Special: Double Issue

Intergovernmental PERSPECTIVE

Winter 1987, Vol. 13, No. 1

Federalism In 1987: Challenges and Choices

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

In This Issue . . .

This Winter 1987 issue of *Intergovernmental Perspective* is a special double issue highlighting the theme "**Federalism in 1987: Challenges and Choices**". U.S. Attorney General Edwin Meese, III describes the on-going efforts of the Working Group on Federalism to define federalism principles and to provide a framework for developing the "proper relationship" between the national and state governments. Steven Gold of the National Conference of State Legislatures reviews the recent work of that organization's State-Local Task Force to help states reassess their policies toward local governments. Professor Barbara Greene presents a summary of preliminary findings of a recent nationwide survey to determine the ability of county governments to cope with the fiscal challenges of the 1980s. Another local perspective is provided by Herbert Bingham and Joseph Sweat in their article on city politics and power. Professor George Brown addresses the question of state sovereignty and the role that the Eleventh Amendment will play in the wake of the U.S. Supreme Court's ruling in the *Garcia* case. And Professor Joseph Zimmerman provides insight about the need and potential for three important tools of "direct democracy"—the initiative, referendum and recall. . . . Our **Fiscal Note** provides a description of the impact of federal tax reform on state personal income tax liabilities. . . . The **Intergovernmental Focus** department features the Missouri Commission on Local Government Cooperation as part of our continuing series focusing on the state ACIR counterpart agencies. . . . And important information is provided about major ACIR services, including our diskette series, recent publications, and the new **ACIR Subscribers Program.**

Intergovernmental PERSPECTIVE

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Intergovernmental Perspective
is published four times a year
by the U.S. Advisory Commission
on Intergovernmental Relations,
Washington, D.C. 20575
202-653-5538

The Chairman of the Advisory Commission on Intergovernmental Relations has determined that the publication of this periodical is necessary in the transaction of the public business required by law of this Commission. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget through September 1987.

ACIR News

Commission Meeting Set For March 20

The Spring meeting of the Advisory Commission on Intergovernmental Relations will be held on Friday, March 20, in Washington, D.C. Highlights of the business agenda include:

- a preliminary report on the impact of federal tax reform on state income tax policy; and
- review and action on two policy reports–fiscal discipline in the federal system, and an appraisal of devolving selected federal highway aid programs and revenue bases.

ACIR Appointments, Reappointment Announced

In recent weeks, two new appointments and one reappointment to the Commission have been announced by the President and the Speaker of the House. Each member will serve a two-year term.

Last Fall, the President named Missouri Governor John Ashcroft as one of four gubernatorial members to replace retiring Governor Richard Thornburgh of Pennsylvania. Prior to his election as governor in 1984, Ashcroft served two terms as the state's Attorney General, and in that capacity was elected president of the National Association of Attorneys General in 1981. Ashcroft began his public career in 1973 as Missouri's State Auditor.

In early March, the Speaker of the House announced the reappointment of Representative Ted Weiss (NY) and the appointment of Representative Jim Ross Lightfoot (IA) to replace Representative Robert Walker (PA).

Representative Weiss is chairman of the Subcommittee on Intergovernmental Relations and Human Resources and has served on ACIR since 1983. Prior to his election to the Congress in 1976, he served as a New York City Councilman for 15 years.

Representative Lightfoot is serving his second term in the Congress, and is a member of the House Committee on Government Operations. A former police officer, city commissioner, and businessman, Representative Lightfoot was named "Agricultural Spokesman of the Year" in 1979 by the National Agricultural Marketing Association.

Intergovernmental Focus

Spotlight on Missouri's Local Cooperation Commission

Lois Pohl
Director

Governor John Ashcroft fulfilled his campaign promise and the long desired dream of many local government advocates when he signed an Executive Order May 6, 1985 establishing the Missouri Commission on Local Government Cooperation. Ashcroft explained: "The state commission will help governmental entities work together more effectively. As Chairman of the Governor's Crime Commission, I have found that a Commission structure linking public entities throughout the state directly to government in Jefferson City is particularly useful in developing effective relations with the General Assembly. Twenty-one states currently have intergovernmental commissions and it is time that Missouri joined their ranks."

Organization

The Commission is a 30-member board established to develop a closer partnership between state and local governments. This Commission has been charged with the important task of developing a linkage between state and local governments, and to provide a forum for solving problems of mutual concern.

The Governor appoints ten members from the private sector and five who are state officials; two members of the House of Representatives are appointed by the Speaker of the House; and two members of the Senate are appointed by the Senate President Pro Tem. The remaining 11 members are appointed by various local government associations. Independence Mayor Barbara Potts was named Chairperson by the Governor. Mayor Potts is immediate past chairman of the Mid-America Regional Council, and is Vice President of the Missouri Municipal League.

The Executive Order assigns the staff duties of the Commission to the Commissioner of Administration, John Pelzer, who also is a member of the Commission. Mr. Pelzer designated the Intergovernmental Relations (IGR) Unit, that was already in existence in the Office of Administration, as staff for the Commission. Although the Commission is the priority of the IGR Unit, it administers other programs which involve federal, state and local governments, including the Missouri Federal Assistance Clearinghouse, state aid to the regional planning commissions, the Missouri planner-in-charge program, and other areas of interest and concern to local governments.

Priorities and Accomplishments

The full Commission meets three times a year. During the interim, the Commission operates through a structure of four working committees:

- Executive Committee—responsible for establishing committee assignments and resolving policy issues needing immediate attention.
- Legislative Committee—responsible for developing and/or studying legislation relating to local government issues.
- Governmental Services Committee—responsible for issues concerning existing and proposed state and federal services to local governments.
- Current Issues—responsible for developing the Commission's research agenda and carrying out all intergovernmental studies, for developing statewide lines of communication, and for reviewing and screening all inquiries to the Commission.

As a result of the work of these committees, the Commission set the following priorities at the January meeting for FY 1986:

(1) The establishment of a Mis-

Governor Ashcroft signed the MoPERM bill into law June 20, 1986.

souri Public Liability Fund and/or other means to help local governments solve the insurance crisis.

(2) Study the impact of changes in federalism and intergovernmental relations and the methods that local governments can use to cope with these changes.

(3) Assessment maintenance and funding.

(4) Solid Waste Management.

The Commission's number one priority issue—the establishment of a public entity risk management fund—is now a law that was originated by and supported by the Commission. The Missouri Public Entity Risk Management Fund, or MoPERM, offers all political subdivisions in the state (including municipalities, counties, school districts, and the various special districts) the option of participating in and making annual contributions to a state-administered self-insurance pool providing liability protection up to the statutory $800,000 limit, and further provides for the purchase of insurance or reinsurance. Two Commission members are on the board. The Governor appointed Ron Houseman to represent counties, and John Pelzer is a member by statute as Commissioner of Administration. At the first meeting the board elected Pelzer to serve as chairman.

The creation of MoPERM was a very important achievement and was accomplished only through the cooperative efforts of the state, cities, counties, school districts, and other public entities working together to sell the program to the General Assembly. The legislation was drafted in November, introduced in the Legislature in January, passed in April, and signed into law June 20 with an emergency clause. The collective efforts of state and local governments can be very effective.

The second priority—to look at the impact of federal changes—is now being studied by the Current Issues Committee. Massive budget cuts combined with proposed changes in tax policy will have a huge, but as yet unmeasured, impact on Missouri and its local governments. This committee is attempting to determine the impact of proposed federal actions and to recommend appropriate responses. In order to do this, a survey was sent to each city and county asking their plans relating to proposed federal cuts.

Chairperson Barbara Potts calls the first meeting to order on October 9, 1985. Also pictured are Stan Perovich, Division of General Services; Jane Roberts, U.S. ACIR; and John Pelzer, Commissioner of Administration.

The survey concluded that the majority of local governments prefer to make up for potential losses of federal funds by reducing or deferring capital expenditures and by reducing expenditures for maintenance and operations. Their preferred methods to compensate losses would require state action: state revenue sharing, removal of required voter approval for licenses and fees, and increased local taxing authority.

As a result of this survey, the Commission will sponsor a one-day symposium to help local officials understand the implications of federal funding cuts and to look for means to enhance existing revenues through better cash management.

Because of the timeliness and importance of the first two priorities, the Commission has not spent much time on assessment maintenance and solid waste issues other than monitoring proposed legislation which has since been passed into law.

Other Activities

The Commission sponsored a symposium on November 14, 1986 entitled "How To Cope With Federalism" that was geared to the needs of local elected officials and employees. The purpose of this symposium was to help local officials understand the implications of federal funding cuts and to help them make their communities aware of the impact of the loss of these funds. There also were sessions on capital budgeting and infrastructure financing. Several state department directors served on a panel to explain how federal reductions in state programs will affect local government through direct or indirect cuts in service or funding. Participants in the symposium included federal, state and local representatives.

Commission staff also is developing a directory of state agencies for distribution at the local level. The directory will include organizational charts of each department and provide information on the services provided by each division within the departments. Staff also will publish a brochure listing all statewide local government associations and the services they provide. The purpose of these two publications is to inform state agencies and local governments of the resources available to them and to give a better understanding to private citizens of how government operates.

In addition, a statewide mailing list of all public entities has been developed. This list includes all special districts as well as villages, cities and counties.

The Year Ahead

New priorities were set at the October 1986 meeting of the Commission. The Current Issues Committee will continue its educational program to assist local governments and to study the impacts of federal action. The Commission will be actively monitoring state legislation of importance to state and local governments.

The Commission also will support a proposal to increase fuel taxes revenues, and designate their use for specific programs of a critical nature such as bridge replacement and improvements.

Another priority will be legislation developed as a result of the Missouri Task Force on Liability Insurance that is studying a wide range of proposals, including either changes in existing law, changes in insurance company rate-making regulations and practices, or both. The Commission will also be endorsing proposed legislation that will amend existing statutes to allow local governments to share jail and other public facilities on a multijurisdictional basis. Finally, the Commission will support legislation that will allow expansion and flexibility of local tax authority.

The Commission will study city and county home rule powers in Missouri and in other states as a tool for revenue enhancement and for greater self-determination in other states and in Missouri.

The Commission also will work with the Department of Natural Resources to perfect a communications system with local governments in the transportation of nuclear waste. This is non-existent at this time and is a major concern of local governments in Missouri.

Because of the structure of the board and staff, the Commission will continue to focus on immediate, short-term policy issues. The transport and handling of hazardous and toxic waste in Missouri is one such issue.

The Missouri Commission on Local Government Cooperation is the only forum in the state that deals with mutual state-local concerns. The Commission's goal is to have all governments working together to form a closer state-local partnership.

The Commission has and will continue to promote the spirit of intergovernmental cooperation that is so very important at this time.

MISSOURI COMMISSION MEMBERS

Local Government Representatives

Delores Hudson, Councilwoman
City of Warrensburg

Joseph L. Adams, Jr., Councilman
City of University City

George Hartsfield, Mayor
City of Jefferson City

* Barbara Potts, Mayor
City of Independence

Gary A. Eide, City Manager
City of Cape Girardeau

Paul Beecher, Assistant City Manager
City of Kansas City

Gary S. Markenson, Executive Director
Missouri Municipal League

Peter Levi
Mo. Association of Councils of Government

** Ralph Krodinger, Presiding Commissioner
Jefferson County

Ronald D. Houseman, County Clerk
Taney County

Juanita Donehue, Executive Director
Missouri Association of Counties

State Agency Officials

John Pelzer, Commissioner
Office of Administration

Carl Koupal, Director
Department of Economic Development

Tom Duncan
Governor's Office

Paul McNeill, Director
Department of Revenue

Fred Brunner, Director
Department of Natural Resources

State Legislators

Norman Merrell, Senator
District 18, Monticello

Fred Dyer, Senator
District 2, St. Charles

Francis R. Brady, State Representative
District 79, Jennings

Roy Cagle, State Representative
District 127, Joplin

Citizens Appointed by the Governor

Mary Doggett
Sikeston

Randy Eaton
Warsaw

Paul Ground
St. Louis

Jon Hutcheson
Houston

Forrest Miller
St. Louis

Lenore Morris
Rolla

Bill Owen
Springfield

Don Redding
Independence

Virginia West
Moberly

Don Winslow
Kansas City

* Chairperson
** Vice Chair

Taking Federalism Seriously

Edwin Meese III

It should come as no surprise to regular readers of these pages that today federalism is a sorely misunderstood concept. For the Framers of our Constitution, balancing the need for a competent national government with the desire to protect the sovereignty of the states had been the paramount concern. Today, however, a regard for maintaining a proper federal balance in government has been transformed, by and large, into a concern for better management of intergovernmental programs.

On Capitol Hill, as well, federalism and the interests of state sovereignty have come to take a back seat. The 99th Congress, for example, saw the passage of the *Truth in Mileage Act*, mandating a statement regarding the accuracy of odometer readings on used cars be included on all automobile titles in this country. At a time when the federal budget deficit and a host of foreign policy and national defense issues should grab the attention of every member of the Congress, it is both ironic and disappointing that an area of public policy so obviously a responsibility of state government should take up the time of the national legislature.

On the other hand, given the way the Supreme Court has come to understand the nature of the relationship between the states and the national government, it makes sense that the Congress should get involved in settling policy disputes in areas which have traditionally been the province of state and local governments. In *Garcia v. San Antonio Metropolitan Transit District*, the Court made it clear that the interests of the states is best determined by the working out of the national political process.[1] According to the Court, "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."[2] In *Garcia*, the Court rejected the proposition it had embraced in 1976 in *National League of Cities v. Usery*, and found that the Constitution places no independent limits on the Congress' power under the Commerce Clause.[3]

Working Group on Federalism

It was in part in reaction to the *Garcia* decision and in part a product of President Reagan's lifelong commitment to federalism that the Domestic Policy Council's Working Group on Federalism was created in August 1985. An interagency working group consisting of representatives from nine agencies and the White House, the purpose of the Group is to develop strategies for ensuring that federal law and regulations are rooted in basic constitutional federalism principles. The Working Group meets regularly to identify and develop initiatives for restoring a proper federal balance to American government, and it has become a forum within the Administration for the discussion of important issues relating to the proper relationship between the national government and governments of the states.

During its relatively brief existence, the Working Group on Federalism has provided leadership in the Administration's effort to continue what the *Wall Street Journal* once labeled the "sleeper revolution" of the Reagan era.[4] The President's success in restoring governmental authority to state and local government was a hallmark of his first term. Through a combination of structural and legislative reform, 60 categorical grants were consolidated into ten block grants, and regulatory relief helped to reduce the red tape that plagues the intergovernmental network, while increasing state and local policy flexibility.

The Working Group is attempting to add to this list of federalism accomplishments by undertaking a review of the various crosscutting requirements which currently are on the books, with an eye toward revising or eliminating those which unduly interfere with the governing authority of the states. In addition, each agency represented on the Working Group is compiling a list of regulations, procedures and programs which should be targeted for revision or elimination because of their negative impact upon federalism.

By far, however, the most important contribution of the Working Group has been the release of its "Report on the Status of Federalism in America." Presented to the President in November, the report will provide the foundation for a number of initiatives during the remaining years of the Reagan Administration. It is an important study in two ways: first, it sets out in a clear and principled fashion just exactly what federalism means; and, second, it minces no words in pointing out why federalism is in trouble.

Federalism Principles

In its analysis of the meaning of federalism, the members of the Working Group make it clear that they adhere to Charles Warren's argument that "however the Court may interpret the Constitution, it is still the Constitution which is the law, and not the decision of the Court."[5] For in attempting to determine just what federalism under the Constitution means, the members of the Working Group turned to the arguments of the Framers rather than relying solely upon Supreme Court decisions.

The Framers, according to the report, recognized federalism to be a "constitutionally based, structural theory of government designed to ensure political freedom and to ensure responsive, democratic government in a large and diverse society."[6] Even so ardent an advocate of national power as Alexander Hamilton argued, in *The Federalist*, that while the new Constitution would create a new national authority with enumerated powers, the "State governments would clearly retain all the rights of sovereignty which they had before, and which were not ... exclusively delegated to the United States."[7] James Madison, considered by many to be the "father of the Constitution," argued elsewhere in *The Federalist*, that under the system contemplated by the Constitution, the states would "form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority than the general authority is subject to them, within its own sphere."[8]

In *Federalist No. 45*, Madison provided a concise statement of his understanding of the appropriate division of governing authority between the nation and the states under the federal system created by the new Constitution. He wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[9]

The report makes clear that the Framers of the Constitution understood that the new national government would be a government of limited and enumerated powers only and that the states would retain the bulk of power and responsibility for governing society. The report also makes clear, however, that the federalism vision of the Framers has undergone considerable transformation during the two hundred years since the Constitution was written.

The centralizing tendency in American politics has been fueled by several things: world wars, the development of a national economic system, the impact of advances in communications and transportation, and so forth. And the arguments for and against the political vitality and importance of the states have to be considered in light of the nation's history during the Civil War and the Depression. Nevertheless, the Working Group argues that the contemporary status of the constitutional principle of federalism can be traced in large measure to the way the Congress, the Executive Branch, and the Supreme Court have interpreted and applied the national government's enumerated constitutional powers, especially since the 1930s, and finds that as a result of national action, we have "witnessed the evisceration of federalism as a constitutional and political principle for allocating governmental power between the States and Washington."[10]

Federalism in Perspective

Much of the report analyzes the various doctrinal developments in constitutional law and congressional action which have led to the erosion of federalism in this country. The Congress, through expansive readings of the Necessary and Proper Clause, the Commerce Clause, and the spending power, has increased the size and extended the reach of the national government far beyond the scope of national powers enumerated and fairly implied in the Constitution. In addition, the Supreme Court, through its power of constitutional interpretation and statutory construction, has been a dominant force in the political branches of the government or by interpreting—and in some instances really amending—the Constitution so as to place limitations on the states not expressed in the Constitution itself.

According to the report, perhaps the greatest challenge to federalism has come through the Congress' and the Supreme Court's interpretation of the Commerce Clause. The Framers' principal reason for empowering the Congress to regulate interstate commerce was to permit the national legislature to eliminate, or at least control, state-created barriers. As Raoul Berger has pointed out in a soon to be published book, the purpose of the Commerce Clause was to remedy "internecine exactions."[11] By the 1940s, however, the Court had argued that the Congress' authority under the Commerce Clause embraced the power to regulate purely local activities that, when considered alone, have no impact on interstate commerce, so long as the class of such activities might reasonably be deemed to have substantial national consequences. Such a reading of the Constitution, however, undermines the very idea of limited and enumerated powers.

As Justice Frankfurter once pointed out, "scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity."[12] Unfortunately, Mr. Justice Frankfurter's argument fell on deaf ears. For today, the Working Group finds that, "the States exercise their reserved powers only at the sufferance of the national government."[13]

In addition to the challenges to federalism emanating from national policy under the Commerce Clause, congressional action under the spending powers has virtually redefined the relationship of the national government to the states. By conditioning state eligibility for federal funds on compliance with regulations sometimes having little or no relationship to the program for which the funds are made available, the national government has undermined the governing authority of the states by intruding into areas of traditional state concern, transforming the states into administrative units of the national government and contributing to a gradual erosion in the

states' ability to control their own subordinate political units.

At times the Supreme Court, through its approach to constitutional interpretation, has single-handedly undermined the sovereignty of states. Through the doctrine of "implied preemption," a wide range of state laws and regulations have been invalidated under the Supremacy Clause, "not because they have been found to violate a specific constitutional prohibition, or to conflict directly with valid federal laws, but because the Court has 'implied' a congressional intent to preempt state regulation in an entire field of activity."[14] And the federal system has suffered as well by the courts affirmatively exercising power not granted to the federal judiciary by the Constitution. Through its more "activist" decisions, the Court has imposed limitations on the states which cannot be traced to the Constitution.

Having analyzed and summarized the doctrinal challenges to federalism, the members of the Working Group argue in their report that federalism was a fundamental component of the Constitution at the time it was written and ratified, and that it should become an important part of American politics and government again, both because of its status as a constitutional principle and because it makes good sense. Chapter three of the report discusses the contemporary importance of federalism and argues that a proper federal balance in the relationship between the national government and the governments of the states promotes more informed public policy while simultaneously fostering experimentation in public policy, providing competition, promoting accountability in public decisionmaking, and preserving political liberty.

Conclusions

A careful reading of the Working Group's report leads to the undeniable conclusion that the primary challenge to federalism comes from the policymaking process of the government in Washington. And only by addressing that problem at its source will federalism once again become an important part of constitutional government in this country.

Toward this end, the report offers several ideas for reform, each aimed at altering the character of the decisionmaking process so that the authority of the states is taken into consideration. Some are keyed to congressional behavior—such as procedural changes which would require every piece of legislation to be accompanied by a statement of its constitutional authority, and an assessment of the potential impact the legislation might have upon the states. In addition, the Working Group suggests that specific legislation be introduced to prohibit the ability of executive agencies to preempt the states unless preemption has been explicitly authorized by the Congress and establishing a requirement that the Congress' intent to preempt be made explicit. Legislation that would make it more difficult to attach federal regulations to federal grant programs when those regulations are unrelated to the purposes of the program also is suggested.

The Working Group points to the need for executive reform as well, suggesting that an executive order be issued to ensure that federalism becomes a formal consideration in actions taken by executive agencies or that existing procedures be reformed to accomplish this. And the Working Group argues that every effort should be made to advance federalism through litigation and to seek a suitable case to overturn *Garcia.*

Finally, the Working Group argues that should such relatively modest suggestions not be taken seriously, or should they fail to achieve any significant results, then serious consideration should be given to the only alternative that will ensure the constitutional vitality of federalism—a constitutional amendment.

Most of the ideas discussed in the report are process-oriented. They don't speak to ongoing Administration initiatives concerning block grants, the consolidation of intergovernmental programs, deregulation and privatization. These initiatives will continue. But the real problem confronting federalism is the way the national governing machine works, and until that problem is addressed federalism will continue to get lost in the interest group-bureaucratic shuffle that so dominates politics in Washington.

The Working Group on Federalism has made a valuable contribution to the ongoing debate on how best to allocate the responsibility for governing in this nation. During the coming months, as the report undergoes serious scrutiny in Washington and within the several states, and as the Administration prepares to implement some of the suggestions outlined in it, the opportunity presents itself for a national debate on these very important issues.

During the bicentennial of the Constitution, especially given the truly fundamental nature of federalism as a constitutional principle, we should welcome that debate. For in the end, what is at stake is improving the quality of government in this country by improving the quality of the relationship between the citizen and his government. And in democracy, there can be no more fundamental or important a task.

Footnotes

[1] 469 U.S. 528 (1985).
[2] *Id.* at 556.
[3] 426 U.S. 883 (1976).
[4] *Wall Street Journal*, December 11, 1985.
[5] As quoted in Edward S. Corwin, *The Commerce Clause Versus States Rights* (1936) at xi.
[6] *The Status of Federalism in America* at 5.
[7] *The Federalist Papers*, No. 32, at 198.
[8] *The Federalist Papers*, No. 39, at 256.
[9] *The Federalist Papers*, No. 45, at 292-293.
[10] *"The Status of Federalism in America,"* Executive Summary at 1.
[11] Raoul Berger, *Federalism: The Founders' Design* (1987) at 132.
[12] *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643, 650 (1944).
[13] *The Status of Federalism in America* at 28.
[14] *Id.*, Executive Summary at 3.

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NCSL State-Local Task Force: The First Year

Steven D. Gold

"This is an excellent report. It has far-reaching implications for all the cities of the country. . . . Several years from now the work of this Task Force will be seen as a watershed" in state-local relations. These are the words of Mayor Joseph P. Riley of Charleston, South Carolina as he addressed the National Conference of State Legislatures' (NCSL) State-Local Task Force last November. Other city representatives, as well as spokesmen for counties and townships, also have applauded the recommendations made by NCSL's Task Force.

What has occasioned all of this cheering? Following a series of meetings throughout 1986, the Task Force approved a set of recommendations to help states reassess their policies toward local governments. The Task Force was the brainchild of North Dakota Senator David Nething, who was NCSL's President last year. He says he created it "to get state officials and local officials talking to one another. For too many years they've been going in different directions. The time has come for them to go in the same direction." Nething appointed Senator Stanley Aronoff of Ohio to chair the Task Force, and 51 other legislators and staff from around the country to serve on it. Most of the legislative members are chairmen of fiscal or local government committees in their respective states. All of the staff (who comprised about one-fourth of the Task Force members) are involved in dealing with state-local issues.

Background

The Task Force decided to take a fresh look at the panorama of state policies affecting local governments. Rather than risk bogging down in specific areas of contention like transportation or mental health, the Task Force concentrated on fundamental questions such as how states should address state-local issues and general principles for shaping policies. A key assumption was that both state and local governments may be headed into a period of fiscal austerity, so it is vital to make the system work as efficiently as possible.

The preamble to the Task Force report noted: "We recognize that many proposed policies go beyond the existing practice in many states. This does not imply that there was anything wrong with past policies but rather that the changed times require new directions." Two developments were foremost in the thinking of the Task Force—the withdrawal of federal support for domestic programs and the anti-tax spirit that is the legacy of the Tax Revolt. The federal aid cutbacks, said the Task Force, "create a vacuum that forces states to reassess their policies."

The Task Force made one fundamental recommendation that underlies all of its other proposals: "Legislators should place a higher priority on state-local issues than has been done in the past. The time has come to change their attitude toward local governments—to stop considering them as just another special interest group and to start treating them as partners in our federal system of providing services to citizens." The Task Force insisted, however, that this is a two-way street, feeling that local officials also ought to change their past attitude toward states: "Local governments should resist a 'go-it-alone attitude' and should participate in the process as partners."

The Task Force recognized from the outset the need to work closely with the US ACIR because of the path-breaking work that it has done in many areas of intergovernmental affairs. John Shannon's description of the current period as one of "fend-for-yourself" federalism was constantly on the mind of Task Force members and was cited in the third paragraph of its recommendations. Jane Roberts of the US ACIR attended and participated in all of the Task Force meetings. Former director William Colman also addressed the Task Force and emphasized the value of ACIR suggested legislation as one vehicle for carrying out the Task Force's recommendations.

State ACIRs

Colman also prepared a revision of ACIR's legislation for state ACIRs in line with the views of the Task Force. Discussions of the role and structure of state ACIRs consumed more of the Task Force's time than any other topic. Relying on the experience of legislators and staff, information provided by Jane Roberts, and a background paper by Harry Green, executive director of the Tennesee ACIR, the Task Force concluded that state-local organizations "can play a pivotal role in studying and resolving local government problems."

The Task Force felt that no single model can be developed for state-local organizations in all states because of differences in traditions and governmental structure. It advocated either a state ACIR or a legislative commission

with a strong role for local governments as advisers. Senator Charles Cook of New York, who chairs such a commission, observes that it has been successful because it can "focus attention on specific issues rather than being caught up in day-to-day activities that normal committees have to deal with." As a bipartisan commission, it "is able to bypass some of the suspicion that normally accompanies program development."

While the Task Force endorsed a legislative state-local commission as a possible alternative to state ACIRs, it recognized that an ACIR also can be extremely important and useful. The Task Force emphasized that legislators should play a prominent role in ACIRs so that the ACIR is responsive to legislative concerns and its proposals receive priority attention from the legislature.

The Task Force also recommended: that the state-local organization should be created by statute rather than by executive order; that it either be part of the legislature or an independent entity, not part of the executive branch; and that it have an adequate budget and qualified staff. A model recommended for states having sufficient resources is a minimum budget of $200,000 and a staff of at least four persons, with local governments helping to finance it.

Four important functions are envisioned for state-local organizations: to provide a forum for discussion of long-range state-local issues, a place where local officials can be heard and engaged in focused dialogue; to conduct research on local developments and new state policies; to promote experimentation in intergovernmental processes, both state-local and local-local; and to develop suggested solutions to state-local problems.

Information Needs

The Task Force had a second important process recommendation—development of an improved information base about local fiscal developments. Such a data base would keep track of changes in tax rates, expenditures, state and federal aid, tax bases, and fiscal stress, among other measures. The state-local organization should use this information to publish an annual report on the state of local governments, explaining in clear and simple language how the fiscal situation of local governments has been changing.

This sort of information system could be vital in the next decade if, as appears possible, some local governments experience increasing fiscal stress. Otherwise local representatives could find themselves in the position of the proverbial little boy who cried wolf. They have been complaining almost perennially about their fiscal problems, even though many local governments are in relatively good shape. According to Philip Dearborn, vice president of the Greater Washington Research Center, the 30 largest cities in the country are generally in the best financial shape they've enjoyed since he started tracking their fiscal position in 1971. But you wouldn't know this from listening to their mayors.

If states have a good information system, they will be able to identify which local governments are having the most trouble and to sort out some of the causes for their problems. Improved information will make it possible to raise the level of discussion of state-local issues. As one Task Force member said at the November meeting, "Many states are spending a great amount of time collecting large amounts of information about local governments that is absolutely worthless." Legislators often suffer from information overload. What they need is not more information, but better information, presented coherently to address the issues that matter. This is a place where a state ACIR or legislative state-local commission can be extremely helpful.

Other Recommendations

The Task Force did not stop once it had identified ways of improving the process of formulating state-local policies. Rather, it went on to present some guidelines for improving policies themselves. These recommendations fall into four areas—local revenue systems, mandates imposed on local governments, sorting out responsibilities and state aid to local governments, and other low-cost ways for states to assist local governments.

One theme running through many of the policy recommendations is that, with some important exceptions, they do not have a high financial cost to the state government. With many states battling their own financial problems and finding it difficult to raise tax rates, the resources that can be devoted to aiding local governments may be limited.

Local revenue systems. The Task Force supported the idea of giving local governments more discretion in raising revenues, including the option of levying sales and income taxes. It rejected a no-strings-attached, "tax anything" philosophy, but supported adoption of a set of safeguards such as those recommended by the US ACIR, involving uniformity of state and local tax bases, limits on rates, and equalization among rich and poor localities.

While favoring revenue diversification, the Task Force urged continued reliance on property taxes as an important element of the local tax structure. It came out for reforms such as improving the quality of assessment systems, adopting state-financed relief programs to shield the poor from excessive levels of taxation, and enactment of "truth in taxation" provisions.

One area where the Task Force went beyond the US ACIR's recommendations involved the limitations imposed by states on local revenue or spending. Without taking a position in favor of or against such limits, the Task Force urged states to evaluate their system of limitations to assure that it does not prevent local revenue from rising at least as fast as the inflation rate.

Mandates. The Task Force urged states to review the mandates they impose on local governments, to consider relaxing or eliminating them, and in some cases to assume the cost of complying with them. It said that the mandates deserving closest analysis are those prescribing local personnel policies, environmental standards, service levels, and tax base exemptions. Certain mandates—such as those assuring openness, ethical behavior, and nondiscrimination—are appropriately financed at the local level, it concluded. The National League of Cities conducted a survey of its membership to help the Task Force in grappling with the mandate issue.

Sorting out and state aid. States should reevaluate their system of assigning responsibilities for various functions, including both delivery and financing of services. Such a reevaluation could help to rationalize and simplify

the intergovernmental system that has developed incrementally over time, often with confusing results. In the process, some programs might be shifted from the state to the local level, while others are transferred in the opposite direction.

The Task Force endorsed the principle of allowing the lowest level of government to keep responsibility for a function unless there is an important reason to do otherwise. Poverty-related programs are one area where the state should assume responsibility, the Task Force said. As part of the sorting out process, states should move in the direction of assuming major poverty-related costs from local governments.

Another area for reconsideration is state aid. In a period of "fend for yourself" federalism, a danger exists that inequality will increase and that local governments with relatively small per capita tax bases will be unable to finance needed services. Therefore, the Task Force called upon states to target assistance to jurisdictions with the lowest fiscal capacity, attempting to equalize resources to some extent among rich and poor communities.

Other low-cost programs. In addition to the policies outlined above, the Task Force endorsed the search for other low-cost programs, such as providing technical assistance, bond banks, and insurance pools. Although they were not specifically mentioned, shared procurement programs and investment pools are other examples of such programs.

The Task Force has finished Phase I of its work and is moving into Phase II. The current NCSL President—Representative Irving Stolberg, Speaker of the Connecticut House of Representatives—has indicated strong support for NCSL's state-local initiative. Phase II will concentrate on dissemination of the recommendations and working with states on implementing them. This work will be carried out as part of NCSL's Fiscal Federalism Project, funded by a grant from the Ford Foundation. Late in 1987, a book about how states can reform state-local policies will be published by NCSL.

How the Task Force's recommendations will be received is yet to be determined. Senator Aronoff, who chaired the Task Force while it was developing its recommendations, thinks that their timing is just right. "If the Ohio legislature is typical, there is a new awareness we have to do something for local governments. It's the hottest issue in the legislature. Members are fighting to be on committees involving local government issues."

Mayor Riley told the Task Force that, in the words of columnist Neal Peirce, we need a new state-city Magna Carta. All informed observers realize that reforming state-local policies is a major endeavor, one that will be long and difficult. But, if Mayor Riley is right, NCSL's Task Force may eventually be seen as having helped to bring about a major change in our federal system, building on the foundation laid by over a quarter century of work of the US ACIR.

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Counties and the Fiscal Challenges of the 1980s

Barbara P. Greene

The decade of the 1980s has produced the most significant challenges of this century to local governments. Efforts to decentralize government by many groups in the political spectrum are causing enormous pressure at the local level. While county governments are trying to assess their needs and their capacity to meet these challenges, much additional research is needed. Data on local governments, especially counties, are quite limited as most recent research has focused on urban areas.

A survey of all 3,000 counties was conducted by the author with the assistance of the National Association of Counties to develop a profile on the variations in county structure, administrative capacity, and fiscal viability. The data collection took place between May 1985 and May 1986. The data gathered may begin to fill the enormous void in available information on county government. The response to the questionnaire was quite impressive considering the size of the instrument and the detail required to complete it.

The county, as a basic unit of local government in all states except Connecticut and Rhode Island, has received little attention in the scholarly literature. This article is intended to describe the data and to generate interest in more research on county government. It deals with only a small part of the data. The article specifically focuses on issues related to the current financial status of county government, and is divided into two major topic areas:

- A statement of the problems that counties face in trying to maintain or improve county services.
- A summary of county financial status in terms of budget requirements and revenue changes.

Table 1 shows the sample of counties that responded to the questionnaire by state, by percentage of counties in the state, and by percentage of the entire state population represented by these counties. It is important to recognize the variations in percent of population covered when interpreting the data by state. The states where less than 50% of the population is surveyed are Arkansas, Georgia, Indiana, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Vermont, Virginia, West Virginia and Wyoming. Accepting a one-third response rate, the list includes only Kentucky, Mississippi, Nebraska, Vermont, Virginia and Wyoming. The national sample is very high in percentage of total population covered. The total number of counties responding was 1,207.

Challenges to Maintaining or Improving County Services

In a period of federal and state budget reductions forced by mounting national deficits, shifting priorities, economic changes, and voter discontent, county governments face the future with less money in terms of intergovernmental transfers. While some county functions vary across the 50 states, basic services are similar. In order to identify the areas of greatest concern, the chief elected county officials were asked to identify the most pressing problems facing their county in the next five years, and the greatest problems they have in maintaining or improving county services.

The service areas identified in the survey are as follows:

- public safety planning
- financial management
- promotion of business and industrial development
- land use planning and zoning
- welfare
- poor relief
- delinquent and neglected children
- housing and community development
- roads
- hospitals
- nursing homes
- medical care facilities
- home health care
- mental health
- law enforcement planning
- jail expansion
- toxic waste management
- education
- public transportation
- parks and recreation
- ground water contamination
- senior citizen programs
- personnel management

Table 2 shows the number of counties that rank this series of service areas as the most pressing problem the county must address in the next five years. Promotion of business and industrial development rank highest on the list, with 70.8% of the counties listing it as very important. Financial management and roads are the second and third

Table 1

SURVEY RESPONSE BY NUMBER OF COUNTIES, PERCENT OF TOTAL COUNTIES, AND PERCENT OF TOTAL STATE POPULATION

State	Percent of Population In State	Percent of Counties In State	Number of Counties Responding
Alabama	58.00	30.0	22
Alaska	91.00	45.0	5
Arizona	86.30	40.0	6
Arkansas	45.40	29.3	22
California	90.00	67.0	39
Colorado	83.00	79.3	50
Delaware	100.00	100.0	3
Florida	82.00	67.0	47
Georgia	43.00	32.0	57
Hawaii	100.00	100.0	4
Idaho	59.90	52.0	23
Illinois	63.94	26.0	34
Indiana	43.18	23.0	22
Iowa	55.26	56.0	56
Kansas	84.75	62.0	66
Kentucky	23.20	25.0	31
Louisiana	44.38	25.0	16
Maine	47.27	43.0	7
Maryland	87.73	58.0	14
Massachusetts	48.16	35.0	5
Michigan	79.63	42.0	36
Minnesota	63.94	36.0	32
Mississippi	10.25	6.0	6
Missouri	50.08	20.0	23
Montana	62.91	48.0	27
Nebraska	22.85	30.0	28
Nevada	70.88	58.8	10
New Hampshire	92.85	90.0	9
New Jersey	77.03	66.0	13
New Mexico	87.12	70.0	23
New York	88.90	58.0	34
North Carolina	52.28	39.0	40
North Dakota	34.95	24.0	13
Ohio	45.90	40.0	37
Oklahoma	53.61	31.0	29
Oregon	63.44	52.0	18
Pennsylvania	70.35	61.0	41
South Carolina	40.25	30.0	14
South Dakota	44.50	25.0	17
Tennessee	57.57	30.0	29
Texas	66.96	36.0	93
Utah	71.84	34.0	10
Vermont	27.16	14.0	2
Virginia	24.78	10.0	14
Washington	94.36	82.0	32
West Virginia	30.20	25.0	14
Wisconsin	62.95	41.0	31
Wyoming	18.92	26.0	6

SOURCE: National Association of Counties Survey.

most frequently listed. Toxic waste management is fourth in this ranking. However, when the "very important" and the "somewhat important" rankings are combined, health, welfare, jail expansion, and law enforcement issues rank quite high.

The service areas which are viewed as important county functions have evolved over the past two centuries. Since the county is an administrative arm of the state and its functions are controlled by the state, this evolution is a result of state and federal requirements as well as direct citizen requests for services. Funding for these services involves a great deal of federal and state money as well as revenue generated by the county. Frequently, however, the county is required to provide the services without the intergovernmental transfers and, in many instances, with state limitations on the amount and source of revenue.

County governments are in a difficult position with this interplay of requirements, needs and changing revenue sources. The survey asked county officials to rank the importance of a series of these problems as they attempt to maintain or improve county services. The areas that were considered are as follows:

- state limits on authority
- state requirements without state funding
- federal fiscal cutbacks
- rural economic base
- urban service demands
- federal requirements without federal funding
- personal income levels
- insufficient tax base
- tax caps or limitations
- insufficient administrative skills
- county debt load

Table 3 shows the total county response by population. The overwhelming concern from all population ranges is with state and federal requirements without appropriate funding and federal fiscal cutbacks.

Financial Status: Budget, Revenues and Borrowing Capacity

The financial strength of local government has become a very significant issue in the last two years. The U.S. Department of Treasury and the Office of Management and Budget have predicated many of their budget recommendations on assumptions about the fiscal strength of state and local governments. However, the availability of data on county surpluses, borrowing power, and their ability to increase revenues is quite limited.

In response to a question on surplus funds in general fund budgets, 43% of the respondents indicated that these funds represent obligations toward future budgets. When the surplus question was asked defining surplus funds as those that "represent cash flow requirements of funds to carry expenses from one budget year to the next," the response was as follows:

	No. of Counties	*Percent*
Yes	675	55.8
No	144	11.9
No response	386	31.9

When the surplus question was worded as "surplus funds representing obligation toward capital improvements," the response was as follows:

Table 2

MOST PRESSING PROBLEM AREAS IN COUNTY

	Very Important		Somewhat Important		Not Very Important		Not Applicable	
	Frequency	Percent	Frequency	Percent	Frequency	Percent	Frequency	Percent
Public Safety Planning	224	18.5	557	46.1	261	21.6	53	4.4
Financial Management	764	63.2	297	24.6	62	5.1	13	1.1
Personnel Management	290	24.0	597	49.4	192	15.9	25	2.1
Promotion of Business and Industrial Development	856	70.8	232	19.2	37	3.1	20	1.7
Land Use Planning and Zoning	423	35.0	471	39.0	177	14.6	52	4.3
Welfare	266	22.0	562	46.5	201	16.6	86	7.1
Poor Relief	209	17.3	526	43.5	256	21.2	108	8.9
Delinquent and Neglected Children	290	24.0	597	49.4	167	13.8	60	5.0
Housing and Community Development	259	21.4	554	45.8	229	18.9	62	5.1
Roads	740	61.2	335	27.7	47	3.9	28	2.3
Hospitals	282	23.3	383	31.7	240	19.9	200	16.5
Nursing Homes	234	19.4	460	38.0	249	20.6	166	13.7
Medical Care Facilities	245	20.3	451	37.3	254	21.0	154	12.7
Home Health Care	245	20.3	566	46.8	215	17.8	85	7.0
Mental Health	216	17.9	672	55.6	184	15.2	44	3.6
Law Enforcement Planning	441	36.5	550	45.5	110	9.1	22	1.8
Jail Expansion	488	40.4	284	23.5	282	23.3	76	6.3
Toxic Waste Management	616	51.0	350	28.9	116	9.6	61	5.0
Education	340	28.1	348	28.8	258	21.3	164	13.6
Public Transportation	552	45.7	355	29.4	66	5.5	153	12.7
Parks and Recreation	150	12.4	406	33.6	357	29.5	201	16.6
Ground Water Contamination	104	8.6	544	45.0	389	32.2	79	6.5
Senior Citizen Programs	392	32.4	410	33.9	220	18.2	97	8.0

SOURCE: National Association of Counties Survey.

	No. of Counties	*Percent*
Yes	**256**	**21.2**
No	**487**	**40.3**
No response	**462**	**38.2**

In the follow-up question requesting open-ended response, three counties replied that these funds represent frozen investments, three identified these as retirement accrual funds, ten cited special fund requirements, and two identified these as funds to meet carry-over mandated services. These responses do not indicate funds that are uncommitted.

The issues of state and federal mandates on county budgets is an extremely difficult question to measure. This survey attempted to get some sense of the magnitude of the problems by asking the percent of the county budget used for mandated services. The estimated percentage is quite varied in the response. However, it is clear that almost half of the counties use more than 40% of their revenues for mandated service.

Percent of County Budget Used for Mandated Service

	No. of Counties	*Percent*
0 to 10%	**126**	**10.4**
11 to 20%	**105**	**8.7**
21 to 30%	**90**	**7.4**
31 to 40%	**79**	**6.5**
40 and above	**583**	**48.2**

Counties have been forced to deal with the question of increasing revenues in the last five years. In response to questions about increasing or decreasing revenues, the data shows that 935 counties representing 77.3% of the respondents had increased or decreased revenues in the last five years. Of those 935 counties, only 50 indicated that there had been revenue decreases. One hundred twenty-eight, or 10.6% of the responses, showed no revenue changes, and 138 counties did not respond to the question. The following table shows the kinds of revenue changes which have occurred:

Revenue Changes 1980-1985

	Increase	*Decrease*
Property Tax	302	20
Sales Tax	133	5
User Fees	155	2
Gas Tax	10	2
Shared State Taxes	44	9
Other State Related Taxes	17	11
Coal Severance Tax	3	
Payroll Tax	8	1
Hospital and Health Levy	5	
Royalties	13	
Improved Investments	9	
Tourist Tax	1	

There are some significant questions generated by the national data in this sample. Are these revenue changes occurring more frequently in counties of different sizes? Are there regional variations in terms of need and ability to raise revenues? Are these revenue changes related to some issue or problem that is state based?

The data presented in the following two tables may help focus on these issues. Interpreting these two tables requires reference to *Table 1* where the survey respondents are broken down by percentage of respondent counties from each state and the percentage of the total state population covered by these counties.

Revenue Increase by Total Population

Population	Yes		No	
	No.	Percent	No.	Percent
0-49,999	523	70.7	107	14.5
50,000-99,999	132	85.2	5	3.2
100,000-499,999	193	91.5	11	5.2
500,000+	68	90.7	2	2.7

Table 3
TOTAL COUNTY RESPONSE BY POPULATION

	0-49,999						50,000-99,999						100,000-499,000						500,000+					
	Very Important		Somewhat Important		Not Very Important		Very Important		Somewhat Important		Not Very Important		Very Important		Somewhat Important		Not Very Important		Very Important		Somewhat Important		Not Very Important	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
State Limits on Authority	373	50.4	222	30.0	84	11.4	84	54.2	43	27.7	17	11.0	111	52.6	69	32.7	21	10.0	42	56.0	23	30.7	7	9.3
State Requirement Without State Funding	614	83.0	70	9.5	19	2.6	136	87.7	11	7.1	3	1.9	180	85.3	18	8.5	5	2.4	63	84.0	8	10.7	2	2.7
Federal Fiscal Cutbacks	556	75.1	116	15.7	26	3.5	112	72.3	33	21.3	5	3.2	132	62.6	65	30.8	5	2.4	55	73.3	16	21.3	2	2.7
Rural Economic Base	444	60.0	201	27.2	27	3.6	65	41.9	57	36.8	23	14.8	57	27.0	77	36.5	54	25.6	7	9.3	10	13.3	35	46.7
Urban Service Demands	111	15.0	262	35.4	178	24.1	41	26.5	59	38.1	35	22.6	82	38.9	87	41.2	21	10.0	42	56.0	22	29.3	7	9.3
Federal Requirements Without Federal Funding	522	70.5	137	18.5	35	4.7	102	65.8	35	22.6	10	6.5	119	56.4	63	29.9	17	8.1	42	56.0	22	29.3	8	10.7
Personal Income Levels	350	47.3	283	38.2	45	6.1	47	30.3	75	48.4	25	16.1	46	21.8	106	50.2	45	21.3	15	20.0	30	40.0	25	33.3
Insufficient Tax Base	390	52.7	209	28.2	73	9.9	71	45.8	53	34.2	22	14.2	72	34.1	85	40.3	37	17.5	29	38.7	24	32.0	17	22.7
Tax Caps or Limitations	295	39.9	237	32.0	110	14.9	50	32.3	44	28.4	29	18.7	65	30.8	71	33.6	46	21.8	32	42.7	20	26.7	13	17.3
Insufficient Administrative Skills	96	13.0	290	39.2	211	28.5	21	13.5	52	33.5	65	41.9	18	8.5	71	33.6	95	45.0	7	9.3	19	25.3	33	44.0
County Debt Load	129	17.4	174	23.5	248	33.5	22	14.2	40	25.8	66	42.6	23	10.9	55	26.1	103	48.8	14	18.7	25	33.3	27	36.0
	Total of 740 Responses						Total of 155 Responses						Total of 211 Responses						Total of 75 Responses					

Table does not include "not applicable" or "missing data" responses

Source: National Association of Counties Survey.

These data show little variation in size and the actual number of counties that have increased revenues. The lowest percentage falls in the under 50,000 population group; however, 70.7% is a significant number for this size county.

Table 4 shows the number of counties and the percentage of that group that have reported revenue increases. Only Indiana, Iowa, Kansas, Louisiana, Montana, Nebraska, Ohio, Oklahoma, Tennessee and Vermont show less than 70% of the counties having increased revenues. In these states only Vermont is under 50% of counties in raising revenues. The low response rate from that state may explain that ranking.

Revenue sources for county governments tend to be limited for many reasons, but a major problem is in the area of state or voter-imposed limitations on property taxes. While these limitations imposed significant problems, raising property taxes to the amount allowed by the state is politically difficult. In response to the question "Does your county levy the full amount of property tax allowed by the state?", the table below suggests that raising property tax is not always feasible.

Counties Levy Full Amount of Property Tax Allowed by State

	No. of Counties	*Percent*
Yes	480	39.7
No	572	47.3
No response	153	12.7

Shifting the revenue base from the traditional property tax base to other sources of revenue is a major concern for local government officials. Voters have made it increasingly clear that the property tax is politically unpopular. Increases in user fees have become an important source for dealing with revenue problems. The survey shows that 47% of the counties have increased user fees or applied them to services where they had not previously been used in the past five years. A total of 575 of responding counties have moved in this direction. The following tables show where increases in fees have been used.

User Fees by Total Population

Population	Yes		No	
	No.	Percent	No.	Percent
0-49,999	249	33.6	415	56.1
50,000-99,999	85	54.8	59	38.1
100,000-499,999	161	76.3	41	19.4
500,000+	70	93.3	3	4.0

Types of User Fee Increases

	No. of Counties
Room & Board in Jail	17
Duplication fees	21
Parks and Recreation	100
Trash Collection fees	13
Business License	16
Vehicle registration	22
Health fees	113
Transportation fees	10
Other types	152

Examples of other types of user charges instituted by the 152 counties above include fees for courts, commu-

Table 4

REVENUE INCREASE RESPONSES

State	YES		NO	
	Number	Percent	Number	Percent
Alabama	17	77.3	4	18.2
Alaska	4	80.0	1	20.0
Arizona	5	83.3	0	0.0
Arkansas	20	90.9	2	9.1
California	36	92.3	1	2.6
Colorado	38	76.0	8	16.0
Delaware	3	100.0	0	0.0
Florida	42	89.4	1	2.1
Georgia	49	86.0	3	5.3
Hawaii	4	100.0	0	0.0
Idaho	18	78.3	1	4.3
Illinois	25	75.3	5	14.7
Indiana	15	68.2	5	22.7
Iowa	34	60.7	8	14.3
Kansas	39	59.1	12	18.2
Kentucky	23	74.2	3	9.7
Louisiana	10	62.5	4	25.0
Maine	6	85.7	0	0.0
Maryland	14	100.0	0	0.0
Massachusetts	5	100.0	0	0.0
Michigan	28	80.0	2	5.7
Minnesota	26	81.3	3	9.4
Mississippi	5	83.3	0	0.0
Missouri	18	78.3	2	13.0
Montana	16	59.3	4	14.8
Nebraska	14	50.0	4	14.3
Nevada	9	90.0	0	0.0
New Hampshire	8	88.9	0	0.0
New Jersey	9	69.2	1	7.7
New Mexico	17	73.9	2	8.7
New York	29	85.3	1	2.9
North Carolina	38	95.0	1	2.5
North Dakota	10	76.9	2	15.4
Ohio	25	67.6	8	21.6
Oklahoma	16	55.2	7	24.1
Oregon	16	88.9	1	5.6
Pennsylvania	35	85.4	4	9.8
South Carolina	13	92.9	1	7.1
South Dakota	12	70.6	4	23.5
Tennessee	20	69.0	2	6.9
Texas	71	76.3	8	8.6
Utah	9	90.0	1	10.0
Vermont	0	0.0	2	100.0
Virginia	13	92.9	1	7.1
Washington	28	87.5	2	6.3
West Virginia	11	78.6	3	21.4
Wisconsin	27	87.1	2	6.5
Wyoming	5	83.3	1	16.7

SOURCE: National Association of Counties Survey.

Table 5

INCREASED USER FEES RESPONSES

State	YES Number	YES Percent	NO Number	NO Percent
Alabama	6	27.3	13	59.1
Alaska	3	60.0	2	40.0
Arizona	6	100.0	0	0.0
Arkansas	7	31.8	14	63.6
California	35	89.7	2	5.1
Colorado	22	44.0	25	50.0
Delaware	3	100.0	0	0.0
Florida	40	85.1	3	6.4
Georgia	23	40.4	33	57.9
Hawaii	3	75.0	1	25.0
Idaho	13	56.5	9	39.1
Illinois	21	61.8	11	32.4
Indiana	11	50.0	9	40.9
Iowa	20	35.7	29	51.8
Kansas	27	40.9	36	54.5
Kentucky	6	19.4	19	61.3
Louisiana	8	50.0	5	31.3
Maine	2	28.6	4	57.1
Maryland	11	78.6	3	21.4
Massachusetts	3	60.0	2	40.0
Michigan	20	57.1	12	34.3
Minnesota	22	68.8	9	28.1
Mississippi	0	0.0	5	83.3
Missouri	4	17.4	17	73.9
Montana	7	25.9	15	55.6
Nebraska	4	14.3	18	64.3
Nevada	6	60.0	4	40.0
New Hampshire	3	33.3	6	66.7
New Jersey	8	61.5	3	23.1
New Mexico	7	30.4	11	47.8
New York	24	70.6	9	26.5
North Carolina	29	72.5	10	25.0
North Dakota	1	7.7	11	84.6
Ohio	15	40.5	18	48.6
Oklahoma	8	27.6	16	55.2
Oregon	15	83.3	2	11.1
Pennsylvania	21	51.2	19	46.3
South Carolina	5	35.7	8	57.1
South Dakota	1	5.9	14	82.4
Tennessee	10	34.5	13	44.8
Texas	29	31.2	53	57.0
Utah	6	60.0	4	40.0
Vermont	0	0.0	1	50.0
Virginia	9	64.3	4	28.6
Washington	26	81.3	5	15.6
West Virginia	5	35.7	9	64.3
Wisconsin	18	58.1	10	32.3
Wyoming	2	33.3	4	66.7

SOURCE: National Association of Counties Survey.

nication center dispatch services, driveway pipe installations, driver's licenses, tuition, rents, utilities, engineering and planning, beach parking, golf and swimming pools, campgrounds, and emergency medical and ambulance services.

Table 5 reports the number and percentage of counties which have increased user fees.

Conclusions

The capacity of local governments to meet the challenges of this decade is very much an empirical question. It is a question that must be addressed by budget makers at all levels of government and by scholars who provide data and analysis that aids the quest. The systematic collection of data on local governments must begin in earnest. The county as a basic local unit of government will require substantial attention if it is to become a viable partner in a more decentralized federal system.

Barbara P. Greene is Associate Professor of Political Science at Central Michigan University.

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Municipal Politics and Power: A Casebook History of Intergovernmental Management

Joseph Sweat
and
Herbert J. Bingham

The central, most important fact about our cities is that they are dependent on legislative and executive officials in the state and national capitals for their power, money and capacity to serve. This point is made again and again in the recently published *Municipal Politics and Power: Tennessee Municipal League In Action.* The book focuses on the creation phases of such legislation and policies, and not on the use of existing federal or state laws and programs.

Very few states provide constitutional protection for their local governments, and the Founding Fathers at Philadelphia completely overlooked local government when they wrote the U.S. Constitution. State "urban policies" often feature restrictions and neglect.

National urban policies over the last 40 years have swung wildly from conservative neglect to excessive liberal outpourings of federal concern, dollars and controls. Thus, organizing effective municipal political influence in state and national capitals is the only hope and safeguard for cities and other local units.

The important question is nothing less than whether our cities should have a vital role in the American federal system. A major theme of the new Tennessee Municipal League (TML) history is to show that the flexible federal system requires constant repetition of the work of the Founding Fathers in Philadelphia. This work must be pressed forward in elections, through propaganda, and in the day-to-day battles waged in legislative and executive agencies at all levels.

In Philadelphia, the statesmen concentrated on a sound American governmental structure, a framework—the Constitution. Today, in state and national capitals, the focus is sometimes on ideology, but mostly on programs and services which often warp basic governmental structure by neglecting the impact of administrative arrangements on who controls, and on the allocation of responsibility and resources among governmental levels.

Municipal Politics and Power: Tennessee Municipal League In Action cites the U.S. ACIR as one of the three great "think tanks" that, for Tennessee officials, has provided intellectual fuel of realistic, sound answers to deficiencies in our federal system. For those working in Tennessee, the other two "think tanks" which made a difference have been the National League of Cities (NLC) and the Tennessee Municipal League itself.

The book goes on to raise this question: after the think tanks, what else is required to convert answers to solutions? The history suggests techniques for managing the federal-state relations of cities and the role of a state municipal league and its city hall members. It adopts the casebook method by reporting hundreds of examples over 40 years. Details of issues, contending forces, and methods to pressure and persuade are included; thus, the environment of decisionmaking is available to practitioners and scholars examining the Tennessee experience.

Seeking intergovernmental answers to city needs has been a demanding task, but a much greater challenge for the TML has been finding ways to influence governors and state legislators, presidents, cabinet members, and members of the Congress, as well as the opinions of citizens and interest groups.

To cite one example, a chapter is devoted to "Serving Fringes: 1,200,000 New Citizens." A TML committee staffed by talented professors at the University of Tennessee formulated a "Fringe Growth Program" in 1954. But it took eight years and ten legislative acts to put the program into effect.

In the early 1960s, ACIR cited the Tennessee "Fringe Growth Program" in its annual report as a national model for urban growth. Yet, since World War II only one other state has been able to enact unilateral municipal annexation and institute an effective urban growth system.

This history, then, has used the cities of Tennessee and

its state league as a microcosm for the cities of this country and their respective state leagues. So what, then, do these cases reveal? What else is needed now in the city halls of the nation? And what is needed in state and national municipal leagues and other city support groups? After the think tanks, what else?

Communicators

In a wrap-up chapter entitled "Great Communicators in City Halls," the book suggests an answer. It is called a "communicator-mayor-council-administrator" form of city government. This approach grew out of a casebook analysis based on the authors' combined 56 years of experience in managing the intergovernmental relations of cities in Tennessee.

We concluded that this is an age of communications demanding professional public relations and advertising techniques in the mass media. Municipal officials need these tools to sell the people major public issues just as soap is marketed. But communications technology must be glued to the political decisionmaking processes of our democracy—especially in the voting booth.

Combining non-partisan issue politics with partisan politics and the democratic election process is not easy. We must install a system for these local officials to inform and lead their electorates on city issues being decided by state or federal officials. The plan exploits the matchless communications capacity of mayors and other city leaders to use local media to inform local electorates on these local issues. The mayor and other city leaders are the natural defenders of the city government which they head. This plan focuses this power and its potential use when working with state legislators and members of the Congress.

Such an enterprise could be developed and installed in two stages. The first stage is to indoctrinate mayors, councilmen and administrators about their vital role as managers and defenders of their city's relations with state and federal governments. In this first stage it must be proved that the stakes are high.

Among other things it is important to convince local officials they have more power than they think. It is amazing how many mayors or governing body members feel they hold less sway over the voters than some state or federal official much removed from the local electorate by distance and daily contact. In the average political shootout on a local issue (and *anything* affecting your city government is local), the local official will outgun his state or federal adversary a surprising number of times. City Hall can win—almost every time.

The second stage is to invent and install a simplified city hall communications system on intergovernmental issues. This system should be designed and serviced by state and national municipal leagues and other policy-lobbying groups.

Such a communications-political plan of loosing citizen pressure at the polls on state and federal officials is an "add on" to the many other successful methods to influence urban policies. The book also describes dozens of TML experiences. The National League of Cities, United States Conference of Mayors (USCM), and others have proven methods to influence federal actions. The book gives several examples of a crucial leadership role by Tennessee officials in these efforts at the national level.

The USCM has largely invented and already demonstrated the potential of such a mayor-communicator system. Most mayors of larger cities have professional public relations staffs for general purposes, including intergovernmental issues, and also have intergovernmental relations managers on their staffs. The influence of our big city mayors in state capitals and in Washington has shifted its base from powerful leadership roles in political parties to even more influence by communicating the specific impact on their city of state or federal policies and programs.

The International City Management Association (ICMA) and local managers could contribute much to both the educational and implementation stages of this plan.

- Educational Phase
  One co-author was introduced in 1940 to ICMA's justly famed handbook series in a course on "Municipal Management" taught by Clarence Ridley, then executive director of ICMA and a professor at the University of Chicago. ICMA is the nation's premier educational institution for municipal government. It generates materials, handbooks and casebooks for in-service training and for university curricula in city management and public administration. ICMA could inject into this system another handbook, and some casebooks, on "managing state and federal relations of cities," while maintaining objectivity and leaving to others the advocacy of specific measures.

- City Managers Can Help
  Possibly ICMA's greatest contribution would be to firmly install intergovernmental relations management as a function of the city manager and other professional administrators, always in proper relationship to elected officials as in other matters. Our history shows that city managers played a leading role in the intense issue politics practiced by TML for 40 years. Four city managers were TML presidents. One of these was David Burkhalter, one of the greatest city managers of this period. He also served as president of ICMA. Burkhalter supports using the casebook method, using books like *Municipal Politics and Power* as "a valuable resource in Political Science and other areas of local government training."

However, we also must consider using professional communications technology and our democratic political system to hold accountable "good or bad" state and federal officials. What would happen if the mayors of a state (or nationally) were to issue periodic reports ranking these officials and listing what governors, presidents, congressmen and state legislators are doing to or for their cities?

City Hall communications and pressure have been the base of municipal lobbying in state and national capitals. Our new plan gives added emphasis to: (1) influencing the urban vote in elections for state and national officers; (2) creating a tradition of telling city voters the impact on their city of actions by these office holders; (3) making the fate of these city issues intelligible and interesting to

city voters; (4) educating citizens about their city's place in the federal system; and (5) creating state and national municipal league support systems for the city hall communicator plan.

Analysis and planning need to encompass the many other essential techniques which have been tested and used in playing this city-state-federal relations game, especially for major issues. We need:

- cooperative lobbying in the capitals and back home
- thorough negotiations with state and federal authorities
- state-national coalitions (as well as local coalitions)
- long-term comprehensive goals, adopted democratically with solid "think tank" resources
- effective communications with various audiences—mass media, league members, legislators, etc.
- campaigns to inspire municipal forces to leap out of the foxholes into the fight
- injection of municipal issues into state and federal elections
- some losing fights—build victory on stinging defeat

Here are two examples of "losing to win": a "one cent gas tax war" was pursued by TML for eight years until 2,000 mayors and councilmen rose up to sign a pledge to oppose any candidate for governor who fails to include a ½th city share of the state gas tax in his platform. They elected a governor who pledged: "Your one cent city share is my number one bill." TML and its mayor spokesmen also advocated a new skill training system to enhance Tennessee's economic growth, waging a seven-year effort before the governor committed and launched a new state-operated system of 27 area technical schools, five technical institutes, ten academic-technical community colleges, and 120 state-funded local vocational schools.

Constitutional Amendment?

TML has largely succeeded in defeating state, and some national, policies that would deprive municipal governments of home rule, fail to delegate maximum local administration and control of state and federal programs, or withhold adequate financial resources. Our history raises the serious question: Does this nation now require a second constitutional convention to restructure and stabilize the federal system? Or must the amendment process be used to adopt a "Bill of Local Rights"?

The Philadelphia Constitution protects one national and 50 state governments to some degree. It leaves 80,000 cities and other local units to the mercies and whims and ideological wars of presidents, congresses, courts and states. Convention President George Washington, Ben Franklin, and other delegates closed down our one and only constitutional convention in September 1787. Surely we in America now have enough experience and wisdom to reappraise the basic structure and allocation of responsibilities and powers among 80,000 local governments, as well as one national and 50 state governments.

A combination of larger amounts of campaign money and a nationalized mass media has helped to erode the political, and thus the governmental, influence of state and local officials, accelerating the long trend of centralizing power in the national government and special interests. This trend must change.

The following are several elements of a "Bill of Local Rights" governing federal relations with units of general local government. The 50 states have tested most of these in arranging state-local relations either by constitution or statute.

A Bill of Local Rights

Our proposed "Bill of Local Rights" has four components. First, in order to restore and ensure federal fiscal fairness and support for cities, counties and other local units of general government, the national government shall:

- enact no federal mandates without paying the full cost; in addition, a fiscal impact statement shall be prepared for all legislation that affects local governments;
- make full payment in-lieu of taxes to local governments for federal properties and operations;
- permit reasonable piggybacking of local taxes on federal taxes (Tennessee has five such state taxes);
- enact federal block grants to pay for a reasonable share of the costs of "national interest" programs;
- adopt an amendment based upon the Canadian program that provides "equalization payments" to their provincial governments for "reasonably comparable levels of public services at reasonably comparable levels of taxation" (including local services); and
- issue a periodic "federal-state-local tax and revenue analysis" and a local impact statement for all federal tax changes, and include an annual federal-state-local fiscal analysis as part of the federal budget. Specifically: "Tax sources shall be reasonably allocated to fund public service responsibilities of the several governmental levels."

Second, an intergovernmental agency (perhaps the ACIR) should be empowered to formulate (and administer) a national program to strengthen local (and federal) capacity through the development of new technology, technical assistance and training programs, and the use of financial incentives. The focus here would be on basic form and capacity as an alternative to federal controls, rather than on particular services. An example of this approach was undertaken in the mid-1970s when the TML implemented the HUD "city capacity building" project.

Third, periodic (every 5-10 years) reports should be prepared by the intergovernmental agency on the state of the federal-state-local relationship, and include an assessment of the impact of national legislation the federal system and recommendations for change.

And fourth, a local home rule provision should be incorporated into the Constitution that is based on the model state constitution of the National Municipal League. Specifically, this provision should state: "Each city is granted full power . . . to pass laws . . . relating to its *local* affairs . . . (this shall) not restrict the powers of the legislature to enact laws of *statewide* concern uniformly applicable to *every* city."

Conclusion

Our approach to increasing local government influence in our federal system, then, is two-fold: add a "Bill of Local Rights" to the Constitution and implement the "city hall communicator" plan. The amendment would provide the much-needed recognition of and framework for local

government in our federal system. And the communicator plan can help refocus attention on candidate records, platforms and pledges about local government issues during our political campaigns.

We must rescue the democratic process from "a tidal wave of special interest money" used to buy media advertising to elect "our" representatives. The empty, negative 1986 elections, shunned by a non-voting majority, proved that it is later than we thought.

Joseph Sweat is Executive Director and Herbert J. Bingham is Executive Director Emeritus of the Tennessee Municipal League. Mr. Bingham is the author and Mr. Sweat is a contributor to ***Municipal Politics and Power: Tennessee Municipal League in Action.***

The Tenth Amendment Is Dead. Long Live the Eleventh!

George D. Brown

In *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court appeared to lay to rest any Tenth Amendment-based doctrine of state sovereignty shielding states from the national government. The fundamental teaching of *Garcia* is that federal courts will not protect the states from the federal congress. Yet in cases arising under the Eleventh Amendment the Court does precisely that, treating the amendment as a limit to congressional power to make states suable for damages in federal court.

What is more, the Court seems bent on continuing to read the amendment broadly despite the obvious clash between this course of action and the thrust of *Garcia*. In *Atascadero State Hospital v. Scanlon*, decided at the end of the same term, the Court held that a private individual could not sue a state for damages in federal court for an asserted violation of Section 504 of the *Rehabilitation Act of 1973*.[1] The specific importance of *Atascadero* is its emphasis on the need for the Congress to make crystal clear its intent to allow such suits whether it is attempting to utilize its Fourteenth Amendment powers to abrogate an Eleventh Amendment immunity or whether it is attempting to put the states on notice of a possible waiver through participation in a federal program. The more general significance of *Atascadero* lies in its reaffirmation of Eleventh Amendment doctrine over the strong protests of four Justices who had been in the majority in *Garcia*. Whether or not it represents an anomaly in the jurisprudence of federation, this doctrine clearly deserves a closer look.

The Eleventh Amendment and State Sovereignty

Jurisprudence—An Introduction. One of the most frequent criticisms of Eleventh Amendment jurisprudence is that it is unduly confusing and complex. As a starting point, this seems surprising since the language of the amendment is clear: suits against a state "by citizens of another state, or by citizens or subjects of any foreign state" are not to be construed as within the judicial power of the United States, despite language to that effect in Article III. The amendment might be seen as a narrowly drafted provision designed to overturn a specific Supreme Court decision, *Chisolm v. Georgia*.[2] Nonetheless, in *Hans v. Louisiana*, the Court held that the amendment also applies to in-state plaintiffs when they attempt to sue their state in federal court on the basis of a federal question.[3] The Court viewed the amendment—and its repudiation of *Chisolm*— as a return to a broader principle: the states are generally immune from the reach of the federal judicial power, regardless of the nature of the plaintiff or the source of law upon which the plaintiff bases the complaint.

Things are not so simple, however. States can be sued by their citizens in federal court in at least two different ways. First, the rule of *Ex parte Young* permits a broad range of *prospective* relief against a state officer sued in his official capacity, even though the obvious effect of such relief runs directly against the state.[4] The *Young* Court justified this result by reasoning that, having violated the Constitution, the officer was "stripped of his official or representative character," leaving him personally liable for his actions. In *Edelman v. Jordan*, the Court reaffirmed *Young*, but emphasized that the plaintiff in an *Ex parte Young*-type suit against a state official cannot seek retroactive relief tantamount to money damages.[5] However, private individuals can sue their own state in federal court for *monetary* relief including damages if the Congress specifically authorizes such a suit. A series of Supreme Court cases has developed an elaborate set of rules governing when the Court will find that the Congress has removed the states' Eleventh Amendment protection. The Congress must speak clearly, although prior to *Atascadero* this intent might be found in legislative history. The Congress may possess greater ability to abrogate the amendment's protection when it is utilizing its Fourteenth Amendment powers rather than one of the other enumerated powers. In some instances the state may consent to suit in federal court through a form of waiver. Apart from its complexity, there is considerable disagreement over whether Eleventh Amendment doctrine can be fitted under a general label such as jurisdiction, sovereign immunity, or state sovereignty. The Court has used these terms, sometimes interchangeably, and all three can be found in the same opinion.

As Jurisdictional Doctrine. Since the Eleventh Amendment parallels Article III in its reference to "the judicial power of the United States," there is considerable justification for viewing it as just another subset of the complicated rules governing federal jurisdiction generally. The Court has held that the amendment is at least quasijurisdictional since it need not be raised as a defense in the trial court. Individual justices have elaborated on the jurisdictional analysis at greater length. Concurring in *Employees of the Department of Public Health and Wel-*

fare v. Department of Public Health and Welfare, Justice Marshall agreed with the majority that private plaintiffs could not sue for monetary relief in federal court under the *Fair Labor Standards Act*.[6] His reasoning was not that the Congress had failed to authorize such suits, but that the Eleventh Amendment barred the Congress from placing those suits in federal court. The plaintiff could have recourse to suit in state courts. For Justice Marshall, it was "clear that the judicial power of the United States does not extend to suits such as this, absent consent by the State to the exercise of such power." In his view, *Hans v. Louisiana* essentially restored the original understanding of Article III. Thus, the Eleventh Amendment did more than overturn *Chisolm*, and the Court in following *Hans* had been correct in furthering the spirit of the amendment. For Justice Marshall, this particular limitation on the Congress arises from the nature of the federal system itself.

Justice Powell has gone even further and argued that the *Hans* rule flows from an explicit jurisdictional limitation in the "plain language" of the amendment in the following manner: "In language that could not be clearer, the Eleventh Amendment removes from the judicial power, as set forth in Article III, suits commenced or prosecuted against one of the United States." He apparently justifies his omission of any reference to the person who brought the suit on the ground that the amendment is a broad statement about the jurisdiction of federal tribunals over states.

There are several problems with the jurisdictional approach to the Eleventh Amendment. First, it is hardly as explicit in the language of the amendment as Justice Powell would have us believe. Current Eleventh Amendment doctrine represents a highly elaborate, policy-oriented construction rooted in the principles of federalism that are thought to underlie the text. Perhaps more to the point, the Court's treatment of the amendment conflicts with general principles of Article III federal court jurisdiction. A state can waive the amendment's protection if it wishes to have the matter in question litigated, even though no such waiver would be possible, for example, with respect to the existence of a case or controversy. Moreover, the notion that the Congress can override what limitations the amendment does impose is fundamentally at variance with the Article III principle that the Congress cannot expand the jurisdiction of the federal courts, a principle that can be traced to *Marbury v. Madison*. Attaching the jurisdictional label to the amendment is tempting, but it does not explain the elaborate structure that surrounds this seemingly narrow provision.

As Sovereign Immunity. The label most frequently attached to Eleventh Amendment doctrine is that of sovereign immunity. The Court's decisions and scholarly analyses are replete with references to the amendment as constitutionalizing the common law doctrine of sovereign immunity. Such an analysis is hardly surprising. Eleventh Amendment jurisprudence does involve immunity from certain types of suits in federal courts. To the extent that states do possess such an immunity, it may be derived more from their somewhat sovereign nature than from anything in the language of the Constitution. The Framers of the Constitution and of the Eleventh Amendment certainly were familiar with the concept of sovereign immunity. Nonetheless, the sovereign immunity analogy is incorrect and can lead to grossly inaccurate and unfair analyses of Eleventh Amendment doctrine.

The concept of sovereign arose in unitary systems. The question in any given country or state is the extent to which the sovereign entity may be sued by one of its citizens. This is a matter of suit or not. The sovereign itself is the body that decides. In our federal system, however, the problem involves the extent to which states may be subject to suit in tribunals of another sovereign, a sovereign that is more than coequal. The policy considerations that underlie the resolution of such questions are substantially different from those that arise in the unitary context. One cannot properly address Eleventh Amendment issues without considering the delicate relationship between the two "sovereigns" presented by any attempt to sue states in federal court. The sovereign immunity analogy has proven to have particular appeal to those who hope to eliminate existing Eleventh Amendment doctrine. Sovereign immunity is a concept that sounds unfair—"the king can do no wrong"—and has been increasingly criticized. A powerful attack on the Eleventh Amendment can thus be mounted by arguing that it is merely sovereign immunity in a special form.

Critics of the Court's continued adherence to *Hans* and its progeny, both on the Court itself and in academia, have decried the Eleventh Amendment as the source of a "lawless" doctrine on the ground that since it incorporates sovereign immunity, the result must be that private parties have no recourse against states that violate federal law. This description is not correct. The *Ex parte Young* fiction permits a range of relief, so long as it can be labeled prospective. The Supreme Court has held that the United States is not barred by the amendment and thus may sue on behalf of individual plaintiffs. Moreover, there is the possibility of suit in state court, as Justice Marshall noted in his *Employees* concurrence. This possibility will be explored at greater length below. The sovereign immunity label also can trigger the application to federal-state conflicts of an extensive body of sovereign immunity "law" developed to deal with problems in unitary systems. This law itself is highly technical and confusing. The point is that the invocation of sovereign immunity leads to a fundmentally false description of what existing Eleventh Amendment doctrine produces: no relief for deserving plaintiffs. The argument is emotionally appealing, but analytically flawed.

As State Sovereignty Doctrine. A more satisfactory approach to analyzing the barriers that the amendment imposes on potential plaintiffs is to view the body of Eleventh Amendment doctrine as a state sovereignty limitation on the national government. "State sovereignty" means a form of protection derived from the Constitution, from certain actions by organs of the national government, which can be enforced in the federal courts. Thus the amendment and the resultant doctrine may be seen as a limitation on the national government derived ultimately from the structure of the federal system. At times, the Court has used the phrase "state sovereignty" in a way that appears to reflect such an understanding of the amendment. At other times, references to sovereignty reflect a belief that what is at stake is sovereign immunity, as discussed above.

To some extent, the Court may be concerned with the symbolic effect of subjecting a state to suit in federal

court. The principal concern, however, appears to be that of preserving the state treasury from substantial depletion by the national government. This concern appears for the first time in recent cases in the majority opinion in *Employees*. The Court noted that since the Commerce Clause was involved, federal authority over state employees would be extensive. The Court expressed apprehension about "how pervasive such a new federal scheme of regulation would be." To some extent, this language may reflect symbolic concerns. In the same paragraph, however, the Court expressed reluctance to find that the Congress had placed "new or even enormous fiscal burdens on the State." This focus on protecting the state treasury became even clearer in *Edelman v. Jordan*. The majority opinion drew a line between prospective and retroactive relief in order to protect state funds, and described the Eleventh Amendment in general terms as a rule barring "a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury." Similar concerns have been expressed in subsequent cases.

Viewing the protection that states enjoy under the Eleventh Amendment as a form of protection of their sovereignty makes sense. The states are shielded from the imposition of retroactive, damages-type relief by federal courts exercising authority under the general jurisdictional statutes and under Section 1983. Although Congress can remove this protection, it is limited at least by the strict canons of construction that make a finding of abrogation exceedingly difficult. Beyond that, there is the question of whether additional judicially enforceable limits on the Congress exist. If so, a statute that transgresses those limits might be struck down. *Garcia*, however, raises serious doubts as to the continued viability of *any* doctrine of state sovereignty, including the elaborate body of Eleventh Amendment jurisprudence.

Garcia and the Eleventh Amendment

National League of Cities v. Usery, the case which *Garcia* overruled, rested in part on the circular language of the Tenth Amendment: the states (and the people) retain whatever powers are not surrendered in the Constitution to the national government. On the other hand, the Eleventh Amendment is specific, albeit perhaps too much so. It deals not with generalities, but with the matter of suing states in federal court. It is true that only one type of suit is forbidden: that "commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." This narrowness need not be a fatal obstacle to the *Hans* construction, however. Suits against states by foreigners and other out-of-state plaintiffs were the ones most vehemently discussed during the ratification period, and *Chisolm v. Georgia* was an example of the phenomenon. Since these were the type of suits with which those who considered the matter were most familiar, it is not surprising that they are singled out by the Eleventh Amendment. Extrapolating from the narrow text of the amendment to a broader policy against suing states in federal court, regardless of the nature of the parties or of the cause, may be better justified by the text, its spirit, and its history than is an attempt to ground *National League of Cities'* sovereignty principles in the vague language of the Tenth Amendment. Still the Eleventh Amendment cases rely on a form of supra-textual analysis which is at variance with the literalistic approach of *Garcia*. The majority in that case focused on whether the Congress acted within its granted powers. If it did, no structural limits derived from the nature of the federal system would stand in its way.

What most alarmed critics of *National League of Cities* was its notion of a judicially enforceable state sovereignty limit on national power. This criticism is based primarily on Professor Wechsler's seminal article on the role of the national political processes in protecting the states. According to Wechsler, the states are sufficiently represented through the structure and orientation of the national legislature that they can rely on the political process, rather than the judiciary, to protect their interests.[7] As Justice Brennan put it in his *National League of Cities* dissent, "decisions upon the extent of federal intervention under the Commerce Clause ... are in that sense decisions of the States themselves."

Professor Wechsler's thesis is not without its critics. His article appeared in 1954. Since then, argues Professor Kaden, changes in the national political process have weakened any leverage that the states might have had.[8] For example, senators and congressmen increasingly have come to view themselves as national political officials, responsive to national concerns and values. Professor Kaden's critique recently has been buttressed by substantial empirical evidence from the Advisory Commission on Intergovernmental Relations.

According to the Commission, the last two decades have witnessed "a dramatic shift in the way in which the federal government deals with states and localities."[9] The shift is away from cooperation and toward coercion. The Commission categorizes the various techniques of intergovernmental regulation as "direct orders ... crosscutting requirements, crossover sanctions, and partial preemption." All four techniques permit such a substantial degree of federal control over the activities of state and local governments that the Commission has noted the risk of serious erosion of state and local independence.

A Wechslerian critique of state sovereignty as articulated in *National League of Cities* would seem equally applicable to Eleventh Amendment doctrine. If states do not need protection from the Congress, then they do not need it from federal courts enforcing federal norms enacted by the Congress. To the extent that the Court in *Garcia* utilized Wechsler's thesis to repudiate both *National League of Cities* and its broader underpinnings, there are substantial implications for any notion of judicially enforceable state sovereignty.

It is no exaggeration to state that the Wechsler analysis is the centerpiece of Justice Blackmun's majority opinion. The structure of the national government is in fact, along with the notion of limited enumerated powers, the guarantor of state sovereignty. As he put it, "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." In sum, the tensions between *Garcia* and the continued existence of Eleventh Amendment doctrine are obvious and deep. At the very least, the clear statement approach makes it substantially harder for the Congress to treat the states like everyone

else in deciding whether private damage suits in federal court are appropriate for the enforcement of federal law. The amendment may even impose limits beyond that of clear statement.

A Possible Reconciliation

One might stop here, noting with a shrug that inconsistent 5-4 decisions are hardly unique these days and that Justice White's swing vote made the difference between *Garcia* and *Atascadero*. Otherwise, the same Justices were on the same sides in both cases. Yet a strong argument can be made that *Garcia* and the Eleventh Amendment are, in fact, in harmony with one another. The continued existence of Eleventh Amendment doctrine is not just an untidy by-product of a federal system, but is instead a means of preserving a necessary balance between the two levels of government. At the outset, one must disclaim any substantial reliance on differences between the two textual provisions involved. The Eleventh Amendment may be the stronger provision, because it is specifically directed at the issue of suits against states in federal court. It is hardly strong enough, however, to carry on its back the entire weight of post-*Hans* doctrine. What justifies this doctrine is first, the duty it imposes on the Congress, and second, the introduction of a new set of actors: the state courts.

Let us begin with *Garcia*. Justice Blackmun suggested provocatively that there might be "affirmative limits that the constitutional structure ... imposes on federal action affecting the States under the Commerce Clause." He left open the question of whether such limits would be judicially enforceable. Requiring courts to consider whether "failings in the national political process" have occurred would seem to implicate the doctrine of political questions which are beyond judicial scrutiny. The heightened clear statement rule enunciated in *Atascadero*, however, performs precisely the function Justice Blackmun envisioned: it permits a form of judicial oversight of the legislative process to ensure that the Congress has in fact considered the states' interests.

That a clear statement rule can be consistent with the Wechslerian view of the national political process as the source of the states' protection hardly seems novel. Yet Justice Brennan attacks the Court's position that this statement must be found in the language of the statute itself, and views as fundmentally improper any special rule of construction for Eleventh Amendment cases. He assumes that the rule makes it harder for the Congress to act because the Court is opposed to what the Congress is doing. After *Garcia*, however, the rule counterbalances the states' loss of any substantive judicially enforceable limitations on congressional regulation. If the Congress is the only source of protection of the states' interests, it does not seem unfair for the Court to force the Congress to do its job. The Court does so not because it is implacably hostile to damages suits against states in federal court, but because its role has been transformed essentially into enforcing process guarantees. As developed below, process guarantees may be all that the states have left under the Eleventh Amendment.

Suppose that a statute does not satisfy the clear statement rule. That does not mean it not be enforced, as would have been the result under *National League of Cities*. Enforcement in the form of damages actions will come in the state courts, a second forum for the consideration of state interests. State courts will probably be more familiar with the effect damage awards would have on the state treasury, and will be more inclined to balance the competing interests. Although such balancing might seem the province of equitable relief, it reflects one of the underlying goals of the Eleventh Amendment: concern for the fiscal well-being of the states. In this sense, the argument for state court enforcement of federal norms that operate against the states parallels the arguments advanced in the context of statutes withdrawing federal jurisdiction over certain classes of cases. As Professor Bator has suggested in that context, "in interpreting the constitutional provisions which restrict state power, it may be wise and ... politically healthy to give the state courts the opportunity in the first instance to enforce federal constitutional restrictions on state power."[10] The goal of uniform interpretation of federal law is preserved not only through the vehicle of ultimate Supreme Court review, but also by the fact that the lower federal courts will entertain damages suits against nonstate defendants.

The question arises whether state courts will entertain damages actions against states based on federal law. State courts hear a wide variety of suits to vindicate federal rights. The Supreme Court has held that state courts must entertain federal claims analogous to judicially enforceable state law claims, and it has been strongly argued that they must enforce any valid federal law. An affirmative answer would certainly strengthen the argument offered here: that the Eleventh Amendment is neither inconsistent with the landmark decision in *Garcia* nor the enemy of the rule of law as charged by Justice Brennan and his academic allies. Admittedly, whether one accepts the views outlined above may depend on precisely how the Eleventh Amendment affects the Congress. Does it impose limits, depending on which power is used, or does it impose simply a process? That process would be the refined clear statement rule, now applicable across the board. Since the Congress can satisfy the rule, it may permit private damages suits against states regardless of the power utilized.

The Amendment and the Question of Limits

The Court has suggested that the Congress' ability to abrogate the Eleventh Amendment shield is limited to exercises of its power to enforce the Fourteenth Amendment. In terms of the relations between the Congress and the states, the Fourteenth Amendment is different from the enumerated powers in Article I of the Constitution. In *Fitzpatrick v. Bitzer* the Court noted that the amendment's "provisions are by express terms directed at the states," and quoted the famous statement from *Ex parte Virginia* that enforcement of the Fourteenth Amendment "is no invasion of State sovereignty."[11] Thus, the underlying principles of the federal system, which generated Eleventh Amendment doctrine in the first place, call for an important exception when another amendment that itself speaks broadly to federalism issues is involved.

Alternatively, one might argue that Eleventh Amendment doctrine is an attempt to balance respect for the role of states with the need to vindicate federal rights. The fact that statutes enacted pursuant to the Fourteenth Amendment are likely to vindicate particularly important rights justifies less Eleventh Amendment protection.

Under either argument, the Congress possesses special power when acting pursuant to section five of the Fourteenth Amendment. Since no question of waiver by the state is involved, the only relevant intent is that of the Congress itself. The clear statement rule ensures that the Congress knew what it was doing to the states.

Yet the notion of limits conflicts squarely with *Garcia* in two respects. For the *Garcia* Court *all* of the Congress' powers stand on an equal footing when it comes to federalism-based constraints. Those constraints—to the extent that they exist at all—are to be found in the national political processes which can be relied upon to protect the states.

Moreover, treating the Congress as limited in the use of, say, the commerce power to abrogate the Eleventh Amendment would raise the question whether the Congress could induce waivers when states "voluntarily" participate in interstate commerce. The Congress might attempt to condition a particular state activity upon agreement to be suable in federal court when damages claims arise out of that activity. The next steps would be an attempt to draw complex lines based on the degree of choice the state had, and, inevitably to a rehabilitation of a form of "governmental" v. "proprietary" distinction. Yet the Court in *Garcia* rejected emphatically any such distinction as inherently unworkable. The notion of limits on congressional ability to abrogate the Eleventh Amendment, with the Fourteenth Amendment a notable exception, has plausibility but is so at variance with *Garcia* that it seems unlikely to survive.

Conclusion

The Eleventh Amendment stands, despite the demise of the Tenth. The states may feel that they have been given a choice in the question of where to be hanged, but denied any choice over the question of whether they shall be. If the Court accepts the position of congressional supremacy outlined above, the Eleventh Amendment becomes process federalism only, as opposed to the "substantive federalism" reflected by *National League of Cities.* Yet it is process federalism that grants the states meaningful protection, a form of compensation, so to speak, for the loss of *National League of Cities.* The clear statement rule assures them at least one bite at the apple—in the sense of full consideration of their interests at the congressional level. If the statute does not meet this stringent test—and many congressional enactments, like that involved in *Atascadero,* will not—then the states at least get to have their fiscal interests considered by a body that will be sensitive to them: their own courts. A balance is struck, a form of equilibrium attained. The Eleventh Amendment is neither toothless nor lawless.

Footnotes

[1] *Atascadero,* 105 S. Ct. 3142 (1985).
[2] *Chisolm,* 2 U.S. (2 Dall.) 419 (1793).
[3] *Hans,* 134 U.S. 1 (1890).
[4] *Young,* 209 U.S. 123 (1908).
[5] *Edelman,* 415 U.S. 651 (1974).
[6] *Employees,* 411 U.S. 279 (1973).
[7] Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* 543 (1954).
[8] Kaden, "Politics, Money and State Sovereignty: The Judicial Role," 79 *Columbia Law Review* 847, 858-68 (1979).
[9] ACIR, *Regulatory Federalism: Policy, Process, Impact and Reform* (A-95), February 1984, p. 1.
[10] Bator, "Congressional Power Over the Jurisdiction of the Federal Courts," 27 *Villanova Law Review* 1030, 1037 (1982).
[11] *Fitzpatrick,* 427 U.S. 445 (1976) and *Virginia,* 100 U.S. 339 (1880).

George D. Brown is Professor of Law at Boston College Law School. This article is based on a discussion of state sovereignty under the Burger Court that appeared in **The Georgetown Law Journal** *in December 1985.*

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Initiative, Referendum and Recall: Government By Plebiscite?

Joseph F. Zimmerman

The various reform movements at the turn of the century—populist, progressive, municipal, administrative management—sought to make government, particularly on the state and local planes, more accountable to the citizenry. In addition to encouraging informed voting in regular elections, many reformers promoted the use of a trivium of correctives—the initiative, the referendum, and the recall—to eliminate gross misrepresentation of the electorate.

Richard S. Childs, an early municipal reformer, wrote:

> Although the people may be ready to vote overwhelmingly for a measure, their nominal agents and servants in the representative system will frequently maintain a successful indifference or resistance election after election. Our governments are less anxious to please the people than they are to please the politicians who thus become an irresponsible ruling class with a vast and marketable influence. Our representative system is misrepresentative. Many Americans, impatient with it, are demanding access to an additional and alternative system, namely, direct legislation by the Initiative and Referendum.[1]

The Referendum

Based upon the concept of shared decisionmaking, the referendum allows the electorate to determine whether referred matters are to become parts of the state constitution, state statutes, local charters, or local ordinances. The first referendum was held in the Massachusetts Bay Colony in 1640.[2]

A new type of plebiscite was adopted in 1898 by South Dakota, when voters approved a constitutional amendment authorizing the petition referendum. This type, also known as the protest or direct referendum, provides for a citizens' veto in 24 states by allowing voters via petitions to stop the implementation of a statute until a referendum determines whether the law is to be repealed.

The constitutional provision for the petition referendum typically excludes enumerated topics—religion, appropriations, special laws, and the judiciary. The Massachusetts Constitution contains the longest list of excluded topics.[3] Petition referendum propositions appear only on the general election ballot. To suspend a law and place it on the referendum ballot requires a number of signatures varying from 2% of the votes cast in the last gubernatorial election in Massachusetts, to 15% of the number who voted in the previous general election and reside in at least two-thirds of the counties in Wyoming.[4]

A typical requirement is that a specified minimum number of signatures must be collected in each county or in a specified number of counties—such as a majority in Utah—in order to demonstrate there is interest in the issue throughout the state. The degree of difficulty encountered by dissatisfied voters in utilizing the protest referendum is affected directly by the signature threshold and distribution requirements. The protest referendum can be employed by conservative or liberal groups, or by integrationists or segregationists. In general, business groups do not employ the initiative to achieve their goals, but use the protest referendum in attempts to repeal statutes.

The Initiative

Voters in Massachusetts towns have been authorized to employ the initiative since 1715.[5] Most writers, however, attribute the initiative to Swiss cantons and to South Dakota where voters ratified a constitutional amendment in 1898 providing for the initiative and the petition referendum.[6] San Francisco freeholders in the same year

adopted a city-county charter providing for the same two popular instruments.[7]

In California, progressives were upset by what they perceived to be control of the state legislature by corporations, and concluded the initiative and petition referendum could break monopoly control and machine politics. Robert M. LaFollette, a leading Midwest progressive, wrote:

> For years the American people have been engaged in a terrific struggle with the allied forces of organized wealth and political corruption ... The people must have in reserve new weapons for every emergency, if they are to regain and preserve control of their governments ... Through the initiative, referendum, and recall the people in any emergency can absolutely control. The initiative and referendum make it possible for them to demand a direct vote and repeal bad laws which have been enacted or to enact by direct vote good measures which their representatives refuse to consider.[8]

Public support for the initiative was strong in the period 1898 to 1918, as 19 states adopted the device. All were west of the Mississippi except Maine, Massachusetts and Ohio. No state subsequently adopted the initiative until 1959, when Alaska entered the Union with a constitutional provision for the initiative. Wyoming adopted the initiative in 1968; Illinois in 1970 adopted a constitution providing for the initiative relative to only the legislative article of the constitution; and Florida adopted the constitutional initiative in 1972. Currently, the constitutions of 23 states contain provisions for one or more types of initiatives.

In 17 states, the initiative may be employed in the process of amending the state constitution, and in 21 states may be employed in the process of enacting ordinary statutes. In most states, voters are authorized by state constitution, state law, or local charter to employ the initiative in the process of adopting and amending local charters and ordinances.

The initiative may be direct or indirect. Under the first type, the entire legislative process is circumvented as propositions are placed directly on the referendum ballot, provided sponsors collect and the appropriate state official certifies the requisite number and distribution of signatures. In Maine, Massachusetts, Michigan, Nevada and Washington, the state legislature is authorized to place a substitute proposition on the referendum ballot whenever an initiative proposition appears on the ballot.

The indirect initiative is used in eight states, and a proposition is referred to the state legislature for consideration upon the certification of the required number of signatures of voters. Should the legislature fail to approve the proposition within a stipulated time period, ranging from 40 days in Michigan to adjournment of the legislature in Maine, the proposition automatically is placed on the referendum ballot. In Massachusetts, Ohio and Utah, additional signatures must be collected to place the proposition on the ballot if the legislature fails to approve the proposal.

The Recall

In contrast to the petition referendum and the initiative, which are designed to reverse legislative errors of commission and omission, the recall is employed to remove public officials from office in advance of the expiration of their terms. The recall process is initiated by the circulation of petitions among the electorate for signatures.

The national platforms of the Socialist Labor Party in 1892 and 1896, and the platforms of the Populist Party in several states in the 1890s, contained provisions for the recall. Nevertheless, the recall was not adopted until 1903 when voters approved a new charter for the City of Los Angeles.[9]

Writing in 1912, Walter E. Weyl reported reformers were seeking "to break the power of a politically entrenched plutocracy" and added:

> The old solution ... is to threaten the representative that if he betrayed his trust he would *never* be reelected. This method was not efficacious. The legislator shrewdly interpreted the word "never" in a Gilbertian sense, as meaning "hardly ever."[10]

In general, advocates assumed the recall seldom would be employed, as the threat of its use would be sufficient to ensure proper representation by public officials.

Ellis P. Oberholtzer in 1912 raised an objection to the recall in the following terms:

> The independent makers, administrators, interpreters, and enforcers of the law are to become the puppets of the people, to obey their changing whims or else to surrender their places to those who shall be more willing to follow popular direction. And why is this done? Because, it is said, of the corruption of legislators, governors and judges, because of the inability of the people to choose from among their number honest and intelligent men to represent them in the halls of government. The people have failed once; they are to be given the opportunity to fail again in a larger sphere in a more menancing way.[11]

Currently, the constitutions of 14 states authorize the removal of state officers from office by means of the recall. Locally drafted and adopted charters providing for a professional manager often include authorization for the recall because opponents of the manager plan maintain a non-elected officer should not possess the amount of authority that typically is delegated to the manager. When plan proponents pointed out the local legislative body can remove the manager at any time by a majority vote, opponents commonly contended the manager can remain in office simply by performing favors for a majority of the members of the governing body. Proponents, in response to this objection, proposed incorporation of the recall into the charter to allow the electorate to remove members of the governing body refusing to discharge a manager in whom the voters have lost confidence.

Restrictions on the employment of the recall typically are contained in authorizing constitutional, statutory and local charter provisions. An officer usually cannot be removed during the first few months of service. In Alaska, Idaho, Louisiana, Michigan and Washington, judicial officers are not subject to being recalled. The Montana recall law is the only state law providing for the recall of appointed as well as elected state officers.[12] A number of local government charters also authorize the recall of appointed as well as elected officers. Greeley, Colorado has an atypical provision in its charter authorizing voters

to terminate the employment of the city manager at an election held every six years.[13]

Voters in nine states decide only on the question of the removal of the named officer, and a second election typically is held to fill any vacancy resulting from the use of the recall. In other states, recall proponents often recruit and campaign for the election of a replacement candidate simultaneously with the campaign to remove a named officer.

Campaign Finance

Election and referenda campaigns are regulated by corrupt practices acts in the various states. These acts require the reporting of campaign receipts and expenditures, and limit contributions to campaigns as well as the total allowable amount of campaign expenditures. The United States Supreme Court in 1976 and 1978 weakened the effectiveness of corrupt practices acts by striking down limits on expenditures of a candidate's own funds and corporate contributions to referendum campaigns.[14]

Initiative, referendum and recall campaigns conducted on a statewide basis are expensive because of the cost of collecting the required certifiable petition signatures, and persuading voters to approve or reject propositions, or retain or recall an officer. For example, approximately $10 million was spent by proponents and opponents of Proposition 15 on the 1982 California ballot that would have placed controls on handguns.

The Supreme Court's decisions clearly have enhanced the ability of wealthy groups to employ the petition referendum and the initiative to advance their interests. Nevertheless, available evidence reveals that the side spending the most funds does not always achieve its objectives.

A Threat To Representative Government?

Fear has been expressed since the 1890s that the initiative, petition referendum, and recall pose a direct threat to representative government. Allen H. Eaton, after examining the adoption of the initiative and referendum by Oregon voters in 1902, concluded "that most of those who were responsible for the enactment of the initiative and the referendum constitutional amendment ... expected them to be used as reserve powers and not for the purpose of establishing a new independent legislative body cannot be doubted."[15]

Agitation for the employment of direct democracy devices has stemmed in part from the same state legislative behavior that motivated the earlier adoption of constitutional provisions in a number of states restricting legislative powers and procedures; *i.e.*, the appearance of undue corporate influence in state legislatures, particularly in the Midwest and in California.

Today, conditions at many state capitols are significantly different as the result of the development of professional legislative staff, public interest groups, and single interest groups; adoption of relatively stringent ethical standards and "sunshine" laws (financial disclosure, access to public records, and open meetings laws); decline of the major political parties; greater candidate and special interest financing of election campaigns; disappearance of the canal and railroad companies as major lobbying groups; consumer advocacy by executive branch officers; investigative media reporting; and related developments.

Related to local governments, the early-minded municipal research bureaus largely have been replaced by public interest groups which conduct research, publicize their findings, and lobby for approval of their proposals by chief executives and governing bodies.

The potential employment of the direct initiative and referendum by numerous special interest groups presents a danger to the public weal as these groups are concerned only with their individual propositions and do not understand the necessity of integrating the proposals into consistent policies for a governmental unit. To prevent the aggravation of certain public problems, compromises are essential on many issues in the development of public policy.

The indirect initiative clearly is preferable to the direct initiative, as the former warns a legislative body of widespread voter dissatisfaction with current policies and the possibility of direct citizen action if the legislature fails to take responsible action. This form of initiative can be viewed as a compromise between advocates of the direct initiative and legislators opposed to the initiative in any form. The indirect initiative allows a legislature to analyze petition propositions and to seek a satisfactory compromise with their sponsors if the legislature is convinced the propositions should be amended.

Representative systems are not perfect and may foster the illusion that all proposals receive careful scrutiny prior to their approval, amendment or rejection. While giving the appearance of relative simplicity as a political institution, representative law-making permits the manipulation of citizens. If legislators are guided only by the highest ethical standards, citizens will have less need for corrective devices.

An irreconcilable conflict between decisionmaking by elected representatives and direct voter decisionmaking need not occur. Should such a conflict occur, it is difficult to argue that the voters should not have the means of resolving the conflict within a reasonably short period of time.

Footnotes

[1] Richard S. Childs, *The Short Ballot: A Movement to Simplify Politics* (New York: The National Short Ballot Organization, 1916), p. 4.

[2] Nathaniel B. Shurtleff, ed. *Records of the Governor and Company of the Massachusetts Bay in New England*, Vol. I (Boston: From the Press of William White, Printer to the Commonwealth, 1853), p. 293.

[3] *Constitution of the Commonwealth of Massachusetts*, articles of amendment, Art. 48, the referendum, 2.

[4] For details, see *The Book of the States* published biennially by The Council of State Governments.

[5] *The Acts and Resolves of the Province of the Massachusetts Bay* (Boston: Wright and Potter, 1874), Vol. II, p. 30.

[6] *Constitution of South Dakota*, art. 3, 1 (1898).

[7] *Charter for the City and County of San Francisco*, art. 2, chap. 1, 20-22.

[8] Ellen Torelle, comp., *The Political Philosophy of Robert M. LaFollette* (Madison, Wisconsin: The Robert M. LaFollette Company, 1920). pp. 173-74.

[9] Frederick L. Bird and Frances M. Ryan, *The Recall of Public Officers: A Study of the Operation of the Recall in California* (New York: The Macmillan Company, 1930), p. 22.

[10] Walter E. Weyl, *The New Democracy: An Essay on Certain Political and Economic Tendencies in the United States* (New York: The Macmillan Company, 1912), pp. 298 and 304-05.
[11] Ellis P. Oberholtzer, *The Referendum in America* (New York: Charles Scribner's Sons, 1912), p. 455.
[12] *Montana Laws of 1977*, chap. 364 and *Revised Code of Montana*, 2-16-603 (1983).
[13] *Greeley (Colorado) City Charter*, 4.3.
[14] *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First National Bank v. Bellotti*, 435 U.S. 765 (1978).
[15] Allen H. Eaton, *The Oregon System: The Story of Direct Legislation in Oregon* (Chicago: A. C. McClurg & Company, 1912), p. 118.

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A Fiscal Note

The Impact of Federal Tax Reform on State Personal Income Taxes

Carolyn D. Lynch
Analyst

As part of a larger study on the fiscal effects of federal tax reform on state and local governments, the Advisory Commission on Intergovernmental Relations (ACIR) is analyzing the impact of the *Tax Reform Act of 1986* on state personal income tax liabilities. Since many state income tax codes conform or "couple" in some way to the federal income tax structure, reform of the federal system has the potential of directly affecting state income tax liabilities. Preliminary results are now available on how the *Tax Reform Act* would alter state personal income tax yields.

The potential impact of tax reform on state individual income taxes was estimated by employing microsimulation modelling techniques of federal and state income tax codes.[1] The data base employed in the simulations is conceptually the same data file that the U.S. Department of the Treasury and the Joint Committee on Taxation use as their primary data source for analysis and revenue estimates of federal individual income tax changes. The number of records, however, is substantially larger and therefore permits the calculation of meaningful results on a state-by-state basis.[2]

The state income tax liability estimates are based on projected levels of 1986 income and are designed to represent the fully phased-in effects of all provisions in the new law. Since some state tax codes reference current and prospective federal tax law while others reference federal law as of a specific date, it was necessary to make some assumptions concerning changes to state tax codes in response to federal reform. Those states which conform to current and prospective federal law are assumed to retain all features of current state law. Since those states which link to the federal code as of a fixed date frequently update their references to federal law, it is assumed that these states update their linkages and tie to the federal code by adopting the same conformity structure to the new federal provisions. Thus, the estimates are based on the assumption that all states conform to the new tax law,

The Potential Effect of the Tax Reform Act of 1986 on State Personal Income Tax Liabilities: Preliminary Estimates of the Percent Changes in 1986 Total State Individual Income Taxes Due to Conformity to Federal Tax Law

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Colorado	22%	Indiana	4%	Vermont	−11%	Florida
Montana	19%	Wisconsin	4%	North Dakota	−10%	Nevada
Oregon	19%	Arizona	**	Nebraska	−9%	South Dakota
Utah	19%	Mississippi	4%	New Jersey	−1%	Texas
Iowa	18%	Illinois	3%	New Hampshire	−1%	Washington
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Missouri	18%	New Mexico	**	Pennsylvania	−1%	
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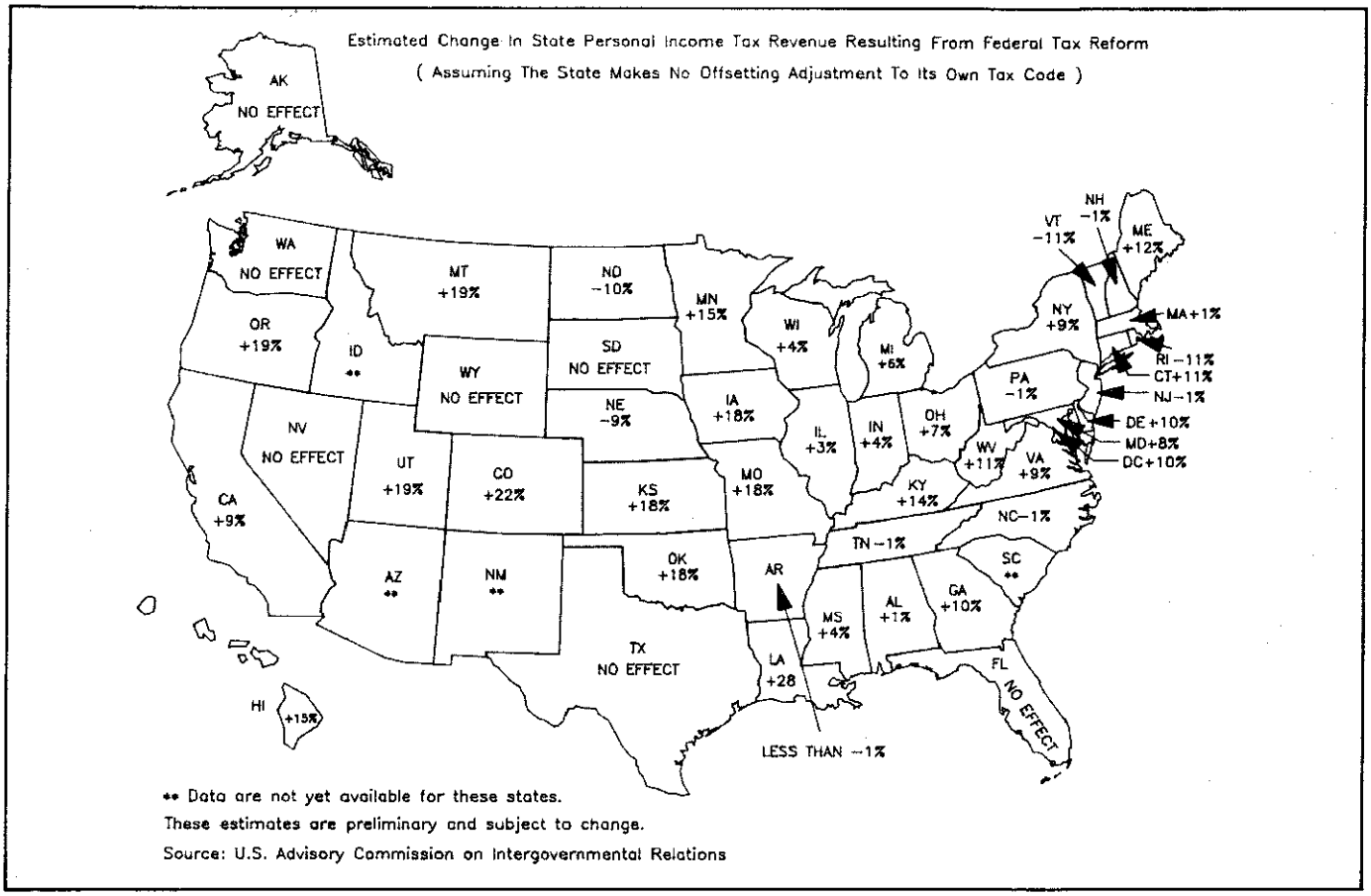
Delaware	10%					
Dist. of Col.	10%					
Georgia	10%					
California	9%					
New York	9%					
Virginia	9%					
Maryland	8%					
Ohio	7%					

** Data are not yet available for these states.

Note: These are preliminary estimates and subject to change.

Source: U.S. Advisory Commission on Intergovernmental Relations.



but make no offsetting adjustments in their state tax laws—either in marginal tax rebates or linkage structure. These assumptions are obviously not realistic, but were made to perform a comparative analysis of the potential impact of the new tax law on state income taxes. In reality, many states are likely to revamp their income tax structures in response to federal tax reform.

Behavioral responses to several provisions in the new tax law were incorporated in the model because certain provisions are likely to evoke significant behavioral reactions among taxpayers. If this was not done, the base-broadening impact of most of these provisions would be overstated.[3] The provisions for which behavioral assumptions have been simulated are: a) the taxation of capital gains as ordinary income; b) the restriction of the use of passive losses to offset income; and c) the repeal of the personal interest expense deduction. In addition, reduced marginal tax rates and a decline in federal income tax liability are expected to influence charitable contributions. The price and income effects associated with charitable donations also have been simulated. The behavioral assumptions employed in this study are generally comparable to those used by the U.S. Treasury and the Joint Committee on Taxation. Although there will be other behavioral responses associated with federal tax revision, such as changes in decisions to work and incentives to save, these second order effects have not been modelled because they are likely to take some time to evolve and are difficult to estimate.

Estimates of percent changes in state individual income tax liabilities under the *Tax Reform Act* relative to what they would be under pre-reform federal law are presented in the following table. To obtain these figures, state individual income tax liabilities were computed for each state based on both pre-reform federal income tax law and the *Tax Reform Act*. The results of this analysis suggest that the potential impact of the new tax legislation on state personal income tax liabilities would be quite diverse among the states. The preliminary estimates of changes in state income taxes range from an increase of 28% in Louisiana to a decline of 11% in Rhode Island and Vermont. In more than half the states, income taxes would rise. Since many of the federal base-broadening reforms affect individuals in the middle and upper income levels, the distributional impact of federal tax reform on state income taxes will be quite different as well. Many states, therefore, are likely to respond to federal tax reform by revising their own income tax codes.

Footnotes

[1]The data necessary for this study was provided to ACIR under contract with Policy Economics Group, a Washington, D.C. based research group, and was funded in part by the Ford Foundation. The construction of the data base and modelling of federal and state tax codes was performed by Policy Economics.

[2]The data base was constructed by merging tax return data from the 1981 Statistics of Income (SOI) file generated by the Internal Revenue Service with the 1981 Current Population Survey (CPS). The data base was updated using information from the most recent SOI file (1984) and extrapolated to 1986 levels based on the Administration's February 1985 forecasts of the national economy.

[3]The behavioral response associated with charitable contributions would increase the base.

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