ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
5875 HOUSE JUDICIARY

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> The ultimate source of power in any democratic form of government is the people. Our Nebraska Constitution is a document belonging to the people. Subject only to the supremacy clause of the Unites States Constitution, the people may put in their document what they will. Even to the shock and dismay of constitutional theoreticians, the people may add provisions dealing with 'non-fundamental' rights, as well as provisions bearing the most tenuous of relationships to the notion of what constitutes the basic framework of go rnment. The people may add provisions which legal scholars might decry as legislative or statutory in nature. But the people may do it nonetheless."

It is apparent from a reading of the Spire decision that this Court's opinion as to the desirability of Initiative Measure #403 is entirely irrelevant. One may argue that the voters of the State of Nebraska were duped by a special interest group from outside the state to pass an amendment to the Nebraska Constitution which was unnecessary or imprecisely drafted. Similarly, a logical person might argue that Initiative Measure #403 should have permitted the State of Nebraska to exercise reasonable restrictions to prevent the possession of: semiautomatic or automatic assault rifles originally developed for combat; plastic handguns designed to evade detection at airport security stations; other types of firearms which are unreasonably dangerous and without social utility in a civilized society; or firearms by persons previously convicted of a felony.

Whatever the relative merits or demerits of those positions might be, they must be considered matters of public policy more properly left to debate and decision by the people of the State of Nebraska and their elected representatives in the Nebraska Unicameral. If the voters of this State are dissatisfied with their Constitution, they may modify the language at any time in their sole and absolute discretion.

The authority of the people of Nebraska to amend the Constitution of the State of Nebraska is set forth in Article III, Section 2, which provides in part:

> "The first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature. This power may be invoked by petition wherein the purposed measures shall be set forth at length."

The language that appeared on the general election ballot on November 8, 1988, for Initiative Measure #403 was as follows:

> "Shall Article I, Section 1, of the Constitution of Nebraska, be amended to establish a right to keep and bear arms for lawful purposes, and to provide that such right shall not be infringed by the State or any subdivision of the State?"

The explanatory language contained on the ballots stated:

> "A vote 'FOR' will amend the Constitution of Nebraska to establish a right to keep and bear arms for lawful purposes, and to provide that such rights shall not be infringed by the State or any subdivision of the State.
>
> "A vote 'AGAINST' will not cause the Constitution of Nebraska to be amended in such manner."

As a result of the passage of this measure, Article I, Section 1 of the Constitution of the State of Nebraska now states as follows:

> "All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof."

In this case, the defendant is not charged with using a firearm for any unlawful purpose. Rather, the defendant is charged with a "status" offense of possession of a firearm with a barrel less that 18

Inches in length.

If the Nebraska Legislature passed a law after the adoption of Initiative Measure #403 prohibiting the possession of handguns, but not shotguns and rifles, would the law be unconstitutional? The answer is obviously yes. Is there any language in #403 which prevents the possession of handguns by prior felons? The answer is an unfortunate no.

Neb. Rev. Stat. Section 28-1206 (1), is clearly unconstitutional in that it makes possession of a firearm with a barrel less than 18 inches in length by a prior felon a crime rather than prohibiting the unlawful use of that weapon. To illustrate the distinction one need only look to the preceding statutory section, Neb. Rev. Stat. Section 28-1205, which provides that any person who uses a firearm to commit any felony commits a Class III Felony, which is treated as a separate and distinct offense requiring the imposition of a consecutive sentence by the sentencing court.

Without a doubt Section 28-1205, remains as a significant deterrent to criminal activity which retains its validity despite the Court's ruling on today's date.

Frequently in the past, judges have been criticized by certain politicians and commentators for liberally interpreting the Constitution to read into it language or a result which could not be found within the "four corners" of the Constitution. This Court neither adopts a conservative nor liberal interpretation in this case, but rather reads the clear and unambiguous language of the Constitution of the State of Nebraska to determine the result. As further stated by the Nebraska

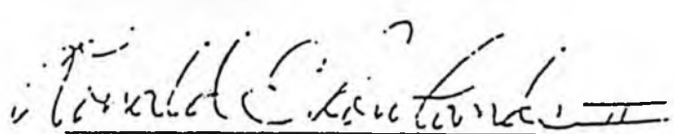
Supreme Court in the Spire decision:

> "In construing provision of a constitution, courts may examine debates and proceedings of a constitutional convention to determine the framers' intended meaning of words, phrases, or clauses of a constitution. (Citations omitted).
>
> With regard to an initiative enactment, however, a different rule must apply. There is no meaningful way to determine the intent which motivates voters to sign a petition for the submission of an enactment, nor is there any real way to determine the intent of those voters who vote for the adoption of an enactment. The motivations and mental processes of the voter in Verdigre or the elector in Elkhorn cannot be determined-except from the words of the enactment itself. Beyond that, all that can be known by this court is that the voters have been subjected to tornadolike winds in voting on this highly political question. We hold that the intent of the voters adopting an initiative amendment to the Nebraska Constitution must be determined from the words of the initiative amendment itself."

For the reasons stated above, this Court sustains the Demurrer filed by the Defendant to Count I of the Amended Information, treats it as a Motion to Dismiss, and dismisses Count I. I hold that Neb. Rev. Stat. Section 28-1206 (1) so far as it pertains to possession of a firearm with a barrel less than eighteen inches in length by a prior felon is unconstitutional in that it violates Article I, Section 1 of the Constitution of the State of Nebraska.

SO ORDERED.

BY THE COURT:



DONALD E. ROWLANDS II
District Judge

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Representative Ann M. Spohnholz
District 13 Seat A

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811
465-2435

MEMORANDUM

TO: Representative Peter Goll
Representative Max Gruenberg
Co-Chairs, House Judiciary Committee

FROM: Representative Ann M. Spohnholz AMS

DATE: February 16, 1989

RE: HJR 7 - Right to Keep and Bear Arms

I am forwarding to you a letter which I received from the staff of the Governor's Interim Commission on Children and Youth regarding HJR 7.

I am personally very concerned about this resolution as it stands. It will not allow for adequate protection of the young or otherwise dependent members of our society, nor will it allow us to limit the access to guns by minors.

I would appreciate the opportunity to testify to my concerns when this bill is scheduled for a hearing in your committee.

Thank you.

Myra Munson
Police Chiefs

STEVE COWPER
GOVERNOR

Office of the Governor
P.O. Box A
Juneau, Alaska 99811
465-3155

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU
INTERIM COMMISSION ON CHILDREN AND YOUTH

February 13, 1989

Honorable Ann Spohnholz
Alaska State House
P.O. Box V
Juneau, Alaska 99811

Dear Representative Spohnholz:

I've received your request for comments from the Commission on HJR7, which calls for a constitutional amendment related to the right to keep and bear arms.

Although the Commission's policy related to legislation prohibits us from taking a pro or con position on a specific bill, we have and do comment on legislation in a conceptual framework.

The Commission's main concern with respect to ready and individual access to weapons, with respect to this bill, is focused on two primary issues: the element of danger and access to guns by minors.

The Commission would be very concerned if this proposed constitutional amendment would have the effect of exposing children to dangerous situations, i.e., guns on school grounds, in school buildings, in shopping malls, etc.

It's my understanding that the proposed constitutional amendment could nullify any statutes currently in place related to use of weapons by minors. While the Commission is aware that there are some appropriate situations in which minors might use weapons (learning survival skills in the company of an adult, for example), use of weapons by minors should be regulated for reasons of health and safety.

Please feel free to contact me, or any member of the Commission, if you'd like additional comments.

Sincerely,

Carla Timpone
Program Coordinator
cc: Members, Commission on Children and Youth
Caren Robinson, Special Assistant, Governor's Office
Shari Kochman, Legislative Aide, Governor's Office

BACKUP HJR 7
Correspondence

January 25, 1989

Mr. Richard Ross
Chief of Police
Kenai Police Department
107 S. Willow St.
Kenai, AK 99611

Dear Rick:

Thank you for your Public Opinion Message regarding House Joint Resolution 7, concerning the right to keep and bear arms. I have forwarded your request to Representative Peter Goll, who chairs the House Judiciary Committee, to which the resolution is currently assigned.

If you wish to contact Representative Goll directly, his telephone number is 465-4925; his address is Box V, Juneau, 99801. Meanwhile, I will keep tabs on this resolution to ensure that it undergoes a legal review before it reaches the House floor.

Thank you for bringing this matter to my attention. I appreciate hearing from you.

Sincerely,

Mike Navarre
Representative

PUBLIC OPINION MESSAGE

DEAR: REPRESENTATIVE NAVARRE

NAME: RICHARD ROSS
TITLE: CHIEF OF POLICE
ADDRESS: 107 S. WILLOW ST
CITY: KENAI, ALASKA ZIP: 99611
PHONE: 283-7879
BILL NO: HJR 7
SUBJECT: RIGHT TO KEEP AND BEAR ARMS
MESSAGE: REQUEST THAT YOUR COMMITTEE NOT MOVE THIS RESOLUTION UNTIL IT HAS RECEIVED THOROUGH LEGAL REVIEW. THE CONCERN BEING THAT THE MINIMAL STATUATORY REGULATION CURRENTLY PLACED ON FIREARMS POSSESSION (IE FELON IN POSSESSION;POSSESSION ON LICENSED PREMISES; WHILE INTOXICATED; OF ILLEGAL WEAPONS; CONCEALED WEAPONS) MAY BE JUDICALLY NULLIFIED IF ADOPTED.

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FROM MARIE
OTTO - 1/31/89

STATE OF ALASKA

DEPARTMENT OF LAW

CRIMINAL DIVISION

STEVE COWPER, GOVERNOR

REPLY TO

X *CRIMINAL DIVISION CENTRAL OFFICE*
P.O. BOX KC
JUNEAU, ALASKA 99811-0310
PHONE: (907) 465-3428

☐ *OFFICE OF SPECIAL PROSECUTIONS AND APPEALS*
1031 WEST 4TH AVENUE. SUITE 318
ANCHORAGE. ALASKA 99501-5993
PHONE: (907) 279-7424

January 29, 1989

The Honorable Jan Faiks
Alaska State Senator
P.O. Box V
Juneau, Alaska 99811

Dear Senator Faiks:

Thank you for the opportunity to review SJR 4, relating to a proposed amendment to the constitutional right to bear arms in Alaska. After considerable research regarding the law in Alaska and other states on this issue, it is our opinion that the existing constitutional provision protecting the right to bear arms should not be, nor does it need to be, amended.

In summary, our analysis is:

1. In Alaska, the right of the people to bear arms for legitimate purposes has never been infringed. In the absence of specific need to amend the constitution, it may be wise to follow the adage "If it ain't broke, don't fix it."

2. In a wide variety of contexts, the Alaska Supreme Court has interpreted individual rights under the state constitution more broadly than the federal constitution, and there is no reason to believe the court would not interpret the existing right to bear arms provision in an equally broad manner.

3. The legal effects of the proposed constitutional amendment can not be predicted with any degree of certainty. The recent experiences of West Virginia illustrate the unreliability of political statements made by proponents of this type of amendment.

4. The only effect of the amendment that can be stated with certainty is that it transfers power currently in the hands of the legislature to the judiciary. A similar and well-known example of such a power transfer occurred when the constitution was amended to specifically mention the right of privacy. The legislature is still struggling with the resulting supreme court opinion which recognized a constitutional right to use marijuana.

5. Based on the broad reading the Alaska court gives to the provisions of our constitution, and the lack of any language in the amendment giving the legislature the authority to regulate the exercise of the constitutional right, it is more likely that portions of Alaska's statutes regulating firearms will be declared unconstitutional. Case authority exists as legal precedent for invalidating, or seriously weakening, both the state statute prohibiting all felons from having firearms, and the Anchorage municipal ordinance against carrying concealed weapons in automobiles.

6. If the Legislature decides to approve a constitutional amendment modifying the right to bear arms in Alaska, the language of the amendment should affirmatively state

that the legislature continues to have the authority to reasonably regulate firearms by law.

1. The Right to Keep and Bear Arms in Alaska

The Alaska Constitution addresses the right of the people to keep and bear arms at Article I, Section 19. It provides: "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed." Although this section of the constitution has never been interpreted by the Alaska Supreme Court, existing law grants Alaskans broad and relatively unrestricted rights to keep and bear arms.

Alaska's right to bear arms provision is virtually identical to language found in the Second Amendment to the United States Constitution. However, as noted by Legislative Counsel Tamara Brandt Cook in her memorandum to Senator Rodey dated April 14, 1983, "the [United States] Supreme Court has never directly considered whether the Second Amendment provides any protection to the private ownership of arms for lawful purposes." There is ample legal authority for the proposition that protection of the individual right to bear arms is provided by the language of both the Second Amendment and Section 19 of the Alaska Constitution.

For example, in one scholarly article,[1] the author demonstrated that the amendments guarantee the individual right to keep and bear arms for the following purposes: (1) to enable the individual to perform militia duties; (2) to deter governmental oppression; (3) to maintain public order; and (4) to enable the individual to exercise the right to self-defense. The author concluded his analysis by clearly stating that, under language identical to the Alaska Constitution, common and traditional users of private firearms are protected and that it would be unconstitutional to enact

> (1) any law that infringes the right of the people (excepting those people who fall into a traditional high-risk category, such as felons, the mentally deficient, and infants) to keep any arms commonly used for personal protection or any of the modern equivalent of arms that were fairly commonly possessed by the people at the adoption of the Constitution, or (2) any law that infringes the right to bear those arms for traditional lawful purposes.[2]

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[1]Dowlut, "The Right to Arms: Does the Constitution or the Predilection of Judges Reign?," 36 Oklahoma Law Review 65 (1983).

[2]Id. at 101. The following articles have been cited as authority for the proposition that the Second Amendment guarantees an individual right to bear arms: S.P. Halbrook, That Every Man Be Armed: The Evolution of a Constitutional Right (Univ. of N. Mex. Press 1984); Dowlut, "The Current Relevancy of Keeping and Bearing Arms," 15 U. Balt. L. F. 32 (1984); Kates, "Handgun Prohibition and the Original Meaning of the Second Amendment," 82 Mich. L. Rev. 204 (1983); Malcolm, "The Right of the People to Keep and Bear Arms: The Common Law Tradition, 10 Hastings Const. L. Q. 285 (1983); Caplan, "The Right of the Individual to Bear Arms: A Recent Judicial Trend," 1982 Detroit Col. L. Rev. 789; Shalhope, "The Ideological Origins of the Second Amendment," 69 J. Am. History 599 (1982); Halbrook, "To Keep and Bear Their Private Arms: The Adoption of the Second Amendment, 1787-1791," 10 N. Ky. L. Rev. 13 (1982); Gardiner, "To Preserve Liberty--A Look at The Right to Keep and Bear Arms," 10 N. Ky. L. Rev. 63 (1982); Halbrook, "The

An analysis of the constitutional right to bear arms in Alaska must of necessity consider the history of gun regulation in the state.[3] The right of the people to bear arms for legitimate purposes is widely recognized in Alaska, and has never been

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Jurisprudence of the Second and Fourteenth Amendments," 4 Geo. Mason U.L. Rev. 1 (1981); Cantrell, "The Right to Bear Arms," 53 Wis. Bar Bull. 21 (Oct. 1980); Caplan, "Handgun Control: Constitutional or Unconstitutional?," 10 N.C. Central L. J. 53 (1978); Caplan, "Restoring The Balance: The Second Amendment Revisited," 5 Fordham Urban L.J. 31 (1976); Whisker, "Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms," 78 W. Va. L. Rev. 171 (1976); Weiss, "A Reply to Advocates of Gun Control Law," 52 Jour. Urban Law 577 (1974); Hardy & Stompoly, "Of Arms and the Law," 51 Chi.-Kent L. Rev. 62 (1974); McClure, "Firearms and Federalism," 7 Idaho L. Rev. 197 (1970); Levine & Saxe, "The Second Amendment: The Right to Bear Arms," 7 Houston L. Rev. 1 (1969); Olds, "The Second Amendment and The Right to Keep and Bear Arms," 46 Mich. St. Bar. J. 15 (Oct. 1967); Comment, "The Right to Keep and Bear Arms: A Necessary Constitutional Guarantee or an Outmoded Provision of the Bill of Rights?," 31 Albany L. Rev. 74 (1967); Sprecher, "The Lost Amendment," 51 Am. Bar Assn. J. 554 and 665 (1965); and Hays, "The Right to Bear Arms: A Study in Judicial Misinterpretation," 2 Wm. & Mary L. Rev. 381 (1960).

[3]See, e.g., Hootch v. Alaska State-Operated School System, 536 P.2d 793, 800 (Alaska 1975): "In determining the scope of a constitutional right, the focus of the court's inquiry is not, however, on the question of whether there is a burden on the exercise of that right. We must look to the intent of the framers of the constitution concerning the nature of the right itself, the problems which they were addressing and the remedies they sought. While prior practice and the framers' purposes are not necessarily conclusive, an historical perspective is essential to an enlightened contemporary interpretation of our constitution."

infringed.[4] Alaska and Vermont share the distinction of having the least restrictive firearms laws in United States.[5]

Proponents of the amendment indicate it is not proposed to rectify a current injustice nor to overturn existing guns laws or regulations, but to protect the rights of individuals to keep and bear arms against the caprice of an irresponsible legislature. We believe the protection of the existing constitution and the respect and restraint historically shown by the Alaska legislature and courts for the people's right to bear arms renders the proposed amendment unnecessary, and worse, the amendment interjects the uncertainty of judicial interpretation into a new and uncharted area.

2. Constitutional Interpretation in Alaska

It is often difficult to predict how a court will interpret the scope and effect of a new constitutional amendment, and how the power of the legislature will thereafter be limited. This unpredictability is very familiar to Alaskans. In 1972, the

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[4]In previous years, a 1983 informal Attorney General's opinion has been cited as proof of the need for a constitutional amendment. The opinion addressed whether a landlord could prohibit a tenant from having firearms. This analysis of the right to bear arms, rendered in the context of a contractual relationship between private parties, did not comprehensively address the issue of governmental regulation of arms.

[5]Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, State Laws and Published Ordinances: Firearms (18th Ed. 1988).

people explicitly recognized the right to privacy in Alaska by approving a constitutional amendment. In the first major case interpreting the privacy amendment, the Alaska Supreme Court in Ravin v. State,[6] struck down the law that criminalized possession of marijuana in the home for personal use. The legislature has been struggling for many years to deal with this unique interpretation of our constitution.[7]

Ravin is only one example of the propensity of the state supreme court to interpret the Alaska constitution as giving broader protection to individual rights than similar constitutional provisions in other jurisdictions. As a result, the judicial decisions of other states interpreting individual rights cannot be

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[6]537 P.2d 494 (Alaska 1975).

[7]Although other states, including Arizona, California, Florida, Hawaii, Louisiana, Montana, South Carolina, and Washington, have adopted similar constitutional provisions recognizing the right to privacy, the Alaska court stands alone in its conclusion that the right to privacy protects the right to possess marijuana in the home.

heavily relied upon in predicting what will happen when the Alaska courts are asked to analyze identical issues.[8]

With respect to the actions of individual citizens, Alaska court decisions frequently rely on the privacy amendment to justify constitutional interpretations that are significantly broader than those reached by other courts. Our court has repeatedly determined that the effect of the right of privacy is to amplify the protections afforded by other constitutional rights. The complexity of anticipating the court's interpretation of a right to bear arms is compounded by the potentially augmenting effect of the explicit right to privacy.

For example, the Alaska constitutional guarantee against unreasonable searches and seizures is held to be broader in scope than identical guarantees under the federal constitution, in part because of the right to privacy.[9] Despite considerable authority

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[8]In addition to the cases discussed below, the Alaska Supreme Court has held that the Alaska Constitution provides greater protection in areas ranging from the free exercise of one's religious beliefs, Frank v. State, 604 P.2d 1068 (Alaska 1979) (defendant entitled to exemption from fish and game regulations on account of his religious beliefs even though the charges against defendant would have been upheld under the federal constitution) to the right to counsel, Resek v. State, 706 P.2d 288 (Alaska 1985) ("the right to counsel under the Alaska Constitution is more expansive than the corresponding right under the sixth amendment to the United States Constitution.").

[9]Reeves v. State, 599 P.2d 727, 734 (Alaska 1979). In this case, the court reversed a conviction for possession of heroin. The defendant had been arrested for driving while intoxicated, and a correctional officer discovered the heroin inside a balloon in

to the contrary in other jurisdictions, the Alaska court has held that the state constitution prohibits warrantless administrative inspections of private business premises.[10] The warrantless monitoring of private conversations with the consent of one participant, acceptable under federal constitutional standards, is held in Alaska to be an unreasonable search and seizure in light of the combined effect of the Alaska constitutional prohibition against unreasonable searches and seizures, and the Alaska constitutional right of privacy.[11]

The Alaska court has also forged new legal ground in interpreting the equal protection clause of the state constitution. This amendment provides additional protection for the exercise of constitutional rights such as the right to bear arms because it is used by the court in evaluating whether legislation is

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the defendant's pocket. Although it was permissible for the officer to take the balloon away from the defendant before he was booked into the jail, the court held that the defendant's right to privacy and right to be free from unreasonable searches and seizures was violated when the officer looked inside the balloon.

[10]Woods & Rohde, Inc. v. State, 565 P.2d 138 (Alaska 1977).

[11]In the cases of Coffey v. State, 585 P.2d 514 (Alaska 1978) (court reversed conviction of marijuana dealer); Aldridge v. State, 584 P.2d 1105 (Alaska 1978) (court reversed conviction of heroin dealer); State v. Glass, 583 P.2d 872 (Alaska 1978) (court agreed charges against heroin dealer should be dismissed), the decisions were based on the court's broad interpretation of Alaska's constitutional rights to privacy and to be free from unreasonable searches and seizures. Federal courts faced with the same issues have interpreted similar federal constitutional guarantees relating to searches and seizures differently, and would have upheld the convictions.

constitutional. In developing its own equal protection analysis, our court rejected the deferential test applied by the United States Supreme Court, holding instead that the Alaska Constitution requires social and economic legislation to pass a more rigorous test.[12]

In Herrick's Aero-Auto-Aqua Repair v. DOT, 754 P.2d 1111 (1988), the court explained its expansive equal protection analysis as follows:

> In reviewing equal protection claims under the Alaska constitution ... the minimum burden that the state must meet when defending legislation challenged on equal protection grounds under the Alaska constitution is greater than that required under the United States Constitution. The burden on the state increases in proportion to the primacy of the interest involved. Eventually this burden reaches the functional equivalent of the federal compelling state interest test in those cases where fundamental rights and suspect categories are at issue.[13]

Another liberal interpretation of Alaska's constitution was set out in Vogler v. Miller, 651 P.2d 1 (Alaska 1982). In this case the court invalidated statutes relating to ballot access by

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[12]Isakson v. Rickey, 550 P.2d 359 (Alaska 1976).

[13]754 P.2d at 1114. The court in Herrick also pointed to an additional burden placed on the state in defending against an equal protection challenge. "[T]he rational basis test articulated by the Supreme Court allows a court to 'hypothesize' facts. Under that test, a party challenging legislation on equal protection grounds, cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable." Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). In Alaska, the court will not hypothesize facts.

candidates of small parties. The court relied on the free speech and equal protection provisions of the Alaska constitution, and acknowledged that the statutes would have been upheld under the interpretation the federal courts have given to identical provisions of the United States constitution. The court declared that Alaska restrictions on the right to associate in pursuit of political beliefs are permissible only where the government is able to show that the restrictions are justified by compelling governmental interests. Further, the restrictions must be no broader than needed to accomplish the governmental interests which justify them.[14]

Thus, any effort to predict the interpretation of any amendment relating to an individual right in the Alaska court must be mindful of the court's tendency to interpret individual rights broadly, in often unexpected contexts, and the court's frequent insistence that regulatory schemes satisfy a compelling state interest test.

3. The West Virginia Experience

Despite Alaska's unique constitution and the willingness of our court to adopt novel legal interpretations, we have also considered the experience of other states with right to bear arms amendments. For example, based on its newly-enacted right to bear

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[14]651 P.2d at 5.

arms amendment, the West Virginia Supreme Court recently struck down a statute that prohibited carrying dangerous or deadly weapons without a license.

Proponents of the amendment had argued during legislative hearings that existing laws would not be affected by the amendment, but when an existing law was challenged, the proponents switched positions and argued for the unconstitutionality of the West Virginia law. This case shows the dangers that arise when a legislature approves a constitutional amendment that does not spell out in plain language its precise intent. A detailed description of what happened in West Virginia is therefore important because many of the same issues are currently being discussed in the context of your consideration of SJR4.

a. Legislative History

In 1986, West Virginia amended its constitution to expand the right to keep and bear arms. The new constitutional provision stated, "A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreation use."

Despite the popularity of the right to keep and bear arms amendment in the West Virginia legislature, the legislative process "failed to give the amendment's language any real definition beyond

a general sense that passage of the amendment would leave undisturbed current law and constitutionalize existing state law prohibiting municipal governments from banning the ownership of weapons or ammunition. The very popularity of the concept seemed to insulate the proposed amendment from the 'hard look' analysis appropriate for amendments to a constitution."[15]

No significant statement of legislative intent was prepared by any of the committees that considered the proposal, nor was any substantive research done by the legislative committees that recommended the measure for passage. As a result, there was little in the legislative history to assist the court in fixing any specific meaning to the words, phrases, or the intent of the amendment. In researching the legislative history, McNeely concluded, "All that can be said without question was that legislative proponents consistently took the position that the amendment, if adopted, would not change existing laws, and that legislative opponents consistently attempted, with no ultimate success, to amend the measure to assure that the state would retain its ability to maintain the existing state of the law."[16]

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[15]McNeely, "The Right of Who to Bear What, When, and Where - West Virginia's Firearms Law v. The Right-To-Bear-Arms Amendment," 89 West Virginia Law Review 1125 (1987) at 1160.

[16]McNeely at 1152.

In an analysis provided to the West Virginia legislature by the National Rifle Association, the proponents argued that under the amendment the bearing of constitutionally-protected arms "may be regulated." The analysis described the various statutes that the NRA believed would be upheld if the proposed amendment were adopted, and specifically stated that "a license may be required to carry a pistol away from one's home, place of business, or land."[17]

In attempting to predict the effect the court would give to the amendment, McNeely predicted that,

> Given the legislature's failure to provide clear legislative intent in any formal sense, it shall be up to the judicial branch of the state to interpret the amendment consistent with its language and demonstrated intent. With that interpretation, the court may continue the state's traditional legal attitude toward firearms by finding the amendment consistent with state law, or it may embark the state on an uncharted course of repeal and revision of long-standing statutes and case law ... It is, perhaps, ironic that such a lack of legislative research and formal legislative findings, coupled with the broad, unqualified

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[17]The National Rifle Association "Analysis of Proposed West Virginia Constitutional Guarantee to Keep and Bear Arms" is set out as Appendix H to the McNeely article at 1176-78. It is virtually identical to the "Analysis of Proposed Alaska Constitutional Guarantee to Keep and Bear Arms" contained in the Senate Judiciary file for SJR4.

In addition, at least one advertisement by the NRA for the amendment in West Virginia contained "a prominent statement that no existing federal or state law would be repealed by passage, with the statement reading 'Amendment 1 keeps Federal and State firearms laws the law.'" McNeely at 1148.

> language of Amendment No. 1, have combined to place the future of firearms regulation, heretofore primarily a legislative activity, in the hands of the judicial branch of state government.[18]

b. Princeton v. Buckner

The case of Princeton v. Buckner[19] began when a police officer searched a drunk driver who had been placed under arrest, and found a .22 caliber automatic pistol concealed in the driver's pocket. Under existing West Virginia law, a license was required to carry a concealed weapon. Although the drunk driver did not have a license, the magistrate refused to issue charges for illegally carrying a firearm because he concluded that the licensing law was unconstitutional under the newly-enacted right to bear arms amendment to the West Virginia Constitution.

Despite the assertions during the legislative and public debates that existing West Virginia firearms laws would not be affected, the challengers to the law in Buckner lost little time in proving the non-binding nature of such statements.[20] In their analysis of legislative intent, the challengers pointed to the

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[18]McNeely at 1162.

[19]Case No. CC972, West Virginia Supreme Court of Appeals, July 1, 1988, reconsideration denied December 20, 1988.

[20]The National Rifle Association filed an amicus brief in the Buckner case on behalf of its West Virginia members, which concluded: "... the licensing statute is unconstitutional because it frustrates rather than regulates the right to bear arms."

legislature's refusal to modify the amendment to specifically state that the legislature retained the power to regulate firearms.

For example, in his brief to the Supreme Court, Buckner argued as follows:

> The State, in its brief, concludes that "it is clear that the Right to Keep and Bear [Arms] Amendment to the West Virginia Constitution was not meant to nullify existing laws." This conclusion is without factual support or logic. Had the efforts of Delegate McNeely to add the word "lawful" and had the efforts of Delegate Knight to make the amendment subject to the "police power" of the State, or either of these efforts, been successful, then the argument of the State might bear some logic. The fact that both of these efforts were specifically turned down by the Legislature indicates clearly that the Legislature had no such intent as stated by the State. Had that been the clear intent of the Legislature in passing the resolution, it could have simply added language to that effect, or adopted on of the amendments referred to. (emphasis added) Brief of Respondent Buckner at 4.
>
> The basis of the argument of the State is that the proponents took the position that the right to bear arms amendment did not change existing laws. The fact of the matter is that the opponents of the amendment took the position that it would, in fact, change existing law and the Legislature refused, although given opportunity to do so, to word the amendment in such a fashion so as to deal with that question. (emphasis added) Brief of Respondent Buckner at 5.

In addition to pointing out that the legislature refused to address the extent to which it retained the power to pass firearms legislation, the challengers concluded that the

legislature and the people must have wanted to place restraints on the legislature. At page 6 of his brief, Buckner argued that if the constitutional amendment "means anything, it has to mean that the people of the State wanted to change the law in existence at the time, and place restraints upon the Legislature. Any other conclusion is illogical and would render the act of the Legislature and the people in adopting the constitutional provision an exercise in futility." In other words, it doesn't matter what the supporters of the bill said; it only mattered what the legislature itself said in the language of the amendment.

The West Virginia Supreme Court accepted the arguments presented by the challengers, and held that a "constitutional amendment will supersede any inconsistent portions of antecedent constitutional or statutory provisions, as 'the latest expression of the will of the people.'"[21] The court rejected the position taken by the state that "West Virginia's licensing statute evinces an intent to control, but not prohibit, carrying weapons, such as handguns, which are both easily concealable and deadly."[22]

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[21] Princeton v. Buckner, at page 10.

[22] Brief of Petitioner State of West Virginia, at 15.
On December 20, 1988, the West Virginia Supreme Court reaffirmed its holding that the statute was unconstitutional. The opinion did not isolate the specific provisions of this statute, or the related licensing requirements, which rendered the statute violative of the right to keep and bear arms amendment. Instead, the court declared that the prohibition against carrying a dangerous or deadly weapon for defensive purposes without a license or other statutory authorization was overly broad.

c. Current Status of West Virginia Gun Law

Similar to the current situation in Alaska where the legislature is trying to pass a constitutional statute prohibiting people from possessing marijuana in their homes, the West Virginia legislature is now working on developing a constitutional statute relating to the carrying of deadly and dangerous weapons.[23] In the meantime, unless a person commits a separate criminal offense with a firearm, West Virginia law enforcement authorities are prohibited from arresting persons for, or protecting persons from, carrying concealed weapons, regardless of whether the offender is carrying the weapon for defensive or other purposes. (Source--West Virginia Department of Public Safety)[24]

Although the court acknowledged that the legislature "may, through the valid exercise of its police power, reasonably regulate the right of a person to keep and bear arms in order to promote the health, safety and welfare of all citizens of this State, provided that the restrictions or regulations imposed do not frustrate the constitutional freedoms guaranteed by...the Right to Keep and Bear Arms Amendment," the court recognized that each statute regulating firearms would need to be evaluated in light of the new constitutional provisions. The court cautioned that "a governmental purpose to control or prohibit certain activities, which may be constitutionally subject to state regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the realm of protected freedoms, such as the right to keep and bear arms guaranteed by our State Constitution." (emphasis added)

[23]Telephone conversation, Steve Hernden, West Virginia Assistant Attorney General.

[24]Petition for Reconsideration of Remedy filed by the State of West Virginia at pages 1-2.

4. The Proposed Alaska Amendment

The proposed amendment to the Alaska constitution states that "The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state."

The first and most significant effect of the constitutional amendment proposed in SJR4 is to limit the legislative authority to regulate the right to bear arms. The amendment takes authority away from the people's elected representatives as to what policies the state will follow concerning the right to keep and bear arms and, shifts to the courts the ultimate authority to decide state policy through the uncertain course of constitutional interpretation.

The sweeping but ambiguous language of the proposed amendment means that, if passed, it can be expected to trigger a great deal of litigation in a number of different contexts. If the courts were to construe the amendment in a fashion that the Legislature felt was harmful to the public interest, the only way that the law could be changed, without inducing the court to change its own position, would be through another constitutional amendment. Thus, the amendment would give the courts a much greater role in interpreting the regulatory authority of the Legislature than it has at present.

As discussed above, relying on legal precedents from the courts of other states to predict what the Alaska court may decide under the proposed amendment is fraught with difficulty. Although proponents of amending Alaska's constitution argue that at least 42 states have constitutional provisions guaranteeing a right to bear arms, and that all firearms laws have been upheld in every state, this assertion is incorrect and misleading, as discussed below.

Most constitutional provisions enacted by other states differ from SJR4 because they either define the circumstances in which the constitutional right applies, or they expressly recognize that the constitutional provision is subject to legislative regulation.[25] Only Rhode Island has a constitutional provision, like SJR4, that grants an apparently unfettered right to keep and bear arms.[26]

Each of the 50 state supreme courts interpret its own constitutional provisions consistent with the legal precedents of that state. Decisions made by courts of sister states may be

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[25]See R. Dowlut & J. Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Okla. City U.L. Rev. 177, 236-240 (1982).

[26]We have been unable to find any cases in which the Rhode Island Supreme Court has directly interpreted this constitutional provision.

informative, yet are not persuasive or conclusive authority from which one can predict the result in a different jurisdiction. For example, the West Virginia court struck down its licensing statute after considering and rejecting an Indiana Supreme Court decision that reached the opposition conclusion.[27] In the Indiana decision, the dissent noted that "The decisions from other jurisdictions are not uniform on the right to keep and bear arms any more than the constitutional provisions are stated in the same language."

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[27]An Indiana statute which imposed licensing requirements on handguns similar to those of West Virginia was addressed in Matthews v State, 148 N.E. 2d 334 (1958). As in West Virginia, the Indiana statute placed no restrictions on possessing or carrying a weapon on one's own premises, but to carry a gun elsewhere required a license conditioned on a showing that, among other things, "the applicant has a proper reason for carrying a pistol and is of good character and reputation and a suitable person to be so licensed." 148 N.E.2d at 336. The Indiana constitution provided that "the people shall have a right to bear arms, for the defense of themselves and the State." The Matthews court affirmed the statute and held that the licensing statute was a legitimate exercise of the legislative power to provide for the public safety and welfare.

In a subsequent case, Schubert v. DeBard, 398 N.E.2d 1339 (Indiana App. 1980), the Indiana court relied on the constitutional right to bear arms provision in reversing the denial of a license to carry a handgun made by an applicant who claimed he needed a gun for self-defense. The authorities had denied the license after reviewing evidence showing that the applicant "was a 'chronic liar' suffering from a 'gigantic police complex.'" Evidence also showed that when the applicant had previously held a license, he "had carried and displayed his pistol at inappropriate times." Other witnesses testified that the applicant had "mental problems."

The Schubert court reiterated that establishing a licensing procedure for handguns is not violative of the constitution. However, the court ruled that once a person makes the claim that a gun is needed for self-defense, the constitutional right to bear arms provision prohibits authorities from withholding the license, or even making a factual determination as to whether the person actually needs a gun.

Since the analysis of each case turns on the precise wording of each constitutional provision, it is difficult to use the cases for purposes of comparison. For example, the court's reasons for upholding a challenged statute in State v. Grob, 690 P.2d 951 (Idaho App. 1984) are illustrative of the limited precedential value out-of-state decisions would have in Alaska. In this case, the defendant argued that a statute providing a mandatory sentence for using a firearm while engaged in kidnapping or aggravated battery violated his constitutional right to bear arms. Since Idaho's constitutional right to bear arms provision was amended in 1978, the court looked to the language of both the pre-1978 and post-1978 constitutions. The court found that the statute was constitutional under the pre-1978 language because the provision specifically stated "the legislature shall regulate the exercise of this right by law." Similarly, the statute was found to be constitutional under the post-1978 language based on the specific authorization given the legislature to prescribe "minimum sentences for crimes committed while in possession of a firearm" and to punish the unlawful "use of a firearm."[28]

5. The Risk to Specific Alaska Statutes

a. Constitutionality of Concealed Weapons Statutes

Despite the assertions of supporters of this amendment, it is by no means certain that a new right to bear arms amendment

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[28]State v. Grob, 690 P.2d 951, 953-54 (Idaho App. 1984)

would leave current Alaska statutes prohibiting the carrying of concealed weapons untouched. If the Alaska courts interpreted the amendment to permit the carrying of concealed weapons, AS 11.61.220(a)(1) would be unconstitutional. On the other hand, it cannot be said that the Alaska Supreme Court would hold that this was an area beyond legislative regulation. The matter is simply uncertain.

An article published by Robert Dowlut, General Counsel for the National Rifle Association,[29] gives rise to concern about the constitutionality of an Anchorage municipal ordinance, if the proposed amendment to the Alaska constitution were approved. Dowlut asserts that the right to keep and bear arms includes the right to carry weapons in private vehicles,[30] something which is now prohibited by Anchorage Municipal Code 8.05.070(A), as interpreted in Municipality of Anchorage v. Lloyd, 679 P.2d 486 (Alaska App. 1984).[31]

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[29]Dowlut & Knoop, "State Constitutions and the Right to Keep and Bear Arms," 7 Oklahoma City University Law Review 177 (1982).

[30]Id. at 220.

[31]Support for amending Alaska's constitutional right to bear arms provision has been predicated on an unwarranted assumption that the amendment will not have an effect on existing state or municipal laws. For example, Resolution No. AR 87-238, dated September 29, 1987 and passed by the Anchorage Assembly, included the bald assertion that the amendment "will not invalidate existing municipal public safety measures regulating the use and possession of firearms."

In the document entitled "Analysis of Proposed Alaska Constitutional Guarantee to Keep and Bear Arms," which was written by Dowlut and provided to members of the Senate Judiciary Committee, the assertion is made that "concealed carrying statutes ... are routinely upheld." A review of the cases cited in support of this proposition highlights the problems involved in relying on judicial decisions in jurisdictions outside the state of Alaska to predict how our court would interpret the proposed constitutional amendment.

For example, Dowlut cites Holland v. Commonwealth, 294 S.W.2d 83 (Ky. 1956) as standing for the proposition that concealed weapons statutes are constitutional despite the broadly drafted language of SJR4. However, a review of the case shows that the Kentucky constitution explicitly declares that the right to bear arms is "subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons," a phrase not included SJR4. The court upheld the concealed weapons statute because it found that "the meaning of the constitutional provision is plain and the legislature has exercised the power granted to it by enacting [the concealed weapons statute]." Id. at 85.

Similarly, Dowlut claims that State v. Kessler, 614 P.2d 94, 99 (Oregon 1980) is another case in which a concealed weapons statute was "routinely upheld." In fact, the court in Kessler

struck down a statute that prohibited possessing billy clubs. Despite Dowlut's claim, the court did not address the constitutionality of concealed weapons laws, although it noted in passing that the court in State v. Hart, 157 P.2d 72 (Idaho 1945) upheld a concealed weapons statute.

In Hart the Idaho court specifically based its decision to uphold the ordinance on the language of Idaho's constitutional right to bear arms provision. At the time Hart was decided, the Idaho constitution stated "The people have the right to bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law."

The final case cited by Dowlut to support his claim that Alaska's courts will uphold concealed weapons statutes is State v. McAdams, 714 P.2d 1236 (Wyo. 1986). However, once again, the constitutional provision that was analyzed in McAdams is significantly narrower than the proposed amendment contained in SJR4. The Wyoming constitution provides, "The right of citizens to bear arms in defense of themselves and of the state shall not be denied." The court upheld the concealed weapons statute because it did not believe that the law placed unnecessary restraints on the right to possess arms for self defense: "We are cognizant of the fact that our concealed deadly weapons statute imposes some limitation on a person's right to bear arms in defense of himself;

but, when balanced against the object of the statute, we do not find the limitation unreasonable." Id. at 1238.

b. Constitutionality of Felon in Possession Statutes

It is also by no means certain that the Alaska Supreme Court would uphold current laws controlling or prohibiting convicted felons from owning or possessing weapons if SJR4 were adopted. Felons convicted of bootlegging or drug dealing would be allowed to possess firearms with impunity if the opinion expressed by the General Counsel of the National Rifle Association, and discussed below, were adopted in this state. Moreover, the Colorado Supreme Court has interpreted its constitutional right to bear arms as providing a defense to the charge of felon in possession. If the Alaska courts reached a similar interpretation, the ability to prosecute felons for possessing firearms would certainly be impaired.

The supporters of SJR4 have provided you with the "Analysis of Proposed Alaska Constitutional Guarantee to Keep and Bear Arms" which implies that Alaska's felon in possession statute would withstand constitutional scrutiny. However, Robert Dowlut, General Counsel for the National Rifle Association, has previously published contrary statements. In a law review article, he stated, "To prevent the people from being disarmed by the expedient of classifying regulatory offenses as felonies, the disqualification

for felons should be restricted to common law felonies and their modern equivalents and to offenses requiring some state of mind above strict liability which are inherently inimical to life and property."[32] (emphasis added). Thus, under Dowlut's view, felons charged with drug dealing and bootlegging, which are not "common law felonies," could legally carry weapons.

Under current AS 11.61.200, all persons convicted of any felony are prohibited from possessing a firearm capable of being concealed on the person, and this law applies to persons convicted of regulatory offenses such as bootlegging and drug dealing, as well as the common law felonies such as murder, assault or kidnapping. If Dowlut's interpretation were adopted, Alaska's statute would be overbroad, and struck down as unconstitutional.

A conviction for being a felon in possession of a firearm was reversed by the Colorado Supreme Court in People v. Ford, 568 P.2d 26 (Colorado 1977), based on the "right to bear arms" provision of the Colorado Constitution. The court held that the constitutional protection extends to a defendant "who presents competent evidence showing that his purpose in possessing weapons was the defense of his home, person, and property" and that this type of evidence provides a complete defense to a felon-in-

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[32]Dowlut & Knoop at 192.

possession charge.[33] Once the defendant has raised the issue as a defense, the prosecution must prove, beyond a reasonable doubt, that the defendant's purpose in possessing firearms was not for defense. Thus, unless the felon is committing a crime with the gun, it is virtually impossible to prove that the weapon was not for "defense." As a practical matter, the teeth have been taken out of the law because of the problems of proving that a felon in possession of a gun at the felon's home, on the felon's person, or on the felon's property is using it other than for defense.

As with the concealed weapons statutes, there are problems in relying on the judicial decisions of other states in reaching the conclusion that Alaska's statute would withstand constitutional scrutiny. For example, in the North Dakota case distributed to the Senate Judiciary Committee, State v. Ricehill[34], the statute only prohibited persons "convicted anywhere for a felony involving violence or intimidation" from owning firearms. Unlike current Alaska law, North Dakota's narrower felon in possession statute would fall within the category of felon in possession statutes that Dowlut considers to be constitutional, in

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[33]The court noted at page 28 that this affirmative defense is available in cases involving the charge of carrying a concealed weapon.

[34]415 N.W.2d 481 (N.D. 1987).

that it only prohibits felons convicted of common law felonies from having firearms.[35]

Other state courts have upheld felon in possession statutes based on express constitutional language that preserved the right of the legislature to regulate arms. In Landers v. State, 299 S.E 2d 707 (Ga. 1983), the court affirmed the conviction of a felon charged with possessing a firearm, and held "Where a State constitution in terms provides, in connection with the right to bear arms, that the State may regulate this right, or may regulate the manner of bearing arms, these words expressly

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[35]See also, Dickerson v. State, 517 So.2d 625 (Ala. Cr. App. 1986), Bristow v. State, 418 So.2d 927 (Ala. Cr. App. 1982) and Mason v. State, 103 So.2d 337 (Ala.App. (1956), aff'd 103 So.2d 341 (1958)(Statute prohibited "a person who has been convicted of a crime of violence from owning or possessing a pistol); State v. Krantz, 164 P.2d 453 (Wash. 1945) and State v. Tully, 89 P.2d 517 (Wash. 1939) (Statute prohibited possession of a firearm after having been convicted of a crime of violence); Carfield v. State, 649 P.2d 865 (Wyo. 1982) (Statute prohibited persons convicted of "murder, voluntary manslaughter, assault to commit murder, aggravated assault, robbery, burglary or sexual assault in the first or second degree, or mayhem" to possess any firearms.); State v. Noel, 414 P.2d 162 (Ariz. 1966) and State v. Rascon, 519 P.2d 37 (Ariz. 1974) (Statute prohibited any person convicted of a crime of violence from possessing a pistol); Sheppard v. State, 586 S.W.2d 500 (Tex. Crim. App. 1979), McGuire v. State, 537 S.W.2d 26 (Tex. Cr. App. 1976) and Webb v. State, 439 S.W.2d 342 (Tex. Cr. App. 1969) (Statute prohibited persons convicted of "a felony involving an act of violence or threatened violence to a person or property" from possessing firearms "away from the premises where he lives."); State v. Cartwright, 418 P.2d 822 (Ore. 1966) (Statute prohibited possession where convicted of "a felony against the person or property of another."

recognize the police power in direct connection with the constitutional declaration as to the right."[36]

Similarly, in Nelson v. State, 195 So. 2d 853 (Fla. 1967), the conviction for possession of a pistol by a defendant who had previously been convicted of a felony was upheld. Although the statute applied to persons convicted of all felonies, Florida's constitutional provision said "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law."

The court in Amos v. State, 343 So.2d 166 (La. 1977) upheld charges for felon in possession of a firearm because the "purpose [of the statute] is to limit the possession of firearms by person who, by their past commission of certain specified serious felonies, have demonstrated a dangerous disregard for the law and present a potential threat of further or future criminal activity." However, two justices of the Louisiana Supreme Court dissented from the opinion, believing that the statute impermissibly infringed on the right to bear arms.

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[36]Georgia's constitution states "The right of the people to keep and bear arms shall not be infringed but the General Assembly shall have power to prescribe the manner in which arms may be borne."

The reasoning of the two dissenting justices in Amos is important, since if this position were adopted in Alaska, AS 11.61.200 would be struck down. The dissenters stated that the felon in possession statute "impermissibly limits the affirmative constitutional guarantee and as such is not a valid exercise of the police power." The dissenters looked at other state decisions upholding felon in possession laws and concluded "These states, however, have constitutional provisions different from ours. Every one of these constitutions link the right to bear arms to the need for a militia. Unlike these provisions, the Louisiana Constitution of 1974 expressly grants to each citizen the 'right to keep and bear arms,' a right which 'no law' shall abridge. This constitutional guarantee is not limited by linking it to a militia or a defense for the people as a whole. It is limited only by one state exception: the legislature has the authority to prohibit the concealment of weapons on the person. Otherwise, the legislature lacks the authority to nullify the right of Louisiana citizens to keep and bear arms."

An analysis of the effect the proposed right to bear arms amendment will have on the state's felon in possession statute must be undertaken with both the right to privacy and the Alaska Supreme Court's expansive equal protection standard in mind. Alaska law prohibits all felons, including persons convicted of non-violent felonies such as embezzlement and certain sex offenses, from

possessing firearms. If SJR4 were adopted, the court would require the state to prove that the law is based on a compelling state interest. In relation to non-violent felons, it is not unlikely that the state would be unable to meet the burden of proving it had a compelling state interest in prohibiting the possession of firearms by non-violent felons.

c. Constitutionality of Prohibited Weapons Statutes

The possession of certain classes of weapons is prohibited in Alaska.[37] Included in the category of prohibited weapons are switchblades, gravity knives, and metal knuckles. Under SJR4, this law would be unconstitutional, if the court in this state accepted the analysis of the Oregon Supreme Court in State v. Delgado, 692 P.2d 610 (Ore. 1984); State v. Blocker, 630 P.2d 824 (Ore. 1981); and State v. Kessler, 614 P.2d 94 (Ore. 1980).

In Delgado, the Oregon court held that a statute prohibiting mere possession of a switchblade was unconstitutional under the right to bear arms provision of the Oregon constitution.[38] The court first determined that the drafters of Oregon's constitution "intended that the private citizen have the

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[37]AS 11.61.200(e).

[38]Article I, section 27, of the Oregon Constitution provides: "The people shall have the right to bear arms for the defence of themselves, and the State..."

right to possess arms for the defense of person and property."[39] Next, the court reasoned that switchblades were arms, and as a result, possession of a switchblade is a constitutionally protected in Oregon and the statute making such possession a crime is unconstitutional.

d. Constitutionality of Game Regulations

Alaska's regulatory scheme relating to the lawful methods of taking game is potentially at risk if the proposed amendment is adopted.[40] Since each of the game regulations infringes on the right to bear a particular type of arm, in order for the regulation to withstand constitutional scrutiny, the state would need to prove that it had a compelling state interest for adopting the regulation.

For example, under 5 AAC 92.100(a)(1), it is illegal to shoot waterfowl with a rifle or pistol. The purpose of the regulation is to make hunting waterfowl less efficient, and more

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[39] Delgado at 611.

[40] 5 AAC 92.075 (the permissible weapons for taking big game are a shotgun, a muzzle-loading rifle, or a rifle or pistol using a center-firing cartridge); 5 AAC 92.080 (it is prohibited to take game with the use or aid of a machine gun, set gun, or a shotgun larger than 10 gauge); and 5 AAC 92.100 (it is prohibited to take waterfowl, snipe and cranes with a rifle or pistol, a shotgun larger than 10 gauge, or a shotgun not plugged to a three shell capacity).

sporting.[41] However, many biologists have argued that the regulation is unnecessary as it doesn't matter how a bird is killed, it only matters how many animals are shot, and whether the appropriate bag limit was exceeded.[42] In the face of this type of expert testimony, it is not unlikely that a court would strike down 5 AAC 92.100(a)(1) as an infringement of the right to bear arms.

6. The Legislature Should Affirmatively State Its Intent

The State, through exercise of its police power, is vested with the authority to enact laws, within constitutional limits, to promote the general welfare of its citizenry. The Alaska Supreme Court examined the state's police power in light of express constitutional limitations on regulatory authority in Matthews v. Quinton.[43] In this case, the court analyzed whether a statute providing for the transportation of children to nonpublic schools at public expense was in contravention of a constitutional prohibition against the appropriation of public funds for the support of private schools. Since the statute had been on the books before the constitutional provision was adopted, the court

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[41]Telephone conversation with James Sheridan, Assistant Special Agent in Charge, Law Enforcement, Alaska Region, United States Fish and Wildlife Service.

[42]Id.

[43]362 P.2d 932, app. dism., cert. den. 82 S.Ct. 530, 368 U.S. 517, 7 L.Ed.2d 522 (Alaska 1961)

considered the effect of subsequently adopted constitutional provisions on existing statutes.

The court concluded that for a constitutional provision to operate retrospectively to validate antecedent legislation in the face of claimed unconstitutionality, "the validating constitutional provision must make some reference, however slight or inferential, to the statute intended to be validated." The statute authorizing transportation of private school pupils was declared void because the newly adopted constitutional provision did "not show by the language used, either directly or by necessary implication, that it was intended to operate retrospectively so as to validate [the statute]." Id. at 939.

Whether the statute was a valid exercise of the police power of the state was also considered in Matthews. The court noted that "the police power -- broad and comprehensive though it is -- may not be exercised in contravention of plain and unambiguous constitutional inhibitions." Although the state has "inherent and reserved police power to enact laws to promote the safety, health and general welfare of society," the court emphasized that "this power must be exercised within constitutional limits." Id. at 944.

During the Fourteenth and Fifteenth Legislatures, versions of the right to bear arms amendment contained a general statement of "legislative intent" indicating that the constitutional amendment, if adopted, "should not be construed to preclude the regulation of the manner in which arms may be borne, carried, or used." We are concerned that this indirect statement of legislative intent will not be effective to preserve the present power to reasonably regulate the possession and use of weapons.

As a general rule, a statute or constitutional provision will be interpreted according to the plain meaning of the language on its face. If the intent behind the adoption of the amendment were to later become an issue, it is the intent of the voters who adopted the measure that will be relevant, rather than the intent of the legislators who drafted it. Although last session's resolution directed the Legislative Affairs Agency to consider the stated "legislative intent" when preparing its neutral summary for the election pamphlet, the intent language would not appear on the ballot itself, and might not be contained verbatim in the election pamphlet. See art. XIII, sec. 1 of the Alaska Constitution and AS 15.58.010.

Conclusion

It is our belief that the present provision of the Alaska constitution and the traditional restraint of the legislature in

regulating firearms adequately protect the right to bear arms. However, if the legislature believes this issue should be placed before the people in the form of a constitutional amendment, that amendment should be drafted to explicitly recognize the legislature's regulatory authority with regard to arms.

Both legal principles and common sense dictate that a well-drafted statute or constitutional provision should reduce uncertainty and disputes about interpretation. Statements of "legislative intent" are not an adequate substitute for clear, unambiguous language in the proposed constitutional amendment. A more precisely drafted amendment would minimize the possibility that a criminal defendant would later be able to successfully convince a court, as has been done in other that states, that a statute, regulation, or ordinance is unconstitutional.

As alternatives to SJR4, we suggest language such as:

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state, <u>except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used</u>.

or

> The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state, <u>except that the exercise of this right may be regulated by law</u>.

We appreciate your consideration of our comments, and trust that we can work together to accomplish your goals in a way that does not detrimentally affect our ability to prosecute activities that we all agree should be against the law.

Respectfully submitted,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: _____
Laurie H. Otto
Assistant Attorney General

cc: The Honorable Pat Rodey
The Honorable Peter Goll
The Honorable Max Gruenberg
The Honorable Dave Donley
Grace Berg Schaible
Bob Evans

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FACSIMILE TRANSMISSION

DATE Nov. 29, 1989

2 PAGES INCLUDING THIS COVER PAGE.

DELIVER TO: Laurie Otto

MESSAGE: Laurie — please review the attached draft and see if I have the wording accurately as we discussed. You can fax me back any changes, corrections etc. Thanks,

Rupe

IF THERE ARE ANY PAGES MISSING, CALL (907) 789-7422

For: Laurie Otto

DRAFT: November 21, 1989

IN THE HOUSE BY THE STATE AFFAIRS COMMITTEE

CS FOR HOUSE JOINT RESOLUTION NO. 7 (State Affairs)

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to the individual right to keep and bear arms.

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

* Section 1. Article I, sec. 19, Constitution of the State of Alaska, is amended to read:

SECTION 19. RIGHT TO KEEP AND BEAR ARMS. The individual [A WELL-REGULATED MILITIA BEING NECESSARY TO THE SECURITY OF A FREE STATE, THE] right [OF THE PEOPLE] to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state except that the exercise of this right may be reasonably regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

* Sec. 2. The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XIII, sec. 1, Constitution of the State of Alaska, and the election laws of the state.

ALTERNATIVE METHODS OF RESERVING THE RIGHT OF THE LEGISLATURE TO REASONABLY REGULATE ARMS IN SJR 4

The individual right to keep and bear arms shall not be denied or infringed by the state or a political subdivision of the state,

1. ... except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used.

2. ... except that the state or a political subdivision of the state may reasonably regulate the manner in which arms may be kept, borne, or used.

3. ... except that the exercise of this right may be regulated by law.

4. ... except that the exercise of this right may be reasonably regulated by law.

5. ... except that the state or a political subdivision of the state may regulate the manner in which arms may be kept, borne, or used. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

6. ... except that the state or a political subdivision of the state may reasonably regulate the manner in which arms may be kept, borne, or used. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

7. ... except that the exercise of this right may be regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

8. ... except that the exercise of this right may be reasonably regulated by law. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms.

PHONE MEMO

TO Peter

DATE 2/16 TIME 9:45 AM

FROM M Dale FloRian

AREA CODE NUMBER w: 474-7721

OF Fairbanks

EXTENSION h: 479-8164

MESSAGE

=V-Pres, AK Peace Officers

re: another state constitution (in Nebraska) has been found unconstitutional yesterday & effects AK law

SIGNED DD

PHONED ☒ CALL BACK ☒ RETURNED CALL ☐ WANTS TO SEE YOU ☐ WILL CALL AGAIN ☐ URGENT ☐ WAS IN ☐

MONARCH M5176

SJR

43

HOUSE COMMITTEE REPORT

(7)
Date Referred: April 29, 1989 FURTHER REFERRALS:

Date of Committee Action: 5/4/89

The JUDICIARY Committee considered: SJR 43

SENATE JOINT RESOLUTION NO. 43
[IMPLEMENTATION OF 10TH AMENDMENT]
Relating to implementation by the Congress of the Tenth Amendment to the Constitution of the United States.

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

ADOPTS: ____________ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact ________
[ ] zero fiscal note ________
[ ] zero with analysis ________

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) ________
[X] zero fiscal note(s) 4/26/89 - LAA
[ ] zero fn/analysis ________

SIGNING DO PASS:
Mike Davis
[illegible] Ellis
Mike Miller
Terry Martin
Cliff Davidson
[illegible]
[illegible]

SIGNING:
(Check approp. column)

	Do Not Pass	No Rec	Amend

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Chairman's Signature

Alaska State Legislature

SENATOR BETTYE FAHRENKAMP
CHAIRMAN, RESOURCES COMMITTEE
119 N. CUSHMAN STREET, SUITE 201
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Senate

WHILE IN JUNEAU
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JUNEAU, ALASKA 99811
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To: House Judiciary Members

From: Senator Bettye Fahrenkamp

Re: SJR 43, Relating to the 10th Amendment to the U.S. Constitution.

Date: May 3, 1989

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

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

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

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

I urge your support of this resolution.

The Council of State Governments

Washington Office
Hall of the States
444 North Capitol Street
Washington, D.C. 20001
(202) 624-5460

Washington Office Director
Norman Beckman

Chairman
Senate President
Arnold Christenson
Utah

President
Governor William A. O'Neill
Connecticut

Executive Director
Carl Stenberg

May 3, 1989

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

Dear Mr. Barnes:

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

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

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

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

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

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

Sincerely yours,

Joanne O'Rourke

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

Douglas Henry

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

John Marchi

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

JO:DH:JM/kac

Enclosures

The Council of State Governments

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Washington Office Director
Norman Beckman

Chairman
Senate President
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Utah

President
Governor William A. O'Neill
Connecticut

Executive Director
Carl Stenberg

April 19, 1989

MEMORANDUM FOR THE RECORD

Fr: Norman Beckman

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

The following responses have been received:

EASTERN REGION

New York - Passed Senate and Assembly.

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

Connecticut - Likely to be adopted.

Rhode Island - Likely to be considered.

MIDWESTERN REGION

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

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

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

THE JOURNAL OF

STATE GOVERNMENT

The Council of State Governments

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Past, Present and Future

by David B. Walker

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

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

The Shaping of Our Federalist Tradition: 1789-1963

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

Although the representational and political facets of American federalism experienced major shifts during the period that stretched from Presidents Washington through Kennedy, they continued to support the federal principle. Popular representation at the national and state-local levels steadily broadened during this time. Examples are the Voting Rights Act of 1965 and the 26th Amendment, giving 18-year-olds the vote in 1971.

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

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

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

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

CORRECTION

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TO ASSURE LEGIBILITY

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STATE GOVERNMENT

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The Disappearing 10th Amendment

Editor's Note

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

— Elaine S. Knapp

American Federalism:

Past, Present and Future

by David B. Walker

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

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

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

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

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

During the 75 years following the Civil War, the Supreme Court played a highly activist role. From 1874 to 1937, 62 acts of Congress and 525 state laws were found unconstitutional. The latter development indirectly highlights the emergence during this period of the states as laboratories of novel social and economic policies. By the end of the judicial era (1937), the Supreme Court had chalked up an impressive record of aggressively acting as the ultimate interpreter of the constitutionality of state laws enacted pursuant to their police powers and of national statutes passed in furtherance of Congress' commerce, conditional spending and taxing powers.

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

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

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

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

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

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

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

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

In addition to functional changes in federalism, from Johnson to Carter a transformation occurred in the representational and political areas. As to the representational, the Supreme Court's reapportionment decisions from 1962 to 1965 and Congress' enactment of the 1965 Voting Rights Act produced a dramatic democratization of state and local representational arrangements. The electorates expanded in states that had systematically barred racial and ethnic minorities. State legislatures were recast to reflect the Court's one man-one vote dictum, largely ending rural hegemony. State and local politics have not been the same since that time. State policy-making processes are more accessible, responsive and representative than ever.

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

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

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

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

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

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

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

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

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

Some observers predicted a reversal or reduction of the Warren Court's libertarian and egalitarian tendencies with the appointment of Chief Justice Warren E. Burger. However, analysis of key 1970s' civil rights and liberties cases indicates the Court maintained its sensitivity to libertarian and racial justice values. In cases involving the criminal defendant rights, sex discrimination, local zoning ordinances and state legislative appropriation of federal grant funds, however, the Court exhibited concern for state autonomy and awareness of intergovernmental "comity" and "forbearance."

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

Reagan's Record: 1981-1988

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

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

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

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

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

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

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

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

Intergovernmental deregulation as such was not the basic focus of the Reagan administration; instead, the curbing and softening of the regulatory process was sought. The softening strategy involved appointing Reagan loyalists to key regulatory posts; cutting agency personnel; relaxing, if not forgetting, agency procedures; and establishing a centralized review of proposed new or changed regulations. All these administrative actions slowed dramatically the rate of issuances in the early Reagan years and considerably eased the burden for the private sector, but only marginally for state and local governments (Conlan 1988, 217-218).

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

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

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

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

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

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

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

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

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

Federalism's Current Condition

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

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

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

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

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

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

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

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

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

Continuing Trends

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

1) The Supreme Court continued to favor centralized government. The Court includes seven appointees by Republican presidents (four of them Reagan's) and the conservative Justice White (a Kennedy selection). Yet this ostensibly conservative court continues to favor the central government in about four out of five instances. *Garcia* vs. *San Antonio Metropolitan Transit Authority* (1985), *South Carolina* vs. *Baker* (1988) and *J.A. Croson Co.* vs. *City of Richmond* (1989) are the tip of the judicial centripetal iceberg.

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

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

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

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

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

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

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

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

Yet, the continuities with the past are just as significant and some are not promising. Above all is the verdict that Reagan and Sanzone's "permissive federalism" description is still valid. Most state and local actions could have been initiated, modified or pre-empted by the central government, budgetary constraints permitting. Localities and states continue to be incapable of asserting by any means an authoritative role in national governmental actions affecting their jurisdictional and operational integrity. This does not bode well for the future of American federalism.

The Future of Federalism?

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

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

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

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

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

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

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

All this prompts the guesstimate that elements of all three of these scenarios may play out, but with the author of the second and more pessimistic script writing the final version of this next act of American federalism's 200-year-old drama.

Sources

Bender, Lewis G. and James A. Stever, eds. 1986. *Administering the New Federalism*. Boulder, Colo.: Westview.

Conlan, Timothy. 1988. *New Federalism*. Washington, D.C.: The Brookings Institution.

The Economist. 15-21 October, 1988.

Kayden, Xandra. 1981. "The Nationalizing of the Party System." *Parties, Interest Groups, and Campaign Finance Laws*. Michael J. Malbin, ed. Washington, D.C.: American Enterprise Institute, 276 ff.

Keller, Morton. Oct. 1988. "State Power Needn't Be Ressurrected Because It Never Died," *Governing the States and Localities*. Washington, D.C.: Congressional Quarterly, Inc.

Kelly, Alfred H. and Winifred A. Harbison. 1976. *The American Constitution, Its Origins and Develoment*. New York: W. W. Norton and Co.

Ladd, Everett Carll Jr. 1970. *American Political Parties*. New York: W.W. Norton and Co.

Osborne, David Osborne. 1988. *Laboratories of Democracy*. Boston: Harvard Business School Press.

Reagan, Michael and John G. Sanzone. 1981. *The New Federalism*. New York: Oxford University Press.

Salomon, Lester. 1980. *Rethinking Public Management*, Washington, D.C.: The Urban Institute.

Schwarz, John E. 1988. *America's Hidden Success*. New York: W.W. Norton and Co.

Sununu, John. Fall 1988. "The Spirit of Federalism: Restoring the Balance." *Intergovernmental Perspective*, Washington, D.C.: Advisory Commission on Intergovernmental Relations.

U.S. Advisory Comission on Intergovernmental Relations. August 1986. *The Transformation of American Politics*. Washington, D.C.: ACIR.

____. December 1987. *Significant Features of Fiscal Federalism, 1988 Edition*, Vol. 1. Washington, D.C.: ACIR.

U.S. Census Bureau. *Governmental Finances*. Washington, D.C.: Government Printing Office.

Walker, David B. 1981. *Toward a Functioning Federalism*. Cambridge, MA: Winthrop Publications, Inc.

A Historical View:

Federalism at the Bicentennial

by A. E. Dick Howard

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

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

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

The plan of government finally agreed upon was a compromise among varying views. Madison (1787) described the Constitution as something of a hybrid, "neither a national nor a federal Constitution, but a composition of both."

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

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

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

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

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

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

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

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

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

Thus, forces beyond the states' direct control have operated to account for much of the growth in federal power in the nation's 200 years of history. But the states themselves often have contributed to the occasions for Congress, the federal courts or some other instrumentality of federal power to step in and deal with problems previously left to the states to solve. Those who complain of federal aggrandizement must reckon first with the fact that the states' own record has often been a poor one.

Not only were criminal justice, commercial law and domestic relations essentially determined by state law, but also promotion of economic enterprises was largely undertaken by the states.

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

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

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

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

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

The Contemporary Scene

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

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

Federalism recently has become again a matter of serious political debate and concern. At the National Governors' Association meeting in 1980, then-Vermont Gov. Richard Snelling, a Republican, (U.S. ACIR 1982, 3) complained, "The role of the states has been eroded to the point that the authors of the Constitution would not recognize the intergovernmental relationships they crafted so carefully in 1789." Then-Arizona Gov. Bruce Babbitt (U.S. ACIR 1982, 3), a Democrat, agreed: "The federal system is in complete disarray. Congress has lost all sense of restraint . . . The 10th Amendment, reserving powers to the states, is a hollow shell." President Ronald Reagan (1983, 75) in his first State of the Union message, made federalism a central motif:

> "Our citizens feel they have lost control of even the most basic decisions made about the essential services of government, such as schools, welfare, roads, and even garbage collection. They are right.
>
> "A maze of interlocking jurisdictions, and levels of government confronts average citizens in trying to solve even the simplest of problems. They do not know where to turn for answers, who to hold accountable, who to praise, who to blame, who to vote for or against."

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

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

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

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

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

Reforms and Innovations

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

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

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

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

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

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

Other reforms came from within. The 1960s and 1970s saw intense interest in revising or rewriting state constitutions. At the turn of the century, state constitutions commonly were detailed, complicated documents. Resembling more nearly codes of law than constitutions, they often hobbled responsive or responsible state government. The state constitutions of postwar America are generally shorter and simpler than their predecessors, emphasizing those fundamentals that belong in a constitution. Administrative and executive powers are focused on the governor, there are fewer restraints on the legislature and the judicial articles point toward a more competent system of courts (Howard 1974, 9). Still other reforms have taken shape in legislation or in executive actions. A few innovations and reforms in state government will be sampled here, some resulting from constitutional revision, others flowing from legislative or executive initiatives. They should serve to give something of the flavor of vitality that has brought the states a long way from the malaise and incompetence that often struck the observer a quarter of a century ago.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

State court activity raises questions about legitimacy and competency not unlike the issues that are so familiar a feature of academic and political debate about federal judicial "activism." No more than federal judges should state courts see themselves as knights errant, commissioned to do good and fight evil, whatever its form. But state constitutions exist independently of (although they may not conflict with) the U.S. Constitution. They often reflect historical and jurisprudential traditions of their own. And the decisions of state courts, grounded in the state constitutions, speak of a healthy pluralism in the making of constitutional law, enhancing the opportunity for local polities to make local value choices.

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

Federalism as a Constitutional Value

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

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

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

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

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

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

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

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

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

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

One need not ask for a return to the "old Court" — certainly not to that Court's restrictive view of the capacity of nation and states respectively to regulate the private sector — to ask the Court to show some sensitivity to federalism as a constitutional value. An egregious sample of insensitivity is the Court's 1985 decision in *Garcia* vs. *San Antonio Metropolitan Transit Authority*. In that case, five justices concluded that if the states "as states" want protection within the constitutional system they must look to Congress, not to the courts. *Garcia* neglects history and principle, and it betrays a myopic understanding of the political process. Whatever one may think of *Marbury* vs. *Madison* (over which debate is by now surely academic), it is hard to escape the conclusion that, assuming the legitimacy of judicial review, limiting national power in order to assure the states' ability to function is as much a proper judicial function as any other issue. Moreover, *Garcia* clashes with the principle, fundamental in our constitutionalism, that no branch of government should be the nonfettered judge of its own powers.

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

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

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

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

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

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

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

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

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

Sources

Baker vs. *Carr*, 369 U.S. 186, 258-9 (1962).

Baxter, M. 1984. *One and Inseperable: Daniel Webster and the Union.*

Bergh, A. II, ed. 1907. *The Writings of Thomas Jefferson*: 206.

Chi, Keon. 1985. "Michigan Encourages Early Retirement." *State Government News* (January) :15.

Draper, F. and B. Pitsvada. 1981. "ZBB — Looking Back after Ten Years." *Public Administration Review* 41 (77).

Garcia vs. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

Howard, A.E. Dick. 1974. "Constitutional Revision: Virginia and The Nation." *U. Rich. L. Rev.* 9 (1).

____. 1976. "State Courts and Constitutional Rights in the Day of the Burger Court." *Va. L. Rev.* 62.

Llewelyn, K. 1934. "The Constitution as an Institution." *Colum. L. Rev.* 34 (1).

Madison, J. (1787). Federalist Paper 39.

New State Ice Co. vs. *Liebmann*, 285 U.S. 262, 311 (1932).

Peirce, N. 1982. "The States Can Do It, But Is There The Will?" *National Journal* (February).

____. 1985. "Turning Deadbeats Into Taxpayers with Amnesty." *National Journal* (August).

Public Papers of the Presidents of the United States: Ronald Reagan 1982. Book I, 75. 1983.

Riker, William. 1969. "Six Books in Search of a Subject — Or Does Federalism Exist and Does It Matter?" 2 *Comp. Pol.*

Rosenthal, A. 1981. *Legislative Life: People, Process, and Performance in the States.*

Sabato, Larry. 1980. *Goodbye to Good-Time Charlie.*

Scheiber, Harry. 1980. "Federalism and Legal Process: Historical and Contemporary Analysis of the American System." *Law & Soc'y Rev.*14.

Shapiro, M. 1966. *Freedom of Speech: The Supreme Court and Judicial Review* 30.

"To Form a More Perfect Union: The Report of the Committee on Federalism and National Purpose." 1985.

Toqueville, Alec. 1945. *Democracy in America I*:61,68. Bradley, P., ed.

Uppal, J. 1980. "The State of the Judiciary." *Book of the States*, 1980-81:143.

U.S. Advisory Commission on Intergovernmental Relations. 1981. *The Federal Role in the Federal System: The Dynamics of Growth.* Washington, D.C.:ACIR.

____. 1982. "First Principles of American Federalism: A Working Paper." Washington, D.C.:ACIR, December.

____. 1985. *The Question of State Government Capability.* Washington, D.C.:ACIR.

Worthley, J. and W. Ludwin, eds. 1969. *Zero-base Budgeting in State and Local Government.*

State Activism as a Balance in Preserving Federalism

by Mavis Mann Reeves

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

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

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

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

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

Adjustments in American Federalism

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

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

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

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

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

Upgrading State Governments

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

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

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

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

Other statutory changes strengthened state machinery. State legislatures underwent so many reforms that some are hardly recognizable as the same institutions that operated in 1970. In addition to constitutional modifications, legislatures streamlined operations by consolidating committees, reducing overlapping memberships and providing for pre-session organization and filing of bills.

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

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

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

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

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

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

Greater State Activism

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

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

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

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

Among the most significant actions were those relating to education and welfare reform. State after state moved to deal with school problems. States revised aid equalization formulas and increased appropriations. They created special schools for gifted students, such as North Carolina's Governor's School, and reviewed teacher training.

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

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

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

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

Horizontal Federalism Thrives

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

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

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

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

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

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

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

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

Public Opinion about the States

Public opinion about the states does not reflect the improved state capabilities and efficaciousness. Confidence in state governments has remained substantially the same over the past decade. Opinions as to which level of government provides the public with the most for their money fluctuated during the period from 1980 to 1988; however, the percentage of respondents to ACIR sponsored polls selecting the states as giving the most value for the tax dollar rose from 22 percent in 1987 to 27 percent in 1988. This percentage was almost even with local (29 percent) and federal (28 percent) governments (ACIR 1987, 1988). States fared somewhat better on a 1988 question asking how often state government performs its duties efficiently and at the best possible cost. Of those responding, 36 percent thought state governments performed efficiently all or most of the time as compared with 25 percent for the federal government and 46 percent for local governments.

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

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

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

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

Conclusion

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

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

References

Bowman, Ann O'M. and Richard C. Kearney. 1986. *Resurgence of The States.* Englewood Cliffs, N.J.: Prentice-Hall.

Durning, Dan. 1988. "The New Capital Market Heavyweights." *The Journal of State Government* 61, no. 4 (July/August): 124-128.

Glendening, Parris N., and Mavis Mann Reeves. 1984. *Pragmatic Federalism: An Intergovernmental View of American Government.* 2nd ed. Pacific Palisades, CA: Palisades Publishers.

Keller, Edward B. December 1988. "Image of Government Officials Improves." *State Government News.*

Jones, Benjamin J. and Duane Osborne. 1988. "Recent Developments in Interstate Compacts and Agreements." *The Book of the States,* 1988-89. Lexington, KY.: The Council of State Governments.

Kincaid, John. 1988. "'The New Judicial Federalism." *The Journal of State Government* 61, no. 5:165.

Osborne, David. 1988. *Laboratories of Democracy.* Boston: Havard Business School Press.

Reeves, Mavis Mann. 1982. "Look Again at State Capacity: The Old Gray Mare Ain't What She Used to Be." *American Review of Public Administration* 16, no. 1 (Spring): 74:88.

Rovner, Julie. 1988. "Welfare Reform: The Issue That Bubbled Up From The States To Capitol Hill." *Governing the States and Localities* 2:3 (December).

Sabato, Larry. 1979. "Governors' New Office Careers: A New Breed Emerges." *State Government* 52, no.3:95.

____. 1983. *Goodbye to Good-Time Charlie: The American Governor Transformed,* 2nd. ed. Washington, D.C.: C.Q. Press.

Sanford, Terry. 1967. *Storm Over The States.* New York: McGraw-Hill Book Co.

Webster, William L. 1988. "Protecting Consumers: Challenges Posed by New Federalism." *Journal of State Government* 61, no. 3 (May/June):96.

U.S. Advisory Commission on Intergovernmental Relations. 1982. *State and Local Roles in the Federal System.* Washington, D.C.: Government Printing Office.

____. 1985. *A Question of State Government Capability.* Washington, D.C.: ACIR.

____. *Changing Public Attitudes on Government and Taxes.* Washington, D.C.: ACIR, 1986-1988.

The Spirit of Federalism:
Restoring the Balance

by John Sununu

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

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

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

These two decisions are hardly exceptions to the pattern of recent years. They consolidate a variety of congressional acts. Today the federal government is free to regulate every minute detail of state administration and management. These include police powers, personnel procedures, pensions, fringe benefits, financial accounting procedures and every sector of the economy now under state regulation.

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

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

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

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

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

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

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

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

While the simplest answer is the model established 200 years ago — for the states to convene a constitutional convention to renew the commitment to power shared between the states and the federal government — current fear of a runaway convention has forced the states to rely on the Congress to voluntarily give up powers it has centralized on the national level. History makes it clear, however, that power is rarely given up voluntarily.

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

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

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

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

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

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

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

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

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

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

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

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

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

Public Hearings Announced on Restoring the 10th Amendment

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

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

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

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

Liberty and Sophistication

by Douglas Henry, Jr.

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

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

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

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

From South America to Russia, the story was repeated.

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

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

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

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

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

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

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

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

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

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

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