

Introduction: Work in Progress

by Senator Daniel Patrick Moynihan



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I Each summer for twenty-two years now, I have sat in a one-room schoolhouse up from Pindars Corners in Delaware County and written an introduction to an account of the “balance of payments” between New York State and the Federal government for the previous fiscal year. And that would be about the end of it. The Fisc, as we called it (after the title *New York State and the Federal Fisc*), would be mailed out to Federal, state, and local officials, editorial boards, interested academics. There would be some friendly notices on editorial pages. Once I got a note from President Carter. But otherwise . . . silence.

This was a state of mind: whatever our economic problems might be, they surely had little to do with programs coming out of Washington, or how the programs were being financed. New Yorkers supported those programs; created many of them. If they were redistributive, well that was the idea. Our own resources were surely sufficient; we could take care of ourselves. Then, of a sudden, a short while back attitudes changed. That at least is my impression, and comports with a general view of public opinion, which the great Hungarian scientist and philosopher Michael Polanyi used to propound. “People,” he would say, “change their minds.” But not, as we tend to assume, in rather small increments moving up or down a long curve. No, he would say, suddenly, overnight. Thus, in 1955 everyone in Western Europe went to bed a socialist; when they woke up they had quite changed their minds. (This was said in 1965, but look around Europe today, and you get the idea!)

Doubtless any number of events led to *our* change of mind. I can think of two. Starting in 1992, the work of compiling and analyzing our data was taken over by scholars at the Taubman Center for State and Local Government, part of the John F. Kennedy School of Government at Harvard University. In short order we had superb analyses and graphics. Nothing equivalent had ever been done. In particular, there was a one-page entry for *every* state showing how each had fared the previous year: where it stood as regards Federal tax collection and Federal spending. Of a sudden, the annual report, now named *The Federal Budget and the States*, became an impartial academic study of the sternest standards, and not just special pleading for New York. Indeed, one of the findings was that

our balance of payments deficit ranked 41st in the nation in 1992, a fact that brought forth no small measure of interest in this subject on the part of states that fared even worse than we did.

Next came the great transportation debate. In 1991, Congress passed — and President Bush signed — the Intermodal Surface Transportation Efficiency Act (ISTEA). Its purpose was to proclaim that the Interstate Highway system, proposed by President Roosevelt in 1944 and seriously begun as a Federally financed program by President Eisenhower in 1956, was finished. Completed. It was time to turn our attention to other modes of transportation. (And to settle up. As Senate manager of the bill, I was able to include \$4.9 billion in highway trust fund money to repay New York for having built the Thruway — the first Interstate route — on our own, before there was any Federal financing.)

My House counterpart, Robert A. Roe of New Jersey, was as much or more sensitive to the imbalance of a Federal transportation program that could think of nothing else but to build four-lane highways. Make that six. We developed a city-friendly bill, or so we hoped, and so some commented. Neal Peirce wrote at the time:

After decades of pro-highway, anti-transit policies that skewer cities and waste energy, official Washington seems finally to have done something right. At least the [Intermodal] Surface Transportation [Efficiency] Act just passed by the Senate can be read that way . . . Assume for a moment that instead of the 1956 Interstate Highway Act, the nation had been operating under this kind of balanced, local-responsibility system. At least a measure of the paving over of city neighborhoods — for the massive exurban roads that have drained life and activity from our older cities — might have been avoided.¹

ISTEA was a six-year bill, and so in 1997 we returned to the issue of surface transportation and funding formulas. The Federal transportation program is paid for by gasoline taxes collected at the pump across the country. Officials typically calculate their state's "return" on highway spending by comparing what the citizens and visitors within their borders have paid in gas taxes to what their state receives in Federal transportation dollars. The figures are easy to obtain, as the U.S. Department of Transportation tracks and publishes — monthly! — a tally of gas taxes collected by state.

The low-population western states, which receive far more in transportation funding than they send to Washington in gas taxes, as "lane miles" are part of the allocation formula, do extremely well under the Federal transportation program. More-transit-oriented states, where fewer people commute by car (and hence buy less gasoline) — states such as New York and New Jersey — also fare well with regard to their return on gas tax dollars. In contrast, many of the populous southern and midwestern states, whose residents mostly drive and use relatively little public transportation, make out poorly under that *one* measure.

Of course, return on gas taxes paid fails to capture all the costs that a state's population incurs for transportation. New Yorkers spend the least per capita on gasoline in the country, but spend plenty on train, subway, and bus fares. Furthermore, there are other transportation programs where urbanized states like New York do not fare so well. The U.S. Department of Transportation does not provide a state-by-state breakdown of the amount of ticket taxes collected to support the Federal aviation program, which favors

¹ Neal R. Peirce, "A Policy Paved with Good Intentions," *National Journal*, July 20, 1991, page 1819.

smaller and more rural states. But the Port Authority of New York and New Jersey estimates that New York City's airports see a return of just one (thin) dime on every dollar contributed under the Federal Airport Improvement Program, which provides airport construction and maintenance grants, the revenue for which is collected through a 10 percent ticket tax.

Ironically, many of the states that do the best in the overall Federal Fisc — Virginia, Florida, Missouri, Alabama — have the worst gas tax “returns” and, therefore, fought the hardest to increase their share of highway trust fund dollars. Meanwhile, with Fisc reports in hand, elected officials from states like New York, New Jersey, Connecticut, and Illinois, all with enormous Federal balance of payments deficits, suggested that their colleagues should consider equity across *all* Federal programs, not just transportation. At a field hearing we held in New York City in April of 1997 on the reauthorization of ISTEA, Governors Whitman and Pataki and Mayor Giuliani all cited the Fisc and the *overall* balance of payments in the debate over surface transportation funding.

The Westerners, who worked with us in 1991, formed their own coalition, “STARS 2000,” pledging to “streamline” the Federal surface transportation program and rescue it from the clutches of the “big government” urbanites. They joined forces with the “STEP-21” coalition of Southerners (and some Midwesterners) who were demanding at least a \$0.95 “return” on every gas tax dollar collected in their states.

In the end, while the Southerners and Westerners boosted their share of the transportation dollars significantly (because we boosted overall spending considerably!), the cities held their own. The new bill is titled the “Transportation Equity Act for the 21st Century” — TEA-21. It provides \$218 billion over six years, demonstrating without a doubt that the Federal surface transportation program is in no danger of vanishing anytime soon.

Perhaps the best surprise is that TEA-21 reflects the realization that, dollars aside, ISTEA's planning and programmatic structure works well not only in New York and Boston, but in San Diego, Phoenix, and Atlanta. We held onto all the original ISTEA programs that benefit cities. In 1991, for instance, we created “Metropolitan Planning Organizations” and gave them, for the first time, direct control over how Federal transportation dollars would be spent in cities. We retained that. We increased funding for the Congestion Mitigation and Air Quality Improvement and Enhancement Programs, which provide Federal funds for a range of projects from transit stations to bike paths to historic train depot rehabilitations designed to reduce auto emissions and restore transportation facilities and right-of-ways to public uses. We also increased the funding for “intelligent transportation systems,” such as the EZ-Pass toll collection system, which is already reducing congestion along the Northeast Corridor.

We also managed, through an alliance that included my colleague, Senator D'Amato (chairman of the Banking, Housing, and Urban Affairs Committee, which oversees mass transit), the White House, and urban Democrats, to increase guaranteed transit spending by 50 percent over ISTEA. We were helped in this endeavor by new friends of transit in the Senate, Republicans such as Kay Bailey Hutchison of Texas, Orrin Hatch of Utah, and Gordon Smith of Oregon, who all represent states with rapidly growing *cities*.

II No one is entirely consistent in our line of work, so let me note that having declared the Interstate system complete, we managed to add a new segment in TEA-21. State Route 17 along the Southern Tier will now become Interstate 86.

A little history. It was 1954. Governor Thomas E. Dewey, who was retiring but also campaigning for the Republican nominee, traveled the length of the newly constructed Thruway, stopping for a ribbon-cutting ceremony at every intersection along the way to cheering crowds. As a young man on Averell Harriman's campaign for Governor, I thought this celebration of a magnificent engineering feat — Yonkers to Buffalo and built in under ten years! — would mean defeat for us in November. It very nearly did. Harriman was elected Governor by just over 11,000 votes. This concentrated our minds on public works. We resolved to build the Southern Tier Expressway, as we called Route 17, to Thruway standards.

This was logical. The Southern Tier, after all, was a great industrial corridor developed along the route of the once mighty Erie Railroad. IBM was in Binghamton. Half of all television sets made in the United States were, at that time, made in Elmira. Over in Corning, science was flourishing at that splendid corporation of the same name, and at the surrounding colleges and universities. Jamestown was a manufacturing center with a national market. The Southern Tier needed a transportation network as fine as any in the nation.

Then a hitch. In 1955, the State asked the Federal government to designate Route 17 part of its new Interstate Highway system — a designation sure to bring more business and greater recognition for the Southern Tier. But the tiny Bureau of Public Roads (since grown into the massive U.S. Department of Transportation) sent word back that the *Thruway alone* would be the east-west route across New York State.

The very next year, the Federal-Aid Highway Act of 1956 was passed, creating a highway trust fund drawn from gasoline taxes. The Federal government would now pay *90 percent* of the cost of any Interstate segment. Route 17 was not eligible for those funds.

The problem was clear: either we acted to get Route 17 Interstate status, or decline in the region would be inevitable. The State did nothing. The inevitable came to pass. The rust set in. We have no one to blame but ourselves.

Forty-three years and an untold number of lost jobs later, we have a second chance — I-86. Business will grow and a great industrial corridor may again flourish.

Lest we get too cheerful, I must warn that the task could not be more arduous. The plain fact is that New York has developed a bipolar economy. New York City, Long Island, and Westchester are prosperous right now, due to the financial services industry and tourism, but the rest of the State, not just the Southern Tier, is in prolonged economic malaise.

This spring, Jerry Zremski of the *Buffalo News* produced a stunning seven-part series entitled “Upstate: Downbound” with the subtitle “Once proud and prosperous, region loses jobs, residents.” His first article begins: “Seven years into an unprecedented economic boom, America and its Rust Belt are much richer. But upstate New York resembles another, poorer country.”²

In an August 16 *News* update (“Booming economy is a bust upstate as job growth trails most of the nation”), Zremski reports that job growth in upstate New York's 52 counties — at an annualized rate of seven-tenths of 1 percent during the first half of 1998 — con-

² Jerry Zremski, “Upstate: Downbound — Once Proud and Prosperous, Region Loses Jobs, Residents,” *Buffalo News*, March 29, 1998, page 1.

tinues to “lag badly behind most of the rest of the country” (where the annualized rate is nearly four times higher, at 2.68 percent). In fact, if the 52 counties of upstate New York were considered as a state, only Wyoming and Hawaii would have worse economic performance. According to Zremski (who cites the Bureau of Labor Statistics), “[A]mong the 50 largest metro areas *in the Rust Belt* [my emphasis], Syracuse, Buffalo, and Rochester rank 48th, 49th, and 50th in job creation . . . ”³

The upstate economy threatens to eclipse the downstate economy. *New York Times* reporter Elizabeth Kolbert writes that despite favorable economic conditions in the metropolitan area, New York is 39th among states in job growth and 25th in personal income growth. She notes,

. . . while the New York economy has improved, that improvement hardly seems much to crow about. As Hal Hovey, the editor of *State Budget & Tax News*, put it: “It doesn’t take a rocket scientist to be associated with a national economic recovery. By all these measures, New York is doing worse than other states.” All in all, Hovey, who has spent a lifetime compiling such comparative statistics, ranks New York 35th in a cumulative measurement he calls “economic momentum.”⁴

This past July, the Public Policy Institute of New York State issued a report, *The State of Manufacturing in New York State*. The report begins, “We’re doing better.” I guess that’s because it would be just about impossible to do much *worse*. Between 1989 and 1994, for instance, more than half the states gained manufacturing jobs; New York *lost* 42,820 manufacturing jobs in each of those years, on average. During this period, according to the report, “New York’s factory employment fell below 1 million for the first time since Theodore Roosevelt was in the White House, early in this century.”⁵

Report author Robert Ward parses available data for good news, and there is some, but not much. Manufacturing employment grew in New York from December 1996 to December 1997, the first such increase since 1984. But the national economy is in its *eighth* consecutive year of expansion. New capital expenditures for manufacturing plants in the State totaled more than \$10 billion in 1995 and 1996, a 33 percent increase over the previous two-year period, “one of the largest percentage jumps of any state.” Still,

. . . the news is mixed. New capital investments in New York in 1996 were only 5.9 percent of the State’s existing manufacturing operations (the latter measured by total manufacturing value added). Nationwide, that figure was 9.9 percent. And total shipments from New York factories barely grew from 1995 to 1996, while shipments in all 50 states rose 3.5 percent.⁶

As I mentioned above, it wasn’t always such. I can speak to the transformation. The Southern Tier and the rest of upstate New York were vibrant and growing regions in 1955 when I went to Albany to work for Averell Harriman, who served one term before losing his bid for re-election to Nelson Rockefeller in 1958. As Zremski notes, “In the five years before Rockefeller’s election, the State beat the nation in private-sector job growth three times.”⁷

Then came the most extraordinary job growth in our history, but it was in the public, not private, sector. As Zremski put it, “Rockefeller built an empire.”⁸ He was the kindest of men, surely the best intentioned. But he thought government could do far more than government can do, and thought our capacity to pay for a vastly enlarged government far greater than it would prove to be.

3 Jerry Zremski, “Booming Economy is a Bust Upstate as Job Growth Trails Most of Nation,” *Buffalo News*, August 16, 1998, page A1.

4 Elizabeth Kolbert, “Big State, Big Dreams, Big Talk,” *New York Times*, August 28, 1998, page B1.

5 Robert B. Ward, *A Special Report: The State of Manufacturing in New York State*, (Albany: The Public Policy Institute of New York State, July 1998), page 2.

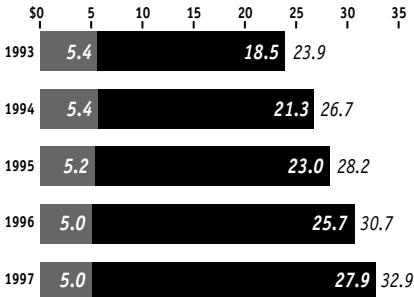
6 *Ibid.*, page 5.

7 Zremski, “Upstate: Downbound,” page 1.

8 *Ibid.*

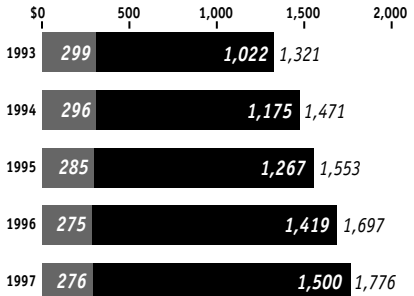
Figure 4

New York's Debt (in \$billions)



Total state-supported debt has increased 37 percent since 1993 and has more than doubled since 1990.

New York Debt Per Capita (in dollars)



Debt per New Yorker has grown from \$1,321 in 1993 to \$1,776 in 1997.

KEY:

- voter approved
- non-voter approved

Source: New York State Comptroller H. Carl McCall, *Comptroller's Report on the Financial Condition of New York State 1997* (Albany, 1997), pages 12-13.

Once a gentle neighborhood of three- and four-story, 19th-century buildings laid like an old piece of velvet across Albany's hills. All since bulldozed to create a fantasy of omnipotent government.

If there is one symbol of the cost of his good intentions it is that ghastly Empire State Plaza — officially named the “Nelson A. Rockefeller Empire State Plaza” — just south of the Capitol. The art and architecture critic Robert Hughes has written of the area,

It is designed for one purpose and achieves it perfectly: it expresses the centralization of power, and one may doubt if a single citizen has ever wandered on its bleak plaza, so out of scale that even the marble facing seems like white Formica, and felt the slightest connection with the bureaucratic and governmental processes going on in the towers above him. This place makes Albert Speer's projects seem delicate. Its meaning is utterly simple: there are no ambiguities. . .

. . . What speaks from these stones is not the difference between American free enterprise and say, Russian socialism, but the similarities between the corporate and the bureaucratic states of mind, irrespective of country or ideology. One could see any building at Albany Mall with an eagle on top, or a swastika, or a hammer and sickle; it makes no difference to the building . . . It is, in essence, an architecture of coercion.⁹

The problem with an *expansive* state government is that it is *expensive*, too. Taxes rose and rose. To cite Zremski one last time: “those taxes don't matter much to the downstate economy. After all, Wall Street and the Statue of Liberty aren't about to move to North Carolina to escape the tax collector.”¹⁰ But manufacturers can, and do. Ask anyone in Syracuse.

Taxes are one thing. At least there's a certain amount of transparency to them. Perhaps the more ominous threat to the State's long-term fiscal health is debt. And the changing way in which it is being incurred.

Prior to 1960, all of New York State's debt was approved by voters through ballot measures and the State was constitutionally obligated to repay it. As the *Preliminary 1958 Annual Report of the Comptroller, State of New York* notes, “[E]xcept to repel invasion, or otherwise defend the State in war, suppress insurrection, and to fight forest fires, New York State may contract bonded indebtedness only with the approval of its people voting at a general election.”

Since 1960, however, the State has relied increasingly on a troubling form of “back-door” borrowing, using public authorities such as the Dormitory Authority and the Urban Development Corp. (UDC), to incur debt for projects and transactions not subject to voter approval, but nevertheless backed by the State's general revenues. The most notorious example was the State's decision in 1991 to “sell” Attica Prison to its own authority — UDC — for \$242 million and use those funds to balance the budget that year, while obligating the taxpayers to cover the debt service on the sale for the next 30 years at an estimated total cost of \$750

⁹ Robert Hughes, *The Shock of the New* (New York: Alfred A. Knopf, 1991), page 108.

¹⁰ Zremski, “Upstate: Downbound,” page 1.

Figure 5

Growth in Debt Service Compared to Available Receipts (in \$millions)

Fiscal Year	Revenue Available for Debt Service	Debt Service Payments	Debt Service as a % of Revenue
1989-90	\$34,520	\$1,577	4.6%
1990-91	34,794	1,511	4.3
1991-92	36,856	1,922	5.2
1992-93	38,452	2,198	5.7
1993-94	40,462	2,266	5.6
1994-95	42,318	2,490	5.9
1995-96	42,617	2,749	6.5
1996-97	43,528	2,827	6.5
1997-98	45,308	3,195	7.1
1998-99	48,591	3,502	7.2
1999-00	49,314	3,877	7.9
2000-01	49,904	4,112	8.2
2001-02	51,491	4,335	8.4
2002-03	53,985	4,452	8.2

Source: New York State Comptroller H. Carl McCall, *1998-99 Budget Analysis: Review of the Enacted Budget* (Albany, 1998), page 46.

million. The *Journal of Commerce* likened the transaction to “selling your arm to your head to raise money for a new pair of shoes.”¹¹

This irresponsible “back-door” borrowing now accounts for a staggering 86 percent of New York State’s debt. New York State Comptroller H. Carl McCall has done laudable work in drawing attention to this trend. In a June 2, 1998 press release issued by his office, he notes,

Although the State has enjoyed surpluses during the past three years, it has also racked up a growing debt burden that will saddle future generations . . . Debt per New Yorker has grown from \$1,321 in 1993 to \$1,776 in 1997 — a 38 percent increase. And virtually all of the growth has been through non-voter approved debt . . . For years, the trend in this State has been to give the taxpayers less and less of a voice in how State debt is issued . . . Right now, less than 20 percent of the State’s indebtedness has been approved by the voters . . .

Where are we? New York State debt, which stood at \$20 billion in 1991, was at \$33 billion in 1997 (of which only **\$5.0 billion** was actually approved by the voters) and is expected to rise to \$42 billion in 2003. In addition to New York’s mounting debt, the State’s public authorities independently owe an additional \$56 billion. (And I suppose we shouldn’t forget the \$45 billion in outstanding debt owed by New York’s counties, cities, towns, villages, school districts, and fire districts.)

New York is on a borrowing spree. The \$33 billion in State debt is 50 percent more than California’s debt, which stands at \$21 billion — even though California has nearly twice New York’s population. New York ranks fifth highest in state-supported debt (backed by taxes) per capita, trailing only Connecticut, Hawaii, Massachusetts, and Rhode Island. New York’s per capita debt (roughly \$1,800) is nearly three times the national average of \$662.

With debt comes interest. Only eight states have higher debt service as a percentage of revenues. New York’s debt service burden, 6.6 percent of revenues, is 50 percent above the national average.

This does not go unnoticed. Only Louisiana has a lower credit rating than New York in both Standard and Poor’s and Moody’s estimation (and this is just with regard to state general obligation bonds). Lower ratings mean greater risk. Greater risk demands a premium. State residents pay more in interest.

This summer, *State Budget & Tax News* graded 44 states’ strategies for addressing budget surpluses. New York was in a class by itself, the only state to receive an “F” and serve as “SB&TN’s poster child for putting future state finances at risk by relying on current good times continuing forever.”¹²

To repeat, these trends are occurring during a prolonged, broad-based national economic expansion. It may be that New York’s persistent balance of payments deficit with the Federal government (which this series was the first to document) is responsible for some of what we are witnessing. But

11 William E. Simon, “Where New York Went Wrong,” *Journal of Commerce*, May 8, 1985, page 6A.

12 Hal Hovey, “State Fiscal Strategies,” *State Budget & Tax News* 17, no. 18, August 28, 1998, page 4.

we should expect no help from Washington. We must get our own finances in order. The situation is near on desperate.

III. I set about reporting on the balance of payments between New York and the Federal government because it is a vital facet of public finance we ought to understand. Mission accomplished? Not yet, but now we do have a national data base on the flow of funds to and from the national government. Call it a work in progress, but well conceived and with an attentive constituency.

Another subject comes to mind: the regional biases, intended or otherwise, of Federal taxation. This is hardly a new subject. It was, in fact, a central issue of early American politics. Government needs revenue. How to raise it?

Article VIII of the Articles of Confederation, which governed the Union after the American Revolution, stipulated that revenues of the Federal government were to be obtained through a levy imposed on each state “in proportion to the value of all land within each state . . . as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.” Well, how do you measure *that*?

In *The Federalist No. 21*, Alexander Hamilton argued that you couldn't. He observed:

The principle of regulating the contributions of the States to the common treasury by QUOTAS is another fundamental error in the Confederation . . . Let Virginia be contrasted with North Carolina, Pennsylvania with Connecticut, or Maryland with New Jersey, and we shall be convinced that the respective abilities of those States in relation to revenue bear little or no analogy to their comparative stock in lands or to their comparative population.

Hamilton even extended the argument to draw distinctions within individual states, noting that “the active wealth of King's County [Brooklyn] bears a much greater proportion to that of Montgomery than it would appear to do if we should take either the total value of the lands or the total number of the people as a criterion!” He concluded,

The wealth of nations depends upon an infinite variety of causes. Situation, soil, climate, the nature of the productions, the nature of the government, the genius of the citizens, the degree of information they possess, the state of commerce, of arts, of industry — these circumstances and many more, too complex, minute, or adventitious to admit of a

Figure 6

Standard and Poor's Ratings of State General Obligation Bonds as of December 10, 1997

AAA	AA+	AA	AA-	A+	A	A-
GA	DE	AL	CT	CA	NY	LA
MD	FL	AK	MT	HI		
MN	KS	AR	ND	MA		
MO	ME	IL	PA			
NC	NH	KY	RI			
SC	NJ	MI	VT			
UT	NM	MS	WV			
VA	OH	NV				
	TN	OK				
	WA	OR				
		TX				
		WI				

Moody's Ratings of State General Obligation Bonds as of December 10, 1997

Aaa	Aa1	Aa	Aa2	Aa3	A1	A2	A3
GA	DE	AL	FL	AR	CA	NY	LA
MD	NJ	AK	MI	CT	MA		
MN	NM		MS	HI	PA		
MO	OH		NV	IL	RI		
NC	WA		NH	ME	WV		
SC			OR	MT			
TN			VT	ND			
UT			WI	OK			
VA							

Source: New York State Comptroller H. Carl McCall, “Reforming the New York State Budget Process,” *Testimony for the New York State Assembly Forum on Budget Reform*, December 15, 1997.

particular specification, occasion differences hardly conceivable in the relative opulence and riches of different countries. The consequence clearly is that there can be no common measure of national wealth, and, of course, no general or stationary rule by which the ability of a state to pay taxes can be determined. The attempt, therefore, to regulate the contributions of the members of a confederacy by any such rule, cannot fail to be productive of glaring inequality and extreme oppression.

This inequality would of itself be sufficient in America to work the eventual destruction of the Union, if any mode of enforcing a compliance with its requisitions could be devised. The suffering States would not long consent to remain associated upon a principle which distributed the public burdens with so an unequal hand, and which was calculated to impoverish and oppress the citizens of some States, while those of others would scarcely be conscious of the small proportion of the weight they were required to sustain. This, however, is an evil inseparable from the principle of quotas and requisitions.

The problem was insuperable under existing constitutional arrangements but, as ever, Hamilton saw a solution in the newly proposed Constitution:

There is no method of steering clear of this inconvenience, but by authorizing the national government to raise its own revenues in its own way. Imposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will, in time, find its level with the means of paying them. The amount to be contributed by each citizen will in a degree be at his own option, and can be regulated by an attention to his resources. The rich may be extravagant, the poor can be frugal; and private oppression may always be avoided by a judicious selection of objects proper for such impositions. If inequalities should arise in some States from duties on particular objects, these will, in all probability, be counterbalanced by proportional inequalities in other States, from the duties on other objects. In the course of time and things, an equilibrium, as far as it is attainable in so complicated a subject, will be established everywhere.

Hamilton, our first Secretary of the Treasury, had his way. For the whole of the 19th century, tariffs were the main source of revenue for the Federal government. (At one point, half the total revenue was collected in the Port of New York, hence the magnificent Custom House at Bowling Green.) In time, though, tariff bills became a matter of intense regional conflict, notably between southern states — which produced cotton and other agricultural products — and northern states — which produced manufactured goods. Bitter battles ensued over whether to impose tariffs on imported manufactured goods (to the benefit of regional economies in the rapidly industrializing North, but to the detriment of Southerners who were forced to pay higher prices for domestic manufactures) or on imported agricultural commodities (with the opposite effect). Don't dismiss this as a source of the regional hostility that led to the Civil War.

This conflict substantially subsided with the enactment of the XVIth Amendment in 1913 (note how the language echoes Hamilton's argument):

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Today, about 60 percent of Federal revenues come from the income tax. Tariffs provide a nominal one percent or so. And yet the tax code surely has biases still. No one of my generation will forget the celebrated oil depletion allowance which was said to have made so many millionaires in Texas. Such biases are hard to figure, not least because they are typically obscured, if not indeed hidden outright.

Let me give an example of a tax advantage *New Yorkers* have recently received. The tax portion of the Omnibus Budget Reconciliation Act of 1987 (how do we think up those names!) contained a provision which forbade the use of tax-exempt bonds issued by a state or local government to finance the purchase of a privately owned public utility. This was a thoroughly defensible measure. But here in New York, Governor Cuomo had seen to the creation of the Long Island Power Authority (LIPA), a public body, for the purpose of purchasing the Long Island Lighting Company (LILCO). This came in the aftermath of the Shoreham nuclear power plant fiasco. There was no way, however, this plan could be brought off if the new Authority couldn't issue tax-exempt bonds. I was then the second ranking member of the Senate Finance Committee, and took our case to the Chairman, Lloyd Bentsen of Texas. He allowed that we sure had made a mess of things. We had. But our situation was on the edge of desperate. There are seventeen states in the Union that do not have the population of Nassau and Suffolk Counties. And none in the continental United States that have electricity bills as high. Accordingly, an exception was made for us. As follows:

Transition Rule. — The amendments made by this section shall not apply to bonds issued —

(A) after October 13, 1987, by an authority created by a statute —

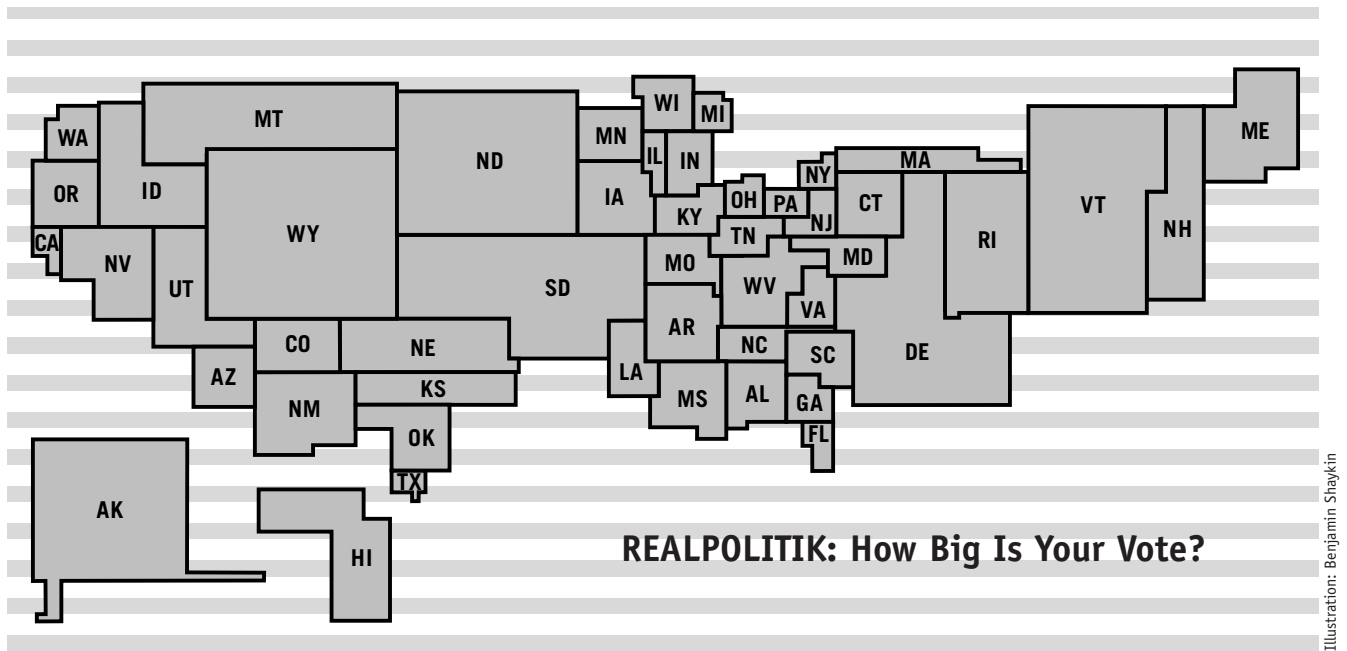
- (i) approved by the State Governor on July 24, 1986, and
- (ii) sections 1 through 10 of which became effective on January 15, 1987, and

(B) to provide facilities serving the area specified in such statute on the date of its enactment.

This arcana allowed LIPA to issue tax-exempt bonds to acquire LILCO, and to provide the rate cuts announced this June. The total cost to the Treasury of the LILCO transaction made possible by this provision is some \$8.2 billion.

The deal, of course, was to have been consummated in a few months. In the end, it took a decade. Which your Senator spent hoping against hope that no Washington lobbyist would spot this transition rule and ask herself, "just what authority was created by what governor on July 24, 1986?" It would have been worth a finder's fee of half a billion for sure, as a new congressional majority would decide to "use" the money in some other fashion. In the end, however, we lucked out. Only to learn later that the top management of LILCO helped itself to \$67 million in bonuses before they closed up shop (and had their LIPA business cards printed). By my lights that was tax money, and they weren't entitled to it. But that is another matter. Soon, Long Islanders should see lower utility rates — no lower than other areas — but no longer ruinously higher.

My point, however, is to suggest that we ought to get interested in this subject. There are more Transition Rules in the tax code than you would think. Unless you have served on the Finance Committee!



This map accompanied Michael Lind's "75 Stars," an essay in the January/February 1998 issue of *Mother Jones* magazine. Reprinted with permission.

Illustration: Benjamin Shaykin

Figure 7

**Realpolitik:
How Big Is Your Vote?**

The size of each state in this map reflects the relative Senate voting power of its citizens: Tiny Rhode Island, for example, dwarfs New York because it has one senator per 500,000 residents, while New York has one per 9 million.

IV. Since tax provisions are something we vote on here, another and far more demanding question we are going to have to address is the matter of apportionment of the United States Senate. Representation in Congress was *the* great issue at the Constitutional Convention convened in Philadelphia on May 25, 1787, and the "Great Compromise" narrowly agreed to was the division of power in the Legislative Branch between a popularly elected House of Representatives, apportioned by population, and an indirectly elected Senate with each state, regardless of size, having two members. It is, perhaps, no accident that the first state to ratify the proposed Constitution was Delaware, then the state with the smallest population. Nor that New York lingered past the point where nine other states had ratified the new Constitution, bringing it into effect automatically.

In the 1994 Fisc, I wrote: "sometime in the next century the United States is going to have to address the question of apportionment in the Senate." As population trends continue to favor coastal states and urban areas over the sparsely inhabited interior of the country, I begin to wonder how much longer we should wait. Writing earlier *this* year, Michael Lind, a richly creative analyst, observed:

Because of our Senate — the least representative body in the democratic world except for the British House of Lords — an ever shrinking minority of voters has the power to obstruct policies favored by an overwhelming majority of the American people. The Senate is the worst branch of government, and it's going to get even nastier in the century ahead.

If democracy means anything, it means one person, one vote — a principle flouted by the Senate's very design, which is based on an antiquated constitutional provision that provides equal suffrage in the Senate for government units (states) rather than suffrage based on the size of the constituency. As a result, a dwindling minority of Americans elects a majority of senators.

California has 66 times as many people as Wyoming — and yet on any given vote Wyoming's two senators can neutralize California's two senators. Texas, with more than 19 million people, has only two senators — as many as Montana, which has less than 1 mil-

lion citizens. New York, the third most populous state in the union, can be outvoted by tiny Rhode Island . . .

This malapportionment favors inhabitants of Rocky Mountain and New England states at the expense of Americans who live in densely populated megastates — not only Sun Belt states such as California, Texas, and Florida, but also states in the Northeast and Midwest such as New York, Illinois, and Pennsylvania. True, big states have more members in the House. But this misses the point: Why should Idahoans be represented in the House and the Senate, while Californians, Texans, and New Yorkers are effectively represented in the House alone? It's not an even trade. The majority of Americans get nothing in return for forgoing their right to democratic representation in one-half of their national legislature.¹³

In a 1997 paper published in the *Journal of Law & Politics*, "The Senate: An Institution Whose Time Has Gone?," authors Lynn A. Baker and Samuel H. Dinkin cite a statistical model to demonstrate the relative power of low-population states vis-à-vis the larger ones in Congress. The population of California is approximately 30 times that of Rhode Island. California has 26 times the number of Rhode Island's delegation in the House of Representatives (52 to 2). Both states, of course, have two Senators. One might assume that California's "power" in Congress is, say, about 13 times Rhode Island's (or the average of its relative power in the House and Senate, respectively). But Baker and Dinkin report that the power of California in Congress is only *7.4 times* that of Rhode Island under simple majority rule, using the "Shapely-Shubik" statistical model that takes into account the ability of the Senators of each state to be the "swing vote" on a particular measure.¹⁴ The result? According to Baker and Dinkin:

First, the Senate systematically and unjustifiably redistributes wealth from the large population states to the small ones. Second, it systematically and unjustifiably provides racial minorities a voice in the Federal lawmaking process which is disproportionately small relative to their numbers. And finally, it systematically and unjustifiably affords large population states disproportionately little power, relative to their shares of the nation's population, to block Federal homogenizing legislation that they consider disadvantageous.¹⁵

Moreover, the Senate possesses institutional mechanisms that further skew representational power. The Senate's deference to the individual prerogatives of each Senator allows any Member to speak on any issue for as long as he or she wants. Only an agreement of 60 Senators to invoke cloture can abrogate the rights of each individual Senator by imposing time limits on floor debate. In practice, this means that virtually no measure garnering less than three-fifths support, or 60 votes, can be passed in the Senate. This, Baker and Dinkin argue, diminishes California's representative power even further, to 1.7 times that of Rhode Island.¹⁶ Put another way, the 40 Senators representing the 20 least populous states (*which comprise just 10 percent of the country's voting age population*) — plus one other Member — can bring the Senate to a standstill until they are accommodated (with more money under the highway bill, perhaps?). That leads to all sorts of policy distortions. For instance, we routinely build "small state minimum" allocations into our grant programs, which skew state-by-state per capita spending. Perhaps there is *some* policy justification for the minimum allocations; most of the time, though, it's simply how you get the votes.

Many of the Founding Fathers were unhappy at the "Great Compromise." Writing in *The Federalist No. 22*, Hamilton put it best:

13 Michael Lind, "75 Stars: How to Restore Democracy in the U.S. Senate (and end the tyranny of Wyoming)," *Mother Jones*, January/February 1998, page 46.

14 Lynn A. Baker and Samuel H. Dinkin, "The Senate: An Institution Whose Time Has Gone?," *The Journal of Law and Politics* 13 (Winter 1997), page 91.

15 *Ibid.*, page 23.

16 *Ibid.*, page 91.

The right of equal suffrage among the States is another exceptionable part of the Confederation. Every idea of proportion and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina. Its operation contradicts the fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and common sense.

During debate at the Convention over whether each state should be granted equal representation in the Senate, or representation in proportion to its population, Benjamin Franklin offered a compromise. He suggested that the type of measure to be considered should determine a state's number of votes in the Senate! Of great interest, given our subject: on spending Treasury revenues, Franklin proposed that states should be allotted votes in accordance with their contributions, saying, "Where a ship had many owners, this was the rule of deciding her expedition."¹⁷

Whether such a bifurcation was practical, or if at all possible, is doubtful. What cannot be doubted is that — even 200 years ago — Convention delegates understood that a lack of proportional representation in the Senate would lead to the systematic redistribution of wealth from heavily populated states to less populated states. (Of course, some embraced the notion!)

When Convention delegates agreed to the "Great Compromise," which left one body purely republican, and the other representing the rights of man as refracted through the prism of states, the ratio of population between the largest and smallest states (Virginia and Delaware) was approximately 11 to 1. Now, the ratio has grown to 66 to 1 (between California and Wyoming), a sixfold increase. And it will continue to grow. The compromise to which we owe our present bicameral legislature was arrived at with the greatest of difficulty — and only then to save the Union. A hard choice for Massachusetts, Pennsylvania, and Virginia, then the most populous states, but probably the best choice possible, considering that each state — regardless of the size of its delegation — had one vote at the Constitutional Convention.

Convention delegates opposed to equal state representation in the Senate harbored no illusions that over time a minority would hold a majority hostage. James Madison of Virginia wrote about James Wilson of Pennsylvania, who appealed to his fellow delegates to use foresight in the determination of representation in the United States Senate:

If equality in the second branch was an error that time would correct, he (Wilson) should be less anxious to exclude it, being sensible that perfection was unattainable in any plan; but being a fundamental and *perpetual error* [emphasis added] it ought by all means to be avoided. A vice in the representation, like an error in the first concoction, must be followed by disease, convulsions, and finally death itself.¹⁸

Wilson was right. The problem perpetuates and no Senator from a low-population state would now vote to remedy it — such would be an act of magnanimity not much seen in public life since Cincinnatus departed Rome.

In that 1994 Fisc, I wrote that the United States Senate is beginning to resemble the "pre-reform House of Commons." Prior to the "Representation of the People Act of 1832,"

¹⁷ James Madison, *Drafting the Federal Constitution: A Rearrangement of Madison's Notes Giving Consecutive Developments of Provisions in the Constitution of the United States, Supplemented by Documents Pertaining to the Philadelphia Convention and to Ratification Processes, and Including Insertions by the Compiler*, compiled by Arthur Taylor Prescott (New York: Greenwood Press, 1968), page 312.

¹⁸ *Ibid.*, page 377.

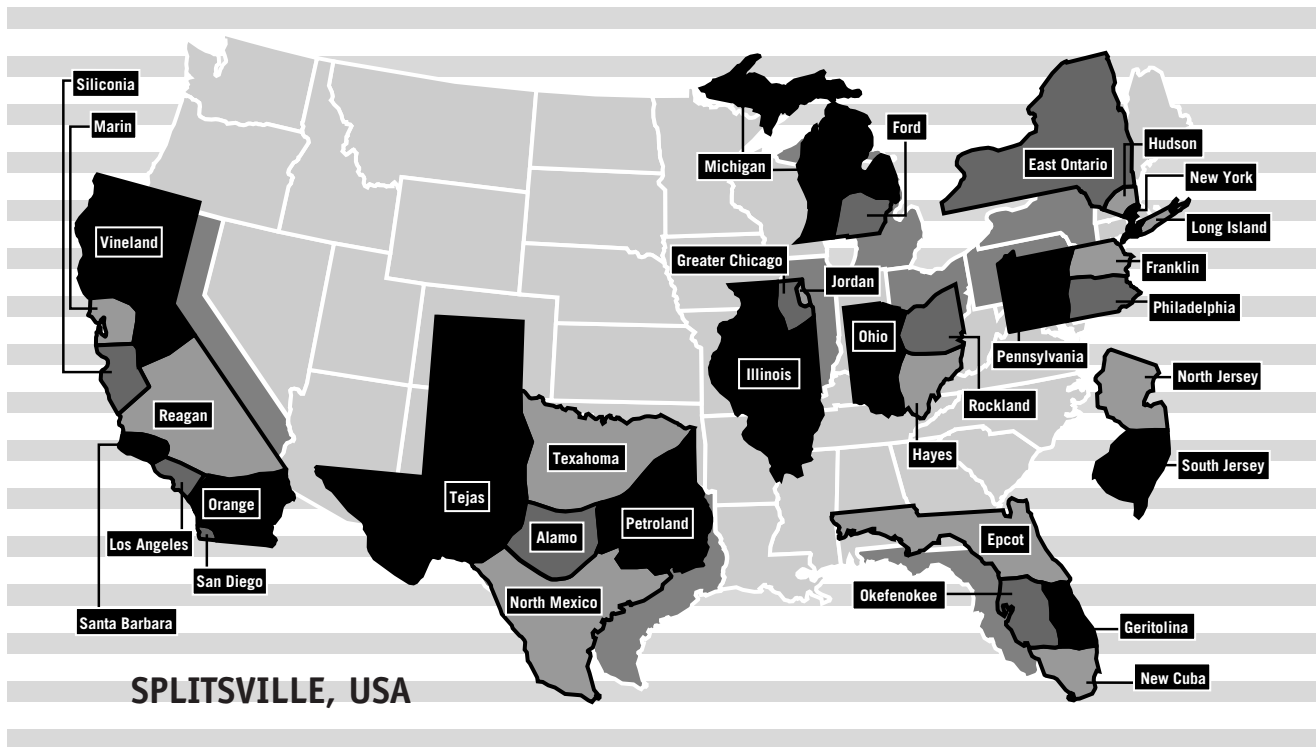


Illustration: Benjamin Shaykin

This map accompanied Michael Lind's "75 Stars," an essay in the January/February 1998 issue of *Mother Jones* magazine. Reprinted with permission.

Figure 8
Splitsville, U.S.A.
 Subdividing high-population states would lessen the disproportionate power of low-population states in the Senate.

representation in the British House of Commons was wholly disproportionate. "Rotten Boroughs" such as the famed Old Sarum, home to seven voters, sent two members each to the House of Commons while the rapidly industrializing, burgeoning cities of Liverpool and Birmingham sent none.¹⁹ With California now inhabited by 32 million citizens and climbing while Wyoming holds fast at fewer than 500,000, "rotten boroughs" are developing in the United States Senate. As you can well guess, Wyoming saw a better return on its dollar for contributions to the Federal Treasury than did California (or New York) — and will continue to do so.

The Constitution — again, drawn up under conditions in which each state had one vote and simple majorities prevailed — offers little remedy. How much longer, however, Illinois, New York, Ohio, Michigan, or California can endure is anyone's guess.

Potential solutions to the this problem — while extraordinarily difficult to enact — do exist. Michael Lind offers an intriguing alternative in another article, "Prescriptions for a New National Democracy," published in the *Political Science Quarterly*.²⁰ Mr. Lind proposes the establishment of a "National Senate," comprised of individuals garnering the most votes out of thousands running in a nationwide election. Individuals seeking a Senate seat would aspire to appeal to citizens on the basis of political views or any number of things that unite people more significantly than do the boundaries of the states in which they reside.

A second possibility is for the large states simply to subdivide, another of Lind's suggestions.²¹ Article IV, Section 3 of the Constitution states that ". . . no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." While we would need a consti-

19 Norman Wilding and Philip Laundy, *An Encyclopedia of Parliament* (London: Cassell and Company Ltd., 1958), pages 490, 500-1.

20 Michael Lind, "Prescriptions for a New National Democracy," *Political Science Quarterly* 110, no. 4 (Winter 1995-1996), page 573.

21 Lind, "75 Stars," page 48.

tutional amendment to create Lind's National Senate, subdividing might only require fifty percent plus one vote in the affected state legislature, the United States House of Representatives, and the United States Senate.²² This issue may arise sooner than I would have thought. Indeed, we could be but one ballot initiative away from the "State of Southern California" and the "State of Northern California," doubtless with more imaginative names. The joint resolution Congress passed in 1845 admitting Texas into the Union allowed for its subdivision into as many as four additional states "of convenient size," subject to the approval of the Texans.²³ They opted for one, but still they could change their minds. I once asked Senator Bentsen about this. His reply was that no one down that way would be able to agree on who would get the Alamo!

V And now for a final suggestion for the already overburdened scholars at the Taubman Center. A study of the cost of Census undercount, as it is called. This summer, I gave a paper at the annual meeting of the American Statistical Society (founded in 1839) on the subject "Data and Dogma in Public Policy." This was the President's Invited Address, and the President, David S. Moore of Purdue University, picked the topic. I made the point that the decennial census, in that it provides for apportionment of the House of Representatives, has steadily been a subject of dogmatic controversy. The 1920 Census, for example, recorded that a majority of Americans were living in cities. This obviously would not do, and the House declined to reapportion itself for the whole of the 1920s. (Which gives us an idea of what Al Smith was up against when he ran for President in 1928.) In recent decades, we have grown increasingly aware of the undercount. This is to say persons the Census Bureau missed. (There is also an overcount, persons with two addresses who are recorded twice.) This situation is not new. We have always missed some persons; overcounted others. What *is* new are the statistical methods of correcting these shortcomings. Which is to say sampling. Simply as an historical note, may I say that 31 years ago, as Director of the Massachusetts Institute of Technology and Harvard University's Joint Center for Urban Studies, I convened a conference in Washington on the topic of the undercount. At that time, Census Bureau statisticians were persuaded that one day they would be able to devise reliable sampling techniques that would correct for the undercount in inner cities. *But they were not there yet.*²⁴ By 1990, the consensus was that it could now be done. The Bush Administration forbade this. Later, we learned that for the first time (we know of) the census was getting *less* accurate: the undercount in 1990 was greater, by half, than the undercount in the 1980 Census. It is within this setting that Congress and the Administration are debating the matter.

A recent Federal court decision held that current law — not the Constitution — precludes sampling in the decennial census. Whilst ordaining it for everyday purposes. The Court may be right, but the outcome is wrong. An August 26, 1998 *Washington Post* editorial put this plainly enough:

Though framed in constitutional and scientific terms, the objections to the use of statistical sampling techniques in the census always have been chiefly political. That sampling tools can produce a more accurate census is a matter on which there is wide scientific agreement. The claims that such techniques would violate the Constitution's requirement of an "actual enumeration" of the population are, likewise, a thin cover for the fact that past cen-

22 Baker and Dinkin, "The Senate: An Institution Whose Time Has Gone?," page 72.

23 *Congressional Globe*, 28th Congress, 2d Session, February 27, 1845, pages 362-363.

24 The report was entitled *Social Statistics and The City: Report of a Conference Held in Washington, D.C., June 22-23, 1967*. The forward was written by Senator Daniel Patrick Moynihan and edited by David M. Heer.

suses have undercounted urban dwellers and minorities. Since the census is used in part to assign congressional districts, the undercount is believed by many to help Republicans, and whether that situation will be preserved is what this fight is really about.

I would say to Republican friends that they do themselves no service by insisting on a Census count that is the equivalent, if opposite, of a stuffed ballot box. The issue goes beyond apportionment in the House of Representatives. Nearly 100 Federal programs allocate funds on the basis of population. If cities are undercounted, city dwellers are deprived of Federal funds to which they are legally entitled (and, in New York's case, which they more than paid for). Which is always and everywhere wrong. And will produce legitimate and needless discord.

In New York, the 1990 Census undercount had little effect on what the State received from Washington. According to Census Bureau estimates, the average state undercount was 1.6 percent, while New York State residents were undercounted by 1.5 percent. But nearly all of New York's undercount took place within New York *City*. The Census Bureau estimates that the City's undercount was 3.2 percent, which translates into approximately 240,000 City residents. The New York City Department of Planning estimates that the City's undercount was actually closer to 450,000 residents.

Speaker Peter Vallone of the New York City Council has prepared an estimate of how much the Census undercount has cost the City in terms of formula grants. The Council estimates that lost revenues over ten years (from Fiscal Years 1991 to 2000) from just the few grants listed below will equal approximately \$415 million. The hardest hits are to children. The Council estimates that the City has lost out on \$169 million in Chapter I education aid, \$48 million in Federal day care funds, and \$42 million in Head Start funds. The City has also missed out on \$95 million in Community Development Block Grant funds, \$42 million in Job Training Partnership Act Funds for job training and summer jobs for youth, \$15 million for meals and services to the elderly distributed under the Older Americans Act, and \$4 million for emergency shelter grants.

Great credit to Speaker Vallone. If the 2000 Census is no more accurate than that of 1990 — or worse — such studies should become regular exercises for city governments. And regular subjects of congressional debates.

POSTSCRIPT

In the introduction to last year's *Fisc*, I related the events that led to our challenge of the Line Item Veto Act (a principal measure of the Republican Contract with America in the 1994 election), later passed by the House and Senate and signed into law by President Clinton on April 9, 1996. Senators Robert C. Byrd (D-WV), Mark O. Hatfield (R-OR), Carl Levin (D-MI), myself, and two members of the House filed suit in Federal court challenging the constitutionality of the measure. We were promptly upheld by the United States District Court for the District of Columbia but then, alas, by a 7-2 decision the Supreme Court ruled that we did not have "standing," a legal term meaning that we could show no personal injury. In the meantime, President Clinton had exercised his veto to strike a measure which would provide New York with \$2.6 billion in Medicaid reimburse-

ments. As it was to later in the highway bill debate, the Fisc came to the fore. Here is my comment from last year:

The President's veto caused something of a shock in New York. For the first time since this series began, public officials in large numbers began to cite the balance of payments issue with conviction and *feeling*. Editorial comment was no less firm, and equally informed. We now have *numbers*.

Governor George E. Pataki weighed in:

"We are not going to sit back and take this," vowed Pataki, who pointedly noted that last year the Empire State sent over \$17 billion more in taxes to Washington than Uncle Sam returned in spending. (*New York Post*, August 12, 1997.)

So, too, did the Mayor:

(New York City Mayor Rudolph W.) Giuliani said the veto was especially unfair because "we send \$14 [billion] to \$18 billion more to Washington than we receive back. There's no possible way in which the Federal government is subsidizing New York's Medicaid. It's the other way around." (*Daily News*, August 12, 1997.)

And this from the *New York Times* editorial board:

New York is routinely shortchanged in budget battles. The provision protecting its Medicaid reimbursement practices would modestly restore some balance. Mr. Clinton's veto rights no wrong. (*New York Times*, "Line Item Mischief," August 12, 1997.)

A happy, if unanticipated, consequence of the President's decision to use the line item veto on a measure designed to help New York is that now, surely, there will be a lawsuit that will challenge the measure's constitutionality. All manner of New Yorkers have "standing"; they have suffered injury. The Court was explicit that in such a case, the Act was open to "constitutional challenge." Let the Governor sue. The Comptroller. The Speaker. Mayors. Hospital administrators. Nurses' unions. I shall be honored to join in!

Sure enough, New York City, in the company of the Greater New York Hospital Association and two unions — Local 1199 of the National Health and Human Services Employees Union and District Council 37 of the American Federation of State, County, and Municipal Employees — sued. Senators Byrd, Levin, and I filed a brief as "friends of the Court" (*amici curiae*). And sure enough we were right.

In February of this year, the U.S. District Court again ruled in our favor. And on June 25, 1998, in a 6-3 decision, the Supreme Court affirmed, holding that the Line Item Veto Act was indeed unconstitutional. In his opinion for the majority, Justice John Paul Stevens wrote that the Act violated the "presentment clause" of Article I, Section 7 of the Constitution, which states:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; if he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . .

The Line Item Veto Act conflicted with this constitutional provision because the Act impermissibly granted the President the power to repeal portions of duly enacted statutes.

In a powerful concurring opinion, Justice Anthony M. Kennedy wrote that the Act was a threat to the separation of powers — and, therefore, to liberty. Justice Kennedy wrote:

Liberty is always at stake when one or more branches seek to transgress the separation of powers. Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty . . . It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened. Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.

Curiously, the Court's decision did not get the attention it deserved, or so I felt. Of necessity, the Court simply ruled that the "presentment clause" had been violated. The President signs a bill or vetoes a bill; he has no power to change it. Congress makes the laws. But the real issue, as I saw it, was not the *actual use* of the veto; rather, it was the *threat* of its use. A President says to the Senator from New York, "I know you New Yorkers pay too large a share of Medicaid expenditures, and I want to help you. I really do. And I can. But, you know, I really need your help on my NATO enlargement treaty. Surely you can help *me* on this." And so it would go, year after year, until the constitutional balance of power between the legislative and executive branches would be unrecognizable. A great Washington lawyer, advisor to Presidents, a Democrat, commented to me that if Lyndon B. Johnson had that veto, "we would have had Nero."

Pindars Corners
Summer, 1998