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THE ROLE OF THE STATES AS POLITIES IN THE AMERICAN FEDERAL SYSTEM

Prepared by

Stephen Schechter & Daniel J. Elazar
with the assistance of Gail Charette

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THE ROLE OF THE STATES AS POLITIES IN THE AMERICAN FEDERAL SYSTEM

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Prepared for

The Alaska Statehood Commission

September 20, 1982

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EXECUTIVE SUMMARY

The states are polities, not middle managers, in the federal system. This means that the states' principal tasks are to govern--to make and implement policies within their respective spheres of jurisdiction, not simply to administer programs developed by the federal government--and to share in the governance of political conduct for the country as a whole. This role of the states--as polities, not middle managers--is constitutionally correct and historically accurate. Moreover, despite the very real concentration of power in Washington, D. C., and the federal limits imposed on state action, a variety of avenues are open to the states for rebuilding their role as polities in the federal system. Most of these avenues require some form of intergovernmental cooperation; however, many of these relationships can be undertaken with minimal or no federal government involvement. This latter form of intergovernmental relations, known as "federalism without Washington," includes state-local relations, interstate relations, and state relations with foreign governments.

While recognizing the importance of current efforts designed to strengthen the role of the states in the formulation and implementation of federal programs, we believe there is much the states can do without Washington, D. C., to rebuild their role in the federal system. Moreover, we believe that Alaska can play a lead role in demonstrating and advancing the use of these avenues by virtue of its unique geohistoric position, combining elements of the last land-frontier and the first frontier of an increasingly internationalized system linked by supersonic transportation and cybernetic technology systems.

Therefore, this study focuses on various avenues of "federalism without Washington" that can be utilized by the states in rebuilding their role as polities in the federal system. Five state-centered avenues are explored in this report: (1) state-local cooperation in developing citizenship education programs designed to prepare future generations of Alaskans for the challenges of citizenship in the federal system; (2) other avenues for strengthening the bonds between citizens and their respective states; (3) state avenues of constitutional choice, including not only state constitutions but the role of the states in amending the U. S. Constitution; (4) interstate compacts and agreements, formed without the consent of Congress, as an alternative mechanism for intergovernmental coordination and problem-solving in the federal system; and (5) state relations with foreign governments, notably Canadian provinces, as an alternative responses to such transborder needs as migratory wildlife management.

In the remainder of this section, we summarize the principal findings and recommendations of our study.

A. Summary of Findings.

•The American system is not a management hierarchy but a compound republic or "matrix of arenas." In its constitutional design and historical application, the American federal system resembles a matrix--not a pyramid--in which differences among governments are based on jurisdictional scope not status. Hence, the federal government is indeed a "general government," framing the whole, while the states serve smaller, but no less important, arenas in their constitutional capacity as "constituent polities."

•Over the past two decades, there has been a trend away from the matrix model and its intentionally "noncentralized" framework. This trend has taken several forms: (1) Influenced by theories of management, the federal establishment in Washington, D. C., has come to be permeated with an attitude of superiority that touches even those who remain in Washington as lobbyists for state and local interests. (2) Increasingly, there is a tendency on the part of many to see the federal government as the only source of national policy. (3) This "hierarchical" view is also manifested in the belief that the federal government should mandate state administrative tasks. (4) A contributing factor is the centralization of the political party system and the decline of its state-centered controls, loyalties, and attachments. (5) Another factor is the explosion of federal programs and regulations affecting state and local governments. (6) Additionally, there is the tendency on the part of federal court judges to decide federal-state controversies in favor of the federal government, relying on deference to Congress and on outmoded theories of preemption.

•At the same time, the states have not done so badly in recent years as the foregoing tendencies toward centralization might suggest. The past two decades has witnessed the unparalleled growth of all governments in the American federal system. As a group, the states have increased the level and range of their activities in ways that have kept pace with, and often exceeded, the growth of the federal government. Moreover, the states are fiscally the healthiest of any in the federal system. Additionally, they have improved their governmental machinery, strengthened their capacity for planning and management, and become more representative of, and responsive to, their citizens than at any time since the Civil War. Finally, the federal courts have upheld state interests in important cases involving the taxing power, the regulatory power, and the formation of interstate and foreign agreements without the consent of Congress.

•The present situation is a kind of stand-off. Hierarchical assumptions prevail in many congressional policies and court decisions, while older forms of noncentralization are maintained by the emergence of strong state government, the actual practice of many

intergovernmental programs, and occasionally supportive court decisions.

B. Summary of Recommendations.

The future role of the states depends on the way in which this stand-off is resolved. This is an eminently practical issue which requires resolution in the minds of opinion-molders and decision-makers first and foremost.

We believe that Alaska can play a lead role in this effort. As a relatively young state, Alaska can demonstrate the meaning of statehood in the way its leaders and citizens approach the second generation of state building. Additionally, Alaska can join with other western and border states in strengthing the role of the states in interstate and foreign relations. Recommendations for advancing these goals are summarized below:

•We recommend that the Governor establish an Advisory Council on Citizenship Education. The purpose of the council would be twofold: to catalyze statewide interest in the need for citizenship education and to develop alternative educational strategies for meeting that need. Toward these ends, the council could draw support from the Alaska Council for Social Studies, the Anchorage school district which began a pilot project on citizenship education in the fall of 1982, and other local educational organizations.

•The nation's governors can play a lead role in rebuilding the images and institutions of the states as polities. This effort could be initiated in several ways: (1) The Governor of Alaska, individually or as part of a common effort coordinated by the National Governors' Association, could periodically issue a "political impact statement" on the potential effects of proposed governmental policies (state as well as federal) on political traditions, institutions, and citizenship roles in Alaska. (2) The National Governors' Association could join with other associations of elected officials in creating a joint task force to develop findings and recommendations for strengthening the states' political institutions. (3) The states could be more attentive to the symbolic avenue for revitalizing the states as polities, including, for example, the restoration of state designations of National Guard units.

•The Alaska Statehood Commission might serve as a model for a Pacific Statehood Commission. The purpose of such a commission would be to identify common problems affecting member states as states and to explore cooperative responses to those problems. Again, the importance of statehood concerns for Alaska puts Alaska in a key role in educating other states on what it means to be a state.

•A state's constitution can provide an opportunity for expressing fundamental statements about the role of the states and its citizens in the federal system. One example is the role of state constitutions as a framework of government, for which Alaska's constitution has long served as a model. Another example is the role of state constitutions in prescribing new powers and limits on government, such as the provisions in Alaska's constitution regarding natural resources. For Alaska and other western states, the new preamble in Montana's constitution can provide a model for a "compact with the land." And the constitutional convention debate over the deletion of "foreign relations" in Article XII, section 2, of the Alaska constitution provides useful evidence in support of the role of the states in hemispheric relations.

•The states also have a vital role in proposing as well as ratifying amendments to the U. S. Constitution. For fifteen years, the states have attempted to persuade Congress of the need for a convention procedures act that would take the uncertainty out of the convention method for proposing amendments. Since Congress seems reluctant to address this need unless its back is up against the wall, we recommend that the states initiate an amendment petition drive for a convention that would propose a convention procedures amendment to the U. S. Constitution.

•The states should make maximum use of the Supreme Court's deferential attitude toward interstate compacts. In U. S. Steel Corp. v. Multistate Tax Commission, 434 U. S. 452 (1978), the U. S. Supreme Court reaffirmed rulings and dicta dating back to 1893 on the "Compact Clause" of the U. S. Constitution. That is, despite the broad language of the "Compact Clause," interstate compacts and agreements requiring congressional consent are limited to "the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." In upholding the Multistate Tax Compact as an interstate agreement which does not require congressional consent, the Court has considerably widened the possible uses of this device as a mechanism of intergovernmental cooperation.

•We recommend the creation of appropriate state mechanisms to coordinate and strengthen Alaska's relations with foreign governments. In the Multistate Tax Commission case, the Supreme Court did not directly address the situations in which the states could enter into foreign agreements and compacts without congressional consent. Presumably, the same rule applies to both interstate and foreign agreements. Therefore, mindful of Alaska's position as an international crossroads, we recommend strengthening Alaska's coordinative and legal capacity to enter into foreign agreements vital to its interests. Our recommendations include: (1) designating a special assistant within the Governor's Office for Interstate and Foreign

Relations; (2) creating an inter-agency task force to coordinate state policies involving interstate and foreign relations; and (3) developing a full-time legal staff with the capacity to clarify and widen state roles in interstate and foreign matters.

•We further recommend that the National Governors' Association develop a working group on the role of the states in foreign affairs. The purpose of such a working group would be: (1) to identify the full range of foreign policy matters affecting state interests; (2) to provide assistance to individual states in strengthening their capacity in this field; (3) to initiate negotiations with the U. S. Department of State during the Reagan administration on ways in which the states can become involved in treaty negotiations affecting their interests and on ways in which the use of foreign agreements by states can provide an alternative to the treaty mechanism.

•We also recommend the creation of a Western Governors and Premiers Conference. Such a conference, modelled after the successful Conference of New England Governors and Eastern Canadian Premiers, would provide a forum for the exchange of information and policy coordination on matters affecting the western states and Canadian provinces (and the Yukon Territory). These objectives could be obtained by an annual conference, a permanent coordinating body, and ongoing conference committees for special projects and policy areas. In all likelihood, congressional consent would not be required to form the conference.

•Existing organizations can provide the necessary bridges between the articulation of common policy concerns, in such forums as the Western Conference, and the sharing of technical information needed to implement policy in member states and provinces. Four such organizational structures are identified: (1) science and technology councils of member state and provinces; (2) university resources, such as the annual science conference of the University of Alaska; (3) international professional associations, such as the Western Association of Fish and Wildlife Agencies, which already includes members from two Canadian provinces; and (4) state departments and provincial ministries, ranging from commerce and economic development to natural resources and fish and game.

•Finally, we recommend consideration of the establishment of a Border States Coalition. While efforts in the western states to secure a regional voice in Washington, D. C., should continue, we also recommend consideration of a cross-sectional coalition, open to all border states, to bring pressure on the foreign policy establishment to recognize and incorporate the role of states in foreign policies, particularly with Canada and Mexico, affecting state interests. Such a coalition could be strenghthened by including otherwise diverse states with a shared history of transborder concerns--Maine, Michigan, Montana, Washington, Alaska, California, Texas, and Florida, and others--in a united effort to safeguard state interests in foreign affairs.

I. INTRODUCTION

For many Americans outside Alaska, the concept of statehood no longer holds much meaning as a basis for understanding the continuing role of the states in the federal system. Americans continue to celebrate the anniversary dates of the entry of their respective states into the Union. However, scant attention is devoted to the utilization of statehood as a means of maintaining and building upon the role of the states as the only constitutionally recognized members of that Union. As a result, statehood has come to be viewed primarily in historical terms as a series of steps in acquiring it, not as a collection of powers and limits in utilizing it.

This tendency is symptomatic of a more general tendency in recent years to view the states principally as "middle managers" in the federal system. In this view, the federal system is pictured as a three-tiered pyramid of governments, with the federal government on top, the states in the middle, and localities on the bottom. For those who view the federal system in this way, attention is invariably devoted to the federal government as the central source of public policies and their funding, while the states and localities are relegated to the status of administrative agents with primary responsibility for carrying out those policies.

This hierarchical notion of the federal system has become so prevalent that it now dominates most sides of the debate over President Reagan's "New Federalism" proposals. New federalists

talk about turning back program responsibilities and funding to the states, but no mention is made about transferring political authority over those programs to the states or undertaking the kind of "de-authorizations" that would require. Even so, centralists express concern over the consequent variations in state policies and the loss of congressional control, while decentralists worry about "state capacities" for handling the burdens of increased program responsibilities. Urbanists argue that cities still find it easier to deal with federal bureaucrats than with state officials, while even friends and leaders of the states seem resigned to the administrative jargon of "sorting out program responsibilities" under congressional authorizations.

We would argue that these views represent a misperception of the true role of the states in the federal system. We believe that the principal role of the states is to function as polities, not middle managers. Moreover, despite the very real concentration of power in Washington, D. C., and the limits imposed on state action, a variety of avenues are open to the states for rebuilding their role as polities in the federal system. Most of these avenues require some form of intergovernmental cooperation; however, many of these relationships can be undertaken without the federal government or with minimal involvement by the federal government. This latter form of intergovernmental cooperation, elsewhere referred to as "federalism without Washington," includes state-local relations, inter-state relations, state relations with constituent units outside the United States (such as Canadian pro-

vinces, and state initiated relations with the federal government. (Elazar, 1.72, pp. 174-78 and 179-116.)

Moreover, we believe that Alaska can play a lead role in demonstrating and advancing the utilization of these avenues by virtue of its unique geohistorical position, combining elements of the last land-frontier and the first frontier of an increasingly internationalized system linked by supersonic transportation and cybernetic technology systems. Through state-local cooperation in education, Alaska can prepare its future generations for the challenges of American citizenship in an Alaskan setting. Through relations with other American states and Canadian provinces, Alaska can enter into a variety of cooperative agreements, joint ventures and information sharing arrangements that need not require the consent of Congress. These are some of the state-centered avenues of "federalism without Washington" explored in this report.

II. THE STATES AS POLITIES IN THE FEDERAL SYSTEM

Before addressing specific avenues of state policy, two tasks are necessary. The first task involves setting out the principal elements of the theory of the "states as polities" in constitutional and political terms. The second task requires some classification of the current potentialities and limits of the "states as polities" in constitutional law. The following points in this section address these tasks.

--The states are polities, not administrative arms of the federal government. As members of the Union, the states are specifically recognized as complete "constituent polities." In a little known case, Chief Justice John Marshall delivered the opinion for the U. S. Supreme Court on the question of whether the residents of the District of Columbia were entitled to maintain an action in a circuit court which was limited by law to cases between citizens of different states. Marshall accepted the Columbia residents' argument that the District of Columbia is a "distinct political society." However, Marshall rejected the idea that this political fact made Columbia a state. According to Marshall, "the word 'State' is used in the Constitution as designating a member of the Union, and excludes from the term the signification attached to it by writers on the law of nations." (Hepburn & Dundass v. Ellzey, at 452. Emphasis added.)

From the beginning of the republic, then, the constitutional meaning of the American states has implied (a) distinct political societies (i.e. "polities") (b) who are "members of the Union"

(i.e., constituent in nature). In this sense, the proper signification of the states is that of a complete "constituent polity." (Daniel J. Elazar, 1981; Stephen Schechter, 1981.)

In subsequent decisions, the Supreme Court would expound on the meaning of the states as constituent polities. Undoubtedly the most widely known decision was in the Reconstruction era case, Texas v. White, which students of federalism most frequently attach to the notable phrase: "The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." (at 726). In delivering the Court's opinion, Chief Justice Salmon P. Chase elaborates at some length on the meaning of American statehood. In fact, while much of his opinion on the states' indestructibility seems intended as mere justification for congressional Reconstruction policies, his definition of the American state as a polity is both cogent and complete:

> In the Constitution the term state most frequently expresses the combined idea...of people, territory, and government. A state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such states, under a common constitution, which forms the distinct and greater political unit, which the Constitution designates as the United States, and makes of the people and states which compose it one people and one country. (at 721.)

Chase's definition of the states as polities offers a fruitful beginning not only for understanding what it means to be a polity but also for justifying the continuing relevance of the states in the American federal system. As to the first point, Chase's defini-

tion contains four characteristics of the states as polities: (i) people, characterized in their political capacity as citizens; (ii) territory, composed of definite boundaries; (iii) a government that is republican in nature, drawing its legitimacy from the consent of the governed; and (iv) the idea that the way these elements are combined provides the basis and uniqueness of each state.

--The states as polities are designed to play a political role in the largest sense of the term. This means that the states' principal tasks are to govern--to make and implement policies within their spheres of competence, not simply administer programs developed outside of their jurisdiction--and to govern the conduct of politics for the republic as a whole. These roles are constitutionally correct and historically accurate. The states are recognized as polities in the federal constitution. When they were at the height of their power, they were actively governing even though they may have done much less administering of program than they do today. Moreover, until recently, their role in governing the conduct of politics was unchallenged from any quarter.

James Wilson, the Pennsylvanian who was the strongest advocate of a strong national government at the constitutional convention, put it this way:

> [There is a] kind of liberty which. . . I shall distinguish by the appellation of federal liberty. . . . When a confederate republic is instituted, the communities, of which it is composed, surrender to it a part of their political independence. . . . The states should resign to the national government, that part, and that part, only, of their political liberty, which,

> placed in that government, would produce more good to the whole, than if it had remained in the several states. While they resign this part of their political liberty, they retain the free and generous exercise of all their other facilities, as states, so far as it is compatible with the welfare of the general and superintending confederacy. (Jonathan Elliot, ed., 1836.)

The states' important administrative responsibilities should not suggest that their primary function is managerial. Quite properly, as the velocity of government has grown, so, too, have the administrative functions of the states increased. This is especially visible in intergovernmental programs. Given the current American tendency to think in managerial terms, this has led to a subtle reconceptualization of the states' role, suggesting that it is one of "middle management," functioning within policy parameters set by the federal government, with some discretion in setting the policy parameters for their local subdivisions. One consequence of this is to encourage federal bypassing of the states wherever Congress or a federal agency wants to set policy parameters for local governments directly. Thus states are expected to administer, not govern and, indeed, are even chastized if they attempt to act as autonomous governors.

--<u>In this sense, the American federal system is a compound republic of national and constituent polities, each served by representative governments.</u> The United States, in the words of <u>The Federalist</u>, is a compound republic, partly national and partly federal. That is to say, the American system consists of a national polity with the whole country for its arena and served by the <u>general</u> government (that nineteenth century phrase is still more

appropriate than today's reference to the "national" government), plus the constituent state polities each with its own state for an arena and served by its own government. As James Madison explains:

> Among a people consolidated into one nation, . . . supremacy is completely vested in the national legislature. Among communities united for particular purposes, it is vested partly in the general and partly in the municipal legislatures. In the former case, all local authorities are subordinate to the supreme; and may be controlled, directed, or abolished by it at pleasure. In the latter, the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere. In this relation, then, the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects. (Alexander Hamilton, John Jay, and James Madison, The Federalist Papers, No. 9.)

The governments of both elements that together compound the republic are complete or essentially complete.

In this respect, federalism is like democracy, which G. K. Chesterton, the British essayist, distinguished in this way:

> Democracy . . . is not like writing poetry or playing the church organ, because these things we do not wish a man to do at all unless he does them well. Democracy is, on the contrary, a thing analogous to writing one's own love letter or blowing one's own nose. These things we want a man to do for himself, even if he does them badly. (Quoted by George F. Will, Washington Post, July 28, 1977.)

--The American system is not a management hierarchy but a matrix of arenas, each designed to be politically responsive to its citizens. In its constitutional design and historical application,

the American federal system resembles a matrix of arenas, in which differences among governments are based on the scope of jurisdiction, not the status of the actors. As the image in Figure 1 suggests, the federal government is indeed a "general government," framing the whole, while the states serve smaller arenas within that whole, and local governments yet smaller ones. In this way, political arenas (and, to a certain extent, governmental jurisdictions, even when shared) are distinguished by being larger or smaller rather than higher or lower. Powers are located in the arena or arenas deemed most suitable in each particular case, and the ordering of relationships changes accordingly. Unlike the pyramid model depicted in Figure 2, the matrix model is essentially nonhierarchical in nature. There are no "levels" of government in the matrix model, and since there is no "center" of power, noncentralization, not decentralization, is the operative process.

Historically, the states' position in the matrix has been maintained through their political role. The states were powerful because their governments saw their function as one of governing, not simply administering. Much of that governing was done by legislative policy-making in which the actual tasks of program administration were placed in the hands of the localities. Many of the governmental tasks involved federal-state relations, but in a way that recognized the states' proper role.

Additionally, the states were powerful because the conduct of electoral politics was their preserve. The political parties were organized within their boundaries and barely had a national dimen-

Figures 1 and 2: Alternative Views of the American Federal System

Figure 1. Matrix View

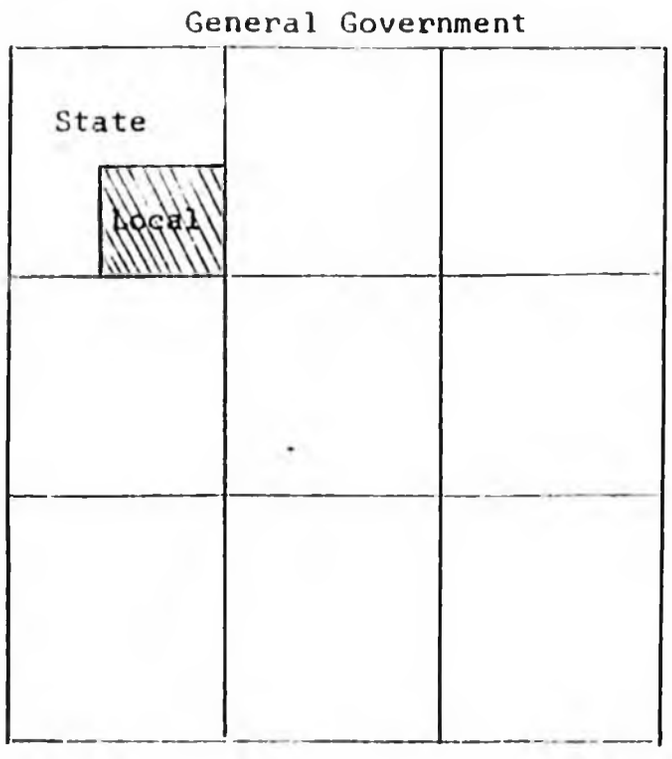
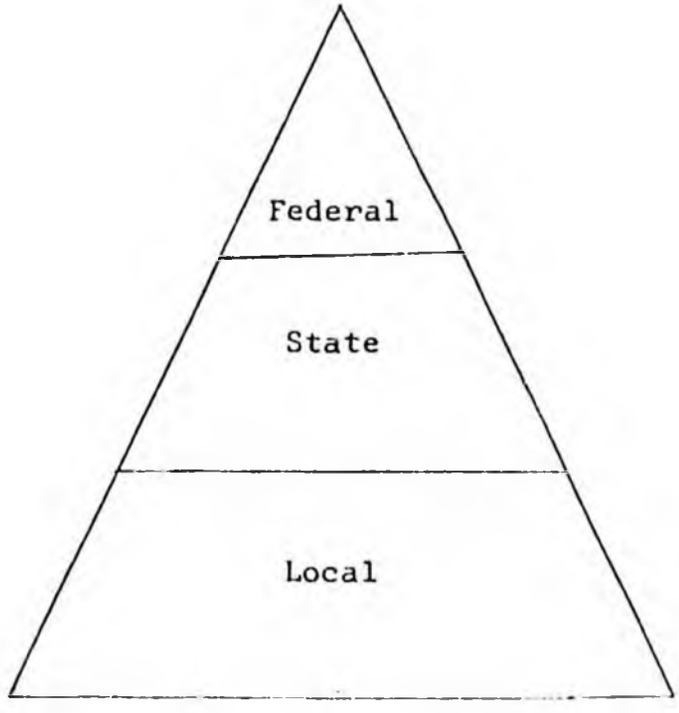


Figure 2. Pyramid View



SOURCE: Daniel J. Elazar, "Is Federalism Compatible with Prefectorial Administration?" in American Federalism and Prefectorial Administration edited by Daniel J. Elazar, a special issue of PUBLIUS: The Journal of Federalism 11, no. 2 (Spring 1981): 13, 18.

sion. Moreover, the patronage system gave the state and local party leaders control over most federal officials within their jurisdictions. As Morton Grodzins pointed out some time ago, there is an intimate relationship between the degree of diffusion of power in the party system and the intergovernmental system. (Morton Grodzins, 1966, pp. 254-89). The states must regain this role to bring Congress back to a concern for state interests.

--Over the past two decades, there has been a trend away from noncentralization and toward the view that the federal government should mandate state administrative tasks. This trend has taken several forms. The most important of these are briefly summarized below, additionally serving as federally-imposed limits on state action.

1. The attitudinal dimension of the recent trend toward centralization is perhaps the most important yet difficult to measure. Over the past twenty years, the federal establishment in Washington, D. C. has come to be permeated with an attitude of superiority that touches even those who remain in Washington as lobbyists for state and local interests. The various components of this "superiority syndrome" include: (a) the idea that the morass of intergovernmental programs can be managed and controlled from Washington, if only Congress would legislate "sound management" measures (e.g., regulatory reform, central focal points, sorting out functions, etc.); (b) a view of state and local interests as simply two among many competing interests that contribute to the "cross-pressures" of federal decision-making; (c) a view

of state and local officials as either supplicants or obstructionists of the "national will," as seen from Washington; and, finally (d) a consequent rereading of the Constitution's "supremacy clause" as a license rather than a limit of congressional action. (The "supremacy clause," in Article VI, paragraph 2 of the U. S. Constitution, is first designed to establish the supremacy of the Constitution over its governmental agents (federal and state) and of the Union formed by them, not of the federal government over the states.)

2. A second element of the centralization of governmental power is the centralization of the political party system and the loss of its state-centered organization. The general decline of the political party system, in terms of voter identification and campaign organization, has contributed to this development. But so too have more recent efforts to rebuild the party system. Since the mid-1970s, the Democratic party has witnessed the trend of centralization brought on by the central policy-making functions assumed by its national committee structure, while the Republican party has emerged as a kind of miniature federal aid system in its own right. Moreover, the courts (including some state courts) have, in their zeal to strengthen the political party system as an expression of political rights, contributed to this trend. (See Cousins v. Wigoda and Democratic Party of the U. S. v. La Follette.)

3. A third component is the veritable explosion of federal programs and regulations impacting on state and local govern-

ments. In its much-quoted study of this twenty year trend, the U. S. Advisory Commission on Intergovernmental Relations begins with this sobering thought:

> Over the past 20 years the federal role has become bigger, broader, and deeper--bigger within the federal system, both in the size of its intergovernmental outlays and in the number of grant programs, broader in its program and policy concerns, and the wide range of subnational governments interacting directly with Washington; and deeper in its regulatory thrusts and preemption proclivities. This is the broad summary conclusion that emerges from this 11-volume study and it points to a growing centralization of policy-making. (U. S. Advisory Commission on Intergovernmental Relations, The Federal Role in the Federal System . . . An Agenda for American Federalism . . ., June 1981, p. 1.)

4. A fourth component has to do with one of the recent trends in federal court decisions. This trend involves the increasingly unlimited deference to Congress, in cases involving a purportedly irreconcilable conflict between federal law and state interests, and the tendency to utilize preemption as a means of resolving such disputes in favor of federal law. The 1982 decision by the U. S. Supreme Court, upholding various provisions of the Public Utility Regulatory Policies Act of 1978, is perhaps the most recent example of this trend. (Federal Energy Regulatory Commission (FERC) v. Mississippi, June 1, 1982.) Other examples include: (a) narrowing recent advances in Tenth Amendment challenges (Hodel v. Virginia Surface Mining and Reclamation Association), (b) enlarging Section 1983 of the U. S. Code (Title 42) as a basis for civil suits against state and local officials (Maine v. Thiboutot); and (c) and extending the sweep of the commerce clause, even in cases involving the absence of congres-

sional legislation (Consolidated Freightways Corp. of Delaware v. Kassell).

--At the same time, the states have not done so badly in recent years as the foregoing tendencies toward centralization might suggest. Several factors account for this seemingly contradictory finding.

1. The past twenty years have witnessed not only the enlargement of the federal establishment but also the growth and development of state governments. As a group, they are fiscally the healthiest of any in the federal system. Additionally, they have increased the level and range of their activities in ways that have kept pace with, and often exceeded, the growth of federal government involvement. Moreover, they have improved their governmental machinery, strengthened their capacity for planning and management, and become more responsive to their citizens than at any time since the Civil War.

2. Despite real concerns about the unparalleled sweep of federal policies and control, the practice of intergovernmental relations most typically remains noncentralized. One reason for this has to do with the real limits on the span of control from Washington, D. C., which often forces an "over-extended" federal government to back track and rely on state and local counterparts. This, in turn, tends to create an atmosphere of chaos and confusion, often supported by what Governor Bruce Babbitt of Arizona has termed the "vague, woolly" rhetoric of federalism. Yet it has created many situations in which the adage "local is as local

does" continues to prevail. Additionally, intergovernmental negotiation has not always produced the kind of "zero-sum" outcomes reported by the working press, in which the federal government's gain is invariably a state government loss.

3. Finally, federal court decisions on state powers have not always gone against the states. While federal courts have tended to rule against the states in clashes with federal law, the states have won many less publicized court battles involving fields in which Congress had not entered (and even some in which congressional legislation was present). In recent years, the Supreme Court has upheld: (a) Montana's severance tax, while at the same time indicating that Congress had the power to limit it (Commonwealth Edison v. Montana); (b) a Minnesota law banning plastic (but not paperboard) non-returnable milk containers (State of Minnesota v. Clover Leaf Creamery Co.); (c) a California petition that a state may impose conditions on the "control, appropriation, use or distribution of water" for a federal reclamation project which are not inconsistent with clear congressional directives respecting the project (California v. U. S.); (d) state claims in two Section 1983 cases, which may have the effect of limiting its use as a challenge against state violations of federal grant and regulatory statutes (Pennhurst State School and Hospital v. Halderman and Middlesex County Sewerage Authority v. National Sea Clammers Association; and, as we shall consider in the following section, (d) the formation of an interstate compact without consent of Congress (U. S. Steel Corporation v. Multistate Tax Commission.)

--The present situation is a kind of stand-off; hierarchical assumptions prevail in many congressional policies and court decisions, while older forms of noncentralization are maintained by the emergence of strong state government, the actual practice of many intergovernmental programs, and occasionally supportive court decisions. The future role of the states depends on the way in which this stand-off is resolved. This is an eminently practical issue which requires resolution in the minds of opinion-molders and decision-makers first and foremost.

The avenues back to real partnership must be based on the reaffirmation of constitutional noncentralization. It requires the states to see themselves as polities that govern and lead where and when it is necessary to do so. It requires that the federal government be mindful of the states as polities and that Congress return to representing state interests rather than competing with them. It requires that the noncentralized party system be renewed. Perhaps most of all it requires that the federal courts restore (or refrain from interfering with) the constitutional basis for noncentralization.

Nothing less than a full scale, wide ranging effort on the part of the states and friends of the states will accomplish this end. By way of summary, the recommended avenues such an effort might take are listed below in general terms:

--Over the next two decades, the states' political and governmental institutions must be redirected toward the end of strengthening the capacity of the states for governance in the

federal system. The states, acting individually and collectively, must be recognized as constitutionally empowered instruments of policy-making, not simply policy implementation. State legislatures as well as state governors must assume their rightful place in the formulation of intergovernmental policy; and the states should resist and reform those federal aid conditions which prescribe organizational designs on state government that are inconsistent with preferred state responses.

--The states must undertake a massive educational effort designed to reestablish the idea of the states as polities. For opinion-makers, the 1980s has already demonstrated the need for independent news sources and media for reporting state and local news as well as state perspectives on national news. For decision-makers, including court judges and the foreign policy establishment, there is a continuing need for educational forums designed to explore theories of federalism and the role of the states in the federal system. For the next generation, there is a need for educational programs that prepare Americans for citizenship in a complex system of multiple jurisdictions and access points.

--The state must exercise their full potential as alternative mechanisms for the coordination of national and regional policies. Individually, through reciprocal legislation, and collectively, through various formal and informal devices of interstate cooperation, the states can demonstrate the capacity for responsible partnership in the federal system.

--The states must continue to strengthen their collective ability to monitor and block federal decisions inimical to state

interests. In the federal courts, the states might well learn from the litigation strategies of successful interest groups, by establishing their own legal defense fund, systematically pursuing so-called "test cases," prudentially using Tenth Amendment arguments in efforts to incrementally strengthen its narrow base, and utilizing other arguments in other fields appropriate to a targetted strategy of building upon existing case law. In Congress, the states must strengthen their resolve to marshall voting coalitions on key votes affecting state interests. (The most recent case is the Senate vote on the proposed "Balanced Budget--Tax Limitation" Amendment to the U. S. Constitution, in which the states failed to retain a section protecting them against the fiscal impact of congressional budget balancing actions.) Finally, in dealings with the federal executive branch, the states should continue to develop departmental and White House channels for negotiations in formal ways designed to insure a state role in the formulation of federal policy. Recent examples of intergovernmental negotiation range from the president's "New Federalism" proposals to the siting of nuclear power plants and high-radioactive waste disposal sites.

These general-order recommendations are consistent with and build upon many efforts currently underway in the states and their representative organs. In its final report, the National Governors' Association Task Force on the NGA Agenda for the Eighties noted two themes guiding its proposals: "First, the Task Force believes that the Governors must be strengthened in their individual role as state chief executive. Second, we believe that the Governors must be strengthened in their collective role in national affairs

and in their direct involvement with the Administration and Congress." (National Governors' Association, July 22, 1982, p. 2.)

The recommendations in this report focus primarily on those state-centered and state-initiated avenues of "federalism without Washington" that can be utilized with minimal or no federal involvement. However, the overall purpose of this report is not to detract from other efforts designed to strengthen the role of the states in federal policy-making. Rather, it is designed to provide some of the glue needed to hold both efforts together in ways that reinforce their individual strengths. It is toward this end that the following recommendations are addressed.

III. CITIZENSHIP AND THE STATES

Over the past decade, public opinion surveys and educational testing results have confirmed an alarming decline in public confidence and knowledge regarding American institutions. If the latest surveys are correct, only one out of every two American believes that American political institutions can solve the important political problems of today or that elections determine how the country is actually run. (Report on American Values in the 80's, 1981; Boyer and Hechinger, 1981.)

In light of such findings, it hardly seems surprising that only one out of two eligible voters went to the polls in the last presidential election, while no more than one-half of those approaching voting age knew basic political facts, such as the number of U. S. Senators per state. (National Assessment of Educational Progress, 1973, 1976, 1980.) Still more disturbing is the fact that many of these figures must be halved again, if one considers voter participation in state and local elections. (U. S. Senate Subcommittee on Intergovernmental Relations, 1973; U. S. Advisory Commission on Intergovernmental Relations, 1980.)

There are some encouraging signs: The so-called "crisis of confidence" in government, partly brought on by the Watergate crimes and their aftermath, seems to have peaked and begun a decline. The successes of the Proposition 13 movement, whatever one's view of their correctness might be, have served to strengthen images of the responsiveness of state and local governments. Moreover, there are indications that the consequential effects of "New Feder-

alism" initiatives have begun to redirect some attention to the states. (Schechter, 1982.)

Of long-range significance are American attitudes regarding the importance of civic education. Here, one can distinguish a growing recognition on the part of the American public as to the need for strengthening the education of the future generation in its members' individual and collective role as citizens. According to the "The Eleventh Annual Gallup Poll of the Public's Attitudes Toward the Public Schools," nearly 90 percent of public school parents rated "civics/government" as an essential subject of study. (Gallup, 1979.)

Still, the states have a long way to go in strengthening citizen attitudes and attachments to them. According to the 1980 survey of the U. S. Advisory Commission on Intergovernmental Relations, Changing Public Attitudes on Governments and Taxes:

--Except for 1979, the federal government has taken the lead in ACIR surveys since 1972 on the question, "From which level of government do you feel you get the most for your money." In this "moneysworth" rating, local government has consistently occupied second place, moving to first place in the 1979 survey. By contrast, the states have garnered only 18-24 percent of respondents on this question, with their highest rating occuring in 1974.

--In ratings on this question, state government drew above-average support from higher income groups, younger men and women (18-29 years of age), and in the West. They found below-average support among the retired or elderly, those with less than a com-

plete high school education, and residents of the Northeast region.

--In 1978, the latest survey on this question, responses were less than inspiring on public confidence in state government: 36 percent of respondents supported the statement "State and local government is too fragmented and disorganized to be effective"; 33 percent indicated support for the statement "State and local government should be given more authority because it is closest to the people"; while 22 percent supported the statement "State and local government does an adequate job in dealing with today's problems." Taken together, however, over half of the respondents (52 percent) indicated a confidence in state and local government in adequately performing their present tasks or in assuming added authority. Nonetheless, it is surprising that even the Advisory Commission on Intergovernmental Relations would lump state and local governments into one category and focus its statements on the "managerial" (i. e., fragmentation and disorganization) dimension of both rather than on their political capacities for governance and representation.

--A similar distribution was found among respondents to questions on federal government responsibilities: 38 percent of respondents supported the statement "Federal government has too much power"; 36 percent supported the statement "Federal government should use its powers more vigorously to promote the well being of all segments of the people"; while only 18 percent supported the statement "Federal government is using about the right amount of power for meeting today's needs." We would suspect that the percent of respondents to the first statement has increased in the four years since this survey question was last asked.

--On one question, the states continue to fare best . In answer to the question "Which do you think is the worst tax--that is, the least fair?" the fewest respondents have singled out the state income tax, with the decrease in respondents on this question (from 13 percent in 1972 to 10 percent in 1980) indicating a growing acceptance of this tax. The state sales tax also seems generally accepted, with only 19 percent of respondents in the 1980 survey listing it as the "worst tax." By far, the federal income tax and the local property tax lead the way as "worst tax" in ACIR opinion surveys, with the federal income tax taking the lead in the 1979 and 1980 surveys undertaken in the aftermath of Proposition 13 and its counterpart measures.

Clearly, the states have a base on which to rebuild a sense of citizenship and strengthen the bonds of citizens to their states. However, it is equally clear that the states, like other planes of government, have a long way to go in achieving these goals after the "crisis of confidence" in all governments that characterized so much of the politics of the 1970s. The following recommendations represent some of the measures that can be initiated by Alaska to advance the goals of citizenship. These recommendations focus on: (a) citizenship education, as a means of preparing future generations of Alaskans for their role as citizens, not simply consumers, in the federal system; and (b) other avenues for strengthening the bonds of attachment between Alaskans and their state in the federal system.

A. Citizenship Education in Alaska.

The Fourteenth Amendment of the U. S. Constitution provides in part: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ratified eighty years after the adoption of the U. S. Constitution, the opening clause of this section makes, in the words of Edward S. Corwin, "national citizenship primary and State citizenship derivative therefrom." (Corwin, 1974, p. 386.) In its other parts, this section of the Fourteenth Amendment guarantees the basic rights of national citizenship against state action in much the same way as the Constitution elsewhere provides guarantees against the deprivation of rights by federal action.

Section 5 of the Fourteenth Amendment places its enforcement in the hands of Congress. But who is to provide the concepts by which citizenship is understood? Who is to design the channels through which it is expressed? Who is to provide the opportunities by which its meaning is learned, rehearsed, and exercised? And who is to insure that the exercise of citizenship and its rights are carried out with a sense of individual and collective responsibility?

The answer to these questions, first supplied by Alexis de Tocqueville nearly 150 years ago, is "the people themselves," as they learn how to work together in the voluntary associations, local communities, and states of which they are a part. The essentials of government were hardly less complex then than today. As Tocqueville reminds: "when one examines the Constitution of the United States, the best of all known federal constitutions. it is frightening to see how much diverse knowledge and discernment it assumes on the part of the governed." (Tocqueville, 1969 edition by J. P. Mayer, p. 164.) But one cannot say with equal certainty today what Tocqueville observed so long ago:

> Nothing has made me admire the good sense and practical intelligence of the Americans more than the way they avoid the innumerable difficulties deriving from their federal Constitution. I have hardly ever met one of the common people in America who did not surprisingly and easily perceive which obligations derived from a law of Congress and which were based on the laws of his state and who, having distinguished the matters falling within the general prerogatives of the Union from those suitable to the local legislature, could not indicate the point where the competence of the federal courts commences and that of the state courts ends. (Tocqueville, 1969 edition by J. P. Mayer, p. 165.)

We believe that Alaska is in a unique position to restore the skills and knowledge of federalist thinking to citizenship education. As in other states, Alaska citizens must learn to cope with a maze of intergovernmental relations and multiple jurisdiction, additionally compounded by a fourth layer of international agreements and commissions. Unlike other states, the size and diversity of Alaska's population, the salience of statehood in the public mind, and the vitality of Alaska's frontier location provide a

a meaningful basis for fashioning a thoroughly federalist approach to citizenship education.

--We therefore recommend that the Governor establish an advisory council to catalyze statewide interest in the need for citizenship education and to develop alternative educational strategies for meeting that need. While public schools in Alaska are financed primarily with state funds, there is a strong tradition of local control over curricular matters. In this context, it would be entirely inappropriate to require curricular changes by statewide mandates, either from the state education department or the state legislature. Rather, the operating model for introducing new subjects into the curriculum seems to involve a combination of forces: (a) local school districts, with the lead often taken by a particular district with early experience in the subject area; (b) appropriate state educational associations, which bring together professional educators on a statewide basis; and (c) the possible involvement of the governor's office as a catalyzing agent for statewide leadership and interest. (A recent example of such gubernatorial involvement is the precedent of developing an environmental education program in Alaska.)

Citizenship education has all the appropriate elements for such a working model. Moreover, our research indicates that the subject of citizenship education is in the process of gaining recognition within the social studies profession in Alaska and among local school districts, which may be concerned not only about the educational value of this subject but also its potential value as a long-range preventive measure for the erosion of community and

rising crime rates (particularly in Anchorage and perhaps other urban centers as well).

On April 28, 1980, the Anchorage School Board approved a list of goals to serve as the basis for a Citizenship Program. The board recommended that the Anchorage school district provide opportunities for each student to develop an awareness of ethical and social responsibilities to include: appreciation and respect for the worth and dignity of individuals; observance rules; respect for personal, public, and private property; being socially responsible to family and community; obligations and responsibilities of citizenship; character education--stronger moral values, namely, honesty, respect for law and respect for property; democratic ideas and the rights of others while maintaining individuality; developing a social conscience; awareness of social injustice and responsibility; development of a personal value system so that the student may be a more constructively self-directed individual. (Douglas A. Phillips, September 1, 1982.)

Later, the Governor's Task Force on Effective Schooling presented its report, Effective Schooling Practices, adopting a series of goals of effective schooling. Two of the twelve goals are citizenship education and moral and ethical character. Taken together, however, the main thrust of the report seems directed toward citizenship-building ends. To quote from that report: "The goals of education as presented above, if met to a reasonable degree, would enable all students regardless of culture of origin to retain cultural identity and to enter the broader society as fully functioning citizens. Of course, meeting the goals is a

shared responsibility of all components of that broad society." (Governor's Task Force on Effective Schooling, p. 17. Emphasis added.)

In 1982, there have been two important developments that may move the Alaskan educational community closer toward the goal of citizenship education. In March 1982, Alaska social studies teachers formed a professional association, The Alaska Council for Social Studies, presently headquartered in Anchorage. During the upcoming (1982-83) school year, this association will probably concentrate its efforts on a membership drive. In all likelihood, this association will then turn to the consideration of items for a social studies agenda representing the professional concerns of its members. Undoubtedly, citizenship education will be one of those concerns.

The second development is the preparation of pilot projects in citizenship education for the Anchorage school district. In the fall 1982 semester, Anchorage will initiate a pilot program at the elementary school level. This program will follow the new "law-related education" (LRE) approach, which is most conducive to the kind of citizenship education model articulated in this report. In the spring 1983 semester, the Anchorage school district plans to initiate a secondary school citizenship education program.

On August 27, 1982, we interviewed Douglas A. Phillips, the social studies curriculum specialist of the Anchorage school district, who is responsible for developing that district's citizenship education programs. He also was involved in the formation of the Alaska Council for Social Studies. According to Mr. Phillips,

Alaska educators seem most receptive to the need for citizenship education. However, there is a first-order need for the kind of statewide leadership and human resource development (including teacher training) that can mobilize the Alaska community for citizenship education.

We believe that these first-order needs can be met by the establishment of a Governor's Advisory Council on Citizenship Education. That council would be composed of members from the state education department, the governor's office, the Anchorage school district, other appropriate school board members, representatives from the Alaska Council for Social Studies, representatives from other appropriate state educational associations (such as the Association for Supervision and Curriculum Development), and representatives from appropriate university programs (such as the Justice Center of the University of Alaska at Anchorage, which assisted in the development of the Anchorage citizenship program).

Moreover, we believe that the emphasis on citizenship education can bring together several loose strands currently being developed around the country in the social studies curriculum. These strands include such re-emergent concerns as: state and local history, law-related education, moral education, and ethnic awareness. The weaving of these strands into a state-initiated program of citizenship education, cognizant of the peculiar responsibilities and rights of citizens in a federal system, would be an achievement for which Alaskans could be proud indeed. (Representative studies of citizenship education and its allied fields can be found in the bibliographic endnotes to this section.)

B. Other Bonds Between Citizens and their State.

A citizenship education program, grounded in the idea of the state as polities in the federal system, is a necessary precondition in the revitalization of citizenship and statehood in the American system. But citizenship education, however broadly defined, can only lay the foundation for a sustained commitment to citizen-building and state-building as mutually reinforcing pursuits. The commitment to revitalizing the citizenship-statehood relationship requires a wide-ranging effort involving most avenues of state and local action. Some of the recommended avenues that such an effort might take are briefly summarized below:

--The Governor of Alaska, acting individually or as part of a common effort coordinated by the National Governors' Association, could issue what amounts to a "political impact statement" on the potential effects of proposed governmental policies (state as well as federal) on the political institutions, traditions, and citizenship roles in Alaska. Such a report might focus on the impact of governmental policies on the state as a polity, its residents as citizens, and its governmental and political structures as governing and mediating institutions. Designed for immediate press release, such reports could provide the basis for a continuing forum of public information and exchange in which the "state perspective" is articulated and, over time, expected in any public debate over federal and state policy.

--State constitutions can provide a basis for fundamental statements for expressing compacts between citizens and their state. This and other functions of state constitutions are elaborated in

Section IV of this report.

--The National Governors' Association could lead the way in establishing a joint task force, composed of bipartisan representation from all associations of elected state officials, to develop findings and recommendations for strengthening the states' political institutions. For over a decade, political observers have decried the decline of political parties. Only recently have some political observers begun to connect that decline with the nationalizing tendencies of governmental policy and of political party organization. (See Austin Ranney, 1978; John F. Bibby, 1979; and Leon Epstein, forthcoming.) In recent years, the national committees of both major parties have begun to eclipse state party committees, transforming both political party systems from state-centered confederations to something approaching the kind of nationally-organized federal system that dominates much of today's intergovernmental fiscal relations.

The decline of state parties within their respective party systems is a product of numerous factors, including changes in voter identification, new campaign practices, regulations of campaign financing and new sources of funding, utilization of national committees as an instrument of policy and organizational reform, and, of course, the increased attention devoted to national races. Recently, however, many of these changes have begun to work their way into federal court decisions. In two recent decisions by the U. S. Supreme Court, disputes between a national party committees and state convention delegations were actually accepted for review and decided in favor of the national committee.

(Cousins v. Wigoda; Democratic Party of the U. S. v. La Follette.) Should this trend continue national party committees may become the predominant element in the party system. This would produce a unique regulatory problem, since national parties are beyond the reach of state law and largely unregulated by federal law. This political impact of judicial decision-making along with the general need to strengthen state parties as meaningful political institutions might well occupy the attention of state elected officials in years to come.

--State decision-makers should be attentive to the symbolic avenue for revitalizing the states as polities. The symbols of statehood can play a meaningful role in strengthing the idea of the states as constituent yet distinctive polities in the public mind. This can take various forms: (a) Alaska could mobilize other states to join in recommending a restoration of state designations of National Guard units. (b) The state flag could be flown over all state and local public buildings, including schools. (c) Alaska statehood day, particularly on the twenty-fifth anniversary of statehood in 1984, could become the basis of a real public understanding and celebration of the meaning of Alaska for Alaskans. (William Riker, 1957; National Guard Bureau, 1982.)

--Finally, the Alaska Statehood Commission might serve as a model for a Pacific Statehood Commission. Since its formation, the Alaska Statehood Commission has studied the implementation of the Alaska Statehood Act and alternative forms of association between Alaska and the United States. In its preliminary report, the Commission reported: "Our work indicates that Alaska can do

little to make unilateral structural changes in its statehood status; but Alaska can and should make efforts to explore the full powers of the states within our Union." (Alaska Statehood Commission, 1981, cover letter.) As a follow up to this finding, and some of the Commission's specific findings on the Pacific region, the Governor of Alaska might join together with the governors of the Pacific states to form a Pacific Statehood Commission. The purpose of such a commission would be to identify common problems affecting their states as states and to explore cooperative responses to those problems.

IV. CONSTITUTIONAL CHOICE AND THE STATES

The role of the states and their constitutions in the American constitutional system is most typically treated as a subject of reform. State constitutions are viewed by many as wordy patchworks of political compromise having little rhyme or reason; and whenever the states attempt to utilize the Article V convention method for proposing amendments to the U. S. Constitution, the specter of a "runaway" convention is raised.

This report rests on an entirely different set of assumptions about the role of state constitutions and the state role in amending the U. S. Constitution. We believe that both were intended to function as "vital links" in the American constitutional system, completing its framework and providing alternative avenues of constitutional choice. Some of the findings and recommendations that flow from this set of assumptions are summarized in this section.

--The U. S. Constitution is an intentionally "incomplete document." Every schoolchild learns that the U. S. Constitution supplies three sides of the constitutional matrix of American government. In establishing a new federal government, the Constitution of 1787 set out the powers of the new government, the limits of that government, and the limits of that new government on the states. But what of state powers and their internal limits? Most schoolchildren still learn that the prior existence and continuing operation of state constitutions supply the answer to this question.

Unfortunately, the conclusion to be drawn from this formulation is rarely explicated or developed. The U. S. Constitution

is, in the words of one constitutional historian, "an incomplete document." (Donald Lutz, 1980, 1982.) In 1787-88, it completed the founding process of constitutionalism begun by the thirteen states in their respective constitutions and in the Articles of Confederation; and today, it completes the constitutional framework within which that process continues. By its "Supremacy Clause," in Article VI, section 2, the U. S. Constitution represents the crowning achievement of American constitutionalism as the "supreme law of the land." However, it is not "the only law of the land," but rather the source of fundamental principles against which others must be judged. Historically, the Constitution of 1787 became the ultimate constitution in a compound system of fourteen constitutions; today, it remains the ultimate statement of constitutional principles in a compound system of fifty-one constitutions.

This helps explain why the U. S. Constitution is so brief and why many state constitutions are so long. It also helps explain why state constitutions are not mere duplicates of the federal constitution. The U. S. Constitution is a "framing document." It is supposed to frame its adaptation by court interpretation, though at times those interpretations seem boundless. But it also frames the fifty state constitutions and the myriad of choices which different states prefer to express in constitutional form. In this respect, state constitutions and judicial review together form many of the interstices of America's evolving system of constitutional law. Several examples illustrate this point.

--The preamble of a state constitution affords Americans with the unique opportunity to make a fundamental declaration of those principles which embody the character of their state and the way of life it represents. In describing the drafting of Alaska's constitutional preamble, Victor Fischer, convention delegate from Anchorage, recalls: "Most delegates felt that rather than using the traditional language of other states, a statement more relevant to Alaska should introduce the state's constitution. Accordingly, the preamble was thoroughly rewritten to state that the constitution was ordained by '. . . the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land. . . ." (Victor Fischer, 1975, p. 75.)

More recently, the Montana constitution of 1972 extends the frontier traditions of the western states to include a "compact with the land" in its preamble. That statement reads:

> We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

While the Montana preamble, like other preambles, contains little operative force, it expresses in fundamental terms the operative frontier principles--of the quest for the good life, equal opportunity, and liberty, and a respect for the land--that hold its citizens together and lend meaning to their public policies (such as the now famous "severance tax" on coal and other natural resources extracted from Montana's land and heritage).

We recommend the Montana preamble as a model for consideration. As Alaskans approach the twenty-fifth anniversary of statehood, public education and debate will undoubtedly focus at one time or another on what it means to be an Alaskan. Such concerns can be crowned, in terms that are both symbolic and real, with a new preamble that embodies a renewed compact between Alaskans and their land.

--State bills of rights represent expressions of citizenship as a bundle of rights and obligations. It is a well-established fact of constitutional law that individual rights contained in state constitutions can be, and typically are, more expansive than those conferred by the federal constitution. This point was recently confirmed by the U. S. Supreme Court. (Prune Yard Shopping Center v. Robins, 1980.) Moreover, as the Court stated in Prune Yard: "It is, of course, well-established that a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provisions. (Id., at 4652.)

These constitutional traditions provide the states with the continuing opportunity to extend the rights and obligations of citizenship in ways that do not contravene the U. S. Constitution. Since the Civil War, for example, statehood requirements have insured that new states would embody the principles of the Declaration of Independence in their constitutions. One finds expression of this in the Alaska constitution's conferral of "natural rights" and the idea "that all persons have corresponding obligations to

the people and to the State." (Article I, section 1.) Another and more recent example is the adoption by many states of their own Equal Rights Amendments, while the country debated the incorporation of the proposed ERA in the U. S. Constitution.

One state, Texas, has even utilized its bill of rights as a vehicle for asserting its sovereignty and the right of local self-government in the federal system, thereby linking the ideas of statehood and citizenship in a single bill of rights. Article I, section 1, of the Texas constitution provides:

> Texas is a free and independent State, subject only to the Constitution of the United States, and the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States.

This Texas constitutional provision may serve as a starting point for consideration of state constitutional provisions linking the ideas of citizenship, statehood, and local self-government in Alaska.

--State constitutions provide an overall frame of government and public expressions of the proper roles and purposes of government. In a recent issue of PUBLIUS: The Journal of Federalism, Daniel J. Elazar notes:

> Even when students of American government, as well as well as reformers, have examined state constitutions from the perspectives of history, institutional organization, interest accommodation, and the inclusion or exclusion of specific provisions, they have generally bypassed the important functions of state constitutions as (1) overall frames of government for polities which are, in most cases, larger and better developed than most of the world's nations; (2) practical public expressions of political theory and the purposes of government; and (3) reflections of public conceptions of the proper roles of government and politics. (Daniel J. Elazar, "The Principles and Traditions Underlying State Constitutions," 1982, p. 11.)

Few examples of the importance of these functions surpass the debates in the Alaska constitutional convention on the question of natural resources and the extent, nature, and organization of the state role in their management. In preparing the natural resources article, Victor Fischer remembers, "the convention was conscious of how the federal government as well as older state governments had failed to conserve and properly develop land and water resources; also, the convention was mindful of the indequacy of federal management of Alaska's resources. Thus, as they worked, delegates strove to provide a harmonious balance between consumption, preservation, and expansion of natural resources. Special emphasis was given to management of renewable resources on a sustained yield principle, multiple use of land wherever practicable, preservation of land for recreation and other public purposes, and regulation of mining and fisheries." (Victor Fischer, 1975, p. 130.) And as E. L. Bartlett, the keynote speaker at the convention, noted:

> . . . fifty years from now, the people of Alaska may very well judge the product of this Convention not by the decisions taken upon issues like local government, apportionment, and the structure and powers of the three branches of government, but rather by the decision taken upon the vital issue of resources policy. (As quoted by Victor Fischer, 1975, p. 130.)

At the time, the convention delegates might not have fully recognized the implications of their debate over another provision for future natural resources policy. That provision lies in Article XII, section 2, of the Alaska constitution and concerns the subject of intergovernmental relations. As finally adopted, that

section reads:

> The State and its political subdivisions may cooperate with the United States and its territories, and with other states and their political subdivisions on matters of common interest. The respective legislative bodies may make appropriations for this purpose.

As originally drafted, this intergovernmental relations provision contained an additional phrase, which followed the words "on matters of common interest." That phrase reads:

> and to the extent consistent with the laws of the United States, with foreign nations. (Alaska Constitutional Convention Proceedings, Appendix, p. 139.)

This proposal, committee proposal No. 12, was introduced on December 16, 1955, by the Committee on Executive Branch Article Containing General and Miscellaneous Provisions. Fearing the adverse reaction of Congress, the phrase was dropped. However, we believe that the intent of the framers of Article XII, section 2, could easily be construed as a farsighted understanding of the future need for such a provision and the express view that future relations between Alaska and Canada would not be barred by its omission from the language of Alaska's constitution. Partial support for this conclusion can be drawn from the delegates' adoption of a nonconstitutional resolution, "Friendly Relations with Canada." Further support can be drawn from the intent of the framers, as expressed during the debate over Article XII, section 2. Mindful of the present concern for the role of the state in international wildlife management, the following exchange of January 21, 1956, is presented:

> V. RIVERS: Mr. President, as you will note there we are striking the words 'and to the extent that is consistent with the laws and the constitution of the United States, with foreign nations.' Now, we believe that with this stricken we will still have that same amount of authority in the hands of the government and also believe that it may be waving a red flag at some of the Congressman who are going to approve this constitution and who will have considerable to do with whether or or not we become a state. We feel that we would like to, at times have direct relations, perhaps, with Canada in the sense that if we were invaded and wanted to have refuge for our people, doubtless our governor would immediately take action and negotiate with some of the provincial governors so our people could go through Canada or even be given refuge there. Such a thing might occur, but we believe that in view of the fact that the power will still remain in the chief executive for such doings, there was no intention of the Committee to abrogate the national treaty-making power when we put it in. We believe it will be done better and with less disturbance if we leave it out, so we recommend striking it.
>
> PRESIDENT EGAN: Mr. McNees.
>
> MCNEES: May I ask a question. You brought up an emergency factor here where such cooperation with Canada might take place, but have you given consideration to the fact that if this hydroelectric project goes in along the Yukon River there might be a peacetime negotiation there and would this possibly prohibit that?
>
> V. RIVERS: No, we don't forsee that this would prohibit any intergovernmental relations allowed under the constitution and laws of the United States. (Alaska Constitutional Convention Proceedings, Part 4, pp.2906-7. Emphasis added.)

For these reasons, we find nothing in the state constitution that would prohibit Alaska from entering into relations with the federal government, provinces or territories of Canada on matters of wildlife management. In fact, we find every indication from the intent of the convention framers that the power to enter into such relations is fully within the authority of the state "to the

extent consistent with the laws of the United States." In the following section of this report, we examine the law of the federal constitution on this question. Here, however: We urge formal recognition of the intent of the framers of the Alaska constitution on this question and, at some future debate, the possible reintroduction of the provision concerning foreign relations within Article XII, section 2, of the Alaska constitution.

--Yet another dimension of the role of the states in constitutional choice has to do with the Article V provisions in the U. S. Constitution for amending that document. Article V provides for a two-step process in amending the U. S. Constitution. Each step may be taken by one of two alternative methods, though each option requires an extrordinary majority and is limited by the provision "that no State, without its consent, shall be deprived of equal suffrage in the Senate." The act of proposing amendments may be undertaken by Congress (requiring a two-thirds majority in both houses) or by the so-called "convention method." Under this latter method, Congress "shall" (presumably meaning "must") call a convention for proposing amendments on petitions from two-thirds (presently, thirty-four) of the state legislatures. The second step, ratification, requires approval by three-fourths (presently, (presently, thirty-eight) of the states. Congress may prescribe the ratification mode (i. e., by state convention or state legislature); however, the type of majority required for ratification is set by the legislative bodies of each state, which when acting in their ratification capacity perform a "federal function" that cannot be restricted by other state instruments (such as a

gubernatorial veto or, even, state constitutional provisions).

Recommendations for the clarification and utilization of the Article V "convention method" are presented elsewhere by the Alaska Statehood Commission. (Alaska Statehood Commission, 1982, pp. 45-49.) Moreover, while even some members of the academic community seem swayed by the specter of a "runaway" convention in their interpretations of this provision, there is ample scholarship on the side of the states in this matter. (Ann Stuart Diamond, 1981; Stephen Schechter, 1982.) Given the weight of existing information on this subject, it seems necessary here only to highlight what is already known:

1. The framers of the Constitution intended the Article V "convention method" to be a full and complete alternative to the congressional mode for proposing amendments. In defending the need for alternative modes for proposing amendments, James Madison notes in "Federalist Paper No. 43":

> It guards equally against that extreme facility, which would render the Constitution too immutable; and that extreme difficulty, which might perpetuate its discovered faults. It, moreover, equally enables the general and the State governments to originate the amendment of errors, as they may be pointed out by the experience on one side, or on the other. (Alexander Hamilton, John Jay, and James Madison, The Federalist Papers, No. 43.)

2. Despite the mathematical possibilities, prudence and common sense have prevailed in the introduction of amendments. State amendment drives have been no less reasonable than the welter of over 9,000 constitutional amendment measures introduced in Congress. The states have never secured the requisite number of petitions to invoke the convention method. However, the states suc-

cessfully forced one of the most popular amendments on the U. S. Senate by utilizing the convention method. (That amendment is the Seventeenth Amendment, requiring popular election of U. S. Senators which had already been put into practice in seven states by 1911.)

3. The fear of a "runaway" convention seems to center on two distinguishable factors: The first is a general distrust of the states by many who believe that state legislatures could actually act more irresponsibly than the federal legislature. The second factor is the uncertainties surrounding the convention method: As one text queries: What constitutes a valid call of two-thirds of the legislatures? In what time span must the required two-thirds of the states submit their resolutions? If the required two-thirds of the legislatures issue a convention call, is Congress obligated to call the convention? How would Congress act to call a convention? How should a congressional resolution calling a convention be worded? What would be the apportionment of a constitutional convention? How would delegates be chosen? (Congressional Quarterly, Guide to Congress, 1976, p. 224.) To these we might add the question whether Congress has the power to limit a convention.

4. Fifteen years ago, in August 1967, Democratic Senator Sam Ervin of North Carolina first introduced a bill to provide procedures for calling a convention under Article V. Nearly identical versions of that bill have been subsequently introduced in the U. S. Senate, the latest being the Federal Constitutional Convention Procedures Act, introduced by Democratic Senator Jesse Helms of North Carolina. All of these bills substantially address the unanswered questions of the convention method in reasonable terms; some addi-

tionally would enable the states to rescind their ratification votes.

5. After fifteen years, it seems clear that both houses of Congress will not pass this measure unless their backs are squarely against the wall. A situation such as this may yet present itself in the ongoing state drive for a convention on the so-called "balanced budget amendment; however, this seems less likely in the wake of Senate passage of the proposed Balanced Budget--Tax Limitation Amendment. Having lobbied unsuccessfully for congressional enactment of a convention procedures act, the states might now initiate a petition drive for a convention that would propose a convention procedures amendment to the U. S. Constitution. This might then put enough pressure on Congress to short circuit the process with a federal convention procedures act. In any case, lineal descendants of the Ervin bill should be continuously before Congress in the event of the need for recourse to them.

6. The convention method can be used to draw attention to the current imbalances in the federal system, but we do not believe the states would succeed in securing a convention for the purposes of proposing a substantive amendment on federal-state relations. At a meeting in Chicago in 1962, the Council of State Governments(CSG) developed a three-part amendment proposal for "returning the Constitution to the states and the people." Precipitated by the U. S. Supreme Court's ruling in Baker v. Carr, the CSG amendments proposed: (a) permitting the legislatures of two-thirds of the states to amend the Constitution without congressional approval; (b) enabling

the states to retain control over legislative apportionment; and (c) creating a "Court of the Union," composed of the fifty state chief justices, empowered to meet on extraordinary occasions for the purpose of reviewing and, if necessary, overruling U. S. Supreme Court decisions. (The text of these amendment proposals can be found in State Government, Winter 1963, pp. 10-15.) The CSG-drafted convention petition was approved by various state legislatures, but its open-ended provisions may have raised sharper and more damaging criticism than the contemporaneous efforts by Senator Everett Dirksen (R-Ill.) for a proposed amendment that would have allowed the states to apportion one house of their legislature on the basis of factors other than population. In any case, both efforts failed, although thirty-three of the necessary thirty-four state legislatures had submitted petitions to Congress by 1969 for a convention to propose a reapportionment amendment.

In light of this history, we hold out little prospect for current efforts to change the federal-state balance via the amendment route. This prognosis includes a proposal by Governor Bruce Babbitt of Arizona for a constitutional amendment that would give the states a veto power over federal legislation, except in matters of foreign affairs, defense, and civil rights. A more promising avenue for research might be to explore ways of utilizing the models of concurrent majorities built into Article V (and Article VII) of the Constitution in the formulation of public policy by intergovernmental negotiation. Utilizing the Article V approach, policies would take affect in all states upon approval by an extraordinary majority of the states. Utilizing the Article VII approach, policies would take effect only in consenting states.

V. INTERSTATE AND FOREIGN RELATIONS

In his introduction to a section entitled "Federalism Without Washington," Daniel J. Elazar notes: "Often unnoticed in discussion of the place of the states in the federal system is the growing routinization of interstate relationships that are not routed through Washington and that act as a counterbalance to federal activity." (Daniel J. Elazar, 1972, p. 174.) In fact, one of the best kept secrets of American federalism is the variety of meaningful working arrangements that the states can and do establish with each other and with foreign governments, without the consent of Congress.

One of the reasons for this neglect is, of course, the tendency on the part of many to look to Washington, D. C., for the answers to, and even the authority to address, problems of regional or national scope. As a result, even studies of interstate relations tend (1) to focus on those relatively infrequent instances of interstate compacts in which congressional consent was sought, and (2) to assume that all "meaningful" interstate agreements (e. g., those of a "political," "substantive," or "formal" nature) require congressional consent. Unfortunately, both the focus and assumption of such studies widely misses the mark.

Since 1893, the U. S. Supreme Court has repeatedly issued dicta and rulings that have narrowly construed the "Compact Clause" of the U. S. Constitution and provided the states with the maximum flexibility possible to enter into agreements with other states, if not with foreign governments, without the consent of Congress. In doing so, the Court has consistently relied on the principle

that neither the form of the agreement nor its tendency to enhance state power is dispositive. As a result, listings of only those interstate compacts which have obtained congressional consent can be quite misleading in terms of the full scope of this instrument for state policy. (The latest listing of interstate compacts operating with congressional consent or pending consent can be found in Council of State Governments, 1979 edition. This source lists 176 such compacts.)

For all these reasons, some attention must be devoted to the current interpretation of the "Compact Clause" in constitutional law. Following this discussion, we recommend various uses of this and other state avenues of interstate and foreign relations.

A. The "Compact Clause."

Article I, section 10, clause 1 of the U. S. Constitution provides: "No State shall enter into any Treaty, Alliance, or Confederation; . . ." The "Compact Clause," Article I, section 10, clause 3, provides:

> No state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power, . . .

Read literally, the language of the "Compact Clause" plainly indicates that a state must obtain congressional consent before it can enter into something called or likened to a compact or agreement with another state or foreign government. However, since 1893, the U. S. Supreme Court has chosen not to rely on a literal reading of this clause. State litigants are, of course, quite familiar with the Court's inclination to sidestep the language of the Constitution involving interpretation of congressional power.

It should come as a pleasant surprise to some that the Court has relied on the same vehicles for broadly reading the powers of the states to enter into compacts and agreements without congressional consent.

The lead opinion in this case history was delivered for the Court by Justice Stephen J. Field in a case involving a boundary dispute between two states. (Virginia v. Tennessee, 1893.) The suit was brought by Virginia alleging that an agreement in 1803, without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, was within the prohibition of the "Compact Clause" of the U. S. Constitution. In deciding this case in favor of Tennessee, the Court reasoned as follows:

1. The terms, "agreement" and "compact," literally read, are "sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects." (Id., at p. 734.)

2. There are, however, "many matters upon which different states may agree that can in no respect concern the United States." (Id., at p. 734.) Hence, the terms "compact" and "agreement" in the Constitution "do not apply to every possible compact or agreement between one state and another . . ." (Id, at p. 734.)

3. To what compacts or agreements does the constitutional prohibition apply? Or, put differently, under what conditions must a state obtain the consent of Congress in order to enter into a compact or agreement with another state or foreign power? In answering this critical question, the Court concluded:

> Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. (Id., at p. 734.)

4. In this and other respects, there is no difference between a compact or agreement, except that "the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'." (Id., at pp. 734-5.)

5. In a final nod to the pragmatic needs of the states, Justice Field addressed the question, unanswered in the language of the "Compact Clause," as to when the consent of Congress shall be given. Justice Field indicated various instances, all drawn from other provisions of Article I, section 10, clause 3, in which congressional consent "will usually precede the compact or agreement." (Id., at p. 735.) "But," Justice Field adds, "where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given." (Id., at p. 735.)

The implications of this case are far-reaching. Three practical conclusions can be drawn from Virginia v. Tennessee regarding the "Compact Clause": (1) The name or form of an interstate agreement (whether called "compact," "agreement," "understanding," or otherwise, or formed by written or verbal agreement) is not dispositive. (2) Congressional consent need only be obtained for those agreements which tend to increase the political power of the states in such a way as to interfere with the just supremacy of the United

States. (3) Where the impact of an agreement on the federal structure is uncertain, the agreeing parties may enter into the agreement, inform Congress, and seek consent if the operations of the agreement so warrant.

In the decades since Virginia v. Tennessee, most notably between 1920 and 1970, the uses of interstate compacts, like other forms of intergovernmental relations, have expanded considerably in terms of scope, frequency, and organizational powers. The Port Authority of New York and New Jersey, formed in 1921 by a compact with the consent of Congress, successfully demonstrated the use of interstate compacts in forming a regulatory body with governmental and proprietary powers. Four years later, the now-classic study by Felix Frankfurter and James M. Landis set out the full potential for such arrangements in a modern age. (F. Frankfurter and J. Landis, 1924.) What followed was a veritable explosion in the number and types of interstate agreements. According to one study: Prior to 1920, the states entered into only thirty-six interstate compacts with the consent of Congress. During the next thirty years, approximately the same number of compacts were created, while at least 110 compacts have been created since 1950. (Benjamin J. Jones, 1981, p. 15.) At the same time, the states have widened the scope of the compact device by creating "multi-state" compacts in response to national problems, while the reach of the federal government has been extended to the most remote communities in response to the demands for national policies.

Collisions between the onrushing uses of federal and interstate powers were inevitable. In the early 1960s, these collisions erupted

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in full force in congressional investigations of the New York Port Authority and in congressional restrictions imposed on compacts submitted for its consent. Brevard Crihfield, then Executive Director of the Council of State Governments, was quick to respond:

> The investigation of the Port of New York Authority by a Congressional committee, the sweeping demands made for all books, papers and records of the agency, and the subsequent prosecution of its Executive Director make clear the lengths to which Congress has gone in asserting authority over compacts to which it has given its consent. Also within the past year (of 1962), bills granting consent to compacts have been amended in various restrictive ways, including the adding of specific provisions granting Congress and its committees the right to examine all books, papers and records concerning operations under the compacts.
>
> The states have strongly opposed these attempts by Congress to interfere in interstate programs. Resolutions expressing vigorous opposition have been adopted by [e. g.] the General Assembly of the States [and] the Governors' Conference. . . . Nevertheless, the fight goes on. Until it is won, compacts should not be submitted for consent unless it is completely clear that consent is necessary for the compact to become effective. (Brevard Crihfield, 1963, p. 29, 68; as quoted by David E. Engdahl, 1965, p. 71. Emphasis added.)

For those compacts requiring congressional consent, this period of American history could bring frightening results. One example is the Great Lakes Basin Compact, created in 1955 for membership by eight American states and two Canadian provinces. The need for congressional consent was necessitated by the preexisting boundary waters treaty of 1909, which, among other provisions, created the International Joint Commission as the official Great Lakes regulatory agency. And this treaty brought two unlikely allies into the congressional battle against the interstate compact. These allies, the U. S. Department of State and the New York State Power Authority, objected, for different reasons, to the international pro-

pisions of the compact, which extended membership and cooperation to two Canadian provinces. After much negotiation, the U.S. State Department seemed only willing to concede to "informal cooperation" between the compact members and Canadian provinces with prior Department consent. However, even this provision was carved out of the final consent settlement, reached in 1968, thirteen years after the process began. (For a complete history of congressional consent on this compact, focusing on the international issues of treaty v. compact, see Mariane Ridgeway, 1971, pp. 137-203.)

One conclusion can be drawn from these two cases of the New York Port Authority and the Great Lakes Basin Compact: Congressional consent is an open-ended process, not a single act. Once congressional consent is sought, Congress can amend compact provisions as a condition of approval and attach far-reaching conditions to it. And once approved, interstate compacts can be subjected to continuing congressional scrutiny. Moreover, it seems unlikely that the Court would overturn congressional consent legislation in a controversy between Congress and the states. In short, Crihfield's warning against seeking congressional consent unless clearly necessary, seems worthwhile advice. (Those instances in which congressional consent would be required are considered later in this section.)

Paradoxically, while Congress and federal departments have often tended to exert supervision and control over "modern" compacts seeking congressional consent, the U. S. Supreme Court has incorporated the "modern" features of interstate compacts into the Virginia v. Tennessee precedent, thereby enabling many to escape

the need for congressional consent. The latest and most complete opinion in this direction was delivered for the Court by Justice Lewis F. Powell, Jr., in a 7-2 decision upholding the Multistate Tax Compact, created in 1967 without the consent of Congress. (United States Steel Corp. v. Multistate Tax Commission, 1978.)

As summarized by the court reporter: The Multistate Tax Compact was formed for the purposes of (1) facilitating proper determination of state and local liability of multistate taxpayers; (2) promoting uniformity and compatibility in state tax systems; (3) facilitating taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration; and (4) avoiding duplicative taxation. To achieve these ends, the Compact created the Multistate Tax Commission to adopt advisory regulations, perform audits of taxpayers upon request by a member state that adopts the audit procedure, and seek compulsory process in aid of its auditing power in the court of any state permitting such procedure. Member states retain control over all legislative and administrative actions affecting tax rates, the composition of the tax base, and the means of determining tax liability and collection. Member states are free to adopt or reject the Commission's rules and regulations, and to withdraw from the Commission at any time. (Id., at pp. 688, 689.)

After losing their case in federal district court, the U. S. Steel Corporation and other taxpayers appealed to the U. S. Supreme Court. They alleged that the Multistate Tax Compact was invalid (1) as a violation of the "Compact Clause" for failure to obtain congressional consent, (2) as a burden on interstate commerce, and

(3) as a violation of taxpayers' Fourteenth Amendment rights. The U. S. Supreme Court upheld the validity of the Compact against all charges. In so doing, the Court strengthened the rule set out in Virginia v. Tennessee and extended it to the "modern" features of the interstate compact and the federal system within which it operates. The key points in the Court's opinion are as follows:

1. The Court reaffirmed the "two-pronged" rule of Virginia v. Tennessee: The application of the "Compact Clause" is limited to agreements that are directed to "the formation of any combination tending to the increase of political power in the states which may encroach upon or interfere with the just supremacy of the United States." (Id., at p. 699.)

2. The Court approvingly cited its earlier opinion in a reciprocal-legislation case, New York v. O'Neill (1959): "The Constitution did not purport to exhaust imagination and resourcefulness in devising fruitful interstate relationships. It is not to be construed to limit the variety of arrangements which are possible through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federal system created by the Constitution. Far from being divisive, this legislation is a catalyst of cohesion." (359 U. S., at p. 6. Quoted at p. 700, id.) The Court also stated that reciprocal-legislation (e. g., uniform laws) may present opportunities for the enhancement of state power at the expense of federal supremacy similiar to a more formalized "compact." (Id., at p. 700.)

3. The "Compact Clause" reaches "both 'agreements' and 'compacts,' the formal as well as the informal. The relevant inquiry

must be one of impact on our federal structure." (Id., at p. 700.) In this sense, "the mere form of interstate agreement cannot be dispositive." (Id., at p. 700.)

4. The number of parties to an agreement is irrelevant. "It is true that most multilateral compacts have been submitted for congressional approval. But this historical practice, which may simply reflect consideration of caution and convenience on the part of the submitting States, is not controlling." (Id., at p. 701.) "As to the powers delegated to the administrative body, we think these also must be judged in terms of enhancement of state power in relation to the Federal Government." (Id., at p. 701.) In short, there is nothing inherent in the nature of a multistate regulatory commission that requires congressional consent.

5. Enhancing state power is also not a sufficient condition requiring congressional consent. "There well may be some incremental increase in the bargaining power of the member States quoad the corporations subject to their . . . taxing jurisdictions. Group action in itself may be more influential than independent actions by the States. But the test is whether the Compact enhances state power quoad the National Government." (Id., at p. 702.)

6. Finally, in a note with far-reaching implications, the Court took the dissenting opinion to task for confusing potential impact on federal interests with threats to federal supremacy. "Absent a threat of encroachment or interference through enhanced state power, the existence of a federal interest is irrelevant. Indeed, every state cooperative action touching interstate or for-

eign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval." (Id., at p. 706 note.)

B. Recommendations.

--Clearly, the Court's decision in the Multistate Tax Commission case represents the kind of development in federalism case law that the states should seek to utilize on its own terms and replicate in other areas of the law. By reaffirming the "two-pronged" requirment of increased state power and encroachment of just federal supremacy, the Court explicitly declared several features of interstate compacts to be irrelevant in considerations of congressional consent: the number of parties involves, the powers delegated to the administrative body, the "formality" of the agreement, the enhancement of state powers in relation to entities other than the federal government, and the involvement in areas of federal "interest."

Mindful of the peculiar geohistoric location of Alaska, the principal uncertainty remaining in the wake of cases like the Great Lakes Basin Compact controversy and the Court's Multistate Tax Commission decision is the extent to which the Court's rulings on the "Compact Clause" cover the kinds of foreign relations into which the state of Alaska might seek to enter. Unfortunately, we can only conclude that the application of Multistate Tax Commission to a meaningful range of relations between Alaska and Canada embraces an unsettled area of affirmative, negative, and debatable answers to the use of state power without congressional consent.

The language of the "Compact Clause" suggests a parallel construction of interstate and foreign relations. What holds for one would seem to hold for the other, so that limits of the "treaty power" would extend no more than the limits of, say, the "commerce power." However, while most "Compact Clause" cases involving interstate agreements have been upheld, many of those involving foreign relations have not.

The lead case in the area of compacts with foreign powers was decided by the U. S. Supreme Court in 1840. (Holmes v. Jennison.) Holmes had been arrested by Vermont Governor Jennison on a warrant apparently reflecting an informal agreement between Jennison and the authorities of Canada, where Holmes had been indicted for murder. In delivering the opinion of the Court, Chief Justice Roger Taney, joined by Joseph Story and two other justices, concluded that the informal agreement was invalid because it collided with the federal power to extradite persons sought for crimes in other countries. In this case, like many others and the Great Lakes Compact controversy, the state agreement with a foreign government entered an area of foreign relations in which there was a preexisting federal power or treaty. As reread by the Court in Multistate Tax Commission case, Justice Taney "concluded that the Compact Clause would permit an arrangement such as the one at issue only if 'made under the supervision of the United States'." (Multistate Tax Commission, at p. 897.) Then, in a footnote, the Multistate Tax Commission opinion states:

> . . . Mr. Chief Justice Taney's opinion in Jennison is not inconsistent with the rule of Virginia v. Tennessee. At some length, Taney emphasizes that

> the State was exercising the power to extradite persons sought for crimes in other countries, which was part of the exclusive foreign relations power expressly reserved to the Federal Government. He concluded, therefore, that the State's agreement would be constitutional only if made under the supervision of the United States. (Id., at p. 697, note 15.)

--Clearly, the American states may enter into agreements with foreign governments, otherwise this form of relationship would have been entirely prohibited as is the case with treaties, alliances, and confederations. A 1978 study counts 766 interactions between American states and Canadian provinces, including agreements, understandings, and arrangements, all, presumably covered by the term "agreements," formal and informal, in the "Compact Clause." (Roger F. Swanson, 1978, pp.221-65 on "Intergovernmental Relations on the State/Provincial Level." This chapter is excerpted from a study, State/Provincial Interaction, prepared by Swanson for the Office of External Researsh, U. S. Department of State, August 1974.) Of those 766 interactions, there are 541 arrangements, 181 understandings, and 44 agreements. Nearly one-half are in the areas of transportation and natural resources, which, together with commercial and human service interaction, comprise approximately two-thirds of state-provincial interactions. Maine has far more interactions than any other state (110), followed by Michigan (56), New York (48), and Minnesota. (Swanson, p. 239.) Alaska is listed as having only 11 interactions, but presumably this low figure is due to the exclusion of Canadian territories from the Swanson study.

--It is also clear that some agreements between American states and foreign governments do not require (or succeed in avoiding) the the consent of Congress. In his study, Swanson relates one inter-

esting account, though omitting the name of the involved state:

> Characteristic of the attention to the legal dimension, and the deference accorded to it, was the attempt of one state in 1961 to enter into a formal 'Memorandum of Understanding' with a Canadian province concerning civil defense. However, the formal signing of the memorandum did not take place because the U. S. federal government advised that it could not permit the document to be executed in that it had not been presented to, or concurred in, by the U. S.-Canadian federal authorities. A year later the state and province concluded a mutual understanding with no formal exchange of notes or any written agreements. (Swanson, p. 262, note 7.)

Additionally, we believe it is possible to identify at least three forms of cooperation that lie beyond the reach of the "Compact Clause":

1. international bodies of public officials, such as the New England Governors-Eastern Canadian Premiers Conference, with functions that are purely consultative in nature;

2. international professional associations, such as the International Association of Fish and Wildlife Agencies, designed to foster the exchange of information and other forms of cooperation among individual members; and

3. regional and national coalitions of state officials, organized to influence the outcome of treaty and other foreign relations in favor of state interests. (As the Court noted in its Multistate Tax Commission opinion: ". . . enhanced capacity to lobby within the federal legislative process falls far short of threatened 'encroachment upon or interference with the just supremacy of the United States." Id., p. 706.) In 1979, the states successfully lobbied to prevent the U. S. signing the Convention on the Conservation of Migratory Species of Wild Animals. (U. S.

Dept. of State, 1979.) Another example is Maine's effort to block the East Coast Fishery Agreement. (Gov. Brennan, Sen. Mitchell, 1980.)

--At the other extreme, there are equally clear instances in which state agreements with foreign governments would require congressional consent and would have a difficult time securing it. Based on the Great Lakes Basin Compact controversy, and subsequent cases of a similar nature, a regulatory compact operating in an area covered by preexisting treaty provisions would undoubtedly require the consent of Congress. Moreover, the likelihood of such a compact including foreign members is remote unless closely supervised by appropriate federal agencies. In a case such as this, the American compact members could, at best, hope to secure a "cooperative" understanding with those agencies, providing for minimal federal supervision and control.

A more ambiguous situation might involve an area yet to be covered by proposed treaty provisions. One such example concerns efforts by the Carter administration to establish an international treaty with Canada for the management of Porcupine River caribou migrating between Alaska's North Slope and the Yukon Territory. Prior to treaty negotiations, Alaska maintained informal "working relations" with Yukon territorial officials to facilitate caribou herd management. In November 1980, Ronald O. Skoog, commissioner of the Alaska Department of Fish and Game, issued a "decision memorandum," detailing the state's objections to the proposed treaty. Since then, the new Reagan administration has held off action on resumption of treaty negotiations. If the Reagan administration were to indicate a lack of federal interest in pursuing this treaty, citing the capacity for state management in this area, it would un-

doubtedly strengthen the case for the state in pursuing a caribou management agreement with the Yukon Territory. However, once the federal government has entered a field such as this, it might be difficult to avoid the congressional consent process, without formal State Department authorization of some kind. Because the Supreme Court has repeatedly found that the form of agreement is not dispositive, it seems unlikely that one could find legal support for avoiding congressional consent by an "informal," rather than "formal," agreement between Alaska and the Yukon Territory. (Paradoxically, Yukon officials, as territorial officials, might have more leeway than Alaska state officials in this matter.)

--Mindful of state priorities, we recommend the creation of appropriate state mechanisms to coordinate and assist efforts to clarify and strengthen Alaska's role in foreign affairs. The function of coordination might be accomplished through the establishment of an inter-agency task force, composed of representatives from the Governor's Office, the Council on Science and Technology, and the departments of Fish and Game, Commerce and Economic Development, Natural Resources, Transportation and Public Facilities, and Law. The Governor also might designate a Special Assistant for Foreign Affairs and Interstate Relations to serve on the task force. Additionally, the foregoing discussion of the "Compact Clause" suggests the need for a full-time legal staff to assist the task force and its represented agencies in clarifying state roles in foreign and interstate relations and, where possible, widening the acceptable boundaries for an expanded state role. This legal staff could be housed within the inter-agency task force, within the Department

of Law as a special section, or drawn from existing departments.

--Moreover, we recommend that the National Governors' Association establish a working group on the role of the states in foreign affairs in ways that include but go beyond matters of foreign trade and promotion. The purposes of this group would include: (1) identifying the full range of foreign policy areas and issues affecting state interests (including shipping, commercial fishing, wildlife management, coastal zone management, management of boundary waters and waterways, environmental conservation and protection, foreign trade, science and technology policy, etc.); (2) providing assistance and coordination for state governors in strengthening state capacities in this field; and (3) initiating negotiations and working relations with the U. S. Department of State for the purposes of developing (a) state roles in the negotiation and implementation of international treaties affecting state interests, and (b) possible models for the utilization of state agreements with foreign governments as an alternative to and administrative mechanism of international treaties.

--We also recommend the creation of a Western Governors-Premiers Conference, modelled after the successful New England Governors-Eastern Canadian Premiers Conference. In February 1973 there was an exchange of correspondence between Maine Governor Meskell and the eastern Canadian premiers suggesting a meeting. In August of that year, the first meeting of the New England Governors and Eastern Canadian premiers took place at Brudenell, Prince Edward Island. The agenda subjects of that meeting were transportation and energy. That meeting was the first of ten

annual meetings, the most recent being the Rockport, Maine, conference in June 1982. At this meeting, Ambassador Kenneth M. Curtis, former Governor of Maine during the Conference's founding years, recalled its beginnings:

> Premier Hatfield deserves much credit for the organization of this conference. It was largely by his initiative that in 1973 this series of meetings was begun as an extension of several interactions between Maine and New Brunswick in an attempt to pool resources and exchange ideas to solve common problems on a regional basis. . . .
>
> Cooperation between the states and provinces is not uncommon--and occurs most often regionally and on a north-south basis. . . . It is not surprising that by far the greatest amount of activity occurs in this region. Here, we face many similar problems, share common resources and frequently share a common heritage that breeds a genuine kinship between us. . . . Throughout the generations, harsh winters, tough times, and a necessity for hard work has instilled a sense of that which is real and a special kind of pride within us.
>
> This century in which we are living is a rapidly changing one. To reach full employment, increase productivity, and maintain this region's unique quality of life is perhaps the most difficult problem we face. Today, I suggest that this is another example of where the search for answers need not stop at the boundary. . . . Premier Hatfield summed it up in the early years of this conference in testimony before the Canadian Standing Senate Committee on Foreign Affairs with this thought: '. . . The impetus to do more must come from the states and provinces themselves, by identifying areas of common interest and concern, by assisting one another when possible and by cooperating with one another when cooperation will yield mutual benefit. . .' (Kenneth M. Curtis, June 21, 1982.)

Ambassador Curtis' enthusiasm is unique but not atypical. There seems to be general feeling among Conference participants that the Conference provides a low-cost basis for continuing and periodic opportunities to consult and cooperate in areas of shared concern. The Conference includes the governors of the six New England states (Connecticut, Maine, Massachusetts, New Hampshire, Vermont, and

Rhode Island) and the premiers of the five eastern Canadian provinces (New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Quebec).

The Conference is organized as follows: (1) Conference meetings are held annually in May or June. (2) The coordinating body meets on a regular basis to ensure that Conference projects run smoothly and that the governors' and premiers' decisions are implemented. This body is composed of principal advisors to each of the governors and premiers. (3) In addition, there are Conference committees to provide functions of information exchange and project management on a continuing basis. These committees include the Northeast International Committee on Energy and the International Surface Transportation Committee. (A history of the conference is presently being prepared under the direction of Emery Fanjoy, Secretary of the Council of Maritime Provinces, Halifax, Nova Scotia.)

The Conference of Western Governors and Premiers could be modelled after its eastern counterpart. Membership would certainly include the Northwest Pacific region of Alaska, Washington state, the Yukon Territory, and British Columbia. We also recommend that membership include the prairie provinces and plains states on the Canadian border, so as to encompass the entire western tier beyond the Great Lakes Basin states. Certainly, membership should extend eastward to include Montana and Alberta, which share common energy-producing concerns with each other and with Alaska. Patterned after the New England Governors-Eastern Canadian Premiers Conference, the Western Conference might be organized around annual meetings.

with provisions for a permanent coordinating body and standing committees. Conference concerns might include such functional areas as wildlife management, natural resources policy, and hydroelectric projects.

--Four existing mechanisms can be utilized to extend the necessary bridges between the development of common policy concerns, articulated in such forums as the Western Conference, and the sharing of technical information needed to implement policy in the member state and provinces. These are briefly enumerated below:

1. Science and Technology Councils. Since the late 1970s, most states and provinces have designated some governmental body to coordinate science and technology policies (often including research priorities) within their respective polities. In Alaska, there is the Council on Science and Technology within the Department of Administration. In the winter of 1977/78 there was an informal meeting of provincial science officials coordinated by the Science Council of Canada. Subsequently, at the First Ministers' Conference (which includes the eleven federal and provincial first ministers of Canada), Prime Minister Trudeau instructed the Federal Minister of Science and Technology to develop a channel of communication with his provincial counterparts. (Stephen Schechter, 1979, p. 89.) Through networks such as this in the United States and Canada, much can be done to develop and coordinate science and technology policies for Western Conference members.

2. Utilization of University Resources. Alaska should identify university facilities that can be utilized in the advancement of regional concerns. One example is the annual Science Con-

ference sponsored by the University of Alaska. Another example is the Center for Canadian and Canadian-American Relations at Western Washington University in Bellingham, Washington. Institutions such as these could be encouraged to develop research and educational programs that address priority concerns of the region. They also could be involved in building the necessary public-private sector links for specialized regional centers from hi-tech to caribou.

3. International Professional Associations. Whether one looks to the implementation of a citizenship education policy of a wildlife management policy, professional associations continue to provide the principal vehicle by which professionals responsible for policy implementation can share, obtain, and refine the kind of technical information and skills needed to get the job done. In the field of wildlife management, for example, there is the International Association of Fish and Wildlife Agencies, the Western Association of Fish and Wildlife Agencies, the International Union for the Conservation of Nature, and the Wildlife Society. The Western Association of Fish and Wildlife Agencies includes members from two Canadian provinces. Its membership could be expanded to reflect the scope of the Western Conference of Governors and Premiers.

4. State Departments and Provincial Ministries. The committee structure of the Western Conference could provide the basis for consultation and cooperation among and between representatives of state departments and provincial ministries. It could be within a setting such as this that Alaskan state and Yukon territorial officials continue the dialogue over such issues as caribou herd management. This, in turn, provides the necessary bridges from the

Western Conference of Governors and Premiers to line departments and professional associations.

--Finally, we recommend consideration of a Border States Coalition to function in Washington, D. C., as a research and advisory group on the role of the states in hemispheric policies affecting state interests. Otherwise dissimilar and competing states (such as the energy-producing states of Alaska and Montana, the energy-consuming states of Michigan and Maine, the "Sunbelt" states of Florida, California, and Texas) have all, in their own ways, become vocal critics of American foreign policies that do not reflect the needs and experiences of the states, ranging from international conventions on migratory wildlife to American immigration and refugee policies. While ongoing efforts in the western states to secure a regional voice in Washington, D. C., must continue, we also recommend consideration of a purposefully cross-sectional coalition designed to bring pressure on the foreign policy establishment to recognize and incorporate the role of the states in the formulation and implementation of American foreign policy, particularly with Canada and Mexico, that affect state interests. This coalition would also lend support to the efforts of National Governors' Association working group, previously recommended.

VI. CONCLUSIONS

As note earlier, the present role of the states in the federal system is a kind of stand-off. Hierarchical assumptions and attitudes prevail in many congressional policies, federal court decisions, and federal rules and regulations. At the same time, older forms of noncentralization and sharing are maintained by the emergence of strong state governments, the actual practice of many intergovernmental programs, occasionally supportive court decisions, and a new resolve among state officials.

The future role of the states depends on the way in which this stand-off is resolved. If the states want to restore their political role as polities in the federal system, they must continue to develop a watchful eye and powerful voice in the formulation of federal policies detrimental to their interests. But they also must begin to develop an agenda of their own for undertaking state and interstate actions without Washington, D. C., that demonstrate the vitality of the states as polities in the federal system.

This report has focused on the latter course of state-centered actions that can be undertaken with minimal or no federal involvement to restore the idea of the states as polities in the federal system. Some of the state-centered avenues--such as citizenship education and constitutional choice--recommended in this report are often absent from studies of the role of the states in the federal system. Others, such as interstate and foreign relations, are typically given casual mention in studies of American federalism. One of the reasons for this neglect is that the federal government has come to so overshadow the states in the minds of many. As a

result, it is often assumed that little can be done to reverse the imbalances in the American federal system without guidance from Washington, D. C. We hope that is assumption, at least, has been partially challenged by the findings and recommendations of this report.

VII. ENDNOTES

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