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Challenges Facing State Constitutions in the Twenty-First Century

Ann Lousin*

Since 1776, each state in the federal union has had its own constitution. At the cusp of the twenty-first century and after two hundred and twenty-five years, we should ask what the role of the state constitution *is, will* and *ought to be* in the next one hundred years. The answers to these questions emerge by addressing the current social, political and economic changes that confront state constitutions. Awareness of our changing environment will help serve as a guide to drafters of future constitutions and help broaden the scope of their constitutions in order to meet the changes underway in their states.

A state constitution is the basic charter of a sovereign state and stands completely apart from the United States Constitution. Nonetheless, the fifty state constitutions must operate within the federal union, whose basic charter provides a model and sets minimum standards. In my view, most state constitutions adopted prior to 2000 have emphasized local issues. Some constitutional provisions are unique to each state. There are agrarian provisions in farm states;¹ home rule in states with large municipalities;² and environmental provisions in states having prized but fragile relationships with the environment.³ Louisiana also has a constitution with local flavor.⁴

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1. Iowa Const. art. IX (2nd), § 3; Kan. Const. art. XI, § 12, art. XV, § 9; Neb. Const. art. VIII, § 2, art. XII, § 8.

2. *E.g.*, Ill. Const. art. VII, § 6.

3. The Preamble of the Montana Constitution (adopted in 1972) is poetic: We the people of Montana grateful to God for the quiet beauty of our state, the grandeur of our mountains, the vastness of our rolling plains, and desiring to improve the quality of life, equality of opportunity and to secure the blessings of liberty for this and future generations do ordain and establish this constitution.

Mont. Const. pmbl.

4. Throughout the Louisiana Constitution (adopted in 1974), there are references to "parishes" because Louisiana is the only state that has subdivided itself into "parishes," instead of "counties." *See, e.g.*, La. Const. art. VI, § 1, which establishes "parishes." La. Const. art. IV, § 21 provides for a Public Service Commission that regulates common carriers and public utilities, while La. Const. art. IX constitutionally provides for protection of "natural resources." The detail

As we enter the twenty-first century after over two hundred years of independence, changes in the structures of state constitutions are forthcoming. In the present and the foreseeable future, the challenges facing the fifty states and the fifty state constitutions are and will be fairly uniform. Each individual state and its constitutional structure must face three, perhaps four, challenges. The first challenge is the trend towards national uniformity, a resurgence of federal power and "nationalism." The second challenge is that of "internationalism" or economic globalization and the development of the "global village." The third challenge is that of computers and other technology, which make it easier and yet more complicated for state governments to gather and process information. These changes will challenge election and tax collection provisions of many state constitutions. Finally, if I were to add a fourth challenge facing state constitutions, it would be the impact of the growing trend to centralize the administration of state educational systems, from kindergarten to graduate degrees, through state-wide funding and state-imposed standards. These challenges will undoubtedly necessitate changes in the structures and content of every state's constitution.

I. THE TREND TOWARD NATIONAL UNIFORMITY AND FEDERALISM

With the national growth of communications and transportation, it is fair to say that the American economy is now an interstate or "national" economy. It no longer consists of fifty independent state economies, but rather it has become harmonized and interdependent.

One clear impetus for this is the revolution caused by the Internet and the facility to purchase goods and services through it. Sales in cyberspace are growing in number and value so rapidly that they will soon match those of sales across the counter and by mail. This trend will compound the existing problems that states now have in collecting sales taxes on mail order and interstate sales. Ordinary "Main Street" merchants, who still must collect sales taxes, find themselves at an economic disadvantage against the untaxed Internet sales. For state governments, these Internet sales equate to a decline in sales tax revenue. For state constitutions, provisions on the imposition and collection of state and local sales taxes are therefore less important. Does anybody think that Congress will resist the temptation to impose a *national* sales tax—one that has uniform definitions, has national application and taxes Internet sales? My thirty years observing state governments have taught me the truth of an old maxim of government: "If it makes money, tax it." The

of these provisions suggests that these topics are unusually important to Louisianians.

pending conflict between a nationally-imposed Internet sales tax and declining state sales tax revenues will undoubtedly cause tension for state constitutions and their sales tax provisions.

Another example of the trend toward national uniformity that will test state constitutions is the proliferation of uniform national laws, especially those produced under the auspices of The National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Over a hundred of these laws have been drafted by representatives from each state, most of them in the last century, and have enjoyed great success in the state legislatures. The Restatements of the Law, drafted by law professors under the sponsorship of The American Law Institute ("ALI"), are black-letter summaries of the states' case law. While some state courts are reluctant to adopt the restatements, others are eager to do so. The trend towards adoption appears to be growing. The ALI's other project, the Model Acts, has also embraced some success, although state legislatures are more likely to adopt a uniform statute than a model act.

The Uniform Commercial Code ("U.C.C."), a project of both the NCCUSL and ALI, is the most successful and best-known example of the national law movement. Even Louisiana, the only state that has not formally adopted the U.C.C., has adopted some of its articles. The United States bankruptcy laws and other federal statutes, coupled with Louisiana's interstate commerce, have undoubtedly influenced its adoption decision.

It is not surprising that one of the current projects of the national law movement is The Streamlined Sales Tax Project, an effort by the states to make the administration of the sales tax more uniform nationally. The growth of Internet sales has undoubtedly spurred this development. By simplifying the administration of their sales tax and reducing costs, especially on interstate sales, states could potentially realize a gain to offset any unexpected decline in gross sales tax revenue.⁵

Two aspects of the "federalization" trend will affect state constitutions: the growth in federal spending in areas formerly reserved to the states and the growth in federal litigation based on federal laws and the United States Constitution. Beginning with the G.I. Bill of Rights in 1944, the federal government has played a growing role in funding university education. Today, many college and graduate students have federally-guaranteed loans. Also, starting in the post-Sputnik era of the late 1950s, the federal government increased its role in funding mathematics and science education in elementary and high schools, the education of sub-university level

5. See Christopher Swope, *E-Tax Outrage Turns into Action*, *Governing*, Sept. 2000, at 86.

teachers, the rebuilding of schools and the overall financing of education generally. Inevitably, this increased federal funding includes a demand that the federal government hold educational institutions "accountable" for the quality of the teaching and learning at those institutions. This example illustrates another governmental maxim: "control of the course follows control of the purse." Because state education programs are largely based upon state constitutional provisions, there will be conflicts between the federal government's control and the protections afforded to the state and local governments by the state constitution.

Federal litigation, the growth of which has accelerated in the last quarter-century and promises to continue, will strain state constitutional provisions as well. Much of this growth is due to the expanding scope of federal legislation. However, litigants are also becoming more aggressive and are using the United States Constitution to claim rights in areas previously considered to be purely state matters. The breathtaking litigation over the 2000 presidential election, beginning in the Florida state courts and culminating in a United State Supreme Court decision,⁶ is one such illustration. It demonstrates how powerful litigation based on the Due Process and Equal Protection Clauses has become and how imposing federal standards can be on state election practices, a traditional state constitutional matter.

Apart from the federal litigation of state election matters, which will only intensify after the 2000 presidential election cases, there is growing federal litigation in the area of state and local government regulation. One recent and very powerful example is *Village of Willowbrook v. Olech*.⁷ Originally, this was a run-of-the-mill dispute between Olech and her suburban government over the extension of a water main to her house. The village demanded a thirty-three foot easement on Olech's property instead of its customary demand for a fifteen foot easement. She contended that the village was "taking" more of her private property to punish her for prior legal disputes she had had with the village. In the end, the case held that a person acting alone could bring an Equal Protection claim. Olech was, in effect, a one-person "class" for purposes of Equal Protection litigation. She did not have to rely on the Due Process Clause, which one person acting alone could litigate; she could declare herself a class being denied equal protection. In the next few years, we shall see how many zoning litigants, not to mention others, will avail themselves of their new rights on Equal Protection grounds.⁸ These

6. *Bush v. Gore*, 531 U.S. 98, 121 S. Ct. 525 (2000).

7. 528 U.S. 562, 120 S. Ct. 1073 (2000).

8. See Jonathan Walters, *The Land-Use Busybodies*, *Governing*, May 2000,

claims will invariably test the boundaries of state constitutional provisions as they encroach on traditionally state law-dominated issues.

II. THE TREND TOWARD INTERNATIONALIZATION

The growing internationalization of state economies and politics will also affect state constitutions in the future. At first glance, it would appear that the states have no role in international relations. Since *Missouri v. Holland*,⁹ the assumption has been that the Supremacy Clause not only gave federal treaties with foreign countries pre-eminence over any state laws, but that foreign relations were exclusively the realm of the federal government. However, we are no longer dealing with anything so simple as a flock of Canadian geese flying south for the winter.

One major development is the creation of the Global Village—a new home for states, local governments, and even national governments. Because of the Internet, our citizenships have converged into that of one Cyber-world, of one earth. With this globalization, citizens and their governments perceive that businesses profit from international commerce more than individuals do. The fear of losing one's livelihood has a powerful impact on Americans who have grown up to believe that a free market economy will provide for them—and that if the free market does not, government will provide a safety net. Starting in the nineteenth century, some state constitutions have contained sections designed to protect its citizens from certain economic forces and entities. Since the New Deal, most Americans have come to accept the idea that it is proper for governments to provide a safety net. As our "community" gradually becomes more international, the economic protections provided by many state constitutions will be stressed because of the need for a more flexible state economy.

In June, 2000, leaders from seven states met to discuss how international affairs could affect their state and local governments. The federal government was a sponsor of the conference, which is only the first of several planned meetings.¹⁰ Legislators from the Pacific Northwest meet regularly with legislators from the western Canadian provinces to discuss economic development of the "Pacific North West Economic Region."¹¹ One impetus for these meetings is

at 14.

9. 252 U.S. 416, 40 S. Ct. 382 (1920).

10. As reported in *State Leaders Learn to Think Globally*, 26 State Legislatures 9 (Dec. 2000).

11. Dave Naftzger, *The States' Role (if any) in Foreign Affairs*, 26 State Legislatures 24, 25 (Dec. 2000).

the concern over the ratification of several federal treaties dealing with foreign trade and commerce. The North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) are the two most prominent treaties among the many trade agreements the United States entered into in the last two decades. One lesser-known treaty is the U.N. Convention on Contracts for the International Sale of Goods (CISG), which was promulgated in 1988. It mirrors many of the provisions of Article 2 of the U.C.C., as well as the comparable sales statutes of other countries. The CISG provides an international sales law that states must enforce under the Supremacy Clause. State and federal courts must interpret and enforce the CISG, supplemented by the U.C.C. and the general law of contracts. This U.N. treaty is thus, to a great extent, part of American domestic law.

State and local governments have other reasons for playing a role in foreign affairs. Most governmental entities openly court foreign investment and tourism and encourage exports abroad. According to three reports in 1999, forty-one states have two hundred and forty trade offices in thirty-four countries.¹² The states' "salementship" is hardly objectionable, but occasionally there is criticism of governors who, accompanied by business moguls, ostentatiously (and expensively) visit a foreign country on a "trade mission."

There was general approval when Illinois Governor George H. Ryan opened an Illinois trade mission in South Africa recently. However, controversy loomed when Governor Ryan, with several prominent Illinois businessmen in tow, led a "mission of mercy" to Cuba with medical supplies and goods for children. The United States has imposed sanctions against Cuba, and many Americans, particularly of those of Cuban refugee descent, are deeply opposed to Castro's regime. Governor Ryan and his state-based initiative were criticized for his implied contradiction of a forty year U.S. foreign policy.

State and local governments can express their approval or disapproval of foreign governments in many ways. Of course, their legislative bodies can pass resolutions that have moral and public relations effects but lack "legal" effect. These resolutions are usually the pet project of one legislator or ethnic group with influence in the legislature who is determined to promote his cause. This has been true since governments passed resolutions condemning the former South African government for its policies on *apartheid*.

Foreign affairs issues become far more complicated when state legislative bodies attempt to impose economic sanctions on domestic businesses that deal with certain foreign countries that the state

12. *Id.* (quoting a 1999 study by the European Commission).

deems to be politically objectionable or offensive. In recent years, these sanctions have targeted Burma (Myanmar), but there have also been sanctions against Indonesia, Nigeria, Tibet and Northern Ireland.¹³ Usually, there are two tools a state may use to achieve its foreign policy goals. First, states often create regulations on purchases by the state. These procurement provisions restrict from whom state entities can purchase goods and disallow purchases from those companies that do business with the objectionable countries. It is reported that Berkeley, California, has difficulty buying energy and other goods and services because most of its suppliers “do business with” sanctioned countries.¹⁴

A state may also conduct a foreign policy by placing restrictions on the investment of public funds, especially pension funds.¹⁵ Like the procurement prohibitions, the state is conducting foreign policy by assuring its public funds will not ultimately support a foreign country that the state has found to be out of favor. One example has been for states to restrict the deposits of their public funds in Swiss banks. It is difficult to quarrel with the objective of trying to force Swiss banks to release information on funds deposited during the Nazi era. However, the means to accomplish this goal, restricting the public deposits in Swiss banks, can become very complicated.

In 2000, the constitutionally-permissible role of state and local governments in the foreign policy sphere came before the United States Supreme Court in *Crosby v. National Foreign Trade Council*.¹⁶ Massachusetts passed a law in 1996 that effectively imposed a ten percent surcharge or penalty on the bid of any business seeking to contract with a public entity if that business also did business in Burma. Congress subsequently imposed less restrictive sanctions against Burma than those of Massachusetts. The Supreme Court considered the case to be a question of federal preemption. It held that the United States government had “spoken” on the issue of sanctions against Burma and that Congress had preempted the field.¹⁷ However, this ruling was narrow. The Supreme Court’s holding could have been more encompassing if it had said that because the federal government is the author of foreign policy under the Constitution, state and local governments are prohibited from taking actions in that sphere.

13. See Miles A. Pomper, *Sanctions Showdown*, *Governing*, June 2000, at 28.

14. *Id.* at 29.

15. *Id.* at 28.

16. 530 U.S. 363, 120 S. Ct. 2288 (2000). The case and issues on “state and local foreign affairs” are discussed in the Naftzger and Pomper articles cited above in *supra* notes 11 and 13.

17. *Id.* at 370, 120 S. Ct. at 2302.

The Court apparently tabled the issue of sanctions by a state or local government when the United States government has not already announced an official foreign policy towards that country. Currently, the United States government has imposed sanctions against only a few countries, notably Cuba, Iraq, North Korea and Burma. Does that leave the state and local governments free to impose sanctions, whether through procurement restrictions as in *Crosby* or prohibitions on investment of public pension funds, to those countries that are *not* sanctioned? The political and practical arguments, as well as the constitutional ones, are clear. The answer that the United States Supreme Court will give is not.

I mention these issues, especially those regarding sanctions, because they are of growing significance to state governments. But, they are not yet issues in the medium that most often addresses a state's significant concerns—the state constitution. However, I have learned that if an issue concerns a state government function, it will eventually effect the state constitution. Undoubtedly, the increasing role of state and local governments in foreign affairs will have a growing impact on their constitutions and necessitate reform.

III. THE GROWTH OF TECHNOLOGY IN STATE GOVERNMENT

One word describes the biggest development in technology in the last half-century—computers. They are having and will have great impacts on state constitutional provisions that address sales tax and voting. As previously mentioned, we can now buy goods and services on the Internet, thereby escaping state sales taxes. The growth of computer technology has also meant that any state government that *can* use computers to perform a function *must* use them to perform that function.

Citizens demand that their states have greater accuracy and accountability in information gathering, data processing and tax collection. For example, when tax bills are sent out late, taxpayers do not want to hear excuses. If the taxing body had proper computers and ran them accordingly, it would have issued the tax bills timely. Expectations for greater efficiency in all state functions, not just tax collection, are thus being driven by the growth of technology in state government.

Voting is the area of greatest demand for efficiency. The 2000 presidential election showed that many voting machines systems are now outmoded. Some have claimed that the disparity in efficiency and accessibility in voting machines across the country may even rise to a denial of equal protection under the federal Constitution.

Clearly, it is not only possible to vote by computer at voting booths, but also it may be feasible to do so. Some observers predict

that Americans will soon vote by computers from their homes or offices. Others predict that within a few years Americans will register to vote on the Internet. The issues of security from hackers, accessibility by all segments of the electorate, and ballot privacy are obvious. Yes, the technology is there; and, at the moment, the public is demanding an end to dimpled, hanging, pregnant and swinging chads.

By 2002, most states, if not all, will experiment with more sophisticated voting mechanisms. There is a definite trend towards state-wide funding and supervision of elections. The obvious consequence is that state constitutions will need to contain provisions mandating state-wide uniformity of elections.¹⁸ No state government will be able to ignore the public demand for more modern election procedures. If modernization of state functions triggered by technological advances requires amending state constitutions, that must be done.

IV. THE TREND TOWARD CENTRALIZATION OF THE ADMINISTRATION OF STATE FINANCING AND CONTROL OF EDUCATION

If I were to add a fourth challenge facing state constitutions, it would be the trend towards greater state funding and centralized control of education at all levels. It is not necessary to cite authority for the proposition that many state courts have required state governments to assume a greater share of funding schools. Since the nineteenth century, state governments, not local governments, have supported most public universities. Although public university students pay tuition from their freshman year until their post-graduate degrees, the taxes used to support expenses not covered by tuition revenues have traditionally come from state funds, not local funds.

On the elementary and secondary level, the situation has been the opposite. Traditionally, locally-imposed property taxes have funded basic primary and secondary public education, which is usually compulsory through the age of sixteen. Because many state constitutions have mandated a "common school system" or "provision for a thorough common education," there is a basis for requiring the state, and not the local governments, to provide adequate and reasonable equal funding to all schools throughout the state. Certainly, there is no escape from the conclusion that

18. Two of the best articles on these voting issues were written in *Governing* magazine by Anya Sostek just before and just after the presidential election. See e.g., *Vote Naked? Not Yet*, *Governing*, Oct. 2000, at 48 and *Goodby Mr. Chad*, *Governing*, Jan. 2001, at 40.

providing an equal educational opportunity to all schoolchildren will require substantial equal funding.

The foundation upon which the claims for equal funding and equal opportunity are based is one alluded to earlier: control of the course follows control of the purse. School officials are invariably aware that as funding from a source increases, there will be an increased demand for more accountability for their performance. If the source is a tax imposed by the local school board, the school officials will be accountable to the local school board. If the funds derive from the state government, then a state board of education or educational officer will inevitably establish standards and require accountability for their use.

Education from kindergarten through graduate school is always an issue in political campaigns. Which candidate for executive office has not run as "the education governor" or "the education president"? Voters, taxpayers, teachers and students all like the sound of the phrase. Certainly, candidates do not admit that they want to raise taxes in order to provide equal funding and opportunity while concurrently imposing more uniform standards upon schools. Likewise, anyone involved with drafting a state constitution in the last half-century knows that the education article always receives much attention.

As the demand for equal opportunity in education intensifies in the next century, the pressure to "constitutionalize" this goal and the means of achieving it will increase. This may well be the fourth challenge to state constitutions in the coming century.

V. WHICH STATE CONSTITUTION WOULD BE BEST FOR THE TWENTY-FIRST CENTURY?

Because I have suggested that the major challenges to state constitutions will be common to all fifty states in the twenty-first century, it might be logical to conclude that there should be a nationwide, uniform or model state constitution. Yet, I shrink from making such a suggestion.

Conventional wisdom holds that the "ideal" state constitution is short and "loose," one with relatively few strictures designed for the ephemeral moment and with little "legislative detail." Clearly, the state constitutions with the constraints of time-bound "legislative detail" will not succeed in meeting the flexibility needed to face the major challenges of the next century.

However, I am unsure if a "loose" state constitution is a wise idea. The Model State Constitution drafted and endorsed by The National Municipal League is certainly short and "loose." Yet, it seems to be more like a corporate charter without by-laws than a

constitution in the American tradition. It is devoid of any local color; it does not address what citizens of each state might regard as their own local and special problems. This is why many states are reluctant to adopt it.

If I were to outline what a state constitution should contain or what functions it should perform in the coming century, I would suggest the following four provisions that are in fact common to most state constitutions drafted since 1970. First, it should contain a strong bill of rights. It is unsafe to rely upon the United States Supreme Court to incorporate federal rights on the state level on a consistent basis. Second, there should be strong provisions governing elections, especially those to the state legislature. There should also be strong provisions governing the decennial redistricting of the state legislature. Third, the constitutions should consolidate most local powers and functions of counties (parishes in Louisiana) or towns and into the state government. This would reduce the number of local districts. Of course, there should be an exception of home rule powers for large cities and metropolitan areas. Finally, state constitutions should have provisions on revenue that account for a continuously changing revenue base. For example, they should incorporate methods of raising revenue because of the increasing need to adapt to sales taxes changes in an economy ever dependent upon the Internet.

I have suggested that nationalism and federalization, internationalism and technological changes wrought by computers will be the three most important challenges facing twenty-first century state constitutions. However, none of the four proposed recommendations directly addresses these challenges. The fourth challenge I suggested, state-wide funding of education, is undergoing a constitutional metamorphosis through litigation. I am not certain if the next generation of state constitutions will or can deal with that change.

Unfortunately, I do not think that a state constitution *can* directly address those challenges. It would be best if drafters of the next generation of constitutions remember these challenges and try to draft state constitutions that will be flexible enough to meet them; one would hope that these adoptions will also suffice to address all the unforeseen challenges of the new century.

