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# Popular Government

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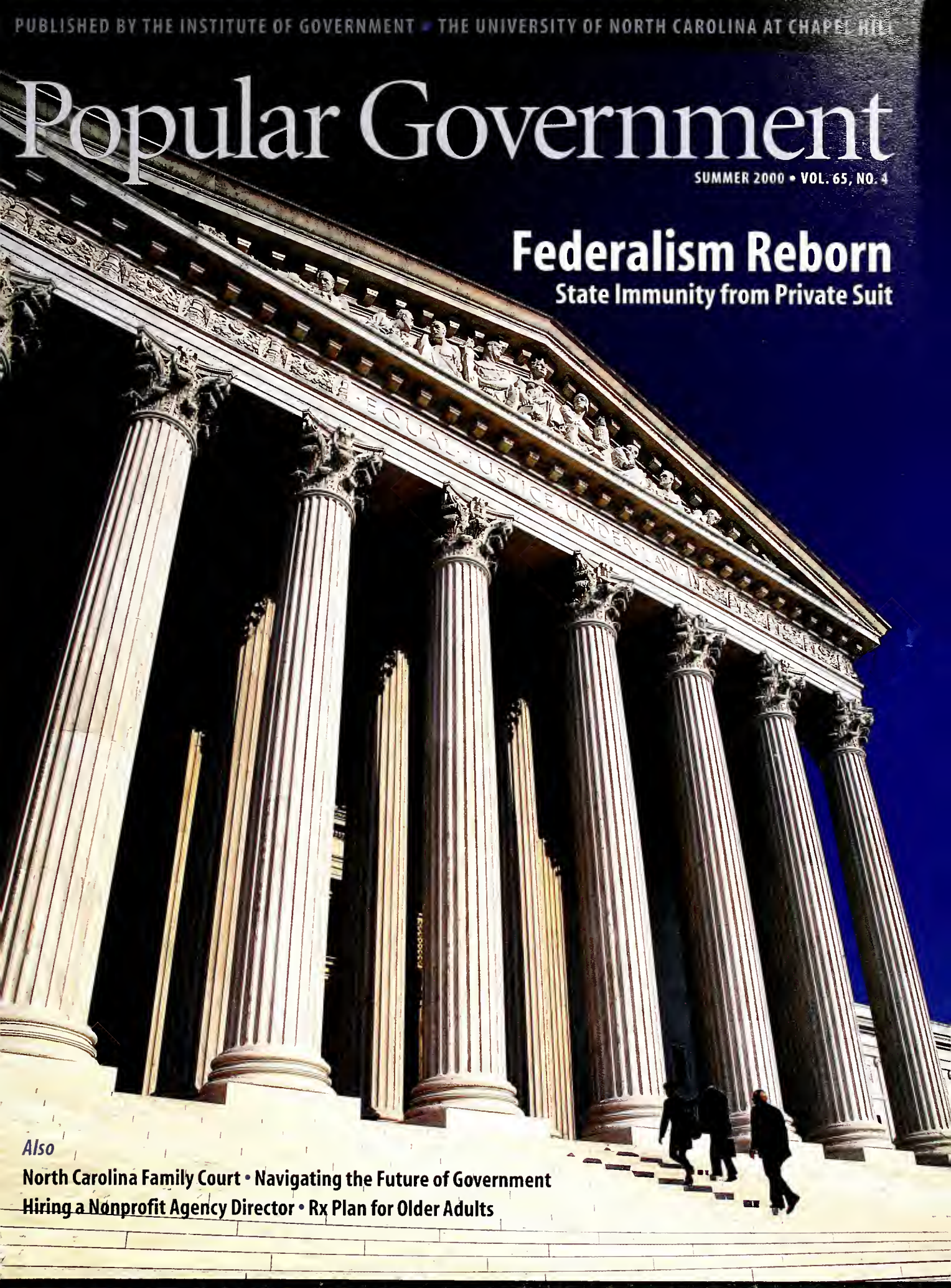
## Federalism Reborn

### State Immunity from Private Suit

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# Popular Government

SUMMER 2000 • VOLUME 65, NUMBER 4


Page 2


Page 15


Page 21


Page 37

ON THE COVER
Entrance to the U.S. Supreme Court

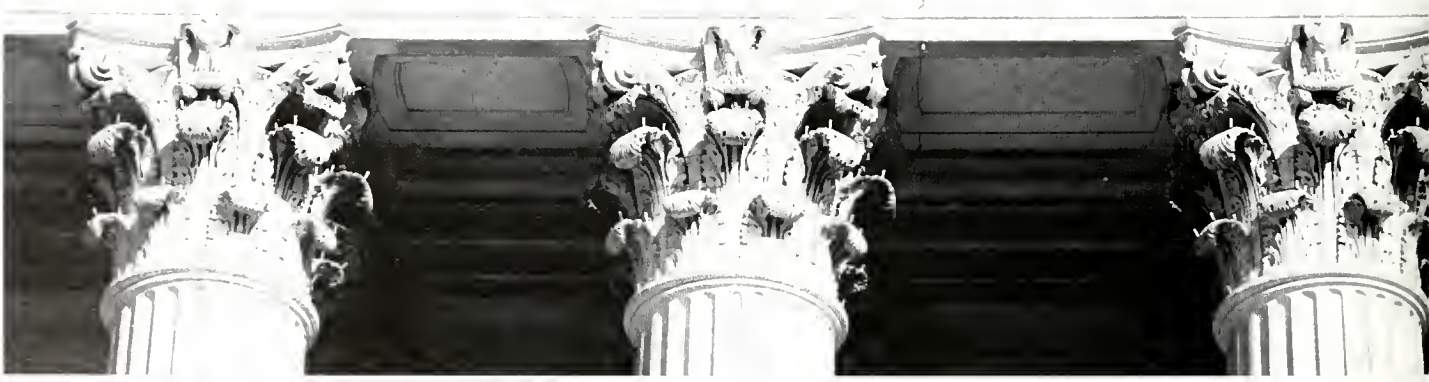

## COVER ARTICLE



## FEATURE ARTICLES



## DEPARTMENTS







COVER ARTICLE

Anita R. Brown-Graham

# When You Can't Sue the State

## STATE SOVEREIGN IMMUNITY



Most people believe that, for every legal wrong, there is a legal remedy. In fact, as far back as 1803, in *Marbury v. Madison*, the U.S. Supreme Court wrote, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[1] For the past eight years, however, the Court, in several sharply divided decisions, has significantly restricted both the federal government's ability to provide remedies for wrongs committed by state governments and individual citizens' ability to use the courts to enforce remedies against state governments for violations of federally guaranteed statutory rights.[2] Each of the decisions on the right to enforce remedies has been decided by a five-person majority consisting of Chief Justice William Rehnquist and Associate Justices Anthony Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas. Associate Justices Stephen Breyer, Ruth Bader Ginsburg, David Souter, and John Paul Stevens have dissented. This article describes the law on state sovereign immunity before and after the Court's recent decisions and discusses the effects of current law on various areas, particularly employment law.

The Court announced the most recent barrier to relief on January 11, 2000, when it held, in *Kimel v. Florida Board of Regents*, that state employees are barred from bringing suit against the state for violations of the Age Discrimination in Employment Act of 1967 (ADEA) (for details, see the sidebar on page 4).[3] The ADEA is a federal civil rights statute that makes it unlawful for an employer, including a state, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."[4] Despite clear evidence of Congress's intent to hold states, like other defendants, liable for violations of the ADEA, the Court held that states could not be subject to suit for monetary damages by individuals. The Court based its decision on the notion of "federalism"—that is, the need to balance the supremacy of the federal government against the autonomy of individual states.

The Court's decision in *Kimel* follows on the heels of its "federalism trilogy," three cases decided at the end of the 1998–99 term. In *Alden v. Maine*, the most important of the three cases, the Court held that state employees could not sue their employer for overtime wages, notwithstanding provisions of the Fair Labor Standards Act requiring payment for overtime.[5] In the two other

*The author is an Institute of Government faculty member who specializes in the civil liability of governments and their employees or officers.*

cases—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board* (hereinafter *Florida Prepaid I* and *Florida Prepaid II*)—the Court held that a state could not be sued for infringing a patent or for engaging in false advertising in violation of federal law.[6]

Several years earlier, the Court had foreshadowed its federalism trilogy in *Seminole Tribe of Florida v. Florida*. In that case the Court found that an Indian tribe was barred from bringing an action against the state of Florida or its governor in federal court under the Indian Gaming Regulatory Act.[7]

The impact of the Court's recent federalism cases is significant. One commentator has observed,

> *For the last 212 years, Americans have been able to sue state governments for violating federal laws and inflicting injuries. There has always been some judicial forum available for redress. The result of [the Supreme Court's recent cases] . . . is that states often can violate federal law with impunity and not be held accountable.*
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> . . . .
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> *The decisions mean a state laboratory can dump toxic wastes in violation of federal laws and those who become ill will have no recourse. A state university can violate copyright laws by making copies of a book and selling it to students for a few dollars less than its usual price, profiting at the expense of the publisher and author. States can ignore patent laws, violating the rights of inventors and patentholders, and no court will be able to grant relief.*[8]

The five justices of the Supreme Court who authored the recent federalism cases believe predictions that states will knowingly violate such laws to be overstated. The four justices who have constituted the minority in each case contend, however, that "the importance of the majority's decision[s] . . . cannot be overstated."[9] Indeed, despite a curious unwillingness to concede that the decisions will affect state conduct, or more specifically state compliance with the federal laws for which private individuals may no longer hold the state liable for violations, even the justices in the majority acknowledge (or perhaps forewarn) that the recent federalism decisions will broadly affect many kinds of cases.[10] The nature and the extent of the impact remain to be seen.

## The Rebirth of Federalism

The Supreme Court has defended its recent decisions and their potential impact on people wronged by state governments on the ground that each case's result was compelled by federalism. Issues of federalism arise because the U.S. constitutional system contemplates two levels of government, federal and state, with states playing a central role in the essential functions of the nation. For decades, jurists and academics have grappled with defining federalism and delineating the respective roles of the federal and state governments. The Court's recent federalism decisions not only have expanded state autonomy but also appear to interpret federalism as a nation of dual sovereignty consisting of coequal levels of government.[11]

Controversy over the meaning of federalism is not new. In the 1700s the nation's founders heatedly debated the need to define and protect the position of states relative to the federal government. Throughout the 1800s Southern states repeatedly invoked states' rights in an effort to preserve first slavery and then segregation. In the 1990s and into the year 2000, the Court has again revived debate about the fundamental nature of American federalism. Yet despite a perhaps valiant effort to develop a principled and workable doctrine, the Court has generated more questions than answers by its recent decisions.

The question that immediately arises with each new federalism decision is "What is the effect on Congress's ability to regulate states?" The question can be approached in either of two ways. In the first approach, the inquiry is "whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution [the commerce power]." In the second approach, the question is how much protection states enjoy from congressionally imposed

# Kimel v. Florida Board of Regents

### *Analysis of the January 2000 federalism case decided by the Supreme Court*

On January 11, 2000, the U.S. Supreme Court held that the Eleventh Amendment to the Constitution barred state employees from bringing suit against their employer for violations of the Age Discrimination in Employment Act of 1967 (ADEA).[1] The consolidated case facing the Court—there were actually three cases—involved employees of the states of Alabama and Florida. All three cases presented the same issue, on which the federal courts of appeal could not agree: can a state be sued for violations of the ADEA?[2] The Court's response in *Kimel v. Florida Board of Regents* settled the conflict among the lower courts but sparked contention that the Court had sounded yet another death knell for the right of private citizens to sue states for violations of federal statutes.[3]

## The Cases

The first case involved a group of then-current and former faculty and librarians of Florida State University and Florida International University, including J. Daniel Kimel, Jr., the named petitioner in the Supreme Court case. These university employees, all over age forty, filed suit against the Florida Board of Regents complaining that the board had failed to require the two universities to allocate funds for a previously agreed on market adjustment to the salaries of eligible university employees. The salary adjustments, which were aimed primarily at equalizing the pay of older faculty with that of newer faculty, were withheld for two years as a cost-cutting measure. The plaintiffs contended that the failure to allocate the funds violated the ADEA because of the disparate impact on the base pay of employees with a longer record of service, most of whom were older.

In the second case against the state of Florida, Wellington Dickson filed suit

legal control by the courts.[12] (For a discussion of the effect on local governments, see the sidebar on page 11.)

## Federalism and the Tenth Amendment

In the first approach, the issue has been whether federalism protects states from federal legislation enacted pursuant to the national government's commerce power. Beginning in the New Deal era, this inquiry into states' *freedom from regulation* became mostly a formality because, consistent with this period of strong nationalism, Supreme Court decisions virtually transformed Article I's Commerce Clause into a blank check for Congress to regulate any state activity that "affected interstate commerce."[13]

Any inquiry into whether an act of Congress is authorized by the Commerce Clause must be considered against the backdrop of the Tenth Amendment to the U.S. Constitution, which provides that "[t]he 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."[14] On occasion the Court has used this provision to invalidate acts of Congress.[15] However, not until fairly recently has the Court shown signs of putting permanent teeth into the Tenth Amendment inquiry.

In 1992 in *New York v. United States*, the Court blocked federal legislation that required states either to regulate the disposal of radioactive waste according to instructions from Congress or to assume legal responsibility for the waste. The Court's language in this case reflected the justices' new orientation toward federalism. The Court held that the Tenth Amendment prohibited Congress from "commandeering" states to carry out federal purposes by forcing them either to regulate against nuclear waste dumps within their borders or to accept ownership of nuclear waste.[16]

Then in 1995, in *United States v. Lopez*, the Court held that a provision of the Gun-Free School Zones Act that prohibited possession of a firearm within 200 yards of a primary or secondary school exceeded Congress's reach under the Commerce Clause.[17]

Two years later in *Printz v. United States*, following its reasoning in the 1992 *New York* case, the Court found unconstitutional a provision of the 1993 amendments to the federal Gun Control Act of 1968 (the Brady Act) that required local law enforcement officers to run background checks on certain categories of gun purchasers. The Court made clear that the Tenth Amendment prohibited Congress from directing the functioning of state executives, and that the effort to do so under the Brady Act compromised "the structural framework of the dual sovereignty. . . ." Again, the Court stressed that congressional "commandeering" of state resources and usurping of state sovereignty would not be tolerated. The Court explained, "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly."[18]

After *New York*, *Lopez*, and *Printz*, Congress may not rely on the Commerce Clause to (1) regulate state conduct that does not significantly affect interstate commerce or (2) discriminate against states by subjecting them to regulation not generally applicable to other entities. All three freedom-from-regulation cases are important to this article, not because of their individual holdings but because of the increased concern they reflect for state autonomy.

## Federalism and the Eleventh Amendment—Sovereign Immunity

The second view of federalism, which is more directly the subject of this article, assumes that states enjoy a *freedom from suit* by individuals seeking monetary damages as compensation for violations of federal statutes. This freedom-from-suit inquiry, used to a more limited extent in the past, has become very prominent in recent case law.

In each of the five recent freedom-from-suit federalism decisions, both the majority and the dissenting opinion devote considerable attention to constitutional history, particularly the history and the development of the Eleventh Amendment to the U.S. Constitution. That amendment states, "The Judicial power of the United States shall not be

*During the upcoming term, the Supreme Court will hear arguments on its first "federalism" case involving the Americans with Disabilities Act. Some lower courts have found immunity; others have not.*

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against the Florida Department of Corrections alleging that the state refused to promote him because of his age and because he had filed grievances regarding the state's alleged acts of age discrimination. Dickson sought back pay and compensatory and punitive damages.

In the Alabama case, the employees were two associate professors at Alabama State University, aged fifty-seven and fifty-eight at the time they filed their suit. The professors alleged that the university had (1) discriminated against them on the basis of their age, (2) retaliated against them for filing discrimination charges with the Equal Employment Opportunity Commission, and (3) employed

construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or the Citizens or Subjects of any Foreign State."[19]

The language establishes sovereign immunity for the states and reflects several policy considerations inherent in dual sovereignty: the need to protect a state's financial integrity; an unwillingness to place an undue burden on a state's ability to apportion scarce resources according to the will of its citizens; and a reluctance to distort a state's separation of powers by impermissibly tipping the balance toward its judiciary.[20] As courts balance those considerations against notions of state accountability, the need for uniformity of laws, and federal preeminence, a fluid framework has resulted. It is a framework that is susceptible to change as the composition of the Supreme Court changes.

### Sovereign Immunity before the Rebirth of Federalism

The body of law on the Eleventh Amendment has never been a model of clarity. It has always been characterized by fictional features and fairy-tale distinctions. Yet, before the rebirth of federalism, there were some basic understandings of its parameters. The following questions had relatively clear answers, as indicated.

*1. To which courts and cases does the Eleventh Amendment apply?*

The Eleventh Amendment has long been interpreted beyond its literal text to prohibit not only suits against states in federal court by citizens of other states but also suits against states in federal court by their own citizens.[21] However, the Eleventh Amendment never was applied to actions brought against states in state court for violations of federal law. In fact, the language of several cases strongly suggested that the Eleventh Amendment did not apply to state court actions.[22]

*2. Can Congress take away the states' sovereign immunity?*

Sovereign immunity never has been considered absolute. Congress could abrogate the immunity afforded by the Eleventh Amendment using its authority to enforce the Fourteenth Amendment[23] or its power to regulate commerce under Article I of the Constitution.[24] However, congressional intent would not be implied; it had to be unmistakably clear.[25]

*3. Can states voluntarily surrender their sovereign immunity?*

States could waive the immunity afforded by the Eleventh Amendment.[26] A long-standing line of cases suggested that a state's waiver had to be clear and unambiguous. With one exception, the waiver had to be expressed; it could not be implied from circumstances.[27] The only appropriate sources for expression of a waiver were state legislation, a consensual agreement under the Compact Clause of the U.S. Constitution, or the actions of properly authorized state officials.[28] Moreover, a general statutory waiver of sovereign immunity without specific reference to the Eleventh Amendment or to actions in federal court was insufficient to waive Eleventh Amendment immunity.[29] A waiver of the immunity for litigation in one forum—for example, state court—did not apply to litigation in other forums. States would not be deemed to have waived their Eleventh Amendment immunity simply by entering into a contract with a private party for the provision of goods and services or by participating in a federal program.[30]

The sole exception to the requirement of an expressed waiver arose in cases in which Congress clearly expressed its intent to create a private right of action against states engaged in certain activity and thereafter a state engaged in that activity.[31] This form of relinquishing sovereign immunity was known as "constructive waiver."

*4. Does Eleventh Amendment immunity apply when a plaintiff is not seeking monetary damages?*

To deal with unconstitutional state action, the Supreme Court had held that Eleventh Amendment immunity was not applicable in cases in which the plaintiff sued state officials directly for "prospective" relief—that is, for a remedy that requires a state official to comply with federal law but does not involve monetary damages.[32] The Court reasoned that, when a state official acts contrary to the federal constitution or

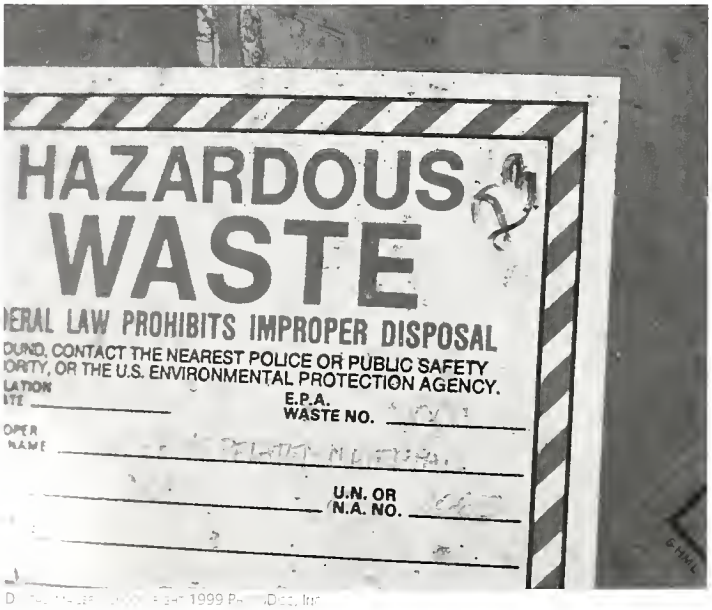
an evaluation system that had a disparate impact on older faculty members. These plaintiffs too sought back pay and compensatory and punitive damages.

## The ADEA and Eleventh Amendment Immunity

### The ADEA

The ADEA, as amended, makes it unlawful for an employer, including a state, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." The ADEA covers individuals aged forty and over.[4]

The broad prohibitions of the ADEA are not without exceptions. For example,




*In one commentator's view, the Court's federalism decisions mean that a person who becomes ill from toxic wastes dumped by a state laboratory in violation of federal law will have no recourse in the courts.*

laws, he or she is stripped of his or her official character and is no longer entitled to Eleventh Amendment immunity. The decision establishing this right is discussed further under question 4 in the next section.

The Court was careful to ensure that a plaintiff's own designation of the type of award he or she was seeking was not determinative of whether the Eleventh Amendment barred the action. For example, in a case in which plaintiffs sought to require state officials to pay retroactive benefits to people wrongfully denied benefits under an invalid state regulation, the Court held that the award would violate the Eleventh Amendment because the money, which would come from the state's general revenues, would closely resemble a monetary award.[33] On the other hand, courts have held that the Eleventh Amendment does not bar plaintiffs from obtaining an order requiring a state institution to pay for a future program of services (that is, to pay prospectively), when the program is necessary to undo the harmful effects of past constitutional violations.[34]

*5. Can a state official be sued personally in a case in which the Eleventh Amendment bars suit against the state?*

To recover monetary damages for the unconstitutional wrongs of a state official, a plaintiff always could file suit against the official in his or her individual capacity—that is, the plaintiff could seek recourse against the official personally. Such a suit was permissible even in cases in which the state was obligated to indemnify the individual officer.[35]

### Sovereign Immunity after the Rebirth of Federalism

Nothing in the text of the Eleventh Amendment answered the specific questions presented to the Court in the recent freedom-from-suit cases. For example, in *Alden v. Maine*, the Court was asked to determine whether sovereign immunity barred lawsuits brought in state courts against states for violations of a federal statute. In *Kimel, Florida Prepaid I*, and *Florida Prepaid II*, the Court was asked to determine the circumstances under which Congress might abrogate or revoke a state's sovereign immunity. The Eleventh Amendment is silent on those issues.

Instead of looking to the body of law set forth in the preceding section, the Court turned to the text of the Eleventh Amendment, the nation's constitutional structure, and the Supreme Court justices' individual interpretations of history to find the answers. The answers given by the five-to-four majority in all the recent freedom-from-suit cases add to, modify, or repudiate each of the foregoing understandings of the parameters of the law.

*1. To which courts and cases does the Eleventh Amendment apply?*

In a dramatic expansion of sovereign immunity, the majority in *Alden* reversed the Court's position in earlier decisions[36] and declared that any action that would be barred in federal court by the Eleventh Amendment is barred in state court by the greater notion of sovereign immunity. The Court explained that

> *the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. . . .*[37]

The Court maintained that the understanding that a sovereign could not be sued without its consent had been universal in the states when the Constitution was drafted and ratified. Moreover, delegates to state conventions that addressed state sovereignty in their ratification documents had believed, as the leading advocates of the Constitution had, that nothing in the Constitution would strip them of sovereign immunity.

The Court pointed to the enactment of the Eleventh Amendment itself as evidence of this universal belief. The amendment came about in response to the 1793 decision in *Chisolm v. Georgia*, the first case to ask the Supreme Court to address the issue of sovereign immunity. The Court held that nothing in the language of the Constitution prevented it from assuming jurisdiction over the

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an employer may rely on age when it is a "bona fide occupational qualification" reasonably necessary to the normal operation of the particular business. Also, an employer may legally refuse to hire people over the age of forty if it can show that a person would have to be under the age of forty to perform the tasks required of the job in question. Further, an employer may engage in conduct otherwise prohibited if its actions are based on reasonable factors other than age or if it discharges or otherwise disciplines an employee who is over age forty for good cause.[5]

When an employer's age discrimination does not fall within an exception to the act, the ADEA explicitly provides that the employer will be subject to liability for legal and equitable relief.[6] This means that a person whose rights under the ADEA are violated may file a lawsuit to obtain monetary damages, as well as to have a court direct the employer to reinstate, promote, or otherwise return the affected employee to the position he or she would have enjoyed but for the employer's discriminatory action.

The act specifically incorporates the enforcement provisions of the Fair Labor Standards Act. The latter act authorizes employees to initiate actions for back pay "against any employer in any Federal or State court of competent jurisdiction. . . ."[7] In 1974, Congress amended the definition of "employer" to include "a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State," and it deleted text that had explicitly excluded public entities from the definition.[8] Given such express language, one might ask, how, then, could the Supreme Court hold that state employees may not sue their employer for violations of the ADEA? The answer lies in the Eleventh Amendment to the Constitution and the underlying notions of sovereign immunity.

### The Eleventh Amendment

By the literal terms of its text, which refers only to suits brought "by Citizens of

State of Georgia as a defendant in an action by a citizen of another state.[38] The response to the *Chisolm* holding was swift and unfavorable. Congress immediately proposed a constitutional amendment to nullify the Court's decision. With one slight change, that proposal became the Eleventh Amendment to the Constitution. According to the current Court, the Eleventh Amendment simply restored the law to what people believed it to be before the *Chisolm* decision. Moreover, because the amendment was a response to a specific case, it did not embody the universe of understanding on sovereign immunity. Instead, it focused on the particular issue raised by the *Chisolm* case.

The dissenting justices in *Alden*, and many other critics of the majority's opinion, have challenged the majority's interpretations of history. In a lengthy dissent, Justice Souter pointed out evidence of a diversity of attitudes about sovereign immunity among the nation's founders, ranging from the natural law conception of Alexander Hamilton to utter rejection of the principle by James Wilson. Souter's reading of the historical record discerned that only "a doubtful few" were "espousing an indefensible natural law view of sovereign immunity."[39]

It is difficult to assign error or right to either side of the debate, for both sides necessarily based their arguments almost entirely on negative inferences. As one Eleventh Amendment scholar so aptly put it, "[t]he search for the original understanding on state sovereign immunity bears this much resemblance to the quest for the Holy Grail: there is enough to be found so that the faithful of whatever persuasion can find their heart's desire."[40] The majority of justices on the Court believe that because the Constitution itself, excluding its amendments, is silent on state sovereignty, the notion must have been so universally accepted that no one thought its inclusion was necessary. On the other hand, the dissenting justices presume that the Constitution's silence means there was no consensus on sovereign immunity. "[E]ach side [cleverly] listened for the sound of its own position in the silence of the historical record."[41]

*2. Can Congress still take away the states' sovereign immunity?*

In its 1996 decision in *Seminole Tribe*, the Court reaffirmed the basic principle that Congress may enact legislation that abrogates state sovereign immunity. However, the Court ruled that the Commerce Clause of Article I does not give Congress authority to abrogate a state's immunity from suit directly. The Court therefore limited authority for abrogation solely to Section 5 of the Fourteenth Amendment, which empowers Congress to pass legislation implementing the Fourteenth Amendment.

The Court's basis for the distinction amounts to nothing more than a timing argument. Simply put, the Court's reasoning is that because the ratification of the Constitution did not eliminate states' sovereignty, as confirmed by the Eleventh Amendment, nothing in the text of the Constitution can be read to authorize Congress to abrogate sovereign immunity. But the Fourteenth Amendment was enacted after the Eleventh, so it essentially trumps the Eleventh and any "common understanding of state sovereignty" on which the Eleventh was based. Indeed, the Fourteenth Amendment, "by expanding federal power at the expense of state autonomy[,] . . . fundamentally altered the balance of state and federal power struck by the Constitution."[42]

The Court's reasoning is questionable. When one is construing a law that has been amended, it is not ordinary practice to view a provision added later as trumping any predecessor. More typically, courts seek to make sense of the enactment as a whole. Had the Court adopted the latter practice in *Seminole Tribe*, the inevitable conclusion would have been that states are not fully sovereign. If they were, even the most pressing need could not overcome their sovereign immunity.[43] If they are not, then abrogation under Article I should have as much effect as abrogation under the Fourteenth Amendment.

Moreover, the original Constitution contains a Supremacy Clause, which states that federal law shall be "the supreme Law of the Land; and the Judges of every State shall be bound thereby. . . ."[44] Nowhere in the *Alden* majority opinion does the Court give the plain meaning of that text proper accord. Instead, the Court reads it to mean

another State, or the Citizens or Subjects of any Foreign State,"[9] the Eleventh Amendment bars lawsuits against nonconsenting states in federal court. However, the Supreme Court always has read the amendment more expansively, finding that it bars actions by citizens against their own states unless one of the exceptions to the amendment applies.[10] The exceptions include an express waiver of immunity by states[11] or a clear and valid abrogation of immunity by Congress.[12]

The Court in *Kimel* reaffirmed that the Eleventh Amendment applied to the three consolidated suits, which had been brought by citizens against their own states for violations of the ADEA. Because the plaintiffs did not argue that either of the states had waived its immunity, the issue was whether, in enacting the ADEA, Congress had invalidated or abrogated the states' Eleventh Amendment immunity.

The inquiry into whether Congress had abrogated a state's Eleventh Amendment immunity was predicated on two questions: "first, whether Congress unequivocally expressed its intent to abrogate that immunity; and second, if it did, whether Congress acted pursuant to a valid grant of constitutional authority." In response to the first question, the Court held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." The Court agreed that the ADEA satisfied this test: "Read as a whole, the plain language of [the ADEA's] provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees."[13]

The Court was less generous with respect to the second inquiry, though, holding that Congress had not acted pursuant to a valid grant of constitutional authority when it sought to subject states to suit by individual citizens under the ADEA. Interestingly the Court once before had decided a case involving the constitutional validity of the 1974 exten-

merely that *if* Congress has the power to enact legislation that abrogates states' freedom from suit, it may do so.

The Court's changed course on the Commerce Clause does not affect the enforceability against states of civil rights laws that rest on the Fourteenth Amendment. The Fourteenth Amendment provides as follows:

> *Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the Untied States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any persons within its jurisdiction the equal protection of the laws.*
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> . . . .
>
> *Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.*

Section 5 is an affirmative grant of power to Congress, and the current Supreme Court has recognized that "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference."[45] The power granted is that of remedying and deterring violations of rights guaranteed under the Fourteenth Amendment. Thus any resulting legislation may prohibit "a somewhat broader swath of conduct"[46] and need not parrot the precise wording of the Fourteenth Amendment or otherwise confine its parameters to the conduct forbidden by the amendment's text.

The Court also has interpreted Section 5, however, as imposing some limitations on Congress's authority. According to the Court, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[47] In *Florida Prepaid I,* the Court considered the validity of a provision in the Patent and Plant Variety Protection Remedy Clarification Act (Patent Remedy Act) that in effect abrogated states' sovereign immunity. The Court held that the statute, which subjected states to suit for patent infringement, was not appropriate legislation under Section 5 of the Fourteenth Amendment. The Patent Remedy Act failed to meet the congruence-and-proportionality test for two reasons: (1) "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations"; and (2) it was unlikely that many of the instances of patent infringement affected by the statute were unconstitutional. The scope of the Patent Remedy Act was out of proportion to its supposed remedial or preventive objectives. The Court found that the "statute's apparent . . . aims were to provide a uniform remedy for patent infringement and to place States on the same footing as private parties under that regime."[48] Such aims were proper congressional concerns under Article I and sufficient to meet the standard of the freedom-from-regulation inquiry, but they were insufficient to support an abrogation of the states' freedom from suit because the concerns had little, if anything, to do with the Fourteenth Amendment.

It remains the case that even if Congress has the power to abrogate sovereign immunity under the Fourteenth Amendment, Congress's intent to do so by legislation will be found only when there is clear, specific, and unmistakable language in the statute. The Supreme Court will not infer abrogation in the absence of unequivocal evidence of Congress's intent.[49]

*3. Can states still voluntarily surrender their sovereign immunity?*

In *Florida Prepaid II,* the Court severely limited the potential for a constructive waiver. (As explained earlier, a state could be deemed to have waived its sovereign immunity by engaging in an activity for which Congress had clearly provided to individuals the right to seek monetary damages against wrongdoers.) The lawyers for the plaintiffs had argued that, under the doctrine of constructive waiver, Florida Prepaid (an agency of the state of Florida) had waived its immunity by "engaging in the interstate marketing and administration of its program" after the Trademark Remedy Clarification Act made clear that such activity would subject violators to suit. Writing for the five-to-four majority, Justice Scalia declared that the doctrine

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***The Supreme Court's recent decision in* Kimel v. Florida Board of Regents *bars state employees from bringing suit against states for violations of the Age Discrimination in Employment Act.***

sion of the ADEA to state and local governments. In *EEOC v. Wyoming,*[14] the Court had held that the ADEA constituted a valid exercise of Congress's power under Article I of the Constitution to regulate commerce among the states. Further, the Court had held that the ADEA did not transgress any restraints imposed on the commerce power by the Tenth Amendment, which specifically reserves to the states those powers of the union not specifically granted to the national government.[15]

The Supreme Court decided recently, however, that Congress's powers under Article I do not include the power to subject states to suit by private individuals. In

of constructive waiver "stands as an anomaly in the jurisprudence of sovereign immunity[] and . . . constitutional law" and that "[w]hatever may remain of . . . the doctrine is expressly overruled." Justice Scalia found it impossible to square the doctrine with the general requirements that a waiver be unequivocal and voluntary. The states' mere presence in a field that is subject to regulation, Justice Scalia contended, should not be deemed unequivocal evidence of a voluntary surrender of a constitutional right to sovereign immunity.[50]

In eliminating constructive waivers, the Court sought to ensure that Congress's power to overcome a state's immunity was limited to statutes enacted under Section 5 of the Fourteenth Amendment. If Congress could subject a state to private lawsuits simply because the state engaged in an area of regulated activity, Congress could essentially obtain waivers by exercising powers authorized by Article I's Commerce Clause, a result the Court already had forbidden.

The Court did provide a narrow exception to its bar against constructive waivers, holding that Congress could continue to seek waivers on the basis of statutes that conferred a gift or a gratuity on the states. Clearly, laws approving interstate compacts or offering federal funds meet this criterion. Little guidance exists, however, on whether the exception will encompass statutes conferring other federal benefits.

States still may expressly waive their sovereign immunity under the standards developed before the recent federalism cases. A waiver will not be inferred, though, in the absence of an express declaration from a proper source. Neither silence nor "constructive consent" (consent implied by a state's actions) will be recognized. In determining the nature and the scope of a state's waiver of its immunity under the Eleventh Amendment, courts will deem an ambiguous statutory waiver to be no waiver.

*4. Does sovereign immunity apply when a plaintiff is not seeking monetary damages?*

In *Seminole Tribe*, as noted earlier, the Supreme Court dismissed the tribe's claims against the governor of Florida for violations of the Indian Gaming Regulatory Act. The Court reasoned that the intricate remedial scheme set forth by the statute in question applied only against the state. Thus, although the claims against the state were barred by sovereign immunity, the statute also implicitly precluded the tribe's right to bring suit under *Ex parte Young* against an individual official.[51] In *Ex parte Young*, the Court upheld an order restraining a state attorney general from bringing suit under a statute alleged to be unconstitutional, notwithstanding the sovereign immunity bar to action against the state. The case has been read to stand for the principle that permits private suits for prospective relief against state officials alleged to be violating federal requirements. Prospective relief has therefore been presumed to be available to constrain illegal state action, at least until *Seminole Tribe*. This presumption "is nothing short of indispensable to the establishment of constitutional government and the rule of law," Justice Souter argued in his dissenting opinion in *Seminole Tribe*.[52]

Despite *Seminole Tribe*, *Ex parte Young* is not on its deathbed—yet. A plaintiff may still, albeit in more limited circumstances than before *Seminole*, seek injunctive or declaratory relief[53] against state officials in their official capacity to require them to conform their conduct to federal law if the federal remedial scheme at issue does not apply solely to states. In fact, in the *Seminole Tribe* decision, to minimize the significance of its expansion of the freedom from suit, the Court specifically pointed to the existence of the *Ex parte Young* doctrine as a "method of ensuring the States' compliance with federal law."[54] However, *Seminole Tribe* may have a chilling effect on lower courts' willingness to apply the *Ex parte Young* doctrine. The courts now may hesitate before permitting an action for prospective relief against state officials in cases involving a statute with a comprehensive remedial scheme that does not explicitly provide for such enforcement of its provisions.

*5. Can a state official be sued personally in a case in which sovereign immunity bars suit against the state?*

The effect of the recent Court decisions on this issue is purely practical. To the

*Continued on page 12*

1996, in *Seminole Tribe of Florida v. Florida,* the Court dramatically reversed its earlier rulings and decided that the sole authority for abrogation of the Eleventh Amendment is Section 5 of the Fourteenth Amendment.[16] Applying this ruling in *Kimel*, the Court reasoned that "if the ADEA rested solely on Congress' Article I commerce power, the [state employees could not] . . . maintain their suits against their state employers" because Congress would have lacked the power to give the employees the right to sue the state.[17]

The next hurdle for the *Kimel* Court, then, was to determine whether the ADEA could have been enacted pursuant to Section 5 of the Fourteenth Amendment. Section 5 permits Congress to enforce the substantive provisions of the Fourteenth Amendment, which include the right to equal protection of the laws and due process of law.[18] Although Congress is not restricted to parroting the language of the Fourteenth Amendment, Section 5 does provide some limitation on Congress's authority. According to the Court, there must be a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[19] To meet the threshold test for Section 5 authority, the ADEA had to be an appropriate remedy for a problem of constitutional proportion, rather than an attempt by Congress to redefine the states' legal obligations with respect to age discrimination.

Applying its test of congruence and proportionality to the *Kimel* case, the Court found that the ADEA imposed obligations on state and local governments that were disproportionate to any unconstitutional conduct that might be targeted by the act. The Court's finding was based on a comparison of the ADEA's protections of older employees with the protections provided by the Equal Protection Clause of the Fourteenth Amendment.

According to the Court, "[o]lder persons have not been subjected to a history of purposeful unequal treatment." Thus

## The Scope of State Sovereign Immunity

Neither the Eleventh Amendment nor any greater notion of state sovereign immunity serves to bar liability of a local government or its entities.[1] Cities and counties continue to bear liability for violations of statutes like the Fair Labor Standards Act and the Age Discrimination in Employment Act, notwithstanding the state of North Carolina's new exemption from such liability.

Under North Carolina's system of delivering some public services through agencies jointly funded and administered by state and local government, it sometimes is difficult to determine at first glance whether an agency should be characterized as a state or a local one. In these circumstances, courts must determine whether the entity is to be treated as an arm of the state (entitled to protection from liability for violations of federal rights) or as a local government (not entitled). In resolving whether the agency qualifies for sovereign immunity, courts often resort to a technical, fact-intensive inquiry. The factors that they consider generally involve (1) whether a monetary judgment would be satisfied with state funds; (2) how the agency is characterized under state law; (3) how much funding the agency receives from the state; and (4) to what extent the agency is controlled by the state. The most important factor is the first one.

In a recent case, a federal district court held that North Carolina's local school boards are entitled to sovereign immunity from a suit for past overtime wages due under the Fair Labor Standards Act. The court relied on the facts that (1) the N.C. Constitution requires the General Assembly to fund education and (2) local boards of education are subject to close supervision by the State Board of Education.[2] The decision has not yet been reviewed by an appellate court. Earlier courts have held that the campuses of The University of North Carolina system and the campuses of the state's community college system also are entitled to Eleventh Amendment immunity.

Moreover, courts in several North Carolina state law cases have found local government employees to be acting as agents of the state for a variety of purposes.[3] In such cases, courts have held that the state may be held liable for monetary damages under state law for resulting injuries. If the wrongful conduct also violates federal law, the Eleventh Amendment or sovereign immunity might bar individual recovery of monetary damages from the state provided under federal law—and possibly from the county if the court finds that the official was acting as a state policy maker at the time of the wrongful conduct.[4] In this context, it is important to note that an official may be treated as a state official for one purpose and a local government official for another. For example, a prosecutor may be a state official with respect to prosecutorial decisions but a local government official with respect to administrative decisions.[5]

### Notes

1. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).
2. Cash v. Granville County Bd. of Educ. (Lawyers Weekly, No. 0-02-0289) (Britt Sr.) (E.D.N.C. Mar. 8, 2000).
3. *See, e.g.*, Vaughn v. North Carolina Dep't of Human Resources, 286 N.C. 683 (1991) (child protective services); EEE-ZZZ Lay Drain Co. v. North Carolina Dep't of Human Resources, 108 N.C. App. 24 (1992) (sewer permitting).
4. *See, e.g.*, McMillian v. Monroe County, 520 U.S. 781 (1997) (holding that action against county for violation of 42 U.S.C. § 1983, a federal law, was barred when local officer acted as final policy maker for state rather than county).
5. Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992); Ying Jing Gan v. City of New York, 996 F.2d 522 (2d Cir. 1993); Gentile v. County of Suffolk, 926 F.2d 142 (2d Cir. 1991).

states may discriminate on the basis of age without violating the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. States may use age as a proxy for other qualities, abilities, or characteristics that are relevant to the state's legitimate interests, even if the reliance on such generalizations does not apply to a particular individual. For example, a state might require recreational personnel who teach physical fitness programs to retire at age fifty because of an assumption that a person over age fifty would lack the necessary agility to teach physical fitness. A particular employee over age fifty being more fit than the average twenty-five-year-old would not make this mandatory retirement rule unconstitutional. When conducting a rational-basis review under the Fourteenth Amendment, the Court "will not overturn such [state discriminatory action] unless varying treatment of different [aged] groups or persons is so unrelated to the achievement of any combination of legitimated purposes that [the Court could] only conclude that the actions were irrational."[20]

In comparison, the ADEA's broad prohibition of age discrimination makes considerably more state employment decisions and practices illegal than would likely be held unconstitutional under the applicable equal protection, rational-basis standard. Under the ADEA a court might well have found that the earlier example of mandatory retirement for physical fitness instructors was illegal. Judged against the backdrop of the constitutional standard of equal protection, though, the ADEA was "so out of proportion to a supposed remedial or preventive objective that it [could not] be understood as responsive to, or designed to prevent, unconstitutional behavior," in the Court's view.[21] The ADEA therefore failed to meet the standard of congruence and proportionality.

Further, in considering the appropriateness of the remedial measure, the Court determined that the ADEA's legislative record confirmed that "Congress' 1974

*Continued from page 10*

extent that the Court has restricted the opportunity to seek monetary relief from the state, potential plaintiffs will be forced to look to state officials for compensation for injuries. This option has been unaffected by the recent decisions. As long as the unconstitutional or otherwise wrongful conduct is fairly attributable to a particular officer, and the plaintiff seeks relief not from the state treasury but from the officer personally, he or she has the right to sue.[55]

## The Response of Lower Courts to the Recent Decisions

Most of the Court's recent freedom-from-suit litigation has been in employment law. Not surprisingly, therefore, as states now more aggressively assert their right to be free from suit for violations of federal laws, most of the resulting litigation in the lower courts is related to employment law.

The Supreme Court has invalidated congressional attempts to abrogate state sovereign immunity under the Fair Labor Standards Act and the Age Discrimination in Employment Act. Lower courts appear to have decided that states also are immune from suit under the Family Medical Leave Act. Similarly, lower courts have generally held that Section 1981 of the Civil Rights Act of 1870 does not abrogate state sovereign immunity in federal courts.[56]

On the other hand, although the Equal Pay Act is an amendment to the Fair Labor Standards Act, most circuit courts of appeal have decided that states are not immune from suit under it.[57] Nor, according to the lower courts, are states immune from suit under Title IX of the Education Amendments of 1972, which prohibits gender discrimination.[58]

The response to the Americans with Disabilities Act has been mixed, with some courts finding immunity and others finding no immunity.[59] The Supreme Court should resolve the uncertainty soon, for it has agreed to hear argument on an Americans with Disabilities Act case this term.

There has been little litigation surrounding Title VII of the Civil Rights Act of 1964 because the Supreme Court decided in 1976, long before the rebirth of federalism, that states were not immune from suit under Title VII.[60] Justice Rehnquist, writing for the Court, found Title VII, which prohibits discrimination based on race, color, gender, religion, or nationality, to be a valid and proper abrogation of a state's Eleventh Amendment immunity. First, congressional intent to abrogate Eleventh Amendment immunity in the statute was clear because the 1972 amendments to the statute specifically authorized federal courts to award monetary damages and attorney's fees against a state government found to have subjected an employee to unlawful employment discrimination under Title VII. Second, Title VII was enacted pursuant to Section 5 of the Fourteenth Amendment.

There has been significant litigation over state sovereign immunity in other areas of the law. For example, the Fourth Circuit Court of Appeals, which defines federal law for North Carolina, held that the Bankruptcy Code provision purporting to abrogate states' sovereign immunity was unconstitutional because the provision could not be sustained under the Fourteenth Amendment's Enforcement Clause (Section 5).[61] Several environmental laws may suffer a similar fate. Federal environmental laws are generally based on Congress's Article I power to regulate interstate commerce. Most would undoubtedly fail the Fourteenth Amendment's congruence-and-proportionality test and are therefore now vulnerable to sovereign immunity defenses by states when private citizens bring lawsuits.

Many have argued that the recent federalism cases and the ensuing lower court cases make clear the Supreme Court's comfort with the idea that in some cases there will simply be no judicial remedy available to ensure state compliance with federal law. However, the Court has been quick to respond that neither the federal government nor another state is limited by sovereign immunity in its right to bring action against a state. Thus, to the extent that the federal government is willing or practically able to bring action on behalf of people injured by state action, states still may face damages for violations of an individual's statutory rights. Similarly a state could bring action against another state to vindicate wrongs

extension of the Act to the states was an unwarranted response to a perhaps inconsequential problem." Despite references in congressional debates and reports to the practice of age discrimination in employment by public agencies, Congress never identified any pattern of age discrimination by the states, much less any discrimination that rose to the level of constitutional violation, according to the Court. The Court was simply unimpressed with the "assorted sentences [lamenting the pervasiveness of age discrimination] . . . cobble[d] together from a decade's worth of congressional reports and floor debates," or the report on public-employment age discrimination in California. The Court found that this evidence fell "well short of the mark."[22] The lack of "any evidence" for consideration by Congress meant that Congress could not have been responding to a problem of constitutional proportion.

## Conclusion

The Court took care to note that the *Kimel* decision

> *[did] not signal the end of the line for employees who find themselves subject to age discrimination at the hands of their state employers. We hold only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals. State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision.*[23]

In North Carolina, state employees who experience age discrimination may sue the state under Section 126-34.1 of the North Carolina General Statutes (hereinafter G.S.). The state provisions closely parallel those of the ADEA, and courts may award monetary damages against the state if they find that a violation has

committed against one of its citizens. Except for the environmental context, though, it is difficult to see how suits by either the federal government or sister states are an appropriate substitute for suits by private citizens.

## Conclusion

The Supreme Court's recent decisions purport to be faithful to constitutional text, constitutional structure, and original meaning. Many scholars, lawyers, and potential litigants against state government disagree, though. The five justices in the majority insist that they are developing a workable theory of federalism. On that point, there is even more disagreement. As one scholar puts it, the efforts to give significance to federalism have "produced unprincipled, arbitrary judicial decisionmaking that can disrupt the functioning and accountability of Congress, without providing any principled zone of state power."[62] Clearly the Constitution's presupposition of two levels of government, federal and state, does not by itself affirm or even imply that the higher unit cannot exert preeminence over the subunit. Such an interpretation would render the Supremacy Clause of the Constitution entirely superfluous.

Nonetheless, the law of state sovereign immunity or freedom from suit is as the recent federalism cases have decreed. If the Eleventh Amendment would bar an action in federal court, notions of sovereign immunity bar the action in state court. The exceptions to the Eleventh Amendment or sovereign immunity bar allow plaintiffs to sue the state directly for monetary damages as compensation for violations of federal rights when (1) the state expressly and voluntarily consents to be sued, including situations in which Congress gives the states a gift or a gratuity in exchange for a waiver, or (2) the case concerns a statute in which Congress has made clear its intent to abrogate the states' immunity and the statute is authorized by Section 5 of the Fourteenth Amendment. In cases in which the plaintiffs' primary motivation is to have the illegal conduct cease, plaintiffs sometimes may avoid the issue of sovereign immunity by bringing suit against the state official in his or her official capacity for prospective relief only. However, this recourse may not be available if the plaintiff is suing under a statute with a comprehensive remedial scheme that does not provide for suits against individuals. If recovery of monetary damages is important to the plaintiff, the only recourse available may be to sue the offending state official in his or her individual capacity.

## Notes

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
2. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992); United States v. Lopez, 514 U.S. 549 (1995); Printz v. United States, 521 U.S. 898 (1997).
3. Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000).
4. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621, 623(a)(1).
5. Alden v. Maine, 527 U.S. 706, 199 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).
6. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank (Florida Prepaid I), 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999); College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd. (Florida Prepaid II), 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).
7. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996). The Indian Gaming Regulatory Act, 25 U.S.C. § 2710, requires states to negotiate with Indian tribes for the purpose of entering into tribal-state compacts governing the conduct of certain gambling activities on Indian reservations. Further, it authorizes tribes to sue states in federal court to compel good faith negotiations. In dismissing the tribe's claims against the governor of Florida, the court reasoned that the act's comprehensive remedial scheme did not provide a right of action against the governor and therefore Congress must not have intended for one to exist.
8. Erwin Chemerinsky, *Permission to Litigate: Sovereign Immunity Lets States Decide Who Can Sue Them*, 85 American Bar Association Journal, 42, 42 (1999).
9. *Seminole Tribe*, 517 U.S. at 77.
10. *Seminole Tribe*, 517 U.S. at 70.
11. *See Florida Prepaid II*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).
12. New York v. United States, 505 U.S. 144, 155 (1992).
13. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941).
14. U.S. Const. amend. X.
15. *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

occurred. As a practical matter, therefore, the impact of the *Kimel* decision on state employees may be limited to (1) the foreclosed right to be heard in federal court and (2) the requirement that an employee follow the state administrative procedure, which calls for filing a grievance as provided by G.S. 126-34.

However, *Kimel* is one of a line of cases that have significantly restricted the right of state employees to bring action against states for violations of federal employment statutes. North Carolina has state laws that parallel federal laws in their prohibition of discrimination in employment on the basis of age, sex, race, color, national origin, religion, creed, political affiliation, or handicapping condition. However, there are no state counterparts to a host of other federal employment laws, including the Family Medical Leave Act. If the trend continues, and it probably will unless the Supreme Court's composition changes, state employees will inevitably lose the right to seek monetary damages for their employer's violation of federal rights that have no state counterparts.

Moreover, *Kimel* and the cases that precede it extend beyond the employment context to affect the rights of all citizens to seek compensation from the state for violation of federal statutes. The potential impact of these cases in civil rights, intellectual property, environmental law, and bankruptcy is vast. Because the Court gave no guidance on the issue, the quantity and the quality of evidence that federal legislation in these areas must reflect to meet the standard of congruence and proportionality remain to be seen. As it stands, the Court appears comfortable with the notion that Congress has the authority to regulate state conduct but not the authority to subject states to suit by individuals when they fail to comply with validly enacted laws. Yet when courts deny citizens the right to seek monetary compensation for violations of these federal laws, they may well be denying Congress the most effective tool for obtaining state compliance.

16. *See New York*, 505 U.S. at 144.

17. United States v. Lopez, 514 U.S. 549, 567–68 (1995).

18. Printz v. United States, 521 U.S. 898, 932 (1997).

19. U.S. Const. amend. XI.

20. Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999).

21. Hans v. Louisiana, 134 U.S. 1 (1890).

22. *See, e.g.*, Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197, 204–05 (1991); Will v. Michigan Dep't of State Police, 491 U.S. 58, 63 (1989).

23. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

24. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) (now overruled).

25. Dellmuth v. Muth, 491 U.S. 223, 229 (1989).

26. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

27. Edelman v. Jordan, 415 U.S. 651, 677 (1974).

28. Clark v. Barnard, 108 U.S. 436 (1883); *Atascadero State Hosp.*, 473 U.S. 234; Petty v. Tennessee-Missouri Bridge Co., 359 U.S. 275 (1959).

29. *See* Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946).

30. *In re* San Juan Dupont Hotel Fire Litigation, 888 F. Supp. 1033 (W.D. Wis. 1989); *Edelman*, 415 U.S. 651.

31. *See* Pardon v. Terminal Ry. of Alabama Docks Dep't, 377 U.S. 184 (1964).

32. *Ex parte* Young, 209 U.S. 123 (1908).

33. *Edelman*, 415 U.S. at 665.

34. Clark v. Cohen, 794 F.2d 79 (3d Cir. 1986).

35. *See, e.g.*, Greiss v. Colorado, 841 F.2d 1042 (10th Cir. 1988).

36. *See, e.g.*, Hilton v. South Carolina Public Rys. Comm'n, 502 U.S. 197 (1991).

37. Alden v. Maine, 527 U.S. 706, ___, 199 S. Ct. 2240, 2270, 144 L. Ed. 2d 636, 652 (1999).

38. Chisolm v. Georgia, 2 U.S. 419 (1793).

39. *Alden*, 527 U.S. at ___, 199 S. Ct. at 2273, 144 L. Ed. 2d at 684 (Souter, J., dissenting). Justices Breyer, Ginsburg, and Stevens joined the dissent.

40. JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY at 28 (New York: Oxford University Press, 1986).

41. *Constitutional Law*, 113 HARVARD LAW REVIEW 200 (1999).

42. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 59 (1996).

43. See Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUPREME COURT REVIEW 1 (1996).

44. U.S. Const. art VI., cl. 2.

45. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) (internal citations omitted).

46. Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S. Ct. 631, 643, 145 L. Ed. 2d 522, 540 (2000).

47. *Flores*, 521 U.S. at 520.

48. *Florida Prepaid I*, 527 U.S. 627, ___, 119 S. Ct. 2199, 2210, 144 L. Ed. 2d 575, 593 (1999).

49. Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990).

50. *Florida Prepaid II*, 527 U.S. at ___, 119 S. Ct. at 2228, 144 L. Ed. 2d at 619.

51. *Ex parte* Young, 209 U.S. 123 (1908).

52. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 118 (1996) (Souter, J., dissenting; internal quotations omitted).

53. "Injunctive" relief in this kind of circumstance would be a court order that the state perform, or refrain from performing, a particular act. "Declaratory" relief would be a court declaration of the legality of a state law.

54. *Seminole Tribe*, 517 U.S. at 71 n.14.

55. *See* Sheuer v. Rhodes, 416 U.S. 232 (1974).

56. *See* Freeman v. Michigan Dep't of State, 808 F.2d 1174, 1178–80 (6th Cir. 1987) (collecting cases); *accord* Hafford v. Seidner, 167 F.3d 1074, 1079 (6th Cir. 1999).

57. *See, e.g.*, Anderson v. State Univ. of N.Y., 169 F.3d 117 (2d Cir. 1999); Varner v. Illinois State Univ., 150 F.3d 706 (7th Cir. 1998); Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997).

58. *See* Doe v. University of Ill., 138 F.3d 653 (7th Cir. 1998), *rev'd on other grounds*, ___ U.S. ___, 119 S. Ct. 2016, 143 L. Ed. 2d 1028 (1999); Franks v. Kentucky Sch. for the Deaf, 142 F.3d 360 (6th Cir. 1998); Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997).

59. *See* Kimel v. Florida Board of Regents, 139 F.3d 1426 (11th Cir. 1998) (finding immunity). *Compare* Nihiser v. Ohio Envtl. Protection Agency, 979 F. Supp. 1168 (S.D. Ohio 1997) (finding that accommodation provisions of ADA and Rehabilitation Act were not valid exercise of Congress's enforcement power under Fourteenth Amendment). The Supreme Court could have answered this question in its *Kimel* decision but failed to do so.

60. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

61. *In re* Creative Goldsmiths of Washington, D.C., 119 F.3d 1140 (4th Cir. 1997); *accord In re* Estate of Fernandez, 123 F.3d 241 (5th Cir. 1997).

62. *See, e.g.*, Frank B. Cross, *Realism about Federalism*, 74 NEW YORK UNIVERSITY LAW REVIEW 1304, 1310 (1999).

## Notes

1. Kimel v. Florida Bd. of Regents, ___ U.S. ___, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–631 (1994 ed.).

2. Cooper v. New York State Office of Mental Health, 162 F.3d 770 (2d Cir. 1998) (holding that ADEA validly abrogates states' Eleventh Amendment immunity); *accord* Coger v. Board of Regents of the State of Tenn., 154 F.3d 296 (6th Cir. 1998); Goshtasby v. Board of Trustees of the Univ. of Ill., 141 F.3d 761 (7th Cir. 1998); Keeton v. University of Nev. System, 150 F.3d 761 (7th Cir. 1998); Migneault v. Peck, 158 F.3d 1131 (10th Cir. 1998); Scott v. University of Miss., 148 F.3d 493 (5th Cir. 1998). *Compare* Humenansky v. Regents of Univ. of Minn., 152 F.3d 822 (8th Cir. 1998) (holding that ADEA does not validly abrogate states' Eleventh Amendment immunity).

3. As the law now stands, the *Kimel* decision does not affect the right of local government employees to bring suit against their local government employers for violations of the ADEA.

4. 29 U.S.C. §§ 623(a)(1), 631(a).

5. 29 U.S.C. § 623(f)(1), (f)(3).

6. 29 U.S.C. § 626(c)(1).

7. 29 U.S.C. § 216(b).

8. 29 U.S.C. § 630(b)(2) and note.

9. U.S. Const. amend. XI.

10. Hans v. Louisiana, 134 U.S. 1, 15 (1890).

11. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

12. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

13. Kimel v. Florida Bd. of Regents, ___ U.S. ___, ___, 120 S. Ct. 631, 640, 145 L. Ed. 2d 522, 536 (2000).

14. EEOC [Equal Employment Opportunity Commission] v. Wyoming, 460 U.S. 226 (1983).

15. U.S. Const. amend. X.

16. Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

17. *Kimel*, ___ U.S. at ___, 120 S. Ct. at 643, 145 L. Ed. 2d at 539.

18. U.S. Const. amend. XIV.

19. City of Boerne v. Flores, 521 U.S. 507, 520 (1997).

20. *Kimel*, ___ U.S. at ___, 120 S. Ct. at 645, 145 L. Ed. 2d at 542, *citing* Vance v. Bradley, 440 U.S. 93, 97 (1979).

21. *Kimel*, ___ U.S. at ___, 120 S. Ct. at 647, 145 L. Ed. 2d at 544, *citing* Flores, 521 U.S. at 532.

22. *Kimel*, ___ U.S. at ___, 120 S. Ct. at 648, 145 L. Ed. 2d at 546.

23. *Kimel*, ___ U.S. at ___, 120 S. Ct. at 650, 145 L. Ed. 2d at 547 (internal citation omitted).

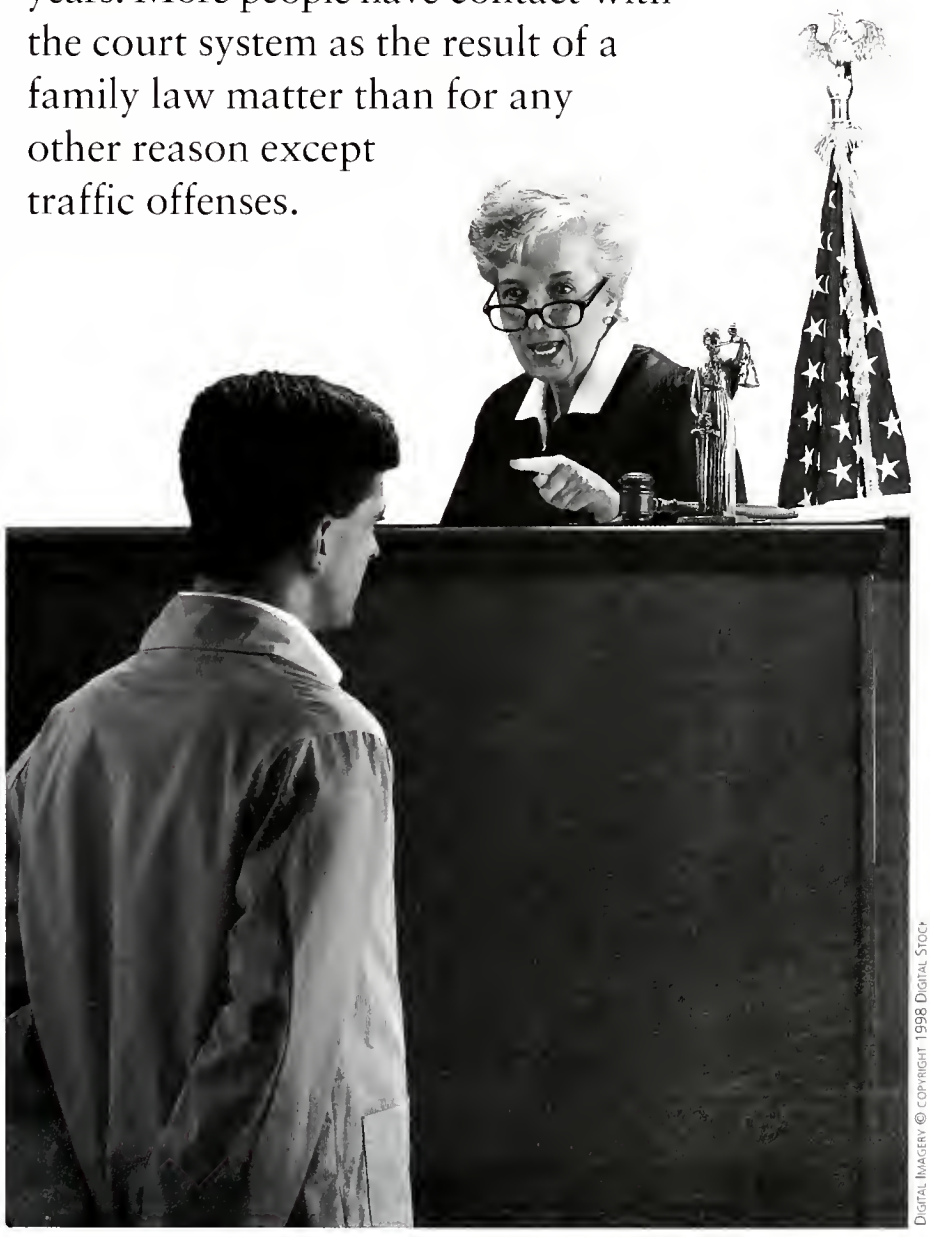
# North Carolina's Experiment with Family Court

*Cheryl Daniels Howell*

In December 1996 the Commission for the Future of Justice and the Courts in North Carolina (the Futures Commission) recommended sweeping changes in North Carolina's court system.[1] The Futures Commission acknowledged that, for decades, North Carolina has been recognized as a national model for court reform. The North Carolina General Court of Justice is a uniform, state-funded system[2] that has provided high-quality service to all the people of the state at a relatively low cost to taxpayers since its creation in the late 1960s. However, the Futures Commission found that, over the last three decades, "the lives, behavior, and needs of the people" whom the system serves have changed significantly. The commission concluded that "the gap between the system of the past and the needs of the present and the future has resulted in rising dissatisfaction both inside and outside the court system."[3]

Nowhere is the gap felt more acutely than in the handling of family disputes —matters such as divorce, child custody, child support, juvenile delinquency, and protection of abused and neglected children. According to the commission, the number of family cases filed annually in North Carolina has increased by 483 percent in the last 25 years. More people have contact with the court system as the result of a family law matter than for any other reason except traffic offenses.[4] Further, as the numbers have grown, the courts also have had to respond to the increasingly complex social issues affecting families, such as juvenile crime, domestic violence, and substance abuse.

The number of family cases filed annually in North Carolina has increased by 483 percent in the last 25 years. More people have contact with the court system as the result of a family law matter than for any other reason except traffic offenses.





*The author is an Institute of Government faculty member who specializes in judicial education and family law.*

The current court system was not designed to meet the present-day needs of troubled families. Judges, lawyers, and the public all agree that "the handling of domestic cases is where the courts can improve most."[5] As part of a solution, the commission recommended the creation of a unified family court—a separate division within the court system responsible for all cases involving family-related legal issues. In family court, specially trained judges and staff provide a coordinated response to the comprehensive needs of individual families. (For a history of family court, see below.)

Although most of the recommendations of the Futures Commission are being debated throughout the state, the General Assembly quickly embraced the family court concept. As part of the sweeping Juvenile Justice Reform Act of 1998, the General Assembly directed the Administrative Office of the Courts (AOC) to test the concept of family court by conducting pilot projects in three judicial districts. The pilots began March 1, 1999, and will run through June 1, 2001. During its 1999 session, the General Assembly directed the AOC to expand the pilot program into three more judicial districts beginning January 1, 2000.[6] (For sample mission statements of the pilot programs, see page 17.)

This article discusses ways in which the court system's present method of handling family conflict is inefficient and less than satisfactory to the public, and explains how a unified family court might solve some of the problems. The article also identifies some obstacles to the long-term success of family court in North Carolina.

## The Present System

Family matters now are heard in the district court division of the North Carolina General Court of Justice. The district court is the lower division of North Carolina's two-tiered trial court system. Family matters include divorce and all related economic issues; paternity, child custody, and child support; juvenile delinquency; protection of abused and neglected children; adoption; and protection against domestic violence. District court judges also are responsible for other types of cases, among them all traffic cases and misdemeanor criminal actions, appeals from magistrates, and civil law cases in which the amount in controversy is less than $10,000.

To illustrate the present system's method of handling family matters, consider the following divorce case:

> *After ten years of marriage, Pam decides that she can no longer tolerate Steve's heavy drinking and chooses to separate from him. Pam and Steve have two children. Pam is a homemaker, Steve an insurance salesman. Pam's attorney files a legal action, asking the court to grant her possession of the marital home and custody of the children. The action also asks the court to order Steve to pay child support as well as support for Pam, and to divide all marital property.*

Although Pam and Steve's case as just represented is a typical, relatively uncomplicated divorce, numerous court hearings and trials will be required to resolve all the legal issues. A hearing early in the case will establish temporary child custody and child support. Another hearing will settle temporary support for Pam, and yet another may be necessary to deal with Pam's request for possession of the home. Later there will be a trial on the issues of permanent custody and permanent support. Property distribution will require a separate trial and may involve several pretrial court actions. In addition, Pam and Steve likely will be required to meet at least twice with a custody mediator before a trial on custody or visitation issues.[7] After Pam and Steve have been separated for at least one year, one of them must file a separate legal action requesting an absolute divorce. Another court hearing will be required to finalize the divorce.

Each court hearing results in legal fees for both Pam and Steve. Each day in court will be a day that Pam must pay for child care and Steve cannot go to work. The chances are good in most judicial districts that each court hearing will be set before a different district court judge. Thus with each hearing, a new judge will have to be educated about the family, increasing the risk of conflicting orders. Because of overcrowded dockets, it will be difficult for Pam's attorney to schedule the various hearings and easy for either Pam's or Steve's attorney to delay hearings for tactical reasons. Resolution of all the

## History of Family Court

Family court is not a new idea. Other states have experimented with the concept since the early 1900s.[1] Interest in finding a more comprehensive response to the complex needs of families in the court system grew significantly in the 1980s and early 1990s.[2] In 1980 the American Bar Association adopted a policy in support of family court, and in 1994 it reaffirmed the commitment.[3] At present, ten states—Delaware, Florida, Hawaii, Massachusetts, New Jersey, New York, Rhode Island, South Carolina, Vermont, and Washington—and the District of Columbia have a division within their court system designated as a uniform family court, and numerous other states are experimenting with the concept. The details of the existing courts differ significantly, but all emphasize intensive case management by court personnel, coordination of all legal matters relating to a family, and coordination of court and community resources to address family problems.[4]

### Notes

1. Catherine Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts,* 32 Family Law Quarterly 3, 13 n.26 (1998), stating that the first family court was created in Cincinnati, Ohio, in 1914.

2. Jay Folberg, *Family Courts: Assessing the Trade-Offs,* 37 Family and Conciliation Courts Review 448, 449 (1999).

3. *See American Bar Association Policy on Unified Family Courts,* adopted Aug. 1994. A copy of the policy can be found in 32 Family Law Quarterly 1, 2 (1998).

4. Barbara Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts,* 32 Family Law Quarterly 31, 38 n.45 (1998). This article includes a comprehensive comparison of jurisdictions with family courts.

family's legal issues will take a significant amount of time, frustrating family members' efforts to begin rebuilding their lives.

As well as being expensive, fragmented, and slow, the present system treats family cases the same way it treats all other cases in the court system—that is, as adversarial proceedings focused on deciding specific legal issues in favor of one party or the other. Many experts believe that this traditional adversarial process, which serves the court system well in other situations, does little to provide families with the resources they need to function without future assistance from the court. Indeed, many experts believe that the extended process of litigation actually deepens family conflict.[8] Such a result is especially troublesome in cases involving children, because parties often must continue to be parents even after the end of their marriage.

Still, Pam and Steve's case as stated earlier is relatively straightforward. Consider the following complications:

*After the court enters an order giving Pam temporary custody of the children and Steve visitation rights, Pam learns that Steve's drinking has increased significantly. Pam charges in court that Steve neglected the children during a weekend visit by leaving them unattended while he went to a local bar. One child says that Steve was physically abusive to her while he was intoxicated. After a Department of Social Services case worker visits Steve to investigate the allegations of child abuse and neglect, Pam alleges that Steve told her over the telephone he "will kill all of us" before he will let a court*

## Family Court Mission Statements

### Durham Family Court

*Supporting Families in Crisis*

Our mission is to provide services which are family focused, individualized and coordinated, timely, courteous, professional and respectful.

Durham's Family Court believes that functional families are the cornerstone of a successful community. The mission of our family court is to provide a less adversarial forum for the fair, just and prompt resolution of family disputes. The Family Court will utilize the least intrusive intervention necessary, provide individualized response by linking families with appropriate community resources and offer a full complement of alternative dispute resolution options. We pledge to protect and preserve the rights of family members, treating all with courtesy, professionalism and respect.

### North Carolina Family Court

26th Judicial District, Mecklenburg County

*Mission:* To help resolve cases involving children and families through the combined efforts of the family, the Court and community services in ways that are the least adversarial and intrusive, and that are just, safe, timely, efficient, courteous and accessible.

*take his children away. Pam asks the court for protection against domestic violence.*

With these additional serious allegations, the Department of Social Services may initiate a separare legal action to address the issues of child abuse and neglect. The protection against domestic violence may be requested in yet another action or be brought as an additional claim in Pam's pending divorce case. Again, it is very likely that different judges will hear each claim, and each judge will address only the specific legal issue before him or her at a particular hearing. If both Pam and Steve have an attorney, the judges probably will know about the other court proceedings involving this family. If, however, neither Pam nor Steve is represented by an attorney, or if their attorneys do not know about the other pending matters, there is no mechanism to ensure that the judge has a complete understanding of the family's legal history. Whether or not lawyers are involved, the judge addressing each legal claim has neither the time nor the resources necessary to address the comprehensive needs of this family.

## The Unified Family Court

According to the Futures Commission, the goal of a unified family court is to "provide a unified, rational, and caring forum for the resolution of all judicial proceedings involving family members." To that end, family court separates family-related matters from other types of cases in the court system and subjects the family cases to intensive management by specially trained judges and staff. Family court, while still responsible for providing a forum and ensuring a fair process for settlement of legal disputes, also is responsible for "promot[ing] the best interest of the family and help[ing] families structure their own solutions."[9] Therefore, family court strives to resolve the immediate legal issues of the family in a way that minimizes the harmful effects of litigation. In addition, when necessary, family court attempts to address the long-term needs of individual families, in the hope that by dealing with problems that cause legal disputes, it will render families less likely to need court intervention.

The working details of the family court system currently being tested in North Carolina vary by judicial district, but the basic components are the same, as follows.

*Comprehensive jurisdiction over all family cases.* In each pilot district, a separate family court division has been created within the district court. All family-related cases are assigned to this division: all juvenile matters, including abuse and neglect of children and delinquency; adoptions; domestic violence protection orders; child custody, paternity, and child support; divorce, property distribution, and alimony; adult protective services; guardianship; and mental health commitments.[10]

*Specialized family court judges and staff.* Individual district court judges are assigned to family court. They spend the majority, if not all, of their time hearing family matters. The Futures Commission recommended that judges be assigned to family court for a minimum of three years to ensure that each judge has the opportunity to become a true specialist in family matters.[11]

In addition, the General Assembly has allocated resources for employment of staff to assist judges in the management of family court.[12] All pilot districts employ one family court administrator to coordinate the pilot project and a varying number of case managers, depending on the district's volume of family court cases and the number of judges assigned to family court.

Both judges and staff participate in specialized training designed to increase their expertise in family matters. In addition to family law, training topics include family dynamics and child development, substance abuse assessment and treatment, and the effects of domestic violence on children. The goal of the additional training, as stated by the Futures Commission, is to "provide citizens with a judiciary that is competent, sensitive, compassionate, and well versed in family law."[13]

*A structure of one judge or one manager working with one family.* Often cited as the most critical component of any successful family court, this structure ensures that each family coming into family court is assigned to a specific judge or to a team of court personnel. The assigned judge and court staff maintain responsibility for the family as long as any family member remains within the court system. The obvious purpose is to avoid the fragmentation, the duplication of effort and expense, and the potential for conflicting court orders highlighted earlier in the case of Pam and Steve. In some districts a family is assigned to an individual judge, and various court staff assist the judge in managing the case. In other districts the case is assigned to a case manager who coordinates the case with the goal of ensuring that all matters are heard by the same judge to the extent possible. In either circumstance, someone in the family court is responsible for coordinating all issues associated with a single family.

*Intensive case management by the court.* In most North Carolina judicial districts, attorneys and parties control the pace at which a family matter moves through the court system. In those districts a judge hears family issues only when an attorney or a party requests a court hearing. According to the Futures Commission, the result is that family litigation moves "too slowly through the courts." The lack of court control over cases "allows litigants to manipulate the system, to engage in piecemeal litigation and to obtain inconsistent court orders."[14] To address this problem, family courts implement case management guidelines. The court, rather than the parties, is responsible for ensuring that cases move through the court system at a pace intended to lessen expense, delay, and stress on the family. Timelines are established for each step in the case, with the goal of resolving all of a family's legal issues within one year. Only family court judges are allowed to extend deadlines or alter set schedules.

All case management plans in family court must incorporate use of alternative techniques of dispute resolution. The Futures Commission concluded that "[f]amily issues are not well-suited to the traditional adversarial model of the courts." Therefore the commission recommended that services such as mediation and arbitration "be used to reduce the emotional damage to the individuals involved, to empower the weaker parties, and to come up with solutions that preserve amicable rela-

tionships among family members."[15] Because studies indicate that early intervention is most effective in producing settlement of disputes, each pilot district refers family members to alternative dispute resolution programs as soon as possible after a case is originally filed. In addition, family court staff and judges in each pilot district are working to increase the availability of alternative dispute resolution resources within their court and community.

The Futures Commission's report stated that family court services "should be fully accessible to citizens, regardless of economic status." To address this goal, pilot districts allow access to court services such as mediation or arbitration at no charge or at a reduced rate for families unable to pay.[16] In addition, each pilot district is developing management procedures and policies designed to make family court accessible to those who cannot afford to hire an attorney. For example, the three original pilot districts have developed pamphlets and legal forms for use by litigants without lawyers. District 26, Mecklenburg County, has created a Pro Se Clinic, in which court staff assist litigants without attorneys by providing forms and other information.

*Coordination of court and community resources.* Family court staff work to ensure that each family maximizes use of available court and community resources. Accepting the premise that the court must be responsible for more than the immediate legal issues of a family, family court judges and staff direct families to the community services available to address the underlying problems that brought the family into the system. For example, litigants are directed to family counseling services, substance abuse treatment programs, and domestic violence intervention programs. Family court judges and staff closely monitor cases referred to outside agencies and programs to make sure that they provide necessary services in a timely manner.

In addition, family court makes use of court-based services designed to lessen the emotional distress of family litigation. Alternative dispute resolution programs, discussed earlier, are examples of such services. Another example is a parent education program designed to help parents recognize and lessen the effect of divorce on children.[17] The three original pilot districts also have established programs that promote visitation between noncustodial parents and their children.[18] Mecklenburg County uses custody coordinators to protect the needs of children in high-conflict custody cases, and it has established another program to provide expert assistance to the court in cases involving allegations of child sexual abuse. In District 14, Durham County, the family court is working directly with local middle schools in a truancy prevention project. In District 20—Anson, Richmond, Stanly, and Union counties—family court staff coordinate Day One Conferences, which bring together a wide variety of community service providers and court officials to address the needs of children alleged to be abused, neglected, or dependent, on the day immediately following the filing of a court petition.

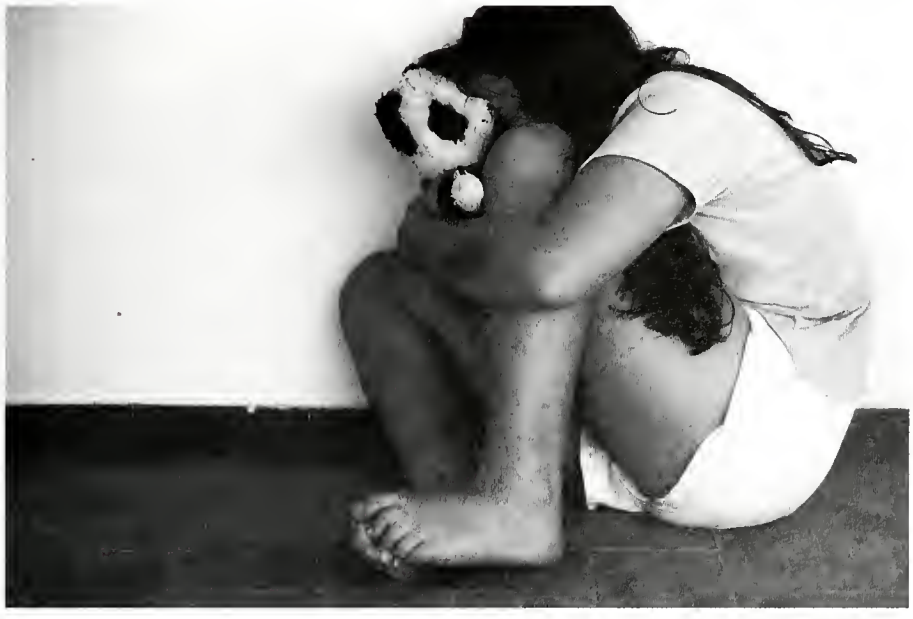
## Pam and Steve in Family Court

How would the case of Pam and Steve be handled in a family court? Perhaps most important, the case filed by the Department of Social Services would be coordinated with the pending divorce case. All court personnel would be aware of the threat of domestic violence and knowledgeable about how best to ensure the safety of family members. The family would be referred to community resources capable of addressing Steve's substance abuse problem as well as the long-term effect that his problem will have on the family. Active case management by the court would guard against the unnecessary delays often associated with such complicated cases.

## Family Court's Future in North Carolina

On April 1, 2000, the AOC submitted a report to the General Assembly on the progress of the family court experiment.[19] The General Assembly will determine whether and to what extent family court will be expanded throughout the state. However, the pilot districts did not begin actual operation of the family court model until April 1999.[20] Such a comprehensive change to an established system takes time, and a meaningful evaluation of the success of the program in meeting the goals set out by the Futures Commission will not be possible for a number of years.

According to court personnel participating in the pilot projects, the long-term success of family court depends primarily on the continued availability of adequate funding. Put simply, family court is more expensive to operate than the present method of dealing with family cases. Whereas most district court judicial districts employ no staff to manage cases, the family court model depends on family court administrators and case managers to accomplish the



labor-intensive case management and service coordination. In addition, family court requires a comprehensive, automated information system for case management, currently unavailable in North Carolina. Without appropriate technology, it is impossible to track and manage the ever-increasing number of families in the system. Further, the additional staff and services created by family court in turn generate a need for more court facilities, which are not readily available throughout the state.

Despite the up-front expense, supporters argue that family courts save money in the long run. By actively managing and coordinating cases, they avoid duplication of resources and promote efficiency. Perhaps more important, they address the problems underlying family conflict, thereby reducing the number of times that families must return to the court system for assistance.

Family court represents an expansion of the role of courts in society. While continuing to provide a neutral, fair forum for dispute resolution, family court undertakes the additional responsibility of coordinating a community's response to critical societal issues affecting families. Family court judges become problem solvers in addition to neutral arbitrators.[21] Permanent integration of these additional responsibilities will require not only more resources but also willingness on the part of those within the present system to embrace such a fundamental change in the traditional role of judges and the court.

## Notes

1. Commission on the Future of Justice and the Courts in North Carolina, Without Favor, Denial or Delay: A Court System for the 21st Century (Raleigh, N.C.: the commission, Dec. 1996) (hereinafter Commission Report). James Exum, former chief justice, created the commission in 1994 in response to evidence of growing public dissatisfaction with the North Carolina court system. Justice Exum's successor, Chief Justice Burley Mitchell, continued the commission. The charge to the commission was to study public concern and to propose changes that would "meet the public's demand for a better [court] system." The twenty-seven commission members, representing all regions of the state, included lawyers as well as people from business, newspaper publishing, social services, law enforcement, academe, and the legislature. There were no incumbent court officials on the commission, but a number of judges, prosecutors, clerks, and others served as advisory members.

2. *See generally* N.C. Gen. Stat. ch. 7A (hereinafter the North Carolina General Statutes will be cited as G.S.).

3. Commission Report at 3. The Futures Commission obtained information about the public's perception of the court system through a telephone survey conducted in 1995 by Wilkerson and Associates of Louisville, Kentucky.

4. Commission Report at 45, 47. This is consistent with courts throughout the country. See Catherine Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 Family Law Quarterly 3, 3 (1998). Studies by the National Center for State Courts indicate that domestic relations matters are the "largest and fastest growing segment of state court civil case loads." Ross, *The Failure* at 6.

5. Commission Report at 45.

6. SL 1998-202, § 25, authorized the pilot projects and specified that the family court operate in accordance with the report issued by the Futures Commission. The 1998 Appropriations Act, SL 1998-212, § 8.1(a)(15), appropriated $318,228 for the first three pilot districts: District 14 (Durham County), District 20 (Anson, Richmond, Stanly, and Union counties), and District 26 (Mecklenburg County). SL 1998-202, § 25, authorized the pilot program to run through December 1, 2000. During its 1999 session, the General Assembly extended the duration of the pilot program through June 1, 2001. Also, it provided funding for three more pilot districts beginning January 1, 2000: District 5 (New Hanover and Pender counties), District 6A (Halifax County), and District 12 (Cumberland County). SL 1999-237.

7. The custody mediation program is administered by the AOC. *See* G.S. 7A-494. It currently operates in 28 of the state's 39 district court judicial districts. G.S. 50-13.1 requires that all child custody and visitation issues raised in a district with a custody mediation program be referred to mediation. Expert mediators meet with parents in an attempt to resolve the custody disputes without actual litigation. The General Assembly has provided that the custody mediation program expand to all district court judicial districts as funds become available.

8. *See* Andrew Schepard, *Parental Conflict Prevention Programs and the Unified Family Court: A Public Health Perspective*, 32 Family Law Quarterly 95, 95 (1998). According to the author, "[o]verall, the adversary procedure usually does children more harm than good." The Futures Commission reached a similar conclusion. Commission Report at 47 ("Family issues are not well-suited to the traditional adversarial model of the courts").

9. Commission Report at 45–46.

10. Commission Report at 46.

11. Commission Report at 46.

12. SL 1998-202, § 25.

13. Commission Report at 46. The commission suggested that training include substantive legal issues, basic principles of mediation and other techniques of alternative dispute resolution, sociology, psychology, child development, family systems, family-based services, and social work. Commission Report at 47.

14. Commission Report at 48.

15. Commission Report at 47. The commission recommended that court-monitored alternative dispute resolution be mandatory in the following types of cases: child custody and visitation, property distribution, alimony, and some child support cases. The commission also recommended that alternative services be available in all other cases except those involving domestic violence protection orders.

16. Commission Report at 45. Other services discussed later, such as parent education classes, also are available to families unable to pay the normal fee.

17. SL 1999-237, § 17.16.

18. The AOC accepted a $100,000 grant from the North Carolina Child Support Enforcement Office of the North Carolina Department of Health and Human Services to fund access and visitation programs in the first three pilot districts.

19. The AOC is required to report to the chair of the Appropriations Subcommittee on Justice and Public Safety in both the Senate and the House, and to the General Assembly's Fiscal Research Division by April 1, 2000. SL 1998-202, § 25. (The legislation required a report by March 1, 2000. However, the General Assembly subsequently granted the AOC an extension to April 1.) The report must evaluate the success of the pilot programs in bringing consistency, efficiency, and fairness to the resolution of family matters and the impact of the pilot programs on the caseloads of the districts. SL 1998-202, § 25.

20. The General Assembly ordered the project to begin March 1, 1999. Although staff began working in March, it took them about one month to complete the administrative details necessary to begin actually operating family court.

21. *See* David Rottman & Pamela Casey, *Therapeutic Justice and the Emergence of Problem-Solving Courts*, National Institute of Justice Journal, July 1999, at 12, 14 (chart outlining differences between "traditional" court process and "transformed" process).

# A Map, a Compass, Asking for Directions, and Visioning

## Organizational Tools for Navigating the Future

*Phillip Boyle*



BEYOND DOUBT, THE SHAPE OF THINGS IN THE YEAR 2000 *will be more like the situation at that time than has ever been true before.*

—Anonymous

For both real and symbolic reasons, the turning of the calendar to 2000 has made people think about the future. In public organizations, discussions about the future are likely to occur as part of long-range planning. For many years, long-range planning typically meant "forecasting," especially in large public and private organizations. New public policies and programs often were based on linear forecasts, such as population and employment projections. Not surprisingly, many linear forecasts turned out to be wrong. For example, in 1992 the North Carolina Employment Security Commission predicted slower population and labor-force growth in the 1990s than in the previous decade.

Most forecasting began with the present and assumed the future to be a logical extension of the past. This approach worked well when times were reasonably stable. As both public organizations and corporations began to experience rapid "discontinuous change,"[1] linear forecasting gave way to a more dynamic process, best known as "strategic planning." Strategic planning originated in corporate or business planning of the 1960s, which grew out of the "Gantt charts" designed during World War I to plan war production.[2]

Strategic planning is one of the most frequently discussed topics in the management literature, yet many organizations find it difficult to put into practice. Using navigational tools as a metaphor, this article describes some limitations of strategic planning and suggests why public organizations should consider visioning as an alternative.

IT'S TOUGH TO MAKE PREDICTIONS, *especially about the future.*

—Yogi Berra

### Limitations of Strategic Planning

Strategic planning is based on a systems theory approach, which recognizes that a specific enterprise is part of a larger social, political, and economic system. Strategic planning includes (1) setting goals or objectives; (2) assessing and forecasting the external environment; (3) designing and assessing alternative courses of action, including their potential risks and rewards; (4) selecting the best course of action; and (5) evaluating results as the course of action is implemented.[3] In strategic planning, the ability to make decisions about the future depends on a clear knowledge of the available alternatives, a systematic assessment of the costs and the benefits of each alternative, consistent ordering of preferences, and clear decision rules. The hallmark of strategic

*The author is an Institute of Government faculty member who specializes in organization and board development.*

planning is a comprehensive plan designed to interrelate all of an organization's decisions and activities.

Whether applied to local government, a corporation, or a nonprofit association, strategic planning "consists of taking stock of how major social and economic trends—'megatrends'—will affect the community, deciding on the most important issues and goals, and then laying out specific, feasible steps to reach those goals."[4] The cardinal purpose of strategic planning is to discover future opportunities and exploit them. The most effective plans, then, exploit opportunities and remove obstacles on the basis of an objective and systematic survey of the future.[5] To accomplish this, strategic planning emphasizes "environmental scanning."[6] The purpose of environmental scanning is to prepare the organization's internal environment to respond to changes in the external environment.

Adopting this linear approach to planning leads organizations to make frequent and common mistakes, such as relegating strategic planning to the chief executive or to a central planning office, assuming that strategy can be fully determined up front, and mistaking strategic planning for strategic thinking.[7] The core problems with planning, and the reasons that most planning fails, relate to commitment, change, politics, and control. Henry Mintzberg, a former president of the Strategic Management Society, argues that the real role of planning is to serve as a vehicle for elaborating on and operationalizing strategies that the organization already has chosen.[8] The overwhelming degree of uncertainty about the environment, the pervasive influence of administrative politics, and the sheer unpredictability of the future make strategic planning more feasible in theory than in practice.

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MORE THAN ANYTIME IN HISTORY, MANKIND FACES A CROSSROADS. *One path leads to despair and utter hopelessness, the other to total extinction. Let us pray that we have the wisdom to choose correctly.*

—Woody Allen

## Ways of Navigating the Future

To carry out strategic planning successfully, an organization must understand its own internal and external constraints. Organizations trying to plan strategically must navigate between two sets of constraints: the need for environmental adaptation and the need for internal coordination.[9] (To see how these two dynamics shape an organization's choice of navigational tools, see Table 1.) "Environmental adaptation" refers to the degree to which an organization must respond quickly to changes in its external environment. "Internal coordination" refers to the degree to which an organization must coordinate its decisions and actions within its internal environment. In this context, strategic planning is an organization's attempt to navigate its internal and external environments simultaneously. Four tools can help an organization navigate: a map, a compass, asking for directions, and visioning.

*A map.* Organizations with high needs for internal coordination but relatively low needs for environmental adaptation prefer to navigate using a map. Such organizations must appear rational in their decision making. They attempt to map where they are going in relation to where they are now and where they have been. Rapid response to the external environment is less important than coordinated internal action. The organization presumes its environment to be relatively stable. This means that it can take time to assess the environment fully and subject alternatives to an analysis of costs and benefits.[10] The best known and most widely analyzed attempt to apply this model of strategic planning to government was the planning, programming, and budgeting system (PPBS) initiated in the early 1960s by Secretary of Defense Robert S. McNamara. It was intended to centralize planning in the Office of the Secretary, provide guidance on programming, correlate budgets with plans, and use cost-benefit analysis and other analytical techniques to assist in decision making.

*A compass.* Organizations with high needs for environmental adaptation but relatively low needs for internal coordination are more likely to navigate using a compass. These organizations see themselves as entrepreneurial. They search for innovations and new opportunities, avoiding complex decision processes that slow down response time. Imagination, flexibility, and creativity are more highly valued than internal coordination, integration, and control.[11] In Scottsdale, Arizona, a strategic shift in direction from fire fighting to fire prevention has helped reduce fire losses even as the assessed value of property has increased.[12]

*Asking for directions.* Organizations with relatively low needs for environmental adaptation and internal coordination prefer to navigate by asking for directions. They are much more likely to want to be told to "go two blocks and turn right at the light" than to be told to "go north until the terrain seems to transition from deciduous trees to conifers." These organizations prefer directions that are logical, sequential, and incremental. They would rather take one small step at a time than try to garner support for a "big" idea all at once. Small steps make it easier to forestall resistance, to "test the water," to collect feedback, and to make adjustments along the way.[13] Madison, Wisconsin, began exploring community policing by using parking-meter monitors as the "eyes and ears" of the police. A wholesale shift to community policing might have aroused opposition from some seg-

ments of the Police Department. This incremental experiment proved so successful that the department became its strongest advocate.

*Visioning.* Organizations that must balance high environmental adaptation and high internal coordination need a different approach to planning. Visioning, literally a combination of "vision" and "planning," allows organizations to incorporate the benefits of a map, a compass, and asking for directions into an approach that attempts to create a desired future instead of reacting to the future. In visioning, organizations shop widely for new ideas and important signals; build awareness by creating study groups and developing new options; broaden support by forcing discussions, probing positions, exploring options, and encouraging trial ideas; and develop commitment by launching exploratory projects and capitalizing on external crises or events.[14] Governmental efforts to navigate the future through visioning, also known as "anticipatory democracy,"[15] can be found across states (for example, Goals for Georgia, Hawaii's Future, and Texas 2000), municipalities [Imagine Rockville (Md.), Livable Tucson (Ariz.), and Chattanooga (Tenn.) ReVision 2000], and communities [Boulder (Colo.) Healthy Communities, Lander Valley (Wyo.) 2020, and Wrangell Alaska 2001].

THE BEST WAY *to predict the future is to create it.*

—Peter Drucker

## The Need for Visioning in Public Organizations

Strategic planning may fail because an organization does it badly, but it is more likely to fail because the model an organization chooses is a bad fit. Mapping is likely to work best in organizations that need internal coordination more than they need environmental adaptation. The latter characterization may have been true of public organizations at one time, but it is certainly less true or untrue today! Because the external environment of most public organizations is not likely to remain stable for very long, a detailed map is less useful for navigating the future. For example, when one is lost on a highway or in a city, a detailed map can be very useful; but when one is lost in a swamp, a compass is much more valuable.[16] Public managers and officials who try to force a fit between their organizations and strategic mapping are likely to get frustrated at the process, if not at one another.

Navigating by compass and asking for directions are not likely to work much better in most public organizations today. Public organizations are under enormous pressure to respond quickly to their changing external environments by moving in new directions, as evident in their efforts to "reinvent" themselves, "break through" bureaucracy, "deregulate," or "innovate."[17] This pressure to respond to the environment is likely also to increase the need for internal coordination. And few agencies can adopt incremental planning because few can claim that tomorrow will be "business as usual."

A map, a compass, and asking for directions are useful tools for navigating the future, but they share a weakness. They all attempt to navigate the future by starting from today. Organizations that need to adapt to the environment and coordinate their internal actions cannot use these tools alone. They must incorporate these tools into a planning process that creates rather than reacts. Visioning embraces each of these other tools. It uses the long-range analyses inherent in rational mapping to probe the future; it seeks strategic directions that can be discovered only with a compass; and it experiments with and learns from a series of incremental decisions rather than through a comprehensive strategy.

The notion that an organization can map out strategy in detail in advance of its implementation—the "strategy is in the binder" myth[18]—fails to take into account that, to a considerable degree, strategy must be allowed to emerge as new circumstances present themselves. A six-year study of visionary companies explodes the myth that successful organizations operate on the basis of highly planned strategy: what might look in retrospect like brilliant moves were actually trials, experiments, sheer opportunism, or even accidents.[19] Visioning organizations try things and, in doing so, discover what works. "We think in order to act, to be sure, but we also act in order to think," explains Henry Mintzberg.[20]

In visioning, acting often precedes planning. An organization may seem to be responding to a demand from the environment, but often it is creating the en-

**Table 1.** Navigational Tools in Organizations

| | |
|---|---|
| **A Map**<br>Low adaptation<br>High coordination | **A Compass**<br>High adaptation<br>Low coordination |
| **Asking for Directions**<br>Low adaptation<br>Low coordination | **Visioning**<br>High adaptation<br>High coordination |

Source: Adapted from JAMES M. KOUZES & BARRY Z. POSNER, THE LEADERSHIP CHALLENGE: HOW TO GET EXTRAORDINARY THINGS DONE IN ORGANIZATIONS (San Francisco: Jossey-Bass, 1987); JAMES B. QUINN, STRATEGIES FOR CHANGE: LOGICAL INCREMENTALISM (Homewood, Ill.: Irwin, 1980); HAL G. RAINEY, UNDERSTANDING AND MANAGING PUBLIC ORGANIZATIONS (San Francisco: Jossey-Bass, 1991); and N. ROBERTS, *Limitations of Strategic Action in Bureaus,* in PUBLIC MANAGEMENT: THE STATE OF THE ART at 153 (Barry Bozeman ed., San Francisco: Jossey-Bass, 1993).

vironment through action and implementation. Strategies tend to be "just-in-time..., supported by more investment in general knowledge, a large skill repertoire, the ability to do a quick study, trust in intuitions, and sophistication in cutting losses."[21] Visioning does not become subservient to any one model. Instead, "each approach becomes simply a component in a logical process that improves the quality of available information, establishes critical elements of political power and credibility, creates needed participation and psychological commitment, and thus enhances both the quality of strategic decisions and the likelihood of their successful implementation."[22] Such an approach balances the appeal of creating the one big plan and the necessity of adopting a series of successive smaller plans. In visioning, "[t]he big picture is painted with little strokes."[23]

IF YOU ARE PLANNING FOR A YEAR, SOW RICE; *if you are planning for a decade, plant trees; if you are planning for a lifetime, educate people.*

—Chinese proverb

## Conclusion

The rational organization prepares a detailed map of the future, the entrepreneurial organization uses a compass to discover uncharted opportunities, and the incremental organization asks for directions. Which approach is best? None of these approaches fit well with modern public organizations that have needs for high environmental adaptation and high internal coordination, that find "the logic of rational, comprehensive action too limiting, the beliefs about management control illusory, and the acceptance of the status quo unimaginative."[24]

Organizations trying to navigate the future using only a map, a compass, or directions are reacting to a future based on today. Visioning organizations seek to create the future. As Peter Drucker writes, "[t]he institution, in short, does not simply exist within and react to society. It exists to produce results on and in society."[25] Perhaps the time has come for public organizations to think about creating the future instead of responding to it.

## Notes

1. "Discontinuous change" refers to a major shift in an organization's environment that results in major shifts in the organization's mission or activities. See DAVID A. NADLER, ROBERT B. SHAW, & A. ELISE WALTON, DISCONTINUOUS CHANGE: LEADING ORGANIZATIONAL TRANSFORMATION (San Francisco: Jossey-Bass, 1995).

2. PETER F. DRUCKER, THE NEW REALITIES: IN GOVERNMENT AND POLITICS, IN ECONOMICS AND BUSINESS, IN SOCIETY AND WORLD VIEW (New York: Harper & Row, 1989).

3. For a more detailed discussion of the planning process, *see* Kurt Jenne, *From Vision to Reality: Effective Planning by the Governing Board*, POPULAR GOVERNMENT, Summer 1988, at 33; and Roger Schwarz, *Managing Planned Change in Organizations*, POPULAR GOVERNMENT, Winter 1988, at 13.

4. Kurt Jenne, *Strategic Planning: Taking Charge of the Future*, POPULAR GOVERNMENT, Spring 1986, at 36, 36.

5. Barton Wechsler & Robert W. Backoff, *Policy Making and Administration in State Agencies: Strategic Management Approaches*, 46 PUBLIC ADMINISTRATION REVIEW 321 (1986). Strategic planning assumes that planners will take into account three essential sets of knowledge: (1) the fundamental social, political, and economic purposes the organization is expected to serve; (2) the values of the people within the organization and the people served by the organization; and (3) opportunities and problems in the organization's environment. *See* GROVER STARLING, MANAGING THE PUBLIC SECTOR (Fort Worth, Tex.: Harcourt Brace, 1998).

6. Environmental scanning is actually part of a set of strategic planning procedures. Other common procedures include stakeholder analysis, scenario building, strategic conversation, strategic issue analysis (assessing opposing forces and values), and SWOT analysis (assessing strengths, weaknesses, opportunities, and threats). For a discussion of their application, *see* JOHN M. BRYSON, STRATEGIC PLANNING FOR PUBLIC AND NONPROFIT ORGANIZATIONS: A GUIDE TO STRENGTHENING AND SUSTAINING ORGANIZATIONAL ACHIEVEMENT (San Francisco: Jossey-Bass, 1988); PETER SCHWARTZ, THE ART OF THE LONG VIEW: PLANNING FOR THE FUTURE IN AN UNCERTAIN WORLD (New York: Doubleday, 1996); and B. Wechsler & R. W. Backoff, *Policy Making and Administration in State Agencies: Strategic Management Approaches*, 46 PUBLIC ADMINISTRATION REVIEW 321 (1986).

7. CAROLE S. NAPOLITANO & LIDA J. HENDERSON, THE LEADERSHIP ODYSSEY: A SELF-DEVELOPMENT GUIDE TO NEW SKILLS FOR NEW TIMES (San Francisco: Jossey-Bass, 1998).

8. For a thorough review and critique of strategic planning, *see* HENRY MINTZBERG, THE RISE AND FALL OF STRATEGIC PLANNING: RECONCEIVING ROLES FOR PLANNING, PLANS, AND PLANNERS (New York: Free Press, 1993).

9. Nancy C. Roberts, *Limitations of Strategic Action in Bureaus*, in PUBLIC MANAGEMENT: THE STATE OF THE ART at 153 (Barry Bozeman ed., San Francisco: Jossey-Bass, 1993).

10. NAPOLITANO & HENDERSON, THE LEADERSHIP ODYSSEY.

11. JAMES M. KOUZES & BARRY Z. POSNER, THE LEADERSHIP CHALLENGE: HOW TO GET EXTRAORDINARY THINGS DONE IN ORGANIZATIONS (San Francisco: Jossey-Bass, 1987).

12. Scottsdale contracts out its fire service to a private firm, which can initiate a strategic environmental shift without needing to be as concerned with internal coordination as it would if it were a public organization.

13. Roberts, *Limitations*.

14. JAMES B. QUINN, STRATEGIES FOR CHANGE: LOGICAL INCREMENTALISM (Homewood, Ill.: Irwin, 1980).

15. Alvin Toffler first used the phrase "anticipatory democracy" in FUTURE SHOCK (New York: Random House, 1970). For applications to state and local government, see ANTICIPATORY DEMOCRACY: PEOPLE IN THE POLITICS OF THE FUTURE (Clement Bezold ed., New York: Vintage, 1978).

16. KOUZES & POSNER, THE LEADERSHIP CHALLENGE.

17. For more detailed discussions of these forces at work in public agencies, *see* MICHAEL BARZELAY, BREAKING THROUGH BUREAUCRACY: A NEW VISION FOR MANAGING IN GOVERNMENT (Berkeley: University of California Press, 1992); DEREGULATING THE PUBLIC SERVICE: CAN GOVERNMENT BE IMPROVED? (J. D. Dilulio, Jr., ed., Washington, D.C.: Brookings Institution, 1994); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (Reading, Mass.: Addison-Wesley, 1992); and SANDFORD F. BORINS, INNOVATING WITH INTEGRITY: HOW LOCAL HEROES ARE TRANSFORMING AMERICAN GOVERNMENT (Washington, D.C.: Georgetown University, 1998).

18. STEPHEN J. WALL & SHANNON R. WALL, THE NEW STRATEGISTS: CREATING LEADERS AT ALL LEVELS (New York: Free Press, 1995).

19. JAMES C. COLLINS & JERRY I. PORRAS, BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES (New York: HarperCollins, 1994).

20. Henry Mintzberg, *The Rise and Fall of Strategic Planning*, HARVARD BUSINESS REVIEW, Jan.–Feb. 1994, 107, 111.

21. KARL E. WEICK, THE SOCIAL PSYCHOLOGY OF ORGANIZING at 223, 229 (Reading, Mass.: Addison-Wesley, 1979).

22. QUINN, STRATEGIES FOR CHANGE at 58.

23. Mintzberg, *The Rise and Fall* at 111.

24. Roberts, *Limitations* at 172.

25. Peter Drucker, *Management's New Paradigms*, FORBES, Oct. 5, 1998, 152, 176.

# Hiring a Director for a Nonprofit Agency: A Step-by-Step Guide

*Kurt J. Jenne and Margaret Henderson*

Hiring an executive director is one of the most important actions that the governing board of a nonprofit agency takes. The board depends on its director for day-to-day operation to achieve the agency's purposes and objectives within the constraints of its budget—not an easy task to accomplish year in and year out. Also, the working relationship between the director and the board, the staff, volunteers, clients, funding organizations, and other service agencies can significantly influence the agency's effectiveness and reputation in the community.

This article suggests a process designed to help ensure that, in selecting its next director, a board will meet its own needs and those of its constituencies. We have used and refined the process over more than ten years of assisting local elected and appointed government and nonprofit boards. It should be equally applicable whether a board is hiring its first director or it is replacing one who has resigned or been fired. If a clearly agreed on successor already is working for the organization, the board might want to proceed directly to negotiations with and appointment of him or her. However, even in such a case, the board may want to use part or all of the process that we suggest in order to be certain that it has given this important choice the most careful deliberation. To illuminate our description of the process with real examples, we include materials used in the Orange County Rape Crisis Center's recruitment of a new director in 1999.

Whether the board conducts the hiring process itself or secures outside assistance, it might use the steps described in this article as a framework for planning and arranging its search and as a checklist for ensuring that it has completed all the essential tasks.[1]

## Hiring a Director: A Decision-Making Process

A board can rationally select a director by figuring out what its agency needs, looking at several candidates with an eye to how well each one fits the needs, and then choosing the best candidate on that basis. Assuming that a board's goal is to hire the best director whom it can attract, it can do so by gathering enough information in the steps described in this article to answer the following questions:

- What knowledge, skills, abilities, and other characteristics must a person have to be the ideal director for our agency; what is the relative importance of those attributes; and what level of salary should we expect to pay? (Step 1)
- How should we organize ourselves to find the person? (Step 2)
- Who meets our essential requirements and wants the job? (Step 3)
- How do those people compare with one another, especially with respect to the most important skills? (Steps 4 and 5)
- All things considered, who would be the best director? (Step 5)

(For a summary of the steps and the tasks that we recommend a board complete during an effective recruitment, see Figure 1.)

The transition to a new director may come when the agency is in turmoil. The transition itself may cause anxiety among board members and staff. The emotions generated by the transition may distract people from the rational process that these steps represent, especially if the transition is abrupt, for whatever reason. During the transition the board may feel pressure from staff, clients, or other stakeholders in the community to act quickly or to place undue emphasis on one or another interest or agenda when doing so might not serve the overall long-term needs of the agency. Therefore it is important throughout the hiring process to balance immediate and long-range needs, personal and institutional agendas, and political and objective standards of evaluation.

It also is important to pin down specific responsibilities for all the tasks that constitute an effective recruitment effort. The board and its needs and constraints will necessarily drive the process. But board members themselves should not—and cannot—do all the work that goes into a successful recruitment. The board will need assistance from staff, from clients perhaps, and from other people outside the agency. Effective timing and coordination will be important: the agency will have to complete tasks effectively and efficiently if it wants candidates to see it as an agency they would be proud to represent. What the agency does—its mission—will surely be

*Kurt Jenne is an Institute of Government faculty member who specializes in local government management and board-staff relationships. Margaret Henderson is a research associate at the Institute focusing on nonprofit agency/local government relationships.*

### Figure 1. Steps in Hiring an Executive Director

**Step 1:** *Determine future needs of agency and develop profile of ideal candidate.*
- List demands of job—issues facing agency (see Figure 2).
- List assets (knowledge, skills, and abilities) of ideal director (see Figure 3).
- Agree on salary range.
- Complete candidate profile.

**Step 2:** *Plan hiring strategy and recruit applicants.*
- Agree on tasks and schedules.
- Make interim arrangements for agency's management.
- Agree on process and schedule.
- Decide how to involve staff and others.
- Advertise.

**Step 3:** *Screen applicants.*
- Receive applications.
- Screen applications (see Figure 4).
- Choose whom to interview.

**Step 4:** *Assess candidates.*
- Plan assessment process.
- Design interview (or assessment center) (see Figure 5; also see guide, page 33).
- Conduct interviews (or assessment center) (see guide, page 33).

**Step 5:** *Hire director.*
- Agree on choice.
- Negotiate details.
- Draft employment agreement.

**Final Steps:** *Establish and maintain good relationship.*
- Set clear expectations.
- Plan for formal evaluation.

attractive. That is why candidates agree to be considered for the job. How the agency carries out its mission is what candidates will want to learn. And how the board goes about recruiting and hiring a director will reveal a lot about its functioning. Thus at the outset the board should specify both the tasks that have to be completed and the people responsible for them.

**STEP 1: Determine future needs and develop a profile of the ideal candidate.**

*List the demands of the job.* Before it does anything else, the board can smooth its path by anticipating the future demands on the executive director: What will be happening in the community that will affect the agency's mission and operations? What are the strengths and the weaknesses of the organization as it moves into the future? What will the staff be like, and how will it change? How does the board want the director to divide his or her efforts between internal management of the agency and external management of the board's agenda in the community? The answers to these questions are likely to be different for almost every agency. (For the list of issues developed by the Orange County Rape Crisis Center in 1999, during this initial stage of recruiting a new director, see Figure 2.)

*List the assets (knowledge, skills, and abilities) of an ideal director.* Having taken time to anticipate the most important issues facing it in the future, the board of directors should identify specific assets that it seeks in candidates. Otherwise, it risks choosing a director on the basis of stereotypical characteristics that might not be relevant to its particular circumstances. For example, if the agency is in financial trouble, an otherwise attractive candidate who has worked only for large, financially flush agencies and has had no direct responsibility for fund-raising, budgeting, or financial controls, is unlikely to meet the agency's needs. Similarly an agency experiencing serious problems of employee morale might want to make an effort to attract applicants who have demonstrated records of effective staff management.

Most of the applicants who respond to a board's advertisement will probably be qualified in some respect; however, no two of them will be the same. Applicants will have different combinations of strengths and weaknesses. The challenge facing the board will be to choose, from many capable applicants, the person who comes closest to having the unique set of assets that the agency needs to deal with its most important issues. Therefore it is useful for board members to review the list of issues that they developed and then to specify the kinds of assets that they think their director will need in order to carry out the agency's mission effectively.

Board members can brainstorm or take turns listing issues and characteristics until everyone is satisfied that the group has not missed anything relevant. Usually the resulting list of characteristics is fairly long. The board can focus on the most critical items by combining any redundant or similar ones and then trying to agree on the relative importance of the resulting characteristics.

A tedious but effective way to do that is to perform a "pairwise comparison" of all the items on the list. First, the members vote on the relative importance of the first item compared with every other item in turn. They place a mark by whichever item wins each vote. Then the members compare each succeeding item with every other item on the list until they have worked through the whole list. The items with the most marks should be the ones that the members believe to be the most critical.

Now the board has a manageable list of the most important characteristics on which it might focus its attention in reviewing applicants' qualifications. The board also can ask employees to add their points of view on an ideal director. (For the list of knowledge, skills, and abilities that the Orange County Rape Crisis Center's board thought were necessary to deal with the list of issues in Figure 2, see Figure 3.)

In developing a profile, a board must focus on the needs of its agency. Sometimes the strengths and the weaknesses of the outgoing director exert undue influence on a board's thinking about the kind of director the agency needs. If a board focuses too much on correcting its outgoing director's weaknesses, it

risks overcompensating for attributes that might not be most critical to the demands of the job. Listing the issues facing the agency helps the board shift its focus from the past to the future.

One attribute that always seems to be necessary to perform effectively as a nonprofit director but frequently seems to be overlooked is the ability to maintain personal and professional equilibrium in the face of overwhelming demands on limited resources. A frequently heard comment from new nonprofit directors is "I never dreamed I'd be expected to know so much about so many different things!" How a board might accurately evaluate this "coping capacity" in candidates is not clear, but experience suggests that trying to do so is important. The inability to temper a passionate dedication to the agency's purpose and objectives with a realistic acceptance of the limits imposed by available resources frequently contributes to dysfunction in the management of nonprofit agencies.

*Agree on a salary range.* Setting a salary range when hiring has the same advantage as setting a ceiling when buying a car: it makes the search realistic and limited. Like a car buyer, a board might later decide to deviate from its planned limits if it wants a candidate badly enough to do so, but setting some limits initially provides a firm foundation from which to make such a decision. In setting the salary range, the board should consider factors such as the knowledge, skills, and abilities included in its profile; the size and the complexity of the agency and its operations; the general cost and standard of living in the community; and the salary levels of directors of comparable agencies.

Providing salary information in the agency's advertisement can serve as a screening device. If the salary is significantly higher or lower than a prospective applicant's needs or reasonable expectations, he or she might be less likely to submit a fruitless application, and the board will not waste time interviewing candidates who have salary expectations that the agency is unable to meet.

*Complete the candidate profile.* Once the board has listed the demands of the job, identified desired characteristics, and agreed on a salary range, it should combine this information in a profile of the ideal candidate. Having such a profile makes almost every other step in the hiring process easier and more effective:

- The board has a realistic basis on which to decide the salary range it must offer to obtain the skills it needs.
- The board is in a position to compose a clear, specific advertisement that can save time and effort by discouraging inappropriate applications.
- The board has a fair and effective device—a set of objective criteria—by which to screen applicants and to select those who appear to be most qualified to interview.
- The board can explain clearly to disappointed applicants why they were not selected for an interview, should they ask for further explanation after being notified.

**Figure 2.** The Most Important Issues for the Orange County Rape Crisis Center over the Next 3–5 Years

We need to do fund-raising to achieve self-sufficiency.

We need to consider ways to obtain endowments for the center.

Staff management will remain an important part of the job.

It might become harder to get enough volunteers to keep up with service demand.

Demand for services will increase as the population of the area grows.

Our services will be invited to expand in the schools.

Our services will become more widespread geographically in the county.

Our services will move toward regional cooperation, maybe consolidation.

We will need more space. We will need to decide whether to rent or own.

We will need more advocacy and marketing to maintain access to resources.

We will need to increase diversity on staff and board to reflect changes in the community.

- The board can use the criteria to construct a valid set of questions or tasks to use in its interviews or other assessment procedures.
- The board can use the criteria to evaluate the qualifications and the performance of the finalists.

**STEP 2: Plan a hiring strategy and recruit applicants.**

*Agree on tasks and schedules.* Before it goes further, the board should outline the tasks it will have to complete, and lay out a rough timetable for hiring the new director. Doing this accomplishes several purposes. First, it gives board members a realistic view of how long the hiring process will take. Second, it requires them to decide how to provide for management of the agency in the interim if the director being replaced already has left or will leave before recruitment can be completed. Third, it gives them an idea of how much time they should expect to devote personally to the effort. The board should agree on realistic target dates for completing each task in the hiring process, consistent with the commitments that members and others who will participate are willing to make.

*Make interim arrangements for the agency's management.* Nonprofit boards, staff, and volunteers typically contribute time and energy to an agency and its mission in an intensely personal way. This usually leaves scant reserves to call on in the interval between directors. The board should pay careful attention to interim management of the agency's business. If

**Figure 3.** Knowledge, Skills, and Abilities of Ideal Orange County Rape Crisis Center Director

| Score | Knowledge, Skill, or Ability |
|---|---|
| 17 | Ability to be an advocate for staff's welfare and its ability to function well |
| 14 | Sense of humor |
| 14 | Ability to listen well and be perceptive |
| 13 | Ability to know his or her own limits and to practice and model self-care |
| 13 | Comfort relating to and working with many different kinds of people |
| 12 | Ability to be cool, tactful, and thoughtful under pressure |
| 11 | Good oral and written communication skills |
| 8 | Ability to network with key stakeholders |
| 8 | Ability to deal effectively with media on sensitive issues |
| 7 | Ability to deal directly with a case or to back up staff |
| 6 | Ability to maintain financial solvency |
| 6 | Excellent conflict resolution skills |
| 5 | Ability to market the services of the Orange County Rape Crisis Center |
| 4 | Ability to keep on top of what's going on in the community |
| 2 | Good delegator |
| 2 | Knowledge of trauma |
| 0 | Knowledge of or familiarity with the clinical issues that will be involved in the work of the center |

the current director has given notice, the board should make a deliberate (but realistic) effort to replace him or her within the time available or to make arrangements for interim direction of the agency without placing an undue burden on board members or other staff members. It is generally not advisable to ask a board member to assume the entirely different role of director in the interim. Some boards have divided the director's responsibilities among staff. However, coordination and decisions about priorities become more difficult under those circumstances, and such arrangements are difficult to manage beyond a very short period. If resources allow and the hiring process looks to be very long, hiring an interim director might be more effective.

*Agree on a process and a schedule.* It is unusual for a board to do a thorough job of recruiting outside candidates and have a new director on the job in less than three months. Four months is a more reasonable expectation for a straightforward recruitment with no special problems. More time may be necessary if there is substantial discord among board members, a shortage of good candidates, or other complicating factors. Overall, time spent up front on developing a clear profile of the new director and on planning carefully for recruitment can save time in the long run by making everything else the board does more efficient and more effective. It also is important to have board members discuss openly and honestly how much time each can devote to the recruitment and to organize and carry out the process in a manner consistent with the commitments people make.

*Decide how to involve staff and others.* Any kind of change causes stress in an organization. A pending change in leadership always creates unease. It is a major transition for an agency, even if someone already on the staff is appointed as the new director. People's natural fear of the unknown will compound the stress commonly existing in a nonprofit staff that is stretched to the limit. Keeping staff members informed about the process and, if possible, involving them in it can mitigate anxiety over the transition. As it plans the recruitment, the board should share with staff as much information as it can about the general procedure it will follow, its general timetable, and its target date for having a new director in place. It might schedule each finalist to meet with staff members as individuals or as a group. If the board invites staff members to share their impressions of candidates from these meetings, it should determine and communicate clearly how much weight it expects to give to their observations in making a decision. The Orange County Rape Crisis Center's board decided to include one staff member on its search committee and to give the rest of the staff the opportunity to meet candidates and offer individual impressions afterward.[2] Even though the board is responsible for making the final decision, it might wish to involve staff actively in the interview process. Staff members are likely to be in the best position to evaluate candidates' capabilities in areas that are critical to successful day-to-day operation of the agency. As long as the staff's role is clearly spelled out, its participation can provide valuable data to the board in making a decision and can ease the transition to a new director.

Other people whom the board might add to the search committee are agency volunteers, clients, professionals who are linked to the agency's work, representatives of funding agencies, and representatives of other agencies whose work is related. There are several good reasons for including these stakeholders: (1) they have a legitimate interest in the outcome of the search; (2) through their formal and informal channels of communication in the community, they can play a key role in the new director's assimilation; (3) stakeholders who are dissatisfied with the agency's performance have an opportunity to work from the inside to bring about positive change; and (4) candidates are assured of the opportunity to meet and talk with people who might play important roles in the agency's future. The board should weigh the value added to the search process by such additions against the effect of having a larger committee, a more complicated process, or a longer recruitment. Also, the board should make clear to all the people whom it invites to join in the process, the limits of what it is asking them to do.

*Advertise.* An advertisement that specifies the desired knowledge, skills, and abilities and includes a salary range serves as an initial screening device by deterring people who

do not have the qualifications the board seeks and by attracting people who do. Resisting the temptation to publish a generic advertisement as soon as the outgoing director resigns is hard because an advertisement is tangible evidence that the replacement process is under way. However, doing so deprives the board of this initial screening device and likely will require additional effort to review applications from people who do not meet the board's minimum expectations. Other information that candidates might look for in an advertisement includes the board's size, its method of recruiting a new director, the past rate of turnover in the director's job, the size and the nature of the community or the population served, and any peculiarities in organization or services. Newspapers are the fastest means for circulating an advertisement, but they may not reach all the agency's target audience. Advertising in relevant professional journals can help cast the net widely; however, their longer lead times for publication normally add significant time to the process. Announcements might be sent to other nonprofit agencies and to state or national coalitions and might be posted on relevant "listservs" (programs that automatically manage mailing lists on the Internet). There also might be special local media, such as newsletters, that reach interested and qualified people.

**STEP 3: Screen applicants.**

*Receive applications.* The board should allow two to six weeks to complete advertisement of the position and receipt of applications. It should designate one person to receive the applications, check them for completeness, and ensure that only board members have access to them. Applications should be kept confidential unless and until the applicants formally agree to the release of any information. One board member should be designated to be responsible for the orderly processing and handling of applications. In some cases the outgoing director or another staff member might fulfill this role, but the board should consider all the possible ramifications of either one's doing so and be certain that the person would under no circumstances become a candidate. Whatever arrangement is devised, the person handling the applications on behalf of the board must have the full confidence of all the members.

*Screen applications.* The board has many options for screening applications. A staff assistant might eliminate applications that clearly fail to meet basic factual qualifications in the profile, or sort applications into several groups according to apparent level of qualification. A committee of board members might do an initial screening for the whole board. In the interest of openness, most boards give all their members access to all the applications no matter which method of screening they use. This has the advantage of making it less likely that a promising candidate will be overlooked in the screening stage. With a small board, applications can be copied for distribution to members during screening; however, many boards feel more secure in meeting applicants' expectations of confidentiality if members review the original applications in the place of custody.

As they review applications, board members might use a rating sheet of some kind (see Figure 4 for the rating sheet that the Orange County Rape Crisis Center used). The résumés accompanying the applications will indicate the most basic qualifications of applicants as a starting point. For example, they will reveal whether applicants meet basic education and experience requirements, and they might reveal low-level writing skills. Rarely, though, will they reveal reliable information about how well applicants performed in previous employment. Beyond the basics, the board can only draw inferences from the candidates' résumés relative to its list of desired knowledge, skills, and abilities.

*Choose whom to interview.* When all the board members have reviewed applications, the whole board can meet, compare notes, and decide whom it wants to invite for an interview (or an assessment center, explained later). Most boards invite three to seven applicants. However, some boards conduct 30- to 45-minute screening interviews of ten or so applicants before narrowing the field to a smaller set of finalists. The board or its recruiting committee can conduct these screening interviews by videotape at the applicants' locations or in person at a designated central location. In any case, when the screening interviews are complete, the recruiting committee or the whole board usually agrees on a few finalists to invite for more intensive assessment.

It is customary to send some background information about the agency and its work to the candidates who are invited to interview. This might include brochures and other publications about its services, the job description for the director's position, information about the agency's financial status, information about the community the agency serves, and any publicity about the agency that would help applicants understand its origin and nature, its role and acceptance in the community, and any formative events or issues in its history.

**STEP 4: Assess candidates.**

*Plan the assessment process.* The most common method of assessing candidates is to interview them. However, an interview has limited reliability in predicting success on the job. The best predictor of a person's behavior on the job is the behavior itself. An interview reveals only what a candidate *says* about his or her behavior. To a large extent, the person being interviewed can tell the interviewer what he or she wants to hear without having to back it up. An "assessment center," a series of exercises designed to demonstrate candidates' actual ability to perform relevant work tasks, is a more reliable predictor of a person's ability to do a given job.[3] However, because a valid and effective assessment center is difficult, expensive, and time-consuming to design and administer, most boards still depend on interviews to assess candidates.

*Design the interview.* The board can take several steps to increase the validity and the reliability of its interviews. First, it can carefully design them. The desired characteristics in the profile and the priorities assigned to them provide a valid

**Figure 4.** Résumé Evaluation Sheet, Orange County Rape Crisis Center

Applicant. _____

| | Inadequate | Meets Needs | Excellent |
|---|---|---|---|
| Writes well | | | |
| Résumé neat, complete, professional | | | |
| Nonprofit management experience | | | |
| Experience serving diverse populations | | | |
| Experience managing programs | | | |
| Experience supervising staff or volunteers | | | |
| Financial management experience | | | |
| Fund-raising experience | | | |
| Grant-writing experience | | | |
| Familiarity with sexual violence issues | | | |
| Familiarity with rape crisis work | | | |
| Demonstrated interest in our work | | | |

Comments:

Interview? ☐ Yes ☐ No ☐ Maybe

Points to clarify in interview:

focus for the interview panel's examination of each candidate and for its design of questions that will yield relevant data in the limited time available for each interview. (For an example of desired characteristics translated into questions, see Figure 5. The complete questions appear in the guide used by the Orange County Rape Crisis Center's interview panel, page 33.)

Allowing for introductions, follow-up questions from board members, and closing questions from the candidate, an interview panel can explore only four or five questions adequately in a one-hour interview. If the board wants to obtain more information, the interview panel should plan a longer interview. One and a half hours is not unusual. More than two hours probably goes beyond the limits of endurance and effectiveness of candidates and panel members alike. If the board thinks that it has more important questions to ask than a reasonable interview time will allow, it might consider other ways to obtain some of the information—for example, discussions at meals and other events on the itinerary, or observations and opinions from candidates' references.

A second step that an interview panel can take to make its interviews more valid and reliable is to review and discuss the criteria to be measured by each question before the first interview. This allows the panel to ensure that every interviewer has the same understanding of what will constitute high, medium, or low performance on each question. It also allows the group to discourage panelists from making inferences that are not verified by actual observation. For example, if a panelist reveals that he will rate a candidate low on ability to supervise the agency's spirited staff if the candidate is quiet and soft-spoken, the panel might discuss whether there is a valid relationship between the inference and the observed behavior, try to agree on a valid way to measure supervisory effectiveness, and make sure that everyone on the panel uses it.

Third, the panel should administer the interview consistently across the candidates. Asking each candidate the same set of questions in the same sequence and in the same manner provides a yardstick by which to compare candidates' responses. As long as the panel establishes this common basis for comparison, it still is free to vary its follow-up questions to explore the differences among the people whom it interviews.

Most interview panels have found that they become more consistent and efficient with each succeeding interview. This in itself introduces some inconsistency across candidates. One way to mitigate the inconsistency (it probably cannot be eliminated entirely) is to rehearse asking the questions once or twice before the first interview. This also suggests keeping the same people on the panel for all the interviews.

Finally, after each interview, while impressions are fresh, panel members should share their ratings. If the ratings differ significantly, divergent members should discuss their reasoning. Sometimes one person sees, hears, or infers something that another does not. It is helpful for members to exchange information and impressions and try to resolve the different perceptions. Some panels try to reach consensus on the ratings. Others find that hard to do and not worth the effort.[4]

*Conduct the interviews.* The board should plan and arrange each candidate's interview visit with care. The visit can

**Figure 5.** Interview Questions Based on Desired Knowledge, Skills, and Abilities, Orange County Rape Crisis Center

| Knowledge, Skills, & Abilities (Score) | Question (from guide, page 33) |
|---|---|
| Advocate for staff (17) | 2. What responsibilities do you have to your staff? |
| Sense of humor (14) | Whole interview |
| Ability to listen well/be perceptive (14) | Whole interview |
| Know own limits . . . self-care (13)* | 9. What do you do to take care of yourself? |
| Comfort with different people (13) | 3. How did you deal with differences? |
| Cool . . . under pressure (12) | 4. What did you do when you were on the spot ? |
| Ability to be cool . . . under pressure (12) | Whole interview |
| Good oral/written communication (11) | Whole interview and writing sample |
| Network with key stakeholders (8) | 7. What do you do to stay informed? |
| Deal effectively with media (8) | 5. Tell us about your experience and strategies in working effectively with the media. |
| Financial management (6)† | 6. What experience have you had in financial management? |
| Delegation (2)† | 8. Tell us how you see that the work gets done. |

* This dimension might seem intrusive, but it was considered important for the director of a rape crisis center to be able to practice self-care for his or her own well-being, to model the behavior for staff, and to explain it to clients seeking healing in the aftermath of trauma.
† These attributes were ranked relatively low on the search committee's list. It is unlikely that board members had the opportunity to observe directly either the outgoing director's day-to-day influence on the financial stability of the center or her delegation of work to staff on a daily basis. However, she convinced the committee that these were important skills that should be examined in the interview.

accomplish several purposes: the candidate can tour the community and get a feel for it; meet staff, other agency heads, or local officials with whom the director works; and obtain information about housing, schools, and other matters of interest to the candidate's family. Agencies that can afford to do so might invite spouses to accompany finalists so that they can form an opinion about the community, but this is neither expected nor necessary if the board feels that the cost is too high. It is possible to invite the successful candidate back with his or her family to be courted after extending an offer. Some boards invite all the finalists at the same time; set up tours, interviews, and other events in rotation; and even have the candidates together at one or more social functions. Other boards invite each candidate separately. Bringing in candidates all at once shortens the time spent on the interview stage of the search but requires more careful planning and coordination.

Sometimes a panelist feels that he or she has determined whether or not a candidate is viable before the interview is complete. In such a circumstance, a panelist may be tempted to stop listening carefully, to stop recording impressions, or to record sketchily or carelessly. A panelist takes at least two risks in doing this. One is that sometimes a candidate will start an interview awkwardly or slowly and gradually warm up or "come alive" well into the interview. If the interviewer stops taking notes at some point, he or she may be at a disadvantage in the evaluation discussion. Another risk is the possibility of depriving a candidate of useful feedback on the interview if he or she asks for it.

**Step 5: Hire the director.**

*Agree on a choice.* After the interviews the panel usually tries to reach consensus on one candidate unless the board of directors has instructed it to do otherwise. If the board uses a panel of less than its entire membership, the panel might recommend a first choice and a backup, or rank-order the finalists from best to worst, and then communicate that to the board. The panel's explaining the reasoning behind its recommendations usually helps the board. When there are serious conflicts on a board, a candidate might accept only an offer based on consensus, believing that anything less would make his or her position too tenuous. Many candidates, however, are willing to start with the tentative security of support from a simple majority of the board.

*Negotiate the details.* In these last steps, a board often designates its chair to conduct final negotiations and actions on its behalf. If it opts to do so, it first should decide what it will leave to the discretion of the chair and what the chair should bring to the whole board for discussion, guidance, concurrence, or decision. Usually the board arranges for a final background check while it negotiates the terms and the conditions of employment with the prospective director. When the facts and the quality of the candidate's experience have been corroborated, the board should confirm the new direc-

tor's agreement to come to work, take whatever action is required by its bylaws, notify the other candidates, and *then* announce the new director. These last steps are taken in that order so that other candidates do not find out secondhand that they were not selected. Although care is obviously required in these actions, experience suggests that the more time that passes after the final interview, the less control the board has over the time and the conditions under which the decision becomes public knowledge.

*Draft an employment agreement if one is desired.* There are advantages to executing a formal employment agreement. The agreement might set out a variety of conditions of the director's employment, such as leave, use of a car or mileage reimbursement for official business, an expense account, participation in professional activities—virtually any matter on which the board wants to have a clear understanding with the director. The agreement also might specify the conditions under which the director should give notice of resignation and under which the board may ask the director to leave involuntarily.

**FINAL STEPS: Establish and maintain a good relationship.**

The relationship between a governing board and a director can enhance or impede governance significantly, so devoting some time to establishing and maintaining a good relationship is important. Putting the necessary effort into this typically requires a lot of discipline by the board. Members are usually relieved that a decision has been made, all the extra meetings and work on recruitment can end, and they can return to their routine. It is useful at the outset for the board and the director to establish what they expect of each other beyond the general tenets of the bylaws. No two boards are exactly alike, nor are any two directors. The very process of recruiting a new director often raises issues and creates dynamics that might unify or splinter a board. Either way, the board is likely to undergo some change. No matter how much experience a new director has or how many directors a particular agency has had, the relationship among a particular board, a particular chair, and a particular director is certain to be different in some ways than any of them has ever experienced.

*Set clear expectations.* Soon after a new director is hired (and at other times when a significant turnover in the board occurs), the board, the chair, and the director usually find it helpful to review their specific expectations of one another. Such a discussion allows them to understand what each thinks he or she needs from the others to be effective in carrying out major responsibilities. Often this discussion takes place at a retreat, during which the board and the director also might discuss the substantive goals and objectives that the board wants to pursue as part of its long-range agenda. The result of such a retreat should be a common understanding of what the board wants to achieve and how the board and the director will work together to accomplish that.[5]

*Plan for formal evaluation.* The board's expectations of the director provide a sound basis for it to be effective in both formally evaluating the director's performance and giving the director informal feedback. They also provide the director with one reliable reference for self-evaluation during the year. Most boards find it effective and convenient to conduct a formal evaluation of the director once a year, usually associated with their consideration of adjustments in his or her compensation. Typically the evaluation is held in a private meeting, with the director present and participating.

## Conclusion

Hiring an executive director for a nonprofit agency is neither quick nor simple if done conscientiously, but a conscientious process is critically important to effective governance of the agency and effective administration of the agency's mission. Time and effort spent on defining carefully what the agency and its governing board need in the near future, searching systematically for candidates with attributes that will meet those needs, and thoroughly examining the candidates can yield significant returns in the form of satisfied clients, board members, and employees.

*For more information about nonprofit organizations, contact the North Carolina Center for Non-Profits, 4601 Six Forks Road, Suite 506, Raleigh, NC 27609-5210, telephone (919) 571-0811, fax (919) 571-8693.*

## Notes

1. *See also* Claudio Fernandez-Araoz, *Hiring without Firing*, HARVARD BUSINESS REVIEW, July–August 1999, at 109.

2. To prepare for this, staff met, reviewed (and modified slightly) the list of desired knowledge, skills, and abilities developed by the recruiting committee, then used a pairwise comparison to reveal the relative priority that *staff* placed on each characteristic.

3. An assessment center might require each candidate to write a brief analysis of an issue, present the analysis to a group that includes people playing the role of hecklers, mediate a simulated dispute among people playing the role of employees, and dispose of a series of items in an in-basket, in addition to going through a structured interview. *See* Ronald G. Lynch, *Assessment Centers: A New Tool for Evaluating Prospective Leaders*, POPULAR GOVERNMENT, Spring 1985, at 16 (available from the Institute of Government as offprint 92.03B).

4. Reaching consensus is different from—and harder than—compromising. To reach consensus, disagreeing parties must exchange enough valid information so that each can freely agree on and fully support the final position or solution.

5. *See* Kurt Jenne, *Governing Board Retreats*, POPULAR GOVERNMENT, Winter 1988, at 20 (available from the Institute of Government as offprint 88.13B).

# Guide for Interview Panelists and Candidate Evaluation Form, Orange County Rape Crisis Center Executive Director

## PROCEDURE

1. **Time allocation**

| | |
|---|---|
| Introductions, outline of process | 5 minutes |
| Opening question | 5 minutes |
| Nine questions | 90 minutes |
| Applicant's questions | 5 minutes |
| Panel discussion and rating | 15 minutes |
| **Total time** | **120 minutes** |

2. Evaluate each applicant on three dimensions throughout the interview: sense of humor, communication skills, and listening skills.

3. The most effective way to assess "ability to be cool, tactful, and thoughtful under pressure" is to create a stressful situation by challenging the applicant during the interview. One way to do this is to assign a panel member to look for a weakness or an inconsistency and ask a challenging question in an impatient tone. For example, "You've never worked in a non-profit, but you think you have the skills to manage one. That seems arrogant to me. Tell me how you think you can possibly step right into the job with the requisite skills." *Only after the end of the interview, explain that this was a staged question intended to gauge grace under pressure so that the panel could observe how the applicant handled the stress of being challenged.*

## QUESTIONS

1. *Opener.* Please take a few minutes to tell us about yourself and why you are applying for this position.

|_____|_____|_____|_____|

**(1) Inadequate** **(3) Meets Needs** **(5) Excellent**

Comments:_____

2. *Ability to advocate for staff.* We'd like you to tell us how you would define your role as director. Our board hires and supervises the director, who hires and supervises the staff. As director, what responsibilities do you have to the board, and what responsibilities do you have to your staff?

   What can you do when your staff and your board are opposed on an issue?

   Look for:
   - maintains two-way communication between staff and board through director
   - takes facilitative approach to managing staff to carry out direction set by board
   - represents director's role as hiring strong staff and then providing environment in which staff can do its best work

|_____|_____|_____|_____|

**(1) Inadequate** **(3) Meets Needs** **(5) Excellent**

Comments:_____

3. *Comfort with diversity.* Give us an example of when you have had to work with people who were very different from you—culturally, racially, economically, etc. How did you deal with those differences?

   What specific issues did you have to deal with in working together as a result of those differences?

Look for:
- genuine belief that diversity can make stronger product
- acknowledgment that obvious diversity (race) is not only kind of diversity that matters
- acknowledgment that diverse groups may take more time to build trust and agree on plan

| | | | |
|---|---|---|---|
| **(1) Inadequate** | | **(3) Meets Needs** | **(5) Excellent** |

Comments:_____

4 *Problem solving.* A former board member of ours always said that three things go wrong with every special event, no matter how well you plan. Tell us about a time when you were on the spot, when something went wrong. What did you do?

Look for:
- ability to acknowledge that things can go wrong
- ability to trouble-shoot problems
- contingency planning for solving potential problems
- ability to improvise while staying calm
- capacity to use available resources to fix problems
- evaluation of successes/failures after event
- documentation of processes for future reference

| | | | |
|---|---|---|---|
| **(1) Inadequate** | | **(3) Meets Needs** | **(5) Excellent** |

Comments:_____

5. *Dealing with media.* One of our challenges is that sexual violence is an extremely complex issue that is easily sensationalized. It is not unusual to give a 30-minute interview and end up with a one-sentence quote and a dramatic headline. Tell us about your experience and strategies for overcoming this kind of challenge and working effectively with the media. What do you do when you're misquoted?

Look for:
- ability to build relationships with reporters
- ability to be useful as resource to media
- understanding of reporters' constraints and ability to work with them
- ability to create sound bite himself/herself rather than leaving it to reporter
- ability to use editorial page, etc., to get agency's message out
- ability to problem-solve after bad story

| | | | |
|---|---|---|---|
| **(1) Inadequate** | | **(3) Meets Needs** | **(5) Excellent** |

Comments:_____

6. *Financial management skills.* What experience have you had in financial management that is relevant to running a small nonprofit agency?

Look for:
- experience in grant-writing and reporting
- ability to track contributions through fund-raising
- ability to do or supervise payroll and accounts payable
- ability to prepare budget and then to manage it
- ability to use many different funding sources that require different kinds of relationships

| | | | |
|---|---|---|---|
| **(1) Inadequate** | | **(3) Meets Needs** | **(5) Excellent** |

Comments:_____

7. *Maintain community relationships.* There are many different people and organizations in this community that have a stake in the work of our agency—police officers, survivors, philanthropists, activists, and schoolteachers, to name some. What do you do to stay informed about all the different currents swirling around in a community, and how do you apply it to your job?

   Look for:
   - is cognizant of informal power and communication channels
   - has strategy for staying informed and involved
   - knows how to identify key stakeholders and how to work with them

   |_____|_____|_____|_____|

   **(1) Inadequate** **(3) Meets Needs** **(5) Excellent**

   Comments:_____

8. *Delegation.* There is more work to do in this position than can possibly be done by one person. Tell us specifically how you see that the work gets done.

   Look for:
   - is willing to let go of control
   - delegates appropriately to staff or volunteers
   - defines expectations clearly
   - provides means for success to those to whom he/she delegates
   - avoids micromanagement but monitors progress at key points

   |_____|_____|_____|_____|

   **(1) Inadequate** **(3) Meets Needs** **(5) Excellent**

   Comments:_____

9. *Practice and model self-care.* As director, you have to deal with the stress of our clients' trauma, the stress of meeting the needs of staff and the board, and the stress of managing the community's perception of this agency. Tell us how you balance all of these demands while maintaining your personal equilibrium. What do you do to take care of yourself?

   Look for:
   - employs healthy strategies for coping
   - what he/she says is consistent with how he/she looks and acts
   - is aware of own spiritual, mental, physical, and emotional needs
   - exhibits thoughtfulness in his/her personal evolution of self-care

   |_____|_____|_____|_____|

   **(1) Inadequate** **(3) Meets Needs** **(5) Excellent**

   Comments:_____

10. *Final question.* Do you have any other questions of us?

    Comments:_____

11. *Writing sample.* Chair: Please do one more thing. Write and submit by [date] a one-page memo to the board answering this question: "If you were offered the position of executive director, what would motivate you to accept it or decline it now that you have had the opportunity to visit here today?" Here are detailed instructions [gives a memo to candidate].

    Look for:
    - thinks clearly
    - expresses ideas clearly
    - presentation shows professional attention to detail
    - is willing to discuss "undiscussable issues"

    |_____|_____|_____|_____|

    **(1) Inadequate** **(3) Meets Needs** **(5) Excellent**

    Comments:_____

12. *Sense of humor* (rated throughout interview)

Look for:
- ability to see humor in situations outside own control
- ability to see humor in own actions
- ability to pick up on others' humor

| | | | |
|---|---|---|---|
| **(1) Inadequate** | | **(3) Meets Needs** | **(5) Excellent** |

Comments: _____

13. *Listening skills* (rated throughout interview)

Look for:
- responds accurately to what was asked or said
- listens carefully and patiently
- is willing to ask for clarification

| | | | |
|---|---|---|---|
| **(1) Inadequate** | | **(3) Meets Needs** | **(5) Excellent** |

Comments: _____

14 *Oral communication skills* (rated throughout interview)

Look for:
- speaks in way that is easy to understand and follow
- is responsive to cues from listeners
- is brief, specific, and accurate
- is able to think on his or her feet

| | | | |
|---|---|---|---|
| **(1) Inadequate** | | **(3) Meets Needs** | **(5) Excellent** |

Comments: _____

## NEXT STEPS

Chair: The top two or three candidates will be invited back to have the opportunity to meet privately with staff and to meet other board members and volunteers at a special event to be arranged. Our time frame for completing all interviews and making a decision is [date]. If you have further questions, you can call me in the meantime.

## GENERAL OBSERVATIONS AND FINAL OVERALL ASSESSMENT OF CANDIDATE

*[Interview panelists enter general comments and overall evaluation here.]*

# Does North Carolina Need a Pharmaceutical Assistance Program for Older Adults?

*Patrick Liedtka*

In his 2000 State of the Union address, President Bill Clinton echoed a sentiment that older Americans have been expressing for years: affordable prescription drugs are "the greatest growing need of seniors."[1] For the last two years, the North Carolina Coalition on Aging has called for state legislation addressing access to prescription drugs, and in 1999 the Governor's Advisory Council on Aging included prescription assistance to older adults among its recommendations to the governor.[2]

In 1997 the Health Care Financing Administration estimated that 89 percent of older adults (those sixty-five years of age and over) regularly use at least one prescription drug, spending an average of $742 per year on prescription medications. By the year 2005, this average yearly cost for medications is expected to rise to $1,000 per person.[3] Although older adults make up only 12.7 percent of the U.S. population,[4] they consume more than 32 percent of all prescription medications.[5]

Yet at the time in their lives when Americans require more prescription drugs, they are most likely to be without insurance to help pay for the drugs. Medicare, the primary insurance for older Americans, does not pay for most prescription drugs outside hospital settings. Although an estimated 65 percent of all older Americans have prescription drug coverage (through Medicaid, employer-sponsored coverage, Medigap policies, and other private policies), only 36 percent of seniors with incomes under $10,000 have such benefits.[6]

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Americans with low incomes may be forced to choose between medications and basic necessities. In a national survey conducted in 1995, "among persons aged 50 and over with an annual income of $10,000 or less, 40 percent reported that they had to cut back on essentials such as food or heat to pay for prescription drugs."[7] Research indicates that older adults with low incomes purchase as little as one-quarter of the medications they require.[8] This problem is compounded by the rising price of pharmaceuticals.[9]

The State Division on Aging has estimated that, in the year 2000, among older adults in North Carolina living at or below 200 percent of the federal poverty level (two times $8,050, or $16,100 per year for an individual), about 56 percent (roughly 275,000 people) are without prescription insurance. A survey of 600 older adults in eastern North Carolina found that 44 percent resorted to various strategies, some dangerous, to manage their prescription costs, including taking less than the amount prescribed or going without prescribed drugs altogether.[10] The consequences of such strategies can be significant. One recent study found that underuse of drugs for high blood pressure was associated with preventable hospital readmissions, and another estimated that 5.5 percent of all hospitalizations (approximately two million annually) resulted from noncompliance with medication regimens, leading to an annual cost of $7 billion.[11]

*The author, a recent graduate of the Institute of Government's Master of Public Administration Program and of UNC–CH's School of Social Work, is a health insurance specialist for the Health Care Financing Administration, U.S. Department of Health and Human Services.*

This article draws on lessons from academic literature, interviews with aging-policy experts, and analysis of existing data to suggest parameters for a North Carolina pharmaceutical assistance program.

## Criteria for a North Carolina Program

Between 1977 and 1996, eleven states enacted programs to assist low-income older adults in obtaining prescription medications at affordable prices.[12] North Carolina's response to the dilemma of prescription drug affordability has come from community-based programs, at least thirty-one of which now exist in the state.[13] These programs include community health clinics that distribute manufacturers' samples as well as independent nonprofit organizations that offer an array of services, such as financial assistance, medication education, and help in obtaining access to manufacturers' assistance programs.

In considering whether to establish a statewide pharmaceutical assistance program in North Carolina, policy makers must address two important factors, cost and need:

- *Cost.* Administrators of state pharmaceutical assistance programs have identified the growth of program cost as their primary concern.[14] Therefore, to be feasible, any North Carolina program would have to satisfy some cost criteria. Of course, in evaluating cost, one must take into account the potential for savings in overall health care services as a result of a program's implementation.
- *Need.* A second criterion for a North Carolina program is that it focus services on the older adults most in need of access to affordable medications. As of January 1, 1999, North Carolina raised the income eligibility level for Medicaid to 100 percent of the federal poverty level. This means that adults sixty-five years of age and over with an annual income of $8,050 or less and limited assets can qualify for Medicaid, which offers a prescription drug benefit. However, older adults between 100 and 200 percent of the federal poverty level, currently $8,050 to $16,100 per year for an individual, remain vulnerable to lack of prescription drug coverage.

## Selected State Programs: Features and Examples

Existing state pharmaceutical assistance programs vary in terms of guidelines but generally share the following characteristics:

- A defined eligibility age (usually sixty-five)
- A maximum income eligibility level
- A "copayment" (a fixed dollar amount that a person must pay) for each prescription

Despite these common characteristics, the cost per beneficiary ranges widely across states, from $86.23 in Vermont to $933.65 in New Jersey in 1995. The number of beneficiaries also ranges widely, from 4,400 in Vermont to almost 332,000 in Pennsylvania in 1995. These latter two states also represent the minimum and maximum overall expenditures in 1995: $380,000 and $248 million, respectively.[15]

Little data exist on the number of older adults served by North Carolina's community-based programs. They have been described as "a patchwork" in which "efforts to improve access to medications are duplicated, solutions [are] fragmented, or only a limited amount of assistance [is] provided"[16]

Senior PHARM*Assist*,[17] an effective nonprofit program in Durham County, is an example of a community-based program in North Carolina. It places as much emphasis on educating older adults, their physicians, and their pharmacists about appropriate and effective medication use, as it does on increasing access to medications. Also, it gathers data about outcomes to discover the effectiveness of various strategies and programs.

Serving more than 600 older adults in Durham County, Senior PHARM*Assist* had a fiscal year 1998 budget of approximately $395,000.[18] Of Senior PHARM*Assist's* current budget, 51 percent is from foundations, with other funding coming equally from individuals, businesses, and government. Older adults with incomes up to 140 percent of the federal poverty level ($11,270 per year in 1998–99) are eligible for services. They pay the first eight dollars of any prescription, with Senior PHARM*Assist* paying the remainder. There is no limit on the number of prescriptions. The average yearly benefit paid by Senior PHARM*Assist* on behalf of its medication-eligible clients is $660. Senior PHARM*Assist* reimburses local retail pharmacies at rates below those of Medicaid, in effect working with pharmacists to reduce prices.

Senior PHARM*Assist* considers a geriatric formulary and prospective medication review to be among its innovative characteristics. A "formulary" is a list of all medications that are paid for by the program.[19] Senior PHARM*Assist* has established a committee of pharmacists, physicians, nurse practitioners, and other professionals to develop a formulary of cost-effective medications known to be safe for older adults. Through this program feature, Senior PHARM*Assist*, unlike some state pharmaceutical assistance programs, avoids paying for expensive medications that have limited therapeutic benefits.[20]

"Prospective medication review" means that older adults meet with a staff pharmacist to generate a list of all medications they take and to discuss their reasons for taking each medication, the possible side effects, and potential interactions among the drugs. This information also is used to alert the client's physicians and pharmacists to possible drug-related problems.

## Potential Impact of a North Carolina Program

Evaluation of the potential cost of a pharmaceutical assistance program in North Carolina involves a two-part inquiry: (1) Is it possible to identify savings in the health care system to balance the cost of such a program? (2) What should the eligibility guidelines be?

### Possible Savings

Gina Upchurch, director of Senior PHARM*Assist*, cites data from a 1996 study indicating a 31 percent decrease in the percentage of Senior PHARM*Assist*

clients who made an emergency room visit after one year in the program. The study also found a 29 percent decrease in the percentage of clients who stayed in the hospital overnight after one year of participation in the program. To derive these figures, clients and family members were surveyed regarding hospitalizations and emergency room visits upon enrollment in the program and after one year of enrollment. In 1998 the national average cost per inpatient hospital day was $1,245.[21] Thus Senior PHARM*Assist's* reduced rate of hospitalizations and emergency room visits illustrates the potential savings.

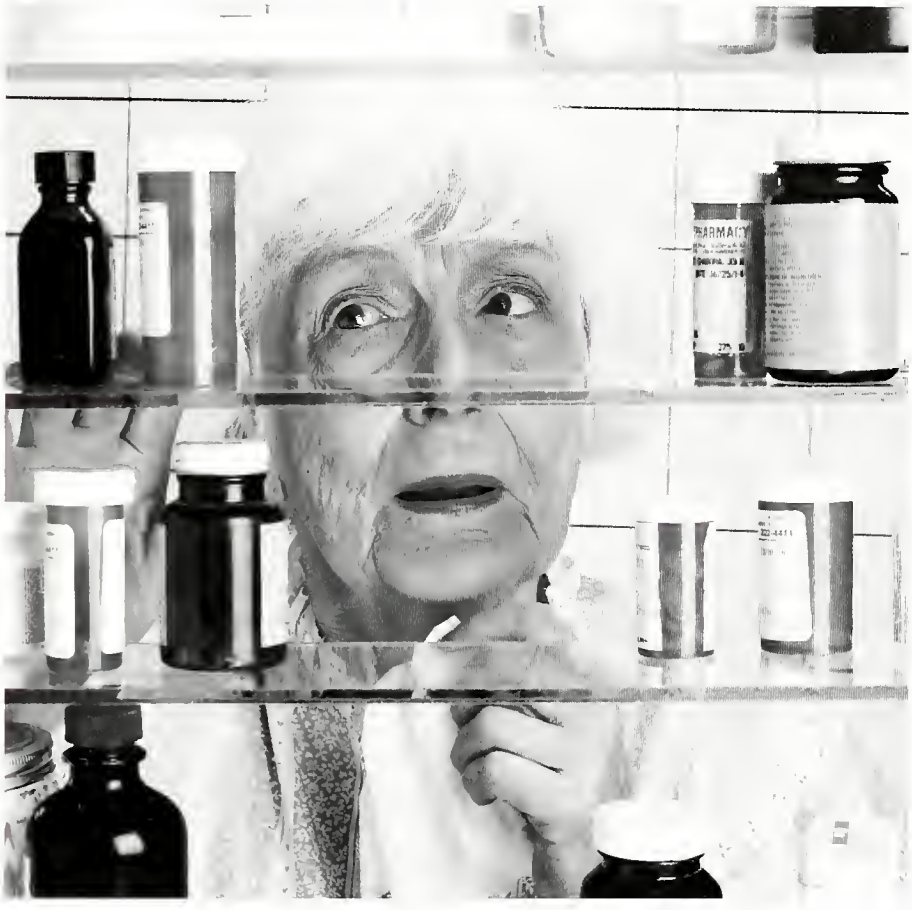
A 1987 analysis of Medicare expenditures comparing older residents of New Jersey and eastern Pennsylvania found a significant decrease in the cost of inpatient hospital care among New Jersey residents after enactment of the state's drug assistance program.[22] Other researchers have concluded that limiting access to prescription drugs could increase the risk of nursing home placement for low-income older adults.[23]

### Eligibility Guidelines

North Carolina's decision to raise the income eligibility level for Medicaid may provide about 50,000 of the state's lowest-income older adults with prescription drug coverage. The Fiscal Research Division of North Carolina's General Assembly estimates that this expansion will cost the state $57 million in fiscal year 2000.[24] Even with this action, though, an estimated 219,000 older adults between 100 and 200 percent of the poverty level are without drug coverage and thus are vulnerable to high prescription drug costs.[25]

Despite the limited options available to older adults to pay for prescription drugs, program benefits or eligibility may need to be constrained, at least initially. The state already has made a significant financial commitment to low-income older adults through the Medicaid expansion. Other demands, such as the Hurricane Floyd recovery effort, may limit additional funding. Administrators of pharmaceutical assistance programs in other states believe that starting with a limited program that can be expanded is better than cutting benefits from a generous program after costs escalate.[26]

The second criterion for a state pharmaceutical assistance program is that it focus on the most vulnerable low-income older adults. Discussions with North Carolina state and local advocates for the aging and an analysis of income eligibility levels for existing state pharmaceutical assistance programs suggest that people at 100 to 150 percent of the federal poverty level are the most vulnerable to the high cost of prescription drugs. Therefore a North Carolina pharmaceutical assistance program might best set a maximum income eligibility level of $12,075 per year for an individual, or 150 percent of the federal poverty level.



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Closely associated with selecting the income eligibility level for the program is determining the level of copayments, if any. Although copayments generate savings and instill a sense of responsibility for health care, they have been shown to cause patients to reduce use of needed health care services, particularly when they are applied to people whose incomes are below 200 percent of the federal poverty level.[27] The most prudent course may be to limit copayments for this population to nominal amounts and include an annual ceiling on the total amount of copayments paid by a patient.

## Recommendation

One way to initiate pharmaceutical assistance in North Carolina is through a public-private partnership among the state, charitable foundations, and communities. Demonstration projects might be established initially in six to eight counties to encourage a racially and geographically diverse pool of participating older adults. Foundations might provide seed funding to communities through a competitive-grant process. The goals of the demonstration projects would be as follows:

- To improve access to affordable prescription drugs
- To educate older adults, pharmacists, and physicians about appropriate use of medications
- To integrate pharmaceutical assistance with existing services when possible
- To save costs in the health system by meeting the foregoing goals

A flexible framework for awarding grants would encourage innovation among projects in meeting these goals. The North Carolina Department of Health and Human Services might form a board of administrators of pharmaceutical assistance programs, aging-policy professionals, pharmacists, physicians, and older adults to provide technical and organizational assistance to communities that receive grants. Such a board would set minimum standards that programs must meet, including the following:

- A geriatric formulary
- Prospective medication review
- Copayments
- An income eligibility level of 150 percent of the federal poverty level
- A strategy to assist ineligible clients and to refer them to other pharmaceutical assistance services
- Participation of local pharmacists, businesses, health providers, and councils on aging
- Uniform procedures for evaluation of program performance

A five-year seed grant might be necessary to give projects time to generate reliable data, as measured by rates of hospitalization, emergency room visits, medication knowledge, self-perception of health status, and physicians' perception of health status, among other indicators. Projects able to prove cost savings might eventually be absorbed into existing service systems, or they might incorporate as free-standing nonprofit organizations. Projects also might develop alliances with community hospitals or county social service offices.[28]

A public-private partnership of this nature requires the support of a wide range of groups—policy makers, foundations, professionals in aging, communities, pharmacists, and other health care providers. To gain such support, programs will have to limit start-up costs, demonstrate savings in other sectors of the health system, generate reliable outcome data within a reasonable time, and show the ability to win private support to match public investment. If they can attain these goals, North Carolina should be able to deliver beneficial and cost-effective pharmaceutical assistance to its neediest older adults.

## Notes

1. The 2000 State of the Union address is available at http://www.washingtonpost.com/wp-srv/politics/special/states/docs/sou00.htm.

2. The two organizations' statements are available at the North Carolina Division of Aging's Web site, http://www.dhhs.state.nc.us/aging/drugs.htm.

3. Division on Aging, North Carolina Department of Health and Human Services, A Study of Options for Making Prescription Drugs More Affordable for Older Adults at 1 (Raleigh, N.C.: NCDHHS, 1997).

4. *Statistical Abstract of the United States*, available at http://www.census.gov/statab/www/part1.html.

5. E. W. Lingle, Jr., et al., *The Impact of Outpatient Drug Benefits on the Use and Costs of Health Care Services for the Elderly*, 24 Inquiry 203 (1997).

6. Telephone conversation with Gina Upchurch, director, Senior PHARMA*ssist* (March 3, 1999); L. Lagnado, *Proposal's Aim: Help "Near Poor" Pay for Medicine*, Wall Street Journal, March 4, 1999, at B12.

7. Division on Aging, A Study of Options at 1.

8. Lagnado, *Proposal's Aim* at B12.

9. From 1980 to 1990, prescription drug prices rose at an annual rate of 13.8 percent while overall prices in the American economy rose at an annual rate of just 5.3 percent. S. D. Sullivan et al., *The Economics of Prescription Drug Coverage for the Elderly: Implications for Health Care Reform*, 18 Generations: Journal of the American Society on Aging 55 (1994).

10. Division on Aging, A Study of Options at app. 2, p. 1.

11. Lingle et al., *The Impact* at 56.

12. Division on Aging, A Study of Options at 4.

13. Telephone conversation with Glenn Pierce, director of the North Carolina Association of Free Clinics (Feb. 15, 1999). The number includes free community pharmacies and clinics that offer varying levels of services.

14. Stuart Bratesman, Jr., *Pharmaceutical Assistance Programs for the Low-Income Elderly: A Review of Findings from a Survey of the Literature*, Duke Long-Term Care Resources Occasional Policy Paper Series, No. 3, May 1997, at 2.

15. All the information on state pharmaceutical assistance programs was gleaned from Division on Aging, A Study of Options.

16. Gina Upchurch et al., *Access to Medications for Low-Income North Carolina Citizens: Without Funds, How Can They Follow Doctor's Orders?*, 55 North Carolina Medical Journal 173, 173 (1994). About 50,000 North Carolinians were served by community pharmaceutical programs in 1997. It was not possible to determine how many older adults were among those served. Telephone conversation with Pierce.

17. All information regarding Senior PHARMA*ssist* was obtained in an interview with Gina Upchurch, executive director, in Durham, North Carolina, on February 5, 1999, and through subsequent e-mail correspondence with her.

18. Senior PHARMA*ssist* has both funded and unfunded clients. "Funded" clients are those who meet income guidelines and for whom the program purchases medication in addition to providing pharmaceutical consultation and educational services. "Unfunded" clients do not meet income guidelines and are not eligible for medication reimbursement but still benefit from pharmaceutical consultation, educational services, and assistance in gaining access to corporate pharmaceutical assistance programs.

19. K. S. Levin, A Guide to Implementing a Community-Based Pharmaceutical Assistance Program Modeled after Senior PHARMA*ssist*, Durham, NC (Durham, N.C.: Senior PHARMA*ssist*: 1998).

20. Interview with Upchurch.

21. Selected Community Hospital Statistics: 1995–99, available at http://www.hcfa.gov/stats/indicatr/indicatr.htm.

22. Lingle et al., *The Impact* at 208.

23. S. B. Soumerai & D. Ross-Degnan, *Experiences of State Drug Benefit Programs*, Health Affairs, Fall 1990, at 45.

24. Fiscal Research Division, North Carolina General Assembly, Current Issues in Budgeting: State of North Carolina, handout at presentation to Publication Administration 222 (Institute of Government course) (Feb. 4, 1999).

25. Division on Aging, A Study of Options at app. 2, p. 3.

26. Bratesman, *Pharmaceutical Assistance Programs* at 5.

27. *See, e.g.*, Massachusetts Health Care for All, The Affordability of Health Care for Massachusetts's Working Families (Boston: Massachusetts Health Care for All, Dec. 1989); Joseph Newhouse et al., Some Interim Results from a Controlled Trial of Cost Sharing in Health Insurance, No. R-2847-HHS (Santa Monica, Cal.: Rand Corp., Jan. 1982).

28. These options emerged in a telephone conversation with Gina Upchurch, executive director, Senior PHARMA*ssist* (March 3, 1999); a telephone conversation with Sandra Leak, associate director, Duke Long Term Care Resource Center (Feb. 19, 1999); and a conversation with John Saxon, faculty member, Institute of Government, The University of North Carolina at Chapel Hill (March 1999). The precedent for seed funding from foundations with eventual absorption into Medicaid comes from the Medicaid Community Alternatives Program (CAP), an option for North Carolina counties.

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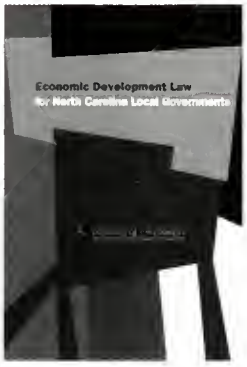


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