

Intergovernmental

Spring 1987, Vol. 13, No. 2

PERSPECTIVE

**AMERICAN
CONSTITUTIONS:**

2000

years

OF FEDERALISM

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(March 5, 1987)

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In This Issue . . .

As the nation begins the celebration of the Bicentennial of the U. S. Constitution, this issue is built on the theme of **American Constitutions: 200 Years of Federalism**, highlighting the relationships between the U.S. and state fundamental laws. The authors were participants in a conference on "State Constitutional Law in the Third Century of American Federalism," held March 15-17 in Philadelphia, sponsored by the Center for the Study of Federalism at Temple University in cooperation with ACIR, the American Bar Association and the Philadelphia Bar Association. The articles are based on the presentations at the conference. The papers will appear in longer, scholarly versions in *The Annals of the American Academy of Political and Social Science* in Spring 1988.

Lawrence Friedman gives an historical overview of the development of the constitutional system, citing as its two most important distinguishing characteristics the reliance on written fundamental law and the American brand of judicial review. Donald Lutz outlines the differences between the English and American traditions—the most critical being the institution of federalism—and sees the U.S. Constitution as incomplete without the state documents. Stanley Mosk talks about the emerging agenda in state constitutional law. Two of the items on that agenda are the subjects of the last two articles. Earl Maltz analyzes approaches to constitutional law and state court activism on protection of individual rights, focusing especially on issues generally considered to be federalism related. G. Alan Tarr examines the treatment of church-state issues under the First Amendment and the state bills of rights, particularly aid to religious schools and sponsorship of religious practices and displays. The Intergovernmental Focus department features the Washington Advisory Commission on Intergovernmental Relations.

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92nd Commission Meeting Considers Research Studies

The 92nd meeting of the ACIR was held in Washington, D.C., on March 20. The staff presented research and administrative reports for the Commission's consideration.

The first report concerned the study on the *Potential Impact of Federal Tax Reform on State Income Tax Liabilities*. ACIR's preliminary estimates have been favorably received by the states, with many citing their value in refining and substantiating the states' own estimates. The study will include an analysis of the relationship between state linkages and the diverse impact of tax reform.

The second report considered was *A Critical Appraisal of Devolving Selected Federal-Aid Highway Programs and Revenue Bases*. The staff summarized the conclusions and the arguments for and against turnbacks of highway responsibilities. The Commission adopted three recommendations on stabilizing federal highway financing, facilitating state-local cooperation in highway financing as an intermediate goal, and, as a *long-term goal*, turning back all noninterstate highways.

The study on *Fiscal Discipline in the Federal System* was discussed by staff and Commission members, and suggestions for further research were made. A revised report will be considered at the next meeting.

At the meeting Chairman Robert Hawkins announced the appointment of Commission member Daniel Elazar to head a research agenda committee that will review and recommend proposed studies. The members also discussed financial matters and ways for ACIR to participate in the constitutional Bicentennial celebration.

The next meeting of the Commission will be held on June 5, in San Francisco, CA, at the Sheraton Palace Hotel.

Coming Soon . . .

Throughout the summer and fall, several new reports will be issued by ACIR on federal tax reform, welfare, federalism and the constitution, tort reform, highway turnbacks, local public economy, readings in American federalism, public opinion, fiscal federalism and the measurement of state fiscal capacity.

Intergovernmental FOCUS

Spotlight on the Washington ACIR

Ken Back
Special Assistant

1987 marks the fifth year of operation for the Washington State Advisory Commission on Intergovernmental Relations (ACIR). By 1982, the absence of a recognized forum for the open exchange of information between the state and its units of local government had become a matter of growing concern to officials at both levels. There was agreement that effective government necessitates the developing and maintaining of good state-local relations, particularly in an era of changing roles and relationships among all levels of government.

In recognition of this concern, and with strong support from city and county officials, the state ACIR was created by executive order in May 1982 by then Governor John Spellman. As stated in the order: "The most efficient and effective delivery of services to the citizens of the state of Washington requires close cooperation between the state and local governments. Such cooperation must be characterized by openness, frankness and mutual support. The current decline in resources available to the state and to local governments and the impact . . . of the changing role of the federal government make cooperation even more necessary. That cooperation can best be achieved by establishing a formal, ongoing entity that permits discussion, study and resolution of matters of mutual concern to all governments within the state of Washington."

Organization and Operation

The Washington ACIR is composed of 22 members who are appointed by and serve at the pleasure of the governor. As specified in the ex-

ecutive order, the Commission includes six elected city officials, six elected county officials, five state agency directors, and the chairs and ranking minority members of the House Local Government Committee and the Senate Government Operations Committee. Governor Booth Gardner serves as chairman. As originally established, the ACIR had 21 members, but the executive order was amended in 1984 to include the executive director of the Governor's Office of Indian Affairs.

Staff support is provided by the state Department of Community Development (DCD). DCD Director Richard J. Thompson is a member of the Commission and serves as vice chair. The ACIR meets on a regular basis, approximately every two months.

The ACIR is an action-oriented group, concentrating not on long-term studies of broad academic topics but rather on seeking and facilitating practical solutions to specific intergovernmental problems. A further objective has been to review areas of friction between the state and local governments and to work to resolve these differences before they become more serious. In its five years of operation, the ACIR has served successfully as a forum for the discussion and review of numerous problems, and has worked effectively as an ombudsman to bring together the state and local officials who can resolve those problems.

Early on, the ACIR members decided that the meetings should be structured to provide maximum opportunity for discussion rather than having a series of formal presentations by outside experts or staff. Ac-

cordingly, the ACIR has functioned as a working group with the members making many of the meeting presentations. Additionally, time is allotted at each session for input from the members regarding future agenda topics. This approach has served to ensure that the issues considered by the ACIR are those of highest priority to state and local officials responsible for the day-to-day operation and management of governmental programs.

Issues Considered

Since its establishment, the Washington ACIR has considered a wide variety of intergovernmental issues and problems. This is in part a reflection of the diverse state and local interests represented on the Commission. Major areas of review have included:

- state economic and revenue projections;
- areas of friction in the state/local tax structure;
- the U.S. Supreme Court's *Boulder* decision and its effect on the antitrust liability of local government;
- problems associated with the state's recall procedures;
- city, county and state responsibilities in law and justice;
- development of a successor to the A-95 review process;
- local emergency preparedness problems;
- city, county and state responsibilities in the management and disposal of dangerous waste;
- maintenance of state and local public facilities (infrastructure);

Washington ACIR

Mission and Goals Statement

Mission

To provide an ongoing forum for the identification, discussion, analysis, review and resolution of inter-governmental issues and problems affecting Washington's state and local governments.

Goals

- To focus attention on and signal the importance of state-local relations and local government issues, and to develop practical solutions to identified problems.
- To provide a vehicle for ongoing, nonadversarial consultation between state and local policymakers on common problems and emerging issues.
- To strengthen state and local governments' ability to resolve issues proactively by providing a "sounding board" for policy initiatives prior to implementation.
- To identify emerging intergovernmental issues and problems and respond to them in a coordinated manner prior to their becoming crises.
- To provide local governments and state agencies with a forum for addressing and resolving mutual concerns prior to the need for legislative action.
- To function as an ombudsman between state and local governments by bringing together those state and local officials who can most readily resolve intergovernmental problems in a expeditious manner.
- To conduct necessary research on intergovernmental issues and problems.
- To serve as a resource to state and local officials by providing a clearinghouse of information on inter-governmental issues.

- potential local financial problems resulting from the state's new determinate sentencing program;
- growth management options;
- implementation of the Job Training Partnership Act;
- local tribal relations;
- court reform proposals;
- coping with the loss of federal revenue sharing;
- local tort liability and the insurance crisis; and
- dealing with strict new solid waste disposal regulations.

Accomplishments

In addition to serving as a *forum* for consideration of these and other complex intergovernmental issues, the Washington ACIR has been instrumental in facilitating the *solution* of a number of significant problems. For example:

—As a result of ACIR deliberations, legislation was passed in 1984 that provides for state assumption of a portion of the cost of holding state

prisoners in local jails. Previously, counties were bearing a major share of the costs associated with alleviating overcrowding in the state prison system.

—The ACIR served to delineate the need to determine responsibility for planning, siting and managing dangerous waste disposal facilities in the state. As a result of ACIR consideration of this issue, the state Department of Ecology, in consultation with the ACIR and selected local officials, undertook an extensive study that included a statewide needs assessment, development of siting standards and criteria, and guidelines for disposal facility operation and management. The recommendations of the study were included in a major piece of legislation that passed the legislature and was signed by the governor in 1985.

—The ACIR was instrumental in working with representatives of the state Sentencing Guidelines Commission to ensure that the impact of determinate sentencing on local government was fully considered. An ACIR position statement reflecting this con-

cern was formally transmitted to the legislative leadership. Subsequently, the enabling legislation was modified to provide for the mitigation of any unforeseen financial impact on local government.

—An ACIR position statement was forwarded to the legislative leadership recommending the provision of additional resources to help defray increased local costs associated with the prosecution of drunk drivers. As a result, a state DWI prosecution assistance grant program was established by the legislature.

—The Washington ACIR played a key role in identifying the state's infrastructure problems. Following delineation of the problem by the ACIR, an extensive study was undertaken by the Department of Community Development that further identified the specific public works deficiencies. Subsequently, the legislature established the first state public works trust fund program in the nation. The fund will provide local governments with over \$45 million in low-interest loans over the next two years to fi-

nance critically needed public works projects.

—On numerous occasions the ACIR has served as an ombudsman and facilitator to bring together state and local officials in a nonconfrontational setting to resolve intergovernmental disputes. A recent example involved the state Department of Labor and Industries and the local government associations. At issue was a proposed increase in the amount of the security deposit that would be required of local governments which self-insure for workers compensation. As a result of ACIR facilitation and the good faith negotiations of the department and the local government associations, a compromise was reached and a difficult issue resolved.

Current and Future Plans

The coming year for the Washington ACIR promises to be a busy one. Several major projects are under way or will be starting shortly. Among these are an in-depth analysis of the local sales tax program with the objective of improving the administration of this vital local revenue source. An ACIR subcommittee has been formed to work with staff and local government officials to identify areas where problems exist and to develop proposed solutions for consideration by the full commission. Cities and counties rely heavily on the sales tax to provide operating revenues, and the

most efficient and effective administration of this tax has become even more crucial with the decline in federal funds available to local governments.

The ACIR will continue to monitor the progress of Washington's Local Governance Study Commission (LGSC) and will provide assistance as necessary. LGSC's task is to "examine the evolution of the powers, revenue sources and service responsibilities of Washington's cities, counties and special purpose districts in their changing economic and demographic contexts; analyze future trends and potential problems in these and other areas, as well as the experience of other states; and make recommendations to the legislature and governor concerning policy, statutory and constitutional changes to define more appropriate roles and activities for cities, counties and special purpose districts and their relationships to one another." The LGSC is scheduled to complete its two-year assignment by the end of this year. A number of ACIR members also serve on the Local Governance Study Commission, thus providing another important link between the two organizations.

In the coming year the ACIR will place increased emphasis on issues surrounding the disposal of solid waste. Strict new federal and state standards, coupled with higher local

compliance costs, have made this a top priority for state and local officials alike.

The ACIR also will continue to monitor federal and state legislative proposals which have an impact on state and local governments. Additionally, the Commission will work with local governments to determine the effects of the recently enacted federal budget reductions and tax policy changes, and to help them cope with the loss of federal dollars.

Finally, the Washington ACIR will continue to emphasize its role as an ombudsman and facilitator to help resolve disputes between the states and local governments before they reach an impasse. As Governor Gardner has stated: "Washington's state and local governments are all part of the same governmental family, and a major function of the ACIR is to help resolve disagreements among the members of this family." The resolution of intergovernmental disputes in this manner has saved countless taxpayer dollars which might otherwise have been spent in expensive litigation or which would have required legislative intervention. The Washington ACIR places a high priority on improving intergovernmental communication and cooperation and developing practical solutions to emerging problems. The ombudsman and facilitator functions typify this philosophy.

Washington ACIR Membership

**Booth Gardner, Chairman,
Governor**

**Mary Margaret Haugen, State
Representative**

**Linda Smith, State Representa-
tive**

Stuart Halsan, State Senator

Hal Zimmermen, State Senator

**Les Eldridge, Thurston County
Commissioner**

**Brian Seanning, Pierce County
Auditor**

**John Havelop, Kitsap County
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**Jennette Williams, Seattle
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**Bob Roegner, Mayor of
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**Jule Sugarman, Secretary
Department of Social and Health
Services**

**Orin Smith, Director, Office of
Financial Management**

**Michelle Aguilar, Executive
Director, Governor's Office of
Indian Affairs**

**Richard Thompson, Director,
Department of
Community Development**

State Tax Resources and Utilization Diskettes

ACIR's data on state tax bases, effective rates and fiscal utilization information are now available for microcomputers in the form of easy-to-use Lotus 1-2-3[®] and Symphony[®] worksheets. This fiscal resources and utilization diskette series is based on the data used to produce ACIR's annual publication of *Tax Capacity of the 50 States* (also referred to as the "Representative Tax System" or "RTS" for short). However, these disks contain a considerable amount of additional data—including other indices of fiscal utilization—not published in the annual tax capacity report.

State Tax Resources and Utilization Diskettes offer analysts, planners, and budget and tax officers a single consistent data base organized for custom calculations and ease of presentation. With ACIR's State Tax Resources and Utilization Diskettes public finance professionals can:

- monitor changes in a state's tax base and tax revenues using a consistent time series;
- compare and contrast tax rates in neighboring states; and
- project future revenues given past state experience and data from similar states.

The data base includes:

- the dollar amount of the state-local tax base;
- state-local tax collections;
- the statutory state tax rate (for sales and income taxes); and
- effective tax rates (essential for interstate comparisons and monitoring tax burdens in a single state from year to year).

Data for selected years are presented for five other indices of tax utilization and the condition of the state economy:

- representative revenue system (nontax revenue sources);
- per capita personal income;
- personal income adjusted for a state's ability to "export" taxes;
- gross state product; and
- total taxable resources (a new measure of fiscal utilization).

Most of the data covers 1981 through 1984, with a longer time series for aggregated indices.

The price of the State Tax Resources and Utilization Diskettes is \$200. Annual updates will be offered. **TO ORDER DISKETTES**, complete the order form and return to the address listed below. Questions regarding orders should be directed to Lin Steinko or Tom Hahn at (202) 653-5640. Technical questions can be answered by Mark David Menchik at (202) 653-5544. **ALL ORDERS MUST BE PREPAID.**

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An Historical Perspective on State Constitutions

Lawrence M. Friedman

One of the most striking features of American law and government is the constitutional system. As it evolved, it developed two important and closely linked characteristics. The first is the reliance on written constitutions. The federal Constitution is, of course, a major presence on the American scene. Yet, every state also has its own constitution, each the product of a unique, revealing and important constitutional history. For Americans, the idea of a charter, fundamental law or constitution is a deeply ingrained cultural trait, one might almost say habit.

The second distinguishing characteristic of the American system is its brand of judicial review, which lodged tremendous power in the various high court judges. This is, of course, connected to the first trait; without written constitutions it would be harder if not impossible for courts to wield the power they do. Furthermore, it is a general judicial power. In light of this fact, it is surprising how little scholarly attention has been paid to the state constitutions.

The Importance of State Constitutions

The state constitutions do not deserve this neglect. They are, to begin with, significant in their own right. To take just one instance, the California Constitution is the highest law on many issues for a domain of 25 million people. Moreover, during most of the history of this country, the states were the main arena of economic and social development, and of public conflict and dispute.

The history of state constitutions is full of little surprises, and these often shed light, if only obliquely, on federal constitutional law and American history. Take, for example, Article 9, Section 4 of the Washington constitution of 1889: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." Article 1, Section 11 of that constitution also provided that, "... No public money or property shall be appropriated for or applied to any religious worship, exercise or institution, or the support of any religious establishment."

There were similar provisions in other state constitutions, under which questions were raised about the acceptability of Bible reading in the schools. In the majority of cases, Bible reading was upheld, but Washington did not go along with the crowd. In a case decided in 1918, the state supreme court struck down an arrangement offering high school credit for Bible study. Yet as far as the world of constitutional scholarship is concerned, the issues of school prayer and Bible reading appeared suddenly, out of nowhere so to speak, in *Engel v. Vitale*¹ and *Abington School District v. Schempp*,² in the 1960s.

Equally important historically is the opposite kind of evidence. No cases on freedom of speech were decided by the United States Supreme Court in the 19th century; the first decisions date from the time of World War I. Unless we look at the state constitutions and the work of the state high courts, there is no way of knowing whether the issue was important anywhere. The situation, as it turns out, is not at all the same as school prayer. State cases on that issue were also quite rare, with only a handful reported for the whole 19th century. Thus, the question of why freedom of speech became a *legal* issue in the 20th century can be posed more sharply than if the only evidence we had was the federal decisions.

The historical study of state constitutions is also important in that it forces us to ask what a constitution is. This may seem an obvious, even foolish question, but it needs to be asked. Our views tend to be fixed on the federal constitution. We have become accustomed to the

idea that a constitution is a sacred text, deeply, almost religiously, fundamental. The state constitutions have nothing of this quality. They are, to begin with, much more impermanent. By 1985, the states had produced a total of 147 state constitutions, according to the *Book of the States*. Louisiana topped the list with 11; Georgia had 10; South Carolina, seven; Alabama, Florida and Virginia, six each. Only 18 states have made do with a single constitution. Only six of the constitutions in force now were drafted before 1850, and the Council of State Governments estimates that the existing documents have been amended nearly 5,000 times.

The appetite to scrap whole constitutions and adopt new ones began early (Pennsylvania's 1776 Constitution was replaced in 1790) and reached a peak between 1876 and 1900. The process abated somewhat in the early 20th century, but, between 1964 and 1982, there were new constitutions or total revisions in Michigan, Connecticut, Florida, Pennsylvania, Illinois, Virginia, North Carolina, Montana, Louisiana and Georgia (two). At the moment, all appears to be quiet, as least as far as root-and-branch change is concerned. The amending process, however, gallops on.

What State Constitutions Do

State constitutions do much the same things that the federal Constitution does, and they have given rise to some of the same institutions. There is judicial review in the states just as there is on the federal level. Indeed, a case could be made for the proposition that state constitutional law and practice are essentially like the federal versions.

State constitutions contain many of the same kinds of provisions as the federal constitution, only in somewhat different proportions. First, state constitutions describe and establish the frame of government—for example, the legislative, executive and judicial branches and their powers. Second, they provide for the civil rights of the citizens—the immunities and powers which are supposed to be beyond the reach of temporary majorities. Third, and here they deviate most from the federal model, they contain a vast storehouse of miscellaneous provisions which we might call “super-legislation.” These are provisions that do not have a constitutional stamp; they are no different in quality or type from ordinary laws, but for some historical or political reason have been upgraded from the statute books to constitutional status.

Most state constitutions contain an ample quantity of super-legislation. The U.S. Constitution is relatively pure in this regard, but not entirely—the first part of Article 9 made the slave trade off limits to congressional legislation until 1808; and many people would classify the 18th Amendment (Prohibition) as a classic example of super-legislation, and a bad example at that. State constitutions are often riddled with such provisions, which, historically, have been a major source of constitutional instability. Behind each instance no doubt

lurks some concrete story, factional dispute or clash among interest groups.

Provisions about frame of government, powers of the governor, suffrage, and so on, are not merely technical, of course. They establish and maintain a specific distribution of power. The federal Constitution was also concerned with the issues of power and social structure; these were central to the debates of 1787. But its open texture, and its bland neutrality of style on most such issues tends to obscure the point. In any event, whether by design or evolution, the U.S. Constitution has become a much more flexible instrument. The state constitutions, blunter and more explicit, have been by the same token more brittle.

Stages in Constitutional Development

The states embarked on the constitution-making process before the present the federal government had even come into existence. At least one of these early constitutions, in Massachusetts (1780), is still in force. Some of the early constitutions are uncommonly interesting. They exerted considerable influence on the drafting of the federal Constitution and the Bill of Rights.

After 1787, the main lines of influence went the other way. In most cases, when a state drafted a constitution it used other states as a model, but the general outlines of the federal Constitution, and some of its language, were very influential.

The early constitutions differed greatly from each other, but there were some typical patterns. Often the executive branch was deliberately weakened, with the governor given very little power. These provisions reflected vivid colonial memories. The drafters did not want state officials to be courtiers or careerists, but rather virtuous amateurs who would put aside their plows for awhile to serve the people in public office.

The power taken from the executive passed to the legislatures, though in the course of time a certain disillusionment set in. There were several reasons why this happened, not least the scandals involving blatant corruption and rank inefficiency which rocked legislatures from time to time. By the middle of the 19th century, it was typical of new constitutions to devote considerable attention to this problem. These constitutions tended to put limits on the legislatures in hopes of curing or at least curbing their vices. The tendency became more pronounced in the 1870s. Restrictions on the use of state money became common, as did rules against specific kinds of “special” or “local” laws. Still other provisions tried to prevent hanky-panky in the processes of drafting and passing laws.

This is the justification for one of the most important clauses in many state constitutions, which provides that every act shall deal with a single subject which must be expressed in the title. No such clause appears in the U.S. Constitution, but it was so popular by the 1860s that it was inserted in the short-lived Confederate Constitution. Whether such a clause actually helps prevent the old hidden-ball trick or contributes to purity in the

legislative process is unknown. What is clear, however, is that this clause was a gleeful and constant inspiration to litigants who wanted some statute or other declared unconstitutional. Just as no one really knows what "equal protection" or "due process" means, no one knows, or can know, whether a complicated law "embraces" only one "subject" and whether the title gives adequate notice of what this subject is.

Of course, the real issue in these cases was never the esthetic delight in clean, well-drafted statutes; rather it was some specific economic and political struggle. These clauses still exist and are still useful for tactical or strategic purposes.

Who was it that was corrupting the legislatures? The big corporations, the banks, the railroads—or so people thought. Thus, in the 1870s, along with the theme of restriction on the power of the legislatures went restrictions on corporate power. At the very end of the century, some constitutions also began to sound themes of conservation of resources.

The process of making and remaking state constitutions has not ended in the 20th century. Something on the order of one-fourth of the states have adopted new constitutions since the end of the Second World War. The pace has slackened, however, and it remains a question why some states tamper so little with their constitutions and others so much.

Of course, an unreplaced constitution is not the same as an unamended constitution. Just over half of the states have initiative or referendum provisions, usually both. South Dakota was the first state to adopt a device of this type in 1898, but essentially it was a 20th-century development, usually associated with the Progressive movement. Progressivism has come and gone, but the initiative and referendum are still flourishing. What one author called "amendomania" in 1949 has shown no signs of decreasing. In some states—California is a prime example—the initiative and the referendum are very widely used (some would say abused). In a sense, there is not much point in redoing the constitution in California; it is in a constant process of change, with proposals on the ballot in virtually every election.

Generalizations are not easy, but there does seem to be a real difference between constitution making in the 19th century and today. In the 19th century, constitutions tended to be intensely political in the most literal sense. They were taken to be instruments which not only set out the frame of government but also expressed the basic power structure of the state. They were pro-railroad or anti-railroad; they favored the northern part of the state or the southern part, this or that party or faction. Thus, when there was a political change, a turn of the wheel, the constitution itself had to go, to be replaced by an instrument embodying the aims and policies of the victors.

This does not seem to be so much the case in the 20th century. Perhaps changes in factional power in this century focus more on seizure and control of the bureaucracy. At any rate, our minor political revolutions,

when they occur, do not seem to require a brand-new constitution. The 20th-century constitutions, at least the recent ones, are less products of political upheaval and realignment than they are technicians' ideas, that is, law reform in some highly technical sense.

The two trends are, to be sure, contradictory. The technocratic approach to constitution making is inconsistent with the initiative and referendum processes, which practically guarantee a bloated constitution. All sorts of provisions get shoehorned by "the people" into the constitutional text. The experts are not happy with the initiative. The process seems so nicely democratic, yet, likely as not, voters are befuddled by a combination of misleading ads on the one hand and a text that would baffle a lawyer on the other. Still, the process marches on.

Judicial Review

The most dramatic aspect of American constitutionalism is judicial review. The Constitution is the supreme law of the land, but, to quote a famous line from Charles Evans Hughes, the Constitution is what the judges say it is. This dictum is hard to deny. Hence, to talk about state constitutions means to talk about state high courts and the way they use, interpret or manipulate those documents.

State constitutions shed some light on the vexing question of the origins and legitimacy of judicial review. In the Pennsylvania Constitution of 1776, for example, there was a curious provision for a council of censors, which was a kind of watchdog over constitutional behavior. In New York's first constitution, there was a provision for a council of revision, made up of the governor, chancellor and Supreme Court judges. The council had the job of reviewing the constitutionality of bills passed by the legislature.

These provisions point in two directions. The drafters of the Pennsylvania Constitution probably did not think of judicial review in the modern sense; otherwise, they would not have written in the provision for the council. On the other hand, the provision strongly suggests a search for the solution to what was seen as a problem—checks and balances were in the air, so to speak, and judicial review was the ultimate solution. Whether it was literally intended or not, it came to be accepted as the most satisfactory way of controlling the other two branches.

In the states, judicial review followed, more or less, the same general course as on the federal level. The great flowering of judicial review took place after the Civil War, between 1870 and 1900. In fact, during this period, the state courts were probably bolder and more inventive than the federal courts in using general clauses as excuses or occasions for review.

This makes state constitutional history in the late 19th and early 20th centuries extraordinarily rich and significant. But it is not an easy history to sum up. There were great differences in activism between state courts. It is also easy to exaggerate the destructive force of judicial

review. Most state statutes passed their constitutional tests, if they were reviewed at all. It is the infamous cases which are famous. Exactly what was the impact of judicial review on state legislation? There is no way to answer this question systematically, but surely it is less than is ordinarily surmised.

The use of judicial review continued, of course, in the 20th century, and state courts have remained extremely active. The state supreme courts continue to decide many cases on classic issues of state constitutional law, in proportions that have remained more or less stable since the 1870s. In addition, the state courts have been increasingly active in "new" fields of constitutional law, especially the rights of criminal defendants. In the period 1965–1970, according to a study by Robert Kagan and his associates, almost half of all criminal cases before state supreme courts posed constitutional issues—a dramatic increase.

To be sure, over the past century or so, there have been changes in the power of state high courts to create national constitutional doctrine. It is doubtful that any major new ideas in constitutional law, since the 1950s, have originated in state courts or were first devised as readings of some state constitution. The deafening silence that has enveloped the field works against that. More significantly, the incorporation doctrine has led to a kind of "nationalization" of judicial review. As the 14th Amendment gulped down bigger and bigger chunks of the Bill of Rights, the "freedom" of state courts to interpret their own texts diminished. The center of attention tended to pass to the federal courts, which have the power to impose a national standard on the states. State jurisprudence became, necessarily, much more of a wallflower.

The power and scope of state judicial review suffered somewhat relative to review in the federal courts, and the state courts sank into a kind of dusky obscurity. But this did not necessarily mean a decrease in power and scope in absolute terms. "Judicial activism" is not confined to the federal courts. Many striking examples of judicial lawmaking come from the state courts—outside the constitutional sphere. The total transformation of tort law owes almost nothing to the federal courts and everything to the state courts.

State Court Activism

In constitutional law, the federal influence is much greater, but the sheer quantity of state judicial review has increased. The courts still decide a substantial number of cases under their own clauses, which often have no federal counterpart. What are these cases about? They are a miscellaneous lot, but include many cases on the validity of tax or regulatory laws. Many cases arise under clauses dealing with procedures of the legislature, and the jurisdiction and tenure of judges. This suggests that the state courts, quietly, have been playing a powerful political role, and that they were inserting themselves into economic issues that the United States Supreme Court had given up on almost entirely.

Moreover, in recent years, state courts have been increasingly showing their muscle. This is not surprising. There are structural reasons which may account for some of this development; over the course of the last century or so, high courts in more and more states have gained total control over their dockets. This means courts are free to choose to decide only "important" cases, which in turn perhaps encourages more "activism" than would otherwise be the case. The powerful work of the United States Supreme Court may also have an impact: Supreme Court cases generate controversy and make headlines.

One vehicle for the new state court activism is the interesting doctrine of "independent state grounds." This doctrine, moreover, permits something close to outright defiance of the federal High Court. The germ of this doctrine, in Supreme Court jurisprudence, can be traced at least as far back as 1874, to language in *Murdock v. Memphis*.³ But the doctrine has gotten a tremendous burst of energy in the last two decades. State constitutional law as a rival to federal law—that is new and interesting, harder to ignore than state constitutional law in the past.

Many key cases arise under state bills of rights. To be sure, state courts cannot interpret their own cruel and unusual punishment clauses, for example, to permit torture. The federal standard overrides theirs, whether or not they claim that they are only "interpreting" their own constitution. But what if they give their bill of rights a more "expansive" reading than the federal courts do? This was one way of reading the issue in the California *Pruneyard*⁴ case. The U.S. Supreme Court had held in an earlier case that a privately owned shopping center did not have to allow citizens to talk, distribute leaflets, and so on. But in *Pruneyard*, the state interpreted its constitution to grant broader free-speech rights. The Supreme Court agreed that California was entitled to "adopt . . . individual liberties more expansive than those conferred by the Federal Constitution."

Several states have leaped eagerly into the breach. California is one of the most egregious examples, so far. Another is Massachusetts. Here the state supreme court has declared the death penalty unconstitutional as a violation of Article 26 of the state Declaration of Rights, a clause that for all practical purposes simply mimics language in the federal Constitution. Thus, the decision flatly contradicts current dogma as enunciated by the United States Supreme Court. This type of activism is by no means confined to the big and presumably liberal states.

There is a logical or theoretical problem here. In constitutional law, textual "interpretation" is often or perhaps usually disingenuous, and now, maybe more than usual. In addition, "more" rights for A often mean fewer rights for B. In the *Pruneyard* case, the shopping center complained about its property rights. It was forced to allow people to hand out leaflets on its own land against its will. Was this a violation of its federally guaranteed private property rights? The Supreme Court said no, and

most commentators agreed. But the case undeniably has a certain zero-sum aspect.

Even if the only rights cut down are those of the government, some people think these cases pose a problem for the federal system. Arguably, the job of the courts is to establish what "free speech" ought to mean; there are always conflicting values, and what the court is after is the right line, or the best line, between the rights of the individual and the collectivity. The court, in *Pruneyard*, obviously thought that it was letting California grant "more" free speech, which is presumed to be an absolute good, so that there can never be too much of it. In fact, the Court allowed California to adopt a *different* rule about free speech—to draw a different line. This may be well and good, but it erodes the national standard.

There are, of course, policy arguments on both sides of this question. It probably makes sense to argue the issue point by point and area by area. For our purposes, it is worth noting that the doctrine of "independent state grounds" permits a revival of state constitutional law, and underscores the importance of the subject. Perhaps the long years of scholarly neglect will end.

We are also reminded that state constitutions, even when they use the same words as the federal Constitution, are not the same beasts, either among themselves or as compared to the "grand" Constitution. State constitutions, too, are not simply documents, words, pieces of paper. They have a life of their own. They are part of a complex process, a history, a context, a tradition.

Notes

¹370 U.S. 421 (1962)

²374 U.S. 203 (1963)

³87 U.S. 590, 636 (1874). The Court was discussing its right to review and reverse state court judgments. Review was available only if a federal question was involved; but even when the federal question had been decided wrongly, the Court, before reversing, "must further inquire whether there is any other matter or issue adjudged by the state court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."

⁴*Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)

Forasmuch as it hath pleased the Almighty God by the wise disposition of his diuine prouidence so to Order and dispose of things that we . . . are now cohabiting and dwelling in and vppon the River of Conectecotte and the Lands thereunto adioyneing; And well knowing where a people are gathered together the word of God requires that to mayntayne the peace and vnion of such a people there should be an orderly and decent Gouernment established according to God, to order and dispose of the affayres of the people at all seasons as occation shall require; doe therefore assotiate and conioyne our selues to be as one Publike State or Comonwelth; and doe, for our selues and our Successors and such as shall be adioyned to vs att any tyme hereafter, enter into Combination and Confederation together . . .

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The United States Constitution as an Incomplete Text

Donald S. Lutz

Americans are the heirs of a constitutional tradition that was mature by the time the United States Constitution was framed in Philadelphia. The national document was preceded by 18 state constitutions, as well as by the Articles of Confederation, our first national Constitution. Furthermore, three states, Rhode Island, Connecticut and Massachusetts, used as their first constitutions colonial charters written during the previous century. The other ten states wrote constitutions many of which enshrined the political institutions they had developed as colonies.

The 157 years from the first successful British settlement in North America until the break with Britain in 1776 should have been long enough to make us thoroughly British in our political inclinations. Instead, the longer the colonists lived along the eastern seaboard, the less they resembled their peers in the mother country when it came to the design of fundamental political institutions. With the *Declaration of Independence*, the Americans did not so much reject the British Constitution as affirm their own constitutional tradition. Derived in part from English theory and practice, American constitutionalism was distinct from the tradition in which it was partially rooted.

Commitment to Popular Sovereignty

While England had a constitution long before we did, the United States Constitution is written as a single document. The importance of this practice cannot be overestimated. Placing everything of constitutional status in a single document makes the Constitution more accessible to the average citizen as opposed to only an educated elite. Although over time the precise meaning of many of its passages would be articulated in Supreme Court opinions, the basic principles of the Constitution are easily available. Putting the essentials of a political system in a single document reflected, for Americans, a high level of commitment to broad citizen participation. This commitment to popular sovereignty reflects a profound shift from the British Constitution.

A relatively complete notion of popular sovereignty, as reflected in the U.S. and state constitutions, was lacking in the 18th-century British Constitution. Americans felt perfectly comfortable with the idea that they, as a people, could do the following things on their own authority: form themselves into a new community; create or replace a government to order the community at any time; select and replace those who hold important positions of political power; determine which values bind them as a community and thus should guide those in government in making decisions; and replace political institutions that tend to operate at variance with these values. The British Constitution, resting on the common law, a long history of institutional evolution from feudalism, and to a significant degree on autocratic institutions, could not yet begin to generate the same commitment to popular sovereignty that Americans seemed to take for granted by 1776.

There were other distinguishing features: a functional separation of powers, bicameralism on a completely different basis than in England, use of different constituencies for electing different officials, different terms of office for different branches, an independent judiciary, an elaborate and formal system of checks, and a formalized method for altering or amending the Constitution.

The Institution of Federalism

Perhaps the most critical difference between the English and American systems is the institution of

federalism, which summarizes the overall position of the United States Constitution within our ongoing constitutional tradition. Before there was a national constitution there were state constitutions which were the culmination of a process that produced most American political institutions and practices before 1776. The existence of those states was a fact of central importance. Confederation was tried and found to be inadequate, so Americans devised a system they now call federalism to create an effective national government.

The use of federalism as a central organizing principle for our second national Constitution had a peculiar effect on its contents. The states are mentioned explicitly or by direct implication 50 times in 42 separate sections of the U.S. Constitution. Anyone attempting to do a close textual analysis of the document is driven time and again to the state constitutions to determine what is meant or implied by the national Constitution. This has the effect of raising what should be an obvious question—what was the intent of the founders in forcing us to consult these other documents?

One of the most important passages involving the states is Article V, describing the amendment procedure. The concept of formal amendment is not only innovative but also conveys an important message to the reader of the Constitution—the document is not finished. Alexander Hamilton states at the beginning of *Federalist 1* that the American political system is an experiment in government directed by a free people using reflection and choice as opposed to accident and force, an experiment whose ultimate outcome must remain always in doubt. Thomas Jefferson said each generation must leave its page in America's unfolding story, and that the ability to do so was part of the story's historical significance. At the very least it was expected that the formal institutions of decisionmaking would require some adjustment in the future.

The Definition of Citizenship

The drafters probably foresaw another use for amendments—completing a definition of citizenship. Article IV, Section 2 of the Constitution establishes that Americans are simultaneously citizens of the United States and of the state wherein they reside, a situation known as “dual citizenship.” Dual citizenship requires two court systems, national and state. Here, a close textual analysis reveals an interesting version of “the dog that didn't bark.” The United States Constitution contains no definition of citizenship. On the one hand, we might infer that since the ability to vote is an essential aspect of citizenship, and since those who vote for the lower house of their respective state legislatures can vote in federal elections, that we must go to the state constitutions to determine what is meant by the U.S. Constitution. On the other hand, while this nicely illustrates the close connection between national and state constitutions, it still leaves open the question of why we need two court systems if what appears to be dual citizenship amounts to a single status defined by the

states. There is the further problem that the states are far from agreeing on a definition of citizenship.

In 1787 most states had a property requirement for voting and holding office, a situation that produced a wide variation in the percentage of the population enfranchised. In some states blacks were completely excluded from citizenship; in others they were included. In some states religious tests were applied to those wishing to hold office; in others, not. In short, while a given state might have a reasonably clear definition of citizenship, a common national definition was impossible. If there are “seams” in the Constitution where the fabric does not quite fit smoothly together, it is often a reflection of this problem of citizenship. It is reasonable to conclude that this was one of the things left for future generations to work out, and the amendment process was one obvious way to do it.

The most important way in which the United States Constitution is incomplete is that from the beginning the national document included the state constitutions as part of the complete text. The role of the states in the amendment process is clear from Article V. The role of the states through the judicial system should be just as clear.

If the national government had continued to rely on the states to define national as well as state citizenship, the situation would have been very peculiar from a constitutional point of view. The national judiciary chose to do otherwise, and, using constitutional amendments, constructed a national definition of citizenship. This definition was in important respects also the product of congressional action that established a naturalization process and created national standards for elections. The continued inability to deal with illegal aliens, to name just one relevant problem, indicates that the definition is not yet complete.

During this century the Supreme Court has gone beyond helping to define national citizenship and attempted to enforce its view as the definition of state citizenship as well. Here we have a situation as peculiar as the original one where the states provided the definition for both citizenships. If, as the United States Supreme Court now seems to be doing, the national definition is viewed as a common “floor” to be met in state courts, there is no constitutional reason why the states cannot define state citizenship to include other rights and duties as well. It will be interesting to see if state courts and legislatures decide to affirm the American constitutional tradition in this respect and use their own constitutions as the basis for defining state citizenship.

Compacts and Constitutions

By 1776 Americans had evolved a form of document they called a compact, which included as a second part something termed a constitution. The constitution described the basic institutions for collective decision-making, distributed power among these institutions, and established the basic procedures for their operation. The first part of this compact often included a long preamble

that created a people and laid out the basic political principles shared by that people. Often, but not always, there was also a bill of rights which articulated in greater detail basic political principles, shared values and common goals. The bill of rights was an implied limit on governmental power, not in a legalistic sense but more often in an admonitory sense.

With only a few exceptions, the first state constitutions were in fact compacts. The Declaration of Independence contained all the elements that belong to the first part of a compact; the Articles of Confederation contained the elements ascribed to a constitution. Together, the Declaration and the Articles comprised our first national compact. When the Articles were replaced by the Constitution of 1787, the Declaration of Independence was not repudiated but remained as the first part to our second national compact.

It is noteworthy that those writing the early state constitutions tended to keep the two parts of the compact separate—the bill of rights did not have constitutional status. Insistence by the Antifederalists that a bill of rights be added to the U.S. Constitution resulted in a new form of document, one with perhaps unforeseen consequences. Because the Bill of Rights was added as a series of amendments to the Constitution, they were by implication part of it. The second national compact thus had two bills of rights, one symbolic and admonitory, and one with legal status as part of the Constitution.

The national Bill of Rights also echoes the bills of rights found in the early state constitutions, although the latter are usually more comprehensive, along the lines of the Declaration. More than one state constitution simply puts the Declaration at the beginning as part of the preamble. Notwithstanding the different perspective injected by the Federalists in the Constitution of 1787, there is remarkable continuity beginning with the Declaration and running through the state constitutions, the Articles of Confederation and the U.S. Constitution.

Nor should we be surprised at the substantial continuity. Of the 55 men sent to the Constitutional Convention, 44 had served in the Continental Congress where seven played a prominent part in writing the Articles; 41 had served in state legislatures where 18 had prominent roles in writing at least one state constitution; 26 had served in colonial or provincial legislatures; and eight had signed the Declaration of Independence. Working from the other end, of the 56 men who signed the Declaration of Independence, 48 had served in a colonial legislature; all but one served in the Continental Congress after the Declaration was signed; 32 helped write the Articles; 33 served in a state legislature where 22 were prominent players in writing at least one constitution; and eight signed the Constitution of 1787.

The Intent of the Founders

The Constitution is part of our national compact, and, thus, is incomplete as a founding document without the Declaration. At the same time, considered just as a

constitution, it is incomplete without the state constitutions.

Who actually wrote the founding document? Who are the "founders" (a term now more problematic than is generally realized)? It was the result of committee work, floor debate and revision, and frequent reconsiderations introduced by many people. As far as the public record is concerned, those who signed the document were its authors. But we know from Madison's notes that some of the people who refused to sign the Constitution were far more active in the debate leading to its design than some of the signers. Even among those who signed the document, there was considerable disparity in the quality and quantity of their contribution. Even James Madison, often considered the father of the Constitution, did not play a dominating role. No one person or small group dominated the convention.

Many men who were not at the Constitutional Convention are also considered founders, such as Thomas Jefferson, John Adams and other signers of the Declaration of Independence. Scholars have long linked the Declaration and the Constitution, and most Americans view the Declaration as a founding document of the United States, as witnessed by the Bicentennial celebration in 1976. It is reasonable to conclude that those who wrote the first state constitutions and the Articles of Confederation must also be included among the Founders.

If we now ask the intention of the founders, the answer is both problematic and misleading. We must now consider the intentions of many more people than those who met in Philadelphia in 1787. Nor can we identify a single person or small group and examine their private or public writings to determine the Founders' intent. If Madison's notes to the Convention are reliable, he is exemplary only in that he, like many others, defended a founding in which he was a participant, managed to get only a small part of what he wanted, but worked hard anyway to defend the work of the many. The narrower, though relevant, question of the intention of those who wrote the Constitution of 1787 must be answered in part by saying they intended for us to read the state constitutions as well. Without the state constitutions, the national Constitution as written was an incomplete text.

The Grand Experiment

It is reasonable to conclude that the Founders viewed American government as an experiment directed by a free people attempting to use reflection and choice, that they expected each generation to write its page in the nation's unfolding story. At the same time, the Founders would not have us believe that the experiment is to proceed without rules to distinguish a valid from an invalid outcome, or that any generation should start a completely new story, change the major outline of the plot or disown earlier chapters.

There is a set of underlying commitments that define not only the proper methodology of the experiment but also the criteria for its failure. These commitments not

only permit continuing updates in the story but also limit what can be considered valid extensions of the story.

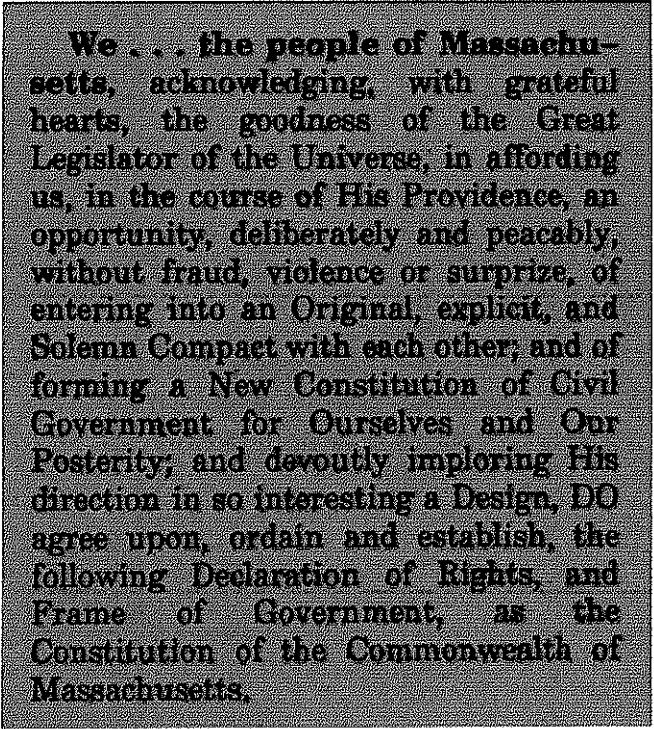
Americans are still defining the political system, so we are in a sense part of the founding—and this was apparently one of the founder's intentions. We are part of an ongoing process in which we deliberate not only among ourselves but also with those who have come before. The Bicentennial celebrates those underlying commitments which continue to define America but whose implications are still not completely resolved.

The status of blacks, the situation of the native American, the uncertainty about illegal aliens, the rights of the accused, the role of religion in politics—these and many other controversies are reflections of the Constitution's incompleteness. And all of these controversies involve state governments, guided by their own constitutions. What we have with the institution of federalism—without which there could have been no extended, national republic—is an interlocking system of constitutions in which no one document is in itself a complete text.

The Constitution was looked on as an experiment that needed careful control and some means for future adjustment. The provision for the amendment process and putting significant power in the state governments are manifestations of this perspective. It was left for future generations to judge the progress of the experiment, make adjustments, and add their own considered innovations.

Beyond questions dealing with the Founders' intentions, there will always be issues that cannot be resolved without expanding the text. New problems arise, and old ones take on new and unexpected forms. For example, it is now possible for authorities to listen to our every word without ever tapping a phone line. Technology has advanced to a point where the issue of privacy needs further constitutional development, but there is nothing in the Constitution that deals explicitly with privacy. If ever there was a potential constitutional issue that pleaded for state action, this is one.

Viewing the Constitution as a political text and as an incomplete text, we are led to prospects and conclusions somewhat at variance with standard constitutional analysis. At the same time, we are led back to a more traditional perspective on the Constitution that, ironically, opens up the possibility of a deeper involvement by contemporary Americans in constitutional development—development that could involve the states more actively.



We . . . the people of Massachusetts, acknowledging, with grateful hearts, the goodness of the Great Legislator of the Universe, in affording us, in the course of His Providence, an opportunity, deliberately and peaceably, without fraud, violence or surprize, of entering into an Original, explicit, and Solemn Compact with each other, and of forming a New Constitution of Civil Government for Ourselves and Our Posterity; and devoutly imploring His direction in so interesting a Design, DO agree upon, ordain and establish, the following Declaration of Rights, and Frame of Government, as the Constitution of the Commonwealth of Massachusetts.

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The Emerging Agenda in State Constitutional Law

Stanley M. Mosk

There may appear to be a kind of heresy in mentioning alternatives to the United States Constitution in this period when we are celebrating the Bicentennial of that remarkable document. The response to any such criticism can only be that human liberty is so fundamental that we must explore every avenue for its preservation. There are times when it may be expedient to look to international instruments—the Universal Declaration of Human Rights, for example—or to state constitutions.

Take, for openers, the right of privacy. In courts throughout the land, that somewhat elusive concept is being urged and generally accepted. Significantly, in many respects the Universal Declaration of Human Rights and the state constitutions protect individuals in a similar manner, and more expansively than does the United States Constitution.

Example: a police officer or a public prosecutor may walk into a bank, and with no authority of process, demand to examine the bank records of an individual or corporation. There is no constitutional violation, says the United States Supreme Court. But some states have pointed out that canceled checks, loan applications and other banking transactions are a mini-biography, that one reasonably expects private bank records to be used only for internal bank processes, and, therefore, an examination of them violates the state constitutional right of privacy unless the records are obtained by a warrant or subpoena. Does one reasonably expect privacy in credit card records or unlisted telephone numbers? Tune in later.

Education as a Fundamental Right?

To most of us, learning and knowledge are our most prized possessions. Yet, in *San Antonio Independent School District v. Rodriguez*¹ in 1973, the Supreme Court specifically held that education is not a fundamental right, and it has never retreated from that position. Contrast that result with the growing number of states that have recognized the inherent value of public education. California, in its celebrated 1971 *Serrano v. Priest*² case, openly and firmly declared that “the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a fundamental interest.” Courts in Connecticut, Michigan, Wyoming, Arizona, Mississippi, Washington, Wisconsin and West Virginia have reached the same fundamental right conclusion.

The State-Church Conflict Goes On

The revival of religious fervor in the country—indeed throughout the world—and the aggressiveness of the fundamentalist movement indicate future cases in the seemingly perpetual church-state conflict. In this area, United States Supreme Court cases have not been models of clarity.

In *Everson v. Board of Education*³ in 1947, the court upheld a New Jersey statute which authorized reimbursement to parents for fares to transport their children to public or nonprofit private schools, including religious schools. In a five-to-four decision, the majority held that the legislation did no more than provide a general program to assist parents, regardless of their religion, to get their children to school safely and expeditiously.

The first case dealing with the constitutionality of providing textbooks for use in religious schools was the 1968 *Board of Education v. Allen*⁴ challenge to a New York law. The court invoked what has come to be called

the "child benefit" theory, i.e., it held that the financial benefit of the program was to the children and their parents rather than to the parochial schools, that no funds or books were furnished to the schools. Moreover, it held, while books, unlike buses, are critical to the teaching process, the record did not support the proposition that textbooks on nonreligious subjects were used by the parochial schools to teach religion. Later, in 1973, the Supreme Court declared that a law which confers an indirect, remote and incidental benefit on religious institutions is not for that reason alone unconstitutional.

The "child benefit" theory has been criticized by several state courts on the ground that it proves too much. If the fact that a child is aided by an expenditure of public money insulates a statute from challenge, constitutional prohibitions of state aid to sectarian schools would be virtually eradicated. There is no logical stopping point.

It is impossible to predict how many states will rely on their own constitutions to retain the traditional wall of separation, but some have done so and others will face the test in the near future. Many states have constitutional provisions more precise and sweeping than the First Amendment, and have been stricter than the Supreme Court in enforcing separation of church and state.

What to Do about *Miranda*

High on the constitutional agenda in the next few years will be what, if anything, to do about *Miranda*. When the *Miranda v. Arizona*⁵ ruling was announced in 1966, many states were reluctant to accept it. Some were dragged kicking and screaming into conformity. But conform they did. The question will be, if *Miranda* expires—and, to paraphrase Mark Twain, reports of its imminent demise are no doubt exaggerated—will the states revert to policies of anything-goes-at-the-stationhouse or will they insist on some form of *Miranda*-type warning under state constitutional authority?

Unless the Supreme Court should rule that a *Miranda* warning is absolutely forbidden—which seems inconceivable—many if not most states will adhere to the rules they adopted. It has taken two decades, but law enforcement officers in the states have become reconciled to giving appropriate warnings to suspects. And trial judges understand that they must reject statements obtained from defendants who were not warned. Many of the state decisions have been based on state constitutions.

For example, in a New York case the Supreme Court permitted statements obtained in violation of *Miranda* to be used for impeachment purposes. California, Hawaii, Texas and some other states have held that if a statement offends *Miranda* it is useless for all purposes.

Good Faith and the Exclusionary Rule

Another hole was dug in the exclusionary rule by the United States Supreme Court in 1984. In *United States v.*

Leon,⁶ the court announced the "good faith" exception to the exclusionary rule: In the absence of an allegation of misconduct by the judge, suppression of evidence obtained by search warrant is, as a matter of federal law, appropriate only if the officers were dishonest in preparing their affidavit for the warrant or could have no objective, reasonable belief of probable cause.

In addressing the question of the proper remedy for an unconstitutional search, the court weighed the costs and benefits of preventing the use of "inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective."

The good faith doctrine was expanded to include reasonableness in a recent case in which the Baltimore police actually invaded the wrong apartment. In a six-three vote, Justice Stevens held for the court that the validity of the search depended on whether the officers' failure was "objectively understandable and reasonable."

Several state courts, notably New Jersey, New York, Michigan, Mississippi and Wisconsin, have declined on state constitutional grounds to follow *Leon*, and will probably do with the later ruling. All the cases to date involved searches conducted pursuant to a warrant later determined to be invalid.

The Use of Pretrial Silence

Another significant federal-state conflict arises over the use of a defendant's pretrial silence. All jurisdictions agree that the silence of a defendant, under a claim of privilege against self-incrimination, may not be admitted. But there is some divergence as to the use of such silence for impeachment purposes. Most state cases agree that the silence must amount to an invocation of Fifth Amendment rights in order to be excluded.

After arrest, however, the dichotomy depends on whether *Miranda* warnings have been given. If so, obviously it would be unconscionable to penalize a defendant for remaining silent after he has been told by the authorities that he has a right to refuse to talk. However, if *Miranda* warnings have not been given, the U.S. Supreme Court held that a defendant's constitutional rights are not violated by permitting him to be cross-examined about his pre-*Miranda* silence.

Courts in Washington, Connecticut, Alaska, New Jersey, Pennsylvania, Texas and California reached a contrary conclusion. The last relied entirely on the state constitution. Several of the cases feared that to allow the defendant's silence to be used for any purpose would invite the police to dispense with *Miranda* warnings. They also expressed concern that silence used for impeachment would likely be used by the jury in determination of guilt.

Obscenity

A conflict is inevitable between national and state standards in the field of obscenity. Under the U.S. Supreme Court's *Miller v. California*⁷ rubric material is obscene if: (1) it depicts sexual conduct in a patently

offensive manner; (2) the average person, applying contemporary state standards, would find that it, taken as a whole, appeals to a prurient interest in sex; and (3) taken as a whole it lacks serious literary, artistic, political or scientific value.

Recently, the Oregon Supreme Court, dealing with the conviction of the proprietor of an adult bookstore after his entire inventory was seized in a police raid, declared that its constitution was written by "rugged and robust individuals dedicated to founding a free society unfettered by the governmental imposition of some people's views of morality on the free expression of others." Oregon's pioneers intended to protect freedom of expression "on any subject whatever," including the subject of sex. Rejecting the *Miller* rule, the state court declared, "In this state any person can write, print, read, say, show or sell anything to a consenting adult even though that expression may be generally or universally considered 'obscene.'"

The Fate of Peremptory Challenges

There is no better example of how the states can be laboratories for development of the law than the fate of *Swain v. Alabama*.⁸ In that case, the majority of the United States Supreme Court held that there could be no limitations whatever on the exercise of peremptory challenges in jury selection. A modest concession was made if a defendant could demonstrate a long pattern of discriminatory use of the challenges. This, of course, was an impossibility.

The California Supreme Court rejected *Swain*, holding that there could be a limitation on peremptory challenges if they were employed for a discriminatory purpose. The method of determining the systematic exclusion of a group was described in detail, and if discrimination was evident the trial judge could call on the prosecutor to explain each of his challenges. If he flunked the test, the entire jury panel was to be excused and a new one brought in. Massachusetts adopted much the same procedure.

Last year, the United States Supreme Court admitted that *Swain* is not workable, and finally conceded that the use of peremptory challenges for discriminatory purposes must not be condoned. This suggests that state courts can have a significant effect on the pattern of the law, even federal law.

The Boundaries of Permissible Searches

Motor vehicles present a particular problem as courts at every level grapple with the boundaries of permissible searches.

A person stopped by a police officer for a simple traffic violation may be subjected to a full body search and the vehicle may be searched. There is no constitutional violation, says the United States Supreme Court. But Hawaii and other states have found such police conduct offensive to state constitutional provisions unless the officer has articulable reasons to suspect illegal conduct other than the minor traffic infraction. Most

courts have difficulty in ascertaining the limits, if any, of automobile searches in light of more recent federal opinions, and the states are likely to reach independent and varying conclusions.

The right of police to inventory the contents of an impounded motor vehicle results in another conflict between United States Supreme Court and state court decisions. The Supreme Court has held inventory searches of automobiles to be consistent with the Fourth Amendment, and has justified the inventory as a means to protect the police and garage attendant from subsequent false claims of theft.

Colorado and California reached a different conclusion: since property could conceivably disappear prior to or during the inventory, a simpler solution would be to lock and seal the vehicle in a secure facility. The California case, *People v. Mozzetti*,⁹ was particularly blatant: the woman was not a criminal suspect, but had been in an auto accident and had been taken to the hospital. It is difficult to justify the police searching her car trunk and examining a closed suitcase, all on an inventory theory.

Whose Freedom?

My favorite federal-state dichotomy relates to a not uncommon situation: a small, orderly group of citizens undertakes to pass out leaflets, or to solicit signatures on petitions, in a privately owned shopping center. The shopping center owners seek to prohibit the activity.

Obviously there is a built-in tension between two constitutional guarantees. On the one hand, the citizens assert their right of freedom of speech and the right to petition the government for redress of grievances. On the other hand, the shopping center owner asserts his right to control his private property and to exclude all non-business related activity. Which right is to prevail?

The Supreme Court of California held in 1970 that unless there is obstruction or undue interference with normal business operations the bare title of the property owners does not outweigh the substantial interest of individuals and groups to engage in peaceful and orderly free speech and petitioning activities on the premises of shopping centers open to the public. This, of course, is subject to reasonable time, place and manner restrictions.

On four occasions the shopping center owner sought certiorari and rehearing from denial of certiorari, and in each case he was rebuffed by the United States Supreme Court, with no votes noted to grant. We had every reason to believe that we had acceptable law.

Two years later, however, the Supreme Court took over an almost identical case from Oregon and held that the owners had the right to prohibit distribution of political handbills unrelated to the operation of the shopping center. Back to the California Supreme Court came the shopping center owners and asked to be relieved from the previous orders. A four-three majority of the state court agreed that we were bound by the U.S. Supreme Court ruling.

Five years later, in 1979, a new majority of the California court decided in *Robins v. Pruneyard*¹⁰ that the free speech provisions of the state constitution offer “greater protection than the First Amendment now seems to provide.” The United States Supreme Court granted certiorari, and we sensed doom to our theory of state constitutionalism. But the Supreme Court agreed with the state court, nine–zero, declaring that the earlier Supreme Court reasoning did not “limit the authority of the state to exercise its police power or its sovereign right to adopt in its constitution individual liberties more expansive than those conferred by the Federal Constitution”

Federalism and the Bicentennial

No doubt, there is a growing interest in true federalism. There was a time when states’ rights were associated with Orval Faubus and George Wallace barring the entrance of blacks to public schools. We are long past that confrontational period. Today, states’ rights are associated with increased, not lessened, individual guarantees. There is every indication that the Rehnquist court will defer to the states when they rely on state constitutional provisions.

At the top of any agenda for this Bicentennial is review of James Madison’s words in *The Federalist* (No. 44):

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people and the internal order, improvement, and prosperity of the State.

Sound policy 200 years ago. Sound policy today.

Notes

- ¹411 U.S. 1
- ²487 Pac.2d 1241
- ³330 U.S. 1
- ⁴392 U.S. 236
- ⁵384 U.S. 436
- ⁶468 U.S. 897
- ⁷413 U.S. 15
- ⁸380 U.S. 202
- ⁹484 Pac.2d 84
- ¹⁰592 Pac.2d 341

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence on Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

Stanley Mosk is a Justice of the California Supreme Court.

Federalism and State Court Activism

Earl M. Maltz

Commentary on the resurgence of state court activism has often focused on issues of federalism. To a certain extent, this focus is entirely understandable. After all, state constitutional law becomes prominent only when state courts establish principles which diverge from the Supreme Court's interpretation of federal constitutional law. On its face, such divergence seems to raise important issues of federal-state relations. Moreover, the answer to one key question—whether a state court has the power to interpret the state constitution differently from the federal counterpart—is plainly controlled by considerations of federalism.

The power question is, however, not only central but also noncontroversial. All agree that the federal constitution in no way constrains state courts in their interpretation of the state constitution, that the U.S. Supreme Court has no power to force state courts to alter these interpretations, and that in the event of an irreconcilable conflict between state constitutional law and federal law the state courts must follow the federal law. The debatable issues are quite different; they involve the question of what standards state courts should adopt to determine state constitutional rules.

Federalism and Models of State Constitutional Adjudication

Discussions of federalism figure most prominently in comparisons of the competing approaches to state constitutional adjudication. Each of the approaches identifies a method for assessing the relationship between federal and state constitutional law. Three basic models have been suggested: the pure independent model, the lockstep model and the reactive/independent model.

The Pure Independent Approach

Those courts which take the pure independent position view state constitutional law as entirely separate from its federal counterpart. They argue that the analysis of the Supreme Court is entitled to no greater respect than that of any other court. In states where this position prevails, courts conduct an independent analysis of each issue before them to determine the proper reach of state constitutional law.

The opinions of those courts which adopt the pure independent approach follow two basic patterns. Some hardly even refer to Supreme Court opinions in conducting their state constitutional analysis. This methodology was adopted by the New Hampshire Supreme Court in *State v. Ball*.¹ Mentioning the view of the Supreme Court only in passing, the *Ball* court held that under the state constitution, a police officer had no probable cause to seize a marijuana cigarette which he saw in a car ashtray during a lawful traffic stop.

Other courts which adopt the pure independent approach examine the views of the U.S. Supreme Court in greater detail. The opinion of the Colorado Supreme Court in *People v. Sporleder*² offers a typical example. *Sporleder* involved an attempt to suppress evidence obtained through the use of a pen register, "a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses . . ." The issue was whether the police were required to obtain a search warrant prior to installing such a device.

In *Smith v. Maryland*,³ the Supreme Court had held that the use of a pen register did not constitute a search within the meaning of the Fourth Amendment, that telephone users had no "legitimate expectation of privacy" in the numbers dialed. The *Sporleder* court summarized *Smith*, conceded that the relevant state constitutional provision was "substantially similar" to

the Fourth Amendment, and found, nonetheless, that "the defendant's expectation that the numbers dialed would remain free from government intrusion is a reasonable one" and that a warrant was necessary as a matter of state law. Other than a simple disagreement with the *Smith* majority, the *Sporleder* court gave no reason for rejecting the conclusion of the Supreme Court.

Of course, the fact that a state has adopted the pure independent position does not imply that its courts will reject the Supreme Court reasoning on any given issue. The action of the North Carolina Supreme Court in *State v. Arrington*⁴ illustrates this point. *Arrington* revolved around the question of what constitutes probable cause supporting the issuance of a search warrant; the key issue was the sufficiency of affidavits based on hearsay from informants. The Supreme Court in *Illinois v. Gates*⁵ adopted an analysis which emphasized the "totality of the circumstances." The North Carolina court rejected the notion that the holding of the Supreme Court was binding in any way on state constitutional claims, but found that the state and federal constitutional protections were precisely the same.

In short, it is the methodology rather than the results that distinguishes states using the pure independent approach. At the other end of the spectrum are state courts which use the so-called lockstep approach, concluding that the state and federal constitutions provide the same level of protection. As the Supreme Court clarifies or changes its view of the federal constitution, state constitutional law changes as well.

The Lockstep Approach

In Montana, *State v. Jackson*⁶ engendered a heated dispute over the desirability of adopting the lockstep approach. *Jackson* began as a prosecution for drunk driving; at issue was the admissibility into evidence of the defendant's refusal to take a breathalyzer test at the time of his arrest. The defendant claimed such a refusal was testimonial and that, therefore, the admission of evidence would violate his right to be free from self-incrimination—a right guaranteed by both the federal and state constitutions.

Initially the state supreme court found the evidence inadmissible by a four-three vote. The dissenters argued that Montana had adopted the lockstep approach to self-incrimination issues and that federal constitutional law did not bar the use of the evidence. The majority opinion, by contrast, concluded that the evidence was inadmissible under the Fifth Amendment and that the "issue is also controlled by the [self-incrimination provision] of our own constitution." The majority did not specifically address the question of whether the state constitutional protections might differ from those provided by federal law; in its discussion of the state provision, however, the opinion cited only federal cases to support its conclusion.

The state petitioned the Supreme Court for a writ of certiorari. Prior to the disposition of the writ, the court held in *South Dakota v. Neville*⁷ that admission of the

type of evidence at issue in *Jackson* did not violate any federal constitutional norms. The Court vacated *Jackson* and remanded the case for further consideration.

On remand, the Montana Supreme Court reversed its earlier stance by a five-two-vote. All members of the majority firmly embraced the lockstep approach to self-incrimination issues, concluding that in this area of law the "Montana constitutional guaranty affords no greater protection than that of the Federal constitution." This conclusion brought a bitter dissent from the author of the original *Jackson* opinion, stating that "the majority has abdicated [its] responsibility by . . . permit[ting] the United States Supreme Court to tell us what our state constitution means."

The Reactive/Independent Approach

Some judges and commentators have advocated an intermediate position, which can perhaps best be described as a reactive/independent approach. Under reactive/independent analysis, interpretations of federal constitutional law presumptively control state court analysis. The state courts will adopt a different analysis, however, if justified by certain prescribed factors.

The New Jersey case of *State v. Hunt*⁸ provides a classic example of reactive/independent analysis. Like *Sporleder*, *Hunt* held that evidence obtained through use of a pen register is inadmissible as a matter of state law. A concurring opinion stated that, while not formally controlling state constitutional adjudication, "the opinions of the Supreme Court . . . are nevertheless important guides on the subjects which they squarely address."⁹ The opinion then set out seven conditions that would justify the imposition of more stringent state constitutional guidelines.

Activism, Autonomy and Federalism

Advocates of the pure independent approach have attacked both reactive/independent and, most stridently, lockstep analysis, claiming that these approaches are inconsistent with the basic premises of federalism and that the pure independent approach is a necessary corollary of the theory that each state is a quasi-sovereign entity.

To understand the flaw in this argument, one must first analyze the relationship between state court activism generally and the concept of state autonomy. Some commentators seem to believe that such activism per se advances the values of federalism. For example, Justice William Brennan claimed that "every believer in our concept of federalism . . . must salute this development [of an increasingly activist posture] in our state courts."¹⁰ Similarly, state court protection of rights not protected by federal law has been described as a cornerstone of federalism. This argument necessarily rests on the premise that a refusal by a state court to be activist implies that it is allowing the Supreme Court to control the interpretation of the state constitution. Given this premise, the negative implications of a lack of judicial activism are obvious.

The difficulty with the argument is that the premise reflects a fundamental confusion between the decision to take an activist posture and the power to choose whether or not to be activist. Plainly, principles of state autonomy guarantee to the state courts the right to adopt any rule of law not inconsistent with the federal Constitution. In exercising this choice, the state court may refuse to take a more activist position than the Supreme Court for a variety of reasons. The state court may be persuaded by the reasoning of the Supreme Court on the issue; it may believe that the state constitution provides less protection than the federal constitution; it may even believe that the state constitution does not deal with the relevant issue at all. In any of those cases, the state court will be bound to apply the law as enunciated by the Supreme Court. This obligation does not imply, however, that the state court accepts the doctrine of the Supreme Court as a binding interpretation of state law; instead, the obligation is derived from the Supremacy Clause, which binds the state court to honor applicable federal law.

Once this point is understood, it becomes clear that state court activism in and of itself does not advance the cause of federalism. Federalism is concerned with the allocation of authority between the state and federal governments. Thus, considerations of federalism are important when the United States Supreme Court reviews state legislation. The question in such cases is whether a state can retain its locally established rule or must yield to a paramount national principle enunciated by the Supreme Court. By contrast, state court review under the state constitution raises no such issues. The only question is whether the controlling rule will be that established by the legislature or a court-made substitute. In either case, the relevant decision will be made at the state level.

Once the link between the concepts of federalism and activism is broken, lockstep analysis emerges in quite a different light. Basically, a decision by a state court to follow such analysis reflects the view that there is no need for additional judicial review in a system where it exists at the federal level. Such a decision does not enhance federal power in any respect; instead, it simply takes account of an unalterable reality—the existence of federal judicial review—in determining the allocation of authority among state governing bodies. The choice is not between federal and state judicial power but rather between state judicial and legislative power. The courts which advocate lockstep analysis simply choose to allocate maximum power to the state legislature.

In short, the substance of lockstep analysis is entirely consistent with the basic concept of state autonomy. Of course, one can still attack the standard verbal formulations of the approach, which seem to suggest that Supreme Court decisions somehow create state constitutional law. For lockstep courts, however, these flaws in articulation have had little impact on the practical results reached.

By contrast, analogous difficulties create very real federalism-related problems for more activist state courts. These difficulties revolve around the application of the concept that federal constitutional decisions create a minimum standard for state court analysis.

The Problem of the False Floor

The image of federal constitutional law as a “floor” in state litigation pervades most commentary on state constitutional law. The contention is that state judges must not apply rules which fall below this floor. Courts may, however, appeal to the state constitution to establish a higher ceiling of rights for individuals.

Certainly, as a matter of federal law, state courts are bound not to apply any rule which is inconsistent with decisions of the Supreme Court. The Supremacy Clause of the U.S. Constitution clearly embodies this mandate. It would be a mistake, however, to view federal law as a floor for state constitutional analysis. Principles of federalism prohibit the Supreme Court from dictating the content of state law. In other words, state courts are not required to incorporate federally created principles into their state constitutional analysis; the only requirement is that in the event of an irreconcilable conflict between federal and state law, the federal principles must prevail.

This distinction creates no problems for courts which follow lockstep analysis, which rests on the conclusion that state law-based judicial activism is simply inappropriate in the area under consideration. Thus the state court need not speculate on what rights would be guaranteed if such activism were appropriate.

State courts following either the pure independent or reactive/independent models are faced with far more difficult problems. Unlike lockstep courts, they cannot claim to be deferring to the state legislature except when forbidden to do so by the Supremacy Clause of the U.S. Constitution. Instead they must make an independent determination of the merits of each case based solely on the principles of state constitutional law. If that analysis begins with the federal “floor,” the state court is allowing a federal governmental body—the Supreme Court—to define (at least to some extent) the rights guaranteed by the state constitution. Thus, to avoid conflict with fundamental principles of state autonomy, a court deciding whether to expand federal protections as a matter of state law must use a two-stage process. It must first determine whether the federal protections are incorporated in the state constitution and only then determine if those protections are more expansive under state law.

Of course, state constitutional law does not exist in a vacuum. Judges operate within a context that includes a body of federal law which state courts are powerless to change. Clearly, in making their decisions, state judges quite properly take this body of law into account. They cannot, however, allow federal judges to *dictate* the content of state constitutional doctrine.

In short, the concept of federalism suggests constraints on judges who would adopt either the pure independent or the reactive/independent approach to state constitutional adjudication. These constraints are, however, relatively minor. The only necessity is that state courts consult their own preexisting law rather than simply adopting federal constitutional standards as a floor for state constitutional analysis. Once this requirement is satisfied, considerations of state autonomy are irrelevant to the ultimate result.

The Future of State Constitutional Theory

Discussions of state autonomy have played far too large a part in state constitutional analysis. On close examination, most of the expressed federalism-related concerns prove groundless. Moreover, by focusing on such considerations courts and commentators divert attention from the real issues involved—the allocation of decisionmaking authority within each state's government.

Analysis of this problem should begin by reference to general constitutional theory. Application of such theory, however, must also take into account the special context in which state courts operate. Many commentators point to state-specific characteristics which claim they should lead state courts to assume greater power in the governing process. These activists totally ignore the central point that state courts operate in an environment in which the legislature will always be constrained by federal judicial review.

This fact generates the central issue of state constitutional theory: do we wish to construct a system in which the judgment of state legislatures is subordinated to the sense of fairness of not one but two sets of judges? The activist response has often been that such a system is a necessary corollary to the American concept of federalism. This argument is, I believe, totally unsound. Until a more persuasive justification is put forth, the case for state court activism will remain unproved.

Notes

¹124 N.H. 226, 471 A.2d 347 (1983)

²Colo. 666 P.2d 135 (1983)

³442 U.S. 735 (1979)

⁴311 N.C. at 643, 319 S.E.2d at 260

⁵462 U.S. 213 (1983)

⁶196 Mont. 185, 637 P.2d 1 (1981), *vacated*, 460 U.S. 1030, *rev'd.*, Mont. 672 P.2d 255 (1983)

⁷459 U.S. 553 (1983)

⁸91 N.J. 338, 358-372, 450 A.2d 952, 962-969 (1982)

⁹91 N.J. at 363, 450 A.2d at 964

¹⁰William J. Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harvard Law Review* 503 (1977)

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We, the people of Montana, grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity, and to secure the the blessings of liberty for this and future generations, do ordain and establish this constitution.

Church-State Issues and State Constitutions

G. Alan Tarr

Among the many articles in law reviews and social science journals examining the resurgence of state civil liberties law, only a handful has examined state rulings on religious liberty or church-state issues. Even fewer have undertaken in-depth analyses of relevant state constitutional provisions. This omission is regrettable, because some states have sought their own solutions to these complex issues at a time when the U.S. Supreme Court's jurisprudence of church and state is in disarray.

With Supreme Court rulings under the Establishment Clause commanding only narrow majorities, with dissenters openly challenging decisions, and with even justices sympathetic to the court's interpretation confessing difficulty in applying the mandates to specific situations, there is ample reason to investigate whether recourse to state constitutional guarantees might offer more consistent direction.

State constitutions can furnish such direction, but it must be remembered that provisions dealing with religion were often developed as responses to specific controversies and, consequently, bear the marks of their origins. In addition they frequently reflect a different perspective on relations between church and state than is found in the U.S. Constitution.

The relationship between church and state under the federal Constitution was fixed during the founding period and has never been altered, but the states have amended and revised their constitutions in recognition of changing views and in response to the emergence of new church-state issues.

The constitutional language in many states tends to be considerably more concrete and specific than that in the federal document. This accounts, for example, for the emphasis on "no aid" and on freedom of worship in early guarantees. State provisions also represent constitutional judgments about contentious church-state issues, and, as such, lend themselves to direct application with only minimal interpretation.

There are some common features in the treatment of church-state issues. Most state constitutions acknowledge the existence of God, and many encourage worship. Almost all state constitutions contain emphatic prohibitions on favoring a particular religion and on giving financial aid to religious groups and institutions, frequently basing these bans on the importance of avoiding intrusion by government into the realm of freedom of conscience. Most state constitutions also seek to maintain separation of church and state in education, in part by safeguarding public funds for public schools and preventing their diversion to sectarian institutions and purposes, in part by banning religious practices in schools receiving state funds. Nevertheless, some states, particularly during the 19th and early 20th centuries, sought to ensure that these prohibitions would not be interpreted to interfere with traditional practices such as Bible reading in public schools by inserting provisions either permitting or requiring such practices.

The adoption of these provisions suggests that in their absence the practices they authorized would have been incompatible with constitutional principles and directs our attention to how state constitutions have been and should be interpreted in resolving long-standing and current issues.

State Aid to Religious Schools

Almost all state constitutions expressly prohibit aid to schools that are controlled by religious denominations or teach religious doctrines. In the few cases on direct aid

that have arisen, the courts have almost always struck down the aid. However, particularly since World War II, numerous state cases have focused on the constitutionality of indirect aid, such as providing transportation or textbooks to students attending non-public schools. Because the U.S. Supreme Court has ruled that such programs do not violate the First Amendment, the basis for challenge has typically been the state constitution.

Most states adopted strong constitutional prohibitions on aid in the wake of Catholic attempts to secure funding for parochial schools. Given the emphatic and comprehensive "no aid" language in most state constitutions and the historical circumstances leading to its adoption, it seems reasonable to conclude that indirect aid to parochial schools should also be viewed as constitutionally suspect. Some states, recognizing the implications of their constitutional prohibitions, have revised their constitutions specifically to authorize such aid (e.g., New Jersey, New York and Wisconsin).

Most state constitutions, however, have neither expressly authorized nor prohibited the provision of bus transportation or the loan of textbooks to students in non-public schools. In ruling on these programs, state courts have divided almost evenly. For the most part, the variation seems to reflect the courts' willingness or unwillingness to read the applicable provisions as independent constitutional judgments on the permissibility of aid to religious institutions.

State courts which have upheld the challenged programs have tended to assume, often without supporting analysis, that the relevant state provisions impose no greater restriction than does the First Amendment. In addition, they have usually claimed either that the challenged programs benefited the child rather than the school or that the valid public purposes served by ensuring safety or providing better education justified their continuation. Courts which have invalidated indirect aid programs have been more attuned to the differences in language between federal and state constitutions and to differing historical experiences. If the U.S. Supreme Court decides that heretofore prohibited forms of indirect aid are compatible with the Establishment Clause—not a farfetched possibility given the divisions on the Court—one can expect renewed litigation under state constitutions. Should this happen, state courts will have both the opportunity and the constitutional basis to chart an independent course.

Public Sponsorship of Religious Practices and Displays

Many state constitutions not only prohibit governmental expenditures for sectarian purposes but also expressly forbid sectarian control or influence in schools supported by state funds. These provisions serve two purposes: they prevent the public funding of parochial schools, and they address Catholic concerns about the prevalence of Protestant religious practices and the inculcation of Protestant doctrine in the public

schools. More generally, several state constitutions guarantee an absolute freedom of worship and forbid government from compelling attendance at a place of worship. Taken together, these provisions provide a clear basis for invalidating religious practices in the public schools and, more generally, for ensuring that state government does not interfere with freedom of belief and worship.

At least initially, however, these restrictive provisions did not have much effect. In states where constitutional guarantees of freedom of worship and belief antedated public education, those guarantees did not prevent the institution of Bible reading and daily prayer in the schools or curtail the pervasive (non-monetary) support for Protestant Christianity. In states which banned sectarian influences in state-funded schools, the constitutional guarantees typically did not eliminate religious practices. Nonetheless, the adoption of these constitutional principles was important, for it furnished a weapon for litigants who would later challenge state sponsorship of religious practices.

The challenge to religious practices in the public schools began during the 19th century. Five state courts anticipated the U.S. Supreme Court's analysis in *School District of Abington Township v. Schempp*¹ by striking down Bible reading in the schools under their state constitutions. The Florida and New Jersey supreme courts upheld Bible reading but ruled against distribution of the Gideon Bible to students as an unconstitutional sectarian preference. The New Mexico court forbade distribution of other religious literature on similar grounds. Most state courts, however, rejected constitutional challenges to Bible reading and other sectarian observances in the public schools. To do so, they were forced to deny that the Bible was sectarian, arguing that its adoption "by one or more denominations as authentic . . . or inspired cannot make it a sectarian book."² They also had to contend that the use of a version of the Bible favored by a particular sect did not constitute governmental endorsement or preference for a particular religion. Finally, they had to deny that school prayer and Bible reading transformed the classroom into a place of worship, insisting that the constitutional ban on compelling attendance at a place of worship applied only to places where people met for that express purpose.

These assertions, unconvincing though they are, demonstrate the commitment of many state courts to upholding Bible reading in the schools. Indeed, even after the Supreme Court struck down the practice under the federal Constitution, the Florida Supreme Court continued to insist that Bible reading was not a religious exercise. Paradoxically, the state courts' opinions also underline the strength of state constitutional strictures on government sponsorship of religious practices. State courts were thus forced to misrepresent the situations they confronted in order to uphold the practices they favored. Should new issues arise, these constitutional provisions can serve as a barrier to efforts to compromise the secular character of the public schools.

A more difficult question is posed by state sponsorship of religious practices or displays. State courts must resolve these issues in light of the state's more general constitutional church-state provisions. Prior to 1984, when the U.S. Supreme Court ruled that the inclusion of a nativity scene in a Christmas display on public property did not violate the First Amendment, courts in five states had addressed the issue. In three instances (Florida, Oklahoma and Oregon), the courts ruled that there was no constitutional violation. The supreme courts in California and Colorado held the opposite view.

In only three of these cases did the courts consider whether the displays violated the state bill of rights. The Colorado Supreme Court, maintaining that the state and federal religion guarantees were similar, relied on the U.S. Supreme Court decision in *Lemon v. Kurtzman*³ in interpreting the state guarantee and concluded that the appellants had shown a clear constitutional violation. In contrast, the Oklahoma and California courts undertook independent interpretation of their state guarantees, albeit with conflicting results.

One might well generalize the issue: Is it valid under state constitutions for the states to recognize and support religion in general? Needless to say, much depends on the specific constitutional language. The preambles of most contemporary state constitutions expressly recognize the existence of God, often admitting the state's dependence on His blessings, and several acknowledge a duty of religious worship. The constitutions of the American states, taken together, are far from neutral on the question of religious belief. But this recognition neither obligates nor authorizes the states to give financial support to religion. Indeed, many state constitutions preclude such support in no uncertain terms.

From the foregoing observations, it appears that state constitutions would not be violated by governmental recognition of religion and religious practices so long as this recognition did not: (1) entail favoritism to particular sects or religions; (2) involve financial aid to religion; and (3) interfere with the freedom of religious belief, sentiment and worship. Whether programs could be devised that would meet these exacting requirements is a real question, as is whether such programs would run afoul of the Establishment Clause of the First Amendment. Nonetheless, the fact that such criteria can be developed once again underscores the fact that state constitutions tend to incorporate a different perspective on church and state than is found in the federal Constitution.

Conclusions

State constitutional provisions dealing with church and state have been fashioned out of distinctive historical experiences, and reliance on these provisions can lead to different results than would be obtained by relying on the First Amendment, at least as presently interpreted by the U.S. Supreme Court. Yet, even if it is possible to develop a

state jurisprudence of church and state, is it appropriate and desirable to do so?

One way to answer that question might be to examine how state courts, relying on their state constitutions, would likely rule on various church-state issues and then determine whether the results are more desirable than under the First Amendment. This is not an appropriate basis for deciding whether to base rulings on state constitutions. For one thing, such a result-oriented approach retards rather than promotes the development of state constitutional law. In addition, if judicial decisions are to be defensible, they must be seen as rooted in judgment rather than in will, and a resort to state constitutions which is opportunistic rather than principled undermines that perception. Examination of the standards proposed by jurists and scholars for determining when judges should rely on state constitutional protections in resolving issues of individual rights reveals that the development of an independent state jurisprudence of church and state is not only possible but indeed legitimate and desirable.

The most expansive conception of the role to be accorded state constitutional protections is the "state law first" or "first things first" approach originally proposed by Justice Hans Linde of the Oregon Supreme Court. Linde argues that judges should always address and resolve state constitutional challenges to state legislative or executive action before addressing themselves to federal constitutional issues. This insistence on looking at state law first logically follows, he contends, from the relationship of state and federal law in protecting rights. One cannot determine whether a state has violated the Due Process or Equal Protection clauses of the Fourteenth Amendment until the state has completed its action, and this includes not only action by the state's legislative and/or executive branches but also the evaluation by the state judiciary of the compatibility of their actions with state law. If a violation of the state's bill of rights is found, then the success of the state constitutional challenge serves to dispose of the federal constitutional challenge and obviates the need for a court to address itself to those federal issues. From this perspective the development of a state jurisprudence of church and state is not only permissible but indeed essential for the state constitution to fulfill its role in the American legal system.

Another group of scholars and jurists has concluded that the federal Constitution should provide the primary protection for civil liberties and that state bills of rights should be viewed as supplementary. From this it follows that state courts must justify their actions when they choose to rely on state rather than federal constitutional guarantees. The presumption in favor of federal law is particularly strong, according to most advocates, when the U.S. Supreme Court has provided direction by ruling on the same question confronting the state court. In such circumstances, state judges, even in interpreting provisions of the state constitution, should be guided by the Supreme Court's interpretation.

Yet even those espousing this position recognize that state protections of individual rights have a role to play. Several scholars and judges have listed criteria for distinguishing situations in which reliance on the state constitution is appropriate. Several factors seem to show up consistently, among them textual differences between federal and state constitutions and a distinctive legislative history for the state provision which indicates the validity of a broader interpretation. If one concludes that this repetition indicates a consensus about the adequacy of these factors as justification for independent constitutional development, it is plain that a state jurisprudence of church and state is warranted.

The criterion of textual differences is met by the significant differences in the specificity and scope of the federal and state guarantees, and the criterion of distinctive legislative history by the circumstances surrounding the adoption of state provisions on disestablishment, on aid to sectarian schools and religious influences in the public schools. Put differently, even if one accords a presumption in favor of federal law, as elaborated by the Supreme Court, there is ample basis for looking to state constitutions in cases involving church and state.

Finally, some commentators have argued that the societal interests in legal uniformity, consistency and comprehensibility should lead state judges to rely on the federal Constitution, as interpreted by the Supreme Court, rather than on state guarantees of civil liberties. What typically underlies this position is the assumption that state courts should defer to the Supreme Court because of the stature of the court and the quality of its analyses. That justification disappears when the court is inconsistent and unconvincing. Indeed, an inability of the Supreme Court to provide adequate direction affords ample justification to look to the state constitution for guidance.

Notes

¹374 U.S. 203 (1963)

²*Hackett v. Brookville Graded School District* 87 S.W. 792, 794 (Ky. 1905)

³403 U.S. 602 (1971)

We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage and our uniqueness as an island State . . . reserve the right to control our destiny, to nurture the integrity of our people and culture, and to preserve the quality of life that we desire. We reaffirm our belief in a government of the people, by the people, and for the people, and with an understanding and compassionate heart toward all the peoples of the earth do hereby ordain and establish this constitution for the State of Hawaii.

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