

# PERSPECTIVE

## **Federalism — A Balancing Act**

### **Flattening Hierarchies in the American Federal System**

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### **The Spirit of Federalism: Restoring the Balance**

*John Sununu*

### **The Case for Restraint in Congress**

*Robert M. Isaac*

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*Pam Plumb*

### **Rebalancing the Federal Budget and The Federal System**

*Robert B. Hawkins, Jr.*

# A View from the Commission



Dear Reader:

Fifteen years ago, as we prepared for the Bicentennial period, I wrote an article that emphasized the problems of federalism in a society where bigness seemed to be everything and trends toward nationalization prevailed in virtually every sector of the polity. Two years later, the looming crisis to which that article pointed—the imperial presidency atop a Washington-oriented power pyramid—came to a head in the Watergate scandal and the events that accompanied it.

As it turned out, the political paralysis and subsequent resignation of Richard M. Nixon from the presidency was something of a turning point in American intergovernmental relations. With the White House unable to function, the task of resolving key policy issues in the wake of the oil crisis of 1973-1974 and the last days of the Vietnam War fell to the governors, who rose to the challenge and rediscovered that the states are polities and their chief executives could be, indeed should be, policymakers.

The mid-1970s brought widespread disillusionment with Washington and big government generally, reinforced by the apparent failure of many federal programs to deliver as promised. After the Ford interregnum, Jimmy Carter became the first governor elected president since Franklin Roosevelt. Carter's election was widely interpreted as a slap at Washington. Whatever the final judgment on his administration, he did set in motion certain revolutionary trends.

Carter was succeeded by another former governor, Ronald Reagan, who brought with him a well-articulated states' rights philosophy, which included practical steps to reduce the size, scope, and influence of the fed-

eral government. Here, too, the final verdict on his administration is far from being in. Nor was everything that he did supported by the federal system. Nevertheless, Reagan did recast the debate in such a way that the idea of the states as polities with rights once again became an acceptable position.

The Reagan administration also reduced the heavy hand of the federal government in intergovernmental policymaking and administration in myriad small ways, not only through budget cutting but also through a relaxation of federal administrative regulations and overall interference, and a deliberate effort to channel federal aid through the states. As we approach the end of the Reagan years, it is safe to say that the states as policymakers are stronger than they were eight years ago.

Even the Supreme Court of the United States periodically lessened its assault on federalism. This was true despite the *Garcia* decision, whose implications, or durability for that matter, are not entirely clear. Although the post-Warren court did not quite restore federalism as a central value, it does seem to be more of a value than it was under the Warren court.

Meanwhile, the reduction in federal aid, coupled with changing demographics, has weakened the formerly dominant big cities. The urban population is no longer simply decentralizing; it has become a noncentralized "rurban" population to match the noncentralized federal system, creating new modes of development and innovation, mostly in smaller jurisdictions.

These trends have combined with a new energy in the states to give the states the initiative in the American intergovernmental system. The culmination of a generation of institutional reform, a decade of paralysis in Washington, and new times in which the directions for solving new problems require a lot of definition and experimentation strengthen this movement toward state initiatives. Even the media have begun to recognize this new phenomenon and to pay attention to the states.

Indeed, the states are part of a general trend toward diffusion. Whereas economic concentration was still considered to be the hallmark of efficiency 15 years ago, today it is widely reported that most new jobs are created by small businesses. Many big firms are in deep crisis as they try to compete in the world market. Conglomerates have turned out to be inefficient, and problems of excess mass are widespread even among the more conventional industrial giants.

One reason for the new state energy is their sheer size and power as political entities. In 1987, the gross domestic product of California passed that of Great Britain, making California's economy the fifth largest in the world after the United States, Japan, West Germany, and France. While California had the largest state economy, 23 states were in the top 50 economies in the world. This was reflected in the states' expanded role in international economic affairs.

All told, the half-generation from 1973 to 1988 has featured the revival of the states, the reassertion of state powers within the federal system, the reawakening of the states as polities, and even, to no small extent, the refocusing of public attention on the states as the most energetic of American governments. This has not been a return to the "good old days" of dual federalism, however, because it has been accompanied by Supreme Court decisions that continue to challenge the constitutional position of the states, presidential initiatives that often support national business interests at the states' expense, and increasing congressional interference with the states' prerogatives in intergovernmental programs by assumptions of new rulemaking powers through statute to replace some of the administrative regulations reduced by the Reagan administration. Even so, the nation has taken a step in the right direction.

Daniel J. Elazar

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**Staff**

John Kincaid  
**Executive Director**

Joan A. Casey  
**Editor**

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## ACIR Staff Appointments Announced

John Kincaid has announced the appointments of Dr. Robert D. Ebel as director of Government Finance Research, and Dr. Bruce D. McDowell as acting director of Government Policy Research. Dr. Robert W. Rafuse, Jr., has joined the ACIR staff on detail from the U.S. Department of the Treasury.

Ebel, a former ACIR Scholar-in-Residence, was most recently the director of the Public Finance Program at The Urban Institute. He has served as congressional aide to U.S. Sen. Dave Durenberger, and was the executive director of both the Minnesota Tax Study Commission and the Washington, DC, Tax Revision Commission. Ebel has also been an economist in the Office of Policy Development and Research at the U.S. Department of Housing and Urban Development.

McDowell served on the ACIR staff from 1972 to 1985, first as a senior analyst in the Government Structures and Functions Division, and later as executive assistant to the Executive Director. From 1986 to 1988, he was director of Governmental Studies for the National Council on Public Works Improvement. His former positions include senior planner with the Maryland-National Capital Park Planning Commission, assistant director of regional planning for the Metropolitan Washington Council of Governments, and consultant to the Housing and Home Finance Agency (predecessor of HUD).

Rafuse will be developing the concept of the Representative Expenditure System for ACIR. The RES takes into account the differences in the cost of providing services among the states—e.g., states with younger populations have a greater demand for spending on education, and states with more poor people have a greater need for welfare spending—and seeks to de-

termine what state-by-state expenditures would be in various programmatic areas if each state provided the national average level of services. Rafuse is on detail from the U.S. Treasury where he is director of the Office of Regional Economics. He was Deputy Assistant Secretary (State and Local Finances) of Treasury from 1979 to 1987.

### ACIR Will Cosponsor Conference on Homelessness

ACIR has joined the Home Builders Institute and the National Association of Home Builders as a cosponsor of a national symposium, "Builders Examine the Many Faces of Homelessness: Laying a Foundation for Action." State Senator David E. Nething of North Dakota, a member of ACIR, will address a conference session on behalf of ACIR. Senator Nething will discuss ACIR's findings and recommendations on homelessness, which will be published in the next issue of *Intergovernmental Perspective*. In October, ACIR will publish a collection of papers presented at its own conference on homelessness.

A large group of national organizations, businesses, government agencies, and members of Congress is also cosponsoring the November meeting. For program and registration information, contact the Home Builders Institute, 1-800-368-5242, ext. 494 (in Washington, DC, 822-0494).

The symposium, to be held November 17-18 at the Washington Hilton Hotel, will focus on improving the number and quality of housing options for the homeless, and discuss workable program and policy solutions that can be implemented in local communities. In addition to workshops on various types of housing options, the symposium sessions will discuss the nature

and extent of the homeless problem, how individuals cope with homelessness, housing industry solutions, government and private initiatives, employment and training, and legal issues.

### ACIR-NCSL Meeting on Telecommunications

ACIR and the National Conference of State Legislatures will hold a conference on November 30 in Washington, DC, to address the array of complex regulatory and tax issues facing state legislatures as a result of the dramatic changes in the structure of the U.S. telecommunications industry. The program will include an overview of changes in the industry, economic development impacts, tax issues and alternative approaches, and a discussion of recent state experiences. For further information, contact Anita McPhaul at ACIR, (202) 653-5536.

### In Memoriam

ACIR was saddened to learn of the death of two former Commission members and distinguished public servants in September.

Robert E. Merriam served as ACIR chairman for eight years, from 1969 to 1978. A Chicago businessman, Merriam served as a city alderman and also held several senior posts in the Eisenhower Administration, including assistant to the President.

Price Daniel served on the Commission from 1967 to 1969 in two capacities, as a private citizen and as director of the Office of Emergency Preparedness in the Johnson Administration. A three-term governor of Texas, Daniel also served in the Texas House, was the state's attorney general, was elected to the U.S. Senate, and was a justice of the Texas Supreme Court.

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# Flattening Hierarchies in the American Federal System

Ronald Reagan

**I** hope that history will record that this former governor not only talked about the need to get the federal government off the backs of the states, but as President did, in fact, fight the use of federal grant-in-aid dollars first as bait, then as a club, and sought to return power and responsibility to the states, where they belong. And I am confident that history will also find that the states were up to the challenge, and that America entered a new era of democracy and had a new birth of freedom.

Many business people speak of the necessity to “flatten hierarchies.” Simply put, this means that company presidents listen to and work with the men and women on the shop floor, in the stores, and driving the trucks. Along these lines, scholars tell us that one of the great advantages entrepreneurial firms have over giant corporations is that they do this better.

Apparently, the most modern business consultant has rediscovered a wisdom known to our Founding Fathers—that the genius of America, whether in governing ourselves or in providing our daily bread, is in the ordinary man and woman. America’s strength and wisdom have never come from the power and cleverness of those on top, but from the strength and wisdom of the American people. And after years of skepticism, the wisdom of our founders is once more the accepted guide to practice in Washington.

In the last seven and a half years we have broken the federal government of its compulsion to control every breath the states take. Dozens of categorical grants have been consolidated into nine block grants, putting power that was once in the hands of federal agencies back into the hands of governors and state legislatures. Federal controls on the states have been loosened in other areas. Federal agencies are required to consult more often and in greater detail with state and local officials on issues dealing with federal grants and economic development aid to their areas. Uniform rules have been issued governing grants and cooperative agreements.

Too often in the past, when Washington listened to the states, it heard only what it wanted to hear. Today things are different. At the heart of this new era in American government is not the idea that the federal government will merely let the states toss ideas into a suggestion box, but that Washington will also honor the leadership role the states have to play. From education to transportation to helping America’s poor and homeless, the states have led. While Washington has been caught up in partisan intrigue, the states have gone out and done the job.

All this vitality in our states could not have come forth, of course, if our nation had remained stuck in the era of stagnation and inflation of a decade ago. State and local receipts have doubled in the last decade—dollar for dollar, a bigger climb than we had in federal revenues. Some of this was because, with our 1981 tax cuts, with tax reform in 1986, and by restraining some Washington eager beavers, we’ve broadened the tax base of the states and kept the federal government from preempting state revenue sources.

But more than that, our states—like our citizens—have known the blessings of the longest peacetime economic expansion on record. Since the recovery began, America has created more than 17 million jobs, and the percentage of the labor force employed this year is the highest, not only in the history of the United States, but in the peacetime history of the industrial world. At the same time, unemployment is at the lowest level in 14 years, and the income of the typical American family, after dropping almost 7 percent between 1977 and 1981, has soared nearly 10 percent in the last eight years.

Since 1982, U.S. manufacturing production has risen at a faster rate than Japan's. One authority on manufacturing said not long ago that we have become the most competitive manufacturing nation in the world. As a result, we are today exporting chopsticks and Hondas to Japan; highly processed, high tech sand to Egypt; and, all in all, more goods and services than ever before in our history.

As our nation's most effective sales men and women, governors have seen the result on overseas trade missions. From Japan to Germany, governors have persuaded international business to invest in America and create new jobs here and, in the process, have seen the respect and awe the American economy commands around the world.

But state governments see the sunshine of our expansion in other ways as well. Thanks to the strong rises in the financial markets since 1982, state and local pension funds, with few exceptions, have shared in the growth of America in these years. Since 1981, total assets in state and local government pension reserves have more than doubled.

Guiding the policies that have given America what one economic writer has called the "silent boom" is the wisdom that has guided federal-state relations in the past seven and a half years: flattening hierarchies, with less power for Washington, and more for the people. However you describe it, it has produced in America a blooming of entrepreneurship, investment, innovation, and opportunity unlike the world has ever seen.

Some say this blooming has gone hand-in-hand with a rise in greed. But every governor can point to just the opposite—to the record highs in charitable contributions; to the growing endowments of schools, universities, and museums. Yes, thanks to the silent boom and to a re-discovered initiative, state and local governments, together with private charities and churches, have done more for those in need than ever before.

Looking at all this, I can't help thinking that, while much of the 20th Century saw the rise of the federal government, the 21st Century will be the Century of the States. I've always believed that America is strongest and freest and happiest when it is truest to the wisdom of the Founders. In Federalist 45, James Madison wrote that, "The powers delegated by the . . . Constitution to the Federal Government, are few and defined. Those which are to remain in the State Government are numerous and indefinite." Or, to put it another way, "We the People." So long as we remember these words—"We the People"—and make them our guide, so long as we remember that America has always drawn its inspiration from the people and has always been governed best when governed by those governments closest to the people, America will remain strong and free, the envy of the world.

*This article is adapted from President Ronald Reagan's address to the Annual Meeting of the National Governors' Association on August 8, 1988, in Cincinnati, Ohio.*



## Significant Features of Fiscal Federalism 1988 Edition, Volume II

Contains completely revised and up-to-date information on federal, state, and local revenues and expenditures; public sector employment and earnings; and selected additional topics. For policymakers, analysts, researchers, educators, and all others interested in the intergovernmental fiscal system, *Significant Features* provides:

- historical and state-by-state data
- trends and regional comparisons
- expenditures by function
- constitutional and statutory restrictions on state and local spending and debt
- per-capita rankings on state-local revenue, expenditure, and debt

### Highlights

The federal debt has reached an all-time high in absolute dollars, but not as a percentage of GNP or per capita, inflation-adjusted dollars.

All governments are spending more than ever in absolute dollars and per capita, constant dollars, but not as a percentage of GNP.

The increase in the relative share of the federal budget devoted to Social Security and Medicare rose from 5% in 1954 to 27% in 1987. Conversely, national defense spending dropped from 59% in 1954 to 28% in 1987.

In 1978 the federal government provided 27% of all the money spent by state and local governments. This figure is projected to drop to 17% for 1988.

The overall trend in government employment has been downward for the last ten years. Local governments have the largest number of employees by a wide margin: 9.7 million as against 4.1 million for the states and 3.0 million (civilian) for the federal government.

*Significant Features-Volume II* for 1988 contains 58 tables on revenues and expenditures and 14 tables of state rankings and a subject index to Volumes I and II.

M-155 II	152 pages	\$10
M-155	128 pages	\$10
Both Volumes		\$15

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# The Spirit of Federalism: Restoring the Balance

John Sununu

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

*Amendment X,  
Constitution of the United States*

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

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

The *Garcia* decision ignored state authority and effectively rescinded the constitutionally mandated division of

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

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

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

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

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

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

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

Some problems require national action, and in other cases states do not have the fiscal resources to act on their own. The challenge is to assure that each level of government retains the freedom and authority it needs to carry out its own responsibilities well, without unnecessary lim-

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its and constraints. Retaining the vital balance presents a serious constitutional challenge that must be addressed directly and openly.

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

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

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

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

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

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

Under this approach, two-thirds of the states could pass memorials that seek the addition of a specific constitutional amendment. Unlike the petitions for a constitutional convention that must be served on the Congress, these memorials would be filed with every state. When the necessary 34 states is reached, the proposing states would appoint representatives to a Committee on Style to reconcile the details of the language of the various memorials.

When a majority of the states represented on the Committee on Style approve the proposed amendment, it would be submitted to the Congress. A two-thirds vote by both houses within the next congressional session would be necessary to stop the amendment from going back to the states for ratification. If the Congress did not vote by two-thirds to stop the amendment, it would be submitted to the states for ratification by the required three-fourths. This reasonable, measured approach can restore the balance of power without any radical alteration of the structure, process, or specific responsibilities exercised today. It would, however, return a parity to the system of review and redress.

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

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

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

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

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

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

*Governor John Sununu of New Hampshire is the immediate past chairman of the National Governors' Association, and is vice chairman of ACIR. This article is adapted from NGA's August 1988 publication Restoring the Balance: State Leadership for America's Future.*



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# The Case for Restraint in Congress

Robert M. Isaac

**T**he eyes in the audience glaze over when I tell them I am going to discuss federalism as it exists today. How can I possibly convey the seriousness of the problem, the extent of the intergovernmental imbalance, and the emptiness of the Tenth Amendment protection for the states?

I often include in speeches to groups of constituents a statement to the effect that Congress ordered the City of Colorado Springs to hire 18 additional fire fighters in 1986, and that they, the local taxpayers, were required to pay for them. My audiences have found it difficult to understand how Congress' authority to do this stems from a constitutional provision enabling Congress to make all laws necessary and proper for carrying into execution the "power to regulate commerce with foreign nations and among the several states and with the Indian tribes." I then explain that the law in question is the *Fair Labor Standards Act*, which has been applied to state and local government employees with the blessing of the United States Supreme

Court in the 1985 case of *Garcia v. San Antonio Metropolitan Transit Authority*.

I then quote the following statement of Chief Justice Charles Evans Hughes from the case of *A.L.A. Schechter Poultry Corp. et al. v. United States*, decided in 1935:

If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect on interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government.

The prophetic nature of that statement is best illustrated by the *Garcia* opinion, and was highlighted in Justice Sandra Day O'Connor's dissent, in which she states:

The central issue of federalism, of course, is whether any realm is left open to the states by the Constitution . . . whether any area remains in which a state may act free of federal interference.

Apparently, there are no such areas today.

In my opinion, the continuing erosion of the original design of the Constitution poses a threat to our freedom and our basic form of government. Congressional action and court interpretations seem far more concerned that the end is achieved than that the means are appropriate. It is ironic that we found the Supreme Court freeing Congress from any restraint in its actions with regard to states just as we approached the 200th anniversary of the Constitution, a document which envisioned the relationship between the federal government and the states to be one characterized by a distinct limitation of the federal power. The framers of the constitution, and the people, consented to be governed in a certain way. They feared too much power in a strong central government, and thus they specified and limited the delegation of power to the federal government, reserving to the states or to the people all power not delegated.

Granted, times have changed, but I truly believe that judicial permissiveness toward the federal government has totally changed the intergovernmental relationships envisioned by the framers and included in the constitution. Chief Justice Roger B. Taney issued a warning, which I believe has been ignored, when he said, "If we are at liberty to give old words new meaning . . . there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."

At first I thought that the *Garcia* decision, together with Congress' penchant for applying conditions to the spending power (whether or not the conditions were related to the purpose of the act in question), and the use of the supremacy clause (even in areas in which the federal law did not conflict with state and local law), had clearly placed all power in the central government and that no more damage could be done. I was wrong. Adding to the annoyance of the federal government setting drinking ages, speed limits, and retirement ages, we must now cope with the 1988 decision in *South Carolina v. Baker*. In that case, the court upheld Section 310(b)(1) of the *Tax Equity*

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and Fiscal Responsibility Act of 1982 (TEFRA), which removed the federal tax exemption for interest earned on publicly offered long-term bonds issued by state and local governments unless those bonds were issued in registered form. Not content with a ruling on the issue in question, the court took the opportunity to overrule the 1895 case of *Pollock v. Farmers' Loan and Trust Company*. Thus, the court eliminated the long-standing rule that had invalidated federal taxation of interest derived from state and local bonds.

Now, in addition to the commerce power, the spending power and the supremacy clause, the Congress is free to deny tax-exempt status to state and local bonds or to condition tax exemption on policy conditions that strike the Congress' fancy at any particular time. Tax exemption for general obligation bond interest, for example, could be conditioned on conforming the project to Davis-Bacon prevailing wage requirements. Arbitration and collective bargaining could be mandated directly, pursuant to the *Garcia* decision, or made conditions of individual projects funded by state and local bonds in order to qualify for tax-exempt treatment. Such conditions could increase the cost so as to eliminate the benefit of tax-exempt financing altogether, or simply force state and local governments to accept intrusive and expensive conditions out of necessity in light of the massive infrastructure requirements of state and local governments.

The Federal Tax Code has been used as a vehicle to carry out federal policy for many years, but to set that policy through conditions of tax-exempt treatment for state and local projects where debt service is to be paid solely by state and local taxpayers would, in my opinion, be outrageous. But, there I go, speculating about dire consequences that may not occur, parading the "horribles" after being told not to worry. Chairman Dan Rostenkowski of the House Ways and Means Committee, in a statement released on April 20, commented that it has been the presumption of Congress for the past 20 years that the matter of federal tax treatment of state and local government bonds was a matter of statutory law and not one involving constitutional principle. To calm our fears, I suppose, he states, "There is no reason to believe that today's court decision will either prompt or deter future Congressional action." Further soothing comments came from Sen. Lloyd Bentsen on the same day when he stated, "The fact is, the tax exemption for general obligation bonds is extremely popular in the Congress." And then on June 30, Rep. Larry Combest submitted a resolution to the House Ways and Means Committee, which resolved that "it is the sense of the House of Representatives that federal laws regarding the taxation of state and local government bonds should not be changed in order to increase federal revenues." In light of all the assurances, why do state and local leaders feel uneasy?

I believe our insecurity is justified and well founded. I am convinced that the budget deficit will continue to reign over any federalism principles because Congress and the Administration are unwilling politically to take on the tremendous outlays in the form of entitlements to individuals not based in need, and since defense expenditures, entitlements, and interest on the debt now absorb nearly all of the projected revenues. The Congress will, I believe,

continue to seek ways to cut expenditures where the constituencies are the smallest and the weakest, and avoid forgoing revenue by tinkering with the tax code so as to increase revenue at the expense of state and local governments. Unfortunately, tax exemption for federal obligations is viewed by many in Congress as a necessary and appropriate method of financing federal needs, whereas state and local obligations are seen from the point of view that the investor is receiving an unfair break. Thus, the loophole must be eliminated.

House Ways and Means Committee member Bob Matsui recently expressed concern that the federal government will be looking seriously at municipal bonds as a means of meeting the Gramm-Rudman-Hollings targets next year. He indicated further that unless state and local public officials mounted a concerted campaign, further bond restrictions were a certainty next year.

In the face of expanded use of the spending power, the unrestrained use of the supremacy clause, and the unlimited power of the Congress under the commerce clause, we have been told that Congress will restrain itself. We are also advised to use our substantial lobbying power in the political process in the event that the Congress does not exercise that restraint, so that we might, I suppose, as James Madison suggested, "by the election of more faithful representatives, annul the acts of the usurpers." Justice William Brennan noted in the South Carolina decision that there was no evidence that the state had been denied participation in the national political process or "singled out in a way that left it politically isolated and powerless." It makes me wonder if that is true when one observes that the meetings of the House Ways and Means Committee on the *Tax Reform Act of 1986* were closed, and the fact that state and local governments are not members of PACs, and that nearly 50 percent of the federal budget expenditures are directed to individuals, most of whom are organized into large lobbying groups. Unfortunately, some in the Congress view any organization representing state and local governments as just another interest group.

In view of the foregoing, and in speculating on what may be in store regarding states' rights as a result of past congressional and judicial action, the words of Justice Robert H. Jackson in *Youngstown Co. v. Sawyer*, the 1952 steel plant takeover case, may give us a clue. He saw in the government's plea for a resulting power to deal with a crisis or an emergency according to the necessities of the case the unarticulated assumption to the effect that "necessity knows no law." In the minds of some, the budget deficit may well have reached crisis proportions, creating a sense of necessity, even urgency, to foster legislation without regard to any federalism principle. As for the opinions of judges, he states that they "often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote. . . ." The tendency is strong, he said, "to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our republic."

*Robert M. Isaac is mayor of Colorado Springs, Colorado, and a member of ACIR.*

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# Federalism— Can We Pull Together?

Pam Plumb

**M**any analogies have been used to describe the structure of American federalism. Since the City of Portland, Maine, where I serve as a city councilor, is famed for its seafaring heritage, I propose using the analogy of a rope, such as that employed to lift a heavy sail or to pull a heavy load.

The three strands of the rope are federal, state, and local government. In such a rope each strand is itself composed of smaller strands, which may be conceptualized as the individual units of government or in the case of the federal government as its major branches and agencies. Together the strands support each other and provide the aggregate strength to bear the load. While each of the major strands is identifiable, all the strands are interrelated and interwoven. This is an apt description of the highly interdependent governmental arrangements which have evolved in the United States to deal with the increasingly complex bundle of public policy challenges that confront us as a nation.

The United States has achieved great things in 200 years of federal organization, but great challenges remain. We are well advised as a nation to equip ourselves with the best organizational “rope” possible to meet these challenges.

Just as a rope is weakened and made less capable if one of its strands is thinner, shorter, or severed, so too, the American system of government is not as capable if some of its constituent units are weakened or overloaded. I believe that our system of federalism is currently weakened by an overcentralization in which the federal strand is assuming too great an importance and shifting too much of the load to the state and local strands.

Two concurrent processes are contributing to this accelerating trend. First, the federal government is increasingly mandating more requirements on state and local governments and not providing the resources to achieve these nationally determined priorities. Second, federal court decisions and federal legislation as well as regulatory and administrative actions are taking away tools which have been traditionally employed by state and local governments to meet service needs. Thus, we see a heavier load placed on state and local governments and at the same time a trend toward eliminating the tools required to help pull the increased load.

Cities are not mentioned in the U. S. Constitution; thus the position of cities in relation to the federal and state governments has to be found in the sphere of laws, politics and state constitutions.

Why aren't cities in the Constitution?

The omission of cities and other local governments grows out of the period in which the Constitution was drafted—when our forefathers did not foresee extensive involvement of the federal government in local affairs. Events since that time have forged direct federal-local relationships not imagined by the drafters of the Constitution. Along with the more traditional federal-state and state-local relationships, this federal-local relationship is an important element in the operation of our system of governance.

Some of the other shifts which account for the absence of city governments from the Constitution, but which argue for an important city role today, would include:

1. The shift from a predominantly agrarian to a predominantly nonagrarian society;
2. The shift from an expectation of self-sufficiency to a recognition of societal interdependence;
3. The shift from the city governments of the 1780s offering a limited array of services to the cities of today providing a wide range of services.

Recent Supreme Court cases have made strong declarations that the federal government has the constitutional authority to regulate cities and states with great specificity. Just because constitutional permission has been granted

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for such broad regulation does not mean that it is good public policy.

I believe that dynamic cities, counties, and states as well as the federal government are required to ensure a vital and adaptable governmental system. This is political imperative, not a clause or an article drawn from the U.S. Constitution.

Revitalized communication is critical to counter the current deterioration in intergovernmental relationships. Tension is inevitable in this process, but as in a good rope the right degree of tension in the right directions is essential to the strength of the line.

The Advisory Commission on Intergovernmental Relations and the similar state-level organizations serve as important components of a communications strategy, but more is required. I suggest the following as beginning steps to provide additional voices for the interests of cities and the citizens they serve:

1. Improvements to the federal fiscal note process.
2. Creation of a Council of Municipal Advisors.
3. Encouraging restraint by the Administration and the Congress.

**1. Improvements to the current fiscal note process provided for by federal law.** Under this process, estimates of the costs to be imposed on state and local governments are required to be attached to all federal legislation. These estimates of the cost impacts of federal legislation are currently provided at the time of floor consideration in each house and frequently not far in advance of a vote. To be most useful, such cost estimates should be delivered prior to congressional subcommittee consideration of legislation, and revisions should be made to such estimates at the point that major amendments are made to the proposals.

**2. Creation of a Council of Municipal Advisors within the Executive Office of the President to review the impact of all proposed regulations and legislation prior to its implementation.** Both presidential candidates have committed in writing to establishing communications channels with municipal officials. Vice President George Bush has indicated that one mechanism he would use is establishment of a Presidential Task Force on Urban Affairs, with membership primarily from the ranks of municipal officials. Governor Michael Dukakis has indicated that he would establish a federal counterpart to the Local Government Advisory Committee in Massachusetts. These forums, if convened on a systematic basis, would be valuable in the attempt to maintain a continuing dialogue on matters of mutual concern.

**3. Encouraging restraint on the part of the Administration and Congress in their enactment of new duties to be imposed on state and local governments without providing funding or access to funding sources.** To achieve this purpose, municipal, state, and county officials will

have to take up the challenge issued by the Supreme Court to be more political as they approach the Congress and Administration with problems and challenges. At the same time Congress and the Administration would be well served to consider more often the impacts their actions are having on state and local government capacity.

Just as better use of the fiscal notes process by Congress is needed, so the Administration should be more vigorous in performing the analyses of impacts of federal actions on state and local governments called for in the Executive Order on Federalism issued in October 1987.

The American system of government remains vital and capable of adaptation, but increased mandates, federal restrictions on revenue and borrowing powers, and declining levels of fiscal assistance threaten to make America's governments less able to deal with continuing change in society. There are many legislative, constitutional, and political changes which are being proposed to alter these trends. In order to begin evaluating these changes, we must find ways to encourage and assure a reinvigorated, informed and continuing discussion between all levels of government.

While some would argue that recent federal actions have pushed state and local governments to the end of the federalist rope, I believe that we have no real choice but to grasp the rope where we are and begin searching for ways to pull together more cooperatively. These efforts will expose the tensions that exist in the current arrangements. However, if the tasks are approached with goodwill and mutual respect, our efforts will yield the better governmental systems and results which our citizens deserve.

*Pam Plumb, a city councilor in Portland, Maine, is president of the National League of Cities.*

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# Rebalancing the Federal Budget and the Federal System

Robert B. Hawkins, Jr.

**T**he Advisory Commission on Intergovernmental Relations has endorsed federal deficit reduction, in part because the federal debt affects policymaking in ways that harm our federal system. The ACIR believes, moreover, that the federal government should draw on state experiences in fashioning tools to discipline its fiscal behavior. The states have long had a good record of fiscal discipline—buttressed by constitutional and/or statutory requirements for a balanced budget, debt limits, and tax and expenditure limits. Furthermore, while federal debt is incurred for current operating expenses, state and local debt is incurred mainly for capital projects, which benefit present and future taxpayers who will share the costs of these benefits.

While recognizing differences in the fiscal circumstances of the national and state governments, in *Fiscal Discipline in the Federal System: National Reform and the Experience of the States*, the ACIR has recommended that: (1) the Congress consider proposing a balanced budget amendment to the U.S. Constitution; (2) the Congress and the President consider adopting a biennial budget, a capi-

tal budget, rules of germaneness for all bills, and taxing and spending limits; and (3) the President be given a line-item veto of appropriations voted by the Congress, subject to an appropriate override by the Congress.

## Balancing the Federal Budget and the Federal System

The Commission is very concerned that a rebalancing of the federal budget be accompanied by a rebalancing of power in the federal system. There is a budget deficit and a power surplus on the national side of the federal equation. The federal budget is out of balance in part because the federal system is out of balance. The federal government has used its spending powers, among others, not only to strengthen national defense and public welfare, but also to invade traditional domains of state and local authority, and to impose requirements on states and localities. Unless the imbalance of power is redressed, federal deficit reduction may simply shift costs to state and local taxpayers, and compel state and local officials to make the hard political and fiscal choices that should be made by the elected federal officials who created the budget crisis.

Deficit spending and surplus power allow federal officials to create rules and programs without having to ask the voters for a tax increase. Deficit spending shifts costs to future generations, and surplus power shifts costs to state and local governments. If deficit spending is curtailed or eliminated, then federal officials may use their power simply to require state and local implementation of, and payment for, federal policies. Elected federal officials would be able to claim credit for policies that work, while hiding behind state and local officials who would bear the onus of asking voters to pay for federal policies, good and bad.

Based on its research on restoring the constitutional balance in the federal system, the ACIR has concluded that present trends already “indicate a basic and growing imbalance between the fiscal side and the regulatory side of federalism. Federal regulation of state and local governments is outpacing federal financial support.”

For several decades, federal aid to states and localities was increased in partial compensation for the growing imbalance of power. In effect, the federal government purchased power from state and local governments. Federal grants to state and local governments grew from 4.7 percent of all federal spending in 1955 to 17 percent by 1978. Similarly, federal grants represented 10.2 percent of state and local spending in 1955, but climbed to 26.5 percent by 1978. Since then, however, federal aid has been dropping—to an estimated 10.9 percent of federal outlays and 17.1 percent of state-local outlays in 1989, according to the 1988 edition of *Significant Features of Fiscal Federalism*. The federal government now has the lion’s share of power, but not the money to pay for the use of all that power. Increasingly, state and local governments are getting stuck with the bill.

A further decline in federal aid will be a problem for fiscally distressed state and local governments, but not the key problem for states and localities as a whole. The key issue is whether state and local governments will have enough authority to cope with federal deficit reductions in ways that best suit their needs and citizens. Increased federal regulation, restrictions on state and local authority, unfunded mandates, preemption, and invasions of state

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and local revenue sources to balance the federal budget will only place state and local governments in the same predicament as the federal government now finds itself. The federal government cannot expect states and localities to pick up costs while also hampering or invading their revenue-raising abilities and policymaking authority.

Federal deficit spending has been like a pressure valve, allowing steam to escape from the fiscal system. If deficit reduction closes that valve, then pressure will build up in the federal fiscal system. If costs continue to shift to state and local governments, then those governments will be pushed ever more tightly against the legal tax, debt, and expenditure limits desired by their citizens, causing political conflict and possibly damage to long-standing tools of fiscal discipline. States and localities must, therefore, have greater policymaking authority in order to accommodate and reduce fiscal pressures within limits of their own choosing.

### Allowing States to Opt Out of Unfunded Mandates

Along these lines, in 1984 in *Regulatory Federalism: Policy, Process, Impact and Reform*, ACIR recommended "full federal reimbursement to state and local governments for all additional direct expenses legitimately incurred in implementing new federal statutory mandates, including costs imposed by federal direct order mandates, crosscutting requirements, partial preemptions and provisions enforced by crossover sanctions." The ACIR also recommended "that the legislation establishing such a system specify that no state or local government be obligated to carry out a federal statutory mandate that does not fulfill this requirement." These recommendations must be an integral part of any serious deficit reduction plan if we are to maintain our federal system.

### Reducing Federal Aid in Accord with Federalist Principles

In *The Federal Role in the Federal System: The Dynamics of Growth*, the Commission also recommended that a number of grant-in-aid programs be reduced through termination, phase-out, and consolidation. Specifically, the

most likely candidates for consolidation should be those which are, or could be made, (a) closely related in terms of the functional area covered; (b) similar or identical with regard to their program objectives; and (c) linked to the same type(s) of recipient governmental jurisdictions. The primary candidates for termination and phase-out should include: (a) the approximately 420 small federal categorical grant programs, which account for only 10 percent of all grant funds; (b) programs in functional fields in which federal aid amounts to approximately 10 percent or less of the combined state and local outlays, including federal aid; (c) programs which do not embody essential and statutorily clearly stated national objectives, or which are too small to address significantly the need to which they relate; (d) programs, especially small ones, which have high administrative costs relative to the federal financial contribution; (e) programs which obtain, or could obtain, most of their funding from state and/or local govern-

ments, or fees for service, or which could be shifted to the private sector.

### Devolving Some Federal Programs

In its report on *Devolving Selected Federal-Aid Highway Programs and Bases*, the Commission has also concluded that turnbacks (simultaneous repeal of federal aid programs and relinquishment of federal tax bases) are a promising way to achieve greater political decentralization. The Commission has recommended devolution of non-Interstate federal-aid highway programs, for example, and believes that turnback legislation should be based on the following principles:

- An adequate transition period to allow state and local governments to adjust to the new environment of increased political decentralization.
- An adequate pass-through of state funds to local governments during the transition period to minimize fiscal dislocation and uncertainty as local governments adjust to the new environment of political decentralization.
- A mechanism during the transition period to facilitate any state legislative or constitutional changes necessary to adjust the political and fiscal relationship between states and their local governments, such as adjustments in local financial aid and changes in laws affecting local taxing authority. (*Devolving Federal Program Responsibilities and Revenue Sources to State and Local Governments.*)

### Restoring Constitutional Balance in the Federal System

Growing concern about the expansion of federal power relative to the states, and consternation over such recent U.S. Supreme Court decisions as *Garcia v. San Antonio Metropolitan Transit Authority* (1985) and *South Carolina v. Baker* (1988) prompted the ACIR in 1988 to recommend that the states form a commission on constitutional revision, and that the Congress and the states amend the U.S. Constitution to remove the prospect of a "runaway" convention as an obstacle to state-initiated amendment proposals. These recommendations reflect the Commission's view of the gravity of the situation for federalism today.

### Conclusion

Restoring balance in the federal budget and balance in the federal system must proceed in concert and with all deliberate speed. State and local governments must bear a fair share of the burden of deficit reduction, but must not become convenient receptacles for the costs of responsibilities shed by the federal government. If the federal government expects state and local governments to share the costs of deficit reduction, then the federal government must also share power with the nation's 50 states and 83,166 local governments.

*Robert B. Hawkins, Jr., is chairman of the ACIR. This article is based on a statement to the National Economic Commission.*

# ACIR MICROCOMPUTER DISKETTE SERIES

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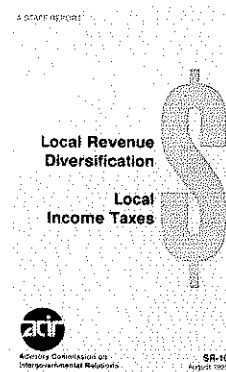
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August 1988 SR-10 52 pages \$5.00

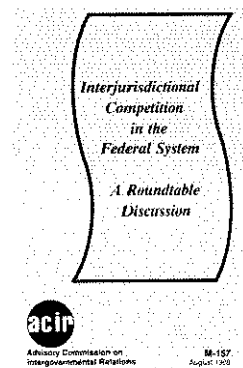
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## State Bank Taxation and the Rise of Interstate Banking: A Survey of States

John Kincaid and Sandra B. McCray

Tremendous changes are occurring in the U.S. banking system. One of the changes has been the rise of interstate banking. Bank holding companies and banks are branching out into other states by (1) locating subsidiary banks throughout the nation and (2) soliciting deposits and offering loans to customers across the country by mail and through electronic means in a form of "branchless banking." A person living at one end of the country can now do most or all banking through mail and electronic transfers with a bank located at the other end of the country. Increasingly, in fact, citizens do business, directly and indirectly, with many banks, both in state and out of state.

Interstate banking poses a number of tax and regulatory challenges to the states. Forty-six states have enacted interstate banking laws as a first response to these challenges (see Table 1). The ACIR has been conducting research on state taxation and regulation of banks and will issue its first report, entitled *State Regulation of Banks in an Era of Deregulation*, in October 1988. The second phase of

the research involves an examination of the principal issues and options in state taxation of banks.

The challenges faced by states include: (1) the adoption of jurisdiction rules that create tax parity between domiciliary banks (i.e., banks that are chartered by or are headquartered in one's own state); and nondomiciliary banks (i.e., banks that are chartered by or are headquartered in another state but conduct business in one's own state) and (2) the search for an apportionment formula for taxation that reflects how and where multistate banks earn income.

Basically, the spread of interstate banking poses three tax problems for the states: (1) the in-state activities of nondomiciliary banks may escape taxation, thus putting domiciliary banks at a competitive disadvantage, (2) state taxation of nondomiciliary branchless banks may result in double taxation, thus putting out-of-state banks at a competitive disadvantage, and (3) the use of differing and conflicting formulas by states to apportion bank income can create administrative burdens and overlapping taxation. Accordingly, interstate banking is causing states to reexamine their bank taxes and, in some cases, to experiment with new tax formulas. New York and Minnesota, for example, recently enacted changes in their bank tax laws.

The ACIR has undertaken a study of state taxation of banks in order to examine the issues involved in the taxation of interstate banking and the options available to states. One element of this research was a survey of existing state tax practices, the summary results of which are reported here.

In April 1988 a questionnaire was mailed to bank-tax administrators in all 50 states and the District of Columbia. A follow-up mailing was made to states that did not respond to the first mailing. This survey was conducted jointly with the Federation of Tax Administrators, which FTA provided close cooperation and valuable support, especially in handling the mailings of the questionnaire. Usable responses were received from 49 states plus the District of Columbia.

### State Taxes Levied on Banks

The most widely used bank tax is a franchise tax, levied by 69 percent of the responding states and the District of Columbia. The popularity of the franchise tax is due largely to two factors.

First, a franchise tax has significant revenue advantages for states. According to federal law, states cannot include the value of or income from federal obligations in their tax base unless they adopt a "nondiscriminatory franchise or other nonproperty tax." Because federal obligations ordinarily comprise a large fraction of a bank's assets and income, failure to use a franchise tax for banks can be costly for states.

Table 1  
State Interstate Banking Laws and Effective Dates

Nationwide <sup>1</sup>	Regional <sup>2</sup> Reciprocity Required/ Trigger to Nationwide	Regional <sup>3</sup> Reciprocity Required	States without Interstate Banking
Alaska 7/82	California 7/87	Alabama 7/87	Hawaii
Arizona 10/86 <sup>6</sup>	Colorado 7/88 <sup>6</sup> <sup>8</sup>	Arkansas 1/89 <sup>9</sup>	Iowa
Idaho 1/88	Delaware 1/88	Connecticut 6/83 <sup>5</sup>	Kansas
Kentucky 1/86 <sup>4</sup>	Illinois 7/86	District of Columbia 11/85	Montana
Maine 1/78 <sup>5</sup>	Indiana 1/87	Florida 7/85	North Dakota
New Jersey 1/88 <sup>4</sup> <sup>5</sup>	Louisiana 7/87 <sup>10</sup>	Georgia 7/85	
New Mexico 1/90 <sup>6</sup>	Michigan 1/86 <sup>5</sup>	Maryland 7/85	
New York 6/82 <sup>4</sup> <sup>5</sup>	Nebraska 1/90	Massachusetts 7/83 <sup>5</sup>	
Oklahoma 7/87	Nevada 7/85 <sup>6</sup> <sup>8</sup>	Minnesota 7/86	
Rhode Island 1/88 <sup>4</sup> <sup>5</sup>	Ohio 10/85 <sup>5</sup>	Mississippi 7/88	
South Dakota 2/88 <sup>4</sup> <sup>5</sup>	Oregon 7/86 <sup>7</sup>	Missouri 8/86	
Texas 1/87 <sup>6</sup>	Pennsylvania 8/86 <sup>5</sup>	New Hampshire 9/87 <sup>5</sup>	
Utah 1/88	Vermont 1/88 <sup>5</sup>	North Carolina 1/85	
Washington 7/87 <sup>4</sup>		South Carolina 7/86	
West Virginia 1/88		Tennessee 7/85	
Wyoming 5/87		Virginia 7/85	
		Wisconsin 1/87	

Source: Conference of State Bank Supervisors, August 1988.

<sup>1</sup>Any out-of-state bank holding company can acquire an existing and/or new (de novo) host-state bank.

<sup>2</sup>An out-of-state bank holding company can acquire a host-state bank only if (1) the principal place of business of the holding company is in one of the states named in the host state's statute, and (2) the other state accords equivalent reciprocal privileges to the banks of the host state. After a certain date, set forth in the statute, any out-of-state bank holding company can acquire an existing and/or new (de novo) host-state bank.

<sup>3</sup>An out-of-state bank holding company can acquire a host-state bank only if (1) the principal place of business of the holding company is in one of the states named in the host state's statute, and (2) the other state accords equivalent reciprocal privileges to the banks of the host state.

<sup>4</sup>Reciprocity requirement.

<sup>5</sup>De novo entry permitted.

<sup>6</sup>De novo entry permitted after specified time period—Arizona (6/30/92), Colorado (7/1/93), Nevada (7/1/90), New Mexico (7/1/92), and Texas (9/1/2001).

<sup>7</sup>Oregon law has no reciprocity requirement.

<sup>8</sup>States which drop reciprocity requirement after trigger—Colorado and Nevada.

<sup>9</sup>Effective date 1/89, unless determined otherwise according to statutory specifications.

<sup>10</sup>After 7/1/94, an out-of-state bank holding company may open any new bank or acquire a nonestablished LA bank if the acquirer has an established LA bank.

Second, the use of a franchise tax for banks tends to increase the neutrality and fairness of a state's tax system. States that choose a direct net income tax for banks, for example, must exempt the value of and/or income from federal obligations from their bank tax base. This exemption can cover from 10 to 60 percent of a bank's income. By contrast, federal obligations typically constitute an insignificant percentage of the assets and income of nonbank corporations. Therefore, unless states offer a comparable reduction in the tax base of competing nonbank institutions, the use of a direct net income tax will generally favor banks over nonbank corporations.

Of the 35 states that reported using the franchise tax, 20 states (61 percent) measure the tax by a bank's net income. In addition to, or instead of, a franchise tax, 19 of the responding states (38 percent) levy a direct net income tax,

7 (14 percent) impose a bank shares tax, 4 (8 percent) levy a gross receipts tax, and 6 (12 percent) impose another type of tax on banks. Judicial interpretations of the U.S. Constitution probably account for the use of a direct net income tax alone or in conjunction with a franchise tax. According to its interpretations of the commerce clause in the early part of this century, the U.S. Supreme Court ruled that states could not tax businesses operating in interstate commerce by means of a franchise tax, but they could do so with an apportioned direct net income tax. The court's rulings led many states to adopt either a straight, direct, net income tax or a system by which the in-state business of banks was subject to a franchise tax while their interstate business was subject to a direct net income tax.

Interestingly, there are regional differences in bank tax practices. Fully 81 percent of the responding states in

the South, 73 percent in the Northeast, and 70 percent in the Midwest levy a franchise tax as opposed to only 42 percent of the states in the West.<sup>1</sup> In contrast, 54 percent of the responding states in the West and 41 percent in the South levy a net income tax, as opposed to only 22 percent of the states in the Northeast and 18 percent of the states in the Midwest. No northeastern state reported using a gross receipts tax, although this tax is used by one midwestern, one southern, and two western states. None of the responding states in the West reported using a bank shares tax, which is levied by 33 percent of the eastern states, 9 percent of the midwestern states, and 18 percent of the southern states. Although these percentages do not directly reveal it, the total number of states using a bank shares tax has been dwindling in recent years.

The bank shares tax was more widely used prior to 1983 because an 1864 federal law restricted state taxation of national banks to a real property and/or bank shares tax. The 1983 Supreme Court decision in *American Bank & Trust Co. v. Dallas County*, however, hastened the demise of the bank shares tax by severely limiting its revenue-raising capability. In its ruling, the court struck down a Texas bank shares tax because the tax, which the court found to be a property tax, included the value of federal obligations in its base in violation of federal statutory law. Currently, only seven states use a bank shares tax, and at least two of those states are reviewing that tax for possible changes.

Another finding from the survey is that in taxing banks, 32 states (64 percent) include the value of, or income from, state obligations (e.g., bonds), and 25 states (50 percent) include the value of, or income from, federal obligations. Federal law prohibits a state from including the value of, or income from, federal obligations in the measure of its tax unless it uses a *nondiscriminatory* franchise (or other nonproperty) tax. A state franchise tax is deemed discriminatory and in violation of federal law if it includes the value of or income from federal obligations in the base while exempting the value of or income from its own state or municipal obligations. Thus, every state that taxes federal obligations must also tax its own state obligations. Because states are usually loathe to tax the obligations of their own government while exempting those of the federal government, the federal law has the effect of creating a partial tax parity among state and federal obligations. No federal statute or judicial decision prohibits a state from taxing the income from the obligations of other states while exempting the income from its own obligations, how-

<sup>1</sup>Regions were defined in accordance with official Census categories: Northeast—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania; Midwest—Ohio, Indiana, Illinois, Michigan, Wisconsin, Iowa, Missouri, Nebraska, Kansas, Minnesota, North Dakota, and South Dakota; South—Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Texas, Oklahoma, and Louisiana; West—Montana, Wyoming, Colorado, Utah, Idaho, Arizona, Nevada, New Mexico, California, Oregon, Washington, Alaska, and Hawaii.

ever. This fact apparently accounts for the finding that more states tax state obligations than tax federal obligations; the state obligations being taxed are those of other states.

### **Banks Versus Other Firms**

Twenty-seven of the responding states (54 percent) do not tax banks in the same manner as they tax general (non-financial) business corporations. The remaining 23 states (46 percent) do tax general business corporations in the same manner as banks. The use of an industry-specific bank tax by most states appears to be the result of two historical forces. First, until 1976, federal law restricted the methods by which states could tax national banks. Second, until the 1980s, most banks occupied a narrow niche in the business of financial intermediation. The business of banking was confined to soliciting deposits and making short-term commercial and consumer loans. Today, however, federal law provides that states are free to tax banks in any manner they choose, as long as the tax does not discriminate against national banks. Also, banks now engage in a wider variety of business activities, such as securities, insurance and real estate, thus competing directly with non-bank entities in these areas. The number of states that question the continued use of an industry-specific bank tax in this new competitive environment may well increase in the near future.

Again there are regional differences. Fully 77 percent of the states in the West and 53 percent in the South tax banks in the same manner as they do other business corporations. Only 20 percent of the states in the East and 25 percent in the Midwest reported doing so.

Forty of the states (80 percent) tax savings and loan institutions in the same manner as banks. Here there are no marked regional differences, although slightly fewer states in the South (67 percent) tax savings and loan institutions in the same manner as banks.

### **State Constitutional Limits**

In the vast majority of states, there are no constitutional limits on state taxation of banks. Forty-six (96 percent) of the responding states reported no constitutional limits on state taxation of domestic banks and savings and loan institutions. The two responding states with such limits are located in the South and West.

Except for three states—one each in the Midwest, South, and West—45 of the responding states (94 percent) have no constitutional limits on state taxation of out-of-state banks or savings and loan institutions. Similarly, except for one state in the South and three in the West, 44 of the responding states (92 percent) have no constitutional limits on state taxation of income from state or municipal obligations.

### **Taxation of Interstate Bank Income**

The survey results presented in Table 2 indicate that, with one exception, most states do not have statutes that permit them to tax major categories of income earned by out-of-state banks that do not have a physical presence in the state. Nevertheless, some states report that they do tax such income by administrative practice. Generally, the

greater the physical presence of an out-of-state bank, the more likely a state is to tax that in-state operation.

The fact that large numbers of states do not tax a fraction of the income of out-of-state banks that conduct their in-state activities without a physical presence (i.e., banks that conduct their business solely by mail or through electronic means) is due primarily to past judicial interpretations of the commerce clause. According to its interpretation of the commerce clause in the early part of this century, the U.S. Supreme Court invalidated all state taxes on multistate corporations, holding that such taxes created multiple taxation and thereby burdened interstate commerce. Gradually, however, the court changed its interpretation of the commerce clause. If the multistate corporation had an office in the taxing state, the court often upheld the state's tax against a commerce clause challenge, finding that the tax fell on a local business rather than on interstate commerce. Later, the court found the existence of an in-state employee to be sufficient to sustain a state's tax. Still later, the court announced a general rule allowing states to tax an apportioned share of the income of a nondomiciliary corporation. The court found that the use of an apportionment formula solved the problem of multiple taxation.

Some observers argue, however, that a remaining impediment to state taxation of interstate business can be found in the Supreme Court's 1967 decision, *National Bellas Hess v. Department of Revenue of the State of Illinois*, which prohibits *unapportioned* state sales taxes on mail-order sellers. Other observers maintain that this decision does not apply to apportioned net income taxes, and that, therefore, states are free to broaden their tax jurisdiction rules as interstate branchless banking becomes more prevalent.

There are also some regional differences in state taxation of interstate bank income. Generally, states in the

Midwest more often tax interstate bank income than do states in other regions. For Category 1 in Table 2, the Midwest at 50 percent is well ahead of other regions (20 percent in the South, 10 percent in the Northeast, and 9 percent in the West). For Category 2, the West at 39 percent is ahead of other regions (27 percent in the Midwest, 17 percent in the South, and 10 percent in the Northeast). For Category 3, the Midwest at 50 percent is again ahead of other regions (20 percent in the South, 18 percent in the West, and 10 percent in the Northeast). Similarly, a larger percentage of states in the Midwest (60 percent) tax the interest income in Category 4 than do states in the West (42 percent), South (43 percent), and Northeast (20 percent). For Category 5, however, the Midwest and the South are tied at 80 percent, although the West (70 percent) is close behind, but far ahead of the Northeast (30 percent). In all categories, except Category 1, the Northeast has the smallest percentage of states taxing interstate bank interest income.

The results displayed in Table 2 also point up the problem of equity in interstate bank taxation. The ACIR does not advocate increased bank taxation or a particular bank tax policy, but it should be noted that states that do not assert tax jurisdiction over the kinds of interstate bank income listed in Table 2 need to examine whether they are placing their domiciliary banks at a competitive disadvantage. At the same time, a state that bases its taxation on the entire net income of its domiciliary banks needs to determine whether other states are taxing the out-state-ports of that same income, thereby subjecting domiciliary banks to double taxation.

#### Licensing Out-of-State Bank Operations

The survey results displayed in Table 3 show that most states are not active in registering or licensing the loan and

Table 2  
Categories of Interstate Bank Income Potentially Subject to State Taxation

Does state tax . . . ? (income category)	Percent of Responding States		Leading Tax Region*
	Yes	No	
1. Interest income from loans made by an out-of-state bank which has no office, employees or representatives in state to a resident of the state and secured by personal property located in state.	22	78	Midwest 50
2. Interest income from credit cards issued to state residents by an out-of-state bank which has no office or employees in state.	21	79	West 39
3. Interest income from loans to residents in state made by an out-of-state bank which has no office, employees or representatives in state and secured by real property located in state.	24	76	Midwest 50
4. Interest income from loans solicited by in-state representatives of out-of-state banks (e.g., call programs).	40	60	Midwest 60
5. Interest income from loans solicited at loan production offices located in state but closed at the out-of-state home office of the soliciting bank.	67	33	Midwest & South 80

\*Region with highest proportion of states reporting a tax on each category of interstate bank income. Table shows name of region and percentage of states in the region levying a tax.

Table 3  
State Registration or Licensing of Out-of-State Bank Operations

Does state license . . . ? (business activity)	Percent of Responding States		Leading Region*
	Yes	No	
1. Require the agent or representative of an out-of-state bank who solicits loans or deposits in state to register or apply for a license.	21	79	West 40
2. Require an out-of-state bank which solicits loans or deposits in state through an agent or representative to register or apply for a license.	38	62	West 44
3. Require an out-of-state bank which solicits loans or deposits in state through a loan production office to register or apply for a license.	54	46	West 80

\*Region with highest proportion of states reporting a requirement in each category. Table shows name of region and percentage of states in the region imposing the requirement.

deposit activities of out-of-state banks. Only where an out-of-state bank operates a loan production office do more than half of the states require registration or a license. Again there are regional differences. States in the West are more active in registering or licensing out-of-state banking operations than are states in other regions. In Category 1, 31 percent of southern states, 10 percent of midwestern states, and none of the responding northeastern states require a license. Requirements are imposed in Category 2 by 38 percent of the states in the South, 40 percent in the Midwest, and 25 percent in the Northeast. In Category 3, requirements are imposed by 60 percent of midwestern states, 38 percent of southern states, and 25 percent of northeastern states. Thus, as in the taxation of interstate bank income (Table 2), fewer states in the Northeast than in other regions require registration or licensing of out-of-state bank activity.

### Tax Apportionment Formulas

Thirty-two (64 percent) of the responding states said that they have a statute, regulation, or administrative procedure that governs the apportionment of the income (or other tax measure used) of a multistate bank. Of the 32 states that use an apportionment formula, 11 (or 22 percent of the 50 states) have adopted the three-factor "Massachusetts" formula consisting of property, payroll, and sales.

The Massachusetts three-factor formula was developed to apportion the income of multistate manufacturing companies and was later codified (with some modifications) in the Uniform Division of Income for Tax Purposes Act (UDITPA). However, the UDITPA formula specifically excludes financial institutions from its provisions. The formula is not well suited for apportioning the income of financial institutions because it does not include intangible property, which comprises most of the assets of a financial institution, in the property factor. For this reason, the states that have recently revamped their bank taxes have either dropped the property factor entirely or have changed the make-up of the property factor to include intangibles.

No commonality exists among the 21 states that use an apportionment formula other than the UDITPA. The lack

of uniformity among state apportionment formulas can lead to overlapping taxation of bank income because state formulas that assign particular pieces of interstate bank income to specific states are likely to clash.

### Future Plans

In terms of the immediate future, 30 states (60 percent) responding to the survey have no plans to change the formula currently used to apportion the income of banks for tax purposes. The remaining 16 states (32 percent) expect changes to be made in their formula. (Eight percent did not answer this question.)

Similarly, 34 of the responding states (68 percent) indicated no plans to broaden state jurisdictional rules in order to tax the income that out-of-state banks receive from banking transactions with in-state residents solely by mail or through electronic means. Again, 8 percent did not respond to this question, leaving 12 states (24 percent) with reported plans to broaden jurisdictional rules.

### Conclusion

The results of the ACIR/FTA survey show that a number of states are beginning to meet the tax challenges posed by interstate banking. For example, 10 states reported that they have broadened their tax jurisdiction rules to allow them to tax the in-state activities of out-of-state branchless banks, thereby creating greater tax parity between in-state and out-of-state banks. Nevertheless, much remains to be done. For example, states have made scant progress toward finding a uniform rule to apportion the income of multistate banks. The states have, however, entered a period of experimentation that may lead to the identification of the most effective method for taxing banks in the new world of interstate banking—a method that would promote uniformity among state bank taxes and equity for in-state and out-of-state banks.

*John Kincaid is executive director of ACIR, and Sandra B. McCray is the principal analyst for the Commission's studies of bank regulation and taxation.*

## Closing the Opinion Gap: State and Local Governments Fare Well in ACIR Poll

Debra L. Dean

In recent years, the Advisory Commission on Intergovernmental Relations, along with many state and local officials, has expressed concern about continuing changes in the balance of power in the federal system. State and local governments have experienced a long-term erosion of authority, despite many signs that they have, for the most part, significantly improved their governing capabilities in recent decades. In addition, with the decline in federal aid to state and local governments since 1978, those governments have been called on by their citizens to maintain services, stimulate economic development, and perform new functions.

As state and local governments take on more responsibility, public attitudes toward these governments—the willingness of citizens to support them with taxes and to trust them with powers—will occupy a place of central importance in the analysis of the federal system. How are state and local governments perceived by the public, compared to the federal government and to each other? Do Americans have confidence in their state and local governments, and do they believe that those governments operate efficiently?

One indication of public attitudes toward government can be found in the annual opinion polls commissioned by ACIR and conducted by the Gallup Organization. These polls show that Americans evaluate state and, especially, local governments at least as favorably as the federal government, and sometimes more favorably.

In 1987, ACIR explicitly asked respondents: “Overall, how much trust and confidence do you have in your federal, state or local government to do a good job in carrying out its responsibilities?” (See Table 1).

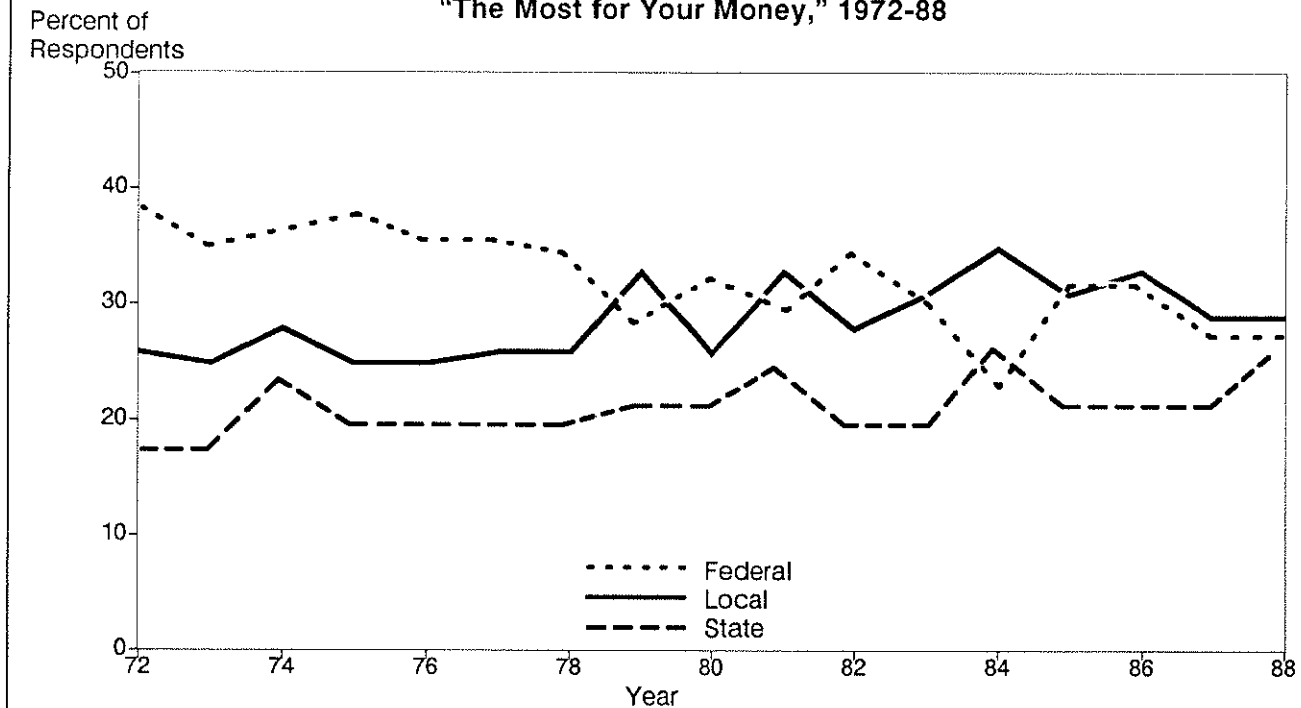
Table 1  
Perceptions of Confidence and Efficiency of Government

	Federal	State	Local
<b>Confidence (1987)</b>			
A great deal	9	11	16
A fair amount	59	62	57
Not very much	24	19	16
None at all	4	4	7
Don't know/No answer	4	4	4
<b>Performs Efficiently? (1988)</b>			
	Federal	State	Local
Almost all the time	2	3	5
Most of the time	23	33	41
Some of the time	48	47	37
Hardly ever	23	13	13
Don't know/No answer	5	4	4

As the top half of Table 1 indicates, state governments and, especially, local governments compare very favorably with the federal government in terms of overall public confidence. The proportion of Americans expressing “a great deal” of confidence was highest for local government, followed by the state and federal governments. The proportions of respondents expressing no confidence were quite

Figure 1

Comparison of Opinions about the Level of Government that Provides  
"The Most for Your Money," 1972-88



small, ranging from a total of 4 percent for the federal and state governments, to 7 percent for local government.

In 1988, ACIR asked a different question intended to provide another perspective on how Americans view their federal, state, and local governments. Respondents were asked: "In your opinion, does the federal government, your state government, or your local government perform its duties efficiently and at the best cost possible?" (See Table 1). Once again, attitudes toward state and local governments were at least as favorable as those toward the federal government.

As the bottom half of Table 1 indicates, local government was more likely to be seen as being the most efficient. A total of 46 percent of all respondents said that local government performs efficiently either "almost all" or "most of the time." The local government figure is higher than similar ratings for state government (36 percent) and the federal government (25 percent).

The generally higher rating of local and state governments compared to the federal government may be a new development, as can be seen from results of earlier ACIR-sponsored surveys. Since 1972, ACIR has asked the American public: "From which level of government do you think you get the most for your money—federal, state, or local?" (See Figure 1).

In 1972 more than one-third (39 percent) of the respondents said that they got the most for their money from the federal government. Local government was runner-up, selected by 26 percent, followed by state government, chosen by 18 percent.

Although the trend is not uniform, the gap between the proportion of respondents choosing the federal government as giving "the most for your money" and the proportions choosing state and local governments is nearly gone. The percentage of respondents choosing the federal government as giving "the most for your money" was 28 percent in 1988—down from 1972; 27 percent of the respondents picked state government, and 29 percent picked local government, for a three-way statistical tie.

Clearly, whatever opinions may have been prevalent in the past, state and local governments no longer play second or third fiddle to the federal government in the public's opinion. These findings suggest that a rebalancing of the federal system may be starting, at least in terms of public attitudes toward the state and local participants in the system.

*Debra L. Dean is a public opinion analyst at ACIR.*



## The Renewed Importance of State Constitutional Law

With the publication of *State Constitutional Law: Cases and Materials* this fall, ACIR will highlight a new development in American federalism: the revival of interest in state constitutions and state constitutional law. Compiled for ACIR by Professor Robert F. Williams of the Rutgers University School of Law, Camden, New Jersey, the report is the first major collection of cases and other materials ever to be made available on a broad range of state constitutional law issues affecting the 50 states.

The study of American constitutional law has long been dominated by a virtually exclusive focus on the federal Constitution and its judicial interpretation. Legal scholars, political scientists, and the media have contributed to this narrow focus by their preoccupation with constitutional matters as defined by the U.S. Supreme Court. In fact, however, the federal Constitution is "incomplete," in the sense that it relies extensively on mechanisms established in state constitutions and leaves nearly all matters within the sphere of state power to be regulated by state constitutions and statutes.

Since the early 1970s, however, many states have experienced a "constitutional revolution"—a revolution in which, among other things, independent state judicial in-

terpretation of individual rights provisions of state constitutions have become an important dimension of state constitutional development. Prior to the turn of this century, major state constitutional innovation was concerned primarily with changes in constitutional texts. Similarly, the wave of state constitutional revision that took place between 1945 and 1970 dealt with revisions to and modernization of the constitutions themselves. The renewal of interest in state constitutional law during the past decade, however, has involved more active state court interpretation of state constitutions.

State constitutional interpretation always has been important in areas of civil litigation, such as state taxation and eminent domain, and in areas of criminal procedure, such as bail rights. Now, however, a broader spectrum of the private bar and a growing number of law professors, political scientists, and other citizens are discovering state constitutional law for the first time. This discovery is largely attributable to the more than 400 cases during the last 20 years in which state supreme courts have relied on independent and adequate interpretations of their own constitutions (1) to provide greater civil liberties protections for their citizens than are required by United States Supreme Court interpretations of the federal Constitution and (2) to insulate their decisions from U.S. Supreme Court review. This phenomenon has been called the "new judicial federalism."

These cases, being concerned with the extent and limit of governmental powers and with the interpretation of constitutional provisions in litigation, have captured the attention of the legal and political community. This new attention, however, has generally been limited to state constitutional protections of individual liberties as an alternative to federal constitutional protections. The field of state constitutional law, however, like federal constitutional law, is by no means limited to cases involving the application of state bills of rights. The structure and power of state and local governments, state-local relations, the state judicial system, taxation and public finance, and public education all are affected by the state constitution and its interpretation. Furthermore, the basic issues governed by state constitutions do not differ significantly from one state to another. Yet, state constitutional law has not been widely treated as a serious matter of political or legal theory or as a subject for comparative treatment; rather, it usually has been thought of as a parochial matter. It is important to recognize, however, that the recurring themes and issues found throughout state constitutional law make it susceptible to treatment on a comparative or "all states" basis.

(continued on page 27)

## Federalism's Fiscal Shifts

Robert Gleason

Depending on your point of view, 1988 was an occasion either to celebrate or lament the decennial of the taxpayers' revolt. In June 1978, California's *Proposition 13*, limiting local property taxation, sparked a nationwide movement for tax restrictions. Though in varying degrees and in different forms, this movement eventually affected revenue raising ability not only for state and local governments in many parts of the country but for the federal government as well.

Yet, a decade after the tax revolt started, statistics on government revenues and expenditures in ACIR's new *Significant Features of Fiscal Federalism, Volume II*, show that the trends were somewhat ambiguous, and conclusions as to the movement's impact can depend on which statistics are cited.

### Revenues

Per capita revenue collections by state and local governments have outpaced inflation since 1979, exceeding the rate of growth in revenue collection by the federal government. On the other hand, state and local revenues measured as a percentage of personal income have remained fairly steady.

In constant (1982) dollars, per capita federal-state-local government receipts rose by 16 percent, from \$4,408 in 1979 to \$5,105 in 1987. However, while state and local

own-source receipts (excluding federal aid) rose by 23 percent per capita during this period, Washington's receipts rose by a smaller 12 percent. As a result, state and local governments (including school districts and special districts) accounted for slightly more than half of all growth in government revenues since 1979, even though the federal government approaches being twice the size (as measured by tax collections) of all state and local governments combined.

There was also a difference in the growth of the federal government's revenues as a percentage of Gross National Product compared to state and local governments. While the federal government's revenues as a share of GNP increased from 20.1 percent to 20.4 percent between 1979 and 1987, the state-local share of GNP rose from 11 percent in 1979 to 12.2 percent in 1987.

Even though state and local revenues increased as a percentage of Gross National Product, a large portion of tax revenue growth was attributable to economic growth because real GNP rose by 20 percent from 1979 to 1987.

Nevertheless, while total state-local revenues increased as a percentage of GNP, revenues from traditional broad-based taxes declined from 9.6 percent of GNP in 1978 to 8.8 percent in 1986. *Significant Features* notes that this difference between total receipts and traditional tax collections occurred because "state and local government officials have replaced tax revenue—income, sales, property, and license taxes—with higher levels of user charge revenues as well as revenue from lotteries, special assessments, mineral royalty fees, and other miscellaneous general revenue."

As to whether state and local taxpayer burden has declined during the past decade, the report concludes:

Yes . . . and no. Nationwide, state-local tax revenues expressed as a percentage of personal income have dropped by about 1.5 percentage points over the past eight years, falling from 12.8 percent of personal income in 1978 to 11.3 percent in 1986. . . . [But, because of higher user charges, lotteries, and other assessments], overall levels of state and local own-source revenue held at approximately 16 percent of state personal income.

### Expenditures

While spending by all governments continued to grow during the past decade, there has been a rather dramatic shift in expenditure patterns between the federal government and the 50 states and more than 83,000 local govern-

ments. There has also been a transformation in federal government spending priorities over the past three decades.

The \$1.57 trillion that federal, state, and local governments (including school districts and special districts) spent in 1987 represented a 26 percent increase, in per-capita constant (1982) dollars, from 1979. While the federal government accounted for roughly two-thirds of this increase in absolute dollars, the percentage increases were about equal for the federal government and for state and local governments.

More recently, however, the trend has been for state and local expenditures to grow at a faster rate than federal expenditures. Since 1984, the percentage of per capita, real-dollar growth in state and local spending has been 17 percent, compared to 6 percent for the federal government.

In addition, there has been a significant shift in the intergovernmental "mix" of outlays over the past decade. Excluding national defense, international affairs, Social Security, and interest on the national debt, the federal government accounted for 45 percent of all "traditional domestic spending" in 1977; by 1986 the percentage had dropped to 38 percent.

This shrinking of the federal government's role in traditional domestic spending is a corollary to the long-term shift in the federal government's "big ticket" spending priorities—defense, Social Security, and interest on the national debt. While there was little change between 1954 and 1987 in the total share of federal spending devoted to these three functions (roughly 70 percent), *Significant Features* notes that:

The real story is the changing mix among these three functions. In 1954, 59 percent of the U.S. budget was dedicated to national defense; interest, 7 percent; and Social Security, 5 percent. In 1987, national defense had fallen to 28 percent of the budget, while Social Security had shot up to 27 percent, and interest had increased to 13 percent.

*Robert Gleason is director of Communications at ACIR.*

## The Renewed Importance of State Constitutional Law (continued from page 25)

All 50 states have constitutions. These documents, although varying widely as to detail and length, perform the same general function in our federal system of law and government. This function is very different from that of the Constitution of the United States—the constitution usually thought of when we refer to "constitutional law."

A state constitution serves as a charter of law and government for each state—the supreme law of the state—and prescribes in more or less detail the structure and functions of government. Further, state constitutions serve as limitations on the otherwise plenary, sovereign power of states to make law and govern themselves. At the outset, this fundamental point regarding the legal and political function and effect of state constitutions must be understood. By contrast, the federal Constitution is a grant of enumerated powers on which all exercises of federal power must be based. The states delegated to the federal government certain powers and agreed to restrain themselves with respect to other powers and functions. Such restraints are found in the federal and state constitutions.

A study of state constitutional law, while pointing out similarities, also highlights the diversity in the legal and governmental systems of our 50 states. Many common themes appear in the constitutional law of all states because they confront many of the same issues, but those issues may be resolved differently in each state.

In recent years, educators in law and political science have noted the absence of state constitutional law in the curriculum and called for courses and materials on the subject. This gap has been acknowledged by judges as well as by educators. ACIR's *State Constitutional Law: Cases and Materials* is intended to fill a major gap in the teaching of American constitutional law, and to contribute to the increasing interest in active state court interpretations of state constitutions.

*State Constitutional Law: Cases and Materials (M-159, 470 pp., \$25), will be available from ACIR in October.*

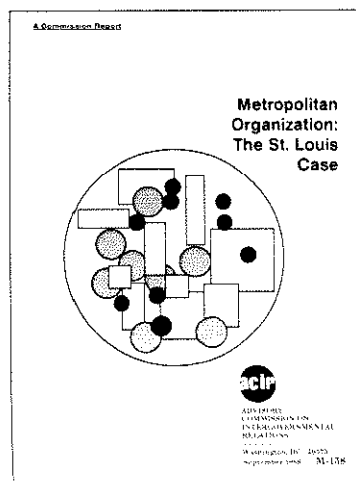
### New Publication

## Metropolitan Organization: The St. Louis Case

September 1988 M-158 172 pages \$10

This is the first report in a series of case studies of how metropolitan areas are organized and governed in our federal system. The St. Louis metropolitan area—particularly St. Louis County—has a governmental structure that is among the most complex in the United States. The report describes the dynamics of "a productive metropolitan community of communities," and challenges many of the traditional approaches to metropolitan reform. ACIR offers this report in the spirit of seeking to learn through discussion, debate, and analysis how to improve the ways in which we govern ourselves.

(see page 17 for order form)



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