

SJR

43

# HOUSE COMMITTEE REPORT

(7)

Date Referred: April 29, 1989

FURTHER REFERRALS:

Date of Committee Action: 5/4/89

The JUDICIARY Committee considered:

SJR 43

SENATE JOINT RESOLUTION NO. 43

[IMPLEMENTATION OF 10TH AMENDMENT]

Relating to implementation by the Congress of the Tenth Amendment to the Constitution of the United States.

RECOMMENDATIONS:

- [ ] be replaced with HCS SJR 43 (JUD)  the same title  
[ ] have attached amendment(s)  a new title
- do pass  
[ ] do not pass  
[ ] no recommendation  
[ ] individual recommendations  
[ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(s):  
(Dept)

APPROVES PREVIOUS:

(Date/Dept)

- [ ] fiscal impact \_\_\_\_\_  
[ ] zero fiscal note \_\_\_\_\_  
[ ] zero with analysis \_\_\_\_\_

- [ ] fiscal note(s) \_\_\_\_\_  
 zero fiscal note(s) 4/26/89 - LAA  
[ ] zero fn/analysis \_\_\_\_\_

SIGNING DO PASS:

Mike Davis  
H. Ellis  
Mike Miller  
Tom Martin  
Jeff Dabison  
W. J. Gandy  
Peter J. ...

SIGNING:

(Check approp. column)

Do Not  
Pass  
No Rec  
Amend

	Do Not Pass	No Rec	Amend

Peter J. Gandy  
Chairman's Signature

# Alaska State Legislature

SENATOR BETTYE FAHRENKAMP  
CHAIRMAN, RESOURCES COMMITTEE  
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Senate

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To: House Judiciary Members  
From: Senator Bettye Fahrenkamp  
Re: SJR 43, Relating to the 10th Amendment to the U.S. Constitution.  
Date: May 3, 1989

This resolution would encourage the President of the United States and Congress to protect and strengthen the position of the states, and to avoid intrusion upon the prerogatives of the states, and afford protection to the proper governing authorities of the states.

At the Council of State Government's annual meeting, the Executive Committee took action urging the Council Governing Board members in each state to adopt a resolution affirming the substantive and operational effect of the 10th amendment to the U.S. Constitution.

This request stems from recent congressional and Supreme Court actions which have resulted in a serious shift in power from the states to Washington. Two Supreme Court decisions, Garcia v. San Antonio Metropolitan Transit Authority and South Carolina v. Baker, especially reduced the Tenth Amendment protection for state authority, holding that the states can find protection from congressional regulation only through the national legislative process itself. Congressional committees and federal regulatory agencies are now considering further extensions of national authority over state banks, businesses and tax systems.

The Council of State Governments will be conducting a national campaign designed to inform state leaders and the voting public about this issue. They created a special "intergovernmental Partnership Task Force" to spearhead this effort, co-chaired by Senators Douglas Henry of Tennessee and John Marchi of New York.

I urge your support of this resolution.



# The Council of State Governments

Washington Office  
Hall of the States  
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Washington Office Director  
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Chairman  
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Executive Director  
Carl Stanberg

May 3, 1989

The Honorable Jim Barnes  
Assistant Majority Floor Leader  
Missouri House of Representatives  
Room 310, State Capitol  
Jefferson City, Missouri 65101

Dear Mr. Barnes:

We need your help, as a member of the Council's Intergovernmental Affairs Committee, to obtain adoption by the Missouri legislature of a resolution affirming the substantive and operational effect of the Tenth Amendment to the Constitution, especially in light of the Supreme Court decisions in *Garcia* and *South Carolina v. Baker*.

On March 14th of this year, our CSG President, William A. O'Neill, Governor of Connecticut, and our CSG Chairman, Arnold Christensen, Senate President of Utah, wrote to each member of the CSG Governing Board asking that they move to have the resolution considered and adopted in their legislative body. Sample copies of the transmittal letter and the resolution are enclosed. To our knowledge, as of this date, some 14 states have either passed the resolution or have it under active consideration in their appropriate legislative committees. We have, however, no information about introduction or progress of the resolution in your state. The persons receiving such requests in Missouri were:

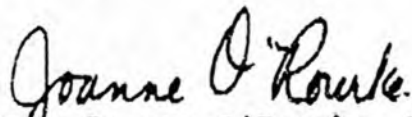
Governor John Ashcroft  
Senate President Pro Tem John E. Scott  
Speaker Bob F. Griffin

We believe that adoption of the resolution by a majority of the states would send an important message regarding preemption of state responsibility and authority to Congress, the President, and the courts. This is an important initial step, as indicated in the enclosed public hearing announcement and press information, to restore balance in our federal system.

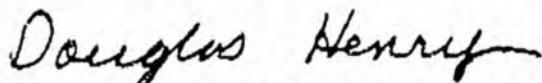
To the extent you find it appropriate to do so, we would request that you introduce this resolution supporting an affirmative interpretation of the Tenth Amendment, or assist in finding another appropriate sponsor.

Please call or write to the Task Force in care of Norman Beckman, Director of the Council's Washington Office, to advise us of the supporting initiatives you may undertake. We would also like your assessment of the chances for adoption of the resolution in Alabama during this session or the next session of the legislature.

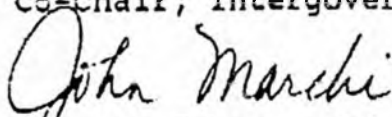
Sincerely yours,



Rep. Joanne O'Rourke, New Hampshire  
Chair, Intergovernmental Affairs Committee



Senator Douglas Henry, Tennessee  
Co-Chair, Intergovernmental Task Force



Senator John Marchi,  
Vice President Pro Tem, New York  
Co-Chair, Intergovernmental Task Force

JO:DH:JM/kac

Enclosures



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Chairman  
Senate President  
Arnold Christensen  
Utah

President  
Governor William A. O'Neill  
Connecticut

Executive Director  
Carl Stenberg

April 19, 1989

## MEMORANDUM FOR THE RECORD

Fr: *NB*  
Norman Backman

Re: Adoption of State Resolutions Reaffirming the Substantive and Operational Effect of the Tenth Amendment to the U.S. Constitution

The following responses have been received:

### EASTERN REGION

New York - Passed Senate and Assembly.

Delaware - Concurrent Resolution No. 45 passed March 22, 1989.

Connecticut - Likely to be adopted.

Rhode Island - Likely to be considered.

*Passed Vermont Senate*

### MIDWESTERN REGION

Indiana - SCR 56, co-sponsored by Senators Garton and Neary and Speakers Phillips and Mannweiler, adopted April 13, 1989.

Missouri - HCR 24, sponsored by Representative Joe Driskill, introduced and referred to House Ways and Means Committee on April 5, 1989.

Nebraska - No action to date. Introduction of resolution expected soon.

# STATE GOVERNMENT



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# Editor's Note

*"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

— 10th Amendment, U.S. Constitution  
(Ratified Dec. 15, 1791)

Mention the Bill of Rights and most Americans think of individual rights such as freedom of speech, religion, assembly, press and trial by jury.

In contrast, the 10th Amendment appears remote from everyday concerns. Yet, our country's founders believed the protection of states' rights was vital to guarding individual freedoms and adopted the 10th Amendment to explicitly limit the power of the national government. In the midst of national bicentennial celebrations, many have forgotten why the framers did what they did to ensure states would not become federal fiefdoms.

Today, the constitutional balance struck 200 years ago is leaning dangerously toward Washington D.C. in wake of the U.S. Supreme Court's 1985 *Garcia* and 1988 *South Carolina* decisions trampling state powers.

In this issue of the *Journal*, The Council of State Governments warns of the danger of letting the 10th Amendment disappear.

In the introductory article, David B. Walker writes about the diminishment of state powers at the expense of the central government. Since the mid-1960s, the national government is more powerful and the future for states in the federal system looks bleaker.

Constitutional scholar A. E. Dick Howard also reviews the history of federalism and argues it is linked with individual liberty and self-government. Only stable institutional safeguards such as the 10th Amendment can ensure individual rights, Howard maintains.

Much of the argument for stronger national powers rests on the assumption that states are the weaker partners in the federal system. State initiatives and achievements belie this conclusion, Mavis Mann Reeves shows in her article.

John Sununu, in his article, advances a bold plan to restore the state-national balance. Sununu in 1988 led the National Governors' Association in calling to restore the states' ability to initiate constitutional amendments.

Tennessee Sen. Douglas Henry Jr., in his article, declares, "The emasculation of the 10th Amendment . . . is the most dramatic constitutional event of our time." He advocates a constitutional amendment to restore the 10th Amendment.

Robert B. Hawkins Jr., writing in this issue, urges starting a constitutional dialogue that links constitutional reform to greater citizen control over government.

Stacey Crane relates state treasurers' efforts to ensure tax exemptions for state and local bonds.

John Kincaid proposes strengthening federalism by requiring a three-fourths vote of the U.S. Supreme Court to void state law. Such a rule would "give the benefit of the doubt to states and would require the Court to reach more of a consensus on questions of federalism."

Daniel Elazar writes that, in its *Garcia* and *South Carolina* decisions, "The Court has stood the Constitution on its head" to give the Congress the last word in federal-state relations. Elazar concludes that federalism and states' rights are "as important to the preservation of liberty as is the safeguarding of individual rights."

Timothy J. Conlan looks at federalism's recent past, its present and likely scenarios for its future. Conlan warns that states could face "the worst of all possible worlds" in which they are stripped of political and legal defenses and saddled with increased federal mandates and exemptions.

Unwilling to accede to Congress powers rightfully reserved to states, the Council's Executive Committee in December urged all states to enact resolutions affirming the substantive effect of the 10th Amendment. The 1989 New York Legislature became the first to adopt a resolution introduced by Sen. John Marchi, a member of the Executive Committee.

In addition, the Council and the Advisory Commission on Intergovernmental Relations are holding regional public hearings to examine the pre-emption of state authority and seek agreement on ways to restore state and local powers. Hearings will be held in Orlando April 21, New York City May 18, Colorado Springs in June and Cincinnati in September.

The Council also is serving as a clearinghouse on constitutional amendment language to restore balance in the federal system. The Council is working with the National Governors' Association, the National Conference of State Legislatures and its Task Force on Federalism and others.

If the Supreme Court ignored the First Amendment instead of the 10th, the outcry from the press and public would shake the country. If states cannot demonstrate the danger to individual freedom through the loss of their equally vital rights, then what is next?

— Elaine S. Knapp

American Federalism:

## *Past, Present and Future*

by David B. Walker

*Where stands American federalism at the close of the Reagan years and what is its future? Understanding how the formal features of our government have shaped and been shaped by socio-cultural, economic, technological and international challenges of the last two centuries is a basic prerequisite for grappling with federal-state-local issues.*

The study of federal systems in other countries and a close probe of our own version of this form of government reveal that three factors have undermined the fundamental bases of a genuine federalist regime. These factors or "conditioners" are: (1) the representational and indirectly the political; (2) the functional or operational, and (3) the judicial and jurisdictional. All three are incorporated in constitutions purporting to establish a federal system of free government. They also influence in part the social, economic and technological development of nations possessing federalist governmental arrangements.

### **The Shaping of Our Federalist Tradition: 1789-1963**

During the first 175 years of American federalism, these three conditioners served to reinforce each other and thus to sustain a territorial division of power and influence.

Although the representational and political facets of American federalism experienced major shifts during the period that stretched from President Washington through Kennedy, they continued to support the federal principle. Popular representation at the national and state-local levels steadily broadened during this time. Examples are the Voting Rights Act of 1965 and the

26th Amendment, giving 18-year-olds the vote in 1971.

Direct election of U.S. senators in 1913 possessed the potential of reducing direct state involvement in national policy-making. Yet, a special concern for states' rights lingered on in the Senate for 50 years following enactment of the 17th Amendment, thanks to the strength of state-local party systems and the political ascendancy of the "conservative coalition" in Congress from 1939 to 1964.

These formal actions to democratize the representational system were significant, but the political developments during this 175-year period more than matched them. The advent of the Constitution initially nurtured a party system that was strong at the national level. With the emergence of decentralized, state-based parties in the late 1820s, relations changed between state officials and political parties. The major parties of the day — the Jacksonian Democrats and Whigs — were loose alliances of state and local parties, generally undisciplined, lacking in doctrine and in clear programs, and composed of diverse socio-economic and regional interests (Ladd 1970, 8-34).

These pluralistic characteristics also applied to their latter-day national successors. State and local parties, though in some cases more cohesive and disciplined, reflected most of these traits. Yet, collectively they were stronger than their national counterparts and this helped make the states the prime arenas in which policy choices were made. These political organizations not only

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*David B. Walker is director, Institute of Public and Urban Affairs at the University of Connecticut. He was assistant director of the U.S. Advisory Commission on Intergovernmental Relations from 1966 to 1984.*

dominated the nominating process at their own levels, but also dominated nomination and election of candidates for federal public offices.

Clearly, the formal representational features of all levels helped nurture these political developments. Moreover, while centralizing periods can be identified — 1861-1876, 1901-1917, and 1933-1938, — the general tendency was that the major national parties with their confederative structures, strong state-local foundations, loose and heterogeneous socio-economic composition, and concomitant lack of discipline at the national level preserved the federal principle both operationally and jurisdictionally (ACIR 1986, 17-46).

In broad terms, the workings of the American federal system until the early 1930s adhered quite closely to the dual or compartmentalized model that the Framers sought to establish, where the power of states and the federal government were fixed so that the national government could not overstep powers reserved to the states. Moreover, even with the marked growth of national regulatory, grant-in-aid and subsidizing roles during the New Deal and the immediate post-war years, dual federalism in most servicing and financing areas was still part of the system as late as the early 1960s (Walker 1981, 76-95). New federal-state relationships emerged as a consequence of the Great Depression and World War II. In addition, during the Truman and Eisenhower years the federal regulatory, promotional and assistance roles increased. Increased federal-state collaboration in domestic programs gave rise to the concept of "Cooperative Federalism." Yet, by 1963 the degree of national activism was moderate, and most responsibilities were still left wholly to state and local discretion and control. The continued strength of the old non-centralized party system maintained its constraining impact on national decision-making.

The umpiring role of the federal judiciary was another vital force shaping American federalism. Under Chief Justice John Marshall, the Supreme Court protected its institutional independence under the separation of powers arrangement, asserted its authority to render judgment on unconstitutional actions of the national political branches and the states, and selectively protected Congress' powers under the Constitution. In the court of Marshall's successor, Roger Taney, a full-fledged doctrine of dual federalism emerged which expanded the states' police powers and capacity to regulate commerce in the absence of federal action. Yet, the Supreme Court still vigorously asserted its right to control state judiciaries in matters of constitutional interpretation.

During the 75 years following the Civil War, the Supreme Court played a highly activist role. From 1874 to 1937, 62 acts of Congress and 525 state laws were found unconstitutional. The latter development indirectly highlights the emer-

gence during this period of the states as laboratories of novel social and economic policies. By the end of the judicial era (1937), the Supreme Court had chalked up an impressive record of aggressively acting as the ultimate interpreter of the constitutionality of state laws enacted pursuant to their police powers and of national statutes passed in furtherance of Congress' commerce, conditional spending and taxing powers.

With the advent of the "New Deal" Court in 1938, a generally deferential position was adopted regarding Congress' interpretation of commerce, pre-emption and conditional spending powers. The question of national constraint was left largely to the central government's political processes. Yet, these processes were relatively restrained until the early 1960s, thanks to the continuing ascendancy of the "Conservative Coalition" and its general propensity to resist most federal domestic initiatives. On the other hand, civil rights, the 14th Amendment and efforts to include some of the Bill of Rights within the provisions of the 14th Amendment provided the basis for a renewed activism on the part of the Supreme Court.

Dual federalism as previously applied judicially was a dead doctrine after 1937. The states' police powers, however, expanded during the 1940s and 1950s, thanks in part to the Supreme Court's elimination of the "twilight zone" wherein neither the national nor state governments could regulate authoritatively various social and economic areas. By 1963, however, it was apparent that the judicial enlargement of the national sphere was at the expense of the states and the private sector. The Court's constitutional interpretation made the national government the more authoritative federal partner. Some scholars trace the beginning of the demise of the states' preferential legal status to this development.

### **Recent Trends: From Cooperative to Co-optive Federalism (1964-1980)**

American federalism and the web of federal-state-local relationships it engenders experienced their greatest challenges and transformations during the current intergovernmental era. By 1980, there were no vestiges of "dual federalism." The triumph of "Cooperative Federalism," however, was brief and transitional — leading to a "Co-optive Federalism" in the 1970s that receded somewhat during the Reagan years of ideological, then fiscal constraint. Contemporary federalism still is highly centralized. Its chief feature is "Permissive Federalism" as described by Michael Reagan: "There is a sharing of power and authority between the national and state governments, but . . . the state's share rests upon the permissiveness of the national government" (Reagan

and Sanzone 1981, 75). The chief reasons for this troubling transformation were the collapse of the old, non-centralized party system, the continued activism and centralizing tendencies of the federal judiciary and a parallel explosive expansion of the nation's domestic agenda until reined in by Carter in the late 1970s and Reagan in the 1980s.

The dimensions of the governmental transformation from 1964 to 1980 are so numerous that it would require a volume to catalog them. In the area of functional federalism, the federal government experienced major shifts from Presidents Johnson through Carter. In quantitative and qualitative terms, the national government's domestic role expanded exuberantly. Its breadth and depth far surpassed New Deal actions and, as analysis of the Reagan years indicate, the federal "heavy duty" domestic agenda was not drastically reduced as a result of major devolutions of the national roles and functions between 1964 and 1980.

A frequently overlooked but historic development of these years was the assumption by localities and especially the states of greater — even indispensable — fiscal, administrative and operational responsibilities in functional federalism. State governments became the paramount field managers, planners and partial funders of the majority and largest of the federal intergovernmental assistance and regulatory programs. States also experienced a dramatic revitalization of their historic role as a source of significant innovative policy initiatives. They carved out a more positive pattern of state-local relationships and again served as the dominant source of local fiscal assistance.

These developments resulted, in part, from the unwillingness of the national government to assume the responsibility for administering and fully funding most of its domestic programs, and, in part, from the transformation of the states during this 16-year period. At the same time, new regulatory thrusts and other national policy and centripetal federal judicial actions were reducing state and local governments in constitutional and jurisdiction terms to only a notch above the level of a pressure group. Thus, our federal system appeared by the late 1970s to be increasingly dysfunctional, given the centralization of major domestic policy decisions and the federal reliance on state and local governments and others to implement these policies. The efficiencies of a territorial division of servicing responsibilities, that a federal system helps assure, were being lost.

In addition to functional changes in federalism, from Johnson to Carter a transformation occurred in the representational and political areas. As to the representational, the Supreme Court's reapportionment decisions from 1962 to 1965 and Congress' enactment of the 1965 Voting Rights Act produced a dramatic democratization of state

and local representational arrangements. The electorates expanded in states that had systematically barred racial and ethnic minorities. State legislatures were recast to reflect the Court's one man-one vote dictum, largely ending rural hegemony. State and local politics have not been the same since that time. State policy-making processes are more accessible, responsive and representative than ever.

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*The deference that had been accorded states and localities eroded by the late 1970s so that Congress and administrative agencies treated them as just another interest group.*

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At the national level, however, far less favorable developments took place from the late 1960s through the 1970s. The deference that had been accorded states and localities eroded by the late 1970s so that Congress and administrative agencies treated them as just another interest group. Four reasons explain this. First, lobbying by states and localities for new aid programs and more funds, as pressure groups were doing, harmed their image. Second, the collapse, beginning in the mid-1960s, of the "Conservative Coalition's" domination of Congress and the concomitant increased control of congressional committees by northern and western Democrats combined to produce a major centripetal force. The third factor was that state and local elected officials could no longer exert the controlling voice in the nominating processes for elective national offices, as well as their own, as they had for 140 years. And fourth, the rise of more powerful pressure groups in Washington with centralizing agendas was another significant reason for the undercutting of state and local influence.

These developments produced the paradox: that as the governors moved their National Governors' Association headquarters to Washington, as the state legislatures merged three national associations and set up a major office there, and as the county and municipal associations beefed up their Washington staffs — all with a view toward presenting the views of their respective groups — the clout of state and local governments in the nation's capital was eroding.

Many factors contributed to the demise of the "old party system." One was the decline in state and local party control over the nominating processes in their own jurisdictions, thanks to the increased use of primaries, the impact of heavy state governmental regulation, national party requirements that pre-empted certain state and local party decisions, expansion of merit coverage of state and local employees, and a new generation of voters who were more independent, issue-

oriented, and less dependent on state and local political organizations for services.

Another fundamental cause of party decline was the emergence of tough competitors who took on assignments that political parties formerly monopolized or dominated. Voter contact now is largely achieved through the independent mass media rather than by party stalwarts and mechanisms. Hired consultants provide much of the expert assistance in campaigning and a range of non-party providers are the main sources of campaign funds. The historically weak party role in Congress was further undermined by reforms adopted in the early 1970s and by the explosion in the number and types of Washington-based interest groups (ACIR 1986, 223-236).

Despite and partly because of these developments, state and national party organizations have endeavored to adapt to the new milieu. At the national level, party organizations — the Republicans more than the Democrats — are stronger than ever. Their financial aid to state parties, direct fund-raising assistance, polling and data processing capacities, voter registration efforts, and candidate recruitment and training reflect activities and roles vis-a-vis state parties that would have amazed their predecessors of a generation ago (ACIR 1986, 85-86).

One might question whether these intra-party federalist changes can correct the overall imbalance in the system. The answer is "No." The electorate is no more strongly committed to a party than it was two decades ago. A majority of those expressing an opinion in a 1983 survey indicated they preferred to work through interest groups to advance their political concerns (ACIR 1986, 52). Moreover, the potent role of the media, PACs, consultants and pressure groups seems unlikely to fade.

The federal judiciary's record throughout the 1964-1980 period was to aggressively expand trends initiated in the 1950s. In the 1960s, the federal court system upheld controversial congressional enactments and assumed the role of "a leader in the process of social change quite at odds with its traditional position as a defender of legalistic tradition and social continuity" (Kelly and Harbison 1976, 856). Generally, judicial decisions enlarged national power by placing severe limits on the states. The few instances where federal courts reflected some sensitivity to a powerful state role included reapportionment and educational finance cases that strengthened the states.

Some observers predicted a reversal or reduction of the Warren Court's libertarian and egalitarian tendencies with the appointment of Chief Justice Warren E. Burger. However, analysis of key 1970s' civil rights and liberties cases indicates the Court maintained its sensitivity to libertarian and racial justice values. In cases involv-

ing the criminal defendant rights, sex discrimination, local zoning ordinances and state legislative appropriation of federal grant funds, however, the Court exhibited concern for state autonomy and awareness of intergovernmental "comity" and "forbearance."

Yet, in constitutional areas of crucial significance to federalism — the conditional spending power, regulation of interstate commerce, the supremacy of congressional enactments and taxation — the Court generally played a nationalizing role (Walker 1981, 135-157). Only in *National League of Cities vs. Usery* (1976) did the Court by a 5-4 vote enunciate an extraordinary exception to this "trend." But later cases eroded *Usery's* significance, until the decision was specifically overturned in the *Garcia* (1985) case.

### Reagan's Record: 1981-1988

Reagan federalism as revealed in his 1980 campaign speeches and early term proposals reacted to and rejected intergovernmental developments of the previous 16 years: the massive expansion of the national agenda; the highly centralized policy-making process; the regulation of state and local governments and the private sector; the resulting administrative ineffectiveness, economic inefficiencies and lack of accountability; the increasingly co-optive approach of federal legislators, administrators and regulators; the dangers of interest group ascendancy; and the lack of clear national domestic purposes.

President Reagan ignored, as did most politicians, the positive results of earlier programs (Schwarz 1988). For example, from 1960 to 1980, the number of Americans living in poverty was halved and the gap between the economically stronger and weaker did not widen despite the massive influx of "baby boom" generation job applicants. An additional 30 million Americans joined the work force, in part because of federal actions. Life expectancy lengthened and child mortality rates declined. A revolution was achieved in civil rights and liberties.

These salutary aspects of the Johnson-Nixon-Ford-Carter years were overlooked, while the negative ones were highlighted. Hence, Reagan's federalist creed stressed: a severe reduction in the federal intergovernmental role, a major devolution of program responsibilities, deregulation, a reduction in government activism and a return to a federal-state partnership in intergovernmental relations.

The administration's drive to reduce the federal intergovernmental role achieved an absolute reduction of \$8 billion (from the Carter figure) in grant programs for fiscal year 1982. However, the projected slashing of federal aid over the following three years never materialized. What is more, during Reagan's second administration, federal

aid increased to nearly \$115 billion for fiscal 1987 (ACIR I 1987, 15; U.S. Census Bureau 1987, 2). This glacial increase in federal aid, however, produced a 25 percent aid reduction in constant dollars between 1978 and 1988 and a 22 percent decline as a proportion of state-local revenues between 1981 and 1987.

Another dimension of this drive to reduce the federal role was the reduction in grant programs from 539 in 1980 to 405 by January 1984. Most reductions were initiated in 1981 and new programs gradually increased after 1982. The increase in grant programs to 435 by 1987 suggests that the dynamics of program proliferation that characterized the 1970s have not been totally eclipsed by retrenchment concerns.

In related moves to devolve programs and responsibilities to state and local levels, the administration scored its greatest successes in 1981. Some 60 aid programs were scrapped by the Omnibus Budget Reconciliation Act (OBRA) and 77 were merged into nine new block grants. By the end of 1986, the total reached 12 as Congress enacted three more in three years and continued the older entitlement Community Development Block Grant. Only one of the 1981 clusters proved inoperative. The renewal of general revenue sharing for local general governments in 1983, with White House support, marked another phase of this devolutionary drive. Revenue sharing's demise in 1986 with the administration's approval was the kind of federal unilateral devolution that subnational governments resent. The Environmental Protection Agency's assignment of greater program authority to states under its regulatory programs was another devolutionary action.

To fully gauge the significance of these centrifugal achievements, they should be placed in a broader context. The major Reagan effort to effect a massive devolution of program responsibilities reached a total impasse by the fall of 1982. Not to be overlooked is that in 1987 federal outlays of block and general purpose grants accounted for only about 14.4 percent of the total budget, compared to 20 percent for the last year of the Carter administration. Moreover, most major domestic programs of the 1960s and 1970s are still on the national agenda (regional economic development and housing were the chief victims of budget cuts). Many enactments of the 100th Congress (catastrophic illness, welfare reform, clean water amendments, housing, trade, etc.) suggest a rise in national activism softened by ingeniously inexpensive draw-downs on the federal fisc.

Intergovernmental deregulation as such was not the basic focus of the Reagan administration; instead, the curbing and softening of the regulatory process was sought. The softening strategy involved appointing Reagan loyalists to key regulatory posts; cutting agency personnel; relaxing, if not forgetting, agency procedures; and estab-

lishing a centralized review of proposed new or changed regulations. All these administrative actions slowed dramatically the rate of issuances in the early Reagan years and considerably eased the burden for the private sector, but only marginally for state and local governments (Conlan 1988, 217-218).

No major deregulatory legislative initiative — other than the block grant proposals — accompanied these efforts, however. Moreover, Congress' propensity to pre-empt and regulate did not slacken. Moreover, the administration supported trailer truck and teen-age drinking regulations and mandated procedures for responding to reports of hospital neglect of handicapped infants. The administration also led the fight for tougher conditions on social welfare programs.

The administration's philosophical goal of reducing governmental activism met with little success. From 1980-87, federal spending rose from \$602.1 billion to \$1,067 billion, and state outlays from \$108.1 billion to an estimated \$209 billion (ACIR II 1988, 22). Combined outlays rose from 33 percent of GNP in 1981 to 35 percent six years later (ACIR II 1988, 22).

Another facet of national activism is the government's credit programs. Following a slight decline in new direct federal loans between 1980 and 1988, new guaranteed loans soared to an outstanding balance of \$507 billion by the end of 1987. Federal government-sponsored enterprises surpassed the \$580 billion level in loans outstanding by 1987. By 1987, the federal government directly or indirectly had influenced the allocation of \$1.3 trillion in outstanding credit to homeowners, farmers, foreign governments, exporters, utilities, shipbuilders, and state and local governments. This contrasts markedly with the grant-in-aid story. Governmental activism, as reflected in expenditures and credit programs, has not been tamed, despite the curbing of the federal grant portion of domestic program outlays.

With Reagan's unstated goal of returning to the pre-1964 pattern of intergovernmental relations, the score board indicates major successes. The states have been the prime recipients of all the new block grants. Four governors were the prime spokespersons for state and local governments during the "great debate" over the president's 1982 "Big Swap" proposal. The states were assigned the chief responsibility for administering the regional "clearinghouse" process under Executive Order 12372. During 1981-1987, the state share of total federal aid rose from 75 percent to 83 percent. With the scrapping of the Urban Direct Action Grant program in 1988 and probably the last remaining major federal-local block grant (the entitlement Community Development program) in 1989, the state share will approximate what it was in the final Eisenhower years. The union of public interest groups with strong

state leadership in advancing federal welfare reform helped bring about the first overhaul of the program since its inception in 1935.

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*This shrinking federal role has increased state funding, program and regulatory responsibilities as states attempt to make up federal cuts.*

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On a more negative note, the states have borne the brunt of implementing stiff conditions added to welfare programs during the Reagan years. They have had to finance a larger share of some programs based on changes in matching ratios. States also have been affected by the expansion in federal regulations since 1981, including uniform federal standards on truck size, a national minimum drinking age and tougher environmental protection provisions (Conlan 1988, 211-217). Above all, states and localities have been significantly affected by "de facto federalism," as the federal fiscal role in intergovernmental programs has gradually shrank or disappeared. For the localities, all but a few direct federal-local grants have expired in the past four years. This shrinking federal role has increased state funding, program and regulatory responsibilities as states attempt to make up federal cuts. From the state vantage point, Washington-initiated actions since 1981 have undercut the basis for real partnership. Such a relationship must be founded on mutual trust and shared decision-making on prime concerns.

An assessment of the Reagan record would be remiss if it did not examine the administration's effect in changing attitudes. State and local officials no longer look to Washington to solve problems as many did in the late 1960s and 1970s. This is not to say the national government is being ignored. Far from it. Too many legal, regulatory, pre-emptive and fiscal actions are taken there to permit that luxury. But the images of Uncle Sam as the sage problem solver and bountiful banker have faded in the minds of state and local governmental officials, the electorate and most leaders of Washington pressure groups.

A positive result from this change in attitude has been the revival of the states' historic role of launching unusual policy initiatives. In primary and secondary education, work-related welfare reform, consumer protection and economic development, states initiated innovative, wide-spread and, in some instances, expensive actions. This state (and to a lesser degree local) renaissance following the severe recession of 1982 prompted some to proclaim the advent of the more balanced federal system sought by reformers in the 1970s (Conlan 1988, 228-229).

## Federalism's Current Condition

With the Reagan years at a close, one way to gauge the health of American federalism is to examine the differences and similarities between its conditioners and condition in 1980 and those of today.

Regarding the differences, at least six developments highlight the sharp contrasts between American federalism in the last year of Presidents Carter and Reagan.

1) Most of today's national agenda is markedly different from nine years ago. Witness the overriding challenge of eight years of three-figure (billions) national deficits and the near tripling of the national debt, continuing trade deficits and the advent of the United States as the world's largest debtor nation, efforts to sustain the prolonged economic growth without inflation, the pent-up popular and political demands for renewed governmental activism, the struggle to maintain political consensus on the usefulness of most domestic (grant) programs and the uncertain disciplining effect of the two deficits.

2) The current operational role of the federal government in the federal system is quite unlike that of 1980; in the sustaining, funding and supervision of intergovernmental programs, the national government's role is still significant. Yet, it is not as extensive, expensive and entangling as it was in 1980. The shortening of Washington's state and local agenda, the proportionate decline in its funding of programs, the slash in the number of grant recipients (especially localities) and the easing of certain conditions in intergovernmental programs are signs of this moderately reduced federal role. In addition, state and local governments have assumed a larger role as a result of greater fiscal efforts and expanded policy initiatives. These developments suggest a slight tilt in power to the states, but not to the extent of undercutting the national government's policy ascendancy in key programs and regulatory areas.

3) The recognition given now to the states' pivotal role in the system stands in contrast to the earlier failure to recognize that during the 1970s states had become the prime planners, administrators and partial funders of most major federal domestic programs. The reductionist posture of the national government, the surge of state activism, and the greater local governmental dependence on states help explain this greater awareness of the states' indispensable functional roles in the system (Osborne 1988).

4) As a result of these changed federal, state and local relationships, the federal government is no longer so broadly indicted as it was in 1980. Less than a decade ago, the federal system was described as dysfunctional, out-of-control and pressure group propelled. Put differently, the

grim gridlock politics of the national deficits have refocused perceptions of the problems and perils of our federal system. Now, it is a matter of the minimum acceptable level of federal participation and what can be expected of state and local governments to compensate for federal defaults on domestic responsibilities.

5) State and local efforts to be represented at the national level are more diverse, difficult and depressingly frustrating than they were in the 1970s. Their lobbying then chiefly focused on grant programs — their conditions, funding, allocation and management. In the 1980s, these concerns have not disappeared, though the growth of most grants is at a glacial pace. In addition, state and local spokesmen must focus on three other major fronts: regulatory, taxation and judicial. Each has presented major problems to state and local governments over the past eight years.

6) Turning to the four criteria for evaluating governmental systems — economic efficiency, administrative effectiveness, accountability and equity — different assessments are made regarding each of these compared to those of the late Carter years. Better program targeting (i.e., the "safety net" cluster), the pruning of marginal and ineffective grants, the federal tax reform act of 1986, and the remarkable resourcefulness of current state and local revenue systems (e.g., state and local general revenues experienced a 42 percent surge from 1981 to 1987) are all signs of greater economic efficiency. The fewer partners, conditions, regulations and dollars for federal grants along with the re-emergence of state and local government have tended to enhance administrative effectiveness at all levels. To the extent that these developments have produced a disentangling of interlevel program responsibilities and helped clear the lines of intergovernmental communication in the remaining 430 plus grants, accountability has been enhanced. Regarding equity, concerns have been raised about the fairness of tax actions taken from 1981 to 1986. In addition, spending levels fell for programs aiding the working poor while the poverty figure rose to 13 percent. The comparatively low public expenditures on poor children compared to extraordinarily high ones for the middle-class elderly suggest fundamental faults in our understanding of the minimal standards for social decency.

### Continuing Trends

Trends present in 1980 that continued unabated during the Reagan era included:

1) The Supreme Court continued to favor centralized government. The Court includes seven appointees by Republican presidents (four of them Reagan's) and the conservative Justice

White (a Kennedy selection). Yet this ostensibly conservative court continues to favor the central government in about four out of five instances. *Garcia vs. San Antonio Metropolitan Transit Authority* (1985), *South Carolina vs. Baker* (1988) and *J.A. Croson Co. vs. City of Richmond* (1989) are the tip of the judicial centripetal iceberg.

2) Congress' inclination — frequently buttressed by administration support — to regulate and pre-empt has continued during the Reagan years. If anything, this trend of the 1970s has been strengthened, since in a retrenchment period regulations can be just as significant politically as grant programs, and they usually involve few federal dollars.

3) The power and influence of the major political parties are as weak today as in 1980. Despite efforts to strengthen the role of elected officials in Democratic national conventions, the national party units are as authoritative now as then and the state and local organizations remain weak (Kayden, 1981, 276). Moreover, the parties continue to relinquish many of their functions to the media, PACs, private consultants, pollsters and pressure groups. State and local officials still are not accorded deference by congressional committees, national administrative bodies and the Supreme Court (ACIR 1986, 242,243).

4) Yet another dimension of adhering rigidly to the status quo is the federal fixation with relying on non-federal employees to implement domestic (and sometimes foreign) policies. Much has been made of the Reagan emphasis on privatization, but ever since FDR and especially since LBJ the national government has relied on "third parties" to administer most domestic initiatives (Salomon 1980, 2-4). The Reagan years are no different in this respect, except that the practice has been extended to defense and foreign policy efforts that would have been deemed unthinkable a few years back.

5) The political and popular appetites for a welfare state are as strong now as they were in 1980. The activist surge was reined in slightly by President Carter's last two budgets. Today, pent-up domestic pressures are being gradually released. Witness the remarkable legacy of the 100th Congress: welfare reform, housing the homeless, catastrophic-illness insurance, clean water amendments, stronger civil rights, drug control and transportation (*Economist* 15-21, Oct. 1988, 29-30). Note also President Bush's domestic agenda — environmental: wetlands preservation, outdoor recreation, clean air renewal, ocean dumping, and superfund viability; education: head start, magnet schools and excellence in teaching; and health: child care, and Medicaid "buy in" for 37 million uninsured Americans. The Democratic Congress has on its domestic agenda such "carry overs" as the clean air act renewal, banking reform, savings and loan bailout, child care, paren-

tal leave, and the required statutory renewals of child nutrition, school lunch, food stamps, library services, vocational education, education of the handicapped, Indian education, energy policy and conservation programs. Congress and the president will continue to joust over domestic programs and, despite budget constraints, they will adopt new and re-enact old measures just as in 1980. However, some will have ingenious to non-existent funding mechanisms.

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*Localities and states continue to be incapable of asserting by any means an authoritative role in national governmental actions affecting their jurisdictional and operational integrity. This does not bode well for the future of American federalism.*

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6) The Washington scene also resembles the 1970s in the policy-making model now in ascendancy. That model is the neo-Madisonian, pluralistic, multiple-actor scenario that dominated President Carter's term, the Reagan administration from 1983 to 1988 and probably will characterize Bush's term. What this means is that the president is an actor on the Washington stage; that Congress is as important in domestic matters as the executive branch; that interest groups remain powerful, plentiful and persuasive, though not as much as in the 1970s; that state and local governments must exert extraordinary efforts to compete successfully with potent conflicting forces; and that the budget dominates this policy-making approach and the attention of these diverse players just as it began to at the end of the Carter years. This non-hierarchical, pluralistic mode of decision-making can produce the expensive and harmful effects of gridlock budgetary politics as happened from 1982 to 1987. It also can skillfully resolve seemingly irresolvable issues such as, Social Security bailout, 1986, tax overhaul and welfare reform. Let us hope the latter cooperative approach is the version of this traditional American approach to policy-making that prevails.

As this analysis shows, many of the changes since 1980 are welcome ones: the somewhat smaller federal domestic agenda, the growing bipartisan consensus on domestic priorities, the less panoramic partnership principle and the remarkable resilience and responsiveness of the localities and states. These, in turn, suggest far less systemic overload, more balance and a degree of vitality in our federalism that has astonished many observers.

Yet, the continuities with the past are just as significant and some are not promising. Above all is the verdict that Reagan and Sanzone's "permiss-

sive federalism" description is still valid. Most state and local actions could have been initiated, modified or pre-empted by the central government, budgetary constraints permitting. Localities and states continue to be incapable of asserting by any means an authoritative role in national governmental actions affecting their jurisdictional and operational integrity. This does not bode well for the future of American federalism.

### The Future of Federalism?

If the condition of American federalism is functionally good, but systemically disturbing, what does this mean for the future?

One school of federalist thought is optimistic (Conlan 1988, 228-231). The positivist activism of state and local governments will continue, so its members argue, and there will be no return to the days of "overwhelming Federal dominance" (Herbers 1987, 28, 34). The fiscal dilemmas confronting the national government, the public's demand for welfare programs and the better fiscal position of state and local governments support this interpretation. A more historically based version holds that federalism is a cyclical affair and that "the states . . . are taking on new life and moving in response to the demands of modern society" (Keller 1988, 57). The "tensions and discontents of modern life have increased the need — social, even psychological — for units of government" that have the "geographic capabilities" to govern effectively, while not being beyond the "reach and comprehension of the average citizen" (Keller 1988, 57).

A second more pessimistic assessment of federalism's prospects rejects this functional theory as unmindful of the long-term centripetal dynamics of our system. This view, which is largely my own, holds that "the systemic position of state and local governments, while operationally powerful, is weak constitutionally and politically. . . . Reagan federalism . . . has done little to . . . place the American states on a par with their counterparts in . . . other federal systems" (Bender and Steven 1988, 344). The combination of centralizing national judicial decisions and political developments have placed the localities and states in a second-class position, compared to that of a generation ago. The change in relations between the levels is probably permanent. The states' inability to convert their functional clout into political power and balanced treatment before the federal judiciary leaves them in a perennially precarious position — legally, jurisdictionally, politically and operationally. This nightmarish condition confronts none of their counterparts in Australia, Canada, Switzerland or West Germany.

A third forecast focuses on correcting legal deficiencies. This view holds that only constitutional and judicial changes will restore the states to a healthy position. The judicial portion of this interpretation emphasizes that because nearly half of all federal judges are Reagan appointees along with four of the Supreme Court justices and at least two future Supreme Court appointments will be made by Bush, there will be a solidly conservative federal judiciary in the near future, including the Supreme Court. With this would come reversals of recent centripetalist court decisions, starting with *Garcia* as then-Justice Rehnquist promised in his dissent.

The constitutional facet of this formulation for the future is provided by former New Hampshire Gov. John Sununu's (and the National Governors' Association's) proposed amendment to the U.S. Constitution. Were it adopted, should two-thirds of the states memorialize Congress for a specific constitutional change, Congress would be required to vote on the proposed amendment. A two-thirds vote in both houses would be needed to stop the measure from going back to the states for ratification (Sununu Fall 1988, 8). Given Sununu's pivotal chief of staff position in the Bush administration, it would be a mistake to dismiss this proposal out of hand.

The judicial part of this third scenario for federalism's future is on firmer ground. Yet, judicial observers might caution against expecting a massive reversal of centralizing decisions. The record of three of the five Nixon-Ford Supreme Court appointees is instructive, because they ultimately favored the position of the central government as much as that of the states and localities in federalist cases. So there is uncertainty surrounding this scenario as well.

What then seems certain? First, the nation's need to confront the deficit will have a constraining effect on Washington's domestic activist propensities. That will increase pressures on states and localities to help fill the gap left by the federal government's preoccupation with its floundering treasury. Some shifts in the Court's composition are inevitable, but not a mass conversion to any dual federalist position. Also unlikely are significant decentralizing or devolutionary actions by political parties and pressure groups.

All this prompts the guesstimate that elements of all three of these scenarios may play out, but

with the author of the second and more pessimistic script writing the final version of this next act of American federalism's 200-year-old drama.

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## A Historical View: *Federalism at the Bicentennial*

by A. E. Dick Howard

*History shows that federalism is a fundamental constitutional value essential to protecting American democracy.*

American federalism has never been easy to define, to understand or to explain. It is as much the product of historical circumstances as of philosophical design. In the colonial era, the remoteness of British authority encouraged colonists to think in terms of *de facto* autonomy, whatever London's juridical authority. Thus, in the 1760s when the colonists were fashioning arguments against British policies (especially those looking to the colonies as a source of revenue), they had no difficulty distinguishing between policies that might legitimately be laid down by the central authority and those requiring assent at a more local level.

The story of how the delegates at the Philadelphia convention accommodated opposing views on state and national powers is a familiar one. There were those, like James Madison and Edmund Randolph, who conceived the overriding need to be the creation of sufficient power in the national government to deal with national problems. There were others, like George Mason, who feared excessive consolidation. There were, of course, the differences between small states and large, and varying economic interests, mercantile and agricultural.

The plan of government finally agreed upon was a compromise among varying views. Madison

(1787) described the Constitution as something of a hybrid, "neither a national nor a federal Constitution, but a composition of both."

The nature of the federal union thus constituted remained the subject of sharp debate. In the famous Webster-Hayne debate in 1830, South Carolina's Robert Y. Hayne saw the Constitution as a compact among the states, while Massachusetts' Daniel Webster argued that the people as a whole, not the states, created the Constitution (Baxter 1984).

Civil War and Reconstruction settled by force what intellectual argumentation had not resolved — the indestructible nature of the Union. And the Reconstruction amendments, especially the 14th, profoundly affected the balance between national and state powers. The 14th Amendment's due process and equal protection clauses planted the seed of federal judicial power, which has become a garden — beautiful to some, a tangle to others — of federal judicial gloss in our own time. And the amendment's fifth section, empowering Congress to enforce its substantive provisions, furnished the basis for extensive new federal legislation such as the Civil Rights Acts of both the 1860s and the 1960s.

In antebellum America, federal power, notwithstanding Chief Justice John Marshall's generous view of that power, was sparingly used. Not only were criminal justice, commercial law and domestic relations essentially determined by state law, but also promotion of economic enterprises was largely undertaken by the states. Indeed, the states competed with each other in the building of canals and other internal improvements and the subsidy of private ventures, very much as nations might do.

Taking the long view, however, especially of the period beginning in the "gilded age" of American

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capitalism, one discerns powerful forces tending to centralize power at the expense of the states. As economic enterprise flourished, spilling across the continent, pressures grew for national measures; seminal examples were the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890. In the 1930s, the social and economic disruptions of the Great Depression were beyond the abilities of the several states to repair, and the New Deal looked to national remedies.

Other forces have tended to enhance national powers. The needs of war and national defense tend, in all times and places, to concentrate power, and the history of American government has been no exception, as the Civil War and the world wars remind us.

Notions of justice and equality also have been powerful forces tending to the enhancement of national power. Egalitarianism has been a strong idea in American history (although not without its competitors). If people ought to be treated equally, a person of egalitarian instincts would reason, how better to assure that outcome than to have one government, the federal government, assure uniform treatment?

Such egalitarianism is especially evident in the decisions of the Warren Court. That tribunal made liberal use of the 14th Amendment's equal protection clause in mandating legislative reapportionment ("trees don't vote, people do") and in acting against state laws discriminating on the basis of color. The Warren Court's quest for a more just society found its outlet in such decisions as those using the 14th Amendment to impose the mandates of the Bill of Rights upon the states. In all such decisions, the Court, of course, laid down national standards to supersede state norms or practices.

Sometimes the growth of national power has been in response to problems whose scope and scale defy state regulation. Ensuring the free flow of interstate commerce is a ready example, one obviously in the minds of those who drafted Article I, Section 8, of the Constitution. Sometimes national power has been seized upon by particular interests who see federal laws or regulations as an apt vehicle for by-passing local preferences. The proliferation of conditions attached to federal grants-in-aid illustrate the popularity of this approach. Frequently the displacement of state or local authority in such cases has little to do with any reflective judgment about which level of government ought to be trusted to decide on a given policy; often the decision turns simply on political muscle.

Thus, forces beyond the states' direct control have operated to account for much of the growth in federal power in the nation's 200 years of history. But the states themselves often have contributed to the occasions for Congress, the federal courts or some other instrumentality of federal

power to step in and deal with problems previously left to the states to solve. Those who complain of federal aggrandizement must reckon first with the fact that the states' own record has often been a poor one.

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In the years following World War II, for example, many of the states proved unwilling to face up to the demands changing times were placing upon them. Demographic changes were not reflected in the apportionment of seats in state legislatures. When the Supreme Court decided *Baker vs. Carr* in 1962, Tennessee's General Assembly had not reapportioned legislative districts since 1901, despite the state constitution's mandate that representation be allocated on the basis of population. Justice Clark, in a concurring opinion, said that he would not consider supporting judicial intervention "into so delicate a field if there were any other relief available to the people of Tennessee." But no such relief was possible. Tennessee's Legislature had "riveted the present seats in the Assembly to their respective constituencies and by the vote of their incumbents a reapportionment of any kind is prevented."

Likewise, the states' record in the field of civil rights was often a sorry one. Blacks were systematically denied the vote, the vehicle being biased registration requirements having their roots in state constitutions and laws adopted with the undeniable purpose of purging the voting rolls of black voters. (Indeed, a perusal of the debates in some of the state constitutional conventions around the turn of the century makes sobering reading.) State laws segregated blacks into separate, and usually inferior, public schools. Blacks rode the back of the bus and state laws joined with local custom to enforce a segregated society. Small wonder that civil libertarians have argued that the states, far from being reliable protectors of civil rights and liberties, are instead a threat.

In academic circles, there often has been a tendency to dismiss federalism. Some scholars seem to consider it unfashionable, even naive, to take federalism seriously. In a searching review of the literature, Harry N. Scheiber points to the comment by a political scientist, William H. Riker (1969, 135): "Almost no ordinary citizens of the United States . . . concern themselves often or seriously about federalism." For him, as Scheiber (1980, 664) observes, federalism is a legal fiction, a structure making little difference in the way a polity is governed. Much in the manner that a

western missionary of the 19th century might have approached tribal customs. Riker (1969, 136) added, "Since some lawyers appear to believe in it (federalism), we must, I suppose, concede that it exists." Legal realists — the late Karl Llewellyn (1934) is a prime example — have denigrated federalism. Indeed, they have tended to look upon federalism — certainly upon arguments seeking to give legal and constitutional significance to federalism — as being, not simply unsophisticated, but downright harmful.

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*Anyone who looks at the staggering federal deficit and considers the mountain of debt we are piling upon our posterity surely must pause before assuming that Washington knows better than Olympia or Raleigh or Augusta.*

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### The Contemporary Scene

Recent years have seen a revival of interest in federalism. For a time it seemed that the simple-minded notion that "bigger is better" had as its corollary the equally simplistic attitude that somehow national solutions surely were better than local ones. Federal initiatives, many assumed, were bound to be fairer, more efficient, more responsive to social needs. Such notions have been undermined by widespread disillusionment with the federal government's record in many fields. Anyone who looks at the staggering federal deficit and considers the mountain of debt we are piling upon our posterity surely must pause before assuming that Washington knows better than Olympia or Raleigh or Augusta. The states may have been irregular guardians of the public trust, but federal officials are no strangers to the abuse of power and office, as the revelations of recent times concerning Iran and the Contras remind us.

Concerns about the centralization of power have by no means been confined to those whose politics might be characterized as conservative. It is easy to assume that arguments for federalism reflect conservative political values. One recalls how federalism — or "states' rights," as it was often called — was relied upon by critics of the New Deal, civil rights legislation and U.S. Supreme Court school desegregation decisions. But, especially since the 1960s, liberals and radicals have worried about centralization. Thus there were calls for local community control for alternative outlets of local opinion.

Federalism recently has become again a matter of serious political debate and concern. At the National Governors' Association meeting in 1980, then-Vermont Gov. Richard Snelling, a Republican, (U.S. ACIR 1982, 3) complained, "The role of

the states has been eroded to the point that the authors of the Constitution would not recognize the intergovernmental relationships they crafted so carefully in 1789." Then-Arizona Gov. Bruce Babbitt (U.S. ACIR 1982, 3), a Democrat, agreed: "The federal system is in complete disarray. Congress has lost all sense of restraint . . . The 10th Amendment, reserving powers to the states, is a hollow shell." President Ronald Reagan (1983, 75) in his first State of the Union message, made federalism a central motif:

"Our citizens feel they have lost control of even the most basic decisions made about the essential services of government, such as schools, welfare, roads, and even garbage collection. They are right.

"A maze of interlocking jurisdictions, and levels of government confronts average citizens in trying to solve even the simplest of problems. They do not know where to turn for answers, who to hold accountable, who to praise, who to blame, who to vote for or against."

President Reagan's proposal, which he called the "New Federalism," was to have the federal government assume responsibility for Medicaid in return for the states' taking over AFDC and food stamps. The president also proposed to turn back to the states 35 federal programs (in such areas as education, transportation, social services, and community development), with a trust fund to finance them.

Reactions to the Reagan proposals from the states, localities, Congress and the press were mixed. There was a fair degree of consensus in many quarters on the need to reform the federal system, but little agreement on specifics.

Unfortunately, appeals to federalism often obscure other objectives, ends for which the language of federalism is simply a convenient vehicle. It is possible to view the New Federalism proposals as being more concerned with reducing government and increasing efficiency than with such abstract notions as increasing political responsibility and civic health. Such a conclusion is bolstered by reading Reagan's (1985:69) inaugural address of January 21, 1985, in which there is but a single sentence mentioning federalism, but extensive attention to limiting government.

Whatever the political objectives of the president — or the governors who speak up at NGA conferences — such proposals as the New Federalism do help bring questions about the health of the federal system into public debate. Other groups have entered the dialogue. A commission chaired by then-Virginia Gov. Charles S. Robb and U.S. Sen. Daniel J. Evans of Washington issued a report (1985), *To Form a More Perfect Union*, containing proposals for "sorting out" important government functions between the federal

government and the states. The United States Advisory Commission on Intergovernmental Relations (ACIR) has been especially active in assessing the viability of American federalism. Its concern is summed upon in a 1981 report in which ACIR (1981:101) concluded, "Contemporary intergovernmental relations . . . have become more pervasive, more intrusive, more unmanageable, more ineffective, more costly and, above all, more unaccountable."

### Reforms and Innovations

One who argues that the states ought to be taken seriously should be prepared to answer the question: Are the states up to the job? Are they worthy of accepting responsibility?

In the 1960s one might have paused before giving a "yes" answer to this question. In the state legislatures, principles of democratic presentation were submerged by glaring malapportionment and fewer than half of the states required their legislatures to meet annually. When it did meet, the typical legislative body was poorly staffed and ill-equipped to deal confidently with the art of legislation. State courts were seen to lack an air of professionalism and their opinions too often failed to command the bar's respect. State criminal justice systems were faulted for failing to meet minimum levels of fairness and due process.

Today things are far different. The ACIR (Peirce 1982, 374-75) points to a "quiet revolution" of reform that took place in the states during the 1960s and 1970s:

"The structurally and procedurally stronger, more accountable, more assertive states of today, performing a major intergovernmental management and financing role, bear little resemblance to the generally poorer organized and equipped and unresponsive entities of a quarter century ago."

Thus ACIR (Peirce 1982) concludes: "The transformation of the states, occurring in a relatively short period of time, has no parallel in American history."

Some of the reforms in state government were mandated by or resulted from federal law. The Supreme Court's reapportionment decisions, requiring that representation be based on population, produced state legislatures more fairly reflective of the people who voted in state elections. Civil rights laws, especially the voting Rights Act of 1965, eliminated the most overtly racist practices.

Other reforms came from within. The 1960s and 1970s saw intense interest in revising or re-writing state constitutions. At the turn of the century, state constitutions commonly were detailed, complicated documents. Resembling more nearly codes of law than constitutions, they often hob-

bled responsive or responsible state government. The state constitutions of postwar America are generally shorter and simpler than their predecessors, emphasizing those fundamentals that belong in a constitution. Administrative and executive powers are focused on the governor, there are fewer restraints on the legislature and the judicial articles point toward a more competent system of courts (Howard 1974, 9). Still other reforms have taken shape in legislation or in executive actions. A few innovations and reforms in state government will be sampled here, some resulting from constitutional revision, others flowing from legislative or executive initiatives. They should serve to give something of the flavor of vitality that has brought the states a long way from the malaise and incompetence that often struck the observer a quarter of a century ago.

State governors are capable of greater leadership today, by and large, than was true at mid-century. They have broader powers of appointment and there are fewer statewide elective officers to make executive management difficult, as was the case when the commissioner of agriculture or other such officers were elected independently of — and hence not answerable to — the governor. Governors serve longer terms. In 1955, 19 states limited a governor to a two-year term; by the 1980s, only four states retained this limitation. In 1955, 17 states forbade a governor to run for a second term; by the 1980s, only four states forbade reelection (*Book of the States* 1956, 502; 1980, 184-85; 1982, 151). The apparatus of state administration has seen thorough overhaul. In the past 20 years, more than half of the states have undertaken major executive branch reorganization. (Compare the failure of "Little Hoover" commissions in the states in the 1940s and 1950s.) The vast majority of states have a cabinet form of government, replacing chaotic systems featuring countless independent departments and boards. In Virginia, for example, until 1972, there was no cabinet; 95 agencies reported directly to the governor (U.S. ACIR 1985, 143-55).

Political scientist Larry Sabato (1980, 57) sums up how we may view today's governors. They are, he reports, "younger, better educated than ever and more thoroughly trained for their specific responsibilities. Greater numbers have concentrated beforehand on developing legislative expertise, while fewer come directly to the executive from minor offices."

State legislatures are no longer the "sometimes governments" of yesteryear — meeting a few weeks every other year, badly malapportioned, lacking adequate staff, ill-paid and controlled by small cliques or powerful special interests. In 1940, only four states had their legislatures meet annually; by 1960, the figure had climbed to 13 and today it is 43 (36 states mandate annual sessions, and all but a half-dozen state legislatures

find some way to meet annually). All states now have legislative research and bill drafting services and fiscal and policy review and analysis (although one should note that the quality varies considerably). The memberships of today's state legislatures better reflect the states' ethnic, racial and gender patterns (for example, in at least nine states women comprise more than 20 percent of the legislature, a far higher proportion than is the case in Congress) (U.S. ACIR 1985, 65-126).

Alan Rosenthal, director of Rutgers University's Eagleton Institute of Politics, observed in 1981 (341) that the state legislative process has become more "open, individualistic, professionalized, democratic" and concluded that today's state legislatures are the strongest in our history.

The emergence of modern, unified courts (mirroring the example set by Article III of the Federal Constitution) marks today's state judiciary. Stronger state courts are made possible by better training, an improved selection process and better staffing, including professional judicial administrators. State judicial-fitness commissions enable the states to deal with problems of judicial misconduct, poor health or incapacity. Bodies such as the National Center for State Courts at Williamsburg have come into being to bring important professional and intellectual resources to bear on how the state courts go about their work (Uppal 1980).

Justice Brandeis once referred to the states as laboratories. He saw the states as experimenting with new ways of tackling social and economic problems. Failures need not be imitated, successes would inspire emulation. A few examples of state innovation and creativity will serve to show that Brandeis' hope for the states was not an idle one.

No functions are more central to government's ultimate performance than finance, revenue, budgets and costs. Zero-based budgeting requires that each program, whether new or existing, must be justified in its entirety each time a new budget is formulated; this concept was first adopted in Georgia, in the early 1970s (Draper and Pitsvada 1981, Worthley and Ludwin 1969).

The states have experimented widely with tax amnesties. Recent studies show that many Americans cheat on their taxes (one report estimates that the federal government loses more than \$100 billion a year this way). In 1982, Arizona promised to "forgive and forget," and other states followed suit. Massachusetts decided to offer a three-month amnesty; 50,000 taxpayers came up with \$84 million. Massachusetts officials have estimated that the amnesty program, coupled with stiffer enforcement and penalties, resulted in an overall gain of \$233 million — a permanent part of the state's tax base. By 1988, 29 states had instituted tax amnesties, taking in more than \$1 billion.

States have looked for creative ways to cut costs. Michigan announced an early retirement program for public employees, under which 51 percent of those eligible during a one-time opportunity (a four-month period) took early retirement. This program was expected to save Michigan \$60 million in salary and fringe benefits during a 16-month period (Chi 1985, 15).

Public education, long a primary concern of state and local government, has attracted increasing attention in recent years. The issues are many: graduation requirements, teacher licensing and competency, salaries and length of school day and school year among them. State initiatives in education have been creative and controversial. In Texas, computer magnate Ross Perot and then-Gov. Mark White led a reform effort that featured higher pay, competency testing, smaller classes, tutoring and a no-pass, no-play rule whose impact on high school football in that sports-minded state cannot have escaped the attention of any reader of American sports pages.

Economic development has been a high priority for most states. Major shifts in the American economy have left few states unaffected, whether it be the decline in heavy industry in the "rust belt," the loss of textile jobs to developing countries or the uneasiness in electronics and other "high tech" sectors. State responses often have been creative, although their effectiveness is often difficult to evaluate and they can entail risks.

Massachusetts appears to be one of the country's economic success stories. Since 1975, Massachusetts has gone from economic despair — in the days when New England was being called "New Appalachia" — to prosperity driven by high-tech industries. Unemployment fell in a decade from 12.3 percent (the highest among the industrial states) to 4.3 percent (the lowest of all states).

It is hard to say just what part state policies played in Massachusetts' recovery. The private sector, especially high-tech industry, played a key and aggressive part. An enviable concentration of fine institutions of higher education has been a lodestar drawing talent to the state. But it appears that state policies played their part.

Geographical targeting has been helpful. The Massachusetts Industrial Finance Agency has issued more than \$3 billion in industrial revenue bonds but has forbade their use outside city and town centers; Lowell, Worcester, New Bedford and other cities have been the beneficiaries. "Heritage parks" are tied to historic themes, Lowell being the prototype. In general, after a period in which public and private sectors seemed to have been at odds in Massachusetts, press reports have spoken of successful efforts by Gov. Michael Dukakis to have better relations with the business community.

Competition among the states for economic development has carried its hazards. In the area of banking deregulation, for example, actions by Delaware and South Dakota have put pressure on other states. In 1980 Delaware abolished usury limits, invited large banks into the state and offered tax breaks. It is reckoned that by such moves, Delaware gained at least 1,500 jobs. When Maryland denied credit card operations the right to charge annual membership fees, three of the four largest Maryland banks shifted their credit card operations to Delaware. Maryland lost jobs, amidst an atmosphere of general complaint and recrimination.

An especially striking phenomenon among the states is the way in which state courts are using state constitutions to shape a body of constitutional law quite independent of that emanating from the Supreme Court. A study of American constitutionalism is not complete without an understanding of state constitutions.

Well before the Framers met in Philadelphia in 1787, the states had written their own constitutions. Frequently those documents reflected a concern for republican values, civic virtue and the duties of citizenship. Today the constitutions reach areas unmentioned in the U.S. Constitution, such as education and the environment. Periodically revised in many states, and amended even more frequently, state constitutions paint a fuller picture of a "way of life" than one could glean from a reading of the federal document.

State courts' use of state constitutions touches many areas. Some of the areas overlap with Supreme Court jurisprudence (for example, criminal justice); in such areas the differences in state and federal constitutional law are essentially interstitial (the state courts, of course, may not devise standards laxer than those laid down by the Supreme Court). In other areas, however, state constitutional law touches frontiers not reached by the nation's high Court (Howard 1976, 873).

An interesting example is economic regulation. Since the so-called "constitutional revolution" of 1937, the Supreme Court has taken the formal position that federal courts ought not to second-guess legislatures on matters of economic regulation. Yet the state courts, using state constitutions, are quite active in reviewing state economic measures. Thus a state court might invalidate a law found to constitute anticompetitive price fixing or intended to advance some special interest, rather than the public good, in hindering access to professions and vocations (Howard 1976, 879-91).

State court activity raises questions about legitimacy and competency not unlike the issues that are so familiar a feature of academic and political debate about federal judicial "activism." No more than federal judges should state courts see themselves as knights errant, commissioned

to do good and fight evil, whatever its form. But state constitutions exist independently of (although they may not conflict with) the U.S. Constitution. They often reflect historical and jurisprudential traditions of their own. And the decisions of state courts, grounded in the state constitutions, speak of a healthy pluralism in the making of constitutional law, enhancing the opportunity for local polities to make local value choices.

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*Garcia rests on erroneous assumptions about the ways in which the nation's political process actually works.*

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### Federalism as a Constitutional Value

The case for taking federalism seriously does not, in the final analysis, turn upon listing the innovations or programs devised by the states. It is fair, of course, to ask how well the states are performing as political entities. But American federalism connotes values more fundamental to a free society than can be measured in the fashion in which one would assess the productivity of a factory or assembly line.

Federalism is linked with individual liberty and self-government. Tocqueville saw this connection. Municipal institutions, he said, "constitute the strength of free nations . . . A nation may establish a free government, but without municipal institutions it cannot have the spirit of liberty."

Participating in government at the state and local level is an education in citizenship. To execute the laws of a distant government — even a government for whose legislators one has voted — is a remote exercise. It is deliberating together, making choices about government policy, that educates the citizen. Again, Tocqueville: "(he who) participates in government at the local level practices the art of government in the small sphere within his reach. . . ."

The very ambiguities of federalism may, paradoxically, be one of its appealing qualities. To one person the word federalism may imply greater central powers; that was the understanding of those who were known as Federalists in 1787. To another person federalism suggests greater respect for state and local institutions; that is more often today's connotation. Federalism aims to achieve national unity while preserving diversity. Achieving both of these ends creates ambiguities and tensions. One byproduct of this dialectic is a continuing dialogue on first principles of government, a dialogue among ordinary citizens as much as among officials and experts.

Federalism is premised on the diversity of the American people. State lines are often arbitrary, to be sure. Yet the states' existence reminds one that mores and attitudes do differ from one part of the country to another. So, too, do laws and institutions. The national Constitution and federal laws place limits, of course, on the extent to which local customs may prevail. But to the extent that federalism permits diverse manners and mores to flourish, it encourages idiosyncrasies, experimentation and self-expression, not unlike the way in which the First Amendment operates to promote an open society.

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*It would be an exercise in myth-making to suppose that on Capitol Hill a constitutional value such as federalism is likely to be weighed for its own merits.*

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Perhaps the ultimate value underwritten by federalism is the right of choice. No value is more basic to self-government. Federalism reinforces this value, and it does so at levels of government closer to the people where choices are more likely to be effective and to have meaning.

Anyone who has studied American history would be foolish to deny the ills perpetuated by states and localities, especially upon unpopular racial, religious or other minorities. But the remedy for such wrongs is judicial enforcement of such constitutional guarantees as the 14th Amendment's equal protection clause and congressional enactments under such provisions as Section 5 of the 14th Amendment.

Guarding against abuses of citizens' rights by states and localities does not entail abandoning federalism as a constitutional value. Federalism — like the separation of powers and checks and balances — is one of the structural devices to protect American liberties.

One would expect the U.S. Supreme Court in interpreting the Constitution to take such an institutional protection seriously. The Court doubtless took federalism too seriously in the pre-1937 days of "dual federalism." In that era, the Court seemed all too prepared to use federalism, as it used the due process clause, to write the justices' economic and social philosophy into the Constitution.

One need not ask for a return to the "old Court" — certainly not to that Court's restrictive view of the capacity of nation and states respectively to regulate the private sector — to ask the Court to show some sensitivity to federalism as a constitutional value. An egregious sample of insensitivity is the Court's 1985 decision in *Garcia vs. San Antonio Metropolitan Transit Authority*. In that case, five justices concluded that if the states "as states" want protection within the constitutional

system they must look to Congress, not to the courts. *Garcia* neglects history and principle, and it betrays a myopic understanding of the political process. Whatever one may think of *Marbury vs. Madison* (over which debate is by now surely academic), it is hard to escape the conclusion that, assuming the legitimacy of judicial review, limiting national power in order to assure the states' ability to function is as much a proper judicial function as any other issue. Moreover, *Garcia* clashes with the principle, fundamental in our constitutionalism, that no branch of government should be the nonfettered judge of its own powers.

*Garcia* rests on erroneous assumptions about the ways in which the nation's political process actually works. Justice Blackmun, writing for the majority, sees the states as having ample protection in that process. His assumptions have two dimensions. One is institutional — that the states play a major role in structuring the national government. The other is political — that the nature of the process (especially in Congress) permits adequate focus on the states' interests as states. Neither branch of the argument reflects reality.

As to institutional influence, state legislatures at one time elected United States senators, the states drew the boundaries of congressional districts, and state law decided who could vote in federal elections. Amendments to the Constitution (direct election of senators), judicial decisions (reapportionment, poll tax, etc.), and federal statutes (such as the Voting Rights Act of 1965) have dramatically reduced state control of the federal political process.

Likewise, the political safeguards have declined. Political parties, especially at the state level, are no longer the force they once were; political action committees now pump vast amounts of money into political campaigns, so that special-interest politics weakens federal lawmakers' sense of loyalty to constituents.

It would be an exercise in myth-making to suppose that on Capitol Hill a constitutional value such as federalism is likely to be weighed for its own merits. One of the reasons we have federal courts and judicial review is that it would be folly to leave the guarantees of the Constitution and the Bill of Rights solely to legislative discretion, state or federal. (The Bill of Rights was, after all, originally drafted to cabin federal power; even the First Amendment begins with the phrase, "Congress shall make no law . . .") In arguing that the Supreme Court ought not leave federalism to the unchecked discretion of Congress, any more than it ought to be indifferent to the impact of federal laws upon free speech or free exercise of religion, one need not impute any kind of bad motives or constitutional recklessness to Congress. It is simply to recognize that the limits of time, the pressures of lobbyists, the temptations of expediency,

undue reliance on staff to draft and interpret bills and other distractions have more to do with the final shape of legislation than any thinking about constitutional issues. Martin Shapiro (1966, 30) has put the point well: "The nature of the legislative process, combined with the nature of constitutional issues, makes it virtually impossible for Congress to make independent, unified or responsible judgments on the constitutionality of its own statutes.

The essential flaw in *Garcia*, however, does not turn on empirical judgments. *Garcia* betrays an unsettling disregard of a basic truth about American federalism: that institutional rights under our Constitution are a form of individual rights. Even our most prized guarantees — such as the First Amendment's speech and religion clauses and the 14th Amendment's due process and equal protection clauses — do not secure absolute personal rights. They protect against governmental (that is institutional) actions, not against infringements by private parties.

Securing individual rights under the Constitution, therefore, requires that Americans be assured of the stability of the institutional safeguards explicit or implicit in the Constitution. Neither institution nor individual protections are to be abandoned simply because they may be thought by some to be inconvenient or outmoded. Federalism may be hard to define, but it is also difficult to give precise meaning to "freedom of speech" or "establishment of religion." That a value may elude easy application does not mean that the Court should neglect the job of enforcing its constitutional dimensions. Federalism is more than a political compromise adopted to get the constitution under way; it is one of the predicates of the constitutional order.

Perhaps one of the legacies of the era in which Americans mark the Constitution's bicentennial will be a revival of concern for federalism, not simply as a convenient administrative arrangement, but as a fundamental constitutional value.

Of vigorous local democracy — local people having genuine power to make choices about issues that affect their lives — one can say what Thomas Jefferson (1907) said in describing his Bill for the More General Diffusion of Knowledge, that the object is to render the people "safe, as they are the ultimate guardians of their own liberty."

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# State Activism as a Balance in Preserving Federalism

by Mavis Mann Reeves

*States are leading the federal government in domestic policy, forging ahead in social welfare, education and consumer affairs. Without the freedom and flexibility afforded states under federalism, however, state innovations would be hampered.*

The states are back as vibrant partners in the federal system.

During the Great Depression of the 1930s and the turbulent 1960s their reputations deteriorated to such a point that some thought (or wished) them dead. In discussing the states' vital role in governing in 1967, Terry Sanford, a former North Carolina governor, listed the criticisms widely accepted about state governments.

States were called indecisive, antiquated, timid, ineffective, unwilling to face their problems, unresponsive, and uninterested in cities (Sanford 1967). Sanford admitted that these charges were "true of all of the states some of the time and some of the states all of the time," but said that "at points in history, most of these charges have been applicable to both the national and local governments." For many years following the publication of Sanford's *Storm Over The States*, few scholars or practitioners recognized the revitalization under way in state government.

Today, however, the rhetoric is different. States are shaking off their reputations as feeble partners and becoming recognized as energetic participants in the federal system. Aided by two Advisory Commission on Intergovernmental Relations' reports (1981, 1985), authors employed different terms to describe states — reformed, resurgent, innovative, transformed (Reeves 1982, Bowman and Kearney 1986, Rosenthal 1988). States

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were re-discovered as "laboratories of democracy" (Osborne 1988).

## Adjustments in American Federalism

Federalism in the United States, as in Australia and Canada, is not only an operating principle but also an arrangement allowing adjustment between the two partners. This adjustment is one of the strengths of a federal system. When one of the partners is unable to perform to expectations, the other can fill the breach. Such an adjustment requires that governments at both levels be equipped to fulfill their responsibilities. This principle is as true now as ever.

Although it could hardly be said that the federal government is unable to meet its responsibilities, the large budget deficit limits federal options as do changing perceptions about how much a financially starved federal government should assist states and localities. States, on the other hand, have snapped out of their lethargy and again assumed an activist stance in governing.

Sometimes adjustments in a federal system are reflected by one partner, usually the central one, expanding its role to usurp powers or activities previously the exclusive domain of the other. In recent years, Congress has pre-empted state authority in areas such as controlling speed limits and maximum interest rates and has imposed myriad mandates on the states. It has regulated state and local governments extensively through conditions attached to grants-in-aid. The courts have left no area of state activity sacrosanct, chipping away at states' rights under the 10th Amend-

ment in such cases as *Baker vs. Carr* (1962) and subsequent reapportionment decisions; *Garcia vs. San Antonio Metropolitan Transit Authority* (1985), which removed constitutional protection of states' rights; and *South Carolina vs. Daker* (1988), which eliminated the tax exempt status of state and local bonds. Lately, some regulatory relief has been available for states in some areas of activity, but controls have been tightened in others. The result has been a weakening of the legal and constitutional position of the states.

Operationally and administratively, however, Congress has shifted to the states decision-making authority in certain domestic policy-making areas as it reduces its involvement in domestic affairs. The role of the states has expanded.

### Upgrading State Governments

Fortunately for Americans, the federal to state shift came at a time when states were better prepared to assume responsibility than they had been for many decades. Between 1955 and the present, states snapped out of their lethargy and assumed an activist stance in governing. They shored up their institutions and processes, improving their capability to fulfill traditional obligations and undertake new ones. (Reeves 1982, ACIR 1985, Bowman and Kearney 1986).

Not all states improved to the same degree; nevertheless, all made changes aimed at improving their capacity to govern. Bit by bit and state by state, reforms were made.

Antiquated constitutions that often prevented responsible and responsive action were revised. Between 1955 and 1982, 11 states ratified new constitutions and others adopted substantial revisions to remove trivial and outmoded material, such as the limitation of voting rights to male citizens, and to improve amending processes.

The new and revised charters strengthened individual liberties by prohibiting discrimination by race and, in a few instances, by sex; by liberalizing suffrage; and by improving election administration. They strengthened the executive powers of the governor by eliminating some elective officials, by allowing the governor to serve successive terms, by lengthening gubernatorial terms, by providing for team election of the governor and lieutenant governor, and by increasing gubernatorial budgetary authority. They improved legislative capability by providing for regular apportionment, annual legislative sessions in most states and greater legislative control over the time and length of sessions. Many states established unified court systems.

Other statutory changes strengthened state machinery. State legislatures underwent so many reforms that some are hardly recognizable as the same institutions that operated in 1970. In addi-

tion to constitutional modifications, legislatures streamlined operations by consolidating committees, reducing overlapping memberships and providing for pre-session organization and filing of bills.

Legislatures became more responsive and open to the public by publishing committee reports and votes on legislation, announcing committee meetings in advance, enacting conflict of interest laws and assuming auditing oversight of state accounts.

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Governors, too, received help through legislative enactment. Many were given larger staffs, paid more and provided Washington liaison offices. Their control over the bureaucracy was augmented by reorganization of state agencies. Twenty-two states comprehensively reorganized the executive branch between 1965 and 1979 and several others reorganized individual departments.

Other advances were made in state processes and procedures. Independent audits were assured as legislative auditors became the rule in two-thirds of the states as compared to 15 in 1965. Planning agencies, most established in the governor's office, were created in every state. Personnel systems were upgraded and improvements made in budgeting, accounting, and financial reporting practices. Purchasing became more centralized and computerized. State tax systems were diversified and made more equitable.

State governments became more open to the public, although the battle for access occasionally has to be refought. Substantial credit for this development belongs to the federal government, which broadened suffrage through constitutional amendment and protected its exercise through legislation such as the 1965 Voting Rights Act. Federal grant-in-aid conditions have required citizen participation and equal opportunity for the receipt of federal funds. Nevertheless, some of the action has come from the states themselves. All states now have open meeting laws and all but two have open record laws. Public access has been facilitated to rule-making and the budget process.

Revised registration and election processes have enabled more people to vote. More states now permit use of the popular initiative and referendum. State governments provide more information to the public, including television coverage of legislative meetings.

Much remains to be done to improve the quality of state government. Nevertheless, the changes of the last quarter of a century have advanced states well along the road to effective, efficient and responsible government.

### Greater State Activism

One of the results of the reforms adopted by the states has been an increase in state activism. The "new breed" of governors (Sabato 1983), better educated, operating from better staffed offices and freed from some of the constraints on their actions, provided leadership in developing innovative solutions to state problems.

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*One of the results of the reforms adopted by the states has been an increase in state activism.*

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Reapportioned legislatures, under increased public scrutiny, dealt with problems often ignored by their predecessors. Sometimes states filled the budgetary gap by supporting programs when federal funding declined. In doing so, states acted in accord with the views of their citizens, 47 percent of whom told pollsters in 1987 that they thought the state should make up for "only some" of the cuts in federal aid. The remaining respondents with an opinion were divided 18 percent to 16 percent between those who did not want the state to make up for any cuts and those who thought the state should make up for "almost all" of the missing federal funds (ACIR 1987).

State governments took the initiative in new approaches and activities. In consumer protection, for example, states established insurance funds for uninsured motorists and liability insurance for physicians. States became involved in child care, housing finance, economic development and land management. They launched educational programs to attack AIDS, drugs and alcoholism.

Following Connecticut and Minnesota, 15 states adopted high-risk health insurance. Massachusetts approved a universal health insurance plan in 1988. Various states legislated on computer crimes and surrogate motherhood. Several East Coast states cooperated on a massive clean-up of Chesapeake Bay. In a surprising victory over the National Rifle Association, the 1988 Maryland General Assembly adopted legislation to control the manufacture and sale of hand guns, an action later approved by its citizens in a referendum.

Among the most significant actions were those relating to education and welfare reform. State after state moved to deal with school problems. States revised aid equalization formulas and increased appropriations. They created special

schools for gifted students, such as North Carolina's Governor's School, and reviewed teacher training.

Some state initiatives were imitated at the national level. In contrast to almost any health and social service policy adopted in the last 50 years, the federal welfare reform adopted in 1988 began at the state level and "bubbled up" from the states to Capitol Hill (Rovner 1988). The National Governors' Association helped craft the reforms and then lobbied Congress for their adoption. The governors also worked on the expansion of Medicaid to cover more poor mothers of young children and pregnant women.

States expanded their public safety activities by adopting seat belt and motorcycle helmet laws, increasing penalties for drunk driving and restricting water scooters and all-terrain vehicles. Some required ignition locks for persons convicted of drunk driving.

States also became "heavyweights" in the financial markets, broadening their participation as investors and borrowers. According to Dan Durning (1988) of Duke University, "They have become sophisticated borrowers, creative investors, and aggressive regulators."

State courts are more actively protecting individual and civil rights than are federal courts. According to John Kincaid (1988), executive director of the ACIR, "Since 1970, state high courts have issued more than 400 rulings granting broader rights protection under state constitutions than the United States has granted under the U.S. Constitution . . ."

### Horizontal Federalism Thrives

Another significant development in the state's role in the federal system has been the growth of a vibrant horizontal federalism marked by increased exchange of information and the spread of innovations from state to state. Cooperation among the states has prospered as well.

This is not to say that substantial interstate conflict does not still exist. It does on many matters, particularly those involving the environment, water supply and economic competition. But the re-invigoration of the National Governors' Association, with its committees and task forces dealing with problems facing the states, has provided a prod to and a mechanism for collaboration on major issues.

Moreover, individual governors have taken action to promote agreement and joint action. The Chesapeake Bay clean-up is a case in point. The Governors' Councils that were created to replace the discontinued Title V Commissions are another. These organizations include the Council of Four-Corners Governors, Inc., and the Council of

Great Lakes Governors, Inc. (Glendening and Reeves 1984).

Interstate cooperation is not new. States have long collaborated to deal with problems through interstate compacts and contracts, uniform and reciprocal legislation, informal agreements and interstate organizations. But perhaps because of the magnitude of the problems facing state officials, there appears to be a greater degree of interstate dependence and cooperation.

For the most part, its extent is impossible to measure because of the many routes such cooperation takes. At least 170 compacts exist (Jones and Osborne 1988) as compared to 101 in 1955 (Glendening and Reeves 1985). States also seem to have borrowed ideas and innovations from each other to a greater extent. The increased exchange of such information is certainly a partial outcome of technological advances in communications. But the establishment of information clearing-houses and publications on state government by such organizations as The Council of State Governments, the Conference on State Legislatures, the National Governors' Association, and others have made it easier.

The National Association of Attorneys General, for example, has formed task forces on issues such as unsafe ambulances, airline advertising regulations and all terrain vehicles (Webster 1988). Such organizations have joined in regional undertakings as well.

There is also a constant demand from state governments for information on current problems. States throughout the country requested a publication on AIDS by the Maryland Department of Legislative Reference, for example. Bureaus of governmental research at state universities and state executive departments and agencies, as well as legislative reference services, constantly receive requests for information and for assistance.

### Public Opinion about the States

Public opinion about the states does not reflect the improved state capabilities and efficaciousness. Confidence in state governments has remained substantially the same over the past decade. Opinions as to which level of government provides the public with the most for their money fluctuated during the period from 1980 to 1988; however, the percentage of respondents to ACIR sponsored polls selecting the states as giving the most value for the tax dollar rose from 22 percent in 1987 to 27 percent in 1988. This percentage was almost even with local (29 percent) and federal (28 percent) governments (ACIR 1987, 1988). States fared somewhat better on a 1988 question asking how often state government performs its duties efficiently and at the best possible cost. Of

those responding, 36 percent thought state governments performed efficiently all or most of the time as compared with 25 percent for the federal government and 46 percent for local governments.

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*Since 1978, the public has been consistent in believing the federal government has too much power over states and localities.*

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Despite these less than glowing assessments of the states, 73 percent of the 1987 respondents had "a great deal" or a "fair amount" of confidence in states to do a good job in carrying out their responsibilities. This percentage equaled that for local governments and exceeded the federal rating (68 percent). The states lagged behind local governments 22 to 37 percent, however, regarding public confidence in people running the governments. The federal government trailed with 19 percent (ACIR 1987).

Since 1978, the public has been consistent in believing the federal government has too much power over states and localities. In fact, the percentage responding "too much" has increased from 38 percent to 45 percent between 1978 and 1987. At the same time, the percentage of people who think the federal government's power is "about right" jumped precipitously during the period, rising from 18 percent to 37 percent (ACIR 1986, 1987).

Governors' reputations improved slightly, with 60 percent of the respondents to a 1988 Roper Poll viewing the governors favorably to 57 percent in 1978. That 3 percent difference, however, was within the margin of error. In the same poll, 52 percent regarded their legislators as efficacious (Keller 1988).

### Conclusion

The increased capacity of states to determine and implement domestic public policy balances, somewhat, the decline of states' constitutional and legal rights. By becoming more assertive and practiced, state officials can mold public opinion, amass bargaining chips and build up representation in the federal arena. Such actions might not be enough, however, to counteract the weight of organized groups pressuring for uniform regulations, groups who would rather lobby Congress than 50 state legislatures.

American federalism affords the opportunity for diversity in public policies, allows innovation, permits small-scale experiments in public programs and provides limited possibilities for escape from repugnant public policies. It should not be lost in the quest for equality and uniformity.

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## *The Journal of State Government*, 1989

# Editorial Calendar

The nation's leading journal devoted to state policy-makers provides a bi-monthly behind the scenes exploration of state government — who and what makes government work, how it can be improved and where it should be going. Whether you are in government or are interested in it, don't miss an issue. To subscribe write: The Order Dept., The Council of State Governments, Iron Works Pike, P.O. Box 11910, Lexington, KY 40578-9989.

**March/April, *Crowded Prisons: State Solutions*.** Authors include Charles Colson and Daniel Van Ness of Justice Fellowship, Peggy McGarry and Linda Adams of the Center for Effective Public Policy, Kay Knapp of the Institute for Rational Public Policy, Joan Petersilia of Rand Corp., Robert Lilly and Keon Chi.

**May/June, *Protecting Consumers' Health*.** Prepared with the National Association of Attorneys General. Consumer protection and the law, health quackery, product advertising, hazardous products in the home, long-term health care financial fraud, and public health and consumers.

**July/August, *Governors and cabinets*.** Prepared with the National Governors' Association and the Governors' Center at Duke University on managing cabinets and departments.

**September/October, *Ethics in Government*.**

**November/December, *Legislative Concerns*.**

# The Spirit of Federalism: *Restoring the Balance*

by John Sununu

*Two hundred years ago, the Founding Fathers worked hard to establish an effective and appropriate constitutional balance between the states and the nation. Although today we have a strong foundation in our Constitution, in recent decades the structure that rests on it has begun to lean perilously away from the states toward Washington, D.C. Unless we restore the balance, we run the risk of letting our federal structure lean so far that it might eventually topple.*

Two U.S. Supreme Court cases, *Garcia vs. San Antonio Metropolitan Transit Authority* (1985) and *South Carolina vs. Baker* (1988), have brought to a head concerns about the erosion of state authority. By making the Congress the arbiter of its own actions, which affect the states, these two decisions not only weakened (some would say eliminated) 10th Amendment protection but also undercut the ability of states to attend to their responsibilities.

The *Garcia* decision ignored state authority and effectively rescinded the constitutionally mandated division of power between state and federal governments. In *South Carolina*, the balance was tilted even further toward a concentration of power in the federal government. The Court's decision to eliminate the tax-exempt status of state and local bonds could have a devastating effect on state and local governments.

These two decisions are hardly exceptions to the pattern of recent years. They consolidate a

variety of congressional acts. Today the federal government is free to regulate every minute detail of state administration and management. These include police powers, personnel procedures, pensions, fringe benefits, financial accounting procedures and every sector of the economy now under state regulation.

The convoluted new concept of state prerogatives postulated in the *Garcia* decision argues that since the states are able to receive (and presumably reject) federal monies, the states have therefore retained all of their rights and their sovereignty. That assertion is wrong. If anything, the situation with regard to federal grants argues just the opposite. The federal government has learned very well that it can use both carrots and sticks to abrogate traditional rights.

As a result of overcentralized federal power, the states cannot do the jobs that they must do as effectively and efficiently as they must. It is time for America's citizens, acting through their state governments, to check and reverse the overcentralization of power and to bring government authority closer to the people through their participation at state and local levels. During this Bicentennial celebration of the U.S. Constitution, it is appropriate for us to take a long hard look at our current situation — and move aggressively to remedy it.

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*John Sununu is President George Bush's chief of staff. He wrote this article when he was governor of New Hampshire, the immediate past chairman of the National Governors' Association and vice chairman of the Advisory Commission on Intergovernmental Relations. This article is adapted from NGA's August 1988 publication Restoring the Balance: State Leadership for America's Future. It appeared in the ACIR's Intergovernmental Perspective, Fall 1988.*

Accordingly, as chairman of the National Governors' Association (1987-88), I asked the nation's governors to undertake an in-depth study of federalism and of the relationship between the states and federal government. As a result, the governors have called on the Congress to adopt a constitutional amendment to clarify and simplify state authority for initiating constitutional amendments.

Americans need governments that respond to their needs and concerns, governments that make good decisions about what to do and then implement those decisions with fairness and efficiency. Americans need governments that can and will build partnerships with the private sector, governments that can adjust to a changing world.

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*The Supreme Court's recent decisions have made it clear that little protection is provided for the states under the 10th Amendment.*

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For two centuries, federal, state and local governments have worked together in constantly changing patterns. Their relationship has been affected by many factors. It has been shaped by the relative speed and efficiency of enacting and implementing state programs, the scope and breadth of state action, new federal legislation and a growing body of constitutional case law resulting from Supreme Court decisions. In most instances, the intergovernmental system has worked, sometimes well, sometimes slowly. In other instances, the system has proven unresponsive or inflexible.

Some problems require national action, and in other cases states do not have the fiscal resources to act on their own. The challenge is to assure that each level of government retains the freedom and authority it needs to carry out its own responsibilities well, without unnecessary limits and constraints. Retaining the vital balance presents a serious constitutional challenge that must be addressed directly and openly.

The Supreme Court's recent decisions have made it clear that little protection is provided for the states under the 10th Amendment. The Court has suggested that the states must seek to limit federal power through the political process, rather than relying on the limitation included in the initial delegation of powers to the federal government. In essence, this approach treats states as another special interest group, rather than as true partners in the federal system.

While the simplest answer is the model established 200 years ago — for the states to convene a constitutional convention to renew the commitment to power shared between the states and the federal government — current fear of a runaway

convention has forced the states to rely on the Congress to voluntarily give up powers it has centralized on the national level. History makes it clear, however, that power is rarely given up voluntarily.

The impact of this problem is now more acute as a result of *South Carolina vs. Baker*. In that case the Court repealed the last vestiges of intergovernmental tax immunity and reinforced its intent to remove itself from defining clear lines between state and federal authority.

For this reason, the governors are convinced that a measured, practical constitutional solution to the federalism issue is needed — a solution that restores the states' ability to initiate constitutional change without being stymied by the threat of the perceived problem associated with a convention, a solution that assures the people of a continued say in the decisions about the basic structure of the nation and the appropriate roles of each level of government.

Such a solution is clearly possible within the current intergovernmental structure. As the Governors' Task Force on Federalism noted, "The Constitution envisioned that amendments could be initiated by both the federal government and the states. However, the fear of a 'runaway' convention has effectively closed the door to state-initiated amendments. Until recently, the 10th Amendment was thought to protect the states and localities from an uncontrolled expansion of federal power through legislation and regulatory action." Now, however, the Supreme Court has effectively removed that protection, and the Congress is free to act without constitutional constraints. Furthermore, the concern over a constitutional convention has blunted the balancing capacity originally provided in the Constitution.

Therefore, the governors have called on the Congress to restore the intended states' ability to initiate amendments. Congress can do this by referring to the states a constitutional amendment that would create a more practical route under Article V for states to initiate amendments to the Constitution.

Under this approach, two-thirds of the states could pass memorials that seek the addition of a specific constitutional amendment. Unlike the petitions for a constitutional convention that must be served on the Congress, these memorials would be filed with every state. When the necessary 34 states is reached, the proposing states would appoint representatives to a Committee on Style to reconcile the details of the language of the various memorials. When a majority of the states represented on the Committee on Style approve the proposed amendment, it would be submitted to the Congress. A two-thirds vote by both houses within the next congressional session would be necessary to stop the amendment from going back to the states for ratification. If the

Congress did not vote by two-thirds to stop the amendment, it would be submitted to the states for ratification by the required three-fourths. This reasonable, measured approach can restore the balance of power without any radical alteration of the structure, process or specific responsibilities exercised today. It would, however, return a parity to the system of review and redress.

Beyond this broad restoration of the intended balance is the specific issue created by the *South Carolina vs. Baker* case, in which the Court held that the Congress has the right, if it wishes, to tax the earnings of individuals from interest payments on state and local bonds. I believe that we must remove the question of the future tax status of state and local bonds from the congressional arena. Such bonds are a critical revenue source for important governmental projects, and their use should not be subject to taxation for regulation by the federal government. This issue also should be addressed through a constitutional amendment.

The federal system works because it is dynamic and flexible, because it encourages and facilitates change. It works because it provides opportunities for experimentation and innovation. It works because it allows for diversity among the states and because, by preserving government close to the people, it assures greater responsiveness and accountability.

The diverse character of the federal system must be preserved if the nation is to respond to

the new challenges that confront us in our third century. While the apparent simplicity of homogenized national action is attractive, the fact remains that many problems are not simple and not all problems can be addressed on a national level or scale alone. The flexibility and innovation that have characterized state government in the past will be even more important in a complex and rapidly changing future.

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*Therefore, the governors have called on the Congress to restore the intended states' ability to initiate amendments.*

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The task will not be easy, but we must devote real effort to preserving the balance so carefully crafted by our founders. Our constitutional history has been full of difficult choices. We cannot avoid this new challenge.

We know the states are key providers of governmental services as well as the laboratories of government. As we rejoin the debate and give direction to the way in which our federal system will evolve, we must work to see that we preserve and enhance the states' mandate for the future.

States must take a leadership role. We must demonstrate our ability to respond to public needs in a timely and effective manner. Over time, it is this performance that will provide the most compelling argument for the federal system.

## Public Hearings Announced on Restoring the 10th Amendment

*You are invited to public hearings on  
"Restoring Balance in the Federal System:  
Constitutional, Legislative and Educational Options."*

April 21, 1-4 p.m., Buena Vista Palace, Lake Buena Vista, Fla.  
May 18, Federal Hall, New York, New York

Sponsored by The Council of State Governments and the U.S. Advisory Commission on Intergovernmental Relations. Additional hearings are planned for June in Colorado Springs and September in Cincinnati.

For more information, contact: Norm Beckman, The Council of State Governments, Director, Washington Office, 444 N. Capitol, Washington D.C. 20001, (202) 624-5460.

# Liberty and Sophistication

by Douglas Henry, Jr.

*A constitutional amendment is needed to restore the 10th Amendment's protection of our liberty and property from an unrestrained federal government.*

Peoples throughout history have forcibly removed the tyrant's heel and proclaimed freedom, only to find liberty short lived.

Three centuries ago, the Roundheads of England did so to the Stuart monarch. Cromwell was elevated as "Protector of the Commonwealth," and shortly, by reason of his regime's excesses, it gave way to the Stuarts.

Two centuries ago, the Parisian mob guillotined the Bourbon king and the aristocrats. They proclaimed "Liberty, Equality, Fraternity" and France was first paralyzed by the avenging zeal of revolutionary tribunals and then exsanguinated by the ventures of the emperor erected to restore order and greatness, Napoleon Bonaparte.

From South America to Russia, the story was repeated.

So liberty can be achieved, but hardly held, unless people of political sophistication and experience employ forethought. Why? Because human nature is such that, with the best of intentions, the liberators will use their power as only they think best, even at the expense of others' freedoms.

How then to restrain the liberators? By providing that they alone are not the sole source of governmental power. And how to do that? By dividing governmental power, or sovereignty, among more than one sovereign.

Federalism is a tested method of doing this. Federalism, of course, is not infallible. Examples include the German Empire of the Hohenzollerns, Brazil, Mexico and the Soviet Union.

On the other hand, the experiences of the United States, Canada, Switzerland and Australia demonstrate how the federal system nurtures and protects liberties.

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*State Sen Douglas Henry, Jr chairs the Tennessee Senate Finance, Ways and Means Committee. He is a member of The Council of State Governments' Executive and Intergovernmental Affairs Committees*

Federalism is not static, but changes with conditions. Our country's first federation was the Articles of Confederation. When the articles' decentralization proved impractical, the Constitution was born.

But practicality is a tricky compass. Mussolini boasted that he "made the trains run on time." Fascism ranked well on the scale of the practical.

Our nation's founders were sophisticated men. They drew a Constitution that was practical, but, mindful of the dismal history of undivided power, amended the document to limit the central government's authority. The 10th Amendment reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

As the United States evolved, the voices of practicality called for greater centralization. The range of the commerce clause widened. The taxing power and the general welfare provision of the preamble have been used by Congress and the courts in a "practical" manner to achieve broad ends of public policy. The due process and equal protection clauses of the 14th Amendment have had far broader and beneficial consequences, but with the effect of transferring more authority to the central government.

Nevertheless, through all those changes, the 10th Amendment, reserving the undelegated powers to the states and people, has rested and remained, in the written Constitution and in general understanding, as a limit beyond which the central government could not pass.

The *Federalist Papers*, written to induce the ratification of the Constitution, assure that only certain powers would be delegated to the central government.

Even so, the 10th Amendment was insisted upon as a safeguard against excess by the central government.

The Constitution in Article 1, Section 8, empowers Congress "to establish post-offices and post roads" and "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Yet, the Congress has passed wide-reaching statutes regulating use of the mails, and, under the commerce clause, the Racketeer Influenced Corrupt Organizations Act (RICO) to fight crime. Under postal and RICO laws, state and local officeholders can be charged with corruption and convicted by the United States. From the prosecutor to judge, every federal official involved is appointed, not elected. Not a single constituent's vote is cast for any of the federal officials whose combined acts can deprive the defendant of liberty and property. If the defendant were tried by the state, at least the functionaries who effect the conviction would have to stand the test of the ballot box.

While the 10th Amendment remains in the Constitution, one might say that the limitation still stands and in a proper case can be relied upon.

But that belief is no longer tenable. In *Garcia vs. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 1985, the U.S. Supreme Court responded to a 10th Amendment argument:

Nonetheless, against this background, we are convinced that the fundamental limitation that the constitutional scheme imposes on the commerce clause to protect the 'States as States' is one of process rather than one of result. Any substantive restraint on the exercise of commerce clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.' "

Thus the Court deprived the 10th Amendment of any significance as a substantive limitation upon Congress or the federal executive branch. Three years later, that Court said, "Where, as here, the national political process did not operate in a defective manner, the 10th Amendment is not implicated" (*South Carolina vs. Baker*).

How gross a contrast with the soothing prediction of Madison, in *Federalist* no. 45:

"The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state" (emphasis added).

How wide a departure from Madison's words in *Federalist* no. 51: "First. In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself" (emphasis added).

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*Even so, the 10th Amendment was insisted upon as a safeguard against excess by the central government.*

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the U.S. Constitution Article 8, Section 18 (the necessary and proper provision) and Article 6, Section 2 (the supreme law of the land provision), Hamilton said in *Federalist* no. 33:

"These two clauses have been the source of much virulent invective and petulant declamation against the proposed Constitution. They have been held up to the people in all the exaggerated colors of misrepresentation as the pernicious engines by which their local governments were to be destroyed and their liberties exterminated; as the hideous monster whose devouring jaws would spare neither sex nor age, nor high nor low, nor sacred nor profane; and yet, strange as it may appear after all this clamor to those who may not have happened to contemplate them in the same light, it may be affirmed with perfect confidence that the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated, as if they were repeated in every article. They are only declaratory of a truth which would have resulted by necessary and unavoidable implication from the very act of constituting a federal government, and vesting it with certain specified powers."

Yet a casual survey of the annotations will show that the supreme law of the land provision has been extensively relied upon by the courts in upholding federal authority, whereas in *Garcia* and *South Carolina* the 10th Amendment has been reduced to a condition of impotence.

*Garcia* dealt with labor law; *South Carolina* with taxation of bond interest. But those topics are not of transcendent importance.

The emasculating of the 10th Amendment, adopted to reserve without question to the states their authority in all matters not delegated, first

among which is personal liberty, is the most dramatic constitutional event of our time. So cavalier a holding, that states' citizens must beg relief from a far-off Congress from whatever that Congress may vote to do to them, staggers belief and would have been dismissed as airy speculation not only by the advocates of the 10th Amendment, but by Madison himself.

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*The emasculation of the 10th Amendment, adopted to reserve without question to the states their authority in all matters not delegated, first among which is personal liberty, is the most dramatic constitutional event of our time.*

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One might say, "I rest content for the preservation of my liberty upon the good judgment of the people and their elected officers." What then of the taxpayer's pocketbook? As fiscal necessity throttles federal grants, may we assume that Congress will accordingly suspend its mandating of costly programs upon cities, counties and states?

The members of Congress are elected, as they see it, to legislate, and legislate they will. Under *Garcia* and *South Carolina*, there is absolutely no constitutional protection against their "meeting a need" (unmet "needs" are as easy to find as vocal constituents) by mandating a national program upon all cities, counties or states, and furnishing not one cent to pay for it. Payment will be had by mulcting again local taxpayers through their state and local governments. Those governments cannot create money as can the federal government. The bill must be paid by money exacted from savings or property, and if not paid will be seized from the city, county or state treasury by a decree from the federal court.

Where then can relief be found for cities, counties and states, made up of their citizens, taxpaying and jealous of their liberties? In humble petition to the Court which has crumpled their shield? In humble application, as the Supreme Court has instructed, to the Congress, to which the Supreme Court has given unlimited license? Hardly so.

The first order of the day must be constitutional amendment, for the preservation of Americans' liberties, and their property as well, under and by means of the federal system.

## CALL FOR NOMINATIONS

### Jim Waltermire Voter Participation Award

The National Association of Secretaries of State invites nominations for the Jim Waltermire Voter Participation Award. This award recognizes the need for increased voter awareness in order that all citizens may participate in the essence of democracy — the right to vote. Any individual, agency, institution or organization (other than secretaries of state or lieutenant governors who serve as secretary of state) are eligible for nomination. Eligible candidates are those who have made significant contributions to encourage citizens to register to vote, to inform voters or to reduce voting barriers.

For further information and nomination forms, contact:

Yolanda Swinford  
The Council of State Governments  
Iron Works Pike, P.O. 11910  
Lexington, KY 40578-9989  
(606) 231-1919.

*Nominations must be received by May 1, 1989.*

# Linking Constitutional Reform to Local Self-Governance

by Robert B. Hawkins, Jr.

*In today's complex information age, a hierarchical structure of power based on command and control does not work well. Yet, as citizens demand more voice in governing their local institutions, the federal government is usurping local and state control. What is needed is a constitutional amendment to restore the balance of power in our federal system.*

There appears to be growing interest in some type of constitutional remedy to the U.S. Supreme Court's abdication of its role in protecting the constitutional balance of powers in the federal system.

The conditional is used here because we have seen similar interest in years past evaporate in the midst of congressional compromises that gave state and local governments at least half the loaf they sought in the political process. However, this is a new day in federal relations. *South Carolina vs. Baker* reaffirms the statistician's law that two points start a trend. Thus, *South Carolina* reaffirms the judgment of *Garcia* that the Supreme Court has little specific language in the U.S. Constitution with which to protect the states and local governments.

To restore balance to the federal system, we must know what we want to restore, why it is worth restoring, and how to accomplish this end. The best place to start this examination is with the U.S. Constitution.

It may seem astounding to do so, but we must ask the question, do constitutions make a difference? To those who are versed in the seemingly archaic intricacies of the constitutional foundations of federalism, or to federalism junkies, the answer is a categorical "yes." It might be argued

that Americans are a constitutional people, and even if they cannot cite chapter and verse, they implicitly act as if constitutions are important. Today, Americans clearly see a direct relationship between the Constitution and individual liberties. The constant stream of cases before the state and federal courts that seek to expand the constitutional protections of individual rights attests to this understanding.

The Bork nomination hearings were fascinating from this perspective. The main attack on Judge Robert Bork was that he did not see the constitutional grounds for many of the new civil and criminal rights the U.S. Supreme Court has established for individuals. When it came to federalism, however, almost no time was spent on the issue in the hearings, in part, because Judge Bork asserted that federalism is now a settled issue (via *Garcia*) and, thus, is not very interesting.

Even if federalism and the Constitution are not burning issues in the public mind, this does not mean that the Constitution has no effect on federal-state-local relationships. The *Garcia* decision is gradually transforming politics in this country. On the federal side, there is a slow but steady usurpation of state and local authority. There is almost no interest on the part of members of Congress — liberal or conservative, Democrat or Republican — in addressing the underlying principles of our federal system. While compensation issues in *Garcia* were modified by legislation to provide some relief for state and local governments, the bureaucrats in the U.S. Depart-

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*Robert B. Hawkins Jr. is chairman of the U.S. Advisory Commission on Intergovernmental Relations, Washington, D.C. He also is president of the Institute for Contemporary Studies in San Francisco, California.*

ment of Labor now are implementing tighter controls on them. In the 101st Congress, the dual banking system is likely to disappear, and increased regulations are likely to be promulgated that hinder or restrict state and local authority.

### Politics of Federalism

This course of events can be predicted with some certainty. The Congress is under tremendous pressure to balance the federal budget without massive tax increases. Yet the desire of members of Congress to assist constituents has not diminished. Thus, *Garcia* gives Congress the green light to set the limits of state and local authority. In simple terms, the Court has given the Congress the proverbial political genie: It can reward constituents by shifting responsibilities and authority without having to suffer the fiscal consequences.

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*Local self-governance is the first and strongest rationale for a reinvigorated state and local government sector capable of linking individuals and institutions.*

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On the state and local side, we are beginning to see understandable yet lamentable changes in the posture of state and local associations toward Washington. They are focusing their attention on Congress and on developing lobbying strategies that will effectively represent their interests. Several of these approaches are ingenious, well planned and ably executed by highly capable staff. While these approaches might be given high grades, their necessity is lamentable because they underscore the tragedy of *Garcia* and affirm its dictum that state and local governments must look to the Congress for the scope of their political authority.

What this dictum will do over time is change the politics of federalism. It will change it from a politics of conflict, negotiation and compromise between partners having independent authority, to a politics of dependency — a politics where state and local governments will be no different than other interest groups trying to get Congress to fix the rules of the political game. This politics is, and will be, fundamentally different from constitutionally based politics.

Many think that constitutional-based politics has served this country well. Self-rule through shared rule has allowed for change and experimentation. It has been the bedrock of our commercial republic. If we want to re-energize this system, then we must understand how we have gotten to the point where most citizens and poli-

cy-makers fail to understand the political principles that underpin our experiment in self-governance. We also must comprehend why it is imperative that we have such a system as we enter the information age with its complexity and new imperatives. In short, we need a new rationale for why a federal system is essential to our way of life and to our remaining a dynamic society. The key to such a rationale is to again link citizens and their local institutions.

### Local Politics: Business or Self-Governance?

There is no question that local institutions suffered from the nationalism that emerged in the late 1800s and was accelerated by two world wars. The Great Depression clearly increased the strength and role played by the national government. Yet, the most decisive factor is what might be called the politics of production. Beginning in the early 1900s, with Americans' disdain for boss rule, local politics came to be seen as a business. Reformers in those days maintained that if state and local governments modernized like corporations, there would be no need for centralization. Reformers became fascinated with consolidations, large-scale operations, comprehensive planning, and a whole litany of schemes that mimicked what they thought corporate America was all about.

Some of these corporate ideas enabled local governments to provide the infrastructure and management capacity to deal with growth in the 20th century. The major problem with the equation, however, was that it forgot about politics and citizens. While many of the boss-led machine cities were corrupt, most citizens were intimately linked to those political organizations. Local liberty has always been a strong force in American politics. While the managerial approach to local government diminished local liberty, it did not snuff it out.

The driving forces behind the ill-conceived War on Poverty also show that local liberty excites liberals as well as conservatives. The advent of the War on Poverty and community action attempted to re-energize citizen participation, especially among the poor. Clearly, politics were seen as supplanted by management and unresponsive to the needs of a given clientele. In turn, the War on Poverty was replaced by the neighborhood movement, which today, in many cities, is an unofficial means of representation. As with the War on Poverty, some of this representation is a negative rather than a positive integration into the politics of a local community.

Yet this trend is part of a larger ongoing change that is sure to be an imperative of the informa-

tion age: Citizens want greater control of the institutions that shape and affect their daily lives. This desire can be a positive force and a rationale for local self-governing institutions. Self-governance links federalism and individuals if it can be forcefully articulated by local leaders. The idea of local self-governance is clearly a stronger force and passion than the idea that local governments are nothing more than good service providers. After all, many private firms are good service providers.

Local self-governance is the first and strongest rationale for a reinvigorated state and local government sector capable of linking individuals and institutions. The second rationale is less direct, but just as important. It is found in the imperatives of the rapidly developing information age. The emerging consensus of organizational theorists and practitioners is that large hierarchical organizations based on command and control will not work well in an information age because they do not manage complexity well and are inefficient in coordinating complex activities. Likewise, small organizations, while having the virtues of flexibility, speed and the ability to manage complex activities, must have a set of institutions that establishes the rules and incentives for productive behavior. These imperatives will force government to adopt different strategies for governing. But it should be clear that state and local governments must play a key role in managing our complex society. It cannot be done by commands and edicts from Washington, D.C.

### A Constitutional Remedy

What does all of this have to do with *Garcia* and constitutional reform that will strengthen state and local governments? Everything. For one of the key tools that we will have in managing complexity and self-governing institutions are constitutions: federal, state and local. We must understand that constitutions and charters are vital governing mechanisms, that modern societies have greater needs for such instruments than their predecessors, and that we must educate the public on their importance.

Thus, to seek a constitutional remedy to the *Garcia* dictum is not just a self-interested effort to save state and local institutions. Rather, it is an effort to fashion new institutional arrangements that will allow the United States to manage its affairs effectively and efficiently in the coming years. It is also an effort to re-energize the self-governing foundations of our institutions so that citizens, through reflection and choice, can have a voice in and a commitment to the institutions they create.

Consequently, there are important reasons for starting the process of constitutional change. In

part, the Supreme Court has taken the first step by abdicating its responsibility for maintaining a balance of powers in the federal system. We must now ask how we should proceed.

If we are to succeed, we must start a constitutional dialogue throughout the United States. This dialogue must communicate clear and convincing reasons to the citizens of this country that some type of change is needed to bring their state and local institutions back under their control. While this might sound like a populist call — and it may be — its genius is nothing more than knowing politically that citizens will support those changes that they see benefiting them for the best reasons.

The best way to start this dialogue is to draft a remedy to the Supreme Court dictum in *Garcia*: a constitutional remedy. What form that remedy ought to take may be less important than the process that is used to draft it. Like the process in Philadelphia in 1787, a group of concerned leaders needs to undertake a process that drafts a remedy that fits the problem and that brings to the process representatives of those institutions that will be affected by change. Since the National Conference of State Legislatures, the National Governors' Association, The Council of State Governments and the Advisory Commission on Intergovernmental Relations have worked on this issue, they would seem to be the core groups from which the process should be started. Equally important, members of the National Association of Counties, the National League of Cities, the U.S. Conference of Mayors and the International City Management Association must be active participants.

The importance of developing a workable constitutional amendment is that it creates the mechanism around which debate and action can start. It will be the basis upon which the politics of constitutional change can start. Clearly, NCSL can play a critical role in this process by starting the resolution process to memorialize Congress to pass such an amendment. Just as important will be the role that the Bush administration will play in supporting such an approach.

What is clear is that those who are deeply committed to strong local and state institutions must start the process of constitutional change. For too long we have hoped that fiscal, managerial and intergovernmental remedies would work. After 30 years of dialogue, we know that improved management and fiscal capacity on the part of state and local governments does not impress the Congress and the Supreme Court. What will impress them is a proper celebration of the bicentennial of the Constitution: an amendment to the Constitution that restores balance to the federal system so that each governmental partner can play its proper and unique role.

Treasurers urge remedy:

## ***Public Works Financing Endangered***

by Stacey Crane

*Treasurers and other state officials are working to protect tax exemptions for state and local bonds. Restrictions on these bonds are endangering the rebuilding of badly needed public works.*

Federal action interfering with the ability of states to finance public works' projects has prompted state treasurers to seek a constitutional amendment protecting tax exemptions for state and local finance.

The National Association of State Treasurers says the amendment is necessary because it would restore constitutional protection for intergovernmental tax immunity — a basic principle of federalism.

Restrictions on state and local government financing imposed by Congress in the 1986 Tax Act have become especially acute because of Reagan's federalist agenda. Reagan has attempted over the past eight years to decentralize government by placing increasing responsibility at the state and local level. In theory, this policy has considerable merit in that the government closest to the people is most likely to best meet their needs.

The problem facing state and local governments, however, is that the tax-exempt bonds needed to provide public services are no longer as easily available as they once were. Strict limitations have been placed on how they must be used.

Over the years, tax-exempt bonds have emerged as an essential financing mechanism for providing schools, courthouses, jails, transportation systems, water and sewer systems, civic centers and the like. Government officials across the country are increasingly aware of the need for increased spending on public facilities. Estimates of the annual spending shortfall on physical infrastructure range from \$17.4 billion to \$71.3 billion. The

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National Council on Public Works Improvement suggested in a 1988 report that annual infrastructure spending might have to double in the near future for the U.S. to meet its needs.

Because state treasurers believe that tax-exempt issuance must be protected, they have asked for President Bush's support for intergovernmental tax immunity and have created a coalition to fight for the issue.

The state treasurers are leading an effort to work with Congress to inform the members of the adverse impact that loss of intergovernmental tax immunity has on their constituents and states. Treasurers are seeking support for an amendment to the U.S. Constitution to restore intergovernmental tax immunity to help protect the continued sovereign status of state and local governments.

States have grown increasingly concerned over their sovereignty in light of constitutional and legislative changes and Supreme Court decisions.

The manner in which the Supreme Court interpreted the Constitution in the recent cases of *Garcia vs. San Antonio Metropolitan Transit Authority* and *South Carolina vs. Baker*, represent a clear and distinct pattern of eroding states' rights and constitutional protections under the 10th Amendment.

These two decisions substantially reduced constitutional protection for state authority, forcing states to make their case with the U.S. Congress much like a special interest group. The *Garcia* decision holds "that the limits are structural, not substantive," resulting in states having to find protection from congressional regulation through the national political process, not through judicially defined spaces of unregulated state activity.

The Supreme Court decision in *South Carolina* not only confirmed the *Garcia* decision but virtually eliminated any remaining 10th Amendment protection. In *South Carolina vs. Baker* the Supreme Court overturned a 100-year-old precedent by stating that the issuance of tax-exempt debt was no longer guaranteed. This attack on the longstanding notion of intergovernmental tax immunity — one of the pillars of federalist society — left states and their municipalities at the mercy of further deleterious cutbacks by Congress.

In her dissent, Justice Sandra Day O'Connor said, "Henceforth, the ability of state and local governments to finance their activities will depend in part on whether Congress voluntarily abstains from tapping this permissible source of additional income tax."

The loss of intergovernmental tax immunity coupled with the enormous federal budget deficit could increase the likelihood that Congress will further restrict the ability of state and local governments to issue tax-exempt bonds. There also is concern that Congress might rescind the deductibility of state and local income taxes and impose a national sales tax or value-added tax that would pre-empt the states' major source of revenue.

The National Association of State Treasurers is working with the major public interest groups

in opposing legislative and regulatory restrictions in the public finance area.

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*Treasurers are seeking support for an amendment to the U.S. Constitution to restore intergovernmental tax immunity to help protect the continued sovereign status of state and local governments.*

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The association also has supported House and Senate resolutions introduced in the 101st Congress banning changes regarding the taxation of state and local bonds and prohibiting the taxation of the interest earned on those bonds.

Legislatures in Oklahoma, South Carolina and Utah have adopted resolutions calling for a constitutional amendment protecting the tax exemption of municipal bonds. Similar efforts are underway in Texas, New Mexico, Minnesota and North Dakota.

State treasurers and other state and local government officials are ready to develop strategies to stop federal encroachment of state sovereignty and restore the ability of state and local governments to rebuild this country's deteriorating infrastructure and meet other capital financing needs.

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# A Proposal to Strengthen Federalism

by John Kincaid

*Federalism could be strengthened immensely by requiring a three-fourths vote of the U.S. Supreme Court to void state law.*

Two recent decisions by the U.S. Supreme Court — *Garcia vs. San Antonio Metropolitan Transit Authority* (1985) and *South Carolina vs. Baker* (1988) — have heightened concern about the erosion of state and local authority in our federal system. These decisions, plus other political and economic developments, have prompted discussion of possible constitutional reform to strengthen the states and, indirectly, local governments in the federal union.

Proposals for reform have taken two general forms: (1) substantive limits on the scope of national decisionmaking, such as a constitutional amendment to protect tax exemptions for state and local bonds, as proposed by the National Association of State Treasurers and by U.S. Sen. William V. Roth, and (2) procedural rules to enhance the voice of the states in national decisionmaking, such as the 1988 proposal by the National Governors' Association to amend Article V of the U.S. Constitution to make it easier for states to initiate constitutional amendments (U.S. ACIR 1989).

There is, however, no widespread agreement on the need for constitutional reform, or on the best type of reform. Even so, discussion of reform is healthy, and helps to focus public attention on fundamental questions of federalism.

This article calls attention to the role of the U.S. Supreme Court in nationalizing the federal system and advances a modest proposal that the U.S. Supreme Court be constitutionally required to reach a three-fourths vote to void a state law or local ordinance. This rule would apply to state or local acts that are said to violate the U.S. Constitution or a federal statute enacted pursuant to congressional and presidential interpretations of national power under the U.S. Constitution.

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The immediate impetus for the proposal is the fact that the 1985 *Garcia* decision, which overruled *National League of Cities vs. Usery* (1976), was decided by a 5-4 vote, as was *NLC*. This sequence of important, narrowly decided, federalism decisions is troubling for many reasons, but two are particularly relevant. First, the decisions illustrate the extraordinary power that can be exercised by a bare majority of the Court in our democracy — five persons (and sometimes only four) who are not elected and who hold office "during good behaviour." Second, this historically speedy reversal of one decision by another, or "Court Flip-Flop" as *Time* magazine put it, illustrates the uncertainty and instability that can be introduced into the federal system in a short time period by simple majority voting on the Court.

The basic premise for the three-fourths vote proposal is that federalism is a fundamental constitutional value. A key problem in protecting this value is that a federal distribution of powers can be stipulated in general terms, and with a few specifics, but not in detailed constitutional terms capable of meeting all future contingencies. Therefore, enduring decision rules and representative structures must be established to protect fundamental values — such as federalism, the separation of powers and individual rights. It is not enough, for example, to stipulate a separation of powers, one must also structure the separation so that, in James Madison's words: "Ambition [can] be made to counteract ambition."

One decision rule that is frequently invoked to protect fundamental values in a democratic society is to require an extraordinary majority vote on certain questions. In framing a constitution, the people decide which questions shall be subject to such a voting rule and then apply the rule to themselves as a whole, to legislative bodies, to plural executive councils and/or to courts. A familiar judicial application of this rule is the

requirement that a jury reach a unanimous verdict of guilty in many types of criminal cases. This voting rule strikes most citizens as being fair and democratic because a criminal trial places a defendant's fundamental rights to liberty or life in jeopardy. Even though some guilty defendants escape punishment, we accept this voting hurdle as a necessary price of justice in our democracy. Many Americans are also familiar with extraordinary vote rules in voluntary associations when, for example, a two-thirds or three-fourths vote may be required to amend an association's constitution or covenant.

Surprisingly, for a document otherwise attentive to checks and balances, the U.S. Constitution provides no voting rules for the U.S. Supreme Court, nor for that matter does it provide for judicial review, the size of the Court, or written decisions. Yet, state constitutions at least stipulate the size of the state high court or courts. Many state constitutions also require written opinions with "the grounds stated;" many establish a quorum rule; and some require the state high court to sit *in banc* for certain cases. The North Dakota Constitution goes so far as to say that "supreme court shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide." For the U.S. Supreme Court, however, judicial review, nine members, written decisions and simple majority voting are all traditions.

The absence of constitutional rules governing these matters is an important reason why the U.S. Supreme Court is so independent and powerful. The Court has had considerable freedom to define its powers. For much of U.S. history, the Court exercised a large measure of restraint. It was not the powerful player that it is today in the political system, although it occasionally tried to be such a player, as in the infamous *Dred Scott* case (1857). Now, however, the Court exerts considerable power and makes policies having far-ranging effects on American society. One key to this power is that it can be wielded by as few as five or even four justices. The question, then, is whether the Court's current power position was anticipated by the people of the several states who ratified the Constitution — a position that may now require a reconsideration of the constitutional provisions governing the Court, at least to provide better protection for the state-local share of the constitutional distribution of powers. The original provisions for the Court may have been compatible with the design of the Constitution because they envisioned a restrained judiciary, but now that the Court is much more aggressive vis-a-vis the states, one must ask whether the Court's behavior has altered the design of the Constitution. If we still value federalism, then just as we protect defendants in criminal trials, it may be time to consider an extraordinary vote

rule for those occasions when a traditional power or the very status of the states as semi-sovereign polities is challenged before the highest court in the land.

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*"Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial."*

— Brutus, 1788

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### The Least Dangerous Branch?

Writing in defense of the proposed Constitution in 1788, Alexander Hamilton asserted that the federal "judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them" (Federalist 78). After all, argued Hamilton, the U.S. Supreme Court would not dispense honors, hold "the sword of the community," command the purse, or prescribe "the rules by which the duties and rights of every citizen are to be regulated." Thus, unless Hamilton was slipping a Trojan horse into the ratification debate, we have to take him at his word: even though the Court would be highly independent and would exercise the power of what we now call judicial review, the Court would not be a major center of power or an independent instrument for the aggrandizement of national power. Sufficient checks had been placed on the federal judiciary to prevent such a development.

Although the judiciary was not a prominent target of critics of the proposed Constitution, Brutus, who was one of the most important and articulate Antifederalist essayists, disagreed with Hamilton. Brutus argued that the judiciary would become the most dangerous branch, at least with respect to the preservation of state powers. "Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial," he wrote in 1788 (Storing 1991). "The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner . . . an entire subversion of the legislative, executive and judicial powers of the individual states." Brutus was convinced: "That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction."

Brutus' observations also are useful for the light they shed on the origins of the 10th Amendment. Brutus believed that if the Constitution were adopted, it would be essential to add amendments to protect the states as well as individual

rights. Here, he was expressing a widely held view that led to the ratification bargain of 1788, namely, the agreement that the first Congress would propose amendments to mitigate the aggrandizing features of the Constitution and afford greater protection for the states. One of those amendments ratified three years later was the 10th Amendment.

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*The 10th Amendment was not, therefore, a mere truism; it was to be both a substantive limit on national power and a guideline for interpreting the U.S. Constitution.*

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This history suggests that the 10th Amendment had meaning; it was not a rhetorical affirmation of what was already enshrined in the Constitution. Yet the U.S. Supreme Court majority dismissed this understanding of the 10th Amendment in its *Garcia* and *South Carolina* rulings. Although it is correct to say that the framers of the Constitution — namely, those who drafted the document and viewed it as a good product — believed that state powers would be protected by the representative structures and procedural safeguards built into the national political process, critics of the document were much less sanguine. Therefore, the critics pressed for, and obtained, a promise of amendments from supporters of the Constitution, a promise that was fulfilled by the Bill of Rights.

The 10th Amendment was not, therefore, a mere truism; it was to be both a substantive limit on national power and a guideline for interpreting the U.S. Constitution. The Supreme Court majority surely aggravated its error in *Garcia* by holding in *South Carolina* that to obtain judicial relief from expansions of national power, states will have to show that the national political process was defective. The whole point of the 10th Amendment, as well as the other amendments, was to correct a process that was already viewed as defective. If the state ratifying conventions had viewed the process as adequate to protect the states in the first place, we would not have the 10th Amendment. We have the U.S. Constitution because most Americans did not believe that the Articles of Confederation provided for a sufficiently strong national government, but we have the 10th Amendment because most Americans did not believe that the originally proposed Constitution provided for the preservation of sufficiently strong states.

In retrospect, the U.S. Supreme Court has been neither as tame as predicted by Hamilton nor as dangerous as expected by Brutus. The Court has not sought "to abolish entirely the state governments, and to melt down the states into one entire government," as Brutus thought it would do.

Yet the Court has become much more powerful and has had a more corrosive effect on state powers than Hamilton led his readers to believe in 1788. By declaring the 10th Amendment to be a "mere truism" in 1942 (*United States vs. Darby*) and by holding in the 1980s that the states must protect their interests through a deficient political process that the 10th Amendment was designed to correct, the Supreme Court has abrogated the ratification agreement of 1788, opened the door to unchecked congressional interpretations of its own powers vis-a-vis the states, and altered even the design of the original Constitution that was to have made the federal judiciary the least dangerous branch.

If state and local governments wish to remedy this situation, they must, as the Court said, turn to the political process. Although the Supreme Court majority had the congressional and presidential arenas in mind when it told the states to protect their interests through the national political process, there is no reason to construe this process so narrowly. The national political process also includes Article V, namely, constitutional amendment. Constitutional politics is high politics and should not be entered into lightly, but it is fully provided for in the U.S. Constitution.

### Court Erosion of State Authority

Brutus was perhaps most correct in arguing that the federal judiciary would be partisan. As an agency of the national government, the federal judiciary would naturally favor expansions of national power over state powers. In this, the federal courts also would have a self-interest because any expansion of national power would be an expansion of federal judicial power.

One way of looking at how this observation has been tested by history is to examine U.S. Supreme Court decisions that have held congressional acts, state laws and local ordinances to be unconstitutional. From 1789 through mid-1986, the Supreme Court had declared only 121 acts of Congress to be unconstitutional in whole or in part. During that same period, however, the Court held 1,026 state acts and 113 local ordinances to be unconstitutional in whole or in part (Congressional Research Service 1987). The exercise of this power has grown during 25-year periods (except 1964-1986) since 1789 (table 1). Clearly, the data in table 1 indicate that the Court was comparatively restrained for about the first 130 years of U.S. history. Looking at the exercise of judicial review from 1789 until the 1920s, one might well agree with Hamilton that the federal judiciary was the least dangerous branch. Since World War I, however, the Court has become much more interventionist.

During the 73 years from 1914 through mid-1986, the Court overturned more congressional and state-local acts than it did during the first 125 years of U.S. history. Put another way, 72 percent of all congressional acts and 78 percent of all state-local acts voided by the U.S. Supreme Court since 1789 were overturned during a period that accounted for only 37 percent of U.S. history.

It is also apparent, however, that the Court has been comparatively restrained in voiding acts of Congress. This restraint is another reason why the Court has acquired power. The Congress and the president can strike back at the Court. By being restrained in attacking congressional and presidential exercises of power that erode state authority, the Court protects itself from its natural competitors (or predators).

Indeed, when the Court first mounted an historically unusual assault on congressional-presidential legislation in the 1920s and 1930s, it soon found itself under siege. Although President Franklin D. Roosevelt's court-packing plan failed, the "switch in time that saved nine" clearly signaled that the Court got the message. The states, however, do not have the same ability to strike back. As a result, having been tamed and put back into its "least dangerous" place with respect to the other two branches of the national government, the Court has, during the past 50 years, regained power and prestige by turning its attention to state powers — a direction that not only makes the Court king of a new hill, but also mollifies its competitors on Capitol Hill.

Given that the Court voided 48 congressional acts from 1964 through mid-1986, one might think that this apparently bold re-entry into the congressional-presidential thicket would have provoked another counterattack. Yet this has not been the case, in large part because there is a crucial difference today. More than three-quarters of the Court's decisions overturning acts, or usually portions of acts, of Congress during 1964-1986 involved questions of individual civil, criminal, or welfare rights having benefits for persons but only marginally frustrating effects on national policies.

Except for a few decisions, such as *National League of Cities vs. Usery*, now overturned by the Court, and *Oregon vs. Mitchell* (1970), now overruled by the 26th Amendment (18-year-old voting), the Supreme Court has not been thwarting congressional and presidential policies that expand national power or contract state power. Furthermore, some of those 48 decisions have benefited one or both of the other branches. For example, *INS vs. Chadha* (1983), which overturned the legislative veto, benefited the president, while *Buckley vs. Valeo* (1986), which voided certain campaign-spending limits, benefited the electoral interests of members of Congress and numerous aspirants for federal office. No wonder

**Table 1**  
**Congressional and State-Local Acts Held Unconstitutional By the U.S. Supreme Court 1789-1986**

Period	Number of Acts Declared Unconstitutional	
	Congressional	State-Local
1789-1813	1	3
1814-1838	0	15
1839-1863	1	20
1864-1888	15	99
1889-1913	17	118
1914-1938	31	301
1939-1963	8	183
1964-1986	48	399
<b>Totals</b>	<b>121</b>	<b>1,139</b>

SOURCE: Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* (Washington, DC: U.S. Government Printing Office, 1987) and 1986 Supplement.

the Court is so powerful. By doing favors for its sister branches, the Court stays well out of harm's way.

Unwilling to meddle with the powers of its strong sister branches in a significant way, the Court meddles with the powers of what are now routinely regarded as the nation's "lower level" governments. This is an astonishing development because it means that the Court is not vigorously policing the borders created by two of the most fundamental features of our national Constitution: the separation of powers and federalism. Hamilton was right. No sibling rivalry here. For Congress and the president, the federal judiciary is the least dangerous branch. For the states, however, Brutus had more than an idle point.

### Decline in Respect for Precedent

Another way of looking at the Court's impact on stability and predictability in the federal system is to examine the number of times the Court has overruled itself. Through 1938, the Court displayed comparatively high regard for precedent by overruling itself only 48 times during the first 150 years of U.S. history (table 2). From 1939 through mid-1986, however, the Court overturned previous decisions 136 times. Put another way, 74 percent of the decisions overturning precedent have been made during the last 24 percent of U.S. history. One also sees (column 2) an increase in the number of precedents overturned in each new period of U.S. history, except the 1889-1913 period. Given the Court's enlarged agenda and active policy-making, the increased number of precedents overturned should not be surprising. Even so, *stare decisis* has not fared well in recent decades.

**Table 2**  
**Trends in U.S. Supreme Court**  
**Overruling of Precedents, 1789-1986**

Period	Number of Decisions Overruling Precedent	Number of Precedents Overruled	Average Age (Years) of Precedents Overruled	Era in which Overruled Precedents were made
1789-1813	1	1	2	6
1814-1838	2	3	17	7
1839-1863	4	9	18	13
1864-1888	17	19	18	26
1889-1913	4	5	41	38
1914-1938	20	28	23	67
1939-1963	51	82	24	70
1964-1986	85	102	32	22
<b>Totals</b>	<b>184</b>	<b>249</b>	<b>—</b>	<b>249</b>

SOURCE: Congressional Research Service, *The Constitution of the United States: Analysis and Interpretation* (Washington, DC: U.S. Government Printing Office, 1987) and 1986 Supplement.

The third column in table 2 shows the average age in years of decisions overruled by the Supreme Court in each 25-year period. One might expect the average age of overruled decisions to increase as more old decisions presumably become outmoded by the passage of time. On average, however, the precedents overruled by the Court have been less than 25 years old. Again, the principal exception was the 1889-1913 Court, but that Court overruled only five precedents, one of which was 99 years old.

The average-age figure of 32 years for 1964-1986 indicates that today's Supreme Court has been reaching farther back into history than usual to overturn precedent. This average figure, however, obscures a kind of schizophrenic peculiarity of the current Court. That is, 47 percent of the precedents overruled by the Court during 1964-1986 were more than 25 years old (compared to 37 percent for the 1939-1963 Court), while 53 percent were 25 years old or less. Such shifting between older and newer precedents as targets for reversal does not promote stability or predictability. Indeed, the states felt the effects of this wandering through history when the Court overturned the 9-year-old *NLC* decision in *Garcia* and then the 93-year-old *Pollock vs. Farmers' Loan and Trust Co.* decision in *South Carolina*. One cannot count on time to settle precedent for the Court. The 1964-1986 Court went back as far as 121 years to overturn precedent.

The fourth column in table 2 shows the periods in which overruled decisions were originally made by the Court. For example, 70 of the precedents overturned by the Court were originally made during the 1939-1963 period. Fully 55 percent of the precedents subsequently overruled by the Court were made during two periods, 1914-1938 and 1939-1963. Again, these data illustrate

the uncertainty produced by the Court's repudiation of even relatively recent precedent.

### The Rise of Split Voting

Changing patterns of voting on the Supreme Court add another element of unpredictability to the status of state and local governments in the federal system. From 1789 through 1929, some 64 percent of the Court's decisions striking down state laws and local ordinances were made by unanimous votes. Since 1929, however, only about 50 percent of these decisions have been unanimous — a significant decline in Court agreement on questions of federalism and a significant increase in the ability of a small number of nationalist-minded justices to overturn the work of numerous governors and perhaps thousands of state legislators.

Another indicator of dissension is David G. Savage's examination of 38 Supreme Court decisions affecting state and local governments in 1987. States and localities won 21 and lost 17 of those 1987 cases. Strikingly, only seven (18 percent) of those 38 decisions were unanimous. Fully 14 of the decisions (37 percent) were decided by 5-4 votes, while another seven (18 percent) were decided by 6-3 votes (Savage 1988). Such voting behavior hardly lends confidence to the idea that the justices are dispassionately interpreting the same document.

Figure 1 graphically illustrates the historical trends discussed here. The graph shows the dramatic rise in Supreme Court decisions striking down state and local acts as unconstitutional, as well as the trends in dissenting behavior. Since 1789, there have been three periods of sharp increases in Court nullifications of state and local acts: (1) the 1860s through the 1880s, (2) the 1910s and 1920s, and (3) the 1960s through mid-1986.

There have been six decades in which the number of cases having one or more dissenters has equaled or exceeded 50 percent: the 1820s (50 percent), the 1840s (56 percent), the 1850s (86 percent), the 1940s (66 percent), the 1950s (58 percent) and the 1980s (50 percent). Overall, however, all six decades since 1929 have been marked by historically high levels of dissent.

### What Might Have Been?

If the Supreme Court had been required since 1789 to reach a three-fourths vote (7-2 today) in order to void state laws and local ordinances, what would have been the effects of the rule on state and local governments? We cannot, of course, be certain what behavior would have been like in the past; however, we can get an indication by tallying the numbers of cases in which state and local acts were voided on constitutional grounds by less than three-quarters of the justices. The results of this tally are presented in table 3.

Except for the 1850s when 71 percent of the voided state acts (5 of 7 cases) would have been upheld, the three-fourths rule would have had modest but useful benefits for state and local governments (table 3). National supremacy within the domain constitutionally assigned to the national government would not have been severely compromised by the rule, but state and local governments would have gained varying degrees of relief from expansive national powers. This is why the three-fourths rule is a "modest" reform proposal. It would change the rules of the game so as to give the benefit of the doubt to state and local governments, but it would not upset the constitutional apple cart or paralyze the national government. Thus, so far in the 1980s, the national government would still have won 68 percent of the cases, but 32 percent (or nearly a third) of the state and local acts voided by the Court would not have been vacated if the rule had been in effect — no small measure of relief in this era of nationalization.

One question that comes to mind immediately, though, is: What would have been the effect of the three-fourths rule on historic decisions, especially those involving individual rights? Although any list of historic decisions is a matter of judgment, what follows is a list of what would probably be generally accepted as historic decisions, each of which would have withstood the three-fourths rule.

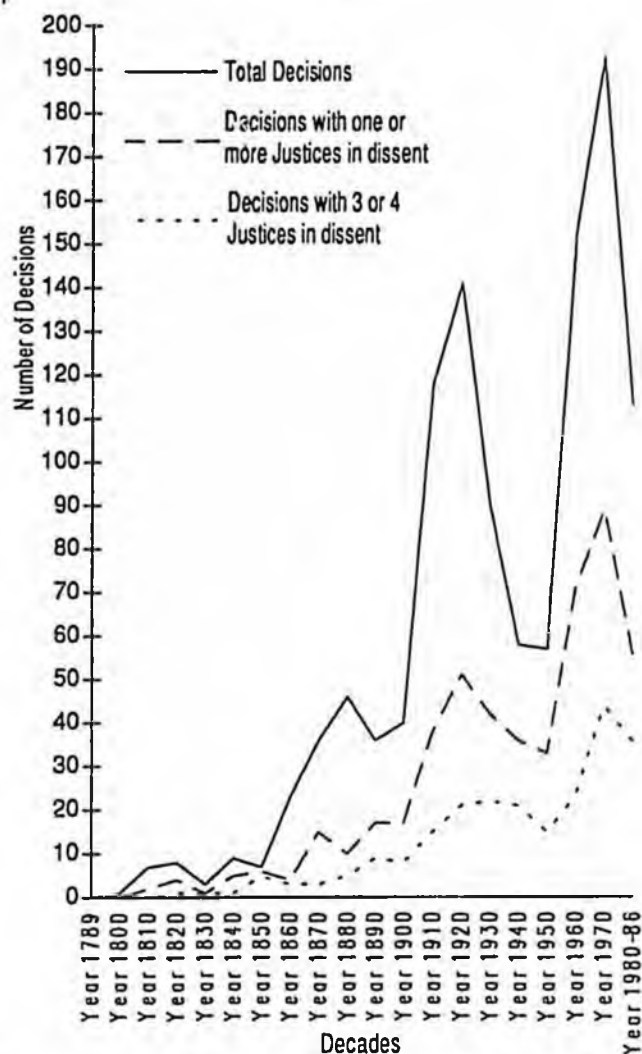
*Fletcher vs. Peck*, 1810 (Georgia law violates contracts clause).

*McCulloch vs. Maryland*, 1819 (state tax on U.S. Bank violates supremacy clause).

*Dartmouth College vs. Woodward*, 1819 (New Hampshire law altering private charter violates contracts clause).

*Gibbons vs. Ogden*, 1824 (New York cannot grant exclusive rights to navigate interstate waters).

**Figure 1**  
U.S. Supreme Court Decisions and Dissents  
in Decisions Holding State Acts and  
Local Ordinances Unconstitutional  
1789-1986



*Brown vs. Maryland*, 1827 (state cannot regulate foreign commerce or levy import duty).

*DeJonge vs. Oregon*, 1937 (state criminal syndicalism law violates First Amendment).

*Hague vs. C.I.O.*, 1939 (Jersey City ordinance prohibiting distribution of printed matter and public assembly without permit violates First Amendment).

*Thornhill vs. Alabama*, 1940 (state law prohibiting publicizing of facts in a labor dispute violates First Amendment).

*Cantwell vs. Connecticut*, 1940 (state law prohibiting solicitation for religion without license and proof of religious cause violates First Amendment).

*Joseph Burstyn, Inc. vs. Wilson*, 1952 (New York prohibition of showing of film deemed sacrilegious violates First Amendment).

**Table 3**  
**Percent of Voided State-Local Acts That Would Have Been Upheld if Three-Fourths Rule Had Been in Effect, 1789-1986**

Decade	Percent	Decade	Percent
1789-1799	—	1890-1899	28
1800-1809	0	1900-1909	20
1810-1819	0	1910-1919	13
1820-1829	13	1920-1929	15
1830-1839	33	1930-1939	25
1840-1849	11	1940-1949	36
1850-1859	71	1950-1959	26
1860-1869	13	1960-1969	15
1870-1879	8	1970-1979	23
1880-1889	11	1980-1986	32

*Brown vs. Board of Education*, 1954 (state laws segregating white and black children in public schools violates 14th Amendment).

*Gomillion vs. Lightfoot*, 1960 (Alabama law altering Tuskegee boundary to exclude black voters violates 15th Amendment).

*Tbrasco vs. Watkins*, 1961 (Maryland religious test for public office violates First Amendment).

*Gideon vs. Wainwright*, 1963 (Florida law not giving indigent defendant court-appointed counsel violates 14th Amendment).

*Abington School District vs. Schempp*, 1963 (Pennsylvania law requiring public-school Bible-reading violates First Amendment).

*Westberry vs. Sanders*, 1964 (Georgia law creating congressional districts of unequal population size violates Article I, Section 2).

*Reynolds vs. Sims*, 1964 (Alabama law creating state legislative districts of unequal population size violates 14th Amendment).

*Dombrowski vs. Pfister*, 1965 (Louisiana subversive and Communist law violates First Amendment).

*Griswold vs. Connecticut*, 1965 (law prohibiting use of contraceptives violates privacy).

*Stanley vs. Georgia*, 1969 (law prohibiting private possession of obscenity violates First Amendment).

*Lemon vs. Kurtzman*, 1971 (state laws providing certain aid to sectarian schools violate First Amendment).

*Roe vs. Wade*, 1973 (Texas law narrowly limiting abortion violates 14th Amendment).

What are some important decisions that would not have withstood the three-fourths voting rule? One decision of continuing concern for state and local governments is *National Bellas Hess* (1967), decided by a 6-3 vote. Another decision is *Kassel vs. Consolidated Freightways Corp.* (1981), which voided state laws prohibiting 65-foot double-trailer trucks on state highways where all neighboring states permitted them. *Democratic Party vs. Wisconsin ex rel. La Follette* (1981), a 6-3 decision, further strengthened national political-party powers. In *First National Bank vs. Bellotti* (1978), a 5-4 decision, the Court struck down a criminal statute prohibiting banks and business corporations from spending money to influence referen-

dum votes on questions not directly affecting them.

Two major rights decisions that would not have withstood the three-fourths rule are *Near vs. Minnesota* (1931), which struck down a newspaper gag law by a 5-4 vote, and *Furman vs. Georgia* (1972), which struck down state death-penalty statutes by a 5-4 vote. Other rights decisions that would not have passed three-fourths muster include *Nixon vs. Condon* (1932), which struck down a Texas white primary law, and *Shapiro vs. Thompson* (1969), which voided one-year residency requirements for welfare assistance.

Looking farther into the past, however, there is a now infamous rights ruling that also would not have passed muster: *Lochner vs. New York* (1905), a 5-4 decision. This ruling struck down state efforts to regulate working hours on behalf of employees. Although today we tend to view the Supreme Court as an institution that expands individual rights over against restrictive state and local laws, in the late 19th and early 20th centuries, the Court often struck down rights-expanding state legislation designed to protect workers, farmers and consumers.

Such Court behavior, moreover, may not be a thing of the past. The recent 6-3 ruling in *City of Richmond vs. J. A. Croson Co.* (1989), which restricted municipal affirmative action programs intended to benefit minority contractors, suggests that the Court may increasingly overturn state and local policies that can be described as progressive or rights-expanding. In some cases, it will be possible to rescue state and local policies by grounding them in state constitutional law (Kincaid 1987); however, in the absence of a three-fourths voting rule on the U.S. Supreme Court, the much-heralded resurgence of the states, which has involved the institutionalization of many now widely accepted reforms and federally induced policies, may be thwarted by narrow

majorities on the Court. A small number of justices deinstitutionalized liberal state and local policies by asserting national supremacy just as readily as they deinstitutionalized conservative state and local policies. The knife cuts both ways.

### Rationales For a Three-Fourths Rule

The basic reason for proposing that three-fourths of the justices on the U.S. Supreme Court be required to reach an agreement to vacate state laws and local ordinances is that federalism is an important value deserving protection in its own right. This is not the place to make the case for federalism, but suffice to say that there is no evidence that conditions in the modern world require unabated centralization and nationalization. Evidence from around the world suggests that decentralization in both private and public sector organizations has many progressive and adaptive benefits. Of course, there continues to be a vital role for national governments. Blind across-the-board decentralization would be as unwise as blind across-the-board centralization. Hence, we are back to questions of balance in the federal system and to the original challenge faced by the framers of the United States Constitution: How can we have a strong union with strong states?

This question cannot be answered for all time by a comprehensive list of national and state powers. This is why proposals to rewrite the 10th Amendment are futile. Even if we could agree on a revision, there would be no way of knowing how the Supreme Court would interpret the new language 20, 50, 100 or 200 years from now. Even a simple change, such as adding "expressly" to the 10th Amendment, would conflict with other portions of the Constitution and still leave the task of interpretation to a Court that can usually find a way to strengthen national powers when four or five justices have a will to do so. Similarly, proposals to require the Court to enforce the 10th Amendment are, under current Court voting rules, tantamount to inviting the wolf to come back to guard what's left of the flock.

What is needed is a procedural or deliberative rule that can afford a greater measure of protection for state and local authority than has been the case for practically a century, a rule that can also restrain a Congress and, indirectly, an executive branch that now exhibit all the liabilities of bigness and power. The distinct advantage of a procedural rule is that it allows us to adapt to circumstances. It does not freeze a dynamic principle like federalism into a deadweight, and it does not require us to answer in advance questions that cannot be answered in advance. A procedural rule is also a neutral principle; it cuts both ways on the political spectrum. Most important,

a procedural rule recognizes that most questions of balance in the federal system are, in the final analysis, matters of judgment. The key issue, then, is who should render this judgment.

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*In short, to protect the lawful powers of the states and the nation and thereby federalism, the Constitution erects, among other things, extraordinary vote rules.*

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One set of proposed procedural reforms would change the way we amend the Constitution. These proposals seek to make it easier for states to initiate constitutional amendments by either resolving or avoiding the problem of a runaway constitutional convention. This fear of a runaway convention is ironic because a constitutional convention is the highest expression of popular sovereignty — the very foundation of our constitutional republic — but the fear exists nonetheless. Hence, changes in the amendment process are worth exploring, but such change would clearly be a major step, the outcome of which is uncertain.

An interim and perhaps sufficient step could be the proposed three-fourths voting rule on the Supreme Court. This procedural rule recognizes that the U.S. Constitution is, in a *de facto* sense, amended by interpretation, mainly by the Court. The Supreme Court is the umpire or gatekeeper of our federal system. Much of the development and change in the federal system can be attributed to the Court. The problem is that the Court has opened the gate too frequently to allow national power to escape from its constitutional corral. Moreover, the Court in *Garcia* and *South Carolina* has removed the 10th Amendment gate, thus compelling the states and their local governments to protect themselves from injury in the political stampede.

It is this *de facto* amendment power of the Supreme Court that highlights the need for an extraordinary vote rule because, where else do we find such a rule already embedded in the Constitution? We find it in Article V. No amendment can go into effect without the consent of the legislatures or popular conventions in three-fourths of the states. The Congress cannot propose amendments unless two-thirds of both Houses deem it necessary. Amendments also can be initiated by two-thirds of the states, in which case the Congress "shall call a Convention." Here, no extraordinary vote rule is provided for the Congress because the call originates from the people of two-thirds of the states. Given that Congress is the servant of the people, it must call a convention. No voting rule is provided for a convention because a convention is an expression of popular sovereignty, and any amendments proposed by it

would still require ratification by three-fourths of the states.

"We the people" inserted these extraordinary vote rules in Article V for three basic reasons. First, the Constitution is fundamental law that should not be subjected to the vagaries of simple majority voting. Second, except for conventions, the actors in the amendment process are legislative bodies. The extraordinary vote rules greatly increase the likelihood that legislatively enacted amendments will reflect as much public consensus as is possible in a diverse society without paralyzing the union by a rule of unanimity. Third, the Constitution establishes the fundamental distribution of powers between the nation and the states. This is the basic federal bargain, and the framers knew that to make this bargain vulnerable to simple majority voting would be to jeopardize the whole arrangement. Indeed, in order to go into effect itself, the proposed Constitution needed the consent of conventions in nine of the 13 states — the original extraordinary vote rule that brought the union into being.

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*Those who supported the 10th Amendment could not possibly have believed that the Supreme Court would be able to ignore it, to say nothing of ignoring it by a 5-4 vote.*

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In short, to protect the lawful powers of the states and the nation and thereby federalism, the Constitution erects, among other things, extraordinary vote rules. Note too that neither party to the agreement, state or nation, can amend the Constitution unilaterally. It takes two to do the amendment tango. Furthermore, Article V is ultimately more protective of state powers than national powers because the only discretionary authority given to Congress is to propose amendments. If the Congress refuses to propose amendments, then two-thirds of the states can require it to call a constitutional convention. Thus, when two-thirds of the states believe that the national government is being truculent, they can appeal to the ultimate sovereign, the people, to arbitrate the issue. The states, moreover, get to ratify all amendments; whether they originate in the Congress or a convention. Congress, however, can neither approve nor veto amendments proposed by a convention. No wonder the Congress is so fearful of a convention. The principal protection for national powers in Article V is the three-fourths state ratification rule. The Congress needs only a minority of states to side with it to block an unfriendly amendment.

If this is not enough evidence that extraordinary vote rules were intended to be important procedural devices for protecting federalism and especially state powers, then consider another

major extraordinary vote rule in the Constitution: Treaties must be ratified by two-thirds of the members of the U.S. Senate who are present. Given that treaties can expand national powers and damage the interests of all or some states, the Constitution gives the states extra protection here. Still another extraordinary vote protection for the states is that a two-thirds vote is needed in the U.S. House to expel a member.

There are still more extraordinary vote rules in the Constitution. A two-thirds vote in both houses of Congress is needed to override a presidential veto of legislation. A conviction in an impeachment trial requires a two-thirds vote of the members of the U.S. Senate who are present.

Two very important patterns underlie these extraordinary vote rules.

First, the Congress is their primary target. They impose procedural restrictions on the Congress because the Congress is the principal repository of the powers delegated to the national government and because the Congress is the principal institutional vehicle for majority rule. Thus, the Constitution's extraordinary vote rules are designed to prevent the Congress, the potentially most dangerous branch, from tyrannizing both its sister branches and the states.

Second, therefore, these extraordinary vote rules are designed to afford a substantial, but not paralyzing, measure of protection for the Constitution's distribution of powers within the national government and between the nation and the states. In other words, when it came to protecting two of the most fundamental features of our national Constitution — federalism and the separation of powers — "we the people" decided that the measure of nationwide consensus required by extraordinary majority voting on fundamental questions is superior to the intrigue, instability and divisiveness that can arise from simple majority voting. Extraordinary vote rules are among what Madison called republican remedies for republican diseases (Federalist 10).

This proposed three-fourths voting rule for the U.S. Supreme Court is, therefore, fully consistent with the letter and spirit of the U.S. Constitution. If those who framed and ratified the Constitution had believed that the Court would be as powerful as it is today, they probably would have provided for such a rule. They, however, did not. As Hamilton said, they expected the Court to be the least dangerous branch. Only people like Brutus thought differently, but ratification of the 10th Amendment was to have taken care of the problem. Those who supported the 10th Amendment could not possibly have believed that the Supreme Court would be able to ignore it, to say nothing of ignoring it by a 5-4 vote.

In effect, the constitutional design of our federal system has sprung an enormous leak. The dam constructed by the 10th Amendment and

the Constitution's extraordinary vote rules to contain and regulate the flow of national power has been battered by many developments in this century. Although the legal origins of rising national power lie primarily in the Congress and presidency, ultimately it is the Supreme Court that not only legitimizes that power but also adds to it by independently striking down state and local laws and by refusing to stand tall against its sister branches.

A three-fourths voting rule would plug the leak and repair the dam, not for the purpose of stopping the flow of national power, but of regulating its flow in a manner consistent with the design of the Constitution. The rule also would have the advantage of strengthening the separation of powers by giving the Supreme Court the constitutional backbone to perform its interbranch duty of checking and balancing congressional and presidential exercises of powers.

### Conclusion

Requiring a three-fourths vote of the U.S. Supreme Court to void state law and local ordinances would go a long way toward restoring a better balance of power in the federal system. Such a voting rule would be simple, neutral, readily understandable, stabilizing but not paralyzing, minimally disruptive and fully consistent with the design and principles of the U.S. Constitution. Most important, the rule would give the benefit of the doubt to the states and would require the Court to reach more of a consensus on questions of federalism. In some cases, such a judicial consensus would simply reflect a more general public consensus; in other cases, it would be the first step in building a systemwide consensus.

Finally, unlike many other amendment proposals, we can get a good idea of the implications of

the voting rule by looking at how it might have affected past judicial decisions. In this article, we examined only a narrow range of Supreme Court decisions, namely, those decided on constitutional grounds. To get a full measure of the implications, we would have to look at the whole range of decisions affecting state-local powers. We also would need a better and more complete classification of major versus minor decisions. In addition, there is a need to work out technical refinements and to ensure that state and local governments could have cases heard by the Supreme Court.

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# Contradictory Trends in Contemporary American Federalism: *Court, Congress and Centralization*

by Daniel J. Elazar

*The U.S. Supreme Court has stood the constitution on its head to give the Congress the last word in federal-state relations at the same time that Congress has stepped up its mandates on states. Despite this, states are taking the lead in policy-making, encouraged by Reagan's New Federalism. In this worst and best of times, protecting the rights of states under the Constitution is important to the preservation of all our liberties.*

The most striking aspect of contemporary American federalism is the existence of strong contradictory trends within the federal system. On one hand, in the *Garcia* and *South Carolina* decisions, the U.S. Supreme Court has compounded all its previous errors with regard to the proper constitutional relationship between the federal government and the states. The Court has stood the Constitution on its head to give the Congress of the United States the last word in determining the federal-state relationship in matters deemed to be within the purview of the federal government. In doing so, it threw over 200 years of constitutional understanding and nearly that many years of precedent. The Court has done exactly what the Constitution pledged not to do, that is to say, make one of the parties to intergovernmental controversy the arbiter of the results.

It is difficult for students of American constitutionalism to understand the Court's reasoning. Its decisions in this regard have about as much relevance to original constitutional doctrine as the Court's decisions in church-state cases that allow the federal government to effectively subsidize church-sponsored institutions of higher education while forbidding the states to do the

same for elementary and secondary schools. There, too, the Court reversed the original meaning of the religion clauses in the First Amendment that restricted Congress but did not bind the states in any way. In these and similar cases, it is possible to follow the Court's tortured reading of the U.S. Constitution through its self-created prism of the 14th Amendment, but even those who agree with the results must conclude that the decisions were reached through the kind of convoluted interpretation usually confined to theologians seeking to disprove some previously fundamental religious doctrine that they have come to consider primitive.

This writer has not yet concluded that the 1787 Constitution is primitive. Nor it seems has the American public, given the respect accorded the Constitution on the occasion of the bicentennial of its adoption. It is hard to overemphasize the erroneous character of the recent trend in court decision-making. If the states cannot act to amend the Constitution to clarify this matter and prevent the 10th Amendment from disappearing, then more is the pity.

Armed with new power from the Court, the U.S. Congress has not been slow to act. If the states have been able to hold the line on a number of issues directly confronted in the U.S. Supreme Court decisions, they have lost the battle with regard to congressional mandates. When I began studying federalism approximately 35 years ago,

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I was able to write with full confidence that even the great expansion of federal aid to the states had to be undertaken apologetically, with the federal government carefully justifying every demand placed upon the states and making that demand only as a condition for receiving federal funding, which the states could choose to accept or reject. Even 15 years ago, it was possible to conclude that this was still the basic federal position and since the number of federal categorical grants had grown so greatly, the vast smorgasbord of federal aids allowed the states to pick and choose in fact as well as in theory.

Then came "mandating" whereby the Congress in court-justified actions ordered the states to do this and that without pretense of winning them over through federal aid or making those orders contingent upon accepting federal grants. Nearly a decade ago I referred to this as "prefectorial federalism" in a symposium presented at the American Political Science Association and later published as a special issue of *Publius* (vol. 11, no. 2, Spring 1981). At that time, prefectorial federalism seemed to be emanating from the executive branch of the federal government. In the intervening years the executive branch, headed by President Reagan, has turned out to be generally a great friend of federalism while Congress, increasingly detached as it is from state and local ties, has turned out to be a danger second only to the U.S. Supreme Court.

The key here is the detachment of members of Congress from state and local ties. The transformation of American politics from a state and local party-based system to a free-for-all among individuals supported by various national economic, cultural, social and political interests through political action committees has meant fewer members of Congress have had experience in state and local government. Increasingly candidates for Congress are new to the political arena, and depend on projecting their personalities to raise funds from PACs and individuals to cover today's outrageous campaign costs. Hence they come to Washington without state and local political roots. They settle their families within the Beltway year round, and, while they continue to work their districts, they do so as visitors more than as residents. Thus they have no strong personal commitments to state and local interests, much less to the constitutional rights of the states.

Even the Reagan administration has played a role in fostering the trend toward centralization, either by preferring private economic interests over states' rights at critical junctures, for example, in deregulating highway trucking and interstate banking, or by succumbing to popular pressure without regard to states' rights as in the case of the minimum drinking age.

## States Reassert Themselves as Polities

Most extraordinary in the face of all this is the other side of the coin, that within this deteriorating constitutional and political framework, the states have become stronger and more vigorous than ever, have reasserted themselves as polities, and have become the principal source of governmental innovation in the United States as well as the principal custodians of most domestic programs. In this extraordinary turnaround, they have been helped by the catastrophes that have befallen previous presidents and by the positive efforts of the Reagan administration.

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*State officials discovered that they had powers of their own derived from the very existence of their states as states and did not need to wait for federal initiatives or permission — that the states were indeed polities.*

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Fifteen years ago, the Center for the Study of Federalism expressed concern for the future of the states as polities, committing most of its public effort on the states' behalf to reawakening the sense of the states as polities among governors, state legislators and administrators, as well as among federal elected and appointed officials (Elazar 1974, 1975, 1976). At the time, the center lacked confidence that the idea could be understood by state officials, including governors whose whole political careers had developed while the states were becoming middle managers in a hierarchical federal system. Then came the crises of the Nixon administration — Watergate, the Arab oil embargo, the national truckers strike and the collapse of South Vietnam. With the federal government paralyzed, the states, particularly the governors, acted to fill the vacuum in the true spirit of federalism and in a manner that should have demonstrated once and for all the virtues of federalism as providing useful redundancy and fail-safe mechanisms, so that when one part of the political system cannot function, other parts can take over.

The states organized the distribution of limited oil and gas resources; governors settled the truckers strike, and state agencies came to the fore in the settlement of southeast Asian refugees. State officials discovered that they had powers of their own derived from the very existence of their states as states and did not need to wait for federal initiatives or permission — that the states were indeed polities. Moreover, states enjoyed exercising those powers and did so well (Hawkins 1982).

By 1975, as the United States was about to enter a new political generation, the second of the post-modern epoch, the states were off and running. The U.S. Supreme Court had entered into a period of rather diffuse retrenchment in the years following the Warren Court. State supreme courts began to pick up the slack through the development of a newly vibrant state constitutional law, building state constitutional foundations for public policy in everything from individual rights to relations among religion, state and society, to the fair distribution of public services. The constitutional legitimacy of these grounds was increasingly recognized by liberals and conservatives on the U.S. Supreme Court, each for their own reasons. State constitutional law became a field of academic and legal interest beyond the courts, a sure sign of its new importance (Kincaid 1988, Tarr 1988, Williams 1988).

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*We must demonstrate that the preservation of federalism and the rights of states are as important to the preservation of liberty as is the safeguarding of individual rights.*

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In the mid-1970s, the federal high court began to look more favorably upon state actions in fields previously subjected to pre-emptive decisions by the court's predecessors. For a while it seemed as if the 10th Amendment would be reinvigorated through decisions such as *Usery*. Even today the Court's decisions on federalism are distinctly mixed, with state prerogatives being preserved at least half of the time.

The states' innovative role continued to expand through the late 1970s, in part because of the relative paralysis of the Carter administration (which was not unsympathetic to fostering a greater state role in the federal system and whose relations with the states were generally good and constructive). The election of Ronald Reagan to the presidency clearly changed the thrust of federal government attitudes toward federalism, the states and localities. Reagan campaigned on a platform of states' rights and decentralization. He unashamedly revived use of "states' rights" terminology and reintroduced it into the American political lexicon. In this he was quite successful. For example, an editorial appeared in the *Washington Post* shortly after Reagan's election in November 1980 criticizing him for talking about state sovereignty, while endorsing his emphasis on states' rights.

Although his visible federalism initiatives had only modest success, and other political interests led him to backslide from time to time, President Reagan never wavered in his support for strengthening the states in the federal system.

He succeeded in persuading Congress to fold a large number of categorical grant programs into larger block grants and to eliminate federal revenue sharing, which had become an exclusively federal-local program. His administration significantly reduced the federal regulatory burden on states. He also substantially reduced direct federal-local relations, insisting that intergovernmental activities in which the federal government was a party be conducted through the state governments wherever possible.<sup>1</sup>

Other Reagan administration actions had an even greater effect on stimulating the new state role. The huge federal deficit almost completely ended federal policy initiatives and reduced the federal role in existing programs, with the states picking up at least some of the slack. The transformed position of the United States in the world economy encouraged the states to expand their economic development activities worldwide. Governors and other state officials worked with firms and communities to promote foreign investment and trade. While this was done with Washington's blessing, states more than ever became independent actors on the world scene.

The governors especially showed a new assertiveness in responding to the Reagan administration, taking the lead in policy-making in many areas in which they had fought with the federal government for a modicum of managerial control. At the same time, state legislatures did not lag behind. They became more active as policy-making bodies and a new generation of state legislative leaders showed new breadth of concern and understanding on domestic issues facing their states and the country.

Congress also responded to the changed situation. It limited the impact of several Supreme Court decisions that had negatively affected the states in matters of regulation and public personnel administration. Perhaps the crowning achievement in the new congressional responsiveness was enactment of comprehensive welfare reform in 1988. The state-initiated act reflected state ideas of welfare reform and was negotiated by governors working through the National Governors' Association with congressional leaders. The result was hailed as marking a new phase in federal-state relations whereby the states as states had a voice in shaping federal legislation by working directly with Congress and not merely through the federal executive department (Rosner 1988).

### The Liberation of States' Rights

What are we to make of all this? Charles Dickens wrote in *A Tale of Two Cities*: "It was the best of times. It was the worst of times." The states'

role in the federal system since 1974 is awesome testimony to state vitality, while the actions of the U.S. Supreme Court and, to some extent, the Congress offer vigorous testimony to the dangers that the states and the federal system face. Even the actions of the Reagan administration offer case studies in both directions, demonstrating once again the need for strong constitutional protections for federalism even where there is the best will in the world on the part of those actively engaged in the political arena to be good federalists. The founding fathers understood this need, which is why they wrote such protections into the Constitution.

In this 200th anniversary of the submission to the states of the Bill of Rights, it is well to remember that, beyond protecting individual rights, these 10 amendments were introduced to preserve the rights of the states within a functioning federal system, to overcome the lingering doubts of many states as to whether the original document was sufficient to do so (Elazar 1988). Those of us who are concerned with federalism need to make the commemoration of the Bill of Rights one that recognizes this fact. We must demonstrate that the preservation of federalism and the rights of states are as important to the preservation of liberty as is the safeguarding of individual rights. We need to call attention to the way in which the U.S. Supreme Court has turned the Constitution on its head, to endeavor to convince the court to change its interpretation so that the Constitution will rest again on its original federalist foundations.

This is now more possible than ever. Until the mid-1970s, states' rights were inevitably associated with arguments on behalf of slavery or racial segregation and discrimination against non-whites. However erroneous such arguments may have been in principle, in practice states' rights were used effectively as a shield for slavery and discrimination. That problem has been overcome as a constitutional issue. It is clear to one and all that the federal constitution and the vast majority of state constitutions are color-blind.

This is the constitutionally correct position in a civil society dedicated to the proposition that "all men are created equal and endowed by their Creator with certain inalienable rights." For the first time in history, believers in federalism can argue that protecting the rights of the states is important for the sake of liberty and is not entangled with slavery and discrimination. Let us go forth and do so.

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<sup>1</sup> See *Publius* "Annual Review of the State of American Federalism," vol. 11, no. 3-4 (Summer 1981) through vol. 18, no. 3 (Summer 1988) and vol. 16, no. 1 (Winter 1986) devoted to Reagan's "New Federalism."

# Federalism at the Crossroads: *Conflicting Trends, Competing Futures*

by Timothy J. Conlan

*The future of federalism is impossible to predict. While states are viewed as stronger than ever, they also have lost valuable political, constitutional and fiscal ground in recent years. The uncertain factors shaping federalism mean that the future of states remains cloudy.*

Over the past quarter century, the federal system has been buffeted by powerful and conflicting currents of centralization and decentralization. After nearly two decades of dramatic growth in federal aid and regulatory programs, the nation in 1980 elected a president committed to reversing the growth of domestic spending and responsibilities, restructuring Washington's relationships with the states and the private sector, and above all, rolling back the modern welfare state. Despite the boldness of this agenda, Ronald Reagan seems to have accomplished much of what he set out to do. Thanks in no small part to Reagan's policies, the federal system has swung from two decades of growth and activism at the national level to a surge of innovation at the state and local levels.

Has the system now found a balance that is likely to persist for the foreseeable future? The answer to that question depends to some extent on the policies of the Bush administration and on unpredictable events. But it also depends on the interplay between Reagan's legacy and evolving trends in intergovernmental relations. Viewing the new vitality in state and local government,

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*This article is derived from his recent book, *New Federalism: Intergovernmental Reform from Nixon to Reagan* (Brookings Institution, 1988). Portions of it appeared previously in "Federalism After Reagan," *Brookings Review* (Fall 1988) 23-30.*

many observers believe that the federal system may have reached a balance reminiscent of the "cooperative federalism" of the 1950s. Yet there are also signs that this vitality may be overshadowed by subtle pressures coming from the federal government which could lead instead to what might be termed "co-optive federalism."

## State Renaissance?

Many contemporary analysts predict the emergence of a healthier and more dynamic federal system in the post-Reagan era, characterized by renewed vitality among state and local governments. In the view of some, the real story concerning federalism in recent years has been the system's adaptability and resilience despite repeated and abrupt changes in federal policy since 1960. This resilience is evident in the contemporary burst of state and local policy innovation, in the declining dependence of states and localities on federal assistance, and in the new era of "cooperative federalism" that characterizes the administration of federal aid programs.

Despite Reagan's intentions and policies to the contrary, the welfare state remains alive and well in states and localities throughout America. Governmental activism has flourished during the 1980s as state after state has aggressively addressed issues of educational reform, economic development and welfare dependency. For example, two education scholars recently noted that "the last two years have witnessed the greatest and most concentrated surge of educational reform in the nation's history. . . . The most surprising aspect of the 'tidal wave' of reform is that it

came from state governments. . . . State governments responded with new legislation, policy initiatives and funding (Doyle and Hartle Dec. 5, 1984:1)." The specific reforms are too numerous to list, but they range from enhanced funding and curriculum changes in states across the country, to the wholesale reform of educational systems in Mississippi and Arkansas, to bold innovations in personnel and enrollment systems in Tennessee and Minnesota.

Apart from education, states such as Massachusetts, New Jersey and California have taken the lead in work-related welfare reform, an approach that Congress recently duplicated. Midwestern states have far outstripped the federal government in the breadth of their policy responses to the 1980s' agricultural depression, adopting dozens of programs to expand agricultural markets and to provide social and financial counseling and support services. Health care, insurance reform and higher education innovations have been state priorities.

Nor is this burst of state activism considered to be a temporary response to Reagan administration policies. Looking over the broad range of state and local policy innovations in recent years, a seasoned observer of state and local governments concluded that this "new sense of independence from the federal government . . . promises to be both more profound and more permanent than most people have recognized (Herbers Oct. 1987:28)."

To some extent, this state rejuvenation is an outgrowth of earlier federal policies that stimulated the states to expand their political and institutional capacity to provide services. Subsequent federal aid cuts under Reagan prompted state and local governments to employ their renewed capacity with innovation and responsiveness. For example, most states moved aggressively to restore reductions in federal block grant funding, especially in areas of traditional state competence (Peterson 1986:13-16).

There is certainly no question that state and local governments are now less financially dependent on federal assistance. In a process some have hailed as "defacto New Federalism," federal aid has declined 32 percent since 1978 as a percentage of state and local revenues. During this same period, intergovernmental aid has dropped 33 percent as a proportion of the entire federal budget and as a percent of GNP. Federal grants for governmental service have been singled out, suffering among the deepest reductions of all major budget categories (see table 1). Direct federal aid to localities has been equally hard hit. With the elimination of General Revenue Sharing and the state-oriented restructuring of the Reagan block grants, many localities that once received direct federal funding now receive none at all.

**Table 1**  
**Changes in Real Domestic Outlays, FY 1981-1987**  
(in billions of dollars and percent)

Budget Category	FY 1981	FY 1987	Percent Change 1981-87
Total Non-defense	\$555.2	\$609.5	9.9%
Payments to			
Individuals*	344.3	394.9	14.7
Total Grants in Aid	100.6	90.4	-10.1
To Governments	61.3	43.0	-29.8
To Individuals	39.3	47.4	20.6
All Other	106.0	84.7	-20.1
Net Interest	73.7	117.5	59.4

\*Including grants to state and local governments for individuals.

Source: Calculated from U.S. Office of Management and Budget, *Historical Tables, Budget of the United States Government, Fiscal Year 1989*, (GPO 1988), table 6-1.

Despite real reductions in federal assistance, state and local expenditures have continued to increase during the 1980s as many jurisdictions have raised existing taxes, broadened their tax bases and adopted more innovative forms of financing. Nor are these trends toward greater fiscal independence expected to be short-lived. Real reductions in federal aid began under Jimmy Carter, not Ronald Reagan, and existing constraints on the federal budget promise to continue for many years.

The trend toward greater state initiative and independence has been complemented by changes in the way remaining federal programs are implemented. Recent studies of federal program administration have emphasized "when federalism works" rather than problems of complexity, duplication and conflict (Peterson, Rabe and Wong 1986; Levin and Ferman 1985). Just as the refinement of New Deal programs led to an intergovernmental era often dubbed "cooperative federalism," longitudinal analyses of more recent federal initiatives have stressed the ability of federal, state and local governments to work together to resolve administrative conflicts and improve program performance over time.

The renaissance of state and local governments indicates to many analysts that bold federalism reforms of the type proposed by Nixon and Reagan are a thing of the past. If ever they were appropriate, they are now clearly obsolete responses to intergovernmental problems that no longer exist. "No one expects a return to the days of overwhelming federal dominance," writes John Herbers. Instead, he implies, we can look forward to a dynamic state and local sector flourishing in a new age of cooperative federalism.

## Or Co-optive Federalism?

A less cheerful scenario for the future of federalism could put reform back on the agenda. Though less fashionable today, this scenario draws attention to new and lingering challenges to the long-term vitality of state and local governments — challenges that may rekindle concern for the federal system. As David Walker (1986:344) has observed:

The systemic position of state and local governments, while operationally powerful, is weak constitutionally and politically . . . Reagan federalism . . . has done little to . . . place the American states on a par with their counterparts in . . . other federal systems.

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*Thanks in no small part to Reagan's policies, the federal system has swung from two decades of growth and activism at the national level to a surge of innovation at the state and local levels.*

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Although such weaknesses may not pose an immediate threat to the health of the federal system, problems may result from the "tyranny of small decisions," as Laurence Tribe (1978:302) has put it:

No one expects Congress to obliterate the states, at least in one fell swoop. If there is any danger, it lies in the tyranny of small decisions — the prospect that Congress will nibble away at state sovereignty, bit by bit, until someday essentially nothing remains but a gutted shell.

Such a scenario rests, first, on the assumption that states and localities are legally vulnerable under contemporary judicial interpretations of the Constitution. Traditionally, the Supreme Court acted as the ultimate arbiter of federal and state roles in the federal system, using such provisions as the 10th Amendment and the commerce clause to carve out separate spheres of sovereignty for each level of government. Indeed, until the 1950s, most accepted definitions of federalism were premised on such a judicially policed system of "dual federalism."

The legal concept of dual federalism began to erode during the 20th century, especially after the New Deal. By 1942, the Court had proclaimed the 10th Amendment to be no more than a "truism," and it had established the legal framework for virtually unlimited federal intervention in state affairs through the spending power and commerce clause. In 1976, the Supreme Court made a brief attempt to resurrect the 10th Amendment as a limitation on Congress' jurisdiction under the commerce clause, but the complex test established in *National League of Cities*

vs. *Usery* to protect "integral" and "traditional" state functions from federal intrusion proved unworkable. Within a decade the Court had thrown up its collective hands and overturned the *Usery* decision, relying instead upon "the effectiveness of the federal political process in preserving the States' interests." Indeed, the Supreme Court majority in *Garcia vs. San Antonio Metropolitan Transit Authority, et. al.* stated emphatically that the court was abandoning its role of adjudicating disputes, pitting Congress' power to regulate interstate commerce against state sovereignty claims:

State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.

## Political Weaknesses

Ironically, the Supreme Court may have abandoned state and local governments to the political fray at the very time that such governments' ability to defend their interests effectively in Washington had reached an historic low. The relative weakness of decentralized party organizations; the rise of nationally oriented mass media, electoral resources and interest groups, and congressional actions all raise questions about the Court's logic. "One wonders why," writes Martha Derthick (1986:32), "if the states' interests are so well protected by the political branches, the issue [decided in *Garcia*] reached the Supreme Court at all."

The basis for the Court's reasoning in the *Garcia* case extends back to arguments developed in the 1950s, when legal scholars and political scientists began to theorize that states and localities protect their interests in the federal system primarily through structural and political means. Legal experts argued that the structural features of the constitutional system — such as the electoral college and equal state representation in the Senate — ensure that state interests are represented and protected in the Congress and the executive branch.

Political scientists questioned the effectiveness of such structural features, noting that the presidency (since the 1930s) and the Senate (since the 1960s) most often have been the sources of extensions of federal authority. They pointed, instead, to the protections offered by the American political party system. "The parties," wrote Morton Grodzins (1966:254), "are responsible for both the existence and form of the considerable measure of decentralization that exists in the United States."

Since the 1950s and 1960s, however, the U.S. electoral system has been transformed. The locus

of innovation and leadership in political parties has shifted from local and state organizations, many of which are weaker than before, to the formerly episodic national parties. Although party modernization is taking place in many states and localities today, it is often the direct result of stimulation by the national party organizations (U.S. ACIR 1986).

At the same time, political parties as a whole have lost the near monopoly they once enjoyed over most elements of the electoral system, including candidate nominations, electoral communications, campaign resources and financing, and voter mobilization. In most cases, competing nationally oriented institutions now dominate these activities. State and local party leaders and activists no longer make independent judgments about presidential candidates at national party conventions, but rather ratify decisions made earlier by primary electorates and caucuses. Independent campaign consultants orchestrate congressional campaigns from coast to coast. Some congressional candidates are reluctant to solicit campaign funds from their constituents and, instead, focus fund-raising efforts on political action committees in Washington and money centers in Texas, California and New York. Meanwhile, candidate communications with the electorate occur primarily through the mass media — particularly television.

As a result, recent scholarship suggests that presidents and members of Congress have become far less dependent upon state and local politicians and elected officials for political success. "The development of national issue-oriented followings by presidential candidates seeking nomination," writes Leon Epstein (Fall 1982:100), "has largely replaced . . . state and local party leaders, acting through the old confederative structure."

Similarly in the legislative branch, Huckshorn and Bibby (1982:91-92) argue that "representatives and senators, once in office, feel little sense of obligation to their state and local parties."

To be sure, state and local influence in Washington is not felt solely through political parties and elections. During the past three decades, state and local governments have greatly increased the size and sophistication of their lobbying presence in the nation's capital. Over the years, this intergovernmental lobby has had its share of important victories, from enactment of General Revenue Sharing to securing and protecting funding for Medicaid. Yet, the need to develop such a presence, in part to compensate for the political changes described above, might well constitute a sign of weakness rather than strength. Given the doubling of interest groups in Washington since 1960, the state and local sector has, at best, only kept pace with its frequent competitors.

Thus, it may be no accident that General Revenue Sharing and the Comprehensive Employment Training Act (CETA) were virtually the only large programs that the Reagan administration successfully eliminated, or that grants-in-aid have suffered a disproportionate share of budget cuts over the past eight years, or that grants to governments were left relatively unprotected by Congress from across-the-board cuts under the Gramm-Rudman process. Even the exceptions to this pattern can be informative. Most, though not all, of the state and local income tax deduction was preserved during the bitter battle over tax reform. Yet, this victory was achieved only after great effort, on an issue supported by three-quarters of the American people, for which the principal beneficiaries are higher income taxpayers, thanks to a lobbying campaign organized and funded by New York real estate interests and organized labor.

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*The renaissance of state and local governments indicates to many analysts that bold federalism reforms of the type proposed by Nixon and Reagan are a thing of the past.*

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### New Complexities

According to the pessimistic scenario, even the perception that intergovernmental interdependence has declined under contemporary federalism is illusory. In many ways, the levels of government are more intertwined than ever. To be sure, Reagan's New Federalism sought to reduce the complexity of existing intergovernmental arrangements and to move the federal system back in the direction of neatly separated functions reminiscent of 19th century "dual federalism" — though on its own strongly decentralizing terms. And federal aid as a percentage of state and local revenues will almost certainly continue to decline.

Nonetheless, state and local governments in many ways face a more complicated Washington environment which goes beyond the issues of federal aid. Although intergovernmental relations once revolved primarily around fiscal relationships, in recent years this federal aid dimension has been massively supplemented by new forms of federal regulatory and tax policy.

In the 1960s and especially the 1970s, the national government began to impose new and far more intrusive regulatory burdens on states and localities. By one count, there were 36 such regulations in force by 1980 (Beam 1981:8-18). Although the pace of new regulations slowed somewhat during Reagan's tenure, since 1981 the federal government has required states and localities to raise the minimum drinking age, to per-

mit larger and heavier trucks on their highways, and to take costly steps to monitor non-point water pollution and public drinking water.

Similarly, virtually every federal tax bill enacted since 1978 has contained provisions inhibiting state and local governments from generating revenue. The national government has increased its competition with the states for "tax room" by raising gasoline and excise taxes. It has relentlessly, and often successfully, attempted to restrict the use of tax-exempt municipal bonds. And it has eliminated federal income tax deductions for state excise, sales and personal property taxes.

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*Ironically, the Supreme Court may have abandoned state and local governments to the political fray at the very time that such governments' ability to defend their interests effectively in Washington had reached an historic low.*

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Thus, in addition to concern over the availability of federal funding and how to obtain or retain it, states must watch closely for intrusive federal regulations and seek to protect their remaining benefits in the federal tax code. "The intergovernmental agenda is getting so long it would take all my time just to keep up the list of issues," lamented one state government lobbyist. "We can't begin to respond to them all."

The list of issues is likely to keep getting longer. As the policy platforms of the 1988 presidential candidates made clear, modern politicians — and the people who elect them — still believe that their role is to "do something" about the endless and changing list of problems confronting contemporary society. Unable to devote substantial public funds to the pursuit of new priorities, policy-makers are apt to accelerate the pattern already established in recent years — imposing new regulatory burdens on states and localities while competing with them over tax sources. Martha Derthick (1986:32) has described the potential result:

In particular, there is a danger that Congress, in striving to close the gap between its desire to define large goals and its unwillingness to provide the administrative means to achieve them, will try to conscript the states. That is, it will give orders to them as if they were administrative agents of the national government, while expecting state officials and electorates to bear whatever costs ensue.

Given prevailing constitutional, political and fiscal trends, states and localities risk confronting the worst of all possible worlds. In the past, they enjoyed legal protections from excessive fed-

eral incursions, and federal influence came in the form of federal grants and subsidies. Now that states' political and legal defenses have eroded, even as federal budget constraints have grown, federal mandates and pre-emption might become the principal forms of intergovernmental interaction.

Even the new cooperative federalism described in recent studies might prove to be more akin to "co-optive" federalism. Evidence from these case studies suggests that the key factor promoting smoother intergovernmental administration has not been evenhanded bargaining between the levels of government but the co-optation of state and local decision-making processes by cadres of federally inspired interest groups and professionals (Peterson, Rabe and Wong 1986).

However harmonious such a process becomes, the upshot remains that state and local resources directed toward federal priorities are unavailable for alternative state and local priorities. And the fact that smaller, territorially organized constituencies generate different kinds of policy priorities is one of the basic rationales for a federal system in the first place. Moreover, the resulting administrative pattern of vertically organized, functionally fragmented spheres of authority recalls the very system of "picket-fence" federalism that frustrated governors and state legislators and prompted federalism reform efforts earlier.

## Conclusion

The trends shaping our federal system are as complex and contradictory as intergovernmental relations. Neither of these two scenarios for the future is apt to triumph completely. In all probability, elements of these conflicting trends are likely to persist and interact. But should the trend toward co-optive federalism gain the upper hand, issues of federalism and intergovernmental relations are bound to regain center stage on the nation's policy agenda and prompt new calls for federalism reform.

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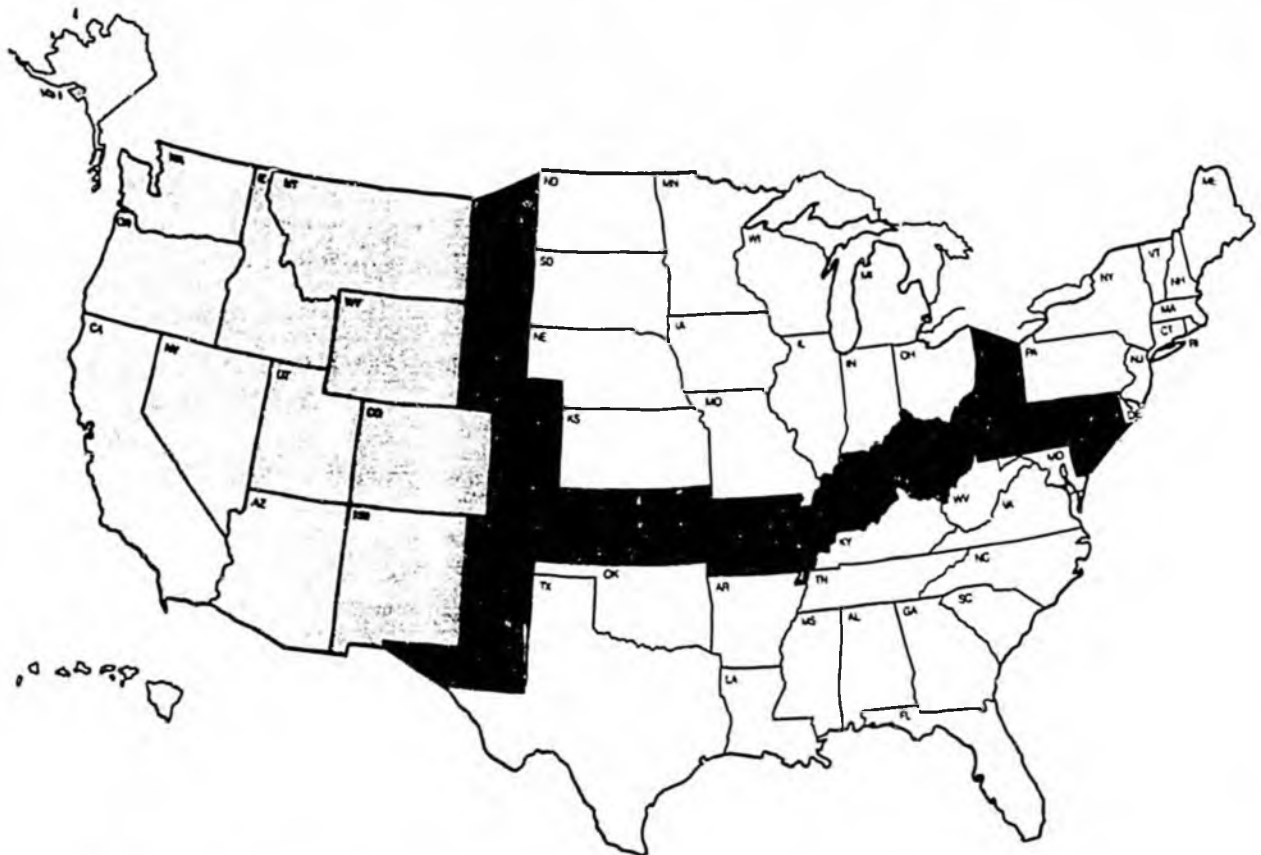
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ARTICLE X.

Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.<sup>18</sup>

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ARTICLE XI.

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ARTICLE XII.

Election of President and Vice President. The electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves: they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate: — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The

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18. Proposed by Congress on September 25, 1789, and declared ratified on December 15, 1791.

19. Proposed by Congress on March 4, 1794, and declared ratified on January 8, 1798.

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REQUEST:

Revision Date: \_\_\_\_\_  
Title: Relating to implementation by  
Congress of the Tenth Amendment to the...  
Sponsor: Senator Fahrenkamp  
Requestor: Senate Judiciary

Affect Agency Legislative Affairs Agency  
BRU: Legislative Council  
Components Session Expenses

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	0	0	0	0	0	0

<b>CAPITAL</b>	0	0	0	0	0	0
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<b>REVENUE</b>	0	0	0	0	0	0
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FUNDING: (THOUSANDS OF DOLLARS)

General Fund						
Federal Fund						
Other						
<b>TOTAL</b>	0	0	0	0	0	0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

No fiscal impact.

Prepared By: Pamela Stoops, Director  
Division: Administrative Services

*Pamela Stoops*

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4 SIXTEENTH LEGISLATURE - FIRST SESSION

5 Relating to implementation by the Con-  
6 gress of the Tenth Amendment to the  
7 Constitution of the United States.

8 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 WHEREAS the Tenth Amendment of the United States Constitution, a part  
10 of the Bill of Rights, provides that "The powers not delegated to the  
11 United States by the Constitution, nor prohibited by it to the states, are  
12 reserved to the states respectively, or to the people."; and

13 WHEREAS the limits under the Tenth Amendment on the authority of Con-  
14 gress to overrule the laws of the states have recently been reviewed by the  
15 United States Supreme Court in Garcia v. San Antonio Metropolitan Transit  
16 Authority, 469 U.S. 528 (1965) and South Carolina v. Baker, 485 U.S. \_\_\_,  
17 99 L.Ed.2d 592 (1988); and

18 WHEREAS the opinions hold that the states must find protection from  
19 efforts by the Congress to overrule state legislation through the political  
20 process rather than from constitutionally defined protection in the Consti-  
21 tution itself; and

22 WHEREAS the opinions offered no protection to state legislation and  
23 invite further preemption by the Congress of the authority of the states;  
24 and

25 WHEREAS the Alaska State Legislature believes that the Tenth Amendment  
26 to the Constitution of the United States is and has been of operational  
27 force governing and balancing the respective powers of the United States  
28 and the states; and

29 WHEREAS the Alaska State Legislature believes that the Tenth Amendment

1 is a substantive limit on the power of the Congress and should be applied  
2 by courts of the United States and of the several states as a substantive  
3 limit on national power in cases coming before them when a question of the  
4 authority of the states is raised;

5 BE IT RESOLVED that the President and the Congress are urged to carry  
6 out their constitutional responsibilities to protect and strengthen the  
7 position of the states in the federal union, to avoid intrusion upon the  
8 prerogatives of the states, and afford protection to the proper governing  
9 authorities of the states.

10 COPIES of this resolution shall be sent to the Honorable George Bush,  
11 President of the United States; to the Honorable Dan Quayle, Vice-President  
12 of the United States and President of the U.S. Senate; the Honorable Jim  
13 Wright, Speaker of the U.S. House of Representatives; and to the Honorable  
14 Ted Stevens and the Honorable Frank Murkowski, U.S. Senators, and the  
15 Honorable Don Young, U.S. Representative, members of the Alaska delegation  
16 in Congress.

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