

## "Fifty Hands on Fifty Triggers"

Economic Interests, Social Policy, and the Logics of American Federalism

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American federalism fragments political will and authority. The architects of American politics strove for this -- arguing famously (in *Federalist X*) that limits on federal power and the reservation of responsibilities to the states would "make it less probable that a majority of the whole will have a common motive . . . or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other." This set the U.S. apart from both unitary Western European states and other federalist experiments (most notably Canada) in which regional governments were carefully circumscribed. The historical consequences of this constitutional choice are immense: weakened central government, fierce competition among regions and states for economic growth, and the disparate and fragmented motives of economic interests torn between encouraging competition among states and regions and escaping that competition through federal law.

This essay explores the logic of business collective action in the American federalist setting. Drawing upon a range of social policy debates, it suggests the conditions under which economic interests will either "bid up" or "bid down" national standards, and the ways in which American federalism exaggerates economic constraints on public policy. Put another way, this essays sits at the intersection of two problems: the notoriously "privileged" status of economic interests in American politics, and the oft-noted institutional weakness of the American state. As I argue below, the peculiarly American combination of business power and state weakness has meant that economic interests are at once stronger and weaker; their advantages over others (such as organized labor) and within the state are magnified, but their own organization -- as competitors, as industries, or as a class -- is also compromised.<sup>1</sup>

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<sup>1</sup> See Joel Rogers, "Divide and Conquer: Further 'Reflections on the Distinctive Character of American Labor Laws'" *Wisconsin Law Review* (1990): 43-98; Phillippe Schmitter, "Still the Century of Corporatism?" *Review of Politics* 36 (1974), 85-100; Graham Wilson, "Why is There No Corporatism in the United States?" in *Patterns of Corporatist Policy-Making*, edited by Gerhard Lehbruch and Phillippe Schmitter (Beverly Hills, 1982), 221-226; Robert Salisbury, "Why No Corporatism in America?" in *Trends Towards Corporatist Intermediation*, edited by Gerhard Lehbruch and Phillippe Schmitter (Beverly Hills, 1979), 213-219; and "Why No Corporatism in the

This paper has three parts. The first part sketches, in broad strokes, patterns of private and political organization in the United States -- establishing, in turn, the political privileges enjoyed by economic interests, and the regulatory competition encouraged by the logic and history of American federalism. The second part examines business response to federated regulation, and suggests a crude typology for the diverse pattern of business response. The third part uses an episode in very recent history -- the health care debate of the 1990s -- to suggest the complex and chaotic ways in which different economic interests, all with different stakes in federated regulation, might weigh in on the same political question.

### **The Bull in the China Shop: Business Power and State Weakness**

Business interests enjoy a “privileged” political status in American politics.<sup>2</sup> This privilege rests on both the generic logic of democratic capitalism and the peculiar logic of American democratic capitalism. Any system of democratic capitalism sets “capitalist” boundaries around “democratic” rule. “Business,” by virtue of its control over employment, investment, resource allocation, consumption, and commercialized public discourse, wields substantial political power. Politicians and voters depend upon economic growth, business investment, and business confidence. Governments can subsidize or sanction business behavior but, seeking stability and growth as a bottom line, they cannot challenge the premises of the economy itself. In turn, economic power shapes political participation, which demands time and resources, in numerous ways. This can be understood as both a “resource” constraint (those with money can invest in politics and control political information) and as a “demand” constraint (those with money have a greater stake in political outcomes, a greater incentive to be politically active). Some interests, in short, have the incentive and opportunity and ability to wield greater influence than the votes they might cast.<sup>3</sup>

The logic of democratic capitalism is exaggerated in an American setting which has always confused political rights and property rights, and which has always understood the

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United States?: Business Disorganization and its Consequences,” *Business and Economic History* 27:1 (Fall 1998), 29-46.

<sup>2</sup> This is hardly a novel assumption, but it is important to understand this “privilege” without recourse to the easy but intangible notions that politics (the state) can be reduced to a structural or instrumental reflection of economic power. As Theda Skocpol has pointed out, the “structuralist” argument fails on two counts: first, its essentially functional reasoning that the state will act in the interests of capitalism defies historical analysis (if not historical logic); second, its assumption that the state is consistently (across time and across national experiences) able to solve capitalism’s problems flies in the face of all we know about the historic and institutional weakness of the national politics in the United States. The solution, for Skocpol and others, has been to qualify or question the political power of economic interests, to stress instead the autonomy of politics and of political interests. There is, I would suggest, another way of sorting this out. Neo-Marxist state theorists are right to point out both the direct ties between political and economic power and the structural constraints which capitalism imposes upon its democratic forms. But they are wrong to argue or imply that this influence is necessarily successful. The point is not that powerful economic interests shape public policy in ways that prove ultimately beneficial to them; it is that these interests have an immediate stake and influence in politics which yields both direct returns *and* unintended and unhappy consequences. See Theda Skocpol, “Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal,” *Politics and Society* 10 (1982): 155-201.

<sup>3</sup> Charles Lindblom, “The Market as a Prison,” *The Journal of Politics* 44 (1982), 324-336; Lindblom, *Politics and Markets: The World’s Political-Economic Systems* (New York, 1977), 154-157, 170-200; Joshua Cohen and Joel Rogers, *On Democracy* (New York, 1982), 47-51; Anthony Downs, “An Economic Theory of Political Action,” *The Journal of Political Economy* 65 (1957), 135-150; Fred Block, “Beyond Relative Autonomy: State Managers as Historical Subjects,” *Socialist Register* (1980), 227-242; Jon Elster, *Ulysses and the Sirens: Studies in Rationality and Irrationality* (New York, 1979), 96-97.

“social contract” as little more than the sanctity of private contracts. The constituency-service, two-party political system invites economic influence, and indeed organizes political competition around material “investments” in parties and candidates -- an influence exemplified by, but certainly not confined to, direct campaign contributions. The material demands of partisan competition further narrow the boundaries of acceptable politics, not only by implicitly reminding legislators that such patronage is important but by distracting political attention from the task of governance to the task of fund-raising.<sup>4</sup> The absence of a social democratic tradition and the weakness of state institutions both reflect a history of disproportionate business influence, and exaggerate and contribute to it. This has compounded (among other things) the peculiar anti-union belligerence of American managers, the short-sightedness of the labor movement, the glacial growth of the American welfare state, the ability of economic interests (widely noted by conservative and radical analysts alike) to dominate and distort political regulation of their activities, and the ease with which established interests have been able to erect legal and cultural obstacles to dissent.

At the same time, business influence in the United States is invariably exercised in a shortsighted, piecemeal manner -- resulting not in the routine rationalization of capitalism, but in petty or profound confrontations between different fractions of capital. Our understanding of business influence rests upon an appreciation of both the unique political advantages enjoyed by economic interests *and* their pervasive organizational problems. And our understanding of the larger contours of “corporatism” in the United States rests upon an appreciation that business, like labor and politics, is woefully disorganized, while at the same time able to ensure that *its* disorganization is the primary concern and driving force of national politics. Ironically, the ability of American business interests to keep the state and labor at bay has exaggerated business hostility toward both. In a setting marked by low-density decentralized unionization and sporadic political intervention, the costs of confronting labor or the state are borne unevenly across the economy. And business cannot, even if it wants to, consistently rely on the state or the labor movement to socialize or even out competitive costs.”<sup>5</sup> For these reasons we should neither be surprised by business opposition to political intervention (which is often simply an attempt by some producers to regulate the behavior of, or impose costs on, others), nor too eager to take business opposition as evidence of the autonomy of politics. Indeed the American experience is a testament to the possibility that business may enjoy immense political privilege with little lasting political success; that the state reflects not the prescience of capitalists, but their chronic disorganization and short-sightedness. The ruling class rules, but not very well.<sup>6</sup>

This pattern of business power and disorganization is both compounded and complicated by American federalism. “The gears of politics and economics,” as General Electric’s Owen Young noted in the early years of the Great Depression, “do not mesh well.” Indeed the

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<sup>4</sup> William Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, 1991), 11-36; Thomas Ferguson, *Golden Rule: The Investment Theory of Party Competition and the Logic of Money-Driven Political Systems* (Chicago, 1995), 17-172; Michael Goldfield, “Worker Insurgency, Radical Organization, and New Deal Labor Legislation,” *American Political Science Review* 83 (1989): 1262-1264.

<sup>5</sup> Rogers, “Divide and Conquer,” 43-98; Sanford Jacoby, “American Exceptionalism Revisited: The Importance of Management,” in *Masters to Managers: Historical and Comparative Perspectives on American Employers*, ed., Sanford Jacoby (New York, 1991), 173-187.

<sup>6</sup> I develop this point in Colin Gordon, *New Deals: Business, Labor, and Politics, 1920-1935* (Cambridge, 1994); and in Colin Gordon, “Why No Corporatism in the United States? Business Disorganization and its Consequences,” *Business and Economic History* 27 (1998), 29-46.

economic crisis of the 1930s underscored the central riddle of modern American economic policy: the “commerce clause” reserved regulatory authority for the states, even as the economy (as one reformer noted) was clearly “not organized according to geographical or political subdivisions . . . [i]ndustries reach across states, sections, and even the continent.”<sup>7</sup> In this atmosphere, individual States treat each other as economic and political competitors, pursuing policies which reflect local business goals but which often prove destructive and shortsighted in a national context. States are anxious to attract jobs and investment and invariably unwilling to risk business confidence through unilateral regulation, but find interstate cooperation virtually impossible to generate or enforce.<sup>8</sup> In turn, as State policies create disparate competitive conditions, business anxieties and demands are increasingly (or simultaneously) focused on the threat or promise of federal politics. And federal politics becomes a complex game of balancing or combining the organizational goals of economic interests with the organizational goals of States and the interests that they represent.

States, of course, do not compete as equals: uneven regional development has also meant that political forces generated by economic growth (including class conflict, business influence, and institutional pressures) are also uneven. One- or two-industry states have simpler economic goals and interests than more diversified states, although strategy will hinge somewhat on whether business patrons have located according to geographic considerations (forests, oil fields), or political concessions (tax breaks, “right to work” laws). As long as production is not confined to a single state, uneven legislation worsens competitive conditions and invites firms to exploit interstate anxieties and variations in state law. States beginning with different resources invariably end up farther apart on policy -- especially fiscal and regulatory -- questions. And industrial regulation is least likely where it is most needed, because the social impact of an industry is invariably trumped by its political influence.<sup>9</sup> Through much of the modern era, for example, diversified industrial states have pressed the expansion of the federal commerce power while Southern and smaller states have tried to protect or solicit business in a tax-breaking, charter-mongering “race to the bottom.”<sup>10</sup> In turn, States often direct their regulatory efforts not

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<sup>7</sup> Owen Young to Hoover, Presidential Personal File (PPF) 207, Herbert C. Hoover Papers, Herbert C. Hoover Presidential Library (HCHPL), West Branch, IA; Frank Graham, “The Grants-in-Aid Federal-State Cooperative Plan” (1934), Box 18, Committee on Economic Security Papers, Records of the Social Security Administration, RG 47, National Archives.

<sup>8</sup> On interstate agreements see Northcutt Ely, *Oil Conservation through Interstate Agreement* (Washington, 1933), 166-213, 359-393; Jane Perry Clark, *The Rise of A New Federalism* (New York, 1938), 6-7, 294; Clark, “Interstate Compacts and Social Legislation,” *Political Science Quarterly* 50 (1935): 502-524; Clark, “Interstate Compacts and Social Legislation II: Interstate Compacts after Negotiation,” *Political Science Quarterly*, 51 (1936): 36-60; National Industrial Conference Board, *Industrial Progress and Regulatory Legislation in New York* (New York, 1925).

<sup>9</sup> Kevin Cox, “The Social Security Act of 1935 and the Geography of the American Welfare State” (Paper presented to the Association of American Geographers, Atlanta, 1993), 3-4; David Brion Robertson, “The Bias of American Federalism: The Limits of Welfare State Development in the Progressive Era,” *Journal of Policy History* 1:3 (1989), 272-274; Aaron Wildavsky, “Federalism Means Inequality: Political Geometry, Political Sociology, and Political Culture,” in *The Costs of Federalism*, ed., Robert Golembiewski and Aaron Wildavsky (New Brunswick, 1983), 55-72; Richard Bense, *Sectionalism and American Political Development, 1880-1980* (Madison, 1984); Elizabeth Sanders, “Industrial Concentration, Sectional Competition, and Antitrust Politics in America, 1880-1980,” *Studies in American Political Development* 1 (1987): 146.

<sup>10</sup> Robertson, “Bias of American Federalism,” 273-274; William Graebner, “Federalism in the Progressive Era: A Structural Interpretation of Reform,” *Journal of American History* 64 (1977): 341-357; Peter Temin, “Free Land and Federalism: American Economic Exceptionalism,” in *Is America Different? A New Look at American*

at their own economies, but -- through interstate cooperation or federal policy -- at less restrictive regulation of industry in competing States. Even those States recognizing the need for uniform legislation, in other words, cannot be counted on to cooperate: some seek the uniformity of unfettered competition (no regulation); some seek the uniformity of formal cooperation (federal regulation). In any attempt to sort this out, State legislatures, the House of Representatives, the Senate, the Executive Branch, and the party system all represent regional and state interests in subtly different ways. State and regional interests are profound, but not officially recognized, in national politics. They wield their influence as lobbyists or through the peculiarities of the Congressional system, but there is no formal process (as, for example, in Canada) of sorting out regional claims to federal cash and favors.<sup>11</sup>

Federalism exaggerates business's political clout by both magnifying business and political anxieties over competitive disadvantage and undermining the organizational efforts of everyone else. Over time, states have proven far more susceptible to parochial interest-group pressure. Federal policies (consider the history of antitrust law, labor law, and environmental standards) have been routinely flouted or dismantled by investment- and job-anxious state legislatures. The question of whether investors are as footloose as they have historically claimed, in this sense, is less important than the fact that State governments have invariably taken such threats seriously -- both by accommodating existing business interests or maintaining an "attractive business climate" to lure new ones. Competitive federalism has discouraged solutions that run up against the anxieties of the states, or the jurisdictional limits of federal power. At the same time, federalism makes it harder for other interests to confront or challenge business' political privilege. Federated politics have encouraged labor and consumer and civil rights organizations (not to mention the mainstream political parties) to forgo peak national associations in favor of often quite diverse state-level organizations. And federated economic regulation has historically presented radical reformers with the riddle of "socialism in one state." In the much-touted "laboratories of American democracy" many experiments were simply too dangerous.<sup>12</sup>

Importantly, American federalism is not a static constitutional construct. The division of authority between the states and the national government has been constantly contested -- indeed, no Administration since the New Deal has failed to announce a "new federalism" of

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*Exceptionalism*, ed. Byron Shafer (New York, 1991), 87-88. On state and regional tax strategies, see Paul J. Hartman, *Federal Limitations on State and Local Taxation* (Rochester, 1981), 6; Hartman, *State Taxation of Interstate Commerce* (Buffalo, 1953), 22-36; Walter Hellerstein, *State and Local Taxation of Natural Resources in the Federal System* (New York, 1986), 5-27; Philip J. Wood, *Southern Capitalism: The Political Economy of North Carolina, 1880-1980* (Durham, 1986), 126-133, 137-138; Harold C. Ostertag, "General Possibilities of Interstate Tax Cooperation," *Tax Relations Among Government Units* (New York, 1938), 50-63; James T. Patterson, *The New Deal and the States: Federalism in Transition* (Princeton, 1969), 92, 99; B. Guy Peters, "The Development of the Welfare State and the Tax State," in Douglas Ashford and E.W. Kelley (eds.), *Nationalizing Social Security in Europe and America* (Greenwich, 1986), 219-243; Clarence Heer, "Financing the Social Security Program in the South," *Southern Economic Journal* 4 (1937-38): 292-302; Mark Leff, *The Limits of Symbolic Reform: The New Deal and Taxation, 1933-1940* (New York, 1984); James Cobb, *The Selling of the South: The Southern Crusade for Industrial Development, 1936-1980* (Baton Rouge, 1982), *passim*.

<sup>11</sup> Christopher Leman, *The Collapse of Welfare Reform: Political Institutions, Policy, and the Poor in Canada and the United States* (Cambridge, 1980), 16-17, 20-21, 142-145.

<sup>12</sup> Harry Scheiber, "State Law and 'Industrial Policy' in American Development, 1790-1987," *California Law Review* 75:415 (1987), 434-5; Robertson, "The Bias of American Federalism," 261-262, 278; Martha Derthick, "Up-To-Date in Kansas City: Reflections on American Federalism" *PS: Political Science and Politics* (December 1992), 671-675.

some description. Over time, in other words, business interests have faced many federalisms: In the era of "provincial mercantilism" which reigned into the late nineteenth century, economic interests dealt largely with solicitous state governments. National corporations and national economic policy (banking, antitrust) became more prominent after the Civil War but formal federal attention remained limited to tariffs, transportation and banking regulation, and (through the Federal Trade Commission and antitrust law) the twin evils of competition and monopoly. Progressives argued famously and futilely for a more rigorous and expansive federal role, and many pressed for more explicit federal control over production in the wake of World War I, using federal authority over railroads, government contracts, and the District of Columbia as an entering wedge. But the core legal assumption of the decades between the Civil War and the Great Depression was that *both* State and federal governments should be sharply constrained, the former on the basis of freedom of contract (as in *Lochner*) and the latter on the basis of the commerce clause (as in *Schechter*). In the ensuing legal vacuum, economic interests were able to play state governments off against each other, secure in the knowledge that the Courts were eager to slap the regulatory hand of either level of government.<sup>13</sup>

Through the New Deal, the commerce clause was redefined (in some cases temporarily, in some case permanently) to encompass the national impact of price, competition, and labor disturbances, and (turning the Sherman Act on its head) competitive practices as a restraint of trade. The federal government carved out new responsibilities for labor law, welfare, regional development, and agricultural stability. In many respects, the New Deal capped a long offensive by some economic interests against competitive and inconsistent State regulation. States with stricter or more costly regulatory legislation pressed for federal legislation that would spread the costs of these policies to other regions and other firms. Industries organized beyond the boundaries of a single State found stability impossible as long as marginal competition could thrive in "backward" regions. Progressive States found the absence of regulation elsewhere equally corrosive in terms of investment, industrial location, and business confidence. The long legal battle which culminated in the New Deal established the practice and precedent of relatively broad federal mandates, pre-emptions, and conditions on federal aid, and turned inside out a fiscal system which (before the 1930s) had been dominated by local expenditures and few intergovernmental transfers. At the same time, New Deal federalism did not simply reshuffle federal and state roles; most of the new federal responsibilities were genuinely "new" (they did not displace state responsibilities), and many of the new federal programs created new and concurrent state responsibilities as well.<sup>14</sup>

From the late New Deal through the 1960s, economic interests confronted a different kind of federalism. The federal role in economic policy increasingly rested on a commitment to

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<sup>13</sup> Scheiber, "State Law and 'Industrial Policy' in American Development," 419-426; Stephen Gardbaum, "New Deal Constitutionalism and the Unshackling of the States," *University of Chicago Law Review* 64:2 (Spring 1997), 483-566; Cass Sunstein, "*Lochner*'s Legacy," *Columbia Law Review* 87 (1987), 873-874; Eldon Eisenach, *The Lost Promise of Progressivism* (Lawrence, 1994), *passim*.

<sup>14</sup> See Gordon, *New Deals*, *passim*; Scheiber, "State Law and 'Industrial Policy' in American Development," 432-3; John Joseph Wallis, "The Birth of the Old Federalism: Financing the New Deal, 1932-1940," *Journal of Economic History* 44 (1984), 139; National Recovery Administration, Division of Review, "Possibility of Government Contract Provisions as a Means of Establishing Economic Standards," *Work Materials*, #26 (Washington, 1938); testimony of Robert H. Jackson, in U.S. Congress, Senate Committee on Education and Labor, House Committee on Labor, *Fair Labor Standards Act of 1937* (Washington, 1937), 9-88; NRA, Division of Review, "Cases on Intrastate Activities . . ." *Work Materials* #14 (Washington, 1939); U.S. Senate, *Constitutionality of the National Labor Relations Act*, S. Doc. 51, 75/1 (Washington, 1937); Gardbaum, "New Deal Constitutionalism," 483-486.

national economic growth and its regulation, and an elaborate pattern of revenue sharing that ran from the late New Deal, through the Great Society and into the 1970s. These decades saw the elaboration of a wide range of federal/state cooperation, including federal adoption of state laws, state adoption of federal laws, and numerous cases of shared law, finance, and administration -- ranging from the Social Security system's grants-in-aid, to civil rights compliance, to labor relations. And these decades saw regionalism gradually trumped by civil rights as debates about individual rights increasingly focused on equality within the state rather than freedom from it. Through the Great Society and beyond, federalism was less cooperative and more coercive as federal aid to states or cities was displaced by direct, targeted aid to persons.<sup>15</sup>

By virtue of its new fiscal prominence, its ability and willingness to leverage state laws or cooperation, and its role as a guarantor of individual rights, the federal government confronted economic interests (and vice versa) on starkly different terms. But the reality and politics of economic decline almost immediately challenged the premises of the Great Society (and the "creative federalism" which paid for it. In the wake of the economic crisis of 1968, fiscal anxieties and doubts about the efficacy of federal power animated Nixon's "New Federalism," Carter's "New Partnership Federalism," Reagan's "New Federalism," and 1994's "Contract with America." Social policy federalism was driven both by local demands for autonomy (especially in the New Deal era) and by the fiscal imperative (especially after the mid-1960s) that state governments bear more of the burden. The politics of "fend for yourself" federalism have reshaped the ways in which economic interests confront the federal system, the prospects for federal solutions, and the competitive dynamics of state regulation. Federal social policy (consider TANF, Medicaid, the Workforce Investment Act) increasingly consists of setting broad standards or preempting states laws which might debase (or overreach) those standards.<sup>16</sup>

Its historical permutations aside, federalism has clearly shaped the relationship between business and government in fundamental ways. First, it has shaped patterns of political influence and representation. Business influence is magnified by its ability to play on the anxieties of state and regional politicians. But business organization is also undermined by state weakness and fragmentation. Assured that the state will be relatively toothless when it threatens, economic interests also find (to their dismay) that it is also lacks bite when it is needed. Second, federalism shapes the administration of economic policy. Economic interests find it relatively easy to "capture" the regulatory apparatus at the state level. But many economic and political concerns sprawl beyond state borders -- involving these same interests in a complex and uncertain chaos of state, regional, and national authority and anxieties and incentives. Again, privileged political status is undermined by the uncertainty and complexity of the political system. Third, federalism yields uncertain consequences -- in large part because its political and legal premises can and have changed dramatically over time. Without the stability of either peak

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<sup>15</sup> Christopher King, "Federalism and Workplace Policy Reform," *Publius* 29:2 (Spring 1999), 53-54; John Kincaid, "From Cooperation to Coercion in American Federalism: Fragmentation and Preemption, 1780-1992," *Journal of Law and Politics* 9 (Winter 1993): 333-430; Michael Brown, *Race, Money, and the Welfare State* (Cornell, 1999).

<sup>16</sup> See Jane Perry Clark, "Some Interrelationships of Federal and State Law" (1934), Box 12, CES Working Papers, SSA Records; Martha Derthick, "Crossing Thresholds: Federalism in the 1960s," *Journal of Policy History* 8 (1996), 64-80; Thomas Swartz and John Peck, *The Changing Face of Fiscal Federalism* (New York, 1990); Demetrios Caraley, "Changing Conceptions of Federalism," *Political Science Quarterly* 101 (1986), 289-295; Martha Derthick, "The Future of the Public Sector: Whither Federalism?" (The Urban Institute, 1997); Brown, *Race, Money, and the Welfare State*, 22-23; Scheiber, "State Law and 'Industrial Policy' in American Development," 437-441.

private organizations or strong public institutions, economic interests can do little more than exercise their political advantage in piecemeal and short-sighted ways -- hoping they are not lost in either the tangle of federated political authority or the cacophony of competing private and regional claims.

### **Patterns of Business Response**

Not surprisingly (given the range of incentives, interests, circumstances and conditions) economic interests have confronted the federal system with a range of strategies, anxieties and expectations. Different industries or types of industries -- characterized, for example, by capital- or labor-intensity, or by local, regional, national, or international scope of their markets -- might be expected to demand or resist different kinds of political solutions. Different industries have different competitive characteristics -- shaping their interest in political regulation and their ability to absorb the costs of regulatory solutions. And individual firms within a given industry have disparate political concerns: leading firms may be drawn to political solutions that promise to squeeze out marginal firms; marginal firms may be drawn to regional political strategies that facilitate “cutthroat” competition. All of this, in turn, is shaped by the existing regulatory environment and the way in which various interests understand their own political clout (in state, regional, and national politics) and their short- and long-term prospects for controlling or shaping political solutions.

In the crudest sense, such circumstances and calculations give some interests the incentive to take advantage of fragmented responsibility and political anxieties by “bidding down” political regulation. It gives others the incentive to escape the chaos of local regulation by “bidding up.” And it leaves many, attracted by the prospect of national solutions but repelled by their costs and the possibility that they will fail, in an “all or nothing” dilemma -- a pattern neatly captured by the tenure of the National Recovery Administration in the early 1930s.<sup>17</sup> More precisely, we might identify four distinct logics of business response; four distinct strategies for confronting federalism which are shaped by the concerns and liabilities of particular economic interests, and by the particular historical circumstances within which those concerns and liabilities are played out.

### *The Race to the Bottom: Resisting Regulation*

The political culture of “American Individualism” is both notorious and peculiar: nowhere (among industrialized democracies) is the political threat to private capital weaker, and nowhere is the antistatist rhetoric more ferocious. In part, this reflects the intellectual legacy of colonial pamphleteers who abstracted their struggle with England as a larger question of freedom from the state. In part, this reflects the relative material wealth and self-sufficiency of the nation’s first century and a half, and the fact that sustained economic growth preceded the emergence of a central government with serious regulatory responsibilities.<sup>18</sup> The ideology of “laissez-faire” reflects both a fierce and rigid rejection of state intervention on principle, and business expectations surrounding the form and function (and often failure) of that intervention. In this sense, the federated state was not necessarily more threatening to economic interests, but it was certainly less likely to be useful -- especially for those whose political or competitive liabilities

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<sup>17</sup> See Gordon, *New Deals*, chapter 6.

<sup>18</sup> Temin, “Free Land and Federalism,” 87-88.

spilled beyond the boundaries of a single state. For these reasons, many economic interests simply dug in against any form of political regulation.<sup>19</sup>

Not surprisingly, interests have historically resisted or resented regulation by any level of government when that regulation was likely to hurt them competitively, to impose costs of compliance which they could not pass on to customers, or to trespass on managerial authority. This, for example, was the position of smaller, local food processors and packers on the question of “pure food” laws in the late nineteenth and early twentieth century: federal or state inspection imposed standards and costs which they were less able or willing to meet than their corporate competitors. This was the position of southern mill owners on the child labor question in 1916 and after; having successfully staved off State-level regulation of their labor markets, they were especially anxious about a national law (or constitutional amendment) which could wipe out a carefully cultivated competitive advantage. This has been the position of resource industries and others in response to the “new social regulation” of the last generation: a case in which the costs of regulation are borne by those within the industry, while the benefits of that regulation are enjoyed by neither some firms nor the industry as a whole.<sup>20</sup> And this has been the position, in recent years, of manufacturers on the issue of workers compensation: many employers supported the passage of compensation laws early in this century as a means of escaping (or at least regularizing) liability claims; many employers, now faced with spiraling costs, are trying to pit states against each other in a competitive scramble to lower standards and premiums.<sup>21</sup>

At the same time, federalism often discouraged those who might benefit from regulatory interventions from supporting them. This was especially true in the decades before the New Deal, when a literal and narrow construction of the commerce clause forestalled the option of federal regulation. Under such political and legal constraints, those inclined towards political or regulatory solutions often saw state action (the only political option) as more trouble than it was worth. Before 1938, for example, state regulation of hours and wages invoked constant controversy -- in part surrounding the sanctity of private contracts, and in part surrounding the question of whether neighboring or competing states would follow suite or simply reap a competitive advantage. Efforts by leading match manufacturers to address the health risks of phosphorous were distracted by the assumption that any legislative solution would result in an uneven state-by-state ban and the specter of degenerative competition. Interest by some leading northern textile interests in child labor law was always premised on the “all or nothing”

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<sup>19</sup> See David Vogel, “Why Businessmen Distrust Their State: The Political Consciousness of American Corporate Executives,” *British Journal of Political Science* 8 (1979?): 45-78; Gordon, *New Deals*, 166-203, 280-287, 294-299.

<sup>20</sup> Gabriel Kolko, *The Triumph of Conservatism* (Chicago, 1963), 108-110; Arden Lea, “Cotton Textiles and the Federal Child Labor Act of 1916,” *Labor History* 16 (1975): 485-494; Graebner, “Federalism in the Progressive Era,” *passim*.

<sup>21</sup> On the passage of compensation laws, see James Weinstein, *The Corporate Ideal in the Liberal State* (Boston, 1968), 40-61; Robert Asher, “Business and Worker's Welfare Relief in the Progressive Era: Workmen's Compensation in Massachusetts, 1880-1911,” *Business History Review* 43 (1969): 452-475; Asher, “Radicalism and Reform: State Insurance of Workmen's Compensation in Minnesota, 1910-1933,” *Labor History* 14 (1973): 19-41; Robert Wesser, “Conflict and Compromise: The Workmen's Compensation Movement in New York, 1890-1913,” *Labor History* 12 (1971): 345-372; and Joseph Tripp, “An Instance of Labor and Business Cooperation: Workmen's Compensation in Washington State,” *Labor History* 17 (1976): 530-550. On recent “reform” efforts, see Robert Weissman, “Bad Claims on Workers’ Comp,” *The Nation* 265:15 (10 November 1997), 22-26; Meg Fletcher, “Ballot Battle in Ohio: Employers Gird For Fight Over Effort to Kill Workers’ Comp Reforms,” *Business Insurance* 31 (8 Sept. 1997), 1; and Fletcher, “Employers Turn to State Legislators for Relief,” *Business Insurance* 31 (19 May 1997), 48.

proposition that a federal law would erase the competitive advantage of the South; in the absence of federal law, northern interests dug in against state laws as well. And a Progressive Era flurry of interest in state-level health insurance for workers counted some employers (willing to socialize the costs of employee illness) among its early proponents, but ultimately evaporated in the face of both opposition from insurers and state manufacturers associations and the fragmentation of its natural allies (organized labor and organized medicine) along state lines.<sup>22</sup>

In each case, opposition to political intervention is inspired less by ideological fealty to the doctrines of individualism and laissez-faire than by a frantic calculation of the costs of political solutions, and of the likelihood (in an atmosphere of fragmented political responsibility) that they will succeed. This ambivalence about the state animated not only business-government relations, but the expectations of other economic and social interests as well. "You cannot pass a general eight hour day without changing the constitution of the United States and the constitution of every state in the union," lamented one union leader in 1894, ". . . I am opposed to wasting our time for legislation being enacted for a time possibly, after we are dead."<sup>23</sup> In this sense, business opposition to economic or social regulation simply reflected circumstances under which the costs of that regulation (especially fragmented state regulation) exceeded its benefits. Economic interests can and will turn to politics to solve their own organizational or competitive problems, but they will be reluctant to do so when the political system replicates or reinforces the disorganization of the market.

### *The Haven of the States: Resisting Federal Regulation*

For some, state regulation remained a viable option. Industries, such as construction, whose competition did not spill beyond state boundaries, were often satisfied with local or state regulation. Industries for whom relocation (or the threat of relocation) was not an option were often forced to deal with state legislatures. This was especially true of resource industries, although the regional character of lumbering or oil created complex problems of interstate cooperation in which leading firms were constantly juggling the competitive chaos of state regulation, the toothless prospect of regional agreements, and the prospect of federal intervention.<sup>24</sup> On some issues, such as incorporation law, economic interests clearly felt that competitive state policies worked to their advantage.<sup>25</sup> And for some interests the advantages of

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<sup>22</sup> Graebner, "Federalism in the Progressive Era," *passim*; David Moss, "Kindling a Flame Under Federalism: Progressive Reformers, Corporate Elites, and the Phosphorous Match Campaign of 1909-1912," *Business History Review* 68 (1994), 246-247, 259-26. On health insurance, see Robertson, "The Bias of American Federalism," 280-285; Ronald Numbers, "The Third Party: Health Insurance in America," in *The Therapeutic Revolution: Essays in the Social History of American Medicine*, edited by Charles Rosenberg and Morris Vogel (Philadelphia, 1979), 177-180; "The American Association for Labor Legislation and the First Health Insurance Movement," handwritten notes; New York State League of Women Voters, "Report and Protest . . . New York League for Americanism," both in Box 209, Edwin Witte Papers, State Historical Society of Wisconsin; John Andrews, "Progress Towards Health Insurance" (1917), American Association for Labor Association Papers (microfilm), reel 62.

<sup>23</sup> Quoted in Gary Marks, *Unions in Politics: Britain, Germany, and the United States in the Nineteenth and Early Twentieth Centuries* (Princeton, 1989), 221.

<sup>24</sup> See Gordon, *New Deals*, 55-68; Gary Libecap, "The Political Economy of the Establishment of the Interstate Oil Cartel," in *Emergence of the Modern Political Economy*, ed. Robert Higgs (Greenwich, 1985), 53-81.

<sup>25</sup> See Christopher Grandy, "The Economics of Multiple Governments: New Jersey Corporate Chartermongering, 1875-1929," (Ph.D., Berkeley, 1987), 4, *passim*; Martin Sklar, *The Corporate Reconstruction of American Capitalism: The Market, The Law, and Politics* (New York, 1988), 207-229.

state-level regulation, including an often cozier and less-contested relationship with state legislators and officials, clearly outweighed the administrative or competitive disadvantages.

Consider the insurance industry. Through the 1940s, the American insurance industry grew and thrived under a system of state regulation, in large part because state insurance commissions were shaped and staffed by the industry itself. In 1945, the Supreme Court (*U.S. v Southeastern Underwriters*) ruled that the business of insurance was interstate in character -- a decision which encouraged the FTC to investigate advertising practices, pressed Congress to legislate a reaffirmation of state authority, and prodded the industry to an anxious and elaborate defense of state jurisdiction.<sup>26</sup> In the early 1950s, this sparked the creation of the Health Insurance Association of America, a lobbying organization directed at the outset to “go all out in its attack on FTC intrusion and in its support of a state system of regulation.” For health insurers, the issue was not simply a jurisdictional squabble over rates or advertising. Postwar efforts to expand the Social Security system, or at least mop up around its edges, repeatedly raised the specter that federal programs or federal spending would invite a federal regulatory role. “It seems extremely unlikely,” argued one HIAA executive in response to a federal reinsurance proposal in 1954, “that any type of federal program involving private insurers could be developed without intolerable interference and regulation by the Federal Government.”<sup>27</sup>

While the HIAA’s defense of state regulation was clear and consistent, the interests of its individual members varied according to their own strategic and competitive interests. Some smaller insurers remained anxious about the scope of state regulation and even voiced familiar concerns that rate regulation could not be regulated by the states without introducing state-by-state inequities and the “buying and bootlegging of policies across state lines.” Larger companies, by contrast, often saw uniform state law and self-regulation as the only way of staving off federal intervention and hoped that uniform state laws might replicate the advantages of federal standards without conceding that insurance constituted interstate commerce. But even among the large companies, some argued that “any attempt by the states to be uniform would fail as a result of political pressure” and would serve as little more than “an invitation to the federal government to step in,” while others winced at the prospect of negotiating new state laws: “I could contemplate sitting down with one government to figure out one question [rate regulation] but I am dismayed at the thought of sitting down with fifty governments.” Behind the HIAA’s lobbying, the industry remained anxious that the actions of smaller firms might force federal action, or that the interests of the larger firms had outgrown simple state regulation. “On the issue of the effectiveness of state regulation,” lamented a Travelers executive, “we will all sink

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<sup>26</sup> The McCarran-Ferguson Act of 1945 struck a compromise by upholding state regulation of insurance and shielding state regulation from the commerce clause; the states, in other words, could regulate insurance without worrying that such regulation might be found to discriminate against out of state carriers or obstruct interstate commerce. See Wendy Parmet, “Regulation and Federalism: Legal Impediments to State Health Care Reform,” *American Journal of Law and Medicine* 19 (1993), 126-7.

<sup>27</sup> The HIAA’s anxieties are drawn from “Motion for Leave to File Brief” (14 November 1956), Box 26; files of the Subcommittee on FTC Jurisdiction (1956-1961), Boxes 26-27; Moses Hubbard to Orville Grahame (2 November 1956), Box 26; HIAA correspondence files, Box 19; Confidential Report of the ALC-HIAA-LIAA Task Force on Medicare for the Aged (1/8/65), Box 25, all in Orville Grahame Papers, University of Iowa Special Collections; AMA News Release (28 November 1954), Box 235, Decimal 901, Federal Security Agency, Office of the Administrator (General Classified Files, 1951-1955), Records of the Department of Health, Education, and Welfare, RG 235, National Archives; Memo for Grahame (16 March 1955), Box 17, Grahame Papers.

or swim together, whether we like it or not. If we cannot agree among ourselves on this subject then we not only invite, but in effect require, the establishment of a federal regulatory body.”<sup>28</sup>

*The Race to the Top: Fleeing State Regulation*

In some circumstances and for some interests, as I have argued, federalism might heighten fears of any level of government intervention or encourage interests to exploit their advantage at the state level. A third response, increasingly common as the federal government won a more elastic interpretation of the commerce clause, found economic interests fleeing state regulation for the stability and uniformity of federal regulation. This was a common strategy for those who feared the radicalism of state governments, for those who saw uneven state regulation as at best a headache and at worst another kind of competitive threat, and for those who saw federal intervention as the only solution to the competitive riddle of the low-wage South. While these interests generally agreed with their stridently *laissez-faire* colleagues that state-level action created more problems than it solved, their competitive or organizational problems demanded some sort of political solution. For these reasons, they preferred to “bid up” to federal regulation rather than “bid down” to the lowest common denominator. This was the logic in the late nineteenth century by which leading railroads saw federal rate regulation as both a solution to their own competitive troubles and a defense against uneven (and potentially more radical) state laws. It was the logic in the middle years of the twentieth century by which leading oil firms saw federal conservation law as the only way to address a savagely competitive and inefficient pattern of private exploitation and interstate competition. And it was the logic in the late twentieth century by which some employers saw national health legislation as an escape from the piecemeal chaos of state action: “Some of the proposals being bandied about in Washington may seem like castor oil for Corporate America,” observed *Business Week*, “but business lobbyists just might decide they taste better than what the states are prescribing.”<sup>29</sup>

Perhaps the best example of this business strategy in a social policy debate is the passage of the Social Security Act in 1935.<sup>30</sup> Before 1935, private and public social policy varied widely by state, region, industry and firm. Some firms had experimented with “welfare capitalism” in the early 1920s. And some states had experimented with state pension and unemployment laws by the late 1920s and early 1930s. The State laws reflected local business goals but also created their own political and economic problems: just as welfare capitalists saw their paternalism evolve into competitive disadvantage, progressive states (and firms in those states) bore the economic burden of scattered and uncoordinated state law. By the late 1920s, the competitive strategies of firms were intertwined with the competitive strategies of states and regions. State legislation was crowded into industrial states (primarily in the Northeast and

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<sup>28</sup> Orville Grahame to Byron Elliott [John Hancock] (10 October 1946), Box 17; Minutes of the Executive Committee Meeting, Health and Accident Underwriters Conference (4 Oct. 1954), Box 17; Regulatory Files (1944-1960), Box 19; Grahame to Byron Elliott [John Hancock] (10 October 1946), Box 17; Grahame to Harry Bates [MetLife] (24 October 1946), Box 17; Moses Hubbard to Grahame (22 April 1959), Box 26, all in Grahame Papers.

<sup>29</sup> On the railroads, see Gabriel Kolko, *Railroads and Regulation, 1877-1916* (Princeton, 1965), 7-44, 217-226; on the oil industry, see Gordon, *New Deals*, 55-62; on health reform in the 1990s, see *Business Week* (17 Aug. 1992): 28.

<sup>30</sup> I have made this argument, in more detail, in Colin Gordon, “New Deal, Old Deck: Business and the Origins of Social Security, 1920-1935,” *Politics and Society* 19:2 (1991), 165-208; and Gordon, *New Deals*, 240-279. See also Peter Swenson, “Arranged Alliance: Business Interests in the New Deal,” *Politics and Society* 25:1 (1997), 66-116.

Midwest) in which the threat of industrial conflict made private and public welfare necessary. And, as welfare capitalism in Northern firms became welfare policy in Northern states, the absence of such legislation in the South became a cherished political and economic advantage.

Business interests were forced to juggle the legislative conditions of certain states and the competitive conditions of certain industries. Labor-intensive and regionally competitive industries, such as northern textile mills, hoped a federal law would regulate competition by imposing higher labor costs on competitors. Many of the early champions of welfare capitalism preferred federal standards to the heavy hand of unions or the inconsistent grip of state law and, more directly, hoped a federal law would both relieve them of the costs (and competitive liabilities) of private and state plans. Looking beyond their own competitive conditions, retailers and consumer goods firms hoped to buttress aggregate demand, and internationalists (especially banks and capital-intensive industry) were willing to exchange wage and welfare concessions for freer trade. "If you wait for state legislation," as General Electric's Gerard Swope argued "you are bound to have different laws enacted in different states, with, therefore, varying burdens upon the industries who have to compete with each other across state lines." In a protected national economy, the regulatory logic of federal welfare law was clear: "The plea of certain business interests that the time is not ripe [for social security] is a mistaken one," continued Swope, "so long as the legislation is applied on a nationwide basis, it makes no difference to industry that unemployment insurance [and pensions] may slightly increase costs."<sup>31</sup> For their part of course, many small firms and Southern political and economic interests saw themselves as the target of this logic, and resisted efforts to socialize or nationalize the costs of industrial welfare.

Once State laws were passed or considered, most employers in relatively progressive states also began to argue that "bidding up" social policy to uniform federal standards was the only solution. This strategy was shaped, of course, by the fact that they had lost the local battle and saw little hope in refighting it under the political and social pressures of the Great Depression. The welfare system needs "some sort of compulsion" argued H.W. Story of Milwaukee-based Allis-Chalmers, ". . . we are already making contributions in Wisconsin and would like our competitors to do likewise." In the same vein, a Wisconsin truck manufacturer who had unsuccessfully opposed his state's welfare laws was, by 1935, ready to up the ante by supporting a federal law: "Since we are at such a distinct disadvantage with our competitors in other states, you can readily see that Wisconsin manufacturers, doing an interstate business, are more interested to see that this social legislation becomes national in scope rather than restricted only to our particular state." In turn, the passage of Social Security in 1935 brought many business recalcitrants around to support the principal of a federal welfare state. This reflected both a recognition of the regulatory and administrative advantages of a single federal program, and a recognition that, in combining uniform payroll taxes with local administration, the Social Security Act had thrown a bone to both northern interests anxious about competitive disparities and to southern interests anxious about the disruption of local labor markets.<sup>32</sup>

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<sup>31</sup> Swope quoted in Senate Subcommittee of the Committee on Manufacturers, *Establishment of a National Economic Council* (Washington, 1935), 308; and Witte memorandum of interview with Swope (Oct. 1934), file 21, CES Records, Social Security Records.

<sup>32</sup> H.W. Story in "National Conference on Economic Security" (Nov. 1934), file 4, CES Records; Highway Trailer Company to Witte (5 Apr. 1935), file 54, CES Records. On business acceptance of Social Security after the fact, see Swenson, "Arranged Alliance," 103-105.

*Protecting Regional Advantage: The Special Case of the South*

The stakes and consequences of federalism emerge most starkly in the historical trajectory of the American South. Since the 1870s, the South has proven both disproportionately powerful in federal politics and disproportionately anxious about the implications of federal power -- largely because debate about the reach or responsibilities of federal politics were always shadowed by the question of federal enforcement of the 14th and 15th Amendments. The New Deal order, in this sense, posed a threat to not only state prerogative but to the racial premises of the Southern political economy. It was for this reason, of course, that Southerners confronted the modern civil rights movement with the fetishism of "states' rights." And it was for this reason that, for many Northern and Southern economic interests, the import of federal power rested on its willingness or ability to legislate away the South's carefully cultivated competitive advantages -- including low wages (reflecting racialized labor markets, reserve agricultural labor and, after 1947, "right to work" laws), racial and political obstacles to class-based organization (including one-party rule and the institutions of "Jim Crow"), and a racist and paternalist opposition to any efforts to raise the social wage. Not surprisingly, the South has historically dug in against federal encroachment and pursued "states' rights" towards fundamentally undemocratic ends: the economic and political and legal disorganization of Southern (especially African-American) workers.<sup>33</sup>

It is not difficult, in this respect, to plumb the logic of the Southern confrontation with the promise and perils of federalism. Most directly, federal reform efforts repeatedly threatened to undermine the South's low-wage advantage and, as a result, often pitted Northern reformers and Northern economic interests against Southern politics and Southern economic interests. This was an important undercurrent of the Progressive Era battle over a Constitutional prohibitions of child labor, and of the New Deal battle over wage and labor standards -- running through the NRA (which closed but sanctioned the Southern wage differential), the Wagner Act (which promised regional equity but shuffled the task of accomplishing it to the labor movement), the Fair Labor Standards Act (which mopped up somewhat behind the failure of the labor movement but still exempted many Southern workers), and the Taft-Hartley Act (which once again opened the door to degenerative regional and interstate competition).<sup>34</sup> As importantly, federal social

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<sup>33</sup> On wages, see Gavin Wright, *Old South, New South: Revolutions in the Southern Economy Since the Civil War* (New York, 1986), *passim*. On class politics, see J. Morgan Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910* (New Haven, 1974), 11-44;; Gavin Wright, *Old South, New South: Revolutions in the Southern Economy Since the Civil War* (New York, 1986), 156-274; Bruce Nelson, "Class and Race in the Crescent City: The ILWU from San Francisco to New Orleans," in *The CIO's Left-Led Unions*, ed. Steve Rosswurm (New Brunswick, 1992); 24-26; Nelson Lichtenstein and Robert Korstad, "Opportunities Lost and Found: Labor, Radicals, and the Early Civil Rights Movement," *Journal of American History* 75 (1988), 786-811; Barbara Griffith, *The Crisis of American Labor: Operation Dixie and the Defeat of the CIO* (Philadelphia, 1988). On the social wage, see Ira Katznelson, Kim Geiger, and Daniel Kryder, "Limiting Liberalism: The Southern Veto in Congress, 1933-1950," *Political Science Quarterly* 108 (1993): 284-297; Warren Whatley, "Labor For the Picking: The New Deal in the South," *Journal of Economic History* 63:4 (1983): 905-908; Alan Dawley, *Struggles For Justice: Social Responsibility and the Liberal State* (Cambridge, MA, 1991), 38-48, 116-128, 160-164.

<sup>34</sup> See Wright, *Old South, New South*, esp. chapter 7; Gordon, *New Deals*, 35-127; James Hodges, *New Deal Labor Policy and the Southern Cotton Textile Industry, 1933-1941* (Knoxville, 1986); Louis Galambos, *Competition and Cooperation: The Emergence of a National Trade Association* (Baltimore, 1966); Landon Storrs, "Gender and the Development of the Regulatory State: The Controversy over Restricting Women's Night Work in the Depression-Era South," *Journal of Policy History* 10:2 (1998), 179-194.

policy threatened the paternalism central to low-wage Southern agriculture. Southern interests (unlike some in the North) were loath to surrender or socialize private patterns of social assistance because their benefits -- dependence and loyalty in the agricultural economy -- were more tangible and important than those of Northern welfare capitalism.<sup>35</sup>

What makes these regional anxieties so central to the story of American federalism is the ways in which Southerners were able to weave parochial interests into the very fabric of federal politics and policy. The elements of American politics that gave economic interests their political advantage (a non-programmatic party system, private financing of elections, etc) were magnified in the South -- a region defined by one-party rule and systematic disenfranchisement. More importantly, Southerners were able to translate the same advantages into national politics. For much of this century, the Southern Congressional delegation, strengthened by institutional seniority, control over the committee system, and other perks of one-party rule, has enjoyed an effective veto over federal reform. This is especially true of the Senate, whose deference to regional interests and tradition of unlimited debate gave Southerners virtual control over the upper chamber for most of the modern era. The South, playing off both the competitive logic of American federalism and the practical limits of two party politics, not only organized Southern economic interests around common regional goals but also ensured that those local and regional interests would wield uncommon clout in national politics.<sup>36</sup>

As a consequence, Southern interests have routinely exacted substantial programmatic and administrative concessions in national politics. Even at the height of the New Deal, Southern Democrats were able to deflect social and labor reforms. Most famously of course, the South demanded (and got) a welfare state which deferred administration (including the right to determine eligibility) to local authorities, abandoned any guarantee that local relief would meet basic standards of "decency and health," and bypassed 90 percent of the southern black labor force by exempting agricultural and domestic labor from coverage under Social Security. To the degree that the New Deal did penetrate Southern labor markets, it was largely understood, as one Southern executive put it, as a tactic of "northern industrialists backed by labor and the President against the South and its industrial development." As war displaced the Depression, Southerners needed the New Deal less and feared its implications even more -- especially as the federal war effort was less able or willing to "put off" civil rights issues. Not surprisingly, Southerners (in state legislatures and in Congress) regrouped after 1945 to dramatically slow the federal threat to Southern race relations and labor relations.<sup>37</sup>

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<sup>35</sup> Lee Alston and Joseph Ferrie, "Labor Costs, Paternalism, and Loyalty in Southern Agriculture: A Constraint on the Growth of the Welfare State," *Journal of Economic History* 45 (1985), 99-102; Alston and Ferrie, "Resisting the Welfare State: Southern Opposition to the Farm Security Administration" in *The Emergence of the Modern Political Economy*, edited by Robert Higgs (Greenwich, 1985).

<sup>36</sup> See V.O. Key, *Southern Politics in State and Nation* (New York, 1949); David Potter, *The South and the Concurrent Majority* (Baton Rouge, 1972); Leon Epstein *Political Parties in the American Mold* (Madison, 1986); Cox, "Geography of the American Welfare State," 13-19; Alston and Ferrie, "Labor Costs, Paternalism, and Loyalty," 104-105; Katznelson, Geiger, and Kryder, "Limiting Liberalism."

<sup>37</sup> See Richard Young and Jerome Burstein, "Federalism and the Decline of Prescriptive Racism in the United States," *Studies in American Political Development* 9 (Spring 1995), 24-25; Alston and Ferrie, "Labor Costs, Paternalism, and Loyalty," 107-113; Jill Quadagno, "From Old Age Assistance to Supplemental Security Income: The Political Economy of Relief in the South, 1935-1972," in *The Politics of Social Policy in the United States*, ed. Theda Skocpol et al (Princeton, 1988), 238-239; Katznelson, Geiger, and Kryder, "Limiting Liberalism," 284-286, 289-297; J. Rogers to R. Graham (18 June 1935), file II:404:4, Westmoreland Coal Papers, Hagley Museum and Library.

While the South has historically been the cutthroat competitor in interstate commerce (offering a low social wage, a refuge from organized labor, and business-friendly tax policies), these strategies and the interests with a stake in them have changed over time. In the early century, for example, the low-wage South was a creature of Southern agriculture. Through the late 1930s and after, the agricultural mechanization, campaigns for economic development (underwritten by competitive tax policies), and the regional patchwork of Taft-Hartley labor law established a new foundation for regional advantage. At the same time, the racial logic of the Solid South began to unravel -- in part as a consequence of demographic shifts (including a decline in tenancy, continued black migration north, and the aging of the Southern population) in the wake of agricultural mechanization, in part as a consequence of the Democratic Party's confrontation with the postwar civil rights movement, and in part as a consequence of the changing terms of federal-state relations through the Great Society and beyond.<sup>38</sup>

While the political and economic logic of the Solid South eventually collapsed, the consequences of its confrontation with federal power -- particularly in the New Deal era -- remain with us. Through the first half of this century, the South had an immense stake in the federal system. Both Southern States and the interests they represented clung to the commerce clause in a desperate effort to keep the expansion of federal powers from revisiting the Compromise of 1877. This slowed the progress of economic and social policy not only in Southern States anxious about the implications of federal power, but also in States and regions that competed with the "backward" South. Concessions to the South in the 1930s and 1940s defined the "moral geography of postwar American liberalism"<sup>39</sup> -- contributing to the postwar retreat from the New Deal, the programmatic drift of the Democratic Party, the meager reach of the American welfare state, and the persistence of ideological anxieties about state (especially federal) power.

### **The Persistent Riddle: Federalism and Health Reform in the 1990s**

While it is relatively easy to tease out how a given interest or state might confront federalism under given historical and political conditions, it is more challenging to understand the ways in which a fragment of social policy might provoke a wide range of interests -- all of whom have distinct (and often contradictory) stakes in the outcome. The health debate of the 1990s suggests the complex ways in which federalism shapes such debates, and in which the dilemmas of federalism not only persist to the present day but have been magnified by the eagerness of federal politicians to abandon federal programs, and the problems they addressed, to the states.

The American health care system is an elaborate compromise between those who provide care (insurers and doctors) and those who pay for it (insurers and employers). In the contemporary reform debate, these interests have both wielded their considerable political influence, and scrambled to shape reform according to their distinct aspirations and anxieties. Through both the 1992-1994 debate over the Clinton health plan, and efforts to mop up around the failure of the Clinton initiative since 1994, economic interests have juggled their stakes in health policy, their expectations of state and federal policies (and the relationship between them), and their understanding of the political demands and clout and expectations of other interests.

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<sup>38</sup> Wright, *Old South, New South*, 156ff; Cobb, *The Selling of the South*; Quadagno, "The Political Economy of Relief in the South," 237-263; Young and Burstein, "Federalism and the Decline of Prescriptive Racism in the United States," 13-32.

<sup>39</sup> Katznelson, Geiger, and Kryder, "Limiting Liberalism," 284-297.

Insurers, accustomed to proprietary state regulation, have dug in against the expansion of federal regulatory authority. But there is considerable uncertainty behind this opposition. First, the industry is increasingly split between the "Gang of Five" (Prudential, Met Life, Aetna, CIGNA, and John Hancock) leading firms, all of whom spent the 1980s and early 1990s reorganizing their health insurance offerings into managed care networks, and smaller insurers cowering under the cover of the HIAA. In the early months of the debate over the Clinton Plan, leading insurers were willing to trade community rating, and even some regulation of plans and premiums, for political support of managed care. At the same time, the HIAA followed the concerns of small insurers and supported mandated coverage (more customers) and standardized benefits (less competition), but opposed any legislated risk pooling or growth of managed care networks. As the debate stumbled along, the Administration (under pressure from employers) began devoting more attention to cost-controls, the big insurers (taking the Administration's cue) continued consolidating their control of health care, and the HIAA launched its infamous "Harry and Louise" television campaign.<sup>40</sup>

Since 1994, this rift has not only persisted (insurers, as one observer notes, are "divided between those who knew what was happening and those who did not and between those with regional and those with national markets") but is increasingly complicated by a flurry of state and federal interest in Health Maintenance Organizations. State-level efforts to mandate employment-based coverage, which require an exemption from federal ERISA (Employee Retirement and Income Security Act) rules, raises the specter of "51 states with 51 different laws" and leaves insurers torn between the prospect of clear national standards and the historic "goodwill of state insurance commissioners." Similarly, state and federal efforts to regulate HMOs -- including mandatory hospital stays for maternity and mastectomies, restrictions on provider incentives to limit care, and a "consumer bill of rights" for HMO patients -- have placed some insurers in the sort of "all or nothing" trap faced by welfare capitalists in the Social Security debate of the 1930s. While insurers might prefer less restrictive state regulation and no federal regulation whatsoever, many -- including both large insurers operating in many states and smaller insurers operating in reform-minded states -- might trade uniform national standards for the administrative and competitive nightmare of patchwork state law. State regulation, in this sense, is a haven from federal interference for some but an incentive to "bid up" social policy for those who (as Robert Reischauer of the Congressional Budget Office concluded recently) simply "don't want to deal with regulators in 50 different states."<sup>41</sup>

Employers too have faced a complex internal and political battle, largely shaped by their divergent stakes in, and expectations of, health reform in a federalist setting. An employer's stance on health reform simply reflects what it is paying, what it is liable to pay in the future, and what its competitors are paying. Employers have long defended employment-based care against

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<sup>40</sup> *Business Week* (24 Aug. 1992), 67; *Business Week* (4 May 1992), 65-66; *New York Times* (25 Aug. 1991); "Whose New Health Plan Is This Anyway?" *New York Times* (15 Nov. 1992), E5; "Leading Health Insurers into a New Age," *New York Times*, (6 Dec. 1992), A11; *New York Times* (11 April 1993), F10; "Suddenly, Momentum for Health," *New York Times* (10 Dec. 1992), A22; *Business Week* (28 Dec. 1992), 36-37; *Mother Jones* (Mar/Apr 93), 44-45; *Business Week* (27 Sept. 1993), 42; *Business Week* (12 July 1993), 134; Thomas Bodenheimer in *The Nation* (22 March 1993), 375; "Health Care Lobbies . . ." *Wall Street Journal* (27 Nov. 1992), 34; Cathie Jo Martin, "Together Again: Business, Government, and the Quest for Cost Control," *Journal of Health Politics, Policy, and Law* 18:2 (1993), 377-8; Colin Gordon, *Dead on Arrival: The Clinton Health Plan* (Open Magazine, 1995).

<sup>41</sup> Daniel Fox and Daniel Schaffer, "Health Policy and ERISA: Interest Groups and Semipreemption," *Journal of Health Politics, Policy, and Law* 14 (1989), 241-243, 247; Reischauer quoted in *New York Times* (7 December 1997), 4:4.

federal intervention but (torn over whether to confront the health industry as its principal consumer or to simply abandon that role altogether) have spent the last decade eroding the quality and security of employment-based care. Like their welfare capitalist counterparts in the 1930s, many firms which provided health care were quite amenable (through the early 1990s) to the idea of an employer mandate which would spread the costs of care across all competitors: older manufacturers, noted *Business Week* in late 1992, "will stick with almost any reform that promises to cut the costs of caring for aging, unionized workers." At the same time, small business remained leery of mandated care and, as the 1992-1994 debate wore on, big business couldn't decide whether they wanted to socialize their health costs or retain the freedom to slash costs and benefits on their own -- in part because they saw little hope of spreading that burden as long as small business would be exempted from mandated coverage or subsidized for their compliance. The attraction of mandates also faded with the Administration's retreat on cost controls: while many larger firms liked the idea of forcing small firms and competitors to pay for care, few were willing to bind themselves to an inflationary insurance system.<sup>42</sup>

Finally, even those sympathetic to reform were disenchanted by the Congressional effort to weaken the federal role and encourage states to experiment. "Big Business," understated *Business Week* in July of 1994, "is shifting from passive acceptance of broad reform to sullen resistance." While federal reform made sense to some, few looked kindly on the prospect of fifty different benefit requirements and regulations. Typically, the tangle of federal and state law encouraged an "all or nothing" sort of response. As it became clear that the new federal role might not sort out the inconsistencies in state-level regulation, employers were more inclined to bid down (that is, flee from regulation) than bid up (socialize costs through federal law). Through 1992-1993, many employers hoped that health reform would absorb a much-reviled worker's compensation system, spread the costs of health care to competitors and historically low-benefit sectors of the economy, and sort out the chaotic and often contradictory demands of federal ERISA standards and state insurance regulation. Since 1994, many of the same employers have joined state-level campaigns to eviscerate workers' compensation, grind down their own health care costs (through co-payments, deductibles, managed care), and escape any regulatory oversight through the loophole of self-insurance.<sup>43</sup>

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<sup>42</sup> *Business Week* (23 Nov. 1992), 107; *Business Week* (30 Nov. 1992), 35; *New York Times* (7 Feb. 93), F1; "GM Orders Staff to Pay Part of Health Care Cost," *New York Times* (26 Aug. 1992), C3; "Utilities want to raise rates to meet future health costs," *New York Times*, (7 Jan. 1992), A1; "Navistar May Sell Stock," *Wall Street Journal* (9 Dec. 1992), B6; *Business Week* (10 Aug. 92), 32; "Breaking Promises to Retirees," *New York Times* (15 Sept. 1991); "Ford to Cut 7.7 Billion . . .," *New York Times* (17 Dec. 92), C1; "Witco Sees Charges. . ." *Wall Street Journal* (9 Dec. 1992), B6; "Clinton's Health Care Sell-A-Thon," *Business Week* (24 May 1993), 30-32; "Employees Face Shift in Benefits," *New York Times* (14 Sept. 1991), A18; "Companies Costs: How Much is Fair?" *New York Times* (7 Jan. 1992), C2; "Excerpts from Clinton's Conference," *New York Times*, (15 Dec. 1992), A14; "Movement to Sell Basic Health Plan is Found Faltering," *New York Times* (10 Dec. 1991), A1; *New York Times* (23 Aug. 1993), A9; *Business Week* (29 March 1993), 66; *Business Week* (23 Nov. 1992), 107; *Business Week* (30 Nov. 1992), 35; *New York Times* (7 Feb. 93), F1; "GM Orders Staff to Pay Part of Health Care Cost," *New York Times* (26 Aug. 1992), C3; "Utilities want to raise rates to meet future health costs," *New York Times*, (7 Jan. 1992), A1; "Navistar May Sell Stock," *Wall Street Journal* (9 Dec. 1992), B6; *Business Week* (10 Aug. 92), 32; "Breaking Promises to Retirees," *New York Times* (15 Sept. 1991); "Ford to Cut 7.7 Billion . . .," *New York Times* (17 Dec. 92), C1; "Witco Sees Charges. . ." *Wall Street Journal* (9 Dec. 1992), B6; "Clinton's Health Care Sell-A-Thon," *Business Week* (24 May 1993), 30-32; "Employees Face Shift in Benefits," *New York Times* (14 Sept. 1991), A18.

<sup>43</sup> *Business Week* (25 July 1994), 32-33; "Briefing Paper on Federal and State Roles" (n.d.), Box 4001, Records of the Clinton Health Care Task Force, National Archives; Fox and Schaffer, "Health Policy and ERISA," 251, 255;

While this story is far from over, it does underscore the complex ways in which different interests with different stakes and different expectations confront the promise and perils of federated regulation. Economic interests do not simply confront federalism as a narrow question of their relationship to state and federal law and policy. As in the health reform debate, State and federal institutions are separate but overlapping arenas in which economic interests battle each other. Sometimes, as in the confrontation between large and small insurers over managed care, this is a simple competitive battle over markets. Sometimes, as in the confrontation between employers and insurers over cost controls, it is a battle for political favor between producers and consumers. Sometimes, as in the confrontation between large unionized firms and organizations of small or service sector firms over the employer mandate, it is a complex dispute over who will bear the costs of social policy. And almost always, these confrontations involve not only the strategic calculations and expectations of economic interests, but those of states who, in a federalist setting, must often think and behave like economic competitors as well.<sup>44</sup>

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Mary Ann Chirba-Martin and Troyen Brennan, "The Critical Role of ERISA in State Health Reform," *Health Affairs* 13 (1994), 144.

<sup>44</sup> Beth Mintz, "Business Participation in Health Care Policy Reform: Factors Contributing to Collective Action Within the Business Community," *Social Problems* 42:3 (1995), 409; Parmet, "Regulation and Federalism," 122; Colleen Grogan, "Hope in Federalism? What Can the States Do and What Are They Likely to Do?" *Journal of Health, Politics, Policy and Law* 20 (1995), 479-480. Washington, Massachusetts, and Florida, for example, all toyed with a state-level employer mandate through 1992-1994 but all abandoned them under intense political pressure. See Fox and Schaffer, "Health Policy and ERISA," 241-243.