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Introduction

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SYMPOSIUM: THE LEGISLATIVE PROCESS

INTRODUCTION

*William J. Pierce**

Early in this century Woodrow Wilson observed:

The question of the relation of the States to the federal government is the cardinal question of our constitutional system. At every turn of our natural development we have been brought face to face with it, and no definition either of statesmen or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question.¹

The most recent example of this continuing interplay between the federal government and the states is President Reagan's proposed "New Federalism." The President's original proposal was severely criticized by the state governors acting through the National Governor's Association. Although the President announced that a revised program would be prepared, little progress has been made thus far;

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1. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES, 173 (1908).

this is largely attributable to the world-wide recession causing federal and state budget deficits, foreign policy concerns, as well as innumerable other national problems and initiatives having greater priority for national resolution. The issue will eventually reemerge, however, as a major political problem, and the nation will embark on another reexamination of federal-state relations. The need for such a reexamination is undisputed. The current pattern of overlap and duplication of efforts at the federal, state, and local levels of government produces inefficiency, waste, and confusion. A better way must be found to implement governmental objectives in order to provide accountability in our governmental system.

Alan Rosenthal in his article on "The State of State Legislatures" has concluded that state legislatures are prepared to accept increased responsibility in the federal system and that these legislatures have the capacity and resources necessary to fulfill that responsibility. Professor Rosenthal, however, also points to other factors, such as turnover of membership, instability of leadership, and individualistic tendencies that may tend to impair the effectiveness of state legislatures as policymaking institutions.

As an observer of state legislation for over thirty years, I have been unable to discern any improvement in the quality of state legislation as a result of reapportionment or the increase in the number of staff members of state legislatures. Rarely, in the last decade, have I discerned any legislation directed at preventing problems before they emerge. As in the past, current state legislation is largely addressed to resolving social, economic, and political problems that have already emerged and demand immediate resolution. The thrust of most legislation continues to be the amendment of existing laws to correct deficiencies or to be responsive to the demands of various special interests in society. New legislation tends to deal with issues of national prominence, such as pollution control, consumer protection, and other subjects given publicity by the media. These subjects, of course, also attract the attention of Congress, which often enacts national legislation on the subject thereby rendering incompatible state legislation unconstitutional because of the supremacy of federal legislation.

Likewise, the growth of state legislative oversight operations has not tended to lead to major changes in legislation, such as making our laws more effective. Although oversight operations may have forced the executive branch departments and agencies to change their methods of operation or their priorities in administering laws,

only on occasion have the laws governing a department or agency been changed to make administration of the laws more effective. Similarly, "Sunset" laws requiring administrative bodies to justify their existence to the legislative branch—probably the ultimate sanction in the oversight function—do not appear to have had any major impact upon state governmental operations, though there have been a few notable exceptions.

Professor Rosenthal points out that over forty states have established some procedures for legislative review of the rules and regulations of state administrative agencies. The proponents of legislative review of administrative agencies have typically argued that such review was necessary because state agencies were not adhering to legislative intent. Professor Dickerson, in his article on "Statutory Interpretation: Dipping into Legislative History," has provided us with a number of insights into the use of legislative history. The legislative history materials we associate with the legislative process at the federal level are available only sporadically in most states, and as Professor Dickerson notes, many commentators are urging the state legislatures to provide more documentation of legislative history. Although many students of and participants in the legislative process have generally been critical of using legislative history in deciding the meaning of particular statutes, its use is firmly implanted in the federal courts. As Professor Dickerson points out, however, a solid theoretical foundation for use of various types of legislative history remains to be propounded.

Professor Dickerson appropriately concludes that the ultimate solution to the problem of ascribing meaning to statutes is the development of better drafted statutes. As mentioned previously, my examination of state legislation over recent years does not reveal improvement in the quality of the legislative product despite the fact that legislatures are employing thousands of staff members and are meeting more frequently and in longer sessions. If the quality of drafting is inferior, as I believe it to be, one should not be surprised by the legislature's reaction that the administrative agencies have not carried out its intent.

The quality of the legislative product also has an impact upon the judiciary which has the responsibility of interpreting the legislative product. A poorly drafted statute increases the number of instances in which litigants can raise problems of meaning. Legislative history is therefore often resorted to in order to ascertain the meaning the legislature most likely intended. Professor Dickerson's article

provides useful insights into the appropriate use of legislative history. One of Professor Dickerson's concerns is that strong-willed judges may misuse legislative history to create rules of law that are not consonant with the context of the statute. My own view on this matter is that the alternative to this application of legislative history is the use of one or more of the multitude of so-called "canons of statutory interpretation," which are even more susceptible to abuse by strong-willed judges who desire to effectuate their own views of appropriate rules of law rather than those ordained by the legislative branch. Strong-willed judges are always with us, and spurious use of legislative history will always be a problem. In my experience, use of legislative history by litigants has placed restraints upon the strong-willed judges in some instances.

Professor Cohen's article on "Legisprudence: Problems and Agenda" also directs the reader's attention to problems of legislative meaning in the broader context of the legal order. His proposed agenda for legisprudence reflects his many years of teaching and research in legislation and jurisprudence and indeed, merits the attention of the legal community. Particularly significant in my view are his agenda items dealing with "the integration of legislation and adjudication" and "problems of criticism." One is immediately reminded of Harvard University President Derek Bok's recent report in which he asserted that the United States "has developed a legal system that is the most expensive in the world, yet cannot manage to protect the rights of most of its citizens."² Professor Cohen's proposed agenda is responsive to that observation.

Professor Kaden's article on "Courts and Legislatures in a Federal System: The Case of School Finance" again reminds lawyers that litigation contesting the constitutionality of state legislation under state constitutions is not the same as contesting the legislation's constitutionality under the United States Constitution. State constitutions contain a myriad of provisions that may provide additional constitutional restraints; yet these limitations may be overlooked nevertheless, because of tendencies to emphasize federal constitutional doctrine in law schools and in most legal writing. Professor Kaden appropriately points out that the state legislatures and courts may have a significantly different role to play than their federal counterparts due to distinctive state constitutional structures.

2. D. Bok, Annual Report to the Overseers of Harvard University at 3, *reprinted in Harvard University Gazette*, Apr. 22, 1983.

Professor Kaden has provided an excellent description and analysis of the complexities of the issues and the social, economic, and political considerations that permeate the cases involving the validity of school finance systems. The article is particularly timely in view of the recent calls for improvement in the public education system which have been endorsed by practically all of the 1984 Presidential aspirants. Undoubtedly, the problems of appropriate methods of school finance will be addressed by Congress as well as by state and local bodies. Further litigation can therefore be expected, and Professor Kaden's observations, particularly with respect to the New York and New Jersey cases, should warrant considerable attention. Necessarily, in the process of addressing public school education problems, a new consensus of the appropriate roles of federal, state, and local governments in education will emerge.

