

*Hearings on  
Constitutional  
Reform of  
Federalism:  
Statements by  
State and Local  
Government  
Association  
Representatives*



Advisory Commission on  
Intergovernmental Relations

M-164  
January 1989

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(January 1989)

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## *Preface and Acknowledgments*

The Commission expresses its appreciation to the representatives of the state and local public interest organizations, and to those organizations, for their testimony at the hearing held in conjunction with the ACIR meeting at the Hall of the States, Washington, DC, on September 16, 1988.

Appreciation is also due to Ruthamae A. Phillips and Lori A. Coffel for typing the hearing testimony for publication.

This hearing represents another followup to earlier work conducted by the Commission, including the following reports: *Is Constitutional Reform Necessary to Reinvigorate Federalism? A Roundtable Discussion* (1987), *Federalism and the Constitution: A Symposium on Garcia* (1987), *A Framework for Studying the Controversy Concerning the Federal Courts and Federalism* (1986), and *Reflections on Garcia and Its Implications for Federalism* (1986).

**John Kincaid**  
**Executive Director**

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## *Commission Members Participating*

*Hon. Robert B. Hawkins, Jr.*, Chairman  
San Francisco, California

*Hon. John H. Sununu*, Vice Chairman  
Governor of New Hampshire

*Hon. John T. Bragg*, State Representative, Tennessee

*Hon. Philip B. Elfstrom*, County Commissioner,  
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*Hon. Donald M. Fraser*, Mayor, Minneapolis, Minnesota

*Hon. William H. Hudnut, III*, Mayor, Indianapolis, Indiana

*Hon. Robert M. Isaac*, Mayor, Colorado Springs, Colorado

*Hon. Jim Ross Lightfoot*, U.S. Representative, Iowa

*Hon. David E. Nething*, State Senator, North Dakota

*Hon. Harvey Ruvlin*, County Commissioner,  
Dade County, Florida

*Hon. Sandra R. Smoley*, County Supervisor,  
Sacramento County, California

*Hon. Ted L. Strickland*, State Senator, Colorado

*Stephen J. Markman*,  
Representing Hon. Richard L. Thornburgh,  
Attorney General of the United States

## *Principal Hearing Participants*

*Hon. John H. Sununu*, Governor of New Hampshire,  
Immediate Past Chairman, National Governors' Association

*Hon. Harvey Ruvin*, Commissioner, Dade County, Florida,  
Immediate Past President, National Association of Counties

*Hon. Ted L. Strickland*, President, Colorado Senate,  
President, National Conference of State Legislatures

*Hon. Robert M. Isaac*, Mayor, Colorado Springs, Colorado,  
Chairman, Advisory Board, U.S. Conference of Mayors

*Hon. Mary McClure*, President Pro Tem, South Dakota Senate,  
Chairman, Council of State Governments

*Hon. Brian J. O'Neill*, Council Member,  
Philadelphia, Pennsylvania,  
Member, Finance, Administration and  
Intergovernmental Relations Steering Committee,  
National League of Cities

*Hon. Douglas Henry, Jr.*, Senator, Tennessee Senate,  
Chairman, Southern Legislative Conference

*Hon. Lucille Maurer*, Treasurer, Maryland

*Hon. Jim Ross Lightfoot*, U.S. Representative, Iowa





## Introduction | Robert B. Hawkins, Jr.

**T**his hearing continues a series of studies and concerns that the U.S. Advisory Commission has had since its beginning 29 years ago. If there is one principle that this Commission has stood by through the years and through various chairmen, executive directors, and members, it is that a balance of powers is a key to a healthy federal system. Yet, over the last 15 years, the Commission has, with increasing alarm, seen the federal system get out of balance.

The 1985 *Garcia* decision by the U.S. Supreme Court certainly accelerated that imbalance. At that time, the Commission held hearings around the country. The general feeling was that, so long as the Congress would act fairly with regard to fair labor standards and compensatory time, everything would be all right.

As a professor of mine once said, one decision doesn't make a trend. Two do. We got *South Carolina v. Baker* in April of this year. Now that the logic of the Court is fairly clear, some kind of reform at least has to be thoroughly discussed, not only within the Commission but also with the American public, to decide just how we want the federal system to operate.

At our last meeting, in North Dakota, it was decided that we ought to have a roundtable on constitutional reform and to hear from a number of the state and local public interest groups. I always hate to use that phrase, public interest groups. Somehow I don't think of elected governors, state legislators, mayors, and county officials as public interest groups.

**Strickland:** We prefer that to the abbreviation (i.e., PIGs).

**Hawkins:** Yes, I know. We thought we should hear from elected officials about the paths that they think we should consider seriously in terms of reforming the federal system. So that is the purpose of this hearing.



Statement

*Hon. John H. Sununu  
Governor of New Hampshire  
Immediate Past Chairman,  
National Governors' Association*

**T**he most important thing that has happened on the federalism issue over the past year or two is that it has been revitalized in terms of interest and commitment by virtually all the organizations that represent local, state, and regional governments.

There is a clear understanding that we are at a point at which federalism must be reexamined in the context of restoring some of the traditional state and local authority and capacity to define policy and to reject policy, as was intended in the amalgam that made this confederation of states so strong.

The governors, the NCSL—and I am pleased that Senator Strickland has joined us because he was a very aggressive and active part of NCSL's recognition of this—have pointed this out. Other groups, such as NASBO, have been very pointed in their comments and their policy statements.

With this resurgence of understanding that something ought to be done, an agenda now has to be defined in terms of specific steps to be taken in order to address the concerns that have been raised.

The NGA had a Task Force on Federalism that looked at the two ends of the problem: one being a very specific issue and the other being the more general issue of how to reestablish the basic strength of the states in terms of constitutional balance (see Appendix A for NGA policy statement).

The specific issue dealt with the latest decision by the Supreme Court, *South Carolina v. Baker*. In that decision, the Court held that the Congress literally has the authority to invade and destroy what had been one of the last vestiges of a state's capacity to do business on its own, namely, the right to issue tax-free debt instruments.

The decision itself was bad enough, but it also contained language making it very clear that if the states or local governments were looking to the federal court to deal with any inequities that might have developed over the years, they were sadly mistaken. The Supreme Court made it clear that the government entities outside of the federal government ought to be addressing such inequities in the federal system through the political process. That's the general term used by the justices. What "political process" means specifically is left open. But they were saying, don't expect us to arbitrate your differences, and if you force us to arbitrate those differences in the court structure, don't expect us to settle these cases in the direction you want.

Now, that may be a slight reaching beyond the specific language of the decision, but experts who have examined the *South Carolina* decision in detail probably wouldn't disagree very much with my conclusion.

Having seen that, then, it is up to ACIR and its constituent members and the other government institutions, non-federal government institutions that care about this, to establish a specific program of action. The governors have recommended that in terms of the specific question of issuing tax-free debt the Congress should at least enact legislation to undo the mischief done by the Court. At the very best, the governors would like to see that mischief eliminated by a constitutional amendment that would make clear what the states have thought all along, namely, that they were fairly autonomous in their capacity to issue bonds and so on for funding particular capital projects.

The second point, though, is to recognize that a great deal of the change in federalism has taken place because of the weakening of the Tenth Amendment, which was intended to be one of the check and balance structures in the Constitution as framed. The erosion of the Tenth Amendment is clearly at the heart of the problem, and we have all talked about that over the last couple of years, and ACIR has been at the forefront of suggesting how to address that problem.

One of the problems in allowing the Tenth Amendment separation of roles to be eroded is that included in Article V was a check and balance for amending the Constitution. If the pendulum tended to swing too far one way or the other, the Constitution had built into it a mechanism for either the Congress to initiate amendments and then send them to the states for ratification, or for the states to initiate amendments and seek the ratification of those amendments.

However, the provision of Article V for state-initiated amendments requires a constitutional convention. Whether right or wrong, there has developed over the last couple of hundred years an aversion to another constitutional convention, a fear of a constitutional convention, a concern that it may not be an appropriate vehicle for the country at this time. Indeed, there has never been another convention since the first one in 1787.

With that in mind, the balancing of power aspect of Article V has become moot. Therefore, in order to be fair, in order to reestablish a balance, it is recommended that the constitution be amended to provide for a third mechanism of amendment, again a state-initiated process, but one in which Congress would have a role that, frankly, is there to balance the process enough so that there might be some possibility of passage.

A provision has been suggested that would allow two-thirds of the states to initiate an amendment. The language would be unified by a committee on style, made up of one representative from each of the proposing states. The proposal would then be sent to the Congress, which would have a two-year period, one congressional session, to reject the proposal by a two-thirds vote. If the Congress failed to reject the proposal by a two-thirds vote, it would be returned to the states for a ratification decision by three-fourths of the states.

There are some folks who suggest that this is a radical departure from what is in the Constitution. I suggest that this proposal is probably the closest

one can come to what was there, without raising the problem of a constitutional convention, which has itself become the problem.

There is no question that this project is not the kind of thing that happens quickly. There is no question that this proposal is just a suggestion for beginning a long-term examination of this issue, but it is a fine point of departure. We are about to ask members of Congress to file this proposed amendment and seek to have the Congress move it forward.

I would also urge states to examine this proposal. Even though there has not been a constitutional amendment initiated by states over the past 200 years, maybe this is the right one for the states to start working on.

In any case, the blend of pressure that would come from that, plus perhaps an enlightened response by the Congress as to the value of federalism to begin with, might move this thing forward.

Mr. Chairman, I urge that ACIR, which already has taken a significant lead on this general issue and has provided much of the intellectual support and the actual administrative support for this kind of an effort over the years, take a significant role in focusing whatever resources and influence can be brought to bear to move this kind of an effort forward.

One last point. The interesting part of what has happened in very recent years, particularly the federal intrusion into such areas as the issuance of tax-free debt instruments, is that there are significant entities in the private sector that understand that this erosion of the states' capacity to issue tax-free debt instruments also is an erosion of some of the business enterprise that takes place around the country. There may be some significant private support to provide resources and personnel that will allow us to do a first-class job on this project. The ACIR might explore a partnership arrangement or a spinoff of some of the efforts that have taken place here, establishing something that might have a focused agenda on this particular issue. It certainly is important one way or the other.

I would recommend that ACIR as an entity, and anybody we can grab hold of to join us, continue this effort.



## Statement

*Hon. Harvey Ruvin  
Commissioner,  
Dade County, Florida  
Immediate Past President,  
National Association of Counties*

**A**s a member of this Advisory Commission and the immediate past president of the National Association of Counties (NACo),\* it is a pleasure to appear before you on behalf of county government. This discussion on restoring some balance to our rapidly deteriorating system of federalism could not be more timely. It also could be helpful in shedding some public attention on our almost collapsed intergovernmental partnership and perhaps even in providing some education for our elected and appointed federal officials.

This hearing is meant to focus on a number of long-term proposals for restoring balance to the federal system. The proposals include constitutional amendments, the process for initiating amendments by states, and limiting constitutional conventions to specific amendments. NACo has not taken a position on any of these proposals, and it is doubtful that the association will take a position in the near future. There is concern and hesitation among county officials about changing the amendment process without a lot more study and thought.

As a concept, there is considerable appeal for allowing states to initiate amendments and not just leave it to the Congress. Whether Congress agreed or not on the language of such an amendment, it could help in focusing attention on the federal system and possibly on the issue of reciprocal tax immunity. If Congress did agree on such an amendment and sent it to the states for ratification, we have to remember that the actual language would be written by the Congress. The final amendment may not be what today's proponents have in mind.

There also is appeal to the concept of limiting a constitutional convention to only state-initiated amendments. However, there is enough disagreement among constitutional lawyers about the terms and issues of any constitutional convention to give us considerable concern. Whether or not Article V could be amended to limit a constitutional convention, it probably would be subject to further clarification by the Supreme Court, and this raises further concerns.

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\*The National Association of Counties is the only national organization representing county government in the United States. Through its membership, urban, suburban, and rural counties join together to build effective, responsive county government. The goals of the organization are to: improve county government; act as a liaison between the nation's counties and other levels of government; achieve public understanding of the role of counties in the federal system.

To repeat, we believe that considerably more study and work have to be given to the various long-term constitutional changes to restore our federal system. In any case, all of these proposals are long term, and it would take many years to bring about real changes. We still have to deal with today's realities and how we can mobilize our resources to force the federal government to again be a partner with the states, counties, towns, and townships of America.

The biggest reality facing us in Washington, DC, is the federal budget deficit and the unwillingness of the Congress to deal with it. If this issue is not faced up to and handled decisively, there will be more unfunded mandates, further cuts in federal funding of intergovernmental programs, and more restrictions on our bonding and taxing authority. All this will happen in the name of deficit reduction, and there will not be much thought or weight given to the intergovernmental partnership that made this country great.

NACo faced up to this dilemma last year and passed a policy statement calling for increased federal revenues as well as equitably balanced reductions in domestic, defense, and foreign expenditures. We urged further that new federal funding initiatives should be paid for dollar for dollar on a pay-as-you-go basis for new revenues. We will continue vigorously to urge the 101st Congress and the new administration to increase federal tax revenues as part of a decisive and meaningful deficit reduction schedule.

No elected official—state legislator, county or city official, or even a member of Congress—is enthusiastic about raising taxes. But we do it when it is responsible to do so. Members of Congress and the new President also have to face up to it next year. Apart from the necessity to get the federal budget under control, we have critical needs in this country that cannot be met alone by state or local governments or by the private sector. All of our states are not equal in fiscal capacity. There is a national purpose in having the federal government help states, counties, and localities to fund basic needs of all our citizens. It is in the national interest that we have federal support for rebuilding our infrastructure network so we can be competitive with other countries. I state these very basic premises because sometimes our national elected officials forget that the meeting of these needs is not a give-away program for special interests. This is precisely what the intergovernmental partnership means—working with states, counties, and localities in providing basic services to all of our citizens, and pooling our resources to meet the needs of a common constituency.

We have to mobilize our resources to renew the interest of the Congress and the new President to rejoin the intergovernmental partnership. Our basic resource is our citizenry. We need to take our message to the grass roots and educate our citizens about:

- How their federal taxes are spent;
- Why we have to borrow funds and raise taxes for federally mandated jails, sewage treatment plants, and incinerators; and
- Why road and bridge projects will be held up for years when we have federal trust fund surpluses of \$10 billion.

Mobilization of our resources is critical in putting together the intergovernmental partnership. We are fortified by the efforts made by our national



associations representing governors, legislators, and county and city officials to work together on a federalism agenda. Our major goal has to be convincing the Congress and the new administration that we have a common agenda to meet the needs of all our citizens and that state and local governments are not just another special interest. While there may be merit in pursuing constitutional remedies, our efforts at NACo will be geared to these more immediate goals.



Statement

Hon. Ted Strickland  
President, Colorado Senate  
President,  
National Conference of State Legislatures

**T**hank you for asking me to appear today. In the process of determining whether a constitutional amendment should be adopted, the state legislatures will ultimately play a key role. The legislators understand that achieving a consensus with other state and local officials will increase the chances for success of any effort we may decide to pursue. That is why this forum is important.

The primary purpose expressed for this hearing is to assess various proposals for constitutional change that the ACIR and the NGA have considered for some time. NCSL has not yet taken an explicit position on these proposals, so before addressing the specifics of those proposals, I would like to review briefly the activity of NCSL in the area of challenges to federal aggrandizement. When the Garcia decision was handed down in 1985, our Law and Justice Committee held numerous forums to debate the options for action. Constitutional amendments were proposed, but not approved. However, we did join with others to effect the changes needed in the *Fair Labor Standards Act* to protect state and local governments from some of its most onerous provisions.

Our Law and Justice Committee passed policy urging a partnership role with the Congress, and that policy has been amended to reflect both some of the political changes suggested in President Reagan's working group report on federalism and the Court's reaffirmation of *Garcia* in *South Carolina v. Baker*.

Shortly after the *South Carolina v. Baker* decision, I appointed a task force to recommend a course of action for NCSL to pursue. The task force, chaired by Senator Stanley Aronoff, President Pro Tem of the Ohio Senate, has met twice and has considered constitutional and other remedies to the current challenge to the standing of the states in the federal system.

At its first meeting, the task force reviewed several options. It discussed briefly the ACIR proposal to allow the calling of a constitutional convention limited to specific amendments, with the Supreme Court having the power to determine whether the convention stayed within the parameters of the call. The task force discussed Governor Sununu's proposal in greater depth. That proposal would provide the states power to urge a particular amendment to Congress without the threat of a convention. Under the governor's proposal, the Congress would still be able to veto the amendment by a two-thirds vote in both houses. Discussion of the Sununu proposal included comments that eas-

ing the amending process would open the Constitution to forces for changes that would be directed to correcting the imbalance of federalism. Others argued that the need for correcting the balance with Congress was so important that the change in the process was essential. Action on this proposal was also deferred until the members had more information and more opportunity to consider various options.

To present the arguments relating to a constitutional convention, we invited Raoul Berger and Kevin Faley to attend our annual meeting. Berger addressed the ACIR at its meeting last fall. He has an impressive grasp of constitutional history and articulates quite forcefully his views of the founders' original intent. He would not have the states hesitate to call a convention to restore their proper place in the system. Mr. Faley was once a counsel for the Senate Judiciary Committee, and he urged caution about calling a convention because it was a last resort with profound consequences. But what was perhaps more important than their differences was the fact that both Berger and Faley thought that it was essential that we start by looking at what substantive changes were needed to right the balance of federalism. Berger was of the opinion that our energy might be dissipated on a procedural change, and even after having the change in place we would still be searching for the words to express our desires for federalism. Faley added that if agreement was reached on substantive changes, procedural changes might prove unnecessary. The states could present a united front within the existing political and constitutional framework to seek changes.

Senator Dawn Clark Netsch proposed at one of our task force meetings that we focus directly on two issues: first, the need to restate the principles of federalism, and second, the need to articulate the duty of the Supreme Court to act as an arbiter in state-federal relations. Senator Netsch's proposal would call for a restatement of the Tenth Amendment, perhaps with amendments to reflect additional realities in today's federal system. To the restated Tenth Amendment would be added a phrase directing the Supreme Court to adjudicate the issue of federalism. The latter point is similar to that found in several state constitutions calling on state supreme courts to determine what is permissible general legislation and what is impermissible "local legislation."

At our meetings, opinions ranged from enthusiasm for the proposals for constitutional change to a cautious and perhaps critical view that we had not exhausted one other remedy—the political approach. The open and thoughtful discussion led to our sense that great promise might exist with certain constitutional changes, but that each of our solutions should be given a more thorough examination.

The Task Force will hold additional meetings to attempt to achieve consensus on a concrete formula for possible constitutional proposals.

NCSL continues to advocate a strong political presence for state and local governments both on Capitol Hill and in the courts. Our policy incorporates some of the political goals recommended by the President's Working Group on Federalism. Specifically, we could work for a statement of constitutional authority and federalism assessment for all federal legislation. This and other recommendations of the Working Group should be given a high priority. Along with local governments, we strongly support the activities of the State

and Local Legal Center. Even after *South Carolina v. Baker*, advocacy in the Supreme Court remains important in matters of preemption, tax policy, and regulation.

In all of our deliberations, we must take a long view both forward and backward. As Professor Berger reminded us, an important task in redefining federalism for this age will be determining to what extent we should roll back to an era when states predominated. Intervening events have changed the face of federalism, and in some instances the state and local governments have been complicit in the realignment. States have acquiesced in accepting money with unrelated conditions; local governments have developed direct relationships with the federal government. Both of these factors should cause us to pause and reflect on what federalism should really mean for today.

We at NCSL will continue to work for an unambiguous, honest, and realistic solution to our role in the federal system. I might add that NCSL, representing legislators from all 50 states and four territories, both political parties, and all philosophies within the range of those two political parties, has spent a great deal of time and effort on this issue. I am very encouraged that, under the leadership of Senator Aronoff, at the end of the task force meetings in November we will be able to come back and present a united front on the way that the states would like to have us proceed.



## Statement

Hon. Robert M. Isaac  
Mayor,  
Colorado Springs, Colorado  
Chairman, Advisory Board,  
U.S. Conference of Mayors

**W**ith the *Garcia* decision, together with Congress' penchant for adding conditions to the spending power even when the conditions were unrelated to an act, plus use of the Supremacy Clause to preempt when there was, in many cases, really no conflict between the federal law and a state or local law or ordinance, and the expansion of the use of the commerce power, I thought that Congress and the courts had gone about as far as they could go. As was stated in one Supreme Court case, state and local governments had become truly just field offices for the federal government.

But I was wrong. The Court went on to *South Carolina v. Baker*. Of course, the Court could have made the decision on that matter without going so far as to overrule *Pollock v. Farmers' Loan & Trust Co.* (1895) by simply determining a proper federal purpose in avoiding the loss of taxes and saying that registration was an appropriate manner of doing that.

So, with the help of the courts and with the commerce power, the spending power, and the Supremacy Clause, Congress is free to deny tax-exempt status to state and local obligations and, what I think may be even worse, to base the tax exemption on further conditions that may be extremely intrusive and onerous.

Such conditions could increase the cost so much as to make it either useless to try to use tax-exempt financing or to force us to accept these intrusive conditions.

Now, we have been told by members of Congress, particularly members of the House Ways and Means Committee and the Senate Finance Committee, that there is really no reason to concern ourselves. I agree that, from a legal point of view, *Pollock* was really a statutory matter; it was not a constitutional principle, so the Court had a right to do what it did.

But we shouldn't worry. In fact, I have one quote from Senator Lloyd Bentsen: "The fact is tax exemption for general obligation bonds is extremely popular in Congress." Well, that doesn't give me a great deal of comfort because I am convinced that the budget deficit, as has been pointed out before, will continue to reign over any federalism principles.

The attempt to cut the deficit without getting into the politically sensitive portions of the budget are going to continue to force Congress to cut expenditures, for example, in the areas where the constituencies are the weakest, and

also to continue to tinker with the tax code in order to avoid forgoing revenue wherever possible.

That strategy has been backed up by some statements from at least one member of the House Ways and Means Committee. There will be further assaults on state and local obligations this coming year. I would like to quote a statement in the *Congressional Record* from Brian Donnelly, a Congressman from Massachusetts, who indicated: "The exemption from federal income tax for interest on state and local bonds is not a right. It is a benefit granted by Congress. My amendment says that as a condition of receiving this benefit, you have to help the poor."

I'm not saying that helping the poor is inappropriate, but I can let you know that there will be a continual assault on this very important feature of federalism, that is, mutual tax immunity.

The U.S. Conference of Mayors has not taken a position directly on the question of the process outlined in this proposed constitutional amendment, but we did adopt a resolution pertaining to *South Carolina v. Baker* at our annual meeting in June:

RESOLVED that the United States Conference of Mayors calls upon Congress to leave its important protection of states and municipalities in place and take some positive steps, through legislation or constitutional amendment, to protect this right.

Perhaps the first step is to have a constitutional amendment changing the amendatory process. It may alert the Congress as to how serious the state and local governments feel this issue, this imbalance, to be. Then, possibly, it needs to go further. A change in the amendatory process may be the tool for specific relief in such cases as *South Carolina v. Baker*.



*Statement*

*Hon. Mary McClure  
President Pro Tem,  
South Dakota Senate  
Chairman,  
Council of State Governments*

**I** am pleased to have been invited by the Advisory Commission on Intergovernmental Relations to testify in my capacity as chairman of the Council of State Governments on the imbalance which exists in our current federal system.

As a citizen, state senator, and chairman of a national organization comprised of elected and appointed officials from all three branches of state government, I am most concerned with the preemptive actions taken by all three branches of the federal government in matters properly within the constitutional powers reserved to the states.

Most disturbing are the Supreme Court's decisions in both *Garcia v. San Antonio Metropolitan Transit Authority* and *South Carolina v. Baker*. The opinions expressed in these decisions represent a clear and distinct pattern of eroding states' rights and constitutional protections under the Tenth Amendment.

These cases in essence hold that the states' participation in the national political process is their own protection against federal encroachments on their sovereign powers. In both cases, the Supreme Court did not recognize the reserved powers of the states made explicit in the Constitution by the Tenth Amendment.

I would like to cite a recent example of this involving my home state of South Dakota. The Supreme Court decision in the case of *South Dakota v. Dole* concerned the requirement, imposed as a condition of each state's eligibility to receive certain federal highway funds, that the state prohibit "the purchase or public possession" of any alcoholic beverage by a person under 21 years of age.

In my view, such regulation not only intrudes on the states' core powers under the 21st Amendment but also usurps the states' reserved sovereignty under the Tenth Amendment to enact their own laws regarding local matters. Furthermore, it represents a fundamental subversion of our constitutional system, which bestowed limited powers on the federal government and reserved the balance of those powers to the states.

I would like to comment further on the *South Carolina v. Baker* case, which Governor Sununu quite accurately called "a devastating decision in every aspect, and a decision in which the Supreme Court abrogated its responsibility

as the protector of the rights of the sovereign states and failed to act as the neutral arbiter between the actions of the Congress and the states.”

This case overrules the Supreme Court’s 1895 precedent in *Pollock v. Farmers’ Loan & Trust Co.*, which established the principle of intergovernmental tax immunity. The Supreme Court’s ruling in *South Carolina v. Baker* has stripped state government of one of the fundamental concepts of federalism—intergovernmental tax immunity.

When our nation was formed through the federal union among the American colonies, the opportunity for diversity embodied in the individual states was established. The U.S. Constitution recognized that the people of the United States would act through a variety of governmental entities, including strong state and local governments.

The sovereignty of the states is essential for preserving the personal liberties of the American citizen. Our country has prospered under the principle that all governmental power resides in neither the state government nor the federal government alone, but is shared between them. The vitality of this system of government was reflected by the Tenth Amendment, which affirmed the doctrine that certain powers were reserved to the states. With the protections afforded by the Tenth Amendment, the states are relegated to the level of a special interest group when they present their arguments against pre-emption of state authority to the U.S. Congress, as well as the President and the federal courts. These matters of states’ authority are of equal and utmost importance to both state and local governments, as local governments derive their authority from the states.

It is clear to us that action must be taken in order to restore constitutional protection to the states. Numerous statutory, constitutional, and judicial proposals have been recommended as corrective measures to strengthen the states’ role in the federal system.

The executive committee of the Council of State Governments, as well as its Eastern Regional Conference and Southern Legislative Conference, have adopted resolutions urging state organizations to strive to reach a consensus on restating the fundamental principles of federalism. These resolutions also urge the National Conference of State Legislatures and other state organizations to lobby Congress to build and maintain an effective role for the states in the federal system.

I join the National Association of State Treasurers, one of the major affiliates of the Council of State Governments, in its concern, which echoes that of Justice Sandra Day O’Connor, with the impact that this case has on state and local governments’ ability to repair the nation’s transportation network, rebuild schools and colleges, and enhance our deteriorating infrastructure.

The states’ chief financial officers have resolved to:

- Ask each of the presidential candidates to support intergovernmental tax immunity;
- Create a coalition to fight for intergovernmental tax immunity and lead an effort to work directly with members of Congress to inform their constituents and their states of the loss of reciprocal tax immunity; and

- Support an amendment to the U.S. Constitution to restore intergovernmental tax immunity in order to protect the continued sovereign status of state and local governments.

The Eastern Regional Conference, comprised of legislators from 10 northeastern states, adopted a resolution at its annual meeting last month in support of the National Governors' Association and National Association of State Treasurers' efforts to seek a constitutional amendment that would exempt state and local bonds from taxation.

In addition to the treasurers' efforts, I personally support the National Governors' Association proposal to amend Article V of the U.S. Constitution to resolve the problems of a "runaway" convention in the case of state-initiated amendments. We must also give serious consideration to the National League of Cities' and National Association of State Treasurers' proposals to inform members of Congress of the adverse impact on their constituents and their states of the loss of reciprocal tax immunity, and seek immediate reassurance from the Congress by enactment of legislation repealing current onerous laws taxing state and local bond interest.

At the urging of the executive committee of the Council of State Governments, representatives of each CSG affiliate will meet to discuss this important matter and agree on coordinated actions. We, as state elected officials, must unite through our national and regional organizations to review the proposals made and to consider new avenues for reform. We must get the commitment of the people and of the Congress and of the President. During the 1988 election process, we will have an opportunity to question candidates and highlight our views.

If we expect to make progress, it will be important for the state and local governments involved to avoid fragmentation of effort. We need to compare notes, strategies, and priorities across all three levels of state government and with our county and city counterparts. We therefore stand ready to cooperate with the National Governors' Association, the National Conference of State Legislatures, and the organizations of locally elected officials in this common endeavor.

Our approaches may vary and our specific concerns may be different, but our overall goal to regain states' independent political power is the same. We need to put a stop to the expansion and intrusion of the national government, which is increasingly having the effect of reducing the 50 states to administrative units of the federal government.

Although I admit to some frustrations at our impotence before the Supreme Court, I am confident that through a cooperative effort we will accomplish our objective of restoring state sovereignty and strengthening our current federal system.



*Statement*

*Hon. Brian J. O'Neill  
Council Member,  
Philadelphia, Pennsylvania  
Member,  
Finance, Administration, and  
Intergovernmental Relations  
Steering Committee,  
National League of Cities*

I am both honored and pleased to be able to contribute my experiences and perspectives as a city government official to an examination of this important and timely issue: how to restore balance in our federal system.

We concede that federalism is an arcane topic. My aim today is to bring to this mysterious but vital subject some of the realities faced by municipal governments and their officials. I would argue that the effectiveness of our American system of governance, or the lack of it, in the first instance is evident in the activities and performance of our local governments. It is in the towns and cities, where most of our citizens work and dwell, that we find the real world of "government." It is in these very same communities that we must evaluate the effectiveness of our federal system of government. Federalism cannot be appraised realistically in the national capital.

ACIR clearly needs no lecture from me on the importance of the vitality in the American political system of such basic concepts as "self-government," "home rule," and "accountable local governments." I will not labor these points here. Nevertheless, the underlying questions that I face every day and that are before this Commission involve the extent to which I, and the local government that I represent, can respond to the needs, demands, and aspirations of citizens who live in my community and who elected me to office. My authority to respond as necessary is an essential element of successful home rule and politically responsible local government.

As a city official in this real world, I am required to be a city planner; I must be an urban systems manager; and by definition I am a politician. If home rule means anything, I am it. If I cannot produce the kind of results my voters want, they can and will throw me out. But to respond to the choices the voters select requires that I be accorded both discretion and the authority necessary to bring about the events that my voters seek.

Given my particular point of view, the basic question before this Commission is what is or should be the authority I can exercise on behalf of the residents of my city. To what extent should I be enabled to provide for or respond to the needs and aspirations of my citizen voters? And, directly related to this question, what decisions and choices should be accorded through local government to the citizens residing in our community? What are the appropriate public policy questions that I ought to be empowered to decide?

What we have seen over the past decade or so, and what, at least in part, has inspired this hearing, is a persistent and, I would argue, mindless erosion of state and local government authorities by a federal government that is unconstrained by any comprehensible view of what services and results state or local governments are supposed to be able to produce for their citizens.

ACIR is intimately familiar with the lengthening list of federal infringements on the traditional authorities and responsibilities of local governments. We have seen federal preemption of local government's authority to specify the hours, wages, and mandatory retirement ages of its employees; we have seen the extension by the federal courts of the federal antitrust laws to some of the basic and traditional activities of local governments; the authority of state and local governments to police the use of state and local highways has been infringed on significantly by the federal government; the regulation of employees of state owned and operated intrastate transit systems critical to the welfare of associated urban communities have been preempted by the federal government; federal mining laws have overruled local governments' traditional authority to govern land use in certain affected areas; and the abilities of local governments to raise necessary funds by the issuance of tax-free bonds have been declared to be a privilege subject to the idiosyncrasies of the Congress. At the same time, federal mandates that increase significantly the costs of local government continue to proliferate. This list of federal encroachments on the authority and ability of municipalities to perform their functions is both clear and growing. What is less clear, however, is the impact of these disruptions on the basic roles and performance of state and local governments.

These realities strongly suggest the pertinence and necessity for the organization of the kind of Commission of the States for Constitutional Revision that ACIR has recommended. We would urge and support the rapid formation of such an entity.

We would also suggest that this commission would benefit substantially from some formal involvement of representatives of local governments so that their particular views and experiences could be reflected in any activities and conclusions. After all, in the evolution of the government that we characterize as federalism, the formation of local governments predated the formation of the states.

In any event, it would be in the national interest for this commission on constitutional revision, or some other suitable entity, to evaluate the present state of federalism, and to propose such changes as may be necessary or desirable.

We have also been invited to discuss two draft proposals that are intended to refine and to improve the existing constitutional amendment process. The aim, as I understand it, is to enhance the ability of the states to raise and to resolve federalism issues by proposing relevant amendments to our Constitution.

As matters stand today, I am reluctant to comment on these proposals. Such discussions seem premature. Rather, I find myself in substantial agreement with those who argue that we have not completed adequately the first step: we have not identified or defined with any precision the problems mani-

fest in contemporary federalism that need to be restructured. Nor have we produced proposed solutions that seem relevant even to the present less-than-adequate perceptions of the so-called "problem." Certainly, so far as I am aware, there is no constitutional amendment yet proposed that could be embraced with confidence as a solution to the problems of federalism.

Consequently, I would argue that we must successfully address the substance of the problem before we shift our attention to the processes necessary to resolve it. We would hope and expect that a new state commission on constitutional revision would first explain and define the dimensions and dynamics of the "balance" it seeks in the federal system before it undertakes procedures designed to bring it about.

In this particular context, it seems to us that the proper balance in our federal system is a product of a meaningful definition of the respective roles and responsibilities of both state and local governments in that system of governance. We complain that the federal partner has been preempting or otherwise interfering with the performance by state and local governments of their functions. This is said to be the problem. But it remains unclear as to what particular roles and responsibilities of state governments are being undercut by these federal actions.

As a city official responsible for the effective performance of a governmental entity characterized as an instrumentality of state government, I also have encountered some of the same kinds of intrusions and limitations by our state legislature that we are complaining about in the context of the federal government. Once again, it is unclear with what local government roles, responsibilities, and authorities my colleagues and I at the local level should be vested to enable us to meet the needs of the citizens within our own governmental jurisdictions.

The first step for a constitutional commission, it would seem, would be a redefinition of contemporary federalism that proceeds from a thoughtful analysis of the characteristics, strengths, and weaknesses of government at each level of our federal system. With these concepts in hand, the commission could then proceed to evaluate the adequacy of our present governmental arrangements and to identify desirable changes and reforms, including, if necessary, amendments to the Constitution.





*Statement*

*Hon. Douglas Henry, Jr.  
State Senator, Tennessee  
Chairman,  
Southern Legislative Conference  
Council of State Governments*

**T**his hearing is a bizarre and somewhat unreal sort of exercise, at least to me. We had the adoption of the federal Constitution without the Bill of Rights, and there was such apprehension for the potential of that government to become centralized that the amendments were adopted, among them the one which has been recently dealt with by the Supreme Court.

I notice, just looking down the list of the ACIR members, that there are four Commissioners from the 13 original colonies: Mr. Dwight of Virginia; Professor Elazar of Pennsylvania; Representative Weiss of New York; and Governor Sununu of New Hampshire.

How could it have even been considered by public servants in those states that this exercise so many years ago of what was deemed to be a very essential precaution—to preserve the liberties of the people—how could you ever have imagined that the Supreme Court of the United States would have wiped it out with a stroke of the pen?

Remember, this was not an amendment adopted in the heat of battle, with arguments about ratification going up and down. This was duly and lawfully adopted right by the book. So that is why I say it seems odd to me that we sit here, having to spend time and trouble as to how to restore that which was intentionally placed in the Constitution in the most deliberate and lawful forum possible.

Well, reason is needed to do a thing. Reason is need to generate activity. The horrible examples have already been well described around the table. There is one, though, that always comes to my mind. It was in the late 1940s, as I recall, that our Senator from Tennessee, Estes Kefauver, got very interested in racketeers. So, Kefauver busied himself with remedying the problem, and the Congress eventually passed the RICO bill. I applauded it, you applauded it, and everybody thought it was fine because we were finally going to get these scoundrels who elude state jurisdiction on this massive scale.

Well, where are we today with the RICO? Suppose I am kind of a shirtsleeve fellow, not of much account, but sort of a ward heeler, and I have some people who don't much like me, so they go down to the elected attorney general and say, "You need to go to the grand jury about Henry." The elected attorney general would have to go to the grand jury empaneled by an elected criminal court judge, and he would have to get an indictment. He would have to prosecute that indictment in a court presided over by the elected criminal

court judge, before a jury empaneled by an elected sheriff. If he was unsatisfied there, he would have to go to the elected Court of Appeals, and from there to the elected state Supreme Court.

Well, that's too much trouble. You can't get those fellows to do what they ought to anyhow. So what do you do? Under RICO, you scoot down here to the U.S. courthouse. You make the same case to the appointed U.S. attorney. He goes to the grand jury empaneled by the appointed U.S. marshall. He goes to the court held by the appointed U.S. judge, and on up all the way through the system.

Now, what is that? Is it an argument that Henry is advocating the release of crooks and thieves? Well, I certainly hope that we are not deceived in that direction. All of us who serve in elected bodies say that we are for law and order, and I vote for all the law and order bills, unless they are absolutely outrageous, and I'm sure you all do, too, in your various bodies. I believe that. But the RICO is a horrible distortion of the system as it was devised by those who put it together.

We should keep the good changes. There have been some good things done by this expansion of federalism. We should not fall into a debate about the wise public policy or the unwise public policy, depending on how you see it, as set out in the *Baker* case, or set out in the *Garcia* case. I don't think we should debate that sort of thing in this forum because we can do that back in our home bodies, which are appropriate for these matters.

The political solution has been suggested. I would not hold out a great deal of hope for the political solution, because if you solve it today politically, it can be unsolved tomorrow, just like that. The state treasurers are to be commended for their zeal in getting cracking on this subject. However, if you do what the treasurers say, by fixing it here, you imply that all the rest of it is okay. So I hope we don't go too fast down that track.

Governor Sununu has a good idea. People talk about these conventions. The Constitution says that three-quarters of the states have to approve whatever comes out of a convention. That is 38 legislative bodies. That's something to think about. I also hope we can look at the language of the Tenth Amendment very carefully as a way to deal with this.

Finally, cooperation is so necessary. Brian O'Neill mentioned the reluctance of the cities to go further until we can define the proper relation of the states and counties and cities and federal government. I hope that NLC and NACo can revisit those positions. The reason I say that is this: If our remedial efforts become bogged down in jurisdictional controversies among ourselves, we are going to have a terribly hard time getting anything done.

Getting this ball rolling and pushing it, and getting the newspapers to understand the importance of it, is going to be a mammoth job. How many articles in your papers have you all seen about these terrible *Garcia* and *Baker* decisions? You can barely find them mentioned in your state bar journals.

At any rate, it's very important that all of us sit down around the table and see what we can agree on, and having found that, then see how we are going to get it done. That's why I would hope that the associations represented here would give some thought to that possibility. We've got a head of steam right now. If the fire dies down in the boiler, it's going to be awfully hard to get that head of steam built up again.

## Statement

*Hon. Lucille Maurer  
Treasurer,  
Maryland*

**T**he National Association of State Treasurers (NAST) commends the ACIR for focusing attention on the fundamental nature of reciprocal tax immunity to our federal system of government. All too often we hear voices from the U.S. Treasury and from “Hill staffers” that state and local governments are just other “special interests” protecting their “federal subsidy.” Fortunately, ACIR knows that a strong federal system needs strong partners at all levels of government—federal, state, and local. To assure an appropriate balance among these partners must be our goal. To that end, mutual respect—as governmental entities—and reciprocal tax immunity have been the foundations of this complex partnership. NAST believes that this foundation should remain in place. It represents good and reasonable policy.

Most state treasurers have responsibilities for the issuance of state general obligation bonds, so our involvement in this matter is both direct and specific. We understand full well the cost implications to the states of losing the capability to issue tax-exempt securities. In Maryland, for example, for our program forecast for general obligation bonds, the additional annual costs in ten years are estimated at \$56 million. We are also concerned about the implications on the demand for tax-exempt bonds of new tax laws dealing with banks, insurance companies, and the alternative minimum tax. We are also concerned that the management of our tax-exempt issues is exceedingly cumbersome and costly as a result of arbitrage, the definition of public purpose, the definition of “expended,” and presumed “loopholes.” At the same time that states are being asked to shoulder heavier burdens in providing capital for environmental programs and in repairing, rehabilitating, and expanding roads, bridges, and other public works, state access to the traditional capital markets for such infrastructure needs is being reduced and obstructed.

Because state treasurers believe so strongly that tax-exempt issuances must be retained, we adopted a five-point program at our July annual meeting. The five points are:

1. Will ask each of the presidential candidates to support intergovernmental tax immunity because of the importance of actions by the incoming administration for the first 100 days.

2. Will help create a coalition to fight for the intergovernmental tax immunity, which will include seeking an amendment to the U.S. Constitution among the options for agreed-upon action.
3. Will lead an effort to work directly with members of Congress to inform the members of the adverse impact on their constituents and their states of loss of reciprocal tax immunity.
4. Will seek immediate reassurance from Congress by enactment of legislation repealing the arbitrage rebate and eliminating tax-exempt interest from the alternative minimum tax.
5. Will support an amendment to the U.S. Constitution to restore intergovernmental tax immunity in order to protect the continued sovereign status of state and local governments.

In addition, a special committee was appointed to continue NAST's work on proposed constitutional amendments and other aspects of the program.

In summary, NAST thanks ACIR for its attention to the fundamental issues raised by the changing federal attitudes toward reciprocal tax immunity and by the *South Carolina v. Baker* decision. As an association of state treasurers, we have adopted a five-point program that includes working with other organizations and groups to maintain the ability to issue tax exempt bonds and to support reciprocal tax immunity. We stand ready to work with ACIR in any appropriate endeavors to achieve these objectives. We urge ACIR to compile data on the amounts of taxes the states forgo on behalf of the government, such as interest on federal treasury and agency debt, and sales and excise taxes on goods sold on federal property. None of these are taxes on the federal government itself, and would appear to fall within the scope of permissible taxation under *South Carolina*. The public discourse on reciprocal tax immunity should not be limited to the loss of tax exemption on state and local bonds; nor should it be limited to using only those revenue estimates produced by congressional committees.

*Statement*

*Hon. Jim Ross Lightfoot  
U.S. Representative,  
Iowa*

**A**s a strong supporter of “states’ rights,” I am very much in sympathy with the bulk of the testimony at this forum. However, I strongly disagree that a tax increase is the only way out of the deficit situation.

You might ask why we are seeing “states’ rights” being eroded? Put as simply as possible, the situation at the federal level is this: Members of Congress spend a great deal of their time going to local senior citizen centers outlining the terrible conditions seniors find themselves in, then promising expanded government services and aid. Next stop are the schools, where the teachers are told what a terrible condition they are in, then promises are made to raise salaries and increase benefits. Next stop is the local Grange or Farm Bureau meeting, same scenario. This process continues until virtually every constituency in the state or district is touched. The representative then returns to Washington, and uses his or her influence, seniority, or whatever to see that the promises are kept. Of course, on the campaign trail the promise is to attack the deficit.

As a result of the unbridled federal spending, the Ways and Means Committee has become a mad dog in the street, snapping and biting at every bit of untaxed revenue in sight. This goes well beyond private citizens and businesses, as has been outlined this morning.

As Mayor Isaac pointed out, the solution to this problem lies in going to the politically sensitive issues and using a common sense approach. Needless to say, this is easier said than done. But, politicians being politicians, it would appear that political pressure from the states will probably be the only meaningful impact we’ll see on this issue.

Therefore, I feel it will require the states, through their citizens, to put political pressure on their federal officials to be responsive to this situation.

Folks left England for much the same reasons we are discussing here today. There’s no new America to go to. We must solve this problem here, and as quickly as possible.



## *The Discussion* |

**Hawkins:** Before we open the discussion, Senator Roth has introduced a constitutional amendment regarding tax immunity on public purpose bonds. He has something he wanted handed out. That will become part of the record (see Appendix B).

Do Commission members have any questions of the panelists?

**Fraser:** I would like to ask Council Member O'Neill about his statement on the lack of clarity as to the practical impact of the court decisions that seem to have extended the federal power. You also referred to the fact that state legislatures are sometimes inclined to intrude on local affairs. Could you say a bit more about your perceptions on these questions? Are you arguing that we really are not dealing with a very fundamental issue, but something that may be more peripheral to the central concerns of local government?

**O'Neill:** I would just hate to see us jump ahead. While we have these energies mentioned by the Senator from Tennessee, we should sit down, as he said, and agree. Basically, the National League of Cities' position is that we not go to the second hurdle yet, that we form this commission, that we involve the local governments, and that we see what differences we have that can be resolved before we go in. There is not a clear-cut script that we can bring to the amendment process. To do that piecemeal and break up the chances for overall success would just not be beneficial.

**Sununu:** I'd like to make an additional comment. The problem is not the specifics that we have discussed here. We could argue about a lot of specifics: about the tax immunity question, about right turn on red, not very earthshaking, or the speed limit. I am absolutely convinced that when those folks gathered in Philadelphia, they had no intention of creating a central entity that would tell us which side of the road the horse would ride on, how fast the horse could run, and whether it could turn right on red. Yet that is what we have ended up with.

It is not the specifics. It is the process that is at fault. It is the process that must be amended. And what will flow from the healing of the process is a correction of each and every sundry specific over time.

Now, it is clear that the structure that was put together has been the strength of this country. The structure established a balance between the rights and obligations of the states and the rights and obligations of the central government. What we are talking about is the balance. It is the balance that

has been lost by the mooted of Article V and by the total ignoring of the Tenth Amendment by virtually all of the recent Supreme Court decisions.

We did examine whether or not amending the Tenth Amendment would be appropriate. The concern we had there is that virtually all the language we found would require another 200 years of court decisions to undo what had taken place. I would suggest to those who are examining Tenth Amendment language as an alternative that they not consider that approach as an either/or. If you want to do that in addition to other things, that's fine. But there is no way, over the generational time frame that we are talking about, that a significant enough impact can be made without undoing the erosion of the other side of the coin that has allowed Congress to do what it wants at will, and resulted in the Supreme Court being an unwilling partner in that process.

That's why if we sit down and argue the substance—are we going to let the towns have the right to the roads, or are the states going to have the rights to the water supplies, or are we going to worry about town-to-state tax structure, or is the federal government going to be able to make this law or that law—we will divide ourselves among constituencies that will all be tugging at different points of the compass. We will never get to the heart and soul of the issue, which is the destruction or erosion, slow erosion to the point where it has been destroyed, of the process that was intended to provide balance.

**Fraser:** Governor, I appreciate your joining in the response to that question because you have put your finger on a very central issue, but I am curious as to how you would deal with it.

I, too, was affronted, because of my personal view, by the federal government saying that we aren't going to get any highway trust funds unless we raise the speed limit. I wasn't personally in favor of raising the speed limit. But there are a lot of federal programs that represent resource transfers that have attached conditions. Welfare is another one that I am unhappy about.

Can you envision a constitutional amendment that would require the federal government to furnish resources to the states or local communities devoid of conditions, and isn't that where the biggest problem is?

**Sununu:** I can envision the Congress suddenly realizing that the possibility of such an amendment existed, and that Congress then would be more responsive to the arguments when you or I or the council member or the treasurers go to testify that those conditions don't make sense.

**Fraser:** But that's a political outcome. We were talking earlier about a constitutional approach.

**Sununu:** That's right. That's the whole point. Let me tell you that the most significant use I make of my veto power is not vetoing legislation but the threat of vetoing legislation. What we have lost is any sense of awareness by the Congress that federalism is a two-way street.

With all due respect to the good intentions of our friends in Washington, it is their attitude as outlined in the quote that was read by Mayor Isaac, their attitude when I and other governors, and I am sure mayors and other local officials have gone down, in which they do categorize us as merely another interest group.



What really does distinguish us from another interest group is the fundamental structure of the Constitution in which some powers move from the states to the federal government with what was thought to be a clear-cut definition in the Tenth Amendment, and with the provision saying that if this thing gets messy later on and the definition and difference aren't there, you can amend this Constitution to strengthen your position by taking this action to initiate it.

Now, those three pieces were there: a transfer of power, a limitation on how much was transferred, and a mechanism to redress whatever might not have been anticipated then. The last two have been lost over the 200 years. It is precisely because of the loss of the last two that all the specifics, which we could sit here and outline for hours, have come to pass.

**Fraser:** I agree with what you said, Governor, except that for a threat to be effective it has to be credible. Let's say, for instance, that we said to the Congress, well, if you're going to attach conditions to the provision of highway construction funds, we're going to pass a constitutional amendment. What kind of a constitutional amendment would we pass that would threaten them with respect to the exercise of their power to attach conditions?

**Sununu:** I'll give you one that comes to mind, and we will probably have to rehash it: the allocation of resources to states or municipal governments shall not be contingent on the fulfillment of requirements that are not germane to the issue. Very simple.

Now, we can probably work that language out a bit more broadly. If the Congress says you can have these funds if you build bridges of a certain quality, that's acceptable. If they say you can have these funds for bridges if you enact a program for the homeless in your cities, that's not germane.

**Fraser:** That's not a bad idea, but we would have a lot of litigation on germaneness.

**Sununu:** But that brings us to a point that can be handled within the courts. We have no foundation to stand on when we go to the court right now because the court has said that in the Tenth Amendment, the word "expressly" was left out. As a result of the word "expressly" being left out, plus the Supremacy Clause and other phrases they have identified in the Constitution, they have said we have nothing to stand on.

Thus, the very quickly and poorly worded amendment I have just offered at least gives you something to stand on and go to the court and fight.

**Fraser:** Just one last comment. Your position is very straightforward and makes sense. I just wonder, as a practical matter, whether in the end it will make any difference. If I were a member of Congress and I decided that the interstate freeways should have a higher speed limit, I am sure it wouldn't be too long before I could draft a germane set of opportunities for states that would be contingent on their adoption of that speed limit. It might be a challenge, but in the end I could figure out some kind of program. In other words, we are always driven back to the political arena and our ability to argue our case.

The places where I feel most deeply about what the government is doing at the moment are not areas that would yield to the germaneness question,

because the restrictions or conditions are germane, and they are just bad. And I don't know how to deal with that as a constitutional issue.

**Sununu:** At NGA we have attacked that part, the overregulation part, from another track. We have presented almost 200 recommendations for change in the regulatory structure, and we have been getting a response.

I am not saying that this proposed amendment will change everything. I am saying that this amendment will give us a position to stand on and, thereby, start to make some of the differences that are crucial to us. If I have implied that any single act allows us to go home and lock the door, and say there's nothing else to be done, I had no intention of doing so.

**Isaac:** I would not want to decide whatever we do on the basis of whether or not there is going to be litigation, because there has been some litigation on the Constitution as it is presently written. I have never seen anything written that couldn't be challenged and isn't challenged in law.

Secondly, the problem with rewriting the Tenth Amendment is that it is now couched as a negative. It is a reservation of power. What you have are positive, affirmative, enumerated powers balanced against reservations. So, if the courts will draw the line between the positive power and the reservation in the Tenth Amendment, then the reservation or the reservoir is empty. Congress can determine how far they can go.

There are three things we can do. We can go to the ballot box, and Madison indicated we could do that, too. But looking at our powerful lobbying positions today, where we are just another group of elected officials who don't pass on transfer payments to this great mass of people out there who have formed themselves into these strong groups, I don't see how we are going to get anywhere in the political process. I think that the statement in *Garcia* about the political process just defies what goes on in the real world.

Secondly, we can look for congressional restraint. That's what I think we have been talking about. But, unfortunately, as Justice Jackson said in the steel plant takeover case 35 years ago, necessity knows no law. So, if you have a budget crisis, then you have a necessity; therefore, forget federalism, forget the relationship.

We could, perhaps, get the Supreme Court to reverse itself. For the Court has been permitting further and further encroachments by the federal government. To take one out of context, how can the Congress tell me to hire 18 more firemen? You ask that question today.

But the Court says that we are not going to go back; it lets the decision stand. So I don't know whether we can go in that direction. Perhaps this proposed change in the amending process will at least get some attention. It will give you a tool. Maybe you can't get to some of the spending power or Supremacy Clause issues, but it gets the attention. Maybe it will force some congressional restraint and an analysis on a national basis of this imbalance, which the majority shrugs off right now.

Maybe that's the way we need to start. Of course, our group has not taken a position yet, but I think we should take that to the Conference of Mayors, no later than our mid-winter meeting.

**McClure:** I believe an approach that was suggested by Senator Netsch of amending the Tenth Amendment by adding an enforceability clause would be a good one. It would put the enforceability in the courts. This would negate the court's decision that enforcement should be through the political process; instead, it would be written in the Constitution that the courts must enforce it.

But, in passing, Governor Sununu responded to that assertion by saying that it wouldn't work because the courts would say that they had already decided under the Supremacy Clause. So that is something that needs to be pursued further. To my mind, the Tenth Amendment is what we're trying to reach, and it would be the most direct approach.

**Hawkins:** I hope that we will share what we've done in the past on that issue. The ACIR did a lot of work on that issue after *Garcia*, looking at the Tenth Amendment. Many of us came to the conclusion that you would have to resolve all the issues that weren't resolved 200 years ago on the Commerce Clause, although today we have many more court decisions on the Commerce Clause.

**Henry:** The problem is that so much water has flowed over the dam and so many things have been done by the general government that are way outside of the terms of the instrument, that whatever we do has to be artfully done so as not to exercise all these people in the various things they have done. It's going to be tough.

**Rubin:** I just want to underscore a few things that have already been underscored a couple of times.

First of all, the question: What has deteriorated or been put out of balance in the federal system? I think that, clearly, the number one culprit has been the federal budget deficit and the attempts to deal with it.

There has been some discussion here as to whether a threat of constitutional revision or constitutional processes for revision would operate in such a manner as to instigate congressional restraint on the process.

I particularly enjoyed Senator Henry's comment about our state bar journals being about the only place that we can sometimes read about this problem. It caused me to do a little thinking. If you were to put out a questionnaire to the American people asking what their basic problems are, if federalism were listed at all, it would probably be way down at the bottom. Most people would not even begin to deal with federalism as a problem. They have no way of relating to it. They haven't really been told about it.

The central theme of my comment was that public opinion is a resource that local governments and state governments have not really gone after in this battle. We could probably get a lot more congressional restraint if the constituencies began to place this problem at a higher level on their list of problems. Most people really see it only in terms of their ability to pay their rent, educate their children, and deal with the other daily problems that people are consumed with.

So we have to get back to our constituents and tell them why their bridges and roads aren't being rebuilt, how the erudite problem of reciprocal tax immunity really affects them, and how it's going to affect their ability to get credit

for their property taxes. In other words, we have to tell them how federalism really affects their day-to-day living.

When we can do that, we will begin to see a response in the other direction that may help us to put this thing back in balance. That was really what I was trying to say. I was not really saying that there is no basis for looking at constitutional revision as an alternative. I think that is commendable. I just don't see it really having an effect that could even compare with the effect that we could achieve if we made people aware of this problem.

**Hawkins:** I just want to respond to one thing. John Kincaid just told me that we tried to get C-Span to cover this hearing today, but they were more interested in covering the hearing on solid waste disposal.

**Bragg:** I agree with Bob's approach. To do nothing, even if, as Senator Henry says, there's so much water over the dam, is to allow the situation to get worse.

In our state we rely heavily on the sales tax. We have no income tax except on bonds and certain dividends and interest. But this year our people learned a great lesson about what's going on in federalism when the Congress and the President took away the exemption of the sales tax on their annual payment of the federal income tax. That provision cost Tennesseans exemptions of over some \$200 million, which translated into \$90 million more taxes that our people paid in Tennessee this year than they paid last year.

The next shoe that drops is either going to be the state income taxes or the state property taxes or the county and city property taxes. The next time they pick up the budget in Washington, the things that will fall out will be your exemption on income tax and the exemption on property tax.

Your constituency is going to get enraged when that happens, as some people in Tennessee are at having lost the sales tax exemption. There is case after case to be made where our people already are suffering. They just have not had a rallying point to get somewhere to follow the flag. We need to run the flag up the pole and see how many people we can get to follow. And I worry about who is going to go in which direction.

**Markman:** I was at the last meeting, representing Attorney General Meese. I am now representing Attorney General Richard Thornburgh. His views are very much consistent with his predecessor's on this issue. I would like to make some comments that I think are consonant with those of Governor Sununu and Mayor Isaac in particular.

As I see it, the issue is basically a constitutional one. We have seen a succession of Supreme Court decisions over the past generation that, almost without exception, have eroded American federalism. This situation has continued, despite dissatisfaction by individuals around this table and among the constituency groups represented here, because the two fundamental parts of the Constitution that have been the underpinnings of constitutional federalism have been undermined—Article V of the Constitution, which was designed to allow the states to challenge exercises of federal authority that they considered overweening, and the Tenth Amendment, which of course apportioned rights and responsibilities between the two layers of government.

These were the two principal expressions of constitutional federalism, and I don't know what one could have expected to have developed within our political system once these two provisions had been undermined as significantly as they have been over the course of the past generation.

It would be our view, then, that debates on what represents wise policy, what represents good highway policy, what represents good municipal bond policy, will continue, but that there will be skewed debates. There will be debates in which there will be simply a ratchet effect. We are going to continue to move in the direction of more central power and diminished state prerogatives unless we consider some kind of constitutional action.

In response to Mr. Ruvin's comments about the fact that they may be impractical things to debate in the short term, I would just suggest that these issues have been in the forefront of debates before the National League of Cities, the National Conference of State Legislatures, the National Governors' Association, and other organizations for the past decade. It seems to me that if they are not prepared to discuss these things with some kind of thought toward imminent action, then these organizations are never going to be prepared to do that. Maybe that's their posture.

Perhaps we sometimes assume that there is too much of a consensus on federalism, or more of a consensus than there actually is. But to suggest that this debate is one that will have to play itself out for the next five or ten years is, I think, a mistake. Indeed, this debate has been playing itself out over the past five or ten years while Supreme Court decisions have been handed down that, without exception, have further eroded state authority.

**Isaac:** I have to agree somewhat with Harvey Ruvin about getting it out to the public. I think it was former Governor Charles Robb who said that if you want to clear the room, the quickest way to do it is to say, "I'm going to talk about federalism."

But some type of an amendment and debate on that amendment in every state and in the Congress would at least bring the media, whose eyes glaze over whenever you talk about federalism, into the debate so that they could understand what is going on.

We can go around and make speeches. I've made speeches, and I consistently talk about how the federal government is not going to raise taxes at their level; they're going to raise them at your level—the state and local level. I tell them exactly how that happens through tax expenditures or whatever, or I tell them about the fireman situation. The people are shocked when they hear that the Congress is telling us these things.

But there is only so much that you can get through the media. You can watch this presidential campaign and find out that they are not really getting into serious issues. Nobody is talking about federalism; nobody is talking about the budget deficit. They are avoiding all of the really tough issues.

C-Span not being here is a good example. We can't get through to the media. They're the eyes and ears of the public. But if you had a constitutional amendment on the table and people were debating it throughout the country, we might be able to bring that awareness up.

**Hawkins:** I make it a point to honor never to talk about federalism. Never.

I think everything that is said here is correct. I talk about self-governing institutions because most people think that their local institutions are important. They think that their local officials ought to have authority. You talk to people about important issues.

I gave a speech the other day to a meeting of the California Special Districts Association. I talked about *Garcia*. I got blank stares. It's just not on their radar scope. But when you start talking about their authority to run water districts and fire districts and sanitation districts, all of a sudden you have their attention. I think that is the way to approach the issue. If there is anything the Yuppie generation stands for, it's self-governance, and you can see the way they're expressing it.

I have a somewhat unique position, since all of you represent states, cities, and counties. As a citizen, I think citizens are well served by a competitive system. It is in a citizen's interest to have cities and states competing in the political system. However, given what is happening today, such competition is going to happen less and less. Mayor Fraser ought to be able to experiment in his city with new ways of doing things. I think we are all better off because of it.

In California, we don't have experimentation anymore because nine times out of ten the state supreme court rules that a state law is of general interest. So, the state legislature just knows that 90 percent of the time, it is going to be right. Those are great odds. Why should a city take the state to court and sue when it knows that there is a 90 percent chance it is going to lose? Such court rulings have had a very detrimental effect.

In a sense, one of the things that a process solution does is to create uncertainty. When the people are uncertain, they are more likely to negotiate and bargain and come out with a solution that's mutually agreeable. But the issue facing us now is how to get this debate going. I am not concerned about the specific solution. The point you raised, Mr. O'Neill, is how we get a group together to start this discussion and build a consensus. We need to get this consensus between the cities, the states, the state legislatures, and the governors on what the solution looks like. Once we have that, once we have worked out that consensus, then we can move forward to educate the American public, which I think we have to do.

**Henry:** That editorial that you and your associate composed is the finest single piece on this topic I've ever seen. I use it every time I talk about federalism. I hope everybody here will take that editorial and make maximum use of it. It was a splendid, stimulating piece that really went right to the point.\*

**Hawkins:** If there are no further comments, I would like to thank the panel.

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\*"An Ode to the 10th Amendment (May Federalism Rest in Peace)," Commentary, *Governing*, July 1988, p. 74.

## **A-1. Federalism**

### **1.1 The Problem**

The American federal system established a strong union while preserving the diversity reflected in the individual states. State and local governments, governments close to the people, provide the needed opportunities for flexibility and innovation, and by their decentralization of decisionmaking and responsive nature encourage citizen participation and support.

Although there is a clear need for a national role in a variety of domestic issues, the principles of local determination and diversity require a careful balance of federal and state roles. It is vital to assure that states have the authority and flexibility needed to respond to the needs and priorities of those who live within their boundaries.

While recognizing that a strong national government was also necessary, the original thirteen states, in adopting the United States Constitution, included provisions to limit the power of the national government and to preserve the power and authority of the states. However, the authority of state governments has been eroded over time due to constitutional changes, Supreme Court decisions, and legislative changes. The legislative changes have generally reduced state prerogatives by preempting, by creating unfunded mandates, and by prescribing minute management and administrative details for specific federal assistance programs.

Not only has there been a trend toward the erosion of state authority, but two recent Supreme Court decisions, *Garcia v. San Antonio Metropolitan Transit Authority* and *South Carolina v. Baker*, cleared the way for this trend to accelerate. These two decisions substantially reduced the Tenth Amendment protection for state authority, forcing states to make their case with the U.S. Congress much like a special interest group. The key language in the *Garcia* decision holds “that the limits are structural, not substantive, i.e., that states must find protection from congressional regulation through the national political process, not through judicially defined spaces of unregulated state activity.”

The Supreme court decision in *South Carolina* not only confirmed the *Garcia* decision but virtually eliminated any remaining

Tenth Amendment protection. Furthermore, it eliminated any remaining constitutional protection regarding the doctrine of intergovernmental tax immunity. The loss of reciprocal tax immunity, coupled with the huge federal budget deficit, increases the pressure on Congress to change the current legislation so that a part or all of the interest from general obligation bonds would be subject to federal income taxes. Other tax issues that are of potential concern are the loss of deductibility for state and local income taxes (sales taxes are no longer deductible) and the possible imposition of a national sales tax or value added tax that would preempt the states' major source of revenue.

## **1.2 Restoring the Constitutional Balance**

**1.2.1 Preface.** While the states are prepared to fight expected legislative battles, there is a pressing need for action to restore constitutional protection as well. Immediate action is thereby needed to restore the constitutional balance, which underlies the creation of our federal system. Toward this end, the Governors call upon the Congress to adopt two constitutional amendments, as well as legislation that establishes a commission to make recommendations regarding the appropriate balance between federal and state government.

**1.2.2 State Authority to Initiate Constitutional Amendments.** The Constitution clearly gives the states the final say concerning the adoption of amendments. Whether proposed by the Congress or by a Constitutional convention, no amendment may become effective until ratified by three quarters of the states.

The Constitution also envisioned that amendments could be initiated by both the federal government and the states. However, the fear of a "runaway" convention has effectively closed the door to state-initiated amendments. Until recently the Tenth Amendment has served to protect the states and localities from an uncontrolled expansion of federal power through legislation and regulatory action. Now that the Supreme Court has removed that protection, the Congress is free to act without constitutional constraints to thwart state efforts to establish needed constraints through the amendment process.

The Governors call on the Congress to restore the states' ability to initiate amendments by passing and referring to the states a constitutional amendment, which would create a third alternative route under Article 5 to amend the Constitution.

Under this approach, two-thirds of the states could pass memorials that seek the addition of a specific constitutional amendment. Unlike the petitions for a Constitutional Convention that must be served on Congress, these memorials would be filed with every state. When the necessary number of thirty-four states is reached, the states would appoint representatives to a committee on style that would be responsible for reconciling the language of the various memorials.



Upon approval by a majority of the states represented at the committee on style, the proposed amendment would be submitted to Congress. A two-thirds vote by both houses within the next session of Congress would be necessary to stop the amendment from going back to the states for ratification. Failure to get the necessary two-thirds vote would cause the amendment to be submitted to the states for ratification by the required three-fourths.

**1.2.3 Protection of State and Local Borrowing.** State and local bonds are a significant revenue source for state and local governments. The threat of federal action to tax the interest on such bonds in the future may have a measurable impact on the cost and availability of such funding in the future. While no congressional action has begun to impose such a tax, the uncertainty remains. Therefore, the Governors call on the Congress to permanently remove this threat by adopting and referring to the states a constitutional amendment that would specifically exempt state and local bonds from federal taxation.

**1.2.4 Creating a Consensus for Action.** The continuing federal deficit will force the federal government to make a number of critical choices relating to the financing and administration of governmental programs. Many of these decisions will have a fundamental effect on state and local governments. Such decision should not be made in a vacuum. Therefore, the Governors call upon the Congress to convene a commission comprised of members designated by the federal government and the states to develop recommendations on the steps needed to retain or restore balance in the federal system. Such a commission should address not only the issues of the allocation of intergovernmental programs, but also the simplification of intergovernmental administration and the protection of state and local revenue bases.

The Governors are asking Congress to enact two amendments and legislation for the commission during the 101st session of Congress. If congressional action has not taken place by the end of that session, the Governors will consider further action.

### **1.3 Defining the Future Federal Role**

**1.3.1 Preface.** In order to assure that legitimate demands for federal actions are met in a responsible manner and that the role of the states and localities is preserved, three steps are needed.

**1.3.2 State Responsibility.** The Governors strongly support the principles of federalism, but the public will insist on federal action should the states fail to act collectively on issues of legitimate concern. The states reaffirm their strong commitment to continued leadership and effective state action.

**1.3.3 Federal Protection and Special Populations.** The states reaffirm their support for a federal role in assuring equality of access and due

process. The federal government also has a responsibility to help states meet the needs of special populations such as refugees, migrants, and Indians.

**1.3.4 Federal Forbearance.** Not all problems require a uniform solution. Priorities and preferences may vary from state to state. The lack of universal action or uniform solutions does not in and of itself provide a sufficient rationale for federal action. Instead, we recommend that the development of future federal programs be guided first by four fundamental principles:

- Federal action should be taken where constitutional authority for action is clear and certain.
- Federal action should be limited to problems that are national in scope, problems where the national interest requires a universal or uniform solution, not merely problems that are common to all of the states.
- Federal action should be sensitive to states' individual abilities to bring a unique blend of resources and approaches to common problems.
- Unless the national interest is at risk, federal action should not preempt additional state action.

#### **1.4 Restoring the Balance**

Steps must also be taken to overcome the imbalance that has resulted from the rapid expansion of federal programs in the past. The proliferation of detailed federal programs must be ended, and states must be given greater flexibility in policymaking. Toward these ends, the following changes are recommended:

- The number of joint federal/state programs should be reduced by a sorting out of responsibilities between the two levels of government.
- Problems that result from the lack of necessary state resources should be addressed by targeted assistance rather than by federal aid to all of the states.
- Where federal programs are to be maintained, grant conditions should not be used to force state program changes not related to the specific purposes for which the grant is provided, and federal funding should not always require state or local matching funds.
- Federal regulations should rely on state laws and procedures for the administration of federal programs.
- Where a joint federal/state role is to be retained, federal grants should be consolidated into general block grants.
- While local governments must be assured that resources will be made available for priority needs, the federal government should end the bypassing of state governments.

As a specific step toward this more rational allocation of services, the Governors support the following action steps:

- Enact a national policy on income security for the needy with a larger federal responsibility in exchange for reduced federal responsibilities in other areas.
- Develop a national program of medical care for the needy financed from federal resources.
- Provide funding for these programs and preserve the balance of costs within the federal system by the orderly turnover to the states of a comparably priced set of program responsibilities such as education, community development, transportation, and social services.
- Ensure that all states have the fiscal capacity to meet the requirements of the national income security policy and other federal goals.

## **1.5 Administration of Intergovernmental Programs**

**1.5.1 Preface.** In order to provide maximum flexibility and an opportunity for innovation, as well as to foster administrative efficiency and cross-program coordination, intergovernmental grant legislation should be designed to meet the following principles:

### **1.5.2 General**

- Legislative authorization should be kept current and all grant programs should be subject to periodic review.
- There should be a congressional determination of a compelling need for federal action.
- Legislation should include clear statements of measurable program objectives to reduce administrative confusion and facilitate judicial interpretation of congressional intent.
- States should be actively involved in a cooperative effort to develop policy and administrative procedures.
- Grant requirements should be tied to the purpose of the grant.

### **1.5.3 Financing**

- Federal revenues earmarked for federal aid programs should be made available fully for the purposes enacted.
- Legislation should authorize and appropriate sufficient funds to meet identified program objectives.
- Where states are unable to act due to a shortage of resources, consideration should be given to targeted assistance to increase financial capacity, rather than to the development of uniform nationwide grant programs.
- Federal assistance funds, including those funds that are to be passed through to local governments, should flow through the states according to state laws and procedures.

- States should be given flexibility to transfer a limited amount of funds from one grant program to another, or to administer related grants in a consolidated manner.
- Federal assistance appropriations should be enacted on a timely basis, possibly even one year in advance.

#### **1.5.4 Administrative Requirements**

- Federally mandated administrative requirements should be uniform across federal agencies and programs and allow the substitution of comparable state requirements.
- Federal grant programs should not impose unreimbursed administrative costs upon the states or localities.
- Congress should limit administrative authority over planning and reporting requirements by specifying the product of planning rather than the process, by delegating planning to existing state organizations, and by requiring that reporting requirements be clearly justified.
- States should be given broad flexibility in establishing federally mandated advisory groups, including the ability to combine advisory groups for related programs.
- Governors should be given the authority to require coordination among state executive branch agencies, or between levels or units of government, as a condition of the allocation or pass through of funds.
- Federal government monitoring should be outcome oriented, and should not focus on process or procedural measures.
- Federal reporting requirements should be minimized and states should be encouraged to develop cooperative reporting efforts.
- The federal government should not dictate state or local government organization.
- States with prior programs and acceptable performance should be excused from detailed federal requirements or certified as meeting federal requirements.
- Federal agencies should accept state and local administrative structures and program administration.

#### **1.6 Conclusion**

We recognize the unique nature of the federal system and the critical importance of developing a close working relationship with our federal partner. They recognize and support a continued federal role in protecting the basic rights of all of our citizens and in addressing issues beyond the capacity of individual states. At the same time, the federal government must recognize that there are problems that can best be addressed at the state and local level.

**In summary, the Governors are committed to a revitalized and strong partnership with Congress and the administration to bring a new balance to federalism. We believe these issues are crucial to the future viability of our separate governments and to a revival of citizen participation in the affairs of government.**

**Adopted August 1988.**



**S.J. Res. 377.** Joint resolution proposing an amendment to the Constitution regarding federal taxation of State obligations; to the Committee on the Judiciary.

**Proposed constitutional amendment regarding  
federal taxation of state obligations**

**Mr. Roth.** Mr. President, today I am proposing a constitutional amendment to overturn the Supreme Court's unfortunate decision in *South Carolina* against *Baker*, decided on April 20, 1988. In that case the Supreme Court construed the 10th amendment, the guarantee clause, and the doctrine of federalism implicit in the Constitution as conferring no rights on States to issue bonds free from Federal taxation. The ability to issue tax-exempt bonds has been and continues to be an important tool for our State and local governments to build schools, bridges, roads, hospitals, and many other public projects. The effect of the Supreme Court decision is to invite a revenue-hungry Congress to dine at the table of State and local governments.

Unless this decision is overturned, there is no question that Congress will accept the invitation to eat away at the tax-exempt status, now lacking constitutional protection, of State and local obligations.

Without wading into the niceties of the doctrine of intergovernmental tax immunity, the Court apparently was satisfied by the fact—perhaps, I should say, by the mere formalism—that Congress taxes State bonds by imposing the tax on the bondholder and not the issuer. What the Court overlooks is the practical impact of Federal taxation of State bonds, even if the tax is paid by the bondholder. To say that the payment of tax by the bondholder does not adversely affect the issuer is to deny reality.

In the early days of our republic, Chief Justice Marshall observed that “the power to tax involves the power to destroy.” *McCulloch v. Maryland*, 4 wheat, 316, 431 (1819). Later Justice Holmes was to observe that “the power to tax is not the power to destroy while this court sits.” *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928). In *South Carolina* against *Baker* the Court says, in effect, that it no longer cares about the “power to destroy” as long as the means of destruction are not direct and not discriminatory.

Well, I care. The power to tax does involve the power to destroy. We must, therefore, exercise Federal taxing authority with caution. States cannot

be States in our federal system, they cannot be sovereign, unless they have their very own source of revenue free from Federal encroachment.

The Supreme Court's admitted lack of concern over the deterioration of federalism stands in marked contrast to its vigilance in policing the separation-of-powers doctrine. While the Court has time and again declared the separation of powers among the three branches to be central to the Constitution, and has been willing to upset established institutions to vindicate that central concern, the Court has clearly given notice that it will not police federalism in any similar way.

The irony is that federalism and the separation of powers were conceived by the framers as twin doctrines to safeguard political freedom. The framers believed—and so do I—that if the responsibilities of governing this country were divided between the Federal Government and the States and further dispersed among three branches, freedom would be assured and democracy strengthened. By dividing and separating powers, the opportunity for monarchy and for tyranny is foreclosed. Moreover, the power of the people is maximized since decisions of government are made by different officials, each responsible for a limited area. By holding different officials discretely accountable for their welfare, the electorate exercises greater control over their destiny.

Once the genius of federalism is understood, it will come as no surprise that the decline in federalism has run concurrently with an increase in electoral apathy. The decline of federalism means that people are losing freedom and losing control of government. As every important issue becomes federalized, there is less and less that the people can do to influence government. More and more the electorate is confronted with all-inclusive Federal solutions by Federal officials. As Federal officials become the only officials that count, State and local offices become less relevant to the people.

This decline in federalism concerns me. While my proposed constitutional amendment does not address this problem in all of its ramifications, it does address the heart of the problem. For State sovereignty and local autonomy are nothing so long as burdens may be imposed on raising revenue.

The amendment that I am today introducing may not be the perfect answer, the last word. But it is the first step of a most important journey. I am well aware of how our Federal income tax laws got to be what they are. I am aware of past abuses by State and local governments, which our tax laws have addressed. But I am also aware that much we have done has been driven simply by the need to raise revenue. This must be stopped.

The simple elegance of the proposed amendment may strike some tax specialists as vague. But the Constitution should not address issues with the strict particularity of the Internal Revenue Code. There must be some flexibility. The courts will have to define the amendment's meaning on a case-by-case basis. And, more important, the courts will once again be commissioned to police this most critical aspect of federalism.

The amendment states simply that "the United States shall not have the power to lay and collect taxes on incomes derived from the obligations of the several States issued for a public purpose."



While the amendment borrows its phrasing from the 16th amendment, it is intended to be more than an exception to that provision. Rather it is, more broadly, an exception to the taxing power of the United States. The phrase "incomes derived from \*\*\* obligations" refers to the interest income of the bondholder which the issuer is obliged to pay and not to any capital gain the bondholder may realize upon sale to another bondholder. The language thereby incorporates a historic distinction made between interest and capital gains with respect to tax-exempt bonds.

The amendment would not exempt all State obligations but only those "issued for a public purpose." This limitation is intended to address the concerns of many that a total exemption might be abused. Very often State and local governments undertake to aid private parties in obtaining financing. In striking a balance between the sovereignty of the several States and the Federal Government's revenue needs, it seems unnecessary to allow the State to lend its prerogatives to others at the expense of Federal revenue interests.

I would expect this limitation to receive careful scrutiny, for it establishes the breadth of the exemption. I recognize that the limitation differs from current tax policy, but current tax policy may have to yield to the paramount purpose of restoring some measure of federalism to our system. While I am not wedded to the specific limitation contained in my proposal and while I would welcome constructive alternative formulations, I must indicate my opposition to any changes that would undercut the purpose of according traditional protection to State bonds issued to pay for the essential functions of a State government.

Finally, while the language of my amendment includes no reference to any political subdivisions of the States, this is only customary constitutional drafting. The protection accorded to a State would flow to any of the State's subdivisions acting under State law.

Were it not for certain fears regarding the amendment process, it would not be necessary to begin the process of restoring a State prerogative in a Federal forum. But fears regarding State initiatives under article V have petrified into dogma, so that the mere specter of a runaway convention chills State proposals for constitutional amendments. The framers intended that States be able both to propose and to ratify amendments. But fears have atrophied State political muscle while at the same time the Supreme Court has abandoned the defense of federalism, so that it is here, in this forum, that repair must begin. Let us begin now.

Thank you, Mr. President

Mr. President, I ask unanimous consent that my joint resolution be included as part of the *Record* at this point.

There being no objection, the joint resolution was ordered to be printed in the *Record*, as follows:

#### S.J. RES. 377

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of*

the United States, which shall be valid to all intents and purposes as part of the constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission to the States for ratification:

### **ARTICLE**

The United States shall not have the power to lay and collect taxes on incomes derived from the obligations of the several States issued for a public purpose.

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# What is ACIR?

The Advisory Commission on Intergovernmental Relations (ACIR) was created by the Congress in 1959 to monitor the operation of the American federal system and to recommend improvements. ACIR is a permanent national bipartisan body representing the executive and legislative branches of Federal, state, and local government and the public.

The Commission is composed of 26 members—nine representing the federal government, 14 representing state and local government, and three representing the public. The President appoints 20—three private citizens and three federal executive officials directly and four governors, three state legislators, four mayors, and three elected county officials from slates nominated by the National Governors' Association, the National Conference of State Legislatures, the National League of Cities/U.S. Conference of Mayors, and the National Association of Counties. The three Senators are chosen by the President of the Senate and the three Representatives by the Speaker of the House of Representatives.

Each Commission member serves a two-year term and may be reappointed.

As a continuing body, the Commission addresses specific issues and problems, the resolution of which would produce improved cooperation among the levels of government and more effective functioning of the federal system. In addition to dealing with important functional and policy relationships among the various governments, the Commission extensively studies critical governmental finance issues. One of the long-range efforts of the Commission has been to seek ways to improve federal, state, and local governmental practices and policies to achieve equitable allocation of resources and increased efficiency and equity.

In selecting items for the research program, the Commission considers the relative importance and urgency of the problem, its manageability from the point of view of finances and staff available to ACIR, and the extent to which the Commission can make a fruitful contribution toward the solution of the problem.

After selecting specific intergovernmental issues for investigation, ACIR follows a multistep procedure that assures review and comment by representatives of all points of view, all affected levels of government, technical experts, and interested groups. The Commission then debates each issue and formulates its policy position. Commission findings and recommendations are published and draft bills and executive orders developed to assist in implementing ACIR policy recommendations.

