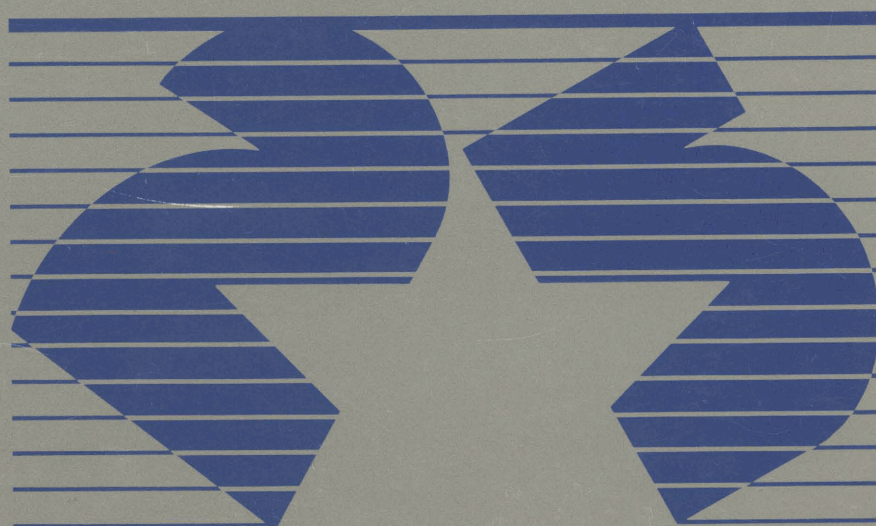


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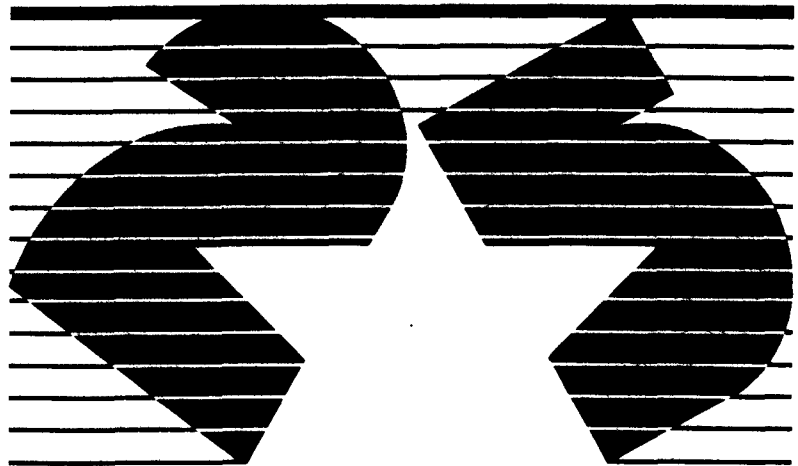
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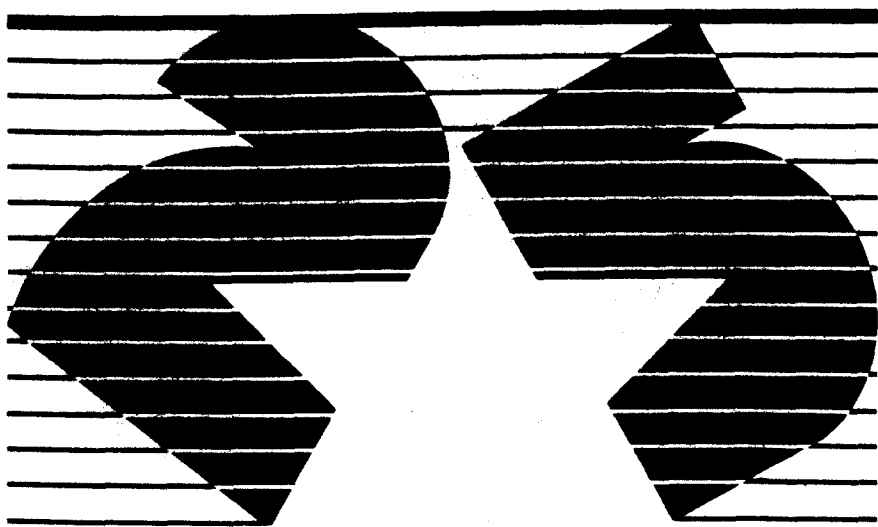
Advisory Commission on Intergovernmental Relations

Emerging Issues *in* American Federalism *Papers*

*Prepared for ACIR's 25th
Anniversary*



Advisory Commission on Intergovernmental Relations



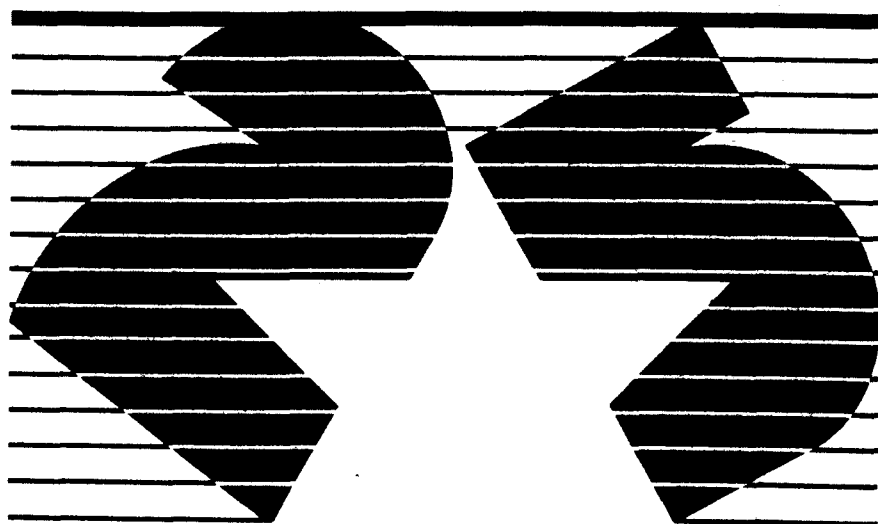
Preface

For 25 years, since 1959, the Advisory Commission on Intergovernmental Relations has pursued its primary responsibility: proposing ways to improve the federal system that are based on research, analysis, and deliberate consideration by concerned participants drawn from many different settings. On occasion, to further understanding of this system, the Commission has sponsored conferences, commissioned papers, and generally encouraged opportunities for fuller discussion of federalism.

The 25th anniversary of the Commission in 1984 provided an appropriate opportunity to give attention to our past actions and their importance to contemporary and future federalism. Several events served this purpose: a retreat in Annapolis with scholars; a series of hearings throughout the country with officials, scholars, and others; and a dinner at year's end to commemorate the contributions of the organization and its past commissioners. A formal history of the Commission was also prepared to document these 25 years during which the character of the federal system was significantly transformed.

This particular volume includes papers by four distinguished scholars of federalism, extended comments by a United States senator and the former director of the Congressional Budget Office, and a broad synthesis by a nationally known journalist. The range of their insights and conclusions gives ample evidence that the philosophy and actions underlying our federal system have direct relevance to our daily lives. The workings and future of American federalism deserve attention commensurate with this relevance.

Robert B. Hawkins, Jr.
Chairman



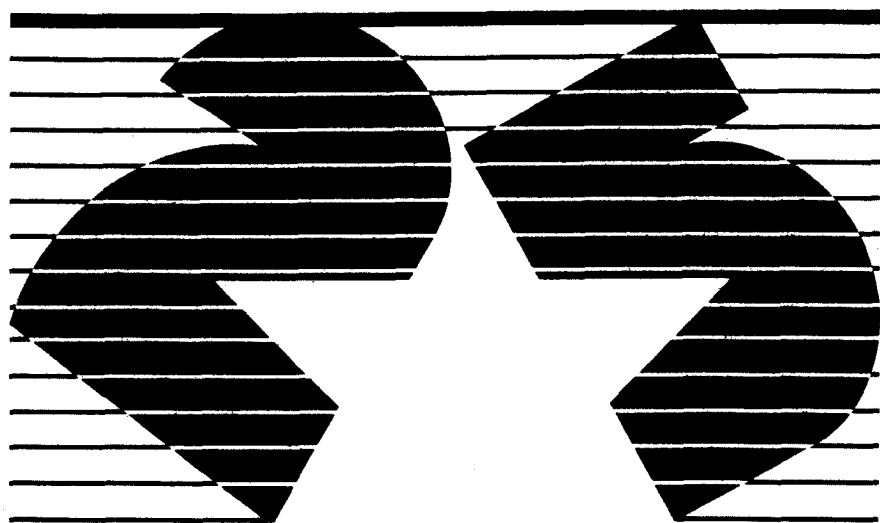
Acknowledgements

ACIR is grateful to those who participated in the efforts which resulted in these stimulating papers: those who prepared them, those who were active and thoughtful discussants.

S. Kenneth Howard planned and coordinated activities commemorating the Commission's anniversary. Jane F. Roberts carried primary responsibilities for the programs at the Annapolis retreat, September 23, 1984, and the 25th anniversary dinner in Washington, December 7. Franklin A. Steinko bore similar responsibilities for the facilities at both events. The many positive expressions from participants are tributes to their efforts.

This volume was planned and edited by Donald W. Lief. The manuscript was typed by Elizabeth Bunn, Karen Kirkwood, and Harolyn Nathan.

John Shannon
Executive Director



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Forces Shaping the Federal System Today

Daniel J. Elazar
Temple University

Daniel J. Elazar has been director of the Center for the Study of Federalism, Temple University, since 1967. He has also been, since 1973, head of the Institute of Local Government, Bar Ilan University, in Israel. He is professor of political science at both institutions. In 1971, he became editor of *Publius: The Journal of Federalism*. He has contributed to more than 100 books as well as leading scholarly journals, and is author or editor of 30 books, the most recent of which is *Governing People and Territories* (1982).



After four years of the Reagan administration, the condition of American federalism is best characterized as ambiguous. This, in itself, represents a great advance for noncentralized government over the situation which had prevailed for the previous fifteen years, during which the trend was rather unambiguously centralizing. The various "New Federalisms" of the preceding administrations at most sought to replace noncentralization, that is to say, the constitutional diffusion of power among federal and state or federal, state, and local centers in such a way that the relationships among them were those of true partnership, with decentralization, that is to say, a federal center deciding what the states and localities should or should not be doing, even as it relied upon the latter to carry out most federal programs.¹

The present ambiguity is based upon two trends. On one hand, President Reagan, from the very first moment of his election, began to reshape American attitudes toward the federal government and the states in particular. The President announced a very traditional dual federalist view of the American system, but, by announcing it forcefully, he forced even committed centralists to respond in federalist terms and to justify their extraordinary reliance on federal intervention in those terms. With his flare for communication, President Reagan brought federalism into the headlines, something in a way unequaled by any president in this century.

The Reagan administration, by its decisive actions in so many fields, has demonstrated how it is possible to take

hold of the reins of government in the United States and begin to reverse presumably irreversible trends—to defy the conventional wisdom that nothing can be done to arrest and reverse the at least seventy-year-old-long thrust toward greater government permeation of society. Yet fulfillment of President Reagan's promise to strengthen the states within that system and thereby strengthen the system as a whole has not been an easy task. In principle, it should be—simply have the federal government return or turn over certain functions to the states, free certain revenue sources to accompany them, and reduce federal regulatory interventions into state affairs and the process of state governance.²

Unfortunately, that is far easier said than done, as successive administrations since the Nixon presidency have discovered. There are several reasons why this is so:

1. Even when there is general agreement in principles, there is great disagreement around the country and even in the administration as to what shall be turned over to the states. This administration is no more immune to this problem than any other. Indeed, its people have suggested new federal interventions almost as frequently as they have federal withdrawals.

2. The states are not necessarily willing to accept added responsibilities. They often have to be "forced to be free."

3. There is a tendency in the administration—paralleled in the ACIR

during its first twenty-five years—to rely on simple notions of striving to separate federal and state functions as a basis for making policy rather than gaining an understanding of the possibilities of strengthening the states by

The Reagan administration . . . has demonstrated how it is possible to take hold of the reins of government . . . and begin to reverse presumably irreversible trends . . .

restoring classic patterns of intergovernmental cooperation. Much of the problem relates to a misunderstanding of the principles of federalism and how they informed the American political system in better days.

The Balance Sheet

While the Reagan administration failed to secure the adoption of the most visible portions of its New Federalism program, by shifting federal government priorities, reorganizing existing grant programs, and reducing federal domestic expenditures as a proportion of the total federal budget, it did succeed in introducing new attitudes among state and local officials and their constituents. The latter learned that it was no longer possible to turn to Washington for solutions to most of their problems and therefore it was necessary to rely

The idea that new models of intergovernmental, interorganizational, and public/private activity are needed has attracted increasing attention across the entire political spectrum . . .

upon state and local efforts and initiatives.³ All this was accompanied by a shift in the orientation of the federal departments and regulatory agencies in favor of loosening or reducing federal regulation of state and local activities and oversight of intergovernmental programs.

On the other hand, the Reagan administration did not succeed in restoring anything approximating dual federalism, even in the limited areas in which it made proposals. Quite to the contrary, the general sense that cooperative federalism was the only kind of federalism possible was much strengthened from both directions—that is to say, among those who would have hoped for more federal activity and those who hoped for less.

Worse than that, whenever an issue came forward in which an increased federal role was perceived by the administration to be beneficial to its interests, it acted in what has by now become the usual way of opting for the expansion of federal powers. Three examples of this will suffice: one, the federal act allowing double bottom trucks on most federally aided highways thereby preempting and superceding state standards and, two, the enactment of a requirement that states raise the minimum drinking age to 21 or lose a percentage of their federal highway funds. The first was in response to pressures from the trucking industry, an influential force among Reagan backers, and the second was a response to popular pressure—or what seemed to be popular pressure as presented by the media to do something about drunk driving among teenagers. Since the political payoff was to be found in federal action, the Reagan administration rose above principle in both cases, as it did in others.

Perhaps the worst of these three examples is the case of interstate banking. The Reagan administration led the way to federal preemption of state laws prohibiting multistate banks, thereby initiating a process of nationalization of the banking system. Moreover, it has done so by administration rather than legislation.

A New Direction

Still, all told, the Reagan administration has pointed the United States in a new

direction. In doing so, it has not generated that new direction out of its own energy so much as it has galvanized and focused a shift that began to be evident even earlier. The idea that new models of intergovernmental, interorganizational, and public/private activity are needed has attracted increasing attention across the entire political spectrum, from Robert Reich's *America's Next Frontier* to John Naisbitt's *Megatrends*, from conservative advocates of old-fashioned states' rights to environmentalists interested in the greening of America.⁴ Even ten years earlier, similar ideas, whatever their intellectual value, ran against the realities of American civil society.

By the early 1980s, certain shifts in those realities were having their effect. During the postwar generation there was an environmental basis for the centralization which occurred. The nation's economic system became increasingly centralized as locally owned firms were purchased by national (and multinational) corporations. The civil rights revolution led to substantial federal intervention in the education system. Even organized religion underwent centralization as the various denominations developed strong "national offices" with extensive bureaucracies. The country's communications system, which so influences the public, led the pack toward an almost exclusive focus on Washington as the single center of political power.⁵

More recently, there have been changes in the first three and there

movement to nationwide interstate banking—America's new economic concerns focus on industrial redevelopment and improving foreign markets. Both are spheres in which the states have played and are likely to continue to play a prominent role. Those who are concerned about an American industrial policy are increasingly discovering that they must be concerned with American federalism in their efforts to develop such a policy.

With regard to the educational system, the federal role in everything but civil rights matters had been declining for well over a decade and, in the Reagan administration, federal intervention in civil rights matters has also diminished. Moreover, criticism of the results of the American educational system which has emerged over the past several years has led to greater involvement of those seeking change in local school affairs and, more particularly, greater state involvement in setting minimum educational requirements and achievement standards. What seems to be emerging is a combination of an increased variety of educational options locally, often on a nonterritorial basis. Both public and private schools offer a greater variety of approaches to education designed to meet the differing needs of different children, coupled with state standard setting which is designed to set certain basic requirements for all who pass through the elementary and secondary educational networks in the various states.

Those who are concerned about an American industrial policy are increasingly discovering that they must be concerned with American federalism in their efforts to develop such a policy.

may be signs of some changes in the fourth as well. While the trend towards further integration of the national economy has not abated—witness the

Noncentralization has come back to the religious sphere with even greater effect. The tendency to transfer power to the national offices of the various denominations, so prominent in the postwar period, had already been stopped by the early 1970s. Since then, the national offices have retreated even further and the great national seminaries had lost much of their influence. The revival of fundamentalism, which tends to be highly localistic or, failing

that, based upon individual evangelists with their own regional or national followings, has increased noncentralization in the religious sphere. As fundamentalists have become involved in politics, they have brought some of that noncentralization with them. Even

...this new noncentralization... does not represent a retreat from nationalization to an older style territorial democracy, but a movement to a new stage which combines territorially based and nonterritorially based actors....

when they seek national solutions, their national political activity has been devoted largely to repealing federal policies which interfered with what earlier had been considered issues in the domain of the states such as abortion policy and school prayer.

Communications is the sphere in which there has been the least change. Political news, especially in the electronic media, still seems to be heavily national in orientation, flowing from Washington and concentrating on the White House. In this respect, the media, following the line of least resistance, have lagged behind the overall trends in American society. In doing so, they have lost the confidence of the American people.

Public television, for example, has offered a good model for noncentralized mass communications, with major local stations responsible for programming that is then spread nationwide but remains the product of the original stations. Cable television offers the promise of more public affairs programs that do not originate in Washington or New York even if, as yet, that promise has not been fulfilled.

What is characteristic of this new noncentralization is that it does not represent a retreat from nationalization to an older style territorial democracy, but a movement to a new stage which combines territorially based and non-

territorially based actors in a multidimensional matrix. Technological change has made much of the old centralization obsolete, or is rapidly doing so, but the new technology is certainly not restoring the simpler territorial democracy of a more rural age. American civil society is becoming more multidimensional than ever before, having to accommodate people who have embraced different lifestyles rubbing shoulders with one another in an urbanized environment as well as different stages of economic growth, educational aspiration, religious commitment, and social group expression.

At first the federal system sought to accommodate this new diversity by ignoring the older territorial divisions, taking the states and localities as administrative vehicles to manage the government activities designed to respond to the new complexities. This has turned out to be an oversimple response, just as those who sought to turn back the clock and reverse the expansion of the federal government in more than modest ways turned out to have offered an inadequate response. For if the system has become too complex to simply turn things back to the states, it has also become too complex to simply rely upon the federal government. There are too many forces in a country of nearly 240 million people spread over three and one-half million square miles. States, localities, and sections offer points of identification and expression which have a real vitality in their own right and offer opportunities to deal with a multidimensional society.

It is easy enough to see how this is true in the case of California and Texas. By now, it has come to be generally recognized that a state like Minnesota also offers a distinctive way of life, which the institutions of the state foster and maintain. In the last decade, even the people of a state like New York, whose citizens had, in the previous generation or two, virtually abandoned any sense of state identity, have

discovered how much their state has a personality, policies, and programs which serve the special needs of New Yorkers.

The twentieth century is a time in which objective conditions cause state roles to diminish. As many students of

... each of the fifty states is a polity in its own right, in the fullest sense. While either the federal or state governments may serve the others in some administrative capacity by mutual agreement, neither is designed to be the administrative arm of the other per se.

the subject have pointed out, whether the states have acted responsibly in meeting the century's challenges, they found the federal government stepping in as senior partner or more. There are many signs that objective conditions in the twenty-first century will require different responses. Conditions of size and scale will reduce the utility of the federal government as a problemsolver and increase that of the states. Changes in the patterns of urban settlement will continue to reinforce that trend. Finally, the closer integration of an international community whose members increasingly will rely on federal principles in their own organization, will increase the international role of the states, including a closer relationship with their counterparts in other federal systems.

New Dimensions and First Principles

In order to cope with these new dimensions, it is necessary to go back to first principles—not for formulas but to reexamine them and to discover how they can help us deal with the new environment which the American federal system must serve.

First and foremost, we must recall that the nation and each of the fifty

states is a polity in its own right, in the fullest sense. While either the federal or state governments may serve the others in some administrative capacity by mutual agreement, neither is designed to be the administrative arm of the others per se.⁶ Together they form a governmental matrix established by the American people to serve the American people, not a power pyramid with the federal government on top, the states in the middle, local governments on the bottom and—by implication—the pyramid as a whole resting on the backs of the people. The general government (that nineteenth-century term has great merit for its precision and the clarity it brings to the subject) sets the framework for the matrix as a whole by defining and delineating the largest arena. The states, whose boundaries are constitutionally fixed, provide the basic decision-making areas within the matrix.⁷ Both together provide the constitutional basis for the diffusion of powers necessary to prevent hierarchical domination, given the human penchant for hierarchies.⁸

Nevertheless, since the beginning of the Republic, the elements in the matrix have worked together to develop common policies and programs, with most important actors involved in most important details of most steps in problem definition, planning, programming, budgeting, implementation, and evaluation of most policies of mutual interest to them through the political process.⁹ That is the very heart of the argument of the cooperative federalist.

Empirically, students of federalism pointed this out two decades ago, and more, through detailed case studies of federalism, the party political process, and the role of Congress, particularly in the quadrangle linking states (and/or local) administrators, their federal counterparts, their congressional representatives, and their common professional associations or interest groups. Congressional-administrative preclearance of proposed legislation and administrative regulations is a regular

feature of American government and has been since 1790. Plans for programs are developed, more often than not, in consultation with spokesmen for the interested parties.¹⁰ Unfortunately, the inroads of the new hierarchies into the manner in which all this is done have become increasingly great, to the point where the traditional system is in serious jeopardy.¹¹

The problem, then, is not that the federal and state governments must cooperate in the governance of the country, but that the federal government, under the guise of "cooperative federalism" has changed its role from being supportive—from playing a "backstopping" role—to being coercive and even preemptive. That is what must be changed. The present administration is right when it seeks to do so through radical measures since only by getting to the root of the problem can the dangerous trends of the past generation be reversed. But it must devise a strategy that begins by recognizing the interlocking character of the federal system and then seeks a correct role for the federal government within that system.

Stated boldly, the federal government should only deal with:

1. The application of the framing principles of the United States Constitution;
2. Extraterritorial issues (e.g. foreign affairs, defense);

It is clear that the coercive federalism which emerged in the mid-1960s, under the guise of federal-state-local cooperation, has failed. Coercion of the states and localities does not work.

3. Boundary questions between the constituent entities of the federal system; and
4. Backstopping the states and their localities in matters of national concern.

It need not, indeed should not, deal with any of these on an exclusive or

preemptive basis. Nor should every branch of the federal government necessarily be involved in every one of these four fields. In most cases, except in aspects of (2), the federal role should be seemingly (in the sense of support of other governments or the private sector) entered into reluctantly or because of special circumstances.

It is clear that the coercive federalism which emerged in the mid-1960s, under the guise of federal-state-local cooperation, has failed. Coercion of the states and localities does not work. Not only does it lead to a strong negative reaction on the part of the principals involved and the public in general, but it also is not efficient by any standard. The evidence has mounted that it does not get the job done. Indeed, the failure of coercive federalism is tied closely to the failure of managerialism—the ideology of those who sought to replace traditional federalism with a power pyramid approach—as an ideology and as a substitute for a more broad-gauged approach to public systems.

The first effort to replace coercive federalism was the neo-dual federalism of the Reagan administration. However, it is an inadequate formulation for our times. Just as the federal government cannot manage everything or require the states and localities to serve its management ends, so, too, the federal government cannot abandon many of the responsibilities which it has acquired in the course of the twentieth century.

Significantly, the ACIR has tried both approaches. Initially, it saw the improvement of the federal system in the improvement of the managerial capacities of state and local government, emphasizing the managerialist reform agenda which took form during the Progressive era. Then it turned to neo-dual federalism even before the Reagan administration, seeking to separate functions by transferring certain ones, such as income maintenance, to the federal government and others, generally unspecified, to the states. Both of these

approaches proved inadequate. There may, indeed, have been some gain in governmental effectiveness as a result of introducing four-year terms for governors and annual sessions for the state legislatures, but they certainly have not

Federalism... is more covenantal than contractual, emphasizing a concern for community as well as for the individuals within it and the sense of mutual responsibility which makes a people great.

solved the problem of the role of the states in the federal system.

As far as separation of functions, there is little doubt that, if the ACIR had succeeded, there would have been far more centralization, since experience has demonstrated that it is far easier to transfer state and local functions to the federal government than it is for the federal government to overcome interest group pressures to return functions to the states. As I pointed out in earlier testimony before the ACIR, practically speaking, the sorting out of functions will only go in one direction—toward Washington—just as the introduction of managerially oriented reforms will only go in one direction—towards greater hierarchy in government and less public control.

What is needed is a reemphasis on cooperative federalism properly understood and properly designed for the new multidimensional society. Such a cooperative federalism should be based upon five basic principles:

1. The American federal system is a matrix of governments, with the federal government as its framing institution and the states as the principal cells that constitute the matrix, not a power pyramid organized hierarchically or a model of Washington as center with the rest of the country as its periphery.

2. The states have to be seen as polities, not simply as middlemen managers.

3. The states and localities should be seen as the primary agents of the people for domestic affairs.

4. The federal government should be seen as playing a positive role as a backstop for the states and localities.

5. The relationship between the federal government, the states, and the localities must truly be one of partnership with the interest in mutualism and commitment to self-restraint which is necessary to make any partnership work.

Refocusing on the States

It is appropriate, then, that the Reagan administration is undertaking radical surgery to cure a far-advanced disease. I must confess that there are aspects of that surgery which bother me. I am not as convinced of the virtues of libertarianism and radical individualism as many in the present administration seem to be. Federalism, in my opinion, is more covenantal than contractual, emphasizing a concern for community as well as for the individuals within it and the sense of mutual responsibility which makes a people great.¹² The hardline approach to reducing social benefits can easily degenerate into meanness. American society is not ennobled by depriving people in real need in order to catch a few cheaters. Nor is a policy that allows the prosperous to prosper further and to fritter away the fruits of their prosperity for private amusement while others fail to prosper at all, worthy of this great nation. On the other hand, neither is the nation ennobled by going bankrupt trying to do more than can be done or by allowing excessive government waste in doing what must be done.

Consequently, there is a real need for radical surgery if the federal system is to survive. The states must be forced to stand on their own to a greater extent than they have been, to function as polities and not as middle managers,

to take the lead and not merely respond to Washington-based initiatives. To do this, the attention of the American people must be redirected to their states far more than it has been since the New Deal.

The states must be forced to stand on their own to a greater extent than they have been, to function as politics and not as middle managers, to take the lead and not merely respond to Washington-based initiatives.

There was a time when the American public—reformers and conservatives, interested parties of all kinds—looked to their states as the arenas in which to fight great battles and do great things. Indeed, that was the case even though American society was in many respects a national society from the first, and certainly became more intertwined nationwide in the wake of the Industrial Revolution. The New Deal quite properly represented a recognition that the states could not “go it alone,” at least not after the Supreme Court had so limited their powers that reform was stymied unless Congress acted. But to carry the principles of the New Deal to absurd extremes, to assume that because the states cannot go it alone in some things, they cannot go it alone in any, or that they cannot lead in those things that are done cooperatively, is simply to misread American reality and American aspirations.

If there is one lesson to be learned from the principles and practices of American federalism, it is that matters need not be either wholly national or wholly state. That is the lesson that the Reagan administration sometimes seems to reject in theory, but operationally even that rejection may be understood as part of the radical surgery necessary at this time, given the critical illness of the patient. In sum, the New Federalism holds out real promise of improvement, provided that it does not strike at the equally important social ideals of

Americans so that it founders on them. This lesson becomes even more important in light of the recent election results.

Refocusing on the Matrix

The Reagan administration has grasped the idea apparently lost in the previous generation that, while under normal circumstances the elements in the matrix do work together to develop common policies and programs, the secret of the preservation of the nonhierarchical relationships within the network lies precisely in the right of the elements not to act under certain conditions. Without that right, the search for consensus becomes one unending round of coercion on the part of one party or another. A distinction must be made between those governmental activities that require the participation of all and those which do not, or which do not require joint participation. The Constitution was an attempt to deal with just this problem. Properly understood, it still provides a good basis for dealing with it. But the Framers never claimed that they had provided the ultimate answer for all time, or even all the answers for their time. By the very nature of things, it is a problem that recurs daily, especially in a complex political and social system as ours.

There is no formula that can be developed, once and for all, to be applied automatically to each case. What there must be, however, is a consensus that, within constitutional limits, the constituent units, as politics, can do what they will unless a strong case is made to the contrary. For some issue areas, that case is made *a priori* under the Constitution; for others the case is very murky indeed. Here, as in all other relationships within the federal system, it is not, and never has been, a “win-lose” proposition except in the minds of those who have dominated public discussion of the subject. If the system itself is far less hierarchical today than their images of it, even after

two generations of centralization, it is because of the system's own tough resilience and rough-and-ready responses of those very untheoretical practitioners who make it work.

On the other hand, because powers are really diffused—usually in a rather untidy way throughout the matrix, it is very difficult to decide to transfer power from Washington. Other presidents have discovered that in order to decentralize, they must first centralize. Morton Grodzins pointed this out in 1959, in commenting on the failure of President Eisenhower's Joint Federal-State Action Committee to decentralize anything.¹³

At that time, the president did not have sufficient initial power to centralize so he could not decentralize. Today, in an age of hierarchy assumers, a president can be a successful centralizer to a great degree but, as Grodzins pointed out then, there is no guarantee that an administration strong enough to overcome the noncentralization inherent in the system will so willingly part with hard-won powers. Certainly the Nixon administration did not. At most, it was willing to pass on the hard choices to the states and localities, reserving to itself the basic powers in areas where there was potential positive payoff. For those who believe in the virtues of federalism, the substitution of decentralization for noncentralization is not an advance.

... Americans have begun to note the failure of managerial techniques widely touted as means to come to grips with contemporary governmental problems. Certainly, the idea that they would automatically result in efficiency and economy has long since gone by the boards.

Federalism and the Curses of Bigness

Today Americans are confronted with

the obvious failure of hierarchical structures which are not only unable to "deliver the goods," but which also have come to distort the delivery system in the pursuit of their own vested interests. We have discovered that, in very large bureaucracies, coordination is well-nigh impossible "at the top" since the people on the top can barely control and are frequently at the mercy of their own organizations. Moreover, in a system of interlocking arena (which is what exists in the United States despite all the talk about "levels"), there is no real "top" to do the coordinating.

Similarly, Americans have begun to note the failure of managerial techniques widely touted as means to come to grips with contemporary governmental problems. Certainly, the idea that they would automatically result in efficiency and economy has long since gone by the boards. We now know how bureaucracies create their own inefficiencies and diseconomies. Beyond that, there has been a discovery that the new management techniques (PPBS and zero-based budgeting are prime examples) are inappropriate to the political arena with its lack of precise, agreed-upon goals and its basic purposes of conciliating the irreconcilable and managing conflict.

On a different but closely related plane, Americans are beginning to sense the failure of consumerism—the redefinition of people primarily as consumers and their institutions primarily as vehicles for the satisfaction of consumer wants. At the very least, the redefinition of government as a service delivery mechanism and citizens as consumers leads to an unmanageable acceleration of public demands. It also leads to the evaluation of all institutions by a set of standards that, being human institutions, they are bound to fail. Not the least of its problems is the abandonment of the principle that people have responsibilities as well as rights, obligations to each other if not to the polity in the abstract, which,

when neglected, imperil democracy by undermining its very foundations. The Reagan administration, to its credit, has tried to address many of these very problems and redirect the responses of the American people.

...[ACIR] must become oriented toward a truly federalist perspective, not merely toward the improvement of intergovernmental relations. It must concern itself with such subjects as the role of the courts, political parties, and presidential-congressional relations as well as its more traditional interests. . . .

In the *Federalist* No. 1, Alexander Hamilton suggested that the possibility of constitutional choice was one of the greatest blessings conferred by providence on the American people:

It seems to have been reserved to the people of this country, by their conduct and example, to decide the important questions, whether societies of men are really capable or not, of establishing good government from reflection and choice, or whether they are forever destined to depend, for their political constitutions, on accident and force.

The federal system was one product of that power to choose. Its future, which affects the future of the entire American experiment, depends upon the continuing exercise of correct choices by the American people.

Appropriate ACIR Responses

ACIR can and should play a major role in helping American governmental institutions, policymakers, and administrators respond to these new directions and to make the right choices. In order to do so, it must become oriented toward a truly federalist perspective, not merely toward the improvement of in-

tergovernmental relations. It must concern itself with such subjects as the role of the courts, political parties, and presidential-congressional relations, as well as with its more traditional interests in intergovernmental programs and fiscal relations. It would be very useful if it were to add a study of media coverage of federalism and intergovernmental issues and the role of the media in influencing centralization and decentralization efforts. In this respect, the ACIR must become multidimensional in its interests and not just management-oriented. To the extent that the ACIR has been moving into these other dimensions, it is to be congratulated.

The problem remains: How can the ACIR help restore the spirit and revitalize the practice of federal democracy? This means, in short, preserving noncentralization, freedom of choice, pluralism, and regional and group differences; maximizing liberty in tandem with equality, and assuring proper access and representation for citizens.

Within the limits of a reality that will never conform as closely to our models as we would like and which might not pass certain aesthetic tests, we need to strengthen the basic noncentralization of the American system. We must reconceptualize our understanding of the federal system by rediscovering the federal principle which underlies it, a principle that, in human terms, seeks to substitute coordinative for hierarchical relationships to the maximum possible extent.

I would submit that ACIR needs to focus its problem in the direction of three grand goals. They are:

1. The revival of citizenship, or the reestablishment of the principle that people are not simply consumers of government services but citizens of a polity—indeed, multiple polities—with obligations as well as rights.
2. The revival of constitutionalism, or the reestablishment of the principle that the federal government is one of

limited powers and cannot do everything it may wish to do.

3. The revival of real and true intergovernmental partnership with the reestablishment of the principle that more is gained by cooperation than through compulsion.

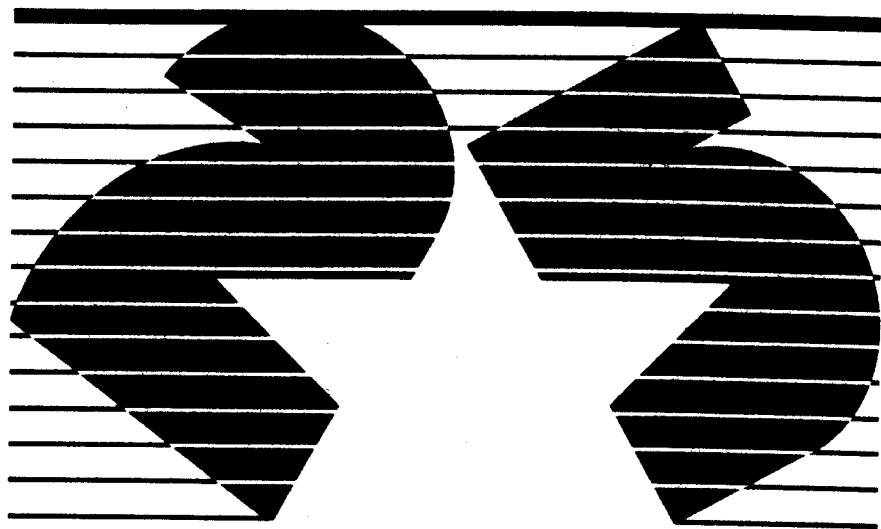
All proposals to revitalize the American system of government should be measured as to whether they are in harmony with these principles which represent that foundations of a federalist standard reflective of American values. Applying such principles, the federal government properly becomes a framing institution rather than a "cen-

tral office" or the top of the pyramid. That is certainly a vital role and no diminution of the importance of the federal government but it is consistent with the intentions of the Founders of our federal union.

On one level, these principles are relatively easily understood. On another, they are the subject of eternal probing—for their meaning and for the ways to apply them on a day-to-day basis. Both of these tasks will continue to exist as long as the United States does; should they cease, that in itself would be a sign of the death of the American polity as we know it. The ACIR shares in the responsibility for carrying out those tasks.

FOOTNOTES

- ¹ Cf. Jeffrey L. Mayer, ed., *Dialogues on Decentralization*, a special issue of *Publius* Vol. 6, No. 4 (1976) and Robert B. Hawkins, ed., *Federalism and Government Reorganization*, a special issue of *Publius* Vol. 8, No. 2 (1978).
- ² Robert B. Hawkins, ed., *American Federalism: A New Partnership for the Republic* (San Francisco: Institute for Contemporary Studies, 1982).
- ³ For a first assessment of Reagan's New Federalism, see Stephen L. Schechter, ed., *The State of American Federalism, 1980*, a special issue of *Publius* Vol. 3-4 (1981); 1981, Vol. 12, No. 3 (1983); 1982 Vol 13, No. 3 (1983); and 1983 Vol. 14, No. 3 (1984).
- ⁴ Robert Reich, *The Next American Frontier* (New York: Penguin Books, 1983) and John Naisbitt, *Megatrends: Ten New Directions Transforming Our Lives*, 6th ed. (New York: Warner Books, 1983).
- ⁵ Cf. Daniel J. Elazar "Cursed by Bigness: Toward a Post-Technocratic Federalism" in *The Federal Polity*, *Publius* Vol. 3, No. 2 (1973) republished by Transaction Books as Daniel J. Elazar, ed., *The Federal Polity*.
- ⁶ See Daniel J. Elazar, "The Rebirth of Federalism: The Future Role of the States as Politics in the Federal System," *Commonsense*, Vol. 4, No. 1 (1981).
- ⁷ See Daniel J. Elazar, *American Federalism: A View from the States* 3rd ed. (New York: Harper and Row, 1984), Chapter 1.
- ⁸ See Martin Diamond, "On the Relationship of Federalism and Decentralization," in *Cooperation and Conflict: Readings in American Federalism*, ed. Daniel J. Elazar, et. al. (Itasca, Ill.: F.E. Peacock Publishers, 1969).
- ⁹ Daniel J. Elazar, *The American Partnership* (Chicago: University of Chicago Press, 1962) and Morton Grodzins, *The American System* (Chicago: Rand McNally, 1966, reprinted by Transaction Books, 1984).
- ¹⁰ *Publius* has documented examples of virtually every aspect of these phenomena.
- ¹¹ See Daniel J. Elazar, ed., "Federalism and Prefectoral Administration," *Publius* Vol. 11, No. 2 (1981).
- ¹² Daniel J. Elazar and John Kincaid, eds., *Covenant, Constitutionalism Consent*, *Publius* Vol. 10, No. 4 (1980).
- ¹³ Grodzins, *The American System*, Chap. 12.
- ¹⁴ See, for example, Norton E. Long, "The Three Citizenships" in *Serving the Public in a Metropolitan Society*, a special issue of *Publius* Vol 6, No. 2 (1972), pp. 13-32.



When Federalism Works

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The politics of federalism has been transformed since this study was begun in the summer of 1979. At that time the federal government was consolidating its hold over the health, housing, and educational responsibilities it had assumed in the prior decade. Compensatory education programs for the disadvantaged, begun in 1965, not only had increased in size, but had also become more focused through regulatory requirements and detailed evaluations. In addition, Washington had undertaken new responsibilities for the education of the handicapped, for assisting the processes of school desegregation, for aiding community development, for assisting the access of low-income people to the housing market, and for opening up the field of prepaid group medical care. This enlarged federal role seemed to have been institutionalized within the American federal system; issues were limited to the ways in which that role would be played.

In our initial statement of research we had accepted what can now be seen as a more pervasive, more significant conventional wisdom than was then apparent: namely, that intergovernmental relations were so marked by regulation, red-tape, and confusion that policy implementation was disjointed and counterproductive. Our primary objective for this study was to document how and why this red-tape and regulation was an almost inevitable by-product of intergovernmental attempts to deliver services to those in the population with special needs. We hoped that if people understood better the reasons for federal-local conflicts, expectations would be more realistic and issues would be cast in less personal and partisan terms.

As the research progressed, three unanticipated findings dramatically re-

shaped the study, yielding a set of conclusions that, even though based on our original understanding, is nonetheless decidedly different from what was first proposed. First, we were surprised by the swiftness with which the election returns of 1980 affected federal policy in education, health, and housing. By the time our field research had begun, Congress had passed the *Reconciliation Act of 1981*, which eliminated the curricular supplies, and school desegregation programs, altered the regulation context for the rent subsidy and compensatory education programs, and cut funds for impact aid, vocational education, special education, health maintenance organizations, and community development.

The legislative changes would take a year or two before they began to affect program operations, of course; nothing that was happening in Washington had yet begun to have an effect in the field. We were still able to see federal programs as they had developed during what may now loosely be referred to as the Great Society era, an era that we can now see began somewhere in the early 60s and came to end in 1980, and which included two Republican as well as three Democratic administrations. Yet we—and our respondents—became conscious that we were historians, writing a concise, eye-

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witness account of how these Great Society policies had finally developed in the decade or more after their original enactment, immediately before a new political era might forever change their shape. It was as if we were given a

... we found a level of competence, energy, focus, and seriousness that was quite out of keeping with the political rhetoric of the day.

chance to record the dying moments of Pompeii shortly before Mount Vesuvius was to erupt. Perhaps this was why so many gave us the time and cordiality that it was our pleasure to experience in our visits to the four study sites.

Our second surprise was no less unanticipated than the first. We expected to see confusion and disarray, regulation and conflict, discouragement and defeat. As one analyst has recently argued, "the Great Society Ronald Reagan

challenged in 1980 was *not* a healthy and robust one, but an ailing and decrepit Great Society."¹ Pompeii's wickedness was to be avenged by a fire-breathing god. Instead, we found a level of competence, energy, focus, and seriousness that was quite out of keeping with the political rhetoric of the day. Under close observation, Pompeii turned out to be nothing more than an ordinary town going about its daily business but which quite coincidentally happened to be located next to a no-longer-dormant volcano.

These findings prepared us for the third unexpected development. Mount Vesuvius erupted all right, but the lava it spewed forth reached only to the edges of this modern day Pompeii. Or, more exactly, the town fought back, dousing the fires that a new political leadership in Washington had been igniting. Thus far the *Reconciliation Act* of 1981 has changed federal policy less than many had anticipated. In education, the major programs—compensatory education, special education, vocational education, impact aid, bilingual education—have remained essentially intact, if reduced in size. The rent subsidy, community development, and health maintenance programs also remain in place. Deregulation has begun haltingly and with little apparent programmatic consequence—at least for the time being. Our account of federal policy *circa* 1980 is not just a history; it helps to account for the way in which these programs preserved their identities at least through one term of a conservative administration. Their future, though still fragile, seems more assured at this writing than when our field research began.

The observations and interpretations reported in the ensuing pages are based on documentary research and nearly two hundred semi-structured interviews with federal, state and local officials (and other informed observers) in four cities: Baltimore, Miami (Dade County), Milwaukee, and San Diego. The intergovernmental programs oper-

Figure 1

List of Federal Programs Included in Study

Development Programs

- 1) Hill-Burton Hospital Survey and Construction Act of 1964.
- 2) Aid to Federally Impacted School Districts.
- 3) Title IVB of the *Elementary and Secondary Education Act*, successor program to Title III of the *National Defense Education Act* (curricular and instructional programs).
- 4) *Vocational Education Act* of 1963.
- 5) Community Development Block Grant, Title I of the *Housing and Community Development Act*.

Redistributive Programs

- 1) Title I of the *Elementary and Secondary Education Act* (compensatory education).
- 2) *Education for All Handicapped Children Act* of 1975 (PL 94-142).
- 3) Section Eight Rent Subsidy for Existing Housing Program of 1974, Title I of the *Housing and Community Development Act*.
- 4) *Health Maintenance Organization Act* of 1973.
- 5) *Emergency School Aid Act* (school desegregation).

ating in these locales for which data was collected are listed in Table 1. They are classified either as developmental programs whose primary purpose was to help strengthen local economies or as redistributive programs whose purpose was to help some segment of the population that had a special need. As we shall see, the two types of federal programs differed markedly in their administrative style and local impact.

In this paper we have only the space to report the major conclusions from this study. (For supporting documentation the reader must for the moment resort to the archives of the governmental agency that sponsored this research.)² These conclusions are divided into three parts: (1) a report of the major specific findings of the study; (2) a theoretical statement on the nature of contemporary federalism, broadly considered; and (3) some interpretive commentary on recent trends in the direction of the American federal system.

The Specific Findings

1. Developmental programs are loosely administered, require few regulations, are subject to few evaluations, and generate few intergovernmental conflicts. Since communities are only asked to carry out programs and perform services they are already inclined to provide, they need little guidance from the federal government. Since conflicts of interest are minor, Washington writes few guidelines and monitors local activity only in general terms. The vocational education program and Title III of the *National Defense Education Act*, both of which had broad developmental goals, illustrate these tendencies. In both programs regulations were minimal, local discretion over the use of funds was ample, and intergovernmental relations were generally smooth and cooperative.

2. Redistributive programs are more closely monitored by state and federal officials. Regulations are more detailed; evaluations are more frequent and more extensive; audits are more searching; and conflicts are more frequent. The federal government acts as if it is more dubious about local commitment to programs of this genre. This pattern is exemplified by the special education, emergency school aid, compensatory education, "Section 8" housing, and health maintenance organization programs.

3. Federally funded programs tend to be well-defined, segmented within a city's service delivery system. This permits the federal government to regulate, audit, and evaluate local policy. It also allows the local community to vary the size and scope of its activity with variations in federal appropriations. Rapid growth, dramatic cutbacks, funding delays, and surprise supplemental allocations are all more easily accommodated within a system somewhat separable from other local government programs.

In vocational education and Title III (later Title IV-B of ESEA) moneys were usually spent on equipment, renovation, and supplies, items which can be purchased sooner or later in larger or smaller amounts depending on fund availability. Compensatory education programs typically had their own administrative and teaching staff; teacher aides hired under the program had no tenure apart from the availability of federal dollars.

4. Block grant programs with broad, ill-defined, or multiple purposes will tend to pursue developmental objectives. In the absence of well-defined federal expectations, local governments use money for overall community expenditures or for programs especially designed to promote economic betterment. The impact aid and Community Development Block Grant programs, both of which had broad or multiple purposes, provided

money which localities used for general city services or for clearly defined developmental objectives. Only in rare instances did we find local use of these "block grant" funds for a special needs population.

5. Redistributive programs are more likely to be readily implemented in economically and fiscally prosperous locales than in cities facing economic decline or fiscal shortfalls. The cities with more resources are apparently better able to attend to those with special needs. The most economically hard-pressed city, Baltimore, was least compliant with federal regulations in compensatory education, special education, emergency school aid, and Section 8 housing programs. Dade County, the most prosperous district, was not responsive to federal initiatives in compensatory and special education.

6. Redistributive programs are more likely to be effectively implemented when professionals are responsible for their administration at the local level than when administration is closely directed by associates of elected officials. Professionals are more program oriented and less community bound than local political leaders are. Education and health programs were directed by professionals, and compliance was generally higher than in housing, where politically sensitive leadership is the norm. In the city (Baltimore) where administrative leadership was less professionalized and more closely connected to political leaders in both education and in housing, policy was less responsive to federal directives than it was in the other three cities, all of which relied more heavily on professional administrators.

7. Developmental programs are more likely to be administered more effectively when political leaders are influential. Political leaders are better able to mobilize the cooperation of diverse community institutions whose

help developmental projects often require. Professionals tend to routinize and isolate such undertakings. Both vocational education and community development programs were directed with greater imagination and community impact in Baltimore than in Milwaukee.

8. Redistributive programs seem to go through three phases during the early years of their administration. First, localities resist poorly specified federal guidelines, and charges of funds misappropriation are rampant. Second, federal officials develop stringent regulations, conduct detailed audits, and scrutinize local operations. (In some instances, the first stage is bypassed when groups supporting the passage of the program press for rigorous federal direction from the outset.) Charges of federal interference reach their peak. Third, mutual tolerance begins to emerge as federal officials learn what is reasonable to expect and local administrators learn through experience, conferences, and conversations the formal rules and informal expectations. In compensatory education, special education, and health maintenance programs, intergovernmental relations became more cooperative and mutually adaptive over the course of several years.

9. Over time the intergovernmental system develops highly consensual decisionmaking processes. Developmental programs give local administrators great flexibility, and local professionals learn to live with and adapt to the requirements accompanying redistributive policies. Many federal programs are established locally in ways that allow them to expand, contract, and transform themselves as federal expectations change. If difficulties arise they are more likely to arise from continuously changing legislative requirements than from administrative inefficiency.

10. The more visible the poten-

tially negative impact of a federal program on a community's economic development, the more politicized an issue becomes and the more resistant it will be to federal policies. Housing policies designed for low-income people generate conflict because the anticipated negative effects are both visible and long-term. School desegregation policies expected to hasten "white flight" are especially controversial and difficult to implement.

11. The image of unworkable federalism persists in part because social scientists and journalists focus on the conflictual, the controversial, and the newly initiated instead of on the routine, the consensual, and the long established. Generalizations about federal programs as a whole from case studies of desegregation policies are the most compelling example of this tendency.

Toward an Alternative Theory of Federalism

These specific findings are of interest and significance in their own terms. They revise our understanding of the federal system by emphasizing the continuing cooperative relations among federal, state, and local officials; by distinguishing among types of programs and locales; and by showing the way in which programs stabilize over time. Yet it is also possible to place these specific findings into a broader theoretical perspective.

Distribution of Authority

In broad, general terms, the proper distribution of power between a central government and a large number of local governments can be readily stated. Policies that affect the entire society more or less equally are appropriately assigned to the central government; national defense is the preeminent example. Policies that affect only one subdivision and no other are appropri-

ately assigned to local governments; the people in that community can then decide whether the benefits from the program exceed the costs and decide accordingly. People who value the program more than it costs for them to receive these benefits will, *ceteris paribus*, move to the community. Differences in policies among localities will arise, as each community offers a somewhat differentiated set of public services and accompanying taxes in order to satisfy the particular demands of the relatively homogeneous group of residents living within it. A differentiated set of local government programs, all of whose effects are entirely local, will in this way provide a higher level of satisfaction in a society than any uniform set of services provided by the central government. Playgrounds can be concentrated where young children are in abundance; senior citizen recreation halls can be clustered in adult communities; parks can be maintained at varying levels of care, depending on local aesthetic tastes.

It has been cogently argued, in fact, that to the extent that services can be decentralized, to that same extent one can obtain a better fit between public provision and genuine public demand (i.e., willingness to pay the cost of that service).³ However, a close fit between public demand and service provision can occur, even under the best circumstances, only when services have strictly local consequences. For those governmental activities whose effects spill over local boundaries and affect adjacent communities, one cannot match citizen demand and public service in a system of uncoordinated local governments. Each local government attends only to the consequences of its policies for its own residents; each overlooks the impact of its policies on its neighboring communities. Even worse, it may attempt to make its neighbors "pay" part of the cost of its services by, for example, locating its garbage dump on that edge of town opposite from the direction of the pre-

vailing wind. Its noxious fumes are thus endured by its neighbors, and it has no incentive to minimize them.

Recognizing that "two can play such a game," norms of common courtesy and local agreements among neighboring communities can eliminate or at least reduce the tendency of local governments to externalize costs and internalize benefits. But to the extent that external consequences are widely diffused, not easily discerned, or affect many other local governments, to that extent cooperative agreements among localities are unlikely to provide efficient solutions. In this case, citizens in all communities can be expected to call upon the central government to intervene.

Types of Policies

One can distinguish between two kinds of policies—developmental and redistributive—whose systemic consequences require intervention by the central government. Developmental policies which require central government involvement are those which both contribute to local economic development and which have consequences external to the locality. The best examples perhaps are transportation systems which not only enhance localities' capacities for commercial interchange but also increase trade and communication among them. The U. S. Constitution recognized the important role of the central government in this

Intergovernmental efforts on behalf of developmental objectives are marked by cooperative, mutually adaptive relations between central and local governments. . . .

area when it forbade states to erect tariffs or other barriers to commerce among themselves. Even in the *ante bellum* years, when the federal role was otherwise extremely limited, Congress took upon itself the responsibility for

assisting states in the building of canals, roads, and other modes of transport.

Central government support of these and other developmental goals is warranted by the fact the local communities, if left to themselves, would spend for such purposes only an amount equivalent to that which the community itself expects to gain from the resultant increase in economic activity. It will not spend funds for that portion of the project that benefits people living outside the community. Without central government support, localities would thus underspend for developmental purposes.

Intergovernmental efforts on behalf of developmental objectives are marked by cooperative, mutually adaptive relations between central and local governments, because the federal government, by aiding economic development, is only assisting localities with projects which they would otherwise want to carry out in any case. To be sure, they would do less development without central assistance. But as long as the central government is willing to pay the costs (or some fraction of them), the locality has every incentive to carry out programs that redound both to its benefit and to the benefit of its neighbors.

Some intergovernmental discussion and negotiation is required, of course. Highways need to be built along routes that make more than strictly local sense. And circumstances will arise when a locality, or some special interests within it, will attempt to skew developmental policy along lines that the central government will feel is inefficient for the larger society. Also, partisan political considerations, bureaucratic ineptitude, and side payments to well-placed group interests can confuse and confound particular programs. Yet the broad pattern of intergovernmental relations in this arena is likely to be mutually adaptive.

The central government will also assist in the formulation and financing

of redistributive policies. In this arena the policy consequences external to a community are, if anything, more far-reaching, if less visible, than are the external consequences of developmental policies. If a locality redistributes local

Intergovernmental programs that redistribute resources to disadvantaged groups take a form different from those with a developmental focus.

resources to an especially needy segment of the society, it will, *ceteris paribus*, attract members of that needy segment to its community. All other localities will benefit from the fact that they can see those in need well cared for without themselves bearing the cost. If, however, a locality does not redistribute resources to help those in need, other localities suffer. Either they must take up the burden, or their residents must observe the consequential suffering.

Localities thus face an example of the classic collective action problem. This problem arises whenever a good or service available to one member of a group is available to all. Clean air is a well-known example. One member of a community cannot enjoy clean air (outside his electronically filtered air conditioned home) without other members also having the same opportunity. Even though all may value the clean air, each member continues to pollute because he realizes that even if he stops polluting the air will remain dirty, unless others also stop. Everyone waits for the other person to take the first step, and, as a result, nothing happens. What is commonly desired is still not provided.

In the case of redistribution it is possible that citizens of all local communities want to see the government help the needy, yet no local government will provide the services for fear that it will be unduly burdened by societies' problems while others escape

the responsibility or, as is often said in this connection, "ride free."

Two solutions are possible. First, the central government may simply assume for itself the responsibility for supplying redistributive services. Help for the needy, like national defense, may often be best provided by the central government. The Social Security and Medicare programs are well-known examples of federally funded and (largely) federally administered programs.

Secondly, there are circumstances under which the central government might wish to involve local governments in its programs of redistribution. The central government can directly provide for the needy without involving local governments when redistribution takes the form of a cash award on the basis of some fairly well-defined criteria. But whenever commodities are to be distributed or services are to be performed—housing, education, medicine, food, legal assistance, or social support—the administrative complexity of the redistributive program may call for participation by local governments. When this happens, central and local governments undertake joint responsibility for redistribution. The education, health, and housing programs we have studied are such programs.

Joint Central-local Administration of Redistributive Programs.

Intergovernmental programs that redistribute resources to disadvantaged groups take a form different from those with a developmental focus. In this case local governments are being asked to carry out a responsibility quite distinct from any they are likely to have initiated on their own. Initially, they are likely to react guardedly to central government policies. How much actual—as distinct from symbolic—redistribution does the central government expect? How aggressively will the central government pursue its ostensible goals and enforce its stipulations? Will any overly zealous local government be

saddled with obligations others have evaded? Is the central government going to sustain its program or is this but a passing episode?

A three-phase evolution of inter-governmental relations may occur during the initial years of a redistributive program. In the first stage, the central government is likely to be vague in its objectives, imprecise in its stipulations, and inept in its administrative actions. Local governments are likely to use program resources either for traditional local activities or as substitutes for revenue that would otherwise need to be generated locally. Administrators of preexisting programs will attempt to modify the program so that it is consistent with established practice. The program's focus on those with special needs will be diffused.

As these diffusing forces become evident, the groups supporting the redistributive program will ask the central government to monitor its implementation more closely. (They may even have anticipated such developments and written strong language regulating program direction in the initial statute, thereby bypassing the first stage.) Central governmental officials will prepare and disseminate more detailed regulations and guidelines, carry out more intensive audits, and conduct evaluation to see whether objectives are being realized. Word from other communities gradually convinces local officials that they are not undertaking any commitments others are able to ignore. New professional administrators, who are supportive, perhaps even enthusiastic, proponents of the central government's policy, take charge of local programming. Compliance is so complete it becomes almost stereotyped. Local administrators become so attentive to the explicit and implicit guidelines of central government officials that even substantive policy objectives are at times subordinated to procedural regularity.

As responsiveness to federal requirements increases, conflicts between

local program administrators and local elected leaders intensify. These elected leaders resent the intrusion of federal rules upon local decision making. The community's autonomy, for which the elected official is especially responsible, seems violated by the plethora of rules, audits, and external evaluations. That local professionals identified with the program are responsible for its administration does little to assuage the politician's concern, for these professionals seem more committed to federal directives than to community concerns. Suggestions by local elected leaders are often blocked by administrators who cite federal directives and expectations. It is even possible—indeed likely—that federal regulations are used as an excuse for professional inaction that is actually motivated by quite other considerations. Many an administrator has discovered that the most effective response to his or her elected superiors is not that it *shouldn't* be done but that it *can't* be done. Federal regulations may be exactly the justification the professional bureaucrat needs to block changes he opposes in any case. Eventually, the elected officials observes that the array of seemingly mindless procedures imposed by federal regulations prevents the program from efficiently achieving its own objectives.

Three factors affect the probability that such tensions will complicate the "fit" of federal policy in a particular locale. First, difficulties will arise more quickly in communities where the economic and/or fiscal situation is deteriorating. The more constrained local resources, the greater the desire to use federal dollars to solve local problems and the less the willingness to use local funds to help smooth over any administrative difficulties. Prosperous, growing communities see federal aid as a supplement to their own resources which can help them achieve goals they could not undertake on their own. Declining communities see federal aid as a means for ameliorating the problems they are encountering, and they

resist those regulations that limit local flexibility.

Second, whenever administrative officials are less autonomous vis-a-vis their elected officials, local programs will be less responsive to federal expectations. The professional is rule-bound, while the politician is place-bound. The more the politician is in control, the less tolerant of federal procedures and the more resistant to federal dictates a local government becomes.

Third, whenever redistributive programs become politically visible, their implementation is impeded. Newspaper attention, group pressure, partisan controversy, and public debate focus attention on the local effects of the program, not on the way it may make a small contribution to a national problem. Power shifts from the professional administrator to the elected official. Federal officials generally accept minimum compliance.

While fiscal pressures, administrative practices, and constituency pressures produce varied results among localities, the combined effect of repeated conflicts over program regulations generates a third stage in the evolution of program administration. Federal bureaucrats, facing complaints from local leaders as well as from their legislative representatives, modify program guidelines and expectations once again. A new tolerance of local diversity, a new recognition that no single programmatic thrust is clearly preferable, and an appreciation of the limits

and back again. Stage three is more a synthesis, a discernment of the appropriate balance between what is desirable and what is possible. Since local administration of the program is now in the hands of friendly professionals, and since the basic redistributive thrust of the program is accepted by all levels of government, central government decision making becomes more acceptant of the fact that all programs must be modified as they are carried out in particular contexts. Issues remain, problems arise, adjustments become necessary, but the dimensions of the debate become roughly those characteristic of any intergovernmental program, redistributive or not.

The story of intergovernmental redistribution does not always have as happy an ending as that which occurred when the prince embraced Cinderella. Some efforts to address the concerns of needy groups cannot be domesticated in the ways we have described. When programs of redistribution are clearly perceived as having a long-range, substantially adverse effect on communities, local resistance to policy implementation can be intense. At times federal aid is simply refused. At other times the dollars are accepted but the regulations are all but ignored. In still other cases compliance occurs only as the result of direct judicial intervention or after prolonged, intense negotiations between high officials of the central and local governments.

These are the events that are best known, can be told to greatest effect, capture the attention of popular and academic audiences, and shape the general understanding concerning the processes of federalism.⁴ But though the particular incidents are painfully enticing, they constitute a biased sample from which one generalizes only at great risk. Cooperative federalism is not only a widely practiced art; there is every theoretical reason to expect its continued practice. Its main critics are those who expect optimum efficiency when that can only be approximated. It

The story of intergovernmental redistribution does not always have as happy an ending as that which occurred when the prince embraced Cinderella.

as to what can be directed by the national government steadily emerges. Stage three is not a return to stage one, it must be emphasized. One does not see dramatic oscillations from complete permissiveness to detailed regulation

has been observed that the best is the enemy of the good, as striving for perfection only undermines what is quite satisfactory. In this case, those who constantly attempt to perfect intergovernmental relations only rearrange, confuse, and destabilize a complex system that takes years, even decades, to develop.

The Future of Federalism

A pure theory of federalism transcends time and place. It identifies general properties of a system that one expects to find, at least to some degree, in any historical instance. But what can be said about the historical evolution of the federal system over the past decades? What clues do we have about the direction that the system will move in the years ahead?

It can now be seen that Great Society programs constructed in the 60s and 70s placed considerable stress on the intergovernmental system. In prior decades cooperative federalism had thrived in part because it confined itself to the administration of developmental programs. National and local administrators had worked together on highway construction, vocational education, aid for federally impacted schools, and mathematics and science programs. In all these programs federal and local governments had a common interest in seeing these projects prosper and expand. When the creators of the Great Society asked the federal system to car-

When the creators of the Great Society asked the federal system to carry out a host of redistributive programs . . . they placed that system under considerable stress.

ry out a host of redistributive programs—in health care, education, housing and numerous other policy areas—they placed that system under considerable stress.

The first round of legislation and

administrative guidelines were written in the same vague language that had always been suitable for intergovernmental programs. But Great Society proponents soon discovered that such vagaries presupposed a similar commitment to reform, innovation, and redistribution at the local level as pervaded Washington. When local officials—in both North and South—turned out to be more recalcitrant than anticipated, a second round of legislative and administrative activity ensued. This time regulations were more precise; what was once left to interpretation was now elaborated in specific detail. Even Congressional statutes were written with a new precision, as members of Congress and their increasingly numerous staff assistants wrote into law exactly what was desired and precisely how to achieve it.

Regulations were followed by evaluations, as the new tools of the social sciences were mobilized on behalf of institutional reform. In the old federal system lawmakers had had to accept the word of the administrators and their interest group allies. Few had doubted that vocational education had a beneficial effect, for example, because local vocational administrators had reported how many boys had learned a new trade, the Vocational Education Association had shown the rising number of students participating in such courses, and outstanding members of the Future Farmers of America had testified how much the program meant to them.

As the theory and practice of evaluation research evolved, lawmakers discovered a new source of information about the effects of program activities. Instead of success stories from unique individuals, it was possible to gather information on the experiences of a scientifically selected random sample of program participants. Instead of biased reports from self-interested administrators, factual, objective accounts could be obtained from independent researchers. Instead of interest group

pressure, the lawmaker had facts and figures to review.

Independent evaluations greatly disturbed the policy-makers for the Great Society. More often than not, these studies revealed that federally funded programs had little or no effect. The poor and the disadvantaged received little educational compensation from Title I funds; Head Start had only modest long-term effects; the nutrition of the poor improved but little from the availability of food stamps; Medicaid enabled the poor to see the doctor more frequently but their health did not detectably improve. Even vocational education did not seem to work—one could learn as much and get a job as easily if one were in general education as in a vocational program.

In the early years these evaluations encouraged federal lawmakers and administrators to redouble their efforts. Believing the problem to be in the commitment and determination of local officials, national policymakers both wrote tighter regulations and encouraged members of what became known as the "target population" to press local decisionmakers. For a time the conflicts among federal, state, and local governments, reinforced by racial conflicts in the wider society, became so severe that the durability of the system almost came into question. Even today, the intensity of the exchanges of that period—the exact timing varied with both city and program—have left a legacy of uncertainty and disappointment that helps explain much of the current suspicion of intergovernmental programs.

But well before the contemporary review of federal programs conducted by the Reagan administration, the intergovernmental system had begun its own processes of assessment. These were less visible, less controversial and less sweeping examinations. But although the steps taken in response to them were incremental, ad hoc, and in one program at a time, the overall effect was to diminish greatly the diffi-

culties of managing intergovernmental programs while nonetheless keeping their purpose basically intact. The processes of adjustment occurred on both sides. At the local level a new professional cadre more identified with program objectives was recruited to administer federal programs, and locals became more sensitive to federal expectations. At the federal level policymakers began to doubt whether detailed regulations, tight audits, and experimental-design evaluations were unmixed blessings. Regulations tended to distract administrators from substantive to procedural issues; audits demanding the return of federal funds when compliance was incomplete seemed tantamount to shooting rabbits with bazookas; the more evaluators found nothing to have any effect, the greater the doubt among policymakers that experimental-design research could actually isolate the effects of federal programs. Expectations became more modest, administrators developed program identifications that transcended governmental boundaries, citizen groups replaced contentious criticism with astute support for more federal resources, and a commitment to a coordinated effort gradually emerged.

The Omnibus Budget Reconciliation Act of 1981 altered the landscape of the federal system, changed the terms of the debate, eliminated many specific programs, and reduced levels of federal support. The question at stake was no longer how quickly a program would grow but whether it could avoid deep cuts, if not outright elimination. But even in this case the short-term consequences have been less than what one might have anticipated in the summer of 1981, when a Republican administration and a conservative Congress, working in harness under the brilliant leadership of the Office of Management and Budget, developed a long-range plan to deregulate federal programs, to substitute block grants for categorical programs, and to reduce step by step the amount of federal support with

each succeeding year.

In education the outcome was more of a compromise with less dramatic consequences for educational policies than neo-conservatives had hoped. While the emergency school aid

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act and the instructional supplies programs (which had succeeded NDEA Title III) were eliminated in favor of a small block grant to the states, the largest and most significant federal programs—compensatory education, special education, vocational education, bilingual education, and impact aid—remained intact. Funds were reduced; if one calculates money in constant rather than current dollars, the cuts appear especially substantial. But even in monetary terms change was less than it might have been. After 1981, Congress proved less willing to reduce further the size of these and other intergovernmental programs, and what was proposed in Washington in 1981 did not begin to take effect locally until 1983. By that time the economic recovery, the renewed state interest in education, and administrative actions designed to ameliorate the processes of adjustment softened the impact of a changing federal policy.

Yet one should not close this manuscript on a note that suggests that long-term effects can be discerned within a year or two of a new legislative initiative. If our research has

shown anything, it has demonstrated that the full effects of federal policy are known only a decade or more after enactment. Hasty judgments, which seem to have great policy relevance, are often misleading guides. The analyses of the Great Society, written only a year or two after the experiments began, frequently reached the conclusion that nothing much had changed at the local level. With some hindsight we can cast doubt on those pessimistic conclusions. But we must then avoid the temptation of reaching a similar conclusion about the Reagan experiment in a new, more modest federalism. Thus far, its impact on the federal system, though detectable, has not been pervasive. But if this new policy thrust has a decade or more to become institutionalized in American governmental practice, the consequences may accumulate in ways that at this writing cannot be easily ascertained.

The theory of federalism prepared here, it must be pointed out, does not specify what level of intergovernmental redistribution a country will attempt. That depends on social expectations, political forces, and the accidents of policy campaigns. If a society decides to expand its redistributive agenda, it can call on its federal system for help. But if a country wishes to limit its level of support for those with special needs, the size of the intergovernmental system will then contract. The system itself is responsive and adaptive. Though it takes time to change its contours, the federal system, as an institution, is quite consistent with a broad range of policy perspectives. Were it otherwise, it could not accommodate the diversity of American society and opinion, a diversity that has required a federal system, with all its complexity, in the first place.

FOOTNOTES

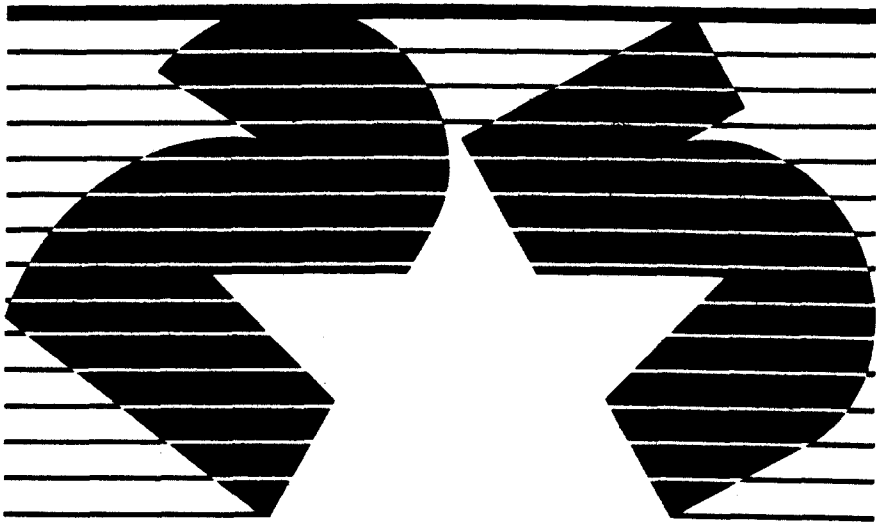
¹William A. Schambra, "Is New Federalism the Wave of the Future?" Paper presented to the "Great Society Revisited" Conference, Boulder, CO, June 1984.

²Paul E. Peterson, Barry Rabe, and Kenneth Wong, "When Federalism Works." Final

report submitted to the U.S. Department of Education, National Institute of Education, 1984. Also, see a forthcoming book under the same title by these authors to be published by the Brookings Institution.

³C. M. Tiebout, "A Pure Theory of Local Expenditures, *Journal of Political Economy* 64 (1956) 416-24.

⁴Henry J. Aaron found the research upon which "common views" of federal policy were based to have serious shortcomings that fostered skepticism through excessively negative assessments. Aaron, *Politics and the Professors: The Great Society in Perspective* (Washington, DC: Brookings Institution, 1978).



Federalism in the Courts

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No issue engaged the framers at Philadelphia in 1787 more than that of federalism. It was the weaknesses of the Articles of Confederation that had brought concerned citizens to meet, first at Annapolis in 1786, then at Philadelphia to seek answers to such problems as the balkanization of commerce among the American states.

The Constitution, as framed, was part political theory, part practical compromise. The delegates at Philadelphia were well read in the lessons of history—none more so than James Madison, who had pored so intently over accounts of the ancient and modern confederations. What the framers finally agreed upon was a document meant to secure the advantages of a centralized government, one with powers adequate to the needs of a growing nation, while preserving to the states and their peoples local control of their own destinies.

Just what role the federal courts were to play as arbiters of decisions about federalism was never made clear, either in the convention debates or in the Constitution itself. Even the institution of judicial review as such—the courts' power to declare a legislative act unconstitutional—was not spelled out in the Constitution. The "original intent" as to the legitimacy of judicial review has been the subject of continuing debate among the scholars. But, as Leonard Levy has said, "it may forever remain obscure, a seductive issue to those who would lift the veil."¹

Whatever the academic debate, judicial review, as declared by John Marshall in *Marbury v. Madison* (1803),² has long since been well established as the vehicle by which the Supreme Court acts as the Constitution's most authoritative expositor. Reviewing actions of both state and federal govern-

ments, the Court has been especially conspicuous in interpreting constitutional protection of individual rights. In modern times, it is Warren Court decisions, using both the 14th Amendment and the Bill of Rights, that highlight the judiciary's role as a forum for vindicating claims of individual liberty.

But what of the federal courts' role as arbiters of federalism? On that question, both history and practice are mixed. There is strong evidence that the framers, to the extent that they anticipated the courts' exercising the power of judicial review, foresaw that the courts would be called upon to decide questions of state and federal powers. In *The Federalist*, Madison observed that "in controversies relating to the boundaries between the two jurisdictions" (the federal government and the states respectively) "the tribunal which is ultimately to decide, is to be established under the general government"—that is, the Supreme Court.³

Throughout most of American history, certainly well into the 20th century, there seemed little doubt that the Supreme Court would indeed play an active role as an active arbiter of the federal system. Even after the Reconstruction amendments shifted the constitutional balance further toward the nation, the Supreme Court, in an opinion rendered the year after the 14th Amendment's adoption, was able to declare that the Constitution, "in all its provisions, looks to an indestructible Union, composed of indestructible states."⁴

Between the Civil War and the advent of the New Deal, the Supreme Court's federalism cases reflected the notion of "dual federalism"—a belief that the Court should police the boundaries between state and federal power by defining the proper province

of each. As Justice Day put it in the *Child Labor Case* (1918):⁵

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involute the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In sketching the contours of "dual federalism," the Court sometimes limited national power (as in the child labor case), and other times it ruled against state laws, as in finding a state regulation to be an impermissible burden on commerce.⁶

The so-called "constitutional revolution" of 1937 brought a marked change in the Court's thinking about federalism. The justices abandoned their willingness to decide whether

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there could be meaningful limits to Congress' exercise of its Article I powers (such as that to regulate commerce) as a basis for dealing with the nation's social and economic problems. No economic activity, it seemed, was now so "local" that it could not be reached by

way of the commerce power—even, in a famous 1942 decision, a farmer's growing wheat for use of his own farm.⁷ Arguments based on federalism, once so potent, now counted for little. The Court's new attitude was made manifest in Justice Stone's remark, in *United States v. Darby* (1941), about the Tenth Amendment—the amendment stating that "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." That amendment, said Stone, was "but a truism"—one which says no more than that "all is retained which had not been surrendered."⁸

It is easy to understand why national power has grown in the two centuries since the Constitution's framing. Wars, economic depressions, and civil rights for abused minorities are among some of the phenomena which have lain beyond the competence of the several states (or indeed sometimes been aggravated or ignored by those states). Likewise, it is easy to see why some observers might counsel the Court's restraint in using federalism concerns as a factor in its decisions, in light of the justices' excessive zeal, before 1937, in permitting their own economic and social philosophies to affect their reading of the Constitution.

There are those, however, who would prefer that the Court leave the states and their interests altogether to the political process. States would be players in the political arena, just like any other interest group of constituency. Justice Holmes, who never doubted the need for the Court to have the power to strike down state laws, once declared, "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void."⁹ Professor Herbert Wechsler argued in 1954 that the states were amply protected by the "political safeguards" of federalism, and more recently Professor Jesse Choper has urged that

the constitutional issue whether federal action is beyond the authority of the central government and thus violates "states' rights" should be treated as nonjusticiable, with final resolution left to the political branches.¹⁰

The argument for abdication raises serious difficulties. Foremost among these is its colliding with the assumptions of the framers that an obvious function of judicial review would be to see that state and national governments alike respected the boundaries of the federal system. Moreover, for the Supreme Court to treat questions of federalism as beyond its competence would leave major actors in the constitutional system to be the final judges of their own power—hardly a salutary principle in an age which has seen the misdeeds of which even presidents are capable. Further, if the Court is to simply ignore one of the most obvious and fundamental aspects of the Constitution—its structuring of a federal system—how, in a principled fashion, is one to distinguish that act of abdication from the Court's deciding it would be expedient to leave unenforced other provisions of the Constitution, such as the guarantees of the Bill of Rights? There may be no escaping the Court's interpreting the often vague language of the Constitution, but the essence of constitutionalism is ill served by commissioning the justices as an ongoing Constitutional convention, empowered to excise portions of the Constitution thought unsuited to the needs of modern government.

Clearly the Court does not today police the federal system as it did in the days of "dual federalism." Nor is there any reason to think, whatever the changes in the Court's membership, those days will return. Nevertheless, at many turns in the road, the Court has occasion to decide cases with significant bearing upon federalism—upon the interests of the states and localities. The very growth of federal power and activities that characterized the period

from the New Deal to the 1970s brought with it frequent occasions for litigation challenging federal actions on federalism grounds. And the conservative tide that saw President Reagan's election in 1980 has brought with it a renewed interest in the health of the body politic at the state and local level.

Federalism, then, is a staple of the Supreme Court's agenda, no matter how the issues may be characterized in purely legal terms. Federalism becomes an issue, explicit or implicit, in a wide variety of cases. It becomes relevant, therefore, to ask how federalism fares in the Supreme Court. The Court in the 1960s, during the era of Earl Warren, is not remembered for its sensitivity to state and local interests. Quite the contrary, for it was the Warren Court that busied itself with social reform—requiring the reapportionment of state legislatures, imposing the mandates of the Bill of Rights upon the states via the 14th Amendment, decreeing desegregation of public schools. With the advent of the Burger Court—a majority of its justices having been appointed by Republican presidents (four by Nixon alone)—there arose expectations of a renewed judicial concern for state and local values. It is to the matter of how the Court, in the fifteen years since Warren Burger's becoming Chief Justice, has dealt with federalism questions that we now turn.

Several areas will serve to illustrate the issues: (1) protecting national interests under the Supremacy Clause, (2) imposing national standards on the states, (3) Section 1983 litigation, (4) choosing between federal and state courts as appropriate forums, and (5) autonomy of state institutions and processes.

Protecting National Interests Under the Supremacy Clause

Whatever they may think of the Court's protecting state interests against federal intrusion, most observers would not question the legitimacy of the Court's

role in reviewing state actions challenged as impinging upon some overriding national interest. Article VI of the Constitution declares that the Constitution and all laws made in pursuance thereof "shall be the supreme Law

...most observers would not question the legitimacy of the Court's role in reviewing state actions challenged as impinging upon some overriding national interest.

of the Land. . . ." There are at least two paradigm ways in which the Court acts to ensure the supremacy of federal law or of a national interest. One is by finding preemption of state law by operation of federal law, such as an act of Congress. Another is holding that, even where a federal power (such as the commerce power) has not been exercised, a state has burdened or impinged upon a national interest (e.g., by unduly burdening the flow of commerce among the states).

The Supreme Court's preemption cases defy easy analysis. The cases speak of a search for congressional "purpose" in enacting a federal statute, as if the Court were simply a conduit for Congress' will. In fact, one should read the preemption cases with a skeptical eye. Congress' intentions as to how state law may be affected by a fed-

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eral statute are often unclear. It is hard to escape the conclusion that the Court's decisions turn heavily upon the justices' underlying assumptions about the weight to be given the respective

state and federal interests. As a result, there are competing lines of cases. Some cases give the states ample breathing room, others favor national interests even where there is no clear evidence that this is what Congress intended.

Some Burger Court opinions suggest an effort to be generous to state interests in preemption cases, for example, stating that a congressional intent to preempt should be shown specifically, rather than inferred.¹¹ On balance, however, it is hard to see a marked ideological "tilt" to the states in the Burger Court's preemption cases. Sometimes the Court comes to a unanimous result, whether in upholding state power or in finding preemption.¹² When the Court does divide, often there is no evidence of ideological voting blocs.¹³ In general, the Court's preemption cases seem about as ad hoc as they were in the Warren era.

In burden-on-commerce cases, once again the Burger Court does not appear to have any particular ideology about striking the balance between state and federal powers. Actually, the Court seems to suffer from a kind of split personality. In highway cases, where truckers challenge state regulations, the justices speak in deferential terms about the scope which should be given to state power, in light of the states' traditional interests in highway safety. Yet the Court appears willing to engage in a close review of "legislative facts"—undertaking to draw conclusions about the likelihood that a state measure under review will in fact contribute to highway safety or to other objectives which the state claims for it.¹⁴

Imposing National Standards on the States

One index of the justices' attitude toward federalism is their tendency to endorse national standards or, conversely, their permitting diversity among the states. In applying provi-

sions of the Bill of Rights to the states, the Warren Court imposed, as well, the gloss on those provisions arising in federal cases, thus nationalizing criminal procedure in the state courts.¹⁵ In the Burger Court, Justice Powell has complained (in a right-to-counsel case) that

[I]n holding that the Fourteenth Amendment has incorporated "jot for jot and case for case" every element of the Sixth Amendment, the Court derogates principles of federalism that are basic to our system. In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the states of freedom to experiment with adjudicatory processes different from the federal model.¹⁶

In another case, involving the defining features of "trial by jury," Chief Justice Burger and Justice Rehnquist joined Justice Powell in arguing that the 14th Amendment does not force upon the states every aspect of a right as understood in federal cases.¹⁷ Thus far, however, there has not been a majority in the Burger Court for backing off from the full-scale standards of "incorporation" as laid down in Warren Court cases. It is perhaps a bit surprising that the Burger Court, having slowed the momentum of the "criminal justice revolution" of the 1960s (especially in Fourth Amendment cases), has stuck to the basic premise of the incorporation doctrine: that when a procedural guar-

tion of a national standard. When a jury is instructed to apply "contemporary community standards" in deciding whether the material alleged to be obscene appeals to the prurient interest of the average person, a majority of the justice agree that the "standards" need not be national. As Chief Justice Burger said in *Miller v. California* in 1973:¹⁸

Under a national Constitution, fundamental First Amendment limitations on the powers of the states do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 states in a single formulation. . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City.

The Court's approach to obscenity cases runs the risk that distributors of magazines or other publications may be subjected to community standards that vary from one locality to another. This risk seems especially real as regards the federal statute banning the mailing of obscene materials, under which prosecutions may be brought wherever the publications are received through the mails.¹⁹ It is notable, therefore, that in the obscenity cases, having such First Amendment implications, the justices indulge a tolerance for pluralism of taste and for localism over national standards.

Section 1983 Litigation

The 13th, 14th, and 15th Amendments assured national power to legislate in defense of civil rights. In 1871, Con-

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antee of the Bill of Rights is applied to the states, it is applied with the same force as when applied to the federal government.

In the obscenity cases, by contrast, the Burger Court has rejected the no-

gress enacted the Ku Klux Klan Act, today 42 U.S.C. 1983.²⁰

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

... the Supreme Court has struggled with a central concern: How to accommodate the principle of having a federal forum for the enforcement of civil and other rights, with the value of local control of local affairs.

Territory, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

The statute was Congress' response to terrorism against the newly freed slaves and other lawlessness in many of the southern states. For years few cases were brought under section 1983—only 21 cases altogether in the half century between 1871 and 1920.²¹

In the past two decades or so, however, section 1983 has become a font of litigation. Creative plaintiffs have used section 1983 to litigate everything from prison conditions to school dress codes. Finding so many 1983 cases on its docket, the Supreme Court has struggled with a central concern: How to accommodate the principle of having a federal forum for the enforcement of civil and other rights, with the value of local control of local affairs.²²

Section 1983's general language is anything but self-revealing. Hence the Supreme Court has many opportunities to decide where to strike the balance between state interests and those invoked by 1983 plaintiffs. Were the Court to wish to limit the statute's reach, there are several avenues.

1. For years, it was assumed that states and municipalities were not "persons" within the meaning of section 1983.²³ As long as that was the case, 1983 plaintiffs found the "deepest pockets" beyond their reach. They could, of course, sue individual officials, but they would surely prefer to go after the greater resources of a governmental entity. In 1978, to the surprise of liberal critics of the Burger Court, the justices ruled that a municipality can be sued under section 1983—thus doing what even the Warren Court had been unwilling to do.²⁴ Justice Brennan, the Court's strongest advocate of federal forums and federal remedies, has argued that Congress meant for states, too, to be reached under section 1983.²⁵ He has failed, however to persuade a majority of his colleagues, and states remain immune from 1983 suits.²⁶

2. On its face, section 1983 is silent on the question of whether traditional immunities from suit—such as those for judges—are to be read into the statute. The Court has reasoned that had Congress intended to abolish traditional common law immunities, it would have done so explicitly.²⁷ Some of the immunities—those accorded legislators, judges, and prosecutors—are absolute; that is, the claim of immunity cannot be defeated by the plaintiff's arguing that the official acted from improper motive.²⁸ Other officials may claim only a qualified immunity. This permits a defense of good faith—that the officer acted without improper motive in implementing a policy that reasonably was thought to be constitutional. Among those who may claim qualified immunity are police officers, prison officials, state hospital superintendents, and members of school boards.²⁹

In 1980 the Court ruled that the defense of good faith, available to an individual defendant, may not be asserted by a municipality.³⁰ Justice Powell, dissenting, was concerned

whether the result would be expensive lawsuits threatening to break the budgets of smaller municipalities.³¹ He worried, too, whether there might be a “chilling” effect upon officials’ performance of their duties. Justice Brennan, who wrote the majority opinion, thought not.³² In the final analysis, the Court’s refusing to allow municipalities to invoke a good faith defense probably turns heavily upon a sense of the equities of risk distribution—that as between an innocent plaintiff and the municipality that hired the erring officer, the loss should be borne by the government and not by the injured individual.

3. Section 1983, in permitting suits to be brought to vindicate rights “secured by the Constitution and laws” does not qualify the word “laws,” but it had been commonly thought that, in light of the historical circumstances in which the act was first passed, the statute’s reference was to laws protecting civil rights or rights of equality. *Maine v. Thiboutot*, decided in 1980, proved this assumption wrong. In *Thiboutot*, Justice Brennan concluded that the statute’s “plain language” permitted using section 1983 to hear a claim by AFDC beneficiaries that state officials had denied them benefits to which they were entitled under the *Social Security Act*.³³ Justice Powell, dissenting, worried that the Court was opening the floodgates of litigation; he thought that

... for years, there has been a running debate between those who look to federal courts as the primary vindicator of federal rights and those who would repose more trust in the state tribunals.

“literally hundreds” of cooperative regulatory and social welfare laws might be the basis for section 1983 suits.³⁴

There continue to be many battlefields for interpreting the reach of section 1983. Among these are cases in

which the issue is whether a governing statute provides an exclusive remedy, thus preempting a section 1983 remedy.³⁵ In general, the course of the Court’s 1983 interpretation is likely to be episodic and uncertain. The results in given cases will turn heavily upon underlying philosophies about the desirability of easy access to court—contrast Justice Brennan’s liberality with Justice Powell’s caution—and upon presumptions as to whether the ability to invoke section 1983 should be taken as the norm.³⁶

The Appropriate Forum: Federal Versus State Courts

In and out of the Supreme Court, for years there has been a running debate between those who look to federal courts as the primary vindicator of federal rights and those who would repose more trust in the state tribunals.³⁷ Those who prefer a federal forum advance a number of arguments, among them that federal judges are more competent, that life tenure gives federal judges greater independence, and that federal judges are more willing to intervene in behalf of individual rights when other organs of government fail to act.³⁸

Many Burger Court opinions reflect a greater willingness to trust state courts than was true of the Warren Court. A good example is Justice Powell’s 1976 opinion in *Stone v. Powell*, in which the Court curtailed the opportunity of state prisoners to use federal habeas corpus to relitigate Fourth Amendment claims already heard in state courts. One unmistakable premise of Powell’s opinion was that state courts are equally competent with federal courts to hear and decide such claims.³⁹

Another way the Supreme Court has enhanced the position of state courts is to limit the occasions for federal courts to intervene in pending or impending state proceedings, such as criminal trials. In a 1965 decision, the

Warren Court relaxed the traditional doctrine that federal courts should not interfere with proceedings in state courts, save in exceptional cases to prevent irreparable injury.⁴⁰ The Burger Court, however, has made such inter-

To what extent, in declaring rights or fashioning remedies, must or should Congress, the federal executive, or the federal courts respect the autonomy of state institutions generally?

vention more difficult. In *Younger v. Harris* (1971), Justice Black invoked the theme of "Our Federalism" and laid down a policy of comity and respect for state institutions.⁴¹ In a series of cases, the Court has built upon and extended the principles laid down in *Younger*.⁴²

The *Younger* line of cases requires the justices to accommodate competing values—the enforcement of federal rights on the one hand, and the integrity of state judicial proceedings on the other. The justices who have prevailed in the *Younger* cases recognize the post-Civil War role of the federal government as a guarantor of basic civil rights against state power. But, in reconciling state and federal interests, those justices want to leave state institutions ample breathing room.

Autonomy of State Institutions and Processes

Respecting the functioning of state courts is but one aspect of a larger question that runs through a number of Supreme Court cases: To what extent, in declaring rights or fashioning remedies, must or should Congress, the federal executive, or the federal courts respect the autonomy of state institutions generally? Two areas of litigation will illustrate the point—institutional reform cases, and claims based on the Tenth Amendment.

The traditional constitutional law claim sought to prevent government's

acting in some fashion thought to infringe upon one's constitutional rights. Increasingly, however, the paradigm lawsuit over constitutional issues is the class action. Often this takes the form of a request for systematic relief, asking the court to reapportion a legislature, reform a jail or prison, clean up a mental hospital, desegregate a school, or make policy for some other state or local function. Today federal judges not only decide the legal issue at dispute, they oversee the execution of their decrees. In the process, a judge may act in effect as a school superintendent or a prison warden.

Such use of federal equity power by federal judges has obvious implications for federalism. When a judge undertakes systematic relief, he displaces the elected or appointed officials who normally supervise the state or local function that is the object of litigation. There are signs that at least some of the justices on the Burger Court are concerned about the activist roles of federal courts in undertaking supervision of state and local functions. In *Rizzo v. Goode* (1976), the Court reversed a district judge's ordering sweeping reforms in Philadelphia's police department. Justice Rehnquist framed the issue in *Rizzo* as follows:

We granted certiorari to consider petitioner's claims that the judgment of the District Court represents an unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions.⁴³

Rizzo notwithstanding, the Supreme Court has not been notably active in reviewing lower court decisions undertaking institutional reforms. An exception has been school desegregation cases, a number of which have reached the Court. By and large, the Court's desegregation decisions have been marked by an essentially generous attitude toward federal courts' equity powers. In two 1979 cases, for example, the Court

upheld comprehensive desegregation orders in a way that reflected a far greater tolerance for the fashioning of systematic relief than the Court showed in *Rizzo*.⁴⁴ Justice Rehnquist, dissenting, said that the remedy in one of the cases was "as complete and dramatic a displacement of local authority by the federal judiciary as is possible in our federal system."⁴⁵ Justice Powell, another dissenter, complained that the federal judiciary "should be limiting rather than expanding the extent to which courts are operating the public school systems of our country."⁴⁶

There have been some occasions when the Burger Court has limited the ability of federal courts to order systematic reform of state institutions. An example is the Court's 1981 decision in which, without reaching constitutional questions, it ruled that a lower court had erred in using a federal statute as the basis for ordering that the State of Pennsylvania must take steps to remove retarded inmates from a large state mental hospital and provide habilitation in the "least restrictive environment."⁴⁷ There is thus some evidence of restlessness in the Burger Court about the sweep of federal court injunctive power. Nevertheless, when one looks at the extent of institutional litigation throughout the country, and compares it with the relatively modest restraints placed by Burger Court opinions, it is difficult to conclude that the federal courts have been swayed in any fundamental way from their pattern in exercising equity powers.

In gauging the justices' attitude to the autonomy of state and local functions, no cases serve as a better talisman than do those in which the Tenth Amendment is invoked in opposition to the exercise of federal power. For about 40 years after the Court's *volte-face* in the 1930s, the Tenth Amendment hardly mattered at all—recall Justice Stone's remark about the amendment as "truism." Then came *National League of Cities v. Usery* (1976).⁴⁸ By a five-to-four vote, the

Court struck down amendments to the *Fair Labor Standards Act* which made state and local government employees subject to the act's minimum wage and maximum hours requirements. Justice Rehnquist's majority opinion turned directly upon a theory of state sovereignty—that even when Congress acts within powers conferred upon it by the Constitution, it may not interfere with functions essential to the states' "separate and independent existence." Rehnquist concluded that the FLSA amendments operated "to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions."⁴⁹

National League of Cities seemed to offer the seeds of a genuine revival of judicial concern for state and local interests. Applying *National League's* formulae, to be sure, would not be easy. How does one determine, for example, when a state function is "traditional"? Hard though it might be to draw lines, nevertheless the Court's 1976 decision was promising as a first step toward making a principled effort to respect national interests while also protecting the ultimate integrity of state and local functions.

In the years since 1976, however, *National League of Cities'* principles have seen hard going. In a series of decisions, a majority of the justices—sometimes by a one-vote margin—have rebuffed efforts by states and localities to take shelter under the Tenth Amendment. In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, the Court laid down a three-part test for determining whether a federal statute enacted pursuant to the commerce clause violates the Tenth Amendment. First, there must be a showing that the challenged statute regulates the "states as states." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." Third, it must appear that states' compliance with the federal law would "directly impair" ability to structure "integral operations

in areas of traditional governmental functions.”⁵⁰ Even if the challenger can satisfy these three requirements, it may still fail to upset the federal law. In *Hodel*, the Court added a further step—balancing of the federal interest in-

The road from National League of Cities has proved to be a series of snares for Tenth Amendment arguments. . . . Despite the Supreme Court's steady erosion of National League of Cities, the basic issues posed by the case are still very much alive.

involved against the state's interest; “the federal interest may be such that it justifies state submission.”⁵¹

The road from *National League of Cities* has proved to be a series of snares for Tenth Amendment arguments. In *Hodel* itself, the Court reviewed the *Surface Mining Control and Reclamation Act*, which lower courts had seen as having a pervasive effect on states' control of land use, and concluded that the act did not regulate the “states as states.”⁵² The text Term the Court upheld the application of the *Federal Railway Labor Act* to a state-owned railroad (the Long Island Rail Road), reasoning that operating a railroad was not a “traditional” government function.⁵³ In another 1982 case, the Court rejected Mississippi's challenge to a federal statute which required state public utility commissions to entertain certain disputes under federal regulations, and to consider certain federal proposals in accordance with federally dictated procedures. The Court's majority found the first set of requirements not sufficiently burdensome on the state as to be invalid and, as to the second set, ruled that Congress had simply conditioned the state's continued involvement in a preemptible area (energy regulation) on the states' considering proposed federal regulations.⁵⁴ Finally, in a 1983 case, a

majority of the justices voted to uphold the application to state and local government employees of the *Age Discrimination in Employment Act*. Here, the rationale was that the challengers had failed to meet the third prong of the *Hodel* test; ADEA did not “directly impair” the state's ability to structure integral functions in areas of traditional government functions.⁵⁵

Congress' attempts to impose obligations directly on a state, as in the FLSA or the ADEA, raise the most obvious Tenth Amendment questions. More elusive—and as yet not the subject of a Supreme Court opinion on the merits—is the question whether a Tenth Amendment issue is raised when the federal government, rather than mandating state action directly, attaches conditions to federal grants. Lower courts have given a deceptively easy answer: The states are “free” to choose. If they accept the federal money, they must accept the conditions. If they do not like the conditions, they do not have to accept the money.⁵⁶ Such reasoning is simplistic. Simply because government need not create a program (e.g., of welfare benefits or tax deductions) does not mean that government may attach any conditions it pleases. If it could, then government (state or federal) could condition my receiving benefits or tax deductions on my political or religious beliefs. That I have a “choice”—change my political or religious beliefs, or forego the government benefit—is no answer. It seems curious that, in Tenth Amendment case, courts do not face the force of this logic.

Despite the Supreme Court's steady erosion of *National League of Cities*, the basic issues posed by the case are still very much alive. The Court was sharply split in both the utility regulation and age discrimination cases, with four justices dissenting in each case.⁵⁷ Among the cases argued in the Court's 1984 Term is *Garcia v. San Antonio Metropolitan Transit Authority*.⁵⁸ That case involves, among other issues, whether publicly owned

and operated mass transit systems are a "traditional governmental function." The case was argued in the 1983 Term, but in July 1984 the case was set for reargument in the fall. Significantly, the Court has requested supplemental briefing on the question: "Whether or not the principles of the Tenth Amendment as set forth in *National League of Cities*, 426 U.S. 833 (1976), should be reconsidered?"

As even this brief survey of cases and issues—preemption, Section 1983, Tenth Amendment, and others—makes clear, federalism is a major battleground in the courts. Appointments to the Court in recent years—especially those of Justices Rehnquist, Powell, and O'Connor—have revived a judicial debate that many casual observers, noting the departure of Justices Felix Frankfurter and John Marshall Harlan from the bench, might have thought of historical interest only.

Assessing how the Supreme Court treats federalism as an aspect of the American constitutional system is no easy task. There are several reasons for this difficulty. First, federalism itself is hard to define. From the republic's origins, federalism has been an evolving concept, a dialectical process in which both national and local interest are involved. There are, to paraphrase an old

likely to stand alongside other values urged to be served by the decision, such as the needs of law enforcement or an interest in finality in litigation.

Third, if it is Burger Court cases to which one is looking (as in much of this paper), the patterns of the Court's decisions make generalization difficult. There is some evidence, in the 1983 Term, that a conservative working majority may be emerging, but throughout most of the Burger years voting patterns have been fluid and the Court's decisions accordingly ad hoc.⁵⁹

Fourth, while this paper has focused largely on the importance of federalism as a value under the Constitution, state and local actions often conflict with other values, some of them fundamental, which the Constitution either mandates or recognizes. At various times in American history, states or localities have been unable to meet social or economic needs or have indeed themselves been the engine of injustice. National power exists to do what more parochial units cannot do, or to undo wrongs sanctioned by those units. Federal courts, whatever the case at bar, cannot be insensitive to the historic need for that reservoir of national power.

Having acknowledged such difficulties in assessing the courts' federalism track record, one cannot escape the central role those courts play in maintaining a healthy federal system. Courts have many values to maintain—among them, rights of expression and conscience, fairness in criminal procedure, and equality in the application of the laws. Such values are basic to American constitutionalism. But basic, too, is the Constitution's recognition of the protections against unlimited government offered by a healthy measure of local control of the people's own destinies. Federalism is no mere administrative arrangement. Like conceptions such as a bill of rights and the separation of powers, federalism is one of the constitutional devices geared to protecting individual rights in a free society.

... rarely is federalism, however defined, the only significant issue in a case. Even when a justice takes a position which one might characterize as favorable to state or local interests, the justice's invocation of federalism is likely to stand alongside other values urged to be served by the decision. . . .

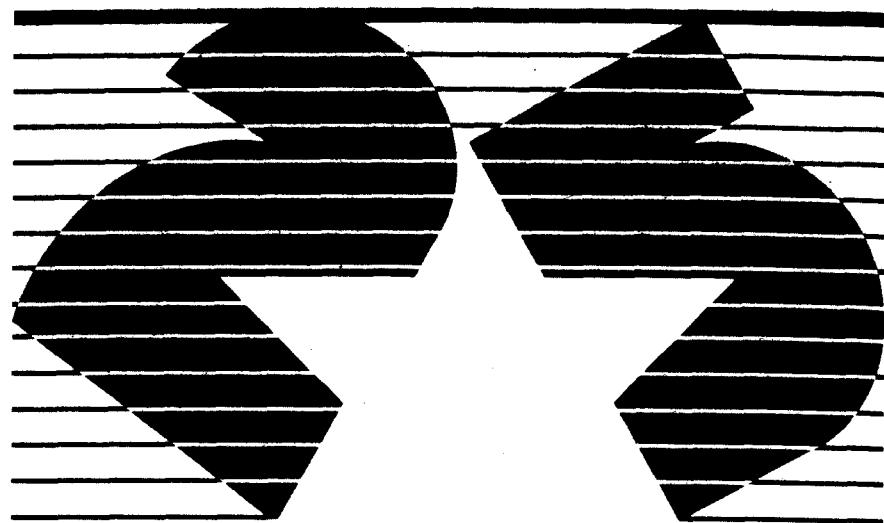
saying, as many notions of "federalism" as there are pies at the Leipzig fair.

Second, rarely is federalism, however defined, the only significant issue in a case. Even when a justice takes a position which one might characterize as favorable to state or local interests, the justice's invocation of federalism is

FOOTNOTES

- ¹Leonard W. Levy, ed., *Judicial Review and the Supreme Court* (New York: 1967), p. 2.
- ²1 Cranch 137 (1803).
- ³*The Federalist Papers*, No. 39.
- ⁴*Texas v. White*, 7 Wall. 700, 725 (1869).
- ⁵*Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).
- ⁶See, e.g., *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).
- ⁷See *Wickard v. Filburn*, 317 U.S. 111 (1942).
- ⁸*United States v. Darby*, 312 U.S. 100, 124 (1941).
- ⁹Holmes, "Law and the Court," in *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), pp. 295-96.
- ¹⁰Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* 543 (1954); Choper, "The Scope of National Power vis-a-vis the States: The Dispensability of Judicial Review," 86 *Yale Law Journal* 1552, 1557 (1977).
- ¹¹See *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973).
- ¹²See, e.g., *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979).
- ¹³See, e.g., *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 141 (1973).
- ¹⁴See *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).
- ¹⁵See *Ker v. California*, 374 U.S. 23 (1963).
- ¹⁶*Apodaca v. Oregon*, 406 U.S. at 366, 375-76 (Powell, J., concurring).
- ¹⁷*Ballew v. Georgia*, 435 U.S. 223, 246 (1978) (Powell, J., concurring). See also *Crist v. Bretz*, 437 U.S. 28, 40, 52-53 (1978) (Powell, J., dissenting) (double jeopardy).
- ¹⁸413 U.S. 15, 30-32 (1973).
- ¹⁹See *Hamling v. United States*, 418 U.S. 87 (1974). See also *Jenkins v. Georgia*, 418 U.S. 153 (1974).
- ²⁰See Act of April 20, 1871, ch. 22, 17 Stat. 13.
- ²¹Comment, "The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?" 26 *Indiana Law Journal* 361, 363 (1951).
- ²²For a fuller discussion of Section 1983 cases, see A. E. Dick Howard, "The States and the Supreme Court," 31 *Catholic University Law Review* 375 (1982).
- ²³*Monroe v. Pape*, 365 U.S. 167 (1961).
- ²⁴*Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978).
- ²⁵*Quern v. Jordan*, 440 U.S. 332, 349-66 (Brennan, J., concurring).
- ²⁶440 U.S. at 338-45.
- ²⁷See *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).
- ²⁸See *Tenney v. Brandhove*, 341 U.S. 367 (1951) (state legislators); *Pierson v. Ray*, 386 U.S. 547 (1967) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976).
- ²⁹See *Pierson v. Ray*, 386 U.S. 547 (1967) (police officers); *Procunier v. Navarette*, 434 U.S. 555 (1978) (prison officials); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (state hospital superintendents); *Wood v. Strickland*, 420 U.S. 308 (1975) (members of school boards).
- ³⁰*Owen v. City of Independence*, 445 U.S. 622 (1980).
- ³¹445 U.S. at 670 (Powell, J., dissenting).
- ³²445 U.S. at 650-53.
- ³³448 U.S. 1 (1980).
- ³⁴448 U.S. at 34-37 (Powell, J., dissenting).
- ³⁵See, e.g., *Middlesex County Sewage Authority v. National Sea Clammers Association*, 101 S. Ct. 2615 (1981).

- ³⁶For example, compare Justice Rehnquist's opinion in *Pennhurst State School and Hospital v. Halderman*, 351 U.S. 1, 28 (1980), with that of Justice White, 451 U.S. at 51 (White, J., dissenting in part).
- ³⁷See generally Symposium, "State Courts and Federalism in the 1980s," 22 *William & Mary Law Review* 599 (1981).
- ³⁸See Burt Neuborne, "The Myth of Parity," 90 *Harvard Law Review* 1105-06 (1977).
- ³⁹*Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976).
- ⁴⁰*Dombrowski v. Pfister*, 380 U.S. 479 (1965). See also Owen Fiss, "Dombrowski," 86 *Yale Law Journal* 1103 (1977).
- ⁴¹401 U.S. 37 (1971).
- ⁴²See, e.g., *Steffel v. Thompson*, 415 U.S. 452 (1974); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977).
- ⁴³423 U.S. 362, 366 (1976).
- ⁴⁴See *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); *Dayton Board of Education v. Brinkman*, 443 U.S. 526 (1979).
- ⁴⁵443 U.S. at 489 (Rehnquist, J., dissenting).
- ⁴⁶443 U.S. at 489 (Powell, J., dissenting).
- ⁴⁷*Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981).
- ⁴⁸426 U.S. 833 (1976).
- ⁴⁹426 U.S. at 851-52.
- ⁵⁰452 U.S. 264, 287-88 (1981).
- ⁵¹452 U.S. at 288 n.29.
- ⁵²452 U.S. at 288.
- ⁵³*United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 684-88 (1982).
- ⁵⁴*Federal Energy Regulatory Commission v. Mississippi*, 456 U.S. 742, 759-61, 765 (1982).
- ⁵⁵*EEOC v. Wyoming*, 103 S. Ct. 1054, 1061-62 (1983).
- ⁵⁶See, e.g., *Dupler v. City of Portland*, 421 F. Supp. 1314, 1320 n.8 (D. Me. 1976); *Florida Department of Health and Rehabilitation Services v. Califano*, 449 F. Supp. 274, 284 (N.D. Fla.), *aff'd per curiam*, 585 F.2d 150 (5th Cir. 1978); *City of Macon v. Marshall*, 439 F. Supp. 1209, 1217 (M.D. Ga. 1977).
- ⁵⁷See *FERC v. Mississippi*, 456 U.S. at 771 (Powell, J., concurring in part and dissenting in part), 775 (O'Connor, J., joined by Burger, C.J., and Rehnquist, J., concurring in the judgment in part and dissenting in part); *EEOC v. Wyoming*, 103 S. Ct. at 1068 (Burger, C.J., joined by Powell, Rehnquist, and O'Connor, JJ., dissenting).
- ⁵⁸No. 82-1913, together with *Donovan v. San Antonio Metropolitan Transit Authority*, No. 82-1951.
- ⁵⁹See A. E. Dick Howard, "The Burger Court: A Judicial Nonet Plays the Enigma Variations," 43 *Law and Contemporary Problems* 7 (1980).



Some Realism About Federalism: Historical Complexities and Current Challenges

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The proper balance of state and national powers, Woodrow Wilson wrote in 1911, is not a matter that can be settled "by the opinion of any one generation." Changing conditions and perceptions of social need, transformations of political values, and the lessons of time will serve, he contended, to make federal-state relationships "a new question" subject to reconsideration by each successive generation.

What follows here is an appeal for "realism about federalism," as this generation engages in the time-honored quest for the proper ordering of state and federal powers in our Constitutional system. The first part of this essay recalls the 1960s, when federalism underwent basic change, as it is doing once again in this day. There are important lessons to be drawn from the experience of two decades ago, highly relevant to our situation now. In Part II, the record of the Advisory Commission on Intergovernmental Relations in the last quarter century, since its founding, is reviewed. Its achievements are considerable, and it has itself made splendid contributions to a realistic appraisal of changing federalism; but there are some caveats to be entered, as well, that also bear on our task of reappraisal today. In the concluding section, an agenda of issues and challenges is presented. The direction that American federalism will take in the coming years will doubtless be shaped above by all political forces. But we ought to know what we are doing in order that what is valuable in modern federalism can be recognized and retained, and so that the gains and

losses of innovations are clear when choices have to be made.

The Need for a New Realism

Two decades ago, in the 1960s, this nation underwent a period of far-reaching reconsideration and reappraisal of federalism—linked to truly sweeping changes in the working system. Decisions that were made in the mid-60s set the pattern through three presidential administrations, a period long enough in this age of accelerating change to qualify as one of Woodrow Wilson's "generations." As we contemplate the pressures for change in the federal system today, we do well to recall the meaning of both the 1960s innovations and the way in which they were understood at the time.¹

Part of the story of the 60s was the way in which that decade witnessed the culmination and consideration of earlier trends in federalism. Above all, that decade witnessed the settlement—for the long run, as it then seemed—of fundamental issues from the New Deal era of the 30s and a wide acceptance of the basic New Deal reforms. President Dwight Eisenhower and the new, postwar Congressional leadership of the Republican Party, had already led the GOP to new ideological ground. As the result of their accommodation of 1930s innovations, for example, the system of extensive grants-in-aid to the states, some degree of "bypassing" that permitted federal aid to reach local government directly, elements of regional-level planning, expansion of the Social Security system's

coverage, active national responsibility for pursuing the goals of full employment and economic growth, and Keynesian countercyclical expenditure policies and tax reforms all became something close to commonplace. They were debated, to be sure, as matters of policy. But they no longer had standing as issues of ideology and principle, as had been true in the New Deal era and even during President Harry Truman's first years in the White House. No longer did such questions serve as the lightning rods of fundamental ideological controversy.²

Centralizing forces from the federal judiciary were no less significant. The Eisenhower administration was initially reluctant to accept judicial mandates as the sources of changes so basic as those generated by *Brown v. Board of Education*. But in the end, the administration lent its prestige and full power to the upholding of such new extensions of the reach of the 14th Amendment in the causes of equality and democracy. The dramatic days of Little Rock set in place that foundation stone of a new political era with a finality hard to deny.

The Warren Court's decisions in ensuing years were equally a source of centralization of authority in the federal system. Not carrying Presidential responsibilities and obligations in the early 1960s, the more conservative

counsel and other rights in criminal process. Ironically, however, controversial decisions by the Court in an earlier day can play a new and wholly unanticipated part in the politics of later years. Thus today we have the irony of a conservative President arguing that the states can be trusted to safeguard the rights and interests of minorities, and to be truly representative and responsive, because (as he contends) *Baker v. Carr* and its successor decisions guarantee such results—especially as augmented by the *Federal Voting Rights Act*.³ Neither the reapportionment decisions by the Supreme Court nor the *Voting Rights Act* brought unrestrained cheering ten years ago from the New Federalism advocates who today cite their beneficial effects as arguments for decentralization. Such are the strange ways of our politics.

Accommodation of New Deal innovations and the political detente of sorts that accompanied it did not comprise the whole story—or even the main story—of the 1960s. They were, as it proved, only the prelude to massive, far-reaching innovations in policy. And those policy changes brought sweeping innovations in the working federal system: the transformations that came with the policies of the Great Society, followed by the moves toward revenue sharing and grant-in-aid reforms that culminated in the Nixon administration in the 1970s. The Great Society/Creative Federalism innovations, some of them continuing into the Nixon and Ford administrations, had several leading features with profound implications for the condition and future of American federalism. These features included a marked proliferation in the number of programs that involved grants-in-aid, with a concurrent rise in the amount of funding (grants in 1972 had reached nearly \$40 billion, four times the 1964 level); and an increase in the degree of complexity, as project grants and categoricals were augmented by block grants. Associated with these changes was another impor-

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wing of the Republican Party joined with regional forces to condemn the reapportionment decisions that flowed from *Baker v. Carr* and an even wider coalition raised strong voices against the decisions expanding the rights of

tant new feature of the Great Society agenda, a significant shift toward social services, education, and community development in the mix of programs that were aided with federal grants. The Johnson administration also linked Cre-

The theorists of the Great Society boldly proclaimed that despite these ostensibly far-reaching changes in federal-state relationships, there was no cause for concern that something of major significance might be happening to the foundations of American federalism.

ative Federalism innovations in policy to what Johnson termed "an expanded partnership," designed to augment federal-state and federal-local collaboration with involvement of private-sector institutions in delivery of grant-aided services and benefits.⁴

The theorists of the Great Society boldly proclaimed that, despite these ostensibly far-reaching changes in federal-state relationships, there was no cause for concern that something of major significance might be happening to the foundations of American federalism. Indeed, they asserted that what previous generations—from George Washington's to Dwight Eisenhower's—had regarded as a central issue of constitutional theory was now quite irrelevant and altogether intellectually bankrupt: "The overall degree of centralization or decentralization," as a leading Great Society spokesman declared, "is seldom an interesting or even useful question"! Traditional ways of looking at power relationships, he contended, could now confidently be written off as obsolete:

[It] is possible to think of vast increases of federal government power that do not encroach upon or diminish any other power. Simultaneously, the power of states and local governments will in-

crease; the power of states and the power of individuals will increase.⁵

Intoxicating doctrine it was. Unfortunately, the realities of government operations did not conform to the heady rhetoric. Equally attractive, but equally spurious claims, were made by some students of political science in the 1960s that power in the American federal system was (and since the beginning of the Republic always had been) "noncentralized."⁶ Here again, the claim that concern about concentration of power—at the expense of diffusion of power—could be safely set aside, proved unable to withstand criticism and did not survive the Great Society era.⁷

What shattered the euphoria of those who truly believed that considerations of power could be rendered obsolete, in the study of the historical or latter-day federal system, was not only political experience but also intellectual realism. A few lonely voices, my own included, protested then that neither the model of history in which nothing substantial had changed in federal-state power relationships since the 1790s, nor the model of a new federalism that dismissed issues of power, could withstand serious scrutiny.⁸ This plea for realism was not a partisan one at all.⁹ Conceptually, the critique of Great Society doctrine owed much to what the Legal Realists had brought to constitutional analysis: an insistence that, if either stasis or change was supported by legislation, executive fiat, or judicial decisions, we know what we were doing, that we be honest in appraising results, that winners and losers be identified—in sum, that we study "law in action" and not only "law in books."¹⁰ The critics of the Johnson administration doctrines fused with this sort of realism a robust concern about principles of federalism—not necessarily to stand pat, but rather to insist that if change were instituted we not deny its meaning on grounds that power no longer mattered. Their concern was that "federal-

ism in action"—its effects on institutions, doctrines, and the structure and dynamics of governance—be examined realistically in order to understand its impact on the life of the nation.

An intriguing change in common terminology, reflecting the new euphoria about power's no longer mattering as it had in the past, was especially disturbing to critics of Great Society doctrine. The change was the shift from "federalism" to "intergovernmental relations."¹¹ Critical Realists in the 1960s contended that the research focus and normative concerns of IGR were too narrowly bounded by public administration and by considerations of efficiency, coordination, and technocratic tidiness. The critics insisted on the continuing relevance of fundamental political values and inherited doctrine in the light of changing conditions. An incisive critique of prevailing pragmatism, penned by Robert McCloskey in the 1950s and given wide attention in later days, summed up the normative issues. "The idea that governmental purposes and societal needs are something less than coterminous," wrote McCloskey,

may still have some merit in America. There may remain something to be said for local vitality as a protection against tyranny and as an alternative to static national uniformity.

But whatever the conclusion that may be arrived at, one point seems clear—that there is nothing at all to be said for letting the question be answered by default. It is still important that we realize what has happened . . . and that we take careful stock of the constitutional values that have been vitiated as well as those which have been elevated to a new place.¹²

From a different perspective, Samuel Beer augmented this critique by in-

sisting that we recognize the rising importance of "public-sector politics," by which something close to "monopolization" of innovation in public programs was coming from the central government, and within it from the bureaucracies of professionals. The implications of this process, which Beer termed "technocratic federalism," for responsive and responsible government deeply troubled Beer. Himself a confirmed admirer of New Deal reforms, Beer, like other critics of the day, reverted to the notion that issues of power flows could not be swept aside by euphoric assertions that power was no longer a question warranting serious inquiry.¹³

Such concerns were reinforced by the voices, increasingly in dissent, of Justice Frankfurter and others on the bench who believed that the survival of the states as viable political entities was endangered by the combined force of Warren Court doctrine and policies being generated by Congress and the Executive. My own view of that day also contended against cavalier assertions that issues of centralization and decentralization no longer mattered:

If it is desirable to force new changes in the federal system, to enhance or diminish the initiatory role of the central government, or to accept skewing of state resource allocations—and it may well be desirable—still it aids us little to make the blithe assumption power at all levels will increase.¹⁴

Reinforcing such criticism from a realist perspective and out of concern for fundamental principles of federalism was concern about efficiency. Few ideas have been as frequently reiterated in the discourse of American political and constitutional theory as the assertion stated by Madison in *The Federalist* No. 14, that if the states were abolished "the general government would be compelled by the principle of self-preservation, to reinstate them in their

proper jurisdiction." The well remembered assertions of Justices Holmes and Brandeis, that the states were invaluable as "laboratories of democracy," or "insulated chambers" for experiments in land and policy, were an important variant of Madison's view. Echoing these assertions, Adlai Stevenson had written in 1950 that the power of the states "to pass upon and decide local affairs" was surely to be regarded as

one of the very great assets of our free society, making possible democratic participation at the grass roots of our human relations. If our 150 million people did not have the states they would create them, rather than centralize all power at one point where congestion of authority would soon defeat the purposes and possibilities of democratic development and progress.¹⁵

Survival of the states as decision-making political entities that truly mattered went beyond efficiency; it was a means of ensuring diffusion of power, which could work for either good or ill. The Framers believed, as Alexander Bickel has written, "that the secret of liberty lay in the diffusion of power [and] they perceived the states as natural centers of power. . . ."¹⁶ Yet the Founders also recognized that an excess of state autonomy was a problem of enormous magnitude—the principal

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threat, in fact, to the survival of the nation for which they wrote a new constitutional charter. Thus Hamilton reflected in *The Federalist* No. 17 that state governments could certainly "encroach upon the national authorities" much more easily than the new de-

signed central government could be expected to encroach on them. Thus, he concluded, "too much pains cannot be taken," in shaping the powers of the national government, "to give them all the force which is compatible with the principles of liberty."

We do well today, I think, to reflect both on that haunting phase "compatible with the principles of liberty" and on the terms of the critique that was launched against the euphoric rhetoric of 20 years ago about power's no longer being an issue. To do so will help to mobilize the same sort of realism—a critique mindful of enduring political and legal values of federalism, a perspective founded on concern for knowing what we are doing both to the liberty and to efficiency as we adjust federal-state relationships—as we appraise our condition in the mid-1980s and consider new proposals for federalism reforms.

We face today a serious crisis of understanding and perspective that calls for such a new realism about federalism. As the nation approaches the bicentennial of the Constitution, Robert Hawkins has said, we need to be concerned about "developing the capacity to understand the capabilities and limitations of alternative constitutional, political, organizational and regulatory strategies" in governance of this nation.¹⁷ Let us confront honestly the issues of real power and principle, rather than undergoing later a painful rediscovery that power really does matter, as happened in the wake of the Great Society two decades ago when a sudden recognition of "the Imperial Presidency," the impotence that comes from reticence, and the needs of vitality of politics and community "at the grass roots" all animated critics across the whole political spectrum.¹⁸ We need to probe behind the grandiloquent, sometimes cynical rhetoric that praises federalism and "traditional values" while distorting history, or while bending theory to fit current short-run political goals.

The ACIR Agenda to Date— Scope and Limitations

Major contributions to a realistic understanding of changing power relationships and the condition of

To a remarkable degree, ACIR managed to be a detached analyst, even though its members and the constituencies they represented were deeply engaged. . . . Even the best research studies by ACIR staff prior to 1980, however, were credibly subject to the charge that the emphasis remained too much on management issues.

federalism were made in the 1960s and 1970s by the Advisory Commission on Intergovernmental Relations (ACIR). Customarily, ACIR's work has been characterized as "bipartisan." It would be more accurate, I think, to term it "nonpartisan," both as to the research program and as to the policy recommendations of the Commission down to 1980.

President Eisenhower's original vision of ACIR as a body representative of the interests and perspectives of all major governmental actors in the modern federal system was largely realized. To a remarkable degree, ACIR managed to be a detached analyst, even though its members and the constituencies they represented were deeply engaged. The original version was a conception carried forward with great success by ACIR's leadership and staff through periods of intensive political controversy and profound change.¹⁹

That the Commission's studies were nonpartisan does not say, however, that they were without a point of view or that ACIR steered away from all controversy. In fact, there was point of view in the research studies and many of the policy recommendations of the 1960s and 1970s. It was a distinct, systematic bias toward concern with

analysis of management efficiency and programmatic design—a technocratic bias that defined the research agenda and ranking of priorities in terms largely of public administration. ACIR truly excelled in this regard, producing a series of studies that still stand as important research landmarks.

In some respects, however, the ACIR's work did transcend this technocratic-managerial approach to the issues. This was true most notably in ACIR's investigation of the controversial area of school financing and its equitability in the states and municipalities. Indeed, the Commission aired thoroughly the issues concerning interstate variations in school support, taxing capacity, and equity. Monographic studies of that sort, probing a politically sensitive question—but a question of highest importance to the nation, bearing on how well the youth would be educated—led to a more general research agenda on taxation. The ACIR investigations that followed were of great importance in defining "tax effort," variations by state, and the implications of tax policy and fiscal performance on eligibility and grant-in-aid allocational criteria. The ACIR tax studies of the 1960s identified major policy issues bearing on the social and governmental consequences of regional and local disparities in tax base and tax programs.

ACIR's leadership in these studies served well the cause of realism in the analysis of evolving federal-state relationships. Equally impressive were ACIR studies, published during the height of Great Society domestic policy innovation, on the fiscal strains, administrative problems, and even the political tensions that were identified with new programs such as those in welfare and medical care. As grants-in-aid proliferated, moreover, ACIR research on the narrower managerial issues—program design, management structure, auditing and responsibility, fragmentation, etc.—proved indispensable to scholars, policy makers, and legislators

who sought to understand the impact of the grants on the institutions of government.²⁰

The apogee of "high-profile" activity of the ACIR came when the Commission moved from a focus on taxation to the larger issues of "balance" in the federal system, to related studies of governmental organization at the state and substate (and also regional) levels—finally coming to a new plane altogether, the outright advocacy of the revenue sharing idea in the Nixon and Ford years. In the case of revenue sharing, ACIR was championing a cause that had been built upon conceptual contributions from leaders of both major political parties; and it had won broad support essentially because it was a "centrist" position that served a variety of purposes including grant-program simplification ("streamlining"), management efficiency, and enhancement of national uniformity in some programs and creation of room for diversity in others. In effect, ACIR became a political actor and led in hammering out a compromise position supportive of state and local fiscal needs, but also supportive of Congress's policy priorities. It was hardly uncritical, however, of the delivery systems previously used to serve those Congressional priorities.²¹

Even the best research studies by ACIR staff prior to 1980, however, were credibly subject to the charge that the emphasis remained too much on management issues. More attention was needed, some of us in the scholarly community thought, to what the long-term effects of innovation would be on the real balance of state versus federal power. The vitality of the federal system and the fundamental values of constitutionalism and federalism needed to be addressed, it was argued. The Commission had illuminated, sometimes brilliantly, issues of equity and issues of centralization and decentralization in the system of federalism in action. It had omitted too consistently, however, the related problems of the

changing structure of formal authority—that is, of constitutional law as enunciated by the courts and constitutional claims emerging from executive and legislative action—and it seemed too much aloof from the sensitive research area of political shifts and their implications for federalism.

ACIR responded to such criticism, to some degree, by issuing a brace of interesting comparative studies of federalism in other democratic nations. It went much further, however, with the massive study proposing an "agenda for American federalism." In the *Agenda* report, there was unfortunately an excess of what Thomas Anton has termed "journalistic hyperbole."²² Polemics against lack of accountability and complexity in the federal system obscured some of what was extremely valuable in the report. There was also insufficient hard data on the actual performance of state and local government—too little, in other words, of the type of research that had distinguished the ACIR taxation studies of an earlier day.

Ungracious as it may seem for one who has criticized the Commission in the past for giving insufficient attention to fundamental issues of constitutional values in relation to social needs and politics, I must also express some discomfiture with some of ACIR's recent forays into comment on these very issues. The problem is exemplified by the report on *Jails: Intergovernmental Dimensions of a Local Problem*, in which the Commission makes wide-ranging recommendations as to desirable standards for institutionalization, guidelines for sentencing, state-local and inter-local fiscal and administration arrangements, and the like. Some of these recommendations are fairly narrowly administrative. Others, however, would be very controversial in any forum of law-enforcement officers, legal scholars, and criminologists. The most startling feature of the report is the Commissioners' wholesale condemnation of the federal judiciary in the section entitled "Constitutional Consideration." To be

sure, a distinguished scholarly authority, A.E. Dick Howard, is quoted with regard to what he terms excessive use of the federal courts' equity power, and appealing for restoration of "normal" political processes.²³ The report goes on, however, to direct especially strident criticism at federal judges for their alleged "serious circumvention of state and local legislative and executive processes;" and it calls upon the federal courts to refrain generally from "using judicial decrees to prescribe detailed remedies."

My objections to this report are based, first of all, on its failure to represent fairly the division of responsible opinion on these matters among students of constitutional law and history, public leaders, administrators, or indeed the individual justices of the Supreme Court of the United States. The requirements of the Bill of Rights and the 14th Amendment are given scarcely passing recognition. Moreover, there is nothing here as to the factual situations that have evoked judicial interventions in the administration of prisons and in the processes of criminal justice—nothing of the very serious abuses which have brought forth the actions of the federal courts. Secondly, one can raise reasonable objections to the fact that the report's recommendations were formulated entirely without the participation of representatives of the judicial branch.

The insights and wisdom—not only the data—in ACIR reports during a quarter century of truly sweeping change in American federalism have made the Commission an institution of unique and truly remarkable importance.

One does not want an agency always to take the middle ground, but ACIR can do better than this in advancing public understanding of the full range of issues and informed opinion bearing on high questions of poli-

cy, let alone bearing on anything so basic as the protection of constitutionally guaranteed rights in relation to federalism. That our politics lately have taken a more ideological turn than we have seen for half a century makes detachment and balance even more imperative. An ACIR that reflexively represents the opinion of a prevailing ideology, or the opinion of one party or one of its factions—or indeed an ACIR that becomes the lobbying agent for localism—is not the valuable institution that has won such respect in the past. In any of these other roles, ACIR's value would be quickly dissipated.

The Commission's most impressive work, in the past, has been done in pursuit of the ideal of wide-ranging discussion and exchange of ideas that bespoke an atmosphere of authentic intellectual freedom. Perhaps some basic procedural adjustments and innovations are desirable now, in order to maintain the scope and freedom of inquiry and (by consequence) ACIR's credibility. *One innovation that would serve these purposes would be publication by ACIR of formal position papers representing the spectrum of informed opinion on the major questions ACIR examines.* The current practice of the Commission—circulating of drafts of staff reports and Commission documents for outside-expert comment, or holding of informal discussion meetings to obtain criticism from experts—may be insufficient to maintain the nonpartisan research mission or provide the range of policy guidance that one expects from ACIR.

Whatever the failing of some recent ACIR reports—the *Jails* study, discussed here, is only one of several to which similar caveats would apply—there is no gainsaying the contributions of the Commission over the long run to the cause of realism about federalism. The insights and wisdom—not only the data—in ACIR reports during a quarter century of truly sweeping change in American federalism have made the Commission an institution of unique

and truly remarkable importance.

What, then, are the prospects for an agenda that will similarly advance the cause of realism about federalism in the years ahead of us now?

Six Trends and Challenges

The charge given each of the speakers at this conference, to consider "what forces are shaping American federalism and what . . . those trends portend for the work of ACIR," brings us to the difficult task of prophecy. The patterns and pressure-points that I would judge most likely to determine the course of federalism all will involve the ACIR in new challenges of great magnitude.

1. Political Sea Change?

The pattern of politics in the mid-1980s, with foundations that reach back to the last decade, indicates the possibility of a distinct new era opening for federalism.²⁴ This pattern has involved the mobilization of political forces in what began as a "rationalization" of federal aid through revenue sharing and coordination of administrative mechanisms. A converging but in many respects autonomous political force was the "tax revolt" in the states, with California's Proposition 13 acting as a catalyst in 1978—but with its own origins in a widespread tendency in both political parties for new leaders to frame their campaigns and programs on a strategy of running against party regularity and government itself. Finally, the new conservative national administration elected in 1980 has given eloquent voice to antigovernmentalism. The Reagan leadership has linked it with a zealous regard for the virtues of privatism. Solicitude for maintaining the freedom to control wealth in the private system, with concomitant concern to curb civil government's growth and reach at all levels (military spending and growth is another matter), seems fairly consistently to overwhelm the more classic concerns about the diffusion of power through federalism.

Put simply, when the Reagan administration confronts policy decisions that involve more or less government regulation of business, or limitations upon the conservationist activities of state government regarding natural resources, or the like, *the principles of federalism tend to be suborned to the objectives of privatism.*²⁵

Recent polls of the "baby boom" generation, which today is a burgeoning element in the electorate and in the power structure of the private sector, indicate that despite anti-nuclear and pro-environmental views they provide strong support to the priority given privatism over support of governments' role in social programs and regulation. How well their skepticism of taxation, social programs, and regulation will sustain a political alliance with evangelic religious and other elements of the conservative coalition is a matter of speculation: Overseas military involvements or a series of environmental catastrophes such as this nation experienced in the late 60s and early 70s could put enormous pressure upon the new political alignments. Presumably issues of federalism and fundamental political ideology could take on importance in entirely new ways if extreme positions by the party in power or by the opposition party alienated significant political groups. And the measures that must inevitably be taken, by one course or another, to deal with the deficit that Austin Ranney has termed "a time bomb" in the political arena of the late 1980s, doubtless will place the values of federalism in the balance against the formidable imperatives of competing values.

What attention ACIR should give to macropolitical forces is an interesting, but also perplexing, matter. In the past, the Commission has not hesitated to seek readings of both public officials' and the general public's degree of confidence in government at various levels—a revealing probe into political behavior that indicated awareness of political realities as a necessary element

in appraisal of the working federal system.²⁶ Similar willingness to make soundings of political sea change—a sensitive and highly charged area of inquiry—would seem indispensable in the course of policy studies covering a

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wide range of issues. However ACIR decides to deal with politics as a reality shaping federalism, the depth and implications of changing “mood” and political behavior is the principal force behind policy innovations and initiatives that occupy our attention from day to day.

2. Regionalism and Rivalism

Persistent regional self-consciousness, together with rivalry and conflict among regional groupings, continues to be a vital animating force in the politics of federalism—as has been true since the nation's founding period.

In the pre-Civil War era of American history, sectionalism was set in motion by the protection of the institution of slavery in the South; the abolitionist movement in the North; and the antebellum coalitions of western states for federal aid to internal improvements (canals, railroad, river improvements) and development of resources on the public lands. After the Civil War, regional alignments of states continued to be an important force in the federal system's dynamics. Sectionalism deeply affected the movements for railroad regulation and antitrust legislation, for example, as well as for national programs to support the farm sector, to create regionalized banking regulatory mechanisms, and to create programs for forest conservation, dry-

land irrigation, and coastal improvements.²⁷

Many of the policy initiatives and reforms associated with regionalism through the course of American history involved realignments of real power in the federal system—generally with power moving to the center and away from the states. A culmination of sorts came in the 1930s, when many of the most important New Deal programs—generating a great transformation of federal-state relations—were specifically designed to address regional problems. The South was affected with special intensity. Although the region's politicians and statehouses did not easily surrender important elements of their autonomy, such New Deal programs as the Tennessee Valley Authority, agricultural price supports, public works construction, relief for unemployed and disadvantaged citizens, Social Security and national minimum wage standards, all went far toward attacking the long-intractable income gap by which the South had lagged behind the rest of the nation. Similarly, the West looked to the national government in the 1930s not only for relief but also for hydroelectric projects, flood control, reclamation and conservation programs, and aid in both industrial recovery and agricultural development that created new tensions in state-federal relationships—tensions which often, though not always, were resolved on the side of a stronger federal influence as a concomitant of economic renewal.²⁸

Against this background, the Sunbelt-Snowbelt controversies are a reprise with substantial role reversal, not something without precedent. Today, however, the actors are taking different parts. The post-New Deal Sunbelt, including regions whose desperate economic problems in the 1930s generated major changes in federalism, has come to rest its remarkable prosperity upon federal programs and expenditures to a degree unthinkable to its political leadership in an earlier era. The very activism and large scale of modern

governmentalism that the South resisted so long has today become a key advantage for the Sunbelt in continuing regional and sectional rivalries.

In the 1980s, moreover, the reform proposals that carry transforming implications for the federal system—particularly President Reagan's New Federalism initiative package of 1981-82—are generally linked to social and fiscal policies likely to accentuate income disparities among the states; the already disadvantaged sections and governmental units are likely, it appears, to be affected most adversely.²⁹

A major feature of persisting rivalries within the federal system is the competition among individual states for economic advantage through pursuit of aggressive "industrial policy." Such policy, like that of the nineteenth-century states, can take both positive and negative forms. There is, for example, a competitive spirit in many of the state legislatures with regard to improving education at all levels, and especially upgrading their state universities' research capacities, as a way of attracting investment and employment. Providing regulated natural environments for health and aesthetic purposes can serve as a stimulus and an attraction to investment; so too, however, can cutting back on such regulations, either substantively or in the complexity of administration. Whichever side of the policy one terms "positive," it is an important instrument of state rivalries today. Discrimination against firms that

The rivalistic policies that generate both regional conflict and conflict among states are likely to be far more important in an era of scarcity for the public fisc.

are non-resident (either through controlling access to resources or by affecting the terms of marketing arrangements); competition to extend attractive corporate privileges and immunities (the "Delaware syndrome"); tax induce-

ments; provision of free or low-cost utilities and services for new firms; and other competitive tools are also wielded regularly throughout the system. State and local governments remain highly resourceful in locating the points at which they can breach the mandated uniformities of the modern federal system to their parochial advantage. "Beggar thy neighbor" has not disappeared from the political landscape, as tax-exporting through severance and other taxes and the excesses of some industrial development agencies vividly remind us.

Despite some attention by ACIR and by independent researchers to the question, What are the costs of such competition?, there is still abundant room for further investigation. Here, after all, are the instruments of state policies that are likely to be mobilized even more aggressively if Congress and the Executive decide to cut back further on national minimum regulatory standards and if various federal direct-spending programs are eliminated or curtailed. The rivalistic policies that generate both regional conflict and conflict among states are likely to be far more important in an era of scarcity for the public fisc.³⁰ Moreover, these are the policy weapons that bring about a situation of what Justice Brandeis called "competition in laxity," by which the states reduce their health, safety, educational, and environmental standards in order to keep business costs down and to avoid losing investment to rival states. We need to have an informed understanding of how, in reality, these rivalries are working and with what costs to whom. Few topics can be studied to better advantage if there is to be realism about federalism—if the full range of "federalism reform" impacts is to be gauged.

A final element of regionalism and sectionalism is the coalitional activity manifested since the 1960s in the groupings of states for both policy and administrative purposes. Formal regional organizations of governors, in some

instances augmenting interstate compacts; coordination of anti-central movements, especially the "Sagebrush Rebellion" on the question of ownership and the use of the public lands; political efforts inspired by the Snow-

...there is evidence that the states as states continue to be major actors in politics, with power to mobilize themselves in standing against potentially detrimental policies from the national capital.

belt-Sunbelt controversy over federal expenditures patterns and programmatic decisions adversely affecting the industrial heartland and the Northeast—all have been designed to advance the interests of regionally allied states, either against other regions or against the central government itself. Again, a realistic appraisal of how interests are thus being pursued, and with what effects, is necessary if we are to comprehend the significance of this dynamic in the federal system.

3. The States as United Political Actors

The Framers had anticipated that the states could—and readily would—unite to protect their common institutional interests against intrusions of federal power. Thus in *The Federalist* No. 46, Madison predicted that "ambitious encroachments" on the authority of any state would be perceived by all states as a common threat. Consequently, Madison predicted, "every [state] Government would espouse the common cause. A correspondence would be opened One spirit would animate and conduct the whole."

This was an uncannily accurate prediction from Madison of how the state governors in fact responded during 1981-83 to the crisis sparked by the Reagan New Federalism initiative. When faced with the prospect of being handed burdens that their states could

not carry responsibly, at a time when other fiscal pressures (especially those generated by the national business recession) were powerfully constraining them, the governors stood together. Despite the fears of New Federalism champions that the states have lost their vitality and importance, here was vivid evidence of how state interest and state political power do continue to matter in the operations of the governing system.³¹

The Supreme Court has shown solicitude for protection of what legitimately belong to the "states as states" in the federal system. Here there is evidence that the states as states continue to be major actors in politics, with power to mobilize themselves in standing against potentially detrimental policies from the national capital. Despite the potential sea change that may be in progress, the continuing process of defining the interests of the states as political entities—and the active pursuit of those interests, which certainly must include fiscal capacity to carry responsibilities of governance—will constitute one of the most intriguing challenges of the years just ahead.

4. "Whiplash Federalism" and State-Local Performance

Behind coalitional activity and rivalries alike, however, are the realities of state and local fiscal resources and performance. It is my view that, from the heady days of the Great Society and revenue sharing, through the crises generated by price inflation and business recession, the present prospect for New Federalism reforms, a stop-and-go situation with regard to grants has created great volatility in the working federal system. Government "closest to the people" has been severely challenged; many state and substate governmental units have been severely curtailed in their capacity to maintain traditional—let alone expanded—obligations in provision of public services. In this sense, our system has been characterized by a

damaging "Whiplash Federalism," with sudden policy changes generating a succession of problems that outrun efforts at adjustment by the state and local governments. The unprecedented level of the federal deficit can only work to make the impact of Whiplash Federalism even more severe now. Unless there is an abrupt reversal of the rising trend of military expenditures, even a sustained period of economic growth and rising public revenues will not likely abate much the whiplash effects of deficit pressures.

If, as seems likely, the "swap" and "turnback" schemes become prominent political issues once again in 1985, Congress and an informed citizenry are owed—at the least—a full and accurate inventory of current state and local governmental performance, an appraisal of the effects of past federal cutbacks on subnational government operations, and an informed estimate of the likely impacts of further shifts in responsibilities from Washington to the states and local governments.

This vital work of monitoring governmental performance and assessing the impact of innovations in fiscal and programmatic policy has scarcely begun. Several university-based investigations have been undertaken, to be sure, but ACIR ought to be provided with the financial support, staff augmentations, and intellectual freedom in a continuing nonpartisan atmosphere to

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serve as the reliable "observatory" of governmental performance throughout the system.

The widely publicized results of the Princeton University-coordinated studies of New Federalism cutbacks

since 1981 in selected states offer both some guidelines and some reasons for caution in undertaking this kind of analysis.³² The Princeton project has probed deeply at the state level, and many of the individual investigations offer invaluable hard data on the dollar impact of grant-in-aid cutbacks and on specific features of the government programs affected. Yet an unfortunate by-product has been a misleading round of press attention averring that the research demonstrates a pattern of "little impact" on the states and local governments. Indeed, the project's official "Highlights" summary, which is probably all that many busy reporters actually used, employs the following language: "Federally aided services so far have been affected less than most people expected. . . ." The impression given is highly misleading. In fact, quite a different picture emerges from close reading of the overview report by the project directors (Nathan and Doolittle) and especially of the individual state investigations.

First, as Nathan and Doolittle state in the overview, "The biggest and most lasting cuts of the Reagan domestic program" affected entitlements; that is, they are "cuts in *people* programs"—and these cuts "have been concentrated on a particular group, the working poor." The full impact of these cuts is underestimated, moreover, by dint of failure in the reports to systematically use constant-dollar data and (even more important) failure to take account of rising client loads as unemployment and recession effects were registered. Changes in eligibility requirements, eliminating former or potential recipients from the lists of eligibles, are also given scant attention.

Second, the rather sanitized language of the report asserts that "most states and localities 'ratified' the federal aid cuts—that is, passed them along to the recipients of the federally aided benefits and services." In other words, the impact was less than "most people [had] expected" but was very great in-

deed for the group to whom cuts were "passed along"! Moreover, where impacts were authentically attenuated, it was mainly because of Congressional action restoring 1981 cuts or because

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of the emergency jobs bill's impact, which is temporary.

Third, and I think most important to analysis of the federal system's structural stability and dynamics today, is the evidence that virtually unprecedented volatility has come into play as the federal cornucopia is turned on and off—the impact of Whiplash Federalism. This volatility is recognized in the Princeton studies, but its full depth and reach can be plumbed only when one recognizes the effect of changes that have been going on within the states themselves. Following the tax revolts, which may or may not have peaked, we have witnessed creation of new state and local tax sources that are generally regressive in their income-redistributive effects: user charges, in lieu of regular taxes; sales tax increments; and special levies that serve to leverage the inequity of such measures as California's Proposition 13, which discrimi-

It can be taken as a given that in this process of 'sorting out by reductions' the fabric of the federal system will be put under great strain. The question that will be left is whether the fabric of the social and political systems will also be subjected to massive stress.

nates against post-1978 property purchasers so that they are taxed at three times the level of "old" (pre-1978) property owners.³³ Thus any effort by the states to find relief from

whiplash and cutbacks now will—in the absence of a massive turnaround in economic growth rates—fall hardest on the same low-income groups as have been in the primary target group of New Federalism-era cutbacks. The methodology of public choice analysis, predicting behavior of voters in state politics on money issues, apparently tends to confirm this view of how further fiscal stress will work its effects.³⁴

Realism about federalism requires that such income and welfare distributive effects, and the new volatility itself, be well explored and understood. It will take a rare sort of courage to maintain true non-partisanship and receptivity to debate as ACIR pursues such sensitive questions. Some observers will find the situation in federalism today to be perfectly benign: that cutbacks in federal programs are unlikely to produce new efforts by state and local governments to fill the gap is cause for congratulation if "getting government off our backs" is the principal objective. If one views this condition as alarming, however, precisely because it places the states as effective political entities in serious jeopardy, and will radically curtail social services, one's appraisal of the situation will be entirely different. If the analysis offered here is accurate, however, the "narrow," traditional federalism issue of "sorting out" responsibilities that ought to be state and local will be overshadowed by the more realistic question: What government services in support of minimum welfare, medical, educational, and cultural standards will we be willing to give up or radically curtail? It can be taken as a given that in this process of "sorting out by reductions" the fabric of the federal system will be put under great strain. The question that will be left is whether the fabric of the social and political systems will also be subjected to massive stress.

Both the accomplishments and the flaws of the recent studies of cutback impacts indicate the vital importance of ACIR's dealing in greater depth with

the performance of state and local government. Regular monitoring of both the routine and the innovative activities of subnational government, appraisal of institutional performance and welfare impacts, and, not least, moving toward a position of leadership in developing methodologies for more effective studies of such matters are all areas in which uniquely important contributions can be made.³⁵ Such contributions would build on the splendid data base represented by the annual reports of intergovernmental fiscal relationships, but they would go far beyond the scope of fiscal affairs.

5. New Departures in Constitutional Law

The extended attention I have given to matters of structure, performance, and welfare impacts is not intended to minimize the importance of matters bearing on the basic values of federalism or on the changing pattern of formal authority in our constitutional law. The ACIR's recent interest in the role of the federal courts in "umpiring" national-state relationships is a welcome one, as would be any contribution to enhance public awareness and understanding of movements in constitution-

A realist view of these [Tenth Amendment] issues will also recognize the importance of related federal judicial decisions in areas such as land-use zoning and property rights, criminal due process requirements, and church-state issues. . . . touching the ordinary lives of the citizenry and raising issues of vital moral and constitutional values. . . .

al law. And despite the objections I have raised above to the ACIR report on jails, there is every reason for the Commission to include a section termed "Constitutional Considerations" (as it did in the prisons report) in its

analyses of many policy issues ACIR is likely to be examining in future years.

Pressure points now evident in the constitutional law of the nation are several, and they deserve the same sort of serious, systematic monitoring and analysis as administrative or programmatic issues.

The Tenth Amendment: First among these issues is the renascent interest in—and judicial reappraisal of—the Tenth Amendment. This amendment states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people" The Supreme Court's decision in *National League of Cities v. Usery* (1976) and subsequent decisions regarding state power over waterways, regulation of power facilities, and environmental controls have not lacked for attention either from scholars or from such organizations as the Council of State Governments. Nonetheless, informed understanding by the public and governmental officials of the changing terms of the Tenth Amendment jurisprudence could be significantly advanced by systematic monitoring of this and related developments in the courts. Some of the formulations offered by individual justices, especially O'Connor and Rehnquist, have suggested new, and in some respects startling, interpretations of state autonomy and immunities.³⁶ Beyond that, moreover, the jurisprudence of *National League of Cities* and successor cases has raised important questions of basic law and constitutional values—on how the spending power and the commerce clause relate to the Tenth Amendment, on what are the "essential" functions of the states, and on what degree of judicial umpiring the Court is prepared to undertake on both statutory and constitutional interpretation.

A realist view of these issues will also recognize the importance of related federal judicial decisions in areas such

as land-use zoning and property rights, criminal due process requirements, and church-state issues. In all of these areas, touching the ordinary lives of the citizenry and raising issues of vital moral and constitutional values—far more important, I would insist, than the minimum wages or maximum hours of state or municipal employees, as the National League of Cities case—the Supreme Court and lower federal courts are engaged in boundary setting that establishes the federal Constitution's reach and the proper limits of state governments' discretion. That centralization and decentralization are real issues, and that power matters in citizens' lives when federalism issues are settled juridicially, cannot be denied in any appraisal of contemporary litigation on such issues.³⁷

Federal preemption: Second is the burning issue of federal preemption, especially its relationship to regulation and the policy deregulation. For about a century (since the establishment of the Interstate Commerce Commission and the beginnings, with that measure, of the modern federal administrative regime), Congress has been supplanting state regulatory laws with national regulation. Such action, termed "preemption," is often explicit, sometimes only implicit and subject to judicial interpretation, and on occasion intentionally vague so that courts have no choice but to make determinations as to how far preemption has been intended.

The debate currently raging over the desirability of a national products liability law suggests even more vivid examples of centralization may lie ahead.

There is no question that, when national regulation supplants state control, the effect is to centralize power significantly in the working federal system. The power of the states is as much curtailed, however, when federal

agencies intervene to supplant stringent state regulations with a more benign regime, as when federal preemption occurs to supplant a benign state regime with more stringent national regulation. As my colleague Susan Foote has shown in recent studies of medical-device and other regulation, the Reagan administration has tended—despite rhetoric about devotion to "returning power to the states"—to take significant power away from the states by its preempting important areas of regulation. This occurs when the state regulations are regarded as imposing high costs upon particular business interests. All the traditional arguments are invoked on the two sides: the need for uniform national standards, the requirements of the commerce clause and the need to keep interstate commerce from being burdened, the desirability of honoring pursuit of diverse policy goals in the states as "laboratories of democracy," and the like.³⁸ (That business interests should "vote with their feet" by refusing to offer their products for sale in states with stringent regulatory standards is one argument not heard, however.) The actors in this drama are playing roles strangely inconsistent with their customary ones, as the ideology of entrepreneurial freedom and privatism comes into conflict with the ideology of state rights. Here again, the contemporary scene offers an intriguing opportunity for keeping the record straight, inventorying policy and performance, holding expressions of constitutional theory up against realities of administrative practice, and enhancing public knowledge of how authority is actually being allocated between the national government and the states.

The debate currently raging over the desirability of a national products liability law suggests even more vivid examples of centralization may lie ahead. Certainly the "tort revolution," by which for the last twenty-five years the state courts and legislatures have refashioned industrial liability for damage to consumer health and safety, is a

major piece of historical evidence for any argument that historically federalism does matter. It bespeaks the ability of the states, as autonomous units whose decisions are of real importance, to be creative and innovative in ways

Like the preemption issue, the doctrine of 'adequate state grounds,' as it is termed, often inspires cleavages that are unusual.

that advance their various conceptions of the public interest.³⁹ Yet who can doubt that the very groups in national politics which trumpet the need for returning power to government "close to the people" will tend to line up in favor of a uniform national product-liability law that eliminates the diversity and variety of state rules? or that the opposing groups—which generally favor uniform national standards in the welfare, wage-and-hour, and medical services areas of policy—denounce nationalization of product liability law as an instrument by which business interests seek to escape the regulations (and attendant costs) that the states have imposed? Again, a continuing inventory of how real power is shifting in the federal-state balance must take account of such politically sensitive but vitally important policy debates and decisions.

"Adequate state grounds" doctrine: The vitality of federalism in today's formal constitutional law is evident, too, in the willingness of many state courts to seize on provisions of their state constitutions—often cast in language identical to provisions of the national Constitution — as the basis for extending their citizens' civil rights and civil liberties beyond what the Supreme Court has done in national law.⁴⁰ Like the preemption issue, the doctrine of "adequate state grounds," as it is termed, often inspires cleavages that are unusual. In this instance, it is most frequently the liberal members of the judiciary, sympathetic to Warren Court-style views of individual rights

and wary of the Burger Court's ideology, who urge the cause of state autonomy and independence—and lining up against them are generally conservative jurists, who argue for the wisdom of national uniformity!

The importance of this development—and the contributions of this doctrine to diversity of law and policy within the framework of federalism — was long given scant notice in the scholarly literature, and only recently have even the law journals given it the attention it deserves. Here too is an aspect of contemporary federalism revealing the continued vitality of state interests and autonomy in the formal system of law. It deserves systematic analysis from an agency charged, as is ACIR, with responsibility for advancing public understanding of the working Constitution.

Litigation policies and the diffusion of power: The recruitment of "centralists" who favor business regulation and civil rights to the cause of adequate state grounds, like the enlistment of "states righters" who favor nationalizing powers through federal preemption, finds a curious counterpart in recent policies of the Reagan administration regarding litigation by federal executive agencies. Critics of the New Federalism initiatives that President Nixon pursued in the early 1970s contended that while championing return of authority in many areas of policy to the states, the White House simultaneously attempted to concentrate authority and power *within the federal government itself* in the Executive branch, at the expense of Congressional and judicial power.

Quite apart from its uses of the Internal Revenue Service and other agencies, before and during the Watergate affair, the Nixon administration's innovations and formal claims had major implications for the working federal system. Funds voted by Congress, including grant funds, were not distributed because the administration claimed

legitimate power to "impound" such money; the OMB was given an expanded rule in coordinating and monitoring grant programs; and the promulgation by the White House of new guidelines and regulations affecting social programs had an immediate impact on state and local finances and services.⁴¹ A champion of New Federalism ideas who believes that diffusion of power is a cherished value cannot avoid putting such actions into the balance, in assessing the impact of Presidential initiatives. A recent study concludes that, during the Carter administration as well, the White House's efforts to expand the reach of executive power continued unabated in important respects.⁴²

Similar enlargement of executive discretion is the goal and result of such litigation policies in the Reagan years as the extraordinary posture taken in regard to federal court decisions in Social Security cases involving appeals of eligibility rulings. The Reagan administration's policy of "non-acquiescence," regarding each adverse district court decision as applying to only the case at the bar and no other cases, even in the same district, is a litigation policy without modern precedent so far as I know. The attorneys charged with the litigation have protested strongly against the strategy, and federal judges have had to extend severe warnings to administration officials responsible for the policy. Whether or not the administration decides to abandon the policy, as seems a strong possibility in fall of 1984, the whole episode serves as a vivid reminder that the underlying values of federalism, especially suspicion of concentrations of power, can be served with the left hand while threatened with the right hand.⁴³

Other litigation policies of the Reagan administration have been more consistent with the general New Federalism goal of giving the states more leeway with regard to federal judicial oversight in matters concerning enforcement of constitutional rights. Thus

the Solicitor General since 1981 has argued on the side of the states in a substantial procession of cases in which state authorities have resisted application of the First and Fourteenth Amendments as barriers to their actions in areas touching religion, civil rights and desegregation, and criminal due process.

The challenge to ACIR: This intriguing array of issues in "formal federalism," concerning the patterning of formal authority by the courts, stands as a serious challenge but also a rich opportunity for ACIR. Seldom have ACIR reports or publications broken any new ground in analysis of constitutional issues.⁴⁴ I suggest that ACIR should regularly sponsor exchanges of views by jurists, legislators, public administrators, and scholars on matters of constitutional law and their implications for the federal system in action. A continuing symposium format, inventoring issues and providing a spectrum of views on the prevailing trends, would be an invaluable contribution to public and political dialogue on those issues. Such symposia would also offer valuable guidance to jurists as they confront federalism questions in the courtroom.

One salutary byproduct of such inquiries would be to advance our progress toward a "theory of the states," as was called for by Professor Sallyanne Paton in the ACIR's 1980 symposium on federalism. To say, she contended, "why state and/or local autonomy is such a central value or ought to be" we need to have a "coherent theory of what a state does and is."⁴⁵ This objective—which, as Woodrow Wilson said of the state-federal division of responsibilities, is something each generation must regularly reconsider for its own times—would best be pursued by monitoring of the law and expressions of basic values that the law provides, linked with the monitoring of actual governmental performance and the impacts of policy mentioned earlier. An important result of the whole enterprise

might be to advance a cause that conservatives and liberals of many differing viewpoints can agree is desirable: to make explicit the issues of federalism, both in law and in policy, and to lay to rest finally least the oft-heard conten-

Despite the rhetoric of political leaders who make reference wholesale to 'the Founders' as though there were no ambiguity in their beliefs on the matter, there was abundant difference of opinion from the outset of the Republic.

tion that "federalism is dead" (replaced by "intergovernmental relations"), or that it is a legal fiction of no great consequence either way.

6. "Sorting Out," Historical and Contemporary

All the foregoing amounts to a plea that we take federalism seriously—seriously enough, in examining both the law and the working governmental system, that we probe deeply into performance and consequences; and seriously enough to seek for the kind of systematic constitutional and normative theory that can provide the foundation for a "sorting out" process. The last of the trends and problems to be considered here is this question of sorting out.

The process is as old as federalism itself; history has borne out amply Woodrow Wilson's view of continual reconsideration. Despite the rhetoric of political leaders who make reference wholesale to "the Founders" as though there were no ambiguity in their beliefs on the matter, there was abundant difference of opinion from the outset of the Republic. Witness, in that regard, the difference between Madison's view in *The Federalist* that powers remaining "exclusively" with the states would be "numerous [and] indefinite" and the view of his coauthor Hamilton, concerning "those residuary authorities which it might be judged proper to

leave with the states for local purposes"! The problem has been, from the outset, what one of the Founders, James Wilson, reduced to the central "general principle" of the new Constitution in 1787:

that whatever object was confined in its nature and operation to a particular State ought to be subject to the separate government of the States; but whatever in its nature and operation extended beyond a particular State, ought to be comprehended within the federal jurisdiction.

Precise echoes of this general principle, seeking to make areal jurisdiction congruent with the scope of governmental duties and social needs, are found in a host of subsequent debates. The problem has been, of course, to give the principle specific content—to sort out what functions must perforce be national functions, what others state and local. Modern efforts to wrestle with the problem have included the famous Kestnbaum Report which led to the establishment of ACIR, the recent proposals of Senator Durenberger and others, and the calls for a national "convocation" on federalism.⁴⁶

The bicentennial of the Constitution in 1987 will, one hopes, heighten public appreciation for the importance of this quest to reconsider the allocation of functions to state and nation in the context of modern society and its needs. Here again, however, we need badly to have some realism about the history—and not just the performance, or theory—of American federalism. It distorts history and muddies the intellectual waters, for example, to isolate from its historical context the Tenth Amendment. In fact there were nine other amendments at the Republic's beginning, and without the assurance they would be adopted the Constitution could not have won ratification. Those amendments were concerned with fundamental individual rights and liberties, not with states' rights; and

they were an integral part of the original understanding of 1787. Moreover, the Constitution's history did not begin and end at Philadelphia in 1787 or even with the Bill of Rights' adoption. The Civil War brought a fundamental

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refounding of the constitutional system, with the 14th Amendment and the abolition of slavery its results.

In that light, it is unpleasant but important to recall that the pre-Civil War Constitution was a document that preserved not only the Union but also slavery for seventy years; and the most palpable, direct effect of federalism in the century that followed was the protection of state enclaves in which civil rights were denied and systematic discrimination perpetuated. This darker side of "federalism in action" and the heritage of constitutional law need to be considered alongside the brighter elements of the record. Those latter elements concern the positive values that one hopes, today as in 1787 and in the aftermath of the Civil War, can be

served by a federal division of powers: the diffusion of power in a variety of lawmaking and administrative centers, rather than having power concentrate all at the center; the attainment of efficiencies in administration; and the provision of room for the states to embody diversities and to serve as experimental laboratories of democracy. The responsiveness of government that is kept "close to the people" is a value balanced off against another—the protection of individual liberties. Those liberties have been, paradoxically, both advanced and endangered in our national history by centralization and by decentralization and state rights. No amount of wishful theorizing, political bluff, or misleading rhetoric can obscure these complexities altogether.

Thus it is a final challenge before ACIR, in its service to the government and to the public, to give serious attention to the historical record of American federalism; to probe the changing realities of diversity and uniformity over time; to analyze the record of how formal constitutional doctrine and the uses of real power have operated, in a symbiotic process, over time in the federal system. To achieve realism about federalism requires an informed sense of the past as well as intellectual independence and toughness in examining often-highly-charged partisan measures and philosophies of the present day. As the quest for perfection of a system that James Madison called, at the time of its founding, "a novelty and a compound," continues in our own day, neither the realities of power in contemporary life nor the lessons of the past ought to be kept in shadow.

FOOTNOTES

¹Historical overviews are in James L. Sundquist, *Politics and Policy: The Eisenhower, Kennedy, and Johnson Years* (Washington, DC: Brookings Institution, 1968); Harry N. Scheiber, "American Federalism and the Diffusion of Power," *Federalism Symposium, University of Toledo Law Review*, 9 (1978). See also essays in *The New Deal Legacy and the Constitution: A Half-Century Retrospect, 1933-83* (Boalt Hall School of Law, University of California, Berkeley, 1984).

²Sundquist, *Politics and Policy*; William E. Leuchtenburg, *A Troubled Feast: American Society Since 1945* 2nd ed. (Boston: Little Brown, 1973).

- ³President Reagan stated, for example, in an address before the Alabama State Legislature, March 15, 1982: "Reapportionment and the Voting Rights Act have eradicated once and for all the most glaring inequities in State representation." He and the White House staff have said substantially the same thing on other occasions.
- ⁴ACIR, *The Federal Role in the Federal System*, Vol. 2: *The Condition of Contemporary Federalism: Conflicting Theories and Collapsing Constraints* A-78 (Washington, DC: U.S. Government Printing Office, 1981); Scheiber, "American Federalism," pp. 659-65.
- ⁵Max Ways, "Creative Federalism and the Great Society," *Fortune*, January 1966, p. 121.
- ⁶See, e.g., Morton Grodzins, *The American System: A New View of Government in the United States*, ed. Daniel Elazar (Chicago: Rand McNally, 1966); Daniel Elazar, "Urbanism and Federalism," *Publius*, 5 (1975), 15.
- ⁷See, e.g., Henry Abraham, "Effectiveness of Governmental Operations," *Annals of the American Academy of Political and Social Science* 26 (1976), 94.
- ⁸Scheiber, *The Condition of American Federalism: An Historian's View*, testimony delivered to the U.S. Senate Subcommittee on Intergovernmental Relations, Oct. 15, 1966 (Washington, DC: U.S. Government Printing Office, 1966). See retrospective discussion of the controversy in ACIR, *Condition of Contemporary Federalism*, p. 3.
- ⁹My own contribution to the debate (note 8), for example, carried an introduction by one of the Senate's prominent liberal Democrats and was read into the *Congressional Record* by an equally prominent conservative Republican Senator.
- ¹⁰The phrases are Roscoe Pound's, from "Law in Books and Law in Action," *American Law Review*, 44 (1910), 12.
- ¹¹Thus Michael Reagan declared flatly in a widely read study that "federalism—old style—is dead. . . . Federalism—new style—is alive and well and living in the United States. Its name is intergovernmental relations, . . . a political and pragmatic concept stressing the actual interdependence and sharing of functions between Washington and the States." Reagan, *The New Federalism* (New York: Oxford University Press, 1972), p. 3. For a useful analysis see Deil Wright's excellent study, *Understanding Intergovernmental Relations* (N. Scituate, Mass.: Duxbury Press, 1978).
- ¹²McCloskey, *Essays in Constitutional Law* (New York: Alfred A. Knopf, 1957), p. 184.
- ¹³Beer, "The Modernization of American Federalism," *Publius*, 3 (1973).
- ¹⁴Scheiber, *Condition of American Federalism*, p. 19.
- ¹⁵Stevenson, "Reorganization from the State Point of View," *Public Administration Review*, 10 (1950), 5.
- ¹⁶Bickel, in *The New Federalism: Possibilities and Problems in Restructuring American Government* (Washington, DC: Woodrow Wilson International Center, 1973) pp. 41-43.
- ¹⁷Statement before the Joint Oversight Hearing on the Twenty-five Year Record of the ACIR, Intergovernmental Relations Subcommittee of the U.S. Senate and the Intergovernmental Relations and Human Resources Subcommittee of the U.S. House of Representatives, Washington, July 25, 1984. (Mimeographed.)
- ¹⁸Reference here is to the "Imperial Presidency" idea pursued by Arthur Schlesinger, Jr., and others; to Philip Kurland's eloquent concern about Congress's "Impotence of Reticence," title of Kurland's article in *Duke Law Journal*, 1968 vol., 619 (1968); and praise for returning power to the grass roots from commentators across the whole spectrum of ideological opinion in the United States.
- ¹⁹This section draws heavily upon my testimony before the oversight hearings, cited in Note 17.
- ²⁰The major contributions are cited systematically in the full overview and analysis by the ACIR's former Assistant Director, David B. Walker, *Toward a Functioning Federalism* (Cambridge, Mass.: Winthrop, 1981).

- ²¹The full story of this intriguing episode in ACIR history has yet to be written, but see Paul R. Dommel, *The Politics of Revenue Sharing*. (Bloomington: Indiana University Press, 1974) p. 64.
- ²²Anton, testimony before the oversight hearings, cited in Note 17.
- ²³Professor Howard elaborates on these issues in his paper on constitutional change in this volume.
- ²⁴See Robert Hawkins' testimony, cited above, note 17; Scheiber, "From the New Deal to the New Federalism," *New Deal Legacy*; Daniel Elazar, "Reagan's New Federalism and American Federal Democracy" (paper presented at the American Enterprise Institute, December 6-10, 1982); S. Kenneth Howard, "De Facto New Federalism," *Intergovernmental Perspective*, Winter 1984, pp. 4, 49. For a historical model of stages of American federalism's development, see Scheiber, "American Federalism and the Diffusion of Power."
- ²⁵This theme is explored further, below, in discussing of preemption.
- ²⁶Such research formed an essential underpinning to the findings in ACIR's *An Agenda for American Federalism: Restoring Confidence and Competence* A-86 (Washington, DC: U.S. Government Printing Office 1981).
- ²⁷Scheiber, "Federalism and the American Economic Order, 1789-1910," *Law and Society Review*, 10 (1975), 72-100 *et passim*.
- ²⁸See George B. Tindall, *The Emergence of the New South, 1913-1945* (Baton Rouge: Louisiana State University Press, 1967); Scheiber, "Federalism, the Southern Regional Economy, and Public Policy Since 1865, in *Ambivalent Legacy: Southern Legal History*, ed. James Ely and David Bodenhamer (University, Miss.: University of Mississippi Press, 1984).
- ²⁹This conclusion is drawn from data in the Princeton studies, cited in Note 32; and a forthcoming study by Robert P. Inman, "Fiscal Allocations in a Federalist Economy" (provided by author), 1984.
- ³⁰See, e.g., Jane F. Roberts, "States and Localities in 1983: Recession, Reform, Renewal," *Intergovernmental Perspective*, Winter 1984, pp. 10-19. The Commission recently published a full study of cigarette tax evasion and smuggling, a related issue.
- ³¹See Neal R. Peirce, "Amazing Things are Happening," *National Civic Review*, 71 (1982), 518-20.
- ³²For background of the fiscal situation, see John Shannon, "New Federalism: Perspective and Solution," *Governmental Finance*, September 1982, pp. 9-16, and Jane F. Roberts, "States and Localities;" R.B. Lucke, "Rich States—Poor States," *Intergovernmental Perspective*, Spring 1982, pp. 22-28. The Princeton University-coordinated studies are available in unpublished form, as "Effects of the Reagan Domestic Program on States and Localities: Papers for a Conference at the Woodrow Wilson School, Princeton University, June 7, 1984." Subsequent references in the text to "Overview" are to Richard P. Nathan and Fred C. Doolittle, "Overview: Effects of the Reagan Domestic Program on States and Localities." (Processed.)
- ³³Data on inequity effects on Prop. 13 are published in the *San Francisco Chronicle*, 2 October 1984; and are available in various studies sponsored by the Institute for Governmental Studies, University of California, Berkeley.
- ³⁴See Inman, "Fiscal Allocations."
- ³⁵In his testimony at the oversight hearings, cited Note 22, Thomas Anton makes an extended argument for more comprehensive ACIR monitoring.
- ³⁶Justice O'Connor, in dissent, insisted in *FERC v. Mississippi* (102 S.Ct. 2126 [1982]) that requiring certain procedures of the state utilities commission was an undue intrusion by Congress into state administration, "tax[ed] the limited resources" of the state agency, amounted to a "commandeer[ing]" of the state and a form of "dismemberment of state government" that rendered state agencies "bureaucratic puppets of the federal government"! Since two other justices joined in her dissent and a fourth partially dissented, the significance of these strictures for future adjudication should not be minimized. Much of the ma-

jority opinion was given to refutation of Justice O'Connor's strongly phrased opinion, finding her arguments inconsistent and unpersuasive, her readings of precedent in error. Justice O'Connor's strong disposition to leave state authorities alone extends as well to state judges in civil rights matters. See her article, "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge," *William and Mary Law Review*, 22 (1981).

³⁷See Professor Howard's article in this volume for fuller discussion.

³⁸Susan Foote, "Administrative Preemption: An Experiment in Regulatory Federalism," forthcoming in the *Virginia Law Review*.

³⁹On the history of the "tort revolution," see Edmund Ursin, "Judicial Creativity and Tort Law," *George Washington Law Review*, 49 (1981); also "Business's War Against the States," *Fortune*, December 12, 1983.

⁴⁰See the symposium on independent state grounds, *Harvard Law Review*, 95 (1982), 1324ff.

⁴¹Scheiber, "American Federalism and the Diffusion of Power," pp. 669-70.

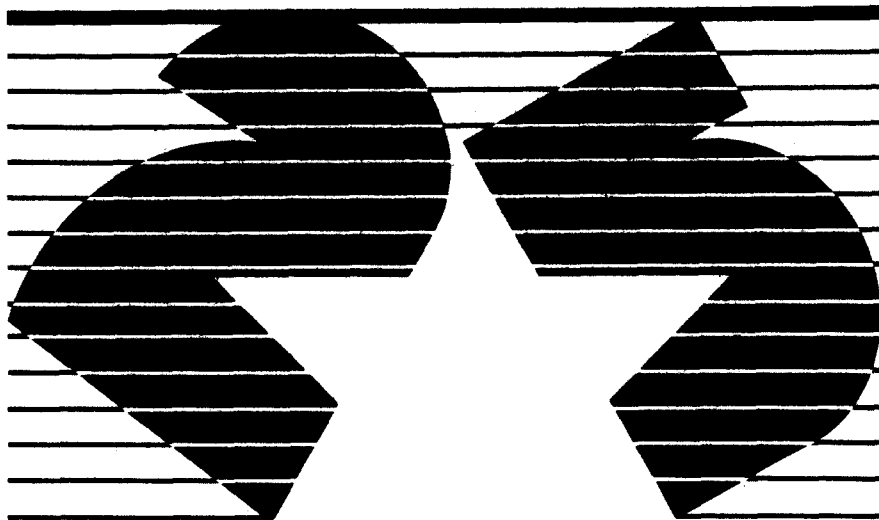
⁴²Peter E. Quint, "The Separation of Powers under Carter," *Texas Law Review*, 62 (1984). No Watergate-style abuses are charged or implied as to Carter.

⁴³"Health Secretary Awash in Adverse Disabling Rulings," *Los Angeles Daily Journal*, 12 September 1984, p. 1 (U.S. District Attorney for New York wrote to 35 district judges that he could not in conscience defend the Social Security Administration's position in many pending cases); *Zimmerman v. Hechler*, 575 F. Supp. 1436 (1984) (Court warns that the government is "close to the line" in the ethics of its litigation); Daniel Skoler, "Hard Times, Soft Justice," *Human Rights* (American Bar Association), 11 (1983), 26-29, 41-44. In September 1984, Congress moved to require a reversal of this litigational policy. (See also "U.S. Flouts Courts," *New York Times*, 13 May 1984, p. 1.)

⁴⁴An important exception is Prof. Lewis Kaden on the adjudicative history of grant-in-aid issues in ACIR, *The Future of Federalism in the 1980s*, M-126 (Washington, DC: U.S. Government Printing Office, 1981) pp. 89-108.

⁴⁵Quoted in ACIR, *Future of Federalism*, p. 120.

⁴⁶Dave Durenberger, "A Resolution of National Purposes," *National Civic Review*, 71 (1982), 521-25. See also Benjamin R. Schuster, "American Federalism: What Has Changed and What Has Endured," *State Legislatures*, September 1981, pp. 22-25; and the reflections of James W. Fesler, interviewed in *New England Journal of Human Services*, Fall 1982, pp. 6-12. For an argument against the Supreme Court's continuing to involve itself as arbiter of federal-state sorting out questions, see Jesse H. Choper, *Judicial Review and the National Political Process* (Chicago: University of Chicago Press, 1982). On how sorting out relates to basic values of federalism, see Harry N. Scheiber, "Federalism and Legal Process: Historical and Contemporary Analysis of the American System," *Law and Society Review* 14 (1980), 664-722. See, finally, articles in a symposium, "Federalism: Legal and Political Ramifications," *Harvard Journal of Law and Public Policy*, 6 (1982), especially the contributions by Charles Fried and Lino Graglia.



Comments

Senator Richard Lugar
State of Indiana

Senator Richard G. Lugar (R-IN) is Chairman of the Senate Foreign Relations Committee. Before his election to the U.S. Senate in 1967, as mayor of Indianapolis, he was responsible for establishing a metropolitan form of government for the city and surrounding Marion County. He served as president of the National League of Cities and vice chairman of ACIR. In the Senate, he played a key role in the legislation approving loan guarantees for New York City and the Chrysler Corporation.



I come this evening with a different point of view with regard to federalism. It comes perhaps from topical experience of the moment. I've read the very fine papers that Professor Elazar and Professor Scheiber have presented already to you today. I profited from them and I think those papers offer a very good historic perspective on the Commission over the years.

My perspective on questions of federalism is shaded by a preoccupation with full employment. It is a preoccupation of one who has been involved in Senate campaigns and prior to that mayoral campaigns—it is a preoccupation which will not abate. I have found that particular issue and that particular index of our national economy to be by far the most politically sensitive and volatile in terms of how well things are likely to go.

As a mayor, I discovered the subject of governmental reform as mentioned by the Chairman. As a matter of fact, in my first year the momentum for change and the mood of the times did allow a city-county consolidation through the legislature of Indiana which required an extraordinary amount of political effort. It remains, to the best of my knowledge, the largest of the city-county consolidations. The political problems that surround consolidation efforts are perhaps even greater than they once were, in terms of racial polarization and all sorts of divisiveness that lead people to want to draw boundaries around themselves. Many of these concerns are justifiable, but in Indianapolis we felt that we could not achieve any degree of racial and social harmony without fundamen-

tal reform. We brought one mayor, one council, and all the tax money on the table at the same time, offering an opportunity to do transportation planning, zoning, planning, and the rest at a local level with what amounted to a city/state of sufficient size in terms of resources and people to be effective.

It was an important step in the history of the city. It remains important, but I have come to a more recent conclusion that, without employment or very low unemployment, our chances to do the sorts of things we wanted to do would be substantially limited. In those days, I felt that we could substantially reduce unemployment by ourselves and we began with that assumption in mind. Also, in those days we had fairly low employment to begin with. As I recall in Indianapolis when I came into office, unemployment was no worse than 4%; in the course of time it even declined to 2%. We had a cadre of key people form a voluntary job corps. It consisted of business and professional people who literally volunteered to work with an unemployed person—taking that person by the hand through job interviews, through the job requirements such as getting to work on time, and helping them through as many as 15 or 20 attempts to gain a job. It was an extraordinary movement. It resulted in a lot of people getting jobs and keeping them. It represented an involvement by our business community and by more affluent citizens with poor people who were not succeeding. That gave us the view that with a local government of sufficient size and enough people who were willing to give of themselves, you

could get a lot of worthwhile things done.

I still think low unemployment is fundamental, but it has come back to me in a different way in the federal service. I look over the items on my desk

... in Indianapolis we felt that we could not achieve any degree of racial and social reform without fundamental reform. We brought one mayor, one council, and all the tax money on the table at the same time . . .

over the last two or three weeks while thinking about these remarks and I find that almost every Congressional district in my state and every large community has come to me asking assistance. They ask for assistance that relates to new jobs or continuation of jobs.

It may be a very large cause as, for example, the tremendous lobbying effort by steel companies and steel workers for a quota on steel. The case for protectionism was presented to me starkly because I come from the state that produces more steel than any state in the country. Indiana is first through default because many mills around the country are closed. When you are a politician in Indiana it is expected that you will be *numero uno* when it comes to protecting steel. However, in this case, it was clear to me that the proposed 15% quota goal would have been a disaster. I said so, and indicated that I thought the President should follow a course that offered the least protection.

Now that does not settle well with people who are in steel and, beyond that, with people who are in communities that have steel. If you were a citizen of Gary, Indiana, for example, which not only has many steel problems but also other serious problems, you might view the federal government and federalism generally in a very different light. Gary is part of the Chicago metropolitan area; it has never developed

a clear relationship with the state of Indiana nor to Lake County which surrounds it. Lake County is predominantly white, whereas Gary is predominantly black. Great attempts have been made by citizens in both the county and the city to keep it that way: to maintain the current distribution of political power. In the days of Democratic administrations, my friend Mayor Dick Hatcher achieved abnormal amounts of federal aid in Gary. In the days of President Ronald Reagan, he has not done nearly as well. Unfortunately, at no time during any administration has employment in Gary grown. Population declined precipitously as well.

The question is: How can federal, state or local officials solve the types of problems that confront Gary? There are 152,000 people in that city living under perpetual economic decline. Moreover, there is little prospect of near-term improvement. Then, to have your local Senator oppose the only legislation that might help the steel industry must seem to be adding insult to injury.

Gary may be an extreme example, but during the last recession it was not the only one. In my state alone, Anderson and Kokomo were usually among the top five in terms of unemployment during those days; they frequently had unemployment reports of 18-22% on a monthly basis. In Indiana there was a strong feeling that all politicians, and Senators specifically, should be doing something to help the automobile industry. The pressure was strong to keep the Japanese out, and to pass domestic auto content legislation so that cars would be fully American made.

In short, as I remember the election of 1982, from vivid personal memory, these appalling figures are indelibly etched on my consciousness. We had a 14% unemployment rate on election day, and an additional 26% of the people of our state said that they felt that they were likely to be unemployed within six to 12 months. In other words as much as 40% of the

population not only saw unemployment as the number one problem, but they saw it in very personal terms—involving themselves as unemployed or very likely to be so in a short while. The prospect of unemployment tended

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to lessen their interest in philosophical discussions on other issues. There may have been discussions about foreign policy from time to time, but there was no discussion of governmental structure or efficiency—that was beside the point, and I fear it is increasingly beside the point.

Out of necessity there is a tremendous preoccupation in Congressional offices with plant closings, new industries, and job opportunities in general. When there is any chance of federal assistance in any form, Senators are expected to call the President or at least Jim Baker at the White House. If that is not done, certainly the least one could expect is that you would have touched base with subcabinet officials and the secretaries of the relevant departments. Failure to do this and more is likely to leave you under suspicion, with numerous comments that you do not care, you lack effectiveness, and probably both.

Just this week, a very fine developer in Indianapolis asked me to call Secretary Pierce regarding a 34-story apartment building near the center of Indianapolis. If you were to ask this person, a very affluent and able builder, why he has not simply borrowed the money and built the building, he would indicate that there are subsidies in various HUD programs and they were meant for him and for others who were clever enough to think of them.

Moreover, he would imply, my failure to be an advocate for this project might cost Indianapolis \$50 million and at least 400 units of housing. It is therefore imperative that I call the Secretary of HUD about this, and in fact I did. Now I don't know what Sam Pierce will do with this sort of thing, but that wasn't the only call that I made. Franklin College, a fine college, found that there was "3%" money available for dormitory renovation. A modest loan of \$1,700,000 was all that they wanted. The school's very determined board of trustees thought their senior Senator ought to be up to that type of thing. All they wanted was a call to the Undersecretary of Education.

Similarly, the rural electrification lobby is now facing the final deadline on legislation it thought was going to be fairly easy to pass. Some of you might like a bill like this for your jurisdiction. The rural electric folks want the government to write off \$8 billion or \$9 billion of debt and also to continue to make below market loans in perpetuity. They suggest that this multi-billion debt is troubling because it might have to be paid back at some point. That sort of hangs a damper over the whole program. Moreover, the thought of paying market rates has never even entered the consciousness of anybody who is involved in this program. I say that as somebody who is a card carrying member of the Farm Bureau of Indiana, certainly a favored son of agricultural interests in our state for a long time. I was the only member of the Senate Agriculture Committee who demurred as our chairman railroaded the whole thing onto the Senate floor. He admitted to me that he didn't really care for it either, but this was not the time or the place to say so.

Students come into my office throughout the year and—as you all know by now—there has been a startling change as our young people are becoming Republicans. I find them to be very heartening and refreshing and it is delightful to talk to them. It is also

true that they are as adamant as ever about more student loans; in other words, they want more of them. They feel that anybody who is pro-education ought to be for this kind of thing. Not only do the students feel this way, but their parents do, too. Middle-class and upper-middle-class parents feel that the poor really get virtually all the help they need, and that education loans are the one middle-class subsidy that ought to be available, especially at the time when all of us are squeezed with kids in college. Since I have two at a university, I run into all these same constituents as I visit my sons. They are not shy about reminding me of the need for this program.

Finally, letters are coming in from people who are shocked that the President vetoed the recent public broadcasting authorization. That bill called for substantially more money for public broadcasting than the President had requested, so he vetoed the measure. My guess is that he probably would sign a bill for something somewhere between his request and Congress' bill. Perhaps we will see some compromise in the next two weeks. Most of the correspondents on this issues are friends from the Rotary Club, the Chamber of Commerce, and from auctions to assist public television. They are people who vote Republican, usually with a vengeance, but who also feel that it is time that Congress stood up for the arts and for public broadcasting in particular.

These are not new stories but they illustrate a preoccupation with jobs. But even when jobs are not directly at stake, there is a general view that if there is a subsidy available you should take advantage of it. Then, as a rule there are programs for doing this and this becomes what politics is all about. Those of you in state government hear these requests from time to time too. If you are county officials or city officials, you are also afflicted with similar requests.

To put this discussion in a federalism context, let us consider an alterna-

tive. Instead of offering federal programs for every local need, we might very well say that if Indianapolis wants a first-class symphony orchestra, Indianapolis ought to pay for the orchestra. If it wants a first-class public transportation system with about a million people in a metropolitan area, then it should pay for that too. If there are farmers who need rural electrification, then they ought to get it, but that there should not be a federal subsidy. As Senator Al Simpson from Wyoming has pointed out, 91% of the people of Wyoming are not in agriculture, but have found a good thing in using the federal rural electrification program to subsidize their electric rates.

In short, we probably all ought to do these things, but not much self-reliance is happening. There has been an enormous hue and cry over the President's preemptory idea of sending back functions and decision making to states and cities.

Although the President's New Federalism plan did not happen, there has been a degree of shifting done through individual bills. I made some notes from work we did in the Housing Subcommittee when I was chairman. In the Community Development Block Grant program we continued to fund the program but eliminated almost all authority for the federal government and HUD bureaucrats to meddle in the decisions of cities. Similarly, the mass transportation program was rewritten to allow much greater flexibility, with local policy decisions actually establishing policy; we increased formula funding by 30%. A new Rental Rehabilitation Block Grant program was passed to help those who are having especially difficult problems renovating multifamily buildings in the cities. The Small Cities Community Development Block Grant program was turned over to the states for administration and by all accounts appears to have been a really great success.

Each of those five accomplishments—and they are just part of what

we have done—was opposed by many, if not most governors, and by a large galaxy of state legislators and local officials. One can say that a major reason for resistance was that the changes occurred at a time of recession; everybody felt that it was like a game of old maid. It was a question of who would end up with the responsibility without the money. One can fault all of the President's federalism initiatives as having come about at a most inappropriate juncture.

I believe it was in Professor Scheiber's paper that he suggested the governors stood up to the administration and said that they will not be pushed around. This is an example of assertion indeed! But what about all the concern about federal preemption I have heard since the days when I was a member of ACIR? This was an excellent opportunity for governors to say we would really like to wrest these powers from the federal government, and we will take all the responsibility you will give up. Some were pleased and ran down the trail with those responsibilities. Others were much more worried about their state treasuries. They said, this is not the time to assume more responsibilities and we resent even being asked to do so. So the redistribution of powers that ACIR has suggested over the course of time happened in part. Some of the courses followed had been

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suggested by ACIR. It is interesting that after all the rhetoric about local decision making and the ability of cities and states to deliver services, when the time came to "put up or shut up" a lot of people decided that, even though

programs might be better off at the local level, now was not the time, not under these circumstances, and not with cutbacks of money. The revenue sharing debate got rough because the fact that there wasn't any revenue to share was especially true with the federal government running a \$200 billion deficit.

In the old days, one could see that there was a deficit but so much money was being squandered that a sensible efficient program could be justified. Revenue sharing passed because the needs of cities and states were very great. They continue to be great but the need is perceived to have lessened. Fortunately, we have not dealt in radical change but incremental change. Elimination of revenue sharing at this particular juncture would have been radically traumatic.

I will continue to vote for revenue sharing forever; it is too deeply ingrained in the system. But at the same time, we are at a point that needs to be noted. The public as a whole has the same ambivalence as always but now it is much more dramatic. On the one hand very clearly 75% of the public is calling for balancing the federal budget. Not all call for a balanced budget Constitutional amendment, although many do, but a very large number feel that the budget ought to be balanced. And as ACIR's surveys certainly must show, and mine do so very clearly, in every category of expense save two from year to year, defense and welfare, a majority also want more spending—not less. They feel that cuts constitute a backsliding in our national commitment. Occasionally, people even want more for defense too, but at the moment they want slightly less. This issue sort of goes up and down, depending upon the world situation.

But never has a balanced budget found the same intensity of support as job issues. Sixty-two percent of my constituents wanted no change in Social Security at all; similarly, no changes in indexing, COLAs, or any

other past hard program. They felt it would be a violation of the public trust. Yet 75% of my constituents thought the whole thing would go bankrupt in two years. If there be a problem here, that is the dilemma we are looking at. To the extent that we get people back to work and the unemployment question begins to recede, there is at least some glimmering hope in my judgment of solving budgetary problems. To the extent it does not recede, I am not optimistic.

I say this not only in a general sense, but also in a partisan sense. I see no way Republicans can thrive over the course of time unless unemployment is low. I see no way Republicans can make substantial changes in the budgetary structure or in the general format without there being reasonable assurance in most states that people will find work and the opportunity to do so will improve year by year. Unemployment has been coming down or, to state it a more optimistic way, the number of jobs has been going up. This country has been unique in sustaining job growth. For example, if we had European friends with us here tonight, they would point out that in the last ten years Europe has had no net gain in jobs. They are frustrated by this lack of growth because their desire to do more for their people has been increasing. The demands of NATO have been constantly upon them and they can't meet those and they will not be able to meet them without economic growth. Even the Japanese have a rate of growth substantially less than our own, and an increase in jobs that is also less than ours. We have a remarkable economy.

I make this point because the President has been criticized from time to time for not being interested in specific programs such as housing. I visited with representatives from the housing industry again this week; I do this more or less quarterly to survey that situation. They said that there is not even a housing specialist in the

White House now. They ask, How can the President and this Administration have compassion for those who need housing if they are not even looking at it? This is a reasonable criticism. The President probably has not spent a whole lot of time in the last three years thinking about housing. The President's rejoinder would be that housing will thrive if inflation stays low, if interest rates go down, and if the country feels reasonably prosperous and optimistic. As opposed to looking at housing specifically or at steel or autos or textiles or whatever it is, the President would argue that true growth will only occur through a substantial change in macroeconomic conditions. Changes in the tax code, changes in regulation, and other changes which allow the market system work. In his judgment we are doing well. The Europeans now feel that there is more merit to this approach than they had thought possible. But even if this is the President's way, even if it is working, let me just say that this approach is met with massive resistance day by day in all the ways that I have already enumerated here and in many more.

In short, in my state of Indiana and across the country, people want to continue to make automobiles, to produce steel, and to farm. They want to do these things precisely as they have always done them. We have made commitments to the farmers through legislation that says, any farmer who wants to continue farming ought to have the right to do so. Woe be it to the person who suggests that the market ought to work, that some people ought to get out of farming. In short, after a number of foreclosures, the word has gone out that lenders ought to be lenient with regard to agricultural loans. This week the President went well beyond that and suggested that the bankers ought to forgive a percentage of the principal, and interest ought to be cut substantially on what remains. In essence, if a farmer can't make it under the terms of his previous

agreement, then we need to change the terms until that farmer can make it. That is a humane, compassionate policy. That is the way it was received although some farmers in my state and many in Iowa said it was not enough,

... we have come to a point that is alarming from a federalism perspective. I know of no way out, aside from a firm determination on the part of persons who are heavily involved in government at all levels to at least examine the problem and to talk about it.

that they are still in too much trouble for a merely humane policy to help much. Whether it is enough or whether it is compassionate, the question finally comes down to one of whether we as a nation should attempt to apply subsidies to allow those employed in unsuccessful enterprises continue as they have, or do we gain sufficient efficiency in the use of capital and the mobility of persons to justify the more difficult courses? I think the latter, although politically I would say that the fairness issue, the compassion issue, is a very strong one and that any policy that is not moderated by compassion is not likely to succeed. My prediction is that any change will be incremental, tempered by those realities, and there will be no change at all unless unemployment keeps coming down.

What has this to do with federalism? I think a very great deal. To the extent that the preoccupation comes with the President and his cabinet, with his advisors, with people such as those of us in Congress who are supposed to whisper in his ear or make phone calls to all of the above, or at least at minimum serve as advocates for each of the groups and persons in our state. We either succeed or fail. The calls that come asking for help are serious. We are hearing now from cities in which over half of their budgets are federal moneys. That is a substantial

change from ten years ago or 20 years ago. We pray that that this situation will change in due course, but it means that if you are a mayor of a dependent city, you spend much of your time in Washington or talking to Washington in the same way a lobbyist or a national union or a national industry does.

In short, we have come to a point that is alarming from a federalism perspective. I know of no way out, aside from a firm determination on the part of persons who are heavily involved in government at all levels to at least examine the problem and to talk about it.

As we look for alternatives to a wholesale elimination of aid to local government, we do not have many options. One option is Social Security. Two years ago, Congress passed legislation which delayed for six months cost of living increases, and raised by two years the retirement age for participants after the year 2000. But I would say, woe be it to the person who really wants to take on Social Security. This is one issue that for obvious reasons is almost impossible even to debate.

Last year, the President thought that he could entertain a flat tax idea or two for a while. He tried them out for size. Then someone asked him, "Does this mean, Mr. President, that interest on mortgage payments might not be allowed totally as a deduction?" Well, the President tried to keep that option open and said, for the moment we needed to look at all options, sort of brushing that one aside, but not for long. The mountain of protest persuaded the President to recant very rapidly. He said, of course, interest on mortgage payments will always be an allowable deduction. Fair enough, but that means goodbye flat tax. It might not have been a good idea to begin with, but I would say people who are still seriously talking about flat taxes and simplification are blowing smoke.

If we face a situation where any change in deductions cannot be debated, then we have really locked ourselves into a difficult problem. One can

say the debate over Social Security is over, although Social Security is a very large part of our national budget and a very large part of the problem of the deficit. We can say the same for mortgage interest payments and with various other deductions. But that will not close the deficit.

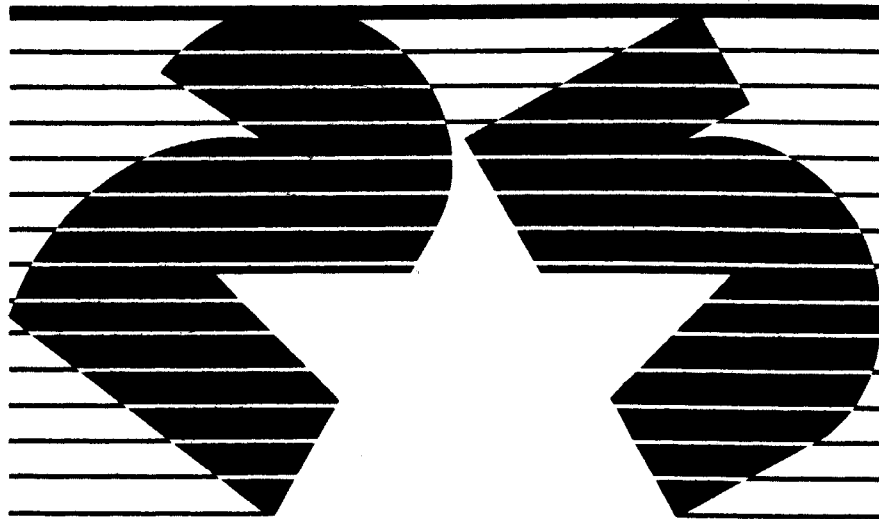
In short, I would hope that ACIR will, as a courageous group of people, look at the unmentionables, the sacred cows. The problem of doing this is the same for you as it is for me. Most of you are office holders, many of you still have political lives to lead (at least I hope so). ACIR might be the terminal event in your otherwise promising public service careers if you bite off too much. But the failure to get into these sorts of issues will likely lead to an unfortunate trend similar to one which I have described in my own personal life this evening. We are always going to have pressures in public life. People will want us to do things. Sometimes there is at least a debate. But at this time I find that there are some issues which are nondebatable and many oth-

ers related to jobs that are nearing that point. Perhaps, jobs, development, full employment ought to be what government is all about. It is certainly a very important part.

But I find that with my constituents jobs have become such an overwhelming issue that our strategy towards the Soviet Union pales in significance in relation to the plans of General Motors.

What will happen to the environment is of interest to some people, and they are often vocal and emotional about it. But that issue pales in significance to steel issues in Gary.

Perhaps those are the issues that ought to highlight our dialogue but others will only come about if they are brought to the floor by people of good will and intelligence such as yourselves. If this is a heavy burden, so be it. The Commission has done so much in 25 years that the next quarter century could be even more challenging if somehow we are guided onto a higher ground of public debate.



Comments

Alice Rivlin
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Alice M. Rivlin is Director of Economic Studies at the Brookings Institution and was the first director of the Congressional Budget Office. She was a staff member of ACIR in 1961-62, when she worked with the late Selma Mushkin on measuring state and local fiscal capacity.



I mentioned to some colleagues that I was going to a retreat on federalism this weekend. Their reaction was: "Oh, do people still talk about that?" It was as if I had said I was going to a discussion of free silver or Seward's folly or "40 acres and a mule." They acted as though "federalism" were a burning issue of a bygone era—way back in 1982! But I will go back to Washington to reassure my doubting friends that intelligent, thoughtful, and otherwise busy people did spend a rewarding day thinking together about our federal system and how it can be made more effective, and what ACIR, which has done so much to make federalism effective over the years, should do in the future.

I believe it is time for a new national debate on our federal system, followed by action to bring our federal structure into better alignment with the evolving conceptions of what people want from their government, the technology of government, and the capacity of different levels to perform their governing functions.

Let me warn you that I am an unreconstructed devolutionary. There are not very many of us. I was reassured this weekend to find that there are more than two. I thought maybe there was only me and Ronald Reagan. I think the President gets very high marks for raising the basic issue of how we sort out functions among state and local jurisdictions and the national governments. Whatever you think of his solution—and not all of it appeals to me—he should get enormous credit for having raised the issue. Candidate Mondale should also get enormous credit for having faced up to the deficit issue and proposed a deficit reduction plan—whatever you think of his particular plan. How's that for bipartisanship?

My own involvement with federalism began in the early 1960s with the ACIR and continued with the White House Task Force, which recommended revenue sharing to President Johnson. That was not a slip of the tongue: the President was Johnson. The year was 1964 and Johnson, not surprisingly, would have none of it. President Nixon picked up the idea of revenue sharing along with some welfare reform proposals that were also originally made to Johnson. These proposals did fit with President Nixon's sense of what the various levels of government should be doing. He thought of the federal government as playing a role in redistributing income among individuals and governments, but not meddling in the delivery of particular services. The Nixon approach was one of the best-thought-out and coherent plans for sorting out governmental functions that we have had to date. Not all of it was passed. Nixon might have returned to it in his second term, if he had not been overwhelmed by Watergate.

I hope President Reagan returns to the question of federalism in his second term, and is not overwhelmed by the deficit question. I anticipate a lively debate on federalism, not only in the second Reagan administration but off and on for the rest of all of our lives. Indeed, I expect to be discussing federalism at the 50th Anniversary of the ACIR in 2009. Indeed, I do not think there is a pure theory of federalism which is going to stand for all times; we are going to have to return to this subject again and again.

Let me cover three topics today. First, what should be the criteria for sorting out the roles of the various levels of government? Second, in what kind of fiscal environment does it seem likely that this sorting out will occur? Third, what thoughts do I have and

did I hear in the last 24 hours about the role of ACIR?

The first approach to sorting out the roles of levels of government is what I think of as the economist's approach, although it was articulated at

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this meeting by my colleague Paul Peterson, who is a political scientist. That criterion has to do with the question of how much the benefits or costs of government action spill over jurisdictional boundaries. Economists think in those terms and believe that if there are big spillovers, there is a strong case for central action. Obviously, there is much truth in that. We can't leave action on air and water pollution or flood control or major long distance transportation and communications networks to local or even to state government. There would be considerable underinvestment in these activities if we did. We would get a lower level of services and a much less coordinated system than people really want and are willing to pay for.

Unfortunately, that criterion does not get us very far. It does not tell us what we ought to do once we have decided that central government ought to do something. Should the Federal gov-

In all of the arguments that have been going on in the past few years about changing the social security system. . . I have not once heard anyone say, 'Let's turn it over to the states.' Nobody wants to do that.

ernment run a program, as we decided to do in Social Security? Or should it only help pay for one, as in Medicaid and AFDC and VocEd and highways. Or should it regulate, as in air pollution and broadcasting? Or should it do

some combination of all of those things?

Moreover, unfortunately, spillovers are neither fixed nor easily measured. I would submit that in the 1930s and again in the 1960s we witnessed a dramatic shift in *perceived* spillovers. Suddenly people began feeling injured or abused by poverty and injustice occurring in other jurisdictions. Many people began to feel that poverty and injustice were national problems. One might hypothesize—I am sure people did at the time—that this heightened consciousness of what was going on in distant places had to do with better communications and education. Perhaps it was related to the spread of radio in the 1930s and television in the 1960s. If that was true, one should expect a steady trend toward centralization, but we have not seen that, nor do I think we will.

The Peterson paper focuses heavily on the tensions that arise when the goals of national programs are not shared by local areas. Peterson is optimistic that these tensions will work out eventually as people get used to each other. Others are less hopeful. In any case, we have been through a period of testing what happens when voters become concerned with what is going on in areas other than their own, particularly with respect to poverty and injustice.

A second possible criterion for sorting out functions among levels of government might be called the "managerial capacity criterion." We are a big and diverse country. We have to ask what kinds of activities are most effectively carried out at the national level, and what are most effectively and responsibly handled at the state or local levels. My own view, one held by many others at one time or another, is that the federal government is especially good at writing checks. It is particularly adept at writing checks to people, which is how we got the social security system as a national program. The federal government collects information

very well. It keeps records very well. It pays checks out reasonably promptly. In all of the arguments that have been going on in the last few years about changing the social security system—changing the benefit levels or the taxes or some other aspect of the system—I have not once heard anyone say, “Let’s turn it over to the states.” Nobody wants to do that. It is generally agreed that the federal government administers Social Security very well and should go on doing it.

The argument for keeping Social Security centralized is not a spillover argument; it is a managerial argument. It is certainly not obvious that the spillover benefits of the social security system are any bigger than the spillover benefits of education. But a nationally run education system would be a managerial nightmare. It would not be possible to run a national system in a country this big and to have accountability and control.

We are also confronted with the question of controversial values. We care deeply what our children are taught and even fight about it. We don’t fight about the fact that the elderly should get some type of check from somewhere. That’s not controversial. The only controversial part is how the amounts are set and how much is contributed.

To some, I was one of them, the lesson of the 1960s was really just this: that the federal government did some things better than others, but was trying to do too much. It seemed sensible to try to concentrate the activities of the central government on basically two roles. One role was where there were clear spillovers, as in pollution and interstate transportation. The other would be to equalize the playing field—as we now say—by reducing the disparities between individual incomes and between jurisdictional capacities to provide governmental services, especially social services. This latter role implied a national presence in income maintenance. It implied a federal floor

under welfare, or perhaps a negative income tax. It probably implied a national minimum for health insurance for low-income people. It further implied revenue sharing or very loosely-structured block grants, but it also implied getting the federal government out of the business of running or writing specific guidelines for services which didn’t fall into the spillover category. That meant that the federal government should not write detailed rules for programs like compensatory education and mental health centers.

If that sounds like Richard Nixon, it should not be surprising. Congressman Fountain reminded us this morning that, although not all of that was explicit in the Nixon proposals, it was there. Only part of it was accomplished. Welfare reform didn’t pass; block grants passed only in smaller versions than had been proposed; and, national health insurance never went anywhere. It was a program advocated by a conservative administration thought to be against the poor, so it got hit by both sides. It was attacked by the liberals who were afraid that it was going to penalize the poor and by the conservatives who thought a national floor under income was about as radical a proposal as they ever heard.

In fact, there is nothing in this division of roles, as there is nothing in the spillover criterion, that tells us very much about the desirable size of the federal budget or the degree of redistribution. We could divide functions along Nixonian lines and have a lot or a little redistribution depending on the national mood. But for those who care most about services to the underprivileged, to believe in this kind of division, they would have to believe also that there will be sentiment for substantial redistribution at the federal level; that what the poor need most is money and not services and that state and local governments are competent and responsive to their full constituency. At that time, the liberals lacked their confidence. They were not fo-

cused on what can be done to further their causes at the state and local level.

I think there is now emerging a third set of criteria—besides spillovers and managerial efficiency—which is coming to dominate the discussion of how we sort out the functions. That is pure decision overload at the federal level. My congressional experience showed me what a terribly hard job it is to be in Congress. It is not easy to be a governor or mayor either, but the range of subjects that the federal government and its legislature have to deal with makes it impossible for anybody to know enough to make wise decisions in all areas. Senator Lugar's speech last night reinforced that point. He spoke of too many programs, too many decision points, too many bills, too many votes, and too many constituents leaning on him.

The Congress has been spending the majority of its time on the budget for the last several years. This is a very serious concern and it ought to be. We now have at the federal government level so much to do that the unimportant problems, like balancing the federal budget, are running the truly hard things off the agenda, such as how to get along with Russians and what to do about Third World development. There are lots of solutions or possible solutions to this problem of overload which do not involve federalism, such as a bi-

better than the federal government—although one could argue that. I advocate this devolution simply because the federal government *can't* do everything; it needs a smaller list of things that decisionmakers have to worry about. Some of the Reagan proposals had this flavor, particularly the swap proposals. The swap proposals simply said, "Look, it doesn't make sense for the feds and state and local governments to be sharing responsibility for Medicaid and AFDC. It doesn't matter how we orchestrate this swap, but if we do this and you do that, everybody will have less to think about." That was not the entire Reagan rationale, but it is surely part of the appeal for any kind of devolutionary scheme.

Unfortunately, as others have pointed out, this cutting of the pie or the marble cake was viewed simply as a transferring of burdens, an effort to shift the costs to state and local governments at a time when everybody was hurting. This swap was not fully accomplished or even partially accomplished and the problem it attempted to resolve continues to persist.

The federal government is going to have to be more and more involved in what goes on in the rest of the world. It is necessary and right that we do so. We've got to give up something. It may be time to turn over pieces of the domestic agenda, like housing and education for instance, to other levels of government.

What can we discern about the environment in which we will be discussing all of this for the next several years? I think we know a lot about it. One thing we know is that the federal budget is going to be under continual pressure; the deficit is large and serious. I haven't lost my hope that we will do something about it in the next session of Congress but even if something fairly substantial is done, the pressure is going to continue for a long time. We already have built in growth for defense spending. There are no signs of easing tensions of the interna-

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ennial budget or the reform of the congressional committee structure.

Devolution would help by clearing the federal agenda of some of its responsibilities. I don't advocate devolution because state and local governments would perform some tasks

tional front. We have the demographics on Social Security turning against the government in the sense of raising the cost over the next several decades. We have given away the goose that laid the

... the consequences of continuing the shift of responsibilities to state and local levels as well as cutbacks in federal spending will not produce government reorganization; it will create the competency of local agencies to deliver services.

golden egg by indexing the tax system. To some extent we have flattened the tax rates so that we are getting less automatic bracket creep as the economy grows.

We know we will have a rising level of education and information in the country, and people caring about government and putting pressure on their legislators and their public officials at all levels. I would expect to see an increasing shift of this pressure from the federal government to the state and local level. It is likely to escalate as time passes, and as we make more and more use of multi-channel television in various ways. We will not just have the Congress on television, but the government. That's the environment in which we are going to be thinking about these things and an environment in which the pressures will be heavy.

We are going to have, and have already seen, that the conversation about federalism hasn't yet caught up with a rising level of competence and professionalism at the state and local level. This will be accelerated, and perhaps already has been, by the cuts in federal spending at the local level and by the slowdown in the increase in the federal workforce which has slowed to a negative growth rate. Bright young people coming out of public policy schools are going to work somewhere; they are going to be beating on the doors of state and local governments. The choice of talent, already vast, is go-

ing to be even more considerable. We will see a shift also in the quality and intensity of the lobbying and the political action at the state and local levels that employs some of the same people.

It may surprise the small government people, but it seems to me that the consequences of continuing the shift of responsibilities to state and local levels as well as cutbacks in federal spending will not produce government reorganization; it will create the competency of local agencies to deliver services. It will also raise the consciousness of the constituents so that they will know where the money is and where they should apply the pressure. So I think those who believe in smaller governments and those who hold out hope that by transferring functions away from the feds to the state and local levels, government will shrink, may in the long run be disappointed. And then, of course, there is the probability that Professor Howard reminded us of, that the Supreme Court will be more conservative over the next few years and will move in the direction of more protection of state and local rights and standards and decisionmaking. We might—"horror of horrors"—also have a Constitutional convention to discuss all of this in a great national forum. I don't think that is likely to be a very constructive way to go about it, but it is certainly not an insignificant possibility at the moment.

In short, I expect ferment over the next 25 years at the ACIR. What role should the ACIR be playing? It seems to me that they have played a very good role and should continue it. In many ways, the important catch words are "nonpartisan" and "credibility." There are lots of roles to be played and you can't do them all. One certainly is to be a forum for debate and a place to assemble information for other governments and for other people involved in this debate. Dick Howard mentioned the need to remind people why the federal system is a good thing and to educate people, including law profes-

sors, about federalism. I would concur. I don't think that being an advocate of federalism in the broadest sense is an inappropriate role; that's what ACIR should be doing. When particular ideologies creep into the debate, we should be very wary. There surely should be a monitoring role of how the federal system is functioning in practice and an in-depth review of the particular aspects of the relationship.

The important debate over the next several years is going to be concerned with the principles on which some kind of allocation of functions or devolution should proceed. We had some discussion of that in the small groups here under the rubric of "sorting out," and I would only underline that sorting out the principles has to come first. What are we trying to accomplish when we try to determine who does what among the levels of government; more specifically how does this sorting out apply to particular domestic questions?

Two other aspects of federalism much discussed at this meeting were: federalism in the courts and the whole area of economic development. Clearly ACIR might play a role in not only studying the impact of the courts on federalism but also in considering how the courts ought to move in particularly complex areas of state and local relationships. Economic development is a potential battleground among states and localities, but it has a more positive side. If states and localities begin competing more and more to get business by improving their services rather than by lowering their taxes—by having better education services or more effective manpower training—there might be major national benefits. ACIR might play a role in seeing what can be done to channel competitive instincts into positive kinds of competition rather than beggar-thy-neighbor policies.

One thing that was mentioned as a high priority was that we have little trust between levels of government. What do we do about that? Mayors

don't trust governors, county officials don't trust the feds, and so forth. There are two ways to go and probably we ought to pursue them both. One is to think about ways of breaking down barriers so that the people are able to talk to each other and communicate with each other better. Some ways of doing that were already mentioned here and might be thought through better by ACIR. But that, of course, goes on the opposite track from the real "sorting out" issues. The other thing to do is to say, "O.K., let's not worry about trusting each other. You do your thing, and we'll do ours." The citizens would be the beneficiary in the end.

Finally, I sensed, after coming back to ACIR after not having had very much contact in the last few years, that the definition of what ACIR is about has broadened enormously and that everybody or most of the people who seemed to be talking about it were seeking to broaden it even more. There were suggestions that ACIR worry about the role of political parties and interest groups and pressure groups at the different levels; what to do about single issue politics; how to approach privatization or alternative service delivery at different levels; how the media impact everything—how they represent federalism and how they affect the different levels of government—and how the Supreme Court is functioning.

This variety of questions and solutions means that you have a terrible problem at ACIR. You can take on the world, you can become the Commission on Intergovernmental Relations and Other Things. That is an undertaking to be thought about and to be strenuously resisted. I will watch with great interest as to how it all comes out. What cannot be escaped and what is a challenge for ACIR is that the federal system is strong. But it can be stronger. We all have different views about how to do that. ACIR has got to be in the middle of the argument or go out of business.

Comments

Neal R. Peirce

Neal R. Peirce is a nationally syndicated columnist on state and local government, contributing editor to *National Journal*, and co-author of *The Book of America: Inside Fifty States Today*. His first book, *The People's President*, dealt with the U.S. electoral college and the direct vote alternative.



There's a temptation when one talks of intergovernmental relations to say that all things go round and round, the old becoming the new again, ancient problems again resurfacing. And sometimes resurfacing in devilishly perverse form.

The distinguished historians of the ACIR remind me, for example, that about the time this commission was authorized in 1959, President Eisenhower's Federal-State Action Committee was phasing out. After three years of struggling with the question of which federal responsibilities, and matching revenue sources, might be returned to the states, it found just one—wastewater treatment grants—and one revenue source—telephone excise taxes.

Well, to measure how far we've come, wastewater treatment, now a \$2.4-billion dollar program, comes up for reauthorization in Congress again next year—it never did make it down to the state level. And the telephone excise tax, reintroduced in 1982, will be debated for reextension if there's a tax bill in 1985.

And so around we go. It is almost 20 years to the day, John Shannon reminds me, that economists such as Walter Heller and Joseph Pechman were looking at the radical fiscal imbalance between Washington and the state and local governments—the prospect of huge federal surpluses matched by deficiencies out there in the states. The solution they proposed was federal revenue sharing, which eventually came into being in 1970.

Yet, what if one of the early ACIR leaders, Rip Van Winkle-style, had fallen into deep sleep in the 1960s and

were to reawaken today? He would find it's now the federal government which has the problem! The order of the day, Brother Shannon tells us in his customarily tart way, is not federal revenue sharing—it is federal deficit sharing.

With all the certitudes that surrounded us just ten or twenty years ago in ruins, you might understand why I was mentally resistant when Ken Howard, in asking me to speak this evening, suggested I look not only to the Constitution's Bicentennial Year of 1987 but all the way through to its 300th anniversary in 2087, to see what our federalism might be like then.

Risking his reprimand, my choice tonight is to view trends on a somewhat shorter time curve. I'll not spend much time on dollars, cents and program-by-program analysis of federalism today; with this group of intergovernmental junkies, the constant readers of ACIR's own reports, that would like carrying coals to Newcastle. Let me risk a larger view, add some cheers and some warnings, and then conclude with a Constitutional proposal for what might be a more secure intergovernmental future.

What would such a future be? One, I think we'd generally agree, characterized by a healthy, viable system of shared and separate powers, one that delivers government services efficiently, one that encourages multiple arenas for political debate and policy experimentation. A system with crisp standards of accountability. A system that allows multiple voices to be heard, yet ultimately leads to consensus and the consent of the governed. A system that

fosters equity with special assistance to people, to communities—indeed, to entire states—that may have come on hard times. We would want an inter-governmental future that fosters state and local governments not only as “the training schools of democracy,” as de Tocqueville put it, but also as arenas in which citizens are empowered, through representative democracy, to make critical decisions about their own futures.

Easy to say; hard to achieve.
Where do we stand now?

After two decades of rapidly expanding federal initiatives, the eruption of the hundreds of grant-in-aid programs that ACIR so amply catalogued and critiqued as dangerous overload of the system, we now face significant cutbacks. We have today in America budget-driven decentralization. It is not the logical and rational course toward reform we might have assumed from ACIR's authorizing legislation a quarter century ago:

[T]o bring together representatives of the federal, state, and local governments for the consideration of common problems, . . . to recommend the most desirable allocation of governmental functions, responsibilities and revenues among the several planes of government.

No, this is not a reasoned sorting out of roles; it is not even President Rea-

gan's heroically ambitious New Federalism initiative of 1982.

stead of expanding numbers of federal aid programs—and dollars in each—and along with all that, a clear but something less than sweeping cutback of the federal mandates, rules, and regulations which sparked such bitter complaint by state and local officials in the 1970s.

In a rough way, de facto federalism is working. One reason: block grants of the first Reagan administration, along with those of the preceding decade. But an even more compelling reason is the resurgence of state and local government over the past two decades. Again, the ACIR has documented that movement—especially the spectacular rise of more professional, constitutionally updated, responsive state governments. The states, once called the “weak sisters” or the “fallen arches” of the federal system, have so developed their broad-based revenue systems that they are today, in John Shannon's words, “powerful fiscal work horses.” In the worst recession since the Great Depression, they showed remarkable fiscal grit by raising taxes and cutting expenditures in a way that put the federal government's fiscal performance to shame. They have done better than their critics ever dreamed on the equity front, some even making up for lost federal social funding. The scope of their activity and frequent innovation, from criminal justice to education, from environmental protection to health cost control, is mind-boggling. And their aid to local governments has risen spectacularly since the '60s.

Candor requires some caveats: Not every state is fiscally resurgent, not every one expert in administering such complex programs as Medicaid, not everyone willing to plunge into innovative policy areas. Many tolerate egregious inequities between the poor rural counties and depressed cities on the one hand and their affluent suburbs on the other. A handful still countenance appalling levels of official corruption.

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Rather, we call what we're getting “de facto” federalism—horrendous federal deficits paving the way for deficit sharing with the states, contracting in-

Still, the bottom line on the states is most positive: Within the context of their divergent political cultures, they have become increasingly reliable pillars of American federalism.

But state strength to the side, is de

On judicial federalism, the best that states and cities can say is that they have gotten a quarter loaf out of the Supreme Court in recent years, with many issues still unsettled.

facto federalism enough? Do we need to go farther? The answer is emphatically "yes." Despite some relief in the last four years, the ACIR continues to list 36 major federal programs regulating state and local governments, some very intrusively. David Walker notes that block grants notwithstanding, nearly four-fifths of federal, state, and local aid still flows through some 300 or 400 categoricals. Congress still loves to preempt and forgets federalist principles in the twinkling of an eye—witness its takeover of trailer truck weights and action under "MADD" pressure to mandate a standard drinking age in all states. Many business lobbies lust for federal regulation to save them the trouble of dealing with the states. On judicial federalism, the best that states and cities can say is that they have gotten a quarter loaf out of the Supreme Court in recent years, with many issues still unsettled. The Court subjected cities and counties to triple damage lawsuits under the *Sherman Antitrust Act*, as if localities were conspiring economic cabals instead of democratic forums of self-governance.

Behind all this lies political change: centralism accelerated by the startling decline of our state and local political parties. In a forthcoming study, the ACIR will suggest there's a direct, causal relationship between the loss of party allegiance and power and the nationalizing trends of American government. Once upon a time, the

study notes, national officeholders owed their election to state and local party organizations. National party conventions were brokered by powerful state political leaders. Congressmen looked first to party in their voting.

But today the mass media, and especially television, have replaced the parties and party-oriented newspapers as the main conduit between candidate and voter. Television has operated powerfully to switch people's attention to the national arena, away from state and local issues. Presidential nominating campaigns are "brokered" by television commentators instead of governors and state party chiefs. Special interest groups have risen spectacularly in numbers, professionalism, and political power. Political action committees use direct mail and allied techniques to mobilize peculiarly national—not state and local—constituencies. Members of Congress develop their own styles and are as politically independent as a cat on a hot tin roof.

There are pluses to all of this. The American political system has become "more open, more responsive, more sensitive to specific issues than in the past." No longer do you have Democratic National Conventions where a Richard Daley speaks for all of Illinois. Brought back to life, such a fabled old Pennsylvania boss as Boies Penrose would not be able to wheel and deal for his Republican organization and the powers of Big Steel and Big Railroads behind it as if he embodied the voice and soul of the Keystone State.

But the downside the ACIR study cites is a tremendously serious one. We are saddled with a system "excessively fragmented, volatile, and hyperresponsive to narrowly defined interests." And what are the potential casualties? Such federalist values are shared power, accountability, and that elusive but incredibly important notion: the common good.

Let us ask: Will other forces emerge to right the political balance, to substitute for the lost balance wheel of

strong state parties? And it is on that score that I am not as pessimistic: In my own reporting for the last decade I have witnessed an incredible outpouring of grassroots initiatives. Community economic development corporations, neighborhood citizen security patrols, tenant-managed public housing, gardening and energy conservation and do-it-yourself, sweat equity housing rehabilitation experiments—all are part of the picture. Neighborhood organizations are forming alliances that permit them to become fully recognized partners in the political and social life of their cities. From confrontational starts, they themselves often evolve into consensus-building forums. City- and metropolitan-wide alliances of business, civic, and government leaders are growing rapidly in number; they tap the public pulse, conduct goals studies, often reach remarkably broad consensus, even taking account of the interests of lower income groups, on which they then evolve strategic plans for their regions.

Participatory management initiatives in industry fit the same pattern. So do several of the themes gleaned from in-depth national polling, which I heard in a Yankelovich, Skelly and White presentation a few weeks ago:

- That the American people are essentially optimistic in mood now, but in a realistic manner, understanding that one can't fix everything overnight.
- That there is today in America a heightened will to win, the Olympic syndrome, less throwing up our hands in despair over the Japanese mystique, and less the 1970s ethic of "let's enjoy first."

In the new competitive postures, merit outshines egalitarianism. The Yankelovich crew sees among Americans a rise of "strategic non-ideological thinking" and willingness to take risks. Openness to any road from here to one's objectives—whether that be the

marketplace, the ballot box through initiatives, or whatever. A new dependence on wit and wisdom, a demand for expertise without the separation of the sectors and their roles we had in the 1970s. A rekindled notion that history and traditions have a role in solving problems. Openness to new networks and alliances, and to public-private partnerships, with more popular attention to state and local government as an arena for empowerment. A belief in the free market and competition, but with some reservations: to invest whatever it takes to save the environment, the gradual evolution of a new social agenda that's far more conservative than what we embraced in the 1960s but still insists on more personal freedom than the New Right's social prescription.

There are, of course, contradictions in all of that; all of us harbor contradictions in our own thinking, and goodness knows the public does. But I don't see in all of this an entirely gloomy future for federalist values. They must compete hard, but they will have a chance.

Connect this, if you will, with the statewide efforts to improve our educational systems and rebuild our economies. You and I might applaud these initiatives because they reflect highly sophisticated forms of partnerships between government and business and nonprofit sectors, because they indicate extraordinary sophistication in our state governments. Led by California, Tennessee, Florida, and Texas, and now joined by a majority or more of the states, school reform efforts have spread with amazing rapidity. On the science and technology front, such states as Pennsylvania, Ohio, Massachusetts, Indiana, New Jersey, Michigan, and North Carolina have initiated what amount to full-fledged industrial policies. And all of this is not just high-tech hype for public relations purposes; it embraces stepped-up R & D capacity of targeted universities, research parks in microelectronics and biotechnology,

science-based business development centers such as Pennsylvania's Ben Franklin Partnerships, the creation of new venture capital funds, and tapping state pension funds to help small businesses form and grow.

Before our very eyes, state governments, and city administrations in such places as St. Paul, Cleveland, and San Antonio and many other places have become entrepreneurial entities. It is a function far beyond their traditional role as service providers, the folks who built the roads, kept the jails, ran the poor houses. State and local officials seem willing—or perhaps one should say obliged—to make themselves accountable on a brand new front: jobs enhancing the state or city economic future. Increasingly they recognize, as Bob Hawkins has written, how high the stakes are: Their future revenues as governments hang in the balance. Jane Jacobs carries us in her new book to an advanced notion of how a nation's economy depends, ultimately, not on macroeconomic manipulation, but on the health of its cities.

Governor Bruce Babbitt suggests that today's enthusiasm for scientific research and technological innovation as keys to economic growth is the greatest since the Gilded Age of the 19th century, save perhaps for the spurt of interest in the post-Sputnik era. It stems from our fear of Japanese competition and our discovery that it is small, not big business that generates job growth. In times past, Babbitt observes, technology had a centralizing impact:

Only massive multinational corporations commanded the resources for large-scale projects such as nuclear power plants, jet transports, and huge mainframe computer systems. Giant corporations joined with big labor and big government to dominate our economic life. Washington and Wall Street make economic policy.

But now, he notes, all that is changing, due in large part to the mi-

croelectronics revolution. Technology job growth doesn't come from the "biggies"; it originates largely in firms that didn't even exist a few years back.

"Central" has begun to lose its grip in economics, even as in government. State-sponsored incubator facilities become part of the wave of the future, just as the Morrill Act and land grant colleges and agricultural research stations were that wave of the future a century past.

Babbitt draws a fascinating parallel between today's educational reform push and the last wave of educational reform, in the late 1950s, when we responded to the Soviets' Sputnik. Then we did it in a "top down" manner through the *National Defense Education Act* and vast outlays of the National Science Foundation. But the reforms didn't last—precisely, in Babbitt's view—because they were "top down" and not supported by sustained public interest and commitment. He is betting that today's reforms will prove more long-lasting. Why? Because they're

... being won at the local level with persistent leadership, intense debate, and widespread public commitment. The reforms are coming more painfully and more slowly, but for precisely that reason they are likely to be more permanent.

If this is what federalism is meaning, and may continue to mean at the grassroots of American life today, we should have great reason to be heartened.

Yet, there are other outstanding, unresolved, important federalist issues. Take state-local relations. How willing are our states to extend New Federalism and the increased discretion and freedom they have won to their counties and cities? The degree of mindless state intervention, of lingering application of the infamous Dillon Rule of the 19th century, is very disturbing. How can we expect a city or county to rise to its potential as a vehicle of self-gov-

ernment if the state grants it only half-baked home rule, or no home rule at all? There has been some progress; many states have stopped imposing unfunded mandates on their localities. But what of fiscal freedom: letting localities impose sales, or income, or any other kind of tax they think they can get away with politically—and competitively in view of what the neighboring jurisdictions do? Stringency means we may be headed into a “pay-for-yourself” fiscal future; one imagines Bob Hawkins is atop the times when he says:

No intergovernmental system can be considered fair or effective that conceals fiscal and political accountability or that causes a mismatch between a government’s responsibilities and its resources.

All the more reason, then, for an urban Magna Carta on home rule and fiscal freedom.

The states, however, need to do a lot more than get out of the way of their cities and counties. They need to share with local government their knowledge of, and contacts in, the international trade and investments field as we move to an increasingly borderless global economy. They need to take a proactive stance in helping troubled areas redo their downtowns and rebuild their economies—the breakthrough idea of a state urban policy, pioneered by Massachusetts in the 1970s. State urban strategies make spe-

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cial sense because success eventually reduces welfare dependency. Perhaps not every troubled city can move as Lowell, Massachusetts, has, from 13% unemployment in the mid-1970s to

just over 3% today. But the potential is immense.

Governors, as the critical leaders in subnational government, can also solidify ties with their cities and counties—earn the loyalty of their localities—by proving their mettle as negotiators with the federal government. They did that most admirably in the precedent-shattering New Federalism negotiations during Reagan’s first term, and later in taking a lead—before it was acceptable to say so in Congress—in urging significant budget cuts in both entitlements and defense. Political differences notwithstanding, I find mayors and county officials less anxious to criticize, more interested in building collaborative relations with their governors and legislatures than four years ago. The road is a long one, but the first steps already taken.

From all of this an exciting vision does emerge. The dynamic compromise that was and is American federalism is taking on new forms barely imaginable when Senator Edmund Muskie and others brought the ACIR to life.

Yet the question must be asked: Is this any time for the intergovernmental community to rest on its oars? Surely not.

This Advisory Commission on Intergovernmental Relations has described itself as “the first official ‘federal’” body created since the Constitutional convention itself. With its regular representation of states, and perhaps most particularly the role it accords local government, the Commission represents an historic advance in bringing hitherto unheard voices into the circles of national policy debate.

But think for a moment about the Constitution of the United States. Nowhere in that great document or its amendments do the words “federal,” “federalism,” “county,” “city,” “town,” or “municipality” appear as much as once. Local government is total non-being within the Constitution. Even in an urban age, Justice William Brennan could write, as he did in the Boulder

cable television case, "ours is a 'dual system of government' which has no place for sovereign cities."

Since 1982, there has been a privately constituted Committee on the Constitutional System, looking towards

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1987 and considering needed Constitutional amendments. In one of that group's subcommittees, chaired by former Congressman Henry Reuss of Wisconsin, an amendment of potentially great interest has been written. Its chief author is Benjamin Read, former president of the German Marshall Fund of the United States. The text is quite short:

Article ____ Section 1. Every decade the President shall convene a convocation to make recommendations to achieve a more cooperative, responsive, equitable, accountable, and efficient federal system.

Section 2. Such decennial convocations shall consist of citizens knowledgeable about intergovernmental relations who are selected in equal numbers by federal, state, and local governments under procedures established by Act of Congress.

Section 3. When a convocation so requests, its recommendations for legislation shall be considered and voted upon promptly by the Congress and the state legislatures.

It's scarcely necessary to underscore the import of such an amendment. Local governments would be constitutionally recognized for the first time in American history: a fitting development at a time when, in matters ranging from foreign trade to techno-

logical innovation, their efforts and success or failure are of substantive importance to the entire nation. The state and local and intergovernmental agenda would be raised to a level of concentrated national attention it has rarely received in American life. The President and Congress would be obliged, at least once in a decade, to join with state and local officials in examining those vital questions that the ACIR has dealt with for a quarter century: How well is the system functioning? What are the new and evolving systemic problems, as separate from economics and health and defense and a thousand and one discrete policy areas that normally preoccupy us? Which level of government should be responsible for what? And how to steer our course on judicial federalism? We continue to face the problem of a Tenth Amendment which provides the courts with only the vaguest outlines for the intergovernmental division of powers and responsibilities. A convocation could and should set down guidelines for the benefit of the judiciary.

A decennial convocation might also dramatize to the nation oft-hidden issues of federalism: gross inequalities between our rich and poor states and the case for a representative tax system; state neglect of beleaguered inner cities; the dilemmas of governing metropolitan areas that sprawl across state lines; proliferations of special districts that undermine general purpose government; and the intense problems that irregular federal budgeting causes for the states and localities. The media would unquestionably devote much more serious attention to these issues than could ever be hoped from regular ACIR meetings. And with the requirement of Congressional and state legislative votes on recommendations, the decisions of the convocation would be well publicized to the nation.

Yet—it goes without saying—I should hope that Congress would make ACIR the staff agency for these decennial convocations. I can imagine the

ongoing research agenda of this Commission oriented to preparation for those meetings. Some of the friends of the ACIR—city and county officials—would see substantive promise for their levels of government in the proposed amendment, and constitute a built-in constituency to press for its passage. And if they decided to do that, they might just succeed, for it is hard to see why anyone's blood would race hot in opposition.

As with any Constitutional proposal, a myriad of questions arise. What is this new animal called a convocation—not a Constitutional convention, not a legislative body, not a court, yet still Constitutionally mandated? And how would delegate selection be accomplished? The President might well designate federal executive branch representatives, majority and minority congressional leaders might choose persons from their ranks, the Chief Justice delegates from the federal judiciary. But how would state representatives be picked? By groups such as the National Governors' Association and the National Conference of State Legislatures and chief justices of the state supreme courts? Perhaps. But what of local government: the National League of Cities, U.S. Conference of Mayors, National Association of Counties? But how about those who don't represent general purpose elected governments: the International City Management Association, or school board officials, or local bar associations?

And then the size of the convocation. The amendment's text leaves the question open; one possibility is 18 persons from each level of government, plus a chair appointed by the President or elected by the convocation. That would add up to the rather neat total of 55, the same number which attended the Philadelphia convention of 1787. There would be questions about the duration of the convocation, partisan balance, and, of course, how the recommendations might emerge: as general principles and guidelines, or

more precise structural or procedural changes, and how Congress and the legislatures could practicably vote on them.

All those questions are resolvable detail. The essential point would be to write the requirement for the decennial convocations into the U.S. Constitution and not settle for statute alone. And for very clear reasons:

First, the Constitutional path would avoid the various legal challenges that could be raised against a convocation created by statute alone.

Second, a Constitutional amendment would dignify each level of our intergovernmental system.

Finally, and most importantly, it would pledge the people of the United States to regular and far more serious effort, as their history rolls on, to mold their system of governance, from White House to town hall, to the changing exigencies of the time.

Do we owe our system of government any less? I think not. Every person in this room, I am sure, has heard Woodrow Wilson's words:

The question of the relations of the states to the Federal government is the cardinal question of our Constitutional system. At every turn of our national history we have brought face to face with it, and no definition of either statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.

I would submit that Wilson's admonition of openness to growth, of the imperative adaptability within the parameters of our wondrously flexible American federalism, will be relevant, and as important as a spur to progress, as long as the system itself shall endure.

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 Council of State Governments, 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.

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

As a continuing body, the Commission approaches its work by addressing itself to 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 the all-important functional and structural relationships among the various governments, the Commission has also extensively studied critical stresses currently being placed on traditional governmental taxing practices. One of the long-range efforts of the Commission has been to seek ways to improve federal, state, and local governmental taxing practices and policies to achieve equitable allocation of resources, increased efficiency in collection and administration, and reduced compliance burdens upon the taxpayers.

Studies undertaken by the Commission have dealt with subjects as diverse as transportation and as specific as state taxation of out-of-state depositories; as wide ranging as substate regionalism to the more specialized issue of local revenue diversification. In selecting items of its work 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 policies.