

*Is
Constitutional
Reform
Necessary
To
Reinvigorate
Federalism?*

*A Roundtable
Discussion*



Advisory Commission on
Intergovernmental Relations

M-154
November 1987

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(November 1987)

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Preface |

Since 1959, the Advisory Commission on Intergovernmental Relations has had, as its primary mission, responsibility for assessing the condition of American federalism and proposing ways to improve the federal system.

As part of its efforts to further public understanding of the federal union, the Commission has sponsored conferences, roundtable discussions, and public hearings involving participants representing many different points of view.

The Bicentennial of the Constitution of the United States of America is certainly an appropriate occasion for reflecting upon the most basic question of all: the constitutional status of federalism. The following roundtable discussion is one of a number of Commission efforts to assess and promote public discussion of the contemporary constitutional condition of American federalism.

Although the Commission has long been concerned with constitutional issues as well as fiscal, political, and regulatory issues in federalism, Commission concern about the constitutional status of federalism has been heightened since the Supreme Court's 1985 ruling in *Garcia v. San Antonio Metropolitan Transit Authority*. In that decision, the Court, by a 5-4 vote, not only declined to rule against the Congress but also appeared to abandon the last vestiges of the judiciary's role as "umpire" of the federal system. In effect, the Court defined the constitutional status of the states as being essentially political by holding that the states must rely principally on the national political process to protect their interests and position in the federal union.

Combined with the increased scope of federal commerce powers, increased federal regulation of state and local governments, federal mandates placed on state and local governments without funding assistance, declining federal aid to state and local governments, and the frequent lack of policy-making coordination among congressional committees and executive departments, the *Garcia* decision has raised many concerns about the constitutional vitality of federalism and about the very ability of states to be self-governing polities now and in the 21st century.

At the same time, there is no doubt that the 50 states have experienced a tremendous renaissance since World War II. They are stronger, more competent, more creative, more rights conscious and more fiscally responsible than perhaps they have ever been since the founding of the republic. The states, as many observers have noted, are where the action is today.

As a result, some observers argue that the modernization of state government has made the states important and powerful actors in the federal system and that, therefore, there is no need to be concerned about the constitutional status of federalism in a post-*Garcia* era. The states do quite well in the political process.

Other observers argue that there is a need to bolster the constitutional position of the states, not only because the Constitution guarantees the states a substantial self-governing position but also because stagnation at the center and resiliency at the periphery inhibit the ability of state and local governments to get on with the job of serving the American people effectively. In the recent past, the federal government was often a progressive force, one that helped to pull the states into the modern era. Today, however, we may have to ask whether the states, as a group, have sailed right on past the federal government to the point where excessive stagnation at the center is now acting as a drag on grass-roots competency.

In considering these issues at its meeting on September 11, 1987, the Commission invited five distinguished citizens to address the following questions.

Have recent Supreme Court decisions, congressional mandates, and political developments so eroded the self-governing position of the states in the federal system as to warrant extraordinary remedial action?

If yes, what exactly are the problems, and what remedial actions might be taken by the states?

If no, how and why should we understand recent developments as being positive for the federal system?

There are no easy answers to these questions, but the diverse views presented by the roundtable participants help to shed light on recent developments in federalism and to clarify issues pertaining to the constitutional condition of federalism today. The Commission sincerely hopes that this roundtable discussion will facilitate and contribute to wider discussions of the vitality of federalism during this Bicentennial era.

Robert B. Hawkins, Jr.
Chairman

Acknowledgments |

The Commission expresses its deepest appreciation to Raoul Berger, Stuart Eizenstat, Randy Hamilton, Paul Peterson, and John Sununu for their excellent roundtable presentations and for their assistance in preparing the proceedings for publication. Commission Chairman Robert B. Hawkins, Jr., moderated the discussion.

The roundtable was organized by John Shannon and John Kincaid. The proceedings of the roundtable were edited for publication by John Kincaid with the assistance of Rosita Thomas and Joan Casey. The proceedings were typed by Anita McPhaul.

John Shannon
Executive Director

John Kincaid
Director of Research

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Ross O. Doyen, Senator, Kansas State Senate

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John H. Sununu, Vice Chairman,
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Governor, New Hampshire,
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Introductory Remarks

Robert B. Hawkins, Jr.

I would like to bring the Commission's roundtable on federalism to order. Let me give you some background information and introduce our guests.

At our San Francisco meeting last June, Governor John Sununu raised the issue of addressing problems in the federal system at the constitutional level. Since hearing the dictum laid down in the *Garcia* decision in February 1985, the Commission has been very interested in, and concerned about, the constitutional status of federalism and the balance of power in the federal system. At this time in our history, perhaps, the country can benefit from a wide-ranging and thorough debate on this issue.

I will ask Governor Sununu to start this discussion. He will be followed by Professor Raoul Berger who, for those of us who are federalism junkies, needs no one to recite his credentials. They are legion. We will then ask Stuart Eizenstat for his comments on this issue. As you know, Mr. Eizenstat was Chief Domestic Policy Advisor to President Jimmy Carter for domestic affairs. We will then ask Professor Randy Hamilton to give us his thoughts on the perplexing problems of state and federal relations. Randy is the Dean of the Graduate School of Public Administration at Golden Gate University. Then we will ask Professor Paul Peterson, Director of Governmental Studies at The Brookings Institution and at Johns Hopkins University, to give us his thoughts. Governor Sununu, would you frame the debate and the issues for us?

Evolution and Erosion of Federal Principles

John H. Sununu

First of all, I want to compliment our staff for the excellent materials they have prepared. These materials outlining the pros and cons of possible amendments to the U.S. Constitution to restore balance in the federal system provide a good starting point for debate and discussion.

I would like to talk a little bit about this issue, not from a philosophical or academic point of view, but from the point of view of one who has the responsibility of serving citizens within a state, one of 50 states which, together, represent the full constituency of this nation.

The key issue is one of examining how best the institutional structures of the federal, state, and local governments can meet what I believe were the intentions of those who framed the Constitution of the United States and the intentions of those who had a vision of what this nation ought to be.

We are now celebrating the 200th anniversary of the Constitution. The word “celebrate” is a very important one. We are not just commemorating an historic event. We are celebrating because we recognize that, as a document, the Constitution has been very successful. It has served this nation well, and it has served the world well as an example. As we participate in the celebration, we have opportunities to reexamine and reevaluate, in greater detail than usual, the fundamental debates and compromises that took place in order to frame that document.

I think as you read it, you are struck by a number of things:

First, there is the timeliness of the discussions that took place in the 1780s. These discussions were, in many cases, absolutely in tune with the concerns that those of us who care about making things happen constructively in this country would discuss today.

Second, one is struck by the fact that, as a document, the Constitution has had an impact in a real way. The success of the last 200 years has not been an accident. In almost every case where something constructive has happened, particularly during times of crisis, we can point to the value of that Constitution as the foundation and the bedrock for this nation’s capacity to have met

the need that was there in those times. It is a foundation, and on that foundation is built a framework of governance that has worked for two centuries.

Over the last 200 years, however, there has been a drift away from first principles, or an erosion, if you will, of that foundation. There has been a change in character in the relationship between state government and the federal government. There has been an evolution certainly, and an evolution implies a movement toward something better, but there has also been an erosion.

Clearly, the *Garcia* decision of 1985 brought very quickly to a head the concern that many of us have had about the loss of the capacity of states to maintain prerogatives in areas that were traditionally theirs, not only by virtue of what may be considered an appropriate turf but also by virtue of the capacity of states to do the best job for the citizens of the country.

Many areas of erosion come to mind. Some of them are perhaps trivial in the context of larger issues, but they are certainly things that citizens experience every day, some more subtly than others.

In one case we have the 55-mile per hour/65-mile per hour speed limits imposed by the Congress as a condition of highway funding. Of all the issues I discuss with citizens on a day-to-day basis, this is the one that brings home to them what we mean when we say that there has been an intrusion of the federal government into an area that would probably be most appropriately left, or should have been left, to the states.

Clearly, no one in Philadelphia 200 years ago ever expected the federal government to determine the side of the road on which horses would ride and how fast they could be ridden. Yet the analogy today relative to the congressionally required 55-mile per hour/65-mile per hour speed limit is real. It is of concern, and it is more than a matter of just passing concern in many states.

Our ability to deliver health care to the elderly is impaired by a perception that all wisdom resides inside the Washington Beltway. We in New Hampshire know that we can take care of the elderly in a home setting much more cost effectively than is now possible and, in fact, keep a family intact for a longer period of time; yet by virtue of mandates and requirements, and constraints and carrots, the federal government has taken from the states the authority to make that decision.

The capacity of states to issue their own debt instruments is restricted, and the constraints on the states to finance the programs they consider crucial are numerous. Our capacity in the State of New Hampshire to finance a measure of highway construction is impaired and restricted by virtue of the taking of authority by the federal government well beyond, I am convinced, whatever was expected by the framers of the U.S. Constitution.

We could talk about examples in education. We can also talk about the fact that I cannot execute a contract that was agreed on with our state police

regarding the terms of their overtime compensation, and in a way that can improve their effectiveness and their capacity to do their job well.

We have a federal system that has done well. We have a strong foundation and a strong structure, but with the erosion which has occurred during recent decades, that structure has begun to lean. We are at a point analogous to the Leaning Tower of Pisa. Yes, the system is still working, it is still upright, almost, but it doesn't take anyone with great intellectual capacity to realize that, with much more of an erosion of that foundation, much more of a lean, the structure will topple.

Today we have a responsibility to address the issue of over-centralization of power in the federal government. Right now, post-*Garcia*, it is clear that there is nothing that the federal government cannot do willy-nilly that would—in any case, in any way, shape or form—be deemed by the federal courts to be an intrusion on the rights of the states. It is that swing of the pendulum, well past the extreme, that must be corrected.

This extreme swing of the pendulum has created a loss of effectiveness and efficiency. The concept of state prerogatives that was postulated by one of the justices in the *Garcia* decision is to me a perfect example of faulty thinking. In his perception, the fact that the states are able to get federal dollars and federal grants is a sufficient indicator that the states have retained rights. If anything, grants are an indicator of just the opposite. The federal government has learned very well that both the stick and the carrot can be used to abrogate those rights, and the federal government has used carrots and sticks very effectively.

I suggest to you that as we discuss the question of balance in the federal system, we do it in the context of what *might* be done rather than of whether something *should* be done. We may responsibly disagree on how we ought to restore the balance, how we ought to return to a structure of checks and balances between state and federal government; however, we ought not to be irresponsible and fail to agree that we must return to that balance.

I would suggest to my colleagues on the panel here that the most constructive thing we can do is to develop an effective mechanism for restoring balance in the federal system. History, the handwriting that is on the wall, and the reality of the obligation of governors and legislatures around the country to serve citizens, all say very clearly that this has to be done, and that we ought to develop a mechanism to do it well.

State and Federal Powers: The Founders' Design

Raoul Berger

The Bicentennial of the Constitution prompted me to inquire into the question of how the Founders distributed powers between the states and the federal government. Lately, discussions of federalism have often revolved around the Supreme Court's overturn of *Usery*¹ by its 5-4 decision in *Garcia*.² Under the *Garcia* ruling, a trip by a Manhattan subway from 72d Street to 42d Street is, in effect, interstate commerce! Such a notion defies common sense and stands the Founders' design on its head. Archibald Cox commented that even though *Usery* "is almost surely consistent with the original conception of the federal union . . . it is thoroughly inconsistent with the constitutional trends and decisions of the past 40 years."³ Why are those decisions more sacrosanct than those of the preceding 140 years? Is constitutional interpretation like the rising and falling hemlines of women's skirts?

A threshold question for any consideration of these issues is whether the states preceded and created the nation. Although Justices Joseph Story and George Sutherland and Professor Richard Morris, among others, maintain that the nation sprang into being immediately upon the separation of the colonies from Britain and, therefore, before the formation of the states,⁴ the priority of the states is, in my opinion, all but incontrovertible. If that is demonstrable, then the Founders did not carve out a few "reserved" powers for the states from a national jurisdiction; instead, the states "surrendered" some powers to the federal government for national purposes and retained control over their own internal affairs. The difference is important for interpreting the respective powers of the states and the national government.

Let me tick off a few items of evidence. Merrill Jensen found that most of the states instructed their delegates to the Continental Congress to vote for a confederation and to reserve "to themselves the complete control of their in-

¹*National League of Cities v. Usery*, 426 U.S. 833 (1976).

²105 S.Ct. 1005 (1985).

³Raoul Berger, *Federalism: The Founders' Design* (Norman: University of Oklahoma Press, 1987), p. 8. This book sets out in great detail the argument sketched here.

⁴*Ibid.*, p. 44, 21n.

ternal affairs and particularly of their ‘internal police.’” He is confirmed by the instructions of Rhode Island and Virginia.⁵ Pursuant to such instructions, Richard Henry Lee proposed a resolution on July 2, 1776, that these “United Colonies are free and independent States. That a plan for confederation be prepared and transmitted to the respective colonies for their consideration.”⁶ On July 4th, the Declaration of Independence, shortly entitled the “Declaration of the Thirteen United States,” was signed separately on behalf of each state.⁷ Justice Samuel Chase, who had been a delegate to the Continental Congress, stated in *Ware v. Hylton* (1796) that this was “a declaration, not that the united colonies jointly in a collective capacity, were independent States &c. but each of them were sovereign and independent, that is, that each of them had a right to govern itself by its own authority.”⁸ The Articles of Confederation followed suit, providing by Article II that: “Each State retains its sovereignty . . . and every Power” not “expressly delegated to the federal government.” Article III provided that the states “hereby enter into a firm league of friendship . . . for their common defense”—a league, not a nation.⁹ The Articles were signed by the delegates on behalf of each separate state.¹⁰ The Treaty of Peace with Great Britain acknowledged that “the said United States, viz., New Hampshire, Massachusetts [etc.] to be sovereign and independent states [and] *treats with them* as such.”¹¹

Emphasis on state sovereignty persisted. Midway in the Constitutional Convention, George Washington deplored the fact that state sovereignty “is ardently contended for.”¹² According to Herbert J. Storing, the Federalists usually “conceded the historical and legal priority of the States.”¹³ Certainly that was the decided sentiment in the Convention. Gunning Bedford stated: “That all the States at present are equally sovereign and independent, has been asserted from every quarter of the House.”¹⁴ Charles Pinkney said that the draft for “a federal government [is] to be agreed upon between the free and independent States.” William Paterson said: “We are met as the deputies of thirteen individual and sovereign States.”¹⁵ In *Federalist* 39, James Madison stated that: “Each State, in ratifying the Constitution, is to be considered a

⁵*Ibid.*, 24n.

⁶*Ibid.*, p. 24.

⁷Henry Steele Commager, *Documents of American History* (7th ed.; Englewood Cliffs, N.J.: Prentice-Hall, 1963), pp. 100-03. See also Berger, *Federalism*, p. 25.

⁸Berger, *Federalism*, pp. 25-26.

⁹*Ibid.*, pp. 26-27.

¹⁰Commager, *Documents of American History*, p. 116.

¹¹Berger, *Federalism*, p. 29 (emphasis added).

¹²*Ibid.*, p. 50.

¹³*Ibid.*

¹⁴*Ibid.*

¹⁵*Ibid.*, p. 30.

sovereign body, independent of all others.”¹⁶ Similar expressions were uttered in the state ratification conventions.¹⁷ Such jealous solicitude for state sovereignty indicates that the states were reluctant to surrender control of their internal affairs.

That was not left to inference. The Founders made plain their reservation of control over internal matters. Thus, Alexander Hamilton stressed in *Federalist* 32 that the states were to retain what was not exclusively delegated to the federal government.¹⁸ Madison stated in *Federalist* 40 that the federal powers “are limited; and that the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.”¹⁹ He emphasized in *Federalist* 39 that the federal jurisdiction “extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects,” what John Marshall later described as “that immense mass of legislation . . . not surrendered to the general government.”²⁰ State control over internal affairs was emphasized again and again. Hamilton advised the New York Ratification Convention that the federal government could not “new-model the internal police of a state.”²¹ Similar statements were made by Edmund Pendleton in Virginia and James Iredell in North Carolina.²² William Davie, who had been a delegate to the federal Convention, assured the North Carolina Ratification Convention that: “There is not one instance of a power given to the United States, whereby the internal policy or administration of the State is affected.”²³ Much has been made of the difficulty of drawing the line between the federal and state spheres, but the Founders did furnish some guidelines. In *Federalist* 45, Madison explained that federal power “will be exercised principally on external objects, as war, peace, negotiations, and foreign commerce,” repeating what James Wilson had said in the federal Convention. Hamilton reiterated this in the New York Ratification Convention.²⁴ In the Pennsylvania Convention, Wilson stated that federal jurisdiction would embrace objects “to the direction of which no State is competent” (e.g., war and foreign commerce). He also said that the internal jurisdiction is whatever is “confined in its operation and effect, within the bounds of a particular State.”²⁵ Operation of a local hospital or school falls within that category. To argue that the nation’s sum total of local employees influences national wage scales is to proceed on the theory that “for want of a

¹⁶*Ibid.*, pp. 32-33.

¹⁷*Ibid.*, p. 33.

¹⁸*Ibid.*, p. 54.

¹⁹*Ibid.*

²⁰*Ibid.*, p. 61.

²¹*Ibid.*, p. 68.

²²*Ibid.*, pp. 68-69.

²³*Ibid.*, p. 69.

²⁴*Ibid.*, pp. 71-73.

²⁵*Ibid.*, p. 71.

nail . . . the rider was lost.” After all, said Madison, “everything is related immediately or remotely to every other thing.”²⁶

Madison’s assurance that federal jurisdiction was primarily “external” indicates that a takeover of an indubitably local function in reliance on a remote “national” ground would have been rejected by the Founders. Equally important is Hamilton’s emphasis that the federal and state governments were each supreme in their respective spheres, stressing, for example, that the states “cannot be controlled” in the “administration of criminal law.”²⁷ In the Connecticut Ratification Convention, Oliver Ellsworth explained that each “has its province; their limits may be distinguished.” Earlier he said that the United States “are sovereign on one side of the line dividing the jurisdiction, the States on the other.”²⁸ Similar statements were made by Robert Livingston, Roger Sherman, and Edmund Pendleton.²⁹ Where state jurisdiction was retained, not delegated to the federal government, it was “supreme.”

Bearing in mind that the federal government is one of “limited” powers, that all powers not delegated to it are reserved to the states, there is, as Herbert Wechsler wrote, “a burden of persuasion on those favoring national intervention.”³⁰ It is not, as Justice Harry Blackmun indicated in the *Garcia* case, up to the states to prove that they have the jurisdiction; it is up to the federal government to prove that it is acting within its delegated powers. Justice Louis Brandeis pointed out that federal grants are an *exception* from state autonomy.³¹ One who relies on an exception has the burden of proof.³² If state power is to be curtailed, it must be clear that the federal government was given supreme jurisdiction in the premises, and doubts are to be resolved in favor of the retained state powers.

Let us test these propositions by the commerce clause. In England, commerce had been associated with trade with foreign countries.³³ The Founders frequently alluded to commerce in terms of foreign commerce.³⁴ To each state, another state was a foreign country. The commerce clause speaks of commerce “with foreign nations and among the several States.” “Among” may suggest internal trade, but the New Jersey plan had proposed federal regulation of commerce “with foreign nations as well as with each other.”³⁵ The shift from “with” to “among the several States,” I suggest, was merely stylistic. Had the words “with the several States” been employed, the words

²⁶*Ibid.*, p. 121.

²⁷*Ibid.*, p. 58.

²⁸*Ibid.*, p. 59.

²⁹*Ibid.*, pp. 58-59, 60-61.

³⁰*Ibid.*, p. 55.

³¹*Ibid.*

³²*Ibid.*, 155n.

³³*Ibid.*, p. 123.

³⁴*Ibid.*, p. 132.

³⁵*Ibid.*, p. 126.

would have had no antecedent—who was to have commerce “with the several States?” The Founders repeatedly substituted “between” the states for “among.”³⁶

More importantly, one vainly searches the sources for a reference to regulation of a state’s internal commerce. Instead, the Founders were concerned with a particular evil, and it is that mischief which, under a centuries-old rule, delineates the scope of the interstate phrase—the burdens imposed on the movement of goods by sister states.³⁷ Wilson “dwelt on the injustice and impolicy of leaving N. Jersey, Connecticut &c. any longer subject to the exactions of their commercial neighbors.”³⁸ Ellsworth observed that: “The power of regulating trade between the States will protect them against each other.”³⁹ In the Constitutional Convention, Madison stated that it was necessary to remove “existing and injurious retaliation among the States.”⁴⁰ Observe that for Madison “among” was synonymous with Ellsworth’s “between.”

In his dicta-laden *Gibbons v. Ogden* (1824) opinion,⁴¹ Chief Justice Marshall declared that the commerce clause does not “comprehend that commerce which is completely internal, which is carried on . . . between different parts of the same State, and which does not extend to or affect other States,” what he described as “the completely interior traffic of a State.”⁴² A row of early cases, such as *New York v. Miln* (1837), stated that the commerce power did not take from the states the “power to regulate their own internal police.”⁴³

How is this history to be implemented? The Iran-Contra hearings revealed an abiding assumption that all agencies of government must conform to the Constitution. The prime task is to educate the people, and to dispel the murkiness with which the U.S. Supreme Court, with no little help from academe, has surrounded the subject. The Court too lives under the rule of law.

³⁶*Ibid.*, p. 127.

³⁷*Ibid.*, p. 128.

³⁸*Ibid.*, p. 129.

³⁹*Ibid.*

⁴⁰*Ibid.*

⁴¹*Ibid.*, p. 133.

⁴²*Ibid.*, p. 133.

⁴³*Ibid.*, pp. 141-43.

*Adapting Federalism within
The Present
Constitutional Structure*

Stuart E. Eizenstat

With regard to the relationship of the federal government to the states, I would like to make several points. I will elaborate on them shortly, and indicate that appropriate changes can and should be made within the existing system.

It seems to me that it is somewhat ironic for dramatic notions of constitutional amendments to surface at a time when states are, more clearly than at any point in the last 50 years, the centers of innovation and creativity, while policymaking in Washington is an utter shambles.

The *Garcia* decision is in many ways a conservative decision. It could be argued that the decision demonstrates a Borkian judicial restraint in deciding what is a traditional state function and what is not. In the *Garcia* decision, the U.S. Supreme Court left it to elected representatives to decide federal-state policy issues rather than have an unelected federal judiciary make fine distinctions on a case-by-case basis as to what is or is not a traditional state governmental function.

In response to a marked decrease in grant expenditures during the Reagan administration—15.5 percent of federal expenditures in 1980 down to a little over 11 percent today—states have assumed an activist role and flourished within the federal system. Ironically, the very administration that has talked about greater state responsibility has given states less resources to fulfill them, and yet states are again the laboratories for novel social and economic experiments, to quote Justice Louis Brandeis, who envisioned such a role for the states many years ago.⁴⁴

In education, states have begun to look to early intervention programs for low-income students. States have also implemented programs to raise academic standards and improve teacher training and certification.

States have addressed critical problems in our nation's health-care system. For example, some years ago New Jersey developed the Diagnostic Rating Group (DRG) system to control health care costs. The administration and

⁴⁴*New York State Ice Co. v. Leibmann*, 285 U.S. 262, 310-11 (1932).

the Congress have now embodied those ideas in their DRGs. Massachusetts just recently proposed a plan to help assure health care for the state's uninsured residents, thus leading the way for the national government to follow suit at a later time if resources permit and the Massachusetts program is successful. As Richard Nathan has recently noted, states have retained more control than many observers have recognized by administering federal grant-in-aid projects, thus giving them a great degree of discretion.

In the last several years, many states have proposed new-style work requirements for AFDC mothers, requirements emphasizing job placement, remedial education, child care, and job training so as to enable welfare families to become self-reliant. More than half of the states have now implemented some form of these programs. Indeed, these innovations are again the models for federal legislation (e.g., the Moynihan bill in the Senate and the House Ways and Means Committee welfare-reform bill).

In a post-*Garcia* world, it seems to me that states are well positioned to make their points to the Congress and to the President. The National Governors' Association (NGA) has been, and remains, an active and successful lobbying force in Washington. It has worked through the political process to push the states' agenda successfully. In February 1987, for example, the NGA lobbied for congressional support for its policy to replace welfare payments with an emphasis on work and job training. NGA's policy has received a receptive audience in the Congress. The NGA has been able to establish an effective link between state officials and national leaders and to pursue innovative policies on behalf of the states. The Congress has, in fact, become more sensitized to state needs and has avoided imposing some new mandates that states cannot afford to implement.

If anything, the current stagnation in social reform is rooted in Washington, where a budget impasse has prevented the enactment of forward-moving policies. There is certainly a need for a more cooperative relationship and, I believe, for a sorting out of federal-state responsibilities. This cooperative relationship and this sorting-out should be based on the following principles:

We should place services in the hands of the level of government best able to deliver those particular services. We should presume that states and localities have principal responsibility to solve a problem, unless that problem is clearly a national one that is beyond the states' resources or that cuts across state boundaries.

The federal government's responsibility lies in (1) areas of broad national interest, such as defense; (2) areas where nationwide uniformity in administration or finances is essential, such as income maintenance programs; (3) areas where destructive competition between states may occur or where a problem cuts across state boundaries, such as in environmental pollution issues; or (4) areas where federal oversight is necessary to protect individual liberties, as in the field of civil rights.

Thus, the federal government should assume greater responsibility for income support programs like AFDC, Medicaid, SSI, and Food Stamps, while

the states should assume greater responsibility for economic development, infrastructure, and social service programs.

Under my proposal, the U.S. government would eventually assume full policy responsibility and up to 90 percent of the financial responsibility for Medicaid and AFDC, while states would assume greater responsibility for economic development programs, transit, infrastructure, social services, community development, and waste-water treatment programs, now largely a federal responsibility. The goals are greater uniformity of benefits in income support programs, a rational division of labor between different levels of government, and a division of responsibilities that makes economic sense.

President Reagan's federalism reform proposed in his first term was, in my opinion, illogical and bespoke more a desire simply to rid the federal government of its social responsibilities than to reallocate and sort out funding in a logical manner. For example, Reagan's proposals would have devolved AFDC and Food Stamps (two income-support programs) to the states, together with several dozen federal categorical programs, while at the same time recommending the federalization of Medicaid, another income support-type program whose eligibility criteria are interlaced with those of AFDC, which would have been devolved.

In addition to a rational sorting out of responsibilities in the 200th year of our Constitution, and in addition to having the federal government look at innovative state programs in education, social services, welfare, and the like, there are other reforms which can be made, but again within the current system.

Perhaps most important is the issue of federal mandates referred to by Governor Sununu. I faced this in the White House on a whole variety of issues, such as the *Safe Drinking Water Act* and the 1977 handicapped regulations. If the handicapped regulations had been implemented in their initial form, New York City, for example, would have had to spend over \$1 billion to make its subway system barrier-free. Estimates were developed showing that it would have been less expensive to give every handicapped person lifetime taxicab service than to have removed all of those barriers.

As federal resources are drained in this era of large federal deficits, the federal government has moved to mandate actions by states and localities that it cannot afford to do itself. This has not been an entirely healthy situation. Any new mandates from the federal government should come with the federal resources to carry them out, or, except in the most pressing or unique situations, the mandate should be withheld. The federal government should not impose requirements on states which it cannot afford, and dump them on states which, likewise, cannot afford them. Again, however, this issue should be addressed within the current constitutional structure and without radical change in that structure.

In short, the current constitutional structure has been flexible enough to adjust and adapt to changing circumstances and situations. I believe that while states do have, in many cases, legitimate gripes—as do localities and cities—

with the federal government, the present structure permits states and localities to work within the political process to secure recognition of those gripes.

I likewise believe that as a result of the work of groups like the National League of Cities, the U.S. Conference of Mayors, the National Governors' Association, and the National Conference of State Legislatures, the federal government is more sensitive to state needs and recognizes that states now have a much greater capacity for creativity and policy innovation. State governments are much better equipped than they were ten or 15 years ago. Their bureaucracies are better trained. Their legislatures are more professional, and they meet for longer periods of time than before. They are, in fact, the policy innovators in the 1980s. In short, I do not think we should throw the baby out with the bath water.

*Local Self-Government
Through Citizen Legislators:
The Bedrock of Liberty*

Randy H. Hamilton

I commend the chairman for sitting me to the left of Stu Eizenstat. I don't know how that happened. Following Governor Sununu, Stuart Eizenstat, and Professor Berger is a difficult task. I would point out, however, that I have some disagreement with both Stu and Dick Nathan, with whom I have discussed these matters. I do not understand how one can suggest that state and local governments can have more control over their affairs by "administering federal programs." That strikes me as being somewhat of a contradiction in terms.

In *The Federalist Papers*, James Madison wrote that the jurisdiction of the national government would extend "to certain enumerated objects only," and leave "to the States a residuary and inviolable sovereignty over all other objects." He also wrote that "the general powers are limited" and that "the States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction." Two years after the Constitution was ratified, the Tenth Amendment was added to the document to put the obvious beyond peradventure.

Nevertheless, we know what is happening today. I will not recite a litany of decisions by unnamed federal administrators, but let me mention a couple.

When Donald Regan was Secretary of the Treasury, he said that unless the 12 states which then had a unitary tax abolished the tax, legislation would be introduced by the administration to abolish or preempt it. I am not arguing for or against the unitary tax here, but only with the propriety of a federal administrator making such a statement, particularly in view of the fact that 12 Senators signed a letter to Regan protesting his statement. By the way, not a single newspaper in the United States of America reprinted that letter.

Ralph Stanley, then in charge of the urban mass-transit program of the Department of Transportation, in setting out guidelines for the receipt of federal grants, said that he would give priority to local transit systems that involved themselves with the private sector. No stauncher advocate of the private sector than myself exists, but I do not understand how, without legislation, an unelected federal administrator can set policy for local transit agen-

cies with respect to private sector involvement. That strikes me as being either a legislative matter—that is to say, a mandate from the Congress—or a matter to be decided by local authorities.

I could go on and on. Mention has been made here of *Garcia*. A much more important case has been decided by a special master of the Supreme Court of the United States. Can anybody tell me the name of the anonymous special master who said, in effect, that the traditional intergovernmental immunity from taxation is no longer applicable?

Governor Sununu mentioned the whole question of intergovernmental immunity from taxation. I am suggesting to my mayor friends, governor friends, and county commissioner friends that if *South Carolina v. Baker* is upheld by the United States Supreme Court, they should then start doing something about the huge parcels of federal land in the West that are not taxed, about the number of federal buildings in San Francisco that are untaxed, about the number of federal automobiles that ride on our streets without state license plates, and so on. If intergovernmental immunity no longer applies, it means just that: it doesn't apply. What is sauce for the goose is sauce for the gander.

Now, much has been made of the importance of the U.S. Constitution during this Bicentennial year. However, the central constitutional issue is not the sorting out of powers. Bob Hawkins, Ed Meese, and I tried that once in California. We were not very successful.

The central issue is the fact that this nation was established with a peculiar notion. The peculiar notion is local self-government—not local government but local self-government. As such, we must rededicate ourselves to appreciate a truly unique American invention: the fact that the bulk of this nation's governance is in the hands of the part-time, unpaid (or virtually unpaid) citizen legislator. In no country in the history of mankind has the part-time citizen legislator, free from the dictates of kings, prime ministers, potentates, and presidents been so integral a part of a nation's governmental processes.

When our federal Constitution was adopted, there was still a Holy Roman Emperor. France was ruled by a profligate king, Russia by Catherine the Great, Egypt by a pharaoh. Venice was still a powerful republic, and the Ottoman Empire was in the penultimate stages of unraveling. Great Britain had only the barest beginnings of democracy.

Those once-proud regimes, and scores of others that have faded from history, lacked one vital ingredient: part-time citizen legislators fashioning and refashioning government in accordance with citizen needs and desires every week, every month, every year. Thomas Jefferson reminded us that “laws and institutions go hand in hand with the progress of the human mind . . . Each generation has . . . the right to choose for itself the form of government it believes the most promotive of its happiness.”

The dangers of increasing central government activity in what have been historically matters of local concern (e.g., bikeways, jelly-fish control, dog and

cat spaying) bids fair to convert the Congress of the United States into a city council, with the possible concomitant of requiring central government approval for too many local and state government activities. There is now a distinct possibility that the United States may move to the position now prevailing in England where prior to installing so picayune a thing as a pedestrian crossing by a municipality, approval must be obtained from Whitehall. There was even a debate in Parliament as to whether the little green men on traffic signals should be illuminated for 18 seconds or 26 seconds. It required an act of Parliament to allow municipalities and county councils to extend the pedestrian walking period from 18 to 26 seconds. In England, there is a significant number of local ordinances that require central government approval before becoming legal and operational. *Only* strong local self-government stands between our present situation and that one.

Let us not forget in this Bicentennial year that the overwhelming bulk of American government was, is, and should be under the leadership of freely elected selectmen, mayors, councilpersons, commissioners, supervisors, state governors, and state legislators. The widespread enjoyment of the “blessings of liberty” in the United States has not come about because of the national government or because of specific individual leaders (however great their contributions have been). The part-time citizen legislator has made possible the conditions under which we live, fulfilling the dream and promise of our nation. Those whom we choose to serve our will on a part-time basis, serving without realistic pay, without glamour, and without general recognition have been the true heroes of America’s governance for 200 years.

It has been state and local governments which have been successfully concerned with the housing, economic climate, education, public health and, indeed, even municipal baths needed to fulfill the American dream for the “huddled masses.”

When the U.S. Constitution was adopted, only 20 percent of Americans could expect to live to age 60. Today we expect most Americans to live to age 75. Much of the credit for this goes to the part-time citizen legislators whose works conceived, created, and still maintain the world’s best infrastructure for communicable disease control, with “sanitation” having been a municipal concern from 1634 in Boston (well before the national government was established). It is local self-government that prevented the scourges of yellow fever, dysentery, and typhoid that plague much of the world even today. It is not federal officials or the national government, but the practitioners of local self-government to whom the credit goes for being “able to drink the water there” without fear of consequences in this nation. It is state and local government that built and maintains the hospitals where the poor get medical attention, where the babies of immigrants were and are born.

This nation sends over 50 percent of its young people to college. It was the part-time citizen legislators who developed and govern over a thousand community colleges and the great state systems of higher education, beyond doubt the world’s greatest response to the educational needs of citizens and non-citi-

zens. It is not the national government that maintains more than 15,000 school districts and 84,000 public schools, which, for all their faults and failings, are the finest, freest, and most accessible on earth. These schools provide much of the private leadership for this country as well as its governmental leaders.

The United States occupies a vast but not benign continent. This continent was tamed by public works on a scale and scope that stagger visitors. Bridges, roads, tunnels, dams, reservoirs, schools, hospitals, drainage, water supply, sewage systems, street lighting, parks, cultural centers, and other public works were and continue to be built so rapidly for the benefit of our people that we have not had time to stop and count them. Our fascination with high-speed crisscrossing of a continent by automobile causes us to forget sometimes that well over two-thirds of the total road-miles traveled each year are not on those intergovernmentally constructed freeways, but on city streets and county roads built with wisdom, courage and forethought by local self-governors, mostly with funds raised locally.

When I studied public administration, using the same book that you did and the Attorney General did, Dimock & Dimock, there was a pie chart in the book showing that of every dollar collected in the United States, two-thirds went to state and local government. That same pie chart is now in the umpteenth edition of Dimock & Dimock, except that the ratio has been reversed: two-thirds of every dollar collected in the United States in taxes goes to the central government. That astonishing change leads me to mention my golden rule of public administration: "He who has the gold rules."

While criticism of state and local government is in vogue, in our nation where nearly 75 percent of the people live in urban areas, you see not the *favellas* of Brazil, the *callampas* of Chile, the *bustees* of India, the *gourbevilles* of Tunisia, or the *gecekindu* of Turkey. Large portions of the world's urban population are inhabitants of shanty towns pieced together from scrap lumber, sheet metal, or cardboard. This is the way of life for two-thirds of Calcutta's 9 million residents, 60 percent of the three million in Bogota, half of the population of Gyaquil, and 35 percent of Manila.

With the encouragement and partnership of state and local government franchises, 98 percent of the homes in the United States have electricity, compared with 50 percent in Turkey, 25 percent in the Philippines, and 10 percent in some supposedly "oil rich" countries. The national government played a scant part in that American accomplishment. Connected to local government water and sewage lines, 97 percent of American homes have flush toilets. In the rest of the world, the average is 25 percent. On the outskirts of Paris, the "City of Light" for a thousand years, I have seen one public water-faucet serve nearly 2,000 people. Those who talk, therefore, of the "failures" of American state and local government are simpletons.

Part-time state and local legislators practicing home rule have created a standard of civic wealth unrivaled on this side of the heavenly city. In our lifetimes, there is no chance that the people of most nations in the world will be even remotely as civically wealthy as the average American. Despite the fact

that two-thirds of every tax dollar collected now goes to the national government, it is state and local governments which have created the preponderance of this civic wealth.

The central task of ACIR consequently becomes one of nurturing, preserving, defending, and strengthening state and local self-government, resisting, if you will, the unceasing pressures for centralization. The doomsayers, the revisionist historians, and the fuzzy-headed insist that all this has been attributable to “luck” and not hard work; available “resources” and not talent, ingenuity, and invention; “climate” and not public works created by state and local governments that have brought us to the fruition of mankind’s striving for civic wealth. They are wrong!

In this Bicentennial year, let us celebrate the manifold contributions of state and local governments—the “home rulers” if you will. I would remind the detractors of local self-government, who long for the supposed “efficiency” of centralism and the supremacy of the central government in the bulk of the nation’s governance, that both North and South America are essentially the same in size, climate, and resources. Perhaps the difference in our civic wealth and system of governance is that those who came from Europe to settle South America went in search of gold; those who came to North America came in search of God and a better system of self-governance.

The seemingly ceaseless drift of power and operational responsibility to the center is to be deplored and resisted. In this Bicentennial year and forever, intergovernmental relations must be specifically focused on providing meaning to the Tenth Amendment. The people hold the ultimate power in this country, not the national government. Local self-government, once vibrant and alive, is becoming almost extinct because the national government by legislation, by regulation, and by U.S. Supreme Court rulings constantly usurps and supplants state and local government. The national government daily becomes more involved in what are traditionally and rightly local and state affairs.

A federal government is one in which a constitution divides governmental powers between a central or national government and constituent governments, giving substantial functions and powers to each. Neither the national government nor constituent governments receive their powers from the other; both derive them from a common source: the people, as expressed in a Constitution, including our Tenth Amendment.

This constitutional distribution of powers cannot be altered by ordinary pieces of legislation or regulation without doing violence to the Constitution. In a federal system of government, there are multiple sovereignties. Each is not merely responsible for providing services and governance but is also sovereign within its own sphere.

Unless the glacier-like drift of power to the center is stopped, your grandchildren will live, not in a federal system, but in a unitary government in which all power lies in the central government and in which the constituent units exercise only the authority given to them by the center.

The evidence for my conclusion lies all about us in bits and pieces. More evidence of diminishing state and local home rule is added routinely—by the Congress, by the courts, and by anonymous central government administrators who write the regulations in our central agencies and bureaus.

Example. Several years ago, as I mentioned earlier, Secretary of the Treasury Donald Regan stated that if the states did not abolish the unitary tax, the administration would propose legislation to preempt the states' authority to impose the tax. Again, I speak not to the merits of the unitary tax, but to the self-government issue. If the central government can preempt the unitary tax, what is to stop it from preempting other state or local taxes; or, indeed, from imposing a national value-added (sales) tax? What happens to the *rights* of state and local government to decide how to raise their own revenues—the muscle and fiber of self-governance?

Example. The Congress has mandated full Social Security coverage for state and local employees hired after December 1, 1985. This costs about \$3,000 per employee, which must come from locally raised taxes, thus usurping the right of state and local governments to agree with their own employees on their benefits. The same can be said of mandated Medicare coverage to the tune of about a half-million dollars in state and local taxes per working day.

Example. Ralph Stanley, then head of the federal mass-transit agency, acting apparently without legislation, announced (December 1985) that the Department of Transportation would give “priority consideration” for grants from its \$1.1 billion fund for capital improvement programs to those transit agencies “who demonstrate their commitment to . . . private sector involvement.” Again, I am speaking not to the merits or demerits of private sector involvement, but to the state and local self-governance issue concerning the imposition of rules by non-elected federal officials on how local transit agencies should conduct their own business.

Example. On October 1, 1986, a trigger mechanism took effect “allowing” states to “voluntarily” exempt purchases made with Food Stamps from state and local sales taxes, beginning October 1 of the calendar year in which state legislatures first met after 1986. If the states do not exempt such purchases “voluntarily,” federal legislation preempts the field. By October 1988, cities, counties, and states will lose that portion of their sales tax revenue derived from purchases made with Food Stamps, again weakening the fiber of state and local self-governance and revenue-raising options.

Example. States had to raise their legal drinking age to 21 or suffer the loss of 5 percent of federal highway funds in 1986 and 10 percent in 1987 and thereafter. Again, I speak not to the merits of a higher legal drinking age, but to the issue of state and local self-governance. Without evidence, President Ronald Reagan said that “the problem is bigger than the states,” thus indicating more concern for the political clout of MADD than for the principles of federalism as expressed in the Constitution he has sworn to uphold and de-

fend. The President went on to say: “With the problem so clear-cut and the proven solution at hand, we have no misgivings about this judicious use of federal power.” I point out that there is absolutely no valid research showing a relationship between a *legal* drinking age and a drinking age accompanied by the operation of motor vehicles. Increasingly, this kind of “cross-over sanction” is becoming the norm, with more than 50 such sanctions diminishing state and local self-governance.

Example. Cities, states and counties won a battle in the Congress to ease the implementation of the *Garcia* ruling, which brought state and local employees under the *Fair Labor Standards Act*, but they lost the war concerning their ability to determine pay and compensation for their employees. In the rush to compromise, states and localities voluntarily gave the Congress the right to control the bulk of state and local personnel systems. Although now, this right applies only under “limited” circumstances, ultimately more elements of local and state personnel systems will be regulated by the Congress, resulting, I predict, in the creation of a National Public Labor Relations Board paralleling the National Labor Relations Board.

Example. In two recent, massive changes in federal tax law, the central government has imposed various rules, laws and regulations that bid fair to destroy the cornerstone of intergovernmental fiscal relations—intergovernmental immunity from taxation. You know those provisions as well as I. But, again, I call your attention to the astounding statement in the opinion of the special master who decided against the states in *South Carolina v. Baker*. In his decision, he said that traditional intergovernmental immunity from taxation is no longer applicable. He did so in deciding against South Carolina’s contention that: “The constitutional scheme and intent was to divide sovereignty . . . to deter undue concentration of power in one government. Nowhere in our federal system is there a more basic and fundamental right than that of the states and political subdivisions to issue debt, free from taxation by the federal government.” In current Washingtonese, that principle is “no longer operable,” according to the special master.

Example. The *Cable Communications Policy Act of 1984*, while allowing municipalities to issue and renew cable franchises, has interposed national standards for franchise renewal, coming very close to central government approval of local ordinances in the British mode. Last year, local governments were preempted from even setting basic rates for cable television services.

Example. The *Motor Carrier Safety Act of 1984* included the preemption by Congress of a number of state and local motor safety laws and regulations which had been operable for three-quarters of a century. Now, federal standards exist for state standards, and regulations must first be submitted to, and approved by, the Secretary of Transportation before taking force and effect. This is a far cry from state and local self-governance. In the same vein, the *Transportation Assistance Act of 1982* preempted state and local laws prohibiting tandem trucks on the interstate system. The effect is obvious to anyone try-

ing to drive safely as behemoth trucks negotiate city streets not designed for their use.

As of today, a House-passed bill appropriating \$11.1 billion for FY 1988 could remove still more of state and local ability to regulate large trucks in their communities. "Terminal access" policy will be decided by the Secretary of Transportation, not state or local highway officials. This will permit large trucks to travel from any point of origin to any destination. Hence, by January 1988, monster vehicles will be able to use any city street or county road despite the hazards these trucks represent by the simple fact that these roads and streets were not designed or maintained for such use. The basic right of states and local governments to provide for the "health, safety, and welfare" of their citizens simply erodes by yet another bit or piece. DOT will publish the regulations, the discretion of the states will be removed, and that will be that.

Example. Commissary sales of cigarettes by the carton are exempt from state and local taxes as a way of providing, at state and local expense, a subsidy to members of the armed forces and the millions of retirees from those services. This occurs at the same time that the national government is telling states and local governments which of their bonds will be tax exempt.

Example. On January 31, 1986, the Federal Communications Commission snipped away the remaining state and local regulations concerning the installation of telephone wires in households. Now anyone may be permitted (if invited to do so) to enter your home to install "inside wiring." Previously, state law specifically licensed or recognized who may be permitted to enter your home. If states or local governments wish to exercise that power to protect their citizens, the FCC says that is a "no, no."

Example. An administration that is a self-professed opponent of double taxation of corporate dividends signed into law a provision that eliminates the deductibility of state and local sales taxes from their federal tax obligation. No mention was made, of course, of the huge amounts of federal property that are exempt from state and local property taxation. It would seem that intergovernmental immunity from taxation is in reality becoming a one-way street.

Example. The latest central government thrust, in its lemming-like drive to impose costs on state and local governments, is an increasing use of a central government tool—which I characterize as cost-free to the central government, but not to state and local governments—namely, the mandate to remove asbestos from schools. Of course, neither I nor anyone else wants school children to be exposed to asbestosis. However, a conservative estimate of the cost is about \$3 billion. The cost is no pain to the central government, but it is to constituent governmental units.

There are many, many more "bits and pieces" I could recite, including the recent EPA regulations concerning underground storage tanks, which will cause many small towns and cities to purchase publicly used fuel from other

and more expensive sources, and a proposed parental leave law that will increase the Congress' role as a city council's civil service commission. The U.S. Supreme Court also plays the role of a civil service commission, as it recently did in ruling that state and local governments cannot impose labor standards as a condition for granting franchises to employers that operate public-service industries (*Golden State Transit Corp. v. City of Los Angeles*, 1986).

Those interested in the preservation of state and local self-government and sovereignty should understand what is happening to our country in "bits and pieces." President Calvin Coolidge said it well in 1923:

There is always grave danger of encroachment upon the states by the national government. But it must always be emphasized that such an encroachment is a hazardous undertaking The true course to be followed is the maintenance of the integrity of each state by local laws and social customs, which will place it in harmony with all the others. By such a method . . . it will be possible to maintain an "indestructible union of indestructible states." . . . [T]he nation can be inviolate only as it insists that states can be inviolate.

If I may, Mr. Chairman and members of the Commission, I would suggest, therefore, that your nine barks at the constitutional tree are all wrong. The proposed changes in the Constitution are directed to the Tenth Amendment. I recommend that you direct your attention not to the Tenth Amendment and not to the commerce clause; they are not the problem. The problem is the necessary and proper clause.

This clause presently reads: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

I suggest that it be amended to read as follows: "To make only those laws *essential* for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." I would add a second sentence: "Congress shall make no law abridging the Powers reserved to the States or the people thereof, respectively, by the Tenth Amendment hereunto."

Resolving Federal-State Issues through the Political Process

Paul E. Peterson

If there is a crisis in American federalism, it is a crisis that is taking place in astonishing silence. The main reaction of the American public to discussions such as we are having today is at best a stifled yawn. I do not believe this is an accident.

The states, as Stu Eizenstat has suggested, are a powerful, dynamic component of the federal system. Seldom have they been stronger than they are today. They are providing an increasing proportion of our public services. State revenues are increasing, and surpluses are being enjoyed in many parts of the country. Many problems are being addressed at the state level, problems that were once thought to require a national solution.

Intergovernmental relations are also better than they have been in the past. The federal grant-in-aid system, which did create considerable problems in intergovernmental relations in the 1960s and early 1970s, has been noticeably modified. Accommodations among different levels of government have taken place in many programs in many subtle ways by many specific administrators, during a time that historians may come to call the Carter-Reagan era of reduction in the federal role.

The mechanism by which these accommodations took place has been the political process. Constituents and local public officials communicated their concerns about excess federal regulation to national administrators and to their representatives in Congress.

When the U.S. Supreme Court stated in *Garcia* that federal-state relations were to be resolved politically, the Court did nothing more than identify exactly the mechanism that has transformed the federal system in the last 15 years. Whereas one might have talked about an emerging crisis in American federalism in the early 1970s, the political process has addressed that problem to a substantial degree in the ensuing years.

Quite apart from these political trends, one must also bear in mind that the nation's economy has become increasingly integrated in the postwar period. The notion of separate regional economies is rapidly disappearing. Indeed, the main concern now is that we are developing an internationally inte-

grated economy in which capital and labor flow across national boundaries. Certainly, the Europeans have recognized this problem and have established a common market that establishes international standards that apply to all countries in the European Common Market, something that we accomplished in the United States a long time ago and to the enormous benefit of this nation.

Increasingly, states and localities have to attend to their economic development, and they have to worry about the competition that is occurring in other states and localities. These developments have a drastic effect on how each state designs its public policies. Indeed, the major constraint on state policymaking today is not any federal regulation, but the competition posed to each state by communities and states in other parts of the country. People can move easily. Even more easily, investment policies can change dramatically in response to changes in state policies.

Faced with that situation, states often find it necessary to act jointly to address a problem, which each cannot satisfactorily address on its own terms. Thus, it would be a strange Constitution that we would create that would prevent states from working together to address their common problems. Yet that is exactly what we would design if we prevented the Congress from assuming responsibility for programs and policies that are not easily concocted one at a time in each particular state.

Let me take, for example, the case of the handicapped. When the Supreme Court said that free public education had to be provided for every handicapped person in this country, up at least until the age of 18, it was a new problem, a new burden that was going to be imposed on states. If each state designed its own program in isolation from others, those states providing adequate services for the handicapped could become a haven for the handicapped and could bear significant costs detrimental to the overall well-being of that state. So it is not surprising that state and local officials asked the federal government, encouraged the federal government, to design a national law that would help to address this problem.

Admittedly, the handicapped issue did pose a severe problem in intergovernmental relations in the early 1970s, but early problems have been addressed in a spirit of intergovernmental cooperation. This is just one of many instances in which the political process and the discussions between national, state and local officials have enabled our country to move forward in a significant social sphere through our federal system. I would submit, therefore, that the Supreme Court has been wise in following the guidelines laid down by Justice Felix Frankfurter some decades ago, namely, to avoid the political thicket and to leave to the responsibility of political leaders the appropriate determination of what should be done at the national level and what should be done at the state and local level.

When I say that we need to leave intergovernmental relations to the political process, I do not mean that there is no room for improvement. The kind of proposal that Senator Daniel J. Evans has advanced and Stu Eizenstat has

endorsed today, which calls for the sorting out of intergovernmental functions, is a good one that requires careful consideration. The federal government should take more direct responsibility for income-maintenance policies and health-care policies that are of concern to our low-income population. Responsibility for managing local and state economic development should be given primarily to state and local officials. If we were to follow such policies, we could reduce many friction points in the federal system.

However, even though I endorse the Evans proposal, the main message I would like to convey here is that there is no easy solution to federalism questions. There is no straitjacket solution that is going to be adequate for a society and an economy that is constantly changing. The best wisdom that we can bring to bear on this is the wisdom of the limits of our own knowledge. Only by leaving it to discussions among state officials, federal administrators, members of Congress, and the President in his proposals to Congress can we resolve questions of federalism one at a time. It is only through that mechanism that we can define for ourselves gradually and slowly the appropriate balance of powers between our states and our national government.

The Discussion |

Hawkins: I would like to thank the whole panel for very fine presentations. We are going to open it up for discussion now. We will let Governor Sununu offer his comments; then we will ask Mr. Eizenstat for some additional comments.

Sununu: In trying to frame the issue, I avoided getting into some detail. However, I must strongly differ with Mr. Eizenstat's and Mr. Peterson's perspective on the world. The fact is that their arguments, as closely as they may parallel Mr. Hamilton's golden rule, "that he who has the gold rules," seem to me to be localized to determining who pays bills. This is not the issue that governors and state legislators around the country are primarily concerned with.

We are concerned with a climate of governance that has altered drastically. What has been enunciated as a constructive situation is a situation that is clearly a hat-in-hand theory of government, one in which we as states must come hat in hand to the Congress to try to encourage and convince the Congress to make changes in constraints. The fact is that we have been extremely unsuccessful. Historically, packages of devolution have been presented, but it just has not happened. I suggest to you that the internal mechanics of Congress—with the conflicts over turf that occur between so many committees—make it virtually impossible for that to happen in reality.

Most of the arguments that have been presented for the preservation of the status quo are consistent with the analogy I gave at the beginning. Proponents of the status quo may see that the tower is leaning, but since it is not falling right now, they say that there is no need to make change.

The concern that I have is that the foundation has been eroded. It is diseased, and unless you want to lose the tower, you have to do some remedial work. We are not asking for change. We are asking for restoration. We are asking for a return to the system that provided strength to our nation over the last 200 years. The fundamental issue at hand is whether we can take the capacity of the states to be creative and allow that creativity to continue to exist in a fertile environment.

One comment that really concerns me was Mr. Eizenstat's observation that we ought to take the example of a program in Massachusetts and mandate that as a national program. The idea that what works in one state becomes the model for mandating across the board is the fundamental flaw in the philosophy we are talking about. To allow states to do what is best is quite different from forcing states to copy what has worked somewhere else. The difference between the urban and rural areas of New Hampshire are stark enough. The difference between New Hampshire as a whole and New York as a whole is extremely great. There has been no evidence of a capacity in the Congress to allow for such distinctions.

The only way to maintain the capacity and strength of the states to serve their citizens well is to go back to the principles so clearly enunciated by Professor Berger and the historic perspectives he gave: that those issues that apply to citizens in day-to-day commerce within the states and day-to-day activities within the states are best left to the prerogatives of the states. Those issues that deal with international commerce, issues of war, and other issues that, as a society, we have added to the Constitution—the civil liberties issue for example—are appropriate prerogatives of the federal government.

Because we have been able to survive under difficult times does not mean that we will continue to do well, especially as that system continues to lean. I am afraid that if we continue to apply the kind of philosophy that was enunciated here, the tower will fall.

Hawkins: Stu, would you like to respond to a few of those points?

Eizenstat: I disagree with the Governor fundamentally. We just don't live in a confederation of states. We do live in a highly integrated society. As Paul said, it is now integrated not only across a great continent, but across the oceans. We cannot continue to pretend that we live in a different world.

Again, it is supremely ironic that this debate is occurring at a time when the states have virtually won many of the arguments that they have been making over the years. The Governor talked about states having to come hat in hand to the Congress for changes in mandates. My experience was that if states came hat in hand, it was for additional federal money. I am not sure that situation has changed, but it was certainly the case in our administration.

As I mentioned, states are in fact being remarkably creative and innovative on a whole range of social policy issues at a time when there is an impasse in Washington, and I am not casting political aspersions on the Reagan administration or the Congress. The fact is that because of the budget situation, there is simply a lack of innovation at the federal level. The policy innovations and creativity are coming from the states.

I did not say that the Massachusetts experiment on covering the uninsured should be mandated to the rest of the states. Indeed, I made it very clear that the federal government should be very wary of additional mandates on the states and on the private sector that it can't itself afford. In the *Washington Post* just a couple of days before this meeting, I wrote a piece on extending

Medicaid benefits. The article made it clear that we have to move incrementally in the health-care area because we do not have the funds or the expertise to establish a broad-based national health insurance program all at once.

It is terrific that Massachusetts is giving us the opportunity to see how the program will work—if it is too expensive, how the private sector will react, what effects the imposition of mandates by the state to cover the currently uninsured will have on its small business sector, the benefits of the program, and what kind of burden the program will place on the private sector. In this way, we can determine if and when the federal government should move and can move in a way that is much more rational and sensible than might otherwise be the case.

The last point I would like to make is that I can cite chapter and verse the number of times when we were called to task by states and localities, and properly so. Mayor Henry Maier of Milwaukee spent a lot of time in my office on this. The fact is that the political process did work. When the governors and mayors came up to point out the problems, we did tend to be very sensitive to the problems. This is not to say that we did not make mistakes with respect to intergovernmental relations, but we certainly were sensitized to their concerns.

I will just give you one example of a time when we did not listen and got our comeuppance as a result. At the height of the Iranian oil crisis in 1980, we proposed the creation of an Energy Mobilization Board. The legislation would have permitted a national board to license major energy projects and cut through what we considered to be overly burdensome local and state regulations regarding the siting and location of major energy projects, like synthetic fuel projects and the oil pipeline that had been vetoed by Washington State.

That program lost in the Congress. It lost because states and localities were able to convince the Congress, through the political process, that the federal government should not have that type of extraordinary power. We thought it was, in fact, an extraordinary time and that there was an extraordinary urgency on energy, but time has shown that perhaps the state arguments were sound. That is only one of innumerable instances which show that the states have won.

Perhaps what we need is a little of what Senator George Aiken recommended with regard to the Vietnam War, namely, to declare victory and withdraw the troops. Governor, your points have been made and heard. States are the centers of creativity. The political process is working beautifully, and let's continue to work through that process rather than amend the Constitution in ways that would not permit the kind of flexibility which is provided by the current structure.

Hawkins: Thank you. Mayor Robert Isaac?

Isaac: About this question of the enumerated powers, I hope I am reading your statements correctly, Mr. Eizenstat and Mr. Peterson. Are you saying that, in accordance with *Garcia*, there should be no judicial limit on the ability

of the Congress to determine the extent of its enumerated powers? In other words, the Congress should determine the extent of its own powers as enumerated under Article I. If that is what you are saying, then I imagine you are adopting Justice Harlan Stone's remarks in the *Darby* case, in which Stone is alleged to have stated that the Tenth Amendment added nothing to the Constitution.

I ask you, then, about the situation in which you have an enumerated power of the Congress, which is positive, pitted against another positive, which is the enumerated power of the Executive. In such a situation, do you feel that the Judiciary should make a determination as to the extent of the power for both the Congress and the Executive, in order to determine the balance?

Peterson: One of the mistakes we make in this area is to believe that our constitutional system is solely determined by court decisions. I think it was the Attorney General who pointed out that the executive branch makes its own contribution to the interpretation of constitutional doctrine, as does the Congress. If you look at court decisions in the area of federalism, the one thing I have heard the panel agree on is that they are a mess. The Supreme Court has wandered this way and that way, and has been unable to come up with any kind of a doctrine that has been able to have any staying power over a long period of time.

Some people say that the solution is to go back to the intention of the founders. That gets us into a discussion of what the word "among" means. Professor Berger gave us one narrow interpretation of the word "among." Professor William Crosskey, as I recall, has a very expansive interpretation of the word "among."⁴⁵

Justice Antonin Scalia has pointed out that trying to determine the intent of Congress with respect to a piece of legislation is virtually hopeless. Which committee report do you read—the Senate, the House or the Conference Committee, the statements that are made in the course of the debates on the Hill, or the remarks of the President when he signed the law?

Justice Scalia has a compelling argument, one that becomes even more compelling when you try to figure out what the intentions of the Founders were with respect to words in a document that have complex ramifications for a society that has changed dramatically. Consequently, I believe that the way in which we address these issues is by a conversation that takes place among the branches of government, one that involves the states, the Congress, the President, and the courts. The courts are going to continue to play a role in this area, but I do not think that we will ever have a settled doctrine.

Isaac: The question was, do you agree with the statement attributed to Justice Stone after the *Darby* case that the Tenth Amendment adds nothing to

⁴⁵William W. Crosskey and William Jeffrey, Jr., *Politics and the Constitution in the History of the United States*, 3 vols. (Chicago: University of Chicago Press, 1981).

the Constitution? As a result of the *Garcia* case, are we left with the ballot box as the only way, as Madison said, to get rid of the usurpers who exceed their power in government?

Berger: If I may, let me first address Justice Stone's alleged remark that the Tenth Amendment added nothing to the Constitution. There has been an extraordinary, almost classical misinterpretation of what Stone meant when he said that the Tenth Amendment is merely "declaratory." Let's remember what "declaratory" means. It refers to a statute that is enacted to remove all doubt as to what the law is.

Now the fact is that, in one sense, the Tenth Amendment was not necessary because the Founders were assured, time and again, that only those powers that were enumerated could be exercised by the Congress. They did not have to talk about reserved powers because everything that was unenumerated was reserved. Despite these assurances, the ratifiers insisted on an explicit guarantee. The ratifiers wanted to make this reservation absolutely certain. Thus, even though the Tenth Amendment made the assurance doubly sure, we are now told that the Tenth Amendment does not mean anything. I think this is the greatest folly.

Now let me direct myself to Mr. Peterson's remarks about original intent. I have great admiration for Justice Scalia, but ultimate wisdom is confided to no one. I was taught by a marvelous introduction that James Iredell made to the North Carolina Ratification Convention that we are all fallible; no one is infallible.

First, there are certainly many cases where the evidence is vague, ambiguous, or conflicting. We cannot talk about original intent in those cases. However, there are cases where the intention is quite clear, and in those cases, one has to be headstrong to disregard original intent.

If one thing is plain, it is that the states did not want to be at the mercy of the Congress. The lion's share of the power had been conferred on the Congress, not on the Judiciary, which was declared to be next to nothing by Hamilton, and not on the Executive, which was to carry those powers into execution. All of the records in every ratification convention are full of expressions that "we must fence this tremendous legislative power about."

Consequently, even though the legislatures were the darlings of the colonists because they elected them, they still wanted to have a check in the event that the Congress, to use their language, "overstepped its bounds." This check was the judicial branch. The idea that the Supreme Court in *Garcia* could abdicate that function of protecting the states from the Congress is revolutionary, and plainly contrary to the Founders' intention.

Let me address another thing. We are told that ours is an integrated society. This is true; the economy has become increasingly national. However, economic change does not confer power on the Court to reorganize the Constitution which, if we face up to it, is what it has been doing.

There is no doubt that the Court has facilitated the transformation of our capitalist society. Those of us who rejoice in it should cast their minds back to *Lochner v. New York* (1905), where I think it was attorney Joseph Choate who said, why shouldn't an Irish washerwoman work 12 hours a day? She doesn't need to be protected. In those days we had a Court that was execrated by the academicians and by society because it overthrew minimum wages, maximum hours, and child labor laws. What that points up is the folly, at any given moment, of identifying a currently fashionable social theory with the Constitution. Tomorrow you will have a different theory, and if you are going to be guided by that, you will have a constitution which is like a whirligig, just swirling in the political winds. All of the things that some people applaud today are really judicial constructs resulting in an unwritten constitution. Were time to permit, I could give you chapter and verse on that.

George Washington, in his Farewell Address, made a profoundly wise statement. He said that there will be times when the exigencies of government may seem to require an adjustment of the Constitution—and I roughly paraphrase him—but let it not be done by usurpation. Let it be done in the way that the Constitution provides, by amendment.

What Mr. Peterson is talking about is what I would call squatter sovereignty. I am a Chicagooan, and we had a bearded fellow way back in 1900 who just put up a tent on the lake front by Grant Park. He stayed there for 21 years and wasn't ousted by the authorities. He claimed all of Grant Park by adverse possession, and in private law he would have had it. Squatter sovereignty, however, does not run against the people of the United States. Because larceny was committed 100 years ago, and has been repeated 100 times, does not make it less larcenous. Larceny is not legitimated by repetition.

If we are really going to trust our Constitution, if it is to be the shelter and the bulwark it was meant to be, we must have a profound respect for it. One has to appeal to the people to change it. When women sought the ERA, they didn't go to the Supreme Court. They might have, I suppose, under currently vague and broad theories of equal protection. They failed by two states, which is, in my judgment, a pity, but, nevertheless, that shows a respect for the legal process, the constitutional process. When we play ducks and drakes with the constitutional process, we undermine its foundation.

Peterson: May I just point out one interesting aspect to this debate. The argument that is being made for overturning *Garcia* is an argument for an activist Court that will declare acts of Congress unconstitutional. Only in this way can we protect the powers of the states. The argument is made that unless this is done, the states, as when they originally joined the union under the Constitution, would be acting within a framework that they did not intend to create. The framers of the Constitution, it is said, felt that it was extremely important that the Supreme Court have this power of judicial review.

If you look carefully at the U.S. Constitution, you will see that nothing in there speaks directly about judicial review. It took a very long, careful argu-

ment by a distinguished justice of the Supreme Court in order to find the doctrine of judicial review in the Constitution. It is not there with any clarity. Apparently, the original states believed that it was possible to entrust their rights to a Congress unfettered by an express grant of the power of judicial review.

Berger: Well, that's only apparent. One of the folk tales of American history, like Washington chopping down a cherry tree, is the notion that John Marshall, for the first time, uttered the doctrine of judicial review in *Marbury v. Madison* (1803).

First of all, you make the best argument for original intention because you are quite right, Mr. Peterson, there is not a word in the Constitution about the Court having the power to overthrow legislation, not a word. But Marshall, who was a delegate to the Virginia Ratification Convention and who echoed similar remarks made in almost all of the conventions, said that we must have judicial review. Who else will protect the states from Congress?

I submit to you that this was not the naive reliance of the states on a Court that would, in time, assume powers that were withheld from the federal government. The Founders contemplated that the Court was to make sure that the Congress would stay within its boundaries and not encroach on the states. One could not make a better argument for original intention than to say that without it there would be no power in the Court to overturn legislation. One cannot invoke original intention to legitimate judicial review and then shunt it aside on the issue of its scope. Logic and consistency demand even-handed applications of original intention.

I want to mention one other thing. I have not said anything about the tremendous power that the federal government exerts by virtue of the spending power under the general welfare clause. I did not touch upon that today, although I devoted a very elaborate chapter in my book on federalism to the general welfare clause. We should remember that it was only in 1936, and it may have been in the *Butler* case, I believe, that the Supreme Court at last sanctified the federal government's spending power. Those of you who are interested in the way that the federal government exerts this potent, tremendous influence on the states should realize the flimsy basis on which the spending power stands.

Hamilton: Mr. Chairman, may I make a comment in connection with the position of those to my right who talk about a national economy? I can collect garbage real good, and I can count up to three on a council of five, but what happens when you begin to talk about a national economy and an unfettered Congress? The members of Congress would likely be surprised, I think, to realize that Article I only gives the Congress 18 powers. If you count them up, that's all you've got. Let me explain the operational effect of the spending power on the governor, the mayor, and the county supervisor.

The *Motor Carrier Act of 1984* included the preemption by Congress, under the guise of the spending power, of a whole slew of motor vehicle safety laws and regulations which had been operable in the states for three-quarters

of a century. Currently, state laws that would amend those regulations must be submitted to and approved by the Secretary of Transportation. We all laughed when we talked about little green men, but you are not laughing as I suggest to you that important state motor vehicle and safety regulations have to be provided to the Secretary of Transportation before they are implemented: right turn on red, for example.

The *Transportation Assistance Act of 1982* preempted state and local laws that pertain to tandem trucks. The House has passed, within the last six weeks, an additional piece of legislation, which I assume is now before the Senate. This legislation would give the Secretary of Transportation the right to implement what is called “terminal access.” That is high-class language, which says that any behemoth truck can go from point A to point B on state highways, on city streets, and on county roads, regardless of whether those streets and roads are designed or built to stand them. That law is probably going to pass. Sure, we have a national economy, but operationally, what is going to happen can be predicted: city streets and county roads will be torn up. Under the guise of controlling or regulating interstate commerce and a national economy, we will see more trucks that say “Caution, this truck makes wide right turns” on streets and roads not designed for them.

The point is fairly simple. At the operational level, everything that looks good inside the Beltway results in problems outside the Beltway. What is a big issue inside the Beltway is, for the operational folks in our cities, states, counties, and special districts, not much of an issue, but local self-government is. Don’t tell us that a huge truck going from A to B must be allowed on our city streets.

Sununu: Mr. Chairman, I would like to make one last point. With all due respect to the conclusions that are drawn, there is a perception that we are now more international in our economy than ever before, but I suggest to you that today is not very different from the 1780s. The 13 colonies that became the 13 states that became the United States were actually very dependent on international trade. In fact, it was international commerce and trade between the states, such as the taxes New York imposed on New Jersey for all products coming into its harbor, that were the driving forces that brought those states together. Perhaps today we are moving back toward an equivalent ratio of international commerce to domestic commerce, but those 13 colonies were not purely independent and not independent of “international” trade between themselves. Hence, the changing character of this country is not due justification for an expropriation of power by the federal government.

Furthermore, to suggest that the decision of the Court in *Garcia* to apply a federal law to a specific case is less activist than the Court not choosing to decide on that case is absolutely ludicrous. It was not a question of determining the constitutionality of the law, it was a question of applying that law in a specific instance to a specific contract in a specific situation.

Hawkins: The hour is getting late, and the panel has served us well. We have gotten clear and diverse opinions, well and cogently argued, and I think that is always of benefit to the Commission and to the public.

I would like to thank the panelists.

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