Intergovernmental
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Federalism and Constitutional Rights

ACIR
Has Moved

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Advisory Commission on Intergovernmental Relations

A View from the Commission

States and cities are having increasing difficulty finding the funds to provide traditional services and facilities—police, fire, education, and infrastructure—while also trying to find the additional resources needed to attack the problems of drugs, crime, gang violence, and AIDS that are ravaging so many of our cities. Citizens are struggling with rising education and health care costs and with the necessity for child care as the need for two-parent breadwinners grows and the number of single women heading households increases.

Some mayors want to march on Washington for more money to solve these problems. I don't happen to be one of them. I'd gladly march, however, if it would help convince the Congress and the Administration to honor the clear meaning of the Constitution as to the relationship among governments. It would be quite a task to convince the Congress, preoccupied with reelection and unable to control its own expenditures, to stop trying to control all of the activities and conditions of all citizens. The Congress has attempted to remedy all ills through legislation that requires state and local governments to foot the majority of the costs.

By mandating, preempting, and placing conditions on the spending of our own money, the Congress has effectively reduced state and local governments to mere agents of the federal government. Where does it get that power? It just takes it. Federalism today is an intergovernmental arrangement in which the Congress declares everything to be of national interest, and then requires the states and local governments to raise the money and perform the mandates under threat of civil and, often, criminal sanctions.

The Constitution has been amended a thousand times over without the need to use the cumbersome, constitutionally provided, amendment process. The Congress, the Administration, and the courts have ignored the admonition of Chief Justice Roger B. Taney who said, "If we are at liberty to give old words new meanings—there is no power which may not by this mode of construction, be conferred on the general government and denied to the states." Through the Constitution, the states delegated specific and limited powers to the federal government. Although it should not have been needed, states added the Tenth Amendment providing that powers not so delegated are reserved to the states or to the people. Over the years, the Congress has acquired the habit of acting at will and without regard for constitutional justification, leaving that troublesome technicality, if ever called for, to creative legal assistants. I recently asked a United States Senator, a member of our Commission, if the Senate ever discusses the constitutional justification for a bill. He just chuckled.

The commerce power, which delegates to the Congress the power "to regulate commerce with foreign nations, among the several states and with the Indian tribes," has often been tested in the courts, where the ingenuity of judges and lawyers in construing constitutionality is downright amazing. The evolution of federal jurisdiction over the waters of this nation is a good example of how Congress' commerce power can be expanded through liberal interpretation of the Constitution. Federal jurisdiction once required navigability, but today, the Congress has extended its commerce power jurisdiction over "waters of the United States" to any land upon which rain falls.

After *Garcia* v. *San Antonio Metropolitan Transit Authority* (1985), revisionists don't even have to be so clever in fashioning a constitutional justification because the Supreme Court threw up its hands and said to the Congress, do what you want to do. The Court concluded that the Tenth Amendment offers no guidance on where to draw the line between federal and state power, and that the only avenue left for maintaining some balance among the governments in our federal system is through the election process.

For the Congress, the end now justifies the means, and the Tenth Amendment is dead. When Justice Robert H. Jackson, in *Youngstown* v. *Sawyer* (1952), involving President Truman's steel plant takeover, stated that "necessity knows no law," he was right. For members of Congress, the greatest necessity is reelection. He added that some judges are strongly tempted "to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our republic."

We no longer have a balanced power structure in our federal republic. How do we restore it? ACIR, together with organizations of governors, state legislators, and mayors, has struggled with this issue since *Garcia*. They have suggested changing the Tenth Amendment to require the courts to determine the limits of congressional power. They have suggested changing the amendment process to give states an equal right to amend. Unfortunately, the steam has gone out of those efforts. As people all over the world are trying to gain a measure of local control, fully realizing that it is the best way to ensure freedom, we continue to give more and more power to the central government.

It is obviously difficult to restore the balance to the intergovernmental system, but I am firmly convinced we had better get fired up again.

Robert M. Isaac
Mayor, City of Colorado Springs

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ACIR News

On the ACIR Agenda

At its 106th meeting on September 13, 1991, in New Orleans, Louisiana, the U.S. Advisory Commission on Intergovernmental Relations took the following actions:

Panel on Health Care

A panel of experts briefed the Commission on various intergovernmental aspects of Medicaid. They discussed some of the intergovernmental issues in development and administration, such as the roles of different government sectors, the future of Medicaid, financial issues involving state and local ability to implement effective Medicaid programs, and the relationship between Medicaid, Medicare, and other segments of the national health care delivery system.

The panel included Jane Horvath of the American Public Welfare Association; Michele Melden of the National Health Law Program, Inc.; and Elmer Smith of the Medicaid Bureau, Health Care Financing Authority, U.S. Department of Health and Human Services.

Staff presented a plan for completing projects and recommendations on Medicaid and the intergovernmental aspects of health care reform that would culminate in a national conference. A policy report will be published in 1992. Discussion will continue at the next Commission meeting.

Update on Environmental Decisionmaking

Staff presented draft findings on the environmental decisionmaking study for state and local public works projects. A committee was appointed to assist staff in developing policy options. Appointed to the committee were Mayor Robert M. Isaac, State Senator Samuel B. Nunez, Governor Stan Stephens, and County Commissioner D. Michael Stewart.

Federal Crime Bills

The Commission discussed provisions of crime bills pending in the Congress, particularly provisions that would significantly expand federal powers in criminal justice and the po tential impacts on state and local governments of the Senate's proposed "Police Officers' Bill of Rights."

State Laws Governing Local Government Structures

The Commission authorized publication of the information report *State Laws Governing Local Government Structure and Administration: A Comparison of the Laws in 1978 and 1990*. Melvin Hill compiled the 1978 report, which was published by the Institute of Government at the University of Georgia, and updated the report for ACIR. He conducted a comprehensive 50-state survey of the laws affecting forms of local government, annexation and consolidation, local elections, administrative operations and procedures, financial management, and personnel management. Data collected for this report will be very useful to state and local government policymakers and researchers.

Surface Transportation

The Commission also discussed the proposed House and Senate bills on surface transportation.

Property Taxation

The Commission approved and provided input for a staff proposal for a major study of developments in property taxation. The study will focus on the impacts on property taxation of recent technological innovations, court challenges and decisions, cyclical swings in the United States and regional economies, and voter attitudes about "fair" taxes.

December 1991 Meeting

The next meeting of the Commission will be held on December 6, 1991, in Washington, D.C.

State Support for ACIR

Fiscal 1991 was a record year for state support for ACIR. The Commission would like to thank the following states for their recent support: Minnesota, Montana, New York, North Dakota, Ohio, Pennsylvania, and Utah.

Executive Director Elected To NAPA

ACIR's Executive Director, John Kincaid, has been elected a Fellow of the National Academy of Public Administration. NAPA is a nonpartisan, nonprofit organization of elected fellows formed in 1967 to improve the effectiveness of government. The Academy was chartered by the Congress in 1984, the first such charter since President Lincoln signed the charter for the National Academy of Sciences in 1863.

Previous ACIR members and staff who are NAPA Fellows include Wayne F. Anderson, Norman Beckman, Tom Bradley, William G. Colman, Daniel J. Evans, Arthur S. Fleming, Richard G. Lugar, Allen D. Manvel, Edwin Meese III, Arthur Naftalin, Alice M. Rivlin, Terry Sanford, George P. Shultz, Carl W. Stenberg, Richard L. Thornburgh, David B. Walker, and Robert C. Weaver.

ACIR Staff Changes

Jeffrey S. Fitzpatrick has joined the ACIR staff as an analyst. He has a master of public administration degree from the University of North Carolina at Charlotte.

Ronald Allen, an analyst, has taken a position with the Federal Bureau of Prisons in North Carolina. *Phillip Riggins*, also an analyst, has taken a position with the United States Information Agency.

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Rights: The States and the Federal Government

Daniel J. Elazar

It used to be that mere mention of the word "rights" in connection with the states would bring the immediate response, "What about racial discrimination?" Yet, even in the earliest days of racism in the United States, less than two-fifths of the states legally required or allowed varying degrees of racial discrimination, while over three-fifths provided greater legal protections than the federal government at any given time. In fact, most of what later became landmark federal civil rights legislation in the 1960s was pioneered in the more progressive states years earlier. In many cases, over half the population in the United States was covered under state civil rights laws, admittedly not always well enforced, before the Congress took action.

With the shifting of problems of race from the domain of legal discrimination, we can confront the role of the states in matters of rights protection without the blemish of racism for the first time in American history. What emerges is a picture of state pioneering and activism that is not widely recognized but is very important.

We begin with the very idea of bills of rights. The states were the first to develop such protections, years before the adoption of the federal Bill of Rights which, indeed, was proposed by the Anti-Federalists because of their state experiences. The first bills or declarations of rights, as they were then called, go back to the early days of the American colonies in the 17th Century, to the 1630s and 1640s, long before the famous English Bill of Rights of 1689.

The first "modern" American bills of rights were written into the new state constitutions during the Revolutionary War, beginning with Virginia in 1776. As the citizens of each new state wrote a state constitution, they included declarations of rights, many modeled after the Virginia declaration. Almost all of the provisions later incorporated in the federal Bill of Rights first appeared in those state declarations of rights.

There are several reasons why this is not recognized. Under the tradition of constitutionalism prevalent in the states, most rights enforcement was left to legislatures rather than courts. This was true for the United States as a whole until after the adoption of the Civil War amendments to the U.S. Constitution. Moreover, the kind of court enforcement of individual rights that presently dominates the American scene did not begin until the 1920s.

As rights enforcement passed from the legislatures to the courts, the U.S. Supreme Court took the lead, shattering all precedents and, in many cases, extending rights protections far beyond then-accepted public opinion. This trend reached its peak during the years of the Warren Court, but after the civil rights revolution in the 1960s and the retirement of Chief Justice Earl Warren, the U.S. Supreme Court reduced the pace, though not the scope, of its rights enforcement activities. The state supreme courts, by now open to the idea, began to pick up on issues of rights enforcement. Beginning in a few of the more progressive states, such as California, New York, Oregon, Washington, and Wisconsin, state supreme courts began making rights decisions on state constitutional grounds, going beyond the protections extended by the U.S. Supreme Court on federal constitutional grounds. In the 1980s, this movement spread to many more states, so that today it can be said fairly that rights enforcement is a task actively shared by federal and state courts on both federal and state constitutional grounds.

Prior to the Civil War, federal rights enforcement was confined to issues directly involving the federal government. Indeed, in *Barron* v. *Baltimore* (1833), the U.S. Supreme Court, following the intentions of the Framers, explicitly ruled that the U.S. Bill of Rights did not apply to the states. It was only after the Civil War amendments to the U.S. Constitution that the Court began to apply federal rights protections as a standard to judge state actions. In most cases, though, the Court acted on matters having to do

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The State Foundations of the U.S. Bill of Rights

Donald S. Lutz

One of three assumptions is usually made about the origins of the U.S. Bill of Rights: (1) the Bill of Rights was the original product of a few minds in 1789; (2) the Bill of Rights was an updated American version of Magna Carta; or (3) James Madison simply compiled the Bill of Rights from the suggestions for amendments made by the state conventions that ratified the U.S. Constitution. None of these assumptions is correct. Instead, the Bill of Rights resulted more from a long political process on American shores, a process in which the states and their respective colonial predecessors played a key role.

The Limited Influence of Magna Carta

To deal with the second assumption first, it is possible to demonstrate the relatively minor influence of Magna Carta on the Bill of Rights by simply counting overlapping provisions. The Bill of Rights lists 26 separate rights. Of these 26 rights, only four can be traced to Magna Carta using the most generous interpretation of the language in that famous document (see Table 1). Looking at it from the other direction, only four of the 63 provisions in Magna Carta ended up in the U.S. Bill of Rights. The lack of overlap is not surprising because Magna Carta and the U.S. Bill of Rights had enormously different functions. The former defined the relationship between a king and his barons, whereas the latter placed limits on all branches of a government vis-a-vis an entire citizenry.

Despite the enormous historical importance of Magna Carta, in content, form, and intent, it is only a distant forerunner of the U.S. Bill of Rights. Nor is the overlap with the rest of English common law, although important, that extensive. In addition to the four rights that can be traced to Magna Carta, another right in the U.S. Bill of Rights can be traced to the 1628 English Petition of Right, and two to the 1689 English Bill of Rights.[1] This brings to seven the number of rights among the 26 in the U.S. Bill of Rights that can be traced to a major English common law document. (The highly respected scholar, Bernard Schwartz, is willing to make such a linkage for only five of these seven rights.)

Furthermore, as writers on the English common law always point out, Magna Carta had to be reconfirmed continually, at least 47 times by one count, because the document was ignored for long periods, and its contents were at best honored in the breach.[2] Indeed, despite the guarantees for certain rights contained in major documents of English common law, at the time of the American Revolution, these rights were either not protected at all, or were not protected to the level common in America.[3]

Even in those instances where protection of a right in England approached that in America, there was a fundamental difference in whose actions were limited. Partly for this reason, James Madison said that there were too many differences between common law and the U.S. Bill of Rights to warrant comparison.

> (The) truth is, they (the British) have gone no farther than to raise a barrier against the power of the Crown; the power of the Legislature is left altogether too indefinite. Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question (in Parliament) the invasion of them is resisted by able advocates, yet their Magna Carta does not contain any one provision for the security of those rights, respecting which the people of America are most alarmed . . . those choicest privileges of the people are unguarded in the British Constitution. But although . . . it may not be thought necessary to provide limits for the legislative power in that country, yet a different opinion prevails in the United States.[4]

We should turn to documents written on American shores, specifically, to state and colony documents, for the principal origins of the Bill of Rights. As Table I illustrates, all but the last two rights in the U.S. Bill of

Table 1

First Statement of Rights in U.S. Bill of Rights*

Bill of Rights Guarantee	First Document Protecting	First American Guarantee	First Constitutional Guarantee
Establishment of Religion	Rights of Colonists	Same (Boston)	NJ Constitution, Art. XIX
Free Exercise of Religion	MD Act Concerning Religion	Same	VA Declaration of Rights, S. 16
Free Speech	MA Body of Liberties, S.12	Same	PA Declaration of Rights, Art. XII
Free Press	Address to Inhabitants of Quebec	Same	VA Declaration of Rights, S. 12
Assembly	Declaration and Resolves of the Continental Congress	Same	PA Declaration of Rights, Art. XVI
Petition	Bill of Rights (England, 1689)	Declaration of Rights and Grievances (1765), S.XIII	PA Declaration of Rights, Art. XVI
Right to Bear Arms	Bill of Rights (England, 1689)	PA Declaration of Rights, Art. XII	Same
Quartering Soldiers	Petition of Right (England), S. VI	NY Charter of Liberties	Delaware Declaration of Rights, S. 21
Searches	Rights of the Colonists	Same (Boston)	VA Declaration Rights, S. 10
Seizures	Magna Carta, C. 39	VA Declaration Rights, S. 10	Same
Grand Jury	NY Charter of Liberties	Same	NC Declaration of Rights, Art. VIII
Double Jeopardy	MA Body of Liberties, S. 42	Same	NH Bill of Rights, Art. XVI
Self-Incrimination	VA Declaration of Rights, S.8	Same	Same
Due Process	Magna Carta, C. 39	MD Act for the Liberties of the People	VA Declaration of Rights, S. 8
Just Compensation	MA Body of Liberties, S. 8	Same	VT Declaration of Rights, Art. II
Speedy Trial	VA Declaration of Rights, S. 8	Same	Same
Jury Trial	Magna Carta, C. 39	MA Body of Liberties, S. 29	VA Declaration of Rights, S. 8
Cause and Nature of Accusation	VA Declaration of Rights, S. 8	Same	Same
Witnesses	PA Charter of Privileges, Art. V	Same	NJ Constitution, Art. XVI
Counsel	MA Body of Liberties, S. 29	Same	NJ Constitution, Art. XVI
Jury Trial (civil)	MA Body of Liberties, S. 29	Same	VA Declaration of Rights, S. 11
Bail	MA Body of Liberties, S. 18	Same	VA Declaration of Rights, S. 9
Fines	Magna Carta Sects. 20–22	PA Frame of Government, S. XVIII	VA Declaration of Rights, S. 9
Punishment	MA Body of Liberties, S. 43,46	Same	VA Declaration of Rights, S. 9
Rights Retained by People	VA Constitution Proposed Amendment 17	Same	Ninth Amendment
Reserved Powers	MA Declaration of Rights, Art. IV	Same	Same

* Source: Based on Bernard Schwartz, *The Roots of the Bill of Rights*, Volume 5 (New York: Chelsea House Publishers, 1980), p. 1204. Contrary to Schwartz, this author attributes more to English common law documents. Schwartz attributes the first prohibition on the quartering of troops to the 1683 New York Charter of Liberties instead of the 1628 Petition of Right in England; and he attributes the first prohibition against excessive fines to the 1682 Pennsylvania Frame of Government, whereas it is here attributed to Magna Carta. The difficulty in such attributions lies in the English version always being somewhat different in intent and application, as well as usually being less explicit and sweeping in expression.

Table 2

Amendments Proposed by State Ratifying Conventions Compared with Madison's Original Proposed Amendments*

	MD	MA	NH	NY	NC	PA	SC	VA	Madison
1. Power Derived from the People					X			X	X
2. Government Exercised for the Common Good					X			X	X
3. Life, Liberty, Property, and Happiness					X			X	X
4. Right of People to Change Government	X				X			X	X
5. Number of Representatives		X	X	X	X	X		X	X
6. Congressional Pay Raises				X	X			X	X
7. Religious Freedom	X		X		X	X	X	X	*X*
8. Right to a Free Conscience			X		X	X		X	X
9. Free Speech	X				X	X		X	*X*
10. Free to Write	X				X	X		X	X
11. Free Press	X				X	X		X	*X*
12. Assembly					X			X	*X*
13. Petition and Remonstrance					X			X	*X*
14. Right to Bear Arms			X		X	X		X	*X*
15. Pacifists Need Not Bear Arms					X			X	X
16. No Quartering of Troops in Peacetime	X		X		X			X	*X*
17. No Quartering without Warrant					X			X	*X*
18. No Double Jeopardy	X								*X*
19. No Double Punishment									X
20. No Self-Incrimination					X	X		X	*X*
21. Due Process of Law Guaranteed	X				X			X	*X*
22. Compensate for Property Taken									*X*
23. No Excessive Bail or Fines					X	X		X	*X*
24. No Cruel or Unusual Punishment					X	X		X	*X*
25. No Unreasonable Search and Seizure	X				X	X		X	*X*
26. Speedy and Public Trial					X	X		X	*X*
27. Told Nature of Crime	X				X	X		X	*X*
28. Confronted with Accusers	X				X	X		X	*X*
29. Can Call Witnesses for Own Defense					X			X	*X*
30. Right to Counsel	X				X	X		X	*X*
31. Rights Retained by States or People					X			X	*X*
32. No Implied Powers for Congress	X				X			X	X
33. No State May Violate 8, 9, 11, or 26 above									X
34. Appeal Limited by Dollar Amount									X
35. Jury Cannot Be Bypassed									*X*
36. Impartial Jury from Vicinity	X				X	X		X	*X*
37. Jury Unanimity Required									X
38. May Challenge any Judicial Decision									X
39. Grand Jury Indictment Required		X	X						*X*
40. Jury Trial for Civil Cases	X	X			X	X		X	*X*
41. Separation of Powers Required					X	X		X	X
42. Powers Reserved to the States		X	X		X	X	X	X	*X*

* The first 42 rights are arranged in the order used by Madison in his original version sent to the House of Representatives. Going from left to right, the states are arranged in the order their ratifying conventions produced a list of recommended amendments, from earliest to latest. The proposed amendments for each state are taken from Merrill Jensen, John P. Kaminski, Gaspare J. Saladino, et. al., eds., *The Documentary History of the Ratification of the Constitution* (Madison, Wisconsin Historical Society, 1976), Madison's 42 proposed rights are based on an examination of the original document in the National Archives. When the X under "Madison" is *italicized* it means that the proposed right eventually was included in the U.S. Bill of Rights.

Table 2 (cont.)

Amendments Proposed by State Ratifying Conventions Compared with Madison's Original Proposed Amendments*

	MD	MA	NH	NY	NC	PA	SC	VA	Madison
43. Limit National Taxing Power	X	X	X	X	X	X	X	X	
44. No Limit on State Taxes						X			
45. No Federal Election Regulation		X	X	X	X	X	X	X	
46. Free Elections					X	X		X	
47. No Standing Army	X		X	X	X	X		X	
48. State Control of Militia					X	X		X	
49. State Sovereignty Retained				X		X			
50. Limits on Judicial Power	X	X		X	X	X		X	
51. Treaties Accord with State Law	X					X			
52. Concurrent Jurisdiction for State and National Courts	X								
53. No Infringing of State Constitutions	X			X		X			
54. State Courts to Be Used as Lower Federal Courts			X	X					
55. Can Appeal Supreme Court Decisions				X					
56. Defend Oneself in Court					X	X		X	
57. Civil Control of Military					X	X		X	
58. Liberty to Fish, Fowl, and Hunt						X			
59. Advisory Council for President						X			
60. Independent Judiciary						X			
61. State Courts Used if Less Than X$						X			
62. Trial in State Crime Occurs		X							
63. Judges Hold No Other Office		X							
64. 4-Year Limit on Military Service					X			X	
65. Limit on Martial Law	X							X	
66. No Monopolies		X	X	X	X				
67. Reduce Jurisdiction of Supreme Court		X	X						
68. No Titles of Nobility		X	X	X					
69. Keep a Congressional Record				X	X			X	
70. Publish Information on National Use of Money					X			X	
71. Two-Thirds of Senate to Ratify Commerce Treaties					X			X	
72. Two-Thirds of Both Houses to Pass Commerce Bills					X			X	
73. Limit on Regulation of DC				X	X			X	
74. Presidential Term					X			X	
75. President Limited to Two Terms				X					
76. Add State Judges to Impeachment Process				X					
77. Senate Doesn't Impeach Senators					X			X	
78. Limit Use of Militia Out of State	X			X					
79. Judicial Salaries Not Changed					X			X	
80. Add Requirements for Being President				X					
81. Two-Thirds Vote of Both Houses Needed to Borrow Money				X					
82. Two-Thirds Vote of Congress Must Declare War				X					
83. Habeas Corpus				X					
84. Congress Sessions to Be Open				X					
85. No Consecutive Terms in Senate				X					
86. State Legislature Must Fill Vacant Senate Seat				X					
87. Limit on Power of Lower Federal Courts				X					
88. Congress May Not Assign Duties to State					X				
89. Congress May Not Regulate State Paper Money					X				
90. No Foreign Troops to Be Used					X				
91. State Law Used on Military Bases				X					
92. No Multiple Office-Holding	X			X	X			X	
93. Limit on Bankruptcy Laws				X					
94. No Presidential Pardon for Treason				X					
95. President Not the Commander of the Army	X			X					
96. Official Form for President's Acts				X					
97. No Poll Tax	X								
98. No Suspension of Laws by Executive					X			X	
99. No Separate Emoluments					X			X	
100. Judicial System May Not Be Bypassed					X			X	

Table 3

Madison's List of Proposed Amendments Compared with Provisions in the Existing State Bills of Rights*

	DE	MD	MA	NH	NC	PA	VA	Madison
1. Power Derived from the People	X	X	X	X	X	X	X	X
2. Government Exercised for the Common Good	X	X	X	X		X	X	X
3. Life, Liberty, Property, and Happiness	X	X	X	X		X	X	X
4. Right of the People to Change Government		X	X	X		X	X	X
5. Number of Representatives								X
6. Congressional Pay Raises								X
7. Free Exercise of Religion	X	X	X	X	X	X	X	X
8. Right to a Free Conscience	X	X	X	X	X	X		X
9. Free Speech								X
10. Free to Write						X	X	X
11. Free Press	X	X	X	X	X		X	X
12. Right to Assemble		X			X	X	X	X
13. Petition and Remonstrance	X	X			X	X		X
14. Right to Bear Arms			X		X			X
15. Pacifists Need Not Bear Arms								X
16. No Quartering of Troops in Peacetime	X	X	X	X				X
17. No Quartering without Warrant	X	X	X	X				X
18. No Double Jeopardy				X				X
19. No Double Punishment								X
20. No Self-Incrimination	X	X	X	X	X	X	X	X
21. Due Process of Law Guaranteed	X	X	X	X	X	X	X	X
22. Compensate for Property Taken		X	X	X	X			X
23. No Excessive Bail	X	X	X		X		X	X
24. No Cruel or Unusual Punishment	X	X	X		X		X	X
25. No Unreasonable Search and Seizure	X	X	X	X	X	X	X	X
26. Speedy and Public Trial Guaranteed	X	X	X	X	X	X	X	X
27. Told Nature of Crime	X	X	X	X	X	X	X	X
28. Confronted with Accusers	X	X	X	X	X	X	X	X
29. Can Call Witnesses in Own Defense	X	X	X	X		X	X	X
30. Right to Counsel	X	X	X	X		X		X
31. Rights Retained by States or People			X					X
32. No Implied Powers for Congress								X
33. No State May Violate 8, 11, or 26 above								X
34. Appeal Limited by Dollar Amount								X
35. Jury Cannot Be Bypassed								X
36. Impartial Jury from Vicinity	X	X				X	X	X
37. Jury Unanimity Required								X
38. May Challenge any Judicial Decision					X			X
39. Grand Jury Indictment Required								X
40. Jury Trial for Civil Cases							X	X
41. Separation of Powers Required		X	X	X	X		X	X
42. Powers Reserved to States or People			X	X				X

* The first 42 rights are those Madison compiled and sent to the House of Representatives. The order is that used in his list. The rest of the rights are those found in the state bills of rights, but not in Madison's proposed amendments. Madison's list is taken from the original document in the National Archives. The rights in the state bills of rights are based on the docu-

Table 3 (cont.)

Madison's List of Proposed Amendments Compared with Provisions in the Existing State Bills of Rights*

	DE	MD	MA	NH	NC	PA	VA	Madison
43. No Taxation without Consent	X	X	X	X	X	X	X	
44. Free Elections Protected	X	X	X	X	X	X	X	
45. Frequent Elections Required	X	X	X		X	X	X	
46. No Standing Army Permitted	X	X	X	X	X	X	X	
47. Civil Control of Military	X	X	X	X	X	X	X	
48. No Martial Law (suspending law)	X	X	X		X		X	
49. No Compulsion to Bear Arms				X		X	X	
50. No Ex Post Facto Laws	X	X	X	X	X			
51. No Bills of Attainder		X	X					
52. Habeas Corpus						X	X	
53. Justice Not Sold	X	X	X	X				
54. Location of Trial Convenient		X	X	X				
55. Independent Judiciary	X	X	X					
56. Recurrence to Fundamentals			X		X	X	X	
57. State in Community to Vote		X					X	
58. Equality Is Supported			X	X				
59. Majority Rule Is Protected							X	
60. Frequent Meeting of Legislature	X	X	X					
61. Free Speech in Legislature		X	X					
62. Convenient Location of Legislature		X						
63. Public Office Not Hereditary			X	X			X	
64. No Title of Nobility		X						
65. No Emoluments or Privileges					X			
66. No Taxing of Paupers		X						
67. No Monopolies		X			X			
68. Collective Property Right					X			
69. No Sanguinary Laws		X		X				
70. Right to Common Law		X						
71. Right to Migrate							X	
72. No Poll Tax		X						
73. No Infringing of State Constitutions							X	
74. No Religious Test		X						
75. Support of Public Worship			X	X				
76. Attend Religious Instruction			X					
77. Uniform Support of Religion			X	X				
78. Support of Public Teachers			X					
79. Time to Prepare Legal Defense		X						
80. Rotation in Executive Office							X	
81. No Multiple Officeholding							X	
82. Proportional Punishment				X				
83. Qualified Jurors				X				

ments as collected in Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, DC: Government Printing Office, 1907), 7 vols. When an X under under "Madison" is *italicized* it means that the proposed right eventually was included in the U.S. Bill of Rights.

Rights had been codified in state bills of rights by 1789. Sixteen of the 26 rights were first codified and protected in a document written by a colony's government. Four more were first codified and protected in documents written by the Continental Congress. Thus, Table 1 shows that the Bill of Rights was not simply made up from nothing by a few people in 1789. These rights existed in state and colonial documents.

The Limited Role of the Ratifying Conventions

There is still the third assumption to consider. It is perhaps natural to assume that Madison used the amendments proposed by the state ratifying conventions to produce his own list of proposed amendments for the Congress. After all, eight of these ratifying conventions had together proposed 100 distinct amendments, and it was the opposition to the Constitution represented by these proposed amendments that Madison needed to address. As Table 2 illustrates, the 42 distinct rights contained in Madison's nine proposed amendments, listed in the order he gave them as numbers 1-42 in the table, do seem to be related to what was proposed by the ratifying conventions. However, if we use a crude measure of association to approximate the "density" of the relationship between Madison's list and the proposals of the state ratifying conventions, we are led to a contrary conclusion.

The data on state ratifying conventions in Table 2 constitute a matrix that is 8 cells wide and 100 cells from top to bottom. The more cells that have an X in them for the matrix defined by the top 42 rows (that is, the more state ratifying conventions that proposed one of the amendments that ended up in Madison's list), the denser the relationship between Madison's list and the convention proposals. Thirty-five percent of the cells are filled (116 out of 336) which suggests a modest relationship between the two sets of proposals. However, if we identify the proposed amendments made by the state ratifying conventions that most directly addressed the protection of state sovereignty (numbers 31, 32, and 42-53), only 3 of these 14 proposals made it onto Madison's list; the density for the 14 proposals is 46 percent (51 out of 112 cells). That is, while there is a modest relationship between what Madison put in his list and what the states proposed, Madison avoided almost all of the amendments that the state ratifying conventions wanted most—namely, reinforcements for state sovereignty.

Madison needed to make some connection with state interests to mollify the Antifederalists, but he did not like most of what the states proposed. The tactic he fastened on was to exploit seams in the Antifederalist position. Americans who argued most vigorously against the proposed Constitution offered three different kinds of amendments that were often intertwined and confused. One type of amendment was aimed at limiting the federal government by withholding a specific power. Examples included prohibitions on direct taxes, monopolies, and borrowing money on credit. A second type of amendment altered an institution in such a way as to pull teeth. Examples included making senators ineligible for concurrent terms, giving state and national courts concurrent jurisdiction, and requiring a two-thirds vote in both houses for any bill dealing with navigation or commerce.

A third type of amendment was one suitable for a bill of rights as we now understand it. Examples included protection of the rights to speak, write, publish, assemble, and petition (rights that safeguarded the ability of a people to organize politically), as well as prohibitions on self-incrimination, double jeopardy, excessive bail, and searches without a warrant (rights that defined an impartial legal system). One can see in Madison's selection process a clear inclination toward the third over the first two kinds of amendments.

In effect, then, Madison avoided any alternation in the institutions defined by the U.S. Constitution, largely ignored specific prohibitions on national power, and opted instead for a list of rights that would connect clearly with the preferences of state governments, but would not increase state power vis-a-vis the federal government as defined in the Constitution. The states' concerns about powers and rights were subtly shifted to a focus only on rights.

This finesse upset some Antifederalists, who argued that Madison had "thrown a tub to the whale" (that is, created a distraction to deflect attention from the real issue), but it worked very well for one critical reason: Madison used the bills of rights attached to the state constitutions as his model. The Antifederalists had difficulty opposing Madison's use of this model because it was of their own making and was part of what they were demanding. Madison offered the Antifederalists the "paper barriers" he felt were ineffective in existing state constitutions, and the Antifederalists had either to accept such amendments as useful or to admit the truth of Madison's "paper barrier" argument.

The Centrality of State Bills of Rights

An examination of the state bills of rights written between 1776 and 1787 shows that Madison effectively extracted the least common denominator from them as the basis for his proposed list of amendments, excepting those rights that might reduce the power of the federal government. Almost every one of the 26 rights in the U.S. Bill of Rights could be found in two or three state documents, and most of them in five or more.[5]

The state bills of rights typically contained a more extensive listing than did the national version. Maryland's 1776 document listed 49 rights in 42 sections; Massachusetts (1780) listed 49 rights in 30 sections; and New Hampshire (1784) listed 50 rights in 38 sections.[6] Virginia's (1776) 42 rights and Pennsylvania's (1776) 35 rights came closest to duplicating the content of the U.S. Bill of Rights.[7]

Table 3 shows clearly the strong connection between the state bills of rights and Madison's proposed amendments. If we look at the matrix formed by the 42 rights on Madison's list and the seven state bills of rights, 59 percent of the cells in the matrix are filled (173 out 294) compared to the 35 percent density between Madison's list and the amendments proposed by the state ratifying conventions. If we construct a matrix using the contents of the state bills of rights and the rights on Madison's list that were eventually ratified as the U.S. Bill of Rights, we find that the percentage of the matrix filled rises to 71 percent (129 out of 182 cells), compared with 45 percent (81 out of 182) when comparing the state ratifying convention proposals with the rights ratified as part of the U.S. Bill of Rights.

The density of the relationship between Madison's list and the final Bill of Rights appears to be about 60 percent stronger than either of them is with the list of amendments proposed by the state ratifying conventions. Of course, the members of the ratifying conventions were working from expectations created by their respective state constitutions and bills of rights, which explains the strength of the relationship between their proposals and

Madison's list; but the significantly stronger relationship between the state bills of rights and the U.S. Bill of Rights indicates that, ultimately, the state documents were the basis for the form and content of the national document.

A final comparison between Table 2 and Table 3 indicates another connection between the state and national documents. The listing for the two tables is the same for the first 42 rights because these are, in each case, the rights contained in Madison's proposed amendments in the order in which he proposed them. However, the rights listed after number 42 vary in the two tables depending on the content of the documents being examined.

In Table 3, rights 43-52 have a very high density. They also happen to be addressed successfully in the body of the U.S. Constitution proper, as are 55, 61-65, and 81. In other words, many provisions commonly found in state bills of rights had been addressed in the Constitution and did not need to be included in the Bill of Rights. Also, only a few of these provisions from the state bills of rights are directly contradicted by anything in the Constitution. The importance of the state constitutions for the federal Constitution is thus even stronger than is apparent from an examination of the Bill of Rights alone. If we look at the list of proposals from the state ratifying conventions, however, only eight are addressed in the Constitution proper, while at least 20 of the remaining proposals are directly contradicted by provisions in the Constitution. The state constitutions and their respective bills of rights, not the amendments proposed by state ratifying conventions, are the immediate source from which the U.S. Bill of Rights was derived.

Conclusion

Students of American politics sometimes speak of the states as laboratories for innovative policies that, after an initial trial by states, eventually form the basis for much legislation by the Congress. However, innovation in American rights protection is usually portrayed as beginning with the U.S. Supreme Court and as being imposed on the states. Although there is considerable truth in this view, it holds primarily only for the period of the 1940s to the 1970s. It is worth remembering that the very idea of a written bill of rights attached to a constitution, as well as the content of the U.S. Bill of Rights, were first developed by the states—namely, the people of the original 13 states who wrote our first constitutions.

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Notes

[1] The author has relied on the texts as found in Richard L. Perry, ed., *Sources of Our Liberties* (New York: Associated College Presses for the American Bar Association, 1959), pp. 11-22, 73-75, and 245-250.

[2] See, for example, Perry, pp. 23-24.

[3] See Bernard Schwartz, *The Great Rights of Mankind: A History of the Bill of Rights* (New York, Chelsea House Publishers, 1977), p. 197; as well as Irving Brant, *The Bill of Rights: Its Origin and Meaning* (Indianapolis: Bobbs Merrill Company, 1965), especially chapters 5 and 6.

[4] *Annals of Congress*, Vol. I, p. 436.

[5] The state constitutions and their respective state bills of rights can be found in Francis N. Thorpe, ed., *The Federal and State Constitutions* (Washington, DC: Government Printing Office, 1907), 7 vols.

[6] Thorpe, pp. 1686-1691 (Maryland), 1889-1893 (Massachusetts), and 2453-2457 (New Hampshire).

[7] Thorpe, pp. 3812-3814 (Virginia) and 3082-3084 (Pennsylvania).

Rights: The States and the Federal Government
(continued from page 5)

with "freedom of contract" and "property rights." Generally, these decisions limited the efforts of the progressive states to come to grips with the social problems of the industrial revolution. The court invented the doctrine of substantive due process, which, as applied to the states, limited the possibility of state legislation in such matters as regulation of wages and hours or the organization of unions on the grounds that such actions by their very nature violated the substance of rights. The Court's rulings did much to bring about later federal intervention in those fields.

Beginning with *Gitlow* v. *New York*, the U.S. Supreme Court began to apply other provisions of the Bill of Rights to the states, especially those relating to the First Amendment freedoms, particularly rights of free speech (later expanded to free expression) and church-state issues. Beginning in 1940, but most especially after Earl Warren became Chief Justice of the United States in 1953, the Court began applying other articles of the Bill of Rights to the states, although still selectively, especially rights of privacy and rights associated with criminal justice and obscenity. In so doing, the court sought to achieve greater national uniformity on rights matters. Since its high-water mark in the late 1960s, the Court has had to draw back from some of its more far-reaching decisions to establish national uniformity because they simply did not work. Procedurally, they placed an intolerable burden on the nine justices, who had to sit almost as a local court on matters which required adjudication within the states themselves. From a larger perspective, the Court tried to create national standards where the great diversity of the United States, a pluralism upon which Americans pride themselves, required other solutions.

Even more far-reaching was the Warren court's intervention in state governmental processes. With landmark decisions on reapportionment, beginning with *Baker* v. *Carr* (1962), federal court standards were applied, on Bill of Rights grounds, in an area that had always been left to state political processes. Paradoxically, the political effect of those decisions was to strengthen state government by making it more responsive to the new needs of suburbia. In the 1970s, the Court entered into such traditionally state fields as abortion. These and subsequent rulings leave many constitutional lawyers with the feeling that the Court has turned matters on their head and that the constitutional protections the Bill of Rights was designed to provide for states, as well as individuals, have been consigned to the political process.

Today, both the federal government and the states actively pursue the protection of rights. U.S. Supreme Court intervention is more directed to fine tuning than to massive change, while many state supreme courts keep raising rights standards on state constitutional grounds.

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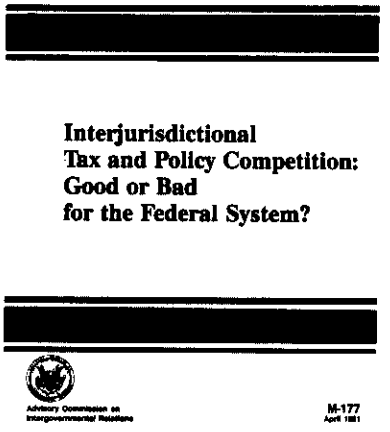

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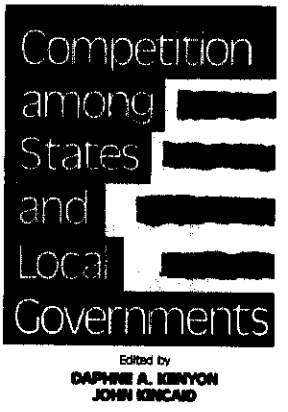

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The Legacy of 19th-Century State Bills of Rights

Kermit L. Hall

In the past decade, state constitutions and their accompanying bills and declarations of rights have stirred considerable attention. Much of this interest stems from a belief that, in the face of an increasingly conservative U.S. Supreme Court, state high-court judges can raise the ceiling of rights well above the minimum floor already provided by the federal courts. Former Supreme Court Justice William J. Brennan and Oregon Supreme Court Judge Hans Linde, for example, have inspired much of this enthusiasm for state constitutional law.[1] They frequently point to 19th century state constitutional history to demonstrate the advantages of local control and state judicial review. Although this call for a revitalization of state-based constitutional rights has considerable merit, 19th century state constitutional history had its darker side, one that raises concerns about how well *national* rights can be protected through state constitutions and bills of rights.

Neglect of State Bills of Rights

The new attention to the state constitutional tradition is welcome, if for no other reason than it has been neglected for so long. The story of our *federal* constitutional history has been explained from the top down rather than the bottom up, a perspective encouraged by the stability of the federal government and the difficulty of generalizing about constitutional developments in 50 states. The United States, after all, has had only one constitutional convention (in Philadelphia in 1787); the states have held more than 230 separate conventions. Since the beginning of the republic, there has never been a three-year period in which at least one state constitutional convention has not met. The 50 states have operated under no fewer than 146 different constitutions, with most states having had two or more. Through 1988, more than 8,000 amendments have been proposed, and more than 5,000 of these have been added to the organic laws of the states.

The bills and declarations of rights connected with these state documents were, after all, the first American charters of liberty. The Massachusetts Constitution of 1780 is the oldest written constitution still in effect in the modern world. The drafters of the federal Bill of Rights, moreover, borrowed extensively from the early state experience, which in turn derived from the strong covenantal tradition in the colonies. That tradition included the Mayflower Compact of 1620, the charters of the original colonies, and later the town covenants of the colonial frontier. All of the rights eventually recognized in the federal Bill of Rights had previously been spelled out in one or more of these early documents.

Limits of U.S. Bill of Rights

State bills of rights continued to be important in the 19th century, despite the presence of the first ten amendments to the new federal Constitution. The framers of the U.S. Bill of Rights had an opportunity to apply those rights protections to the states, but they decided that the Bill of Rights should apply only against the federal government. James Madison, the architect of both the Constitution and the Bill of Rights, was convinced that state constitutions alone were inadequate to protect minority rights. Accordingly, he offered as part of his proposed Bill of Rights an amendment providing that "No State shall infringe the right of trial by Jury in criminal cases, nor the right of conscience, nor the freedom of speech or of the press."[2] Because these guarantees would go into the Constitution, Madison believed that "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."[3] Madison concluded that this judicially enforced national restriction against the states was essential if local majorities were to be prevented from abusing minority rights. The Senate, however, rejected his proposal.

Throughout the 19th century, therefore, the Bill of Rights only limited the federal government. Chief Justice John Marshall sanctioned this view in *Barron* v. *Baltimore* (1833); there the matter stood until ratification of the 14th Amendment in 1868. That amendment granted significant new authority to the federal government to prevent

the states from interfering with due process of law, equal protection of the laws, and the privileges and immunities of citizens of the United States. The Supreme Court, however, concluded that the state action provision of the amendment did not incorporate (that is, bring under the scope of the amendment) the various guarantees of the Bill of Rights. The justices did not embrace the concept of incorporation until the 1920s, and even then, they did so only selectively.

For most of our history, therefore, state bills of rights have been the primary line of defense against governmental invasion of personal liberty. Wrenching any generalizations about these documents from the welter of 19th century state constitutional activity is complicated, in part because it has been so little studied. Still, patterns do emerge, and those patterns caution us against relying too fully on state constitutional authority to safeguard liberty.

Popular Consent and Control as Limits on Rights

Such prudence is in order because popular control and consent were the most important sources of 19th century state constitutions. Constitutions became lengthy documents filled with seemingly endless details that made them and their bills of rights less and less statements of fundamental principles and more and more super-legislation. For example, the decision by Wyoming constitution-makers in 1890 to proscribe certain school textbooks affirmed that whomever controlled the course of constitutional change could also mold constitutionally mandated rights. Politicians frustrated by the regular legislative process turned to constitutional conventions and the amending process to secure social and economic objectives, a development that weakened the rhetorical power of bills of rights. State constitutions became law codes rather than fundamental frames of government.

The comparative brevity of the federal Constitution has been a source of its strength. It is composed of approximately 7,400 words; only the Vermont constitution is shorter, at an estimated 6,600 words. In 1776, the average length of state constitutions was 7,150 words; by 1900, it had ballooned to approximately 29,000 words, somewhat greater than the 27,000-word average today. Nineteenth century state constitutions became remarkably pliable documents of modest age, and they increasingly paled before the federal Constitution as stable representations of fundamental principles and timeless structures designed to distribute and protect rights fairly.

The emphasis on popular consent and control also eroded the independence of 19th century state supreme courts. The justices of the U.S. Supreme Court were appointed for good behavior; their independence enabled them to promote the institution of judicial review and the concept that the justices alone could conclusively interpret the federal Bill of Rights. The state appellate judiciary developed in exactly the other way. Beginning in the 1840s, state constitutional reformers succeeded in making the highest judgeships in most of the states elective offices of limited terms rather than appointive positions held during good behavior. Local majorities were able to control the scope of state bills of rights through the pressures they brought to bear on elected judges as well as the influence they exercised in constitutional conventions and over the amending process.

The result was considerable variety in the rights enumerated in the state documents, often differing interpretations of the scope of those rights from state to state, and even instances when enumerated rights were not enforced or were even litigated. For example, the U.S. Supreme Court heard few direct challenges to freedom of speech and press before World War I involving the states (or the Congress for that matter) because it refused to incorporate the Bill of Rights through the 14th Amendment. Under these circumstances, constitutional protection of speech fell exclusively under state bills of rights. Yet there is only a handful of reported cases dealing with freedom of expression during the entire century, even though every state constitution, in one form or another, protected these rights.[4] The rights that we consider the most fundamental to democratic self-governance today were barely enforced as a matter of state constitutional law in the 19th century. In the pre-Civil War era, for example, many state courts (both North and South) interpreted the speech and press clauses of their constitutions in ways that muzzled abolitionist and anti-slavery advocates.

Religious Freedom

The status of religious freedom during the 19th century offers another example of the way in which state bills of rights often yielded before majority social pressures. As G. Alan Tarr has explained, the new American states did not so much guarantee freedom of religion as regularize the relationship between church and state within their borders.[5] While state-established churches persisted, early constitution-makers framed bills of rights that repudiated the colonial practices whereby government either infringed on rights to worship in faiths other than the established church or collected taxes for the established church. As Tarr reminds us, the liberal Pennsylvania Constitution of 1776 set the standard for the 19th century, although some states adopted it sooner than others. The Pennsylvania document guaranteed that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent."[6]

Early 19th century constitution-makers also recognized the existence of God and the dependence of the state on God's favor. The New Jersey Constitution of 1844, for example, attributed both the civil and religious liberty of the state to the guiding hand of God. This provision, however, offered scant protection to nonbelievers, which is what its framers intended. The prevailing assumption was that government protected religion generally and Protestant Christianity in particular. Religion clauses in state constitutions reinforced the impact on religion of society and government while simultaneously blunting the intrusion by government into the religious sphere. Prevailing interpretations of state bills of rights, therefore, permitted government officials to prosecute blasphemers of the Protestant church and merchants who insisted on doing business on Sunday.

Beginning in the 1850s, the ethnic and religious upheavals associated with immigration inspired state

constitution-makers to reformulate religion clauses. The leaders of the emerging Roman Catholic church in New York City and Boston, for example, charged that public education indoctrinated students in the Protestant ethic to the exclusion of other religious beliefs. Even more important, they complained that public revenues should not be used exclusively for schools that preached only Protestant learning. The Protestant majorities in state constitutional conventions and legislatures did not respond to these demands by redistributing funds; instead, they reformulated the religion and education provisions of their constitutions to take account of the newcomers while maintaining Protestant hegemony. In almost every instance, eastern states adopted constitutional language that made it a matter of right that public funds could not be diverted for denominational purposes and prohibited schools that received those funds from carrying out any religious practices. Where the impact of immigration was less direct, traditional practices continued. In the post-Civil War period, for example, Mississippi retained a constitutional requirement for Bible reading in schools. Constitution-makers in other southern states embraced language that either permitted or required this practice in the schools. The decision to include such an item in their bills of rights suggests that without them, the practices would probably have been prohibited.

Settlers in the trans-Mississippi West carried much of their eastern constitutional baggage with them, including attitudes toward religious freedom. The Oregon Constitution of 1859, for example, closely paralleled its Indiana counterpart, including in almost exact form the latter's bill of rights. As the West matured, however, forces of popular control and consent reacted to local circumstances by leaving their own often unique impact on state bills of rights. The Washington Constitution of 1889 affirmed the independence of the West by declaring that public schools "shall be forever free from sectarian control or influence" and forbidding the expenditure of public money on any "religious worship, exercise or institution" or the "support of any religious establishment."[7]

Minority Rights

Western constitution-makers innovated in other areas as well. Even as a territory, Wyoming in 1869 extended the right to vote to women; by the time the 19th Amendment to the U.S. Constitution was ratified in 1920, 17 states west of the Mississippi River had authorized female suffrage. One by one, the arid states of the far West followed the example of Colorado in 1879, when that state's constitution-makers declared water a public property right to be distributed in the best interests of the people of the state. Taken together, these developments underscore the pragmatic and reactive nature of 19th century state protection of rights.

Popular consent and control also limited the sweep of rights guaranteed to racial minorities. Persons of African-American and Chinese descent suffered because of their minority status, despite the constitutional wording guaranteeing individual liberty. Constitutions drawn in the southern states, for example, included provisions that enslaved African-Americans before the Civil War and segregated them after Reconstruction. Chinese-Americans in the West were systematically denied basic political, social, and economic rights. Popularly elected state supreme court justices in both sections of the country did little to protect either group.

The traditions of constitutionally accepted 19th century discrimination died hard. Only the organized litigation efforts of the American Civil Liberties Union, the International Labor Defense, and the National Association for the Advancement of Colored People in the federal courts produced meaningful change in this century. These organizations developed constitutional strategies that ultimately enlisted the national power of independent federal judges to break African-American and other minorities free of the grasp of oppressive state majorities.

Judicial Independence vs. Popular Control

The contemporary lessons to be drawn from the 19th century history of state bills of rights are two-fold. The first is that an important tradition of rights has existed in the states, and that tradition remains an inspiration today. Despite the majoritarian forces of consent and control and despite the degeneration of many state constitutions into law codes filled with super-legislation, these documents persist as bulwarks of individual liberty. Yet, if the states have been, from time-to-time, creative laboratories for the constitutional protection of individual rights, the 19th century record also reminds us of their limitations. Because state constitutions rested so heavily on popular consent and control, the judicially interpreted federal Bill of Rights developed in this century as the best means of protecting local minorities in the states from politically dominant majorities. Of course, we ignore state bills of rights at our peril, as both Justice Brennan and Judge Linde have so wisely reminded us. Yet we should also heed Madison's admonition of two centuries ago that the federal Bill of Rights interpreted by an independent judiciary provides the best possible protection for liberty in all of the states.

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Notes

[1] William J. Brennan, "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90 (January 1977): 489-504; and Hans Linde, "Due Process of Lawmaking," *Nebraska Law Review* 55 (1976): 197-237.

[2] As quoted in Kermit L. Hall, ed., *"By and For the People": The Bill of Rights in American History* (Arlington Heights, Illinois: Harlan Davidson Publishers, 1991), p. 20.

[3] Ibid., p. 20.

[4] We know more about the fate of the press than of speech in the 19th century. See Timothy W. Gleason, *The Watchdog Concept: The Press and the Courts in 19th Century America* (Ames: Iowa State University Press, 1990).

[5] G. Alan Tarr, "Religion under State Constitutions," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 65-75.

[6] Ibid., p. 66.

[7] Constitution of the State of Washington, 1889, Article 9, section 4.

Federal-State Relations in the Habeas Corpus Process

Daniel E. Lungren

The often arcane process of federal habeas corpus review is an important component of our criminal justice system. Since 1867, this statutory process has permitted convicted state prisoners to ask a federal court to determine whether their constitutional rights may have been violated in the state process that resulted in "custody."

At stake in the habeas corpus process are decisions made by two sovereign court systems. The first entails the state court process that produced a conviction and a sentence of confinement (which also has been upheld by the state supreme court and which the U.S. Supreme Court has decided not to review). This is the direct review process through which the state seeks to enforce its criminal laws.

The second process involves the federal court review of whether any federal rights were violated during the first process. This is the secondary or collateral stage of review.

Not surprisingly, decisions made in this area of concurrent sovereignty can be the source of great friction between the states and the federal government. Repeatedly, the U.S. Supreme Court has emphasized that federal-state relations and delicate federalism interests must be taken into account under this process.

Unfortunately, the federal habeas corpus process is not working as it should. Several studies, including that of a special committee chaired by former U.S. Supreme Court Justice Lewis F. Powell, Jr., have concluded that the process is in dire need of reform because it permits unnecessary delay and repetitious litigation.[1] In the current congressional debate, a critical policy question is how best to reform the habeas corpus process to deal with these problems while being sensitive to federalism concerns.[2]

On July 11, 1991, the U.S. Senate, in an overwhelming bipartisan vote, adopted legislation to redress these problems. One central feature of the reform legislation seeks to strike a proper federalism balance as state court rulings are reviewed in federal court. The "full and fair adjudication" standard involves the proper standard of review of state court judgments that are collaterally challenged by state prisoners in federal court.

As the attorney general of our most populous state, I believe the full and fair adjudication proposal is perhaps the single most important provision in the much needed reform of the federal habeas corpus process. I have been a long-time advocate of this proposal, which is similar to legislation I repeatedly introduced and co-sponsored while a member of the House of Representatives.[3] In 1984, the Senate also approved a similar proposal by a vote of 67 to 9.[4]

The full and fair adjudication standard is central to any genuine reform because it involves the essence, function, and scope of federal habeas corpus review. Specifically, in our federal form of government, this reform proposal raises the issue of what review should be available on a writ of federal habeas corpus filed after the state trial, state appeal, and state collateral proceedings and certiorari review by the United States Supreme Court. Put another way, why should matters fully and fairly decided by competent state courts be subjected to relitigation in the lower federal courts?

There are at least five reasons why the full and fair adjudication standard is an essential part of any congressional reform.

1. Federalism Concerns/Deference to State Courts

The full and fair adjudication standard best fulfills the principles of federalism and respects the role and integrity of state court processes. We cannot lose sight of the fact that in the federal habeas proceeding, the enforcement of state criminal laws by the state in state forums is at stake. Moreover, in our federal form of government,

state courts are co-equal with their federal counterparts and have the same obligation to apply constitutional and federal rights. To permit federal intrusion and independent relitigation in lower federal courts of matters properly and reasonably decided in state court is to relegate state courts to mere fact-finding commissions whose decisions are subject to ultimate review and resolution by federal district courts and courts of appeal.

Simply stated, federal courts are not superior to state courts merely because the habeas corpus statute affords them the last word and opportunity for review. U.S. Supreme Court Justice Sandra Day O'Connor did not become a more competent judge when she made the transition from the state courts to the federal judiciary. Nor did California Supreme Court Chief Justice Malcolm Lucas become less competent when he left the federal bench to join California's highest court. Yet, current habeas corpus proceedings treat state and federal judges as if they were vastly different in their ability to interpret and apply constitutional law. Historically, state courts have been the primary tribunals for adjudicating criminal laws. Federal intrusion into state court rulings should be the exception, not the norm.

The Congress should confront the matter squarely. If it concludes that state courts are unable to apply constitutional rights in as competent a manner as federal courts—a proposition I wholly reject—then it should permit state prosecutors to bring their cases in federal court in the first instance at the trial level. At least this would avoid duplicative rounds of litigation of the same issue.

Former state appellate court judge and now U.S. Supreme Court Justice Sandra Day O'Connor recently discussed the problem in this way:

> When a federal court decides independently a question that has been decided by several state courts, it shows a lack of respect for those state proceedings. Why do we allow relitigation of these claims in federal court? The answer cannot be that two rounds of review are better than one, because federal habeas does not involve the cumulation of judgments. Federal court determination of federal questions in habeas is independent of what the state courts determined, and is dispositive; the state court determinations are rendered a nullity. Independent federal court relitigation of issues that have been *fully and fairly litigated* by state courts may help to achieve a measure of national uniformity, but it seems to me that much of what motivates independent federal inquiry is the notion that federal courts are better at deciding questions of federal law than are the state courts. I wonder if this is necessarily true when it concerns the kinds of federal questions that arise repeatedly in state criminal trials.[5]

As a state judge, Sandra Day O'Connor also noted the importance of enhancing the role of our coequal judicial systems:

> If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on federal constitutional questions where a *full* and *fair* adjudication has been given in the state court.[6]

2. Consistent with Prior Standard of Review

The full and fair adjudication standard would reinstate the standard for federal court review that had long been recognized by the Supreme Court. In one opinion from 1944, the Court noted that a refusal to defer to state courts is justified *only* "where resort to state court remedies has failed to afford full and fair adjudication of the federal contentions raised, either because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate."[7] This rule of deference should apply equally today.

3. Collateral Nature of Remedy

The full and fair adjudication standard is more consistent with the collateral or secondary nature of the federal habeas corpus process. We must keep in mind that federal habeas review occurs *after* several stages of judicial review have already transpired. As one commentator concisely posed the central question: "Must there be further supervision if the Supreme Court has had a chance to review the case [on direct review] and has chosen not to, and if the federal district court finds [on collateral review] that the state has afforded fair process for the litigation of federal rights?"[8]

The full and fair adjudication standard takes into account the secondary nature of the habeas corpus remedy because it respects the trial and appeal in the state forum as the "main event," which has already been subject to certiorari review by the U.S. Supreme Court. As the Court has emphasized in a related context, "It must be remembered that direct appeal is the primary avenue for review of a conviction or sentence. . . . The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials."[9]

4. Federal Habeas Review Retained

Contrary to the assertion of opponents, the proposed full and fair adjudication standard would not deprive federal courts of post-conviction review. Federal habeas review would be preserved in at least two important respects. State decisions would be open to relitigation whenever an adequate remedy for considering and deciding a prisoner's claims had not been provided at the state level. For example, federal review would be available if a state court clearly disregarded applicable federal law. Second, and perhaps most significantly, this determination would be made by the federal habeas corpus court. Consequently, under the full and fair adjudication standard, federal courts could still correct state decisions that were decided unjustly. Under this

standard, federal courts would merely be relieved of the burden of reviewing issues that were fully and fairly adjudicated in state court.

5. Conservation of Judicial Resources

The full and fair adjudication standard conserves already scarce judicial resources for questions that truly warrant reexamination. The standard protects the federal interest in uniform application of constitutional principles at the same time that it respects the role of state courts in our federal system.

The most effective manner to accommodate the divergent interests affected by federal habeas corpus review is under the full and fair adjudication standard. Only in this way may the integrity of state court processes be preserved while criminal defendants retain a right of federal review of those infrequent state court rulings that may encroach on essential constitutional rights. In this way, the original essence, function, and scope of federal habeas corpus review may be attained.

Conclusion

The objective of the full and fair adjudication standard is to avoid relitigation of state court issues fully and fairly resolved, *unless* truly warranted. The 1983 U.S. Senate report put it best:

> Overturning a state judgment—often years later and after a defendant has been accorded the various remedies and layers of review available in the state courts—should require a finding by the federal habeas court that *something more substantial was amiss in the state proceeding than a mere difference of opinion regarding a matter on which judges may reasonably disagree.*[10]

A reasonable "full and fair" standard attains the proper balance in federal-state relations in the habeas corpus area. This standard provides due deference to state court decisions while preserving federal review of rulings in which constitutional violations may have occurred or in which U.S. Supreme Court precedent has been disregarded. In this way, respect is afforded the central role of state courts in criminal justice and in our federal system, and criminal defendants retain a right of federal review for those instances where it is warranted.

Daniel E. Lungren is Attorney General of California and previously served for ten years as a member of Congress on the House Judiciary Committee. This is an edited and updated version of his testimony before the House Judiciary Subcommittee on Civil and Constitutional Rights on June 27, 1991.

Notes

[1] Judicial Conference of the United States, *Report and Proposal of the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases,* August 23, 1989. [Powell Committee Report]

[2] Significantly, the current habeas corpus reforms, including the "full and fair" standard, do not implicate the Great Writ in the Constitution, U.S. Constitution, art I, 9, cl.2, but instead are matters of *statutory* concern. See Powell Committee Report, p. 4, n. 2; see also "Federal Habeas Corpus Review of State Judgments," *University of Michigan Journal of Law* 22 (1989): 901, 918-20. There is no constitutional right of post-conviction federal review of state court judgments. In fact, a *statutory* right to federal habeas corpus for state prisoners did not come into existence until the *Habeas Corpus Act of 1867,* Ch. 28, 14 Stat. 385.

[3] See H.R. 1333, 100th Cong., 1st Sess. (1987); H.R. 1127, 99th Cong., 1st Sess. (1985); H.R. 2238, 98th Cong., 1st Sess. (1983); H.R. 6050, 97th Cong., 2d Sess. (1982); see also H.R. 2151, title VI, 98th Cong., 1st Sess. (1983); H.R. 7117, title III, 97th Cong., 2d Sess. (1982).

[4] S. 1763, 98th Cong., 1st Sess., *Congressional Record,* February 6, 1984, S9778-9795.

[5] "Local Control of Crime." Speech by Justice Sandra Day O'Connor at the Attorney General's Crime Summit, Washington, DC, March 4, 1991. (Emphasis added.)

[6] Sandra Day O'Connor, "Trends in the Relationship between the Federal and State Courts from the Perspective of a State Court Judge," *William and Mary Law Review* 22 (1981): 801, 814-15. (Emphasis in original.)

[7] Ex parte Hawk, 321 U.S. 114, 118 (1944).

[8] Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," *Harvard Law Review* 76 (1963): 441, 524.

[9] Barefoot v. Estelle, 463 U.S. 880, 887 (1983). (Emphasis added.)

[10] S. Rep. No. 226, 98th Cong., 1st Sess. 26 (1983). (Emphasis added.)

State Regulation of Banks in an Era of Deregulation

This policy report examines the key intergovernmental regulatory issues arising from the changing economic and institutional structure of the banking and financial services industry. It reviews the history of bank regulation and analyzes current issues, focusing on the purpose and scope of regulation and the effects of deregulation on the operation of the American system of dual federal-state banking regulation. The report also evaluates and makes recommendations on regulatory proposals.

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State Taxation of Banks: Issues and Options

This is the second report in a two-part study of state regulation and taxation of banking. The study focuses on taxation of banks, including review of constitutional and legal issues, tax policy, defining a taxable entity, net income tax base, administration, and current practice.

M-168 1989 $10

State and Federal Regulation of Banking: A Roundtable Discussion

At the June 1988 Commission meeting, this roundtable discussion was held to offer differing points of view on current legislative proposals concerning bank regulation. The participants were James Chessen, American Bankers Association; David T. Halvorson, New York State Banking Department; Sandra B. McCray, ACIR; Kathleen O'Day, Federal Reserve Board; and Keith Scarborough, Independent Bankers Association of America.

M-162 1988 $5

(see page 57 for order form)

State Supreme Courts in our Evolving Federal System

Ellen A. Peters

Most scholarly writing about the role of supreme courts has taken as its model the Supreme Court of the United States. From the vantage point of federalism, it is time to explore the extent to which the federal model informs the constitutional role of state supreme courts, to inquire whether state supreme courts are merely minor versions, say, third cousins twice removed, of their federal counterpart.

Drawing on the Connecticut experience, I would like to suggest that there are significant systemic differences between the pursuit of constitutional business in the Supreme Court in Washington and in the high courts of the various states. Federal and state courts do not necessarily (1) share the same constitutional heritage, (2) operate with the same degree of accountability for their constitutional decisions, (3) confront the same mix of cases on their judicial agenda, or (4) rely on the same methodology to reach their constitutional decisions.

Our Multifaceted Constitutional Heritage

Connecticut's constitutional heritage, which predates the federal Constitution, begins with a 1636 constitutional document known as the Fundamental Orders. Only in 1818 did Connecticut adopt a constitution in a more familiar modern form.[1] Even today, though, both constitutions continue to guide state constitutional law.

Prior to 1818, late 18th century legal commentators, such as Judge Jesse Root, emphasized the responsibility of civil government, in implementing the constitution adopted by the people, to ensure "the advancement of order, peace and happiness in society, by protecting its members in the quiet enjoyment of their natural, civil and religious rights and liberties."[2] For the protection of these well understood human rights, commentators and courts invoked, without significant differentiation, common law, natural law, and statutory principles, all of which they endowed with what we would today call a constitutional penumbra.

At that time, the only textual basis for individual rights in Connecticut was a statutory declaration of rights in the preamble to Ludlow's Code of 1650.[3] Grounded in the common law, the preamble was viewed as having established an inviolable bulwark for the protection of individual rights. "Abridgements perpetrated by the government were considered void on their face and courts were to refuse to enforce them."[4]

Even after adoption of the 1818 constitution, which contained a formal bill of rights, Connecticut courts continued to look to statutory law as a source of constitutional protection. In *State* v. *Lamme*,[5] we recently concluded that Connecticut constitutional law, like the federal rule of *Terry* v. *Ohio*, permits brief police detentions, without a warrant, for the purpose of an investigation limited in scope and time. The precise legal question was whether such detentions violate the provision, dating back to our 1818 constitution, that "[n]o person shall be arrested, detained or punished, except in cases clearly warranted by law."[6] This provision has no counterpart in the federal Constitution. Inquiry into this section's judicial history led us to the 1837 case of *Jackson* v. *Bulloch*,[7] which had interpreted the section's "solicitude for personal liberty" by reference to pre-1818 statutes as the authoritative "state of our law upon this subject, at the time of the adoption of the constitution of this state, [which] has not since been varied."[8] Since then, statutory safeguards have continued to be recognized for their central role in implementing this state-guaranteed constitutional right of personal liberty.[9]

Connecticut's history of recognized constitutional rights is rooted in common law precepts as well as in statutory provisions. Well before 1818, Connecticut

looked to natural law principles as a source of common law rights to the assistance of counsel, the invalidation of general warrants, the exclusion of confidential statements given by a prisoner to a prosecuting attorney, and protection against double jeopardy. In *State* v. *Stoddard*,[10] that common law history was a basis for our decision that, contrary to the federal constitutional holding in *Moran* v. *Burbine*,[11] Connecticut police must inform a custodial suspect that counsel has made himself available to offer pertinent legal assistance. We relied on a 1796 treatise, written by Zephaniah Swift, an early state chief justice, which described the Connecticut common law as providing, for any person charged with a crime, "every possible privilege in making his defence, and manifesting his innocence, by the instrumentality of counsel."[12]

Our common law history also furnished the background for another recent case, *State* v. *Marsala*.[13] Rejecting the federal rule of *United States* v. *Leon*, we construed our state constitutional provision that "no warrant . . . shall issue without probable cause"[14] to preclude a good faith exception to our state exclusionary rule for searches and seizures that are not properly supported by a warrant.

The multifaceted nature of Connecticut constitutional history provides our state constitutional law with a starting point that is different from federal constitutional law.[15] A constitutional tradition that does not draw hard lines of separation between constitutional, statutory, and common law precepts serves to emphasize that, even in constitutional law, a state court must cast a wide net in searching for guidance to resolve invariably troublesome constitutional controversies.

Our Heightened Awareness of What is Politically Digestible

To a far greater degree than our federal colleagues, state court judges are publicly accountable for their decisions. Everywhere in state government, accountability and interbranch dialogue have become watchwords from which judges are not exempt.

Structurally, in Connecticut, judges are appointed, not for life but for a renewable term of eight years requiring legislative approval.[16] Although judicial reappointments have been the norm rather than the exception, although there is no documented connection between non-reappointment and the rendering of a controversial judgment, the dialogue that accompanies the reappointment process recurrently reminds judges that judicial conduct is publicly scrutinized. Functionally, the judiciary interacts with the legislature not only to negotiate budgetary matters, but also to plan jointly for the administration of justice. Although, like the federal courts, we do not give formal advisory opinions, members of our legislature frequently consult with our judges administratively for advice about the scope and the drafting of policy proposals. The perception that legislators and judges are partners in the business of planning for the welfare of the state reinforces, in some measure, the presumption that legislation is constitutional.

The difference in political climate for Connecticut judges does not mean that judicial independence is lacking. It does coexist, however, with a recognized role for judicial interdependence that may engender a heightened sensitivity to what is "politically digestible."[17]

Our Statute-Dominated Agenda

The significant cases that come to the Connecticut supreme court follow a fairly predictable pattern: the dispositive issue will be a matter of state constitutional law in about 5 percent of the cases and of state common law in about another 5 percent of our cases. All the other cases basically involve statutory construction. A judicial agenda so dominated by statutory construction may well produce a spillover effect on the way in which judges view their role throughout their case load.

In responding to the steady stream of cases involving statutory construction, given the generality of the language in which much legislation is cast, state courts must often turn to purposive interpretation to assist their implementation of the policy that the legislature has sought to put into place. Common law methodology is helpful in this assignment because it reminds judges that statutes, like cases, are inherently fact-bound. That is, the legislature ordinarily responds to perceived evils, to stories of misfortune and unmet needs, which are necessarily factual in their nature. Judges must therefore search for a legitimate accommodation between the purpose of the legislation, to the extent that purpose is ascertainable, and other relevant statutory enactments and common law principles that may be applicable to the facts manifested in the dispute before the court.

The institutional significance of this judicial undertaking is underscored by the sobering reality that, despite recurrent grumbling by legislators, the legislature rarely overturns the judicial construction of a state statute. Courts acting as surrogates for the legislature recognize, therefore, that their decisions, although reversible in principle, are ordinarily final in fact. This sense of responsibility for legislative undertakings may well dampen judicial enthusiasm for constitutional intervention in derogation of legislative authority.

In contrast to the Supreme Court of the United States, although we too have considerable control over our docket, we do not operate within the constraints of certiorari slots. The U.S. Supreme Court, bombarded with applications for review, now grants certiorari in less than 9 percent of its discretionary docket.[18] Hence, the Court must necessarily target, as worthy of certiorari, those cases that have transcendent national importance, especially in the constitutional arena. When so few meritorious appeals can be heard on certiorari, the initial determination that a particular appeal will enable the Court to address a significant constitutional issue must predispose the Court to resolving that appeal on the ground for which certiorari was granted. Scarce judicial resources counsel against "wasting" a certiorari slot by deciding the case on some other basis.

When appeals come to our court, we rarely have preconceptions about the issues that the cases may raise or the bases on which they are best resolved. In a court that values friendly collegial interchange, our collective wisdom exerts pressure to adopt the more limited view to which more judges can subscribe. We are

confident that, guided by a cautionary footnote, important issues not addressed in any one case will return for decision on another day.

Our Common Law Method

Together, these factors commend recourse to a common law methodology, even when we are engaged in constitutional adjudication. This methodology, may have a different focus than that which prevails in the U.S. Supreme Court, where principles used to elaborate constitutional texts in the past "often acquired their weight in public morality and . . . must be reinterpreted in terms of a contemporary understanding of that morality."[19] In federal constitutional law, "public morality" may have independent weight as a source of law separate from, and transcending, common law methodology. In state courts, even an expansive view of common law methodology is unlikely to make politically digestible a construct so overarching and boundless in its scope.

Although the Connecticut experience with constitutional adjudication is as yet too limited to commend itself to any grand exegesis, the record to date bears witness to its common law origins. We have eschewed constitutional confrontation whenever possible. Whether assessing the constitutionality of a state lemon law's limitations on the right to a jury trial[20] or of a statute granting broad visitation rights to grandparents,[21] we have withheld constitutional guidance in the absence of a factual record precisely documenting the grievance the parties wanted resolved.

Because even constitutionally driven statutory interpretation leaves room for legislative dialogue, we have looked long and hard to find a creative accommodation between statutory language and constitutional imperatives. In a recent right-to-die case, we searched for a statutory pattern that, despite inconsistencies within the legislation as a whole, allowed vindication of the privacy rights of a person in a permanent vegetative state.[22] Confronted by a statute that, contrary to recent Connecticut common law cases, extended the permissible scope of counsel's argument about damages, we found a limiting construction that accomplished the purpose of the legislation but recognized the constitutionally grounded judicial prerogative to control the conduct of trials.[23] When, having exhausted the "passive virtues,"[24] we have reluctantly concluded that constitutional intervention is unavoidable, we have tried to craft judgments that are fact-specific and that give guidance for acceptable alternate ways and means to accomplish the ends that the legislature—or the executive—has sought to implement.[25]

In undertaking constitutional adjudication, Connecticut courts have found that history, reality testing, and experience counsel recourse to the methodology of the common law, to prudent step-by-step developments that allow progress to be monitored, complaints to be heard, and mistakes to be corrected. Concerned about our lack of in-depth experience in constitutional law, unburdened by predispositions derived from scarce certiorari slots, and cognizant of our inexperience in discerning the boundaries of public morality, we have chosen not to compete with the U.S. Supreme Court in a search for overarching constitutional principles. A case-by-case approach derived from the common law is, for us, a more appropriate model for dealing with the uncertain reach of state constitutional law.

Ellen A. Peters is Chief Justice, Connecticut Supreme Court. This article is adapted from the Frank Rowe Kenison lecture at the Franklin Pierce Law Center, April 5, 1991.

Notes

[1] Conn. Constitution of 1818, reprinted in B. Poore, ed., *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States* (1878), Vol. 1, pp. 258-266.

[2] Root's Reports (1789-1793), p. xvi

[3] J.H. Trumbull, ed., *Public Records of the Colony of Connecticut* (1850), p. 509.

[4] C. Collier, "The Connecticut Declaration of Rights before the Constitution of 1818: A Victim of Revolutionary Redefinition," *Connecticut Law Review* 15 (1982): 87, 94; see also H. Cohn and W. Horton, *Connecticut's Four Constitutions* (1989), p. 18.

[5] 216 Conn. 172, 579 A.2d 84 (1990).

[6] Conn. Constitution, art. I, 9.

[7] 12 Conn. 38 (1837). The case relied on the Connecticut constitution to hold that a slave, brought to this state by her Georgia slaveowner, was a free person here.

[8] 12 Conn. 43.

[9] See, e.g., State v. Carroll , 131 Conn. 224, 227-29, 38 A.2d 798 (1944).

[10] 206 Conn. 157, 537 A.2d 446 (1988).

[11] Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed. 2d 410 (1986).

[12] Z. Swift, *A System of Laws of the State of Connecticut* (1796), p. 399.

[13] 216 Conn. 150, 579 A.2d 58 (1990).

[14] Conn. Constitution, art. I, 7.

[15] It is this multifaceted heritage that provides a principled basis for deciding to exercise our own constitutional judgment, even when the U.S. Supreme Court has reached a different result. Federal interpretations of the U.S. Constitution, although often persuasive on their merits, cannot provide compelling precedents for our interpretation of our own constitution, any more than state statutory constructions elsewhere can bind us as we construe enactments of our own legislature. See E. Peters, "State Constitutional Law: Federalism in the Common Law Tradition," *Michigan Law Review* 84 (1986): 583, 593.

[16] Conn. Constitution, art. 5, 2-4.

[17] Wellington, *Interpreting the Constitution* (1990), p. 19.

[18] See 58 U.S. Law Week 3144 (1990).

[19] Wellington, p. 85.

[20] Motor Vehicle Manufacturers Association of the United States, Inc. v. O'Neill, 203 Conn. 63, 523 A.2d 486 (1987).

[21] Lehrer v. Davis, 214 Conn. 232, 571 A.2d 691 (1990).

[22] McConnell v. Beverly Enterprises Connecticut, Inc., 209 Conn. 692, 553 A.2d 596 (1989).

[23] Bartholomew v. Schweizer, 217 Conn. 671, 587 A. 2d 1014 (1991)

[24] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2d ed.) (New Haven: Yale University Press, 1986).

[25] See, e.g., French v. Amalgamated Local Union 376, UAW, 203 Conn. 624, 526 A.2d 861 (1987).

Intergovernmental Digest

Mandate Reform Bills Introduced in Congress

On September 16, 1991, 17 sponsors in the House of Representatives introduced H.R. 3344 to establish a National Commission on Intergovernmental Mandate Reform. This bipartisan commission would have 15 members representing the federal, state, and local governments and other interests. It would have three years to document all federal mandates, estimate their costs, establish criteria for totally or partially eliminating mandates or reforming them to relieve financial burdens on state and local governments, and make recommendations to the President and the Congress.

Earlier, Rep. Doug Barnard, Jr., of Georgia introduced bills on the same subject. H.R. 1546, known as the point of order bill, and H.R. 1547, the reimbursement bill, are designed to ensure that federal legislation imposing costs on state and local governments is not passed without analysis and debate of their consequences. These bills would strengthen the analysis of costs that would be shifted to state and local governments, require reimbursement of certain costs, and give any House member the right to raise a point of order against most bills that would impose unreimbursed costs.

Mandate Relief Enacted in New York

The New York legislature passed a "Mandate Relief Package" in the final hours of the 1991 legislative session. The bill (S.6325/A.8499B) targets the more than 2,700 state mandates to local governments, and addresses other local government finance issues and problems as well. Major provisions (1) make it easier to fund state and federal mandates by authorizing new local revenue sources and liberalizing municipal bonding for those purposes; (2) remove certain smaller projects from mandated requirements by increasing the thresholds at which mandates take effect; and (3) loosen administrative requirements, including deadlines for filing local laws, waiver of presentence investigations by mutual consent, and the use of funds for equipment replacement rather than repair allowances for public assistance recipients where cost effective.

Provider Assessments

In response to rapidly rising Medicaid costs, several states have resorted to the use of provider assessments, which include specific taxes imposed on selected health care providers and voluntary donations by these providers. These funds are then used by the state to induce federal matching payments under Medicaid. According to the National Governors' Association, approximately 30 states use some form of provider assessments. Estimates indicate that at least $2.5 billion in federal matching Medicaid expenditures have resulted from these taxes and donations. OMB Director Richard Darman has labeled provider assessments a "sham" used by the states to shift more of the costs of Medicaid from the states to the federal government. On September 12, 1991, the Health Care Financing Administration issued "interim final" regulations prohibiting the use of specific provider taxes; the congressional moratorium authorizing voluntary donations is scheduled to expire in January 1992. States fear that the loss of this financing flexibility will result in reductions in medical services.

Negotiated Rulemaking Taking Hold

The *Negotiated Rulemaking Act of 1990* (PL 101-468) encourages all federal agencies to use negotiated rulemaking to bring parties together before draft regulations are formulated. Two recent cases show how this process can work.

In August 1991, the Administration announced the successful conclusion of negotiations on regulations under the *Clean Air Act of 1990* concerning clean fuels. The U.S. Environmental Protection Agency, oil companies, and environmental protection advocates agreed on the technical issues and overall structure of regulations to phase in cleaner burning alternative fuels for internal combustion engines over the next several years. Agreement was reached with the help of an impartial mediator.

In September, President George Bush highlighted the agreement between EPA and the Navaho Generating Station 80 miles northeast of the Grand Canyon. Under this negotiated agreement, sulfurous emissions from the plant will be reduced by 90 percent.

With respect to states, the National Institute for Dispute Resolution (NIDR) makes grants "to build statewide offices of mediation to help resolve disputes over the development, implementation, and enforcement of public policy." NIDR can be contacted at 1901 L Street, NW, Suite 600, Washington, DC 20036, (202) 466-4764.

Copyright Protections for State and Local Data Bases?

The U.S. Supreme Court held in *Feist Publications, Inc.* v. *Rural Telephone Service Co., Inc.* (1991) that the white pages of a certified telephone public utility company's directory are not entitled to copyright protection because they contain facts that do not originate with an act of authorship. There must be at least a modicum of creativity. Subsequent to *Feist* and incorporating its rationale, a federal appeals court in New York, while acknowledging that yellow page business directories show enough creativity to warrant copyright protection, has held that such directories will now face higher standards for proving copyright infringement.

Feist does not affect federal government products because copyright protection is not available, but the decision may affect state and local governments, whose employees may produce original works, the copyrights for which could be owned by the governments as employers. Given that governments have amassed large amounts of information, much of it computerized, the possibility of copyright protection and now the portent of copyright erosion are significant issues. A profoundly important consideration is whether state and local data bases, such as geographic information systems (GIS) and those for computer-assisted mass appraisal (CAMA), constitute public records in their entirety. For any portions not in fact public, issues associated with copyright protection, and possibly cost recovery, need reexamination.

Anti-Crime Proposals before the 102nd Congress

Anti-crime bills moving through the Congress continue two intergovernmental trends in criminal justice: increased federal involvement and more emphasis on law enforcement. Tougher sentencing, extension of the death penalty to 51 crimes, and targeted federal law enforcement will allow federal authorities to move more criminal prosecutions out of state and local systems into the federal criminal justice system. In addition, tough federal criminal laws create political pressure for states to enact equally stringent laws. In contrast, proposals to limit criminal appeals and to relax restrictions on introducing evidence will shift some individual rights protection from the federal Constitution to state constitutions.

Although the bills include some treatment programs, they are weighted toward law enforcement. Even a scholarship provision can be repaid only by working in a state or local police force after graduation, not by working as a probation officer, correctional guard, or court employee. The Senate's proposed National Commission to Support Law Enforcement contains no judicial or correctional representation, nor is there any provision for appointing state and local elected officials.

Two significant mandates involve background checks and police rights. Although the legislation may provide $100 million annually to help states computerize their records to allow for instant background checks, if a state fails to computerize within six years, it may lose half of its federal law enforcement funds. The Senate passed a "Police Officers' Bill of Rights Act," which sets standards for internal investigations of police activity. The enforcement provision states that, "The sovereign immunity of a State shall not apply in the case of a violation of the rights afforded by this section." The bill would explicitly preempt state laws or collective bargaining agreements, unless they are "substantially similar to the rights afforded by this section."

Rural America Council Examines Federalism

The President's Council on Rural America is holding seven hearings across the nation to assess federal rural development programs. Of particular interest are the roles of the local, state, and federal governments in developing rural areas, regional cooperation, and intergovernmental relations. The Council is an outgrowth of President George Bush's 1990 Rural Development Initiative. It is is chaired by Winthrop Rockefeller, former governor of Arkansas, and expects to forward final recommendations to the President later this year.

Peace Corps Provides Education Resources

The Peace Corps has developed innovative programs designed to put volunteers to work on some of the nation's toughest problems. The goal of two new programs is to improve the quality of education in the United States.

Through the World Wise Schools program, on-site volunteers send artifacts, letters, photographs, and other educational materials to classrooms, which are designed to teach students about other countries and cultures. The goal of the program is to promote the study of geography, stimulate international awareness, and encourage voluntarism among young Americans. More than 60,000 U.S. students participate in this program.

The Fellows/USA program consists of former volunteers who are pursuing masters degrees funded through scholarships. These former volunteers teach in America's inner cities, rural mill towns, and Indian reservations. Twenty universities are participating in the Peace Corps Fellows/USA program, and the program is expanding to the fields of public health, the environment, business, and community development. For more information, contact the Peace Corps Office of Intergovernmental Affairs at (202) 606-3373.

Court Cases: Proposition 13 and Mail-Order Sales Tax

The U.S. Supreme Court has agreed to hear two cases of considerable interest to state and local governments. In *Nordlinger* v. *Hahn*, the court agreed to hear a challenge to California's Proposition 13. Under this 1978 amendment to the California Constitution, property tax assessments were rolled back to their 1975 levels, and year-to-year increases in those assessments were limited to 2 percent. The annual increase in assessments was effective until the property changed ownership, and the property was then assessed at current levels, with future increases limited to 2 percent of the higher base. The plaintiff argues that Proposition 13 has resulted in large tax disparities between long-term owners and recent buyers of similar houses. The suit was rejected by the California Court of Appeals, and the California Supreme Court refused to hear the case.

In *Quill Corporation* v. *North Dakota*, the court agreed to reconsider the 25-year-old decision in *National Bellas Hess* v. *Illinois Department of Revenue*. In *Bellas Hess*, the Court ruled that the Constitution prohibits states from taxing sales by out-of-state companies that do not have a physical presence (nexus) in the state. In recent years, mail order and direct marketing activities have increased significantly. States argue that their home-based retail firms have to collect the state sales tax and, therefore, are at a competitive disadvantage relative to direct marketers who are not required to collect these taxes. The states further contend that considerable revenue losses accrue as a result of this disparate treatment (estimated at $3 billion).

Several states revised their statutes to make sales by these out-of-state retailers subject to a use tax, the counterpart to the sales tax levied on in-state firms. The North Dakota Supreme Court ruled that circumstances have changed sufficiently that the *Bellas Hess* decision should no longer be binding. The North Dakota Supreme Court held that the Quill Corporation, with no "bricks and mortar" presence in North Dakota, could be forced to collect a use tax on goods sold to customers in the state. North Dakota is supported in a brief by 22 other states that have asked the Court to reconsider *Bellas Hess*.

Supreme Courts in Conflict: The Drama of Disagreement

Stanley H. Friedelbaum

With the advent of the Burger Court in 1969 and the opening of an era of judicial moderation, fears were expressed by some observers that the libertarian advances of the Warren years (1953-1969) would be reversed or significantly weakened. Consequently, a "new" judicial federalism, occasioned by the revitalization of state constitutional law, began to take on the aura of reality. There was increased recognition in the early 1970s that a reliance on state bills of rights might be required, though perhaps not preferred, if the U.S. Supreme Court embarked on a deliberate course of setting aside recent precedents. That such negative results never came to pass either in the numbers predicted or to the extent expected did not deter a conscious, albeit halting, return to the states as a preventive measure, if not an act of political faith.

To the surprise of many court watchers, a renewed emphasis on state constitutional law met with broad approval from the U.S. Supreme Court's liberal and conservative members. The notion of state decisions predicated on independent and adequate state grounds is well known. Assuming that all preconditions have been fulfilled, a state court holding so premised is essentially immunized from Supreme Court review. Intervention by the nation's highest court would not only be untoward; it would also be in the nature of an advisory opinion long precluded by convention and, as the Court has strongly intimated, by the Constitution itself. Thus, judicial federalism should not be viewed as a novel invention but as a descriptive term for established practices that have been revived in a contemporary setting.

A recent New Jersey refuse disposal case, which involved search and seizure law and privacy rights, offers a vivid example of a clash between opposing outlooks in the supreme courts of the nation and a state. Salient differences, as represented and explored by the state court, provide an unusual glimpse of divergent philosophies set out with glaring candor. Of close to 500 cases nationwide in which state courts have construed their state constitutional provisions to provide guarantees more substantial than their federal counterparts, few have reflected the artlessness displayed here.

Is Curbside Trash Private?

The problems associated with solid waste management, it appears, are not limited to such issues as the declining availability of landfill sites and assessments of the utility and environmental impact of incinerators. A much-publicized curbside disposal case, *California* v. *Greenwood* (1988),[1] decided by the U.S. Supreme Court, had sustained against Fourth Amendment challenges a police search of garbage left out for collection. By contrast, a New Jersey case, *State* v. *Hempele* (1990),[2] produced opposite results. Based on provisions of the state constitution analogous to the Fourth Amendment, the state high court found official police action involving a similar seizure to be unconstitutional. In both instances, the waste materials sought and subsequently examined led to drug-related prosecutions. The strikingly different outcomes of the two cases reflected, in dramatic fashion, the increasingly familiar dynamics of judicial federalism as it has come to manifest itself during the past several decades.

All the same, it continues to be a noteworthy, if not wholly unexpected event, when a state supreme court rejects the findings of the U.S. Supreme Court in a case remarkably similar in its factual details. The event is especially impressive when no more than two years have elapsed since the federal case was decided and no more than two members of the nation's highest court have dissented.

The *Greenwood* Decision

At issue in *Greenwood* were the reach and magnitude of a reasonable-expectation-of-privacy analysis derived from a series of precedents dating from the Warren Court era. The case involved the controversial exclusionary rule, so-called abandonment theory, and, most significantly, the nature of privacy interests within the constitutional framework. It was the latter, tied to narrow interpreta-

tions of the Fourth Amendment, that prompted a restrained view of individual rights by the U.S. Supreme Court and an enlargement of the permissible confines of police intrusion. Therein lay the core of the dilemma and the marked differences in judicial outlook in Washington and Trenton.

Justice Byron White, who wrote for the Court in *Greenwood*, readily admitted that the states are free to impose more rigorous state constitutional restraints on police conduct than those prescribed in federal standards. But, within the contours of the Fourth Amendment, he declined to extend any protection to trash set out on public streets for collection. A warrantless search and seizure was not proscribed, White declared, because those accused had failed to demonstrate conclusively a "subjective expectation of privacy in their garbage that society accepts as objectively reasonable." Instead, he observed, the trash had been exposed to general public scrutiny by those who placed it at the curb. It followed that the police were not precluded from inspecting the contents any more than were members of the public whose inquisitiveness might be attributed to myriad motives.

Justice William Brennan, joined by Justice Thurgood Marshall, dissented in *Greenwood*. Brennan took exception to the Court's assertion that the respondent had relinquished any privacy expectation regarding the materials left for disposal. In language reminiscent of natural law philosophy, Brennan predicted that society would be "shocked" to learn of the Court's restricted conception of privacy rights; that the scrutiny sanctioned was "contrary to commonly accepted notions of civilized behavior"; and that the theory espoused was contrary to the Framers' understanding of "unreasonable searches" within the meaning of the Fourth Amendment. No less protection extends to garbage bags set out for waste disposal, Brennan averred, than to personal effects transported from place to place. The expectation of privacy remains undiminished regardless of the contents of the containers selected, he said, and dilution of that expectation endangers individual liberty generally and disregards an exacting adherence to the Fourth Amendment's privacy requirement.

Hempele

The New Jersey Supreme Court, in *State* v. *Hempele*, rejected the U.S. Supreme Court's findings in *California* v. *Greenwood*. In a 5-to-2 ruling, a majority relied, as it has on previous occasions, on counterpart provisions of the state constitution purportedly affording citizens more expansive privacy rights than those found in the Fourth Amendment. The majority made it clear that the federal cases cited were being referred to only for advisory reasons, not to compel the result reached by the court. This statement no doubt was included to ensure that the requirements of *Michigan* v. *Long* (1983)[3] had been followed scrupulously. Its wording connoted that the state case was grounded in documented explicitness and, therefore, that the "plain statement" rule formulated by the U.S. Supreme Court had been met. Otherwise, the possibility always existed that the U.S. Supreme Court might have been persuaded to review and probably reverse the state court's decision.

By reference to specific examples, the New Jersey court emphasized the personal nature of trash and how much it reveals about the intimate life and habits of those who place it at the curb for disposal. Justice Robert L. Clifford, who wrote for the court, asserted that a "free and civilized society should comport itself with more decency" than to permit the exposure of "vestiges of a person's most private affairs." Surely the state should not be entitled to meddle without adequate cause into waste products of its citizens' lives. "There is a difference," as the court perceived it, "between a homeless person scavenging for food and clothes, and an officer of the state scrutinizing the contents of a garbage bag for incriminating materials."

Nevertheless, the marked departures from *Greenwood* injected elements of uncertainty into the decisional calculus. Clifford took pains to repeat the traditional rationale underlying the doctrine of independent state grounds. He stressed that the U.S. Supreme Court establishes no more than the "floor" of constitutional protection; that, if the nation's highest court serves as a "polestar" of constitutional doctrine, the state court still must bear ultimate responsibility for guaranteeing the rights of its citizens, and that, in fact, historic considerations militate in favor of state constitutions as the principal sources safeguarding individual liberties. To avoid the possibility, however remote, that state grounds might not emerge unequivocally as the controlling basis of the decision, Clifford made plain that federal precedents served only for purposes of guidance.

Other curious, if not always trifling, asides appeared in the judicial text and its lines of reasoning. Although it served little purpose, either for law enforcement agents or for doctrinal symmetry, Clifford differentiated the essentials of search and seizure. The latter apparently did not compromise privacy interests, and so the police needed no cause to justify seizure. It was the nature of the search that remained critical, and that search required a warrant based on probable cause. In addition, to assure critics that recently introduced recycling programs would not be unduly encumbered, Clifford, by way of dicta, suggested that the rigorous warrant requirements associated with criminal investigations need not extend to compliance searches under environmental recycling laws. Such inspections, he noted, might not be as intrusive as searches seeking to sustain possible charges of violations of criminal law.

If the majority opinion at times disclosed a defensive tone, Justice Marie Garibaldi, in dissent, took issue not only with the broadly based expectation of privacy espoused by the court but also with presumed encroachments on accepted principles of judicial federalism. Regarding the former, she indicated her inability to discover a "unique" New Jersey state attitude toward trash. Garibaldi found the court's plea for enhanced privacy protection of trash not justified by "sound policy reasons."

To like effect, Justice Daniel O'Hern noted his disagreement with the majority's wide-ranging version of privacy interests, although he acknowledged his revulsion

to the idea of persons "snooping around" in his own garbage. His sole concession (and the reason for a limited concurrence) was that the U.S. Supreme Court might have "drawn the line a bit too far" in *Greenwood*. Perhaps more significantly, O'Hern went on to join Garibaldi in objecting to the state court's cavalier treatment of the U.S. Supreme Court's ruling. Thus, both dissenters conveyed misgivings concerning the majority's views, which, weighed on a nationwide scale, took on exceptional scope and breadth.

The Legitimacy of Judicial Federalism

As O'Hern phrased it, *Hempele* was "not about garbage" but "about the values of federalism." Indeed, it is the latter that will be debated in New Jersey and elsewhere as contemporary judicial federalism continues to develop. Excessive provincialism has long been one of the banes of a growing progression of cases that premise "advances" on state constitutional language, often replicating or closely paralleling their federal counterparts. In New Jersey, departures from federal norms at times have been more expansively adaptive, venturesome, and controversial than in most other states.

Fears of what O'Hern referred to as "personaliz[ing] constitutional doctrine" and what Garibaldi termed breaches of accepted "divergence criteria" were expressed in the *Hempele* dissents. There were somber overtones of old-style, purposeful evasion, recalling state court reactions to the early school desegregation cases of the Warren Court years. Blatantly contrary results, like those in *Hempele*, threaten to squander reserves of public trust and good will that sustain occasional thrusts of judicial activism. The benefits to be gained do not always outweigh the losses of influence and status that may be incurred and that may endanger the ever fragile fabric of judicial review.

Lest it be assumed that overt conflict typifies judicial federalism, a cursory examination of the case law belies such a supposition. Most state decisions still parallel U.S. Supreme Court judgments, often with little more than trifling changes needed to adapt to altered factual contexts. Where departures do occur, these tend to be inconsiderable or to modify rather than to promote abrupt deviations from accepted precedents. Other options, apart from conflict, remain available.

A cooperative framework of mutual interaction emphasizes reciprocity and a process of drawing on the contributions of federal and state courts. Examples of effective collaboration attest to the opportunities afforded creative judges in a system of judicial federalism. Unlike the conflict model, stress is placed on concerted actions toward common objectives rather than on discord as the dominant theme.

In *San Antonio Independent School District* v. *Rodriguez* (1973),[4] the U.S. Supreme Court rejected efforts to prompt a continuing resort to the federal courts as a means of invalidating inequitable state school funding schemes. Justice Lewis Powell, who wrote for the Court, declined to designate in constitutional terms a presumed right to an education as fundamental or to treat poverty as a suspect class. Instead, he included a "cautionary postscript" raising doubts concerning financing provisions while encouraging the states to devise reforms and to proceed toward their implementation. Without intrusive federal initiatives or mandatory prescriptions, a number of states, initially California and New Jersey, introduced major alterations in their school funding statutes, often with far-reaching ramifications for taxation and aid distribution.[5]

Less positively conceived and motivated, judicial choices of federal or state constitutional predicates may reflect a "raw" result orientation and, in effect, projections of the political impact and possibly adverse effects of difficult cases. When in *Bakke* v. *Regents of University of California* (1976),[6] the California Supreme Court elected to posit its findings on the 14th Amendment rather than on the state constitution, it was difficult to avoid the conclusion that judicial "buck passing" had been a paramount consideration. To like effect, the New Jersey Supreme Court's selection of the Fourth Amendment in a youthful drug offender case, *State in the Interest of T.L.O.* (1983),[7] strikes the observer as a similar effort to shunt responsibility to the U.S. Supreme Court. For less obvious reasons, the New Jersey court, despite an activist tradition, had previously turned to the federal Constitution as a basis for sustaining the state's Sunday closing laws in *Vornado, Inc.* v. *Hyland* (1978).[8] Comparable blue law statutes had been set aside elsewhere by reference to state constitutional provisions.

Conclusion

Overt conflict, as in *Hempele*, furnishes elements of drama that attract widespread attention and interest. However, the choices associated with judicial federalism are multifarious in their reach and effects. Indeed, they rank among a profusion of feasible alternatives open to adroit judges. The American system of federalism concededly is intricate and at times perplexing, albeit ever-challenging and, if constructively administered, richly rewarding in its scope and variety.

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Notes

[1] 86 U.S. 35 (1988).

[2] 20 N.J. 182, 576 A.2d 793 (1990).

[3] 63 U.S. 1032 (1983).

[4] 11 U.S. 1 (1973).

[5] Additional examples of a two-directional process appear in Stanley H. Friedelbaum, "Reactive Responses: The Complementary Role of Federal and State Courts," *Publius: The Journal of Federalism* 17 (Winter 1987): 33-50.

[6] 53 P.2d 1152 (Cal. 1976).

[7] 63 A.2d 934 (N.J. 1983).

[8] 90 A.2d 606 (N.J. 1978).

Coordinating Water Resources in the Federal System: The Groundwater-Surface Water Connection

All types of governments have roles to play in improving water resource coordination. One of the most important of those roles is to change laws and policies that obstruct more efficient resource use. A consensus favoring coordinated use of groundwater and surface water—conjunctive management—has arisen in the past decade. This policy report contains contrasting perspectives on groundwater use and management, and an analysis of institutional arrangements and intergovernmental relations. The report identifies barriers to better coordination and suggests changes that the federal and state governments can make to climinate those barriers.

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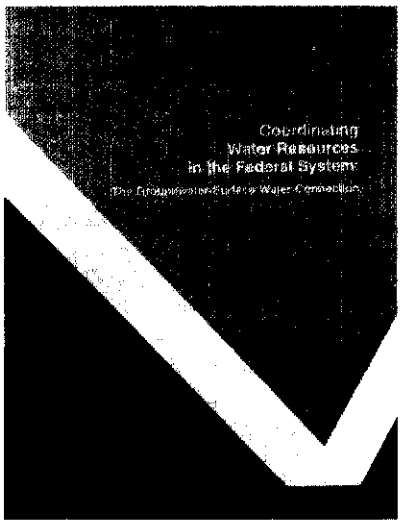

Significant Features of Fiscal Federalism. 1991 Edition. Volume II.

This volume of Significant Features presents data on revenues and expenditures for the federal, state, and local governments. New in this edition are tables on state and local debt and state volume caps on private-activity bonds, state and local public employee retirement systems, federal Medicaid matching ratios and state Medicaid expenditures, and education aid and sources of school district revenue. *Significant Features* contains a broad picture of changes in the government's role in the economy from 1929 through 1989. Also presented are changes in the composition of expenditures and revenues from 1952 through 1989 and in the level and relative importance of federal grants to state and local governments from 1952 through 1993.

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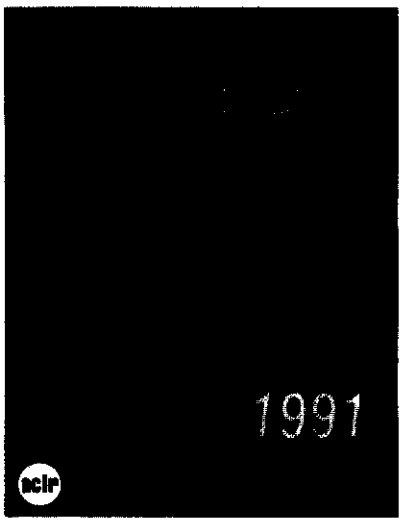

(see page 57 for order form)

The State and Federal Bills of Rights: Partners and Rivals in Liberty

John Kincaid

Our commemoration of the bicentennial of the U.S. Bill of Rights comes when the prospects for spreading popular democracy and human rights throughout the world are greater than at any time in history. The world has crossed a threshold where it is ever more necessary for governments to explain why they do not protect rights rather than for individuals to explain why they should have rights. There is still a long way to go before rights and democracy are realized everywhere, but the balance now seems tipped in their favor.

This is a revolution in which Americans—who, by birth and ancestry, represent peoples from every corner of the world—have played, and will continue to play, no small role. The bicentennial of the U.S. Bill of Rights, coming at this moment in history, is an especially opportune time to reflect on America's rights traditions. The occasion is also a reminder that, in the words of several state constitutions: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."

State Bills of Rights in the Shadow of U.S. Bill of Rights

Although the nation's attention in 1991 is rightly focused on the U.S. Bill of Rights, this document is not the only constitutional enumeration of rights in our federal system. Each of the 50 state constitutions contains a declaration of rights. Indeed, state bills of rights preceded the U.S. Bill of Rights.

In light of the attention given to the U.S. Bill of Rights during the past 60 years, however, many Americans are apparently unaware of their state constitution and bill of rights. The public responses shown in Table 1 to questions asked on ACIR's 1988 and 1991 polls provide startling evidence of the state of civic knowledge. Yet, state declarations of rights are fundamental pillars of liberty in our federal system, and their relevance to the struggles to define, protect, and extend rights at home and abroad is both historical and contemporary.

Early Relevance of State Bills of Rights

The U.S. Bill of Rights was derived from the rights enumerated in most of the first state constitutions adopted from 1776 to 1789. The Virginia Declaration of Rights (June 12, 1776), drafted largely by George Mason, was especially a model for the first part of the Declaration of Independence, for other state declarations of rights, and for the U.S. Bill of Rights. Mason, moreover, was among the prominent founders who advocated a bill of rights for the U.S. Constitution. Thus, the U.S. Bill of Rights is a home-grown product rooted in the native soil of state constitutions.

Because the U.S. Bill of Rights was not approved by the Congress until September 25, 1789, America's state constitutions and declarations of rights, along with the Declaration of Independence, also served as models circulated throughout Europe (with the help of Tom Paine, among others) during the revolutionary era that produced the French Declaration of the Rights of Man and the Citizen (August 26, 1789). Unfortunately, the French Revolution plunged into terror and despotism, a fate that did not befall any American state.

To the extent that rights were protected in the United States from 1776 to 1925 (150 years), they were protected almost entirely under the state bills of rights, not the U.S. Bill of Rights. From 1791 to 1925, the U.S. Bill of Rights was generally understood to apply only to actions of the federal government, and because the federal government exercised relatively limited domestic powers vis-a-vis the states for most of that period, the U.S. Bill of Rights did not figure prominently in American life and jurisprudence.

Table 1
Public Awareness of State Constitutions

In Addition to the United States Constitution, Do You Know If Your State Has Its Own Constitution, Or Does Your State Not Have Its Own Constitution? (1991)

Has its own constitution	52%
Does not have its own constitution	11
Don't know/No answer	37

Does Your State Have Its Own Constitution, Or Does It Rely on the United States Constitution for Its Governing Powers? (1988)

State has own constitution	44%
Relies on U.S. Constitution	19
State has own and relies on U.S. Constitution (volunteered)	5
Don't know/No answer	32

Does the Constitution of Your State Have a Bill of Rights or Some Other Provisions That Protect Individual Rights, Like Freedom of Religion and Freedom of Speech? (1988)

Yes	56%
No	6
Don't know/No answer	38

In those days, Americans did not litigate rights to the extent prevalent today, nor did they refine and expand rights in ways common today. Instead, state bills of rights, in conjunction with electoral processes and constitutional revision, helped create climates of opinion and behavior that generally limited government and perpetuated public awareness of rights. State bills of rights played the primary constitutional role because state and local governments were the primary governments in people's lives.

The State Past in Light of the National Rights Revolution

In recent decades, however, it has frequently been said that the U.S. Bill of Rights properly superseded the state bills of rights in this century because state rights protection was abominable, as exemplified by slavery and then legalized racial segregation. This view has merit, up to a point, though it is also misleading because it judges the state constitutional experience, but not necessarily the federal constitutional experience, against the extraordinary rights revolution of the 1960s.

The new and unprecedented reliance on the U.S. Bill of Rights that developed after World War II represented much more than a shift of certain rights protections from the states to the federal government; it represented an expansion and transformation of our understanding of rights. It was a cultural revolution for which federal institutions, especially the U.S. Supreme Court, were needed to effect social change nationwide.

However much particular states pioneered woman's suffrage, land rights, labor rights, and other rights, some rights could not be protected in certain states, and no state or group of states could mandate protection of a right against all states. Also, some problems, such as racial segregation and discrimination, escaped the nets of both the federal and state bills of rights. Although legally confined to a minority of states and the federal capital, segregation was nevertheless virtually universal because racism was embedded in the majority culture. As a result, even today's efforts to eradicate discrimination under the U.S. Bill of Rights have been difficult, requiring extraordinary judicial action as well as concerted social, political, and educational efforts.

The U.S. Bill of Rights, then, is not intrinsically superior to state bills of rights; in fact, its limited reach makes it inferior in some respects, at least in the absence of judicial amplification. Instead, the U.S. Bill of Rights, as the national enumeration of certain basic rights, became the necessary vehicle for effecting a nationwide rights revolution, one that radically altered and expanded our conceptions of rights.

Early State vs. Federal Rights Protection

Looking back through the lens of this revolution, therefore, it seems easy to say that state declarations of rights were not very effective. Yet, even if the standards of protection under state bills of rights were generally, though not always, inferior to today's standards, compared to the rights afforded most peoples around the world in that day, the United States was, for most citizens, a free, open, and increasingly prosperous society, one that attracted unprecedented migrations of millions of immigrants seeking freedom and opportunity. There was a largely free and diverse press, a multiplicity of religious denominations, a plethora of voluntary associations, and gradually expanding rights with respect to the suffrage, working conditions, and other matters.

Protection under the U.S. Bill of Rights was not distinctly better. In some ways, it was worse. Federal rights protections in the country's vast territories, for example, were not uniformly superior to those in the states. A different picture was once conveyed by TV westerns showing "good guy" federal marshals and U.S. cavalry subduing the "bad guys," especially Indians and corrupt sheriffs, but today we know that the real picture was often quite different. In any event, the people of most territories believed that their rights would be enhanced by becoming states as quickly as possible.

The federal government also was responsible for relations with Native Americans; yet, the U.S. Bill of Rights did not stop federal policies of Indian conquest and removal from nearly extinguishing the Native American population by the end of the 19th century. The federal government then conferred citizenship on the dwindling tribes without their express consent and tried to dissolve the tribes as sovereign governments.

Although northern courts were often friendly to fugitive slaves, the second time in history the U.S. Supreme Court exercised its judicial review power the Court ruled that both before and after ratification of the U.S. Constitution and Bill of Rights, black people were "beings of an inferior order" having "no rights which any white man was bound to respect" (*Dred Scott*, 1857). The

Civil War amendments to the U.S. Constitution gave the federal government authority to protect the rights of black Americans in the states; yet, for some 80 years, the federal government failed to do so, and in 1896, the U.S. Supreme Court upheld "separate but equal" racial segregation (*Plessy* v. *Ferguson*).

The Court also upheld many protections of property rights (mainly business rights) against the states while striking down a number of attempts by states to protect farmers and laborers against the depredations of the urban-industrial revolution. From the *Alien and Sedition Acts* (1798), moreover, to the Palmer raids of 1919-1920, the internment of Japanese Americans (1942-1944), the *Internal Security Act of 1950*, and the FBI of the Hoover years, the federal government engaged in its own forms of rights suppression.

However painful these memories, their recollection puts things in perspective. State rights protection was not, and need not be, invariably inferior to federal rights protection. Any bill of rights can be, in the words of *The Federalist*, a mere "parchment barrier" unless it is backed by proper government action, citizen vigilance, and the general culture of a free people. Prior to the contemporary rights revolution, bills of rights were not as far-reaching as we want them to be today. Yet, even so, from the Revolutionary War, when the United States became a weak and insignificant nation, through World War II, when the United States became the world's dominant and most prosperous power, the many rights enjoyed by most Americans were grounded primarily in their state constitutions.

Nationalization of the U.S. Bill of Rights

Only in 1925 (*Gitlow* v. *New York*) did the U.S. Supreme Court begin to argue earnestly that the Fourteenth Amendment (1868) "incorporated" the U.S. Bill of Rights, that is, applied the U.S. Bill of Rights to state and local government action as well as to federal government action.

Incorporation opened the door for a rights revolution in two key ways. First, it allowed reformers to focus on one high court rather than 48 (and then 50) high courts—a court that is beyond the reach of individual states, especially those practicing the most egregious rights suppression, a court whose justices are not elected or removed easily, a court where only five votes are needed to win a case, and a court whose decisions bind the nation. Second, it extended the reach of the U.S. Supreme Court far beyond its historically circumscribed federal orbit. Given that state courts dispose of more than 98 percent of the nation's judicial business, incorporation opened a vast new field from which the Supreme Court could select cases.

Under incorporation, federal judicial expansions of rights began timidly during the 1930s, picked up during the 1940s and 1950s, and reached a crescendo during the 1960s, but began to taper off after *Roe* v. *Wade* (1973). Additional rights protections have continued, however, especially through congressional-presidential action (e.g., the *Americans with Disabilities Act of 1990*).

In retrospect, the loss of confidence in state bills of rights occasioned by the nationalization of the U.S. Bill of Rights was shortsighted. The period of aggressive federal rights expansion under the U.S. Supreme Court was relatively short, about 30 years. The prior century-and-a-half history of the Court did not lend confidence to the view that the Court could be converted into a perpetually moving rights machine. Initially, the Court itself was an obstacle to expansive rights protection by progressive states. The Court, moreover, has not chosen to incorporate all the rights enumerated in the U.S. Bill of Rights. Unforeseen, too, was the passage of national rights protection into controversial areas (as exemplified by debates over criminal rights, abortion, and "political correctness") where public conceptions of rights often divide along various and crosscutting lines rather than traditional race and class lines. This shortsightedness also violated a cardinal federal principle, namely, the value of redundancy, of not putting all the eggs in one basket.

The New Judicial Federalism

However, one, perhaps ironic, result of the change in U.S. Supreme Court policy, which some observers call a "retreat" from rights, has been a gradual "rediscovery" of state bills of rights and an increasing reliance on those documents for rights protection. Acting on "independent and adequate" state constitutional grounds, a state high court can grant greater rights protection under its state declaration of rights than the U.S. Supreme Court is willing to grant under the same or a similar provision of the U.S. Bill of Rights. Since 1975, there have probably been more than 500 such state court decisions.

Thus, today, under what has been called "the new judicial federalism," U.S. Supreme Court interpretations of the U.S. Bill of Rights establish minimum national standards, or floors, of protection. States cannot fall below the floor, but they can elevate rights above the floor and also lay floors where the U.S. Supreme Court or federal statutes have not provided protection. Reliance on the 50 state bills of rights and the U.S. Bill of Rights, therefore, now helps, in ways not quite true in the past, to promote that "double security" of "the rights of the people," of which James Madison spoke (*Federalist* 51) with respect to the federal system as a whole.

Continuing Relevance of State Bills of Rights

State bills of rights are constitutionally relevant once again, but in new ways and on a new plane. The new plane is the floor established by U.S. Supreme Court interpretations of the U.S. Bill of Rights. Gone is the dual federalist model of rights protection in which the federal and state bills of rights each applied only to their own sphere of government. Gone also is the national supremacy model initially implied by the nationalization of the U.S. Bill of Rights.

State bills of rights continue to be relevant and increasingly important in a number of ways.

For one, they provide alternatives to the U.S. Bill of Rights, thus allowing a range of forum shopping in which persons seek the judicial arena more likely to yield their desired result.

Second, state bills of rights can afford greater rights protection than the U.S. Bill of Rights where state courts elect to exceed a federal rights standard.

Third, state bills of rights can provide protections not available under the U.S. Bill of Rights. State declarations of rights are often longer and more detailed than their federal counterpart, covering areas, such as privacy, woman's rights, and environmental rights, not specifically enumerated in the U.S. Bill of Rights.

Fourth, state bills of rights permit experimentation and innovation in ways not always available to the U.S. Supreme Court because of the national impact of its decisions.

Fifth, state bills of rights allow for gradualism and education in the spread of rights, thus increasing the possibility of public acceptance of new ideas. A U.S. Supreme Court decision has nationwide impact and may strike the public like a thunderbolt, thus producing pressure for the Court to backtrack, which it has done on many occasions. A seesaw course of decisionmaking undermines confidence in the Court and conveys the impression that rights are merely partisan.

Of course, the new judicial federalism does not necessarily mean widespread expansions of rights. State courts will often be happy to rest on the federal floor; some may drop from previous heights to bring rights back down to the federal floor; and some will experience periodic pressure from voters aroused by state judicial activism. Furthermore, some state expansions of rights will go in unexpected directions. In the summer of 1991, for example, the Pennsylvania Supreme Court voided Philadelphia's historic-buildings preservation law on the ground that it violated the "takings clause" of the state constitution. The court found in the state declaration of rights a higher standard of protection for private property rights than the U.S. Supreme Court found in the U.S. Bill of Rights 13 years ago.

An interesting facet of the new judicial federalism is whether a state declaration of rights can be enforced against the federal government in what one scholar has called "inverse incorporation."[1] If a state has a higher criminal rights standard, or if it has an environmental right not found in the U.S. Constitution, can the state enforce such rights against federal agents or agencies, at least within its own borders?

Federalist Rights Protection

This new judicial federalism is one of the more promising innovations in American federalism developed in recent years. At once, it addresses two fundamental issues: (1) rights protection and (2) a basic goal of federalism, namely, unity and diversity. The U.S. Bill of Rights provides for a common rights regime, while the state bills of rights provide for supplementary diversity.

Diversity may be hard to visualize because rights are usually thought of as universal. But there are sharp disagreements over some rights, and it is the specific applications of generally enumerated rights (e.g., freedom of speech) that often provoke controversy. Although certain rights (or their application) may not get into the common national pool under the new judicial federalism, unlike a national supremacy regime, rejection by the U.S. Supreme Court does not obliterate the right or render it unenforceable by the states. Instead, rights not admitted to the common pool or expelled from that pool can be enforced by states.

This arrangement poses a difficult question: What rights are so fundamental as to demand enforcement everywhere, and what rights can be allowed to vary according to local preferences or conditions? This question can be addressed by the people and by the federal and state courts. Although the U.S. Supreme Court is the ultimate forum for reflecting a national consensus or deciding that a moral imperative is so great as to override public opinion, the state courts remain forums for testing and refining rights ideas that may spread throughout the states or later find inclusion in the common national pool.

International Implications

This model is potentially useful for countries seeking to establish a federal system. Rights are now paramount issues in these countries, but historic diversity and ethnic animosities often make unity elusive. The new judicial federalism, however, offers possibilities of at least reaching compromises between unity and diversity by embedding certain basic rights in the national constitution, applicable to all persons in the country, and then allowing the constituent governments to guarantee other rights according to custom and preference. At first, the number of rights included in the common pool may be small, but over time, the number is likely to increase as people become more comfortable with democratic coexistence and as individual rights establish deeper roots.

There are alternative models, such as the "notwithstanding" clause in Canada's Constitution. This clause, which has been used three times thus far, allows provinces to opt out of provisions of the Charter of Rights and Freedoms for five-year, renewable periods. This approach may be politically necessary in some countries, but it undermines the idea that certain rights are so fundamental as to command protection by all governments for all persons at all times. It also weakens a bond of unity by reducing pressure to establish a unifying national consensus around a core of fundamental rights from which no government can opt out.

The new judicial federalism does compel attention to fundamental rights that are to be enforced throughout a federation and that are to define the character and unity of the people of a federation, even while the diversity and local self-government that make a federal system desirable still allow rights to find various expressions in constituent constitutions.

Endnote

[1] Vincent Martin Bonventre, "Beyond the Reemergence—'Inverse Incorporation' and Other Projects for State Constitutional Law," *Albany Law Review* 53 (Winter 1989): 415-418.

Selected Rights Enumerated in State Constitutions

Mark L. Glasser and John Kincaid

A complete understanding of the background and context of the U.S. Bill of Rights, of the rights valued by Americans, and of the diversity of rights protections attempted in the United States requires knowledge of the rights enumerated in the 50 state constitutions. To this end, we set out to tabulate the rights specified in the state constitutions, a task that quickly became monumental. The number and variety of rights enumerated in state constitutions are extraordinary; consequently, the following table is a selected list of those rights.

Scope And Limits Of The List

The table contains rights found in the 50 state constitutions as of 1988-1990. Consequently, some revisions and deletions of rights occurring after 1988 are not accounted for in the table, nor are all rights statements that may have been added to state constitutions after 1988. These omissions are not fatal, however, because rights are altered much less frequently than other state constitutional provisions (see page 45).

Not all rights in state constitutions are found in the declarations of rights; many are interspersed throughout the documents. To prepare the table, therefore, we reviewed each state's entire constitution.

The provisions we included and excluded are subject to different interpretations. Many provisions protect rights, either directly or indirectly, but are not worded as explicit rights protections in the manner of the declaration of rights. We chose to include, therefore, all provisions of the declaration of rights, comparably worded provisions in other parts of the constitution, and provisions that confer a right or power on individuals (e.g., initiative, referendum, and recall).

Excluded are rights-like directives to the legislature, such as a provision found in five state constitutions directing enactment of a direct primary election law. Also excluded are directives not previously viewed as rights but now viewed as such by some state high courts, such as state provision of "a thorough and efficient" education for all children.

We also excluded policy declarations, such as detailed regulatory provisions and procedural rules that serve to protect rights; and rights pertaining to local governments and to citizens as residents of local government. Finally, because it was not feasible to review court cases in every state, we may have omitted provisions that do not look like rights but have been interpreted as such by some state courts.

An argument can certainly be made for including all or most of the kinds of provisions cited above. To have done so, however, would have made the selection process even more difficult and the table much longer. What Alexander Hamilton said of the U.S. Constitution can also be said of a state constitution, namely, that the entire document is, in effect, a bill of rights.

In compiling the table, we endeavored to take into account variable wordings of the same right. In some cases, slashes appear in an entry to show different wordings among state constitutions. In other cases, we listed similar rights separately because the different wording may make some substantive difference in the nature or scope of the right.

Another consideration is that we excluded all qualifications of particular rights. For example, 40 of the 47 constitutions that explicitly enumerate freedom of speech add the following qualification: "Persons may be held responsible for abuse of this right" (e.g., libel). Most rights provisions, however, have no qualifications.

For each right listed in the table, we show the number of state constitutions in which it was found. Where a right was found in only one constitution, we identify that state.

Every effort has been made to provide an accurate inventory, based on the criteria outlined above, and for an accurate count; however, we cannot discount the possibility of error. If there are errors, they are probably small, that is, overlooking one right in a particular constitution.

Lastly, one drawback of the tabulation is that it does not show state-by-state data and, therefore, regional variations and other patterns in state constitutional rights protections. However, we hope to present such a tabulation in the future.

Points To Keep In Mind

1. Not all rights actually enjoyed by the citizens of a state are listed in the constitution. An unlisted right is not necessarily unprotected. For example, only the Louisiana and Rhode Island constitutions specify that a person charged with a crime is presumed innocent until proven guilty; yet, this presumption is the bedrock of jurisprudence in every state and federal jurisdiction.

   There may be several reasons for not listing a right. For one, it may be so taken for granted and widely respected that constitution-makers may not deem it necessary to list the right. Second, many rights are protected by statute or by judicial elaboration of an already enumerated right. This is probably especially true of the contemporary era in which courts have been active in expanding rights and reformers have argued that state constitutions should not be cluttered with details. Third, given the U.S. Supreme Court's application of most of the provisions of the U.S. Bill of Rights to state and local governments, there has been less pressure to include in state constitutions rights already protected under the U.S. Constitution. Finally, of course, an unlisted right may mean that a state does not want to recognize the right. This is true of the opposed rights supported and rejected by proponents and opponents of abortion.

2. In this respect, an unlisted right may not be protected, or may not be protected as well as a listed right. Given the ways in which courts and legislatures interpret constitutions today, the idea of keeping these documents short may not always be advisable. If citizens want to protect a particular right or to protect it in a certain way, it may be necessary to include it in the constitution with careful wording.

3. Of course, not all rights enumerated in a constitution are actually protected, or protected satisfactorily, by the body politic. There are many such examples in American history; so this point need not be elaborated here.

Overall, however, the protection of rights has improved considerably in the second half of this century. Now that rights are taken much more seriously, and now that state declarations of rights have assumed a new significance in judicial federalism, it is all the more important that citizens pay attention to the rights enumerated in their state constitution as well as to those listed in the U.S. Bill of Rights.

State declarations of rights may also be more relevant than the U.S. Bill of Rights to emerging democracies abroad because the U.S. Bill of Rights was originally intended to apply to a national government having only limited, delegated powers. Much like emerging post-colonial and post-authoritarian democracies today, state declarations of rights were crafted by people who were liberating themselves from colonialism and tyranny and who were creating full-fledged, plenary governments for their new democratic republics. Together, moreover, both the U.S. Bill of Rights and state declarations of rights provide useful models for emerging federal democracies.

Table Of Selected State Constitutional Rights

What follows is a listing and tabulation of state constitutional rights provisions. These rights are organized into ten categories, and each category is introduced by a brief narrative.

I. Fundamental Principles

Unlike the U.S. Constitution, where the Bill of Rights constitutes the first ten amendments, state constitutions start with a declaration of rights. Indeed, in early America, the declaration was usually called "the constitution." The rest of the document was merely "the frame of government."

The preambles to most state constitutions reflect two enduring characteristics of Americans: their belief in popular sovereignty and their faith in a Supreme Being. Most preambles suggest that while the people are sovereign with respect to their government, God is the ultimate sovereign. Popular and divine sovereignty are linked to rights in several ways, the most important of which is the idea that rights exist above and before government. Government does not grant rights; it is established to protect rights possessed by individuals by virtue of nature and nature's God.

The U.S. Constitution does not contain a divine invocation for much the same reasons it did not begin with a declaration of rights. The Constitution did not establish a plenary government to lift individuals out of a state of nature. It established a government based on the consent of the people of the existing states, and it established a government of only limited, delegated powers—an overarching special district government, so to speak, to handle such general matters as defense and interstate and foreign commerce.

After the preamble, state declarations of rights ordinarily (1) affirm natural or inalienable rights, (2) proclaim the natural equality and independence of all persons ("men" being the common term in the past), (3) confirm the sovereignty of the people, (4) declare that government derives its just powers only from the consent of the people, and (5) stipulate that government exists only to secure the common good of the people. As the table shows, small numbers of states provide for additional statements of principle.

II. Basic Rights of Human Freedom

In this section, we list what can be regarded as basic, general rights of human freedom. The four rights most overwhelmingly stipulated are (1) freedom of religion

(found in all 50 constitutions, though worded somewhat differently), (2) freedom of speech (47), (3) freedom of the press (47), and (4) the right to bear arms (42). No other such basic freedom comes close to these four in terms of prevalence.

It should be noted that in six states both freedom of the press and freedom of speech are essentially protected under one of these provisions. Thus, all 50 state constitutions guarantee both freedoms. In terms of the debate over whether the militia clause in the Second Amendment to the U.S. Constitution limits the right to bear arms enumerated therein, it is interesting to note that only two state constitutions (Alaska and Florida) link this right to the militia. The Florida Constitution, however, also links this right to self-defense.

III. Rights to Participate in Governance

This section lists rights to participate in government and its activities. The most basic right here, of course, is the suffrage, which is detailed in every state constitution. Today, however, the right to vote is largely governed by the U.S. Constitution, although all such protections (e.g., woman suffrage) were first provided in various state constitutions before the U.S. Constitution was amended to incorporate them.

A second basic right, provided in all but the Delaware Constitution, is the right of the people to ratify or reject constitutional amendments. The third most prevalent right to participate is the right to peaceably assemble and petition government (48 states).

IV. Rights against Tyranny

The rights listed in this section can be said to protect persons and their republic against various forms of tyranny and against government discrimination. The protection most widely specified here (all but New York) is that the military be kept "in strict subordination to civil power."

The next most widely enumerated protections are (1) no taking of private property without just compensation (48 states); (2) no unreasonable searches and seizures (48); (3) procedural rules for warrants (48); (4) no government establishments of religion (46); (5) no ex post facto laws (44); (6) no special privileges, monopolies, or other exclusive establishments by government (43); (7) no deprivation of life, liberty, or property without due process of law (42); (8) no quartering of soldiers in private homes without owner consent or due process in time of war (40); (9) no impairment of the obligations of contracts (39); and (10) the right of the people to alter, reform, or abolish their government (37).

Although only 17 state constitutions have an explicit "equal protection of the laws" clause, provisions in all of the state constitutions add up, in effect, to such a provision. This concept is reflected as well in the provisions in most state constitutions requiring equitable, nondiscriminatory property taxation.

V. Rights in Civil and Criminal Proceedings

This section lists individual rights pertaining to civil and criminal proceedings. Most of these rights protect persons accused of a crime, persons on trial, and persons convicted of a crime. The rights most widely protected here are (1) non-suspension of habeas corpus (48 states), (2) no excessive bail (48), (3) no self-incrimination (47), (4) no excessive fines (47), (5) executive authority to grant reprieves and pardons (47), and (6) no cruel and/or unusual punishment (46).

The rights next most widely protected are (1) the right to be informed of charges (45 states), (2) right to a speedy and public trial (44), (3) right to confront witnesses (43), (4) no double jeopardy (42), (5) no imprisonment for debt (41), (6) right to subpoena witnesses (41), (7) right to bail (40), (8) procedural rules governing the bringing of charges (40), (9) rights to access to the courts (39), and (10) limits on treason convictions and/or punishment (37). It should be noted that 14 of the 16 rights cited above are also in the U.S. Constitution.

Finally, this section reveals the addition in recent years of rights for victims of crime. In some states, such as California, the constitution contains a Victims' Bill of Rights. We have not detailed these rights here, but they include such provisions as rights to be present at various proceedings, to be informed of various proceedings and decisions, and to be heard when relevant.

VI. Natural Resources and Environment

Most state constitutions, especially those of the western states, contain provisions governing water, minerals, and other natural resources; however, most of these provisions take the form of declarations of state policy, directives to the legislature, and specific regulations. Although these provisions serve to define and protect rights, we have included in the table only those provisions that are arguably framed as rights. Consequently, the small numbers of states indicated here should not be taken to mean that most states or state constitutions do not address these matters.

Similarly, only a small number of state constitutions explicitly enumerate environmental rights. There are probably two other reasons for this small number. First, environmental protection has only recently become a prominent public policy concern; hence, it has thus far escaped most rounds of constitutional revision. Second, because reformers have long argued that constitutions should be kept short and free of "legislative" detail, most states have provided for environmental protection by statute rather than by constitutional revision or amendment. Thus, while all states provide for environmental protection, only a few states have embedded environmental protection in their constitution.

VII. Occupational Rights

Most of the rights in this section stem from the urban-industrial era. A few stem from the more recent era of the rights revolution when nondiscrimination became a prominent issue.

Again, however, the small numbers of state constitutions represented in this section can be accounted for by the reasons for noninclusion given above. Occupational rights are much more often specified by statute than by constitutional provision, and, today, most occupational rights are covered by federal law.

VIII. Other Rights

The two rights listed here govern private sector behavior and do not fit neatly into the other categories. Again, the sparseness of this section can probably be accounted for by the fact that these matters are more often covered by statute (federal and/or state) than by constitutional provision.

IX. Limits on Rights

It may come as a surprise to find that a number of state constitutions contain what are, arguably, limits on rights. Many of these limits reflect long-standing cultural struggles in American history and are aimed primarily at what the majority culture has broadly regarded as "aliens"—namely, black Americans, non-English speakers, atheists, polygamists, communists, Ku Klux Klan members, non-citizens, and out-of-state residents. Of course, many of these limits have been voided under color of the U.S. Constitution, and others have fallen into disuse. Plural marriages, for example, exist openly in the four states that constitutionally prohibit them: Arizona, Idaho, Oklahoma, and Utah.

Two of the limits presented in this section are controversial today, and would not be defined as limits by their advocates. Those who support English as a state's official language do not regard these provisions as limiting rights, but those who oppose these provisions do regard them as limits on rights. Similarly, those who oppose abortion regard prohibitions on the use of public funds to pay for abortions as a step toward providing greater rights protection for unborn children. Those who oppose these provisions regard them as limits on the rights of women.

Three limits in this section pose a tension between individual rights and the right of the body politic to root out and prosecute criminal behavior, mainly government corruption. These provisions essentially compel testimony from persons having knowledge of corrupt government acts.

X. Reserved Rights

One question arising from the adoption of a bill of rights is whether rights not mentioned in the declaration are nonexistent or unprotected. To cover this contingency, the U.S. Bill of Rights and 33 state declarations of rights provide that rights not enumerated are nevertheless retained by the people. The other provisions in this section have a similar thrust, except that they pertain to the rights of the people of the several states to retain self-government vis-a-vis the federal government.

Mark L. Glasser compiled the data and prepared the tables during his Summer 1991 internship at ACIR. He is a graduate student at the School of Urban and Public Affairs, Carnegie Mellon University. John Kincaid is executive director of the Advisory Commission on Intergovernmental Relations.

Selected State Constitutional Rights

I. Declarations of Principle

Preamble: We the People the People of . . .[1]	45
Preamble: Divine invocation (e.g., grateful to God).	43
All persons have natural right to:	
Life	13
Liberty	13
Enjoying/Defending lives and liberties	23
Pursuit of happiness	32
Enjoyment of rewards of one's own industry	5
Acquiring, possessing, protecting property	25
Acquiring, possessing, protecting reputation	4
Pursuing and obtaining safety	17
Pursuing and obtaining privacy	CA
Obtaining objects suitable to their condition without injury to others	DE
Freely communicate their thoughts and opinions	3
A clean and healthful environment	MT
Pursue life's basic necessities.	MT
All men are by nature/born equally free/independent and have certain inalienable rights.	28
All persons are equal and entitled to equal rights, opportunities, and protection under law.	6
All free men, when they form a social compact, have equal rights.	4
All persons have corresponding obligations to the people and to the state.	8
When men enter into a society they surrender up some of their natural rights to that society in order to ensure the protection of others; and without such an equivalent, the surrender is void.	NH
Defense and protection of the State and of the U.S. is an obligation of all persons within the State.	NY
All political power is inherent/vested in the people.	43
Governments derive just powers from consent of the people/ All government originates with the people and is founded upon their will only.	33
Government is at all times accountable/amenable to the people.	5
The end of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights and the blessings of life.	MA
Governments are established to protect and maintain individual rights.	6
All government is instituted solely for the good of the people as a whole/for benefit, security, and protection of the people/property.	40
All constitutional government is intended to promote the general welfare of the people.	MO
Sole object and only legitimate end of government is to protect the citizen in enjoyment of life, liberty, and property, and when government assumes other functions it is usurpation and oppression.	AL
Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.	2
The faith of the people stands pledged to preservation of a republican form of government.	TX
Doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind.	3
A frequent recurrence to fundamental principles is essential to security of individual rights and perpetuity of free government.	13
State is an inseparable part of the American Union/The U.S. Constitution is the supreme law of the land.	12

Every citizen of the state owes paramount allegiance to the Constitution and government of the U.S.	3
The provisions of the U.S. Constitution, and of the state, apply as well as in times of war as in times of peace.	2

II. Basic Rights of Human Freedom

No slavery or involuntary servitude.[2]	21
The dignity of the human being is inviolable.	MT
Free exercise of religion/Freedom or natural right to worship according to conscience/Liberty of conscience.[1]	48
Perfect toleration of religious sentiment required/ No inhabitant of state molested for religious worship or lack thereof.	20
All persons are equally entitled to protection in their religious liberty.	MD
No power shall be vested in any magistrate that shall interfere with, or control rights of, conscience in free exercise of religious worship.	14
Freedom of speech.[1]	47
Freedom of press[1]/Freedom to write and publish on all subjects.	47
Shield protection for news persons against contempt for not revealing confidential sources.	CA
To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group because of religious, racial, ethnic, national or regional affiliation are condemned.	IL
Right of the people to preserve, foster, and promote their respective historic, linguistic and cultural origins is recognized.	LA
Right of people to keep and bear arms . . .	9
Pursuant to militia.	2
Pursuant to self-defense/state defense.	32
Pursuant to hunting and recreational use.	6
No law imposing licensure, registration or special taxation on ownership or possession of firearms or ammunition.	ID
No law to permit confiscation of firearms.	ID
Right of the people to privacy is recognized and shall not be infringed.	4
No unreasonable invasions of privacy.	IL
Emigration shall not be prohibited.	5
People of state disclaim all right and title to Indian lands.	5
All lands owned or held by any Indian or Indian tribes shall remain under absolute jurisdiction and control of the U.S. Congress, and continued in full force and effect until revoked by consent of U.S. and people of the state.	7
No state taxes on land or property within Indian Reservations.	AZ

III. Rights to Participate in Governance

Basic Electoral Rights

Right to vote not to be denied due to:	
Race, color, previous condition of servitude[2]	4
Sex[2]	6
Failure to pay poll tax or any tax[2]	4
Age (persons age 18 and older)[2]	37
Property qualification	4
Residence on U.S. land within the state	CO
Religion	2
Every Indian, residing on tribal reservations and otherwise qualified, shall be an elector in all county, state, and national elections.	2
No loss of residence for being employed in service of U.S., a student in any institution of learning, kept at any alms house or other public asylum at public expense, or confined in any public jail or prison.	11
Every elector in military or naval service of U.S. or of the state may exercise the right of suffrage at such place and under such regulations as provided by law.	5
Right to appeal to judge of county concerning denial of, or error in, voter registration.	4
No loss of residence for temporary absence from state/ absence on business of state or United States.	10
All elections shall be free and equal/open/ held often.	27
People have right to cause their public officers to return to private life, and to fill vacancies by certain and regular elections and appointments.	2
Guarantee of vote by ballot/other method prescribed by law.	31
Guarantee of secret ballot/vote.	28
Guarantee of absentee ballot/vote.	21
No person/No power, civil or military, shall at any time interfere to prevent free exercise of right of suffrage.	16
Electors privileged from arrest.	28
No elector obliged to perform military duty on election day.	9

Rights to Alter Constitution

People may propose and enact constitutional amendments/convention by initiative.	16
Constitutional initiative limited to legislative article.	IL
People must approve constitutional amendments proposed by legislature/convention.	49
People must be asked at specified intervals if they desire constitutional convention.	13
No constitutional convention called by legislature unless question/laws providing for such convention are first approved by people on referendum vote.	30
Constitutional conventions shall have plenary power to amend or revise constitution, subject only to ratification by people. No call for a convention shall limit powers of convention.	2

Initiative, Referendum, and Recall

People may propose and enact laws by initiative.	23
People may approve or reject acts of legislature by referendum.	25
People may recall elected officials.	15

Other Participation Rights

People have right to instruct their representatives.	17
People have right to make known their opinions to their representatives.	4
Right to peaceably assemble and petition government/ consult for common good.[1]	48
For redress of grievances, and for amending, strengthening and preserving the laws, the legislature ought to be frequently convened.	2
Public has right to expect government agencies to afford such reasonable opportunity for citizen participation in the operation of agencies prior to final decisions as may be provided by law.	MT
No person shall be denied right to observe deliberations of public bodies and examine public documents, except in cases established by law.	4
Power of grand juries to investigate and make recommendations about public welfare or safety shall never be suspended.	AK
One or more grand juries shall be drawn and summoned at least once a year in each county.	CA
Right to serve on jury not denied because of:	
Sex	5
Race	NC
Color	NC
National origin	NC
Religion	2
No person incompetent to be witness/juror because of religious belief/lack thereof.	17

Women shall not be compelled to serve on juries/Court shall excuse any woman who requests exemption before being sworn in as a juror.	2
No religious test/qualification for public office/employment.[1]	30
No disqualification to enjoy public office by reason of sex.	5
No property qualification to enjoy public office.	6
Appointment of all members of administrative boards and commissions and of all departments and division heads and all the employees thereof shall be made without regard to race, creed, color, or national origin.	MO
Civil service appointments and promotions based on merit/ascertained by competitive examination.	12
No person who has gained permanent status in classified state or city service shall be subjected to disciplinary action except for cause expressed in writing. Such employee shall have right of appeal.	LA
No classified employee shall be discriminated against because of his political or religious beliefs, sex, or race. Such employee shall have right to appeal.	2
No officer or employee in classified service shall participate or engage in political activity; except to exercise his right as a citizen to express his opinion privately and to cast his vote as he desires.	LA
Membership in state/local retirement systems is contractual relationship.	5
Accrued benefits of state/local retirement systems shall not be diminished or impaired.	5

IV. Rights against Tyranny and Government Discrimination

Equal Protection of Laws

No state shall deprive any person of equal protection of laws.[3]	17
All laws of general nature have uniform operation.	12
Rights of all persons under 18 years shall include, but are not limited to, all the fundamental rights of the constitution unless specifically precluded by laws.	MT
No person to be denied enjoyment of any civil or political right due to:	ME
Race or color	14
Creed	6
Sex (ERA)	15
National origin	10
Physical/mental disability	3
Religion	16
Social origin	MT
Political ideas	MT
Discrimination by another person	2
Discrimination by any firm, corporation, or association	2
Discrimination by any agency/subdivision of, or the state	2
In access to public areas, accommodations, and facilities, every person shall be free from discrimination based on race, religion, or national ancestry, and from arbitrary, capricious, or unreasonable discrimination based on age, sex, or physical condition.	LA
No citizen denied enlistment in any military organization in the state nor segregated therein because of race, religious principles, or ancestry.	2
Social status of citizens shall never be the subject of legislation.	GA
No distinction or classification of public school pupils on account of race or color.	6
No person shall be refused admission to any public educational institution on account of sex, race, creed, religion, political beliefs, or national origin.	2
No pupil assigned or transported to any public educational institution to achieve racial balance.	CO
No law granting any citizen, class of citizens or corporation (other than municipal) privileges or immunities not equally granted to all citizens or corporations.	13
No citizen disfranchised or deprived of any rights and privileges secured to other citizens.	3
All individuals, associations, and corporations have equal rights to have persons and property transported over any railroad in the state.	7
Power of taxation shall be exercised in a just and equitable manner.	NC
All taxes shall be uniform upon same class of property within territorial limits of taxing authority.	27
Shall be uniform and equal basis of valuation and rate of taxation of all property subject to taxation.	16
Taxes on property to be assessed in proportion to value of property.	12
Property in the state to be taxed at the same rate.	AL
Foreigners/resident aliens who are bona fide residents of the state enjoy same rights in respect to enjoyment, and inheritance of property as native born residents.	8
Noncitizens have same property rights as citizens.	CA
Every person has right to acquire, own, control, use, enjoy, protect, and dispose of private property.	LA
Lands and other property belonging to citizens of the U.S. residing without the state shall never be taxed at higher rate than lands and other property belonging to residents of state.	10
Citizens of each state entitled to all privileges and immunities of citizens in several states.[3]	0
All citizens of U.S., residents of the state, are declared citizens of the state; and are protected in full enjoyment of rights, privileges, and immunities due such citizenship.	GA
No distinction shall be made between citizens of other states and territories of U.S. in reference to purchase, enjoyment or descent of property.	2

Personal and Property Rights

No state shall make or enforce laws abridging privileges and immunities of citizens of U.S.[3]	SC
No deprivation of life, liberty, or property without due process of law.[2]	42
Exercise of police powers of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such a manner as to infringe upon the rights of individuals.	4
No administrative agency shall impose a sentence of imprisonment, nor any other penalty except as provided by law.	2
No person shall be finally bound by judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and opportunity to be heard.	SC
No commission shall be issued creating special temporary criminal tribunals to try particular individuals or particular classes of cases.	PA
No laws impairing obligation of contracts.[3]	39
Any provision of a contract, express or implied, made by any person, by which any of the benefits of this Constitution is sought to be waived, shall be null and void.	OK
Rights, privileges, and immunities, civil, political, and religious, guaranteed by the Treaty of Guadalupe Hidalgo shall be inviolate.	NM
No private property to be taken/damaged for public/ private use without just compensation/ consent of owner.[1]	46
No private property to be taken for private use without consent of owner/without just compensation.	17
No person deprived of title to an estate or interest in real property by another person claiming actual, continuous, hostile, exclusive, open, and notorious possession of such lands, except to real property of five acres or more.	HI

No private property to be taken or sold for payment of corporate debt of municipality.	4
No person's particular services shall be demanded without just compensation.	3
No unreasonable searches and seizures of citizens and possessions.[1]	45
No unreasonable searches and seizures of private communications.	NY
No person shall be disturbed in his private affairs, or his home invaded, without authority of law.	2
No warrants except for probable cause and supported by oath or affirmation.[1]	47
Warrants must be place and person specific.[1]	46
Homestead protection.	24
No taxation of paupers for support of the government.	MD
Married woman's separate property right/Wife not liable for husband's debt.	9
Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property.	10
No distinction between married women and married men in holding, control, disposition, or encumbering of property.	2
No divorce shall be granted by the General Assembly.	6

No Exclusive Establishments

No laws granting irrevocably any privilege, franchise or immunity.	22
Perpetuities/entailments/monopolies are contrary to genius of free government, and shall never be allowed.	18
No man, or set of men, is entitled to exclusive separate public emoluments or privileges but in consideration of public services.	7
No granting of titles of nobility.[2]	8
No hereditary emoluments, privileges, or powers shall be granted or conferred.	17
No law of primogeniture or entailments.	TX
No office shall be created, appointment to which shall be longer time than during good behavior/ term of years.	9
No establishment of religion/No public money or property appropriated for or applied to any religious worship, exercise or instruction, or to support of any religious establishment.	35
No preference given by law to any religious denomination/Each shall have equal powers, rights, and privileges.	25
No sectarian instruction in public schools.	9
No student of public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as part of the curriculum.	WV
No religious or political test for teachers or students in public schools.	8
No person shall be compelled to worship or support any religious association.	26
No person shall in time of peace be required to perform any service to the public on any day set apart by his religion as a day of rest.	TN
Nothing shall prohibit or require making reference to a belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school institution or place.	MD

Protections against Overt Tyranny

People have right to secure and sustain public trust against abuse.	FL
No power of suspending laws in state shall be exercised except by legislature.	19
No law to be passed, the taking effect of which shall be made to depend on any authority, except as given in constitution.	IN
Inhabitants of the state are not controlled by any other laws than those which they, or their representative body, have given their consent.	NH
The people shall not be taxed without the consent of themselves or their representatives.	11
Power to tax shall be vested in legislature/ shall be exercised for public purposes only.	8
Power to tax shall not be surrendered or suspended by grant or contract/delegated to private corporations or associations.	18
Power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant.	7
Suits may be brought against the state.	14
Citizen of any county, city, or town may file suit for self and others to protect inhabitants thereof against enforcement of any illegal exactions.	AR
No bills of attainder.[1]	30
No ex post facto laws.[1]	44
No retrospective oaths.	MD
No quartering of soldiers/persons in private homes without owner consent or due process of law in time of war.[1]	40
No person because of religious creed or opinion shall be exempt from military duty except on conditions provided by law.	2
No conscientious objector compelled to do militia duty/ in time of peace.	17
No standing army . . .	4
In time of peace.	20
Well regulated militia is proper and natural defense of a free government.	5
No person shall be subject to corporal punishment under military law, except such as are employed in the army or navy, or in militia when in actual service in time of war or public danger.	8
No armed police force, detective agency, or armed body of men to be brought into state to suppress domestic violence except by application of legislature, or executive when legislature cannot be convened.	5
Military shall be in strict subordination to civil power.	49
Persons going to, returning from, or on militia duty are privileged from arrest.	6
To guard against transgressions of high powers being delegated, we declare that everything in Bill of Rights is excepted out of general powers of government, and shall remain inviolate, and all laws contrary thereto, or to following provisions are void.	6
People have at all times inalienable right to alter, reform, or abolish their government in such manner as they think expedient.	37

V. Rights in Civil and Criminal Proceedings

Initiation of Proceedings

Oath, or affirmation, shall be as such as shall be most consistent with and binding on the conscience of person to whom oath or affirmation is administered.	10
All courts shall be open.	26
Every person, for any injury done him, shall have a judicial remedy by due process of law.	37
Right of action to recover damages for injuries/Injuries resulting in death shall never be abrogated.	2
Right to be informed of/demand nature and cause of accusation/to have copy thereof.[1]	45
Every person charged with a crime is presumed innocent until proven guilty.	2

No person to be abused/treated with unnecessary rigor in being arrested, while under arrest, or in prison. 6
No self-incrimination. 47
A wife shall not be compelled to testify against her husband, nor a husband against his wife. UT
Right to counsel for defense.[1] 23
Grand jury presentment or indictment required for capital or infamous crime.[1] 15
Information or indictment required for criminal prosecution/felony. 24
No person shall be held to answer for criminal offense without due process of law. 2
No person shall be held to answer for any crime, punishable by death or life imprisonment, unless on probable cause, shown at hearing. 2
Right to preliminary examination shall not be denied in felony cases except when accused is indicted by grand jury. LA
No person tried for capital or other infamous crime except on information duly filed. 2
No person to be prosecuted for felony by information without preliminary examination before magistrate or having waived same. 5
No person prosecuted by information of public prosecutor after grand jury has ignored charge. ID
No person, for any indictable offense, shall be proceeded against criminally by information. 4
No person shall be arrested or detained except in cases clearly warranted by law. CT
Person unable to understand English who is charged with a crime has right to interpreter throughout proceedings. 2
Privilege of writ of habeas corpus shall not be suspended.[1] 48
Every person restrained of his liberty is entitled to a remedy to inquire into lawfulness thereof. NC
The writ of habeas corpus shall be grantable of right, freely and without cost/in the most easy, cheap, expeditious and ample manner. 4
Right to bail.[1] 40
Every person charged with a crime shall be entitled to pretrial release on reasonable conditions. FL
No excessive bail.[1] 48

Conduct of Proceedings

No accused person before final judgement compelled to advance money or fees to secure criminal rights. 4
Right to trial by jury:
- For all crimes[1] 10
- For all cases in law 29
- For common/civil law cases above certain dollar amount[1] 6
- For cases subjecting any person to capital punishment NH

Right to trial by court in civil cases where matters of fact are at issue, if parties agree. 6
Right to speedy and public trial by an impartial jury.[1] 44
Right and justice shall be administered openly, without sale, denial, or delay/prejudice. 36
No commission of oyer and terminer, or jail delivery, shall be issued. DE
Right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. 2
Trial to be held in state/county where crime was committed/ by impartial jury.[1] 31
No person shall be subject to the same person for both protection and adjudication. SC
Accused shall have right of voir dire examination of prospective jurors and to challenge jurors peremptorily. LA
Right to petition for change of trial venue. 9
Right to testify in one's own behalf/Be personally present with counsel. 36
Right to furnish all proofs favorable to accused. 4
Right to subpoena witnesses.[1] 41
Right to confront witnesses.[1] 43
Witnesses shall not be unreasonably detained/No person imprisoned longer than necessary to secure testimony by deposition. 10
Witnesses shall not be confined with prisoners. 2
Right of all persons to fair and just treatment in legislative and executive investigations. AK
No person to be committed as person of unsound mind except on competent medical or psychiatric testimony. 2

Outcomes of Proceedings

Right to appeal in all cases. 9
No double jeopardy.[1] 42
No excessive fines.[1] 47
No law may limit amount of damages to be recovered for causing death or injury to person/ property. 9
Estates of those who destroy their own lives shall descend or vest as in case of natural death. 8
No imprisonment for debt. 41
No imprisonment for failure to pay fine in criminal case unless afforded adequate time to make payment, in installments if necessary, and unless person has willfully failed to make payment. IL
No imprisonment for militia fine in peacetime. 4
No indefinite imprisonment. FL
No cruel and/or unusual punishment.[1] 46
No whipping allowed as punishment for crime. GA
All penalties determined both according to seriousness of crime and objective to restore offender to useful citizenship/proportioned to offense. 7
Penal administration shall be based on principle of reformation and need to protect public/not vindictive justice. 6
In construction of jails, proper regard shall be had to health of prisoners. 3
Legislature shall, by law, provide for employment and occupation of prisoners/No prisoner required to work where his labor or product shall be contracted to any firm, person, or association. 6
Friends and counsel may at proper seasons have access to those confined. DE
No minor under age 18 may be confined in same section of any jail or prison with adult prisoners. 2
No conviction shall work corruption of blood or forfeiture of estate. 27
No provision shall be construed as prohibiting imposition of the punishment of death. MA
No law shall be enacted providing for the penalty of death. MI
Limits on treason conviction and/or punishment.[1] 37
No citizen shall be outlawed. 6
No citizen shall be transported out of state for any offense committed within state/exiled/ banished. 11
Executive/with approval of Board may grant reprieves, paroles, commutations, and/or pardons.[1] 47
Executive/with approval of Board may remit fines and forfeitures. 26
Victims' rights/Bill of rights. 5

VI. Natural Resources

Each person has right to a clean and healthful environment, including control of pollution and conservation, protection and enhancement of natural resources. 2
People shall have the right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; MA

and protection of the people in their right to the conservation, development, and utilization of agricultural, mineral, forest, water, air, and other natural resources is declared to be a public purpose.

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. State's public natural resources are the common property of all the people, including generations yet to come. Commonwealth shall conserve and maintain these for the benefit of the people. — PA

Conservation and development of all the natural resources of the state including the control, storing, preservation and distribution of water, streams, rivers, forests, and navigation of inland and coastal waters are declared public rights and duties. — TX

The state and each person shall maintain and improve a clean and healthful environment in the state for present and future generations. — MT

Laws and regulations governing use or disposal of natural resources apply equally to all persons similarly situated. — AK

Feudal tenures of every description are prohibited. — 3

No lease or grant of agricultural lands, reserving any rent or service, shall be valid for more than a period of years. — 2

All existing rights to use of any waters in state for all useful or beneficial purposes are hereby recognized and confirmed. — 4

All surface and subsurface waters reserved to the people for common use are subject to appropriation. — 2

Right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when demanded by the public interest. — NE

Priority of appropriation of water shall give prior right. — 6

Right to natural waters limited to that reasonably required for beneficial use. — 3

Riparian rights attach to no more flow than reasonable and beneficial uses. — CA

Common law doctrine of riparian water rights shall not obtain or be of any force or effect. — AZ

Necessity of water for domestic use and for irrigation purposes in the state is declared to be a natural want. — NE

Use of water of every natural stream within the state is dedicated to the people of the state for beneficial purposes. — NE

Rights, title, and interest in and to all water for the development of water power sites, which state now owns or may acquire, shall be held in perpetuity. — OR

The state asserts its ownership to the beds and shores of all navigable waters in the state. The use of waters for irrigation, mining, and manufacturing purposes shall be deemed a public use. — WA

No citizen of U.S. or resident of state to be denied free access to navigable or public waters of state. — 4

State shall have concurrent jurisdiction on all rivers and lakes bordering the state, and all navigable waters shall be common highways and forever free to inhabitants of the state and citizens of the U.S. — WI

An equal participation in the free navigation of the Mississippi is one of the inherent rights of the citizens of the state. — TN

Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use. — AK

People shall have right to fish upon and from public lands and waters thereof. — CA

All fisheries in the sea waters of the state not including any fish pond, artificial enclosure, or state-licensed mariculture operation shall be free to the public, subject to vested rights and right of state to regulate the same. — HI

No exclusive right or special privilege of fishery shall be created or authorized in natural waters. — AK

The natural oyster beds, rocks, and shoals in the waters of the Commonwealth shall not be leased, rented, or sold but shall be held in trust for the benefit of the people. — VA

People shall continue to enjoy and freely exercise all the rights of fishery and the privileges of the shore, to which they have been entitled under the charter and usages of the state; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values. — RI

All public natural resources are held in trust by the state for the benefit of the people. — HI

People of the state are declared to possess the ultimate property in and to all lands within the jurisdiction of the state. — 2

The salt springs, coal, oil, minerals, or other natural resources on or contained in the land belonging to the state shall never be alienated. — NE

Discovery and appropriation shall be basis for establishing a right in minerals reserved to the state. Prior discovery, location, and filing, as prescribed by law, shall establish a prior right to these minerals and also a prior right to permits, leases, and transferable licenses for their extraction. — AK

No person shall be involuntarily divested of right to use of waters, interest in lands, or improvements effecting either, except for superior beneficial use or public purpose and then only with just compensation and by operation of law. — AK

VII. Occupational Rights

The labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. — NY

Rights of labor shall have just protection through the laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state. — WY

All wage earners in the state employed in factories, mines, workshops, or by corporations, shall be paid for their labor in lawful money. — KY

Eight-hour workday:

- All employment by, or on behalf of, state or any political subdivision — 9
- Private sector employment (injurious or dangerous jobs) — CO

No laborer, in employ of a contractor or subcontractor engaged in performance of any public work, shall be:

- Permitted to work for more than five days in any week. — NY
- Paid less than the rate of wages prevailing in same trade or occupation in locality where such public work is situated. — NY

Child labor:

- No child under age employed during public school hours. — AZ
- No child under age employed underground in mines/any hazardous occupation. — 7
- No child under age in factories/workshops. — ND

No contractual immunity of employer from liability for negligence. — 2

Common law doctrine of fellow servant, so far as it affects liability of a master for injuries to his servant by other servants of master, is forever abrogated. — 2

Right of employees or employers to pay into a state or other system of insurance for compensation for injuries to employees.	4
Labor "black lists" prohibited.	3
Right to work/No person to be denied employment because of membership or non-membership in any labor organization.	7
Right to bargain collectively through labor organization shall not be abridged.	3
Persons in private employment shall have the right to organize for purpose of collective bargaining.	2
Persons in public employment shall have the right to organize for purpose of collective bargaining, as provided by law.	HI
Person in public employment shall have the right to organize, present to and make known to the state, or any political subdivisions or agencies, their grievances and proposals through representatives of their choosing.	NJ
Person not to be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin.	CA
Every citizen of the state shall be free to obtain employment wherever possible, and any person, corporation, or agent thereof, maliciously interfering or hindering in any way, any citizen from obtaining or enjoying employment already obtained, from any other corporation or person, shall be deemed guilty of misdemeanor.	ND
No discrimination in hiring or promotion practices by any employer on account of race, color, creed, national ancestry, sex, or physical or mental handicap.	IL

VIII. Other Rights

No discrimination in sale or rental of property on account of race, color, creed, national ancestry, sex, or physical or mental handicap	IL
Any person may, by will, bequeath all or any portion of his estate to any charitable, religious, educational, or civil institution, subject to statutory rights of surviving spouses and minor children.	MS

IX. Limits on Rights

No person who advocates, or who aids or belongs to any party or organization or association which advocates, the overthrow by force or violence of the government of the U.S. or the state shall be qualified to hold any public office of trust or profit under this constitution.	4
Secret political societies shall not be tolerated.	NC
Constitution does not prohibit state from granting preferences, on basis of state residence, to residents of state over nonresidents to extent permitted by U.S. Constitution.	AK
Rights of aliens in reference to purchase, enjoyment, or descent of property may be regulated by law/ Ownership by aliens prohibited.	6
No person not a citizen or ward of the U.S. shall be employed upon or in connection with any state, county or municipal work or employment.	3
Public employees have no right to strike.	FL
Public schooling shall always be conducted in English.	AK
English fluency required to hold state office.	AK
English is official language of state.	6
English and Hawaiian are official languages of the state.	HI
No individual, corporation, or association allowed to purchase more than 160 acres of agricultural land or more than 640 acres of grazing land.	AK
Polygamous or plural marriages, or polygamous cohabitation, are forever prohibited.	4
No public funds will be used to pay for any abortion.	3
Legislature shall never pass any law to authorize or legalize any marriage between any white person and a negro, or descendant of a negro.	AL
The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more negro blood, shall be unlawful and void.	SC
No unmarried woman shall legally consent to sexual intercourse who shall not have attained the age of fourteen years.	SC
Any person having knowledge or possession of facts that tend to establish guilt of any other person or corporation under the laws of the state shall not be excused from giving testimony or producing evidence on grounds that it may incriminate them.	OK
In trials of contested elections and investigations of elections, no person may withhold testimony on ground of self-incrimination, but testimony may not be used against person.	5
Person having knowledge of bribery or illegal rebating cannot be excused from testimony, but cannot be prosecuted on testimony (i.e., immunity).	7
No soldier, sailor, or marine in the military service of the United States shall acquire residence by reason of being stationed in this state.	13
No person who denies the being of God shall hold any civil office/be competent to testify as witness in court.	4
No person who denies the being of Almighty God, is not qualified to vote, and/or is convicted of felony or treason having not been restored to rights, shall be disqualified from holding public office.	NC
No person who fights or participates in a duel shall hold any office in the state/for period of ten years.	9
Any rights created for the first time by Declaration of Rights shall be prospective and not retroactive.	IL

X. Reserved Rights

Rights not enumerated are retained by the people.[1]	33
Rights guaranteed by state constitution not dependent on those guaranteed by United States Constitution.	CA
Powers not delegated to U.S. or denied the states are reserved to the states or to the people.[1]	4
People of the state have sole and exclusive right of governing themselves as a free, sovereign, and independent state.	7
The state is free and independent, subject only to the U.S. Constitution; all proposed amendments to the U.S. Constitution qualifying or affecting individual liberties of the people or impairing local self-government should be submitted to conventions of the people.	MO
People reserve the right to control own destiny, to nurture integrity of the people and culture, and to preserve quality of life desired.	HI

Table Notes:

[1] This provision or a similar provision is also found in the U.S. Constitution and applies to the U.S. government.

[2] This provision is also found in the U.S. Constitution, and it explicitly applies both to the U.S. government and to the state governments (and their local governments). The number next to the right indicates the number of state constitutions having the same or a similar provision.

[3] This provision is found in the U.S. Constitution and applies only to the state governments (and their local governments). It does not explicitly apply to the U.S. government.

Amending State Bills of Rights: Do Voters Reduce Rights?

Janice C. May

The renewed attention to state constitutions during the past 20 years has raised questions about the impact of formal amendment and revision processes on the viability of these charters as protectors of individual rights. A primary reason why questions have arisen is that state constitutions are amended frequently. "Amendomania" is a term that has been applied by some critics to the hundreds of amendments regularly proposed and added to state constitutions. Constant tinkering with a state's fundamental law may not, therefore, augur well for the permanency of rights.

A key concern is the role of the voter, who possesses the sovereign power to decide the fate of constitutional amendments referred by the legislature or by a convention (and in Florida by commissions). Under the constitutional initiative process available in 17 states (only one of which uses the indirect form), voters may propose and adopt amendments independently of the legislature or a convention. Although the U.S. Constitution provides a floor of protection for certain rights, are state constitutional rights imperiled by procedures that allow continual exposure to public opinion? Can the "majority" be trusted to protect "minority rights"?

An analysis of state constitutional amendments referred to the voters can shed considerable light on these questions. In this article, such an analysis will be made on the basis of surveys conducted by the author and the late Albert L. Sturm.[1]

Infrequent Rights Amendments

The first important finding is that state bills of rights have been amended relatively infrequently. From 1970 through 1990, approximately 155 rights amendments were proposed, of which 126 were added to bills of rights.[2] This is an average of 3.0 proposals and 2.5 adoptions for each state, or about one adoption per state every eight years. Of the 11 major articles of state charters, the bill of rights ranked near the bottom with respect to the total number of constitutional amendment proposals (ninth) and adoptions (eighth). Expressed in another way, amendments to bills of rights accounted for about 5 percent of proposals and 7 percent of adoptions. The fact that rights proposals enjoyed the highest rate of adoption among the articles (82 percent) explains the somewhat larger proportion of rights measures ratified by the voters.

Interest in amending bills of rights as measured by the number of propositions on ballots was slightly higher in the 1970s than in the 1980s (75 proposals and 60 adoptions in the 1970s compared to 68 proposals and 59 adoptions in the 1980s). The biennium showing the most activity during the past 20 years was 1972-73—26 propositions, of which 22 were ratified.

An exception to the slight downward trend in the 1980s was an increase in the number of constitutional initiatives to amend state bills of rights. While only five such propositions were on the ballot in the 1970s, of which two were approved, the number in the next decade grew to eight, almost a four-fold increase, with seven adoptions. In 1990, five more initiatives were voted on, and two were approved. This jump in the popularity of the initiative is significant, but the numbers are small. The device has been used sparingly to change rights.[3] Thirteen proposals and nine adoptions over 11 years (1980-1990) amounts to under one proposal and well under one adoption on average for the 17 states having the initiative.

Counting only amendments to state bills of rights understates somewhat the extent to which bills of rights have been changed. By custom, new constitutions and certain other major revisions are not counted as amendments. Suffice it to say that even with the addition of revisions the changes in bills of rights are far from being a flood. The general pattern exhibited by the seven new

constitutions adopted during the past 21 years has been one of retention of traditional rights, editorial improvements, and additions of a few new rights.[4] In summary, then, "amendomania" has not affected state bills of rights nearly as much as it has affected other sections of state constitutions.

Do Voters Expand or Contract Rights?

Of greater interest than the number of amendments is whether the trend has been toward expansion or contraction of rights and whether certain rights are more popular than others.

From 1970 through 1985, the largest category of rights amendments (including rights identical or similar to those in state bills of rights but located in other articles) concerned criminal justice.[5] All but a few of these reduced rights, and most passed. The second largest group, however, consisted of antidiscrimination measures, mostly equal rights amendments (ERAs), which were expansive. Most of these were approved by voters. Coupled with other proposals in different categories, the amendments that expanded rights came close to parity with those that contracted them. If rights from new constitutions were added, the balance would be on the side of expansion in 1970-1985.

During the past five years, criminal justice proposals and various kinds of antidiscrimination measures and related items have dominated the rights scene. Together, they made up 61 percent of both proposals and adoptions. Other rights amendments covered a medley of topics, many of minor importance. Again, though, depending in part on how one classifies amendments, voters expanded rights about as often as they contracted them during 1986-1990. What follows is a detailed discussion of these activities.

Criminal Justice Rights

Criminal justice measures constituted the largest single group of rights propositions in 1986-1990, but were proportionately less numerous than in 1970-1985 (one-third of the total rather than 43 percent). However, the approval rate of 90 percent was somewhat higher.

The most important substantive difference from 1970-1985 was the larger contingent of eight proposals in seven states giving rights to victims of crime (Arizona, California-2, Florida, Michigan, Rhode Island, Texas, Washington). Only the California Victims' Bill of Rights had been on the ballot before 1986. Seven of the eight victims' rights propositions were adopted. The measures represent a new direction for criminal justice, one that has drawn considerable national and international support. (Forty-four states have adopted statutory provisions on victims' rights). All but three of the proposals (California-2, Arizona) may be regarded as expansive because their intent is to add new rights for victims "to the extent that these rights do not interfere with the constitutional rights of the accused" (as expressed in the Florida measure).

Seven other measures in six states (Illinois, Mississippi, New Mexico, Oklahoma, Rhode Island-2, Utah), all passing muster with the voters, cut back on the right to bail and are therefore classified as diminishing rights. The remaining five criminal justice propositions, of which four passed, will be regarded as rights neutral because they involved changes in structure or law enforcement policy, or they mixed rights reductions with expansions.[6]

Antidiscrimination Measures

The number of antidiscrimination measures decreased after 1985. Only two ERAs were on the ballot: a Vermont proposition that failed at the polls and a Rhode Island proposal that included "race, gender, or handicap," which passed. Other developments were favorable to minorities and women, but were largely symbolic. The most ambitious of these was an editorial revision of the entire Maine Constitution to render it gender neutral, which was ratified by the voters in 1988. Quite a few other state charters have been edited for this purpose, but not the whole document. Three successful amendments removed vestiges of segregation: the repeal of an "interposition" amendment that directed the Arkansas legislature to oppose the "Un-Constitutional" school segregation cases (*Brown* v. *Board of Education*), and the removal of two Mississippi provisions, one forbidding interracial marriage and the other requiring segregation of prison inmates.

Abortion Rights

In contrast to 1970-1985, seven abortion measures were on the ballot in 1986-1990 (Arkansas-2, Colorado, Massachusetts, Oregon-2, Rhode Island); all but one were designed to restrict women's rights to abortion. Five of the six were defeated by voters. The only successful measure was an Arkansas amendment prohibiting public funds for abortion. These anti-abortion proposals are classified as rights restricting because they are intended to constrain a right currently articulated by the U.S. Supreme Court and supported by many citizens. The seventh measure, which failed, was a Colorado initiative to repeal a ban on public funding of abortions. However, it should be noted that the U.S. Supreme Court has not recognized a right to a publicly funded abortion (although several state courts have done so), and from a pro-life perspective, any provision to restrict abortion is rights expanding.

Language Rights

A group of five "English Only" amendments represented the only new category of importance since 1985. (The Nebraska Constitution was amended in 1920 for this purpose.) All were approved (Alabama, Arizona, California, Colorado, Florida). Although their language appears benign, except for the Arizona proposition, which was declared unconstitutional by a federal district court in 1988,[7] promoting English as the official language is often thought of as a retreat from language rights for minorities. All the English measures, therefore, will be classified as diminishing rights, although it is not yet evident that these amendments will in fact reduce rights, and, with the possible exception of the Arizona provision, they do not explicitly take away an existing right.

Tort Reform

Four amendments concerned tort reform or regulation (Arizona-2, Florida, Montana), but only the Montana proposal was adopted. Because these proposals can be

considered as limiting access to the courts, an expressly protected right in some state constitutions, they will be classified as contracting rights.

Gun Control

Six propositions dealt with the right to keep and bear arms, and all were accepted by the voters (Delaware,[8] Florida, Maine, New Mexico, Nebraska, West Virginia). Unlike the others, the Florida proposition requires a three-day waiting period before purchasing handguns. One view held by some constitutional analysts is that the right to bear arms is a collective rather than an individual right. However, amendments can be considered rights expansive if the intent is to establish a clear individual right. The propositions are so classified here, except for the Florida measure, which is treated as a police regulation of an individual right.

Civil Jury Trials

Another group of four amendments dealt with jury trials in civil cases (Hawaii, Minnesota, New Hampshire-2). These are, at most, minor restrictions on the right to a jury trial. Typically, they raise the value of the amount in controversy or allow smaller juries, or both. All won at the polls, except a New Hampshire proposition that would have left changes up to the legislature.

Miscellaneous

Of the remaining amendments, three major provisions dealt with freedom of speech (Rhode Island) and the environment (Rhode Island, Kentucky). All of these passed and are classified as expansive. Two other proposals involved sovereign immunity relaxation (Georgia-2) that might increase rights, one of which failed. An Alaska proposition awarding preference to its own residents was ratified and can be regarded as restrictive. Another five amendments were excluded from classification for various reasons: a one-word change (Wisconsin), dual office-holding (Maryland), classified property tax (Wyoming), a drinking age regulation (Montana), and two highly technical "takings clauses" (Oklahoma, South Dakota). One of the takings proposals was defeated, but all the others won.

Voters Restrict Criminal Rights but Not Necessarily Other Rights

Combining the various proposals that were classified as reducing or expanding rights yields the following results: 30 restrictive and 22 expansive proposals; 20 restrictive and 19 expansive adoptions.[9] Although the restrictive propositions were more numerous, the adoption rate of the expansive measures was higher (86 percent to 66 percent), thus leading to a virtual tie between the expansive and restrictive measures. Of the major categories, criminal justice measures accounted for 33 percent of the rights-reducing propositions and 45 percent of their adoptions. The English language and abortion measures were slightly more numerous than the crime propositions among the restrictive proposals (36 percent), but fewer were adopted (30 percent). Hence, concern for crime is the major source of rights-reducing measures approved by the voters. Antidiscrimination propositions (including one pro-choice abortion item) amounted to 31 percent of the expansive proposals and 26 percent of the adoptions.

It is also of interest that, unlike the 1970-1985 period, half (15 of 30) of the restrictive proposals and 40 percent (8 of 20) of the adoptions during 1986-1990 were constitutional initiatives.[10] Although the number of initiatives was small (17), they contributed a disproportionate share of the rights-reducing measures.

Again, however, it should be noted that one can reach different conclusions depending on how one classifies the rights measures. If the anti-abortion measures are classified as rights expanding and if all but one (Arizona) of the "English only" measures are classified as neutral, then one will conclude that there were 20 restrictive and 27 expansive proposals, and 14 restrictive and 20 expansive adoptions. Thus, from this perspective, voters expanded rights more often than they contracted them.

Nailing State Courts to the Federal Floor

Amendments to state constitutions have occasionally overturned state court rulings on rights, and a few amendments have taken a stand on "the new judicial federalism" (state judicial interpretation of state constitutional rights independently of the national document). During 1970-1985, at least six court rulings were singled out for rejection by amendments; in addition, voters in California and Florida adopted "lockstep" propositions mandating that their state courts not exceed standards set by the U.S. Supreme Court in certain rights cases.[11] Even so, California voters also approved in 1974 a clear statement that rights under the state constitution "are not dependent on those guaranteed by the U.S. Constitution" (Art. I, Sec. 24).

Since 1985, the most significant development was the ratification in June 1990 by the California electorate of Proposition 115, the Crime Victims Justice Reform Act. A constitutional initiative, the proposal launched a full-scale attack on the new judicial federalism in criminal cases. For the first time in California history, the state's courts may have been required to give up their power to interpret the rights of "criminal defendants" under the state's fundamental law and, in essence, "delegate" it to the federal courts. Expressing the view that defendants' rights "had been unnecessarily expanded far beyond that which is required by the U.S. Constitution," the proposition directed the California courts to construe 12 enumerated rights, such as due process and privacy, "consistent with the U.S. Constitution" and *not* to construe the state's charter to "afford greater rights to criminal defendants than those afforded by the U.S. Constitution." The state supreme court estimated that the mandates in Proposition 115 would eliminate at least 32 rights, and one commentator stated that 100 cases developed over a span of 40 years would be overturned.[12]

Calling the provisions "devastating," the California Supreme Court, in *Raven* v. *Deukmejian*, struck them down as an unconstitutional "revision" of the state constitution instead of an "amendment," to which California constitutional initiatives must be limited. Chief Justice Malcolm Lucas argued that the measure was a

"qualitative" revision because it would change the basic framework of the state's judicial and constitutional system by "substantially altering the substance and integrity of the state constitution as a document of independent force and effect" and by depriving courts of their basic functions. The court left standing three new sections to the bill of rights incorporated in Proposition 115. One, which has also been described as historic, confers on the *state* for the first time the rights of due process and to a speedy and public trial. The other changes would overturn at least three cases.[13]

At the general election of 1990, California voters rejected Proposition 129, a constitutional initiative that included a provision "reenacting" Proposition 115, but with a proviso that a woman's right to reproductive choice would continue to be protected under the right to privacy in the state constitution.

Another major event relating to the new judicial federalism was the adoption in 1986 of a Rhode Island proposition holding that state constitutional rights are not dependent on the U.S. Constitution. In an ironic twist, considering Proposition 115, the voters also approved new "equal protection" and "due process" clauses taken from the U.S. Constitution to ensure that the Rhode Island courts would be able to interpret them independently and more broadly than the U.S. Supreme Court's interpretation of the U.S. Constitution.[14] It is difficult to predict whether more states will support the new judicial federalism by amendment, but it seems likely that more attempts will be made to limit state courts to federal standards in criminal cases.

Conclusion

On balance, the state constitutional amendment process has not been a threat to state bills of rights, although there may be some long-run cause for concern. For one thing, the process is used relatively infrequently to change bills of rights. Second, voters approve proposals expanding rights in about equal measure to those reducing them. Among the rights-expanding propositions put to voters during the past 21 years, a large number of antidiscrimination amendments (mainly ERAs) were adopted to provide more protection for women and minorities than that afforded by the U.S. Constitution. Of the rights-reducing measures adopted by the voters, it is significant that almost half concerned crime.

In this respect, the question of whether voters can be trusted to protect rights is misguided. The desire to narrow the rights of the accused is pervasive, reaching as it does right into the Congress, the White House, and the U.S. Supreme Court. In other words, voters thus far have not been significantly out of step with many political leaders and judges.

The experience with Proposition 115 also sheds light on the controversial constitutional initiative. Various checks provide safeguards against misuse of the initiative, which in recent years has been the source of about half of the proposals limiting rights. The judicial check "kicked in" to hold unconstitutional the most far-reaching provisions of Proposition 115. Thus, while the state constitutional amendment process may leave many citizens feeling uneasy about the ability of state charters to guarantee rights, the process does allow the public to participate, to forge new rights, and to define rights in controversial areas such as abortion. In our federal democracy, this process is not only a very desirable attribute but also the sovereign prerogative of the people.

Notes

[1] Primary data were provided by official sources in every state. All but the 1990 data have been included in biennial surveys of state constitutions published in *The Book of the States* (Lexington, Kentucky: The Council of State Governments).

[2] The numbers apply to state bills of rights only and not to rights located in other articles of state constitutions. Rights incorporated in new constitutions and certain other "general revisions" are also excluded.

[3] See Janice C. May, "The Constitutional Initiative: A Threat to Rights?" in Stanley H. Friedelbaum, ed., *Human Rights in the States: New Directions in Constitutional Policymaking* (Westport, Connecticut: Greenwood Press, 1988), p. 168. From 1906 to 1986, only 25 rights measures were passed by constitutional initiative.

[4] Albert L. Sturm, "The Development of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 87.

[5] Janice C. May, "Constitutional Amendment and Revision Revisited," *Publius: The Journal of Federalism* 17 (Winter 1987): 170-176.

[6] Regarded as structural changes rather than as rights were three grand jury propositions (South Carolina); two passed. A measure on forfeiture of property in civil proceedings for use in law enforcement was considered law enforcement policy (Louisiana); it passed. A right to a jury measure that included both restrictive and expansive features (Oklahoma) was dropped; it passed. The proposition also included civil trials, but will be classified as criminal.

[7] Yniguez v. Mofford, 730 F. Supp. 309 (1990). Unsuccessful challenges to the Colorado and Florida amendments were not based on the language used in the measures. See Montero v. Meyer, 861 F.2d 603 (1988) and Delgado v. Smith, 861 F.2d 1489 (1988).

[8] In Delaware, amendments are not referred to the voters. They are, however, published before a general election that occurs between the two sessions at which the legislature must approve amendments before their final adoption.

[9] The 30 restrictive proposals were: 3 crime victims, 7 bail, 6 abortion, 5 English, 4 torts and 4 civil jury, and 1 Alaska resident preference. The 22 expansive proposals were: 5 crime victims, 6 antidiscrimination, 1 abortion, 5 arms, 2 environment, 1 speech, and 2 sovereign immunity. Restrictive measures adopted were: 2 crime victims, 7 bail, 1 abortion, 5 English, 1 torts, 3 civil juries, and 1 Alaska residence. Adoptions of expansive measures were: 5 crime victims, 5 antidiscrimination, 5 arms, 2 environment, 1 sovereign immunity, and 1 speech.

[10] The restrictive constitutional initiative proposals were: 3 crime victims (Arizona, California-2), 4 English (California, Arizona, Colorado, Florida), 4 torts (Arizona-2, Florida, Montana), and 4 abortion (Arkansas-2, Oregon-2). The adoptions were: 2 crime victims (Arizona, California), 4 English, 1 torts (Montan), and 1 abortion (Arkansas).

[11] May, "Constitutional Amendment and Revision," pp. 175-176.

[12] See Raven v. Deukmejian, 801 P.2d 1077 (CA 1990); and Gerald F. Uelmen, "The California Constitution after Proposition 115," *Emerging Issues in State Constitutional Law* 3 (1990): 61.

[13] See "Proposition 115: The Crime Victims Justice Reform Act," *Pacific Law Journal* 22 (1991): 1018-1027.

[14] Constitution of the State of Rhode Island and Providence Plantations, Ann. Ed. Art. I, Sec. 24. The commentary reads in part: "This resolution adds to the Constitution a concept that the state Constitution is to be interpreted as expanding and not limiting individual rights, even though similar rights in the federal Constitution may be more narrowly defined."

The Canadian Constitutional Crisis: Who's Right on Rights?

Robert C. Vipond

While Americans celebrate the bicentennial of the ratification of the U.S. Bill of Rights, Canadians face what is arguably the most serious constitutional crisis in their history. Popular support in Quebec for some form of sovereignty has risen dramatically, reaching 60 percent in some polls, and the Quebec government is under enormous pressure to put the sovereignty question to a general referendum in 1992. Several protest parties have parlayed a budding tax revolt, anti-French sentiment, and regional dissatisfaction into an important political force in English Canada. The unacceptable treatment of aboriginal peoples has become an important constitutional issue. And the federal government, led by Prime Minister Brian Mulroney, is deeply unpopular; it will have a difficult time leading the country out of the constitutional bog as long as its position in the polls remains roughly at the level of prime interest rates.[1] What has gone wrong, and what are the prospects for a resolution within the existing federal framework?

The Confederation Settlement of 1867

The basic answer to the first question is that the consensus that sustained the Canadian federation for more than a century is now very much in question. When the federation was formed in 1867, its architects set down two non-negotiable conditions for success.[2] One was to preempt the kind of constitutional crisis that led to the U.S. Civil War; the other was to overcome the domestic political deadlock that had dogged the combined territory of Upper and Lower Canada (Ontario and Quebec) for the previous two decades. The solution to this double problem, set out in the British North America Act of 1867, was to create a centralized but still federal union.

On the one hand, John A. Macdonald, the principal architect and Canada's first Prime Minister, proclaimed that he and his colleagues had corrected the "errors" of the U.S. Constitution by granting the national government "all the great powers of sovereignty"—including the unqualified power to regulate trade and commerce, the power to make and enforce the criminal law, and a broad residual power to control other matters not expressly delegated to the national government.

On the other hand, the various provinces (originally four, now ten) were given "exclusive" power to legislate on matters concerning "property and civil rights." The intention here was to provincialize most of the thorny linguistic, educational, and religious issues that divided Ontario and Quebec. As Macdonald put it, the British North America Act created "a happy medium" between outright centralization (which would never have been accepted, especially in Quebec) and expansive decentralization (which, the U.S. Civil War demonstrated, was to be avoided at all costs).

Balancing Individual and Provincial Rights

The Confederation settlement involved a compromise between two visions of federalism; it also embodied two approaches to rights protection. Some of the Canadian "Fathers" sounded remarkably like James Madison at his most centralist moments. Like Madison, they argued that the federal government must have a veto over provincial legislation, both to protect federal jurisdiction from provincial incursions and to protect individual and minority rights within the provinces. The difference is that where Madison was forced to jettison his proposal for a national veto, the Canadians ended up recycling the old imperial power of "disallowance" to do the job.

Other "Fathers" interpreted provincial autonomy as a means to protect a collective right to self-government. This argument had special force in Quebec, where the danger of cultural assimilation into Anglo-Saxon North America was apparent. Hence, provincial sovereignty over such sensitive matters as language and religion was seen as providing the best hope for ensuring the survival of the French-Canadian community or nation. But the argument for collective rights caught on in other provinces, too, especially Ontario, where provincial officials defended their autonomy over local affairs in terms of a community's

basic right to self-government. So styled, provincial rights became a legitimate, indeed fundamental, constitutional value in Canada at the very moment the doctrine of states' rights fell from grace in the United States.

It was no easy matter to steer a middle course between the competing claims of national and provincial power, and of individual and collective rights. The courts had to address numerous jurisdictional disputes, and the federal government's liberal use of the veto power in the years after Confederation produced a concerted campaign to protect provincial self-government from the "autocratic and tyrannical prerogatives" of John A. Macdonald and his "Star Chamber sitting in Ottawa."[3]

Yet, even at its most discordant moments, the Confederation settlement held, in part because individual and collective rights were not seen as mutually exclusive. Centralists could not reject the principle of provincial autonomy completely because they keenly appreciated the political advantages of consigning religious and linguistic controversies to the provinces. (As a Member of Parliament once put it, provincial autonomy was politically useful because it served as a constitutional "firebreak," preventing sectional disputes from spreading throughout the country.) For their part, provincial autonomists did not deny the importance of protecting individual liberty. Indeed, they (like the Antifederalists in the United States) argued that fully self-governing provincial communities would best protect individual liberty because they are closer to the people and better able to accommodate claims of diversity. That recognition alone helped to restrain their more doctrinaire impulses.

Polarization over Individual and Provincial Rights

By the 1960s, however, this complex federal compromise had begun to wear thin. The 1960s produced two political phenomena that have profoundly affected the course of Canadian federalism. First, a political and economic elite in Quebec became eager to take positive steps to protect the collective identity of Quebeckers and to increase Quebec's leverage in an array of policy areas.[4] Second, Pierre Trudeau, who rose to national prominence as the foe of Quebec nationalism, as Prime Minister championed the "entrenchment" of a constitutional Charter of Rights, including language rights, as one way to stem the nationalist tide.[5]

The simultaneous rise of Quebec nationalism and Pierre Trudeau propelled Quebec and Canadian politics in quite different directions. In Quebec, successive governments acted to secure the position of the French language in the workplace, in the market, and in schools by restricting the use of English. In Ottawa, the federal government embraced bilingualism and sought to extend individual linguistic choice in education and government services throughout the country. In Quebec, the Liberal government of Robert Bourassa gave way in 1976 to the nationalist Parti Quebecois and to PQ's plan to hold a referendum on sovereignty-association. In 1978, the Trudeau government responded by announcing its intention to proceed with major constitutional change, with or without the support of the provincial governments, including Quebec. The federal government was ultimately persuaded to abandon its unilateral approach to constitutional reform. However, when the Charter of Rights and Freedoms finally emerged, in 1982, as part of a larger constitutional package, Quebec refused to sign on. Yet, the Charter of Rights applies to Quebec law, even though the government and legislature of Quebec have never consented to its enactment.[6]

Quebec's Sign Law

As the constitutional agenda in Canada has broadened and diverged over the years, constitutional debate has become more confrontational, as though the values at stake are mutually exclusive and resistant to compromise. There are plenty of examples of polarization, but none is more vivid than Quebec's attempt to protect the dominance of French in the marketplace. In December 1988, the Supreme Court of Canada struck down core sections of Quebec's Bill 101, the Charter of the French Language, which required the exclusive use of French on commercial signs and posters, and in company names. The Court held that commercial expression is a "fundamental freedom" which, if limited as Quebec wanted to limit it, would threaten "an important aspect of individual self-fulfillment and personal autonomy."[7]

Two days after the ruling, Robert Bourassa, the Premier of Quebec, announced that he intended to introduce new legislation into the Quebec National Assembly that would require the use of unilingual, French-only signs outside stores but permit the use of bilingual signs indoors, under certain fairly stringent conditions. Even then, Bourassa was criticized for giving away too much. Forced to defend the new legislation, better known as Bill 178, Bourassa went out of his way to argue that he had broken free from the traditional mold of compromise and half-measures. Those who thought he had done too little should note, he said, that "for the first time in the history of Quebec a premier went so far as to suspend civil liberties, to protect and defend the French language."[8]

At the time he introduced Bill 178, Bourassa maintained that his solution was consistent with the spirit of the Supreme Court's decision. However, in order to foreclose future legal challenges to the law, Quebec's National Assembly invoked the "notwithstanding" clause of the Charter of Rights, a unique provision of Canada's Constitution, which essentially permits provincial legislatures to override certain rights protected by the Charter.

In an extraordinary parliamentary outburst, Prime Minister Mulroney took dead aim at the override provision, calling it "that major fatal flaw of [the constitutional settlement of] 1981, which reduces your rights and mine."[9] Mulroney showed little sympathy for the view that the override is a distinctively Canadian way of reconciling judicial review and democratic accountabil-

ity, and individual and collective rights.[10] He was of the view, rather, that the override provision "holds [individual rights] hostage." A "constitution that does not protect the inalienable and imprescriptible individual rights of individual Canadians," he concluded, "is not worth the paper it is written on."11

Failure of the Meech Lake Accord

The acrimonious debate over Quebec's sign law is especially significant because, in the end, the episode helped scuttle the Meech Lake Accord.[12] The accord was intended to "bring Quebec into the constitutional family" by amending the Constitution Act of 1982[13] to make it more consistent with Quebec's understanding of its place in the federation. The proposed amendments—among them, a clause recognizing Quebec as a "distinct society" within Canada and another limiting the federal spending power in areas of exclusive provincial jurisdiction—were negotiated between the Prime Minister and the ten provincial premiers in the spring of 1987. To become law, the amendments required ratification by the House of Commons, the Senate, and all ten provincial legislatures within three years.

This is where the accord ran into trouble. The "distinct society" clause was generally unpopular in English Canada, and the Quebec government's reaction to the Supreme Court's sign law decision reinforced suspicions in some quarters that Quebec might use the "distinct society" clause to abridge individual rights. Having failed to win approval in two legislatures (Manitoba and Newfoundland), the accord lapsed in June 1990, leaving behind resurgent nationalism in Quebec, widespread bitterness (on all sides) about the process of constitutional reform and, above all, profound uncertainty.

Where Do We Go From Here?

The basic and extremely uncomfortable question thus remains: If it proved impossible to meet Quebec's minimum conditions for constitutional renewal through the Meech Lake Accord, is there reason to expect rapprochement within the current constitutional structure?

Ironically, the difficulty of sorting out direct conflicts between individual and collective rights may be the least of our problems. Survey data reveal that there may be more common ground between Quebeckers and English Canadians than is commonly assumed.[14] Quebeckers are not significantly less "rights conscious" than English Canadians. Quebeckers show strong support for individual rights, including minority language rights, as long as these rights claims are not perceived to threaten Quebec's "national existence" (which is what happened in the controversy surrounding the sign law). In short, if a way can be found to disentangle rights claims from the powerful symbols of national identity, it may be possible to find consensus between the two communities.

The real sticking point may turn out to be the most traditional of federal problems, the division of powers, for here there appears to be little common ground. For at least the past decade, Quebec has consistently demanded greater control over a broad set of policy areas. The failure to address this demand was one of the reasons Quebec refused to sign the Constitution Act of 1982. Now, the death of the Meech Lake Accord, which included some decentralizing features, has only upped the ante. At its 1991 convention, for instance, the Liberal Party of Quebec passed resolutions calling for a restructuring of the federation to give Quebec exclusive jurisdiction over some 22 subjects, including the environment, energy, research and development, and unemployment insurance.[15] Whereas opinion in the rest of Canada appears to run against massive decentralization, in Quebec, some such decentralization seems to be the minimum condition for remaining in the federation.

One way out might be to create an "asymmetrical" federal system, allowing Quebec the greater legislative power it demands while preserving elsewhere the more dominant federal presence apparently desired by the rest of the country. But this, too, will be hard to sell because it contradicts the powerful principle of provincial equality. Tied to the egalitarian spirit of the Charter of Rights, the claim that all provinces must be treated equally became one of the major objections to the Meech Lake Accord. The attempt to constitutionalize Quebec's distinctness touched a raw nerve in English Canada, and there is little evidence that this egalitarianism has lost force in English Canada.

Conclusion

Someone once remarked that the difference between Americans and Canadians is that Americans are forever looking back to their Civil War, while Canadians are constantly looking ahead to theirs.[16] This is a clever quip, but it is also misleading. The problem in Canada is not simply that Quebec has changed, that it may choose to leave an otherwise stable Canadian polity, and that its departure will be resisted. The problem, rather, is that the rest of Canada has changed, too, in ways that strain its relationship with Quebec. English Canadians have been deeply affected by the Charter of Rights and Freedoms. They are more given than before to view policy questions in terms of rights. They are more impatient with the traditional, elite-dominated constitutional process than they used to be. They are more convinced than ever that their national representative institutions do not perform as well as they should. And they appear to be more willing to place other matters (such as the claims of aboriginal peoples) on the constitutional agenda.[17] In that sense, Canada's constitutional difficulties look more like a marriage on the rocks than a war about to happen. Like a troubled marriage, the partners appear torn between the differences that separate them and the realization that divorce could have its own serious drawbacks. And like a troubled marriage, it will take large doses of patience, tolerance, and good will to get things back on track.

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Notes

[1] I owe the quip to my colleague, Richard Simeon.

[2] For a more elaborate account of the Confederation settlement, see Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: State University of New York Press, 1991), ch. 2.

[3] Cited in *Liberty and Community*, p. 79.

[4] For an excellent account of the Quiet Revolution in Quebec, see Kenneth McRoberts, *Quebec: Social Change and Political Crisis* (Toronto: McClelland & Stewart, 1988).

[5] See Stephen Clarkson and Christina McCall, *Trudeau and Our Times* (Toronto: McClelland & Stewart, 1990).

[6] The story of these constitutional negotiations is told in Roy Romanow, John Whyte and Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984).

[7] Ford v. Quebec (Attorney General) (1989) D.L.R. (4th), 577.

[8] *Toronto Globe and Mail*, March 15, 1989.

[9] Canada, Parliament, House of Commons Debates, April 6, 1989, 153.

[10] See, for instance, Peter Russell and Paul Weiler, "Don't scrap the override clause; it's a very Canadian solution," *Toronto Star*, June 4, 1989.

[11] House of Commons Debates, April 6, 1989.

[12] For a good account of the politics of the accord, see David Milne, *The Canadian Constitution* (Toronto: James Lorimer, 1991).

[13] The Constitution Act of 1982 includes the Charter of Rights, a complex formula for amending the constitution, a statement of aboriginal rights, a commitment concerning equalization and regional disparities, and a provision for greater provincial control over the management of nonrenewable natural resources.

[14] See Paul Sniderman, Joseph Fletcher, Peter Russell, and Philip Tetlock, "Political Culture and the Problems of Double Standards: Mass and Elite Attitudes toward Language Rights in the Canadian Charter of Rights and Freedoms," *Canadian Journal of Political Science* (June 1989): 259-284.

[15] See *A Quebec Free to Choose*, better known as the Allaire Report, Report of the Constitutional Committee of the Quebec Liberal Party, January 1991.

[16] Paul Sniderman, H.D. Forbes, and Ian Melzer, "Party Loyalty and Electoral Volatility," in Sylvia Bashevkin, ed., *Canadian Political Behaviour* (Toronto: Methuen, 1985), p. 124.

[17] The best statement of this argument is by Alan Cairns, *Disruptions* (Toronto: McClelland & Stewart, 1991).

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A Bill of Rights for Australia?

Brian Galligan

When Australia federated in 1901, it did so on the basis of a constitution modeled closely on that of the United States. Jurisdiction was divided between the new national government, called "the Commonwealth," and the states, which had been independent and self-governing colonies, by enumerating the Commonwealth's heads of power and guaranteeing the residual to the states. The legislature was constituted on a bicameral basis, with a House of Representatives elected by the people from single-member constituencies, and with a Senate having virtually co-equal power elected by the people of the states with an equal number of senators for each of the six states. A powerful court, called the High Court, was established as the third branch of government for the primary purpose of exercising judicial review. Indeed, the American federal Constitution was "an incomparable model" for the Australian founders. As an eminent previous Australian Chief Justice, Sir Owen Dixon, remarked: "They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality."[1]

The Australian founders departed from the American model, however, in several important ways. They retained the executive form of parliamentary responsible government, which located the real executive primarily in the House of Representatives, a fact that ensured its effective primacy over the Senate, and overlaid this with the formal trappings of constitutional monarchy. In addition, they eschewed a constitutional bill of rights for reasons that were closely linked with their preference for responsible government—namely, that the combined processes of parliamentary representative democracy and responsible government were considered a sufficient guarantee of individual rights.

This position is quite alien to American sentiment, which is informed by liberal assumptions about the individual and wariness toward popular democracy. The Australian institutional tradition is premised on a more positive view of representative democracy and on a faith in the ability of democratic processes to protect individual rights. Interestingly, the Australian case against a bill of rights was put most eloquently by Australia's greatest Liberal Prime Minister, Sir Robert Menzies, in a lecture at the University of Virginia in 1967, after he had retired from politics. As Menzies explained it, the people's control over the executive through a parliament of elected representatives obviates the need for a bill of rights:

> With us, a Minister is not just a nominee of the head of the government. He is and must be a Member of Parliament, elected as such, and answerable to Members of Parliament at every sitting. He is appointed by a Prime Minister similarly elected and open to regular question. Should a Minister do something which is thought to violate fundamental human freedom he can be promptly brought to account in Parliament. If his Government supports him, the Government may be attacked, and if necessary defeated. And if that, as it normally would, leads to a new General Election, the people will express their judgment at the polling booths.

In short, government in a democracy is regarded by us as the ultimate guarantee of justice and individual rights.[2]

Although this was the orthodox view up to that time, the argument would hardly have convinced Menzies' American audience then, or large numbers of Australians today. Nor, even at that time, did Menzies' defense of the Australian system take sufficient account of the iron grip of party discipline and executive dominance over Parliament.

By and large, Australians have long been quite smug about how well rights are protected in their country. For example, Fin Crisp claimed in his leading text on Australian politics: "There has been an extraordinary solidity and general pervasiveness of civil liberties during this century. . . . Australian governments normally live as quietly and unobtrusively as they may in the civil liberties field, even tolerating much very free and hostile speech and much possibly subversive fringe activity."[3] Such optimism has been based on confidence in the democratic processes of responsible government and in our common law heritage, supplemented by a national sense of decency and fairness that is thought to characterize public life.

Hence, according to this majority view, Australia has had no need for bills or charters of rights, which have been increasingly adopted by comparable countries.

Australia's Rejection of a Bill of Rights

Since World War II, however, there has been a contrary minority view that is critical of Australia's record in protecting minority rights and skeptical of reliance on established parliamentary and legal means. Curiously, this has been led by the Australian Labor party, which juxtaposed its call for an entrenched bill of rights with its traditional commitment to centralizing power through abolishing federalism and the Senate. Dr. Herbert V. Evatt, Attorney General in the wartime Labor government and previously a judge of the High Court of Australia, had added the two key Atlantic Charter freedoms of speech and religion to help sell the 1944 "Powers" referendum that would have greatly expanded the Commonwealth's powers for postwar reconstruction, but to no avail. After the scare from Menzies' attempt to ban the Communist party and to deal harshly with suspected Communists, Evatt had the federal Labor party adopt a bill of rights plank in 1951. But with Labor out of federal office for more than two decades, there could be no attempt at implementation.

During the 1970s and 1980s, the Whitlam (1972-1975) and Hawke (1983-present) Labor governments made three abortive attempts to pass a statutory bill of rights.[4] The first, proposed by Attorney General Lionel Murphy in 1973, was the most ambitious. It followed fairly closely the wording of the International Covenant on Civil and Political Rights, to which Australia was a signatory, and was intended to bind the states by means of the external affairs power of the Constitution. This was never tested because the bill was abandoned in the face of stiff opposition in the lead-up to the 1974 election. The second attempt at a statutory bill of rights was made by Garth Evans in 1984 after a broad interpretation of the external affairs power had been confirmed by the High Court in the 1983 *Tasmanian Dam* case. This was a weaker version of the Murphy legislation, "a shield rather than a sword," but it was abandoned after strong criticism by some state premiers and interest groups in the 1984 election campaign. Lionel Bowen, who replaced Evans as Attorney General, proposed a third and weaker bill in 1985, but this too was savagely attacked and defeated in the Senate.

Meanwhile, Bowen had turned the more substantial question of an entrenched bill of rights over to a hand-picked Constitutional Commission that was charged with recommending an overhaul of the Constitution for the 1988 Bicentenary of white settlement in Australia. In its final report, the commission proposed that an extensive bill of rights be added to the Constitution as a new chapter.[5] Meanwhile, in order to cash in on the supposed euphoria of the Bicentenary, the Labor government put some preliminary proposals to referendum that included the extension to the states of three existing rights that already applied to the Commonwealth—trial by jury, freedom of religion, and fair terms for persons whose property is acquired by government. All the 1988 proposals were defeated by voters, with the rights proposal receiving only 31 percent support and winning the dubious distinction of being the least popular of any proposal ever put to the Australian people.[6] This overwhelming defeat of what were in effect modest extensions of existing constitutional rights defeated any prospects of implementing the Commission's ambitious recommendation for entrenching a full-bodied bill of rights in the Constitution.

These initiatives by federal Labor governments for a statutory bill of rights or further entrenching rights in the Constitution have been defeated by a combination of factors: spoiling partisanship from the opposition parties, half-hearted commitment and political ineptness on the Labor side, opposition by state governments, antagonism from various interest groups, and widespread indifference from the public. It should be noted that other piecemeal initiatives for protecting rights have been implemented, including the establishment of special commissions and officers in most states, as well as new Commonwealth legislation against racial and sexual discrimination. Moreover, the checks and balances embodied in the federal division of powers, a written constitution, the bicameral legislature (with the Senate now invariably not controlled by the government party), and judicial review by an independent Court add up to a powerful system of institutional restraint on government.[7]

Going against the Trend in Comparable Countries

In rejecting a bill of rights, however, Australia is going against a strong international trend. Canada experimented with a statutory bill of rights in 1960, then entrenched an elaborate Charter of Rights and Freedoms in its Constitution in 1982. Since then, the Canadian charter has had a powerful impact on Canadian public life, with the judiciary having a field day as social policymakers. New Zealand, despite being a unitary country, has followed the Canadian model. Its Labor government introduced a bill of rights into Parliament in 1985, and finally passed a watered down version in 1990. Britain has become increasingly subject to the European Convention on Human Rights, with periodic scrutiny of its laws by the European Commission and some notable adverse decisions by the European Court of Justice.

Does it matter that Australia has rejected a bill of rights? The Chief Justice of the High Court, Sir Anthony Mason, thinks so and in 1988 announced that he had changed his mind in favor of a bill of rights because Australia was going against the international trend and getting out of step with comparable countries like Canada. Other jurists concerned about threats to judicial independence from an increasingly dominant executive branch favor a bill of rights as a means of enhancing the power and prestige of the judiciary.

But the question should turn on how well rights are respected and protected in Australia. If Australians are sensitive about rights, and if rights are relatively well protected by the existing patchwork of Commonwealth and state institutions and laws, Australians need to know that in order to hold their heads high in the international community. Alternatively, if Australia is a nation of

rednecks with deficient machinery for protecting rights, we also need to know that in order to take remedial action. It is not sufficient to assume that we are a lucky country in being heirs to the best of Westminster parliamentary practice and the common law, and in being the beneficiaries of an indigenous culture of fairness and justice. There are too many exceptions to the contrary, such as the past treatment of aboriginal people and the previous Bjelke-Petersen regime's disdain for civil liberties in Queensland.

Australian Attitudes toward Rights

The question of whether Australia should have a bill of rights is to some extent a secondary one. The prior questions of how sensitive Australians are toward rights and how well rights are protected under existing arrangements have received far less attention than they deserve.

Whether Australia needs a bill of rights is properly a matter of institutional adequacy and design, whereas the attitudes of Australians toward rights has to do with civic culture. If we could establish that Australians hold enlightened attitudes and sensitivities toward rights, we could then tackle the issue of institutional adequacy and design. The answer might be "Yes, they are," or "Yes, with some modifications or additions," or "No, we need a bill of rights." It is perfectly conceivable that, with the appropriate political culture, Australians could make a different institutional system work quite effectively for protecting rights. On the other hand, if Australians do not respect rights, then it is unlikely that changing the institutions would fix things up, although the proponents of a bill of rights claim that it would have an educative effect. Nevertheless, civic culture is more important than institutional arrangements. We are all too familiar with countries that have bills of rights in their constitutions but appalling records in actually respecting rights.

What a bill of rights does is to shift responsibility for rights issues from political to legal elites. This has the effect of politicizing the judiciary and legalizing public policy because judges have the last say on such key issues as whether women should have abortions and, if so, up to what stage of pregnancy; whether compulsory retirement on the basis of age is discriminatory; what constitutes freedom of speech; and how police should deal with suspects. In evaluating such a switch, Australians need to take account of the institutional aptitudes of and constraints on, legislative and judicial bodies for dealing with such matters. In addition, the possible differences in attitudes between citizens and elites and between political and legal elites are also significant. The fact is that, apart from the highly charged and partisan debates over Labor's proposals for bills of rights, we know very little about what Australian citizens or elites think about rights and how they arrive at decisions on rights issues that usually involve balancing conflicting principles.

Take toleration, for example, which underlies respect for rights in a pluralist society. How tolerant are Australians? Some observers would emphasize, on the positive side, the success of the massive postwar migration program, abolition of a "White Australia" policy in the 1970s, the adoption of multiculturalism, and, since the 1967 referendum that gave the Commonwealth government a specific power to make laws with respect to Aborigines, fairer treatment of aboriginal people. Others, however, would claim that Australians have a large and persistent streak of intolerance, which is evident in racist and sexist views that have widespread popular support and strong public articulation. The truth lies probably more with the former than with the latter.

Traditionally, Australians have been favorably disposed to state action in large segments of social and economic life, and are considered less individualistic and entrepreneurial than Americans. Compared to Canadians, however, Australians appear more populist and radically democratic. According to one line of reasoning, this means that Australians are less tolerant and supportive of unpopular groups. But is this the case? Are Australians prone to conformism with peer pressure and to authoritarianism from governments? Or do they have a larrikin streak of anarchism? How firmly do citizens adhere to their views on rights against pressures of authority and conformity?

It is commonly said that Australian political culture is a radical "fragment" of British society, and that its political culture is essentially Benthamite in nature, with a concern for law and good government at the expense of liberty and individual freedom. By contrast, American political culture, representing an 18th century "fragment" of British society, is concerned with liberty, and with personal rights and freedoms. Canada is said to be different again, with a strong "Tory touch" of traditional conservatism. But this has not been tested in any empirical way.

A further issue for civil liberties in Australia is state differences. Australia is a federal country. Important matters, such as criminal law and police, and large parts of social policy and aboriginal affairs, are under state jurisdiction. According to popular stereotypes, there are state differences, but are these grounded in political culture? Do they matter for individual rights and freedoms? Some have argued that there are significant differences in state political cultures, but most observers assume that Australian political culture is fairly homogeneous. This issue has obvious implications for the question of a bill of rights for Australia: do we need a national regime for protecting rights because some states are deficient? If so, is that possible given the extent of state differences?

There are many more questions here than answers, but they do need to be addressed if Australians are to have an informed public debate over protecting rights and whether Australia needs a bill of rights. A research project to survey the attitudes of Australians toward rights, funded by the Australian National University's Research School of Social Sciences and the New South Wales Law Foundation, is under way. It will provide empirical data on Australian citizen and elite attitudes and, because of a strong comparative component, on how Australians compare with Canadians.[8]

An Issue for the 1990s

Meanwhile, the issue of whether Australia should have a bill of rights has been put back squarely on the public agenda by the Sydney Constitutional Centenary Conference marking the anniversary of the first Federation Conference, which produced an earlier draft of the Australian Constitution in 1891. Meeting in April of this year and comprised of leading citizens from across the spectrum of Australian public life, this Constitutional Conference identified 12 key issues for review, with a view to possible constitutional reform, in the decade leading up to the constitutional centenary. Topping the list was "Guarantees of Basic Rights," regarding which the Conference said:

> There was strong support for a guarantee of basic rights in some form, entrenching basic rights, and especially basic democratic rights. This would also have an important symbolic function. But achieving this would require broad support from the Australian community, and would necessarily be part of a long-term process of education and discussion.[9]

Thus, the question of whether Australia should adopt a constitutional bill of rights is a live one for the 1990s. And just as the American federal model proved an incomparable one for Australian constitution-makers 100 years after the American founding, the United States Bill of Rights and 50 state bills of rights might well have the same attraction 200 years on.

Brian Galligan is deputy director of the Federalism Research Center, Research School of Social Sciences, Australian National University.

Notes

[1] Owen Dixon, "The Law and the Constitution," in *Jesting Pilate and Other Papers and Addresses* (Melbourne: Law Book Company, 1965), p. 44.

[2] Robert Menzies, *Central Power in the Australian Commonwealth* (London: Cassall, 1967), p. 54.

[3] L. F. Crisp, *Australian National Government*, 4th Ed. (Melbourne: Longman Cheshire, 1978), p. 134.

[4] Brian Galligan, "Australia's Rejection of a Bill of Rights," *Journal of Commonwealth Comparative Politics* 28 (November 1990): 344-368.

[5] Constitutional Commission, *Final Report*, Vol. 1 (Canberra: Australian Government Publishing Service, 1988), ch. 9.

[6] Brian Galligan, "The 1988 Referendums and Australia's Record on Constitutional Change," *Parliamentary Affairs* 43 (October 1990): 497-506.

[7] _____, Rainer Knopff and John Uhr, "Australian Federalism and the Debate over a Bill of Rights," *Publius: The Journal of Federalism* 20 (Fall 1990): 53-67.

[8] The Australian Rights Survey is comparable to that of the recent Canadian Rights Project and uses the Computer-Assisted Telephone Interview system developed by Merrill Shanks of Berkeley.

[9] Constitutional Centenary Conference, *Statement* (Sydney: April 1991).

Public Attitudes Toward Federal Mandates

ACIR's 20th annual poll on governments and taxes, released in September, found mixed views about the appropriateness of federal mandates.

When asked if the federal government was right in passing a law mandating better pay and overtime benefits for local employees, 60 percent of the respondents said that each local government should make those decisions; only 30 percent said the federal government was right in passing the mandate. On the other hand, 61 percent agreed that the federal government was right to mandate that state governments provide more health care for the poor. In this case, only 30 percent said the state government should decide the level of services. On cleaning up waterways, 71 percent thought the federal government was right to require that local governments improve the treatment of wastewater rather than allowing local governments to set treatment standards (22 percent).

Whether or not the respondents agreed with the federal mandates, most of them believe the costs should be shared. On local pay and benefits, 47 percent said the federal and local governments each should pay part of the cost; 59 percent said the federal and state governments should share the costs of providing federally required health care services; and 62 percent said the federal and local governments should share the cost of federal wastewater treatment standards.

ACIR also asked questions about intergovernmental cooperation; the worst tax; the government that gives citizens the most for their money; the government that spends tax dollars most wisely; state constitutions; and the balance of power between federal, state, and local governments.

The report on the poll, *Changing Public Attitudes on Governments and Taxes, 1991*, is available from ACIR, 800 K Street, NW, South Building, Suite 450, Washington, DC 20575; (202) 653-5640. Report S-20. $10.

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Code Enforcement

STATE AND LOCAL GOVERNMENT CODES: STRATEGIES FOR LOCAL ENFORCEMENT. County and Municipal Study Commission, 115 West State Street, Trenton, NJ 08625, 1990, 118 pp.

This report considers four major areas of local code enforcement and their relation to housing construction and maintenance in New Jersey—uniform construction code, and health, housing, and local planning and zoning codes. The commission found that while state enforcing agencies may act administratively to ensure compliance with standards or approvals, local agencies have no such power. The commission recommends that municipalities be given adequate enforcement authority in local planning matters. The commission also recommends that a certificate of continued occupancy be required at resale or re-rental of one- and two-family homes; that, where possible, the development permit process be delegated to the smallest government able and willing to undertake the responsibility; and that local health agencies be able to levy administrative fines for environmental health violations.

Economic Development

WHO BENEFITS FROM STATE AND LOCAL ECONOMIC DEVELOPMENT POLICIES? By Timothy J. Bartik. W.E. Upjohn Institute for Employment Research, 300 S. Westnedge Avenue, Kalamazoo, MI 49007-3308, 1991. 365 pp. $29 (cloth). $19 (paper).

Over the past 20 years, governors and mayors have assumed responsibility for economic development. While many regions have experienced high unemployment and declining real wages, federal action to deal with these economic problems has been constrained by budget deficits and a conservative political philosophy, and state and local governments have had to act. State and local programs have grown enormously in recent years, but critics question their effectiveness. Do they attract jobs? If so, do these jobs provide benefits to the unemployed or just to landowners? Are these programs a zero-sum game, helping one area at the expense of others? This book provides a comprehensive review of recent evidence that state and local tax and public service policies can affect job growth. The author presents new empirical evidence that job growth creates lower unemployment, higher labor force participation, higher real estate prices, and better occupational opportunities. He also argues that regional competition for jobs may benefit the nation.

Federalism

THE STATE OF AMERICAN FEDERALISM 1990-1991. AN ANNUAL REVIEW OF THE AMERICAN FEDERAL SYSTEM. *Publius*, Department of Political Science, University of North Texas, Denton, TX 76203-5338, Summer 1991. 228 pp. $25 (subscription). $10 (single issues).

Following an overview essay that covers deficit reduction, judicial federalism, sorting out and turnovers, federalism and the states, and comparative federalism, this issue includes reviews of the savings and loan bailout and bank regulation, mandates and preemption, federalism in the 101st Congress, judicial desegregation remedies, the governors and the National Guard, education reform, clean air policies in California, and state fiscal strategies.

Finance

INDICATORS OF SOCIAL AND ECONOMIC DISPARITIES IN SOUTH FLORIDA. South Florida Regional Planning Council, 344 Hollywood Boulevard, Suite 140, Hollywood, FL 33021, 1991. 119 pp.

This report is a survey and analysis of indicators of social and economic disparity in housing, health care, employment, and education. The report reviews the issues and indicators in relation to national contexts and federal policies, followed by regional trends, a regional forecast, and policy and planning recommendations. Information for the report was collected from the state mandated local comprehensive plans, local and national data bases, other studies, and government officials, policymakers, and community leaders.

South Florida is composed of three counties (Broward, Dade, and Monroe) with a population of 3.3 million. There are 57 municipalities, including two of Florida's major metropolitan areas (Miami-Hialeah and Fort Lauderdale-Hollywood-Pompano Beach).

Intergovernmental Fiscal Relations

CATALOG OF STATE AND FEDERAL PROGRAMS AIDING NEW YORK'S LOCAL GOVERNMENTS. Legislative Commission on State-Local Relations, Agency Building 4, 14th Floor, Albany, NY 12248, 1991. 418 pp.

This volume was compiled from a survey of New York and U.S. agencies to aid the commission in evaluating the state system of local aid, the division of responsibilities between state and local governments, state mandates, and state limits on local taxing and borrowing. For state fiscal year 1990-1991, $20 billion of $28 billion in planned disbursements from the state General Fund were classified as grants to local governments. State aid provides 25 percent of aggregate local revenues, and state and local governments rely on federal funds for about 15.8 percent of total revenue. The individual profiles include information about program administration, the award process, method of apportionment, and annual appropriations and disbursements.

CATALOG OF STATE ASSISTANCE TO LOCAL GOVERNMENTS. 4TH EDITION. Illinois Commission on Intergovernmental Cooperation, 707 Stratton Building, Springfield, IL 62706, 1991. 349 pp.

This catalog was compiled from a survey of state agencies on state aid to local governments. The relationship between the state of Illinois and more than 5,600 local governments and special districts (excluding school districts) involves the transfer of over $3.5 billion per year. Federal and state funds are distributed to local units from many state agencies. The state

funds 160 financial programs, shares state revenues with local jurisdictions (income tax, personal property replacement tax, and motor fuel tax revenues), and provides salary subsidies and bonuses to local officials. The catalog also includes data on state technical assistance programs. Each summary includes a program description, eligibility, fiscal data, and sources of additional information.

GENERAL STATE AID TO SCHOOLS. LEGISLATORS' HANDBOOK. Illinois Commission on Intergovernmental Cooperation, 707 Stratton Building, Springfield, IL 62706, 1991. 54 pp.

General state aid to elementary and secondary schools is based on a guaranteed minimum amount or foundation. When a district does not have sufficient tax base to provide the state guaranteed foundation from a "reasonable tax effort," the state makes up the difference. The aid is distributed by a formula and the amount for each district depends on attendance, tax base, and tax effort. In the 1989-1990 school year, general state aid accounted for about 62 percent of all state dollars sent to school districts and for about 25 percent of funds received by school districts from all sources. The report contains sections on components of general state aid, the aid formula, summary of general state aid calculations, examples of different calculation methods, formula revenue, geographic characteristics of general sate aid, and aid amounts by district and county.

Interjurisdictional Competition

COMPETITION AMONG STATE AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM. Edited by Daphne A. Kenyon and John Kincaid. The Urban Institute Press, in cooperation with ACIR. ACIR Publications, 800 K Street, NW, South Building Suite 450, Washington, DC 20575, 1991. 299 pp. $52.75 (cloth). $24.25 (paper).

American state and local governments are the focus of increasing attention as we near the end of the 20th century. Since 1978, real federal aid has declined and more federal mandates have been imposed, while state and local policymakers have faced continuing citizen concerns about taxes. Interest in the effects of competition among states and local governments has been sparked by these and other changes in the federal system. Governments make use of public service, tax, and regulatory policies in efforts to compete with each other. The contributors take a fresh look at the effects of competition. Questions addressed include how competition affects the taxing, spending, and redistributive behavior of governments, and competition for economic development. Two decades ago, policymakers and analysts were nearly uniform in decrying the detrimental effects of competition on public service levels and tax systems. Now, there is a growing realization that such competition can, under certain circumstances, have beneficial effects.

State Government

TEN WAYS TO IMPROVE STATE MANAGEMENT AND SERVICES. MANAGEMENT GUIDE NO. 7. Coalition to Improve Management in State and Local Government, School of Urban and Public Affairs, Carnegie Mellon University, Pittsburgh, PA 15213-3890, 1991. 40 pp. $10.

The purpose of the guide is to provide governors, their staffs, department heads, and legislators with check lists of executive and administrative initiatives that have been found to be successful in improving state government. The states have become a powerful force in the federal system. This reflects the shift of leadership from Washington to the state capitols due to (1) fiscal constraints in all governments, requiring new approaches by states to raising revenues and controlling outlays; (2) the emergence of many new problems and service demands that require state solutions; and (3) the residual powers of the states. Proposals are made for the basic requisites of state government, the executive management role, the executive management team, cabinet and cabinet committees, budgeting, the state planning agency, an administrative management program, energizing departments and agencies, developing an innovative, productive workforce, and strengthening state capabilities for cooperative action.

Local Government

LOCAL GOVERNMENT: AN INTERNATIONAL PERSPECTIVE. Edited by J. Owens and G. Panella. Elsevier Science Publishing Co., P.O. Box 882 Madison Square Station, New York, NY 10159, 1991. 268 pp.

The relationship between central, regional, and local governments is changing. Some governments are committed to decentralizing expenditures and revenues; others are adopting a more interventionist approach in local government affairs. This book is based on a conference to examine ways to improve state and local government operations and how central governments can control development in local government expenditure. The main emphasis was on state-local finance in developed countries. The first part of the book deals with the economic rationale for decentralization, comparing different systems in selected OECD member countries and presenting a theoretical framework. Criteria for choosing between own taxes, shared taxes, nontax revenues, and grants are analyzed in the second part. The third part looks at the arguments for and against block and categorical grants. The final section analyzes local government finance in the context of macroeconomic policy.

ACIR News

(continued from page 4)

State ACIRs Meet

The State ACIR Conference, hosted by the Louisiana ACIR, was held in New Orleans, September 11-12, 1991, in conjunction with the U.S. ACIR's meeting. Commissioners and staff from the U.S. ACIR and Colorado, Connecticut, Florida, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, South Carolina, Ohio, Utah, and Washington participated. A state representative from Kansas was present. Participants also included representatives of the U.S. Conference of Mayors, National League of Cities, National Association of Towns and Townships, National Association of Counties, and National Conference of State Legislatures. Topics of discussion included image and organization of state ACIRs, joint projects, the role of commission members, regionalism, and roles and relationships between ACIRs and state and local government associations.

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