

Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics

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Federal grants are one of the government's most important policy tools. While high-profile debates about constitutional coercion, entitlement reform, and budget cuts receive most of the public attention given to federal grants, a more prosaic but equally important reality describes the operation of these grants on the ground: the web of detailed rules and massive enforcement structure devoted to the administrative side of federal grants, which this Article refers to as "the grants-management regime." Unacknowledged in the legal literature, the grants-management regime drives the implementation of federal grants and tells a very different story than the standard concern about feckless agency enforcement action of federal grants. That is, the powerful grants-management regime creates strong incentives that unintentionally undermine grantees' ability to accomplish the underlying policy purposes of their grants. By mapping out the rules and the institutional realities in relationships among congressional committees, the Office of Management and Budget, agencies, grantees, and auditors, the Article identifies unintended consequences that result from the grants-management regime and unwarranted assumptions on which the regime relies. The Article then develops reform options to improve the functioning of the system in light of the critical role federal grants play in contemporary American governance.

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Introduction

Grants are an important policy instrument for the federal government, serving as “the lifeblood of government services across the country.”¹ In fiscal

1. Subash Kari, *5 Fixes for Grants Management*, GCN (Mar. 24, 2017), <https://gcn.com/Articles/2017/03/24/Fixes-for-grants-management.aspx> [<https://perma.cc/E2GY-WFTS>]; see also Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 255-58 (2014) (“Consider these facts: The cabinet agency that gives the least money in grants each year, the Treasury Department, in 2012 nonetheless provided more in grant money than did the MacArthur Foundation, a giant in American private philanthropy. The

year 2019, the most recent year for which complete figures are available, federal grants to state and local governments clocked in at more than seven hundred billion dollars, constituting over sixteen percent of the entire federal budget, and representing almost a quarter of all state and local expenditures.² Federal grants play a significant role for nonprofit organizations as well.³ Federal grants support policies as diverse as education and health, transportation and food security, emergency management and community development.⁴

Given the importance of federal grants to contemporary American governance, a key question is whether they are working well to accomplish their underlying policy purposes. It is often suggested that they are not. One reason frequently offered for this failure is that agencies have insufficient tools to enforce the terms of the grants against noncompliant grantees.⁵ Individual bad actors may be prosecuted for fraud,⁶ to be sure, but agency enforcement of federal grantees' overall implementation of their funding programs is

Environmental Protection Agency, better known for its work in direct regulation than in grants, provided \$1.5 billion more in grant money in 2012 than did the Gates Foundation, the largest private grant-making institution in the world. And the cabinet agency that gives the most money in grants each year, the Department of Health and Human Services, provided more grant money in 2012 than any individual state spent on its entire budget.”).

2. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2021: ANALYTICAL PERSPECTIVES at 202 tbl.14-1. In some policy areas, federal grants “account . . . for more than half of state government funding.” CONG. RESEARCH SERV., R40638, FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS: A HISTORICAL PERSPECTIVE ON CONTEMPORARY ISSUES 1 (2019) [hereinafter CRS, FEDERAL GRANTS].

3. See, e.g., Sarah L. Pettijohn et al., *Nonprofit-Government Contracts and Grants: Findings from the 2013 National Survey*, URB. INST. 9, 11, 13 (2013), <https://www.urban.org/sites/default/files/publication/24231/412962-Nonprofit-Government-Contracts-and-Grants-Findings-from-the-National-Survey.pdf> [<https://perma.cc/BZJ2-BVVS>] (discussing the significance of government grants in general and federal grants in particular for nonprofit organizations).

4. See CRS, FEDERAL GRANTS, *supra* note 2, at 1. In times of crisis, the federal government's reliance on grants as a policy tool is even more apparent, as Congress's response to the coronavirus emergency, unfolding as this Article goes to press in the spring of 2020, makes plain. Congress passed multiple statutes in short order giving federal agencies one-time infusions of hundreds of billions of additional dollars to provide in grant funding across a wide array of policy areas and all over the country. See, e.g., Coronavirus Aid, Relief, and Economic Security (CARES) Act, H.R. 748, 116th Cong. (2020) (enacted); Families First Coronavirus Response Act, Pub. L. No. 116-127, div. A, tits. I, IV, V, VI, 134 Stat. 178, 179-80, 181-83 (2020); Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, tit. III, 134 Stat. 146, 147-151 (2020); CONG. RESEARCH SERV., R46298, THE CORONAVIRUS RELIEF FUND (CARES ACT, TITLE V): BACKGROUND AND STATE AND LOCAL ALLOCATIONS 1-2 (2020). Debates about still additional hundreds of billions of dollars in federal aid to state and local governments are underway. See, e.g., Seung Min Kim, *Tensions Emerge Between Republicans Over Coronavirus Spending and How to Rescue the Economy*, WASH. POST (Apr. 25, 2020), https://www.washingtonpost.com/politics/replicans-trump-coronavirus-spending-deficit-economy/2020/04/25/9013c5ee-8671-11ea-a3eb-e9fc93160703_story.html [<https://perma.cc/5ZSS-3GKZ>] (describing proposals ranging from \$500 billion to \$700 billion in additional one-time aid to state and local governments).

5. See, e.g., Pasachoff, *supra* note 1, at 251-53 (describing such claims).

6. See, e.g., Matt Zapotosky, *Justice Dept. Anticipates Coronavirus Stimulus Will Be a Major Target for Fraud*, WASH. POST (Apr. 22, 2020), https://www.washingtonpost.com/national/coronavirus-stimulus-fraud/2020/04/22/f17d952a-833e-11ea-878a-86477a724bdb_story.html [<https://perma.cc/38AU-H5AA>] (describing individual prosecutions for fraudulent spending of previous disaster-relief funding).

understood to be rare. Withholding grant funds—the perceived main enforcement tool—is seen as a “nuclear option” that would hurt needy beneficiaries and interfere with federalism values, the story goes; agencies have little motivation or capacity and insufficient political capital to take such a drastic step.⁷

In fact, this story is only partially accurate. While it is true that agencies almost never withhold federal funds when grantees are out of compliance with the substantive requirements of their grant statutes, agencies claw back money all the time for violations of procedural grants-management rules. In the last few years, for example, the financially troubled cities of Camden, Detroit, Flint, and Stockton had to pay back millions of dollars in housing, transportation, justice, and health grants for poor record-keeping in outdated accounting systems.⁸ Another local jurisdiction was subject to a loss of more than \$6 million dollars in federal emergency-management money for soliciting bids for disaster-related work only from contractors with which it was familiar.⁹ Rhode Island had to pay back almost \$2 million dollars of welfare funding for failure to keep an adequate eligibility and verification system in place.¹⁰ Pennsylvania had to pay back \$3 million dollars in Medicaid funding for recording certain program costs as administrative instead of training-related, and then for trying to change that documentation too late.¹¹ The list goes on. In all these cases, state and local governments repaid millions of dollars to the federal government, not for failure to meet the grant program’s performance goals or to support the grant program’s activities, and not for fraud, but rather for failure to comply with detailed administrative requirements set forth in grants-management rules.

This Article shines a light on these grants-management rules and the enforcement system in which they are embedded—collectively, the grants-management regime. This regime, as yet unexplored in the legal literature, is the operational reality for financial-management officials in the White House’s Office of Management and Budget (OMB), the twenty-six federal grant-making agencies, and several hundred thousand state, local, and nonprofit grantees around the country.

As these players know well, the federal grants-management rules (some statutory, some promulgated by OMB, all enforced by street-level auditors

7. See Pasachoff, *supra* note 1, at 253-55 (describing this story in the context of advocating for more enforcement of the substantive terms of Spending Clause statutes).

8. Liz Farmer, *How Cities Lose Millions in Federal Funds*, GOVERNING (Apr. 16, 2015, 5:00 PM), <https://www.governing.com/topics/finance/gov-distressed-cities-often-lose-millions-federal-funds.html> [<https://perma.cc/T5XM-DZAN>].

9. *DHS OIG Offers Tips for Better Funding Oversight*, FED. GRANTS MGMT. HANDBOOK, Dec. 2017, at 11.

10. *Appeals Board Upholds Rhode Island TANF Penalty*, FED. GRANTS MGMT. HANDBOOK, June 2014, at 7.

11. *Pa. Agency’s Medicaid Training Costs Disallowed*, FED. GRANTS MGMT. HANDBOOK, Aug. 2015, at 10.

around the country) have a big effect on grant implementation, and thus on the achievement of the policy goals of the statute and of the appropriations creating a grant in the first place. While the grants-management rules are designed to promote accountability for federal funds and to prevent against fraud, waste, and abuse,¹² they have unintended consequences. For example, because of a regularized enforcement structure through annual individualized audits conducted by nonfederal auditors, surveys routinely find that grantees spend more time on compliance activities under the grants-management rules (such as paperwork) than on improving performance.¹³ Sometimes, in order to simplify compliance activities and avoid the potential of losing federal funding for noncompliance, grantees end up designing their programs in a way that runs counter to the overall purpose of the grant, making it more difficult to accomplish the program's goals.¹⁴ In turn, policymakers may decide to stop funding a program or to redesign its substantive requirements without recognizing that it is grants-management rules, not substantive requirements or grantee competence, that are at issue.¹⁵

Understanding this regime is important. Yet aside from a small set of players in the financial-management community, these rules do not typically receive attention from policymakers or the public.¹⁶ Instead, federal grants tend to be seen through the lens of high-profile debates about coercion,¹⁷ entitlement reform,¹⁸ and budget cuts.¹⁹ These are important topics, to be sure. And as

12. See, e.g., Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590, 78590 (Dec. 26, 2013) (explaining that these grants-management rules will “improve the integrity of the financial management and operation of Federal programs and strengthen accountability for Federal dollars by improving policies that protect against waste, fraud, and abuse”).

13. Study: *Funding Uncertainty Remains Key Grants Management Concern*, FED. GRANTS MGMT. HANDBOOK, Apr. 2019, at 1, 5; Charles S. Clark, *Obama Grantmaking Reforms Are Thriving Under Trump*, OFFICIALS SAY, GOV'T EXEC. (Jan. 24, 2018), <https://www.govexec.com/management/2018/01/obama-grantmaking-reforms-are-thriving-under-trump-officials-say/145451> [<https://perma.cc/S2A6-PQFH>].

14. See *infra* notes 261-264 and accompanying text.

15. See *infra* note 288 and accompanying text.

16. Shelley H. Metzenbaum, *Rethinking Federal Grants Management: From Oversight to Insight*, GOV'T EXEC. (Feb. 3, 2016), <https://www.govexec.com/management/2016/02/rethinking-federal-grants-management-oversight-insight/125637> [<https://perma.cc/6TYA-8E5A>] (“Grants are among the most important tools the federal government uses to accomplish its objectives. Sadly, the way federal grants are managed gets woefully little attention.”).

17. See, e.g., ALEC, *Draft Act to Identify Coercive Federal Funds in the Budget of [Insert State]* (Sept. 12, 2016), <https://www.alec.org/model-policy/draft-act-to-identify-coercive-federal-funds-in-the-budget-of-insert-state> [<https://perma.cc/8DUW-L5UR>] (seeking to “‘operationalize’ Justice O’Connor’s dissent in *South Dakota v. Dole* (1987) and the Medicaid portion of the Supreme Court’s ruling in *NFIB v. Sebelius* (2012)”).

18. See, e.g., Ronald Brownstein, *There’s No Way Congress Is Going to Fix Entitlements*, ATLANTIC (Jan. 4, 2018), <https://www.theatlantic.com/politics/archive/2018/01/gop-tax-bill-entitlement-reform/549623> [<https://perma.cc/LZ9E-XQYJ>]; Tom Rogan, *On Entitlement Reform, Trump Has Morality on His Side*, WASH. EXAMINER (Mar. 11, 2019), <https://www.washingtonexaminer.com/opinion/on-entitlement-reform-trump-has-morality-on-his-side> [<https://perma.cc/D2D8-ETVP>].

against these attention-grabbing things, the grants-management rules seem technical, perhaps even boring. As with many other kinds of procedural and administrative rules, it is easy to tune out and miss their importance.²⁰ But, as with those other kinds of procedural and administrative rules, doing so is a mistake.

Paying attention to the grants-management regime indicates that, far from the standard concern about feckless agency enforcement of federal grants, there is instead a huge infrastructure dedicated to grant enforcement—but this infrastructure is focused on administrative compliance rather than on substantive grant goals. If grantees end up focusing more on paperwork than on achieving grant program goals as a result of this enforcement prioritization, there is reason to question whether the system governing seven hundred billion dollars of federal money each year is working as it should.

In focusing on the grants-management regime, this Article situates itself within two strands of contemporary scholarship—the project of “internal administrative law” on the one hand and the project of “intergovernmental management” on the other—in a way that seeks to connect the disparate fields of administrative law and public administration.²¹

Internal administrative law emphasizes the importance of seeing administrative law as more than simply external constraints on agency action, focusing instead on the centrality of internal measures “such as management structures, guidance, planning and coordination, civil service, professionalism, and the like.”²² One goal of this Article is to provide an intergovernmental case study where internal administrative law reigns supreme.²³ The story told in the pages that follow is not one where external constraints on intergovernmental agency relations figure prominently. By detailing the way the grants-management regime works, this Article illustrates “both internal administration’s lawlike character and its importance for ensuring the rule of law in today’s world of administrative governance”²⁴ at this prime site of

19. See, e.g., Kate Rabinowitz & Kevin Uhrmacher, *What Trump Proposed in His 2020 Budget*, WASH. POST (Mar. 12, 2019), <https://www.washingtonpost.com/graphics/2019/politics/trump-budget-2020> [https://perma.cc/BJ7V-BTN3] (describing “substantial cuts” to domestic grant programs).

20. Cf. J. Maria Glover, *The Supreme Court’s “Non-Trans-substantive” Class Action*, 165 U. PA. L. REV. 1625, 1662 (2017) (“[B]y emphasizing the ‘procedural’ features of those cases, the opinions tend to repel public interest and media scrutiny.”); Peter M. Shane, *The Quiet GOP Campaign Against Government Regulation*, ATLANTIC (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/gop-complicates-regulation/514436> [https://perma.cc/JR47-HTU7] (explaining that efforts to roll back important public-interest regulations “are largely shielded from public scrutiny because of the obscurity of the subject matter”).

21. Cf. Gillian E. Metzger, *Administrative Law, Public Administration, and the Administrative Conference of the United States*, 83 GEO. WASH. L. REV. 1517, 1534 (2015) (arguing for the need to “bridge the current divide between administrative law and public administration”).

22. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1246 (2017).

23. The internal administrative-law literature as it has recently developed has largely remained focused within the federal executive branch itself. See, e.g., *id.* at 1243 n.16 (collecting recent scholarship on internal administrative law, all focused solely on federal administration).

24. *Id.* at 1290.

interaction between federal agency grantors and state- and local-agency grantees.

For its part, intergovernmental management focuses on “pathways for improving governance in our intergovernmental system,” especially in its “fiscal, programmatic, and administrative capacity.”²⁵ Like its cousin administrative federalism (a more familiar topic in the legal literature), intergovernmental management (a subfield of the public-administration literature) focuses on processes governing interactions between federal agencies and state and local governments. But where administrative federalism asks “whether federal agencies, and administrative law more generally, may be trusted to safeguard state autonomy,”²⁶ and “seeks to advance federalism values through the administrative process and administrative law,”²⁷ intergovernmental management is more concerned with day-to-day operations after the dust settles on policy debates and a sprawling program actually has to be implemented.²⁸

This Article seeks to contribute to the intergovernmental-management literature in two ways. First, in its illustration and analysis of the grants-management regime, it fills a gap in what is known about the flow of federal funds.²⁹ Second, more generally, it shows what can be learned about intergovernmental management when legal documents and institutional processes are brought to the fore. For if administrative law often focuses on courts at the expense of understanding internal administration, the intergovernmental-management literature, and the public-administration literature more generally, often focus on management and administration without analysis of the legal frameworks that shape and constrain management and administration. This Article reflects an effort to bring these worlds together.

25. TIMOTHY J. CONLAN & PAUL L. POSNER, INTERGOVERNMENTAL MANAGEMENT FOR THE 21ST CENTURY 4-5 (2008).

26. Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 970 (2016).

27. Miriam Seifter, *States as Interest Groups in the Administrative Process*, 100 VA. L. REV. 953, 980 (2014).

28. CARL W. STENBERG & DAVID K. HAMILTON, INTERGOVERNMENTAL RELATIONS IN TRANSITION: REFLECTIONS AND DIRECTIONS 6-7 (2018) (“The term ‘intergovernmental management’ has been used to underscore that effective implementation of programs requires skill in managing the various actors involved and navigating through complex intergovernmental and intersectoral relationships.”).

29. As the late Paul Posner—former president of the American Society for Public Administration, board chair of the National Academy of Public Administration, and director of the Government Accountability Office’s work on the federal budget and intergovernmental fiscal management—wrote about intergovernmental grants toward the end of his career, “the cupboard is quite bare” when it comes to knowledge about “the real local environment and networks through which federal funds operate.” Paul L. Posner, *The Daunting Challenge of Following the Federal Money*, GOVERNING (Sept. 19, 2012, 11:00 AM), <https://www.governing.com/columns/mgmt-insights/col-recovery-act-transparency-challenge-following-federal-money.html> [https://perma.cc/4BNV-7KWXX] [hereinafter *The Daunting Challenge*]; see also *The Passing of Paul Posner*, AM. SOC’Y FOR PUB. ADMIN. (July 6, 2017), <https://www.aspanet.org/aspa/About-ASPA/In-the-Community/Releases/Paul-Posner.aspx> [https://perma.cc/S7KW-RKSN].

Methodologically, this Article responds to the appeal in the literature on public choice and public law “for more contextual research on institutions,” for “rich case studies from a public choice perspective of how preferences, institutions, and procedures shape regulatory outcomes.”³⁰ While not a formal work of public choice—the Article includes no modeling or empirical testing, for example—it nonetheless tells a story of institutional incentives and interactions in an iterative game. Drawing from a variety of industry publications and news stories about state, local, and federal interactions across the universe of federal grants, the Article treats agencies, grantees, auditors, and OMB as rational and self-interested.³¹ In so doing, it helps explain why the grants-management rules end up operating as they do.

In part, the thrust of the Article is descriptive. Part I first explains the variety of grants-management rules and their legal sources, and then identifies the institutions and their subcomponents that create, implement, and enforce the rules. Part II next describes both unintended consequences that result from the rules and unwarranted assumptions on which the rules rely. That is, because of capacity limitations and the comparative ease of enforcing the grants-management rules, agencies end up prioritizing administrative compliance over substantive compliance. In turn, grantees are incentivized to do the same, which leads to a series of negative consequences for program implementation and policy accomplishment. Prioritizing administrative compliance would be one thing if the integrity of the audit process could be relied on, as the regime implicitly assumes, but history and experience suggest concerns with such reliance. Moreover, while the grants-management rules are often presented entirely as neutral, good-government interventions, they can obscure an underlying political or substantive policy agenda, so a skeptical view of their operation is sometimes required.

In addition to its descriptive focus, this Article has a normative component as well—for the problems of the grants-management regime may feed into the antiregulatory political environment that is currently gripping the nation. From the left, regulation is often portrayed as necessary to support human health, safety, and well-being.³² But to the extent that grants designed to advance those very values are bogged down in proverbial red tape that prioritizes box-checking compliance over substantive implementation, the grants-management rules can seem to undercut the value of government

30. DANIEL A. FARBER & ANNE JOSEPH O’CONNELL, RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 13 (2010).

31. *Id.* at 2. Conversations with grant practitioners in a range of roles, referenced in the acknowledgments footnote *supra*, further confirmed or refined intuitions gleaned from these written sources.

32. *See, e.g.*, Shane, *supra* note 20 (“Thanks to administrative regulation, Americans breathe cleaner air, drink cleaner water, eat healthier food, drive safer cars, work in safer environments, and have fairer and more secure access to education, housing, employment, telecommunications, and the ballot box.”); Rena Steinzor, *The Truth About Regulation in America*, 5 HARV. L. & POL’Y REV. 323, 324 (2011) (defending the “regulatory system we painstakingly constructed over four decades to protect health, safety, and the environment”).

involvement. It becomes harder to promote the proposition that regulation makes us safe when people experience this set of regulations as burdensome busywork at best³³ or ridiculous restraints at worst.³⁴

Part III confronts this problem head on. It first considers potential reactions to the pathologies of the grants-management regime from the perspective of a government skeptic opposed to federal grants in the first place. Section III.A argues that the options that flow from this viewpoint are normatively undesirable, politically unfeasible, and administratively doomed. Section III.B then turns to reform options. While attending to the potential for political manipulation of grant reforms, that Section makes the case for modifying the incentive structure created by the grants-management regime—changes that would improve the operation of this massive intergovernmental system and thereby help ensure that grant programs meet their intended, and important, goals.

These reforms are only part of what is needed. As public-administration scholars Pamela Herd and Donald Moynihan have observed, the “failure to build a progressive politics around the goal of reducing administrative burdens puts liberals in a reactionary or technocratic mode when it comes to defending the capacity of the state to help its citizens.”³⁵ This Article is not the place for building such a politics. But to be clear: in analyzing the role of burdens in the grants-management arena, the Article highlights the potential for increased capacity in the intergovernmental administrative state, rather than telling a story of government failure.

33. See, e.g., NAT’L ACADS. OF SCI., ENG’G, & MED., *OPTIMIZING THE NATION’S INVESTMENT IN ACADEMIC RESEARCH: A NEW REGULATORY FRAMEWORK FOR THE 21ST CENTURY 1* (2016) (describing, as one of report’s central conclusions, the increasing regulation over grant funding for the “government-academic research partnership” that has “led over time to an environment wherein a significant percentage of an investigator’s time is spent complying with regulations, taking valuable time away from research, education, and scholarship”).

34. See, e.g., Bruce Egger, *FEMA Red Tape Strangling Local Governments*, TIMES-PICAYUNE, July 29, 2007 (describing critiques of FEMA grant rules as limiting recovery efforts from Hurricane Katrina); Kurt Erickson, *New Report Finds Red Tape Is Limiting Help for Domestic Violence Victims in Missouri*, ST. LOUIS POST-DISPATCH (Sept. 17, 2018), https://www.stltoday.com/news/local/govt-and-politics/new-report-finds-red-tape-is-limiting-help-for-domestic/article_84273156-336f-52c7-a524-5d4fb4770ea7.html [<https://perma.cc/AG7M-55QP>] (describing state auditor’s report concluding that grant rules keep domestic violence shelters from accessing available funding); Peter Salter, *Red Tape, Grant Rules Will Keep Malone Center Teens from Taking Trip*, LINCOLN J. STAR (Apr. 1, 2017), https://journalstar.com/news/local/red-tape-grant-rules-will-keep-malone-center-teens-from/article_38e3f2e2-d3b7-59c4-952e-d65d73406c31.html [<https://perma.cc/2HVQ-X33Y>] (describing community outrage after grant rules prevented low-income youth from taking an out-of-state trip for which they had fundraised); Karen Lee Scrivo, *Senator Seeks Flexibility for First Responders*, GOV’T EXEC. (Apr. 28, 2003), <https://www.govexec.com/defense/2003/04/senator-seeks-flexibility-for-first-responders/13936> [<https://perma.cc/R6C3-NQ8E>] (describing local governments’ complaints that rules on using homeland security funds are “cumbersome” and “confusing”).

35. PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS* 244 (2018).

I. The Intergovernmental Grants-Management Regime

This Part introduces the intergovernmental grants-management regime. It does so first by presenting a typology of the grants-management rules: those that exist in individual substantive grants statutes; trans-substantive rules developed by OMB; and state-level variations. It next highlights and disaggregates the key institutional players that bring the rules to life: congressional committees, grant-making agencies, OMB, grantees, and auditors. The goal of this Part is to make plain the scope of these rules and the vast institutional infrastructure that supports them. These rules are no afterthought, but are rather a core part of the way federal grants—and thus American policy—operate.

A. Typology of Grants-Management Rules

The key theme of the intergovernmental grants-management regime—accountability for spending of federal dollars—dates back to the nation’s founding. Article I of the Constitution requires that “a regular statement and account of receipts and expenditures of all public money shall be published from time to time,”³⁶ and in the Treasury Act of 1789, the first Congress created the position of a national auditor to “to receive all public accounts, and after examination to certify the balance.”³⁷ Concerns about financial accountability were also a core part of the post-Civil War Antideficiency Act, which limited agencies’ ability to spend unappropriated federal dollars,³⁸ as well as the foundational 1921 Budget and Accounting Act,³⁹ which created both OMB’s predecessor, the Bureau of the Budget (the BOB), and the General Accounting Office (the GAO, renamed the Government Accountability Office in 2004).⁴⁰

Such concerns were largely directed inward, to the functioning of the federal government itself, until the 1950 Accounting and Auditing Act, which for the first time made agencies broadly responsible for how their grantees spent federal dollars.⁴¹ In the 1960s, as the War on Poverty dramatically

36. U.S. CONST. art. I, § 9, cl. 7.

37. An Act to Establish the Treasury Department, §§ 1, 5, 1 Stat. 65, 65-67 (1789).

38. Antideficiency Act, Pub. L. No. 41-252, 16 Stat. 251 (1870) (codified as amended in scattered sections of 31 U.S.C.).

39. Pub. L. No. 67-13, § 304, 42 Stat. 20, 24 (1921). *See generally* LARRY BERMAN, THE OFFICE OF MANAGEMENT AND BUDGET AND THE PRESIDENCY 1921-1979 (1979).

40. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (codified in scattered sections of 5 U.S.C. and other titles).

41. Pub. L. No. 81-784, 64 Stat. 832, 836 (1950) (codified as amended in scattered sections of 5 U.S.C.); CRS, FEDERAL GRANTS, *supra* note 2, at 17-19 (describing piecemeal efforts to attach requirements for fiscal accountability and anti-corruption principles to federal grants); U.S. GEN. ACCOUNTING OFFICE, FGMSD-79-37, GRANT AUDITING: A MAZE OF INCONSISTENCY, GAPS, AND DUPLICATION THAT NEEDS OVERHAULING 1 (1979) (describing this history) [hereinafter MAZE OF INCONSISTENCY].

expanded the extent of federal grant spending,⁴² Congress and the White House both turned their attention to managing the increasingly unwieldy intergovernmental grants regime.⁴³

Out of this interbranch attention to grants administration, two kinds of grants-management rules developed: those that were specific to individual substantive grant statutes and those that were trans-substantive. The latter were typically set out in general financial-management statutes that delegated authority to OMB to promulgate more specific rules. This Section explains each of these two categories, as well as a third set that these categories variously demand or accommodate: state grants-management rules that either overlay or fill in gaps left by the federal rules.

Overall, these rules represent an effort to address a number of different kinds of problems related to federal grants. One goal of the rules is to better target federal dollars toward a specific policy intervention, rather than letting the money be fungible. We might think of this as a response to what could be called the “swimming pool problem,” in light of a famous example in which a school district receiving the first influx of major federal education dollars in the 1960s ended up building a new town swimming pool rather than using the money to improve schooling for poor children.⁴⁴ Another goal is to prevent waste, fraud, and abuse with federal dollars. We might think of this as a response to what could be called the “yacht problem,” after a scandal in the 1990s in which a university applied federal research dollars to entertainment on a fancy vessel.⁴⁵ Still another goal is to improve the administrative operations of the grantees receiving the aid. This might be termed the “backwater problem,” in light of the goal of professionalizing state and local agencies and nonprofits, rather than sending money to poorly functioning institutions.⁴⁶ A final goal is to do all of this while respecting some jurisdictional diversity where doing so is perceived to be possible or desirable. We could think of this as reflecting the “federalism fence,” where the federal government has one foot in federal control and one foot in devolution.⁴⁷

42. For two accounts of the development of these federal grant programs, see JOSHUA ZEITZ, *BUILDING THE GREAT SOCIETY: INSIDE LYNDON JOHNSON’S WHITE HOUSE* (2019); and MICHAEL L. GILLETTE, *LAUNCHING THE WAR ON POVERTY: AN ORAL HISTORY* (2010).

43. See, e.g., Intergovernmental Cooperation Act, Pub. L. No. 90-577, 82 Stat. 1098 (1968) (codified as amended at 31 U.S.C. §§ 6501-6508 (2018)); 29 C.F.R. § 1902.5 (1968); Presidential Memorandum of November 8, 1968, 33 Fed. Reg. 16487 (Nov. 13, 1968).

44. WASH. RESEARCH PROJECT & NAACP LEGAL DEF. & EDUC. FUND, TITLE I OF ESEA: IS IT HELPING POOR CHILDREN? 34 (1969).

45. Lynn McGuire, *Federal Research Grant Funding at Universities: Legislative Waves from Auditors Diving into Overhead Cost Pools*, 23 J.C. & U.L. 563, 563 (1997).

46. See, e.g., Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 613(a)(6), 89 Stat. 773, 783 (codified as amended at 20 U.S.C. § 1400 (2018)) (requiring states receiving funds to educate children with disabilities to set up an agency with the capacity to handle funds appropriately).

47. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 987-88 (2004).

These goals, while quite sensible in themselves, have given rise to a legal regime that is considerably more expansive than the sum of its parts. This Section illustrates the pervasiveness, depth, and complexity of that regime—the grants-management framework. It lays the groundwork for the analysis in Part II of how these rules affect the day-to-day operation of federal grant programs.

1. Statute-Specific Grants-Management Rules

Grants statutes typically contain both substantive requirements and administrative requirements.⁴⁸ Substantive requirements are typically set forth via goals that the program is supposed to achieve. For example, an education grant may have the goal of increasing students' performance on standardized tests;⁴⁹ an environmental grant may have the goal of protecting ground water in a community;⁵⁰ and a transportation grant may have the goal of improving access to jobs.⁵¹ These requirements are often framed as outcomes that the grantee is expected to achieve. In contrast, administrative requirements are typically framed as inputs, directed to the grantee's own efforts, in organizing its activities and its use of money. It is this latter set of requirements that constitute statute-specific grants-management rules.

For intergovernmental programs in policy areas in which state and local involvement is heavy (such as education), one common type of grants-management requirement prevents state and local governments from substituting federal money for their own.⁵² "Maintenance of effort" rules require state and local governments to satisfy a certain level of continued funding in this overall policy area as compared to some base year.⁵³ "Supplement, not supplant" rules require state and local governments to use federal funds on top of, instead of as a replacement for, funding for a particular activity in the general policy area.⁵⁴

The goal of these rules is to make sure that federal funding is truly extra, to deepen the focus on the policy area in question, rather than allowing state and local governments to pare back their own spending.⁵⁵ But compliance with these rules is notoriously difficult to assess. For one thing, the rules vary by grant program even when the different grant programs are funding the same

48. See Pasachoff, *supra* note 1, at 271 (describing different types of grant conditions).

49. See, e.g., 20 U.S.C. §§ 6301, 6311(c)(4) (2018).

50. See, e.g., 42 U.S.C. § 300h-8 (2018).

51. See, e.g., 49 U.S.C. § 5307(a)(1)(C) (2018).

52. ROBERT M. LLOYD & DARLA M. FERA, *A PRACTICAL GUIDE TO FEDERAL GRANTS MANAGEMENT—FROM SOLICITATION THROUGH AUDIT* 100 (2015).

53. *Id.*

54. *Id.*

55. See Nora Gordon & Eloise Pasachoff, *Fiscal Compliance Rules for Federal Funding of Elementary and Secondary Education: Transparency, Reason-Giving, and Agency Accountability*, in *OXFORD HANDBOOK OF US K-12 EDUCATION LAW* 6 (Kristi Bowman ed., forthcoming 2020), <https://ssrn.com/abstract=3237880> [<https://perma.cc/MVY4-V5P9>].

state or local agency.⁵⁶ For another, the rules require case-specific judgment calls about how to calculate the base, when exceptions to the base are permitted, how to distinguish impermissible supplanting from permissible supplementing, and so on.⁵⁷ The rules therefore require significant infrastructure, both from a compliance and enforcement perspective.

Another common type of requirement, applicable to nonprofits as well as to intergovernmental grantees, mandates some kind of cost-sharing or matching of funds.⁵⁸ The rationale for this requirement, “as old as philanthropy” itself, “is that the provider of funds is going to help an organization if the organization helps itself.”⁵⁹ Conceptually related to maintenance-of-effort and supplement-not-supplant rules, cost-sharing and fund-matching are typically calculated differently, as a percentage of the overall project cost.⁶⁰ This, too, can be quite difficult to assess. There are many methods for assessing these arrangements, and different statutes build in a wide variety of limitations.⁶¹

A third common type of requirement is statutory earmarking. For example, a statute may require that grantees spend a certain percentage of their federal funding on an activity (such as, say, on certain kinds of program beneficiaries), or no more than a certain percentage of their federal funding on an activity (such as on program administration).⁶² Compliance with these rules is also difficult to evaluate. It may be contestable whether an activity falls into a particular category.⁶³ Whether a particular requirement applies may depend on facts whose existence may be difficult to ascertain.⁶⁴

These administrative rules may play a large role in individual grant statutes; one assessment of the largest federal education grant to states and localities identified 588 separate compliance requirements in the statute.⁶⁵

56. *Id.*

57. *Id.*

58. LLOYD & FERA, *supra* note 52, at 98-99.

59. *Id.* at 98.

60. *Id.* at 98, 100.

61. *Id.* at 101-04 (describing the variety of approaches).

62. *Id.* at 101.

63. See, e.g., Chris Kardish, *States Want Flexibility for Health Exchange Grants*, GOVERNING.COM (July 2014), <https://www.governing.com/topics/health-human-services/gov-health-exchange-grant-flexibility.html> [<https://perma.cc/NC4F-E8U5>] (describing the debate over whether “meeting enrollment needs” is an “operating cost” under the Affordable Care Act or a “design, development, and implementation cost”).

64. See, e.g., Ryan Holeywell, *Small Transit Agencies Fight Costly Quirk in Law*, GOVERNING: FEDWATCH (Dec. 5, 2011, 10:00 AM), <https://www.governing.com/blogs/fedwatch/Small-Transit-Agencies-Fight-Costly-Quirk.html> [<https://perma.cc/4YXA-SHRW>] (describing difficulties in assessing whether a jurisdiction is an “urbanized area” such that they can use federal transit grants only for capital, rather than operational, costs).

65. See, e.g., Melissa Junge & Sheara Krvaric, *Federal Compliance Works Against Education Policy Goals*, AM. ENTERPRISE INST. 4 (2011), <http://www.aei.org/publication/federal-compliance-works-against-education-policy-goals> [<https://perma.cc/SEF5-AJZH>].

2. Delegation to OMB for Common Grants Rules

A different set of grants-management rules comes from statutes that delegate authority to OMB to create interagency financial management systems. Where the statute-specific administrative rules are designed to shape the operation of individual programs, the grants-management rules under OMB's purview are designed to promote sound fiscal management and administrative capacity more generally.⁶⁶ The prevention of waste, fraud, and abuse is their overall goal.⁶⁷

For decades, OMB (and its predecessor office, the Bureau of the Budget, before President Nixon transformed and renamed it in 1970⁶⁸) issued these rules in a series of circulars that were from time to time revised, rescinded, consolidated, or expanded.⁶⁹ These circulars created a complicated maze for funding recipients to follow, with some duplicative and overlapping but some quite distinct requirements for different kinds of institutions.⁷⁰ Grantees sometimes violated the rules unintentionally because it was confusing which rules they were supposed to follow at different times.⁷¹ This reality, combined with the huge influx of federal dollars from the 2009 stimulus bill, heightened both congressional and presidential interest in improving federal oversight of state and local control of their federal grants.⁷²

In 2013, then, for the first time, OMB consolidated and superseded these individual circulars in one streamlined guidance document.⁷³ Formally called the “Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards”—a long and unwieldy title that captures the three different categories of circulars it joined together—this document is more colloquially known as the “Uniform Grant Guidance.”⁷⁴ OMB required each federal grant-making agency to incorporate by reference this guidance into its own regulations.⁷⁵ With some exceptions and variations, the agencies did so in

66. See Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590, 78590 (Dec. 26, 2013).

67. *Id.*

68. See BERMAN, *supra* note 39 at 112.

69. See 78 Fed. Reg. at 78590. An OMB circular is used “to communicate various instructions and information to the executive departments and establishments . . . when the nature of the subject matter is of continuing effect.” BUREAU OF THE BUDGET, EXEC. OFFICE OF THE PRESIDENT, CIRCULAR NO. A-1 (1952), <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-001.pdf> [<https://perma.cc/29V6-FNV2>].

70. 78 Fed. Reg. at 78591.

71. *Id.*

72. See, e.g., *id.* at 78590-91 (describing this increased congressional interest).

73. *Id.* at 78591 (describing consolidation and noting one aspect that remained as yet unconsolidated).

74. See, e.g., *Uniform Requirements for Managing Grants that Apply to All Federal Executive Agencies*, EPA (Aug. 1, 2019), <https://www.epa.gov/grants/uniform-requirements-managing-grants-apply-all-federal-executive-agencies> [<https://perma.cc/ZL9X-99AX>].

75. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 2 C.F.R. § 200.106 (2019).

2014.⁷⁶ In early 2020, OMB proposed revisions to the Uniform Grant Guidance that would tweak the requirements around the edges but would not fundamentally transform the system.⁷⁷

Because of the importance of the Uniform Grant Guidance to intergovernmental grant administration, it is worth describing each of the three categories it governs—administrative requirements, cost principles, and audit requirements—in a little more detail.

a. Administrative Requirements

The administrative requirements obligate federal agencies, on the one hand, to take certain procedural steps before and after awarding grants, and grantees, on the other hand, to maintain certain kinds of control over the grant money that is ultimately awarded.⁷⁸

For example, as to the former, federal agencies must provide public notice of funding opportunities in specific ways,⁷⁹ collect applications according to OMB-approved guidelines,⁸⁰ and assess the riskiness of grant applicants according to certain criteria.⁸¹ Once grants have been made, federal agencies must monitor grant recipients,⁸² may impose certain specified additional conditions on grantees having difficulties complying with the terms of the grant,⁸³ and may ultimately take steps to temporarily withhold funds or terminate the grant after providing grantees notice and an opportunity to respond.⁸⁴

As for obligations placed on grant recipients, grantees must agree to implement compliant financial-management systems,⁸⁵ abide by applicable procurement standards,⁸⁶ and maintain and provide access to required records.⁸⁷ Grantees that are “pass-through entities”—such as state agencies that give subgrants to local government agencies—must formalize the subgrants

76. Joint Interim Final Rule, 79 Fed. Reg. 75872 (Dec. 19, 2014).

77. Guidance for Grants and Agreements, 85 Fed. Reg. 3766 (proposed Jan. 22, 2020); Courtney Bublé, *White House Seeks to Revise Federal Grants Process to Reflect New Priorities*, GOV'T EXEC. (Jan. 22, 2020), <https://www.govexec.com/management/2020/01/white-house-seeks-revise-federal-grants-process-reflect-new-priorities/162582> [<https://perma.cc/WU87-LYB2>]. I will discuss several proposed changes as relevant in Sections II.D and III.B below, but nothing explained in this section would change if OMB's proposals are ultimately adopted, nor would the central dynamics described in Part II.

78. 2 C.F.R. §§ 200.100-.345 (2019).

79. *Id.* §§ 200.202-.203.

80. *Id.* § 200.206.

81. *Id.* §§ 200.205, 200.207.

82. *Id.* §§ 200.327-.329.

83. *Id.* § 200.207.

84. *Id.* §§ 200.338-.342.

85. *Id.* §§ 200.302-.303.

86. *Id.* §§ 200.317-.328.

87. *Id.* §§ 200.333-.337.

with required documentation and information and must monitor, support, and take enforcement action as needed against noncompliant subgrantees.⁸⁸

These administrative requirements structure the relationship between federal agencies and their grantees in meaningful ways, creating standardized requirements and sets of expectations that last the entire lifetime of each grant, as well as across all grants that the grantee may receive from different federal agencies.

b. Cost Principles

The cost principles govern what grantees may do with their federal dollars.⁸⁹ Like the administrative requirements, the cost principles are issued under OMB's general management authority.⁹⁰ There are two basic kinds of cost principles: general principles for how to determine what grantees may spend their federal grant dollars on, and specific principles covering particular types of potential spending.

The general principles set forth a series of factors that determine whether a cost is "allowable"—that is, whether that cost may be charged to a federal grant.⁹¹ To be allowable, a cost must be "necessary and reasonable for the performance of the Federal award," where "[a] cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost."⁹² A cost must also be "allocable," or able to be assigned to the grant in proportion to the extent to which that cost benefitted the work of the grant (as compared to other work of the grantee not related to the grant in question).⁹³ Allowable costs must also be, among other things, "adequately documented."⁹⁴

These general principles are at some level straightforward, but at the same time their vague words are very open-ended—more standard than rule. It therefore takes a judgment call to determine whether something the grantee spent money on can be charged to the grant.

As for the specific cost principles, while some make certain costs categorically unallowable,⁹⁵ and others make certain costs categorically allowable,⁹⁶ a number of important cost principles make certain costs allowable

88. *Id.* § 200.331.

89. *Id.* §§ 200.400-.475.

90. *Id.* § 200.103(a)-(b).

91. *Id.* § 200.403.

92. *Id.* §§ 200.403(a), 200.404.

93. *Id.* §§ 200.403(a), 200.405.

94. *Id.* § 200.403(g).

95. *Id.* § 200.432 (governing alcoholic beverages).

96. *Id.* § 200.472 (governing training and education for employee development).

only sometimes.⁹⁷ This last category is particularly difficult to assess. For example, consider the cost principle governing “professional service costs,” such as a lawyer’s advice. The cost principles lay out eight relevant factors for whether such spending is a permissible use of grant funds while noting that “no single factor or any special combination of factors is necessarily determinative.”⁹⁸ Or consider the cost principles governing the use of grant money to pay for “indirect” costs—the costs of a grantee’s ongoing “facilities and administration,” as opposed to the “direct” costs that are incurred specifically for the grant.⁹⁹ The cost principles make clear that “[t]here is no universal rule for classifying certain costs as either direct or indirect.”¹⁰⁰ Moreover, an indirect cost rate is subject to bargaining between the grantee and its primary federal agency (which then must be accepted by all of the other federal agencies from which a grantee may receive funds).¹⁰¹ All of these nuances make assessing compliance particularly complicated.

c. Audit Requirements

The third category covered in the Uniform Grant Guidance are audit requirements.¹⁰² While the other parts of the Uniform Grant Guidance and its predecessor circulars are based on OMB’s general management authority, the audit requirements flesh out the details of a specific statute: the Single Audit Act, which instructs OMB to issue implementing guidance.¹⁰³ The audit requirements build in a regular and pervasive accountability structure with potentially dramatic consequences for noncompliance.

The audit requirements provide a regular accountability structure because the process unfolds annually. The statute generally requires each grantee spending more than a certain amount of federal funds per year to have an annual “single audit” of all of its federal programs.¹⁰⁴ OMB sets the amount of federal funding that triggers this requirement, currently \$750,000, which covers more than 30,000 nonfederal entities.¹⁰⁵ Most state agencies fall within this limit, and many local governments¹⁰⁶ and thousands of nonprofits¹⁰⁷ are

97. See, e.g., *id.* § 200.474 (governing travel costs for the grantees’ employees while on official business trips).

98. *Id.* § 200.459(b).

99. *Id.* §§ 200.56, 200.68 (defining direct versus indirect costs); *id.* §§ 200.412-200.415 (describing procedures for calculating rates).

100. *Id.* § 200.412.

101. *Id.* § 200.414(c).

102. *Id.* §§ 200.500-.521.

103. Single Audit Act, 31 U.S.C. §§ 7501-7506 (2018); 2 C.F.R. §§ 200.100(d), 200.101(b)(3), 200.103(c) (2019).

104. Some exceptions allow a biennial audit or program-specific instead. 2 C.F.R. § 200.504 (2019).

105. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590, 78606 (Dec. 26, 2013).

106. See Gordon & Pasachoff, *supra* note 55, at 7-8.

covered as well. Local governments and nonprofits may be affected by the single-audit regime, even if they are not subjected to a single audit themselves, because the single audit of their supervising pass-through entities examines the quality of oversight of subgrantees.¹⁰⁸ Unlike the infinitesimally small chance of an IRS audit,¹⁰⁹ then, or the larger but somewhat random chance of an agency reviewing a grantee's substantive compliance,¹¹⁰ the single audit appears like clockwork.

The accountability structure provided by the audit requirements is also pervasive, going far beyond simply financial statements. Financial compliance is certainly a part of the audit; an auditor must confirm whether a grantee's financial statements are "presented fairly in all material respects in conformity with generally accepted accounting principles," and whether its federal expenditures are presented fairly in connection with overall financial statements.¹¹¹ Much more broadly, however, the audit reviews the strength and breadth of the grantee's "internal controls" to oversee compliance with each major federal program.¹¹² The audit also reviews the extent of the grantee's compliance with the administrative requirements embedded in individual statutes and regulations governing each grant program¹¹³ and in OMB's administrative requirements and cost principles.¹¹⁴

The expansive scope of the audit is well illustrated by reference to an additional document referenced throughout the audit requirements: the Compliance Supplement.¹¹⁵ Although officially an appendix to the Uniform Grant Guidance, this 1,600-page document is too big to be published alongside the rest of the Guidance, so its annual publication on the OMB website is simply noted in the Federal Register.¹¹⁶ The Compliance Supplement gathers in one place, agency by agency and then program by program, what it calls the "important compliance requirements that the Federal Government expects to be considered as part of an audit"¹¹⁷—in other words, all of the requirements

107. Elizabeth K. Keating, *Is It Time to Address Selective Disclosure by Nonprofit Organizations?*, 61 EXEMPT ORG. TAX REV. 151, 152 (2008).

108. 2 C.F.R. § 200.331(d) (2019). Similarly, the possibility of a federal audit outside the annual single-audit process always exists, even for those entities who spend less than the threshold, as the audit requirements provide that grantees must make themselves available for an audit upon the request of any granting federal agency, Inspector General, or the General Accounting Office. *Id.* § 200.501(d); see also *infra* notes 143-144 and 176-179 and accompanying text (explaining the role of these offices).

109. Kevin McCormally, *What Are the Odds the IRS Will Audit Your Tax Return?*, NASDAQ (Apr. 27, 2017), <https://www.nasdaq.com/article/what-are-the-odds-the-irs-will-audit-your-tax-return-cm780898> [<https://perma.cc/663U-MBHW>].

110. See Pasachoff, *supra* note 1, at 278-79.

111. 31 U.S.C. § 7502(e)(1)-(2) (2018); 2 C.F.R. § 200.513(b) (2019).

112. 31 U.S.C. § 7502(e)(3); 2 C.F.R. § 200.514(c) (2019).

113. See *supra* notes 52-64.

114. 31 U.S.C. § 7502(e)(4); 2 C.F.R. § 200.514(d).

115. 2 C.F.R. pt. 200 app. XI.

116. See, e.g., Notice of Availability, 84 Fed. Reg. 35313 (July 1, 2019).

117. OFFICE OF MGMT. & BUDGET, COMPLIANCE SUPPLEMENT at 1-1 (June 2019).

referenced in the previous paragraph. To give a sense of the scope of these requirements, the Compliance Supplement chapters devoted to the largest grant-making agencies—the Department of Health and Human Services (HHS), the Department of Education, and the Department of Housing and Urban Development—are each between two hundred and three hundred pages.¹¹⁸

Noncompliance with these requirements can have significant consequences, as the audit process results in a regularized enforcement decision that can require repayment of millions of dollars of funds or the imposition of burdensome “special conditions” after the auditing process has run its course. After conducting the audit, the auditor writes a report identifying problematic findings and questioned costs.¹¹⁹ The grantee must then write a response, which must propose a corrective action plan to remedy the problematic findings and explain how it has implemented any prior corrective action plan based on the previous year’s audit findings.¹²⁰ Together, the auditor’s report and the grantee’s response are uploaded to the Federal Audit Clearinghouse, a public, centralized repository.¹²¹ Responsibility then shifts to the federal granting agency (or the pass-through entity, if the audit is of a subgrantee), which then issues a “management decision” sustaining or rejecting the auditor’s findings.¹²²

“Disallowed costs” are a major aspect of these decisions. If the management decision sustains the auditor’s findings on disallowed costs, the grantee must repay these costs in some fashion: without complaint as part of a corrective action plan, through a cooperative resolution process,¹²³ or after an appeal through the agency’s internal process.¹²⁴ Unlike substantive funding cutoffs, which almost never happen,¹²⁵ it is not uncommon for a grantee to have to repay of millions of dollars of disallowed costs after an audit.¹²⁶ This reality functions as general deterrence; even grantees that have never had to repay any money are aware that the possibility is real, in light of grant industry publications that highlight major repayments to illustrate the importance of

118. *See id.* §§ 4.14, 4.84, 4.93; *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-14-539, FEDERAL GRANTS: AGENCIES PERFORMED INTERNAL CONTROL ASSESSMENTS CONSISTENT WITH GUIDANCE AND ARE ADDRESSING INTERNAL CONTROL DEFICIENCIES pmb1. (2019) (identifying these agencies as among the “five largest grant-making agencies by amount of grant obligations”).

119. 2 C.F.R. §§ 200.515-.516 (2019).

120. *Id.* § 200.511.

121. *Id.* § 200.511(b)-(d).

122. *Id.* § 200.521.

123. *Id.* § 200.25.

124. *Id.* § 200.341; *see also infra* notes 145-148 (describing this process).

125. *See Pasachoff, supra* note 1, at 284.

126. Ernest B. Abbott, *Representing Local Governments in Catastrophic Events: DHS/FEMA Response and Recovery Issues*, 37 URB. LAW. 467, 469-70 (2005) (explaining the grant compliance rules for FEMA and urging that lawyers work to “protect[] their client communities from the financial disaster that will surely follow a physical disaster if federal rules are not understood and followed”); Gordon & Pasachoff, *supra* note 55, at 11 (describing significant repayment requirements for state and local educational authorities).

compliance.¹²⁷ Nonfinancial consequences from audit findings can be significant, too, as agencies may decide to impose “specific conditions” that add burdens to compliance and reporting.¹²⁸ In these ways, then, the accountability structure provided by the single audit is important.

3. State Grants-Management Rules

In addition to these two sets of federal rules—those stemming from individual substantive grants statutes and those stemming from OMB’s authority to promulgate general management requirements—states may also overlay their own grants-management rules on top of the federal requirements. These state grants-management rules fall into several categories.

One category are those activities specifically identified in the Uniform Grant Guidance as open to state rules. Rather than requiring all grantees to follow entirely the same set of uniform rules, the Uniform Grant Guidance provides that, in certain categories, such as procurement, states have the authority to use their own procedures to govern their own operation under federal grants, even though their subgrantees must follow the standard Uniform Grant Guidance rules.¹²⁹ This distinction raises complexities for compliance. States must monitor their subgrantees for compliance with the federal procurement rules while ensuring their own compliance with the state procurement rules for purchases made under federal grants, but must ensure that their subgrantees are following the state procurement rules for purchases made under state-funded programs.¹³⁰

A second category of state grants-management rules are program-specific rules that arise from the state’s implementation choices under substantive federal grant statutes. Federal grant statutes often leave it to states to determine how they will implement a particular administrative requirement by making choices that they submit to the relevant federal agency in a state plan.¹³¹ Under these circumstances, subgrantees in one state cannot rely on information from subgrantees in other states about compliance or implementation, because the operable rules may be quite different.¹³²

127. The sources cited in notes 9-11 *supra* are illustrative.

128. 2 C.F.R. §§ 200.338, 200.207.

129. *Id.* § 200.317.

130. Junge & Krvaric, *supra* note 65, at 2.

131. See, e.g., Pasachoff, *Spending Clause Statutes*, *supra* note 1, at 276-77. For a discussion of how state educational agencies may use their oversight and implementation discretion in these rules under the largest federal education grant, see *A Guide to State Educational Agency Oversight Responsibilities Under ESSA*, COUNCIL OF CHIEF ST. SCHOOL OFFICERS, https://www.ccsso.org/sites/default/files/2017-10/CCSSO_State_Authority_Over_ESSA_Programs.pdf [<https://perma.cc/V9PW-SP9B>].

132. Junge & Krvaric, *supra* note 65, at 2-3.

B. Institutional Landscape

In order to understand how these rules operate on the ground—the subject of Part II—it is important to comprehend the institutional landscape in which they are embedded. This Section therefore introduces the key institutions that create, effectuate, and oversee the operation of the rules: Congress, agencies, OMB, grantees, and auditors. It also disaggregates each institution into component parts with different responsibilities. In so doing, it demonstrates both the extent of the infrastructure around the grants-management rules and the difficulties of coordination. It also makes plain that courts play only a small role in the grants-management system.

1. Congress

Three kinds of congressional committees play a role in the grants-management system.

First are the authorizing committees for substantive grant statutes—for example, the Senate Health, Education, Labor, and Pensions Committee and the House Committee on Education and the Workforce, which reauthorize the key education and labor grant programs. While these committees have under their purview grants-management rules that appear in the statutes they oversee (such as maintenance of effort, cost sharing, and administrative set-asides in education grant programs), these committees tend to focus more on big-picture policy issues, and often pay little attention to the trans-substantive grant rules developed by OMB.¹³³

Second are the authorizing committees for government oversight: the Senate Committee on Homeland Security and Government Affairs and the House Committee on Oversight and Government Reform. These committees develop trans-substantive grants laws and often delegate to OMB for government-wide execution.¹³⁴ Because these committees lack expertise in the policy areas that these rules will govern and in the state- and local-government machinery that will realize them, they may be disconnected from implementation consequences.¹³⁵ These committees may also overestimate OMB capacity.¹³⁶

133. See, e.g., *id.* at 1, 4 (explaining that these policymakers “typically debate the merits and drawbacks of broad federal education policies and various educational approaches, without examining the underlying federal compliance framework that directly impacts whether and how these policies can be carried out by states and school districts,” and explaining that the OMB “rules are little known to education policymakers and are rarely taken into account when discussing federal education policy”).

134. See *supra* note 90 and accompanying text.

135. See CRS, FEDERAL GRANTS, *supra* note 2, at 39 (describing the need for more input to Congress on intergovernmental grants).

136. Eloise Pasachoff, *The President’s Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2195, 2237-43 (2016) (discussing OMB’s small staff and large delegations in the management arena); Posner, *The Daunting Challenge*, *supra* note 29 (noting overestimating capacity of reporting downstream).

Finally, while the appropriations committees for each substantive grant area do not play a formal role in the grants-management rules, their work has consequences for that system to the extent that appropriations for intergovernmental programs do not break out implementation costs from policy costs.¹³⁷ When new administrative requirements are put in place for intergovernmental actors, there does not tend to be a discussion of this increased obligation in appropriations mark-ups.¹³⁸

2. Agencies

Grant-giving federal agencies tend to divide their responsibility for grant oversight between program oversight and financial oversight, with these responsibilities lying in separate offices.¹³⁹ Program officials tend to have substantive expertise in the subject matter of the grant program, while financial officials tend to have expertise in financial administration.¹⁴⁰ Different agencies arrange these offices differently—for example, some agencies operate with program officials in regional offices rather than only in headquarters, and some agencies divide responsibility for audit oversight from other aspects of financial management¹⁴¹—but the basic divide between program and finance is generally consistent. Unlike in many regulatory programs, there is no federal office dedicated specifically to enforcement on either the program or finance side.¹⁴²

Agency Inspector General offices also play an important role in grants oversight as part of their role investigating the possibility of waste, fraud, and abuse in government programs.¹⁴³ They serve two different functions: investigating the agency's own oversight over its grantees, and investigating individual grantees' operations.¹⁴⁴ They do not have final authority over grant matters, but their investigations can trigger authoritative agency investigations into grantee mismanagement or change agency operations over grants—or they may not. Their attention to the grants-management rules under their agency's substantive statutes may also prompt congressional or even OMB policy changes—but again, not always.

137. The most recent budgets are typical in this respect. Where they specify implementation set-asides, they are for federal agencies rather than for state or local governments as program implementers. *See, e.g.*, Pub. L. No. 115-245, 132 Stat. 2981 (2018).

138. *See infra* notes 468-470 and accompanying text.

139. KENNETH J. ALLEN, *FEDERAL GRANT PRACTICE: A GUIDE FOR THE GOVERNMENT AND GRANTEEES* § 4:25 (2016); THOMPSON GRANTS, *FEDERAL GRANTS MANAGEMENT HANDBOOK* § 410 (2019), <https://grants.complianceexpert.com/handbooks/federal-grants-management-handbook> [<https://perma.cc/M5GX-KD54>]; LLOYD & FERA, *supra* note 52, at 3.

140. ALLEN, *supra* note 139, § 4:25.

141. THOMPSON *FEDERAL GRANTS MANAGEMENT HANDBOOK*, *supra* note 139, § 410.

142. *See* Pasachoff, *Spending Clause Statutes*, *supra* note 1, at 326-27.

143. ALLEN, *supra* note 139, § 4:26.

144. *Id.* at §§ 6:19-22 (describing the variety of inspector-general investigations).

Finally, agencies in which grantmaking is a substantial part of their work tend to have an office of adjudicators overseeing grant disputes between grantees and the agency.¹⁴⁵ These offices vary in size and in the formality of their procedures depending on the extent of grantmaking in the agency.¹⁴⁶ Some agencies have one agency-wide office for all grant disputes, while others have different dispute offices for different programs.¹⁴⁷ It is to these offices that grantees may appeal a management decision affirming an audit finding.¹⁴⁸

Very occasionally, a dispute over the grants-management rules will end up in court after working its way through the agency process.¹⁴⁹ But these occasions are the exception, not the rule.¹⁵⁰

3. OMB

Given the description above of the Uniform Grant Guidance and Compliance Supplement, it might seem that OMB's central role in grants management is the promulgation of those documents (and their predecessor circulars).¹⁵¹ This task is carried out by personnel in OMB's Office of Federal Financial Management.¹⁵²

But other parts of OMB play a role, too. For example, OMB's Resource Management Offices (RMOs) are the key budget and policy shops coordinating the entire executive establishment.¹⁵³ Those RMOs that oversee the work of agencies that are heavily involved in grantmaking may, through the process of developing those agencies' budgets and legislative proposals, participate in designing the way individual grant funding is structured.¹⁵⁴

Still other parts of OMB participate in different strategic initiatives that bear on grants.¹⁵⁵ In recent years, OMB has spearheaded the evidence-based movement in federal policymaking, which includes encouraging the use of

145. *Id.* at § 4:27; THOMPSON GRANTS, *supra* note 139, § 620.

146. THOMPSON GRANTS, *supra* note 139, at § 620.

147. *Compare, e.g., id.* § 621 (HHS), *with id.* § 629 (USDA).

148. 2 C.F.R. § 200.341 (2019); *see supra* notes 124-126.

149. *See, e.g.,* Gordon & Pasachoff, *supra* note 55, at 17 (describing a few court cases reviewing agency decisions on grants-management rules in the education-law context).

150. A search for caselaw mentioning the OMB circulars that were consolidated into the Uniform Grants Guidance retrieved only twenty-nine cases in almost thirty years. *See* Memorandum from Alana Chill to Eloise Pasachoff (Oct. 29, 2015) (on file with author).

151. ALLEN, *supra* note 139, § 4:20 (describing the role of OMB in federal grants).

152. *See* Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590, 78590 (Dec. 26, 2013); *see also* Notice of Availability, 84 Fed. Reg. 31353 (July 1, 2019) (listing OFFM as the key office for the Compliance Supplement).

153. *See* Pasachoff, *supra* note 136, at 2199-201.

154. For example, OMB officials in the budget offices were involved in the decisions to include new competitive grants under longstanding formula grants to spur evidence-based policymaking. *See* RON HASKINS & GREG MARGOLIS, SHOW ME THE EVIDENCE: OBAMA'S FIGHT FOR RIGOR AND RESULTS IN SOCIAL POLICY 2-12 (2015).

155. Of note, given the importance of OIRA for regulatory programs, OIRA does not tend to be among these parts. *See* Pasachoff, *supra* note 136, at 2204-06 (describing comparatively smaller role for OIRA in reviewing budget programs, such as grants).

federal grants to stimulate the development and use of evidence in policymaking at the state and local level.¹⁵⁶ OMB also promulgates the President's Management Agenda, which has included a component on some aspect of grantmaking since President George W. Bush initiated the Agenda in 2001.¹⁵⁷ It also oversaw large-scale public reporting of grant funding during the time period of stimulus spending after the 2011 American Recovery and Reinvestment Act.¹⁵⁸

OMB also plays a convening role in grant reform across the executive branch. For example, it facilitated the creation of the Council on Financial Assistance Reform (COFAR), and the OMB controller served on that board until it was disbanded under the Trump administration.¹⁵⁹

Of note, for all of OMB's coordinating role, there is little formal opportunity for engagement with grantees in various OMB units' development of government-wide grants policy. For example, the Uniform Grant Guidance included no federalism impact statement describing interactions with state and local stakeholders,¹⁶⁰ and state and local governments bemoaned their lack of representation on the COFAR.¹⁶¹ OMB's evidence agenda for federal grants was also not subject to public input.¹⁶² These absences may have clear rationales—no federalism impact statement was formally required;¹⁶³ the

156. Memorandum from Sylvia M. Burwell et al., Dir., Office of Mgmt. & Budget, to the Heads of Dep'ts & Agencies, M-13-17, Next Steps in the Evidence and Innovation Agenda 3, 8-10 (July 26, 2013); *see also supra* note 154.

157. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PRESIDENT'S MANAGEMENT AGENDA 25, 36 (2002) (promoting electronic applications for grants and the removal of application barriers for faith-based organizations) [hereinafter BUSH PMA]; Clark, *supra* note 13 (describing, among other things, a focus on the cessation and recovery of improper payments).

158. *See, e.g.*, Paul L. Posner, *Accountability Under Stress: The American Recovery and Reinvestment Act of 2009*, in GOVERNING UNDER STRESS: THE IMPLEMENTATION OF OBAMA'S ECONOMIC STIMULUS PROGRAM 194-95 (Timothy J. Conlan et al. eds., 2017).

159. Memorandum from Jacob J. Lew, Dir., Office of Mgmt. & Budget, Exec. Office of the President, to the Heads of Dep'ts & Agencies, M-12-01, Creation of the Council on Financial Assistance Reform (Oct. 27, 2011), <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2012/m-12-01.pdf> [<https://perma.cc/42Y3-C39V>]; Memorandum from Mick Mulvaney, Dir., Office of Mgmt. & Budget, Exec. Office of the President, M-17-26, Reducing Burden for Federal Agencies by Rescinding and Modifying OMB Memoranda (June 15, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-26.pdf> [<https://perma.cc/TX9J-T399>].

160. *See* Joint Interim Final Rule, 79 Fed. Reg. 75872, 75977 (Dec. 19, 2014) ("OMB has determined that this joint interim final rule does not have any Federalism implications, as required by Executive Order 13132."); Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590 (Dec. 26, 2013) (not mentioning any federalism determination); Seifter, *supra* note 27, at 971-74 (discussing the 1999 Federalism Executive Order requiring agency consultation of state and local groups when taking regulatory action that implicates their interests).

161. GAO Urges COFAR, OMB To Involve Stakeholders, FED. GRANTS MGMT. HANDBOOK, Mar. 2014, at 10; Ryan Holeywell, *States and Localities Seek Voice in Federal Grants Overhaul*, GOVERNING: FEDWATCH (Nov. 18, 2011, 2:30 PM), <https://www.governing.com/blogs/fedwatch/States-and-Localities-Seek-Voice-on-Federal-Grants-Council.html> [<https://perma.cc/23NE-N9CD>].

162. *See* Pasachoff, *supra* note 136, at 2280.

163. *See supra* note 160 (explaining that the Uniform Requirements implicated no federalism issues).

COFAR was meant to be a convening of federal grant-making agencies;¹⁶⁴ and OMB initiatives are not regulations subject to notice and comment.¹⁶⁵ Nonetheless, this lack of formal coordination is worth noting in this Section highlighting the numerous players in the landscape of federal grants.

4. Grantees

The Uniform Grant Guidance calls all federal grantees “Nonfederal Entities,” but it also recognizes that grantees are a diverse group by acknowledging the distinct categories into which they fall: “state, local government, Indian tribe, institution of higher education (IHE), or nonprofit organization.”¹⁶⁶ Each of these categories could be further subdivided and described in a way that would paint a rich portrait of the importance of federal funding all across America (and, indeed, the world, for the State Department, HHS, and USAID make grants to public international organizations to which parts of the grants-management regime apply).¹⁶⁷ For present purposes, however, two points of commonality among this varied group are worth noting.

First, no matter the category of grantee, the role of a grantee is different when the grantee is a direct recipient of a federal grant than when it is a subrecipient of a federal grant, as when a state agency acts in a pass-through capacity. Not only may different layers of rules apply, but there may also be an iterative process of approval that may have consequences for the accomplishment of the overall purpose of the grant. Section II.B describes some of these consequences in more detail.¹⁶⁸

Second, while it is important not to overgeneralize, a similar feature across all kinds of grantees tends to be the same division of responsibility between program or policy operations on the one hand and financial or administrative operations on the other, which federal agencies themselves reflect.¹⁶⁹ This means that those tasked with carrying out the purposes of the grant may not have a sense of the way the grants-management rules might be used to help or hinder those purposes, while those tasked with ensuring compliance with the grants-management rules may not have the same sense of

164. See Holeywell, *supra* note 161.

165. See Pasachoff, *supra* note 136, at 2279.

166. 2 C.F.R. § 200.69 (2019). For ease of exposition, when I refer to state and local grantees, I mean all intergovernmental grantees, including tribes, and when I refer to nonprofit organizations, I mean all nonprofits, including institutions of higher education. I do this because nothing in my analysis turns on more fine-grained institutional differences.

167. See *id.* § 200.101(c) (authorizing application of the Uniform Grant Guidance with the exception of the auditing rules to a variety of international organizations); *Comments Show Confusion Exists About Procurement Grace Period*, FED. GRANTS MGMT. HANDBOOK, Apr. 2015, at 1, 3, 11 (describing different agencies’ application of the rules).

168. See *infra* notes 270-275 and accompanying text.

169. LLOYD & FERA, *supra* note 52, at 2; *Communication Proves Critical in Award Management, Planning*, FED. GRANTS MGMT. HANDBOOK, Dec. 2015, at 1, 12 (describing this divide in research institutions).

mission that their counterparts do.¹⁷⁰ Again, Part II elucidates this consequence.¹⁷¹

5. Auditors

The last major players in federal grant administration are the auditors.

Audits conducted by nonfederal auditors—the independent auditors who implement the Single Audit Act requirements—are the bread and butter of the system.¹⁷² Most auditors who conduct single audits are certified public accountants from private auditing firms.¹⁷³ In some jurisdictions, in some instances, state auditors play this role.¹⁷⁴

As Part II explains in more depth, these nonfederal auditors have the most regular and direct influence over grantees, but federal auditors also have a role to play, albeit a more sporadic one.¹⁷⁵ Inside agencies, as already noted, Inspectors General take on the auditing job.¹⁷⁶ From the outside, the GAO investigates agency operations at the request of congressional committees, subcommittees, or individual members of Congress.¹⁷⁷ The GAO has a long history of issuing reports on agency grant management, on government-wide grants policy, and on grantee operations.¹⁷⁸ But, like Inspector General offices, the GAO has no direct authority to make anything happen. Its reports may or may not result in the changes it recommends. Its effect depends on its persuasive authority, which may vary significantly depending on the political and institutional context.¹⁷⁹

* * *

170. LLOYD & FERA, *supra* note 52, at 2 (describing this potential conflict).

171. See *infra* notes 261-267 and accompanying text.

172. LLOYD & FERA, *supra* note 52, at 249.

173. *Id.* at 3.

174. *Id.*

175. *Id.* at 4, 250.

176. See *supra* notes 143-144 and accompanying text.

177. Allen, *supra* note 139, § 4:17; *Reports and Testimonies*, U.S. GOV'T ACCOUNTABILITY OFF. (2019), <https://www.gao.gov/about/what-gao-does/reports-testimonies> [<https://perma.cc/U7FK-NKC3>].

178. Some early reports in this area include, for example, U.S. GEN. ACCOUNTING OFFICE, GGD-78-111, FEDERAL COST PRINCIPLES ARE OFTEN NOT APPLIED IN GRANTS AND CONTRACTS WITH STATE AND LOCAL GOVERNMENTS (1979); and MAZE OF INCONSISTENCY, *supra* note 41. More recent reports include, for example, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-491, GRANTS WORKFORCE: ACTIONS NEEDED TO ENSURE STAFF HAVE SKILLS TO OVERSEE AND ADMINISTER FEDERAL GRANTS (2018); and U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 17-159, SINGLE AUDITS: IMPROVEMENTS NEEDED IN SELECTED AGENCIES' OVERSIGHT OF FEDERAL AWARDS (2017).

179. See, e.g., Eric Katz, *The White House Is Not Complying with Inquiries From Government's Top Watchdog*, GOV'T EXEC. (May 30, 2018), <https://www.govexec.com/oversight/2018/05/white-house-not-complying-inquiries-governments-top-watchdog/148602> [<https://perma.cc/WB2S-AUG2>] (describing current political environment); Anne Joseph O'Connell, *Auditing Politics or Political Auditing?* 6 (UC Berkeley Pub. Law, Research Paper No. 964656, 2007) (summarizing empirical research findings “consistent with the GAO’s image of itself as a neutral watchdog agency, but one facing particular political constraints”).

In short, a key feature of federal grantmaking as a form of policymaking is that numerous kinds of grants-management rules are filtered through numerous kinds of institutions on the way to effectuating policy. The next Part assesses what happens during the process of this filtering.

II. The Interaction of Grants-Management Rules and Grant Institutions: Unintended Consequences and Unwarranted Assumptions

There are many advantages of the grants-management regime, advantages that help explain its evolution and growth. Given the importance of federal grantmaking to American policymaking, as well as the sheer number of dollars at stake, it is important to have a mechanism to ensure that those dollars are being spent as they should be. When Congress sends billions of dollars to state and local education agencies intending that the money be spent in the classroom, someone ought to see to it that swimming pools aren't built instead. Likewise, someone ought to ensure that universities don't abuse their research dollars on inflated entertainment expenses for administrators on pricey yachts; that grant recipients have the organizational and administrative capacity to administer federal (and their own) dollars; and that grantees don't use jurisdictional variation as an excuse for not managing their grants as they have committed to do.

In many ways, the grants-management regime rises to these challenges well. Statute-specific rules permit attention to the distinct needs of individual grant programs, while the unified, trans-substantive rules—as opposed to agency-by-agency rules—are an efficient way of accommodating the reality that many grantees receive federal funds from multiple federal agencies. This system promotes sensible coordination rather than complete standardization across the executive branch, while also respecting federalism values, such as by devolving oversight to locally hired auditors and permitting state overlays throughout.

Additionally, the grants-management rules provide some political protection for programs that might otherwise be jeopardized by disagreement over the substantive policy's wastefulness. These rules might allow legislators to compromise on that policy, knowing that the rules limit the potential for grantee abuse.

At the same time, an examination of the interaction of these rules with the institutions that bring them to life reveals both unintended consequences and unwarranted assumptions. This Part identifies and assesses four such issues.

One unintended consequence, discussed in Section II.A, is that the system distorts agencies' enforcement capacity, expanding oversight of grantees' financial compliance while permitting oversight of grantees' substantive work to remain lax. A second unintended consequence, discussed in Section II.B, is that as a result of such agency priorities, the system skews grantees' incentives to privilege financial and administrative compliance over programmatic

outcomes, with further consequences for how policy works on the ground. In other words, there's a problem if grantees spend so much time showing that they are not spending money on swimming pools that they are not using their classroom dollars effectively.

While it is difficult to precisely measure the scale of the problem discussed in these two sections,¹⁸⁰ it is clear that the dynamics discussed there are far from isolated or occasional. An annual nationwide survey of grants managers across sectors routinely reports that they spend more time on compliance with the grants-management rules than they do on any other task, including developing program policy and monitoring programmatic outcomes.¹⁸¹ OMB's assessment is that grant managers spend 40% of their time on compliance instead of working on results.¹⁸² Sector-specific studies consistently show that grantees perceive compliance obligations as significantly weakening their ability to focus on the substance of their grant programs.¹⁸³ Because the drivers that cause grantees to prioritize compliance are not sector-specific, the unintended consequences discussed in these first two sections reflect a widespread problem.

In addition to these unintended consequences, the system reflects two unwarranted assumptions. The grants-management system relies on the integrity of the audit process—the twin principles that that auditors have the capacity to conduct audits as the system expects and that the system itself is clear. The long history of problems in auditing and the complexity of the grants-management system suggests that this reliance is not well-founded, as Section II.C illustrates. Put another way, if different auditors would reach different conclusions on the same facts about whether a university-funded lunch on a boat reflects the yacht problem, and if university administrators find it too costly and difficult to challenge auditors and their funders and therefore forbid marine biologists from week-long research projects at sea, the system is not working as it should.

180. Charles S. Clark, *Agencies in the Dark about Performance of Their Grants, Survey Shows*, GOV'T EXEC. (Feb. 26, 2019), <https://www.govexec.com/management/2019/02/agencies-dark-about-performance-their-grants-survey-shows/155150> [<https://perma.cc/9Z29-XMMX>] (quoting an official saying that “no one has a good picture of the administrative burden”).

181. *See id.*; *see also Study: Funding Uncertainty Remains Key Grants Management Concern*, FED. GRANTS MGMT. HANDBOOK, *supra* note 13.

182. *See Results-Oriented Accountability for Grants*, PERFORMANCE.GOV, <https://www.performance.gov/CAP/grants> [<https://perma.cc/83FH-AXDU>] (“The Federal government uses grants to invest approximately \$700 billion each year in mission-critical needs for American taxpayers, but managers report spending 40% of their time using antiquated processes to monitor compliance instead of analyzing data to improve results.”).

183. Melissa Junge & Sheara Krvaric, *The Compliance Culture in Education*, EDUC. WEEK: RICK HESS STRAIGHT UP (Oct. 24, 2011, 7:48 AM), http://blogs.edweek.org/edweek/rick_hess_straight_up/2011/10/the_compliance_culture_in_education.html [<https://perma.cc/L3DG-QP49>] (explaining “how federal compliance rules can shape the way states and school districts think about using money for education” and describing “some of the specific federal rules we see as barriers to effective programs”); *see also* NAT'L ACADEMIES OF SCI., ENGINEERING & MED., *supra* note 33, at 1 (describing a similar challenge in the context of federal funding for scientific research).

Finally, the grants-management system tends to be portrayed as a series of technocratic, good-government decisions. But, as Section II.D shows, this assumption is not entirely true. If politics is “who gets what, when, how,”¹⁸⁴ rules governing the allocation of and accounting for hundreds of billions of federal dollars are necessarily embedded in a political system of often-disputed policy goals. Any serious effort to assess the operation of the grants-management system must acknowledge this reality.

Two caveats apply. First, this Part is meant to illustrate general dynamics rather than make claims that apply to every grant relationship in every instance. Not every point made below holds true at all times. However, it is possible—and valuable—to make these general observations in the spirit of system-wide assessment.

Second, to illustrate these unintended consequences and unwarranted assumptions is not ultimately to condemn the system. The old adage about the baby and the bathwater applies; a problem is only a problem if its solution is not worse. Before considering what is to be done—the subject of Part III—it is important to understand what is actually happening.

A. How and Why Agencies Prioritize Administrative Enforcement Over Substantive Oversight

One feature of the grants-management regime that is low in salience but high in importance is that it encourages agencies to prioritize administrative enforcement over substantive oversight. This emphasis in agency enforcement activity seems to be a consequence rather than a goal of regime design, however, and is not sufficiently apparent to generate much debate as a matter of public policy.

Start by considering the breadth and generality of the substantive goals of the typical grant statute.¹⁸⁵ It is difficult for agencies to monitor progress toward such goals because many of these goals depend on factors that are beyond the grantee’s direct control.¹⁸⁶ That difficulty increases where there are disagreements about how to measure or observe compliance with general goals that involve tradeoffs with other goals.¹⁸⁷ It is also resource-intensive to monitor progress toward these goals in all grant sites around the country.¹⁸⁸

184. See HAROLD LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

185. See, e.g., *supra* notes 48-51 and accompanying text.

186. See generally, e.g., Pasachoff, *supra* note 1 (distinguishing between grantees’ compliance with terms under their own control and terms depending on external factors).

187. See, e.g., MICHAEL LIPSKY, *STREET LEVEL BUREAUCRACY: THE DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE* 147 (2010) (describing the challenge of “conflicting or ambiguous goals” in public institutions); JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 117 (2000) (noting that there is no objective way to evaluate tradeoffs between vague goals).

188. See, e.g., *Audit Calls for HUD to Better Assist Grantee Risk*, SINGLE AUDIT INFO. SERV., Sept. 2017, at 3 (describing challenges for HUD’s Office of Community and Planning Development in overseeing state recipients of Community Development Block Grant Funds); *FTA To Issue Guidance on*

The reality of limited budgets and the specificity of appropriations language mean that agencies have a fixed amount of money to spend on program oversight, so agency program staff can only supervise the substantive terms of their grants to a limited extent.¹⁸⁹ Even agency Inspector General staff, who are more focused on grant enforcement in general and fiscal compliance in particular through their auditing function, do not have the capacity to review every grantee every year.¹⁹⁰ In previous work, I have called this dynamic the “capacity and motivation” rationale for why agencies do not tend to withhold programmatic funds from noncompliant grantees.¹⁹¹

In that same work, I also identified three other dynamics that contribute to agencies’ reluctance to withhold programmatic funds for substantive noncompliance. One of these dynamics is the longstanding belief that withholding funds from grantees would hurt needy beneficiaries. If grantees are failing to accomplish the substantive goals of their statute, this rationale goes, threatening to take their funds away would be counterproductive.¹⁹² Another such dynamic is rooted in solicitude for federalism. Agencies can be reluctant to withhold substantive program funds from noncompliant state- and local-government grantees out of a sense that to do so would wrongly discount their sovereignty and autonomy, constitute coercion, and reject valuable program variation and diversity.¹⁹³ Still another dynamic reflects political pressure. That is, state- and local-government grantees can enlist their congressional delegations to oppose agency efforts to withhold funds using tools like appropriations to cabin agency action, while the White House, seeking to shore up votes in areas across the country, can be sensitive to state and local complaints about withholding efforts.¹⁹⁴

In my work identifying these dynamics, I challenged their underlying rationales as normatively and practically insufficient, suggesting that agencies

At-Risk Grantee Oversight, SINGLE AUDIT INFO. SERV., July 2016, at 4 (describing challenges for Federal Transit Administration of reviewing actions of 2,000 urban and rural transit operators receiving transit grants).

189. See, e.g., *Evaluating Risk Criteria Aids Monitoring Efforts*, FED. GRANTS MGMT. HANDBOOK, June 2014, at 3 (“Many federal grantor agencies and nonfederal passthrough entities are finding that limited resources are hindering effective monitoring efforts.”). In fact, Inspector General audits of agencies’ own monitoring work routinely criticize agencies for insufficient grantee oversight. See, e.g., *DOL Seeks Better Program Data*, SINGLE AUDIT INFO. SERV., May 2017, at 2 (summarizing monitoring weakness in a Department of Labor office, including zero monitoring for some grantees over the life of their grant, and program officers canceling scheduled monitoring visits due to budgetary limitations); *Increased Monitoring Planned for Rural Ed Program*, SINGLE AUDIT INFO. SERV., Nov. 2016, at 2 (describing Inspector General Report critiquing an office in the Department of Education for conducting only 18 rubber-stamping “desk monitoring reports” of 16 grantees out of 4,300 grantees over a three-year period).

190. See, e.g., COUNCIL OF THE INSPECTORS GEN. ON INTEGRITY & EFFICIENCY, CRITICAL ISSUES INVOLVING MULTIPLE INSPECTORS GENERAL 24 (2017) (“OIGs do not always have the resources to provide effective oversight for the more than 30,000 single audits filed annually.”).

191. Pasachoff, *supra* note 1, at 304-09.

192. *Id.* at 285-93.

193. *Id.* at 293-303.

194. *Id.* at 312-17.

reconceptualize their role in promoting programmatic outcomes through sensible (rather than blunderbuss) enforcement actions—but the descriptive reality is a powerful one.¹⁹⁵ That is, these reasons accurately describe why agencies are often reluctant to engage in enforcement actions for failures to meet the grant’s programmatic goals.

These explanations for agencies’ low focus on substantive enforcement of grants point to agencies’ internal conceptualization of their role. Another contributing explanation is the result of an external force: the history of private enforcement of grant statutes through lawsuits by program beneficiaries. In the 1960s and 1970s, as Congress developed new federal grant programs and dramatically expanded the role of federal funding in American policy, Congress incorporated private enforcement regimes into some of those statutes, allowing beneficiaries to sue state and local agencies for violating their rights or providing insufficient levels or quality of service.¹⁹⁶ Courts also played a role during this era in permitting robust private enforcement regimes, including by requiring due-process hearings before benefits could be taken away¹⁹⁷ and by finding implied private rights of action where none existed in the statute’s explicit language.¹⁹⁸ Because private parties were helping to ensure that federal grantees were delivering on programs’ policy goals, there was little need for Congress to develop robust substantive enforcement regimes for the federal agencies granting the funds in the first place, especially in light of the countervailing effort to encourage state and local governments to take up these voluntary grant programs in the first place. Accordingly, most grant offices are designed to give funds away, rather than to take funds away from noncompliant grantees; grant program managers, rather than grant enforcement attorneys, are the norm.¹⁹⁹ Where Congress did include agency enforcement offices for grant programs, largely through Offices of Civil Rights, private lawsuits against those offices helped pressure the offices to do a thorough and timely job.²⁰⁰

By the 1980s, when courts began to cut back on the doctrine that had up until then made private enforcement a forceful option,²⁰¹ the political environment had shifted to the right. Congress, therefore, did not compensate for judicial retrenchment by invigorating federal agencies’ own capacity to engage in substantive enforcement of federal grants.²⁰² Similarly, when the

195. See generally *id.* at 283-316.

196. See, e.g., Education for All Handicapped Children Act, Pub. L. No. 94-142, § 615(b)-(c), 89 Stat. 773, 788-89 (1975) (codified at 20 U.S.C. § 1415 (2018)).

197. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

198. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979); *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

199. See Pasachoff, *supra* note 1, at 304, 326.

200. See, e.g., *Women’s Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989); *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973).

201. See *infra* notes 241-248.

202. TIMOTHY CONLAN, FROM NEW FEDERALISM TO DEVOLUTION: TWENTY-FIVE YEARS OF INTERGOVERNMENTAL REFORM 141-69 (1998).

Supreme Court decided that agency decisions not to take enforcement actions were unreviewable under the Administrative Procedure Act,²⁰³ Congress accepted this decision without placing any countervailing pressures on agencies to enforce the substance of their grant statutes.

These developments left a vacuum for substantive enforcement of grants. Instead, the 1980s saw the rise and entrenchment of grants-management rules. For example, Congress passed the Single Audit Act in 1984, codifying what had been less formal OMB requirements of grantees for auditing.²⁰⁴ In 1988, OMB finalized what became known as the “common rule,” a unified set of administrative requirements that applied to all federal grants and that was subsequently adopted by all federal grant-making agencies.²⁰⁵ And throughout the decade, both Congress and OMB tightened various restrictions on activities for which grantees could spend federal dollars.²⁰⁶

Against this institutional and historical backdrop, the reasons for agencies’ current focus on administrative enforcement as opposed to substantive oversight become clear. As a consequence, the single audit has come to play an outsized role in agencies’ grant-enforcement efforts. In contrast to the limited agency capacity for substantive monitoring and low tolerance for substantive enforcement, the single audit provides a regular source of oversight.²⁰⁷ In effect, the task of investigating compliance with the fiscal compliance rules is outsourced to nonfederal, front-line auditors.²⁰⁸ Moreover, agencies do not bear the cost of this work because grantees directly pay the cost of the single audit.²⁰⁹ The primary role for agencies under the fiscal compliance

203. Heckler v. Chaney, 470 U.S. 821 (1985); accord *Women’s Equity Action League v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990).

204. Single Audit Act of 1984, Pub. L. No. 98-502, 93 Stat. 2327 (codified in scattered sections of 31 U.S.C.).

205. Final Rule, 53 Fed. Reg. 8034 (Mar. 11, 1988).

206. See, e.g., Nora Gordon & Sarah Reber, *The Quest for a Targeted and Effective Title I: Challenges in Designing and Implementing Fiscal Compliance Rules*, in *THE ELEMENTARY AND SECONDARY EDUCATION ACT AT FIFTY AND BEYOND*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 129, 131 (2015) (describing increased statutory restrictions on education spending); see also *infra* notes 333–341 (discussing the Reagan administration’s changes to spending permissibility).

207. See, e.g., Leita Hart-Fanta, *Why Are Single Audits Challenging for External Auditors?*, SINGLE AUDIT INFO. SERV., Oct. 2015, at 4 (calling the single audit “the primary mechanism used by agencies to ensure accountability for federal awards”); Leita Hart-Fanta, *A Renewed Emphasis on Abuse*, SINGLE AUDIT INFO. SERV., Aug. 2014, at 4 [hereinafter Hart-Fanta, *Why Are Single Audits Challenging?*] (“If you have been in the government environment for a while, you realize that federal, state and local granting agencies don’t have the resources to come and check on every grant in detail. The single audit is often the only assurance they receive that their money is being used properly. So if auditors don’t tell them that something wasteful is going on, they will never know it, and the questioned behavior will continue.”).

208. Cf. Abbe R. Gluck, Anne Joseph O’Connell, & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1834 (2015) (describing the attraction for legislators of such off-budget actions and unorthodox delegations).

209. 2 C.F.R. § 200.425(a) (2019); Hart-Fanta, *Why Are Single Audits Challenging?*, *supra* note 207, at 4 (explaining that auditors “are working on behalf of the federal government, not the nonprofit organization who is only writing a check covered by their federal award”).

rules is simply to approve the auditors' findings.²¹⁰ It is therefore cheaper for agencies to engage in enforcement of the fiscal compliance rules than in oversight of the substantive terms of their grants.

It is not only the increased capacity that results from outsourcing enforcement to auditors that makes fiscal enforcement cheaper than substantive enforcement; the political and social context in which fiscal enforcement occurs makes it cheaper than substantive enforcement as well. As political scientists David Konisky and Manuel Teodoro theorize, a government "regulator will penalize violations when the cost of tolerating the violation is greater than the cost of penalizing the violator."²¹¹ This calculus plays out differently for fiscal violations than it does for substantive ones.

Konisky and Teodoro explain that the "cost of tolerating a violation is the social cost of a regulatory policy failure."²¹² The social cost of tolerating a fiscal violation is higher than the social cost of tolerating substantive noncompliance. If agencies tolerate grantees' fiscal noncompliance, it is easy for the public and for lawmakers to be outraged at the agencies' ineptitude or even corruption.²¹³ In contrast, if agencies tolerate grantees' substantive noncompliance, agencies are less likely to be blamed because they appear encouraging or patient with difficult tasks, especially where the noncompliance is based on the grantees' failure to achieve outcomes that are outside the grantees' own control or on grantees' sympathetic-sounding capacity limitations.²¹⁴ This is a basic premise of agencies' reluctance to withhold grant funds from noncompliant grantees.²¹⁵

As Konisky and Teodoro further explain, the "cost of penalizing a violation is a function of the cost of imposing the penalty and the risk that the penalty will be overturned if and when the violator appeals the penalty through legislative or judicial channels."²¹⁶ Each of these cost categories is lower for fiscal violations than for substantive noncompliance. As explained above, the cost of imposing the penalty is lower for fiscal violations because that task is outsourced to auditors, who are paid directly by grantees.²¹⁷ In contrast, the cost of imposing a penalty for substantive noncompliance is borne entirely by the agency.

210. 2 C.F.R. §§ 200.66, 200.521 (2019).

211. David M. Konisky & Manuel P. Teodoro, *When Governments Regulate Governments*, 60 AM. J. POL. SCI. 559, 563 (2016).

212. *Id.*

213. See, e.g., Erica L. Green & Erin Fox, *Federal Audit Finds City Schools Misspent Stimulus, Title I Funds*, BALT. SUN, May 23, 2013 (describing bipartisan disapprobation of grantee violation of fiscal rules); McGuire, *supra* note 45 (discussing congressional reactions to universities using grant funds improperly).

214. See Pasachoff, *supra* note 1, at 275, 319, 321.

215. See *id.* at 272-73.

216. Konisky & Teodoro, *supra* note 211, at 563.

217. See *supra* note 209.

Similarly, the risk that the penalty will be overturned by either Congress or the courts is lower for fiscal violations than for substantive noncompliance. It can be hard for grantees to garner sympathy from legislators for a perceived injustice associated with the improper use of federal funds or insufficient paperwork documenting their use. Likewise, given the expense associated with challenging audit findings and the incentives to stay in funders' good graces,²¹⁸ grantees rarely challenge audit findings even within agency procedures, much less in court. In contrast, grantees are more likely to find legislators receptive to arguments that agency efforts to withhold funds for substantive noncompliance are unjust, whether because loss of grant funds will hurt needy grant beneficiaries or because stringent federal enforcement impinges on federalism values.²¹⁹

The differing priorities of the political parties also makes fiscal compliance more heavily enforced over time. Fiscal compliance lends itself to bipartisan agreement more than substantive compliance does.²²⁰ Fiscal compliance sounds in good government; after all, who could be opposed to preventing waste, fraud, and abuse of taxpayer funds? Substantive compliance, on the other hand, depends on a belief that government money can solve policy problems if used right, as well as a belief in the capacity and legitimacy of the administrative state to compel compliance with its policy goals, both of which are beliefs more associated with the left than the right in American politics. Fiscal compliance is thus likely to be a consistent feature of both Republican and Democratic administrations, while substantive compliance, especially on the social policy grants that make up the vast bulk of the federal grant universe, is more likely to be a feature of only Democratic administrations.

For all these reasons, then, agencies' enforcement work is skewed toward administrative compliance over substantive oversight.

David Super's case study of the "quality control" (QC) system in the food-stamp program illustrates the dynamic described in this Section nicely. Passed in 1964, the Food Stamp Act directs federal funding to state grantees, who then administer the entitlement.²²¹ The Department of Agriculture (USDA) was given oversight authority, "but with limited resources the Department had little capacity to identify any but the most egregious state administrative deficiencies."²²² In 1977, Congress "sought to improve USDA's oversight capacity by requiring states to conduct QC reviews of their eligibility decisions."²²³ In the early 1980s, as entitlement programs became central to political debate, the food-stamp program was charged with being rife with

218. See *infra* notes 317-320 and accompanying text.

219. See Pasachoff, *supra* note 1, at 284-85.

220. See, e.g., Clark, *supra* note 13.

221. See David A. Super, *Are Rights Efficient? Challenging the Managerial Critique of Individual Rights*, 93 CALIF. L. REV. 1051, 1105 (2005).

222. *Id.* at 1105.

223. *Id.*

“waste, fraud, and abuse,” and the QC program provided a ready means of responding.²²⁴ Because “few members of Congress wanted to be seen as defending ‘high error rates,’” Congress put in place financial penalties for states with high error rates in awarding food stamps.²²⁵ “Although payment accuracy was but one of several objectives set out for the Food and Nutrition Service (FNS)” in USDA’s statutorily required strategic plan, “it was the only one that FNS had a ready means of quantifying at the state level,” and “[e]rror reduction permeated almost all aspects of FNS’s relations with states.”²²⁶ Thus, the combination of quantifiable manageability, agency capacity, and political support led to the agency’s prioritizing the administrative QC rules over the broader programmatic goals of “providing food stamps to eligible applicants,” “supporting working poor families,” and so on, which do not have a “remotely comparable measurement-and-incentive system.”²²⁷

This dynamic should not be surprising, especially as to the question of measurability.²²⁸ In criminal enforcement, prosecutors often focus on violations that are easier to prove.²²⁹ In civil or administrative cases, the clarity and verifiability of requirements are key to their enforcement.²³⁰ The dynamic of measurability is also an important part of both public administration and corporate management writ large. What gets measured gets managed, the classic refrain goes, so it is important to choose the right things to measure.²³¹ Of course, people can then disagree about what those “right” things are.²³²

What is particularly unusual about this dynamic in the context of grant enforcement is that responsibility bifurcates in two dimensions, both along intergovernmental lines (because investigation into compliance is devolved from the federal government to state and local grantees, as well as to nonprofit organizations operating under localized auditing oversight)²³³ and across the public-private divide (because of the prominence of private certified public

224. *Id.* at 1103.

225. *Id.*

226. *Id.* at 1108.

227. *Id.* at 1110.

228. *Cf.* WILSON, *supra* note 187, at 161 (“Work that produces measurable outcomes tends to drive out work that produces unmeasurable outcomes.”).

229. *See, e.g.*, Memorandum from the Office of the Att’y Gen. to All Fed. Prosecutors, Department Charging and Sentencing Policy (May 10, 2017), <https://www.justice.gov/opa/press-release/file/965896/download> [<https://perma.cc/QNB6-QNNG>] (instructing prosecutors to “charge and pursue the most serious, *readily provable* offense” (emphasis added)).

230. David L. Markell & Robert L. Glicksman, *A Holistic View of Agency Enforcement*, 93 N.C. L. REV. 1, 5, 13-21 (2014) (identifying “clarity, norm achievability, [and] compliance verifiability” as important components of “effective regulation both generally and in the specific context of regulatory enforcement and compliance”).

231. *See generally, e.g.*, JOHN DOERR, *MEASURING WHAT MATTERS* (2018).

232. *See, e.g.*, Simon Caulkin, *The Rule Is Simple: Be Careful What You Measure*, *GUARDIAN* (Feb. 9, 2008), <https://www.theguardian.com/business/2008/feb/10/businesscomment1> [<https://perma.cc/4BXJ-HBCA>].

233. *Cf.* Miriam Seifter, *Further from the People? The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 128-46 (2018) (describing challenges in oversight of state-level executive branch operations).

accountant (CPA) firms in conducting single audits).²³⁴ As a result, much of the work of federal grant enforcement is done off-budget and less publicly, making it difficult for congressional overseers and the public to observe—and therefore debate the priorities reflected by—this balance of oversight in federal grants. This critical feature underlying the administration of billions of dollars in annual federal spending thus goes largely unremarked.

B. How and Why Grantees Prioritize Administrative Compliance over Programmatic Outcomes

Given agencies' apparent prioritization of administrative compliance over programmatic outcomes, it is no surprise that grantees adjust their priorities accordingly. To illustrate the point, imagine a hypothetical civil-rights audit. What if every federal grantee each year had to submit the entirety of its policies and practices to a team of on-site auditors to review whether it was in compliance with every single civil-rights statute and accompanying regulations and guidance, with the auditors additionally conducting interviews of all relevant parties? What if after that review, the team of civil-rights auditors wrote a comprehensive analysis making specific findings of noncompliance and demanding a revision of every policy and practice that needed fixing, as well as repayment of funds from programs found to have been in noncompliance, with the promise of returning the subsequent year to make sure the grantee had made the needed changes? Surely such a system would increase grantees' focus on civil-rights compliance.

That is what happens with the grants-management rules. Grantees know that federal agencies' oversight over their progress toward meeting the substantive goals of grant statutes is unlikely to result in a loss of grant funds because agencies have historically been hesitant to withhold funds for most kinds of programmatic noncompliance.²³⁵ In contrast, grantees know that they are subject to annual audits that will focus on the grants-management rules. They also know that audit findings may result in a variety of negative consequences, including a requirement to repay money the grantees have already spent, a loss of access to future funds, the imposition of "specific conditions" on their grant that make it more burdensome to operate,²³⁶ or simply bad publicity that may have ripple effects beyond the federal grant itself.²³⁷ It is therefore financially riskier to miss compliance with the grants-

234. Cf. PAUL C. LIGHT, *THE GOVERNMENT-INDUSTRIAL COMPLEX: THE TRUE SIZE OF THE FEDERAL GOVERNMENT, 1984-2018*, at xv (2019) (discussing the need "to monitor and police the movement of functions across the divide between government and industry"); JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 131 (2017) ("State power passed through private conduits becomes much harder for the rest of civil society to monitor.").

235. See *supra* notes 185-195 and accompanying text.

236. See 2 C.F.R. §§ 207, 338 (2019) (outlining the formal consequences of noncompliance).

237. See, e.g., Deborah M. Rosen, *Why It Benefits a Grantee to Carry out a Proposal as Written*, FED. GRANTS MGMT. HANDBOOK, Jan. 2014, at 4, 5 ("The long-term impact of noncompliance

management rules than with the substantive outcome-oriented goals of a grant statute.²³⁸

The grants-management rules are also easier for grantees to focus on than accomplishing the outcome-oriented substantive goals of grant statutes, in part because of factors beyond grantees' direct control, and in part because of disagreements about what satisfactory progress toward the goals looks like or whether it is observable in the relevant timeframe.²³⁹ In contrast, as input-oriented requirements, the grants-management rules are more within grantees' control and are therefore easier for grantees to comply with. As political scientist James Q. Wilson explained in his landmark study of bureaucracies, "[i]t is very difficult" for managers of bureaucracies "to find ways to change things when it is easier for political superiors to observe whether you are obeying constraints than whether you are achieving goals."²⁴⁰ The constraints of the grants-management rules are more readily observable than the accomplishment of outcome-oriented grant goals.

To be clear, input-oriented rules are not as a class worse than outcome-oriented goals. Some kinds of input-oriented rules are quite sensible—policies designed to prevent grantee self-dealing, say—although reasonable people can, of course, disagree about whether particular rules themselves develop sensible requirements. But the system's focus on the grants-management rules, coupled with the comparative attractiveness of those rules because they are within grantees' own control, creates incentives for grantees to shift attention to compliance with the grants-management rules.

In an earlier era, private lawsuits by grant beneficiaries played something of a counterweight to grantees' focus on the grants-management rules (as described above in terms of implications for federal agency enforcement).²⁴¹ Over time, however, a series of judicial decisions limited avenues for beneficiaries or public interest organizations to sue state and local agencies for noncompliance with the substantive requirements of grant statutes. For example, implied private rights of actions were curtailed;²⁴² lawsuits could no longer be brought under § 1983 to enforce federal spending statutes;²⁴³

can remain with an organization for years and result in negative publicity for the institution and the inability to attract future funding.”).

238. Cf. WILSON, *supra* note 187, at 129 (“The greater the costs of noncompliance, the more important the constraint.”); Konisky & Teodoro, *supra* note 211, at 562 (“[T]he cost of violation is a function of the risk of being penalized, the direct costs of a penalty (e.g., fines or procedural costs) imposed by the regulator, and any indirect costs that follow from violations.”).

239. See *supra* notes 186-187 and accompanying text.

240. WILSON, *supra* note 187, at 128.

241. See *supra* notes 196-203 and accompanying text.

242. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 195-200.

243. *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); see also Nicole Huberfeld, *Bizarre Love Triangle: The Spending Clause, Section 1983, and Medicaid Entitlements*, 42 U.C. DAVIS L. REV. 413 (2008) (describing judicial hostility to § 1983 actions in the Medicaid context).

circumstances in which a prevailing plaintiff could obtain attorneys' or expert-witness fees were truncated;²⁴⁴ the ability to bring class-action lawsuits was restricted.²⁴⁵

In some substantive areas of law, the Supreme Court also cut back on the substance of what the law had previously been seen to require. For example, as the Supreme Court moved from requiring school districts "to eliminate from the public schools all vestiges of state-imposed discrimination" and "to achieve the greatest possible degree of actual desegregation"²⁴⁶ to showing that "the vestiges of past discrimination have been eliminated to the extent practicable,"²⁴⁷ school districts that had previously attended to integration efforts turned their attention elsewhere, with little fear of a private lawsuit to stop them.²⁴⁸

Congress also played a role in limiting the circumstances in which private lawsuits could pressure state and local grantees on the substance of their actions. For example, as part of welfare reform in the mid-1990s, Congress restricted legal-services organizations receiving federal funding from bringing class-action lawsuits, challenging the constitutionality of welfare laws, or obtaining attorneys' fees under fee-shifting statutes.²⁴⁹ Congress has also cut funding for the Legal Services Corporation, which funds legal-aid organizations around the country and plays an important role in holding state and local governments accountable to their low-income citizens.²⁵⁰ While Congress has consistently funded Legal Services even when presidents propose to zero it out—as has President Trump and President Reagan before him—appropriations for Legal Services remain less than they were before its pre-welfare-reform high, in real dollars.²⁵¹ Even where private enforcement

244. See, e.g., *Arlington Cent. Sch. Dist. v. Murphy*, 548 U.S. 291 (2006); *Buckhannon Bd. & Care Home v. West Virginia*, 532 U.S. 598 (2001); see also Karlan, *supra* note 242, at 205-08.

245. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); see also J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015); Mark C. Weber, *IDEA Class Actions After Wal-Mart v. Dukes*, 45 UNIV. TOLEDO L. REV. 471 (2014).

246. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15, 26 (1967).

247. *Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 249-50 (1991).

248. See, e.g., Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: The Courts' Role*, 81 N.C. L. REV. 1597 (2003). These decisions about what the Constitution's Equal Protection Clause required also shaped the requirements of what Federal Spending Clause laws require because of other Supreme Court holdings that make the Equal Protection Clause coextensive with Title VI of the 1964 Civil Rights Act, which prohibits race discrimination by any entity receiving federal funding. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 286-87 (1978) (Powell, J., concurring).

249. See Super, *supra* note 221, at 1094.

250. See, e.g., Alan Houseman & Linda E. Perle, *Securing Equal Justice for All: A Brief History of Civil Legal Assistance in the United States* 7, 62, CLASP (May 2018), https://www.clasp.org/sites/default/files/publications/2018/05/2018_securingequaljustice.pdf [<https://perma.cc/8FYL-KYSS>].

251. See, e.g., *Congressional Appropriations, LEGAL SERVICES CORP.*, <https://www.lsc.gov/about-lsc/who-we-are/congressional-oversight/congressional-appropriations> [<https://perma.cc/CG7B-3Z9A>]; Tim Ryan, *Trump Budget Seeks to Cut Off Legal Aid Group*, COURTHOUSE NEWS (Mar. 18, 2019), <https://www.courthousenews.com/trump-budget-seeks-to-cut-off-legal-aid-group> [<https://perma.cc/9DZC-WPTP>].

regimes under federal law remain robust, there remain wide geographical variations in the availability of lawyers to bring claims.²⁵²

The elimination of consistent pressure from the threat of private lawsuits along all these dimensions is another important component of why the grants-management rules have taken on an outside role for grantee focus.

David Super's case study of the effect of the quality-control system in the food-stamp program again illustrates the point, even in a program where the programmatic goals are connected to an actual individual entitlement that can be privately enforced. As he explains, FNS's focus on QC at the expense of other programmatic goals drove state administrators of the funding program to shift their attention toward payment accuracy, "evaluat[ing] substantive policy proposals based on their likely effect on error rates."²⁵³ The QC system "[s]kewed [i]ncentives in the [f]ood [s]tamp [p]rogram" because state program administrators understood that the likelihood of facing consequences for failing to meet other program goals was slim, either from private litigation or from FNS's substantive oversight.²⁵⁴ To the contrary, even in an era in which antipoverty policy was "overwhelming[ly] pro-work," state food-stamp administrators developed certification requirements "that systematically disadvantaged low-wage working families" (and that "dramatically increased states' workloads") because of the "powerful impact" the QC error rates had on states' substantive policymaking, given the significant financial consequences of administrative enforcement.²⁵⁵ Administrative rules like quality-control systems, he concludes, "can be much more powerful than is generally recognized"²⁵⁶ in shaping program administrators' actions on the ground.

Admittedly, this description of grantees' incentives to focus on administrative compliance at the expense of programmatic outcomes paints with a broad brush. There are grantees who do pay a lot of attention to programmatic outcomes and goals, whether as a result of individual actors' decisions, grant agreements, or otherwise. Moreover, to say that grantees have an incentive to prioritize administrative compliance over programmatic outcomes is not to say that compliance with the grants-management rules is perfect—far from it. Audits routinely result in findings that grantees must address.²⁵⁷ However, getting hit with consequences from audit findings, or

252. See Pasachoff, *supra* note 1, at 308.

253. See Super, *supra* note 221, at 1108-09.

254. *Id.* at 1109-10.

255. *Id.* at 1110-13.

256. *Id.* at 1099.

257. See, e.g., *Weaknesses Often Found in Internal Controls, Subrecipient Monitoring, SINGLE AUDIT INFO. SERV.*, June 2017, at 1 [hereinafter *Weaknesses Often Found*] (describing the most common audit findings).

knowing other grantees who do so, then deepens the incentive to focus on compliance.²⁵⁸

One variation of note may stem from whether the grantee's auditor comes from the private or the public sector. Private-sector auditors are sometimes reluctant to report compliance issues because they want to be rehired to do the single audit again next year.²⁵⁹ In contrast, in states where the state auditor's office oversees the single-audit process, there tends to be more stringent oversight of the grant rules. Compliance with the grants-management rules may be less pressing under review by private sector auditors than state auditors, then. Either way, however, the general principle that what gets measured gets managed applies.²⁶⁰

There are a number of downstream consequences of grantees' fear of expensive audit findings. One of these consequences is that sometimes grantees make implementation decisions based on compliance with the administrative rules that work against the programmatic goals of the grant statute.²⁶¹ For example, consider the "time and effort" cost principle, which requires grantees to be able to justify the use of grant funds to pay the salaries of each employee on the basis of the work that each employee actually did under the grant in question.²⁶² This is a recordkeeping activity of vast proportions, and its violation routinely results in repayment requirements.²⁶³ Because it can be easier to prove that an employee worked under a particular grant if 100% of that employee's time was spent on the grant, grantees sometimes design their programming in a way that silos their work efforts rather than using different sources of funding to create more effective comprehensive programs.²⁶⁴ The substantive goal of the grant is subsumed by attention to the fiscal compliance rules.

258. Leita Hart-Fanta, *How the COSO Model Is Like a Fishing Net*, SINGLE AUDIT INFO. SERV., Apr. 2015, at 4, 5 (noting that many organizations pay close attention to internal controls only after audit findings).

259. See, e.g., Leita Hart-Fanta, *A Renewed Emphasis on Abuse*, SINGLE AUDIT INFO. SERV., Aug. 2014, at 4 (describing different incentives for government and private auditors).

260. See *supra* note 231.

261. See, e.g., *Calif. Agency Needs Better Jobs Data Oversight*, SINGLE AUDIT INFO. SERV., Jan. 2014 (noting that the state agency's focus on meeting federal compliance requirements may cause it to miss opportunities to do better work); Melissa Junge & Sheara Krvaric, *How the Supplement-Not-Supplant Requirement Can Work Against the Policy Goals of Title I*, AM. ENTERPRISE INST. (Mar. 2012), https://www.aei.org/wp-content/uploads/2012/03/-how-the-supplement-not-supplant-requirement-can-work-against-the-policy-goals-of-title-i_111823556546.pdf [<https://perma.cc/G2CE-7NCK>].

262. 2 C.F.R. § 200.430(i) (2019).

263. *Guidance Sets Administrative Costs Provision*, FED. GRANTS MGMT. HANDBOOK, Oct. 2014, at 8 (discussing the difficulties of deciding how to charge personnel time to a grant and explaining that wrong decisions could lead to repayment requirement).

264. See, e.g., Melissa Junge & Sheara Krvaric, *"Time and Effort" Takes Too Much Time and Effort*, EDUC. WEEK: RICK HESS STRAIGHT UP (Oct. 26, 2011, 8:10 AM), http://blogs.edweek.org/edweek/rick_hess_straight_up/2011/10/time_and_effort_takes_too_much_time_and_effort.html [<https://perma.cc/5CHP-TLMR>] (describing how "school districts (typically with the backing of their state) feel compelled to design their programs to minimize the risk of time and effort noncompliance," making "poor educational spending decisions" that are easier to account for).

Federal Grant Rules and Realities

A similar dynamic can exist with administrative rules from substantive grant statutes, not simply the Uniform Grant Guidance. For example, because auditors focus their attention on aspects of grantees' work that are easily auditable,²⁶⁵ grantees may pay more attention to limiting program eligibility rather than conducting program outreach or improving program quality. That is, grantees may focus on ensuring that they serve only clients who are eligible for their services,²⁶⁶ rather than on ensuring that the program is reaching unserved people who are eligible, or on how good the program's services are to begin with.²⁶⁷ This is not to say that eligibility is unimportant,²⁶⁸ but rather that if a grant statute has multiple goals—such as ensuring that no one who is ineligible is served, making sure that all eligible people are served, *and* making sure that the service is of high quality—to focus heavily on only one of these goals in the audit is to stack the deck in a way the statute itself did not specify.²⁶⁹

Grantees may also be less likely to propose innovative uses of funds out of a concern that auditors will be skeptical about whether such uses are permissible.²⁷⁰ For local governments that are subgrantees of a state agency, the possibility of funds repayment has further consequences, in that it can limit the state agency's willingness to approve innovative uses of grant funds out of concern that those uses will ultimately be disallowed.²⁷¹

A delay in getting grant funds out the door is another consequence of a focus on compliance with the grants-management rules. Because the federal grants-management rules require the development of state and local rules and processes, there are often many layers of approval and multiple systems that need to be coordinated before money that has been appropriated and allocated

265. GAO, *Advisory Council Amend Draft Yellow Book; Plan Summer Release*, SINGLE AUDIT INFO. SERV., May 2018, at 1, 3 (explaining that the GAO deleted a proposed requirement that government auditors report “waste or abuse” by grantees because of the difficulty for auditors of objectively measuring such activity).

266. See, e.g., *FNS To Assess Methods to Reduce School Meal Program Payment Errors*, SINGLE AUDIT INFO. SERV., July 2015 (describing an Inspector General report finding that USDA's Food and Nutrition Service needs to better oversee grantees' verification of eligibility for the school-lunch program).

267. See, e.g., Super, *supra* note 221, at 1110 (observing that a particular administrative compliance rule's “dominance in ruling state administration [of the food stamp grant program] is underscored by the fact that no other aspect of the state's performance in administering the food stamp program is subject to a remotely comparable measurement-and-incentive system”).

268. See, e.g., Leita Hart-Fanta, *Auditors Should Identify a Compelling Effect*, SINGLE AUDIT INFO. SERV., June 2014 (explaining that eligible beneficiaries lose when someone ineligible takes their place).

269. Cf. Super, *supra* note 221, at 1109-10 (noting that in the food stamp program, “improper awards of eligibility count as errors and improper denials do not,” and that “no sanctions attach to cases with high rates of improper denials and terminations”).

270. See, e.g., Junge & Krvaric, *supra* note 183 (“It can take an extraordinary leader . . . to spend federal money in an entirely new way because it is always possible [that] change could trigger additional scrutiny and raise audit risks.”).

271. See, e.g., Gordon & Pasachoff, *supra* note 55, at 12-13 (describing such consequences for local school districts).

can actually be spent.²⁷² Sometimes state or local laws or procedures even need to be changed before the federal grant money can be awarded.²⁷³ Even when federal grant money is in grantees' coffers, grantees can delay spending money because they are not sure whether particular uses are permissible and seek guidance from funder agencies to confirm.²⁷⁴ Because relying on an agency official's verbal approval is not sufficient to avoid an audit finding, cautious grantees tend to wait for formal agency guidance, which can take time to promulgate.²⁷⁵

Another consequence is that would-be grantees sometimes decline to participate in discretionary federal programs due to difficulty meeting administrative requirements. This is not the more familiar story of rejecting federal money because of ideological disagreements;²⁷⁶ instead, these may be programs that the federal government wants to incentivize and that states and localities themselves want to take up.²⁷⁷ Requirements that federal funds must be matched at a certain rate²⁷⁸ or must be spent only on certain parts of a

272. Joe Fiorill, *GAO Calls Antiterrorism Grant Delays "Natural,"* GOV'T EXEC., May 14, 2004 (describing "natural delays that should have been expected in the complex process of distributing dramatically increased funding through multiple governmental levels while maintaining procedures to ensure proper standards of accountability at each level"); Michael Martinez, *Auditor Blasts California's Emergency Management Work,* GOV'T EXEC. (Sept. 14, 2006), <https://www.govexec.com/defense/2006/09/auditor-blasts-californias-emergency-management-work/22706> [<https://perma.cc/T7X9-3M7Y>] (describing a delay in spending a billion dollars of emergency-management funds to California because of intergovernmental requirements).

273. Jeff Stein & Arelis R. Hernández, *Despite New Law, Trump Administration Has Not Given Puerto Rico Emergency Food Stamp Aid,* WASH. POST (June 24, 2019), <https://www.washingtonpost.com/nation/2019/06/24/despite-new-law-trump-administration-has-not-given-puerto-rico-emergency-food-stamp-aid> [<https://perma.cc/D5DL-PDZG>] (describing delay in awarding food stamp funds because "the island must first propose a plan for how the aid will be spent and make 'required system changes' to its food stamps program"); Pamela M. Prah, *States Could Lose Millions in Federal Job Money,* GOVERNING (Jan. 30, 2014, 2:20 PM), <https://www.governing.com/news/headlines/states-could-lose-millions-in-federal-job-money.html> [<https://perma.cc/X4EC-K4R2>] (describing the need for state legislatures to change certain employment laws or lose their share of a \$100 million in new federal funding).

274. See, e.g., *ED to Provide Info on Allowable Expenditures,* FED. GRANTS MGMT. HANDBOOK, Dec. 2018, at 5 (describing how state grantees for vocational-education programs left more than \$100 million in federal funding unspent because of a lack of clarity about allowable expenditures and a delay in agency guidance).

275. See, e.g., LEIGH M. MANASEVIT & BRETTE KAPLAN, *THE DO'S AND DON'TS OF EDUCATION COMPLIANCE AND ENFORCEMENT* 5-4 fig.5-2 (2011) (cautioning against such reliance).

276. See, e.g., SEAN NICHOLSON-CROTTY, *GOVERNORS, GRANTS, AND ELECTIONS: FISCAL FEDERALISM IN THE AMERICAN STATES* 1-3 (2015) ("[A] quick examination of Medicaid expansion suggests that state actors sometimes leave massive sums of federal grant money on the table for reasons that appear to be openly partisan.").

277. See, e.g., *id.* at 4-8 (developing the argument that governors have many reasons to secure federal grants); David Super, *Rethinking Fiscal Federalism,* 118 HARV. L. REV. 2544, 2577 (2005) (describing spending programs in which "the federal government leverages its fiscal resources for particular types of activity that it believes are national priorities").

278. J.B. Wogan, *Why Some States Leave Federal Child Care Grants on the Table,* GOVERNING (May 9, 2017, 5:00 PM), <https://www.governing.com/topics/health-human-services/gov-unspent-child-care-federal-funding-states.html> [<https://perma.cc/97FX-N58Q>].

program but not others (say, expansion or initiation projects and not maintenance, operation, or repair projects)²⁷⁹ can discourage participation.

Ironically, sometimes grantees make these choices based on an incorrect or out-of-date understanding of what the grants-management rules actually require.²⁸⁰ In part this is because the rules are complicated and layered in many different documents that are difficult for nonlawyer, nonaccountant grantees to understand.²⁸¹ It is also because many “rules” are standards rather than rules, and different auditors may have different interpretations about what is permissible.²⁸² Grantees, when making decisions, sometimes rely on hearsay from other grantees or on prior experience in trying to gain approval of a spending choice.²⁸³ Such reliance may lead grantees astray: the rules may have changed,²⁸⁴ their own grant may permit more than they think it does,²⁸⁵ or a prior disapproval may have been based on a factual circumstance that is not currently present.²⁸⁶

These consequences of grantees’ choices made as a result of the grants-management rules (or their imperfect understanding of the rules) may have broader consequences for Congress’s and grantor agencies’ subsequent policy choices. The grants-management rules are less salient to agency policymakers, because grant-oversight teams are often siloed from program-office staff, and to Congress, where legislators and staffers with substantive oversight may know little about the OMB rules not within their obvious remit.²⁸⁷ Policymakers observing grantees’ difficulty in achieving substantive programmatic goals may end up changing the policy out of a sense that it is not working, when in fact the substantive policy may not really be fully implemented because grantees are focused on administrative compliance at the expense of programmatic choices.²⁸⁸

279. Richard Weir, *T Loses out on \$10M After Fed Funds Lapse*, BOS. HERALD (Nov. 18, 2018), <https://www.bostonherald.com/2015/04/10/t-loses-out-on-10m-after-fed-funds-lapse> [<https://perma.cc/9LYU-DZLG>]; Chris Kardish, *States Want Flexibility for Health Exchange Grants*, GOVERNING (July 2014), <https://www.governing.com/topics/health-human-services/gov-health-exchange-grant-flexibility.html> [<https://perma.cc/NC4F-E8U5>].

280. Andrew Feldman & Thaddeus Ferber, *It’s Time to Bust Some Myths About How States Can Use Federal Funds*, GOV’T EXEC. (July 5, 2017), <https://www.govexec.com/management/2017/07/its-time-bust-some-myths-about-how-states-can-use-federal-funds/139167> [<https://perma.cc/V656-TXN9>] (“Federal programs, it turns out, often provide more flexibility than states and localities realize.”).

281. See, e.g., Gordon & Pasachoff, *supra* note 55, at 10-11.

282. See, e.g., *id.* at 10.

283. See, e.g., *id.* at 13.

284. See, e.g., *Weaknesses Often Found*, *supra* note 257, at 6 (explaining grantees’ lack of awareness in rule changes under the Uniform Grant Guidance).

285. See, e.g., Feldman & Ferber, *supra* note 280.

286. See, e.g., *id.*

287. See *supra* note 133 and accompanying text; see also CRS, FEDERAL GRANTS, *supra* note 2, at 38-39 (outlining “congressional issues” for federal grants with no mention of compliance rules).

288. See, e.g., Junge & Krvaric, *supra* note 65, at 1.

Alternatively, policymakers may decide to change the substantive policy but miss the fact that the grants-management rules will frustrate the effectiveness of the policy change because the substantive policy change ignores the incentives set up by the grants-management rules.²⁸⁹ Or policymakers may end up deciding to cut funding for a program or eliminate it entirely on the assumption that it isn't working, when the issue was not with the program itself but with the impact of the grant rules.²⁹⁰ Funding is particularly relevant to this issue because grantees pay for the single audit themselves out of their general grant funding.²⁹¹ Funders who wonder why grantees are not accomplishing the goal of the statute may not be aware that the full appropriated amount is not being spent on program implementation. In addition, funders may not always be fully aware of the extent of administrative compliance requirements.

Under any of these scenarios, policymakers may end up making choices they would not otherwise make but for the way the grant rules operate within grantees' compliance universe and for policymakers' lack of attention to those rules. The grants-management rules thus have important consequences for the ultimate accomplishment and specification of the goal of the statute.

C. Systemic Assumptions About the Integrity of the Audit Process

The centrality of the auditor's role in grant oversight indicates systemic assumptions about the integrity of the audit process and the determinacy of the task entrusted to auditors. Yet a long history of issues surrounding single audits suggests that these assumptions are not fully warranted.

Numerous studies over many decades have consistently found a troubling degree of low-quality audits. For example, a high-level presidential commission in 2007 found that more than one third of audits of the largest federal grantees could not be fully trusted.²⁹² Even after a decade of concerted effort to redress the problems uncovered in that report, a more recent study by the American Institute of Certified Public Accountants found "concerning levels of non-conformity with the Uniform Guidance" in audits, noting that

289. See, e.g., Melissa Junge & Sheara Krvaric, *Managing the Law in Education: Strategies for Education Leaders and the Organizations that Support Them* 1-2, AM. ENTERPRISE INST. (2014), <https://eric.ed.gov/?id=ED555550> [<https://perma.cc/6RGF-FN7P>] (describing policy change even though the original policy was never actually implemented because of low-salience, high-impact compliance rules).

290. Cf. Sarah Harney, *Dock Shock*, GOVERNING (June 2005), <https://www.governing.com/topics/politics/Dock-Shock.html> [<https://perma.cc/B2N8-6LD6>] (noting that only twenty-one percent of all funds awarded under a homeland security program had actually been spent because of grantee difficulty, which might make the federal government scrutinize grant proposals even more).

291. See *supra* note 209.

292. PRESIDENT'S COUNCIL ON INTEGRITY & EFFICIENCY, REPORT ON NATIONAL SINGLE AUDITING SAMPLING PROJECT 10 (2007), <https://www.ignet.gov/sites/default/files/files/NatSamProjRptFINAL2.pdf> [<https://perma.cc/S25M-2B52>].

55% of the sample of single audits reviewed were found to be “materially nonconforming” in that regard.²⁹³ Auditors may report grantee compliance problems where none exist, or fail to report compliance problems that do exist.²⁹⁴ They may fail to document their work properly, making it difficult for agencies to review in any meaningful way.²⁹⁵ They may draft corrective action plans for grantees instead of leaving it to grantees to take ownership of their own plans to come into compliance.²⁹⁶

For all of these reasons, the Uniform Grant Guidance required—for the first time—a regular federal study of single audit quality to take place every six years, starting with the data from the 2018 single audit universe.²⁹⁷ In a classic move of a pre-emptive industry self-governance effort, the American Institute of CPAs launched its own “Enhancing Audit Quality” initiative in 2014.²⁹⁸

Yet concerns about audit quality remain. One reason for poor audit quality is that single audits are complex undertakings that require skills and training far beyond what is normally expected of CPAs.²⁹⁹ Experienced CPA firms better understand what is involved in a single audit and bid for the work at a commensurate rate, but less experienced CPA firms may underbid in an effort to win the contract and then may do lower quality work in order to make money on the deal.³⁰⁰

It is also common for junior audit staffers to do much of the frontline auditing work.³⁰¹ The more experience auditors and their institutions have in

293. *Enhancing Audit Quality* 6, 12-13, AICPA (2017), <https://www.aicpa.org/content/dam/aicpa/interestareas/peerreview/downloadabledocuments/eaq-hlt-rpt.pdf> [<https://perma.cc/ZN68-2XJP>].

294. *See id.* at 6.

295. *See id.* at 10.

296. *See Auditor Resource Center Article*, AICPA (Feb. 2017), <https://www.aicpa.org/InterestAreas/GovernmentalAuditQuality/Resources/AuditeeResourceCenter/DownloadableDocuments/PracticeIssueNotedWithAuditeeCAPandSSPAF.pdf> [<https://perma.cc/J5DY-MEWU>].

297. 2 C.F.R. § 200.513(a)(3)(ii) (2019).

298. *See Enhancing Audit Quality*, AICPA (Aug. 1, 2019), <https://www.aicpa.org/eaq.html> [<https://perma.cc/JFN8-6R2K>].

299. *See, e.g.*, Elizabeth K. Keating & Peter Frumpkin, *Reengineering Nonprofit Financial Accountability: Toward a More Reliable Foundation for Regulation*, 63 PUB. ADMIN. REV. 3, 8 (2003) (describing “additional training” needed to conduct a Single Audit in order to “assess the operational activities of the organization as well as the accounting system”); Elizabeth K. Keating et al., *The Single Audit Act: How Compliant are Nonprofit Organizations?*, 17 J. PUB. BUDGETING, ACCT. & FIN. MGMT. 285, 286 (2005) (calling the Single Audit “a highly rigorous form of nonprofit oversight” that “demands skills beyond those necessary for a standard CPA audit” because of the scope of its coverage).

300. *See, e.g.*, Leita Hart-Fanta, *Who Audits the Auditor?*, SINGLE AUDIT INFO. SERV., Oct. 2014, at 4 (describing this problem).

301. *See, e.g.*, Keating et al., *supra* note 299, at 303 (describing this phenomenon); Ken Tysiac, *11 Tips for Success with Single Audits*, J. ACCOUNTANCY (Nov. 1, 2016), <https://www.journalofaccountancy.com/issues/2016/nov/single-audits.html> [<https://perma.cc/X46K-23F3>] (“Junior audit staffers in the field are the first line of defense in finding noncompliance, so they need to understand what they’re looking for instead of performing procedures without thinking about their purpose.”).

conducting single audits, the fewer mistakes are made.³⁰² However, small auditing firms that each does only a limited number of single audits collectively have a large share of the single-audit market overall, as compared to the biggest auditing firms, which make the fewest errors.³⁰³ The problems associated with poor single-audit quality thus likely fall most heavily on smaller, less sophisticated grantees who work with private, rather than state, auditors.

But even as to larger, more sophisticated grantees, difficulties with the single-audit process remain. This fact is related to another reason for poor audit quality: the legal requirements reflected in the Uniform Grant Guidance and the Compliance Supplement are complex, and they can be difficult for auditors to understand. Consider this description of the 240 pages of the Compliance Supplement relevant to grants overseen by the Department of Education:

[T]he Compliance Supplement is hardly straightforward. For example, it summarizes the rules with reference to the statute, the regulations, and guidance, but often doesn't explain the particular source of law for a given obligation, let alone whether the obligation is a true requirement or merely advisory. Moreover, it provides several lengthy lists of potentially relevant Department of Education guidance documents but doesn't explain which ones are relevant to which point, nor does it weave the relevant documents' insights into the summary of what each fiscal compliance rule requires. It contains many cross-references without explaining exactly what should be examined in the cross-referenced sources of law. And it does not always adequately explain statutory changes to the rules that meaningfully affect compliance obligations.³⁰⁴

This description is not unique to the Department of Education's chapter.³⁰⁵ Given that the Department of Education is one of the five biggest grant-making agencies, however, that its chapter is so complex is itself cause for concern.³⁰⁶

302. See *Top Factors Driving Single Audit Quality*, AICPA (2017), <https://www.aicpa.org/interestareas/peerreview/downloadabledocuments/singleauditqualityfactorsinfoaphicpdf.pdf> [<https://perma.cc/88G8-6XKJ>].

303. See, e.g., Keating et al., *supra* note 299, at 305.

304. Gordon & Pasachoff, *supra* note 55, at 11.

305. See, e.g., Jerry Ashworth, *OMB Releases 2015 Compliance Supplement, Despite Title Complexities*, FUNDING ATTRACTIONS (Jul. 15, 2015), <http://fundingattractions.blogs.thompson.com/2015/07/15/omb-releases-2015-compliance-supplement-despite-title-complexities> [<https://perma.cc/UN8T-W6Q9>] (describing the 2015 version as generally involving "complex" changes that "can be confusing, even for those that have been involved with grants and audits for many years"); *GAQC Alert No. 360*, AICPA (May 18, 2018), <https://www.aicpa.org/interestareas/governmentalauditquality/newsandpublications/gaqcalert/2018gaqcalertno360.html> [<https://perma.cc/5P3X-S7TE>] (describing need for "immediate attention" and staff training "to help ensure single audit quality" in light of the particular complexity of the 2018 version); *GAQC Alert No. 387*, AICPA (Sept. 20, 2019), <https://www.aicpa.org/interestareas/governmentalauditquality/newsandpublications/gaqcalert/2019gaqcalertno387.html> [<https://perma.cc/3NY4-75YM>] (noting that the "2019 Supplement contains many more changes than usual," and that it will be a "very challenging 2019 single audit season").

306. See *supra* note 118 and accompanying text.

Furthermore, there may be confusion over whether the Compliance Supplement is a retrospective document instructing auditors on the permissibility of past conduct or a prospective document instructing auditors and grantees on the permissibility of future conduct. This ambiguity emerges when the Compliance Supplement fails to give notice of an impending change in a law that it summarizes. Take, for example, the “supplement, not supplant” rule of the Elementary and Secondary Education Act, the requirement that state and local grantees use federal funds to increase total spending on education, rather than to replace their own spending on education.³⁰⁷ The 2015 reauthorization of this Act transformed what it means to comply with this rule, but gave a two-year grace period for compliance.³⁰⁸ This grace period essentially left it until audits taking place in the 2018 fiscal year to follow the new rule. Yet the 2016 and 2017 Compliance Supplements made no mention of the transformation, and even the 2018 Compliance Supplement buried it as an afterthought.³⁰⁹

This inattention to the statutory change gives neither auditors nor grantees any indication that change is afoot. If history is any guide, it will take a long time for auditors to understand that the rules have changed, and a long time for grantees to change their spending practices to take advantage of their newfound flexibility.³¹⁰

The problems with the Compliance Supplement’s complexity are compounded when the annual update is full of errors, as recently happened. In September 2019, OMB had to release a revised version of the entire 1,600-page document after the auditing community identified numerous errors in the supposedly final version released in June 2019.³¹¹ Since many single audits had already been completed in the intervening months, this update caused consternation in the field, confusion about the process going forward, and concerns about version control for the rest of the year’s audits.³¹² Assumptions about the integrity of the audit process are weakened by the document’s difficulty in conveying to the field the actual legal requirements.

Even when the Compliance Supplement does convey accurate legal requirements, however, those legal requirements are often ambiguous enough that it is not straightforward to apply them to the facts presented by grantees’ operations. Again, to take the “supplement, not supplant” example, different auditors can have a different interpretation of whether a particular instance of

307. 20 U.S.C. § 6321(b)(5)(a) (2018).

308. *Id.*; *Decision Guide for Implementing ESSA: State Considerations for Effective Grant Programs* 21, COUNCIL OF CHIEF STATE SCHOOL OFFICERS (Nov. 2016), <https://ccsso.org/sites/default/files/2017-10/CCSSODecisionGuideForESSAImplementation.pdf> [<https://perma.cc/VR73-H2Z6>] (describing this change).

309. Gordon & Pasachoff, *supra* note 55, at 11 n.21.

310. *See supra* notes 283-286 and accompanying text.

311. *See GAQC Alert No. 387, supra* note 305.

312. *Id.*

spending violates or satisfies the rule.³¹³ The Department of Education even indicated in informal guidance in place for a decade that “any determination about supplanting is very case specific and it is difficult to provide general guidelines without examining the details of a situation.”³¹⁴

But the difficulty in applying the Compliance Supplement and cost principles goes far beyond this one example. Recall, for example, the case-specific determinations of whether grantees should classify a particular cost as direct or indirect, or whether grantees may use federal funds to ask for a particular kind of professional advice.³¹⁵ Auditors additionally have a lot of discretion in how much emphasis they place on any individual compliance requirement, and their choices are contestable.³¹⁶

It would be easier to trust the integrity of the single-audit process if grantees were able to meaningfully push back against auditors whose interpretations strike grantees as incorrect or improperly hamstringing their ability to make good policy choices with their federal dollars. But it can be difficult for grantees to protest the auditor’s determinations. While it is possible to challenge the auditor’s decisions, doing so is costly in administrative time, so the incentive to push back increases with the significance of the expected financial implications of the audit finding, as well as the capacity of the grantee to do so.

Capacity is a major concern here, for pushing back against an auditor’s findings also requires expertise in the complex rules around federal grants. Paying for a lawyer’s advice or assistance, even if permitted under the “professional service” cost principle,³¹⁷ takes money away from the substantive activities the grant is supposed to facilitate. Challenging management decisions that sustain auditors’ findings is even more costly, since there is a flat ban on using grant funding to do so.³¹⁸ Further, management decisions are not made public, so there is a barrier to obtaining information that might be helpful to make the case that similar spending was allowed in other contexts.³¹⁹ While more sophisticated, better-resourced grantees are in a stronger position to challenge the auditor’s decision and a management decision sustaining it, there

313. Kerstin Carlson Le Floch et al., *Study of Title I Schoolwide and Targeted Assistance Programs: Final Report* 61-62 (2018), <https://www2.ed.gov/rschstat/eval/title-i/schoolwide-program/report.pdf> [<https://perma.cc/47VW-7H95>] (describing auditor disagreements about the permissibility of the same spending decision).

314. See, e.g., U.S. DEP’T OF EDUC., TITLE I FISCAL ISSUES: MAINTENANCE OF EFFORT COMPARABILITY SUPPLEMENT, NOT SUPPLANT CARRYOVER CONSOLIDATING FUNDS IN SCHOOLWIDE PROGRAMS GRANTBACK REQUIREMENTS 38 (2008), <https://www2.ed.gov/programs/titleiparta/fiscalguid.doc> [<https://perma.cc/MZJ6-Q4UZ>].

315. See *supra* notes 98-99 and accompanying text.

316. OMB Webinar Helps Clarify Internal Control Concerns, SINGLE AUDIT INFO. SERV., Nov. 2014, at 8 (discussing debates around new time-and-effort rules and whether auditors will accept different grantee proposals).

317. See *supra* note 98 and accompanying text.

318. 2 C.F.R. § 200.435 (2019).

319. Gordon & Pasachoff, *supra* note 55, at 9, 13-14.

are nonetheless strong incentives for all grantees to want to keep in the good graces of their funders for reputational reasons. And collaborative, rather than combative, relationships with both auditors and funders can pay dividends.³²⁰

A final difficulty with the integrity of the audit process relates to audit oversight by funders, whether the state agencies that often act as pass-through entities to local and nonprofit grantees or the federal agencies from which the grants originate. The problem here is that audit oversight is inconsistent. Sometimes agencies rubberstamp auditor reports.³²¹ Sometimes agencies fail to follow up on the extent to which grantees are implementing their corrective action plans.³²² Sometimes agencies fail to check for timely submission of single audits or fail themselves to issue timely management decisions,³²³ or check only for timely submissions that in reality are without much substance.³²⁴ Agency oversight of the audit process can thus appear random rather than rational to grantees.

The primacy of the single audit in the grant-oversight process indicates that the system depends on it to ensure accountability over federal funds. The actual operation of the single-audit process, however, indicates that the capacity of the audit process to meaningfully do so is questionable.

D. Systemic Assumptions About the Technocratic Role of Grants-Management Rules

OMB discusses the grants-management rules in technocratic terms. So too does Congress. The auditing and grants-management industries do as well. Assumptions about the technocratic nature of the grants-management rules run deep.

But these rules are not entirely technocratic. While the mine run of grants-management rules may simply promote fiscal and managerial rectitude, other rules reflect and permit policy and political priorities. This is true whether the rules are developed by Congress, by OMB, or by individual agencies.

Treating the grants-management system as consisting only of technocratic, good-government interventions is problematic for a number of

320. *Grantees Should Make Adjustments To Endure the Shutdown*, FED. GRANTS MGMT. HANDBOOK, Feb. 2019, at 6 (advocating that grantees “strive to maintain a positive, effective relationship with their auditor, because [needed] advice may not be forthcoming if the relationship is an adversarial one”); THOMPSON FEDERAL GRANTS MANAGEMENT HANDBOOK, *supra* note 139, § 611 (“Before questioning an awarding agency’s decision, a recipient must consider not only what the final legal outcome of a dispute may be, but also what effect the mere raising of a dispute will have on subsequent requests for federal assistance and day-to-day working relationships with agency officials.”).

321. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 17-159, SINGLE AUDITS: IMPROVEMENTS NEEDED IN SELECTED AGENCIES’ OVERSIGHT OF FEDERAL AWARDS 15 (2017).

322. *Id.*

323. *Id.*

324. *See, e.g., FWS Aims to Develop Uniform Performance Report*, FED. GRANTS MGMT. HANDBOOK NEWSLETTER, Apr. 2018, at 7 (describing the Department of Interior Office of Fish and Wildlife Service’s oversight of timely filed but incomplete reports).

reasons. Doing so can obscure the true values that underlie decision-making, making it hard for the public to assess what is going on and therefore to hold policymakers accountable for their actions.³²⁵ Portraying grants-management rules as technocratic also helps skew decision-making toward the prevention of waste, fraud, and abuse and away from expansive program benefits or goals, because it is politically easier to join a good-government platform than to battle forces claiming the mantle of good government while actually seeking to gut a program.³²⁶ Finally, describing the grants-management system as purely technocratic complicates efforts to improve the system, as it is easy for some procedural reforms to be politically co-opted and thus not serve as reforms at all.³²⁷ Understanding the potential for the nontechnocratic nature of the grants-management rules helps make sense of both the regime's operation and the possibilities for reform.

There are three distinct kinds of politically inflected or policy-laden rules.

The first category of politically inflected grants-management rules consists of those that explicitly present as furthering a substantive policy priority. For example, the Obama administration's OMB introduced a series of cost principles collectively called "Encouraging Nonfederal Entities to Have Family-Friendly Policies" in order to fulfill the administration's goal of increasing women in science, technology, engineering, and math careers.³²⁸ These cost principles permit grant dollars to be spent on certain kinds of childcare costs.³²⁹

Similarly, the Obama administration's OMB included a broader directive in the Uniform Grant Guidance that agencies ensure that "[f]ederal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements: including, but not limited to, those protecting public welfare, the environment, and prohibiting discrimination."³³⁰ These three policy priorities are surely reflected in positive law, but they are a selection of legal requirements that were particularly prized

325. Cf. HERD & MOYNIHAN, *supra* note 35, at 247 (describing how "opacity" and the mantle of "political neutrality" of administrative burdens "allow policy choices to be made without widespread consultation, understanding of the consequences, and in some cases with a weak relationship between stated aims and actual intent").

326. Cf. *id.* at 248 ("Misleading statements about the motives behind administrative burdens are damaging because they undermine support for policies and programs.").

327. In the famous words of the late Representative John Dingell (D-MI), in hearings on amendments to the Administrative Procedure Act, "I'll let you write the substance . . . you let me write the procedure, and I'll screw you every time." *Regulatory Reform Act: Hearing on H.R. 2327 Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. Dingell).

328. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590, 78593, 78602 (Dec. 26, 2013).

329. One such provision permits grantees holding conferences to spend federal dollars on "the costs of identifying, but not providing, locally available dependent-care resources." 2 C.F.R. § 200.432 (2019). Another provision allows a grantee's employees to spend federal dollars on temporary dependent-care that "directly results from [the employee's] travel to conferences." *Id.* § 200.474(c).

330. *Id.* § 200.300(a).

by this administration over others. The practical import of this policy directive for grant recipients is underscored by the subsequent additions promulgated by first the Obama and then the Trump HHS. The Obama HHS amended this provision in its incorporation of the Uniform Grant Guidance to forbid all HHS grants recipients from discriminating on the basis of gender identity or sexual orientation, while the Trump HHS has taken steps to rescind that requirement.³³¹ For its part, the Trump administration’s OMB has proposed adding “free speech” and “religious liberty” to the Uniform Grant Guidance’s list of policy priorities for funding programs.³³²

These explicitly policy-laden rules are good examples of the way grants-management rules can reflect values, not simply technocracy. This first category is the least troublesome of the politically inflected grants-management rules. Because their policy rationales are explicit, they are easy to see and to debate on the merits.

The second category are those grants-management rules that seem politically motivated despite their neutral, technocratic phrasing. The cost principle banning the use of federal funds for lobbying falls under this category.³³³ The Reagan administration’s OMB finalized this rule over the vociferous objection of left-leaning public-interest groups.³³⁴ Although OMB attempted to portray the need for the restriction in neutral, good-government terms,³³⁵ it undercut this effort by highlighting what it called the “abuse” of federal funds in lobbying only by organizations working on such liberal causes as women’s educational equity, family planning, urban mass transportation, and disability rights.³³⁶ Moreover, the restriction was widely understood to be of a piece with the Reagan administration’s broader efforts to “‘defund the left’—bankrupt the social action, civil rights, and other liberal groups that depend so heavily on federal funds.”³³⁷

Similarly, the Reagan administration tightened requirements that family-planning organizations completely segregate federal funds from the grantees’

331. *Compare* Health and Human Services Grants Regulation, 81 Fed. Reg. 89393, 89395 (Dec. 12, 2016), *with* Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation 84 Fed. Reg. 63831, 63832-83 (Nov. 19, 2019) (notice of proposed rulemaking).

332. Guidance for Grants and Agreements, 85 Fed. Reg. 3766, 3768 (proposed Jan. 22, 2020).

333. 2 C.F.R. § 200.450 (2019).

334. *See* Cost Principles for Nonprofit Organizations—“Lobbying” Revision, 49 Fed. Reg. 18260 (Apr. 27, 1984). The lobbying rule received over 93,000 comments that pitted liberal organizations like the National Education Association and the American Friends Service Committee against conservative organizations like the American Legislative Exchange Council and Taxpayers for Less Government. *Id.* at 18261, 18265, 18267.

335. *Id.* at 18263 (describing related congressional efforts as protecting the integrity of federal funds); *id.* at 18265 (arguing that “the intent behind the revision is nondiscriminatory, and its effects are politically neutral”).

336. *Id.* at 18264, 18267, 19271.

337. CONLAN, *supra* note 202, at 150-51 (describing a variety of methods many contemporary observers saw as falling into this broader effort).

own funds used for abortion services³³⁸ and increased audits of family-planning organizations in the years before the Single Audit Act kicked in.³³⁹ The facial justification was program integrity,³⁴⁰ but the underlying interest was in weakening those organizations. As President Reagan wrote to Senator Orrin Hatch about those efforts, “I regret that we do not have the votes to defeat the family planning program . . . perhaps we can remedy some of the problems in the . . . program administratively.”³⁴¹

Into this category also fall statute-specific administrative-compliance rules presented as efforts to rein in “waste, fraud, and abuse” but which are actually designed to cut spending on disfavored programs or populations, as illustrated by the food-stamp quality-control program.³⁴² More generally, as David Super observes, heightening requirements for administrative compliance can be a tactic to diminish a substantive policy. That is, policymakers wishing to curtail a legal entitlement can either change the substance of the entitlement or they can impose administrative burdens to weaken it. Instead of explicitly “denying public assistance to families in which children are not immunized,” for example, “policymakers could consider reducing Medicaid’s per capita reimbursements of managed-care plans where more than a minimal share of child beneficiaries have not received their shots.”³⁴³

This second category of grants-management rules is troublesome because the underlying purpose of the administrative-compliance rule is obscured. It is easier for the public to understand visible cuts to a program than it is to understand the long-term implications of administrative rules that will have the same effect. Using administrative rules to achieve substantive ends while pretending not to thus reduces political accountability by distracting and obfuscating. In addition, using administrative-compliance rules in this way puts advocates for program beneficiaries at a political disadvantage. Arguing against the administrative-compliance rules can make advocates seem like they don’t care about program integrity or wasting federal dollars, so there are

338. Statutory Prohibition on Use of Appropriated Funds in Programs Where Abortion Is a Method of Family Planning; Standard of Compliance for Family Planning Services Projects, 53 Fed. Reg. 2922, 2923-24, 2938 (Feb. 2, 1988).

339. See COMPTROLLER GEN. OF THE U.S., GAO/HRD-82-106, RESTRICTIONS ON ABORTION AND LOBBYING ACTIVITIES IN FAMILY PLANNING PROGRAMS NEED CLARIFICATION (1982), <https://www.gao.gov/assets/hrd-82-106.pdf> [<https://perma.cc/9BX6-W6QZ>].

340. Robert Pear, *Planned Parenthood Groups Investigated on Use of U.S. Funds*, N.Y. TIMES (Dec. 6, 1981), <https://www.nytimes.com/1981/12/06/us/planned-parenthood-groups-investigated-on-use-of-us-funds.html> [<https://perma.cc/P394-XL9A>] (noting that the Inspector General’s office explained that “the audits had been undertaken in a routine manner, to insure the proper use of Federal money”).

341. NAT’L ORG. FOR WOMEN, REAGAN ADMINISTRATION ACTION ON REPRODUCTIVE RIGHTS 2, (1983), <http://digitalcollections.library.cmu.edu/awweb/awarchive?type=file&item=417547> [<https://perma.cc/2LB5-YZ8M>].

342. See Super, *supra* note 221, at 1114; see also *id.* at 1099 n.218 (discussing similar efforts by the Reagan administration on Social Security disability benefits and welfare).

343. *Id.* at 1099; see also HERD & MOYNIHAN, *supra* note 35, at 33 (“[P]oliticians will sometimes deliberately construct administrative burdens—as a complement or alternative to traditional forms of policymaking—to achieve their policy goals.”).

disincentives to oppose these rules. But if the program's goals don't change as administrative rules are layered, those goals will eventually be hollowed out. The grants-management rules thus help make policymaking into a one-way ratchet.

The third category of politically inflected grants-management rules are those that both seem neutrally motivated and are written in neutral technocratic language but have the potential for political use. The Obama administration's focus on performance measurement in the Uniform Grant Guidance falls into this category. It introduced a new administrative requirement that agencies include "performance goals" in the form of "outcomes intended to be achieved by the program" in each grant award.³⁴⁴ It also developed a way for grantees to escape the cost principles almost entirely through a new kind of grantmaking—"fixed amount awards"—that provides an initial set dollar figure in the expectation that the grantee will hit specific metrics or reach certain results before receiving another installment of funds.³⁴⁵ The Trump administration has furthered this focus, both as part of the President's Management Agenda, which includes as a goal "Results-Oriented Accountability for Grants,"³⁴⁶ and as part of the proposed revisions to the Uniform Grant Guidance, which suggest a number of "changes to emphasize the importance of focusing on performance to achieve program results throughout the Federal award lifecycle."³⁴⁷

While focusing on grantee performance, results, and outcomes sounds like a neutral, good-government proposition, such a focus provides opportunities for political decision-making.³⁴⁸ Consider, as an illustration, the George W. Bush administration's program-evaluation system, under which OMB assessed how well different federal grants and other forms of policy interventions were accomplishing their intended aims.³⁴⁹ A number of scholarly assessments documented ways in which this neutral-sounding evaluation system ended up justifying cuts to programs the administration disfavored while providing support for its political priorities.³⁵⁰

344. 2 C.F.R. § 200.210(d) (2019).

345. *Id.* §§ 200.45, 200.201(b); Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, 78 Fed. Reg. 78590, 78590 (Dec. 26, 2013). Fixed amount awards "rely more on performance than compliance requirements to ensure accountability." *Id.* at 78596.

346. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, PRESIDENT'S MANAGEMENT AGENDA 36 (2018) (discussing the goal of focusing on results instead of compliance for federal grants).

347. Guidance for Grants and Agreements, 85 Fed. Reg. 3766, 3768 (proposed Jan. 22, 2020).

348. *See, e.g.*, Eloise Pasachoff, *Two Cheers for Evidence: Law, Research, and Values in Education Policymaking and Beyond*, 117 COLUM. L. REV. 1933, 1966-71 (2017); Kristen Underhill, *Broken Experimentation, Sham "Evidence-Based" Policy*, 37 YALE L. & POL'Y REV. (forthcoming 2020) (on file with author).

349. BUSH PMA, *supra* note 157, at 27-30.

350. *See, e.g.*, BERYL RADIN, CHALLENGING THE PERFORMANCE MOVEMENT: ACCOUNTABILITY, COMPLEXITY, AND DEMOCRATIC VALUES 163-80 (2006); Irene Rubin, *Budgeting During the Bush Administration*, 20 PUB. BUDGETING & FIN. 1, 9-10 (2009).

To measure performance and results is to make decisions about what to measure,³⁵¹ how to measure,³⁵² within what time frame to measure,³⁵³ and what results the measurement should support.³⁵⁴ It is to rely on data that might be manipulated or poor quality.³⁵⁵ The stakes are especially high when performance and results are connected to the potential for budget cuts or budget increases.³⁵⁶ The move to permit grantees who receive fixed awards to ignore the Uniform Grant Guidance's cost principles as long as they meet certain metrics provides further opportunity to reward political favorites.³⁵⁷ This is especially the case because the decisions to give fixed-award grants is made privately with no opportunity for input or redress.³⁵⁸

But it is not simply the performance-oriented grants-management rules that raise this potential for politicized decision-making. Savvy political players can use the grants-management rules overall to achieve politically desirable outcomes under the cover of neutral application of the rules. For example, after Congress passed a supplemental appropriations bill for hurricane relief in Puerto Rico even after President Trump had urged it not to, the Trump administration was able to delay getting food-stamp funds to Puerto Rico—with whose political officials he had a longstanding feud³⁵⁹—on the ground

351. J.B. Wogan, *Obama Tries to End the Cycle of Broken Poverty Promises*, GOVERNING (July 2015), <https://www.governing.com/topics/health-human-services/gov-promise-zones-obama-poverty.html> [<https://perma.cc/UDY2-3MRP>] (describing the debate about how to measure success in antipoverty programs).

352. Robert Brodsky, *States Report Saving 640,000 Jobs Through Recovery Act*, GOV'T EXEC. (Oct. 30, 2009), <https://www.govexec.com/oversight/2009/10/states-report-saving-640000-jobs-through-recovery-act/30250> [<https://perma.cc/G9YS-UNPE>] (describing the debate about how to measure the jobs saved by President Obama's economic stimulus plan).

353. Wogan, *supra* note 351 (discussing the debate about how long to wait to assess whether antipoverty programs are working).

354. *The Daunting Challenge*, *supra* note 29 (describing the difficulty of measuring a program's effects when a federal grant is merged with state and local sources of funding).

355. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-551R, K-12 EDUCATION: EDUCATION SHOULD TAKE IMMEDIATE ACTION TO ADDRESS INACCURACIES IN FEDERAL RESTRAINT AND SECLUSION DATA 9 (2019) (discussing missing and error-laden data and possibly purposeful underreporting of certain civil-rights violations).

356. *See, e.g.*, Robert Gordon & Ron Haskins, *The Trump Administration's Misleading Embrace of 'Evidence'*, POLITICO (Mar. 31, 2017), <https://www.politico.com/agenda/story/2017/03/the-trump-administrations-misleading-embrace-of-evidence-000385> [<https://perma.cc/Q3V6-9U3H>] (discussing the OMB director's defense of the Trump administration's efforts to cut \$53 billion in domestic spending because the programs in question were “just not showing any results” and “lacked demonstrable evidence”).

357. *See, e.g.*, JOHN HUDAK, PRESIDENTIAL PORK: WHITE HOUSE INFLUENCE OVER THE DISTRIBUTION OF FEDERAL GRANTS (2014) (discussing opportunities for presidents to use grant funding to reward favored constituencies); Christopher R. Berry et al., *The President and the Distribution of Federal Spending*, 104 AM. POL. SCI. REV. 783, 783 (2010) (same); *see also* NICHOLSON-CROTTY, *supra* note 276, at 81 (discussing a similar phenomenon at the state level).

358. Unlike GAO's bid protest process for would-be contractors who do not receive a federal contract, *see* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-510SP, BID PROTESTS AT GAO: A DESCRIPTIVE GUIDE (2018), there is no parallel process for would-be grantees who do not receive a federal grant.

359. *See, e.g.*, Annie Karni & Partiricia Mazzei, *Trump Lashes Out Again at Puerto Rico, Bewildering the Island*, N.Y. TIMES (Apr. 2, 2019), <https://www.nytimes.com/2019/04/02/us/trump-puerto-rico.html> [<https://perma.cc/27C8-WW65>].

that the island needed to implement new financial-management procedures before it could receive the federal dollars.³⁶⁰

Similarly, the day after California filed a lawsuit to invalidate President Trump's declaration of an emergency and stop his repurposing of federal funds to build a wall at the border, the Trump administration moved to cancel a high-speed rail grant to California of almost a billion dollars, asserting the state's noncompliance with a series of grant rules.³⁶¹ The President linked these two events, the lawsuit and the federally funded train project, in a succession of tweets.³⁶²

This third category of politically inflected grants-management rules is not itself troublesome, but its use can be dangerous. Even if the rules themselves sound in good government, and even if some individual decisions under the rules can be factually and legally justified, the grants-management regime can be used in ways that shade into partisan politicization. And because some statute-specific grants-management rules are based on politically contested substantive policy judgments—such as the quality-control requirements in the food-stamps program, funds separation in family-planning grants, and so on³⁶³—the grants-management regime writ large must be seen as part of a larger set of political realities rather than solely as a technocratic intervention. Observers should thus be wary of taking at face value all claims about operational justifications for these rules.

III. To Abandon or Reform?

Reactions to the discussion in Part II may vary depending on one's priors. One set of responses may present itself to those who believe the administrative state is too big and that too much federal money threatens federalism values. While this is not a view I share, it is an important perspective and demands consideration. Accordingly, Section III.A considers possible responses from this perspective, including abandoning the whole grants-management regime or, even more broadly, the ecosystem of federal grants entirely. This Section makes the case that each possible method for abandoning is normatively fraught and politically and structurally implausible.

A very different set of responses may occur to those who believe, as I do, in the importance of the federal government and in the value of intergovernmental programs. Section III.B thus turns to an entirely different set of suggestions. How should the system be reformed, rather than abandoned?

360. Stein & Hernández, *supra* note 273.

361. Brandon Conrads, *California Sues Trump over Cancellation of High-Speed Rail Funds*, HILL (May 21, 2019), <https://thehill.com/regulation/444837-california-sues-trump-over-cancellation-of-high-speed-rail-funds> [<https://perma.cc/MN6V-EU3H>].

362. *Id.*

363. *See supra* notes 338-342 and accompanying text.

As this Section explains, there is no one-size-fits-all solution. In a system governing hundreds of billions of dollars given by dozens of federal agencies to fifty different states and tens of thousands of local governments and nonprofit organizations, as authorized by a vast number of statutes with varying substantive policy priorities passed by different Congresses and overseen by many different congressional committees, with different political constraints and opportunities available at different times, there are bound to be widely different views “about the appropriate trade-offs between discretion and constraint.”³⁶⁴ Certainly, the past forty years of effort to improve the grants-management regime suggest that there is no easy answer.

At the same time, the absence of easy answers does not mean that there are no answers. This Section, therefore, identifies potential reforms that respond to the incentive problems identified above: agencies’ prioritization of administrative enforcement, grantees’ concomitant prioritization of administrative compliance, and concerns about audit integrity. It considers strategies to increase programmatic enforcement, to reduce administrative compliance burdens, and to empower grantees in the audit process. In addition to these reforms focused on particular outcomes, this Section also offers the process-based reform of reducing silos throughout grant decision-making.

The final issue discussed in Part II—the potential for political manipulation of grants-management rules—provides a warning about the limits of technocratic reform, for it is impossible to entirely remove politics from the grants-management system. There is no realistic way to limit the kinds of politically inflected grants-management rules that raise concerns. The best response to those concerns is simply to be aware of them and cautious about taking grants-management reforms at face value. The proposed reforms are thus sensitive in their design to the potential for political cooptation under the guise of good-government reforms.

A. Abandoning

Laying bare the operation of the federal grants-management regime might add fuel to the fire of those who see the ubiquity and size of federal funding as a blight on the American constitutional order.³⁶⁵ One natural response could therefore be to abandon the current structure of federal grants. After all, if federal grants are working so poorly, why keep them around?

Implementation of this goal could take a number of forms. It might mean that federal grant funds should be cut entirely, whether phased out gradually or zeroed out cold turkey. It might instead mean that the federal government and

364. HERBERT KAUFMAN, RED TAPE: ITS ORIGINS, USES, AND ABUSES 81 (2015).

365. See, e.g., *NFIB v. Sebelius*, 567 U.S. 519, 671-89 (Scalia, J., dissenting); *Fiscal Federalism*, in *CATO HANDBOOK FOR POLICYMAKERS* 259 (8th ed. 2017), https://object.cato.org/sites/cato.org/files/serials/files/cato-handbook-policymakers/2017/2/cato-handbook-for-policymakers-8th-edition-25_0.pdf [<https://perma.cc/Z2WV-VSAR>].

states should engage in a “grand swap” or “sorting out” of their respective roles, perhaps trading education funding (left to the states) in exchange for medical funding (left to the federal government).³⁶⁶ It might promote privatizing government services by engaging private entities to take on the projects that are now funded by grants to state and local governments.³⁶⁷ Or it could suggest a federal funding structure light on strings, such as through block grants.³⁶⁸

I do not mean for my analysis of the pathologies of the grants-management system to support these proposals. To do so would end up with worse outcomes than the problems these proposals would in theory respond to—an example of the proverbial throwing of the baby out with the bathwater I cautioned against above. While it is beyond the scope of this Article to rebut each argument against federal grants made by opponents, this Section briefly explains why each of these options to explode the current regime is dangerous as a normative matter, hurting state and local governments, taxpayers, citizens, and program beneficiaries alike. This Section also explains why each of these options is politically unlikely, both now and in the long-term, given political and institutional dynamics. Therefore, even if any one option were to be implemented, it is implausible that any such reform would last.

Cutting federal grants. Opponents of federal grants often argue that such spending encourages poor and bloated policy choices, reduces political accountability, and threatens valuable innovation.³⁶⁹ But these claims overstate the reality. As I have argued elsewhere, states and localities have many opportunities to participate in the design of federal grant programs, and many grant programs reflect a great amount of jurisdictional diversity in implementation.³⁷⁰ State and local governments are well able to get their messages out to voters to distinguish their own choices from federally imposed ones,³⁷¹ and in any event, the idea that states and localities are closer to the people and are therefore better able to reflect their desires is not borne out by serious scholarly attention.³⁷² The claim that state and private spending will step up to replace federal grant spending³⁷³ is not realistic. Instead, what is

366. See, e.g., CRS, FEDERAL GRANTS, *supra* note 2, at 23-26 (describing congressional history of such efforts); ALICE M. RIVLIN, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES, AND THE FEDERAL GOVERNMENT 117-18 (1993) (proposing such a swap).

367. See MICHAELS, *supra* note 234, at 119-41 (describing the rise of contracting out government services).

368. See Carl W. Stenberg, *Block Grants and Devolution: A Future Tool?*, in CONLAN & POSNER, *supra* note 25, at 263-85.

369. See, e.g., Chris Edwards, *Restoring Responsible Government by Cutting Federal Aid to the States*, CATO INST. POL’Y ANALYSIS 1 (May 20, 2019), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa868_2.pdf [<https://perma.cc/XAC2-NU6C>].

370. Pasachoff, *supra* note 1, at 277, 301, 331-33.

371. *Id.* at 303.

372. See, e.g., David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763, 767-69 (2017); Seifter, *supra* note 233, at 146-48.

373. See, e.g., Edwards, *supra* note 369, at 22-23.

more likely is that poor people will lose if federal grant programs are curtailed or abandoned,³⁷⁴ while society as a whole will face negative externalities from the consequences of lost federal financial support.³⁷⁵

As a practical matter, however, despite the negative rhetoric about the intrusiveness of federal grants, the likelihood of their wholesale or significant abandonment is small. There are incentives for federal and state policymakers of both political parties to keep the basic flow of federal grants in place. Democrats and Republicans alike in Congress and the White House have policy priorities that they want to spread throughout the states, even if their policy priorities differ.³⁷⁶ Democrats and Republicans alike have incentives to use federal funds to respond to national crises, even if they would do so in different ways.³⁷⁷ And Democrats and Republicans alike in state and local legislatures and executive offices seek out federal grants when their own coffers need that money in light of cyclical downturns, state-balanced budget amendments, or the federal government's superior fiscal capacity³⁷⁸—not to mention when doing so is helpful for the politicians in question.³⁷⁹ For these reasons, if a movement to significantly reduce or cut off federal funds happened to be successful at any given point in time, such a policy would be unlikely to be stable. It is therefore not a plausible response to the problems of the grants-management regime.

Swapping and sorting. As for the “grand swap” or “sorting out,” both parties have periodically floated this suggestion for almost forty years.³⁸⁰ There is a certain logic to this suggestion, letting each level of government specialize in a policy area that it might perhaps be better suited to—education to the states, for local diversity, and health care to the federal government, for superior fiscal capacity. But it is also a dangerous idea from the perspective of dignity, equality, and liberty values. Many civil-rights obligations prohibiting certain kinds of discrimination attach only through federal funding

374. See, e.g., Super, *supra* note 277, at 2640–41 (discussing the “bleak picture of states’ fiscal capacities” and the resulting difficulties “in funding programs for low- and moderate-income people”).

375. See, e.g., Nora Gordon, *The Changing Federal Role in Education Finance and Government*, in HANDBOOK OF RESEARCH ON EDUCATION FINANCE AND POLICY 318 (Helen F. Ladd & Margaret E. Goertz eds., 2d ed. 2015); Pasachoff, *supra* note 1, at 295–96.

376. See CRS, FEDERAL GRANTS, *supra* note 2, at 40.

377. See, e.g., Niv Elis, *Disasters Become Big Chunk of U.S. Deficit*, HILL (Oct. 14, 2018), <https://thehill.com/policy/finance/411215-disasters-become-big-chunk-of-us-deficit> [<https://perma.cc/GKW5-B9LV>] (describing this dynamic in the context of hurricane relief); Kristina Peterson & Andrew Duhren, *GOP, Democrats Hit an Impasse Over Nature of Next Round of Coronavirus Aid*, WALL ST. J. (Apr. 10, 2020), <https://www.wsj.com/articles/congressional-democrats-gop-wrangle-over-coronavirus-aid-to-small-businesses-11586432954> (describing this dynamic in the context of coronavirus aid); Jenni Bergal, *Federal Cybersecurity Bill Would Help State and Local Governments Ward Off Hackers*, GOVERNING: STATELINE (Apr. 10, 2017, 12:10 PM), <https://www.governing.com/topics/public-justice-safety/sl-federal-bill-cybersecurity.html> [<https://perma.cc/4FD4-M87Q>] (describing this dynamic in the context of cybersecurity).

378. See Super, *supra* note 277, at 2648–50 (describing such realities).

379. See NICHOLSON-CROTTY, *supra* note 276, at 48–78.

380. The proposals discussed at note 366, *supra*, come from both sides of the aisle.

obligations.³⁸¹ Huge variation in state and local efforts and capacity in education spending and oversight have led many to conclude that more, rather than less, federal funding should be required.³⁸² And having multiple, competing governments can be liberty-enhancing rather than liberty-burdening, as one can protect individuals where another is failing.³⁸³

Beyond these normative concerns, there is also a practical reason why these suggestions have never taken root, making such a move an unlikely response to the pathologies of federal grant administration. The states don't have unified interests on this point.³⁸⁴ With wildly different fiscal capacities, a sorting out would hurt many states more than it would help them.³⁸⁵ The states that might benefit from such a swap tend to be blue states with little interest in returning to the "layer-cake federalism" this model represents.³⁸⁶ There is also little agreement on which policy areas belong to which sphere of government, as recent history reveals. For example, some Republican governors sought out sizable education grants under the Obama administration's stimulus spending Race to the Top program, while rejecting the Medicaid expansion under the Affordable Care Act,³⁸⁷ exactly the reverse of what the swapping and sorting argument would predict.

Privatizing. Because privatizing governmental functions already exists on a large scale in America,³⁸⁸ increasing this trend might seem to be a more easily achievable result of backlash to the grants-management regime. But privatization is a normatively fraught endeavor. Most importantly, it makes it harder for civil society to monitor policymakers and policy implementers, and it permits aggrandizement of the federal officials who award grants to those organizations on the ground, who operate without the internal separation of powers that civil servants provide.³⁸⁹ Private organizations that receive federal funds are subject to the civil-rights laws that attach to those funds, but they are generally not considered state actors for constitutional purposes and so may

381. See, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SECURING EQUAL EDUCATIONAL OPPORTUNITY 6 (2016).

382. See generally, e.g., KIMBERLY JENKINS ROBINSON, A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL DECISIONS FOR OUR DEMOCRACY (2019).

383. Pasachoff, *supra* note 1, at 295.

384. Jake Grovum, *How States Divide Federal Money*, GOVERNING: STATELINE (Dec. 10, 2013, 6:25 PM), <https://www.governing.com/topics/finance/how-states-get-federal-money.html> [<https://perma.cc/Q3X9-B6JA>] (describing "stark differences" in the distribution of federal funds in the states).

385. See, e.g., NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES, at vii (Spring 2019) (describing state variations in budget conditions and capacities).

386. See, e.g., Timothy J. Conlan, *Between a Rock and a Hard Place: The Evolution of American Federalism*, in CONLAN & POSNER, *supra* note 25; Liz Farmer, *The 10 States That Give More to the Feds Than They Get Back*, GOVERNING (Jan. 11, 2019, 4 AM), <https://www.governing.com/week-in-finance/gov-taxpayers-10-states-give-more-feds-than-get-back.html> [<https://perma.cc/ACD2-GT7W>].

387. Compare, e.g., NICHOLSON-CROTTY, *supra* note 276, at 1-3 (discussing Republican governors' rejection of Medicaid expansion), with *id.* at 68 (describing Republican governors' submission of applications to the Race to the Top competition).

388. See *supra* note 367 and accompanying text.

389. MICHAELS, *supra* note 234, at 126-31.

escape liability for constitutional violations.³⁹⁰ Given jurisdictional variation in the existence and capacity of the nonprofit sector and industry, privatizing grant-funded government services would likely leave swaths of Americans behind.

Here, too, however, it is unlikely that confronting the problems with the grants-management regime would actually result in more privatization as a solution. While privatizing governmental services is frequently seen as an alternative to bureaucratic red tape,³⁹¹ the grants-management regime applies to nongovernmental organizations receiving federal money through grants (as well as many kinds of contracts as well).³⁹² Moreover, recent scandals about the financial mismanagement of federal funds by private corporations and nonprofit organizations suggest that interest in oversight of federal dollars is not going away any time soon.³⁹³

Block granting. So what about a financial intergovernmental regime light on compliance requirements, such as through block grants? For those attempting to use federal grants to support particular policy goals, block grants are associated with two major problems. First, by definition, they make it harder to target particular goals or populations.³⁹⁴ Since money is fungible, grantees can use the money under the letter but not the spirit of the law, as when school districts in the 1960s used their new federal education dollars to build swimming pools rather than to improve classroom services for low-income, newly integrated communities.³⁹⁵ Second, block grants can lead to destructive budget cuts. They are often sold as promoting efficiencies in grantee operations but in practice over time can lead to cuts in federal dollars regardless of whether efficiencies come to fruition.³⁹⁶

There is also little reason to think that block granting would actually solve the problems of the grants-management system. The block grants that currently exist are less specific than many other more targeted grants, but the statutes that create them are hardly without their own compliance requirements.³⁹⁷ And

390. *Id.* at 126.

391. *Id.* at 97-98.

392. 2 C.F.R. §§ 200.38, 200.40 (2019).

393. See, e.g., Eric Katz, *Congress, FBI Already Investigating Potential Abuse of Federal Funds in Puerto Rico's Disaster Response*, GOV'T EXEC. (Oct. 18, 2017), <https://www.govexec.com/management/2017/10/congress-fbi-already-investigating-federal-spending-fraud-puerto-ricos-disaster-response/141876> [<https://perma.cc/U5HU-UKLW>]; Rebecca R. Ruiz et al., *Justice Department Investigating Migrant Shelter Provider*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/us/southwest-key-migrant-shelters.html> [<https://perma.cc/6698-JDP7>].

394. Stenberg, *supra* note 368, at 272.

395. See *supra* note 44 and accompanying text.

396. See, e.g., CONLAN, *supra* note 202, at 165; Stenberg, *Block Grants and Devolution*, *supra* note 368, at 270.

397. Stenberg, *supra* note 368, at 272-73.

even block grants are, with few exceptions, subject to OMB's Unified Grant Guidance.³⁹⁸

In any event, transforming the system of federal grants into a series of block grants seems no more likely than any of the above options. Historical efforts to move in such a direction have routinely been unsuccessful.³⁹⁹ While past performance is no indication of future results, the difficulty that grant simplification has had, despite decades of attempts in periods of both divided and unified government, suggests that a fundamental barrier exists.

This barrier is the central reason that any grants reform along any of the above lines would likely eventually revert to a system of financial oversight very much like the one we have today: the theme of accountability for federal spending is a core part of the American blueprint. It dates back to the Founding.⁴⁰⁰ Contemporary problems with grants mismanagement suggest that the issues are as important as ever.⁴⁰¹ Legal support for financial accountability exists, too, both in appropriations law (which requires that “public funds may be used only for the purpose or purposes for which they were appropriated”⁴⁰²) and in the Constitution (which limits federal spending to that in pursuit of “the general welfare”⁴⁰³ and which requires regular publishing of the “Expenditures of all public Money”⁴⁰⁴).

Using the problems of the grants-administration system to call for the destruction of federal grants themselves thus seems of doubtful utility. The best illustration of this point is the famous protest against President Obama's health care reform efforts: “Keep your government hands off my Medicare!”⁴⁰⁵ Medicare is, of course, a government program. The uneasy, unspoken truce that currently exists in America is that at some level we want the services that federal funding provides; we just want them to be better, even though we don't fully agree about what “better” means.⁴⁰⁶

398. Compare 2 C.F.R. § 200.102(d) (2019) (describing a small subset of block grants that are not subject to administrative requirements and cost principles yet remain subject to the auditing rules), with Stenberg, *supra* note 368, at 269 (describing a larger set of block grants than the limited exceptions in the Uniform Grants Guidance).

399. See, e.g., CRS, FEDERAL GRANTS, *supra* note 2, at 39 (describing the growth over time of federal grants).

400. See *supra* notes 36-37 and accompanying text.

401. See *supra* note 393 and accompanying text.

402. U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-17-797-SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 3-10 (4th ed. 2017); see also 31 U.S.C. § 1301(a) (2018).

403. U.S. CONST. art. I, § 8, cl. 1.

404. *Id.* § 9, cl. 7.

405. See, e.g., Philip Bump, *Republicans Are Anti-socialism—and Less Likely to See Social Programs as Socialism*, WASH. POST (July 26, 2019), <https://www.washingtonpost.com/politics/2019/07/26/republicans-are-anti-socialism-less-likely-see-social-programs-socialism> [<https://perma.cc/4EVM-SCC5>]; Matthew Continetti, *Hands off My Medicare*, WASH. EXAMINER (Aug. 17, 2009), <https://www.washingtonexaminer.com/weekly-standard/hands-off-my-medicare> [<https://perma.cc/N6TY-VYKA>].

406. Cf. MICHAELS, *supra* note 234, at 2; Paul L. Posner & Timothy J. Conlan, *Conclusion: Managing Complex Problems in a Compound Republic*, in CONLAN & POSNER, *supra* note 25, at 338, 339.

B. Reforming

So how might we reform the system of grants administration rather than exploding it, while acknowledging the lack of agreement over the meaning of “better”? This Section considers four options that respond to the incentive problems identified in Part II: increasing programmatic enforcement, decreasing administrative-compliance rules, reforming the audit process, and reducing the informational and institutional silos that exist throughout the system. Each option is necessarily incomplete, but they are not mutually exclusive. Some combination of them would improve the grants-management system while retaining what is valuable about federal grants.

1. Increasing Programmatic Enforcement

One reform option to redesign incentives is increasing programmatic enforcement, whether through private lawsuits or expanded public enforcement focusing on programmatic goals. The theory behind this reform is that if part of the pressure grantees face toward administrative compliance is that administrative rules are more heavily enforced, expanding programmatic enforcement would helpfully rebalance grantees’ focus toward programmatic outcomes, whatever the legislated content of those desired outcomes at any time.

Although difficult to put in place, more programmatic enforcement would be beneficial. To be sure, expanded programmatic enforcement is more likely to shift incentives around the edges than to dramatically change dynamics, but some recalibration is both valuable and possible. Increasing programmatic enforcement is a worthwhile part of a package of reforms to shift incentives toward programmatic goals.

Increasing private enforcement. Under one path, Congress could reinstate the private enforcement regimes that the Supreme Court spent decades cutting back. At the most basic level, Congress could incorporate private rights of action into Spending Clause statutes that make no specific provision for them. It could also reverse the Court’s statutory-interpretation decisions limiting attorneys’ and expert fees and the availability of class-action lawsuits and reincorporate substantive requirements that the Supreme Court otherwise cut back on. Even further, it could reverse its own decisions limiting certain kinds of Legal Services claims and provide more funding for Legal Services to hold state and local agencies accountable. Were individuals broadly able to bring lawsuits challenging the substantive provision of services under the terms of grant statutes and agreements, many grantees would face a pressure that would serve as a counterweight to the current focus on administrative compliance.⁴⁰⁷

407. Cf. Super, *supra* note 221, at 1059 (“[E]nforceable individual rights can meaningfully enhance the efficiency of governmental operations in achieving the optimal balance among their competing values.”).

At the same time, it is important not to overstate the incentives created by private enforcement. Even where private enforcement regimes continue to exist, they are unevenly used, depending on geographic and economic disparities in access to lawyers, information asymmetries about violations, variations in reputational concerns about suing, and other reasons.⁴⁰⁸ Some incentives set up by specific administrative-compliance rules are so strong that the occasional private enforcement action does not do much to counter this pressure.⁴⁰⁹ Moreover, much ink has been spilled advocating for the return of private enforcement for a variety of reasons, and Congress has thus far shown little inclination to adopt such an effort.⁴¹⁰

This path, then, is not particularly likely to come to fruition any time soon. Even if it were, it would not fully counter the incentives set up by the grants-management regime. Yet increased private enforcement would do something to rebalance grantee focus toward programmatic goals while countering the focus on grants-management rules—another value of a reinvigorated private enforcement regime.

Increasing programmatic public enforcement. Under a second path to incentivize grantees to focus on programmatic goals, agencies could heighten their own substantive enforcement. After all, if grantees understand that they will face real repercussions for undervaluing programmatic goals—rather than simply for administrative issues—they will likely rebalance their focus. Given agencies' own incentives to prioritize administrative compliance over substantive enforcement, agencies' own rebalancing would be no mean feat. However, as alluded to above, in previous work I have offered suggestions for how this turn might be accomplished.⁴¹¹ I both summarize and expand upon those suggestions below.

The bottom line is that increased programmatic public enforcement would be both possible and to the good, in the right circumstances. At the same time, those circumstances are unlikely to be broad enough to fully counter the incentives set up by the grants-management regime, so increased public enforcement alone is an incomplete solution.

When should programmatic enforcement be used? Most basically, the funding cut-off—the ultimate programmatic-enforcement tool—should be reconceived as a valuable tool for rehabilitation (to induce grantees' future compliance) and deterrence (to signal the need for compliance to other grantees), rather than as a disfavored tool of incapacitation (by withholding money from needy beneficiaries) or retribution (by punishing sovereign states

408. See Pasachoff, *supra* note 1, at 308-09; Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1437-45 (2011).

409. See Super, *supra* note 221, at 1111-12 (describing the strength of the counter-entitlement in the food-stamps quality-control program as compared to the entitlement to food stamps).

410. See, e.g., Pasachoff, *supra* note 408, at 1415-16 (discussing the literature and collecting cites).

411. See *supra* note 195 and accompanying text.

exercising their own policy choices). The concerns agencies hold about withholding programmatic funds, as mentioned above,⁴¹² do not capture the full range of potential options, and clarifying those options can encourage rethinking about the potential for substantive enforcement. For example, as to the concern about hurting needy beneficiaries, withholding can be targeted rather than wholesale, and if beneficiaries are already being harmed by insufficient attention to the programmatic purposes of the statute, enforcement action can help improve the situation for beneficiaries overall.⁴¹³ As to the concern about intruding on state and local prerogatives, many enforcement actions would seek to hold state and local governments to their own policy choices, rather than some standardized set of unvarying federal requirements.⁴¹⁴

The concern that agencies have insufficient capacity to engage in substantive enforcement is real, especially in comparison to the outsourced comprehensive single audit model. Nonetheless, some actions would improve substantive enforcement without requiring dramatic increases in capacity. A President, OMB officials overseeing grantmaking agencies, or senior agency leadership interested in grant reform could institute a number of requirements. For example, agency Inspector General offices could expand their focus within their already existing statutory jurisdictions, such as by investigating not only whether grantees serve ineligible beneficiaries but also whether they are excluding eligible beneficiaries and whether they are providing the kinds of quality services the statute requires. Agency officials revising their contributions to the Compliance Supplement could identify programmatic requirements for auditors to review alongside administrative ones in the single audit. Agency leadership could reconfigure grant program offices to separate training and technical assistance from enforcement work. They also could develop mechanisms for strategic or targeted enforcement, as opposed to comprehensive monitoring, such as by further investigating grantees with significant audit findings or those about whom beneficiaries or the public have complained.

In so doing, agencies should carefully distinguish among grantee reasons for programmatic noncompliance in order to ensure that substantive enforcement actions truly serve the purposes of rehabilitation and deterrence rather than incapacitation or retribution. When grantees are having a difficult time meeting program goals despite hard work in good faith, enforcement actions would be counterproductive.⁴¹⁵ Instead, agencies should provide additional technical support or consider whether granting targeted waivers or urging Congress to modify the conditions would be more appropriate.⁴¹⁶

412. See *supra* notes 185-194 and accompanying text.

413. See Pasachoff, *supra* note 1, at 320, 328-29.

414. See *id.* at 302-03.

415. See *id.* at 317-20.

416. See *id.* at 319-20.

However, when grantees are taking insufficient actions to serve programmatic ends or are making programmatic decisions that are difficult to justify substantively out of an over-expanded fear of the audit process, agency enforcement actions would serve a valuable counterweight.⁴¹⁷ So, too, would such enforcement actions be useful when grantees are failing to fulfill programmatic input-oriented or output-oriented conditions that are within their control—more useful than when grantees are failing to achieve outcome-oriented conditions that are more in the nature of precatory policy goals.⁴¹⁸

There are important limits to this potential reform in terms of increasing grantees' focus on programmatic goals. One major limit is implicit in the previous paragraph: the types of grantee decisions and behavior for which programmatic enforcement might be appropriate are not likely to be pervasive enough for programmatic enforcement to fully balance out administrative enforcement. Consider some of the grantee decisions driven by a focus on the grants-management rules discussed earlier.⁴¹⁹ When grantees decide to build their budgets in silos instead of designing comprehensive reforms, or when grantees decline to pursue innovative, promising uses of funds because of the difficulty in persuading auditors of their validity, they are not taking actions that programmatic enforcement would address. When grantees fail to achieve big policy goals, they typically need assistance, not punishment. Increased programmatic enforcement would serve valuable purposes in the right circumstances, but it is unlikely to be widespread enough to serve as a full counterweight to the grants-management rules.

Another limit is political. I explained above why agencies face fewer political hurdles to administrative enforcement than to substantive enforcement; they are less likely to face blowback for efforts to protect against fraud, waste, and abuse than for other efforts.⁴²⁰ Even though those political constraints will not hold water all of the time—there will be times when political alignments make substantive enforcement possible or even likely⁴²¹—this variation makes it difficult for substantive enforcement to be as robust a counterweight as it might otherwise be.

A separate political issue is the potential for politicization of the enforcement process. For example, an agency might attempt to engage in the selective enforcement of grant rules only against disfavored political actors while turning a blind eye to copartisans' insufficient grant implementation.⁴²²

417. *See id.*

418. *See id.*

419. *See supra* notes 261-286 and accompanying text.

420. *See supra* notes 216-220 and accompanying text.

421. *See Pasachoff, supra* note 1, at 315-17.

422. *Cf.* Carol Davenport, *Trump Administration Threatens to Cut U.S. Highway Funds from California*, N.Y. TIMES (Sept. 24, 2019), <https://www.nytimes.com/2019/09/24/climate/trump-california-climate-change.html> [<https://perma.cc/2XMS-XXPC>] (describing threat to withhold highway funds as “the latest parry between President Trump and the liberal West Coast state that he appears to relish antagonizing”). In another project, I taxonomize and assess different kinds of grant politicization,

While courts likely provide a judicial backstop to at least some such efforts,⁴²³ this potential suggests another reason why agencies' increased programmatic enforcement will not fully shift grantees' incentives toward substantive compliance.

While troubling, these limits are not fatal. They illustrate that heightening agency substantive enforcement would be an incomplete response to the incentives set up by the grants-management system. Expanding agency attention to substantive enforcement would encourage at least some adjustment in grantees' focus. More generally, while increasing agency substantive enforcement would be complex along a number of dimensions, it would not be impossible.

2. Decreasing Administrative-Compliance Rules

Another option to shift grantees' incentives to focus on programmatic goals would be to reduce some of the administrative-compliance rules. One ongoing approach tries to reduce and streamline the reporting burden, making paperwork less time-consuming to accomplish, thereby leaving more time to focus on programmatic efforts. Another approach, which OMB has indicated it is considering, would be to waive some administrative-compliance rules in exchange for an intensive focus on programmatic goals. Both approaches hold promise.

Data standardization. There is currently underway a useful effort to standardize and streamline data collection from funding recipients, which would eliminate some busy-work reporting and inconsistent requirements between different grants for some of the same basic pieces of information. This effort attempts to ensure that the inevitable need for grantees to be good stewards of federal funds focuses on collecting meaningful data—rather than unnecessary and duplicative data—and should be more fully implemented.

In 2014, Congress passed the Digital Accountability and Transparency (DATA) Act, part of which directed OMB to develop a pilot program for a subset of funding recipients to “standardiz[e] reporting elements across the Federal Government,” “eliminat[e] . . . unnecessary duplication in financial reporting,” and “reduc[e] . . . compliance costs for recipients of Federal awards.”⁴²⁴ OMB subsequently implemented the pilot, which the GAO found generally successful (although the pilot was required to sunset after two years,

including this one. See Eloise Pasachoff, *Weaponizing Federal Funding* (unpublished manuscript) (on file with author).

423. See Pasachoff, *supra* note 1, at 282-83; Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 84-85, 98-104 (2017).

424. Pub. L. No. 113-101, § 5(b)(1), 128 Stat. 1146, 1150 (2014) (codified at 31 U.S.C. § 6101 (2018)).

per the DATA Act).⁴²⁵ OMB has taken several steps toward implementing standardized and streamlined reporting of grant data elements more generally even in the absence of the ongoing pilot.⁴²⁶ While OMB has indicated its intent to publish guidance directing agencies to adopt standard data elements where they can, it has also acknowledged its delay in doing so.⁴²⁷

OMB has a new reason (and a new deadline) to announce standard data elements, however. At the end of 2019, Congress passed, and the President signed into law, the Grant Reporting Efficiency and Agreements Transparency (GREAT) Act of 2019.⁴²⁸ This Act requires OMB to work with the agency that administers the most funding programs each year (which in practice means HHS⁴²⁹) to develop within two years standards for reporting data on financial management, administration, or management that are not program-specific.⁴³⁰ OMB must then issue guidance to agencies on how to implement those standards within a year after that, and within yet another year, agencies must make sure that their grant reporting requirements use those data standards.⁴³¹

The GREAT Act will helpfully streamline some aspects of grant reporting and is a welcome addition—although its import should not be overstated, considering both the four-year rollout and the significant burdens associated with program-specific reporting,⁴³² which the GREAT Act does not address. Moreover, even as to general administrative reporting, changing requirements at the top will only go so far. OMB's implementation of the GREAT Act should therefore include a plan not only for agency implementation of data standardization but also for grantee training and internalization on the standardization.

As discussed above, too often grantees do not understand or implement changes in federal grant rules, and too often grantees themselves are relying on

425. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-19-299, DATA ACT: PILOT EFFECTIVELY TESTED APPROACHES FOR REDUCING REPORTING BURDEN FOR GRANTS, BUT NOT FOR CONTRACTS (2019), <https://www.gao.gov/assets/700/698806.pdf> [<https://perma.cc/G524-MRCG>].

426. See, e.g., Draft Federal Grants Management Data Standards for Feedback, 83 Fed. Reg. 57751 (Nov. 16, 2018); OFFICE OF MGMT. AND BUDGET, REPORT TO CONGRESS: DATA ACT PILOT PROJECT 56-57 (Aug. 2017), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/sequestration_reports/2017_data_act_section5_report.pdf [<https://perma.cc/2WUS-HZ5B>]; Memorandum from Mick Mulvaney, Dir., Office of Mgmt. & Budget, to Heads of Dep'ts, M-18-24 (Sept. 5, 2018), <https://www.whitehouse.gov/wp-content/uploads/2018/09/M-18-24.pdf> [<https://perma.cc/L432-NZX3>].

427. *Results-Oriented Accountability for Grants 7*, PRESIDENT'S MANAGEMENT AGENDA (Sept. 2019), https://www.performance.gov/CAP/action_plans/sept_2019_Results-Oriented_Accountability_for_Grants.pdf [<https://perma.cc/DQC8-Z6RZ>].

428. Pub. L. No. 116-103, 133 Stat. 3266. As would be predicted by the claim that financial management rules have bipartisan appeal, the GREAT Act passed both the House and Senate unanimously. *Actions Overview*, H.R. 150, CONGRESS.GOV (Dec. 23, 2019), <https://www.congress.gov/bill/116th-congress/house-bill/150/actions?KWICView=false> [<https://perma.cc/6L43-QDTY>].

429. See S. REP. NO. 116-96, at 7 (2019).

430. GREAT Act § 4, 133 Stat. at 3268 (to be codified at 31 U.S.C. § 6402).

431. *Id.*, 133 Stat. at 3269-70 (to be codified at 31 U.S.C. §§ 6403-6404).

432. See *supra* Section I.A.1.

outdated systems that hinder their full participation in grant reforms.⁴³³ Agencies should be required to demonstrate that they are working hard to communicate these changes to grantees, not simply by posting in the Federal Register and on their websites but also by working with membership organizations and grant publications from which grantees often receive information. It would also be helpful to require auditors to provide information about reporting streamlining during the process of audits. Auditors could thus play a helpful informative role rather than simply an evaluative one.

Evaluations, outcomes, and waivers. A second effort to change grantees' incentives to focus on programmatic outcomes more than administrative compliance would develop a system to waive some compliance rules in exchange for grantees' heightened commitment to focus on outcomes and evaluate their success in doing so.⁴³⁴ Given the manifold concerns about the potential for politicization of neutral-sounding grant rules,⁴³⁵ this reform would have to be structured carefully. But with the appropriate guardrails in place, it is a reform with real potential to redirect grantees' efforts toward their programs more than their paperwork.

The Uniform Grant Guidance contemplates a waiver of compliance obligations in exchange for a commitment to focus on outcomes. A new provision added in 2014 permits agencies to propose to OMB "new strategies for Federal awards . . . to develop additional evidence relevant to addressing important policy challenges" alongside requests to waive any aspect of the Uniform Grant Guidance other than the audit rules.⁴³⁶ In principle, this provision allows agencies to propose that grantees focus on tracking progress toward the grants' desired outcomes and evaluating the grantees' goal-oriented strategies, in exchange for which OMB would provide an opportunity to relieve those grantees from some time-intensive but low-value administrative rules. This provision has not been taken advantage of, however, and in the proposed revision to the Uniform Grant Guidance, OMB takes it a step further, "*encourag[ing]* Federal awarding agencies to request exceptions in support of innovative program designs that apply a risk-based, data-driven framework to alleviate select compliance requirements and hold recipients accountable for good performance."⁴³⁷

433. See *supra* notes 280-286 and accompanying text.

434. Thanks to Kathy Stack for focusing attention on, and helpful conversations about, this idea. See Kathy Stack, *Outcome-Based Accountability Pilots* (Nov. 15, 2018) (unpublished manuscript) (on file with author); see also Andrew Feldman & Kathy Stack, *The Missing Piece in OMB's Push for High-Value Government Work*, GOV'T. EXEC. (Dec. 15, 2018), <https://www.govexec.com/management/2018/12/missing-piece-ombs-push-high-value-government/153297> [<https://perma.cc/F68E-H79E>].

435. See *supra* 327-362 and accompanying text.

436. 2 C.F.R. § 200.102(d) (2019).

437. Guidance for Grants and Agreements, 85 Fed. Reg. 3766, 3788 (proposed Jan. 22, 2020) (emphasis added).

This proposed revision to the Uniform Grant Guidance provides a sensible approach to recalibrating the balance between compliance and performance, and it ought to be adopted. Even if it is not, agencies should still take advantage the currently operative language to propose waivers from compliance rules they perceive to be unnecessary under the circumstances. Under either path, agencies would identify grant programs with statutory levers permitting outcome-focused grant designs—for example, embedding an ongoing evaluation component in their funding⁴³⁸—and would work with grantees to identify what compliance obligations should be waived, a theory of change for why the grantees’ strategies to accomplish their program goals are promising, and a commitment to evaluate their work and change strategies depending on what the evaluations show.⁴³⁹ OMB would work with agencies to decide what compliance rules to waive—possibly different ones, to allow evaluation of which rules may not be necessary. Where agencies have the statutory authority to waive certain requirements of the particular grants they oversee, they could also propose waivers of those requirements in order to allow grantees to focus on alternative approaches toward the same goal, again with a commitment to evaluate their approaches.⁴⁴⁰

By removing a slew of compliance obligations in exchange for a commitment to improving program results, this reform would shift the incentives grantees currently face, at least for the grantees operating under a waiver. Its focus on evaluation would also help identify what compliance obligations are truly low-value and could therefore be waived (or removed entirely) for grantees more generally. If this effort proves successful, it can be expanded in a way that would shift incentives to focus on programmatic outcomes for increasing numbers of grantees.

At the same time, this reform has the potential for destructive politicization that could seriously compromise the legitimacy of the effort. Proponents of the reform should be alert to these dangers and attempt to structure the reform to cabin them. For example, one danger is that OMB or agencies would politicize the selection of grantees to receive the waiver,

438. See, e.g., Memorandum from Sylvia Burwell, Dir., Office of Mgmt. & Budget, et al., to the Heads of Dept’s & Agencies, M-13-17, Next Steps in the Evidence and Innovation Agenda, at 6-8 (July 26, 2013), <https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2013/m-13-17.pdf> [<https://perma.cc/Z72V-MMRK>] (identifying ways to embed “[h]igh-quality, low-cost evaluations and rapid, iterative experimentation” into funding programs), *id.* at 8-10 (identifying “innovative outcome-focused grant designs”).

439. Cf. Colleen V. Chien, *Rigorous Policy Pilots: Experimentation in the Administration of the Law*, 104 IOWA L. REV. 2313, 2343-44 (2019).

440. A targeted version of this authority already exists, although not for the purposes of grants management burden-shifting. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-17-208, PERFORMANCE PARTNERSHIPS: AGENCIES NEED TO BETTER IDENTIFY RESOURCE CONTRIBUTIONS TO SUSTAIN DISCONNECTED YOUTH PILOT PROGRAMS AND DATA TO ASSESS PILOT RESULTS (2017), <https://www.gao.gov/assets/690/684159.pdf> [<https://perma.cc/KZJ2-Y2XZ>]; Memorandum from Sylvia Burwell, *supra* note 438, at 9 (discussing performance partnership examples).

choosing only copartisans or rewarding certain regions for political support.⁴⁴¹ A related danger is that even if the selection of grantees is not actually politicized, it will be perceived as politicized by disappointed grantees or the general public. To protect against these concerns, organizations from across the political spectrum should be involved with developing criteria against which to assess grantees' capacity to participate in the pilot. As in many other competitive grant decisions, there should be an outside panel of judges, and their rankings ought to be made public. There should also be an effort to have regional, programmatic, and grantee-type diversity among those selected.

Another danger is politicization on the back end, where OMB or agencies would use the principle of obtaining programmatic results as a pretense for defunding disfavored grantees or program areas—for example, by finding that a grantee had not produced results based on a narrow, contested definition of programmatic goals,⁴⁴² a time frame that is too short to show results,⁴⁴³ or disagreement about how to read the evidence that the program evaluations produce.⁴⁴⁴ Reaching agreement ahead of time about what results the grantees are aiming for within the relevant time period is one way to protect against this concern. Another is to require grantees to demonstrate commitment to the process of continuous learning from program evaluations rather than reaching any particular outcome.

Yet another danger is the politicization of the decision as to which compliance rules to waive. As public administration scholar Herbert Kaufman observed in his classic study of red tape, “Everybody seems to hate red tape, but “[o]ne person’s ‘red tape’ may be another person’s treasured safeguard.”⁴⁴⁵ Advocates for program beneficiaries may see a compliance obligation as protecting beneficiaries when grantees themselves see it as overly burdensome, such as a requirement to spend a certain percentage of dollars or employee time on a particular activity or population. OMB and agencies may thus use selective relief from compliance obligations to transform the purpose of the program in a way that promotes the current administration’s policy preferences more than the congressional design seems originally to have contemplated. On the flip side, grantees and advocates for program beneficiaries alike may see a

441. Cf. Timothy Cama, *EPA Stops Policy of Having Press Aide Review Grants*, HILL (July 8, 2018), <https://thehill.com/policy/energy-environment/392845-epa-stops-policy-of-having-press-aide-review-grants> [<https://perma.cc/VRP7-889N>]; Juliet Eilperin, *Interior Puts Grants Worth Hundreds of Millions of Dollars Through Political Review*, WASH. POST (Jan. 9, 2018), https://www.washingtonpost.com/politics/interior-puts-grants-to-nonprofits-universities-through-political-appointee-review/2018/01/08/ec7140b2-f4bc-11e7-beb6-c8d48830c54d_story.html [<https://perma.cc/634D-48DR>]; Sarah N. Lynch, *Union Says Trump Appointee May Be Improperly Influencing Justice Department Crime Victim Grants*, REUTERS (Sept. 4, 2019) <https://www.reuters.com/article/usa-justice-grants/union-says-trump-appointee-may-be-improperly-influencing-justice-department-crime-victim-grants-idUSL5N25H6AF> [<https://perma.cc/VYC8-ZBRX>]. See generally Pasachoff, *supra* note 422 (discussing such concerns).

442. Underhill, *supra* note 348, at 22.

443. Pasachoff, *supra* note 348, at 1960.

444. Underhill, *supra* note 348, at 24-27

445. KAUFMAN, *supra* note 364, at 1.

compliance obligation as providing political cover from a hostile Congress seeking to cut funding for the program. If a compliance obligation, no matter how burdensome, signals to Congress that grantees are good stewards of federal funds, grantees may prefer keeping that obligation in place, even though OMB and agencies may see it as a low-value regulation that ought to be removed and be perfectly happy for Congress to cut the program eventually. To protect against these concerns, advocates for program beneficiaries ought to be provided an opportunity to comment on agency and grantee proposals for waivers. There also should be public debate around what to waive, to allow for accountability through news coverage and advocacy efforts. Done right, some collective, noncontroversial agreements about obligations to waive are likely.

These dangers ought not be taken lightly. Nevertheless, once acknowledged and designed around, the dangers should not undercut the potential of this reform to shift incentives toward programmatic goals instead of mere compliance.

3. Reforming the Audit Process

A third set of reforms would address the incentive problems created by the audit process. The best proposals would promote audit quality; encourage the making of programmatic decisions by grantees and agencies rather than by auditors; and reduce incentives for grantees to make poor programmatic decisions out of an overcautious fear of audits. Several interventions would help.

Compliance Supplement usability. One reason why audits have so many errors and why auditors are able to end up with de facto power to make programmatic decisions is that the Compliance Supplement is extremely difficult to understand, both for the lay grantee and for the junior auditors who largely conduct single audits.⁴⁴⁶ The Compliance Supplement purports to summarize all of the legal obligations on which grantees will be evaluated in their audit, but it does so in a decidedly non-user-friendly way. One way to shift the balance of power would be to revise the Compliance Supplement in plain English, both as a helpful reference for grantees on their compliance obligations and as a less inscrutable guide for auditors.⁴⁴⁷

The Compliance Supplement touts its value as a one-stop shop for auditors, but it is odd to focus so heavily on the value to auditors without also providing a one-stop shop for the people who actually have to implement what the auditors are evaluating. Giving grantees an opportunity to understand their obligations more clearly would allow them to explain to doubting auditors why

446. See *supra* notes 304-310.

447. Cf. Cynthia R. Farina et al., *The Problem with Words: Plain Language and Public Participation in Rulemaking*, 83 GEO. WASH. L. REV. 1538 (2015) (suggesting that agencies' failure to write rulemaking documents in plain language contributes to the power imbalance between regulated industries and the general public in participation in the rulemaking process).

certain steps that they wish to take for programmatic reasons are actually allowed. Clearer drafting would also help auditors understand their own obligations more easily; it is easier to make errors when the assigned task is more difficult to understand. Clearer drafting would thus help ensure inter-auditor reliability.

This proposal accords with plain-English recommendations elsewhere in the government, including the Federal Plain Language Guidelines issued under the Plain Writing Act of 2010⁴⁴⁸ and the Recommendation for Plain Language in Regulatory Writing approved by the Administrative Conference of the United States in 2017.⁴⁴⁹ OMB could task each agency whose programs are included in the Compliance Supplement to revise its chapter along the lines of those recommendations and then could further revise the trans-agency chapters for which OMB itself is responsible. OMB and each agency should invite grantees, members of the auditor community, and different subject-matter-specific grant industry organizations to participate in such a revision. Their participation would improve accuracy and provide an understanding of common communication breakdowns in the field. If taking on the whole project at one time is too large, a pilot program involving one or two committed agencies which would then share best practices with other agencies would be a good first step.

Safe-harbor development. Another difficulty for the audit process is the need for auditors to make case-specific determinations of compliance rules that are actually open-ended standards. As explained above, grantees sometimes make risk-averse but programmatically poor decisions to avoid raising any audit concerns. One intervention that could help is the development of “safe harbors” within which grantees could operate without risking an audit finding.

One such safe harbor has been developed in a partnership between offices in HHS and in the USDA and two different states to address how to allocate the costs of software development to different federal and state grants.⁴⁵⁰ While the safe harbor was developed to expedite the approval process within federal agencies, it serves a dual function as protection in an audit for a vague and complex calculation.

Similar safe harbors could be developed in similar partnerships across a wide range of indeterminate compliance rules, whether statute-specific (such as supplement-not-supplant rules) or trans-substantive (such as indirect vs. direct cost calculations and professional-service costs).⁴⁵¹ Grantees could thus have

448. See Federal Plain Language Guidelines, PLAINLANGUAGE.GOV (Dec. 23, 2019), <https://www.plainlanguage.gov/guidelines> [<https://perma.cc/5UBS-JCZ3>].

449. See Adoption of Recommendations, 82 Fed. Reg. 61728 (Dec. 29, 2017) (adopting Recommendation 2017-3 of the Administrative Conference of the United States).

450. See Cost Allocation Methodologies (CAM) Toolkit, OFFICE OF CHILD SUPPORT ENFORCEMENT (Jan. 15, 2015), <https://www.acf.hhs.gov/css/resource/cost-allocation-methodologies-cam-toolkit> [<https://perma.cc/2PPW-PCXQ>]. I thank Kathy Stack for calling this example to my attention.

451. See *supra* notes 313-317 and accompanying text.

the benefit of some certainty and could make programmatic decisions without worrying about audit findings from those rules, while auditors and agencies could have the benefit of simplifying the oversight effort.

To encourage the further development of safe harbors, OMB could invite proposals for collaboration from within the grantee community as part of its grants reform work under the President’s Management Agenda. OMB could also use periodic revisions to the Uniform Grants Guidance to specify circumstances that satisfy an otherwise open-ended standard.⁴⁵²

Decisional transparency. Another reason why grantees sometimes let auditor determinations drive their own programmatic choices is that there is no generally available source of precedential decisions about the permissibility of different choices under the grants-management rules. If there were an online clearinghouse of audit reports, management decisions, Inspector General reports on grant programs, GAO reports on grant and program issues, and final agency decisions in administrative adjudications on grants, grantees would have somewhere to turn to assess whether an action they want to take has been upheld or criticized in another context. Akin to the “What Works Clearinghouse” model that has garnered praise for making it easier for grantees to find evidence-based strategies for achieving different policy goals, such a grant-focused clearinghouse—call it the Grants Compliance Clearinghouse—would empower grantees with the ability to justify programmatic decisions as permissible. OMB could develop such a clearinghouse under its President’s Management Agenda work.

The Federal Audit Clearinghouse could, but does not, play this role. Even though all PDF submissions of audit reports to the database have had to be text-searchable since 2015,⁴⁵³ there is no way for a grantee to do a multilayer keyword search for a particular compliance provision, a type of action, a type of decision, or the like—no mechanism to conduct a Boolean search at all. Any lawyer who has ever done an online search in a database like Westlaw or Lexis—or anyone who has ever done a Google search—understands the benefits of a general search functionality compared to scrolling through individual documents looking for keywords of interest.

Even worse, many decisions are not available online at all. For example, the Department of Education’s management decisions, called program determination letters, are available only through a Freedom of Information Act

452. The proposed revisions as of this writing include a clarification that program evaluation costs are an allowable direct cost and an expansion of eligibility for a simplified way of calculating indirect costs, both sensible steps. Guidance for Grants and Agreements, 85 Fed. Reg. 3766 (proposed Jan. 22, 2020) (proposing revisions to 2 C.F.R. §§ 413 and 414(f)).

453. See *Federal Audit Clearinghouse*, U.S. CENSUS BUREAU (Dec. 23, 2019), <https://harvester.census.gov/facweb> [<https://perma.cc/V9ZY-2MGW>]. The GREAT Act calls for data, including audit reports, to be “fully searchable and machine-readable.” Grant Reporting Efficiency and Agreements Transparency (GREAT) Act of 2019, Pub. L. No. 116-103, § 4, 133 Stat. 3266, 3269.

request or through private subscription services.⁴⁵⁴ Other private subscription services summarize select recent agency decisions,⁴⁵⁵ while different agencies make some grants-related decisions available on their websites, with different degrees of searchability.⁴⁵⁶ A grantee struggling to figure out whether an action it wants to take for programmatic reasons will be found permissible under an audit is at a strong informational disadvantage as compared to the auditor and agency reviewers.

Ensuring that all grant-related decisions be posted online would therefore be an important step forward.⁴⁵⁷ Such a move is in keeping with other gestures toward making government documents⁴⁵⁸ and data⁴⁵⁹ more available and transparent. A unified, searchable clearinghouse would go even farther toward providing information in a format that helps grantees make wise programmatic decisions.

4. Reducing Silos

A final set of reforms focuses more on process than substance, acknowledging the institutional and informational disconnects that help produce the dynamics discussed in Part II.⁴⁶⁰ This reform therefore seeks to create points of connection between decisions about substantive grants policy and decisions about grants-management rules. After all, it makes little sense to expect certain policy outcomes when unacknowledged constraints work against

454. See, e.g., Gordon & Reber, *supra* note 206, at 130; TITLEIADMIN.COM (2019), https://www.shoplrp.com/product_p/300915.htm [<https://perma.cc/72AL-X7VH>]; cf. Margaret B. Kwoka, *FOIA Inc.*, 65 DUKE L.J. 1361 (2016).

455. See, e.g., *Thompson Grants Compliance Expert*, THOMPSON GRANTS (2019), <https://grants.thompson.com/compliance-expert> [<https://perma.cc/NW28-WE4F>].

456. The Department of Education's Office of Hearings and Appeals lists decisions by docket number, with no subject-matter search feature. See *Office of Hearings and Appeals*, U.S. DEP'T EDUC., <https://oha.ed.gov/oha-judges-decisions> [<https://perma.cc/W3CK-YE4J>]. In contrast, the HHS Departmental Appeals Board website allows multiple stages of search. See *Board Decisions*, U.S. DEP'T HEALTH & HUM. SERVS. (2019), <https://www.hhs.gov/about/agencies/dab/decisions/board-decisions/index.html> [<https://perma.cc/T6WR-JCB3>]. GAO reports evaluating different programs are generally available online, but it is very difficult to search within the GAO website for specific information on particular programs and provisions. See *Reports and Testimonies*, U.S. GOV'T ACCOUNTABILITY OFFICE (2019), <https://www.gao.gov/reports-testimonies/by-topic> [<https://perma.cc/79ZT-HBVY>].

457. Cf. Metzger & Stack, *supra* note 22, at 1303-04.

458. Adoption of Recommendations, 84 Fed. Reg. 38927, 38931-33 (Aug. 8, 2019) (adopting Recommendation 2019-3, Public Availability of Agency Guidance Documents); Adoption of Recommendations, 84 Fed. Reg. 2139, 2142-43 (Feb. 6, 2019) (adopting, among others, Recommendation 2018-5, Public Availability of Adjudication Rules); 84 Fed. Reg. at 2143-45 (also adopting Recommendation 2018-6, Improving Access to Regulations.gov's Rulemaking Dockets); Adoption of Recommendations, 82 Fed. Reg. 31039, 31039-40 (July 5, 2017) (adopting Recommendation 2017-1, Adjudication Materials on Agency Websites).

459. See, e.g., Hyon Kim, *Data.gov at Ten and the Open Government Act*, DATA.GOV (May 31, 2019), <https://www.data.gov/meta/data-gov-at-ten-and-the-open-government-data-act> [<https://perma.cc/3Q39-29GE>].

460. Cf. FARBER & O'CONNELL, *supra* note 30, at 9 ("[R]eformers should consider focusing on process values instead of on outcomes, if outcomes are highly uncertain and contingent on complex institutional factors.").

the achievement of those outcomes.⁴⁶¹ It is only by sharing information that decisionmakers can make informed, and perhaps different, decisions—whether expecting different outcomes, expecting the same outcomes but on a longer timeframe, providing appropriate resources to temper the constraints, or changing the constraints. Reducing the effects of structural and informational silos—within and across agencies, OMB, Congress, and state and local jurisdictions, as illustrated above⁴⁶²—is the goal of this last reform.

There are several different mechanisms through which one could reduce silos: top-down, bottom-up, or outside-in. A top-down approach would have OMB re-create an expanded version of the Council on Financial Assistance Reform (COFAR).⁴⁶³ In this expanded version, the COFAR would include state and local grantee representation, agency grant program officers, and OMB budget staff members, not simply agency and OMB financial officers, and it would address grant issues beyond the grants-management rules. A parallel top-down effort could take place in Congress through the creation of a study group or caucus to work on grants-administration issues beyond narrow committee jurisdictional lines, meeting periodically with the expanded COFAR.

Under a bottom-up approach, states and localities breaking down silos in their own grants work would invite others to join them, develop working groups, and then share information and requests across program, finance, and budget divides in Congress, OMB, and agencies.⁴⁶⁴ An outside-in approach would see nonpartisan groups or a bipartisan coalition with an interest in improved grants management develop a project to regularly bring together these sets of players across federal, state, and local divides to develop reforms.⁴⁶⁵

Any of these options would be to the good, encouraging the relevant players to reach across silos to seek out and share information. In turn, such information-sharing could help decisionmakers make better decisions.

461. See *supra* notes 261-291 and accompanying text (describing this situation as a result of the grants-management regime).

462. See *supra* notes 133-179 & 287 and accompanying text.

463. See *supra* note 159 and accompanying text.

464. Models for this kind of work exist at different scales. See, e.g., *Innovation Exchange Session*, PRESIDENT'S MGMT. AGENDA (Oct. 24, 2019), <https://www.performance.gov/CAP/innovation-sessions/10-24-reducing-administrative-burden-a-states-perspective.pdf> [<https://perma.cc/B8S9-UFHU>] (Illinois); *Allegheny County Data Warehouse*, ALLEGHENY COUNTY ANALYTICS (2019), <https://www.alleghenycountyanalytics.us/index.php/dhs-data-warehouse> [<https://perma.cc/MJ79-MFBJ>] (Allegheny County, Pennsylvania); *Home, FED, DEMONSTRATION PARTNERSHIPS* (2019), <http://thefdp.org/default> [<https://perma.cc/8WT9-ULQQ>] (consortium of 10 government agencies and 154 university and industry partners that receive federal research grants).

465. Models for this kind of work exist, too. For example, the National Academy of Public Administration and Grant Thornton host a quarterly Grants Management Symposium. The Center for American Progress and the American Enterprise Institute previously cosponsored a project on fiscal compliance rules in education. See Junge & Kravaric, *supra* note 261 (a publication resulting from that project).

For example, recall that policymakers may modify or cut a program in the belief that the substantive policy design is flawed, when actually it is the operation of grants-management rules that are the issue, so the change imposed will be no more successful than the initial version.⁴⁶⁶ Relatedly, in this era of results-oriented grantmaking, consider how program evaluations depend on knowing how federal funds are being used. Congress and agencies alike want to know whether federal funding is having the desired effect. But the complexity of program operation—where a federal grant may go to a state agency, then to a county, then to several local government agencies and nonprofits, where it is combined with other federal, government, and foundation grants, with a broadly defined outcome as a goal, when grantees are focused on grants-management rules as much as or more than program goals—may not be obvious to officials designing an evaluation of a federal program.⁴⁶⁷ Involving grantees in designing evaluations and bringing together policy and management experts could help make evaluations more realistic and give meaning to already existing data.

As another example, consider a disconnect that resulted from raising the threshold for single audits from \$500,000 to \$750,000, as the 2014 creation of the Uniform Grant Guidance did. In practice, this change increased the burden on “pass-through entities” such as state agencies, which had previously relied on reviewing their subgrantees’ single audits for monitoring.⁴⁶⁸ The Uniform Grant Guidance also heightened the requirements for oversight conducted by pass-through entities more generally.⁴⁶⁹ Yet there was no discussion in the congressional budget process whether an increase in appropriations or a change in its allocation would be helpful to state agencies during this transition as they needed to expand their capacity. And in fact, state agencies struggled with the transition, jeopardizing their own federal funding as a result.⁴⁷⁰

To be sure, these examples of better decision-making resulting from reducing silos all assume that better management of federal grants is a shared goal. For those who want to shrink the federal government, oppose intergovernmental programs, or wish to reduce the social welfare state, poor management of such programs may well be desirable to create the proof needed

466. See *supra* notes 287-291 and accompanying text.

467. See Beryl A. Radin, *Performance Management and Intergovernmental Relations*, in CONLAN & POSNER, *supra* note 25, at 245-49 (discussing federal evaluation programs that are insensitive to block grant flexibility); Posner, *supra* note 29 (describing a version of this situation).

468. *New Audit Threshold May Create Oversight Burden for Pass-Throughs*, SINGLE AUDIT INFO. SERV., June 2014, at 1.

469. *Uniform Grant Guidance Expands the Role of Pass-through Entities*, FED. GRANTS MGMT. HANDBOOK, July 2014, at 1.

470. See, e.g., *Better Oversight Sought for Pa. Homeless Programs*, SINGLE AUDIT INFO. SERV., Mar. 2016, at 6-7 (discussing deficiencies in Pennsylvania’s monitoring of grantees and subgrantees and risk of being required to return funds to HUD); *Tenn. Agency to Address Monitoring Weaknesses*, SINGLE AUDIT INFO. SERV., Jan. 2017, at 5-6 (discussing deficiencies in Tennessee’s monitoring of economic and community development subgrantees).

to rein them in. This is a barrier to cross-silo collaboration. Other such barriers exist as well, including a general lack of trust connected to partisan rancor.⁴⁷¹

These are difficult problems that implicate far more than the complexities of federal grants administration. Nonetheless, while collaboration across silos will not always be feasible, it surely sometimes will be. One can acknowledge the existence of these barriers without assuming they will always be fatal to the possibility of collaboration.

Conclusion

The grants-management regime plays a critical but underrecognized role in driving the implementation of some of the nation's most important policies. This Article shows how and why the regime can unintentionally frustrate the accomplishment of those policies' goals. By disaggregating the variety of legal rules and the institutional relationships in which the rules are embedded, this Article reveals the pathologies stemming from the incentives created by the rules and those relationships. This Article also shows how those incentives might be redesigned, not with an easy, one-time, one-size-fits-all fix, but rather with a cautious, real-world approach to the role of federal grants in our political system—one that acknowledges the complex problems of intergovernmental internal administration and ongoing institutional and political realities. For the story of the pathologies of the grants-management rules is not one of inevitable government failure. It is instead a story of the potential to improve the capacity of the intergovernmental administrative state to better implement policies in service of the American public.

471. See, e.g., HERD & MOYNIHAN, *supra* note 35, at 12, 241-51 (discussing the political complexities of negotiating administrative burdens); Paul L. Posner, *The Bleak Outlook for Our Intergovernmental Fiscal Future*, GOVERNING (Oct. 23, 2013) <https://www.governing.com/columns/mgmt-insights/col-bleak-outlook-fiscal-future-state-local-federal-intergovernmental-forum.html> [<https://perma.cc/C8Z3-MGMV>].