Social Regulatory Policy: A Challenge to Federalism

Kimberly Janet Russell

Portland State University

Follow this and additional works at: https://pdxscholar.library.pdx.edu/open_access_etds

Part of the Political Science Commons

Let us know how access to this document benefits you.

Recommended Citation
https://doi.org/10.15760/etd.7935

This Thesis is brought to you for free and open access. It has been accepted for inclusion in Dissertations and Theses by an authorized administrator of PDXScholar. Please contact us if we can make this document more accessible: pdxscholar@pdx.edu.
THESIS APPROVAL

The abstract and thesis of Kimberly Janet Russell for the Master of Science in Political Science were presented March 20, 2006, and accepted by the thesis committee and the department.

COMMITTEE APPROVALS:

Richard Clucas, Chair

Craig Carr

Gerald Sussman
Representative of the Office of Graduate Studies

DEPARTMENT APPROVAL:

Ronald L. Tammen, Director
Hatfield School of Government
ABSTRACT


Title: Social Regulatory Policy: A Challenge to Federalism

Access to assisted suicide has been the center of a federal standoff between Congress and the state of Oregon since 1998, but few academic papers on American federalism acknowledge this development. Through the initiative and referendum process, Oregonians gave themselves the right to assisted suicide in 1998. Congress reacted immediately, attempting to overturn the Oregon law with national legislation. By historical and constitutional precedent states control issues related to events of daily life such as birth, death, marriage, and healthcare issues. In reality, Congress has entered the arena of moral policymaking and protection under the Tenth Amendment is unreliable. The emergence of certain types of policy, like assisted suicide, shows that the principles of American federalism have changed: it no longer acts as a safeguard against domination by the national government. If the national government is successful in criminalizing assisted suicide in the states, it may mean that the constitutional and historical principles of federalism are compromised.
The purpose of this paper was to illustrate that analyses of federalism do not acknowledge that social regulatory policies occur at the congressional level, and that this omission affects the models and theories. The works of prominent federal scholars were selected and briefly reviewed to show first that no accounting of social regulatory policy existed, and second, how its absence impacted the work.

Congressional Quarterly’s Key Votes from the years 1945-2003 were used to code policies and demonstrate that social regulatory policies do occur at the congressional level. Theodore Lowi’s four-point policy model was used in the coding process, with the addition of social regulatory policy. The policy study is consistent with the claim that social regulatory policies are a recent addition to congressional policymaking. The literature review reveals little or no treatment of social regulatory policies.
SOCIAL REGULATORY POLICY:
A CHALLENGE TO FEDERALISM

by

KIMBERLY JANET RUSSELL

A thesis submitted in partial fulfillment of the requirements for the degree of

MASTER OF SCIENCE
in
POLITICAL SCIENCE

Portland State University
2006
# TABLE OF CONTENTS

**LIST OF TABLES**

iii

**LIST OF FIGURES**

iv

**CHAPTER 1: INTRODUCTION**

1

**CHAPTER 2: FEDERALISM**

4

The State of the Discipline

6

A Review of the Literature

8

A Note about the Devolution Literature

18

Conclusion

21

**CHAPTER 3: SOCIAL REGULATORY POLICY**

23

Social Regulatory Policy and Federalism: 1960-2005

23

Public Policy Types

26

Oregon and Assisted Suicide Law

29

Conclusion

36

**CHAPTER 4: TRENDS IN CONGRESSIONAL POLICYMAKING**

37

Methodology

43

Results of Analysis

44

Conclusion

50

**CHAPTER 5: CONCLUSION**

51
LIST OF TABLES

1 Agency and Agenda in American Policymaking 41


<table>
<thead>
<tr>
<th>FIGURE</th>
<th>POLICY</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Regulatory Policy 1945-2003</td>
<td>45</td>
</tr>
<tr>
<td>2</td>
<td>Distributive Policy 1945-2003</td>
<td>45</td>
</tr>
<tr>
<td>3</td>
<td>Constituent Policy 1945-2003</td>
<td>46</td>
</tr>
<tr>
<td>4</td>
<td>Redistributive Policy 1945-2003</td>
<td>46</td>
</tr>
<tr>
<td>5</td>
<td>Social Regulatory Policy 1945-2003</td>
<td>47</td>
</tr>
</tbody>
</table>
Access to assisted suicide has been at the center of a standoff between Congress and the State of Oregon since 1998, but academic papers on American federalism seldom acknowledge this development. Through the initiative and referendum process, Oregonians gave themselves the right to assisted suicide in 1998. Congress reacted immediately by attempting to overturn the Oregon law with national legislation. By historical precedent, states regulate issues related to personal events such as birth, death, marriage, and healthcare issues. In reality, Congress today competes with states in the arena of moral policymaking, and protection under the Tenth Amendment is unreliable. National action on a certain type of policy, like assisted suicide, is a relatively new development in the federal system. If the national government succeeds in criminalizing assisted suicide, it will constitute a major redirection in federal-state relations, one that challenges the constitutional and historical principles of federalism. However, academic writing on federalism is largely silent on this important development.

Assisted suicide is just one of several intimate and private issues on which Congress has chosen to legislate. The national legislature now acts directly to change or prohibit individual behaviors in such policy areas as abortion, sexual preference,
assisted suicide, pornography, and weapons possession. The consequence to federalism of national action on these issues is important: for Americans, it has a profound and imminently personal effect on our lives. For scholars, this kind of policymaking is a relatively new and unexplored area of research on federal-state relations. I argue in this paper that adding this type of policy to federal studies will improve acuity in the field of federal scholarship. An accounting of this policy type will change conclusions about the nationalization of power, and will therefore impact existing models and theories. Past research on federal-state relations offers theories that do not adequately characterize this important feature of the modern American political system, so giving attention to this trend will contribute to the federal literature.

American federalism constantly changes and is not easily characterized or quantified. Since it is also unique, there is no template to which it can be compared and analyses of its functionality remains to scholars. There are a number of approaches to the question of how federalism fares but for this paper, I take the nationalization of power as the benchmark. Federalism articulates spheres of sovereignty; therefore its principles are compromised when power is centralized nationally. In major ways, the Supreme Court is responsible for this trend over time, but beginning in the 1960s and accelerating recently, Congress has centralized power by creating of moral policies. I argue that nationalization of this particular type of policy reduces traditional state authority and alters the distribution of power in the
federal system. I will illustrate that it is important to fortify the analysis of congressional activity on social regulatory policymaking.

Moral policies appeared regularly on the national policymaking scene in the 1960s. In the first chapter, I will review contemporary federal literature to demonstrate the absence of this trend in federal models and theories, and suggest how the omission affects the conclusions in this literature. Primarily, I argue that the consequence of omitting moral policy from an analysis of federal-state relations is an underestimation of the centralization of power, which in turn leads to a mischaracterization of the federal system. Chapter Two describes social regulatory policy in detail and summarizing the difference between these and other policy types. In Chapter Three, I review congressional votes from 1945-2004, coding each vote as one of five policy types, including social regulatory policy, and conclude with an analysis. The empirical study shows the emergence of congressional activity on moral issues, and that spikes in the social regulatory policy graph correspond with contemporary political events.

Academic oversight of nationalized moral policy making can skew conclusions about the political institution of federalism and more. It also creates an inaccurate picture of congressional-state relations and the scope and direction of political power. Overall, challenges to our political institutions, such as the kind social regulatory policymaking presents to federalism, create excellent grounds for new discoveries about the American political system.
A note about the complexity of quantifying federalism is warranted. Simply
arriving at a definition of federalism is a challenge. Past studies have defined
federalism based on constitutional distributions of power, or more complex and
theoretical considerations, or a combination of both. More sophisticated explanations
acknowledge the inherent tension between the dual sovereigns and the ambiguous
nature of federalism itself. There is no consensus of what federalism should look like
in conditions of best practice. Definitions include these:

The Encyclopedia: Federalism is the theory or advocacy of federal political
orders where...sovereignty is constitutionally split between at least
two...levels so that units at each level have final authority and can act
independently of the others in some area. Citizens thus have political
obligations to two authorities.

Martin Diamond: it is the division of political power between two sovereigns,
state government and national government, each with supremacy in its own
sphere.¹

Explanations of the value of a federal system are equally varied:

Federalism…minimizes difficulties of size, enhances opportunities for popular participation in government, and limits the potential for the abuse of power by the central government by creating other countervailing governments.²

Aside from gains in common security and a common market, federalism is also designed to enhance representation.³

Federalism offers a way for diverse communities to come together and derive the strength of unity while retaining their identity. It helps to secure efficiency in the organization and working of the public sector by bringing government closer to the people. For the most part, it also promotes democratic values and protects individual rights and liberties.⁴

Consensus on federalism is particularly difficult to achieve in part because its American iteration is original (comparative studies show that the federalism of other nations leans either toward a league formation of sub-national units, or strong national consolidation). The invention of American federalism, as Alexis de Tocqueville noted, has both national and federal features, and balances power by distinguishing constitutional spheres of sovereignty. Admittedly, the steady increase in national power is well accounted for in academic literature, but moral policymaking is a new venue. Scholars should view congressional action on social regulatory policy with

heightened scrutiny because it trumps federalism by making the deepest incursion possible into state authority.

The next section summarizes the federal literature, and then focuses on key pieces of that literature. I will show that social regulatory policy has been omitted, and make some observations on how the writing would benefit from adding this policy dimension.

State of the Discipline

An overview of literature on federal-state relations reveals a variety of models that explain the centralization of power in the national government. With some notable exceptions, since the early nineteenth century, over time power has been consistently centralized in the national government. With regard to state’s rights, the Supreme Court is seen as either hero or villain by both those who support and oppose a dominant national government. It is frequently cited as the primary actor responsible for nationalizing power and, conversely, as the sole protector of state’s

---


rights. An academic account of the congressional role in centralizing power – the focus of this paper – cites early regulatory and westward expansion policies, New Deal and Great Society policies, funded and unfunded mandates, legislation from the Civil Rights Movement, and occasionally, abortion policy.

Federal scholars are preoccupied with the effect that nationalized economic and regulatory policymaking has on state governments. Except for civil rights era legislation and abortion, neither of which is consistently recognized as moral policymaking, congressional action on moral policies is generally overlooked. Few scholars investigate the moral dimension of anti-discrimination policies or associate the term ‘moral policy-making’ with civil rights legislation. Daniel Elazar and Martha Derthick, for example, offer a detailed account of civil rights and discuss the impact of federal encroachment on state power, yet neither pursues the moral dimension of the policies.

On abortion policy, analysis of the Supreme Court’s decision in major abortion cases⁷ is thorough but congressional action is understated. The Supreme Court’s decision in Roe was a sweeping expansion of national power however, Congress has repeatedly created abortion policy, using appropriations riders to restrict abortion rights and outlaw specific procedures. It is these kinds of congressional actions that are regrettably absent in federal writings.

This failure to notice the moral dimension of civil rights and abortion policies may explain subsequent under treatment of congressional efforts to assume regulatory

control of homosexual marriage, pornography, gun control, and assisted suicide.

Despite the nominal treatment of civil rights legislation, almost all scholars channel their analytic energies into discovering how the national government has expanded at the expense of the states in economic or regulatory ways, and do not thoroughly question advances in moral or social policies.

A Review of the Literature

For this paper, I have identified some prominent federal scholars: Daniel Elazar, John Dinan, Martin Diamond, John Kincaid, Thomas Dye, Morton Grodzins, Dale Krane, Richard P. Nathan, John Donahue, Michael Greve, John Dilger, Martha Derthick, and David Walker. Each of these are influential federal scholars who have either provided a framework of federalism that is often cited in other academic works (Grodzins and Elazar); are on the Editorial Board or Advisory Council at Publius: the Journal of Federalism, (Kincaid, Dinan, and Krane); have made great contributions to the study of American politics (Dye and Diamond); or have published less academic yet popular accounts of federalism (Greve, Nathan). Combined, these writings provide a good overview of the state of the federalism literature regarding the distribution of power between the states and the federal government. The selected writings offer comprehensive conclusions about federal-state relations and draw conclusions about the exercise of congressional power in relation to the states. In this
section, I will show how the addition of social regulatory policy to these works would alter their conclusions.

Daniel Elazar, a principal federal scholar, has two main themes that set the agenda of his book away from acknowledging social regulatory policies from the beginning. In, *American Federalism: a View from the States*, Elazar states first, that the states are “well-integrated parts of the American civil society and have their own civil societies,” and second, that the states are folded into an “intricate framework of cooperative relationships that preserve their integrity while tying all planes of government together functionally in the common task of serving the American people.”

Partnership and noncentralization are key words in Elazar’s work; centers of power bound by a matrix of authority and distributed powers, operate to make and implement policy across both governments. Federal systems demand restraint on the part of political leadership. For example, on civil rights, Elazar writes:

> Even when the federal government has the authority to act, it tends to use great self-restraint in the exercise of its authority. It must do so to preserve the federal system simply because; where it is authorized to act under the constitution it possesses overwhelming power.

In addition, Elazar writes, after the ‘incursion’ that the national government makes into state sovereignty, as it did during desegregation, it returns authority to the states and balance is restored. Elazar argues that the federal system is passing into a

---


9
“new phase”\textsuperscript{10} – one that is outcome-focused and dependant on governmental cooperation. The danger of this new phase, as Elazar sees it, is the hierarchical thinking that accompanies it, citing a “Washington knows best” attitude and offering the voting rights acts of 1970 as an example of legislative fiat.\textsuperscript{11} While the voting rights acts have important implications for federalism, Elazar does not recognize social regulatory policy as examples of ‘legislative fiat.’ Except for civil rights, the issues involved in social regulatory policy do not appear in Elazar’s theory whatsoever. Elazar published \textit{American Federalism} in 1984 – several years after the congressional response to \textit{Roe} had begun, yet abortion is mentioned just twice, both times in warnings about the dangers of an activist Supreme Court. Congressional attempts to limit abortion based on normative conclusions about conception and the beginning is suggestive of Elazar’s ‘hierarchical thinking.’ The under treatment of social regulatory policy also has an effect on the analysis. Elazar may have had to amend his conclusion about partnership between the governments, at least where moral policy is concerned, had he treated social regulatory policy discretely.

Elazar argues that the new federalism created by the founders demanded a new politics to keep the powers separated and allow the mobilization of power for active governing. Federalism is supposed to meet this demand, he argues: energize central government enough for self-sustenance and protect the people from remote, centralized power. Though the “remote, centralized power” Elazar is complaining

\textsuperscript{10} Ibid., XX.
\textsuperscript{11} Ibid., 255.
about the Supreme Court, Congress is at least as willing to override state authority. If the states’ strength is found in its capacity of creating civil society, as Elazar claims, then his model of federal-state relations, where states are the ‘keystone’ in the arch of federalism is crumbling.

Elazar concludes that the “virtue” of federalism is its ability to “maintain mechanisms vital to the perpetuation of the unique combination of governmental strength, political flexibility, and individual liberty.”\(^\text{12}\) At the least, social regulatory policy shows that Elazar may expect too much self-imposed restraint from the national government.

Martha Derthick is vulnerable to a similar critique. In *Keeping the Compound Republic*, she defends a constitutionally supreme national government and therefore, does not prescribe a revitalization of state sovereignty. Federalism, she argues, is chaotic, characterized by fluxes of power between state and local governments. Decentralization is Derthick’s answer to concentrated power at the national level. She believes localities ought to be entrusted with issues that they successfully address according to cultural traditions, thus freeing the national government to act within its appropriate sphere.

Like Elazar, Derthick argues that the national government acts with self-restraint.\(^\text{13}\) She contends that Congress most often chooses not to act in new policy

\(^{12}\) Ibid., 30.
\(^{13}\) Martha Derthick, *Keeping the Compound Republic: Essays on Federalism* (Washington, D.C.: The Brookings Institution, 2001). The compound she wants to preserve is Madison’s ‘middle ground,’ a point he believed existed midway between state sovereignty on one hand, and nationalism on the other, yet with national government supreme.
venues, preferring to allow states to forge new policy, and rarely exercises preemption of state power. Overlooking social regulatory policies, she says that Congress usually does not to act on new or difficult issues, such as AIDS or equal pay and cites Clinton’s national healthcare plan as the apex of national intrusion.¹⁴ Congress prefers, she says, to cooperate with the states, which may in turn, bargain with Congress. Social regulatory policy does not square well with Derthick’s cooperative model.

In the end, the Hamiltonian version of government, articulated in Federalist 27, is what Derthick asserts has come to be: the courts, laws, and legislatures of the states are made “auxiliaries” to the national government. On the whole, state governments accept their subordinate position to the national government since they are unable to successfully fight to retain their legislative prerogatives – here Derthick offers the nationalization of abortion policy as an example. Like Elazar, it is the only social regulatory policy she mentions, preferring to cite other economic, social, and technological changes as the source of centralization. Minus a thoughtful treatment of social regulatory policy, Derthick misses that nationalized moral policymaking constitutes an expansion into new territory for the national government and removes the traditional prerogative of state and local governments to create policy in these areas.

¹⁴ Ibid., 38.
Written in 1963, Grodzins’ classic federal theory, “Marble Cake of American Government,” characterizes federalism as a chaotic, tumbling admixture of authority and activity in which nearly every governmental action – for example, education and police protection - involves local, state, and national government. Dual federalism is an indefensible concept to Grodzins, who thinks, “vertical and diagonal lines almost obliterate the horizontal ones.” 15 Because of a history of shared functions, dating back to the nation’s Founding, a separation of state and federal functions is impossible, illogical, and undesirable.

Grodzins maintains that the national government has a long history of sharing control of local issues with the states, and in some cases is as close or closer to the people than local government entities. The continued viability of state and local governments depends on the scheme of shared functions, and he explains the expansion of national government in terms of economic and foreign policies. Expansion, he writes, “has been produced by…war, defense…grants-in-aid programs,” 16 and (as Derthick would agree) the demands that states make for federal action to enhance or preserve their programs. Congressional activity in the area of moral policy making is absent in Grodzins’ analysis, giving an incomplete picture of nationalized authority.

In the end, Grodzins believes that all levels of government have grown stronger and that states have actually been strengthened “with respect to personnel practices, budgeting, the governors’ power, citizens’ interest, and the scope of state

15 Ibid., 3.
16 Ibid., XX.
action.” 17 In most circumstances, as Derthick would again agree, the federal-state relationship is mostly compatible. Grodzins’ argument seems to hinge on the idea that the national government has always had a role in what has traditionally been considered the realm of state and local politics, offering education and crime policy as examples. However, his theory is vulnerable to the charge that national government has not previously taken a strong role in determining moral policy. The examples he gives – education and crime – differ in content and impact from social regulatory policies. Grodzins does not make this distinction, and therefore does not recognize this as a new development.

Thomas Dye articulates six eras of federalism, the final three – Centralized, New, and Coercive Federalism - being relevant for this paper. Great Society programs nationalized many policy areas including pollution, consumer safety, and waste management, leading Dye to characterize federalism from 1964 to 1980 as centralized. A five-year period of New Federalism follows, from 1980-1985, during which President Reagan’s decision to end General Revenue Sharing began to cut the ties of federal government to state activism, at the same time that the people and state governments demanded a federal takeover of welfare programs. When the Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority 18 held that the Tenth Amendment did not protect states from national labor standards to the states, it appeared to back away from states’ rights principles. This development, plus unfunded mandates like the Emergency Medical Treatment and Active Labor Act (1985), and

17 Ibid., 7.
the Americans with Disabilities Act (1990), led Dye to call this period Coercive Federalism.

Referring to the federal minimum wage requirement set in *Garcia*, Dye argues that prior to 1985, Congress was assumed to have no business directly legislating on state and local functions. Yet he ignores the social regulatory policies that occurred during that period. Incorporating social regulatory policies into his analysis would expand his conclusion that all barriers to congressional legislation in state venues had been removed after *Garcia*. Though he comes to a conclusion compatible with the argument of this paper – that national government has far overstepped its bounds by legislating on state and local issues – the picture is incomplete without consideration of moral policymaking. Social regulatory policymaking at the congressional level is more intrusive than economic or regulatory policies and their consideration would have added weight to Dye’s conviction that no constitutional division of powers between state and national governments now exist. Dye follows Derthick’s approach in singling out Supreme Court action and its effect on federalism, and bypassing Congress’ attempt at making moral policy.

David B. Walker also gives minimal attention to social regulatory policy. He acknowledges that it is a problematic development and ends the discussion there. Walker believes that the condition of federalism is dire, and does not share the optimism of other theorists that a return to the co-operative federalism of the early twentieth century is a possibility. However realistic, he nonetheless underestimates national expansion by nearly omitting social regulatory policy.
In *The Rebirth of Federalism*, Walker begins by calling the Bush-Clinton era federalism “conflicted,” 19 meaning that it is an “overloaded, seriously confused, and distrusted” system. 20 He adds that the federal system is at once centralizing and decentralizing, cooperative and competitive, as well as activist and conservative. In sum, he fingers national activism dating from the seventies (which he calls a “new political system”) 21 and the propensity of the public to expect far too much from government as the culprits in the demise of federalism. He calls civil rights law, “new social regulation,” under his critique of national expansion. Yet, like Elazar, Walker's book generally glosses over social regulatory policy. He illustrates the cooperative and coercive duality of federalism by submitting as examples intrusive grant conditions and judicial mandates like the Clean Air Act of 1990, looking past congressional efforts in moral policy making.

Walker addresses social regulation, but does it as an afterthought to the regulatory federalism began in 1964, as he and Dye agree. He admits that the social regulations are a new subject matter and directed against private citizens, listing abortion, prayer, and desegregation activities as examples of these. However, just a single paragraph is devoted to these events and he says only that they “reduce the states’ police power... add to the imbalances and ambivalences in the overall system, and strengthen federal co-optive tendencies in current intergovernmental relations.” 22

20 Ibid., xx.
21 Ibid., 1.
22 Ibid., 30.
Thus, in Walker’s view, social regulatory policy is subsumed in the greater effect of national expansion, not a distinct development. As a consequence, the true parameters of national expansion are unexplored and Walker is able to conclude that Michael Reagan’s “Permissive Federalism” accurately describes the state of modern federal-state relations. Reagan believes that there is still shared power and authority in policymaking between governments but the states’ share is appropriately exercised with the permission of the national government.

Walker lobbies for the rebirth of an “authentic” federalism that (re)strengthens the states vis-à-vis the national government and recognizes and protects spheres of authority for states. The ‘shared’ power and authority referenced does not include a view of social regulatory policy. Here, Walker wants national government to leave the sub-governments enough room to implement challenging policies of a fiscal and administrative nature. He cannot mean social regulatory policies when he talks about reinventing the state and national policy boundaries. If he did, he would acknowledge that the first step toward his ‘authentic federalism’ is that the national government must withdraw from social regulatory policymaking, since it is historically and constitutionally a state prerogative. If Walker used moral policies as examples, he would have to acknowledge that the state and national spheres of authority have collapsed and that ‘shared’ power and authority does not always describe intergovernmental relations accurately.

---

23 Ibid., 305.
Elazar, Derthick, Grodzins, Dye and Walker articulate theories that would benefit from the consideration of social regulatory policy. Without them, some of the theoretical conclusions are incomplete such as the scope of nationalization, the power of localism, and the degree of shared power in federal-state relations. Congress has centralized power dramatically in social regulatory policymaking. Federal theories that miss this development are less useful for the omission and are sometimes considerable errors – like devolution - occur.

A Note about the Devolution Literature

In the 1990s social conservatives in Washington pressed for anti-abortion and definition of marriage legislation. Ironically, at the same time, the term “devolution” appeared in the academic journals. In, “The Devolution Tortoise and the Centralization Hare,” John Kincaid addresses the scope and likelihood of policy devolution from federal to state governments; he is skeptical that devolution could ever occur, if only because the central government is loath to relinquish real power. His analysis, however, cites the Contract with America as one of the “Forces for Restoring State Powers,” without acknowledging the call for social regulatory policies

---

24 Richard P. Nathan coined the term in, “The ‘Devolution Revolution’: An Overview” Rockefeller Institute Bulletin (Albany, NY: Nelson A Rockefeller Institute of Government, 1996): 5-13. However, in the mid-nineties, a wealth of material appeared about a pro-state bloc of Supreme Court judges. Other material refutes this, showing at best a 5-4 majority, with three judges reliably voting to protect states rights. One of these was Sandra Day O’Connor. The judicial “New Federalism” has also gone the way of devolution. See Bill Swinford and Eric N. Waltenberg in, “The Consistency of the Supreme Court’s “Pro-State” Bloc,” Publius: the Journal of Federalism 28, no. 2 (Spring 1998): 25-43.
in the Contract.\textsuperscript{25} In that section, he mentions the Defense of Marriage Act as an ahistorical encroachment of national government on state power but does not pursue it further. He ends by concluding that the ‘devolution revolution’ is more accurately called a rebalancing of powers more closely attuned to the Framers intent.\textsuperscript{26} In the following year, Kincaid penned an article in which he wrote that “entrepreneurialism” works with the centralizing force of the “equality revolution” (civil rights and welfare policies) to create a dominant central government.\textsuperscript{27} He very briefly mentions the social regulatory policies supported by the Republicans as a “clash between their free-market principles and their federalism principles,” which does not present social regulatory policies as a major centralizing force. In second case, he has again under treated social regulatory policy by not addressing it further and adding it as a centralizing force.

John Donahue agrees that the devolution talk is rhetorical and that the national government has returned authority to the states in very few meaningful ways.\textsuperscript{28} The conclusion is patently true for most of the issues that Donahue uses to illustrate his point (block grants, welfare reform, and telecommunications) but in each of these cases Congress, the President, the Supreme Court, or a combination of the three, have vocally supported devolving power to the states. Donahue finds both parties


disingenuous in asserting that national government has devolved control of the telecommunications industry. It takes a longer, second look at telecommunications policy to appreciate the gap between political posturing and the truth. Donahue would not have had to work as hard at revealing the illusion of devolution if he had addressed the concurrent social regulatory policies: they are frank attempts by Congress to seize state power using no political subterfuge.

Similarly, Richard P. Nathan and Thomas Gais analyze the success of devolution by evaluating the states’ experience after the Personal Responsibility and Work Opportunities Reconciliation Act of 1996, but they open with the broad statement that Republican leaders are working to decentralize many public services and move control closer to the people. In the mid-nineties, devolution came to signify welfare reform, both in the academic and public literature, but social regulatory policy is still off the radar when it comes to federal literature.

Finally, Michael Greve’s theory is kin to the devolution theorists. In Real Federalism, he argues that state-level political “shenanigans” will disappear and personal liberty will be better protected from national-level politics if an inter-state competitive model is adopted. According to Greve, competition among governments offers people a choice and, since people ‘vote with their feet,’ it also leads to innovative policymaking in both moral and economic issues. He says that


Americans rightfully look to the national government for leadership on moral issues and argues that competitive federalism creates the advantage of choice in these policies as well. However; he says that some moral issues, like Jim Crow, were too “fundamental” to be subjected to choice. He does not, I believe, recognize the contradictions in his argument. The implication is that if Jim Crow is too fundamental to leave to choice, then other moral policies could be judged too fundamental as well. The irony is that his theory, which prescribes choice as the panacea for federal ailments, endorses no choice where social regulatory policy is concerned. Yet Greves, unlike the other scholars I have discussed above, at least recognizes that the federal government has become more actively involved in regulating social policy in recent years, stepping into an area of public policy traditionally controlled by the states.

**Conclusion**

Policy analysts noticed that since the 1960s, there has been a distinct increase in the number of social regulatory policies on the national agenda, however as I have shown in this chapter, the literature has given only cursory treatment of this development. It is important to account for this oversight because social regulatory policies are different than economic or regulatory polices. Commonly referred to as ‘social issues’ by the media, public, and politicians, these policies act on individuals by statutorily prohibiting, or seeking to influence behaviors. The next chapter
describes in detail the history of social regulatory policies and their impact on our personal lives.
CHAPTER 3

SOCIAL REGULATORY POLICY

Social regulatory policies are distinct from other kinds of policies because they address those normative, moral, and social issues that are generated by social customs and mores as a part of daily living. Laws pertaining to healthcare, marital and family issues, sexuality, pornography, nudity, gun accessibility, adoption law, marriage licensing, liquor laws, and public decency standards and abortion are examples of social regulatory policy. In the last 60 years, Congress has involved itself extensively in creating these kinds of policies. To understand these trends and their implications, it is important that I first explain in more detail what is meant by social regulatory policy, how it has been treated by government in the past, and how it is distinct from other types of public policy. Has the national government become more involved in social regulatory policy? In the next chapter I present a review of congressional activity to show that it has increased. First, it is valuable to discuss previous research that has documented this trend and discuss some major pieces of legislation associated with it.
In 1998, Raymond Tatalovich and Byron Daynes, among other national policy analysts, noted that in addition to gun control and gay rights, "questions involving abortion, church-state relations, death row appeals, affirmative action, and now child pornography [had] jammed the federal dockets." In his foreword to Tatalovich and Daynes’ work, Theodore Lowi writes that policy studies of the 1960s and 1970s make reference to a new policy type proliferating at that time. Analysts wrote about these policies, “in order to convey an emerging sense that there is indeed something about these policies that does not fit comfortably into existing categories.” What Tatalovich and Daynes intend to capture by categorizing social regulatory policies is that “what is being regulated is not an economic transaction but a social relationship,” and that social regulatory policy is the “the exercise of legal authority to affirm, modify, or replace community values, moral practices, and norms of interpersonal conduct.”

The national government’s actions on abortion and anti-homosexual legislation exemplify this trend. All three branches of government have acted on social regulatory policies. Congress proscribed federal funding of abortions with the Hyde

---

32 Theodore Lowi, *Moral Controversies in America Politics*, xv. Lowi agrees with the authors that there is an important distinction to policies that revolve around moral issues however; he does not agree that it needs to be treated outside his original typology. Rather, he incorporates social regulatory policy into an updated model and calls it radicalized politics, which, he asserts, has always been a feature of politics generally. I believe that social regulatory policy is more important and discrete because it is radical politics nationalized.
Amendment in 1976,\textsuperscript{34} instituted the "gag rule" in 1991,\textsuperscript{35} and enacted the Partial-Birth Abortion Acts of 1995 and 2003. In 1989, Congress defunded "obscene" material produced by the National Endowment of the Arts,\textsuperscript{36} demanded that states meet a burden of "compelling justification" when restricting religious exercise with its ratification of the Religious Freedom Restoration Act of 1993, and banned same sex marriage in with the Defense of Marriage Act of 1996.\textsuperscript{37} The Supreme Court issued open-ended abortion rulings in \textit{Webster} (1989),\textsuperscript{38} and \textit{Casey} (1992)\textsuperscript{39} and overturned the Religious Freedom Restoration Act. President Clinton overturned abortion restrictions using the Executive Order in 1993, and signed the Defense of Marriage Act in 1996. The national government has also attempted to nationalize the English language,\textsuperscript{40} curtail indecent content on the Internet,\textsuperscript{41} and nationalize policy on the death penalty\textsuperscript{42} and affirmative action.\textsuperscript{43}

Among these policy subjects there are four primary commonalities: they are ideological in nature; they attempt to regulate or change a behavior, they are based on value judgments about marriage, abortion, obscenity, or other normative concepts; and they are characterized by intense and highly reactive politics.

\textsuperscript{34} HR 1646 (H.AMDT.34). Amends State Department FY 2000-2003 Authorizations bill.
\textsuperscript{36} Arts, Humanities, and Museums Amendments of 1990 (H.RES.494).
\textsuperscript{37} Pub. L. 104-199, 100 Stat. 2419 (Sept. 21, 1996).
\textsuperscript{38} \textit{Webster v. Reproductive Health Services}, 492 U.S. 490 (1989).
\textsuperscript{40} The Language of Government Act of 1995.
\textsuperscript{41} The Communications Decency Act of 1996.
\textsuperscript{42} \textit{Furman v. Georgia}, 408 U.S. 238 (1972); The Anti-Terrorism and Effective Death Penalty Act (1996).
Public Policy Types

Differentiating social regulatory policies from other kinds of policies is required for an adequate analysis of change in American federalism because the emergence of social regulatory policy, as the past section makes clear, is a relatively recent development. Tatalovich and Daynes base their discussion of policy types on Theodore Lowi’s seminal work on national policy analysis, which identifies four types of public policy. Tatalovich and Daynes add to his four-point model a fifth policy type that they claim does not fit in the categories created by Lowi: policies that seek to control individual behavior. Christopher Mooney also identifies ‘morality-policy’ as a discrete policy type. He writes that:

These conflicts go beyond the typical disputes about which policy instrument might best achieve some agreed-upon goal, such as whether a 55-mile-per-hour speed limit makes highways safer than higher limits. Morality policies are neither tactical nor strategic. Rather, they are authoritative statements about what a polity holds to be fundamentally right and wrong. ⁴⁴

Abortion provides the best-known example of the emotive and divisive nature of social regulatory policy. The antagonistic goals of pro-life and pro-choice lobbies are clear. Reduced to their core missions stated in their preferred terms, the pro-life movement wants to protect unborn children while the pro-choice message is the

---

freedom to choose. The pro-life objective is not to restrict or curtail abortion: it is to end it wherever possible. Pro-choice lobbyists couch their argument in ringing political tones, arguing that the pro-life camp wants to end freedom and choice. The pro-life and pro-choice positions are intransigent because, as is typical of social regulatory policy participants, neither side can pragmatize abortion enough to bargain with the other. Little, if any, political concessions can derive from social regulatory policy making since both sides hold deeply their moral view and see compromise as capitulation. Since neither side can compromise, a zero-sum game is generated precluding traditional political practices like logrolling and bargaining.

Social regulatory policies are also unique because the dialogue has a strong moral dimension couched in normative language. Social regulatory policies reference sinful, inappropriate, bad, or wrong behavior. The bipolar arrangement of power is seen clearly in the dialogue around these issues. Normal political processes include negotiation but because participants are taking up sides side of a moral argument these policies fall outside usual methods of consensus building.

The language of social regulatory policies is critical. Returning to the abortion example, pro-life advocates base their argument on the finality and wisdom of the Bible and God. Words like ‘God,’ ‘murder,’ ‘life’ and even ‘choice’ are meaningful because words are weapons of debate: they evoke a specific emotive reaction like

45 See Ruth Strickland, “Abortion: Prochoice versus Prolife,” Moral Controversies. The most common concession on abortion by the pro-life lobby when the mother faces death without it. Even this is given grudgingly and does not involve a true choice in the sense meant by the pro-choice lobby; therefore I believe it does not undo the non-negotiable nature of social regulatory policy put forth by Tatalovich and Daynes.
anger, sadness, or exhilaration. In an attempt to neutralize pro-life language pro-choice rhetoric counters ‘unborn child’ with the dry medical term, ‘fetus.’ Terming abortion the “murder of an unborn child” prompts an emotional response because that phrase captures certain meanings. The word ‘murder’ connotes the wrongful and criminal taking of a human life, and inserting the word ‘unborn’ before ‘child’ invokes the protective attitude of society toward children. Though an unborn child is by definition a fetus, the murder of a fetus makes little sense, since murder is what happens to humans (and the end of a human life is how the pro-life advocates want everyone to understand abortion).

Similarly, the term ‘choice,’ and conversely, the denial of choice, evokes strong reactions in the abortion rights lobby. Activists on the pro-choice side of the lobby couch their argument in rights-based language – a flashpoint for political activism in America. Conciliation on the terms of debate for either side is impossible because it means the sacrifice of critical meaning. In this case, in the absence of meaningful dialogue, a political compromise becomes a faint possibility.

Equally important as the legal goals of social regulatory policies is why they appear on the political agenda. A definitive difference between other policies and social regulatory policy is that the act of controlling the behavior in question has meaning because the behavior itself is bad or wrong. Pornography is restricted because it is a moral, not an economic, wrong. By comparison, the desirability of enacting economic or regulatory policies is measured by weighing the cost against the benefit. When moral policies are made, answers to practical dilemmas are
unattainable. Pro-lifers do not object to abortion because of its political or economic ramifications; they protest abortion as a moral wrong. Conversely, pro-choicers become enraged at the idea that the anti-abortion movement might endanger rights. They attend marches and rallies with the same zeal as the pro-life lobby.

Finally, one goal of social regulatory policy is to achieve permanence and finality in law. An example is the lobby for a constitutional amendment that codifies that life begins at conception. The tortoise-like nature of the national government creates the possibility that any social policy created at the national level will be difficult to amend or retract. Again, a potential consequence such as this will be overlooked if federal research is not expanded to include social regulatory policies.

Suicide, one of the single most intimate, personal decisions an individual can make, has made its debut on the stage of national politics. Although other cases of social regulatory policy can illustrate why national incursion into state police powers represents a new trend, the example of the federal government’s efforts to overturn Oregon’s assisted suicide law is particularly revealing of the extent to which Congress is becoming involved in social policy and the distinct character of these social policies.

Oregon and Assisted Suicide Law

Oregon is on the vanguard of assisted suicide legislation as the only political entity to write access to assisted suicide into law. On June 9, 1998, the year that
Oregon passed the Death with Dignity Act, Senator Nickles (R-OK) introduced the Lethal Drug Abuse Prevention Act, a bill designed to overturn Death with Dignity by invoking the Commerce Clause to prohibit the dispensation of a controlled substance for the purpose of assisted suicide. Though it died in committee, the LDPA was co-sponsored by 23 Senators. In June of the following year, Representative Henry Hyde (R-Ill) and 165 cosponsors introduced the Pain Relief Promotion Act, which called upon the same constitutional authority to criminalize assisted suicide. The efforts by Nickles and Hyde represented the first in a series of steps taken by Congress and the federal government to overturn Oregon’s law.

Oregon’s suicide law was adopted through the state’s initiative process, which has long been hailed an example of Oregon’s spirit of progressivism. William S. U’Ren’s political activist group, the Direct Legislation League, is primarily responsible for the creation of what is known national as the ‘Oregon System.’ A ballot measure, adopted by Oregon voters in 1902, amended the state constitution to allow voters to propose new laws or change the constitution itself through a general election ballot. The initiative process is frequently the venue upon which politically volatile issues are introduced, lobbied for and against, and voted upon by the general public and have been utilized by activists on social regulatory policies. In Oregon, the initiative process has been used to achieve equal suffrage (1912), abolish the death penalty (1914), and adopt the death penalty by lethal injection (1984).

The initiative to legalize doctor-assisted suicide appeared on the November 8, 1994, ballot. A record 57 percent of Oregon voters went to the polls and provided a
slim but viable 2 percent majority to legalize suicide. Death with Dignity became law in 1997, requiring that persons seeking assisted suicide must be 18 and an Oregon resident; competent to make and communicate health decisions; and have an irreversible medical condition resulting in death inside six months. Several requirements built into the measure protect patients from abuse including the offer, by the physician, of alternatives like hospice care; a mandatory second opinion; mental health evaluation in cases where depression is suspected; and the patients must provide two oral requests and a single written request within a 15-day waiting period, prior the dispensation of medication. Local religious and conservative groups immediately claimed that elderly and terminally persons would be vulnerable to abuses of the act, citing ill-intentioned relatives, depression, and guilt as factors in the misuse of assisted suicide law. In response, the Oregon Health Department (OHD) conducted a study of the first year’s participants.

Recognizing the statistical limitations inherent to a study on death and dying, the OHD did two comparison studies of the fifteen Oregonians who chose assisted suicide in 1998, using 1996 mortality statistics for the entire state of Oregon as a control group. Both studies yielded similar findings about Oregon’s first assisted suicides; they were similar in all respects to others who died naturally of their illnesses. Patients who elected to use assisted suicide were not disproportionately

---

46 627,980 voted in favor, 596,018 against - a record voter turnout, as noted.
47 Physicians who participated in assisted suicides preferred anonymity and in some cases elected not to discuss their experience with assisted suicide for fear of professional repercussions. Further, death and dying are a personal and secretive matter to some patients and their families; therefore researchers had difficulty maintaining consistency in their access to information. “Oregon’s Death with Dignity Act Annual Report,” Oregon Department of Health and Human Resources, 1998: 5.
poor, less educated, lacking in insurance coverage, or unable to access hospice care. None voiced a fear of unmanageable pain or financial concerns as a reason for seeking assisted suicide. The single defining characteristic of Oregonians who chose assisted suicide was a shared conviction on the importance of autonomy and personal control; their common interests were losing autonomy, losing control of bodily functions, and "a determination to control the timing and manner of death." The report clearly captures the deep personal nature in which these Oregonians viewed the decision that they were making, one that was predicated on their desire to control their own lives:

> Autonomy was a prominent patient characteristic in physician’s answers to open-ended questions about their patients’ end of life concerns. Many prescribing physicians reported that their patients decision to request a lethal prescription was consistent with a [personal] long-standing philosophy about controlling the manner in which they died...Thus, in Oregon the decision to request and use a prescription for lethal medications in 1998 appears to be more associated with attitudes about autonomy and dying, and less with fears about intractable pain or financial loss.49

As Oregon made preparations for its first year under the new assisted suicide law, Congress passed the Assisted Suicide Funding Restriction Act in 1997, a shot over the bow of assisted suicide proponents since no assisted suicides were federally funded then or now. In June of 1999, over the opposition’s objections, Democratic

---

48 Ibid., 8.
49 Ibid., 10.
Governor John -Kitzhaber justified the absorption of the cost of assisted suicide by the Oregon Health Plan arguing that voters had twice endorsed it as a legitimate medical practice. Even so, the opposition lingered. After the first use of the assisted suicide law, the Oregon Catholic Bishop’s Conference, one of the law’s firmest opponents, issued a statement consistent with the ideological politics of social regulatory policy. Cardinal Bernard Law commented:

This week Oregon's macabre experiment in assisted suicide claimed its first known victims...Any suicide is an enormous tragedy, a personal loss as well as a loss to us all. Government-approved suicide of the elderly and vulnerable is a sign of moral collapse. Oregon now sends a message of despair to all who may be tempted to view death as a solution to human problems.  

Despite public support in Oregon, and its history of grassroots activism, the issue, predictably, appeared in national government in 1999. Immediately after the law was affirmed, Thomas Constantine, the administrator of the federal Drug Enforcement Administration (DEA), wrote a policy statement that prescribing drugs to help terminally ill patients hasten their deaths would be in violation of the Controlled Substances Act and "was not a legitimate medical use under the federal drug laws." He further warned that "the government would impose severe sanctions on any doctor who writes a prescription for lethal doses of medicine for a patient," and their

prescription-writing authority could be canceled. Congress entered the fray directly after Constantine.

Henry Hyde (R-Ill), and Bart Stupak, (D-Mi), in cooperation with Senator Don Nickles, (R-OK), introduced the Pain Relief Promotion Act of 1999. Its provisions would enable Congress to exercise its authority via the Commerce Clause to amend the Controlled Substances Act. The amendment states that “alleviating pain or discomfort…is a legitimate medical purpose,” and that “nothing in [the Controlled Substances Act] authorizes intentionally dispensing or administering a controlled substance for the purpose of causing death.” Physicians violating the act by prescribing controlled substances to assist in a suicide would face revocation of their license to distribute controlled substances and criminal penalties. Law scholars immediately identified some constitutional issues including federalist Commerce Clause concerns and equal protection issues. Congress’ long history of drug regulation and favorable decisions about its right to regulate drugs under the Commerce Clause are also a concern. The Pain Relief Promotion Act passed the PRPA passed the U.S. House of Representatives in October 1999, with solid bipartisan support and moved to the senate Commerce Committee.

At the beginning of the 2000 Congressional session, opponents of the PRPA pressed for an examination of its costs and intentions, and the PRPA failed to reach the Senate floor for a full vote before adjournment. The bill’s proponents made strong ideological arguments in its defense, exemplifying the type of politics surrounding social regulatory policy making. Senator Tom Coburn, MD (R-OK) said:
All of us, handicapped as we are, have value, whether I agree with the philosophical point of view or not of that other individual, is that all of God’s creation, all life has value. Whether it is the unborn child just conceived, whether it is the child with multiple anomalies, it all has value. If it has no value, there is no real meaning to life in the beginning or in the end.\textsuperscript{51}

Senator Coburn’s remarks were echoed by Representative Henry Hyde, (R-Ill)

Now it happens that Oregon decided to change the traditional time-honored professional purpose of medicine and give Oregon doctors the option no longer to serve as healing forces but as social engineers, messengers of death. So Oregon has passed a State law that gives doctors the right to assist in the intentional killing of patients, patients who may want to die, families who want their older relatives to die, and so doctors are authorized now by Oregon law to put down their stethoscope and pick up the poison pill and proceed to assist in the execution of their patient.\textsuperscript{52}

Over the next several years, conservative members of Congress and the Bush administration continued to take steps to overturn Oregon’s law. The specifics of these steps are not important to examine in detail here. The important point of Oregon’s experience with assisted suicide law is it illustrates what is meant by social policies and it provides a good example of Congress’s newfound efforts to regulate these policies. As with other social policies, the federal government’s effort to restrict physician-assisted suicide was ideological in nature, it was based on a deep-seated value judgment, and the battle was characterized by intense and highly reactive

\textsuperscript{51} Frank Coburn H10877, October 27, 1999.
\textsuperscript{52} Henry Hyde H10885, October 27, 1999.
politics. It is a particularly poignant example of the personal character of these types of social policies and the intense value debate that they entail because Death with Dignity began as a grassroots initiative by people who wished to protect their dignity in life by preserving their autonomy in death, while the opponents sought to restrict suicide based on moral ideologies.

Conclusion

As discussed in the previous chapter, most federal theories acknowledge that power-centralizing events like Roe and the outgrowth of legislation and law from the civil rights movement strain federal principles but these policies are not acknowledged as moral. Rather, they are folded into theories about national expansion and treated like other kinds policies that centralize power and attributed to government’s general tendency toward expansionism. However, as I will show in the next chapter, there is evidence that social regulatory policymaking is trend distinct from other kinds of policymaking and worth of separate consideration.
Studies of federalism have missed an important new trend. Beginning with civil rights era legislation, Congress has acted regularly on a particular type of moral policy that states have historically created. These ideologically driven policies are readily recognizable from other types of policies; they are emotive and have a gut-level relevance for many people. Further, the politics surrounding these issues is particularly divisive, bitter, and irreconcilable, precluding many of the usual political resolutions. Since the 1960s, Congress has created policies on abortion, anti-homosexual, and nationalization of the English language – policy areas that used to be almost solely managed by the states. This is an urgent and new trend that deserves separate treatment in the federal literature.

Because “morality policy has only recently begun to be studied as a class by political scientists,” it is important to this paper to show empirically that congressional entry into social regulatory policy making is both recent and real. To accomplish this task, I completed a long-range policy study to discover what types of policy Congress has been making in the last 60 years. As I describe in more detail below, I categorized the legislation into different types of policies, and then graphed

---

53 Mooney, “Decline of Federalism,”
the trends in each area, including a separate graph for social regulatory policies. I have claimed above that social regulatory policies are a distinct policy type that has been appearing on the congressional agenda since the 1960s, so I expected to find an obvious congressional entry into that policy type at that time. The study includes policies created in the fifteen years before the civil rights era began in earnest in order to capture that specific data. After the entry point on the graph of social regulatory policies in or around 1960, I expected to see regular spikes in the graph thereafter, as Congress continued in this policy venue. On all policy graphs I expected to see alternating peaks and valleys as Congress became more or less active according to the political tenor of the times. Finally, I expected, after 1960, for all graphs to show a similar spike and valley pattern, which would indicate that Congress attempts social regulatory policy with similar regularity as other types of policy. To say it more concisely, if my hypothesis is correct, I would expect to see social regulatory policy appear on these graphs in the civil rights era and then remain on the graphs thereafter, though with some potential fluctuation as it competes with other issues on Congress’s agenda. If I do not find these trends, it would indicate that these policies are not as prevalent as I have argued.

Because it was impractical to categorize all proposed legislation over the past 60 years, I selected Congressional Quarterly Almanac’s "Key Votes" as the data pool for policies because CQ Press is well established as an independent resource for students and researchers. CQ Press publications are reputable among the academic and professional community as an objective and thoughtful scholarly resource
governed by high standards of editorial excellence. Significantly, the CQ Almanac has published its Key Votes list since 1945, summarizing 61 years of congressional policymaking, which provides an excellent backdrop for viewing the history of social regulatory policy.

The editors of CQ Almanac annually select a series of important votes that capture significant issues before Congress, and reflect both the mood of Congress and the impact that constituent and other pressures can have on a member’s vote. CQ Almanac arrives at the Key Votes by reviewing policies that are important to both Congress and the constituency, and illustrate the overall direction of congressional efforts. The use of Key Votes should work around the problem of vote selection, which is a particular concern to this study. Key Votes are a neutral source that both culls important votes out of the entire data pool and changes the data of 61 years of congressional activity from enormous to manageable. Using the Key Votes may not tell us total number of these regulatory policies that have been adopted by Congress, but they do allow us to measure how salient these issues have become over time.

CQ Press began publishing annual almanacs in 1945: as of this writing, the almanacs were current through 2004. At least ten Key Votes were counted annually for each house since 1945. In later years, the total number of Key Votes ranged from 12-15 for each house of the legislature, so that the total number of votes coded is 1572: a solid sample of noteworthy congressional action, provided consistently over a number of years by an informed source.
I coded congressional votes by type of policy based on Theodore Lowi’s original policy typology from 1972, and the revised table he created in the foreword to *Moral Controversies in American Politics*. I merged both of Lowi’s models and added the social regulatory policy cell; however Lowi’s policy types remain true to his initial iteration. The policy types are quantified identically between the first and second version but in order to capture the policy types more completely, I merged the descriptive data from both of Lowi’s models and expanded the definitions of the policy types. I added the social regulatory policy cell, which Tatalovich and Daynes did not do in *Moral Controversies*.

The policy types identified by Lowi are regulatory, distributive, redistributive and constituent. Regulatory policies control business and economic practices. Constituent or ‘in-house’ policies control activities of the federal government internally. Redistributive or ‘entitlement’ policies relocate material wealth from one economic sector to another, while distributive policies regulate how the government does business externally. Each of these categories has an economic or administrative end, pursuant to the interests of national government. Viewed in the context of these policy-making types, social regulatory policies are obvious deviations from the usual sphere of influence of the national government. This policy analysis proceeds using Lowi’s policy categorizations, and Tatalovich and Daynes’ later observation that a type of policy had appeared that did not fit the original schema.

Table 1 presents Lowi’s scheme, and the addition of social regulatory policy, to create the policy table used in this paper.
Table 1. Agency and Agenda in American Policymaking

<table>
<thead>
<tr>
<th>POLICY TYPE</th>
<th>EXAMPLES OF POLICY</th>
<th>POLICY OBJECT</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Regulative Policies:</strong></td>
<td>- Economic regulation</td>
<td>Policy Toward Businesses And Governments</td>
</tr>
<tr>
<td>Elimination of Substandard Goods, Unfair Competition, Fraudulent Advertising, Energy Policy, Embargoes, (De)regulation of Industry</td>
<td>- Taxes</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Standards enforcement</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Withdrawal of regulation</td>
<td></td>
</tr>
<tr>
<td><strong>Distributive Policies:</strong></td>
<td>- Research and development</td>
<td>Policy Toward Business and Governments</td>
</tr>
<tr>
<td>19th century Land Tariffs, Subsidies, Water Works, Farm Supports, Lunch Programs, Work Programs, General Revenue Sharing</td>
<td>- Licensing and sales</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- “Pork barrel” spending</td>
<td></td>
</tr>
<tr>
<td><strong>Constituent Policies:</strong></td>
<td>- Restrict state action</td>
<td>Policy toward Government Structures and Institutions</td>
</tr>
<tr>
<td>Reapportionment, Regulations Rules, Censure, Foreign policy, Appropriations bills, State Annexation</td>
<td>- Restrict federal action</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Internal administrative Reform</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Education</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Appropriations</td>
<td></td>
</tr>
<tr>
<td><strong>Redistributive Policies:</strong></td>
<td>- Poverty programs</td>
<td>Policy Toward Government Practices</td>
</tr>
<tr>
<td>Federal Reserve Controls of Credit, Progressive Income Tax, Social Security, Medicare, Medicaid</td>
<td>- Welfare</td>
<td></td>
</tr>
<tr>
<td><strong>Social Regulatory Policies:</strong></td>
<td>- (Im) moral activities</td>
<td>Policy Toward Individual Behaviors</td>
</tr>
<tr>
<td>HUAC, Abortion, Assisted Suicide, Death Penalty, ERA, Gun Control School Prayer, Cloning</td>
<td>- Non-economic policies</td>
<td></td>
</tr>
<tr>
<td></td>
<td>- Personal issues</td>
<td></td>
</tr>
</tbody>
</table>

The table shows policy types with general descriptions, explicit examples, and very general observations about the object of the policy. Regulatory policies are those that amend and control business and government practices such as the Americans with Disabilities Act, business standards enforcement, environmental policy, and bankruptcy law. Any policy that retracted government controls of business, such as the telecommunications deregulation in the mid-1990s, was also coded as a regulatory policy. Constituent policies are those that occur only in the arena of national government, internally and externally. They include ‘in-house’ votes like personnel censure, procedural changes to floor rules, and Supreme Court confirmation votes. It also includes externally directed issues like foreign policy, embargoes, presidential restrictions on arms sales, and immigration control. Education and healthcare bills also appear in this category as a long-standing focus of active policymaking for national government.

Redistributive policies are few in number since the category primarily consists of the income tax and ‘entitlement’ policies, like Medicaid, Medicare, and large-scale poverty projects. These relocate material wealth from one economic sector to another and therefore are directed at governmental practices. Distributive or ‘pork-barrel’ policies are directed at all levels of government as well as business. Defense spending, General Revenue Sharing, business price supports, appropriations for NASA, and defense spending (e.g., the Starwars Defense Initiative) are all distributive policies.

Regulatory, Distributive, Constituent, and Redistributive policies are all directed at businesses or governmental agencies. By contrast, social regulatory
policies like abortion, assisted suicide, and the death penalty are directed at individual behavior. Congress may use state agencies to operationalize the policy however, the purpose of the policy is to control, change, or prohibit a personal behavior.

Methodology

I coded a 60-year span of Key Votes for all types of policy represented in the five-point model. The method is straightforward: having recreated Lowi’s policy model with the added cell for social regulatory policy, I then read the descriptor for each key vote and coded it according to the policy it best fit.

In general, there were few problems with this method of coding the data; most of the votes fit neatly into the categories specified. There were a few exceptions to this general rule. Whenever the Key Vote was actually a minor procedure (for example, tabling an amendment) I coded the vote based on whatever issue CQ judged to be relevant for the Key Vote. As well, I retained this approach if the action was part of a larger piece of legislation. If, for example, the Key Vote was an abortion amendment (social regulatory policy) that was attached as a rider to an appropriations bill, (constituent policy), then the vote was coded as social regulatory policy. The text of the Key Vote was instructive on how to code the vote in these cases. More problematic were the omnibus bills that contained multiple elements that were competing highlights of the vote because these could be coded under two or three policy types. For example, in 1998, House Key Vote number seven was an Omnibus
Trade Bill that regulated unfair foreign trade practices, streamlined controls on militarily sensitive exports, revised agriculture and education programs and required certain employers to provide workers with 60 days' notice of pending layoffs. These are all significant features of one Key Vote and can be coded as at least three policy types. In these few cases, I did not prioritize one policy over another and coded the Key Vote under all applicable policy types. In this way, I attempted to capture all the policy elements of a single vote and avoid misrepresentation of how often the policy types occur. This seemed to be the most reasonable approach to coding single incidents of policymaking that include more than one policy issue, as is the case in many omnibus bills.

Results of Analysis

Overall, my expectations were satisfied. The graphs show somewhat irregular peaks and valleys in all policy types and the social regulatory policy graph does show it is a new arrival on the congressional agenda. The single incident of social regulatory policy in 1945 is action by the House Un-American Activities Committee. As expected, there were spikes in the social regulatory policy graph that corresponded to political events in history. The spikes from 1960-1970 are civil rights and voting rights legislation. In 1990, abortion, anti-homosexual, and assisted suicide legislation drove the incidents of social regulatory policy up to their highest peaks.
Figure 3. Constituent Policy

Constituent Policy: 1945-2004

Year


CQ Key Votes

Figure 4. Redistributive Policy

Redistributive Policy: 1945-2004

Year


CQ Key Votes
There is some evidence of a slight increase in Constituent Policy, but otherwise, none of the graphs except social regulatory policy show a substantial quantitative increase in number. The Distributive Policy graph actually shows a slight decline in overall incidents. Activity apparently dropped off in 2000 but the Key Votes in the last available years of CQ Almanac (2003, 2004) show that they immediately return. Further, all policy types except constituent policy and a single year in regulatory policy showed years where no such legislation occurred. Social regulatory policy is the only policy type that, except for the single HUAC event in 1945, does not exist at all between 1945 and 1955.
The correlation in the incidence of social regulatory policy with major political events in U.S. history is clear. For example, the spike in 1972 reflects ongoing development of the equal rights movement. Key Votes in that year include: a proposal to allow courts to enforce anti-discrimination policy recommendations from the Equal Employment Opportunity Commission, anti-busing riders on education bills, and the Equal Rights Amendment to the Constitution. This is followed in 1974 by another vote on busing in both houses (as an amendment to an education bill), an appropriations rider disallowing the Department of Education to withhold funds to enforce anti-discrimination compliance, and a vote on capital punishment. Busing continues to be a topic in 1975, 1978, 1979, 1980, and 1981, but begins to give way to abortion in 1976, and other social regulatory policies after 1978.

The data behind the graphs also show a shift in congressional attention from anti-discrimination to abortion in post-Roe years, and the addition of other types of moral policy in the 1990s. Abortion appears as a Key Vote in almost every year after 1976 and in some years, in both houses of the legislature. On twenty occasions since 1976, CQ Almanac has chosen abortion as a Key Vote, and in 1998, it appeared twice: once as a vote to criminalize harm to a fetus, and one as a ban on Partial-Birth Abortion. Congress has been most active on abortion and the normative element of social regulatory policymaking is clearly highlighted on abortion bills. For example, a 1989 amendment prohibiting abortions makes an exception made for “promptly reported rape or incest.” Key Votes on abortion also demonstrate that Congress has considered bills that preempt many state regulations surrounding the issue. A bill in
1996, for example, would have allowed a married man to pursue damages against his wife in the case of an unwanted abortion, disallowed late term abortions, and required the prosecution to prove an abortion was necessary to save the woman.

Other social regulatory policies begin to appear after the late seventies including The Equal Rights Amendment in 1978 and anti-feminist legislation in 1980. School prayer Key Votes appear in 1984, and in 1985, gun control votes begin to appear. School prayer, gun control, flag burning, and the death penalty persist throughout the 1990s. Indeed, 1990 was a banner year for social regulatory policy. Of 32 Key Votes, eight were social regulatory policies including an assault weapons ban, a flag-burning amendment, parental notification on abortion, an obscenity condition via the National Endowment of Arts, and the Civil Rights Act of 1990.

By contrast, the Key Votes for 1945 include votes on trade agreements, Bretton Woods (International bank participation), Labor Racketeering, War Manpower Control, and Railroad Anti-Trust legislation. Aside from HUAC, there are no instances of social regulatory policy making. Admittedly, contemporary congresses debate similar issues, but the Key Votes show clearly that today’s Congress is engaged in the making of social regulatory policy. Consider that table 1 describes many different policy subjects for regulatory, distributive, and constituent policies. Redistributive policies consist of a limited number of policy subjects – primarily Medicaid and Medicare - and therefore appear to have the lowest number of incidents on the graphs. When compared to regulatory, distributive, and constituent policies, social regulatory policy, Key Votes cover a small number of policy subjects:
anti-discrimination and busing, equal rights, abortion, anti-homosexual legislation, and obscenity. Their regular appearance as Key Votes, despite the small number of active issues, shows that Congress repeatedly enters this venue to legislate.

The entire data pool and all graphs, give a false impression of increased overall congressional activity. This is a limitation of the data. Over time, CQ Press increased the number of annual Key Votes from an average of ten, to sixteen in each house. I suspect that a consistent increase in congressional activity over time prompted CQ Press to raise the number of Key Votes in order to capture vital congressional activity; however this conclusion is not adequately supported here.

Conclusion

In order to demonstrate that social regulatory policies exist as a real congressional trend, I chose an independent source to provide the data pool for a study. I found that the Key Votes were easily categorized into the five-point model and that social regulatory policies were easily recognizable among them, as expected. With limited exceptions, most of the policies were quickly and easily fitted into the new five-point model. The social regulatory policy graph does show a definite spike when Congress began to legislate on that policy type. That spike is preceded by no activity, except congressional action in the House UnAmerican Activities Committee. These graphs serve to support the argument of this paper by showing empirically that social regulatory policy is both real and a recent arrival on the congressional agenda.
CHAPTER 5

CONCLUSION

With its action on civil rights legislation, Congress entered a new policy area and in the process, began nationalizing power in ways unaccounted for in the literature on federal-state relations. Prior to congressional intervention in the 1960s, the states almost exclusively controlled the creation of moral policies, however as the literature review in this paper reveals, federal scholars seldom recognize national action on these policies as a noteworthy event. In the preceding chapters, I introduced social regulatory policy, as articulated by prominent policy analysts, and rendered it down to its constituent parts. Social regulatory policy is sets apart from other policy types by its normative content which fuels the intensely emotive reactions it invokes. Moral policy issues have an intimate salience for opposing sides, and preclude the usefulness of usual political mechanisms. The policy study supports the claim that this is a new area of Congressional action and the literature review on federalism supports the claim that this new policy area is unaccounted for in federal writings.

I offered some comments on how particular presentations of federal-state relations might improve with the integration of nationalized moral policymaking. Most benefit, I believe, from improved accuracy in reporting the power balance between the
governments. An immediate benefit of this remedy is a more correct construction of the nationalization of power. Federal theories that overlook nationalized moral policymaking risk mischaracterizing the ebb and flow of political power between national and state governments, leaving room for error in analytical conclusions. For example, minus an account of moral policymaking, national withdrawal from economic or regulatory policy areas it had previously controlled might indicate a sea change in governmental relations. Literature hailing the devolution of power from the national to state governments is susceptible to this exact complaint. While the national government made a display of withdrawing from telecommunications policy, it was simultaneously taking expansionist steps in the area of moral policy, which went unreported by the federal literature. Though in retrospect, devolution has lost credibility it serves to exemplify the type of error that can result from the oversight of congressional advances in moral policy making.

Further, since there is no account of congressional action on moral policy in the federal literature there is no way to track changes in this policy area, including congressional withdrawal from it. This deficiency in the scholarship masks not only the reality of congressional power, but future changes as well. If Congress began to withdraw from moral policy it might signal a shift in congressional attitude toward these issues. To date, any existing federal models would not capture such a change.

The federal literature misses some other important questions about nationalized social regulatory policies. One such question is why these types of policies have generated national attention? A second is, does this policy type impact the federal
system negatively? Empirical research could be employed to yield more data about how Congress acts on all policy types, thus giving a more accurate picture of congressional behavior. Has Congress simply added moral policy to its purview or does it legislate on moral policy at the expense of other policy types? On the other side, have states noticed this development and formulated a counter-strategy? Answers to these can only be attempted if these policy types fall within the purview of the academic literature. If these are included, then federal scholars can begin to present a descriptive picture of federal-state relations, and offer a more detailed and accurate account of how national government has expanded its power.

The Future of Social Regulatory Policy

Professor Robert F. Nagel believes that Americans are of two strong minds with regard to social regulatory policy. If he is correct, then the moral one-sidedness of social regulatory policy could precipitate a kind of single-issue culture war. He wrote in 2002:

Disagreement about issues like abortion, homosexuality, and the place of religion in public life is sufficiently profound and systematic as to suggest that Americans are split by two fundamentally different worldviews. The danger is that this division is too wide for discourse or compromise, indeed, too wide for any peaceful resolution. Similarly, multiculturalism's unsettling claims about collective guilt and racial entitlement raise the possibility of a moral and
perceptual rupture significant enough to evoke images of breakdown and bloodshed.\textsuperscript{54}

Writing in 2004, Dale Krane agrees that there is something more going to these policies with regard to public sentiment:

\begin{quote}
[T]he increasing polarization among elected officials encompasses more than different positions on economic matters. The current inter-and intra-party clashes are fueled by issues of civil rights, culture, lifestyle, morals, and religion, and the positions expressed by elected officials are grounded in divisions within the general public. The rifts within American society over issues such as gay rights, the war in Iraq, the place of religion in the public sphere, freedom of expression in the media, have produced, according to some observers, "two parallel universes [in which] each side seeks to reinforce its thinking by associating with like-minded people."\textsuperscript{55}
\end{quote}

Hoefler and Krane’s identification of the dynamic polarity of social regulatory policies illustrates the point that social regulatory policymaking deserves more

\textsuperscript{54} Robert F. Nagel, \textit{The Implosion of American Federalism}. (New York: Oxford University Press, 2002): 3. Nagel fears that changes in the American character – and therefore, the way Americans conduct politics – have overrun political institutions. He worries that the quality of society will suffer as political power is centralized and federalism collapses. In Nagel’s view, the very value of nationalized government depends on the maintenance of federalism, as does the rational exercise of good politics. In short, the reason to regret the implosion of American federalism and to resist this collapse, at least to the extent that resistance is feasible—ultimately has to do with the quality of our society. The personal and institutional energy that has long kept our political system from being absorbed into its center has also helped to anchor our dealings in some degree of moderation, maturity, and realism. Even the many and palpable benefits of national unity, therefore, may well depend on those centrifugal political and cultural forces that are in decline.

attention, wherever it occurs. Because of the bipolarity of these policies, only one faction can win legislative control, so that one side will be disenfranchised on any given subject. I agree with both Hoefler and Krane that the win-or-lose aspect of moral policy making can be dangerous.

It is precisely the emotional quality of these social regulatory policies that make them so important. These are the issues that spark gut-level reactions and inspire action. How a nation manages the rights of women and minorities, and whether or not it stipulates a national language says something profound about the culture. It is little wonder that these issues, when politicized, are so incendiary. When Congress acts on these, it ventures into a realm of ideological dialogue and normative conclusions. At the least, this requires a separate treatment in the federal literature to capture an important new development. Christopher Z. Mooney, Director of the Illinois Legislative Studies Center, provides the only comment I found on this specific subject. He suggests that moral policymaking has internal challenges and suggests that congressional action in this area is undesirable.

Too much venom and vitriol over fundamentally irreconcilable conflicts do little more than stir up animosities and divide groups within a polity against

---

56 In fairness, Hoefler does not recognize nationalized moral policymaking. In 1994, he noted the ‘federalization’ of state judicial treatment of right-to-die law, but agreed that state judicial activism would “reinvigorate” a failing feature of federalism: the state court. He predicted that while it is questionable that judges have the necessary medical expertise to rule effectively and wisely on assisted suicide cases, the states can still look forward to having their laws stick because he saw no constitutional ground for invalidation by the Supreme Court. Besides, he says, the -states can always ‘fall back’ on their state constitutions to elevate rights. In sum, Hoefler believes that the federal system is alive and working as it should, providing protection to state lawmaking by curbing the influence of national government. See, “Diffusion and Diversity: Federalism and the Right to Die in the Fifty States,” Publius: the Journal of Federalism: the Journal of Federalism, 24, no. 3 (Summer 1994): 171.
each other. In non-morality policy debate, there is opportunity for compromise, side payments, and the quiet reduction of conflict. Rarely do such opportunities arise in morality policymaking, and there are always policy entrepreneurs willing to exploit any morality policy-opinion incongruence. By dealing with morality policy in the more homogeneous polities of the states, rather than in the more heterogeneous federal arena, fewer of these incongruities will arise, and therefore morality policymaking will be in the dormant phase more frequently than it would otherwise be.57

Whether Mooney is correct, and any subsequent normative conclusions must be derived from further analysis of congressional action in this venue. Like Mooney, I agree that identification and analysis of moral policymaking in a federal system is warranted but as yet is under treated. I suggested some ways that federal literature might benefit from the addition of social regulatory policy but anticipate that others will soon expand the research.

Regardless of where the research leads in the future, the findings from this study make it clear that Congress has become increasing involved in social regulatory policy, and in so doing, it has altered the relationship between the federal and state governments in a way not acknowledged by federalists scholars.

WORKS CITED


Arts, Humanities, and Museums Amendments of 1990 (H.RES.494).


The Bill Emerson English Language Empowerment Act, HR 123 (1996).


Bradwell v. Illinois. 83 US 130, 16 Wall 130, 21 LEd 442 (1873).


Gibbons v. Ogden. 22 US 1, 9 Wheat 1, 6 LEd 23 (1824).


McCulloch v Maryland, 17 US 316, 4 Wheat 316, 4 LEd 519 (1819).


The Pain Relief Promotion Act of 1999, HR 2260, S. 1272.


Plessy v. Ferguson. 18 SCt 1138, 163 US 537, 41 LEd 256 (1896).

Prigg v. Pennsylvania. 41 US 539, 16 Pet 539, 10 LEd 1060 (1842).


Scott v. Sandford. 60 US 393, 19 How 393, 15 LEd 1123 (1842).


Slaughterhouse Cases 83 US 36, 16 Wall 36, 21 LEd 394 (1873) and 77 US 273, 10 Wall 273, 19 LEd 915 (1873).


