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PERSPECTIVE

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Judicial Federalism

Our Judicial Federalism
Sandra Day O'Connor

State Bills of Rights: Dead or Alive?
Dorothy T. Beasley

State Constitutions: State Sovereignty
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Constitutional Rights: Resuming the States' Role
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The Expanding Role of the State Constitution
Harry C. Martin and Donna B. Slawson

Interpreting State Constitutions: An Independent Path
Robert F. Utter

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Kara Lynne Schmitt

Advisory Commission on Intergovernmental Relations

A View from the Commission

During this decade, all of the usual indicators of success in the war on illegal drugs have been strongly positive. Arrests are up, convictions are up, prison sentences are up, and so are the forfeitures of the assets used by the drug kingpins in their illegal enterprises.

But no one, at any level of government, can claim success in the fight against drugs, which increasingly is dominated by the dramatic statistics on the availability and use of these illegal substances.

The Department of Justice finds itself in the middle of this crime wave. On one side, we have assumed a growing international role, and, on the other, we recognize the need for stronger state and local law enforcement efforts.

Returning to the department last year after a ten-year absence, I found that one of the biggest changes was in the international challenges we faced. At the top of this list, which includes terrorism, white-collar crime, and money laundering, is the international drug trade. We have worked to forge working alliances with governments of both producing and consumer nations, and through the United Nations Drug Convention, which I signed on behalf of the United States last December, we have laid the groundwork for further international cooperation.

Within the United States, we have also seen substantial progress in intergovernmental cooperation. In 13 cities with the most severe illegal drug problems, we have established Organized Crime Drug Enforcement Task Forces that combine the anti-drug efforts of local, state, and federal governments. Similar task forces have been established by the Drug Enforcement Administration in 56 other cities where the problem is of major concern.

Our efforts are not limited to catching and prosecuting the major drug traffickers. We also cooperate in sharing with local and state law enforcement units the proceeds from drug arrests. This year, in fact, we expect to provide more than $200 million in cash assistance to these agencies out of the asset forfeiture program.

In his recent anticrime package, President Bush has taken this desire for greater cooperation one step forward. In designing that package, federal government officials were acutely aware that when it comes to law enforcement, the cooperation of state and local government agencies is essential—they retain the greatest responsibility against street crime.

The President's package calls for strengthening federal penalties for the use of firearms in commission of a crime; for curtailing plea bargaining that reduces charges against the violent offender; and for vastly increased resources for the apprehension, prosecution, and imprisonment of violent criminals.

It is hoped by federal officials that state and local governments will emulate this effort by passing their own legislation to track these new federal laws. Some observers have suggested that this should be "encouraged" by imposing penalties against state and local governments for not cooperating.

The President, however, rejected this advice and proposed, instead, to provide bonus drug-law enforcement grants to states that do cooperate. This "carrot" approach is one that I, as a former governor who believes in the principles of federalism, can fully endorse.

We need cooperation across the board to press ahead with this fight. There will always be crime and, as long as millions of Americans have an appetite for drugs, unfortunately, there will be drug traffickers as well.

But if we continue to work together to pile up the statistics, put away the criminals, and seize their profits, we have an increased chance of assuring our citizens of what I consider the first civil right—the right to be free from fear in our homes, in our states, and in our communities.

Dick Thornburgh
Attorney General
of the United States

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The Chairman of the Advisory Commission on Intergovernmental Relations has determined that the publication of this periodical is necessary in the transaction of the public business required by law of this Commission. Use of funds for printing this document has been approved by the Director of the Office of Management and Budget.

ACIR News

On the ACIR Agenda

The Commission held its quarterly meeting on June 9, 1989, in Colorado Springs, Colorado. Items on the agenda included the following:

Federal Preemption of State and Local Authority

The Commission's preliminary report documents for the first time that as federal grants have declined preemptions have continued to increase in number and scope. The inventory compiled for the study includes 350 statutory preemptions, 185 of which have been enacted since 1970. The report also documents the wide variety of implementation approaches in the statutes and records the views of state officials about preemption. These state views suggest a need to use the federal preemption power carefully and to select implementation techniques that allow discretion to states and local governments. Recommendations will be presented to the Commission in September.

Residential Community Associations

The Commission approved publication of *Residential Community Associations: Questions and Answers for Public Officials* as a complement to ACIR's policy report *Residential Community Associations: Private Governments in the Intergovernmental System?* The new publication offers practical examples and guidelines in a brief, easily readable format, highlighting the main points and issues involved in state and local relations with community associations.

Representative Expenditure Estimates

The Commission approved publication of representative expenditure estimates, a calculation that integrates relative government service costs into the measurement of fiscal capacity. The essential idea behind the representative expenditure calculation is that the "need" for spending on a particular function can be related to a "workload" measure. This is a simple indicator of the level of spending required in a state to match the national average in relation to need, on the assumption that governments operate with approximately equal efficiency in all states.

The report presents estimates of representative expenditures for the 50 states and the District of Columbia for seven functional categories of state and local government spending. The report also considers the implications of adjusting the estimates for differences among the states in the cost of living and other factors that result in variations in unit costs of the goods and services used by state and local governments to produce public services.

State Taxation of Telecommunications

On January 1, 1984, AT&T was required to divest its 22 operating telephone companies. Until then, for nearly 75 years the phone service system had been quite straightforward; so had the state and local tax system as it applied to phone company operations. Most states levied some type of special utility tax that would be included as a cost in setting the rates for phone service. The technology and economics have changed, and the tax policymaker now has a variety of new decisions to make.

The Commission's preliminary report lays out the background for understanding the economic and technological arrangements that set the policy context for the tax debate, and describes and analyzes the nature of the tax issues. Recommendations will be presented to the Commission in September meeting.

Intergovernmental Regulation of Telecommunications

One of the outcomes associated with the rapid changes in the telecommunications industry is an extraordinarily complex regulatory system. The Commission's preliminary report outlines the process whereby the industry evolved from one of competition to monopoly control by the American Telephone and Telegraph Company; presents a brief review of regulation for the first half of this century; and details the regulatory events that led to the breakup of AT&T, with specific attention to the intergovernmental regulatory tensions between the state public utilities commissions and the U.S. Department of Justice and the Federal Communications Commission. Emerging regulatory issues also are reviewed. Recommendations will be presented to the Commission at its September meeting.

ACIR-CSG Hearings Continue in Colorado

In conjunction with the Commission meeting in Colorado Springs, ACIR and the Council of State Governments held the third in a series of joint hearings on "Restoring Balance in the Federal System: Constitutional, Legislative, and Educational Options." The hearing was co-chaired by ACIR Chairman Robert B. Hawkins, Jr., and Tennessee State Senator Douglas Henry, Jr.

Testimony at the hearing was given by Paul Farley, assistant attorney general, New Mexico; Lino A. Graglia, School of Law, University of Texas; Robert M. Isaac, mayor of Colorado Springs and a member of ACIR; Chris Paulson, House majority leader, Colorado; George A. Sinner, governor of North Dakota and a member of ACIR; D. Michael Stewart, commissioner, Salt Lake County, Utah; and Marvin Thrasher, acting manager, environ-

mental division, City of Colorado Springs.

In a letter to the co-chairmen (see below), President George Bush sent his congratulations on the agencies' "taking the lead in seeking to 'Restore Balance in the Federal System' through the public hearing process," noting that he shared "your concern over potential erosion of that balance."

ACIR Testifies on Personnel Act

On June 20, ACIR Executive Director John Kincaid testified at a hearing on the *Intergovernmental Personnel Act* held by the Subcommittee on Human Resources, Committee on Post Office and Civil Service, of the U.S. House of Representatives.

He noted that a major purpose of the act was to "reinforce the federal system by strengthening the personnel resources of state and local governments." Now, most state and local governments are staffed competently and are able to perform a greater variety of functions than they could 20 years ago. This is an important development because, with only 18 percent of all civilian public employees working for the federal government, much of what the federal government wants to accomplish nationwide is done by state and local employees. Thus, today, the federal government has much to gain by availing itself of state and local expertise through programs of the *Intergovernmental Personnel Act*. The genuine partnership potential of the act is more possible today than ever before.

ACIR encourages greater use of the act to promote personnel exchanges among key decisionmakers and administrators and to establish more forums for dialogue among federal, state, and local officials. "In fact, given the highly intergovernmentalized nature of our federal system today and the preemptive role of the federal government, we would go so far as to say that concrete experience in state and local government service should be a requirement for any federal civil servant charged with responsibility for drafting, overseeing, or enforcing federal rules and regulations that must be implemented by state and local governments. . . . In short, we believe that the personnel mobility provisions of the act are one essential tool for facilitating the cooperative implementation of intergovernmental policy objectives." Kincaid noted that the need for intergovernmental personnel mobility is likely to grow in the coming decades in our dynamic, technological society.

In a report entitled *The Intergovernmental Personnel Act of 1970: Intergovernmental Purpose No Longer Emphasized,* which was released at the hearing, the U.S. General Accounting Office found that mobility assignments are no longer used primarily to strengthen state and local personnel resources. Instead, federal agencies overall have made their agreements with colleges and universities. The GAO survey of participating agencies covering fiscal years 1984-1988 showed that only about 20 percent of the approximately 4,000 agreements were with state and local governments, while about 68 percent were with colleges and universities.

For more information on the *Intergovernmental Personnel Act* programs, contact Ardrey Harris (phone 632-0728) or Ashton Morris (632-7677) at the U.S. Office of Personnel Management, 1900 E Street, NW, Washington, DC 20415.

THE WHITE HOUSE

WASHINGTON

June 8, 1989

Dear Senator Henry and Chairman Hawkins:

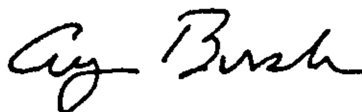
Congratulations on taking the lead in seeking to "Restore Balance in the Federal System" through the public hearing process.

Traditional concepts of federalism as prescribed in the Tenth Amendment have been the strength of our Nation. I share your concern over potential erosion of that balance.

Be assured that I will follow your proceedings with great interest and look forward to receiving the results of your work.

Best wishes for a most successful hearing.

Sincerely,



The Honorable Douglas Henry, Jr.
Nashville, Tennessee

The Honorable Robert Hawkins
Washington, District of Columbia

Intergovernmental Focus

Spotlight on the Virginia Local Government Advisory Council

Carolyn J. Moss
Secretary of Administration
Commonwealth of Virginia
Robert H. Kirby
Staff Secretary
Local Government Advisory Council

An Historical Overview

Virginia's state and local governments operate in accordance with the Dillon rule, the 19th Century legal concept that allows local governments to exercise only those powers expressly authorized by the state legislature. Largely for this reason, Virginia local governments have a dependent relationship with the state. Given the state's relatively expansive authority in local matters, it is imperative that each government communicates its needs and priorities adequately to the other.

In 1977 the Virginia Local Government Advisory Council (LGAC) was created by then Governor Mills E. Godwin, Jr., to provide a mechanism for local officials to convey regularly their concerns about intergovernmental issues to the governor and other senior state officials. The LGAC was established to recognize "the importance of local governments . . . and . . . the partnership between local governments and the state government" and to act "as a forum for discussing and offering recommendations on issues affecting local-state government relations."

Prior to the establishment of the LGAC, dialogue between the state and local governments was restricted primarily to a particular program or agency. This frequently meant that the broad policy concerns of the localities were not presented adequately to the state's leadership.

At the Council's first meeting, the members identified ten critical intergovernmental issues: state assistance to local governments, public employer-employee relations, municipal annexation, delegation of powers to local government, state agency rules and regulations, land use planning, water resource management, revenue resources available to local government, solid waste disposal, and the state road system. While none of these issues has been resolved in the past 12 years, the LGAC has served as an important forum for discussion and as a means of increasing the awareness of the interdependence of state and local governments.

The Early Experience

The LGAC originally had 25 members—22 elected officials of general purpose local governments (one from a local government within each of Virginia's 22 planning districts); the executive directors of the Virginia Municipal League and the Virginia Association of Counties; and the governor, who served as chairman.

In order to address the issues outlined at the initial meeting, the Council established six committees to identify the most critical aspects of each issue, to submit reports, and make recommendations for action. To assist the LGAC, the governor appointed a liaison officer to serve as secretary and to provide additional staff support to the committees. Members of the General Assembly were invited to attend meetings, and other senior state officials, including members of the governor's cabinet, also attended meetings and addressed issues within their spheres of responsibility. Having the governor serve as chairman of the LGAC has been a key factor in its functioning—that arrangement promoted and facilitated a direct dialogue between local and state officials.

In 1978, spurred by the success of the LGAC, the General Assembly passed legislation establishing the Council as the permanent entity for addressing state-local issues. The new statute continued the governor as chairman and added the lieutenant governor as vice chairman. The statute directed the 26-member LGAC to serve as a "forum for identifying areas of mutual concern to local and state officials," with specific responsibility to advise on state and federal policies and programs, arrange conferences between state and local officials, develop proposals for increased state-local coordination and cooperation, discuss the various forms of state assistance to local governments, review shared services and programs, and provide information concerning federal assistance. Further, the legislation instructed all state agencies to assist the LGAC and required the Council to submit a biennial report.

Over the years, many potential sources of conflict between local and state officials were addressed through the exchange of information and the frank discussions at LGAC meetings. Both local and state officials proposed agenda items and, consequently, gave direction to its activities. The governor and lieutenant governor heard from local officials in a setting that differed from any other environment. In addition, the LGAC provided state agencies with a forum through which their concerns could be conveyed to local governments. All discussion of and actions taken by the Council were reported to every local government and to each of the 22 planning districts.

The LGAC adopted more than 30 resolutions on a variety of issues. Among the more significant issues addressed were education, state-local salary comparability, local voter registration, purchasing requirements, delegation of powers to local governments, local government authority to declare emergencies, gasoline taxes, strategies for implementing block

grants, financial support for the administration of local social service programs, and local authority in certain land use issues.

Two other major initiatives undertaken by the LGAC merit attention. First, as a result of LGAC interest, during the mid-1980s the cabinet secretaries instructed their agencies to prepare a list of state programs that had the most direct impact on local governments, along with proposals for improvements. This initiative required state agencies to assess critically the intergovernmental aspects of their work with localities. Each secretary presented a report to the LGAC.

Second, when federal assistance programs were reduced in the early 1980s, the LGAC, in cooperation with the planning district commissions, conducted a survey of local governments to identify services and functions that were expected to experience the greatest impact and to determine how localities proposed to compensate for the loss of federal assistance. The LGAC used these survey results to review prospective state responses to federal aid reduction.

A special highlight for the LGAC occurred at its February 1985 meeting when then Governor Charles S. Robb, who is now a U.S. Senator from Virginia and a member of the U.S. Advisory Commission on Intergovernmental Relations, designated that day as Local Government Day and recognized the many accomplishments of the Council.

A Critical Review

While the LGAC made significant contributions toward improving intergovernmental relations in its first decade, as the 1980s progressed other means were used increasingly to address state-local concerns. Governor Gerald L. Baliles made numerous visits throughout the state to talk with local officials. In addition, the absence of legislative membership on the LGAC, coupled with the increasing need for legislative responses to the federal retrenchment in domestic programs, clearly were factors that prompted the development and use of alternative instruments to address intergovernmental issues.

As a result, state legislators and local officials recommended that the role, structure, and membership of the LGAC should be reexamined. A resolution introduced by Delegate Vincent F. Callahan, Jr., of Fairfax County, which was approved unanimously by both houses of the General Assembly in 1988, requested that the secretary of administration study the need for a new or revised intergovernmental relations commission and, if a need were found, to recommend its structure and define its duties and method of funding.

Utilizing the services of the Center for Public Service at the University of Virginia, a broad research effort was undertaken in the summer and fall of 1988. Comments on the status of intergovernmental relations and the structure and utilization of commissions were solicited from the chief elected officials of each of Virginia's 325 localities, the 22 planning district commissions, state executive and legislative officials, relevant entities and individuals in other states, and the public.

Several interesting and important findings were revealed by the survey. First, a large majority of the respondents rated the overall status of state-local relations in Virginia as average or better, with the quality of the relationship varying with functional area. Second, even though state-local relations were given satisfactory marks, a vast majority of local respondents and members of the General Assembly considered the creation of a strengthened commission on intergovernmental relations as a way to emphasize further the importance of the state-local partnership. Third, respondents thought that an intergovernmental relations commission should include members of the legislature and should serve multiple roles: a forum for discussion, an information clearinghouse, a research mechanism, a source of technical assistance, and an advocate of policy alternatives.

The report issued by the secretary of administration reviewed a number of options, including: increased use of existing organizations, such as legislative study committees; a restructured and reorganized LGAC; a new legislative commission; and an independent advisory commission on intergovernmental relations with its own staff, patterned after the U.S. ACIR.

The secretary's report recommended that the LGAC membership be restructured and that its operating procedures be modified. The principal changes included the addition of legislators, a representative from the planning district commissions, and a citizen member; a role for the local government associations in appointing local government members; annual rotation of the chairmanship; and a minimum of six meetings per year. The report also recommended that staffing be provided by the Commission on Local Government because it is a repository of information on state-local concerns, develops fiscal impact statements on selected legislation affecting local governments, and undertakes annual comparative analyses of local fiscal conditions.

Legislative Response

Consistent with the recommendations of the secretary of administration, the 1989 General Assembly passed House Bill 1642, which restructures the LGAC. The new council will begin operation in January 1990.

The legislation reduced the number of members from 26 to 18, including three state senators and three delegates appointed by the leaders of their respective chambers. There will be 12 gubernatorial appointees, including two members from the state executive branch, one citizen member with no current governmental affiliation, one representative of a regional planning district nominated by the Virginia Association of Planning District Commissions, four elected local government officials nominated by the Virginia Association of Counties, and four municipal elected officials nominated by the Virginia Municipal League. The legislation requires the LGAC to meet at least six times a year, with the chairman elected annually by the membership. The duties of the LGAC were not changed.

With the restructuring of the Local Government Advisory Council, Virginia stands at the threshold of a new era of intergovernmental relations with a revitalized mechanism for addressing the crucial problems that inevitably will arise.

Our Judicial Federalism

Sandra Day O'Connor

Unlike most other nations of the world, the United States has chosen to administer justice through a dual system of state and federal courts. There is an inevitable tension inherent in our "indestructible Union of indestructible states."[1] The balancing of state and federal interest within the federal system is never static; constant and flexible accommodating of the often conflicting interest is required. Justice Hugo Black once described what he saw as the essence of federalism, and he gave that essence a name. He called it "Our Federalism":

> The concept [of "Our Federalism"] does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both state and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate interests of the States.[2]

Any realistic picture of judicial federalism must acknowledge the primary role of the state courts in our federal system of government. The vast bulk of all civil and criminal litigation in this country is handled in the state courts. In 1987, more than 16 million civil suits and more than 11 million criminal actions (excluding juvenile and traffic charges) were filed in the 50 state court systems and the District of Columbia.[3] By comparison, only 233,292 civil and 44,335 criminal actions were filed in the federal courts that year.[4]

Equally important to a fair portrait of the federal system is an acknowledgment of the role played in each judicial system by law from the other system. State law, for instance, plays a significant role in federal court actions—largely through diversity jurisdiction and through the doctrine of pendent jurisdiction. On the other hand, state courts day in and day out apply federal constitutional law—most notably in the multitude of state criminal prosecutions. State trial and appellate judges must be and are fully conversant with case law interpreting such provisions as the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to counsel, the Double Jeopardy Clause, and the fine points of the Fourth Amendment search and seizure jurisprudence. Thus, federal law is in fact developed and interpreted by all 50 state court systems as well as by our federal courts.

These basic facts about our judicial federalism indicate the need for some means to assure a reasonably consistent and uniform body of federal law among the state and federal courts. The goal of national uniformity rests on a fundamental principle—that a single sovereign's laws should be applied equally to all—a principle expressed by the phrase "Equal Justice under Law," inscribed over the great doors to the United States Supreme Court. Justice Holmes recognized that uniformity of federal law also lies at the heart of what binds us together as a nation. Speaking of the power of judicial review of the U.S. Supreme Court, he said, "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States."[5]

In our dual system of courts, review of state court decisions on federal law by the U.S. Supreme Court is the principal means we have of encouraging the needed uniformity. The Supreme Court recognized this as early as 1816 when it stated in *Martin* v. *Hunter's Lessee*[6] that its review of state court decisions is demanded by the "neces-

sity of uniformity of decisions throughout the United States upon all subjects within the purview of the Constitution."[7]

Of course, the sheer volume of state court decisions on federal questions permits the Supreme Court to review only a relatively small number of cases from state courts. That fact guarantees state courts a large measure of autonomy in the application of federal law. At the same time, the inherent limits on Supreme Court resources make it especially important, first, that the Supreme Court give understandable guidance on constitutional questions and, second, that state courts conscientiously follow the constructions of federal law adopted by the Supreme Court. In this way, our several courts are dependent on each other for the successful functioning of our judicial federalism. The Founding Fathers joined our state and federal court systems in a marriage, for better or worse, a marriage requiring each partner to have appropriate respect and regard for each other.

It is no wonder, then, that one of the Supreme Court's most important functions—perhaps *the* most important function—is to oversee the systemwide elaboration of federal law, with an eye toward creating and preserving uniformity of interpretation. It is precisely because of the importance of this unifying function that the jurisdiction of the Supreme Court of the United States has been made ever more discretionary over the years. Today, this function is uppermost in the minds of the Justices in exercising the discretion to take cases for review. Indeed, the most commonly enunciated reason for granting review on a case is the need to resolve conflicts among other courts over the interpretation of federal law.

The chief problem encountered by the Supreme Court in exercising its power to review state court judgments is the problem of deciding when a *federal* question is presented for review. When a state court has decided a case on both federal and state law grounds, the Supreme Court's jurisdiction is limited to reviewing only the federal law grounds. A state court's view on issues of state law is, of course, binding on the federal courts. When the outcome of a state court case could *not* be changed, even if the federal law issue were resolved differently by the U.S. Supreme Court, the Supreme Court must decline review. The state court judgment in such a case rests on an adequate and independent state ground. The roots of this important jurisdictional limitation are found in the nation's long-standing recognition of the importance of preserving the vitality of *both* components of our dual federal-state judicial system. State courts have substantial power to grant or withhold jurisdiction to the Supreme Court by the choice of the grounds for the state court decisions.

Generally speaking, if a state court decides that a particular state action violates *both* federal and state law, the final state court judgment is not reviewable by the Supreme Court.[8] This is true, of course, because even if the state court is wrong about the federal question, the Supreme Court cannot change the state law holding, and the final state court judgment would stand regardless of what the Supreme Court were to decide on the federal question. A decision by the Supreme Court on the federal issue would be merely advisory.

If, in contrast, a state court upholds a particular state action on the ground that it offends *neither* federal nor state law, then the Supreme Court *has* the power to review the state court judgment—though on the federal question only. The decision on the federal grounds in these circumstances *could* change the result in the case because the Supreme Court's disagreement with the state court on the federal question would render the challenged state action unlawful.

These first two situations present few difficulties. A third situation is also straightforward. If a state court holds that a particular state action violates state law *because* it violates a parallel provision of federal law, then the Supreme Court has the power to review the case.[9]

Most of the difficult problems concerning the adequate and independent state ground doctrine arise when a state court's opinion in a case does not make clear whether the decision is based on federal or state law. Over the years, the Supreme Court has adopted various approaches to the problem of determining whether a decision rests on an adequate and independent state ground. None of the methods has been entirely satisfactory either to the state courts or to the Supreme Court itself. The Court revisited this problem in 1983 and adopted a new approach.

In the case of *Michigan* v. *Long*,[10] the Supreme Court held that when a state court decision fairly appears to rest *primarily* on federal law or on grounds interwoven with federal law, and the adequacy and independence of the possible state law ground is not clear from the face of the opinion, the Supreme Court will *assume* that the decision was based on a federal ground. The Court reasoned that, since the existence of an adequate and independent state ground is by hypothesis not clear, the Supreme Court's review in such cases is not advisory.

I believe that the *Michigan* v. *Long* rule both preserves state court autonomy *and* ensures Supreme Court oversight in the interests of uniformity. The rule promotes uniformity by enabling the Supreme Court to review state court decisions that *may* be read as based on federal law. Because in such situations state and federal grounds are not clearly distinguished, such decisions may have precedential force on the federal law issue and, at the same time, may inhibit the appropriate state legislative bodies from freely considering whether to change the state law rule that may have been adopted by the state court. The *Michigan* v. *Long* rule also promotes state court autonomy by virtue of the simple fact that state courts retain complete control over whether the rule will be applied and whether the case can be reviewed. The assumption of a federal ground of decision can easily be avoided by a state court's clear and express articulation of its separate reliance on bona fide adequate and independent state grounds. In these ways, I believe, the *Michigan* v. *Long* approach responds to both the uniformity and state autonomy policies that inform so much of the law governing the relation of federal and state courts.

The effort of the Supreme Court to protect our judicial federalism has proceeded during the past decade on several other fronts as well—the abstention doctrine and recent developments in the application of the federal habeas corpus statute are both grounded in respect by the federal courts for state court proceedings.

Respect for the integrity of state court proceedings was the explicit basis of Justice Black's important opinion in *Younger* v. *Harris* in 1971. In that case, the Supreme Court recognized the "long-standing public policy against federal court interference with state court proceedings,"[11] and held that a federal court may not enjoin a state court criminal proceeding. Accordingly, a federal court must "abstain" from adjudicating any case brought to enjoin a state prosecution. This abstention principle has been recognized in recent years as extending beyond criminal proceedings to other contexts, such as bar disciplinary proceedings, that implicate important state interests. The Younger abstention doctrine thus generally counsels federal courts to decline jurisdiction where its exercise would interfere with "proceedings necessary for the vindication of the state judicial system."[12]

This doctrine accords broad protection to pending state proceedings. Under the *Younger* abstention doctrine, as under the *Michigan* rule, state courts exercise substantial control over the extent of federal court review. Just as a state court can avoid Supreme Court review by clearly articulating a state ground of decision, state courts can often ensure federal court abstention under the *Younger* doctrine by providing the *opportunity* for the parties before them to raise their federal claims. The *Younger* doctrine and the *Michigan* rule thus exemplify two important and complementary themes in our judicial federalism. The *Michigan* v. *Long* rule assures that the state judiciary will retain control of the development of state statutory and constitutional law. The *Younger* doctrine offers further protection to this important state interest by ensuring that state judicial and administrative proceedings are not unnecessarily interrupted or preempted by parallel proceedings in federal court. Further, at bottom, the *Younger* doctrine rests on an assumption absolutely critical to the effective partnership of our federal and state courts: the understanding that state court judges take their duty to enforce federal law and vindicate federal rights seriously and can and should be trusted to do so.

Nowhere is this latter tenet of our judicial federalism more directly implicated than in the review by federal courts of state criminal judgments under the federal habeas corpus statute. The Supreme Court's decisions in this area reflect the strong presumptions that state court criminal judgments are final and that state court proceedings are fully adequate to resolve federal claims. No better statement of the Court's policy in this regard can be found than that written by Justice Powell for the Court in the case of *Stone* v. *Powell*:

> [W]e are unwilling [the Court said] to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.[13]

There are at least four important ways in which federal habeas corpus law pays respect to state courts, and in this past term, the Court has indicated its continuing commitment to the protection of our judicial federalism in a fifth area of habeas corpus law.

First, federal courts, by statute, must give deference to state court findings of fact relevant to federal claims. Congress has provided that in federal habeas corpus proceedings, a state court's findings of fact are presumed to be correct—unless, broadly speaking, the state court proceedings that resulted in the findings were in some way procedurally inadequate for a fair decision on the federal claim.[14] This deference to state findings of fact means that most habeas issues will be decided by the state rather than the federal courts, for, as Justice Jackson once observed in another context, "most contentions of law are won or lost on the facts."[15]

Second, deference to state-court determinations on habeas issues is embodied in the statutory requirement that a state prisoner exhaust his state remedies before making application to a federal court for a writ of habeas corpus.[16] This exhaustion requirement rests on the congressional judgment that it is appropriate that state courts have the first opportunity to address challenges to their own proceedings.[17]

Third, the waiver rules in federal habeas law also rest on federal respect for state court proceedings. If a state prisoner has committed a procedural default with respect to a particular federal claim—that is, if he has failed to comply with a state procedural rule requiring him to raise the claim at a specified time, on penalty of forfeiting the claim for state court purposes—he is generally precluded from raising the claim in federal court. This is because the state procedural rule constitutes an adequate and independent state ground for the state courts' rejection of the claim. The prisoner can overcome the bar to federal habeas consideration of his claim only by demonstrating cause for and prejudice from his waiver. The basis for these restrictive waiver rules, once again, is federal respect for "the State's interest in the integrity of its rules and proceedings and the finality of its judgments. . . ."[18]

The fourth aspect of the law of federal habeas corpus I wish to touch on is the Court's decision in *Stone* v. *Powell*. The Supreme Court held there that lower federal courts cannot entertain a state prisoner's habeas petition that alleges a Fourth Amendment violation if the state court criminal proceeding provided a full and fair opportunity to litigate the issue. If there has been such an opportunity, only discretionary review by the U.S. Supreme Court remains available to a convicted state defendant alleging that evidence obtained in violation of the Fourth Amendment was unlawfully admitted. This principle has been extended to preclude a state criminal defendant from bringing a civil damages action against the police who seized evidence of the legality of the search and seizure has been resolved previously against the defendant in the criminal case.[19] Because of the rarity of Supreme Court certiorari review, these rules, of course, accord substantial

finality to state court resolutions of Fourth Amendment claims.

Respect for any system of decisionmaking, indeed respect for the rule of law itself, entails the proposition that at some point dispute will come to an end and a legal decision will not be subject to further review or revision. The Court very recently reaffirmed its commitment to respect for the finality of the judgments of the state courts in criminal cases in its decision in *Teague* v. *Lane*.[20] The decision in *Teague* dealt with the question of whether new interpretations of federal constitutional requirements should be applied retroactively in federal habeas corpus proceedings to state criminal convictions. The problem arises from the fact that there is no time limitation on the availability of federal habeas corpus review of state criminal convictions. Most Americans probably would be shocked to learn that federal courts often sit to review claims of constitutional error in state criminal trials ten years and more after the defendant has been convicted. During this long interval, the dictates of federal law often have changed in ways that were completely unforeseeable to the police who arrested the defendant, the prosecutor who tried the case, and the state judges who presided at the trial and considered the defendant's appeal. As the Court has noted in the past, "[s]tate courts are understandably frustrated when they faithfully apply state constitutional law only to have a federal court discover, during a [habeas corpus] proceeding, new constitutional commands.[21] Moreover, continued litigation of state criminal convictions in the federal courts tends to undermine the important interests in deterrence and rehabilitation that underlie the criminal justice systems of the states. Justice Harlan captured the essence of the problem when he wrote:

> No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.[22]

Although there was no majority opinion for the Court in *Teague*, seven members of the Court indicated their general agreement with Justice Harlan's views on the subject of retroactivity in habeas corpus. The plurality opinion, joined by four justices, sketched out what I believe will prove an approach to this problem that arrives at a fair and lasting balance between the important state interests in the finality of criminal convictions and the federal interest in ensuring that no innocent person is imprisoned in violation of federal constitutional guarantees. The plurality indicated that once a defendant has been convicted by a jury, exercised his right of appeal in the state system, and has had an opportunity to present his federal claims to the Supreme Court on direct review, his conviction shall be considered "final" for purposes of federal habeas corpus. As a general matter, the constitutionality of his imprisonment will be judged by the standards that prevailed at the time his conviction became final, not by the standards applicable years later when his petition for habeas corpus is considered. Just as the *Younger* doctrine teaches respect for state court proceedings by counseling federal courts to avoid interference before a state court has had the opportunity to consider a federal constitutional claim, the rule of general nonretroactivity on federal habeas corpus teaches us that judgments arrived at by those courts are entitled to respect after the fact and are not to be lightly set aside.

The rule announced in *Teague* is tempered by two exceptions, which ensure that finality does not become an end in itself and that criminal defendants will receive the benefit of certain new federal constitutional rules central to the fairness and accuracy of the criminal process. First, where a new federal rule announces that the conduct itself for which the defendant has been punished is constitutionally protected, the states' interest in finality must give way, and the new rule will be applied even years after conviction on habeas corpus review. Second, the benefits of new federal rules that significantly alter the processes by which the states may arrive at judgments of guilt or innocence, thereby enhancing the truth-seeking function of the trial itself, will be extended to all criminal defendants no matter how long ago their conviction became final. Like the *Younger* doctrine and the other rules of federal habeas mentioned above, the approach to the retroactive application of federal law proposed in *Teague* embodies the careful balance between federal interest and state prerogative that is the hallmark of our judicial federalism.

Each of the doctrines I have mentioned—the *Michigan* v. *Long* rule, the *Younger* abstention principle, the rules of habeas corpus, and the recent developments in the retroactivity of federal law in *Teague* v. *Lane*—are designed to preserve the vitality and autonomy of the state court component of our judicial federalism. I think it is clear that the Supreme Court of the United States has been increasingly sensitive to the role of state courts within the federal system. This recognition of the role of state courts necessarily places a reciprocal burden and responsibility on state court judges to deal with federal issues in a thorough and receptive manner. Hearings on federal issues in criminal cases must be conducted with great care and with knowledge of the applicable principles. Adequate findings must be made and clearly articulated. This kind of careful attention by the state courts to their role in deciding questions of federal law is precisely what enables state courts to exercise the substantial degree of control they have over our dual judicial system.

* * * * * * *

There are, today, as in the past, skeptics and critics of various aspects of federalism as we experience it in this country. When in 1815 the liberator of much of Latin America, Simon Bolivar, was choosing a system of government for the nations he had helped to create, he was skeptical of federalism:

> Among the popular and representative systems of government, I do not approve of the federal system: It is too perfect; and it requires virtues and political talents much superior to our own.[23]

I do not embrace Bolivar's notions that federalism is "too perfect," or that it requires virtues and talents beyond

human capacity. Our judicial federalism is, by its very nature, a flexible and dynamic accommodation of the sometimes conflicting interests of the state and federal courts. Judicial federalism can never be perfect as long as our country continues as a sovereign union of equally sovereign and vital states. But, despite the inevitable imperfections and conflicts in federal and state court relationships in a dynamic federal union, I believe that we have the ability and virtues necessary to make federalism work. But the marriage between our state and federal courts, like any other marriage, requires each partner to respect the other, to make a special effort to get along together, and to recognize the proper sphere of the other partner.

Notes

[1] FERC v. Mississippi, 456 U.S. 742, 777 (1982) (O'Connor, J. dissenting in part), quoting Texas v. White, 7 Wall. 700, 725 (1869).

[2] Younger v. Harris, 401 U.S. 37, 44 (1971).

[3] National Center for State Courts, *State Court Caseload Statistics: 1987 Annual Report* (Williamsburg, Virginia: the Center, 1989), p.3.

[4] Administrative Office of the United States Courts, *Federal Judicial Workload Statistics* (Washington, DC: Administrative Office, 1987), pp. 2, 4.

[5] Oliver Wendell Holmes, "Law and the Court." Speech to the Harvard Law School Association of New York, February 15, 1913. Reprinted in *The Occasional Speeches of Oliver Wendell Holmes*, 172 (1962).

[6] 1 Wheat. 304 (1816).

[7] Martin v. Hunter's Lessee, 347, 348 (emphasis in original).

[8] Henry v. Mississippi, 379 U.S. 443 (1965).

[9] United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973); Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977).

[10] Michigan v. Long, 463 U.S. 1032 (1983).

[11] 401 U.S. 43.

[12] Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 432 (1982).

[13] 428 U.S. 465, 494, n.35 (1976).

[14] 28 U.S.C. sec. 2254(d).

[15] Robert H. Jackson, "Advocacy before the Supreme Court: Suggestions for Effective Case Presentations," *ABA Journal* 37 (1951): 801., 803.

[16] 28 U.S.C. sec. 2254(b).

[17] Rose v. Lundy, 455 U.S. 509 (1982).

[18] Reed v. Ross, 468 U.S. 1, 10 (1984).

[19] Allen v. McCurry, 449 U.S. 90 (1980).

[20] Teague v. Lane, 109 S.Ct. 1060 (1989).

[21] Engle v. Isaac, 456 U.S. 107, 128, n. 33 (1982).

[22] Mackey v. United States, 401 U.S. 667, 691 (1971) (dissenting opinion).

[23] Simon Bolivar, Letter from Jamaica (1815).

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State Bills of Rights: Dead or Alive?

Dorothy T. Beasley

A new interest has developed recently in state constitutional law, particularly in the area of individual rights.[1] There are three primary reasons for the development of this interest. One is the conviction that federal protections, adopted so long ago, are not adequate for the needs of today's citizens, who live in a more complex society in which government is a pervasive force. Another reason is the renewed interest in federalism, as demonstrated by the political popularity of the concept of "returning" power to the states. This reversal of the trend toward centralizing governmental activity, authority, and might has not gone unnoticed in Georgia.

A third reason is the widespread modernization of state constitutions within the last 20 years. The cumbersome old constitutions, with multitudinous amendments, seemed more like legislation that supported outmoded structures of state government than repositories of fundamental principles. Georgia recently has undergone state constitutional revision for the tenth time in its 250-year history. Whether successful or not, constitutional revision has the salutary effect of thrusting to the fore the public debate on state constitutions and, consequently, on state bills of rights.

How has the judiciary responded? There are three principal approaches to the development of state constitutional law, all of which rely to some extent on the federal Constitution.

The first is an interstitial or supplemental use of state constitutions. Under this approach, the federal Constitution is examined first and the state constitution is used only if federal constitutional protections are inadequate. This approach posits that litigants need not invoke the state constitution if the federal Constitution protects their rights.

Critics of this approach argue that it is reactionary or instrumentalist. Its main flaw is the effect that vicissitudes in interpretation of the federal Constitution would have on protection of civil liberties and rights. When the U.S. Supreme Court is expansive in protecting individual rights, state constitutions will lie dormant; when the courts act conservatively, state constitutions will be resurrected and relied on to assert broader rights. This approach does not allow steady, cohesive development of state constitutional law.

The second approach reverses the order of attention to the two constitutions. The state constitution is examined first, and, if it provides the protections sought, no further examination is called for. Disposition of the question by application of the state constitution may end the matter at an earlier stage. Independently construed, the state constitution may give broader or narrower protections compared to the federal Constitution. Regardless of the outcome, the state constitution should be construed and applied separately, so that people know what it stands for.

Under the third approach, both constitutions are addressed and analyzed, with the recognition that they may have different meanings and therefore produce different results. This approach recognizes the state courts' obligation under our federal system to construe and apply the two constitutions, which guard the rights of citizens. While state courts are not the final authority in the meaning of the federal guarantees, they are bound to address the subject, give their reasoned understanding to the federal Constitution, and contribute to the commonality of meaning that evolves through courts' thoughtfully plumbing its depths. This approach is the most difficult from the standpoint of judicial time and energy, and in these days of chronic appellate overload it is not likely to be favored.

Reasons to Develop State Constitutional Law

An Adequate and Independent State Ground

The development of state constitutional law is in no way an affront to the highest court of the land or an effort to deprive it of jurisdiction. Rather, this development complies with the principle of federalism. In addition, the responsible discharge of a state court's duty mandates measurement of the activities of a state's officials, employees, and citizens against the standard they themselves have set up in their organic law.

One of the most important doctrines to help catalyze this development is the principle of an "adequate and independent state ground." The need to develop this federal jurisdictional principle, however, did not arise for many years after the Bill of Rights was added to the U.S. Constitution because the federal Bill of Rights was held not to apply to the states. Consequently, when a state prisoner complained of a constitutional violation such as cruel and unusual punishment, it was presumed that he based his objection on a right protected by the state constitution.

The federal Bill of Rights was not applied to the states until 1897 in the landmark case of *Chicago, Burlington & c. R'd.* v. *Chicago*,[2] in which the Supreme Court held that the due process clause of the Fourteenth Amendment applies to a state's taking of private property. Then began the long and continuing battle between those who believe that the Fourteenth Amendment incorporated the entire Bill of Rights and applied it to the states, those who believe that the Fourteenth Amendment incorporated only selected provisions, which must be identified by judicial interpretation in concrete cases and controversies, and those who believe that the Bill of Rights does not apply to the states at all. In 1947, the Supreme Court in a 5-4 decision refused to take the doctrinal position that the entire federal Bill of Rights is binding on the states.

The complications introduced by the need to determine whether the federal Bill of Rights applies in a given situation only exacerbate the complexity inherent in our federal structure. But the answers to these difficult questions of the meaning and applicability of the federal Bill of Rights provide the relief sought.

Judicial review of legislative acts or official actions challenged on state constitutional grounds is a job peculiarly for the state courts. The test that the Supreme Court applies to determine whether it has jurisdiction of a question goes to the heart of the issue. If the issue is whether the action violated the state constitution, the state appellate court's decision is final. If the only issue is whether the action violated the federal Constitution, the Supreme Court is the final arbiter. If the two issues are involved in the same case, the Court has no authority to construe the state provision if it provides adequate protection independent of the federal Constitution. The doctrine of an "adequate and independent state ground" expresses this accommodation of federalism, which delineates the responsibilities of both sets of courts in our dual system of government. Justice Robert Jackson articulated the doctrine in its present language: "This court . . . will not review judgments of state courts that rest on adequate and independent state grounds."[3]

In the intervening years, the Court has abided by the doctrine, but has often had difficulty discerning the basis for the state court's decision, a determination which is the threshold for the Supreme Court's exercise of jurisdiction. For example, the Court remanded *Ohio* v. *Gallagher*[4] so that the Supreme Court of Ohio could specify whether its opinion rested on the federal or state constitution.

Whenever the Court cannot determine whether the state court's decision rests on federal or state constitutional grounds, the Court must decide the federal question that played at least a part in the state court's ruling. Not only must the state court's ruling depend wholly on state law, but the court also must state this finding expressly in its opinion.

Of course, the state ground must also be adequate. As the court indicated in *South Dakota* v. *Neville*,[5] the state court cannot simply assume that the state provision is automatically violated whenever the federal provision is violated. The court must give a reasoned analysis of the state provision that serves as the "adequate" ground.

The Supreme Court should welcome the state practice of deciding constitutional issues on state constitutional grounds. The presence of an adequate and independent state ground obviates the necessity for federal review and, thus, eliminates the complicated task of deciding issues that could be adjudicated by the state supreme courts. Better application of state constitutional law would ease the federal case-load burden and serve judicial expediency.

The case of *Oregon* v. *Kennedy*[6] illustrates the doctrine's urgency and jurisprudential importance. During Kennedy's state trial for theft, the prosecution asked a question that prompted the trial court to grant a mistrial.[7] Kennedy was retried, and the trial court rejected his double jeopardy claim after finding that it was not the intention of the prosecutor to cause a mistrial. The Oregon Court of Appeals disagreed and concluded that retrial was barred because the prosecutor's conduct amounted to "overreaching." Bypassing the Supreme Court of Oregon, the case went to the United States Supreme Court, which reversed because of the Oregon Court of Appeals' "overly expansive view of the application of the Double Jeopardy Clause following a mistrial resulting from the defendant's own motion. . . ."[8]

Kennedy first contended that the Oregon court's decision was based on an adequate and independent state ground. If the state ground were unclear, he argued that the case should be remanded to the state court for clarification, as the Court had done in *Delaware* v. *Prouse*[9] and *California* v. *Krivda*.[10] Reluctantly, the Supreme Court rejected the connection and examined federal constitutional law. Because the court of appeals had rested its decision solely on federal law, the Supreme Court declined to delay the case further by remanding the grounds question. Addressing the merits, the Court decided that the Oregon Court of Appeals had misjudged the breadth of the federal double jeopardy clause. By remanding the case for further proceedings, the court continued the in-

conclusiveness of Kennedy's conviction for a theft that had occurred two years earlier. The Oregon Supreme Court ultimately affirmed the court of appeals and held that retrial was not double jeopardy under the Oregon constitution.

Because the intermediate state appellate court had based its decision on the federal Constitution, the case proceeded from the state trial court to the second state trial court, to the state court of appeals, to the U.S. Supreme Court (bypassing the state supreme court), back to the state court of appeals and, finally, to the state supreme court. The delay, expense, extended lack of finality, and involvement of the chronically overburdened Supreme Court all could have been avoided if the state court had followed a fundamental principle of federalism. These considerations are a convincing argument in favor of an initial application of state constitutional law.

Indeed, the Court has implored state courts to keep it out of their business. The Court requires only "a clear and express statement that a decision rests on adequate and independent state grounds"[11] to assume the finality of a state court's decision.

State appellate courts cause an administrative nightmare when they blur or ignore the federal-state dichotomy. They can correct this problem by construing their own state constitutions. They have neglected this role in the past, frequently because counsel's failure to invoke the state constitution has precluded this basis for review. All who believe in the principle of federalism should not only heed but also welcome the U.S. Supreme Court's pleas to seek separate meanings in state constitutions.

Why State Courts Should Favor an Independent and Adequate Ground

From the standpoint of the state judge, the easiest and quickest road to travel when individual rights are at issue is to defer to the federal Constitution and its interpretation as announced by the Supreme Court. But when the state constitution guarantees a similar or additional right, the state judge has both an opportunity and a duty to construe the state constitution—even when concluding that both constitutions have the same meaning in a particular context.

Above all, the judge's oath of office requires interpretation of the state constitution. The judge does not swear allegiance to the federal Constitution first and to the state constitution only when there are peculiarly state matters at issue, such as zoning, eminent domain, or jurisdiction. Nor does the judge swear allegiance to the state constitution on the condition that the state bill of rights is to be construed in connection with comparable provisions in the federal Bill of Rights. Each stands on its own merits and requires independent adherence.

Second, Georgia's constitution provides that: "Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them." Note that the provision addresses the commands of the state constitution first. The government, including the judicial branch, has a duty to protect the structure of state government, a structure that must be maintained if the system is to survive. Abdicating a governmental function weakens this structure.

Third, courts must interpret the state constitution if they are to adhere to the principle that cases should be decided on the narrowest possible grounds. When judges establish broader legal rules than are necessary to resolve a case, they risk troublesome application of these precedents to unforeseen circumstances.

Fourth, only state courts can construe the state constitution authoritatively. The federal courts do not share this capacity or function, although the state courts share with the federal courts the function of construing the federal Constitution. Thus, state court failures to construe their state constitution result in a jurisprudential vacuum.

This loss of useful precedent should not be taken lightly. The state constitutions principally define the relationship between the people and their immediate government. Thomas Jefferson recognized the great importance of the state constitution when he wrote that "everyone should be free to appeal to its text."

State courts should welcome this challenge. State bills of rights can protect our liberties more effectively than the federal Bill of Rights for several reasons. Rules enunciated by the U.S. Supreme Court have national significance and applicability. Such repercussions favor a "least common denominator" attitude. In contrast, state courts construing state constitutions make law for fewer people over a smaller area. Unlike the Supreme Court, they need not assess the impact of their decisions on federal-state relations. Nor must state courts construing state constitutions decide whether the Fourteenth Amendment enforces the right in question against the states.

Since their decisions are not so far-reaching in effect, state courts can be more imaginative, more creative, and more experimental. When hindsight counsels that a state pronouncement was unwise, changes are made more easily, either judicially by another case or legislatively by statute or constitutional amendment.

Each state has developed its own constitutions and amendments under different circumstances in different times and by different people and methods. If courts either assume that the meaning of a state constitutional provision is the same as its federal counterpart or ignore the state constitution, we lose the richness of these 50 individual histories. Furthermore, such short cuts may be gravely wrong. For example, the founders' reasons for adopting the cruel and unusual punishment clause of the Eighth Amendment in 1789 were undoubtedly different from the reasons why Georgia first inserted this provision in its 1861 constitution, when it seceded and joined the Confederacy to protect the institution of slavery. Because state and local authorities are close to the people and have daily contact with their lives, they are more likely to accept and apply state-level decisions than pronouncements from Washington. Moreover, state sanctions for compelling adherence are nearer at hand than pronouncements of the U.S. Supreme Court.

Addressing state constitutions demands the scholarship and wisdom of state supreme court justices on the contemporary meaning of fundamental rights in our di-

verse society. Even if the inquiry must proceed beyond the state constitution and embrace the federal Constitution, examination of state constitutions gives the Supreme Court the benefit of state judicial thinking. As a result, the federal rule that binds courts throughout the country will be more broadly based and more deeply considered. Just as Supreme Court decisions on federal law may guide state courts in ascertaining the meaning of state constitutions, so may state court decisions assist the Supreme Court.

In addition, state court decisions construing state constitutions are an important indication of popular sentiment because democracy is more directly instituted on the state level. Although representatives of the people adopted the U.S. Constitution, the people themselves adopted the state constitutions. As a consequence, the U.S. Supreme Court can profit from state analyses of state constitutional guarantees in construing the corresponding federal provisions.

Protection of individual rights through the state court system is effective also because the innovation and application of a state constitution provides speedier and less costly redress to the person claiming the violation of a fundamental right. The substantial time and resources required to pursue a case to the U.S. Supreme Court are not available to everyone. Because the Court hears relatively few cases each year, it is unable to decide many cases in which the federal Constitution is at issue. Many more litigants have an appeal of right or at least a greater chance of obtaining certiorari from the state supreme court.

Moreover, focusing on the state constitution develops state law into a more cohesive and fuller body of precedent. State courts construe law made by legislatures, boards, state administrative agencies, local governments, and prior judicial decisions in thousands of decisions each day. Why then ignore the state constitution, the highest state level of documentary authority? For example, Georgia state law requires that criminal defendants who demand a speedy trial be tried within two terms in which a jury is available. When a defendant who made such a demand later contends that his right to a speedy trial has been violated, why should the state courts neglect the state constitution's speedy trial provision and apply only the federal guarantee as construed by the U.S. Supreme Court?

If state appellate courts do not study, analyze, and apply the state guarantee consistently, how are state trial judges to know the standards that their state constitution requires? Each state's appellate judiciary must promulgate statewide constitutional guidelines defining concepts such as a "speedy trial" to provide the proper development of this crucial area of the state's law. A Wisconsin case, decided over a century ago, eloquently championed the duty of state courts to examine state constitutional issues: "The people [of Wisconsin] then made this constitution, and adopted it as their primary law. The people of other states made for themselves, respectively, constitutions which are construed by their own appropriate functionaries. Let them construe theirs—let us construe and stand by ours."[12]

Approaches to Constitutional Construction

How should state courts' development of state constitutional law proceed? Commentators have suggested several methods of decisionmaking that courts may use in construing and applying a state constitutional provision.

The first approach utilizes arguments drawn from the history of the provision and of each state. This approach, as well as the textual and structural approaches, are "originalist" arguments based on preexisting sources. The historical method focuses on legislation, history, the social and political settings in which the clause originated, state traditions, and the place of the clause in the state's constitutions and case law over the years. Legislative history includes the proceedings of the constitutional commission or other body that adopted or revised the constitution or amendments.

Application of the second approach, the "textual," requires the reader to examine the words used in the constitutional provision and to compare the provision's language and origins with those of analogous provisions in other constitutions. However, a textual difference does not always denote a difference in meaning, nor does textual sameness always import an identical meaning. In addition, the state provision's language may be more explicit. In interpreting state constitutional provisions, courts should consider not only the meaning of the corresponding federal provision but also the meaning of similar provisions in sister states' constitutions.

The "structural" method is the most difficult to apply because it addresses the interrelationships of governmental entities within the state and local framework. For example, a structural analysis of the constitutionality of government action could consider whether the decisionmaker is elected or appointed, whether the level of the decision is state or local, and whether the agency acting is a board, commission, executive, or quasi-judicial entity.

The "prudential" method, like the "doctrinal" and "ethical" methods, discussed below, is "nonoriginalist" because it does not depend on premises that were previously part of the constitution. A judge applying this method asks two questions: Should the court get involved, and to what degree should the court be a policymaker? The first question addresses problems such as standing, mootness, political questions, and advisory opinions. The second question assesses the pragmatic impact of the decision and its costs and benefits as public policy. The court must consider the nature of the subject matter, the nature of the interest affected, and whether uniformity or diversity is appropriate.

The "doctrinal" method often involves the creation of court-made formulas. Unfortunately, this approach lends itself too readily to application of inapposite catchwords to a given set of circumstances. A court using doctrinal analysis categorizes new questions according to previously developed theories. The danger is that facile compartmentalization may prematurely end the inquiry. Terms such as "stop and frisk" are not part of the constitution, but are merely explanatory labels. Courts may be tempted to sort cases into convenient categories that discourage thorough analysis.

Courts employ the "ethical" approach when they desire a certain result because it appeals to their sense of values or reflects the attitudes or ideals of society. The result may have only a tenuous link to a constitutional provision. The right to privacy, enunciated long ago by the Georgia Supreme Court, is an example.[13] Courts used this method

in developing the law of substantive due process with respect to economic rights. If the court goes too far, however, and mistakes the values of society, the state constitution is easier to amend than the federal Constitution.

Central to the use of the "declaratory" method is a determination of whether the right claimed is "fundamental" in character and thus reserved to a citizen. This decision requires an examination of the treatment of the right at common law and perhaps an extrapolation or refinement of the right to fit today's societal background. Early decisions of the Georgia Supreme Court used this approach. In one antebellum case, the court posited that individuals have certain inalienable rights, that state constitutions declare these rights but do not create them, and that other, unnamed rights also exist. The opening paragraph of Georgia's original constitution in 1777 expresses this natural law concept by deriving the authority to adopt a constitution from natural law. This method contemplates the evolutionary development of law from the customs and traditions of the people. This approach reflects a "fundamentalist" rather than an existentialist attitude.

In recognizing the existence of rights which are not explicitly defined, the Georgia Supreme Court in 1846 stated that the rights in the first ten amendments were "virtually adopted" by the people, in their acts of ratification, to guide and control the state legislatures as well as the Congress. This statement illustrates a "fundamental law" theory, not an incorporationist theory. The essential difference is that the state courts are free to decide what rights are fundamental at any given time and circumstances in Georgia law and society, whether or not the Constitution enunciates such rights. If the right existed at common law, the Constitution's silence about it does not foreclose the right's "fundamental" and therefore protectible character. The court examines the principle itself, not merely the constitutional provision which may or may not house it: "... principles which lie lower than the Constitution itself... principles of right, found in the mind of all enlightened and good men—of universal application, and unchanging as the source from whence they come, the bosom of the Deity."[14] Although the "declaratory" method may seem antiquated, it should not be overlooked. Georgia's constitution still contains a deep depository.

Whatever method is used in argument and analysis, we must not lose sight of an important contextual perspective: the federal Constitution is a grant of power from the people to the federal government, whereas the state constitutions define limits on state and local governmental power over the people. Thus, a different purpose prompts the recitations of rights and liberties. Constitutions such as Georgia's therefore make clear that the individual rights enumerated are not exclusive; the Georgia constitution specifically states that, "The enumeration of rights herein contained as part of this Constitution shall not be construed to deny to the people any inherent rights which they may have hitherto enjoyed." The meaning of "hitherto" suggests interesting questions for debate: (1) How far back in history do we "hither" go? And to what sources? The Magna Carta? English common law? (2) Does "hitherto" embrace rights which may have been omitted from this constitution but were mentioned in earlier ones?

State courts should consider another factor when construing state constitutional provisions: whether the litigant challenges a legislative act or an isolated activity of a governmental agent. Striking down a law that reflects the will of the people as expressed by their elected representatives is a far more serious undertaking than invalidating a particular search and seizure by a police officer. Invalidating a legislative act brings into play the separate roles of two theoretically equal branches of government.

In sum, one must interpret a state's constitution in light of that state's distinctive characteristics—its land, its industry, its people, its history. For these elements are the kaleidoscopic sources of the state's constitution and of the liberties that distinguish the people who adopted the constitution from the federal government and from the other states.

Notes

[1] A particularly comprehensive treatment of the subject can be found in "Developments in Law—The Interpretation of State Constitutional Rights," *Harvard Law Review* 95 (1982): 1324. The first contemporary discussion of the rediscovery of state constitutional law are attributable to Paulsen, "State Constitutions, State Courts and First Amendment Freedoms," *Vanderbilt Law Review* 4 (1951): 620; Mazor, "Notes on a Bill of Rights in a State Constitution," *Utah Law Review* 10 (1966): 326; Force, "State 'Bills of Rights': A Case of Neglect and the Need for a Renaissance," *Valparaiso University Law Review* 3 (1969): 125; Collins, "Reliance on State Constitutions—Away from a Reactionary Approach," *Hastings Constitutional Law Quarterly* 9 (1981): 1; Linde, "E Pluribus—Constitutional Theory and State Courts," *Georgia Law Review* 18 (1983): 165; Grad, "The State Bill of Rights," in Sachs, "Fundamental Liberties and Rights, a 50-State Index," in *Constitutions of the United States: National and State—Index* (New York: Columbia University, Legislative Drafting Research Fund, 1980), pp. 117-121. For a survey of state constitutional cases upsetting state economic regulatory legislation, see Paulsen, "The Persistence of Substantive Due Process in the States," *Minnesota Law Review* 34 (1950): 91.

[2] 166 U.S. 226 (1897).

[3] Herb v. Pitcairn, 324 U.S. 117, 125 (1945).

[4] 425 U.S. 257 (1976) (per curiam).

[5] 459 U.S. 553 (1983).

[6] Pruneyard Shopping Center v. Robins, 447 U.S. 81 (1980).

[7] The prosecutor asked a witness if he had ever done business with the Kennedys, and when the witness replied that he had not, the prosecutor asked, "Is that because he is a crook?" State v. Kennedy, 49 Or. App. 425, 417, 619 P.2d 948, 949 (1980).

[8] 456 U.S. 669.

[9] 440 U.S. 648, 652 (1979).

[10] 409 U.S. 33, 35 (1972).

[11] Michigan v. Long, 463 U.S. 1032 (1983).

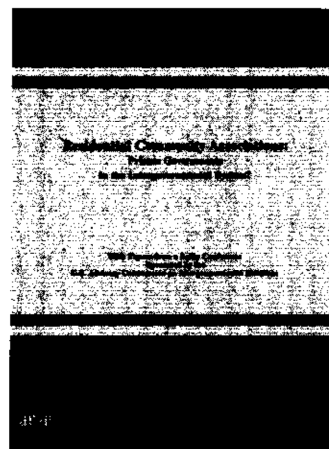
[12] Attorney General ex rel. Bashford v. Barstow, 4 Wis. 567 (1855), cited in Abrahamson, "Reincarnation of State Courts," *Southwestern Law Journal* 36 (1982): 951.

[13] Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 41 (1905). Although we might perceive the right to privacy as a civil right, it seems to have arisen as a property right.

[14] Wilder v. Lumpkin, 4 Ga. 208, 218 (1948).

Dorothy T. Beasley is a judge of the Court of Appeals of Georgia. This is an edited version of her article "The Georgia Bill of Rights: Dead or Alive?" Emory Law Journal *34 (1985): 341.*

Residential Community Associations: Private Governments in the Intergovernmental System?



Residential community associations (RCAs), having territorial scope and authority to levy mandatory assessments, regulate behavior, and provide public services, such as streets, may be the fastest growing form of "local government" today. This policy report examines the growth and characteristics of RCAs and the opportunities and problems they pose for state and local governments.

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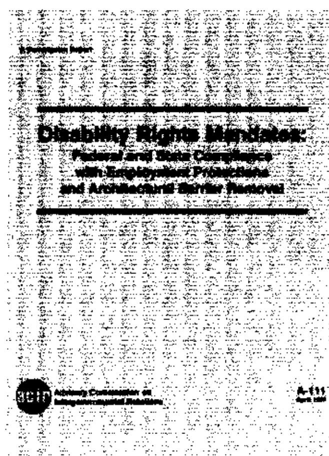

This policy report examines the question of whether the federal government practices what it preaches by comparing federal and state compliance with disability rights mandates that apply to both governments. The report explores how intergovernmental policymaking may be made more effective and how cooperation can be fostered in the intergovernmental system in order to implement policy nationwide.

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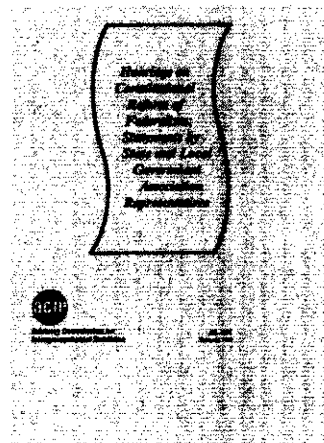

This hearing continued a series of ACIR studies on the balance of powers in the federal system following the U.S. Supreme Court's *Garcia* and *South Carolina* decisions. Participants at the hearing were John H. Sununu, then governor of New Hampshire; Harvey Ruvin, commissioner, Dade County; Ted Strickland, state senator, Colorado; Robert M. Isaac, mayor, Colorado Springs; Mary McClure, state senator, South Dakota; Brian J. O'Neill, council member, Philadelphia; Douglas Henry, Jr., state senator, Tennessee; Lucille Maurer, state treasurer, Maryland; and Jim Ross Lightfoot, U.S. Representative, Iowa.

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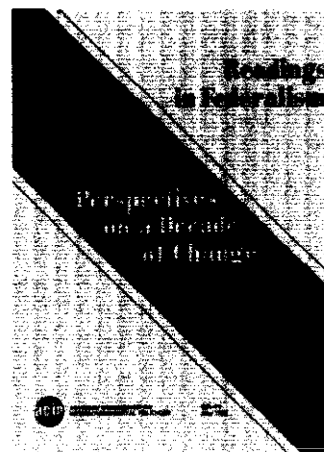

In 1989—the 200th Anniversary of our federal republic—American federalism is a system out of balance, both in terms of the federal budget and the constitutional balance of power. This book of readings, from *Intergovernmental Perspective* and other ACIR reports, provides a convenient overview of the many developments, especially in public finance, that have brought about the current condition of federalism. The essays cover 30 years, but the main focus is on the period 1978-1989.

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State Constitutions: State Sovereignty

Randall T. Shepard

It is with some caution that I choose to use the term state sovereignty in the title of this article. There was a time, of course, when a respectable scholar could describe the interrelationship of federal and state law as "clashing sovereignties," as did Edward S. Corwin of Princeton University, a leading constitutional scholar of the first half of this century. For the present generation, however, the concept of state sovereignty evokes a pejorative image, associated with George Wallace standing in the schoolhouse door to prevent black students from attending the University of Alabama.

Still, the idea of state sovereignty is part and parcel of the recent renaissance of state constitutions as an integral part of the American legal landscape. While many observers ascribe this renaissance to the growing number of Reagan appointees serving on federal district and circuit courts and on the U.S. Supreme Court, that is hardly an adequate reason for state judges and lawyers to take a renewed interest in state constitutional law. Instead, I conclude that stronger state constitutions and stronger state governments can play a better role in forging the common good than they have during most of this century, during which power flowed steadily toward distant Washington.

One need only skim the literature on this subject to read that it all got started at the invitation of Justice William J. Brennan. Having lost yet another time in a case limiting the famous *Miranda* doctrine, Justice Brennan issued an open invitation to state supreme courts to use their own constitutions "to impose higher standards governing police practices under state law than is required by the Federal Constitution."[1]

The view that Brennan provoked this movement resonates with a common theory about the conservative motivation behind the later decision in *Michigan* v. *Long*.[2] In that case, Justice Sandra Day O'Connor wrote that when a state court decision is intertwined with state and federal law "we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so" unless the state court clearly announced an independent and adequate state ground for its decision. In applying this rule for the first time, the U.S. Supreme Court declared valid a search that the Michigan Supreme Court had held unconstitutional under the Fourth Amendment and the Michigan Constitution.

Because the defendant lost in *Michigan* v. *Long*, some observers have attributed this "plain statement rule" to a desire by Supreme Court conservatives to rein in state courts, which they believe have gone too far in protecting the rights of criminal defendants. Chief Justice William Rehnquist's widely reported speech to the Conference of Chief Justices in January 1988 provided an adequate rebuttal to this claim. A state court imposing a restraint on another branch of its state government, he said, should be willing to take the responsibility for doing so on its own authority and not because some justices in Washington require it. Fair enough.

In any event, explanations ascribing the renaissance in state capitals to Brennan, Rehnquist, and O'Connor define state officials as mere reactors. I see the rediscovery of state constitutions as a part of the general renewal of state governments. The energy and ingenuity of state legislatures and governors' offices have attracted considerable attention, even in the very heart of the Capital Beltway. David Broder of *The Washington Post* has compared this activity to the Progressive era of our grandparents and called it "a similar wave of governmental activism and experimentation at the state level." He has predicted "a new beginning for creative excellence in government close to the people."[3]

The Myth of Rediscovery

Of course, the idea that state courts have only recently rediscovered the lost art of state constitutional decision-

making is partly a myth. State courts throughout history have confronted state constitutional questions about the organization of government.

Sometimes the most momentous public interests are involved. The Indiana Supreme Court, for example, was called upon last year to decide whether Secretary of State Evan Bayh, the leading Democratic candidate for governor, was entitled to have his name on the ballot. Bayh led in all the public opinion polls taken during 1988 and seemed capable of running a strong campaign, assuming he could meet the residency requirement of Article I, Section 7 of the Indiana Constitution. This section provides that candidates for the office of governor must be residents of the state for the five years preceding the election. Five years before election day, Bayh had been working in the Washington offices of Hogan and Hartson, and Indiana's GOP suggested that he failed to meet the constitutional requirement. Our courtroom was filled to overflowing on two occasions as this drama played itself out. We ultimately held that the residency requirement implied domicile and not continuing physical presence. We concluded that Indiana had always been Bayh's domicile, and that he was eligible to serve as governor. He presently is governor.[4]

Similarly, our court heard a case in which local officials challenged the constitutionality of a state plan to rescue the poor-relief system in Indiana's largest counties. It highlighted an interesting contrast between our constitution and the federal document. The Indiana Constitution contains a balanced budget provision of the sort President Ronald Reagan promoted for the national charter. Article 10 of our constitution prohibits any but casual debt by the state, and Article 13 imposes severe limits on the debt that can be incurred by local governments. We upheld a plan that relied on the taxing authority and borrowing power of the counties rather than on the inner city townships in which many of the poor live. This resolution of the challenge to the method of financing put tens of millions of dollars to work assisting the homeless and the unemployed.[5]

On issues of government organization, the judiciary interacts with the other branches of state government across a whole range of subjects. The Colorado Supreme Court's ruling that the legislature could not compel the governor to spend federal block grant money in a given way,[6] the Tennessee Supreme Court's decision that legislation creating a human rights commission did not violate the separation of powers,[7] and the Arizona Supreme Court's rejection of Governor Evan Mecham's request to enjoin his impeachment trial before the Arizona Senate[8] suggest the variety of areas in which this interaction occurs.

These are matters that by definition can be litigated only in the state courts. The prevailing federal case on our gubernatorial residency problem, for example, rejected claims by an aspiring candidate based on the First and Fourteenth Amendments to the federal Constitution.[9]

The Other Bills of Rights

Although litigation about state government proceeds unabated, the national press has focused instead on the development of state jurisprudence as an alternative to federal decisions about the Bill of Rights. There was a time, of course, when the Bill of Rights applied only to the federal government. State constitutions were the principal bulwarks protecting individual rights, and state courts acted accordingly. The Indiana Supreme Court spent 40 years asserting its authority in the fight against slavery. As the Taney Court prepared to declare in *Dred Scot* that slaves were property and not people under the U.S. Constitution, the Indiana Supreme Court used the Indiana Constitution to invalidate fugitive slave laws.[10]

Similarly, during the early part of this century, the Indiana Supreme Court prohibited the use of evidence procured without a valid search warrant.[11] This decision was handed down nearly 40 years before the Warren Court issued *Mapp* v. *Ohio*,[12] requiring that all states use the same exclusionary rule.

Of course, *Mapp* was hardly the beginning of the Warren Court's federalization of a variety of legal issues previously thought to be matters of state law. In some respects, the determination to assert federal jurisdiction in areas traditionally left to the states began with *Brown* v. *Board of Education*.[13] Many of the landmark criminal law decisions of the 1960s involved black defendants whose claims had been rejected by the same southern courts that had resisted desegregation of the schools and the civil rights movement in general.[14]

Once the Warren Court's program reached a full head of steam, citing a state constitution to a state court was frequently superfluous because parties could so often prevail on a federal claim. Moreover, those who sought reform of the country's racial policies and its attitude toward the poor saw little hope in the state governments. Jesse Jackson spoke for many in the civil rights movement when he said, "For black people, states' rights has mainly been states' wrongs."[15] Even Republicans were moved to say, as Nelson Rockefeller did, "I believe in States' rights providing they go along with States' responsibilities."[16]

The administrations of John F. Kennedy and Lyndon B. Johnson sought federal solutions to most definable social problems. In some respects, even the Nixon administration followed in their footsteps. It sought to bolster state responsibility under the rubric of "New Federalism" by making states partners in activities ranging from worker safety to clean air. State governments accepted with alacrity this invitation and the money that went with it. The ultimate result was federal regulation of a whole host of previously state prerogatives, such as the age at which one can purchase alcohol. The U.S. Supreme Court and the Congress accepted the idea that the federal government could impose substantial requirements through conditions in grant-in-aid agreements in areas where congressional authority to act directly is doubtful.[17]

In this atmosphere, state judges reacted in the same way many governors and legislators did: they were always looking to Washington. Many came to think about their own constitution as a simple analogue of the federal document. By the middle of this decade, however, the counteroffensive in the state courts was an established phenomenon, with leadership from state supreme court justices, such as Stanley Mosk of California, Hans Linde of Oregon, and Robert Utter of Washington. Justice Thomas Hayes of the Vermont Supreme Court issued a strong message to lawyers practicing in that court: "One longs to hear once again of legal concepts, their meaning and their origin. All too often legal argument consists of a litany of federal buzz words memorized like baseball cards."[18]

The effort to rebuild state courts as independent centers of authority and innovation has fallen largely on receptive ears in the federal judiciary. Even in the most sensitive areas, such as capital cases, there has been an explicit recognition of the value of independent state court determinations. Indeed, even in the context of federal law, these determinations have been accorded deference in the nation's highest court.[19]

To the extent that state decisions represent bona fide jurisprudence, they become entitled to more weight when placed beside other considerations. An encouraging recent demonstration of that entitlement was the decision of a federal court of appeals to set aside a district court order compelling a state legislature to finance certain school desegregation costs. The Sixth Circuit held that the district court's order was an "end run" around Tennessee statutes and the Tennessee Constitution on which they were based. It denounced the district court's decision as an unjustifiable rejection of democracy and called it "the judicial counterpart of a declaration of martial law."[20]

Future of the Movement

I expect the trend in state constitutional interpretation to move ahead contemporaneously on three fronts.

First, state supreme courts will continue independent interpretation of their own constitutions despite contrary conclusions reached by the U.S. Supreme Court concerning federal provisions written in the same language. As the Indiana court has said, "[T]his court would not be bound by [a decision of the U.S. Supreme Court] when considering the involved statute as to whether it is in conflict with said Article 1, Section 1, of our Constitution although this section and the 14th Amendment are similar in meaning and application."[21] The New Jersey Supreme Court has used its constitution to reject the good faith exception to the prohibition against unreasonable search and seizure announced by the U.S. Supreme Court in *United States* v. *Leon*,[22] and North Carolina, Wisconsin, and New York have taken the same step.[23]

Second, states will proceed to litigate many constitutional issues on the basis of protections in state constitutions that do not exist in the U.S. Constitution. Besides containing language like the Eighth Amendment's prohibition against cruel and unusual punishment, Indiana's Constitution, Article I, Section 16, provides: "All penalties shall be proportioned to the nature of the offense." The Indiana Supreme Court recently decided that Indiana's provision affords criminal defendants a more searching review of extremely long jail terms than the federal constitution as the U.S. Supreme Court interpreted it in *Solem* v. *Helm*.[24] Another active area of litigation at the moment involves the "open court" provisions of state constitutions and the various tort recovery caps that have been enacted during this decade. The Texas Supreme Court, for example, declared caps in that state unconstitutional on the basis of state constitutional provisions assuring "open courts" and "due course of law."[25]

Third, many state courts have begun to enunciate methods of analysis that show considerable sophistication in the development of state constitutional jurisprudence. While the U.S. Supreme Court has long lamented its inability to develop a bright line defining unconstitutional land use regulations, the Supreme Court of Washington has announced an elegant due process analysis for such claims.[26]

Conclusion

Our country's founders believed that the rights of Americans could be secured by creating a federal system full of checks and balances. They borrowed this idea, in part, from the French philosopher Montesquieu, who proposed that authority be dispersed among competing institutions in order that no one part of society could achieve so much power as to have the capacity of tyranny.

The federal system created in 1781 supposes two kinds of dispersion of power. One is the separation of powers between the legislative, judicial, and executive branches. The other is between state governments and the national government.

Governors and legislators have done much to make real the promise that state government can act quickly, fairly and innovatively, and that states can serve as laboratories of democracy even in a post-industrial society. Those who serve in state courts have a similar commitment to prove the value of the state constitutions that are the foundation of our existence. It is our collective challenge to provide that government close to the people serves the people well.

Notes

1 Michigan v. Mosley, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting).

2 463 U.S. 1032 (1983).

3 David Broder, "A Weight on the States," *The Washington Post*, June 19, 1988.

4 State Election Board v. Bayh, 521 N.E.2d 1313 (Ind. 1988).

5 Lake County Council v. Dozier Allen, 524 N.E.2d 771 (Ind. 1988).

6 Colorado General Assembly v. Lamm, 738 P.2d 1156 (1987).

7 Plasti-Line, Inc. v. Tennessee Human Rights Commission, 746 S.W.2d 691 (Tenn. 1988).

8 Mecham v. Gordon, 156 Ariz. 297, 751 P.2d 957 (1988).

9 Chimento v. Stark, 353 F.Supp. 1211 (D. N.H. 1973).

10 Donnell v. State, 2 Ind. 480 (1852), overruled, State v. Moore, 6 Ind. 436, 437 (1855).

11 Callender v. State, 193 Ind. 91, 138 N.E.2d 817 (1922).

12 367 U.S. 643 (1961).

13 347 U.S. 483 (1954).

(continued on page 25)

Constitutional Rights: Resuming the States' Role

Sol Wachtler

Whenever we hear of constitutional rights, we generally think of the federal Constitution, especially the Bill of Rights found in the first ten amendments to the United States Constitution. We often forget that the states also have constitutions. In the eastern states that made up the original 13 colonies, these constitutions were adopted at the outbreak of the Revolution, ten years before the federal Constitution. In these years of the Bicentennial of the Constitution, we are frequently reminded that these state constitutions served as the model for the federal one. However, the personal guarantees in the state constitutions are of more than historical significance. They continue as important sources of individual rights, often affording greater protections than the federal Bill of Rights. This is as it was intended to be in our federal Republic.

From the outset of the Republic, the founders contemplated that the states would be the primary guarantors of individual liberties. That is one of the reasons why the federal Constitution originally contained no bill of rights. The idea persisted even after the adoption of the first ten amendments, which by their terms protected individuals only against encroachments by the federal government. The only protections individuals had against the actions of the states were the personal guarantees of the various state constitutions.

These state guarantees were felt to be adequate protections for individuals until after the Civil War, when the slaves were freed and given the status of citizens of the nation and the states in which they resided. A fear that some states might deny certain rights to the former slaves inspired the adoption of additional amendments to the U.S. Constitution granting all persons equal protection and due process in their dealings with the states.

After the adoption of these Civil War amendments, the federal government, acting primarily through the U.S. Supreme Court, took an active role in determining what rights were binding on the states, as well as the scope of those rights. As a result, most of the rights guaranteed by the Bill of Rights are now binding on the states as well as the federal government. Indeed, the Supreme Court took such an active role in defining and often expanding these basic protections that the Court was perceived by many, even in the legal community, as the primary, if not exclusive, guarantor of personal liberties throughout the nation. In recent years, however, the Supreme Court has expressed a renewed interest in the federal ideal, by emphasizing that its role is only to define the minimum protections applicable nationwide and that it is up to the state courts, each interpreting its own state constitution, to decide whether these federal minimums adequately meet the needs and expectations of the citizens of their particular state.

We are now experiencing a renaissance with respect to state constitutional rights. As the U.S. Supreme Court retreats from the field, or holds the line on individual rights, state courts and litigants seeking solutions to new problems are turning with greater frequency to the state constitutions, which for many years lay dormant in the shadow of the federal Bill of Rights. This is not, as some observers have suggested, a way of evading the edicts of a conservative Supreme Court. It is the resumption of a role that the state constitutions were originally designed to fulfill, as the primary guardians of the rights of all individuals within each state's borders. New York has been an active participant in this movement. In several recent cases, the Court of Appeals has held that the New York Constitution does indeed afford greater rights protections than its federal counterpart.

Due process is guaranteed by both state and federal constitutions and is one of the cornerstones of American jurisprudence. The concept is said to have been derived from a statute enacted in New York, and it has always had a special significance in this state. The ideal of basic fairness, which is at the core of due process, applies across the spectrum of civil and criminal cases. In recent years, it has

been held to entitle the citizens of the state to contact visits with family members while detained awaiting trial, to refuse unwanted medication, and to receive prior notice of a garageman's intent to sell a car to satisfy a lien for repairs.[1] In each of these cases, the result under the federal Constitution would either be uncertain or else certain rejection of the argument on behalf of the individual.

Freedom of expression is another area of special interest to New Yorkers. Everyone believes in freedom of speech, but there is great diversity among the states concerning the limits of that right, particularly when questions of taste or morality are at issue. The U.S. Supreme Court has recognized that this is largely a matter of community standards, a concept that is ideally suited to a state constitutional provision tailored to reflect and preserve the expectations of the citizens of the state. New York has always offered a hospitable climate for freedom of expression in the press and in the arts. It has long served as an artistic capital, often encouraging or tolerating works which in other areas of the country would be considered offensive to the community. In fact, the state constitutional guarantee is expressed in terms more reminiscent of Thomas Paine's "Rights of Man" than the sedate tones of the First Amendment. Thus, in a significant number of recent cases, the Court of Appeals has held that something more than the minimum protection afforded by the First Amendment is required to satisfy the state constitutional guarantee of freedom of expression.

Under the federal Constitution, the state can shut down a bookstore if its patrons are engaging in illegal acts, even though the store owner may be entirely innocent of any wrongdoing.[2] The U.S. Supreme Court has held that the First Amendment does not protect the owner of the bookstore because the state's object is to curtail the illegal acts of the patrons, which are not entitled to protection under the First Amendment. New York takes a broader view.[3] Under the free expression clause of its constitution, the question is not "who is aimed at but who is hit." Because the closing will affect the bookstore, which is entitled to constitutional protection under this clause, the state must show that no other measures, such as prosecution of the offending patrons, will eliminate the nuisance before it can order the store to be closed.

The state constitution also imposes additional demands when a warrant is sought to seize allegedly pornographic films.[4] Under the federal Constitution, the application is sufficient if it describes some of the acts depicted. To satisfy the requirements of the New York Constitution, however, the application must describe the work in sufficient detail so that the court can determine its overall character.

There are cases, of course, in which the state constitution affords no more protection than the First Amendment. In most cases, however, the state constitution will at least require the courts to scrutinize more closely the state's action affecting freedom of expression because of the importance of this right to the people of the State of New York.

Another area in which New York has set higher standards than the national minimum concerns the rights of those accused or suspected of criminal acts. Both the New York and federal Constitutions guarantee the assistance of counsel to a person charged with a crime. The question as to when that right "attaches" has bedeviled the courts for many years. It attaches unquestionably once formal charges have been filed against the person. But does it also attach earlier, for instance, when the defendant is taken into custody? Under the familiar *Miranda* rule, the police simply have to advise the defendant of the right to consult an attorney before questioning. New York has gone further. Once an attorney appears to represent a person in custody, the person cannot be questioned unless the attorney is present.[5] The rule has been extended to situations where a person requests counsel even when he or she is not in custody. Thus the New York constitutional right to counsel sets a higher standard than the federal rule, and is probably the most demanding in the country.

Similarly, under the federal Constitution, a person in custody has no right to have an attorney at a lineup until formal charges have been filed. Under the New York Constitution, however, any court intervention, such as an order requiring the defendant to appear in the lineup, triggers the right to counsel.[6] In addition, the state constitution prohibits the prosecutor from introducing at the trial evidence of a suggestive pretrial identification, although under the federal Constitution evidence of such an identification is generally admissible.[7]

The rules relating to search and seizure present a more complex problem. The state constitution contained no equivalent of the Fourth Amendment until 1938. The amendment adopted that year is worded in terms identical to the federal counterpart. For many years, the Court of Appeals followed a policy of conforming the state constitution to the federal Constitution, not only because of the identical wording, but also because of the desirability of having a single, clearly stated rule to guide police officers in the often rapidly unfolding situations they encounter on the streets. Through this process of adopting the federal rule, a consistent body of case law was developed under the state constitution. However, in recent years, the U.S. Supreme Court has eroded or overruled many of these "rigid" precedents in favor of more "flexible" rules or different "bright lines."

For example, instead of requiring strict prerequisite standards before a search warrant could be issued, the Supreme Court changed the rule to require the issuing court to look only to "the totality of circumstances." The question arose as to whether the more flexible approach was consistent with the perceived aims of the state constitution. In cases where the old rule announced by the Supreme Court has been well settled and has provided workable guidelines for those who must employ it, New York has adhered generally to the settled precedent as a matter of state constitutional law, particularly when confusion generated by the new rule might jeopardize individual rights.

In this state, as the brief survey above should indicate, the number of cases in which the state constitution is raised is steadily increasing. In cases where the federal Constitution provides no relief, or where the outcome is

uncertain, or where a matter of special interest to the state is presented, the litigants and the courts are turning to the state constitution for solutions. Resolution of these cases is often difficult because, for so many years, the state constitutions were eclipsed by the federal document. Nevertheless, in this state and others, the problems are being solved by careful examination of the text, the available history of the state, and the traditions and expectations of the people of the state.

In time, with experiment and experience, the states should continue to be able to develop a body of state constitutional law that meets the needs of its citizens. If a consensus is reached on a particular point, it may well be adopted by the U.S. Supreme Court as the national standard. Perhaps in the future, when we hear of constitutional rights, we will think first of the rights guaranteed by our state constitutions.

Notes

[1] Cooper v. Morin, 49 N.Y.2d 69; Rivers v. Katz, 67 N.Y.2d 485; Sharrock v. Dell Buick-Cadillac, Inc., 45 N.Y.2d 152.

[2] Arcara v. Cloud Books, 478 US 697.

[3] People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553.

[4] People v. P. J. Video, Inc., 68 N.Y.2d 296.

[5] People v. Hobson, 39 N.Y.2d 479.

[6] People v. Coleman, 43 N.Y.2d 222.

[7] People v. Adams, 53 N.Y.2d 241.

Sol Wachtler is chief judge of the Court of Appeals of New York State.

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(continued from page 22)

[14]Boykin v. Alabama, 396 U.S. 238 (1969); NAACP v. Alabama, 337 U.S. 288 (1964); Walter F. Murphy, "The South Counter Attacks: The Anti-NAACP Laws," *Western Political Quarterly* 11 (1959): 371.

[15]Rule, "Blacks and Reagan's Goal on States' Rights," *New York Times*, March 11, 1981.

[16]*U.S. News and World Report*, Oct. 13, 1975, p. 50.

[17]South Dakota v. Dole, 107 S.Ct. 2793 (1987) (requiring states to raise drinking age to 21 as a condition of receiving highway funds held not a violation of the 21st amendment repealing prohibition).

[18]State v. Jewett, 500 A.2d 233, 235 (Vt. 1985).

[19]See Spaziano v. Florida, 468 U.S. 447 (1984), relying on the substantial nature of Florida's death penalty reviews.

[20]Kelly v. Metropolitan County Board of Education, 836 U.S. 986, 995 (1987).

[21]Department of Insurance v. Schoomover, 72 N.E.2d 747 (Ind. 1947).

[22]State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987), rejecting United States v. Leon, 468 U.S. 897 (1984).

[23]State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); State v. Grawien, 123 Wisc.2d 428, 367 N.W.2d 816 (1985); People v. Bigelow, 66 N.Y.2d 417, 488 N.E.2d 451, 497 N.Y.S.2d 630 (1985). Contra, State v. Brown, 14 Conn.App. 605, 543 A.2d 750 (1988), app. den., 208 Conn. 816, 546 A.2d 283.

[24]462 U.S. 277 (1983); Taylor v. State, 511 N.E.2d (Ind. 1987).

[25]Lucas v. United States, 757 S.W.2d 687 (Texas 1988).

[26]Orion Corporation v. State, 109 Wash.2d 621, 109 P.2d 1062 (1987).

Randall T. Shepard is chief justice of Indiana.

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The Expanding Role of the State Constitution

Harry C. Martin
and Donna B. Slawson

The courts of North Carolina have joined the lengthening line of state courts that are relying more on their state constitutions now than they did in the past to decide important issues. The felt needs of our citizens often differ from those of our sister states and the United States. To accommodate these pressures, our courts can find support on the public policy expressed by the people through the state constitution.

These decisions fall into many areas of the law, both civil and criminal. It is the purpose of this brief review to demonstrate the extent and the importance of the relatively recent proliferation of state constitutional cases on the law of North Carolina.

Separation of Powers

Not surprisingly, the state's highest appellate court turned to the North Carolina Constitution when faced with a question turning on the separation of powers doctrine. In *Martin* v. *Thornburg*,[1] the court held that the statutory power of the attorney general to appear in any proceeding in which the state is a party does not violate separation of powers vis-a-vis the executive branch. In a different opinion issued on the same day, the court held that a statute providing that the chief justice appoint the director of the Office of Administrative Hearings did not violate the separation of powers provision of Article I, Section 6, which vested executive powers in the governor.[2] While the use of a state constitution to decide issues concerning the authority of different branches of state government appears logical, the extent to which cases involving individual rights have turned on interpretation of the state constitution is a fairly recent development.

Criminal Procedure

The Supreme Court of North Carolina has decided a surprising number of criminal procedure issues on interpretation of the state constitution. In *State* v. *Moorman*,[3] a rape case, the supreme court held that the defendant was denied his right to effective assistance of counsel where the attorney's investigation and trial preparation were limited and well below the standard of practice routinely engaged in by attorneys defending persons involved in serious criminal cases. It was apparent to the appellate court from the trial record that during the trial the defendant's counsel had been markedly under the influence of drugs, which impaired his sensory perceptions, reasoning, and judgment. He had been disheveled and rumpled, had had marked changes in mood, was often inattentive or drowsy, and on one occasion went to sleep briefly. The court based its opinion on the effective-assistance-of-counsel requirement contained in Article I, Sections 19 and 23, of the North Carolina Constitution. Other recent decisions also have decided issues concerned with defendants' rights before and during criminal trials.

For example, in *State* v. *Harris*,[4] the state's highest court held that a "short form" indictment—as opposed to a more detailed and lengthy one—did not violate the defendant's right of confrontation guaranteed by Article I, Section 23, of the state constitution. In another pretrial situation, the court rejected a defendant's state constitutional argument that the denial of his motion to continue, that is, to postpone the trial until two witnesses could be present, denied him the right to have a fair opportunity to present a defense.[5] The court went on to say, however, that under different circumstances it might be possible for the denial of such a motion to result in the violation of a defendant's constitutional rights. Finally, in another pretrial case, the North Carolina Supreme Court held that the fact that different judges heard various pretrial motions did not violate Article I, Section 19, the "law of the land" clause, often read as guaranteeing due process rights.[6]

A number of cases have concerned issues arising during trial proceedings. For example, in *State* v. *Jones*,[7] the state supreme court was faced with the question of

whether the admission into evidence of expert opinion, which was based on evidence that was not self-admissible, violated a defendant's right of confrontation under the state constitution. The court held that this argument was without merit because the expert was in court and available for cross-examination. Additionally, the challenged testimony was not offered for the truth of the matter but only as a part of the basis for the witness' opinion. In an extension of *Jones*, the court held in *State* v. *Deanes*[8] that where a child rape victim was incompetent to testify, her statements to a social worker could be admitted through the social worker's testimony without violating the defendant's state constitutional right to confrontation.

Several cases have addressed concerns with the makeup of and decisions by the jury. For example, in *State* v. *Abbott*,[9] the state's highest court held that a defendant was not denied his constitutional right to an impartial jury under Article I, Section 24 of the North Carolina Constitution where he failed to show that the state's exercise of peremptory challenges to black jurors was racially motivated. The record showed that 40 percent of the black jurors tendered were accepted by the state. In another recent case, the court decided that the right to a unanimous verdict in open court, safeguarded by Article I, Section 24, was not abridged when the trial judge replied to the jury's request for a transcript of certain testimony by sending a message through the bailiff rather than following the statutory method of bringing the jury into the courtroom.[10] Finally, in *State* v. *Bussey*,[11] it was held that questions to the jury concerning the numerical division of the jury did not constitute a per se violation of the Article I, Section 24 protection of trial by jury. The proper analysis was held to be whether in considering the totality of the circumstances the inquiry had been coercive.

Sometimes, in construing provisions of the state constitution, the court adopts the interpretation established by the U.S. Supreme Court of parallel federal constitutional rights. This occurred in *State* v. *White*,[12] in which the court held, in accordance with *Oregon* v. *Kennedy*,[13] that Article I, Section 19 of the North Carolina Constitution, the law of the land clause, prohibits reprosecution for the same offense under certain circumstances. If a defendant moves for a mistrial, he will normally be held to have waived the right not to be tried a second time for the same offense. However, where the motion is made because of prosecutorial misconduct, retrial is still not barred unless the defendant shows that the prosecutor was motivated by the intent to provoke a mistrial instead of merely the intent to prejudice the defendant.

Religious Freedom

In *State* v. *James*,[14] the court held that the prosecutor did not violate the defendant's guarantees of religious freedom under Article I, Section 13 when he referred in court to the fact that the defendant took his oath as a witness by affirmance rather than by swearing with his hand on the Bible.

Obscenity

In *State* v. *Mayes*,[15] the court held that the lack of a statewide standard as to what constitutes obscenity did not render the obscenity statute unconstitutional on its face as being in violation of Article I, Section 14, guaranteeing freedom of speech and press, and Article I, Section 19.

Also, in *Treants Enterprises, Inc.* v. *Onslow County*,[16] the state supreme court held that an ordinance regulating "movie mates" business was overbroad and violated Article I, Section 1, which guarantees persons the enjoyment of the fruits of their own labor, and Section 19.

Racial Discrimination

In racial discrimination decisions, the North Carolina Supreme Court in recent years has tended to rely more on the state constitution than on the United States Constitution. In *Jackson* v. *Housing Authority*,[17] the court faced the question of whether the exercise of peremptory challenges to prospective jurors on the basis of race should be tolerated under the state constitution in civil cases. Such challenges had been held previously to violate the state and federal constitutions with respect to criminal cases. The court held that peremptory challenges on the basis of race were prohibited in civil cases under the state constitution, Article I, Section 26, which guarantees that no person shall be excluded from jury service on account of sex, race, color, religion, or national origin. In so doing, the court further guaranteed the integrity of the decisions of the North Carolina state courts by requiring that all trials, civil and criminal, be decided by juries selected on a racially neutral basis.

Similarly, in *State* v. *Allen*,[18] the court held that where the state accepted 7 of 17 black veniremen who were tendered as potential jurors, no violation of Article I, Section 26 was demonstrated. The *Allen* case again tested the selection of the jury on state constitutional grounds when faced with a racial challenge.

The court in *State* v. *Cofield*[19] extended the protections against racially biased jury selection beyond the petit jury to the foreman of a grand jury. The court held that this selection must be done in a racially neutral manner. On a prima facie showing by the defendant that the foreman had been selected in a racially discriminatory fashion, the burden then shifted to the state to demonstrate that in fact the foreman was selected in a racially neutral manner. The case was sent back to the trial court to give the state an opportunity to produce evidence to support its contention.

These cases on racial discrimination demonstrate the willingness of the court to turn to the state constitution to afford greater protection to the citizens of the state against racial discrimination in the trial of civil and criminal cases than may be found under the U.S. Constitution.

Economic Development

In another recent and important decision, the state's highest court held, in *Cheape* v. *Town of Chapel Hill*,[20] that the town can constitutionally participate in the economic development of certain projects in connection with private developers on the theory that such action does not violate the constitutional prohibition under Article II, Section 24(j) against local acts regulating trade. In another case along the same lines, the court held that a statute regulating the sale of military goods does not violate Article I, Section 1 or Section 19.[21]

Public Trust Doctrine

The North Carolina Supreme Court has relied on the state constitution in deciding cases involving the public trust doctrine. In *Town of Emerald Isle* v. *State of North Carolina*,[22] the court held that a beach access statute did not violate Article I, Section 19, or Section 32, the exclusive emoluments provision. And, in *State ex rel. Rohrer* v.

Credle,[23] the court gave state constitutional protection to the public trust doctrine on the theory that the state constitution mandates conservation and protection of pubic lands and waters for the benefit of the people. In this case, one Credle sought to perfect a private interest in oyster bed bottoms in Swan Quarter Bay, a part of the submerged oyster beds on the coast of North Carolina. The court held that the public trust doctrine, which provides that the state holds the public trust lands and waters for the benefit of the public, was applicable, and that an individual cannot perfect title, that is, establish ownership, in an oyster bed. The *Credle* case was a fundamental decision going to the heart of environmental protection and the protection of public lands based on the constitutional public trust doctrine. It is only through the state constitution that such important doctrines as public trust can be preserved for the benefit of all the people of the state.

It now appears that the citizens of North Carolina are relying more often on the state constitution in seeking to protect the rights to which they are entitled. These rights may not otherwise be protected, particularly by the United States Constitution. This awareness by citizens of rights under the state constitution has been caused in part by the state court basing more of its decisions on state constitutional principles and by lawyers becoming more aware of their clients' rights under the state constitutions through various continuing legal education methods. It also is important to note that a course on state constitutional law is now taught at the University of North Carolina, bringing state constitutional issues to the attention of law students at an early stage of their careers. By continuing these efforts, it is hoped that the state constitutional law principles will continue to broaden and be available to our citizens throughout the entire spectrum of the legal system.

Notes

[1] 320 N.C.533, 359 S.E.2d 472 (1987).

[2] State ex rel. Martin v. Melott, 320 N.C. 518, 359 S.E.2d 783 (1987).

[3] 320 N.C. 387, 358 S.E.2d 502 (1987).

[4] 323 N.C. 112, 371 S.E.2d 689 (1988).

[5] State v. Gardner, 322 N.C. 591, 369 S.E.2d 593 (1988).

[6] State v. McLaughlin, 323 N.C. 591, 369 S.E.2d 49 (1988).

[7] 322 N.C. 406, 368 S.E.2d 844 (1988).

[8] 323 N.C. 508, 374 S.E.2d 249 (1988).

[9] 320 N.C. 475, 358 S.E.2d 365 (1987).

[10] State v. McLaughlin, 320 N.C. 564, 359 S.E.2d 768 (1987).

[11] 321 N.C. 92, 361 S.E.2d 564 (1987).

[12] 322 N.C. 506, 369 S.E.2d 813 (1988).

[13] 456 U.S. 667 (1982).

[14] 322 N.C. 320, 367 S.E.2d 669 (1988).

[15] 323 N.C. 159, 371 S.E.2d 476 (1988).

[16] 320 N.C. 776, 360 S.E.2d 783 (1987).

[17] 321 N.C. 584, 364 S.E.2d 416 (1988).

[18] 323 N.C. 208, 372 S.E.2d 855 (1988).

[19] 320 N.C. 297, 357 S.E.2d 622 (1987).

[20] 320 N.C. 549, 359 S.E.2d 792 (1987).

[21] Poor Richard's, Inc. v. Stone, 322 N.C. 61, 366 S.E.2d 697 (1988).

[22] 320 N.C. 640, 360 S.E.2d 756 (1987).

[23] 322 N.C. 522, 369 S.E.2d 825 (1988).

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Many emerging public issues are not encompassed easily by the U.S. Constitution, but are, or can be, encompassed by state constitutions.

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Interpreting State Constitutions: An Independent Path

Robert F. Utter

In recent years, the Washington State Supreme Court has reemphasized the importance of interpreting the state's bill of rights independently. Framers of state constitutions initially intended their charters to provide the primary protection for individual rights. The federal Bill of Rights, applicable only to the federal government at the time, provided secondary protection.

Nevertheless, there was a role reversal, particularly during the Warren Court. The United States Supreme Court applied many of the provisions of the federal Bill of Rights to the states by incorporating them into the due process clause of the Fourteenth Amendment. The Supreme Court has made it clear, though, that where both the federal and state constitutions protect a given right, the federal protection creates only a minimum guarantee. The states are perfectly free to interpret their own constitutional provisions to provide greater protection.[1]

The concept of federalism, the very basis of our political philosophy, requires such a result. Both state and federal constitutions guarantee rights. State courts have a duty to interpret their state constitutions, consistent with their own state histories and policies, to ensure that state protections are not merely empty promises.

When litigants base arguments on parallel provisions of federal and state constitutions, state courts should address the state issue first.[2] Failure to do so can result in costly and unnecessary appeals to the United States Supreme Court. The Supreme Court often reverses state court decisions that find, for example, a violation of a criminal defendant's federal rights. In doing so, it has noted repeatedly that the state court may interpret the state constitution to provide broader protection.[3]

The Washington Supreme Court, aware of these problems, addresses state constitutional issues first as long as litigants properly present and brief them.[4] To facilitate the analysis, the court articulated a framework of neutral criteria that parties and the court must consider in determining the scope of state constitutional provisions.

The framework consists of six nonexclusive criteria. The court examines, at a minimum, the following: (1) the textual language of the state constitution; (2) the differences in the texts of parallel provisions of state and federal constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences between federal and state constitutions; and (6) matters of particular state interest or local concern.[5]

A law review commentary criticized this framework, finding that it could limit the development of state jurisprudence if it implied that the state constitution applies only where the criteria justify application.[6] This misconstrued the ruling, however, and recently the court made it clear that where provisions in the state and federal constitutions both apply, it is not a question of choosing between them. Washington will continue to address state issues first. The factors listed, the court emphasized, are indeed nonexclusive and serve as an aid for interpreting the state constitution.[7] They provide a framework or skeleton for ordered, understandable, logically reasoned analysis. Their role is to offer guidance for attorneys seeking to present state constitutional arguments in areas where past decisions of our court offer little precedent.

This framework has established a principled basis for interpreting several state constitutional provisions to provide broader protection than their federal counterparts. Several recent decisions have involved Article 1, Section 7 of the Washington Constitution. This provides: "No person shall be disturbed in his private affairs, or his home

invaded, without authority of law." In recent years, the court has concluded that Section 7 provides greater protection for privacy interests than its federal analogue, the Fourth Amendment.

For example, in *State* v. *Gunwall*, the case setting forth the analysis, the court held that Section 7 precludes obtaining a defendant's long-distance home telephone records or installing a pen register on telephone connections without a search warrant or other legal process. The court's application of the six factors provides a meaningful illustration of how the factors are used.[8]

First, the textual language specifies protecting a citizen's "private affairs." The focus, therefore, is on the reasonableness of the state's intrusion into a defendant's private affairs.

Second, there are significant differences between the texts of Section 7 and the Fourth Amendment. The Fourth Amendment reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The federal text does not mention "private affairs." Because the court has held the difference to be "material," it supports a broader reading of Section 7. However, no one factor is controlling. Even if the texts of both constitutions were identical, the court could interpret the state's provision more broadly. Moreover, each state court should consider the interaction of all provisions in the state constitution. That interaction may provide greater protection than an individual federal or state provision.

Third, the Washington Constitutional Convention in 1889 rejected a proposal to adopt the language of the Fourth Amendment.

Fourth, historically, Washington has extended "strong protection" to electronic communications. State codes dating from 1881 have regulated this area extensively. Current state statutes provide greater protection than federal regulations.

Fifth, the structure and function of the two constitutions were found to differ considerably. The United States Constitution delineates the limited powers of the federal government, powers delegated to the federal government by the states. State constitutions limit the otherwise plenary powers of the states. States may act in any area unless the state constitution or federal law expressly forbids such actions.

Sixth, the historical state concern for protecting electronic communications outweighed any possible federal need for uniformity of rules regarding telephone records. This is a balancing process. Consideration often will overlap one or more of the other factors, as it did in this case. State policy interests merit considerable weight.

Because the list is nonexclusive, in different contexts, other criteria may be persuasive. However, in the context of privacy interests, these criteria generally support a broad interpretation of Section 7. Section 7 requires a search warrant to search a locked glove compartment or a locked container in the passenger compartment of a car.[9] This provision also prohibits police roadblocks designed to detect intoxicated drivers if the police stop all vehicles without warrants or individualized suspicion of criminal activity. The rationale is that roadblocks disturb persons in their private affairs without authority of law.[10]

Although Section 7 provided greater protection for privacy interests than the Fourth Amendment in the three cases discussed above, in some situations the result under either analysis is the same. In examining the constitutionality of investigative stops of vehicles, the state and federal courts use similar approaches. Both focus essentially on the reasonableness of the officer's intrusion. Under both analyses, then, it is reasonable for an officer to search for weapons within the investigatee's immediate control.[11]

Another area where the Washington Supreme Court has interpreted the state constitution independently is Article 1, Section 5, the state's free speech provision. It provides: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." In earlier case law, the court found that Section 5 provided broader coverage than the First Amendment of the federal Constitution in certain contexts. For example, the state provision has been held to protect the right of supporters of an initiative to solicit signatures on private shopping center grounds in an orderly fashion that does not interfere with business activities.[12] More recently, however, a majority of the court held that the state provision does not provide broader coverage for obscene speech.[13]

Focusing on the plain language and history of Section 5, the Washington court has interpreted it to provide an absolute bar to prior restraints of constitutionally protected speech.[14] However, the court has used the federally developed analysis of prior restraint when the state seizes obscene materials for evidentiary purposes.[15] That analysis also allows a county to prohibit activities determined to be a public nuisance. However, a county may not prohibit other activities in advance solely because they might involve breaches of the law.[16]

The United States Supreme Court has determined that the government may place certain time, place, and manner regulations on some forms of speech. This ruling has been modified by the Washington Supreme Court by narrowing the federal test for restricting the location (place) of certain speech. The tests are similar except that the restriction must further a "compelling state interest" under the state constitution, while the federal Constitution requires only a "significant state interest."[17] Washington has noted that it has not "as yet" departed from the basic federal analysis, even though the federal and state clauses are different in both wording and effect. The persuasiveness of the federal discussion of the competing interests has prompted adoption, to date, of much of the federal reasoning in this field.

In the privacy and free speech contexts, both the state and federal constitutions apply. However, state supreme courts also address other important issues where only the state constitution applies. One such area is the right to

trial by jury in civil proceedings. The Seventh Amendment to the federal Constitution does not apply through the Fourteenth Amendment to the states in civil trials. Therefore, the right is protected only by Article 1, Section 21 of the Washington Constitution. The analysis relies solely on state doctrine. Federal decisions interpreting the Seventh Amendment provide useful insight, but are in no way binding.

Recently, the Washington Supreme Court interpreted Section 21 in resolving a challenge to the constitutionality of the 1986 tort reform act cap on noneconomic damages. That statute placed a limit on damages that juries could award to personal injury or wrongful death plaintiffs to compensate for pain and suffering and loss of consortium. The plaintiffs argued that the statute violated their constitutional rights to trial by jury, equal protection, and due process. In finding the trial by jury argument dispositive, the court found that the statute's damages limit interfered with the jury's traditional function to determine damages. Section 21 protects as inviolate the right to a jury. In briefly discussing the equal protection arguments, the court left unresolved whether it would continue to follow the United States Supreme Court's analysis concerning equal protection or would examine the unique language of its own privileges and immunities clause.[18]

Although some of the court's past opinions refer to a practice of following the federal analysis, those comments do not mean that the court will fail to assess state constitutional issues independently. This choice of words arose from the history of constitutional interpretation, developed in a period of less intense examination of the state's unique constitutional history and language. During the period of federal dominance of constitutional analysis, most state courts developed a body of state precedent that relied on federal analysis. During the 1950s and 1960s, federal interpretations offered more protection for individual rights than they have in recent years. When dealing with the federal retrenchment, state courts are forced to distinguish their own state precedents, which simply followed federal analysis. Those decisions often contain language that implies a presumption in favor of federal analysis when in reality there is none.

State court reliance on state constitutions to protect individual rights affects both citizens and state officials. Citizens need to recognize that their state constitutional provisions may afford them broader protection than federal analogues. If involved in litigation, they must urge their attorneys to argue state constitutional issues properly. Officials must realize that the state constitution may invalidate state actions otherwise valid under the federal analysis. All involved must understand the merit of a dual sovereign, dual analysis system.

Recent independent state analysis benefits constitutional jurisprudence in several ways. Because most state judges are elected, state courts are more democratically accountable. Voters may react to unpopular decisions by either voting judges off the bench or amending the state constitution. While state courts must continue to protect the individual rights enumerated in their bill of rights, they must explain their rulings in a way that will retain the respect of the local electorate. In addition, state courts are not limited by the delegated nature of the federal Constitution. They serve as experimental laboratories, constrained by their constitutions and democratic accountability. The United States Supreme Court, at times, adopts the analysis of state court opinions on matters that involve unresolved federal constitutional issues. Because state courts are more democratically accountable, their reasoning lends a higher degree of democratic legitimacy to U.S. Supreme Court decisions.[19]

As states interpret their state constitutions independently, adherence to this duty will strengthen both state and federal constitutional jurisprudence.

Notes

[1] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980).

[2] Seattle v. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988); State v. Coe, 101 Wn.2d 364, 373-74, 679 P.2d 353 (1984).

[3] For example, consider the history of State v. Kennedy, 295 Or. 260, 666 P.2d 1316 (1983). The trial court found no double jeopardy bar to trying the defendant again. After the Court of Appeals reversed on federal grounds, the Oregon Supreme Court denied review. The United States Supreme Court reversed the Court of Appeals, finding no federal bar to retrial. On remand, the Oregon Court of Appeals affirmed the conviction on state grounds, assuming the state and federal protections were the same. On review, the Oregon Supreme Court first determined that the Oregon State Constitution provided broader double jeopardy protection and then found, even under that standard, that the facts of the case did not bar retrial.

[4] State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988).

[5] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

[6] See Note, "Federalism, Uniformity, and the State Constitution," *Washington Law Review* 62 (1987): 569.

[7] Sofie v. Fibreboard Corp., 112 Wn.2d ___, ___ P.3d ___ (1989); Seattle v. Mesiani, 456.

[8] For a lengthier discussion, see State v. Gunwall.

[9] State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986).

[10] Seattle v. Mesiani.

[11] State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986).

[12] Alderwood Associates v. Washington Environmental Council, 96 Wn.2d 230, 635 P.2d 108 (1981).

[13] State v. Reece, 110 Wn.2d 766, 757 P.2d 947 (1988).

[14] State v. Coe.

[15] State v. J-R Distributors, 111 Wn.2d 764, 765 P.2d 281 (1988).

[16] Kitsap County v. Kev, Inc., 106 Wn.2d 135, 720 P.2d 818 (1986).

[17] Bering v. Share, 106 Wn.2d 212, 721 P.2d 918 (1986).

[18] Sofie v. Fibreboard Corp.

[19] For further discussion, see Robert F. Utter, "State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?" *Washington Law Review* 64 (1989): 19.

Robert F. Utter is an associate justice of the Washington Supreme Court.

Special Feature
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Orlando, Florida, April 1989

Licensing and Regulation: States v. the Federal Government

Kara Lynne Schmitt

Do states or the federal government have the authority to determine which professions should be regulated? Until recently, the answer to this question would have been noncontroversial—states have this authority. Now, however, although states still are responsible for implementing the regulation of professions and occupations, the federal government seems to be increasing its involvement in activities that traditionally and constitutionally belonged to the states.

The earliest licensing laws in the United States were enacted in 1639 by Virginia and were designed to regulate fees charged by the medical profession. During the next 200 years, the focus remained on the medical profession, with states enacting and eliminating various regulatory laws. By the beginning of the 20th century, state medical examining boards and licensing laws existed in every state. Since the first licensing law, states have had the authority to determine who should be regulated and how. Although some professions, such as medical doctors, nurses, engineers, and accountants, are licensed in every state, others are licensed in only a small number of states. Each state legislature has made the decision as to whether public protection by means of licensure is required for a specific profession.

Prior to the 1970s, with the exception of the mandate for states to license nursing home administrators, the federal government seemed to view state licensure and regulation with, at most, a passive interest. However, in 1971 and 1973, the then U.S. Department of Health, Education, and Welfare (HEW) recommended that states observe a two-year moratorium on legislation establishing new licensing programs for health care personnel. Ironically, at the same time that a moratorium was requested, the federal government imposed the requirement that health care reimbursement could be paid only to providers who were licensed by the state or certified by an approved national certification agency. Such a requirement certainly was not based on public protection issues.

In 1977, HEW issued a report entitled *Credentialing Health Manpower*, which urged the adoption of national standards to be developed jointly by states and professions with limited involvement by the federal government. In fact, the following position was expressed by HEW:

> It is important to emphasize that the development and adoption of national standards should not be confused with federal licensure. *Licensure is presently, and will continue to be, a function of state government.* (p. 11, emphasis added)

Recent publications by the Office of the Inspector General and other units of the federal government continue to emphasize that licensure is a function of the states. Unfortunately, though, actions taken by the federal government during the last decade seem to be in conflict with such statements. It is beginning to appear that the states' traditional and statutory responsibilities for the licensure and regulation of professions are being eroded slowly by the intrusion of federal action.

Perhaps part of the reason for the increased federal involvement in the regulatory arena is a perception that the states are not meeting the needs of the public. Laws of politics are no different than the laws of physics. That is, if a vacuum exists, something or someone will intervene to fill the void. The federal government's apparent perception that a regulatory vacuum exists, whether due to insufficient resources, a lack of interstate cooperation, or a lack of desire on the part of states to act, has fostered increased federal involvement in regulatory activities. It is regrettable that at the same time that states are improving the quality of public protection, initiating improved enforce-

ment procedures, responding more rapidly to issues requiring legislation, and working more closely with each other, the federal government is apparently becoming more concerned about what states are or are not doing.

An example of what might be considered federal action in one area without adequate consideration of the impact in other areas involves proposed rules associated with guaranteed student loans. These rules would require licensure boards to compile and distribute to all non-baccalaureate schools pass/fail data on each school's students who sat for a licensure examination. In most instances states do not collect this data and, depending on the number of candidates examined, this requirement could create a significant increase in a state's workload without any financial support from the federal government. More important, though, is that licensure examinations are *not* designed to evaluate a school's performance, but rather to determine whether licensure candidates have the necessary knowledge, skills, and abilities to be deemed minimally competent to protect the public. Thus, these rules, if enacted, would not only place a financial and staffing burden on states but, more importantly, they also would require states to use the results of licensure examinations inappropriately, simply to satisfy the requirements of the federal government.

In terms of federal legislation, several major laws have been enacted recently that will create a financial and staffing burden on states.

One of these laws, the *Omnibus Budget Reconciliation Act of 1987*, mandates that states evaluate the competence of nurse aides, maintain a register of those who pass the examination, establish a mechanism for handling complaints, and provide for due process. Regardless of what the legislation says, when one looks at all the requirements, it is a licensure scheme. This legislation has created a frenzy of activity and innumerable headaches as states attempt to implement the requirements, which have not been pilot tested and thus offer no assurance that the quality of care will be raised. The requirements will, however, raise the costs incurred by nursing homes and subsequently by the patients.

In some instances, the requirements are too specific and do not take into account individual state differences. In other instances, the requirements are vague and extremely confusing. There is language indicating that states will be partially reimbursed, at least initially, for costs associated with implementing this mandate, but it is not clear what costs are reimbursable, how long reimbursement will be available, and whether states will be able to qualify. At the same time there are penalties associated with noncompliance with the unclear requirements and a limited time for implementation.

Furthermore, the initial reading of the law seemed to imply that only agencies that regulate nursing homes could regulate nurse aides. For many states, the agency regulating facilities is not the appropriate agency for regulating people. Accordingly, after a more thorough investigation, including numerous letters requesting clarification, some states have now been informed that this interpretation is not accurate.

It is interesting to note that once placed on the register there is no requirement to remove a nurse aide's name should disciplinary action be taken by a state. It is also interesting that nurse aides who work in hospitals or home health care organizations do not have to be registered. In the case of home health care aides, however, proposed federal regulations will mandate state registration.

It is difficult to comprehend how the federal government can insist that licensure is a function of state government while at the same time having imposed this nurse aide mandate on states. Along the same lines, the federal government is also attempting to mandate an increase in the minimum educational requirements for nursing home administrators, recommending the composition of professional boards, and pursuing the mandate that states regulate real estate appraisers. In the last instance, not only would states be required to license appraisers, but the required examination also would have to satisfy federal standards, the state agency would be monitored by a federal committee, and the federal government would collect $25 annually for each appraiser licensed in each state. Again, these are decisions that traditionally have belonged to states and not the federal government.

Two companion legislative acts that will soon have a significant impact on states are the *Health Care Quality Improvement Act of 1986* and the *Medicare and Medicaid Patient and Program Protection Act of 1987*. These acts initiated and expanded the National Practitioner Data Bank (NPDB), which will house information on health-related licensees against whom malpractice judgments or discipline have been imposed. More than 30 health professions are included in the mandate, which affects not only state licensing boards but also hospitals, state and national professional associations, insurance companies, and federal employers. The general concept—a disciplinary data bank—is not new and is certainly not inappropriate, as several national associations as well as the National Clearinghouse on Licensure, Enforcement and Regulation already had such a mechanism in place. The NPDB, however, has a tremendous impact on the work of the various agencies, implements penalties for non-timely performance, and creates considerable confusion as to what must be done and how.

Although the system was to be operable in 1988, it is still in the formative stage, and final guidelines have yet to be developed. The projected costs for states to comply is considerable, and there even is talk that states would be required to pay to retrieve information that they are mandated to provide. Of interest is that states must submit data, but they are not required to inquire about potential licensees. If the intent of this federal mandate was to reduce the interstate movement of persons who have been disciplined, why are states not required to access the data bank prior to endorsement or reciprocity? Of course, there is no financial support provided by the federal government.

The problem with federal government involvement may not be so much what it does, but the reasons and the way in which it goes about doing it. The following incident, although not directly related to professional regulation,

seems to exemplify the type of actions or decisions currently made by federal officials.

A few years ago, a federal inspector was evaluating an intermediate care facility for the mentally retarded to determine compliance with federal regulations. Although the facility was generally viewed as doing a good job and the patients appeared to be well cared for, the inspector was particularly concerned with not being able to discern any "active therapy." Because of the threat of losing funding, the facility staff prodded the federal inspector to define "active therapy," because they thought they were doing it. The inspector's response, which was taped, was that he could not quite define it, but he would know it when he saw it because he had a "visceral" feeling about it, and when someone did see it, everyone else ought to be called over to see it so they would know what it was.

We hope that federal decisions are not based solely on a "visceral" feeling, and, yet, the federal government seems increasingly to issue either vague or overly specific dictates, offer less than optimal suggestions, require compliance within an unrealistic time period, develop guidelines after compliance is required, or enact poorly conceived or unnecessary legislation that has a direct fiscal impact on the states.

In summary, the federal government is indeed becoming more actively and directly involved in the regulatory arena, which is generally viewed as belonging to states. Although states are improving their regulatory efforts, implementing formal or informal procedures through Sunrise and Sunset reviews to ensure that only professions or occupations that really require licensure are licensed, and working more closely with each other to reduce the interstate mobility of incompetent and unethical licensees, the federal government has apparently decided to make decisions for states and impose more requirements on states, which are already faced with staffing and financial constraints.

Although the previous examples of federal involvement embody a concern for public protection, an important underlying factor involves fiscal impact, particularly relating to Medicaid and Medicare funding. State regulatory agencies should not be forced by the federal government to address matters that are not directly related to their constitutional responsibility of protecting the health, safety, and welfare of the public. Should this trend continue, states and state regulatory agencies could eventually be reduced to 50 administrative units of the federal government.

Kara L. Schmitt is director of the Office of Testing Services, Michigan Department of Licensing and Regulation, and president of the National Clearinghouse on Licensure, Enforcement, and Regulation.

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Books, etc.

Finance

CREATING A FISCAL BALANCE. *Summary Final Report.* New Jersey State and Local Expenditure and Revenue Policy Commission, 2 Quakerbridge Plaza, Trenton, NJ 08625, 1988. xvi, 144 pp.

The commission focused on the two major fiscal problems that confront New Jersey—the state's fiscal system relies too heavily on local government to provide services, and the burdens of the tax system are not fairly distributed based on ability to pay. The major objectives of the study were to ensure that local resources are sufficient to meet local expenditure responsibilities, to achieve a better balance between state and local taxes and a more equitable distribution of tax burdens, to improve the quality of education services, to sort out state and local roles and responsibilities, and to enhance the state's economic competitiveness. The report provides a framework for analyzing fiscal policies, examines current conditions and trends in the state's public sector, analyzes the dynamics of major state expenditure programs, and identifies the state's major fiscal problems and issues. After outlining its recommendations, the commission presents proposals for safeguarding the resultant benefits and offers illustrations of how the recommendations will affect municipalities and individual households.

A FISCAL AGENDA FOR NEVADA: *Revenue Options for State and Local Governments in the 1990s.* Edited by Robert D. Ebel. University of Nevada Press, Reno, NV 89557-0076, 1989. 700 pp. Maps, graphs, tables. $39.95 (cloth). $24.95 (paper).

This comprehensive study reviews and analyzes the Nevada state and local tax system and provides an inventory of revenue sources available to the state. The book is divided into four sections: principles for judging a state's fiscal system; economic, demographic, and institutional factors that shape the state's economy and that are likely to influence fiscal matters in the future; the organization of state and local fiscal relations in general and the local revenue system in particular; and analysis and evaluation of alternative revenue sources. Of interest is the development of new methodologies used to examine state and local systems. The study was commissioned by the Nevada legislature and prepared by researchers at the Urban Institute and Price Waterhouse.

RETHINKING TEXAS TAXES: *Final Report of the Select Committee on Tax Equity. Volume 1/Findings and Recommendations.* The committee, Box 12666, Capitol Station, Austin, TX 78711, 1989. xiii, 100 pp. Tables.

The committee found the system dominated by two taxes: the sales tax, the primary tax used by state government, and the property tax, the most important local tax. Together, they account for over two-thirds of the tax revenue raised by state and local governments. The importance of these two tax sources has increased in recent years, as they have been used to meet rising funding needs and make up for other revenue losses. The committee concluded that although the rates are higher the tax system is remarkably similar to that of the mid-1960s. Major concerns include the ability of the system to provide needed revenues without repeated tax increases, the equity of the system for individuals and businesses, how the tax system affects the state's economic growth and development, the growing complexity of state and local tax laws, and the degree to which the state has become involved in tax litigation. The committee concludes that the sales tax should remain the cornerstone of the state tax system and supports expansion of the tax base, but not rate increases. The committee also makes recommendations on severance taxes, the franchise tax, a possible state income tax, and local finance and taxes.

STATE AND LOCAL FINANCE IN AN ERA OF NEW FEDERALISM. Edited by Michael E. Bell. *Research in Urban Economics/Volume 7.* JAI Press, 55 Old Post Road, Greenwich, CT 06830, 1988. xi, 296 pp. $59.50.

This book reviews the history of efforts to realign revenue raising and spending responsibilities in the 1980s, presents a conceptual framework for analyzing such proposals, evaluates some of the changes that have been suggested and implemented, suggests the types of policy issues and options that should be considered in future efforts to align the federal system, and examines the diversity of the 50 state and local systems and suggests guiding principles for strengthening the federal system. The purpose is to develop a strategy for reassessing major forms of federal and state subsidies to lower levels of government. The book includes essays on the theory, design, and implementation of federal grants-in-aid, aid through federal tax deductibility, tax-exempt bond reform, revenue and expenditure turnbacks, targeting aid to poor people and places, the state role in local finance, state grants-in-aid and municipal-budgets, and a strategy for intergovernmental fiscal reform.

THE UNFINISHED AGENDA FOR STATE TAX REFORM. Edited by Steven D. Gold. National Conference of State Legislatures, 1050 17th Street, Suite 2100, Denver, CO 80265, 1988. ix, 258 pp. Charts, tables.

What is the unfinished agenda for state tax reform? It varies considerably, but four major areas apply in many states; these involve the personal income tax, the general sales tax, business taxes, and local taxation. The essence of tax reform in the 1980s is generally improving the operation of these taxes. This is NCSL's second major publication on tax reform (the first was *Reforming State Tax Systems*), and it focuses on issues raised by the reforms enacted by the states in 1987 and neglected issues that will confront the states in the years ahead. The book is divided into three parts: a review of recent reform activity and how tax systems ought to be structured and administered; nonbusiness taxes—personal income and general sales taxes, and tax relief for the poor; and business taxes—state and local policy and a state value-added tax.

Intergovernmental Relations/Federalism

INTRODUCTION TO FEDERALIST PAPERS FOR THE TWENTY-FIRST CENTURY. *Volume 1. Part One: Strengthening the Role of State and Local Governments in the Federal System. Volume 2. Part Two: More Systematic and Hence Less Complex and Intrusive Use of National Powers. Part Three: The Role of the People.* Task Force on Simplification of the Law, New York State Bar Association, 1 Elk Street, Albany, NY 12207, 1989. 42 pp. and 58 pp.

The first *Federalist Papers* contributed not only to the ratification of the U.S. Constitution but also to wider perception of the grandeur, simplicity, and adaptability of its architecture—and thus the ability of the people to use its structure to best advantage. The task force examined the concepts of the *Federalist Papers* to determine how they might best be used in the next century. Recommendations were made permitting state and local authorities to perform local functions more effectively, reducing state and local interference with constitutionally protected national interests, and options for state and local governments under existing law. The task force also analyzed national powers under federalist concepts, the question of whether the crucial roles of each branch of government can be maintained, and the roles of the private sector.

NEW FEDERALISM: *Intergovernmental Reform from Nixon to Reagan.* By Timothy J. Conlan. The Brookings Institution, 1775 Massachusetts Avenue, NW, Washington, DC 20036, 1988. xxii, 274 pp. Tables.

During the past 50 years, issues of federalism have emerged repeatedly at the center of domestic politics as cycles of federal expansion and political reaction have shaped the policy agenda. This book finds surprising differences in the goals and politics of "New Federalism" reforms proposed by Presidents Nixon and Reagan, relates these differences to theories of the modern state, and underscores how government has become a critical shaper of its own policy environment. Of the two presidents' philosophies of governance, the author says, "One sought more effective and efficient government, the other a reduction of governmental initiative at every level. At a minimum, their reform initiatives have underscored the continuing importance of federalism and intergovernmental relations in the American system of government. . . . Indeed, the design, operation, and performance of most federal programs cannot be understood outside this intergovernmental context."

THE STATE OF STATE/LOCAL RELATIONS IN CONNECTICUT. Connecticut Advisory Commission on Intergovernmental Relations, 80 Washington Street, Hartford, CT 06106, March 1989. 29 pp.

This report is an analysis of the results of the first survey on the state of state/local relations in Connecticut, undertaken by the CACIR to find out what state and local officials think about their interrelationships and to help them observe trends and understand and deal better with the sources of friction between the governments. A high rate of participation indicated a strong concern—especially among local officials—for the state of state/local relations. Intergovernmental problem areas identified in the survey include solid waste removal, unfunded mandates, and other environmental concerns. Municipal officials showed a greater degree of dissatisfaction than others, but they are less dissatisfied today than they would have been five years ago. Still, less than 50 percent of all respondents said they are generally satisfied with the current state of state/local relations. Only about a third were satisfied with the system of formula aid to municipalities. The CACIR plans to continue the survey on a regular basis.

UNDERSTANDING INTERGOVERNMENTAL RELATIONS. By Deil S. Wright. Third Edition. Brooks/Cole Publishing Company, 511 Forest Lodge Road, Pacific Grove, CA 93950, 1988. xv, 511 pp. Charts, tables.

This edition of *Understanding Intergovernmental Relations* differs markedly from its predecessors in several areas—strengthened policy orientation, especially in completely revised chapters on jurisdictional/boundary, distributive, regulatory, and redistributive issues, urban economic policy questions, and federal aid policy implementation; major expansion in coverage of intergovernmental finance; discussion of the basic legal dimensions of national-state and state-local relationships; and incorporation of data on citizen opinions of intergovernmental relations questions. The edition is up-to-date and comprehensive, covering the dramatic political, policy, and program shocks and shifts in intergovernmental relations during the 1980s. These changes "reflected both 'good news' and 'bad news' messages for almost every national, state, and local participant."

State and Local Government

GOVERNING THE EMPIRE STATE: *An Insider's Guide.* Management Resources Project, c/o Rockefeller Institute of Government, 411 State Street, Albany, NY 12203, 1988. xiii, 256 pp. Illus. $9.95.

Decisions regarding the direction, shape, and cost of state services involve the governor and his staff, legislators, state agency leaders, budget specialists, and many others. Deliberations among these officials can be difficult and time consuming, and must address the needs of a variety of competing interests. This complicated

process of public administration is the substance of *Governing the Empire State.* The guide portrays a clear picture of the processes that guide and control state government while offering a balanced look at the organizational environment that shapes policies and programs and how the systems and leaders interact.

LOCAL GOVERNMENT IN THE UNITED STATES. By Vincent Ostrom, Robert Bish, and Elinor Ostrom. ICS Press, Institute for Contemporary Studies, 243 Kearny Street, San Francisco, CA 94108, 1988. xxiii, 251 pp. Charts, tables. $12.95.

Written originally for the Adriano Olivetti Foundation in Milan as part of its studies of local governments throughout the world, this report provides analytical tools and fundamental principles for understanding the structure, functions, and problems associated with contemporary local governments, and how, in operation, they yield successes and failures. The authors discuss some of the diversity and variety of patterns of organization among local entities, 19th and 20th Century local reform efforts, the contemporary debate over metropolitan reform, a theoretical analysis of a coherent system of local government, interorganizational arrangements, the effects of institutional structures on performance, intergovernmental financial arrangements, and problems and prospects for local government in the United States.

THE NEW ECONOMIC ROLE OF AMERICAN STATES. *Strategies in a Competitive World Economy.* Edited by R. Scott Fosler. Oxford University Press, 200 Madison Avenue, New York, NY 10016, 1988. x, 370 pp. $29.95.

The United States is experiencing a period of significant economic change characterized by declining smokestack industry and emerging service and high tech industry. Consequently, state economic development efforts now include the creation and expansion of new industries by providing capital, promoting exports, and encouraging entrepreneurship. Traditional state functions such as education, transportation, and regulation are now viewed as having a major economic impact as states compete for these newer industries. In this report from the Committee for Economic Development, this activism is seen as a fundamental departure from states' approach to economic development, but not from their historical political role in the American federal system. Case studies are presented from Massachusetts, Michigan, Tennessee, California, Indiana, Arizona, and Minnesota, showing that while conditions and approaches vary from region to region, all states will need to develop their own conceptual, strategic, and institutional approaches to the challenges of a competitive world economy.

THE STATE OF THE STATES. Edited by Carl E. Van Horn. CQ Press, 1414 22nd Street, NW, Washington, DC 20037, 1989. x, 235 pp.

During the 1980s, state governments moved to the center of American domestic politics. This change came about through the combined interaction of independent reforms, the federally mandated reapportionment of state legislatures, and the enactment of national civil rights laws. As the states assumed new roles, they also developed more professional staffs, elected better qualified officials, and produced more revenues. States now are arguably the most responsive, innovative, and effective governments in the federal system. Part of the State of the States Project of the Eagleton Institute of Politics at Rutgers University, this collection of essays by nine leading observers of state politics and government includes chapters on federalism, governors, legislatures, courts, bureaucracies, political parties, and campaigns and elections.

THE STATES AND SMALL BUSINESS. *A Directory of Programs and Activities.* Office of Advocacy, U.S. Small Business Administration, 1441 L Street, NW, Washington, DC 20416, 1989. viii, 411 pp.

Many state programs have been established focusing on the needs of small businesses, which are expected to continue to expand in the 1990s. This fifth edition of *The States and Small Business* is designed to help business owners seeking management, financial, or procurement information and assistance at the state level. It is also a resource for state and local officials. The directory identifies state and local programs, agencies, laws, and other activities that aid in nurturing small businesses. Information is included for the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. The listings are divided into five broad categories: small business offices, programs, and activities; governor's advisory council or task force; legislative committees and subcommittees; legislation; and state small business conferences. Appendices list Small Business Development Centers throughout the country and the SBA's 10 regional advocates, and contain a brief report on the status of regulatory flexibility acts in 24 states.

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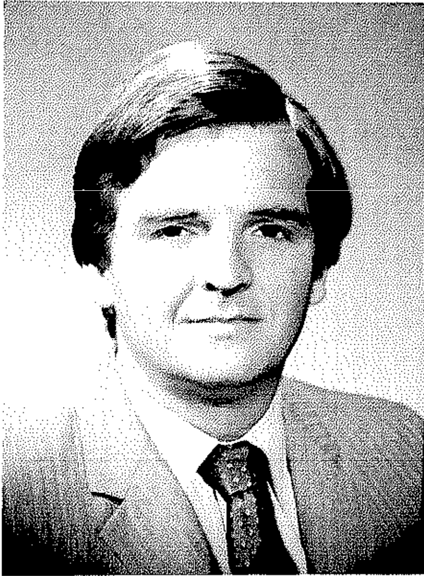
The Chairman's View



Ask ten local officials around the country whether they want to put in a solid waste burning facility, and eight will accuse you of being crazy. Ask ten officials if they want to put in a nuclear generating facility, and they will know you are crazy. Yet, in other countries with federal systems these projects are built with relative ease. The reason why this is so is critical to the strength and viability of local governments in the United States.

Every study I have read suggests that we are facing a solid waste crisis. Two factors explain this crisis. First, as a society we are generating more waste. Second, we are running out of landfills. In the next ten years we must find alternatives to at least 50 percent of our landfills. The question is how. This is the policy issue we face.

The most common approach is the old and tried remedy of command and control. In California the state legislature passed a bill, which was vetoed by the governor, that would have mandated on local governments a 25 percent reduction in solid waste. As usual, no money would follow this bill, just mandates.

If the problems stopped here, we would be in relatively good shape. Larger forces are at work, however. Minneapolis passed a solid waste reduction bill that industry found objectionable. Industry's two-fold strategy was to seek legislation preempting local governments and to threaten a federal case, arguing that a multiplicity of local and state ordinances would constitute a restraint on trade and commerce.

Given the Supreme Court's recent rulings in *Garcia* and *Baker*, the response to such a case in all likelihood would be to say that the Congress has the authority to regulate issues of solid waste in the states and local communities.

The net effect of this approach to solving problems is what some call a zero-sum game: everybody loses. Local and state political processes become less productive because these leaders see little benefit from solving problems that will likely be overridden by the various branches of the federal government.

Is there any way out of this process? To answer this question one must look at the incentives in the decisionmaking system that local officials face in trying to solve critical problems. To site a large prison or solid waste facility in a city or county many times requires a local community to take on risks for a larger community. Many times, local communities do not understand or want to take on such risks. Next, local officials face a decisionmaking process that is full of external actors who have standing to delay and ultimately decide whether the project should go forward. In fact, it is ironic that while state and federal officials many times complain about the fragmentation of authority at the local level, it is the fragmentation of state and federal authority that often discourages local officials from being public entrepreneurs in the best sense of that word. Local officials facing these conditions see only pain and suffering from trying to do the right thing. Long delays, court challenges, and stormy public hearings are what local officials can expect from existing processes. Is it any wonder that local officials increasingly shy away from such projects?

In France, local communities bid for the right to site nuclear power plants because the national government, realizing the risk the local communities will take, underwrites the risk with grants of free electricity to the local community. Maybe it's time that we in the United States began to think in these terms.

Maybe we need to provide local political leaders with two critical ingredients to successful political decisionmaking:

> Greater integrity and integration of federal and state decision processes, so that local officials know that the probability of success is much better than chance.
>
> Underwriting risk in the form of cash grants to local communities, so that political leaders have something to offer citizens in return for the siting of needed facilities.

Such an approach, it seems to me, is much preferable to the command and control approach that ultimately turns into shift and shaft. It upholds the integrity of decisionmaking processes and also creates strong incentives for local political processes to solve problems that we as a society need to solve. For we must understand again that political problems are solved not by management but by allowing political processes to build consensus on how they should be solved. We should start taking a hard look at federal policies to determine where they facilitate and where they hinder the emergence of political problem solving. More importantly, it is high time that local officials began to design their own policy options, educating citizens on their importance and getting state and federal leaders to pass the necessary legislation to give us more self-governance and less command and control.

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