special education, once it is decided that special plans should be made for the education of each eligible child, some provisions for such plans must be made. Any system of

formulating special plans must indicate who makes the plans, what the process of plan-making consists of, and what records shall be kept (presumably, the plan must be communicated to the family, instructors, etc.).

Specification, then, may be an aspect of orderly planning in a complex organization. An obvious question is why organizations such as schools may not be left to find specification on their own. It is obvious that many organizations do make good, internal use of legalisms. In other words, why must the standards be imposed from the outside?

The most common answer is that a problem of recalcitrance, distrust, unwillingness, or divergent preferences exists. If the "outside" organization believes that the regulated organization will not develop any or sufficiently effective policies on its own, then a standard solution helps both to obtain compliance and monitor it. "Recalcitrance" exists in many degrees, from rebellious obstinacy to polite disagreement over priorities. In compensatory education, for example, it may be simply that local school districts would prefer to spend federal money for various purposes, including poor children while the federal government insists that all federal money be spent for that purpose.

In a sense, identifying the problem solved by legalisms as "recalcitrance" is slightly misleading. A potential problem arises at the moment it is decided to have any kind of

centrali.ac licy. If the federal government is determined to accomplish anything, as opposed to letting states and localities do their own thing, problems of interorganizational complexity and coordination are likely to demand a coherent, streamlined and therefore highly specified program. Consider budgetary decisions. Once it is decided that budgetary decisions shall be made centrally, whether by the federal government, a school board, or the chairman of an academic department, a considerable demand for specificity and orderliness (what Max Weber called "rationalization") is "automatically" established. The only way for the federal government to avoid all legalisms in budgetary matters is not to collect taxes in the first place. Conservatives are right: centralism breeds legalism. Legalism is a tool of complex coordinated action.

We see here a reaffirmation of a conclusion reached earlier, that the only way for the federal government to obtain complete deregulation is to abandon all special goals in education.

> 4. Real world legal interventions often are at the point of trading off the advantages and disadvantages of more and less legalism. Therefore, close examination of particular policies is required to establish productive changes.

Normally, since legal interventions are designed to obtain results and counter-legalistic interests are well represented, the degree of legalism which exists is thought by its designers

to be the least which is consistent with obtaining results. As a result, real legal interventions often are near the point where a decrease in legalism would sacrifice more compliance than justified by savings in cost while an increase in legalism would unacceptably elevate costs compared to gains in compliance. This cannot be taken as a justification for all legalisms, because some may be just plain stupid (teacher certification and PPBS are my candidates). Nevertheless, the possibility that a system already is near the optimum point should always be considered. Further improvements which are possible are likely to consist of careful, marginal adjustments.

The idea of moderation is often made to seem incompatible with the bureaucratic mind. Regulators often are portrayed as driven by an insatiable fetish for rules and conformity. Examination of the actual process of designing various legalisms suggests a different picture. Again and again, we see the incremental adjustment of legalism in response to feedback about program effectiveness. The typical pattern is to begin with too little legalism and gradually raise the stakes.

Title I and desegregation are good examples. Both the rules and sanctions utilized in desegregation were made more strict over a period of ten to fifteen years in response to problems of recalcitrance.[37] Similarly, Title I fiscal

allocation standards were tightened up in several incremental stages as weaknesses and loopholes in the previous standards were revealed.[38]

The adjustment and compromise of legalistic requirements also occurs informally. Many systems which critics of legalism would characterize as dominated by considerations of compliance and enforcement are seen by those who study them as systems of conciliation and compromise. Affirmative action laws, for example, contain legalistic sounding requirements like goals and timetables; but the reality is otherwise. In systems like affirmative action, the question of compliance/noncompliance is negotiable. Pressure toward compliance and degrees of actual compliance are serial, incremental, gradual, and open-ended. Planning to conform often is as important as actual conformity; and the plausible demonstration of good faith or reasonable effort is probably the best way to prove compliance in the practical sense of satisfying regulatory inspectors. There is, in other words, a social reconstruction of compliance at the field level which invariably compromises the stricter sounding legal requirements.[39]

> 5. Improvements of legal techniques usually involve substitution of less unreasonable techniques for more unreasonable ones, rather than discovery of ideal techniques. Therefore, criticisms of the imperfections of legalism which do not examine alternative solutions are usually misleading.[40]

The most common type of critique of legalism is a recitation of its many costs and disadvantages. These are normally taken as an indictment of the underlying program, because "how could anything so stupid be right." Notwithstanding its popular appeal, the logic of such criticims is completely erroneous.

A "stupid" thing cannot be right, but it may nevertheless be the best of all the available alternatives and worthwhile in net terms.

Probably the most important insight to be gleaned from studying legal interventions is that there often is not much room for improvement, not because the intervention is enlightened, but because available alternatives are equally unsatisfactory. A good example is the goal of making reasonable exceptions to a law. Regulation always is "overinclusive" in the sense that many of the regulated institutions would comply without paperwork and inspections, or would have a good reason for claiming an exception to the general rule.[41] Denunciations of this overbreadth are incor-lusive, however. The relevant inquiry is a comparison of the various institutional devices available for making exceptions. That inquiry reveals serious flaws in all possibilities. For example, the most flexible possibility, unlimited administrative discretion, allows for unpredictability, arbitrariness, and the frustration of

protection for unerprivileged groups. A system of "waivers" (exemptions for exemplary compliance) turns out to be administratively laborious and politically unpopular; and it exempts organizations which tend to be relatively unburdened by discretionary systems.[42] A system of "certification," exemption of all but the worst cases, may focus enforcement where improved compliance is impossible (because the worst cases sometimes lack the capacity to improve).

IV

A DEREGULATION SENSITIVE FEDERAL ROLE FOR THE EIGHTIES

The skepticism of this paper toward deregulation may have left a wrong impression. Doubt was expressed at the idea of deregulation as a universal solution or miracle cure; but in particular circumstances deregulation probably is a good idea as often as not. It may even be conceded that Great Society educational programs were in need of discipline, and, therefore, that there is a presumption in favor of the effectiveness of deregulation. Nevertheless deregulation must be selective--it cannot be presumed beneficial in any particular context. Indeed, the exercise of a blind ideological deregulatory presumption is almost certain to be harmful. Although opportunities for deregulation are plentiful, they cannot be discovered without careful analysis, and the deregulatory mechanism must be thoughtfully designed. For this reason, the hectic, politically scrambled deregulation achieved by the Reagan administration in the summer and fall of 1981 probably did not capture the theoretical benefits of the deregulatory philosophy. Regulatory costs were erratically reduced; but so, almost certainly, was program effectiveness.[43]

The general thesis of this paper about the need for selectivity in deregulation should be considerably strengthened if concrete examples of beneficial deregulation can be suggested. Examples of what I believe to be promising deregulatory options in federal educational policy are suggested below. To follow the earlier organization of the paper, examples are given at the level of goals, form and technique.

A. Deregulation at the Level of Goals: Reordering Federal Priorities

Deregulatory philosophy applied at the level of goals suggests that emphasis be given to goals which are worthwhile, effective, necessary (in the sense that the states are unwilling or unable to fill the need), and strongly federal in character. Applying these criteria to existing areas of federal intervention suggests a reordering of priorities something like this:

(1) For emphasis

(a) Compensatory education

(b) Youth employment programs

(c) Immigration problems (including language)

(2) For Deemphasis

(a) Vocational education

(b) Special education

(c) Student loans for higher education

The programs to be emphasized: (1) respond to needs which most states do not place a high priority on, or lack capacity (fiscal and technical) to cope with (e.g., language training of immigrant groups), (2) involve basic access to education rather than incremental improvements (see Part I, B), and (3) are strongly federal in character because they are concerned with immigration, functioning of the national economy, and equality of opportunity.

The distinctive characteristic of the deemphasized programs is their popularity and fiscal support among the states. The states have long spent many times the federal contribution on vocational education. Federal aid, therefore, consists practically of general aid; and general aid lacks the "bang for the buck" we associate with deregulation. Special education once was unpopular in the states but now enjoys impressive political strength.

Deemphasis of student loans for higher education rests upon an empirical assertion the validity of which is uncertain. If such loans actually guarantee access to students who otherwise could not attend college because of poverty, the criteria of

emphasis rather than deemphasis would be satisfied. However, it appears that the program is mainly used to ease the financial sacrifices of the middle class. While this is a worthy purpose,it is not one that would survive stringent standards of deregulation.

One characteristic of the suggested priorities can hardly escape notice: the deemphasized programs are more popular. This is because of the "paradox of innovation" mentioned earlier in the paper.[44] Needs unmet by the states are not popular. Programs which could be carried on by the states without federal help are popular and therefore difficult to terminate. Here again, we see an indication of contradictions within the conservative political philosophy. The deregulatory ideal of a sharply defined, distinctive federal role is somewhat inconsistent with the deregulatory ideal of leaving the states alone to do what they want.

B. Deregulation at the Level of Form: The Continued Vitality of Conditional Grants

Deregulatory philosophy does not suggest major changes in the basic form of federal-state relations. The conditional or categorical grant is an effective compromise of federal and state interests, and a better one has not been suggested. States have the option to withdraw from the relationship, and federal money pays for expenses of the state incurred to comply

with federal requirements. The existing practice of limiting direct regulation to bona fide civil rights situations is proper. At the other extreme, every evidence suggests that block grants do not work except as general aid or revenue sharing. And, again, while general aid satisfies the deregulatory goal of few legal requirements, it violates every deregulatory precept about the selection of distinctive federal goals.

Among the types of categorical grants, there is support for a change of emphasis. It may be time to abandon the "effective strings" type (see Table 1). Although effective strings are the least restrictive form consistent with achieving narrowly definined federal objectives, because of their strong emphasis on fiscal accountability, they seem to interfere with educational effectiveness. In a sense, the overall lack of restrictiveness comes at the cost of inefficient and counterproductive details.

Streamlining is best obtained by direct service requirements. Under this arrangement, the government specifies a complete educational program or supplement as the condition of receiving funds. Expenditure of the funds is monitored to prevent abuse but not to insure educational effectiveness. The requirements may be standardized, as with PL-94-142, or custom fit to the local district or school, as in the grant

competition model of bilingual education, or the "negotiated contract" model of the Youth Act.[45]

Here again is a small irony. Direct service requirements are "more regulatory" than what was referred to in Table 1 as "effective strings," because they impose requirements beyond the use of federal money. It so happens that this greater degree of regulation is simpler and cleaner from the standpoint of program effectiveness. Regulating the use of federal funds does not impose much of an obligation, but it does exaggerate the importance of the fiscal aspects of the educational process.

The government also should experiment with relationships of "pure assistance" by entering into consulting relationships with local schools. Because even the people who advocate such arrangements do not see them as applicable on a wide scale, it is not necessary to evaluate them as substitutes for existing programs.

C. Deregulation of Technique: A Multitude of Contexts

The thesis of this paper concerning legalistic technique has been that neither more nor less regulation can be presumed beneficial on the average and, therefore, that all efforts should be concetrated on identifying marginal improvements in particular contexts. Given that perspective, it is impossible

to make any comprehensive recommendations for change, except, perhaps, that research and research funding should be directed at deregulation in particular policy contexts.

On the other hand, the lack of promise of across-the-board deregulation could easily conceal the very great possibilities of deregulation in particular contexts. To prevent that false impression, I would like to suggest a number of specific possibilities here.

Often what seems to make a legal intervention successful is discovering a workable combination of compliance and cooperation. The prototype is probably school desegregation where an early stage of recalcitrance and hostility must give way to a later stage of cooperation between court and school system if educational progress is to occur.[46]

One technique for moving in that direction is the use of "contract" rather than regulation. Grants for bilingual education are awarded on a competitive basis to school districts which submit the best proposals.[47] The ill-fated Youth Act contained provisions by which the federal government could enter into detailed performance contracts with schools serving disadvantaged children.[48] The advantage of these arrangements is that specific, "tough" goals for change are obtained through consent rather than regulation.

Another technique is sharp isolation or confinement of necessary legalisms in such a way that they do not interfere

with the educational process. Marshall Smith's proposal for federal compensatory education is an example. Smith recommends strong, "legalistic" targeting down to the schoolhouse level, so that poor children are guaranteed increased resources, coupled with no targeting within the school, to prevent such counter-productive compliance-oriented behavior as "pull-outs."[49]

Still another technique is "assistance with compliance." Paul Berman correctly reminds us that many school districts do not know how to comply with mandates requiring technical and organizational change (e.g., special education, biligual education).[50]

Finally, much could be accomplished by close examination of what aspects of particular legalisms are functional versus what aspects could be eliminated. I suggest two rather different examples: educational paperwork and the problem of conflicts between the requirements of different programs.

Compliance paperwork is probably the classic example of a legalism which is justifiable in the abstract but which often may be totally useless in particular contexts. Almost all paperwork has a theoretical justification: "the government needs to keep track of its money," "the teacher should have an orderly lesson plan," and so on. However, whether particular paperwork actually contains useful information (or serves to generate it) and is actually used by someone for the supposedly

justifiable reason is quite another question. Much may be gained by studying the actual use of paperwork. What parts, if any, actually are used versus being filed away? Could it be possible to eliminate the unused portion?

Of course, the political and bureaucratic aspects of such inquiries are almost as much of a trick as the technical aspects. How do we institutionalize the kind of skeptical judgement combined with sympathy for underlying programmatic goals which is necessary to make the appropriate distinctions? How can simplification be achieved in organizations wedded to the old, wasteful ways? A good place to start may be in commissioning outside researchers or consultants to look for paper reduction in specific policy contexts.

Conflicts between federal programs are of different sorts: redundant, wasteful political and administrative structures; ambiguities, conflicts and wrongheaded rules about how to combine or not combine funds from different programs, and so on.[51] A substantial portion of the problem seems to be the confusion and misunderstanding generated by the complexity and technicality of the programs themselves and the rules for reconciling the requirements of different programs. The important general point is that conflicts between programs appear to be a blind spot in the regulatory process. Program designers tend to think about the purpose and mechanics of each program in isolation from other programs which apply to the

same institution. This tendency is especially dangerous in education where many regulating organizations ply their trade on one regulated organization, the school. Unknowing proliferation of requirements is a real possibility.[52]

The existence of this blind spot suggests the institutionalization of a regulatory "counter force." Research which examines the interaction of programs at the school, district, and state levels is a good beginning. A true solution may need to go further and create an independent regulatory agency with authority to reconcile conflicts in an educationally sensible rather than a legally precise way. Because they think in terms of program purposes, supporters of individual programs are often somewhat imperialistic. It may seem reasonable to an advocate of compensatory education that "PL 94-142 money" spent on a particular child should not discharge the Title I obligation (otherwise, "what do 'we' get for 'our' money?"). From the perspective of the larger federal government and the school, however, the only important issue is that the combined funds promote the objectives of both programs in a general, programmatic sense. An agency with a nonprogrammatic mission may be needed to impose this sort of flexibility on the process.

CONCLUSION

The constant theme of this paper has been the need to be careful and precise about the deregulation critique. Benefits of deregulation exist, but they do not exist wholesale, and they must be obtained through carefully designed solutions.

The most conspicuous problem with the theme is the clumsiness and imprecision of politics. A certain amount of undifferentiated social indignation is required to overcome the inertia and lethargy of the regulatory process. If this spirit is applied full strength to government programs, the result is likely to be wreckage rather than efficiency. The typical pattern tends to be one of new programs erected on the ashes of the old. This, too, is wasteful; and there are hopeful signs that, with a growing appreciation of the problem, deregulatory discipline can be institutionalized within the regulatory process itself.

NOTES

1. See Breyer, Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform, 92 Harv. Law Rev. 549 (1979). See generally, Peltzman, Toward a More General Theory of Regulation, 19 J.L. & Econ., 211 (1976); Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Management Sci., 3 (1971); G. Stigler, The Citizen In the State: Essays on Regulation (1975).

2. Works that are highly critical of governmental intervention in education include L. Graglia, Disaster By Decree (1976); D. Horowitz, The Courts and Social Policy (1977); A. Wise, Legislated Learning (1979).

3. See T. Bell, Comment, Block Grants: The Secretary Explains the Rationale for Consolidating Federal Education Programs, Education Times 2 (May 4, 1981); R. Docksai, The Department of Education, in The Heritage Foundation Reports 163-211 ( ).

4. E. Bardach & R. Kagan, Going By the Book (Temple, 1982) (forthcoming).

5. See, Graglia, note 2 supra.

6. For statistics on special education, see Kirp, Buss, and Kuriloff, Legal Reform of Special Education: Empirical Studies and Procedural Proposals, 62 Calif. L. Rev., 40, 60, 63 (1974). Exclusionary aspects in the bilingual area may be seen in Lau v. Nichols, 414 U.S. 563 (1974), codified by Congress in the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703 (1976).

7. Comments by officials from the Department of Eduction and State Education Departments at a conference, "Modern Federalism and School Governance," Aspen Institute for Humanistic Studies, Aspen, Colorado, Sept. 14, 1981. See also Bell, note 3 supra, at 2; Docksai, note 3 supra, at 169-75; Administration Proposed Block Grants Defended, Attacked in Senate Hearing, Educational Times 3 (May 11, 1981).

8. "The quality of education today offers no glowing evidence of the magical powers of the federal government, despite years of massive effort." Bell, note 3 supra, at 2.

9. 20 U.S.C. § 1415 (1976).

10. C. Blaschke, Case Study of the Impact of Implementation of P.L. 94-142 (Education Turnkey Systems, Executive Summary, 1979); M. Stearns, D. Greene, J. David, Local Implementation of P.L. 94-142 (Stanford Research Institute, December, 1979). See also, William E. Bickel, The Placement Process in Special Education With Special Reference to Issues of Minority Representation (unpublished draft, Aug. 19, 1981).

11. Marshall S. Smith, Director, Wisconsin Center for Education Research, in conversation with the author.

12. The importance for income and status of educational attainment (years educated) as opposed to quality of education was one of the basic findings of Inequality, C. Jencks, M. Smith, H. Acland, M.J. Bane, D. Cohen, H. Gintis, B. Heyns, S. Michelson, Inequality: A Reassessment of the Effects of Family and Schooling

In America (1972). A brief summary of research findings on the difficulty of improving existing practice from above is Turnbull, Smith, and Ginsburg, Issues for a New Administration: The Federal Role in Education, Amer. J. of Educ. 396, 407-409 (August, 1981).

13. The basic legislation was the National Defense Education Act, 20 U.S.C. § § 401, 541-542 (1976). Cohen, An Idea That Grew, The National Defense Education Act, 4 Amer. Educ. 2-3 (Sept., 1968); Novak, A Case Study of Curriculum Change-Science Since PSSC, 69 School Science and Math 374 (May, 1969); Rothschild, The NDEA Decade, 4 Amer. Educ. 4-11 (Sept., 1968).

14. See, H. Rodgers, C. Bullock, Coercion to Compliance (1976).

15. See, Wilson, The Rise of the Bureaucratic State, in R. Rabin, Perspectives on The Administrative Process 16, 22-28 (1979). One source of program self-perpetuation is the so-called "iron triangle," an alliance between local interest groups, the bureaucracy, and supportive special committees in Congress.

16. The power of Congress to regulate interstate commerce rests ultimately on the inability of states to control actions beyond their borders. See NLRB v. Jones & Laughlin Steel Corp. 301 U.S. 1 (1937).

17. Cover letter to David Stockman from Education Secretary T.H. Bell transmitting Department's consolidation proposal; Bell, Comment, Block Grants: The Secretary Explains the Rationale for Consolidating Federal Education Programs, Education Times 2 (May 4, 1981); Representative John Ashbrook, Comment, Education Times 2

(Aug. 10, 1981).

18. Civil rights statutes which apply to schools and do not depend upon the presence of federal financial assistance are rare. The main one is 42 U.S.C. § 1983 (1976), which creates a private cause of action for violations of the Constitution and other federal laws. See Yudof, Liability for Constitutional Torts and the Risk-Averse Public School Official, 49 S. Calif. L. Rev. 1322 (1976). Some statutes which are commonly thought to be obligatory in fact apply on their face only to programs receiving federal financial assistance. They thus belong in the "any grantee" type of conditional grant discussed in the next paragraph. See especially Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1976) and Sections 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976). Although there may be no practical escape from such laws, in constitutional theory they may be regarded as exercises of the congressional spending power rather than congressional civil rights legislation. For a parallel, see, Katzenbach v. McClung, 379 U.S. 294 (1964). Whether such laws could be enacted pursuant to civil rights powers, or, indeed, are merely statutory codifications of constitutional requirements, is a different question. See note 25 infra.

19. E.g., The Emergency School Aid Act, 20 U.S.C. § 1601 (1976) (aid for desegregation).

20. This type of condition is sometimes called the "crosscutting requirement." Hastings, More Ways Than One: Federal Strategies to

Equalize Access in Education and Health Care Policy, (unpublished paper, prepared for the School Finance Project, U.S. Oept. of Education, Sept., 1981). Just how crosscutting Title IX is is a matter of dispute. See Rice v. Harvard College, ___ F.2d ___ (1st Cir., 1981)(50 USLW 2295, Nov. 17, 1981) (Sex discrimination barred solely in "program or activity" receiving federal funds).

21. 20 U.S.C. § § 1681-1686 (Supp. III, 1979).

22. 3 C.F.R 339 (1964-1965 Compilation), 30 Fed. Reg. 12319 (1965).

23. Family Education Rights and Privacy Act of 1974, 20 U.S.C. § 438(a)(1)(A) (1976). See Comment, 1976 Wis. L. Rev. 975.

24. The federal share of the estimated costs of complying with services for the handicapped mandated by PL-94-142, 20 U.S.C. § 1401 (1976), was about 12% in early 1981. Turnbull, Smith and Ginsburg, note 12 supra, at 400.

25. In New Mexico Assoc. for Retarded Citizens v. New Mexico, 495 F. Supp. 391 (O. New Mexico, 1980), the court held that § 504 of the Rehabilitation Act and its regulations required New Mexico to provide a free, appropriate education to all handicapped children. Under that holding, it would not help a state much to withdraw from 94-142, as New Mexico did, because § 504 applies if there is any federal assistance. The court also mentioned with apparent approval another district court case expressing the view that § 504 codifies constitutional requirements. Id., at 396.

26. All federal education programs impose some form of

uncompensated financial burden, if not through explicit matching requirements, such as vocational education, or direct service requirements, such as Title IX (uncompensated), or PL 94-142 (partially compensated), then through "implicit matching requirements," such as Title I's comparability requirement. Hill, Do Federal Programs Interfere With One Another?, (Rand Corporation Paper Series, P-6416, Sept. 1979).

27. See Barro, Federal Education Goals and Policy Instruments: An Assessment of the Strings Attached to Categorical Grants in Education, in M. Timpane, The Federal Interest in Financing Schooling 229 (1978).

28. Barro, note 27 supra, at 257-60.

29. The most conspicuous recent example is Chapter 2 of the Education Consolidation and Improvement Act of 1981, P.L. 97-35, Subtitle D, Sec. 551-96; 20 U.S.C. 3801 (1981).

30. "Nearly all such studies have found that a large fraction of external aid tends to be substituted for the local district's own revenue." Barro, note 27 supra, at 237.

31. See generally, Berman, Thinking About Program and Adaptive Implementation: Matching Strategies to Situations, in Why Policies Succeed or Fail 205 (Sage Yearbooks in Politics & Public Policy, H. Ingram & D. Mann eds., 1980); Berman, The Study of Macro- and Micro-Implementation, 26 (2) Pub. Policy 157 (1978); Elmore & McLauglin, Strategic Choice in Federal Education Policy (unpublished paper, 1981).

32. If possible, Berman recommends "matching, mixing and switching" implementation strategies. Berman, Thinking, note 31 supra, at 221.

33. See The Youth Act of 1980, § § 411-13, H.R. 6711, 96th Cong. 2d Sess., 126 Cong. Rec. 7846 (Aug. 26, 1980).

34. See Robert A. Kagan, Regulating Business, Regulating Schools: The Problem of Regulatory Unreasonableness (Project Report 81A-14, Institute for Research on Finance and Governance, Stanford U., 1981).

35. There is a gap in this paper compared to a full discussion of deregulation. In this section of the paper (on technique), I am focussing on tightening or relaxing degrees of legalism within existing forms, such as the conditional grant. Omitted is the possibility of switching to a completely different type of mixed form (not a pure deregulatory form such as discussed in Part II). Examples are loans and loan guarantees. See Hastings, note 20 supra. Although it is impossible to do justice to the problem in a footnote, in defense of the omission, I believe that relatively unregulated aid to individuals is best suited to "facilitative" government purposes rather than the innovative, counter-preferential, or capacity building purposes which characterize the federal educational role. See Clune & Lindquist, What Implementation Isn't: Toward A General Framework for Implementation Research, 1980 Wis. L. Rev. ___, ____.

36. See Birman, Case Studies of Overlap Between Title I and P.L.

94-142 Services for Handicapped Children (SRI International, Menlo Park, Calif., 1979); Hill, note 26 supra, at 17-19.

37. See Rodgers & Bullock, note 14 supra.

38. See National Institute of Education, Administration of Compensatory Education (1977); M. Kirst and R. Jung, The Utility of a Longitudinal Approach in Assessing Implementation: A Thirteen Year View of Title I ESEA, II Education Evaluation Policy Analysis (No. 5, Amer. Educ. Research Assoc., Sept.-Oct., 1980).

39. Reis and Bitterman, The Policing of Organizational Life (unpublished paper); K. Hawkins, Environment and Enforcement: The Social Construction of Pollution (Oxford U. Press, 1982) (forthcoming).

40. The importance of comparing one imperfect institution with another, instead of, by implication, with some nonexistent perfect institution, is stressed in Komesar, In Search of A General Approach to Legal Analysis, 79 Mich. L. Rev. 1350 (1981).

41. The central problem of regulatory unreasonableness, and therefore the prime cost of regulation, is often said to be that requirements suitable for controlling worst case offenders are applied to all, including those who would comply voluntarily or exceed minimum requirements. Turnbull, Smith and Ginsburg, note 12 supra, at 405; Kagan, note 31 supra; Bardach & Kagan, note 4 supra; Berman, From Compliance to Learning: Implementing Legally-Induced Reform (Institute for Finance and Governance, Stanford U., Aug., 1981).

42. Murphy, Differential Treatment of the States, A Good Idea or Wishful Thinking? (unpublished paper, Aug., 25, 1981).

43. This is one conclusion of Hyde & Clune. The Education Consolidation and Improvement Act of 1981: Revolution or Evolution (in progress). Functional regulation was repealed, while disfunctional regulation was retained or even added. See note 29 supra.

44. See text accompanying note 15 supra.

45. Note 33 supra.

46. See Clune, Courts and Teaching (unpublished paper, forthcoming as a chapter in a National Institute of Education collection).

47. 20 U.S.C. § 8806 (1976).

48. Note 33 supra.

49. The Youth Act, note 33 supra, contained such a mechanism. See also, Turnbull, Smith and Ginsburg, note 12 supra, at 417-21.

50. Berman, note 41 supra

51. See note 36 supra.

52. See Knapp, David, Finnan, Stearns, Peterson, Turnbull, The Cumulative Effects of Government Categorical Programs and Policies on Schools and School Districts: The Study Framework (SRI International, Project # 3590, November, 1981).