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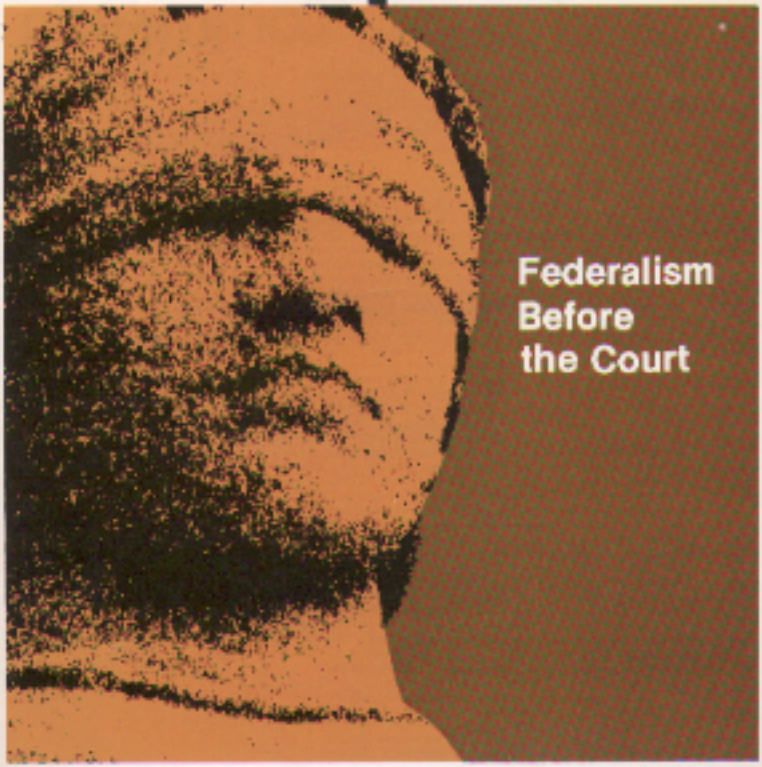
Intergovernmental PERSPECTIVE



Federalism Before the Court

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS

View From The Commission

Dear Reader:

This issue of **Intergovernmental Perspective** deals with a matter which has been of great concern to me for many years: the role of the judiciary in the intergovernmental system.

The framers of the Constitution were quite aware of the power they gave to the judicial system. Their purpose was clear. James Madison expressed it this way: "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Over the years, the courts' role as an "auxiliary precaution," has been the object of much attention. Another role of the courts, as participants in defining and maintaining the intergovernmental process, has not been adequately addressed.

Therefore, I am especially pleased that the Advisory Commission on Intergovernmental Relations has taken a look—albeit a brief one—at the courts' role in the federal system. This publication cannot cover the entire field. It deals with selected recent court decisions that have had a major impact on various areas of intergovernmental concern. It is a first step in the direction of recognizing the key judicial involvement in the system.

I am also pleased that this article highlights still another intergovernmental phenomenon, namely, the increasing importance of state courts in the system. Through key state decisions such as *Serrano v. Priest, Robinson v. Cahill, Southern Burlington County NAACP v. Mount Laurel,* state courts are assuming a strong leadership role in providing for equal treatment for the citizens of their states.

Hand-in-hand with this trend goes a strengthening and upgrading of the quality of the state judicial systems. In my state of Alabama, we have recently implemented a new Judicial Article which has made sense out of what was before overlapping and confusing jurisdictions. We have upgraded the quality of judges by requiring most judges to be lawyers and by providing a procedure by which incompetent judges can be removed; and we have given the supreme court power to provide uniform rules and procedures which are sorely needed in a strong, unified state judicial system. In Alabama, the appellate courts have a current docket—one of the few states able to claim such efficiency.

The courts' role in intergovernmental relations is a major one. It is my hope that this publication will provide the impetus for increased interest in this vital subject.

Conrad M. Fowler

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Washington Watch

Reform Bill Calls for Regular Reauthorization of Programs

Very few things in Washington—or elsewhere—"self-destruct." Yet under a bill pending in the Congress, Federal agencies and the programs they administer would terminate every four years unless the Congress expressly approves their renewal each time.

Under a bill entitled The Government Economy and Spending Reform Act of 1976, the only exceptions to this required periodic Congressional review would be interest on the national debt and payments to individuals under programs such as railroad retirement, Social Security, civil service retirement, and Medicare.

The measure (S 2925) reverses the present assumption that old programs and agencies deserve to be continued. Under this bill, each program must defend its previous performance and justify its existence to the Congress.

A second major change provided in the bill is that programs and activities that deal in the same functional area terminate at the same time so that Congress would get a complete picture of the range and effectiveness of Federal programs in each broad area. Thus it could pinpoint and end any overlapping and duplicative programs.

The legislation is designed to complement the new budget process which forces Congress to look at the Federal budget as a whole.

In introducing the bill, Senator Edmund Muskie (Maine), said the reform is necessary because "in too many cases, we in Congress have satisfied ourselves with the rhetoric of legislation, leaving the hard work of implementation—from rule making to evaluation—to the executive branch. To put it another way, we in Congress haven't paid enough attention to how well the programs we adopted were working—at least not beyond a cursory review every few years."

Another ACIR member, Senator William Roth, is also a sponsor of the bill.

The Senate Intergovernmental Relations Subcommittee held six days of hearings on the bill in March and April.

The legislation incorporates and builds upon two policies ACIR has supported over several years: periodic review of Federal aid programs and grant consolidation.

Similar legislation has been enacted in Colorado and is under consideration in other states.

Municipal Bankruptcy Revision Signed Into Law

Legislation to revise Chapter IX of the Federal Bankruptcy Act was passed by the Congress and signed by President Ford in early April.

The law represents the first change in municipal bankruptcy laws in 30 years and is in line with ACIR recommendations in the area. It outlines a procedure by which a financially distressed municipality may seek the protection of a Federal district court while it negotiates a plan of adjustment and settlement of its debts with its creditors.

Specifically, the law:

☐ removes the requirement for creditor approval prior to filing for bankruptcy;

☐ prohibits creditors from suing to collect payments while a city is developing a debt adjustment plan; and

☐ reduces the current requirement of creditor consent at time of confirmation of the debt adjustment plan from the current two thirds of the total creditors to two thirds of those creditors who vote. The bill also requires approval by a numerical majority of the creditors as grouped by type of claim.

The new law does not require specific state authorization for local bankruptcy proceedings to begin but rather allows the proceedings if the state has generally enabled any city within its borders to file.

In a 1973 report entitled *City Financial Emergencies,* ACIR recommended that the Federal law be updated to make it "more accessible to those who need to make use of it and more responsive to contemporary needs." At that time, the law was unclear in several key areas and posed real difficulties for many municipalities to meet the requirements necessary to file.

The Commission identified three areas where change was needed: the definition of creditor; the proportion of creditor approval required for acceptance of the plan of composition; and the definition of the court's responsibility after confirmation of the plan.

Legislation Introduced to Strengthen Regional Planning

Sen. Warren Magnuson (Washington) has introduced legislation to establish a national policy on areawide planning and coordination. The bill (S 3075) would encourage the use of regional planning bodies to perform Federally assisted or required areawide planning.

In introducing *The Intergovernmental Coordination Act of 1976* in early March, Sen. Magnuson said, "Rather than continuing to encourage the fractionalism that results in the haphazard urban development we have been experiencing, it is time to promote metropolitan approaches to region-wide problems."

Under the bill:

☐ A single areawide planning agency in each substate region would be eligible for all Federally aided areawide planning programs;

☐ All Federally aided areawide planning programs in each region would be melded into a single coordinated work program;

☐ Federal-aid projects in each region would be consistent with areawide growth management planning; and

☐ States' substate districts would be used for the administration of Federally aided areawide planning programs.

In addition, governors, areawide planning agencies, and local governments would review Federally required state plans; boundaries of interstate metropolitan areas would have gubernatorial agreement or OMB designation; joint funding eligibility would be emphasized for all areawide Federal-aid projects; areawide planning funds from any Federal-aid programs could be used to support the A-95 review process; and OMB would be empowered to issue rules and regulations to assure effective demonstration of these provisions.

The key objectives of the bill are

supported by ACIR recommendations contained in the report entitled *Regional Decision Making: New Strategies for Substate Districts.* The impetus for the legislation came from the Mayor of Seattle, Wes Uhlman.

Roth, Kennedy Introduce Federal Program Information Act

A computerized information system will enable state and local governments and others to obtain accurate, timely, and relevant information on Federal domestic assistance programs for which they qualify, if a bill recently introduced in the Congress becomes law.

The *Federal Program Information Act,* co-sponsored in the Senate by Senators William Roth (Delaware) and Edward Kennedy (Massachusetts) and in the House by Rep. Charles Rose (North Carolina), would provide for development of a computerized information system to facilitate the dissemination of information on Federal-aid programs.

Such a system would extend and improve on an information retrieval system presently operated by the Rural Development Service of the Department of Agriculture and would expand upon information currently published in OMB's Catalog of Federal Domestic Assistance.

Under the terms of the proposed programs, a potential applicant would feed his project needs and a brief profile of his community into the computer. The computer would then give him a listing of all the programs for which the state or local government meets the basic eligibility criteria. The applicant could then seek more information on those programs from referred sources and choose the most appropriate source for funds.

Subcommittee to Hold Hearings On Public Pension Regulation

The House Subcommittee on Labor Standards will hold hearings in early summer on the *Public Service Employees Retirement Income Security Act of 1976,* a bill to establish reporting, disclosure, and fiduciary responsibility requirements for state and local pension plans.

The bill (HR 13040) was introduced in response to an interim report of the Subcommittee's Pension Task Force which said it found broad deficiencies and deceptions in several state and local pension systems. The legislation is sponsored by Subcommittee Chairman John Dent, Pa., and ranking minority member, Rep. John Erlenborn, Ill.

The Task Force's interim report, issued in April, concluded that:

- ☐ Public pension plans in general are not operated within accepted financial and accounting parameters established by custom and practice in the private retirement plan field;
- ☐ The policy of some state and local governments of using assets of their public pension plans to finance local governmental operations impairs the stability of those pension plans; and
- ☐ Many participants in and beneficiaries of state and local pension plans are not adequately informed of their rights as participants or of remedies available to aggreived participants.

The Pension Task Force was set up under the Employee Retirement Income Security Act of 1974 which outlined Federal minimum requirements applicable to private pension systems. The task force was directed by that law to conduct a two year study of the pension plans of state and local governments to determine whether Federal regulatory legislation was necessary.

The deadline for the report was late 1976.

The report examined the number, makeup, coverage benefits and finances of the 6,141 state and local pension systems across the country and concentrated on an analysis of pension systems covering employees of the State of Illinois and its local governments; plans covering employees of the State of New York and the City of New York; and the plan of the State of Hawaii.

Committee Reports Revenue Sharing Bill

General revenue sharing moved one step along the legislative road toward reenactment in April, when the House Government Operations Committee reported a bill calling for 3¾ year revenue sharing extension funded at the current level of $6.5 billion.

The committee's bill (HR 13367) calls for revenue sharing allocations to be distributed automatically in a manner similar to the present trust fund mechanism.

The committee made several changes in the present program including:

- ☐ eliminating the prohibition against the use of shared revenues to meet the matching requirements of other Federal grant programs and doing away with local priority spending categories;
- ☐ expanding the citizen participation language to require two public hearings;
- ☐ strengthening civil rights compliance by setting up new administrative procedures with specific deadlines and expanding categories under which discrimination is prohibited to include age and handicapped discrimination; and
- ☐ revising the definition of general purpose local governments eligible to receive the funds to include only those governments which impose taxes or receive transfer payments to provide substantially for two services.

The present program expires on December 31, 1976.

Bill to Offer Taxable Bond Option Passes House Committee

The House Ways and Means Committee has approved a bill that would give state and local governments the option of issuing their bonds on a taxable or tax-exempt basis.

The bill, the *Municipal Taxable Bond Alternative Act of 1976* (HR 12774), calls for a 35 percent automatic subsidy for taxable bonds for those governments opting for a taxable issue.

Floor action in the House is likely soon. The Senate is expected to pass the bill, and the President has said he would sign it.

In a related area, two bills are pending in the Senate which would set Federal standards for financial disclosure applicable to state and municipal bonds.

Federalism Before the Court

By Joanne L. Doddy and
Larry C. Ethridge

In New Jersey, the state Supreme Court invalidates a municipal zoning ordinance which excludes low- and moderate-income families.

In Hartford, seven of the city's suburbs are enjoined by a Federal district court from using Federal block grant funds for allegedly violating provisions of the Housing and Community Development Act of 1974.

In Mississippi, a Federal district court rules that a city cannot discriminate in the provision of services based on race.

These three cases have one common thread: They all demonstrate current court involvement in intergovernmental relations. Such court involvement is not new: *Marbury* v. *Madison* in 1803 established the Supreme Court's role in the federal system. Since that time, various court cases have clarified, slightly altered, or completely turned around the relationship among levels and branches of government. The courts basically serve three functions which directly impact on intergovernmental relations: to divide responsibilities among the various branches of government, to curtail excess or improper uses of governmental power, and to act when the legislative and executive branches refuse or fail to take action. All three roles have been central in the evolution of federalism as we know it in this country.

This article will examine the pivotal role of the courts in the field of intergovernmental affairs, beginning with a brief historical overview and concentrating primarily upon the current trends in the law. Since the area of judicial action affecting intergovernmental relations is both lengthy and dynamic, this article cannot survey the entire field. Nor does it attempt to discuss in depth such key issues as the evolution and background of the courts' roles and responsibilities; the propriety and effectiveness of the courts' actions; or the full range of impacts of the various decisions upon Federal, state, and local governments. Instead, the focus here is on the interpretations of the current case law, highlighting ramifications which are of interest and importance to those Federal, state, and local legislators and administrators especially concerned with intergovernmental relations. Key areas included deal with various regulatory activities, taxation and finance, equalization of services, growth policy and land use control, school finance reform, and home rule.

Historical Overview

The constitutional decision to establish a dual state and Federal court system engaged the courts in the thorny problems of judicial federalism from the inception of the Union. The Constitution left the mechanics of the Federal judicial system deliberately vague; thus early conflicts arose between Federal and state courts in staking out jurisdictional scope and boundaries. The delineation between the courts' jurisdiction generally evolved as: Federal courts exercise Federal judicial power and protect the enumerated and implied powers of the national government; state courts exercise state judicial power and protect the residual powers of the individual states. [The operations of the dual court system are discussed in more detail in accompanying sections entitled **Federal Courts and State Courts.**]

Over the years, the balance of power between the Federal and state courts has shifted. In the beginning, the states held the more prominent position—

"The constitutional decision to establish a dual state and Federal court system engaged the courts in the thorny problems of judicial federalism from the inception of the Union."

due primarily to their more established political and judicial structure. But as the governmental structure of the nation became more developed and complex, new Federal powers and rights were delineated. Powers of the Federal judiciary mirrored this growth in dominance.

Five constitutional doctrines are brought into question in most cases relating to intergovernmental relations. These are:

- ☐ The concept of state sovereignty as guaranteed in the Tenth Amendment and reinforced by the grant of sovereign immunity in the Eleventh Amendment;
- ☐ The doctrine of Federal supremacy over the states derived from the Supremacy Clause and expanded through the operation of the Constitution's Necessary and Proper Clause;
- ☐ The different taxing powers of the Federal and state governments as set forth in Article 1, Sections 8, 9 and 10, and the Sixteenth Amendment;
- ☐ The powers delegated to the Federal government under the Commerce Clause;
- ☐ The Fourteenth Amendment requirements of "due process" and "equal protection under the laws."

Of the five, the last two have been the most significant in the intergovernmental area.

The Commerce Clause has served as the constitutional justification for Federal governmental regulation of many formerly state controlled commercial endeavors. Under its aegis, the Supreme Court has upheld a variety of congressional actions; from the creation of wide ranging Federal regulatory agencies and the establishment of many basic social welfare programs under the New Deal to the government regulation of interstate businesses and their products.

During the 1960s, the *Omnibus Civil Rights Acts* were based in part on the Commerce Clause and have withstood legal challenges from state and local governments in such cases as *Heart of Atlanta Motel Inc. v. U.S.* (upholding the constitutionality of the *Public Accommodations Act* requiring the desegregation of private hotels) and *Sullivan v. Little Hunting Park, Inc.* (requiring desegregation of privately owned amusement parks).

The Commerce Clause also has been used as the basis for upholding Federal legislation which maintains and enforces a certain level of Federal oversight in programs funded in part or totally by the Federal government. The broad reading and application of the Commerce Clause in such cases has strengthened the powers of the Federal government, while simultaneously circumventing the powers of state governments in these areas.

The use of the Fourteenth Amendment became widespread under the Warren Court in the 1950s and 1960s. The cases stemming from this amendment have fallen into two primary areas: those which interpret the Equal Protection Clause and those which have selectively incorporated portions of the Bill of Rights into the Fourteenth Amendment under the Due Process Clause.

The Equal Protection Clause is a prohibition against discriminatory state action in the treatment of persons in like circumstances. In *Brown v. Board of Education,* the U.S. Supreme Court used this clause to hold state laws mandating racially separate but equal education facilities *(de jure* segregation) unconstitutional. Later cases brought pursuant to the ruling in *Brown* resulted in the use of the busing remedy to achieve racial integration *(Swann v. Charlotte-Mecklenburg Board of Education)* and led the courts into *de facto* segregation. Separate, but related, equal protection attacks upon unequal conditions resulted in challenges to school financing systems, legislative apportionment schemes, and allocations of municipal services.

Equally significant changes have resulted from the expansion of the Fourteenth Amendment Due Process Clause. In the area of criminal law, the bulk of the cases are customarily decided in state courts pursuant to state law. Yet in the past, these laws did not always adequately reflect the protection of individual rights guaranteed by the Bill of Rights. During the 1960s, the U.S. Supreme Court incorporated into the Fourteenth Amendment such fundamental protections as the right to counsel (*Gideon v. Wainwright),* the right against self-incrimination *(Miranda v. Arizona),* and freedom from illegal searches and seizures *(Mapp v. Ohio).* These Federal mandates significantly changed the operations of many state criminal justice systems. However, legal scholars are currently debating the court's position in this area in light of recent decisions which seem to represent retrenchment from the Warren Court decisions, such as refusing to declare unconstitutional the practice of distributing "mug shots" of suspected shoplifters who have not been convicted of that crime (*Paul v. Davis).*

Application of the procedural Due Process Clause to cases other than criminal justice recently has become more prominent. Like their forerunners, these cases often require the establishment of additional services on the state and local level—with accompanying increases in money and man-hours. Even

more fundamentally, they affect the relationship of the Federal courts and state governments. Recent examples have been Federal court rulings providing that: non-dangerous persons involuntarily committed to state mental hospitals have a constitutional due process right to liberty and therefore must be released upon request *(Donaldson v. O'Connor)*; students must be given notice and an opportunity to respond to charges before suspension from school *(Goss v. Lopez)*; parents or guardians of a child are prevented from having that child committed to a mental health institution without affording the child procedural safeguards *(Bartley v. Kremens)*; and state laws for forced maternity leave *(Cleveland Board of Education v. LaFleur)* and for denial of unemployment compensation to all women in the third trimester of pregnancy and first six weeks after birth *(Turner v. Department of Employment Security No. 74-312)* are invalid if based on the presumption that the women cannot work, without a due process determination of their ability to continue in their particular position.

A final area where the effects of court decisions embracing both elements of the Fourteenth Amendment have had notable intergovernmental impact is legislative apportionment, commencing with the U.S. Supreme Court's landmark decisions in *Baker v. Carr* and *Reynolds v. Simms*. The "one man-one vote" policy pronounced in these cases has resulted in widespread redistricting of state legislatures and congressional districts to meet judicially imposed guidelines.

Local government reorganizations, particularly those which alter local representation and voting strength, have raised new questions concerning the applicability of the "one man-one vote" rule. In certain cases the rule still applies, such as where the board in question exercises general governmental powers *(Avery v. Midland County)* or where the members of the board are elected, regardless of the type of function performed by the officer *(Hadley v. Junior College District)*.

Exceptions to the "one man-one vote" doctrine now identified by the court include non-elected officials who exercise limited governmental powers *(Sailors v. Kent County Board of Education)* and special purpose districts with limited powers *(Sayler Land Co. v. Tulare Lake Basin Storage District)*.

The *Voting Rights Act of 1965* was enacted as the reapportionment cases began to crest and was an effective tool for obtaining equal representation for minority voters.

When the court perceives a national interest, such as the promotion of racial or ethnic equality, it tends to uphold Federal oversight. One example of such oversight can be found in *Katzenbach v. Morgan* where the court upheld Federal legislation requiring states to provide voting literature in the native language of the community. But exceptions are beginning to occur. In a 1975 case, *Richmond v. U.S.*, the U.S. Supreme Court held that the *Voting Rights Act* was not necessarily violated by an annexation that reduced the annexing city's 52 percent black majority to a 42 percent minority. A 1976 Supreme Court decision involving voting patterns in New Orleans has further weakened the effectiveness of the act by shifting the burden of proof to those who would challenge the constitutionality of existing voting schemes. *(Beer v. U.S.)*.

"Local government reorganizations, particularly those which alter local representation and voting strength, have raised new questions concerning the applicability of the 'one man-one vote' rule."

The background of these major constitutional doctrines and their historical impact on intergovernmental relations provides a basis for reviewing current court decisions that have or could have substantial significance for state and local governments. The first area is regulatory and deals with cases involving Federal supremacy versus state sovereignty in such key matters as employment, health and safety standards, and ownership.

Regulatory Cases

The broad-gauged Commerce Clause is the predominant basis for Federal involvement in cases regulating the employment conditions of state employees, cases where state and Federal health and safety requirements are in conflict, and cases where the states and Federal government claim rights to the same property.

Federal involvement in determining employment conditions of state workers was upheld in a 1968 case, *Maryland v. Wirtz*. In that instance the U.S. Supreme Court ruled that state employees in hospitals and educational institutions were sufficiently "interstate" in nature (due to the significant impact which these institutions had on interstate commerce) and sufficiently undifferentiated from their private sector counterparts to bring them within the regulatory powers of the Federal government and within regulations of the Fair Labor Standards Act. The decision impacted directly upon the states' fiscal

policy-setting role in a manner which had previously been considered an infringement upon state sovereignty.

An expansion—or retraction—of *Maryland v. Wirtz* is expected soon when the U.S. Supreme Court decides *National League of Cities, National Governors' Conference et al v. Usery,* a case to determine the constitutionality of a 1974 law extending the *Fair Labor Standards Act* (FLSA) to non-supervisory state and local employees. Currently, only a temporary stay order halting enforcement of the FLSA amendments is protecting state and local governments from a sizable increase in the cost of labor—estimated at $355 million by the Justice Department, at $1.1 billion by the National League of Cities. If the court rules in favor of the states and local governments in this case, it could symbolize a significant change in the trend toward increased Federal involvement.

The current judicial picture is mixed in this area. In its last term, the U.S. Supreme Court upheld the right of Congress, under the commerce powers, to set limits on the salaries of state employees under the *Economic Stabilization Act (Frye v. U.S.,* and *Ohio v. U.S.).* In the district court in Massachusetts, a Federal judge ordered the cutoff of Federal welfare funds—about $550 million a year—unless the state hired 225 more social workers at a cost of $1.2 million (*Cornelius v. Stevens).*

Yet the U.S. Supreme Court, in *New York State Department of Social Services v. Dublino,* said the states have a legitimate interest in promoting self reliance and protecting their resources in certain areas. In that case, the court upheld state rules requiring individuals to accept employment as a condition of Federal AFDC assistance.

In the areas of consumer and environmental protection, the U.S. Supreme Court has generally taken a more tolerant stance towards state and local regulations impacting on interstate commerce. For the most part, these cases allow states to implement programs which incorporate more stringent health and safety standards but not those which involve more lax standards than those in similar Federal enactments.

An example of permissibly stringent state standards can be found in *Huron Portland Cement Co. v. City of Detroit* where Detroit's strict smoke abatement code was upheld, even as applied to Federally licensed ships in interstate commerce. By contrast, a Pennsylvania transportation control plan which failed to meet national standards for ambient air quality pursuant to the *Clean Air Act* was invalidated in *Pennsylvania v. EPA.*

There is an exception to this rule. In areas where there is a Federal interest for exclusive regulation or control (e.g., national defense or security), state and local governments can be prevented from enforcing standards more stringent than those determined at the Federal level—even if there is no specific Federal law. In *Northern States Power Company v. State of Minnesota,* the court invalidated the more stringent state regulations controlling radiation from nuclear power plants even without express Federal preemptive legislation.

One of the most recent examples of court involvement in determining Federal supremacy in the regulatory area was *U.S. v. Maine,* commonly referred to as the off-shore drilling case. In a suit brought by the United States against 13 Atlantic coastal states, the Supreme Court held that the U.S.—not the states—had sovereign rights over the seabed and subsoil within national territorial waters. The states claimed that they needed revenues from the drilling since they would incur increased costs as a result of the accelerated offshore development.

Taxation and Finance

Money has long been a source of friction among governments. Understandably, the courts have often been called upon to define, clarify, and determine equity in areas of taxation and finance. As the nation's economy faltered during the past few years and revenue-related matters took on greater import, the role of the courts in devising equitable systems of revenue allocation has become even more important than in the past. Two areas in which the courts have been active recently are property tax assessment and commuter taxes. The courts have also played a key role in assuring compliance with constitutional and legislative intent in the administration of Federal aid programs.

Recent state court decisions in New York and Massachusetts have attempted to end inequitable property tax assessment. Such inequities can occur in various ways: through inadequate assessment practices which result in some property being assessed currently while others carry assessments forward from a previous year; through consistent efforts on

"The courts have often been called upon to define, clarify, and determine equity in areas of taxation and finance."

the part of assessors to value one type of property at a higher level in relation to market value than other properties; and through actions of assessors who, due to lack of training and technical competence, incorrectly value certain properties. The New York Supreme Court ruled last year in *Hellerstein v. The Assessor of the Town of Islip,* that real property must be assessed at 100 percent of full market value. Although the full value requirement had been on the New York statutes since 1829, the widespread and longstanding practice there (as in other states) was to assess at a reduced percentage of market value. In a recent Massachusetts case, *Town of Sudbury v. Commissioner of Corporations and Taxation,* the Massachusetts Supreme Judicial Court held that the state's tax commission had both the authority and the duty to direct the activities of local assessors so as to produce uniformity in the assessment and valuation of property throughout the commonwealth.

Another key property tax decision, *Louisville and Nashville Railroad Company v. Public Service Commission of Tennessee,* was resolved in Federal court. The case was brought by the railroad which claimed that although Tennessee law prohibited classification of property for tax purposes and required assessment of all property at full cash value, in practice the property of the L & N Railroad was assessed at 55 percent to 65 percent of actual cash value, while other property in the state was assessed at a statewide average of not higher than 30 percent of actual cash value. The district court held that the higher assessment percentage of railroad and utility property violated the Fourteenth Amendment.

The constitutionality of state commuter taxes was the subject in a recent U.S. Supreme Court decision, *Austin v. New Hampshire.* The court ruled that New Hampshire's commuter income tax, which was levied only on non-residents, was unconstitutional. Subsequently, Maine, Vermont, and Massachusetts (the states of residence of the successful taxpayer plaintiffs in the *Austin* suit) brought their own suit to seek retroactive application of *Austin* in order to prevent "predatory taxation," and to recover the tax revenues which were unconstitutionally diverted into the New Hampshire coffers *(Maine v. New Hampshire).* A decision has not yet been rendered on the last issue.

A companion case, *Pennsylvania v. New Jersey,* is also pending. After the *Austin* case was decided, Pennsylvania sued to have the New Jersey commuter tax declared unconstitutional as violative of the Privileges and Immunities Clause of Article IV and the Equal Protection Clause of the Fourteenth Amendment. The outcome of this suit—along with the New Hampshire case—will help establish the parameters for permissible commuter taxing powers in the interstate context.

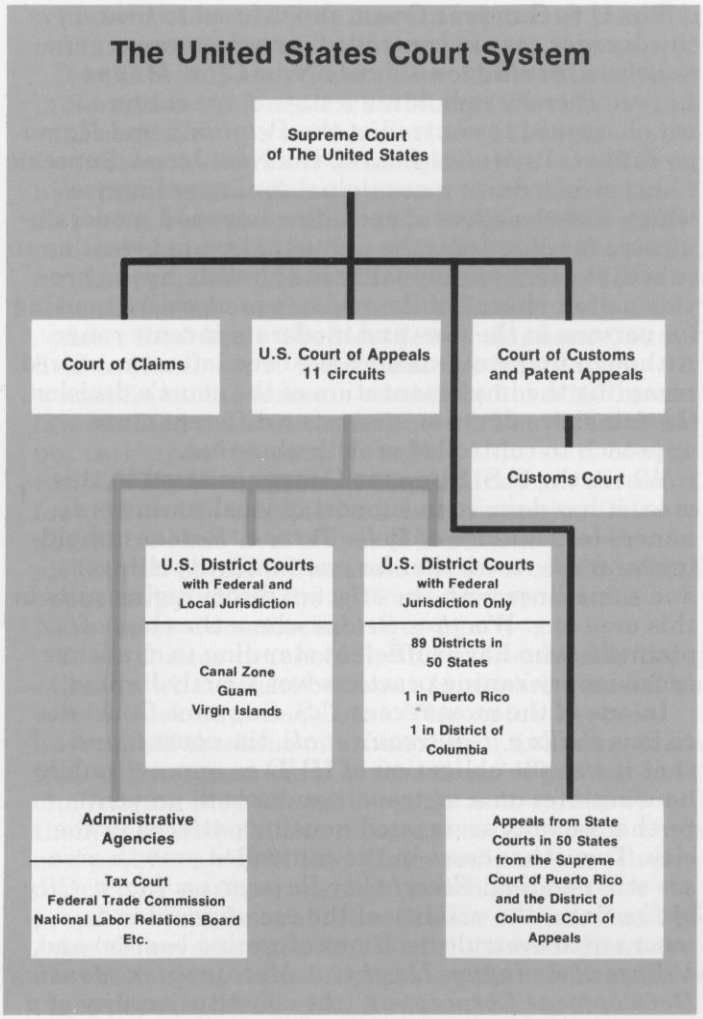
In another recent ruling, the U.S. Supreme Court apparently expanded the taxing powers of the states. In *Michelin Tire Corp. v. Wages,* the Supreme Court reversed a long-standing precedent by ruling that a state's nondiscriminatory ad valorem property tax applied to imported goods did not violate the constitutional prohibition of state imposition of "any imposts or duties on imports." Until the recent *Michelin* ruling, states were prohibited from imposing such taxes by the Export-Import Clause of the U.S. Constitution. Although this was a change in long standing legal doctrine, it is not expected to generate substantial revenues for most states.

Finally, Federal courts have been consulted on various financing questions generated by the increasing number of Federal grant-in-aid programs. Such programs frequently include requirements that the recipient state and local governmental units comply with a variety of Federal laws and regulations in the areas of civil rights, environmental protection, contract procurement, fair housing, and employment. These requirements allow the Federal government to retain a certain level of Federal oversight—both administratively and judicially—even in programs such as block grants and general revenue sharing which are designed to give states and localities more discretion in determination of priorities and goals.

In several key decisions, the Federal courts have determined that recipient governments must meet the Federal requirements before they can receive the Federal funds. In *Robinson v. Simon,* the courts withheld $95 million in revenue sharing funds from the Chicago police department until discriminatory hiring practices were terminated. In *City of Hartford v. Hills,* the court enjoined the use of $4 million in community development block grant funds until the recipient suburban jurisdictions met their obligations for fair share housing.

Equalization of Services

The Federal court decision in *Hawkins v. Town of Shaw,* that a town cannot discriminate in provision of municipal services, has potential widespread ramifications for all state and local governments. The court found that the failure of the small Mississippi town of Shaw to equalize the distribution of municipal services between black and white neighborhoods was a violation of the Fourteenth Amendment's equal protection guarantees. Rejecting the argument that the correction of the established problem is not a judicial function, the court ordered the town to submit to it a plan to provide equalized services to those who had not received them in the past.



The U.S. Court of Appeals for the Second Circuit took a different approach to equalization of services in *Beal v. Lindsay* when it ruled that the Constitution requires an equalization of effort, not an equalization of result. This rationale allowed the court in *Beal* to dismiss a complaint which alleged that New York City failed to properly maintain a public park plagued by vandalism. The court determined that the city's fiscal efforts at upkeep in the vandal-plagued park had been equal to or greater than those in its other facilities and, absent the vandalism, the facilities would have been equal.

Equalization of services was also the underlying issue in *Memorial Hospital v. Maricopa County* which questioned the constitutionality of an Arizona statute requiring a year's residency in a county as a condition for receiving non-emergency hospitalization or medical care at the county's expense. In the earlier case of *Valenciano v. Bateman,* the Federal district court had held the Arizona statute unconstitutional and enjoined its use in Pima County. The Arizona Supreme Court, nevertheless, upheld the constitutionality of the statute in *Maricopa County.* The U.S. Supreme Court accepted the case to resolve the conflict between the courts and to address the Federal question of durational residency requirements. It held that the statute was unconstitutional because the residency requirement infringed upon the exercise of a citizen's constitutional right to travel and was not necessitated by a compelling state reason. Therefore, the unequal treatment of new residents which resulted from the statute's application denied them equal protection of the law.

The constitutional right to travel which the court referred to in *Maricopa County* was first recognized in the welfare rights case of *Shapiro v. Thompson* where the court struck down a state residency requirement as a prerequisite to receiving welfare benefits. The courts have generally invalidated most requirements which would impede a person's right to travel freely in and among the states of the nation as being violative of equal protection.

Controlled Growth and Related Zoning Issues

Case law in the broad area of controlled growth and exclusionary zoning reflects a growing tendency to curtail Federal action in some fields and shift certain types of cases from the Federal to the state courts. Recent actions by the U.S. Supreme Court support this observation.

In two recent growth cases, the U.S. Supreme Court refused to review lower court decisions and left standing locally designated controlled growth plans. One case came from a state court, the other from a lower Federal court. The New York State case of *Golden v. Planning Board of Town of Ramapo* questioned the validity of a controlled growth plan which limited new development by tying it to a capital improvement program that scheduled the construction of needed public facilities (e.g., sewers, schools, roads, firehouses, etc.). The New York Court of Appeals, that state's highest court, upheld the plan which has had the effect of substantially reducing the amount of new building in the city.

The court also refused to hear the California case of *Construction Industry Association of Sonoma County v. City of Petaluma.* In that case, a Federal district court originally struck down a controlled growth plan designed to retard the accelerating growth of the city, curb its suburban sprawl, and correct the imbalance between single family and multi-family dwellings over a five year period, claiming the plan denied the right to travel. A three-judge panel appointed by the Court of Appeals dismissed the right to travel claim out of hand and upheld the original plan, ruling, on the facts, that the original plan did not violate the due process rights of the plaintiffs, thereby narrowing the applicability of the decision to other cities. Although *Petaluma* was decided in the Federal court, the decision was consistent with the trend in the California state courts to uphold local zoning restrictions.

Federal Courts

The Federal court system consists primarily of 94 trial courts, known as U.S. District Courts; 11 U.S. Courts of Appeals, one for each designated geographic region known as a circuit; and the U.S. Supreme Court.

Federal courts may only decide those cases which the Constitution and the laws of Congress allot to them. Their jurisdiction extends to:

☐ cases arising under a Federal law, treaty, or the U.S. Constitution;

☐ cases brought by the United States or one of its agencies (such as Federal regulatory agencies) authorized to bring suits; and

☐ cases where the parties are citizens of different states when the amount of controversy is over $10,000 and the issue is a question of state law.

Most Federal suits are initiated in district courts and can be appealed to a court of appeals.

The U.S. Supreme Court has the ultimate authority to determine the applicability of Federal law; but, as a rule, it will only decide cases raising questions of unusual importance under the U.S. Constitution, Federal laws, or treaties. The Supreme Court has the right to decline to hear a case on appeal from a lower Federal court.

In certain situations, cases are initiated in a court other than the district court:

☐ The Supreme Court has original jurisdiction in cases when the United States brings an action against a state; when one state sues another state; or when a state sues the United States (after obtaining its consent to be sued).

☐ A three-judge court must hear cases which challenge a state statute or administrative order of statewide concern as being violative of the U.S. Constitution when a state officer is the defendant and injunctive relief is sought. These courts will not hear the case if a local officer is the defendant.

The U.S. Supreme Court also refused to hear a third major case in controlled growth zoning, *Southern Burlington County NAACP v. Mount Laurel,* thereby upholding a state court ruling which seemed to contradict the *Petaluma* and *Ramapo* rulings. In *Mount Laurel,* the New Jersey Supreme Court struck down a municipal zoning ordinance which had the effect of excluding low- and moderate-income families from the municipality and went on to rule that every municipality in the state has to provide a "fair share" of the region's prospective housing for persons in the low- and moderate-income range. Although many questions have been left unanswered regarding the implementation of the court's decision, the fair share doctrine suggests a different state approach to controlled growth planning.

Where the U.S. Supreme Court has acted in this area, it has done so in support of local zoning ordinances (e.g. *Village of Belle Terre v. Boraas* upholding land use restriction for one-family dwellings) and sometimes with the effect of discouraging suits in this area (e.g. *Warth v. Seldin* where the class of plaintiffs who have sufficient standing to challenge exclusionary zoning practices was strictly limited.)

In one of the most recent U.S. Supreme Court decisions *(Hills v. Gautreaux et al),* the court found that it was the obligation of HUD to approve public housing sites on a metropolitan basis to prevent further racially segregated housing patterns in the city. Two other cases in the controlled growth area are still pending: *Forest City Enterprises Inc. v. City of Eastlake* (the validity of the use of popular democracy to overrule decisions of zoning boards) and *Village of Arlington Heights v. Metropolitan Housing Development Corporation* (the constitutionality of a refusal to rezone land to allow an integrated low- and moderate-income housing development).

School Finance Reform

School finance reform is one subject of litigation where the jurisdiction is currently clear. Cases in this area are most likely to be waged within the state court systems where the state court has the option to invalidate unequal financing under the equal protection provisions of state constitutions or under some other state provision. There are currently at least ten cases on file in state courts seeking reform of their states' systems for financing education.

One of the early cases in school finance is *Serrano v. Priest,* where the California Supreme Court ruled that the state's school finance system was unconstitutional. The court based its ruling on the state constitution's equal protection clause, stating that the quality of education had become a function of the local school districts' taxable wealth. In a complaint which has become a model for similar suits, the plaintiffs successfully maintained that the disparities in the tax base per pupil from wealthy to poor districts resulted in substantial disparities among

school districts in dollar amounts spent per pupil for public education.

The U.S. Supreme Court later addressed the issue in *San Antonio Independent School District v. Rodriguez* and held, in a 5-4 decision, that the U.S. Constitution did not require equality in school financing schemes, if there was a rational basis for disparity. However, the court's decision could not, and did not, prevent states from following the California approach of invalidating school financing schemes based on state constitutional provisions.

After *Rodriguez,* the New Jersey Supreme Court held in *Robinson v. Cahill* that the New Jersey school financing formula established in a 1970 state law violated the state constitution. The decision did not turn upon the court's reading of its state constitution's Equal Protection Clause. Instead, the court found that the formula for school financing failed to guarantee that local efforts plus state aid would yield to all pupils in the state the level of educational opportunity which the 1875 amendments to the New Jersey Constitution required.

A novel issue in school financing is currently being raised in what might become a landmark case before a New York Supreme Court. The state's big cities have raised the issue of urban school financing or, as they call it, "municipal overburden." They are challenging the state aid formula as it applies to them because it fails to recognize costly special needs and problems which they claim drain urban school districts, even those districts which appear to be property-rich. Several other actions are pending which raise the reverse question. Wealthy school districts are challenging school financing reform legislation in cases pending in Florida, Kansas, Maine, and Wisconsin.

Home Rule

Judicial actions in the area of home rule or local autonomy deal with intergovernmental concerns at the state-local level and thus are solely within the purview of the state courts. Although the powers of home rule municipalities derive from state constitutional and legislative action, the courts are frequently called upon to interpret these grants of power. By so doing, the state courts can play a sizable role in defining the permissible parameters for home rule governments.

Over the years, laws and judicial decisions pertaining to home rule powers have fallen into three stages or models. The first was guided by Dillon's Rule where, in the absence of specific home rule grants, the courts generally acted to limit the powers of a state's political subdivisions to such powers as were precisely spelled out in state laws or constitutions.

The second, and more recent, stage moved in the direction of absolute local home rule (also known as "imperium in imperio") which reserves to local gov-

State Courts

State courts have jurisdiction over matters arising under state statutes, common law, and in some cases Federal law. They hear both civil and criminal cases, but their powers are subject to the limitations of state law.

State courts, like Federal courts, have trial and appellate levels. The trial court identifies the legal and factual issues in a dispute and renders a final judgment based on the application of the relevant law to the factual record. The exact title of the trial court varies.

In appellate court, a party in a case may seek review of rulings of law which are challenged as incorrect. Review of factual issues is rare in appellate court unless the party alleges that the evidence on which the trial court relied was legally insufficient to support the verdict or ruling.

Some jurisdictions have two levels of appellate courts: intermediate and supreme. A judgment rendered by the state supreme court is final in most cases. In a limited number of cases, an appeal to the U.S. Supreme Court will be allowed.

As a general rule, the U.S. Supreme Court will only accept cases from state courts under three conditions:

☐ if the state upholds the constitutionality of a state law which is challenged as repugnant to the Constitution, laws, or treaties of the United States;

☐ if a final state court decision holds a U.S. statute or treaty invalid; and

☐ if a state case raises a Federal question and there is no adequate or independent state basis for the state court decision.

In the first two situations, the cases come to the Supreme Court for mandatory review (by appeal). In the third situation, U.S. Supreme Court review is discretionary (by writ of certiorari).

ernments, discretion in specific areas of local affairs. This model of home rule attempts to carve out discrete areas of state and local sovereignty. "Purely" local matters are left to local governments while matters of statewide concern are the province of the legislature and governor. Obviously such a model allows for great judicial discretion in the determination of which powers are "statewide" versus "purely" local. Only four states currently use this form of home rule.

The newest approach to home rule has been the adoption of broad home rule powers which basically devolve all residual powers not denied by state law or constitution to local governments. This model alleviates much of the judicial responsibility in determining what is "statewide" or "purely" local and replaces that responsibility with a determination of what is or is not prohibited by existing law or charters.

Yet even this broad grant can be interpreted variously by the courts. In the 1971 Alaska case of *Macauley v. Hildebrand,* the state supreme court narrowly interpreted the home rule powers grant to invalidate a jurisdiction's attempt to centralize educational treasury management and accounting functions by local ordinance. The court ruled that since a new state law establishing state centralized power in this area did not specifically exempt home rule jurisdictions, the presumption was in favor of the state law. However, in the 1974 case of *Jefferson v. State,* the Alaska court reversed its position and held that a municipal ordinance was not necessarily invalid because of a conflict with a state statute.

In Iowa, the supreme court upheld that state's 1972 Iowa Cities Code which provided for broad local home rule while retaining certain state powers. Specifically, the act gave municipalities liberal home rule powers in all areas except those explicitly reserved to the states. Yet the act also reserved the power to rule on annexations, incorporations, and disincorporations through a state-created City Development Board and the power to rule on certain fiscal decisions through a state-created City Finance Committee. In *Reuben C. Bechtel et al v. City of Des Moines,* the plaintiff challenged the home rule nature of the new law arguing that the reserved state powers defeated the objective of home rule. The Iowa Supreme Court recognized that home rule provisions may contain reserved state powers without invalidating the basic provisions of the original grant of authority.

Conclusion

Woodrow Wilson said, "Whether by force of circumstances or by deliberate design, we have married legislation with adjudication and look for statesmanship in the courts." The marrying of legislation and adjudication—and the correlative links between the executive branch and the courts are undeniably a major factor in the conduct of American government.

While the relationships both between the levels of government and the branches within a level are in constant evolution, in recent years it has been the Federal and state courts which have been most active in dealing with the all important questions of dividing the responsibility and authority among the levels of government. It is the Federal courts and, recently, the state courts, which have most vigorously and vigilantly enforced government observance of constitutionally guaranteed rights (and interpreted the legislative intent when the Congress has acted in this area). And, increasingly, it is the Federal and state courts which have made decisions crucial to the priority-setting, budget-making powers which are at the heart of the roles of both legislative bodies and the executive.

The courts—both Federal and state—have been viewed by many as a place of last resort to obtain results in politically sensitive areas where legislative and executive branches have failed or refused to act. While it can be argued that a certain amount of judicial activism is necessary and even desirable to maintain the system of checks and balances in our federal system, it should not be forgotten that the activist role is the primary responsibility of the other two branches of government. Yet judicial history is replete with examples of cases—many recent—where the court has acted because other branches did not.

With this substantial—often controversial—impact on the federal system, the Federal and state courts deserve more scrutiny as intergovernmental actors than they have lately received.

An agenda for future research in this area would be long indeed. It would certainly address in depth the question of whether the courts have acted appropriately in recent years to fill a void left by the weakness or ambivalence of other branches of government, or whether the courts have usurped the rightful role of the executive and legislative branches, or whether both views are accurate.

Further study would similarly be useful in considering the dynamic relationship between the Federal and state courts.

One might also look at whether the courts can keep current and well informed enough in their perceptions of government capabilities and spillover effects of their actions to make decisions which can be implemented. Similarly, it is important to ask whether the courts have or can acquire the technical expertise to make informed judgments on the range of issues with which they are confronted.

Study of these and myriad other questions is of real importance as the courts continue to dramatically influence the form and direction of American federalism.

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Where It Happened

This article highlights the background, findings, and intergovernmental significance of three recent court cases, two Federal and one state. Each case represents a judicial action that has prompted governmental action, and each is considered significant due to far reaching and timely rulings which break ground toward possible new judicial trends.

In *Southern Burlington County NAACP v. Mount Laurel,* the New Jersey State Supreme Court found exclusionary zoning based on economic discrimination unconstitutional.

In *Hawkins v. Shaw,* a Federal circuit court said that a town could not discriminate in its service to its citizens on the basis of their race and ordered the town to bring services in the black neighborhood up to the standards maintained in the white areas.

In *City of Hartford v. Hills,* a Federal district court found that the suburbs around Hartford, Connecticut, were in violation of Federal law when they failed to provide for their "fair share" of the region's needed low- and moderate-income housing.

Southern Burlington County NAACP v. Mount Laurel

Law books are full of land use and zoning cases. They are tried in both Federal and state courts, are wide-ranging and narrow. Many are contradictory.

Yet, one recent case that most experts believe will have ramifications across the country can be distinguished from the crowd, for it affects not only "exclusionary" zoning, but also the broad area of economic discrimination.

It involved a flat, sprawling township, outwardly like many other suburban communities throughout the country: a place called Mount Laurel, New Jersey.

Until around 1950, Mount Laurel was a sleepy, primarily agricultural area with no settlements of any size and little commercial or industrial development. Soon afterward, however, the community began to grow: its population doubling by 1960, then doubling again by 1970. Most of the newcomers were former residents of large cities, and many worked in Philadelphia, an easy commute from Mount Laurel. Along with the residents, and an interstate highway interchange, came increased industry and business. Yet most of the developed section of the community was made up of houses.

At the time of the lawsuit, Mount Laurel's zoning ordinance permitted only single-family, detached dwellings, with only one house per lot. Townhouses, apartments, and mobile homes were not allowed.

By so selecting the kinds of houses allowed, the township practically assured a town with few if any poor people, few young couples, and few elderly. The single dwellings were simply too expensive—and sometimes too big—for persons in those categories.

Mount Laurel's zoning was designed to hold down local property taxes. Under New Jersey's tax structure, most of the cost of municipal and county governments and primary and secondary education comes from the property tax. By encouraging industry and business and limiting the building of homes to those most suited to people with a low demand for public services, Mount Laurel was able to keep property taxes from increasing substantially.

In 1972, the Southern Burlington County NAACP and a group of other plaintiffs including residents and potential residents brought suit against Mount Laurel alleging that the township was operating an entire system of land use controls which, in effect, excluded persons of low- and moderate-income. They claimed such selective growth resulted in economic discrimination.

A state trial court ruled that the township's zoning which excluded persons of low- and moderate-income was unconstitutional as it violated the state constitution's basic requirements of substantive due pro-

cess and equal protection. The court declared the township's zoning ordinance totally invalid and ordered the municipality to design a plan to remedy the inequity. The township appealed and the plaintiffs cross-appealed, on the basis that the judgment should have directed the township to take into account the fair share of the regional housing needs of low- and moderate-income families.

In March 1975, the New Jersey Supreme Court ruled that "as a developing municipality, Mount Laurel must, by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course, including those of low- and moderate-income."

The court decision continued: "It must permit multi-family housing, without bedroom or similar restrictions, as well as small dwellings on very small lots, low cost housing or other types, and in general, high density zoning, without artificial and unjustifiable minimum requirements as to lot size, building size, and the like, to meet the full panopy of these needs."

A key part of the decision was that the court felt that every municipality must bear its fair share of the regional housing burden. Yet these two key terms, fair share and regional housing burden, were left vague in the decision.

The court ruled that the community must allow access to future residents and that it must not adopt policies or regulations that thwart or preclude that opportunity.

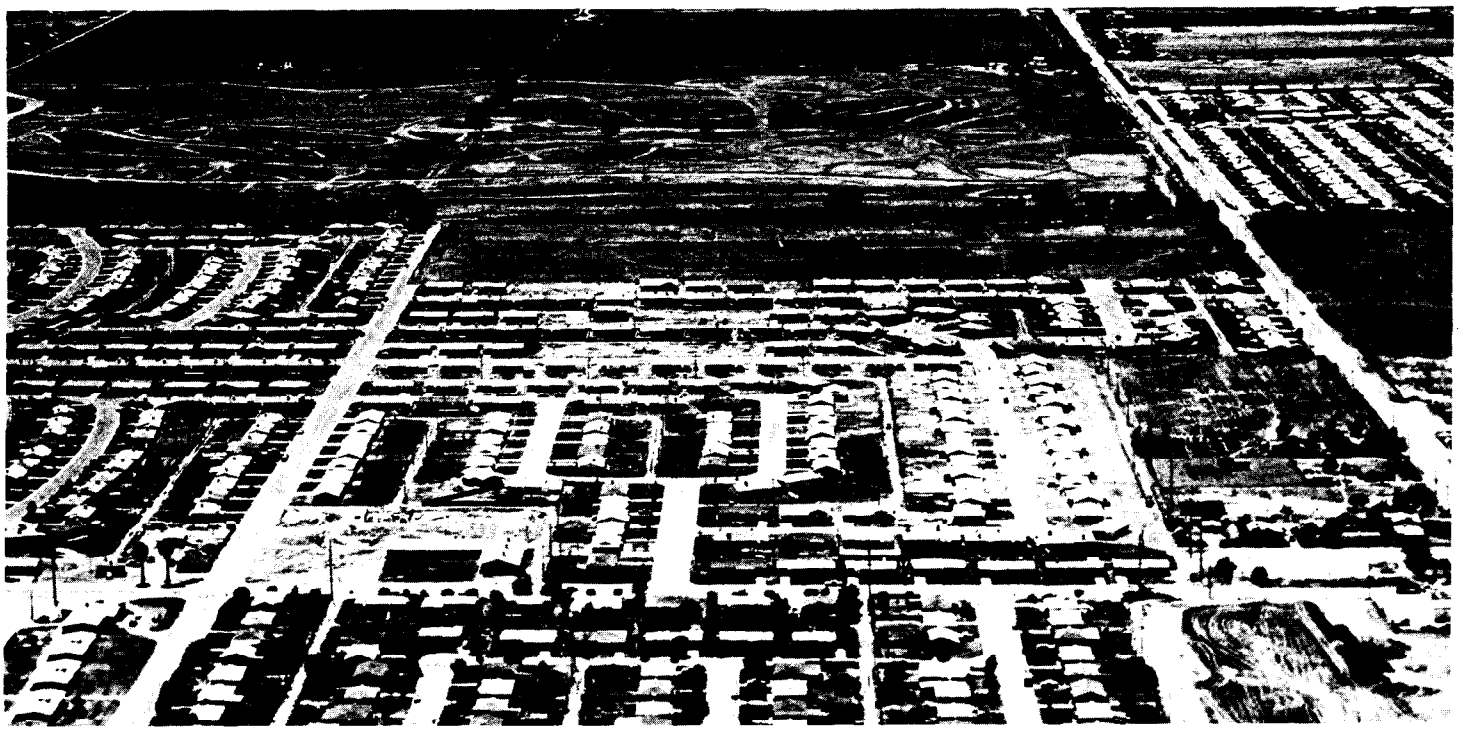
The court stopped short of setting specific requirements to remedy the situation. In fact, it modified the earlier trial court's judgment by saying the entire zoning ordinance should not be nullified, but rather declared invalid only to the extent and particularies outlined in the opinion. It specifically vacated the trial court's judgment ordering the municipality to prepare and submit a housing study, thereby withdrawing the judicial power from the process of enforcing the principles it outlined.

"Courts do not build housing, nor do municipalities," the decision said. "That function is performed by private builders, various kinds of associations, or for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what Mount Laurel must do in that regard."

The supreme court ruling, like the earlier trial court decision, was based on the New Jersey Constitution, under a reading that all police power regulations such as zoning must promote the "general welfare." Such a ruling based on the state's constitution increases its probable applicability to other states which may have similar provisions in their constitutions.

The *Mount Laurel* decision has been both praised

Mount Laurel was a sprawling, fast growing, primarily residential area, much like this, when the New Jersey Supreme Court ruled that its zoning practices, which allowed only single family, detached homes on large lots, were unconstitutional.



for its courage and broad applicability and criticized for its shying away from remedies and for its vagueness in certain key definitions.

James A. Kushner, professor at Southwestern University Law School, is in the former group. He says the decision may prove to be the "Magna Carta of suburban low- and moderate-income housing opportunity."

Yale Rabin, professor at the University of Virginia, who was a technical witness for the plaintiffs in the *Mount Laurel* case, emphasized its importance in the area of economic discrimination. "This case made it unlawful to discriminate on account of income," he said. "It makes no mention of race. It established this principle that discrimination by income is a denial of equal protection."

Randall Scott, chief research attorney for the Advisory Commission on Housing and Urban Growth of the American Bar Association, is more critical. He thinks the decision did not go far enough. "It did not require the actual implementation of affirmative housing programs, nor did it even require adequate housing planning to be undertaken by the municipality," he said. "Private housing is often not possible for the low income without government subsidy and ordinance changes. Thus, a community could avoid restrictive zoning in compliance with the act, but virtually accomplish the same goals by failing to provide direction in the establishment of such housing."

An editorial in *New Jersey Municipalities Magazine* concurred. "Before the Court's ideal objective of balanced housing can become a reality, builders must be found who can profitably construct wholesome, marketable housing at a considerably lower unit cost within the means of the low- and middle-income buyer or else Federal, state, or foundation money must be attracted to subsidize the developments. For either, it is easier said than done."

Rutgers Professor Jerome G. Rose, writing in *Land Use Law and Zoning Digest,* is more concerned with the interpretations of such ambiguous concepts as fair share, regions, future housing need, and presumptively realistic efforts to make possible an appropriate variety and choice of housing. The court decision required each of these points, yet did not clearly define what it meant.

The 1975 New Jersey Legislature considered a bill, the *Comprehensive and Balanced Housing Act,* to establish mandatory municipal guidelines to uphold the *Mount Laurel* decision, but it did not pass. The bill has been revised and reintroduced in 1976.

"The bill is obviously sensitive to local governments," said Spiros Caramalis, legislative aide for the Senate County and Municipal Government Committee. "You can't expect the legislature to get too far in front and leave the municipalities behind. Many municipalities are willing to run the risk of court action instead of meeting the existing requirements."

A voluntary method has been offered by New Jersey Governor Brendan Byrne in an executive order issued in April that provides advisory guidelines to help communities comply with the court decision. It also offers incentives for communities to adopt the guidelines by directing state departments to give preference in discretionary aid programs to those communities that have adjusted their zoning in accordance with the court ruling.

"Things may change if the income tax passes," said Byrne aide Bruce Ackerman. "But right now with the heavy load the property tax carries in this state, fiscal zoning is extremely important." That importance is reflected in the reluctance of the legislature to alter the current property tax system.

Hawkins v. Shaw

Discrimination in city services is routine in some communities. If you are black or brown or just poor, the street you live on may be unpaved, have few or no fire hydrants, no street lights; the house you live in may lack running water and have no sewer. Across town, other residents may have no such problems.

A 1971 court case attempted to remedy racial discrimination in services. In *Hawkins v. Town of Shaw,* the U.S. Court of Appeals for the Fifth Circuit found that the town of Shaw, Mississippi, was in violation of the equal protection guarantee of the Fourteenth Amendment because it was providing certain services to whites and not to blacks. The court gave the town of Shaw three years to bring services in the black neighborhoods up to the standards maintained in the white areas. The improvements required included installation of new lights, additions to water and sewer systems, pavement of streets, and installation of new fire hydrants.

The decision was generally recognized as a landmark equal protection case. Judge Wisdom, writing a concurrent opinion to the case, proclaimed what he felt to be its significance when he said, "By our decision in this case, we recognize the right of every citizen regardless of race to equal municipal services."

The judgment in *Shaw* was hailed by others as a public service equivalent to the 1954 school segregation case, *Brown v. Board of Education.* Yet very little has happened since 1971. Few successful law suits have followed the *Shaw* precedent.

Astrid E. Merget, co-director of the Government Services Equalization Center, attributes the dearth of law suits largely to three factors: costs incurred in court suits, difficulty in finding committed plaintiffs, and costs of remedying problems.

Bringing the *Shaw* case to court was expensive—costing over $100,000. Costs in cases like *Shaw* include not only court and lawyers' fees, but payment for technical expertise necessary to provide supporting data to prove discrimination in services. Engineers, surveyors, and other technical experts are often required.

As is the case with many civil rights suits, plaintiffs in a *Shaw*-type suit sometimes suffer unfavorable peer pressure and even harrassment from local officials and others. The cases often last for years—and the plaintiffs must be committed and willing to last until the end.

Service equalization remedies can be extremely costly—even too costly to be accomplished. Court-mandated improvements in Shaw have cost over a $1 million—a considerable amount considering it is a town of only 3,000 persons—and the court-ordered equalization is not complete. Larger cities would likely experience proportionately high costs. Even with general revenue sharing and community block grants, for many communities, the costs may be simply too great.

In 1974, attorneys, civil rights advocates, planners, and others met in a conference on public service equalization litigation. The purpose was to revive the principle of *Shaw* by determining a selected course of action. As a result of that conference, the Government Services Equalization Center was founded with a mandate to revive and expand the *Shaw* precedent with litigation serving as the initial vehicle for reform.

The center has filed ten equalization cases in towns in Mississippi, Florida, and Michigan. All are awaiting trial.

The Mississippi and Florida cases claim municipal service discrimination against blacks. In Michigan, the alleged discrimination is against American Indians. In several instances, the cases are based not only on discriminatory violation of the equal protection clause of the Fourteenth Amendment, but also on a violation of Federal revenue sharing regulations. In four cases in Mississippi, where the evidence is especially powerful, general revenue sharing funds have been placed in escrow.

This new group of pending cases provide a variation from *Shaw* in that the towns involved are larger, and that several of the suits will deal with special assessments. The special assessments system whereby residents pay for street paving, sewers, and street lights, often operates as a barrier to constructing capital improvements in poor neighborhoods. The center is attacking this special financing device. The special assessments question was left unanswered by *Shaw*.

There is still substantial vagueness in what constitutes equal service. Some areas of service, such as water and sewers can be determined by "accepted engineering standards," according to Yale Rabin, University of Virginia professor who provided technical expertise in both the *Mt. Laurel* and *Shaw* cases. Yet there are other areas such as education and police protection that are much more difficult to assess.

"How do you measure police protection?" Rabin asked. "Do you equalize crime rates or provide the same number of police in various areas? Such issues can become very complex and providing remedies far from simple."

Photo courtesy of Allison Brown.

Unpaved streets such as this are often used as evidence in suits charging local governments with discrimination in service provision. The court ruled in Hawkins v. Shaw *that every citizen, regardless of race, has a right to equal municipal services.*

We do have one court decision on what does *not* violate equal service.

In *Beal v. Lindsay,* a U.S. Second Circuit Court upheld a city's claim that it was making an equal effort to render the same level of services throughout its jurisdiction and that conditions beyond its constitutional obligation—namely, local vandalism—precluded achieving equal results despite equal efforts. Thus the poor conditions in a park situated within a predominantly Puerto Rican and black community in New York City could not be attributed to the discriminatory practices of the municipal government.

City Of Hartford v. Hills

The clash of suburban versus city interests reached the courts recently over the use of Federal funds.

In *City of Hartford v. Hills,* Hartford, Connecticut, brought a class action suit against the U.S. Department of Housing and Urban Development to keep seven of its suburbs from receiving funds under the *Housing and Community Development Act of 1974.*

The City of Hartford charged that the suburban communities had failed to provide or plan for their "fair share" of the region's needed low- and moderate-income housing and thus were in violation of the intent of the act.

The Hartford City Council voted unanimously in September 1975 to sue, and a few weeks later, the U.S. District Court judge issued a temporary injunction, denying the suburbs over $4 million in community development funds that had already been approved by HUD. Meanwhile, the city of Hartford received its $10 million allocation.

The city said it did not want the suburbs' share of the money, but it did want the suburbs to share some of the burden imposed by the region's poor. Hartford said in its suit that more than 90 percent of the area's poor were in the city because there was nowhere else for them to go. The city contains 60 percent of the region's subsidized housing, although it has only one quarter of the total population.

In January 1976, the district court issued a permanent injunction freezing the suburban communities' first-year community development funds.

The injunction is based on a technicality: the towns' failure to measure how many low- and moderate-income persons they expected to live within their boundaries. The judge said that such projections of low- and moderate-income persons were an essential element in implementing the *Housing and Community Development Act of 1974,* which had as one of its goals a reduction in the concentration of the poor in the central cities.

Six communities had submitted "zero" figures in response to that section of their housing assistance plans and had received waivers of that portion of the application from HUD. The other suburb, East Hartford, submitted figures in the category, but the judge found their figures to be woefully underestimated.

The opinion said, in part, "The statute clearly has as one of its objectives, the spatial deconcentration of low-income groups, particularly from central cities. Congress apparently decided that this was part of the solution to the crisis facing urban communities.

"The failure of the Housing and Urban Development Department to gather and consider such information as the town's 'expected to reside figures' amounts to arbitrary and capricious decision-making and constitutes an abuse of discretion. Furthermore, approving the grants on the basis of inadequate information was a clear error of judgment, and was not in accordance with the law."

The judge said that the towns could submit revised first-year applications—with more satisfactory low- and moderate-income projections.

Hartford officials were pleased with the decision. "We think it has healthy long-range aspects for both the city and the region," said Richard Suisman, a Hartford city councilman.

When the temporary restraining order was issued, suburban leaders talked of boycotts and reprisals in the legislature to hurt Hartford for depriving them of the money. "I don't say that any of the towns are going to adopt a vindictive attitude," said Vernon's former mayor, Frank McCoy, in a *New York Times* story covering the temporary injunction. "But anything that has the Hartford label on it is going to get looked at three or four times before it's going to get any backing."

"Hartford has seen fit to do battle with her suburbs," said State Representative Robert Shea of West Hartford in that same story. "We the suburban legislators are left with no alternative but to defend our communities."

Yet, in reality, eight months later, the city and its suburbs are working together—and with HUD—to prepare revised applications. In addition, there is an increased interest in the mutual problems of the various jurisdictions.

Hartford and West Hartford officials recently spent a day touring both cities to better understand their respective problems, and the regional body, the Capitol Region Council of Governments, is serving as the forum and neutral turf for the parties.

"The COG appears to be looked upon by both sides as a vehicle for conciliation—settlement of the difficult issues," said Dana Hanson, executive director of the COG. "The case has resulted in a lot more openness, a lot more dialogue. It swept some of the cobwebs off the problems."

Hanson says the case made many suburban leaders and voters reassess their relationships to, their investments in, and need for the city.

Only a few hours before issuance of the second injunction, the COG adopted a fair share housing plan to redistribute some low- and moderate-income housing from the city to the suburbs. In attempting to meet their fair share, these bodies are also looking for additional funds. "They're pursuing all sorts of spending options," said Mike Duffy, of the housing bureau of Connecticut's Department of Community Affairs.

Nationally, the case may have provided the incentive for other suburban areas to reassess their needs and uses of community development money—and for other urban areas to look at them also. Although no other city has taken its suburbs to court, several cities are now reviewing their suburbs' community development applications to determine if they, like Hartford's suburbs, have ignored regional housing needs.

ACIR News

Commission Recommends Action On Health, Grant Management

At its meeting March 11 and 12, the Commission made a series of recommendations in two key areas: public health and Federal grant management.

The health recommendations were directed at the Congress: the Commission urged passage of Federal legislation authorizing cost sharing in public health expenditures by the states.

Such legislation would replace the current block grant (Section 314d of the *Public Health Services Act)* and 20 categorical grants in the preventative health area by providing a Federal reimbursement of a fixed percentage of state and local expenditures for a defined set of public health services.

The Commission suggested that health cost sharing legislation include a range of statutorily specified public health services, such as drug abuse and alcohol treatment programs, family planning projects, and community health centers. The cost sharing would be limited by a per capita ceiling within each state, modified according to appropriate need factors.

Each state, with local inputs, would develop its own comprehensive health plan, choosing from among the various Federal services, the ones that best suit that state's needs. Federal health priorities could be reflected by permitting a temporary higher variation in Federal matching for those "preferred" services.

Such a cost sharing program would encompass current programs totalling over $1 billion.

In the area of Federal grant management, the Commission considered recommendations to upgrade grant management procedures within the executive branch and to a lesser degree at the recipient governmental levels. Among recommendations passed by the Commission to improve grant management were that:

☐ all units of government increase their efforts to improve the administration and central management of intergovernmental grants;

☐ the current Federal Regional Council system be strengthened through various means including encouraging more decentralization of grant sign-off authority, providing additional staff training, and assuring continued communications with and support from Washington, largely through a more active Under Secretaries group;

☐ Federal grant-administering departments and agencies assign leadership responsibility for interprogram grants management activities to a single unit with adequate authority, stature, and staff in their respective departments or agencies;

☐ Federal interagency agreements be strengthened by giving one central agency responsibility for compiling and updating lists, evaluating major ones, and initiating new ones;

☐ states examine their policies and practices applicable to their expenditure of Federal grant funds including conditions attached to the pass-through of Federal funds to localities;

☐ states and larger units of general local government assign to a single agency the primary responsibility for participation by their respective jurisdictions in jointly funded projects; and

☐ Congress and the Administration take steps to improve information that is available in grants-in-aid through the Catalog of Federal Domestic Assistance and other sources.

The Commission deferred until its next meeting several additional areas in grant management including the improvement of central management activities; Congressional support for intergovernmental circulars; and improvements in the A-95 circular.

The grant management and health recommendations are part of the Commission's overall study of the *Intergovernmental Grant System: Policies, Processes,* and *Alternatives.*

The next ACIR meeting will be held May 20-21. At that time the Commission will continue its consideration of Federal grant management and will review staff findings and consider possible recommendations in the areas of housing and community development and income tax indexation.

Senate to Hold Hearings on ACIR Bank Tax Recommendations

The Financial Institutions Subcommittee of the Senate Committee on Banking, Housing, and Urban Affairs has scheduled May hearings on ACIR's recommendations on state and local taxation of out-of-state financial depositories.

At the request of the Congress, the Commission studied the issue and, in 1975, recommended Federal legislation that would impose restrictions on "doing business" taxes in terms of negative Federal guidelines.

The negative guidelines recommended by the Commission would deny state and local governments the authority to impose designated taxes on out-of-state depositories if that depository conducts business in the state *without:*

☐ a regular office location; or

☐ regular employees or agents; or

☐ *tangible property, including* property involved in lease-financing operations.

ACIR Chairman Robert Merriam will testify for the Commission.

Findings Show Impact of Inflation On State, Federal Revenues

Inflation tends to distort the personal tax burden imposed by the progressive individual income tax.

Such distortion occurs in two ways: First, if a taxpayer's nominal income increases, the share of income paid as tax rises even though there may be no increase—or even a decline—in real income or purchasing power. Second, the response of the tax structure to changing real income is asymmetric: if nominal income is constant so that real income falls by the inflation rate, income taxes do not fall to reflect this taxpayer's decline in purchasing power.

In short, inflation causes individual income tax burdens for any given real income to increase.

According to preliminary figures compiled by ACIR, the Federal income tax from inflation-related factors would amount to about $6 billion in 1977—assuming an annual 6 percent inflation rate and a 6 percent real income growth and no discretionary tax code changes.

Inflation-induced increases for a

"representative state" (one with an income tax elasticity of 1.65) would be about $15 million in 1977, according to the same calculations. In five years, the figures could rise to $50 billion in additional Federal revenue; $140 million in additional state revenues.

One way to lighten the burden on taxpayers would be adoption of a system of tax indexation whereby rate brackets and personal exemptions, credits and deductions, which are measured in fixed dollar terms, are adjusted proportionately with the general price level changes. Such a system is currently under study as part of the Commission's look at the growth in the public sector.

Under indexation, the automatic increase in Federal and state income tax revenues would be slowed. Using Congressional Budget Office economic projections, average annual increases in aggregate state income tax revenues with indexation would be about 13 percent from 1977 to 1980; without indexation, increases would be over 16 percent.

One key point to keep in mind, however, is that although we currently do not employ the indexing methods to relieve excess tax burden, we do use the alternative of legislated tax cuts.

Over the past 20 years, Congress has made major income tax reductions four times. These changes have, over the entire period, generally more than offset inflation effects on the aggregate income tax levels. However, these adjustments have not been as neutral with respect to the distribution of individual income tax burdens as would have occurred with full indexation.

The Commission will consider the advantages and disadvantages of indexation at its May meeting.

ACIR Chairman, Staff Testify Before Congress

ACIR's chairman and staff recently testified before the Congress on issues ranging from interstate regionalism to a Federal-state tax information exchange program. A brief summary of the testimony follows. Copies of the complete testimony are available from ACIR.

Fiscal Conditions of State and Local Governments. ACIR Chairman Robert E. Merriam appeared before the Joint Economic Committee's Subcommittee on Economic Affairs on January 23 to discuss current conditions and future outlook of state and local governments' fiscal affairs. He predicted that some strengthening in fiscal stability would occur in 1976 and 1977 throughout most of the country but that the major central cities of the Northeast and Midwest were most likely to continue to experience several fiscal tensions. He also summarized various ACIR policy recommendations to help relieve the fiscal burden carried on many state and local governments.

Federal-State Tax Information Exchange Program. Senior Analyst Will S. Myers testified before the Senate Finance Committee and the House Ways and Means Committee in late January on inspection and disclosure of information contained in tax returns. Myers relayed to the committees the Commission's recommendations regarding exchange of tax information: that the current program under which Federal and state governments exchange tax information is key to effective enforcement of many state personal income tax laws and that the program should be continued under effective safeguard conditions to assure that the information is used solely for tax compliance and enforcement activities.

The Safe Streets Act. Chairman Merriam appeared before the House Judiciary Committee's Subcommittee on Crime on February 20, to summarize the Commission's major recommendations to improve the safe streets program, including refraining from further categorization of the block grant, increasing the authority, capability, and responsibility of LEAA to see that the act is implemented, and increasing the capacity of state planning agencies to implement the act.

Interstate Regionalism. Assistant Director David B. Walker met with the Senate District Committee on March 4 to make suggestions for dealing with the District's interstate problems, based on ACIR's findings and recommendations in the nationwide study of substate regional and metropolitan problems.

Government Economy and Spending Reform Bill. David Walker also testified March 25 before the Senate Government Operations Committee on the *Government Economy and Spending Reform Act of 1976,* sponsored by ACIR members Senators Edmund Muskie (Maine) and William Roth (Del.). He said the proposed act would implement two ACIR recommendations: to provide a periodic review of Federal-aid programs and to provide a system of grant consolidations.

Content, Dimensions Approved for Financial Emergencies Update

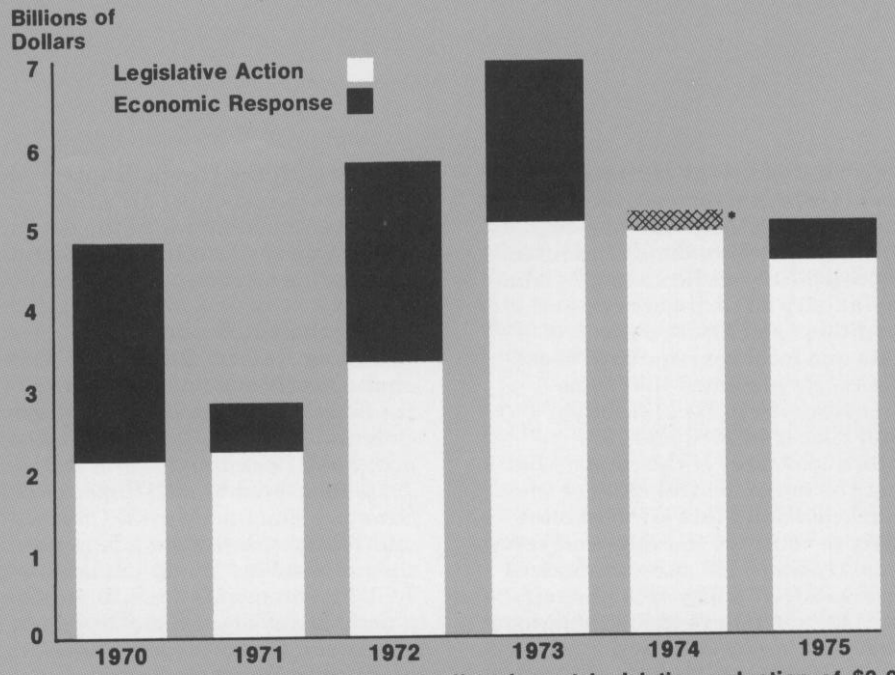
The scope of work for a comprehensive update of ACIR's *City Financial Emergencies* has been defined and approved by the Commission.

The 1973 report was among the first to assess the financial stability of the Nation's largest cities and make recommendations to assure solvency and avoid possible defaults. Much of that report remains timely and useful. Yet the New York City crisis and related difficulties in several other local governments and states suggest another look at the area might be in order.

Tentative areas of concentration are:

- ☐ expansion of report's focus to include not only cities, but states, all local governments, their agencies, counties, school districts, and special purpose districts;
- ☐ discussion of the extent to which states are capable of dealing with local governmental emergencies and the conditions and criteria under which Federal assistance should be made available;
- ☐ another look at the municipal bond market as a provider of local and state governmental needs; and
- ☐ descriptions and analyses of recent financial emergencies such as New York State, State of Massachusetts, New York City, and various other cities and state housing and other agencies.

State Tax Increases by Cause 1970-1975



*Part of the economic response was offset by net legislative reduction of $0.2 billion.

Sources of Increased State Tax Collection 1966-1975 [1]

Fiscal Year	Total Increase	Amount Due To: Economic Factors[2]	Amount Due To: Political Action[3]	Proportion Due To: Economic Factors[2]	Proportion Due To: Political Action[3]
	(billion)	(billion)	(billion)		
1966	$ 2.7	$ 1.8	$ 0.9	67%	33%
1967	2.3	1.5	0.8	65	35
1968	4.1	1.7	2.4	41	59
1969	4.4	2.6	1.8	59	41
1970	4.9	2.2	2.7	45	55
1971	2.9	2.3	0.6	79	21
1972	5.7	3.4	2.3	60	40
1973	7.0	5.1	1.9	73	27
1974	5.0	5.2	—0.2	104	— 4
1975	5.1	4.6	0.5	90	10
10 Year Total	44.1	30.4	13.7	69	31

[1]Taxes included are: general sales tax, individual income tax, corporate income tax and selective sales taxes. In 1974 (the latest year for which data are available), these four taxes accounted for 86 percent of total state tax revenue.

[2]Economic Factors—Both real and nominal (inflationary) economic growth.

[3]Political Action—Discretionary in character such as the adoption or repeal of a tax, the raising or the lowering of a tax rate, the legislative expansion or contraction of a tax base, and changes in taxpayer enforcement practices.

Source: ACIR Survey of Annual State Revenue Growth in co-operation with state revenue departments.

A Fiscal Note

Economic Factors Key In State Revenue Rise

Over the past decade, increases in state revenues have been mainly the result of economic conditions rather than direct political actions.

According to ACIR statistics, of $44.1 billion added to state tax collections since 1966, some 69 percent was due to the automatic response of the state tax structure to the economy. Only 31 percent was the result of discretionary political actions including adoption or repeal of a tax, raising or the lowering of a tax rate, the legislative expansion or contraction of a tax base, and changes in taxpayer enforcement practices.

Other findings, compiled with the assistance of state tax administrators, were:

☐ In eight of the ten years studied, economic growth was the main component accounting for the increased state tax yield;

☐ In the most recent two years (1974, 1975), economic growth appears to be even more important than in preceding years.

☐ In 1974, the net effect of discretionary changes was to reduce the state taxes, the only year that this has occurred.

The data indicate that 1974 and 1975 were not typical years regarding the sources of increased state tax collections. For a combination of reasons, most—but not necessarily all—of the states were in an unusually strong surplus position in 1974. Thus, legislatures were able to grant, on balance, net tax decreases. By 1975, however, these surpluses were beginning to be worked off and legislative changes again emerged as a net addition to the total tax increase.

Because 1974 and 1975 were not typical years, they do not provide a base for projecting future state tax actions. Indeed, 1976 will probably be marked by two significant cross-currents, the return of the more familiar—and more politically uncomfortable—theme of searching for additional state tax revenues, counterbalanced by the political realities imposed by an election year.

And Briefly: Books

School Finance Reform: A Legislators' Handbook. John J. Callahan and William H. Wilken, editors. The National Conference of State Legislatures, 1150 17th Street, N.W., Washington, D.C. 20036.

This handbook, prepared by the Legislators' Education Action Project of the National Conference of State Legislatures, analyzes the main fiscal features of several school finance reform laws enacted since 1971. Included in the handbook are articles dealing with state revenue requirements of school finance reform, Federal aid and school finance, pupil weighting programs, and geographic adjustments to school aid formulae. In addition, the handbook includes selected statistical data on school finance revision in seven states.

The Municipal Year Book: 1976. International City Management Association, 1140 Connecticut Avenue, N.W., Washington, D.C. 20036. $26 if postpaid; $24.50 if payment accompanies the order.

This annual publication of the International City Management Association provides an excellent reference source for facts about and trends and developments in American and Canadian cities.

The Municipal Year Book: 1976 contains profiles of all municipalities over 10,000 including population and governmental and financial characteristics; a directory of all cities over 2,500, listing population, form of government, city hall phone number and names of chief municipal officials; directors of state and local government agencies and associations; and salaries for police, fire, and other city employees. In addition, the volume contains articles on the role of city councils, Federal and state actions affecting local government, and local government reform in Europe.

Property Taxation, Land Use and Public Policy. Arthur D. Lynn, Jr., editor. University of Wisconsin Press, Box 1379, Madison, Wisconsin 53701.

This volume contains 11 papers prepared for a symposium sponsored by the Committee on Taxation, Resources, and Economic Development at the University of Wisconsin.

The papers deal with three broad areas: a current appraisal of the property tax, its land use effects, and public policy alternatives. A final section in the book reports the conference discussion and captures, in part, the consensus of the participants.

The Individual Income Tax. Richard Goode. The Brookings Institution, 1775 Massachusetts Avenue, N.W., Washington, D.C. 20036. $5.50.

This volume examines and evaluates the individual income tax, stressing its equity and economic effects. It also analyzes suggested changes in the tax and considers the merits of other revenue sources. The focus is on the Federal income tax, but many points are relevant for state income taxation as well.

The Individual Income Tax was first issued by Brookings in 1964. The 1975 volume, by the same author, revises the earlier work by taking into account changes in the law, updating the statistics, and using the findings of other research studies that have appeared in the past decade.

The author maintains that the income tax is better than alternatives such as taxes on consumption or wealth, yet he does recommend improvement through such means as curtailment of exclusions and deductions, more effective taxation of capital gains, and revisions of personal exemptions and rates.

The Property Tax System: A Manual. Glenn W. Fisher, editor. Center for Urban Studies, Wichita State University, Wichita, Kansas. $1.50.

This manual was originally prepared for use in a seminar of community leaders sponsored by the Center for Urban Studies. The success of the seminar and applicability of the manual encouraged the Center to offer it, in slightly revised form, to others for use in helping students or community leaders understand the property tax system.

The first six chapters of the manual deal with the legal and administrative aspects of the tax, including assessment, assessment review, and interdistrict equalization. The last four chapters deal with tax policy such as the burdens and effects of property taxation, school finance and the property tax, and property tax relief and reform.

The Property Tax System contains articles written by well-known tax experts as well as material prepared especially for the study manual.

The Comprehensive Employment and Training Act. Impact on People, Places, Programs. William Mirengoff and Lester Rindler. National Academy of Sciences, 2101 Constitution Avenue, Washington, D.C. 20418.

This volume is the interim report of the special Committee on Evaluation of Employment and Training Programs of the National Research Council, whose members are drawn from the Councils of National Academy of Sciences, National Academy of Engineering, and the Institute of Medicine. This Committee was set up to examine and assess the social, economic, and political effects of the approach to the delivery of manpower services provided by the *Comprehensive Employment and Training Act of 1973.* The Committee's final report will be published next year.

The interim report looks at the early years of CETA and focuses on six substantive concerns in Title I (Comprehensive Manpower Services): the distribution of resources, planning process, administrative process, arrangements for delivering services to program clients, the mix of manpower programs, and the type of people served.

The Role of the States in Strengthening the Property Tax. Vol. 1. The Advisory Commission on Intergovernmental Relations, 726 Jackson Place, NW, Washington, D.C. 20575. Single copies are free.

A reprint of this 1963 volume—with an updated introduction—is now available from ACIR. *The Role of the States* deals with such fundamental and still timely issues as the place of the property tax in the state-local tax system, conflict of assessment law and practices, and the responsibilities of the states in property tax administration and assessment.

The Chairman of the Advisory Commission on Intergovernmental Relations has determined that the publication of this periodical is necessary in the transaction of the public business required by law of this Commission. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget through April 30, 1979.

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