Vol. 2

State Constitutions for the Twenty-first Century

Drafting State Constitutions, Revisions, and Amendments

Frank P. Grad and Robert F. Williams

State Constitutions for the Twenty-first Century, Volume 2

SUNY series in American Constitutionalism

Robert J. Spitzer, editor

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Preface

Some of the materials here presented are based on work done in the early 1960s by the Legislative Drafting Research Fund of Columbia University, then led by Professor John M. Kernochan, with the financial support of the Ford Foundation. Those materials were prepared under the direction of Frank P. Grad, who was engaged in the preparation of working papers on the drafting of state constitutions as part of a broader program of state constitutional research. That program resulted in the 1959 *Index Digest of State Constitutions* (updated through 1964) and in a compilation of constitutions, *Constitutions of the United States, National and State*, first published in 1962 and still published today. That earlier project also included the publication by the National Municipal League in 1963 of a selective bibliography on state constitutional revision, in connection with the preparation by the National Municipal League of the sixth edition of the *Model State Constitution*. Frank Grad also participated in the drafting of the model, which, in turn, provided an opportunity to put to work some of the constitution drafting principles formulated at that time. All of this earlier work was undertaken by the National Municipal League and the Legislative Drafting Research Fund of Columbia University to prepare basic research aids and studies to assist in the reexamination and reform of state constitutions. The National Municipal League has now become the National Civic League (www.ncl.org) and has given its permission to reprint these updated materials, based on *The Drafting of State Constitutions: Working Papers for a Manual* (1967).

It is a source of some personal satisfaction that work completed that long ago is now undergoing reexamination, revision, and updating by the Center for State Constitutional Studies. Some of the drafting materials here included were first completed in August of 1963 and were presented to a small group of professionals knowledgeable in the fields of state constitutional law and of legislative and constitution drafting at a three-day conference on the drafting and revision of state constitutions held in September of 1963 at Gould House, Ardsley-on-Hudson, New York. The materials on state constitution drafting were planned for eventual publication, but in view of their timeliness, because

of the number of state constitutional conventions under way or about to get under way, it was decided to make the working papers available in their original form to participants in state constitutional conventions in the 1960s and 1970s. Available in mimeograph form to the staffs and members of every constitutional convention since 1963, they met a very real need. A number of participants in their constitutional conventions expressed great satisfaction at having access to these materials, telling this author that they were the only materials available at the conventions that had immediate bearing on, and utility in, the drafting process of new or revised state constitutions.

There will always be a great need for a work specifically aimed at assisting the drafters of state constitutions, whether they are undertaking the draft of a new or revised state constitution, or of state constitutional amendments for a state constitutional convention, for a state constitutional commission, or even for self-constituted groups proposing to amend a state constitution by constitutional initiative. Currently there is no coherent work available to assist the constitutional drafter. Moreover, the period since these materials were initially prepared has seen significant changes both in our society and in our law, requiring awareness of new conditions and emphases in the preparation of state constitutions and in their revision.

These changes include the increasing reliance on state constitutional commissions in the preparation of constitutional documents or parts of constitutional documents for the vote of the people. Another significant change of importance to constitutional drafters is the new and often independent way in which both state and federal courts have treated the provisions of state bills of rights whether or not they parallel the federal bill of rights, relying in many instances on the independent analysis of rights of privacy and other rights given a separate and distinctive meaning under state constitutions. State courts interpreting state constitutions are freed from the dominant federalism concerns often implicit in the interpretation of such provisions in the federal courts, and particularly in the United States Supreme Court.

An epochal change with vast impact on both state and local government and with a broad impact on the nature of government as whole was the decisions of the United States Supreme Court in *Baker v. Carr* and *Reynolds v. Sims,* the one-person-one-vote decisions, decided in the mid-1960s, around the time of the conclusion of the earlier state constitutional study. Requiring both the reapportionment of the federal Congress, as well as of virtually all of the state legislatures, the one-person-one-vote decisions changed the membership of all legislative bodies in the country, greatly changing the nature of legislative constituencies by providing a more decisive vote and voice to urban areas. These changes affect not only the composition of state legislatures based on numerical representation, but also changing the composition of the House of Representatives in Congress. The apportionment of Congress would be

done by state legislatures that had been apportioned in a new way, providing immediate and clear evidence of the close interrelationship between the states and the federal government, testifying to their mutual interdependence, and emphasizing the essential nature of the state government for a coherent and functioning federal system.

The impact of the one-person-one-vote decisions was immediate and far reaching. By their very nature the decisions were irreversible, because they left open no way to return to the former status quo, because newly elected legislators had an immediate stake in the continuation of the new representational requirements. Another impact was to give greater influence to union and labor constituencies, which had long agitated and worked on changes in representation which would put greater political power in the hands of urban constituencies, more representative of their interests. Another consequence was the significant change and improvement in state legislatures, which in consequence of the decision became more democratic and representative bodies. In many states it also helped to dislodge traditional and archaic aspects of representation that had been perpetuated in some of the traditional rotten boroughs that has grown up prior to the one-person-one-vote decisions. The decisions also caused a new wave of state constitutional revisions, in that thirteen states revised their charters between 1963 and 1976.[1] The change, it was noted, also served to involve the citizens themselves, reflecting the tradition of activist popular sovereignty.[2]

Drafting a state constitution is a great responsibility because the drafter is articulating the voice and language of the people who have provided the appropriate directions in the state constitutional convention, to a constitutional commission, or to a group proposing an amendment through the initiative process. The person responsible for the draft of a state constitution or any of its parts knows that it is the language adopted and voted on that will be interpreted in carrying out the constitutional mandate, or that will be interpreted and analyzed when a judicial analysis of constitutional language is necessary to decide constitutional issues in litigation. The interpretation and analysis of constitutional language, similar to the interpretation of other legal texts, depends on the intent of the policy makers—here the people. The intent is gleaned from, and informed by, the context in which the language was formulated and used. Thus, the reworking of materials to be used by constitutional drafters must also be periodically reexamined, just like the constitutions themselves, in order to inform the policy makers, and through them the drafters, of the appropriate and changed current context, so that the constitutional draft is adequately informed of the setting in which it is articulated and used. A modern constitutional document must serve as an appropriate tool for the tasks of the day's state government, must reflect modern insights of the nature of the government, and must have a full awareness of current conditions and of the context in which it was prepared. It must be added that the person who prepares the draft of a state constitution

or of a constitutional amendment or initiative bears a very heavy responsibility, because in interpreting state constitutional documents, courts have generally taken the position that the document reflects the voice of the people immediately and directly, relying on the adopted constitutional text as reflecting the views and intentions of the people, and often rejecting any sophisticated nontextual analysis that might deviate from the clearly expressed people's voice.

In his preface, Professor Williams gives me great credit as a teacher, but fails to mention that in the many years since then, there has been a notable role reversal. I cannot help but reiterate my great satisfaction at having had the opportunity to cooperate in this work with Robert F. Williams, my colleague and friend. He is indeed the father of the academic study of state constitutional law as a significant subject in our law schools, teaching the subject when they limited themselves almost entirely to federal constitutional studies. Bob Williams changed all that with the first edition of his course book on State Constitutional Law, Cases and Materials, published in 1988 under the auspices of the U.S. Advisory Commission on Intergovernmental Relations. It was Professor Williams' successful effort, through his teaching, writing and skillful advocacy to bring state constitutional law to the forefront of academic consideration as an important part of the law school curriculum. I am happy to add that the current work is the result of a continuing and close collegial cooperation between the named authors.

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September 2005

When I studied as a graduate student in 1979–80 at Columbia Law School, as the Legislative Drafting Research Fund's Chamberlain Fellow in Legislation, Frank Grad gave me a copy of his well-known, mimeographed *The Drafting of State Constitutions: Working Papers for a Manual* (1967). These materials have influenced my work ever since then, as have the ideas and insights that Frank Grad imparted as the supervisor of my studies at Columbia, and as mentor and friend ever since. It is a distinct honor to participate with him now in the long-overdue publication of these materials.

Robert F. Williams
Distinguished Professor
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Camden, New Jersey
September 2005

Introduction

American state constitutions today contain more than 5,000 amendments, and most have been amended more than 100 times. Yet despite the proliferation of constitutional amendments, few states in recent years have undertaken fundamental reform of their constitutions. Whereas states adopted ninety-four constitutions during the nineteenth century, they have adopted only twenty-three since then and only one in the past quarter century.

This is unfortunate, because in the first decade of the twenty-first century, reconsideration of the constitutional foundations of state government is particularly timely. For one thing, we are asking more of the states than we have in the past, and a state's constitutional arrangements influence how effectively it meets its responsibilities. For another thing, many state constitutions badly need a major overhaul. In some instances, the encrustation of amendments has undermined the initial coherence of the documents. In others, the constitutions' framers decided to include "legislative" provisions as a check on legislative majorities, knowing full well that as changes in circumstances and attitudes occurred, the constitutions they drafted would become outdated and in need of reform. Finally, the distrust and dissatisfaction felt by the citizens of many states with the governments created by their constitutions, reflected in low voter turnout for state elections and in poll data tapping attitudes toward state government, likewise suggest the need for fundamental reform.

Part of the reluctance to undertake state constitutional reform stems from the daunting nature of the task. Volume I of *State Constitutions for the Twenty-first Century* addresses the political obstacles to state constitutional reform and suggests how they might be overcome. Volume III addresses the content of state constitutional reform, the choices confronting constitution makers, and what state constitutions for the twenty-first century should look like. The task of reform, however, requires more than goodwill or even good ideas. It requires the ability to translate those ideas into constitutional language that will effectuate the drafters' aims. It requires an attention to how those institutions charged with the implementation and interpretation of state constitutions are

likely to understand what was written. And it requires a consideration of how subsequent generations are likely to read the language.

This second volume of *State Constitutions for the Twenty-first Century,* addresses all these issues—and many more besides. It provides a guide for those involved in state constitutional reform or contemplating such reform by identifying the recurrent problems that reformers confront in drafting or amending state constitutions and explaining how those problems might best be addressed. There is simply no other work that performs this valuable function. Yet this volume is no mere manual for technicians. Rather, its authors recognize that the drafting of state constitutions is a distinctive enterprise, different from the drafting of statutes or other legal documents, and that one cannot engage in this process successfully without a thorough understanding of the nature of state constitutions. Thus, in their analysis of the issues confronting state constitutional reformers, Frank Grad and Robert Williams explore with great subtlety the distinctive aspects of state constitutions, the aims that they are designed to serve, and the ways in which the handiwork of constitution makers might be interpreted. Scholars, judges, government officials, and interested citizens, as well as constitutional reformers, will all benefit from their analysis and from their recommendations. This volume offers a unique perspective on state constitutions and makes a major contribution to the task of creating state constitutions for the twenty-first century.

G. Alan Tarr

Chapter 1

Reflection and Restraint in State Constitutional Amendment and Revision

This volume is a practical handbook for all those involved with state constitutional amendment or revision, including citizens, government officials, lawyers, legislators and legislative staff, initiative drafters and signature gatherers, elected constitutional convention delegates and appointed constitutional commission members, and convention and commission staff. It also should be of interest to judges and others interpreting state constitutions and to those seeking a better understanding of these unique and important documents. State constitutional amendments or revisions to state constitutions may emanate from a variety of different sources, including state legislatures, constitutional commissions,[1] constitutional conventions, or the people through the initiative process.[2] Each of those processes is somewhat different from the others, but the issues discussed in this volume are relevant to those involved in any of the processes.

People involved with considering state constitutional amendments and revisions first face the threshold question of whether the revision or clause should be included in the state constitution at all (a question distinct from the substantive merits of the proposal). Issues concerning whether to include provisions in a state constitution, as well as matters of drafting state constitutional language, are unique and raise concerns that do not arise in other forms of legal drafting. It must be remembered that, after all, it is a state *constitution* that is being drafted or amended.

State constitutions are unique legal instruments, real *constitutions,* but different from the federal constitution. State constitutions differ from the federal constitution in their origin, function and form. They originate from a very different process from that which led to the federal constitution. State constitutions do not

look or work like the federal constitution. They are longer, more detailed, and cover many more topics, for example, taxation and finance, local government, education, and corporations. There are many policy decisions embedded in state constitutions.

In fact, there has been a major shift over time in the idea of what the function of a state constitution should be, and what matters are important enough to be contained therein. Christian Fritz noted this shift in the attitudes of constitution makers during the nineteenth century as the American society and economy became more complex, particularly with the rise of powerful corporations. These constitution makers believed that they needed to include more material in state constitutions, even if it was in areas that could, theoretically, be governed by legislation.[3] Professor Fritz concluded:

> The key to explaining the growing length of nineteenth-century constitutions lies in the delegates' understanding of the purpose of constitutions. There was common agreement that the nature and object of constitutions extended beyond fundamental principles to what delegates called constitutional legislation. Delegates willingly assumed an institutional role that occasionally supplanted the ordinary legislature.[4]

A similar shift occurred several generations later, when the state constitutions of the Progressive Era were formed.[5] Thus, there have been and will continue to be, evolving views of the functions of state constitutions, but those involved with state constitutional amendment and revision must, of necessity, confront these questions.

The function of state constitutions, not surprisingly, dictates their form. Generally speaking, because of the necessity to enunciate specific limitations on an otherwise virtually unlimited governmental power, state constitutions contain a high level of detail and specificity with respect to the structure and operations of government. For example, most state constitutions contain long articles on taxation, finance, and education—three of the most important functions of state government. These provisions restrict state government taxing and spending, and educational policy, in a range of ways that is unfamiliar in the federal government.

It must be recognized that state constitutional amendment and revision also take place within a specific state's political system and hence its own, unique constitutional development. That the process involves politics is hardly surprising, and even though it may not be "ordinary politics," the political dimension must be understood, taken into account and accommodated. Thus, arguments that state constitutions should be brief and limited to only "fundamental" matter must yield to the circumstances in a state at a given time and in particular when some matters are so important to the state as to call for constitutional treatment.[6]

The National Municipal League's revised Model State Constitution was published in its last edition in 1968. Whatever influence it once had on state constitutional amendment and revision, it is unlikely to have great influence today. In any event, the preference of scholars for brief state constitutions (rarely followed) is coming into question.[7] Persons involved in state constitutional amendment and revision soon realize that simplification and movement toward brevity, for their own sake, do not elicit much support. Each state has its own constitutional history. Some have had many state constitutions over time; some state's constitutions are short, some are long. There are identifiable regional patterns in the states' constitutions. Those reviewing state constitutions must remember what came before.

Advocates seek, for a whole variety of reasons, to place provisions in the state constitution even under circumstances where a lesser form of law, a statute, would accomplish the same result. They do so in order to circumvent roadblocks in the legislative branch, that make the passage of a statute impossible or unlikely; in order to bypass the legislature, and achieve the relative permanence of a state constitutional provision; in order to avoid legislative and judicial interference with the policy; in order to overrule existing judicial interpretations of the state constitution, and even in order to "overrule" existing statutes.

This suggests an interesting paradox at the heart of state constitutionalism. In comparison to the *federal* Constitution, *state* constitutions are relatively easy to amend or revise. Yet, the state constitution is the highest and most permanent form of law in a state. There are virtually no legally enforceable limits or restrictions (other than valid federal law) on the substance or content of provisions or policies that advocates may seek to include in a state constitution.

The federal Constitution and other valid federal laws do limit the content or substance of provisions a state may adopt, in its state constitution or otherwise. For example, a state may not coin money, permit the impairment of contracts, regulate interstate commerce, permit the denial of voting rights, or permit various forms of discrimination to take place, even if the state purports to accomplish those forbidden objectives in its *constitution*. Other than these relatively rare federal constitutional restrictions, though, there are no legally enforceable restrictions on the content of what may be placed in the state constitution.

There are, by contrast, numerous limitations and restrictions on the *process,* as opposed to the content or substance, of state constitutional amendment and revision. Most state constitutions require amendments or revisions to be submitted in certain ways, for example, the requirement that a proposed amendment contain only a "single subject." Other process limitations include the common limitation that state constitutions can only be amended, but not revised, through the initiative, and the requirement that ballot summaries accurately describe for the voters the proposed constitutional change. State courts enforce the restrictions with varying vigor, but they do provide real limitations.

While these procedural limits can, of course, affect the content or substance of what is included in a state constitution, they do so only indirectly. If the proper procedure is followed, virtually anything (even if it conflicts with, and therefore amends, an existing provision) may be included in a state constitution, as long as it does not run afoul of federal constitutional, or other federal legal limits.

For these reasons, those who propose to amend or revise state constitutions find themselves quite unfettered in a legal sense. Still, there are very important consequences that flow from using the state constitution, as opposed to ordinary statute law, as the vehicle for establishing policy, rules of government, or the protection of rights. This situation, therefore, requires those involved with state constitutional amendment and revision to be particularly self-reflective about including provisions in a state constitution. This assessment must be separated from weighing the merits of the proposal on its own terms. Those who propose state constitutional amendments and revisions, as well as those who draft, debate and, ultimately, vote on them must apply prudential limits, or self-control, in their recourse to this most important of state laws—the state constitution.

This volume addresses reasons for this suggested deliberation or prudence. Those who propose and evaluate state constitutional amendments and revisions should be equipped to assess, and debate, the consequences of inclusion in the state constitution. They should also be aware of how courts traditionally have treated the interpretation and enforcement of certain types of state constitutional provisions and language. To this end, this volume will also include sufficient depth of analysis to inform those involved professionally in the process of state constitutional amendment and revision, such as drafters, lobbyists, legislators, and convention or commission members and staff. The goal is not to support any particular substantive outcome, but to stimulate a more self-reflective consideration of the functions of state constitutions and the consequences of utilizing this important method of lawmaking.

This volume provides a generalized, fifty-state view of a number of issues in state constitution making. Before actually embarking on any of the alternative processes of state constitutional amendment and revision, therefore, careful attention must be paid to the specific details in one's home state concerning: (1) processes of state constitutional change; (2) the results of research on state constitution making; and (3) to the advice and experience of those experts who have engaged in state constitution making in the state in the past.

This Introduction, as well as the parts of this work to follow, call attention to the variety of subjects covered in modern state constitutions, referring also to some of the uses to which state constitutions have been put in the federal system. Some of the materials in this work also address the role of state constitutions in the governance of the state as part of a federal system. Thus, a constitutional document that adequately serves both of these major purposes must be drafted by people with a good knowledge of state constitutional law,

and with full awareness of the aspects of state government regulated by the state constitution. Such persons must also be well acquainted with such special aspects of state constitutional law as affect the relationship of state and local government, as apply to fiscal aspects of state government and the control of state budgets, state bonding practices, and state taxing authorizations and limits. In addition, an effective drafter of state constitutional materials should also be aware of the role of state constitutions and state constitutional bills of rights in the protection of citizens' rights and civil liberties as well as of the relationship of the provisions of the state bill of rights to the provisions of the federal bill of rights.

Drafters of state constitutional materials must also be aware of the role of state constitutions in the federal system, such as the continuing requirement that state constitutions must provide a republican form of government, as required in the federal constitution. They must also be aware of the powers of government that the states have expressly delegated to the federal government through the federal constitution. Certain other areas of federal constitutional law likewise have an invariable impact on state constitutions, such as the one-person-one-vote rule established by the U.S. Supreme Court in *Baker v. Carr* and *Reynolds v. Sims*. Moreover, the interdependence of the federal and state constitutional regimes is reflected not only in the provisions for the election of the President of the United States but also in the provisions that cast on the states the task of apportionment and districting for the House of Representatives in the U.S. Congress. Thus, a drafter of state constitutions must be aware of established lines of competence and jurisdiction between federal and state governments, together with an awareness of the interdependence of the federal system in that the states form an essential part of the system of governance of the United States.

In addition to full awareness of the high level of interdependence between state and federal concerns, a state constitutional drafter should also recognize that many tasks are a sole domain of state authority, including the licensure of virtually all professions and most occupations, and the governance of family law and decedents' estates, criminal law, as well as many other legal and interpersonal relationships. Thus, the state constitutional drafter should have some awareness of the coverage of state law, as well as of the circumstance that it is the state's judiciary that applies and develops the common law of the state.

It is hoped that the notes that follow will be useful both to new drafters and to experienced ones, and that they will also be helpful in providing some insights into the relationship between drafters and their policy guides, whether members of conventions, commissions, and others who must undertake the task of turning policy directions into clear, effective, and perhaps even inspired constitutional language.

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Chapter 2

The State Constitution
Form and Function*

Much of the discussion relating to the improvement of state constitutional documents has worn a somewhat utopian cast. The effort is frequently pictured by some of the more idealistic civic groups, as well as by some of the more visionary newspapers, as one of achieving something that comes close to an "ideal" state charter.[1] It is the thesis of this chapter that this aim overshoots the mark, and that in state constitution-making we must be content with something less than the Platonic ideal; we must aim rather for a constitutional document that is designed to enable the state to carry on its work of government today and in the foreseeable future with efficiency and economy and with adequate powers to undertake its tasks. That is not to say that a state constitution should be so narrowly concerned with the state's immediate problems as to turn it effectively into a prescriptive code of laws for their solutions; rather, the state constitution should be an instrument of government that, like any good instrument or tool, is suited to the performance of many tasks and not just the immediate task at hand. Viewed in that light, we are likely to discover that a flexible and adaptable instrument that helps us in the solution of today's problems is likely to be effective, with only minor modifications, in managing tomorrow's tasks as well. It is precisely the broad and flexible charters of an earlier day that are still useful in today's circumstances, and it is the charters of the late nineteenth century that were too closely concerned with the solutions of

*This chapter is an updated and revised version of Frank P. Grad, *The State Constitution: Its Function and Form for Our Time,* 54 Va. L. Rev. 928 (1968). Material from that article is used here with permission.

many narrowly specific and immediate problems that have become obsolete and that interfere with contemporary solutions because of their mass of detail and resulting rigidity.

It is common to refer to a state constitution as an instrument of government, and it has been so characterized here. An instrument is a tool. The suitability and adaptability of a tool can only be gauged in the relationship to its set task. Thus, before we may sensibly explore the proper function and form of state constitutions for our time it is necessary to review briefly the continually changing tasks of government in our states. As Alice M. Rivlin has pointed out, the role of the states in relation to the federal government is an ever-changing, moving picture.[2]

The Changing Role of the States

Because the role of state governments in our federal system has been continually changing and evolving, the state constitutions (by contrast to the federal constitution), as enabling tools for the accomplishment of state and local governmental functions, paint at least a partial picture of this evolution. The American state constitutions have been described as a "mine of instruction for the natural history of democratic communities."[3] The suitability of state government to respond to the ever-changing responsibilities and opportunities is, in large part, guided by the state constitution.

State constitutions are closer and more accessible to the people and the government than the federal constitution. They have been changed to reflect (and sometimes in anticipation of) social, economic, demographic, political, and technological developments over time. One of the great strengths of state government and constitutions is that they have been able to adapt themselves to the many changes in society, and that at the same time state constitutional government, in spite of all these changes, has remained largely unchanged at its core. As a consequence, the content of state constitutions has remained remarkably unchanged for over two centuries. Thus, state constitutions as tools for state governments utilize not only contemporary insights but also the wisdom dating back to the eighteenth-century Age of Reason, as reflected by the drafters who preceded us.

While the form of state constitutions has not changed significantly in the last several generations, the function of states has changed considerably. The term "function" is here being used rather broadly, accepting the notion that all of the states' governmental activities are done in compliance with, in pursuance of, but most certainly not in contravention of, the state constitution. There has been a major accretion of new governmental functions, both federal and state, that has created new issues under the state constitution, or that, at the very least, has raised some old and recurring questions in new contexts. Both social

and technological, as well as economic, changes have in some instances altered the nature of the tasks for states and in many instances have rendered them more complex. This evolving process will continue into the future.

To give just one example of newly expanding state responsibilities (which does not necessarily have to be dealt with in a state constitution), while the states had some early involvement in regulating certain aspects of nuclear power plants, and most certainly in regulating the power grid that in large measure depended on such power plants, now in addition to governmental concerns with the technological safety of nuclear power, both federal and state governments are increasingly concerned with the safety of nuclear power plants, in light of the opportunities for major sabotage and terrorism that they may present. From early on, the regulation of nuclear power has been an area of federal/state interaction,[4] with the regulation of nuclear safety predominantly, if not preemptively, a federal power,[5] but other aspects of the regulation of such plants were largely left to state authority. There is little question that then and now the police power imposes major obligations on state government, and the state constitution enters into the picture insofar as it may authorize or inhibit action by different branches of state government in particular circumstances. The disposal of nuclear waste clearly requires federal and state joint cooperation.[6]

Focusing on more conventional governmental issues, the one-person-one-vote rule has become fully applicable to federal, state and local elections.[7] The effect of this change on state constitutional development was rather direct, as observed by James Henretta:

> [S]tate legislatures have once again become relatively democratic and representative bodies as a result of the reapportionment revolution begun in 1962 by *Baker v. Carr*. Not accidentally, that decision spurred a wave of constitutional revision. No fewer than thirteen states revised their basic charters between 1963 and 1976, reviving at least in part, the tradition of activist popular sovereignty.[8]

Since then, however, a new issue has arisen, seeking to make government more reflective of citizen sentiment. The issue of term limits has been addressed in some state constitutions, challenging established incumbents and raising the question of the desirability of retaining experience. This new approach eliminates overly long tenure in certain elected positions in response to the claims of younger delegates, replacing it with new blood and assertedly more youthful courage in governmental undertakings.[9] The Supreme Court, having held a federal term limit law unconstitutional,[10] continues to leave this matter entirely to state courts and electorates to decide for state and local offices. This is an appropriate area for state experimentation, in spite of its occasional painfulness

both for incumbents and for voters who assert that if they want an incumbent to stay another term, it ought to be their choice and not a choice that has been constitutionally denied.

Other governmental issues that have come to the fore, affecting both state and national government, are the recurring issues of reapportionment and redistricting, growing to some extent out of the lack of resolution of the gerrymandering problem in the one-person-one-vote decisions. A cleverly gerrymandered district may defeat the purposes of fair representation, though it neatly meets the one-person-one-vote requirement.[11] Good government idealists had hoped that a fairly apportioned state legislature would be in a position to redistrict both state and federal electoral districts evenhandedly. This hope has not been fulfilled, and in many states fair districting remains one of the major future agenda items.[12]

Another open issue is one that seems simple to resolve but has shown itself to be more difficult than we had ever imagined, as demonstrated by the Presidential election of 2000. Whether the federal government may exercise preemptive jurisdiction over the minutiae of the conduct of elections for federal offices conducted by the states, as for the Electoral College, or whether the matter is purely an issue for the state constitutions and state law seemed to have been disposed of in *Bush v. Gore* though it was hardly resolved.[13] State constitutional drafters must be aware of the United States Supreme Court's concerns about state constitutions in *Bush v. Gore*.

The issue of the regulation of campaign funding and political contributions has seen partial federal-level closure.[14] There is a wide open area for state electoral reforms, whether statutory or constitutional, to prevent the state political process from being swept away in unregulated floods of soft money, open to corruption because of the difficulty of agreeing on sound controls. State constitutions should be a repository for good governmental principles. The issue of campaign contributions is not likely to be submerged and will require either constitutional resolution or else it may require both the legislature and the judiciary to address the issue of political campaign finance. In that context, the issue of judicial campaign contributions to elective judicial campaigns under current state constitutional arrangements has received recent attention.[15]

Medicare and Medicaid legislation was enacted in 1965, and the increasing cost of patient care has resulted in very widespread and major state budgetary problems resulting from the unexpected and untoward rise in medical and patient care costs. Medicaid shortfalls are not directly a state constitutional issue, but they are now a major concern of state business, and budgetary and taxation constraints are indeed constitutional constraints. The tax-limitation movement, utilizing the state constitutions to limit the legislative branch as to the amounts, and processes for adoption, of state and local taxes has had a major impact on state constitutional restrictions in the area of revenue raising.

Other public health matters have increasingly raised issues of the protections of privacy and due process under state bills of rights. The Supreme Court abortion decision, *Roe v. Wade*[16] (which recognized a constitutional due process right of privacy and liberty giving women the choice to terminate a pregnancy or to have it come to term) had consequences not only for due process and privacy law but also for state budgets. On the budgetary side, federal cases and federal law left it to the individual states whether they would pay for abortions out of their public health or Medicaid budget.[17] Decisions have differed from state to state since the Supreme Court left the issue to individual state determination.[18] Later federal abortion cases, while not denying women the right to elect abortion, have nonetheless placed certain limitations or conditions on that right, such as requiring parental or judicial consent when a woman who is not of full age decides to have an abortion. As with the funding cases, such issues have been decided differently in some states under state constitutional privacy provisions.[19] Just as in the search and seizure area, since Mr. Chief Justice Warren and the Warren Court are no longer with us, and since in many states privacy protections exceed federal protections, this part of abortion law has become a matter of almost exclusive state law determination. The same is true with other privacy and equality issues, such as physician-assisted suicide and single-gender marriages.[20]

The 1990s, well toward the end of the twentieth century, were times of unusual prosperity, and unusually high personal income led to a state fiscal prosperity unknown and unusual for a long time. This prosperity and the profusion of funds available to state governments led to a greater budget generosity as well as to tax cuts. Then, as a result of the unexpected economic reversals at the end of the century, the states faced a very unusual change of the situation from budgetary windfalls to budgetary shortfalls. While some states had been cautious and used some surpluses to increase their "rainy day funds," the surpluses and the rainy day funds had come close to the vanishing point and states again found themselves in a situation of penury.[21] In some states, particularly Western states, the years of plenty had also encouraged popular initiatives authorizing budgetary allocations, authorizing legislation to spend the fiscal surpluses in a variety of uncoordinated ways, and authorizing new programs and tax rebates. This contribution to the new penury has not escaped public attention, and may encourage some constitutional limitations or regulations of the initiative process.[22] It should be noted in this context that the U.S. Supreme Court has increasingly broadened the sweep of state immunities under the Eleventh Amendment. Perhaps it might be suggested that the greater protection of states' Eleventh Amendment immunities ought to give rise to a renewed and greater sense of state responsibility with states now somewhat more free of federal court supervision.[23]

The Impact of the Changing Role of the State on the Making of State Constitutions

The changes in the distribution of powers among federal, state, and local government and the considerable devolution of federal authority coupled with the increase in the functions of state government have implications for state constitutions and state constitution-making that cannot be overestimated. The least we may demand of our state constitutions is that they interpose no obstacle to the necessary exercise of state powers in response to state residents' real needs and active demands for service. A constitution that meets these needs and demands must be an instrument of government that will enable the state to play its part not only in the traditional activities of state government, but also in accepting and advancing the new functions, be they service or regulatory functions, that grow out of the increasingly close partnership between state and federal governments.

Any review of the adequacy of a state's constitution must begin, therefore, not by comparing the state's present constitution with the more recently adopted charter of another state or with the provisions of some "model" draft, but rather by systematically examining the entire machinery and operation of the state's government.[24] Such an examination is necessary to determine, first, whether the state's government is adequate to meet the new and contemporary demands made upon it; second, whether provisions of the existing state constitution interpose obstacles to, or in some manner inhibit, the proper functioning of state government; and third, whether, absent such constitutional obstacles or inhibitions to proper performance of government functions, the improvement of the state's governmental machinery and its operation requires improvement by constitutional revision or change, rather than by some possibly less difficult or costly method.

Since effective state constitutional change requires a detailed substantive examination of how the state's business of government may best be structured in the light of the functions it must fulfill and the needs it must serve, the state constitution-maker must first determine the precise nature of such needs and functions. One cannot gauge the effectiveness of the tool unless one first determines the size and scope of the task at hand. Following the evaluation of the task and the examination of the appropriate governmental structure, the constitution maker must proceed to the more technical, drafting-oriented considerations regarding the contextual form of the constitutional document, which form the major content of this chapter.

Before we address ourselves to technical matters of state constitutional content and form, it may be important to draw attention to a variable that is frequently overlooked. Discussions of state constitutional reform and of the changed role of state government in the federal system frequently treat the fifty states

as though they were virtually interchangeable entities. They are not. The governmental concerns of the state of Nevada are unlikely to reach the complexity, diversity, and dimension of those of New York; the concerns of Virginia are likely to be significantly different, in many respects, from those of Rhode Island. States differ, not only in size, urban or rural characteristics, or the composition of the population, but also with respect to their relative political complexity.[25]

Although the states are not fungibles, a look at the fifty state constitutions might almost convince one to the contrary. The states have often been referred to as laboratories of government, providing an opportunity for experimentation with different forms of government and with different administrative structures. In fact, this has not happened to any considerable extent. In spite of their enormous diversity, it is probably safe to say that the similarities between governmental structure in different states are considerably greater than their differences. Regardless of population, all of the states but Nebraska have bicameral legislatures, and almost all of the states, whether they cover huge areas, like California, Texas, or New York, or whether they are as minuscule as Rhode Island, are subdivided into counties or similar territorial divisions. The number of counties, generally speaking, bears no relationship to the size of the state. Nor does the size of the legislature bear any particular relation to the size of the states; New Hampshire, one of our less populous states, has the largest legislature of any. A study of state constitutions conveys the impression, largely born out in practice, that the legislative, executive, and judicial establishments of the several states are not basically dissimilar, whatever minor structural differences between them there may be. This is unfortunate because smaller states simply do not share the larger states' need for elaborate governmental structure. The smaller states' virtual duplication of the larger states' form of government can only result in dilution of their quality, because the smaller states often have neither the resources nor the manpower reserves (including persons with highly technical or scientific qualifications, or expertise) to compete with the larger states on any realistic level. The state constitution of the state of Rhode Island should show considerably greater differences from that of New York or Pennsylvania than it does. There is no *ideal* state constitution but simply the best constitution for any one state at any given period of time. Model state constitution drafting must necessarily try to hit an acceptable average for all of the states, and must limit itself to sage pronouncements in the commentary that of course a model is not an ideal, but needs to be adapted to particular local situations.[26]

Against the background of the individual state differences and the changing role of the states, individually and collectively, in the evolving state-federal relationship, it is clear that no static ideal of state constitutional form can be prescribed. The most that can be done is the enumeration of approaches, attitudes, and criteria that should be applied in developing a state constitution in its peculiar place and time. Past experience in state constitution drafting, amassed over

more than two centuries, enables us to attempt the formulation of such a set of standards or criteria which, if fairly applied, is likely to result in a sound constitutional product, suitable for its time and situation, and likely to remain so for a generation or two.

The Content of State Constitutions—The Need for Criteria of Inclusion and Exclusion

The generally articulated wisdom has been that a state constitution should be brief and should limit itself to "fundamentals," avoiding all "legislative" matter. Little progress has been made, however, toward developing more definite guides to help the constitution maker in drawing the distinction. Unless the constitution maker is to be content with the notion that "fundamental matter" is matter that he or she wishes to include, and "legislative matter" is a term of opprobrium to stigmatize everything he or she wishes to keep out,[27] more specific criteria are required to aid in determining what matter is appropriate and what is inappropriate for inclusion in the state constitution.

There are some, in fact, to whom the words *fundamental* and *legislative* do seem to furnish a sufficient distinction, or who would rely heavily on the Constitution of the United States to make their point for them. Professor Munro, for example, commented in a much cited 1935 article:

> *A state constitution should confine itself to fundamentals.* This of course begs a question as to what one means by "fundamentals." True enough, it is hard to define, but everybody knows what it means. Or, if any one does not, he need only read the Constitution of the United States to acquaint himself with an organic document which comes measurably near fulfilling the requirement.[28]

It may be questioned, however, how far the *federal* constitution, creating a national government of delegated and limited powers, can serve as a satisfactory model for the preparation of a constitution for *a state* government of plenary, inherent powers. The view that the national constitution furnishes an adequate guide, however, continues to receive some support.[29]

Emphasis on the inclusion of "fundamentals" and on the exclusion of "legislative" matter continues to the present. Discussion of state constitutions was stimulated from the late thirties to the early fifties by a major flurry of state constitutional convention activity. Exhortations to conventions to concentrate on "fundamental" matters were commonplace. In New Jersey, the first pamphlet prepared for 1947 constitutional convention use under the auspices of a preparatory committee, entitled *What Should a Constitution Contain?*, presents

a restatement of the "fundamental"/"statutory"[30] distinction, giving examples of each variety. Similar exhortations to limit constitutional matter to "fundamentals" were addressed to the Hawaiian[31] and the Alaskan[32] conventions, and to the 1961 convention in Michigan,[33] and will most probably appear in the published proceedings of any future state constitutional convention.[34] All the sources reviewed that lay stress on the "fundamental"/"legislative" distinction appear to share a number of underlying assumptions: (1) that, although there may be an intermediate area of doubt, there is, on the one hand, a set of constitutional provisions that is clearly fundamental or basic, and on the other, a set that is clearly more appropriate for legislation; (2) that the terms "fundamental" and "legislative" have more or less readily ascertainable and applicable content unaffected by time or place; (3) that a brief constitution, one that is limited to "fundamental" matters, is better than a long constitution that contains "legislative" detail.

These assumptions are only partly true, and a consideration of the problems and criteria of constitutional inclusion and exclusion must concern itself with a balancing of the purposes of the constitution and the needs of government, rather than with an attempt to supply a fixed meaning for the valuative terms "fundamental" and "legislative." Although there is a more or less agreed on "core" area of constitutional content, criteria of inclusion and exclusion must take account of the needs of government as conditioned by time and place. Constitutional brevity may generally be of advantage to state government, but it is only one of several values to be achieved, and not necessarily the most important one. To put the last point differently, the best state constitutions are usually brief—but they are not the best *because* they are brief, but because they best meet the needs of state government.

Some Essential Considerations in the Development of Criteria

What subjects are appropriate for constitutional treatment, how they are to be treated, and what kind of detail is appropriate? First, one must include certain "core" subjects that common experience and tradition support as basic for the proper functioning of state government, and second, one must—depending on the particular circumstances in a state at a given time—necessarily include other matters deemed so important to that particular state as to call for constitutional treatment.

This brings us to a consideration of the significance of treating a subject in the state constitution rather than leaving it to be dealt with by ordinary law. Constitutionalization of a subject places it beyond change by normal law-making processes, and places it at the highest level of the legal authority

of the state. Self-evident as they may seem, the two effects of constitutional, rather than for instance, statutory, treatment of a subject bring with them a large array of consequences. The development of criteria for inclusion and exclusion thus becomes mainly an endeavor of weighing these consequences in particular contexts.

The twin effects of constitutional treatment have consequences that, depending on the circumstances, may be considered beneficial or harmful. The enduring quality of a provision of the state constitution may protect a desirable policy from frivolous changes by the legislature, or it may delay or prevent the change to a new and better policy from one embedded in the constitution which is no longer responsive to current needs. The fact that a constitutional provision stands at the pinnacle of the state's legal authority may protect a major interest of the people against encroachment by any branch of government, or it may nullify inconsistent laws or other governmental acts, regardless of their intrinsic merit and regardless of the fact that changed circumstances may have given them a higher importance in a changed scheme of values. Of course, the beneficial consequences are usually intended, whereas the harmful ones are, more often than not unintended, the result of changed circumstances. Inflexibility in the face of changed circumstances results in constitutional obsolescence and diminished power to act responsibly on the part of government organs. These factors in turn breed constitutional instability as a consequence of the need for frequent amendment.[35] In the light of these various possible consequences, the decision as to inclusion or exclusion of particular subjects in the constitution becomes a matter of weighing the advantages against the potential costs of inclusion.

Constitutional Core Areas

Although weighing the advantages against the costs of inclusion is appropriate with respect to all parts of state constitutions, there are a number of core constitutional areas as to which, in effect, a common judgment has been made that their inclusion is so necessary to the proper functioning of state government as to outweigh the possible disadvantages.

There is considerable agreement on the core provisions a state constitution is to contain. The celebrated nineteenth-century constitutional authority, Thomas Cooley identified five "basic elements of the constitutional pattern," as follows:

> I. We are to expect a general framework of government to be designed . . .

II. Generally the qualifications for the right of suffrage will be declared . . .
III. The usual checks and balances of republican government . . . will be retained. The most important of these are the separate departments for the exercise of legislative, executive, and judicial power. . . .
IV. Local self-government having always been a part of the English and American systems, we shall look for its recognition in any such instrument. . . .
V. We shall also expect a declaration of rights for the protection of individuals and minorities.[36]

Cooley's first and third categories may be viewed as aspects of a more general category, for we may include the establishment of "separate departments for the exercise of legislative, executive and judicial power" in the "general framework of government." Cooley recognizes expressly, as some other writers do not, that these categories do not adequately define what are "fundamentals," for within the basic categories enumerated there may be provisions that are "non-fundamental" and minute in detail in order to "meet particular cases."[37]

Other writers have provided slightly different basic constitutional categories. A mid-twentieth century commentator, W. Brooke Graves, finds four essential categories: a bill of rights, the framework of government, an enumeration or other statement of the powers of government, and provisions for amendment.[38] Other categories, such as provision for the fiscal management of the state and its localities,[39] and powers of local government or home rule have sometimes been suggested as core content. There is no question that constitutional protection of home rule may be warranted in a state where the concerns of the populous cities have not fared well in the legislature. While the contents of most existing American state constitutions can hardly be used as a reliable guide, the recurrence of certain particular essential categories (quite apart from the degree of detail that may be expended on any one such category) indicates a common level of expectations that ought to be weighed, if not followed. Thus, although the suggestion has sometimes been made that a state constitution could operate with but two basic articles—an article to establish a legislature to make all needful laws and to create machinery for their execution, and a bill of rights to protect the citizen against excesses of lawmaking or government—other considerations, including traditional reliance on separation of powers, compel greater elaboration. Without exception, current state constitutions contain a bill of rights, provisions on election and suffrage, provisions on the framework of government, including the establishment of the legislative, executive and judicial departments, public finance, and provisions for

amendment. Thus, while there may be some difference in emphasis, there is no serious disagreement on the basic areas to be covered by state constitutions, or by any constitution, for that matter.

Factors Weighing in Favor of Constitutional Inclusion

In considering the content of constitutional core provisions we dealt with areas of governmental concern that are considered so important and enduring that their inclusion in the state constitution is necessary even at the price of placing the area beyond change by normal lawmaking processes and at the highest level of state legal authority. Putting aside until later the reckoning of the cost of including a subject in the constitution, we are now concerned with various factors that may argue in favor of such inclusion.

The first judgment that needs to be made before a particular provision may qualify for inclusion is whether it has the qualities to be given this enduring and controlling position. Responding to this question depends on many factors of time and place. Major factors are popular demand or pressure; the significance of the provision for effective government; the particular ecological, geographical, or historical factors operative in the state; and the availability and adequacy of means other than inclusion in the constitution to achieve the desired end.

In respect to the weight of popular pressure, it must not be forgotten—in spite of the fact that we are here concerned with technical aspects of constitution making—that a commission or convention is a political body, the process of amendment and revision a political process (whether with or without convention), and a constitution a political document.[40] Consequently, pressure groups must be admitted to have a role in constitution making.[41] Pressure group activity may be stirred to support sound proposals; it may signal a strong popular sentiment, which is a factor to be weighed. If the interest reflected is sufficiently important and sufficiently broad and permanent, and is expressed in such a way as not to interfere with the reasonable aspirations of other groups and with the proper function of government, then the interest deserves serious attention.[42] It must be said, however, that more is necessary to warrant inclusion than a mere demonstration of pressures, and that the satisfaction of some other value ought to be required to convince the constitution maker that the particular proposal that has a popular demand behind it is of sufficiently enduring and important character to argue for its inclusion in the state constitution. The problem here is likely to be greater in the case of special privileges protected in existing constitutions, for special interest groups are not likely to surrender constitutionally protected advantages without a fight. However "legislative" and "nonfundamental" the matter may be, a veteran's preference for

civil service employment, or the constitutional protection of pension rights,[43] or the constitutional status of certain offices arguably no longer essential,[44] are not likely to be easily dislodged.

One value that may weigh heavily in favor of inclusion is the significance of the provision for effective government. This factor may support the inclusion of certain noncore subjects identified with current notions of good government, and enlisting in their support a substantial consensus of informed opinion. These subjects, though not constitutional core content, are matters of comparable concern in a considerable number of states. So, for instance, many constitutions cover the subjects of fiscal matters, including matters related to taxation and local and state tax and debt limits, and the regulation of civil service. While all of these subjects could be dealt with by ordinary legislation, without special constitutional authorization or limitation, inclusion of these subjects reflects an enduring concern with recurring issues of government, and an attempt to resolve them in a more permanent fashion. Even if such attempts are not always wholly successful, constitutional protection of a merit system may be warranted in a state traditionally devoted to the spoils system; and the same may be true of constitutional establishment of the executive budget and of satisfactory appropriations procedures. Including a subject area in the constitution then advances that area as one that should have permanence and is of significant importance by having been treated in the constitution.

What is considered a significant provision for effective government, necessary for inclusion, is of course in large measure a reflection of the times. New constitutions written in the second half of the nineteenth century, at the height of the distrust of the legislature, contained numerous restrictions on that body, some of which may have been considered desirable steps toward effective government in their time.[45] The relative spareness of early state constitutions and of the more recently drafted ones indicates greater confidence in the legislature and in the workings of the representative process generally. The inclusion of "self-executing"[46] and detailed provisions with reliance on court enforcement rather than legislative implementation in particular areas such as reapportionment,[47] voter registration, home rule, or civil service is a response, sometimes warranted, to adverse legislative attitudes displayed in the past.

Other factors weighing in favor of the inclusion of particular provisions may be closely tied to particular regions and states by reason of their geographic location or natural endowment, or by reason of particular local traditions or political configuration. Examples of such constitutional subject matter are furnished by the extensive constitutional regulation of natural resources in Alaska,[48] where no constitution could have been adopted without the inclusion of protections of fishing and hunting rights deemed vital by the people, who saw their future dependent on adequate safeguards in this area. A similar consideration—as well as pressure from the federal government—compelled the

inclusion of the article on Hawaiian Home Lands (dealing with use of certain lands for the benefit of the original Hawaiians) in the constitution of the new state of Hawaii.[49] Considerations of this nature are not restricted in their operation to new constitutions for new states, however. In a 1950s proposed revision of the Louisiana Constitution, which would have reduced that document to one-seventh of its length, the revisers still found it necessary to retain fairly detailed provisions concerning the regulation and maintenance of levees.[50]

Although the discussion of factors in favor of inclusion has thus far emphasized the requirement that a proposal must be of sufficient importance (as that term has been described) to warrant constitutional status, the second major requirement, namely that it have an enduring quality, must also be kept in mind. A provision will meet this requirement if it will not be rendered obsolescent by foreseeable social and technological changes. The consideration of the consequences of inflexibility of constitutional provisions (presented in the later discussion of factors weighing against inclusion) is therefore also relevant in this context.

A third important consideration in determining constitutional inclusion is the availability and adequacy of other means to achieve the desired end. Unless there is reason to believe that the legislature will give active encouragement to the perpetration of crimes, there is no reason to specify crimes or fix their punishment by way of the constitution, because ordinary legislation provides an entirely satisfactory alternative. So, too, the regulation of corporations,[51] of banks and banking practices,[52] of railroads,[53] and of canal companies[54] are not matters as to which inclusion in the constitution offers any present-day advantage over inclusion in ordinary legislation, whatever distrust may once have prompted such constitutional provisions. A provision should not, of course, be included in the constitution if the same result can be achieved by including it in ordinary legislation or by leaving it to be worked out by the executive or by the courts. Obviously, there is no need to create a new executive or administrative agency by constitutional amendment, if such an agency can be created, and made much more responsive to changing needs, by legislation or by regulation.[53] There is likewise no need to raise a rule of construction (such as the rule that all constitutional provisions shall be treated as mandatory unless expressly declared to be directory) to a constitutional principle, particularly when the rule enunciated would be applied by the courts, absent other considerations, without such a constitutional presumption.[56]

On the other hand, in situations where the aim can only be achieved by constitutional amendment, that fact may argue strongly in favor of its inclusion. This is most clearly the case when an urgently needed and strongly supported piece of legislation is voided by the courts. Depending on the reasons for the court's determination, constitutional amendment may be the only route that gives promise of success within a reasonable time, or it may even be the

only possible route. The latter was the case when an early workers' compensation law was invalidated in New York.[57] As read by the highest state court, the constitution itself stood in the way of the adoption of such a law, because the constitution required a jury trial in the cases in which the compensation system would have substituted different procedures, and because, in the court's opinion, the compensation law ran contrary to due process as class legislation and violated the constitutional protection against the abrogation of the action for wrongful death and against any limitation of recovery in such cases. Under a holding such as this, no amendment of the law to satisfy the court's constitutional objections was possible, and the remedy could only be supplied by a change in the constitution itself. As is often the case when an amendment is required, the need for the inclusion of the workers' compensation amendment arose, at least in part, out of the presence of provisions of an earlier time, namely the constitutional prohibition of limitations on recoveries for wrongful death,[58] which in turn had been adopted following the legislative establishment of such limits during the growth of the railroads. The prohibition of limitations on such tort recoveries, in the abstract, was no more a constitutional principle of government than the special authorization of workers' compensation; the functional nature of such provisions designed to meet a specific need in turn often breeds need for further amendment.

A more recent example of state constitutional amendment as the only solution to a perceived problem occurred in the same-sex marriage controversy in Hawaii. There, rather than in New York where the amendment was needed to authorize legislation, the amendment was utilized to block, or overrule, the effect of a 1993 decision by the state supreme court requiring the issuance of marriage licenses to same-sex couples.[59] In 1998 the Hawaii voters adopted Article I, Section 23 of the Hawaii Constitution: "The Legislature shall have the power to resolve marriage to opposite-sex couples."

The decision as to whether a particular problem demands constitutional change or is amenable to legislative or other remedies also depends, to some extent, on whether we deal with the drafting of a new constitution, especially one for a new state, or with the revision or amendment of an existing constitution of an established state. The difference is apparently due to the enduring character of state constitutions, which is shared by its "legislative" provisions, whether useful or useless, as well as by its core provisions. The presence of limiting provisions in an existing state constitution, or the presence of provisions that may give rise to restrictions in consequence of negative implication, may require constitutional change as the only possible solution to a problem, whereas, in a state with a "clean slate," it could be resolved by other, less onerous means. An example is the inclusion of a provision on gambling and games of chance in the New Jersey, and other states' constitutions;[60] it is unlikely that a new state would find it necessary to regulate this matter in its constitution,[61]

but an established state like New Jersey with a long and contentious history of constitutional provisions on the subject, might have difficulty in revising its constitution without reflecting the problem in the document.[62] An existing state that has operated with a constitutional debt limit for years will usually find it difficult to abandon this device, even in the course of a general revision,[63] and will have to resort to constitutional amendment if it wishes to finance a necessary project that would exceed that limit. While it might be a better policy for the future to abolish the debt limit altogether, the usual course will be to leave the debt limit intact, and as a matter of promptness and political expediency in exceptional circumstances, to authorize the financing of the project "outside" the debt limit through often dubious means.

The difficulty of making decisions on inclusion or exclusion in the case of a long-established state is compounded by the fact that such a state carries the burden of its past constitutional history. Some of this history may be embodied in judicial decisions reflecting particular attitudes, and much of it may be reflected in obsolete provisions of the constitution itself, in provisions reflecting the concerns of an earlier age. Many provisions that cause difficulties are of this kind, such as the many restrictions on fiscal and spending powers growing out of the panic of 1837, following the rapid expansion of railroad and canal companies with the aid of public credit or support.[64] So, too, detailed corporate regulations in many of our state constitutions persist, bearing witness to the impact of the *Dartmouth College*[65] case, long after the case itself has ceased to have any operative legal significance.[66]

It is easier to keep the subject matter of constitutional provisions confined to the accepted core area in developing a new constitution for a new state than to eliminate even clearly extraneous matter from the constitution in the course of revision. Special interests aside, a further reason, it seems, is that the inclusion of any matter—whether originally based on sound reason or ill-advised—in a state constitution in and of itself raises it to a higher level, by putting it beyond the power of the legislature and giving rise to fixed expectations on the part of its proponents. Matter that either is no longer of constitutional importance—or that never was—thus obtains a privileged status, enlisting in its support not only those who have a special or vested interest in it, but also of the considerable number of persons who distrust all constitutional change, suspicious of all tinkering with the established system. There may thus be a substantial popular consensus in favor of the retention of useless matter, either because of lack of information, or misinformation, on the number of useless or restrictive provisions in the existing constitution, or because of support for the constitutional document regardless of its contents merely because it is the state constitution.[67] Often, too, useless provisions are retained out of timidity. This may happen when the inclusion of a provision was first prompted by real

necessity, such as to undo an adverse judicial decision, but where the necessity has long passed. The adoption of amendments authorizing state workers' compensation legislation following the New York decision holding such a law unconstitutional is in point. These rather narrowly drawn amendments were needed then, but due to the general acceptance of workers' compensation, they are needed no longer. Yet a substantial number of states retain these enabling provisions largely because of the fear of what the courts might do now to workers' compensation were these provisions omitted in a general revision. On the other hand, in Maryland's failed 1967 state constitutional revision attempt, the proposed removal of hortatory, nonenforceable rights provisions was used by opponents to help defeat the revision at the polls.[68]

While these examples could serve to illustrate the cost of the inclusion of provisions in the state constitution, their purpose here is a different one—namely, to illustrate the considerable practical impact existing constitutional provisions have on the decision whether to solve problems by way of constitutional change or by way of the ordinary lawmaking processes.

In reckoning the need for the inclusion of particular matter in the constitution, we must strive to encourage a balancing of the factors involved. Is the interest sought to be protected truly a major interest, and do its relatively enduring nature and the extent of popular consensus on it justify its inclusion? Are there good and sufficient reasons to believe that it cannot be adequately resolved by legislative or other governmental measures, rather than a constitutional remedy? In short, is the policy involved of such enduring importance that we are willing to bind ourselves to it more firmly than by ordinary legislation?

Factors Weighing Against Constitutional Inclusion

Having considered the factors and circumstances that may argue for the inclusion of a provision in the state constitution, we must now reckon the cost of giving it this enduring and controlling position.

Because of the enduring quality of constitutional provisions, and because of the considerably greater difficulty in amending a constitution than in changing other law, constitutional regulation of a subject is less flexible, and the greater the specificity of the regulation, the more inflexible it becomes. "A Constitution that embodies a series of what are essentially legislative enactments inevitably reduces the elasticity of government, rendering it less capable of adaptation to unforeseeable changes in the areas of its operation."[69]

The consequence of inflexibility and the resulting loss of adaptability to change is obsolescence. This is more readily observed in the case of what have

been referred to above as "essentially legislative" provisions, but it may affect the content of "fundamental" provisions as well. In either case, the inflexibility and obsolescence of constitutional provisions will diminish the power and the freedom of the government to deal with new situations, and will, by the same token, decrease its responsibility for consequences it has no power to control.

> When, from whatever motive, legislatures are denied power to deal effectively with the emergent issues of the day, they are absolved of responsibility for untoward developments. Only by enforcing responsibility, rather than by withholding power, can the people hope for vigilant government in the public interest. As Edmund Burke long ago remarked, "It is not from impotence we are to expect the tasks of power."[70]

The resulting difficulties can, in turn, only be dealt with by constitutional amendment. The more rigid the constitutional document, the greater the need for frequent amendment is likely to become. Excessively frequent amendment, or constitutional instability, creates situations where amendment breeds amendment in a continuing vicious cycle.

The questions to be posed in considering a proposal for inclusion in the state constitution are whether these adverse consequences are warranted by its positive consequences, and whether the provision is so important as to justify the invalidation of all legislative and other governmental action in conflict with it. Some examples may help to point out the context in which these questions may have to be considered.

The price that must sooner or later be paid for including particular subject matter in the state constitution may be demonstrated in the case of contemporary provisions with a high-minded public purpose. One of these is the provision on local home rule for cities found in a number of constitutions. Demands for city home rule originally arose out of the malapportionment and consequent rural domination of state legislatures,[71] that is, out of a condition that could not be effectively dealt with in the legislature itself. To avoid frustration of the desire for city home rule by legislative inaction, constitutional home rule was, justifiably, embodied in self-executing provisions, containing detailed lists of city home rule powers, and detailed "procedural" provisions on the manner of adoption and amendment of home rule charters. Changes in our society have come to render such enumerations of city home rule powers problematic because enumerations of city home rule powers are apt to get in the way of metropolitan regional development, which must seek to combine existing governmental entities into larger groupings so as to facilitate planning, physical development and services for the metropolitan region as a whole. Balancing the earlier immediate needs for municipal self-government against the possibility of future

inflexibility and diminished freedom to deal with new situations in the future, there is no doubt that the home rule advocate of the early twentieth century would have been willing to bear the cost. It must be questioned, however, whether groups interested in effective government *today* ought to be willing to pay the same price, when the reckoning seems so much closer. The area of local self-government, however, has arguably evolved into a state constitutional core area, and therefore the remedy for overly rigid provisions is probably not removal, but revision creating more flexible provisions.

Another example of the price to be paid for constitutional treatment of a subject is furnished by another "good government" provision—namely, the detailed "self-executing" kind of provision establishing a merit system in the civil service of the state.[72] As long as the spoils system was still the major system of employee selection in many states, it may have been necessary to write substantial portions of the civil service law into the constitution. But doing so may render the legislature and the civil service commission incapable of coping responsibly with new problems. A constitutional requirement, for instance, that selection shall be on the basis of competitive examinations "as far as practicable"[73] compels the use of competitive examinations for the employment of personnel with the high scientific or technical competency presently needed in some state jobs, or to attract a diverse workforce, even though such examinations, though "practicable," are hardly the best way of ascertaining competency and diversity. In consequence, too many decisions on personnel policy have to be made or administered by the state's judiciary in the course of constitutional litigation under the civil service provision. Ultimately, when their existing home rule and civil service provisions have become so obsolete as to interfere sharply with the powers of government to meet the changed situation, these states will again have to resort to the constitutional amendment process. The need for change in this area is a matter of wise consideration under the specific circumstances of each state.

In both of the above examples, inclusion in the state constitution seemed on balance to be warranted, at least at the time the issue was first presented. In many of the instances that follow, a weighing of the factors ought to have resulted in an opposite conclusion.

Inflexibility and its consequences are most readily and simply observable in the instances where a constitution has sought to set specific standards for all times, such as by fixing the governor's or other officers' salaries, or by setting standards of value or coinage. In effect this constitutes an assertion that the judgment of the convention delegates (or of other sponsors of such narrow provisions) is superior to that of future legislators and will not be invalidated by changing conditions. It is instructive to observe that one of the few instances in which the United States Constitution might be considered inflexible and obsolescent is the attempt in the Seventh Amendment to fix such a permanent

monetary standard, namely, the guarantee of the right of trial by jury in federal courts "where the value in controversy shall exceed twenty dollars"—once a substantial sum, but now well below the jurisdictional limits of most summary small claims courts.

The problem of inflexibility and its consequences resulting from the constitutional regulation of a subject is not restricted to any particular area of the constitution, and it affects the contents of core areas as well as areas commonly stigmatized as legislative. For example, in establishing the executive department, many state constitutions retain "good government" provisions of another age. Commonly, these constitutions, after reposing in the governor the executive power of the state, proceed to dilute that power by providing for the election of most if not all heads of departments of state government.[74] Direct election of the governor's cabinet undoubtedly represented "good government" notions of Jacksonian popular democracy and distrust of a strong executive.[75] With the twentieth century's shift in the nature and complexity of the tasks of government, the need for strong central authority in the administration of state agencies has become apparent to many people, and such provisions in some state constitutions have become a major obstacle to administrative reform.

In the area of the judiciary article, too, a number of specific provisions have given rise to inflexibility and related difficulties. The constitutional creation of separate courts rather than a unified court system has given rise to major administrative problems for the judiciary, with some constitutional courts having outlived their usefulness yet being maintained by the constitutional requirement, while other courts in the same state suffer from lengthy calendar delays and court congestion.[76] In many states, the lower judiciary, particularly the justices of the peace, were constitutional officers, with the result that the inferior court structure could not be changed by the legislature in spite of the fact that the complexity of even run-of-the-mill legal issues made lay judges an anomaly. Other administrative rigidities in the operation of the courts have been caused by constitutional provisions depriving courts of all or a major part of their power to make procedural rules.

Restrictions on the legislature are many and varied. It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation. The heavy sanction of invalidity of inconsistent legislation is one measure of constitutional inflexibility and the consequent loss of freedom to deal with new problems. In the area of fiscal management, for instance, constitutionally fixed policies of another era now hamper the economic development of many states.[77]

While express and detailed prohibitions and limitations form a major source of constitutional inflexibility, rigidity is fostered to the same extent by

express and direct grants of power to the legislature. This result flows from the nature of the state constitutional document as well as from negative implications flowing from the powers enumerated. In constitutional theory state government is a government of plenary powers, except as limited by the state and federal constitutions. The state constitution is thus a document of limitation, not of grant or delegation, and constitutional provisions purporting to grant the legislature the power to legislate in a particular sphere are therefore useless, because the legislature already has the authority. In order to give the effect to such special authorizations, however, courts have often given them the full effect of negative implication, relying sometimes on the canon of construction *expressio unius est exclusio alterius* (the expression of one is the exclusion of another).[78]

For example, in *Application of Central Airlines, Inc.*[79] the court held the commissioner without power to regulate airlines, since air transportation was not in the list used to define "transportation and transmission companies." Had the authors of the constitution been content to rely on the general terminology, thereby permitting the legislature to define the terms to meet the needs of new developments, there is no doubt that the court would have upheld the commissioner's jurisdiction over airline companies.

The strictures against including "legislative" provisions in state constitutions are frequently coupled with the advice to forego including "mere procedural detail." While it may be important to include directions concerning the method by which a certain result is to be achieved in the case of constitutional provisions intended to be self-executing, the inclusion of such detail almost invariably becomes in inflexible limitation on the organs of government. An express requirement that a particular procedure be followed will often be read as a prohibition on the use of other procedures, regardless of whether such other procedures—whether or not discovered later—are better designed to achieve the basic purpose. For example, a Kentucky court voided an act authorizing the use of voting machines because of a constitutional provision that voting shall be by "secret official ballot."[80]

It is in this context that the amount of detail to be included in any constitutional provision ought to be considered. Not only must the factors of importance and enduring quality be weighed in respect to any provision in its entirety, but they must be brought to bear also on its specific detail. A provision that, taken as a whole, serves an important and enduring purpose, may nevertheless become an obsolescent limitation on effective government, even a barrier to the attainment of contemporary aims, if its "procedural" detail fails to meet contemporary needs. Because details of administration are subject to more rapid change than major principles of government, obsolescence can be expected to hit them more rapidly and more sharply than more general provisions. Thus, the principle that there shall be no taking of property for public purposes without just compensation endures, while a constitutional provision

seeking to tie down the method for determining condemnation awards may become a troublesome sore spot.[81] Moreover, "procedural" provisions are usually drafted with the existing governmental institutions in mind, and the procedure may be entirely ill-adapted to a change of governmental machinery in response to new conditions. One example of this type of rigidity is represented by the numerous provisions delegating certain duties to the sheriff, an office that has seen a great decline with the emergence of modern police organization.[82]

When constitutional inflexibility interferes with the necessities of responsible government, recourse must be had to constitutional amendment.[83] In such circumstances, it is futile to inveigh against frequency of constitutional amendment, because the mass of detailed regulations, with the consequent loss of flexibility and diminished freedom of the government to act, compels frequent constitutional amendment to keep the machinery of the state operating. Constant constitutional amendment, or constitutional instability, is part of the cost to be paid for including so much in a state constitution. The cost is not inconsiderable, for constitutional instability has a number of undesirable consequences of its own. One of these is that the high regard in which the constitutional order is held may be lessened if constitutional amendment is made to appear a commonplace.[84] A constitution should be more than "a restricted railroad ticket, good for this day and train only."[85] A further consequence is that the amendment process often has a cumulative or snowballing effect, as amendment seems to beget amendment. Whenever a narrowly limiting provision is amended by adding an exception to the limitation, the general scope of the provision is likely to become even more narrowly limited in that the stated exception may be taken by implication to disallow other exceptions not expressly stated.[86] Every detailed constitution thus develops certain sore points that become the foci for veritable clusters of constitutional amendments. One critic has aptly characterized such provisions as "constitutional amendment breeders."[87]

The cost of regulating a subject constitutionally cannot be avoided in the long run, but it can be reduced or delayed by thoughtful constitutional draftsmanship. The prerequisite for such draftsmanship is an appreciation of the problem of constitutional inflexibility and its consequences. The drafter must then develop a preference (absent special considerations) for drafting constitutional provisions in general rather than in restrictively specific language, and an awareness of certain recurring types of situations in which the language of a constitutional provision may contribute greatly to, if not cause, inflexibility. Some recurring problems of this kind may be briefly referred to. Any phrasing that readily gives rise to a negative implication ought to be avoided where this implication is not desired; a list of any kind will tend to raise such implications—if it is a list of powers, negative implication may limit the government to the powers expressed and no others.[88]

It might be comforting to be able to say that the drafter should avoid all "procedural" provisions—those that set forth how a particular object is to be accomplished—for such provisions may be interpreted restrictively as providing the only way in which a function may be performed and may, clearly, raise sharp questions of inflexibility. In "self-executing" provisions, however, it is essential to include enough detail to outline the manner in which the object is to be accomplished.[89] A possible way to avoid excessive inflexibility may be to authorize the legislature to provide for other means to accomplish the purpose, in addition to the method outlined in the constitution.

Another device to cut the cost of including a provision in the constitution may be available in certain instances when the sanction of courts' invalidation of noncomplying action seems unnecessarily harsh. In the instance of Michigan's recall provision, for example, the Michigan Constitution provides that the sufficiency of the grounds for a recall position shall not be judicially reviewable—thus leaving it to be enforced by the political process.[90]

But while the constitutional drafter may use his or her skills to reduce constitutional inflexibility by drafting provisions in such a way as to give maximum maneuverability to the several branches of government and by providing enough room for the application of rational principles of interpretation in the face of changed circumstances, it must be recognized that the possibilities are limited. While a good drafter may sometimes cut the costs of constitutional inclusion, he or she cannot avoid them altogether.

Conclusion

The basic inquiry in evaluating any proposal to include a particular subject or provision in a state constitution should be whether the value of embodying *this* proposal in higher law, beyond change by normal lawmaking processes, is greater than the cost of so doing. In the balancing process necessary to reach a final decision, the importance of the provision to the people and to the effective government of the particular state must be weighed against the cost in terms of inflexibility, obsolescence, decreased responsibility of the government, constitutional instability, and the nullification of inconsistent government action. In reaching a decision, consideration should also be given to whether the policy embodied in the proposal is one likely to endure, or whether it is likely to suffer rapid obsolescence by reason of societal or technological changes. A final factor to be considered is whether adequate means other than inclusion in the constitution are available to achieve the particular objective.

It is clear that the criteria proposed will require difficult judgments of degree, and the factors taken into consideration may be evenly balanced. But in

view of the fact that all of the provisions in a state constitution operate as limitations on the legislature and on the government as a whole, and in view of the fact that the cost of including a proposal is likely to be high in the terms described, the burden of proof concerning the need for inclusion should be squarely on its proponent, and any doubts on the issue should be resolved *against* inclusion and in favor of the freedom of government to respond to emerging problems without constitutional limitations, express or implied.

Development and change are part of government, and even the most "fundamental" constitutional document, scrupulously drafted in light of these criteria, will occasionally require amendment and revision. A reliable, unobstructive method of constitutional amendment, to enable the constitution to develop in response to changing needs, will therefore always remain a necessary part of the core content. For our age does not share the certainties of John Locke, who in drafting the Fundamental Constitutions of Carolina made no provision for amendment, but provided instead that the document "and every part thereof, shall be and remain the sacred and unalterable form and rule of government of Carolina for ever."[91]

In spite of all the cautions and dangers of inclusion of subject matter in the state constitution, we have managed to have many good, effective, and even elegantly drafted constitutions in the past two centuries. Like all other forms of draftsmanship, the drafting of constitutions is both a skill and an art of governance. With that in mind, the drafting of state constitutional provisions ought not to be discouraged, but ought to be encouraged so as to achieve the kind of knowledgeable, accurate, sparse, and if possible, elegant drafts of which many of our forebears were capable. With care, thoughtfulness and knowledge of avoidable pitfalls we ought to undertake the task willingly and effectively. The cautions and guidance here provided to the constitutional drafter should not have the effect of a paralyzing system of constraints, but rather an enabling system of sound advice based on past experience to achieve effective and sound government.

Chapter 3

Unique Issues in Drafting State Constitutions

Introduction

While legislative drafting has been the subject of a considerable literature, the drafting of constitutions or constitutional provisions has received hardly any specific attention.[1] The works on legislative drafting generally ignore it, although many of the lessons of legislative drafting are relevant to constitution drafting. The few state bill drafting manuals that mention constitutional amendment at all do so merely in the context of providing the form for the proper introductory clause. The exceptional manual—that of Oregon—has a chapter entitled "How to Draft Constitutional Amendments," that refers to several sources for comparative constitutional materials. One of its key lessons is:

> Adequate background research is required in preparing a constitutional amendment or revision just as in drafting a bill. Since any change in the Oregon Constitution must be approved by the people, correcting an error made in drafting a constitutional amendment or revision is much more difficult than correcting an error made in drafting a bill.[2]

This statement assumes that the drafting of constitutional provisions does not differ appreciably from legislative drafting. Although this assumption may be correct in many respects, the drafting of constitutional provisions presents special problems, both substantive and formal, that require the application of some specialized drafting techniques in their solution. "Adequate background

research" is certainly essential in legislative and in constitution drafting, but its nature and the sources used may differ significantly. On the formal side, too, while general strictures in regard to style and arrangement in legislative drafting may often be applicable to constitution drafting, the latter presents formal problems of its own that set it apart from the drafting of statutes with their frequently greater specificity and malleability. This chapter outlines briefly the methods and some of the principal problems of state constitution drafting, with emphasis on the ways in which it differs from legislative drafting generally.

The Principal Phases and Aspects of the Drafting Process

Commonly the drafter is not the authoritative arbiter or maker of the policies to be embodied in the provisions he draws. This commonly encountered division between the drafter's function and the ultimate authority in matters of policy has contributed to widespread misunderstanding of the nature of drafting itself. It has been assumed, for example, that the drafting task is primarily a task of English composition. The drafter is merely a scrivener, it is thought, who is engaged in putting the ideas of others "into legal language." But, as will become evident later, this is to misjudge badly the contribution made to the development of law by state constitutional drafters, and by drafters generally. In fact, probably only one-tenth or even a lesser fraction of time is spent in formal composition, while the overwhelmingly greater portion of drafting endeavors is commonly devoted to research and investigation to clarify and elaborate the intent of the policy maker, and assisting in the determination of the best means of achieving that intent. The drafter, in order to be effective, must normally participate closely and as early as possible in the policy-making process. This participation is not, of course, the same kind of participation as that of the sponsor, and a drafter who would seek to substitute his or her judgment for that of the policy maker on significant issues would not only run afoul of professional ethics, but would also jeopardize his or her own effectiveness by involvement in partisan struggles.[3] The drafter's participation in the policy-making process is that of a researcher and expert technical consultant, who can help the policy maker arrive at sound decisions by providing data to evaluate the effects of particular policies and by calling attention to policy alternatives, together with supporting information, to aid the policy maker in weighing their relative merits.

The phases of the drafting process are neither sharply distinguishable logically, nor are they strictly chronological, for each phase is likely to give rise to new policy issues, requiring further research or additional policy consultation with the policy maker. A division of the drafting process—which is a truly continuous one—into separate phases merely serves the aim of emphasis in discus-

sion. For this purpose, the process of drafting constitutional provisions may be divided as follows:

1. General background research or investigation
2. Study of the specific problem in the light of the law and experience, including the study of related law of the same or inferior order in the jurisdiction concerned
3. Study of comparative materials: state, national, or foreign
4. Study of consistency and interrelation of the proposal with higher law
5. The making of policy choices: criteria for inclusion and exclusion
6. Review of methods of enforcement: the weighing of sanctions
7. Consideration of means to achieve flexibility: generality and other devices
8. Writing the provision: formal aspects of constitution drafting
9. Revision of the draft[4]

All but the last two steps are here treated under the heading of "substantive" phases of constitution drafting; the last two are treated as "formal" phases. Again, the line between the two is somewhat arbitrary, because content and form are so inextricably connected that the division of the field into "substantive" and "formal" aspects is merely a device to separate the two for ease in reference, rather than an analytical description of the drafting process.

Substantive Drafting Phases and Problems

General Background Research or Investigation

When the function of the drafter is divided, as it normally is, from the final say on policy,[5] the drafting process begins with instructions—oral or written, general or specific—from the person or group of persons responsible for policy. The first task is to elicit from the policy maker at the outset as much information as possible about the nature of the problem and about the proposed solution—if, indeed, any solution is proposed at this stage—so that the drafter can make a good start on the first draft.

Unless, as sometimes happens, the drafter is a specialist or otherwise current and well versed in the facts and law of the area concerned, he must then undertake to prepare to deal knowledgeably with it. Before beginning to deal with the specific problem, the drafter must familiarize himself with the general subject, by referring to the literature in the field, by consultation with specialists, or both. In the context of constitution drafting, background study imposes

a fairly heavy burden, particularly if an entire state constitution is to be revised. A working familiarity with the activities of state government in general, and a rather good acquaintance with the political institutions and the problems and operations of government in the particular state, are probably just as essential as a thorough familiarity with the Federal Constitution and the state constitution to be revised or amended. A good background in constitutional law—both national and state—is a considerable asset to any drafter, and something of a necessity to the constitutional drafter.

A constitutional drafter—particularly one involved in a major revision—ought to be a generalist, preferably a lawyer with broad interests and, if possible, experience in the area of public and administrative law. It will save time if he can bring much of this to the task at hand without special study, but a great deal of it can probably be acquired in the course of conscious familiarization with background materials, such as texts on state government and administration, books, monographs and pamphlets on particular aspects or branches of state government, and studies and reports of public or private agencies, legislative committees, study commissions, civic groups, and research institutes. The scope and depth of background research will vary, clearly, with the problem at hand. If the problem is one of revising an entire constitution, the dimensions of the background study may be quite substantial and may, in fact, engage the energies of a preparatory commission with a sizable research staff for some time in advance of a constitutional convention. Background study related to constitution drafting will have to concern itself too with political, historical, economic, and ecological factors at work in the particular state, for a constitution is a political document and factors that affect or determine the political pressures within the state will have to play an important part in the selection of the policy alternative most viable in the light of the particular state's condition.

Study of the Specific Problem

Armed with as detailed a set of instructions from the policy sponsor as is initially possible, and with the knowledge obtained from general research and investigation or her own expertise, the drafter must undertake a detailed exploration of the specific problem.[6] In constitution drafting as in legislative drafting, the exploration should start with an inquiry into the pertinent facts and the existing law and experience thereunder in the jurisdiction concerned. Three major questions to be answered are:

1. What is the applicable higher law within the framework of which any new provision must be drafted?

2. What is the existing state constitutional law relating to the problem, and what data of experience—including decided cases—and other factors are available to shed light on the problem and on the impact of this existing law?
3. What existing subordinate law and arrangements would probably be affected by the constitutional change?

The question of the impact of applicable higher law, is of the most vital and continuing importance in the drafting process both initially for the appraisal of pertinent existing law and, later, for the shaping of new provisions. It is treated and explored separately below[7] as an independent phase or aspect of the drafting task. Such treatment most nearly reflects the practical emphasis in the sound development of law that the impact of higher law frequently demands. Care must be taken to assess the consequences of judicial opinions on the requirements of federal law, constitutional and statutory, for state constitutions. An important example of this was the United States Supreme Court decisions finding that issues of state legislative apportionment were justiciable, and imposing the one-person-one-vote requirement. This *federal* change required substantial *state* constitutional readjustment.[8] Similar requirements for revision of state constitutional election provisions grew out of the federal Voting Rights Act of 1965, and its subsequent amendments.

The second major question, involving the state of existing law, assumes that there is a body of constitutional law in the particular state. It is unlikely that drafters will be drafting new constitutions for new states in the foreseeable future, so this would seem a sound assumption, even though of course the existing constitution may not contain a relevant provision. An examination of existing constitutional law, then, involves a consideration of the existing constitutional text, if any, constitutional decisions in the field, and factual data of relevant experience, in addition to other materials bearing on the particular area of constitutional law involved. Such other materials would include such extrinsic aids to interpretation as the papers of the convention that produced the constitutional provision under consideration, such as convention committee reports, records of convention floor debates, or the customary "address to the people" that accompanied the submission of the constitution from the convention to the people and that may contain explanations of the changes made. Similar material may be available if the particular provision resulted from an earlier amendment, such as studies prepared by legislative committees or study commissions in support of the original proposal. In either event, an examination or prior constitutional language may provide a clue to the reason or purpose of past changes.

In discussing materials bearing on particular areas of constitutional law, as well as on even broader areas of new constitutional policies, pertinent sources

include drafters' notes, or explanatory material prepared by the constitutional convention staff itself. Another frequently available source is the materials prepared by a preparatory commission appointed to prepare for the constitutional convention. Such materials are particularly useful in the identification and analysis of problems that arose from earlier constitutional documents. Preparatory materials are also useful in determining the specific problems the convention was asked to resolve, which may help the task of purpose interpretation.

In examining the existing situation, the constitutional drafter cannot be limited—as the third major question indicates—to a consideration of state *constitutional* law. Part of the inquiry must be directed to investigation of subordinate state laws and even sometimes of local ordinances and administrative regulations that are dependent on the continuation of the existing status of the state constitutional law, and that may be invalidated or otherwise affected by a change in the constitutional order. Desirable and undesirable effects must be recognized and taken into account. A determination of how far-reaching the effects of a proposed constitutional change may be in terms of the necessity for major amendment or other changes in existing law may cause modification or adaptation of the proposal so as to limit its effect, and so as to avoid unintended invalidation or modification of existing law outside of the proposal's intended target area.

At this stage, in areas already covered by constitutional provisions, the drafter must begin to ask whether the existing constitutional law is indeed inadequate, that is, whether the drafting of new provisions is required; and even when the area is not already covered, must begin asking whether constitutional change is the most appropriate and effective route to the desired objectives. It is possible—just as in the case of legislative drafting—that the investigation of the existing legal situation will show that no problem exists that *requires* state constitutional amendment or revision, in which case nothing further needs to be, or ought to be, done *on the constitutional level*.[9] For here another complexity enters that is not present to the same extent in legislative drafting. Although investigations of the existing state constitutional law may disclose that the problem does not *require* constitutional amendment for its solution, but may merely require a change in the statute, such a conclusion does not dispose of the issue of whether a statutory or a constitutional remedy ought to be selected as more appropriate or better designed to achieve the policy aim. A single example may suffice. As a matter of state constitutional law, there is usually nothing to prevent the adoption of city home rule on the basis of a general statutory, rather than constitutional authorization, but the conclusion that no constitutional amendment is necessary for the legislature to grant home rule is not dispositive of the question whether, as a matter of policy, constitutional or legislative home rule ought to be preferred. This is the type of issue that may require the consideration of political issues by the convention, commission, or

policy maker. Some of the considerations involved in answering these last queries will be developed later.

Study of Comparative Materials

In constitution drafting, no less than in legislative drafting, the study of comparative materials can be invaluable.

> The field of state constitutional research has become in large measure a field of comparative law, and states that propose to amend their constitutions usually look to the constitutional language and experience of other states, either for example or avoidance.[10]

Have other jurisdictions faced the same problem? How have they met it and with what results? Through comparative study states may benefit by each others' experiments and experience. With respect to constitution drafting, comparative materials include similar constitutional provisions in other state constitutions, in the Federal Constitution, in so-called model provisions and even in the constitutions of foreign countries. Tracing comparative provisions from other jurisdictions was, at one time, relatively easy with the aid of the *Index Digest of State Constitutions*,[11] which provided a topical digest of all state constitutions, and with the aid of the most recent compilation of all state constitutional texts, namely, the collection of *Constitutions of the United States, National and State*.[12] Greenwood Press is publishing a fifty-state series of one-volume reference guides to each state's constitution. State constitutions are now available online.[13] "Model provisions" can still be found, of course, in the 1968 edition of National Municipal League's *Model State Constitution*.[14] Other, more specialized model provisions are proposed from time to time.

As with legislation, cases decided under similar constitutional provisions in other states may often be persuasive in interpretation, and where a state has "borrowed" a particular constitutional provision from another state, there may be a presumption that the "borrowing" state took over the provision intending it to be read in accordance with previous interpretations in the state of origin. In gauging the effect of constitutional provisions in other jurisdictions, or in his or her own, the drafter should not—it must be stressed—rely on judicial decisions alone. The nature of litigation under a particular constitutional provision can be an important index of its operation. But in many areas the character of the provision is such that litigation under it is unlikely or inappropriate or otherwise discouraged. Here as elsewhere the drafter's general background in the operation of the state government will be invaluable—for the effect of a particular provision may have to be evaluated in terms of its

effect on the operation and interaction of different branches of state government and on the manner in which it affects the political life of the state. On such matters, the drafter—and the policy maker—can often profit from the assistance of other consultants and specialists in political science, public administration, public finance, and other fields, depending on the particular area of state constitutional law involved, and from preparatory materials assembled for a constitutional convention or commission.[15]

Study of Consistency and Interrelation with Higher Law

The subject of the effect of higher law and its importance has already been alluded to. Examination of applicable higher law is a part, first, of review of existing law needed to define and appraise the problem that the drafter has been asked to help resolve. It is relevant, second, as providing a part of the framework within which the drafter must labor. Proposals for new law must normally be shaped so as to be consistent with superior law if they are to be given effect. Apart from questions of invalidity, they ought to be shaped so as to take advantage of such aid as higher law may offer toward the desired objectives; they ought to be so "tailored" to, and coordinated with, higher law and other contiguous legal rules. So, for example, a state that wishes to prohibit special earmarking of revenue ought to consider that earmarking of certain funds may be required to obtain the benefits of a federal grant-in-aid program.[16]

Because state constitutional provisions stand at the highest level of the state's legal order, fewer superior levels need to be checked than in the drafting of local ordinances or state statutes. These higher levels, for state constitutional provisions, are the Constitution of the United States, federal statutes, and federal regulations. There is also some indication that at least for certain purposes existing interstate compacts to which the state is a party may be superior to state constitutional provisions,[17] and this bears consideration in any constitutional field in which interstate relations may be involved.

The check for consistency with higher law, is best seen not as a search for prohibitions, but as a search for permissible means to achieve desired ends. This way of putting the question has been well stated and explained by Professor Harry W. Jones as follows:

> *Is there any provision of [higher law] that must be taken into account in deciding upon the particular means to be employed in attaining the objectives of this proposed [state constitutional provision]*? This form of expression is used here because of the writer's conviction that constitutional limitations are better viewed as prescribing the right ways of accomplishing social purposes than as enumerations of forbidden objectives.[18]

Instances of state constitutional provisions that are clearly unconstitutional under the Federal Constitution are, unfortunately, not infrequent. Many of them have remained on the books as a dead letter, and are ignored by the legislatures of the states concerned.[19]

Making Policy Choices: Criteria for Inclusion and Exclusion

The application of criteria to determine whether a particular proposal is appropriate for inclusion in the state constitution is comparable to some extent to the important phase in legislative drafting in which the drafter considers possible alternatives to drafting a statutory provision—such as whether the matter should be left to judicial lawmaking, or whether, for instance, stricter enforcement of existing law should be left to development by administrative action under an existing statutory delegation of authority. But in the constitutional area this phase has special ramifications, which have been covered in depth in chapter 2.

Methods of Enforcement: The Weighing of Sanctions

The selection of means by which policy choices will be made effective cannot, in reality, be separated from the making of policy choices themselves. It is a step of the greatest importance both in legislative and constitution drafting, though it has somewhat different ramifications in the latter field. For example, enforcement of constitutional provisions may raise in special ways problems of the relationships between the three branches of government.

The difference in the kind of sanctions appropriate for the enforcement of constitutional, as against statutory, provisions is largely due to the fact that constitutions are in the main addressed to the government, while statutes are more commonly addressed to private individuals. Unlike statutes, too, constitutional commands may be, and frequently are, directed to the legislature. In consequence, the constitutional drafter's arsenal of *possible* sanctions is as broad as that of the legislative drafter, but the arsenal of *appropriate* sanctions is considerably narrower.

The choice of sanctions for the enforcement of particular constitutional provisions depends on various factors, including the nature of the constitutional command or prohibition, the person or branch or agency of government addressed, the availability of enforcement machinery outside of the constitution, and whether or not appropriate enforcement machinery can or should be provided within the constitution.

To be enforceable, the minimal requirement is that a constitutional provision be mandatory. Whether a particular mandatory provision is enforceable

then poses further questions. One of the most important and pervasive sanctions in the enforcement of constitutional provisions—unless the provision in question is directory only—is the judicial nullification of inconsistent legislation or other acts of government. This sanction—which may work unintended and harsh results in some instances—will generally be applied to uphold mandatory constitutional provisions, unless some device is developed to make it inapplicable in particular circumstances. This sanction requires particular mention, because it is applicable to all mandatory constitutional provisions alike, regardless of any other factors involved. The mandatory/directory distinction is discussed in depth in chapter 4. Though many directory provisions may not have any immediate impact, it is part of the genius of state constitutions that they provide an opportunity for a state to note future desirable developments in the greater emphasis on liberties and on the benefits of broader provisions for social and economic benefit in the future, possibly by the expansion of meaningful equal rights in the area of economic and social equality.

Available sanctions may be conveniently discussed under two headings—those applicable to provisions affecting private individuals and those applicable to provisions addressed to a branch or agency of government or to a public officer.

Making effective provisions affecting private individuals. Although the constitution is not usually the place to regulate individual conduct, many constitutions contain provisions that undertake to do so. These provisions cover matters best left to statutes, including not only the designation of specific crimes but also the penalties for treason, gambling, dueling, or criminal libel.[20]

In the case of provisions addressed to individuals, constitutional sanctions may, in theory, parallel the whole gamut of legislative sanctions from no sanction at all, that is, a mere precatory provision, to the most thorough regulation. When certain violations or crimes are referred to in the constitution, the drafter must examine whether law apart from the constitutional provision provides usual and adequate statutory remedies, criminal penalties, and so on and then allow the policy maker to determine whether such available remedies are adequate or whether specific remedies must be constitutionally provided.[21] If a remedy is not supplied, provisions addressed to individuals are generally treated as non-self-executing and such commands or prohibitions are, in effect, addressed to the legislature for appropriate implementation, which the legislature may or may not see fit to undertake. Unless absolutely necessary the constitution, in light of this criteria for inclusion and exclusion, should not provide for a detailed regulatory scheme including a special administrative agency and a detailed schedule of sanctions and remedies. New sanctions most commonly encountered to make effective constitutional provisions related to individuals, mostly including office holders, are criminal sanctions and for certain crimes such as misconduct in office or defrauding public monies, the special sanctions

imposed are the loss of office and disqualification from future office holding.[22] While less objectionable than constitutionally prescribed criminal penalties, these, too, are matters that could be left to the legislature.

Making effective provisions addressed to the government or to public officers. One less common example of a different sanction is the provision in the New York bill of rights that, after guaranteeing the usual right against self-incrimination, provides that any public officer who invokes the right in a grand jury investigation of his official duties shall lose his office and shall be disqualified for five years from holding public office.[23]

When dealing with the problem of sanctions in relation to constitutional provisions addressed to the government or to public officers, that is, provisions more properly in the constitutional sphere, the drafter's task is to help provide the sanctions appropriate to the nature of the provisions and to the branch of government or government agency involved.

In many constitutions, one finds statements on the theory of government, or other provisions unsupported, and not intended to be supported, by sanctions. Such expressly or impliedly directory or precatory provisions may, of course, be implemented by the legislature or other branch or agency of government addressed by the constitution; but normally there is a real question as to whether such provisions ought to be included in the first place. Most constitutional provisions are intended to be mandatory, however, and it is frequently desired to have some means for their effectuation beyond mere reliance on the branch or agency addressed. What these means may be and how far they should be elaborated in the constitution itself depends on the addressee and on the subject matter. It is also subject to the criteria of inclusion and exclusion referred to earlier, including consideration of availability of sanctions outside the constitution itself.

Provisions addressed to the legislature. One kind of command and prohibition addressed to the legislature is concerned with the details and procedure of the law making process. The legislature itself is charged, of course, with the implementation of such requirements. But the sanction for noncompliance by the legislature with provisions of this nature is the threat of invalidation by the courts of legislation that is passed without adhering to the constitutional requirements. To avoid the invalidation of legislation on what may be purely technical grounds, courts in some jurisdictions have treated such requirements as directory only, or have found "substantial compliance" to be adequate.[24] It is the drafter's duty, in respect to such requirements, to ascertain how courts have treated each of them in the particular jurisdiction and to determine the best course to follow accordingly. If the state's courts have taken an inflexible stand in requiring full compliance with technical requirements, the decision may well

be that the invalidation of noncomplying legislation is too high a price to pay. Possibly the impact of the technical requirements ought to be lessened in some manner, either by relying on the legislature's and the governor's participation in the passage of legislation to see to compliance, and expressly removing the matter from determination by the courts, as was done in the Model State Constitution,[25] or by providing that certain kinds of technical objections to legislation, based on procedural defects in its passage, can only be raised within a limited period after its effective date.[26]

Other kinds of provisions addressed to the legislature concern the content of legislation. They may be direct commands to provide by law for one or for a series of public purposes, such as to provide for the public health and welfare, for public education, or for a merit system. In the main, commands of this nature directed to the legislature leave the matter to further action by that body, for in light of the principle of separation of powers, courts will not compel the legislature to carry out the state constitution's mandates to make particular kinds of laws.[27] There are, of course, exceptions to that rule. In the reapportionment area, courts now will compel legislatures to live up to the requirement that it reapportion itself following each decennial census, although the result will usually be reached, not by an order directed to the legislature, but by indirection. When the constitution has imposed the duty to make particular kinds of laws on the legislature, and the legislature has acted on the command, then the courts will, in appropriate cases, determine whether the law passed complies with the constitutional requirement. This has been the case in the education finance litigation. But this is no different from any other instance in which the courts will invalidate laws or other governmental acts which are inconsistent with the state constitution. Prohibitions directed to the legislature, whether express or implied, are enforced by the judiciary in the same fashion—namely by invalidation of laws which violate the prohibition, and by voiding governmental acts undertaken pursuant to the offending law. This requires no further comment in respect to express prohibition, but it may be useful to consider the nature of implied prohibitions, which may be of various kinds. Implied prohibitions may arise from negative implication, that is, from a positive command to accomplish a particular purpose in a certain way, and implicitly, in no other, or from an express grant of powers, implying the denial of others. The doctrine of negative implication is discussed in chapter 5. Chapter 5 asks the drafter to assure that negative implications will follow only where they are intended or where the negative implication will not do violence to the constitutional scheme.

A constitutional command or duty addressed to the legislature must mainly rely, unless other sanctions are "built in," on the responsibility of that body to carry it out. In many instances, that ought to be enough and the matter poses no further problems to the drafter. But if for any one of a variety of

reasons, reliance on the legislature is not considered to give sufficient assurance that a particular constitutional policy will be carried out, the drafter may be called on to provide more stringent remedies. One way to take the matter out of the hands of the legislature is to draft a provision sometimes referred to as a "hammer," such as a self-executing provision[28] or by entrusting the particular provision to some other branch of government unless the legislature acts within the time limit provided, as Texas and Oregon have done when the legislature fails to provide in a timely way for redistricting. [29]

Provisions addressed to the executive. Some constitutional provisions addressed to the executive, such as the direction that "the governor shall, at the beginning of each session . . . give to the legislature information as to the affairs of the state and recommend measures he considers necessary or desirable,"[30] are inherently incapable of enforcement, except by the political processes; so, too, is the provision that the governor is responsible for the faithful execution of the laws. There is an ultimate sanction for the governor's noncompliance with constitutional requirements, namely the sanction of impeachment. But this sanction is so extraordinary and so rarely used that it cannot be viewed as part of the regular machinery of enforcement of the constitution. When the constitution imposes a duty on the chief executive, there is no way in which the courts can compel the governor to act without running afoul of the separation of powers, unless the constitution expressly grants a power to the courts to review gubernatorial action on the subject in question, or allows the courts the power to carry out the duty imposed on the governor if the governor fails to do so. Here, again, due account must be taken of the propriety of delegating executive decisions to the courts. In certain areas, however, reliance on the courts to provide for such enforcement may be acceptable. One such area is reapportionment, where some state constitutions allow court reapportionment orders in default of executive reapportionment.[31]

Constitutional prohibitions directed to the governor are generally enforceable by way of injunction, not addressed to the governor himself, but to the lesser public officers acting under his orders. As noted earlier, a prohibition directed to the governor or the executive department generally is also a limitation on the legislature because it may not legislate inconsistently.

The imposition of particular duties or prohibitions on lesser executive officers—such as, for instance, on heads of executive departments—usually creates less of a sanction problem for the drafter than in the case of the governor, because courts will generally be prepared to review their actions, either under appropriate injunction proceedings, or on review in pursuance to the prerogative writs or the statutory substitute for such writs. There is a question, of course, as to whether the state constitution ought to be so detailed as to provide for the powers and duties of lesser executive officers, but previous mention has

been made of circumstances when a "self-executing" provision may be called for, and such a self-executing provision would, of necessity, provide for the detailed administrative machinery necessary to carry out its purposes.

Provisions addressed to the judiciary. Several kinds of constitutional provisions may be addressed to the judiciary, some of them directly and some by implication only. There usually are provisions regarding the organization and internal management of the courts, rule making and other procedural powers, and matters of jurisdiction. Frequently provisions affecting the management, rule-making powers, and jurisdiction, of the courts are stated as delegations of powers, rather than as constitutional duties. In either event, no particular sanctions problems are posed for the drafter, because—unless a question of conflict with higher law is involved—the judiciary itself is the only branch that can render such constitutional provisions effective. In unusual cases, of course, the provisions on impeachment or removal of judges may be brought into play.

An important category of constitutional provisions addressed to the courts in effect, if not in form, are self-executing provisions previously mentioned in other contexts. A special category of self-executing provisions are the provisions of bills of rights, which are directed to the government as a whole. The rights guaranteed, however, are left to be protected by the judiciary without the need for prior implementation by the legislature (although such implementation is permissible and is frequently encountered in the civil rights area).

Regarding other self-executing clauses providing for regulatory schemes, such as in the regulation of the public school system, the civil service system, or of banking corporations, all of which are frequently encountered in state constitutions, the enforcement of the provisions is left to the courts just as in the context of ordinary statutory regulation of a field. If an administrative agency or other specific arm of government has been entrusted with carrying out the provision, then the court will review its operations in accordance with the common legal procedures in the state applicable to such review, whether pursuant to an administrative procedure act or on the basis of a writ of mandamus or other prerogative writ, or their statutory equivalent. The drafter's task under these circumstances is to determine whether the existing and applicable enforcement machinery in the state is satisfactory to assure the effectiveness of the particular provision, and if not, to provide special enforcement machinery as part of the provision itself. Where a self-executing provision does not name a particular agency or body to carry it out in the first instance, the duty of enforcement falls immediately to the judiciary; but the problem of determining whether existing procedures of law, apart from the provision itself, will be adequate to enable the courts to carry it out, or whether special sanctions must be written into the constitution, remains essentially the same.

Consideration of Means to Achieve Flexibility: Generality of Expression

The main thrust of a constitutional provision is to give directions for the future. In view of the fact that constitutional provisions are more difficult to change, they can generally be taken to speak for a longer—and therefore less foreseeable—future even than ordinary legislation. The problem posed for the constitution drafter, then, is to cast drafts with maximum adaptability to the future and its developments. The drafter must help the policy maker speak in terms that will as far as practicable permit accommodation of the policies to changed circumstances. The relationship of generality to flexibility is clear. Flexibility is achieved by generality of language and such generality is a drafter's essential tool for achieving enduring flexibility.

The federal constitution's generality in areas where developments were not foreseeable has allowed that constitution to survive the enormous changes the nation has seen since it was first adopted. "Great concepts like 'Commerce . . . among the several States,' 'due process of law,' 'liberty,' 'property' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged."[32]

The mechanics of adaptability of general words to change have been described as follows:

> Words in legal documents . . . are simply delegations to others of authority to give them meaning by applying them to particular things or occasions. The only meaning of the word meaning, as I am using it, is an application to the particular. And the more imprecise the words are, the greater is the delegation, simply because then they can be applied or not to more particulars. This is the only important feature of words in legal draftsmanship or interpretation.[33]

This theory of interpretation furnishes a rather accurate indication of the effect of general language in state constitutions and of the manner in which courts deal with it—and probably ought to deal with it. The frequent provision that private property may not be taken except for a public purpose and for just compensation might, if it were a provision of criminal law, be held void for vagueness—for what is a taking, what is a public purpose, and what is just compensation? Clearly an individual would have considerable difficulty in ascertaining what conduct is forbidden by such a direction. And yet, when used in a noncriminal provision in a constitution, the terms are wholly appropriate,

because their effect is to delegate to the legislature or to the courts the task of developing their meaning. By contrast, experience shows that to try to give these words a constitutionally defined meaning, or to try to create a procedure for the ascertainment of "just compensation" in the constitution will often lead to early obsolescence and inflexibility.[34] Another familiar example of the scope of generality acceptable in a constitution is provided by the provisions requiring districts for legislative apportionment to be "compact and contiguous" and "as nearly equal in population as may be."[35] The initial assignment of meaning to these words has usually been the work of the legislature and, as a result of the one-person-one-vote developments, the question whether the words of the constitution authorized the meaning the legislature gave them has become a justiciable one. In a similar fashion, "equal protection" was once held to authorize the legislature to provide for "separate but equal" public facilities, while that is now clearly recognized as an unacceptable standard. The foregoing examples also demonstrate the extent to which generality of constitutional language fosters flexibility of legislative and judicial development of the law in response to changing times.

While generality, and its resulting adaptability and flexibility, are usually desirable, it is recognized that there are instances when the policy maker may not wish to grant the legislature, or another branch of government, the authority to develop the meaning of constitutional terms. This may be the case where the framer of a constitution fears that the delegated authority would not be carried out, leading to nullification of the constitutional command, or would be abused. In most instances the risk of abuse is not great.

The provision that all employment and advancement in the civil service of the state shall be based on merit and fitness is one of admirable generality and flexibility, but unless the legislature enacts a merit system law, establishes a civil service commission, allows job classification, and creates a system of competitive examinations for some of the classifications, the constitutional language may be ineffectual. No court will order the legislature to pass such a law, and without such a law, the court would find it difficult to give content and force to the words. If the legislature seems unlikely to act or to carry out properly the constitutional command, the constitution maker may decide to forego the advantages of generality and flexibility and to have a "self-executing" civil service provision in the constitution—that is, to incorporate some or all of the civil service law in the constitution itself. The effect of such specific constitutional "statute making" is to reduce or eliminate the legislature's power to develop the content of the constitutional language in the first instance, and to modify that content from time to time to meet changed circumstances, though it provides a temporary advantage of relative certainty of meaning and tends to shift the remaining, narrower job of interpretation more directly to the courts. Whether or not such specificity is called for, whether or not in

response to particular needs a statute ought to be written into the constitution is a matter of judgment to which the previously discussed "criteria of inclusion or exclusion" apply.[36]

The matter of specificity and the detailed "working out" of a statutory scheme in the constitution thus has further important ramifications. The more specific and detailed a constitutional provision, the greater the likelihood that the burden of the further development of its content will, in the first instance, fall on the courts. The more general, the greater the likelihood that its development will have to be undertaken by the legislature. The implications of this in the consideration of constitutional sanctions and, perhaps, even in the area of justiciability, may be considerable.

The drafter's task in any event is to reflect the intended generality, and the intended specificity, in the appropriate parts of the document. For the most part, it seems fair to say that courts have not gone out of their way to frustrate the framers' intentions, but have rather responded to the clues contained in the constitution itself. Broad language, that is general and prospective in operation, and clearly capable of an expanded meaning to deal with later developments has normally been broadly construed, in the spirit of Marshall's dictum that "It is a *constitution* we are expounding."[37] On the other hand, narrow, technical, and restrictive constructions have usually been the fate of narrowly, restrictively, and inflexibly drawn provisions—that is, of statutes or municipal ordinances embodied in the constitution. There have been exceptions, of course, and the drafter needs to be aware of the areas where these have occurred and to weigh the possibility of recurrence. But as a rule the drafter need not play a cat-and-mouse game with the courts; most of the time he or she will not have to employ a bag of tricks to force an unwilling court into carrying out the framers' bidding. The drafter must merely do his or her job in such a way as to afford the courts a fair opportunity to do theirs.

In terms of the drafting approach, this means that if a constitutional provision is drafted with the specificity of a statute, there will be a tendency to treat it like a statute—except, of course, that it is still part of the constitution.[38] As part of the constitution it would probably have the effect of nullifying inconsistent acts of the legislature or other agencies of the government as a whole, though courts may strain to avoid decisions on constitutionality and the drastic results they may entail. If such a statute incorporated in the constitution is held mandatory and prescribes a particular mode of attaining an objective, the legislature would probably not be free to provide for a different mode to attain it, no matter how much better designed to achieve the desired result such a new method might be.

Specificity tends to encourage and to multiply negative implications that increase inflexibility. The possibility that such implications will be raised needs to be carefully canvassed in advance by the drafter so that unintended ones may be

avoided. Certain patterns that readily give rise to negative implications may be noted. Such patterns include lists of any kind, and detailed procedural matter, that is, provisions indicating exactly how the constitutional objective is to be attained.[39] What is true of definitions is no less true of exceptions. A listing of exceptions from a definition or from the operation of a provision is likely to be interpreted—unless a contrary intent is made clear—to prohibit the creation of other exceptions by the legislature. This can be particularly serious in the field of taxation.

As to "procedural" provisions, there is a good possibility, too, that a court might treat them as establishing the sole method by which the particular constitutional policy may be carried out. A court might treat them as merely directory, of course, or might treat a different procedure as being in "substantial compliance," but the use of these judicial devices to avoid the impact of a constitutional provision differs from state to state and even within a state from time to time, and should not be relied on to "bail out" the drafter from the unintended consequences of unnecessarily specific provisions. The drafter may avoid this particular difficulty by labeling such procedural provisions as directory. Other means are available to avoid difficulties in respect to "procedural" detail in intentionally "self-executing" provisions. While a self-executing provision will avoid legislative flouting of the constitutional policy by inaction, it may result in inflexibility in consequence of the specificity of the procedure provided. A way out of the dilemma may be to allow the legislature to implement the policy by enacting other procedures to achieve the same end, not as a substitute for the constitutionally prescribed procedure, but in addition thereto.

To deal with negative implications, one may sometimes resort to express disclaimers in the clause affected. A general disclaimer provision may be found useful, for example, to deal with constitutional content that could be regarded as an exclusive enumeration of powers, but the reach of such a provision against negative implication ought to be carefully spelled out. A disclaimer of negative implications ought to be limited to enumerations of powers only. It ought not to interfere with the task of judicial interpretation in other areas of the state constitution where sometimes a negative implication may well have been intended.[40] Thoughtful drafters will generally avoid the inclusion of general rules of construction in constitutions—rules such as the familiar one that all provisions of the constitution are to be treated as mandatory unless expressly indicated to be directory only—because such rules may interfere with judicial efforts to discover the real intent of a provision, emphasizing an undifferentiated mechanical rule for the reasoned balancing of the factors required for sound interpretation of constitutions and statutes alike. The rule that specification of powers leaves the state's plenary powers intact is considerably more defensible, however, because it is a rule in favor of the free and responsible exercise of the government's power, rather than a restriction on it, as the rule in favor of the "mandatory" presumption frequently turns out to be.

The devices available to the drafter will be useful to express intended generality and to avoid specificity where it is unintended. But it needs to be stressed that form and content cannot be separated any more in this context than in any other. The drafter cannot by the use of drafting skills change the basic character of a constitution. If the content of the document as a whole fails to reflect the aim of generality, the drafter's skill cannot provide it.

Writing the Provision: Formal Aspects of Constitution Drafting

Although the major effort in the process of drafting either a statute or a constitution inevitably centers on the substantive phases just considered, the special problems and considerations involved in writing constitutional provisions, in putting desired policies into verbal form, must not be neglected. There is, after all, no way a desirable constitutional policy can be realized until it has been written down in the form of a proposal. If this "formal" phase of drafting is slighted, all care expended on the preceding phases of the drafting process may be wasted.

Experienced drafters know that substantive problems often emerge in the drafting stage. What at first glance may appear to be a "drafting problem," that is, a difficulty in the expression of a policy or thought is often disclosed to be a substantive problem, or indeed a failure or an unwillingness to make a firm policy determination. Sometimes it may even be an effort to rest on an intentional ambiguity of expression, allowing a consensus of support for an ambiguous provision, hiding the intention of postponing decisions and allowing some other agency, such as a court or a administrative agency, to determine what the ambiguous direction meant. Such an intentional ambiguity reflects an unfortunate decision on the part of the policy maker to gain the apparent advantage of the short-term consensus at a cost of difficulties of resolution at a later time. The reason why it is difficult to express certain policies may simply be that the policy had not been clearly thought through on the substantive level. If it is, however, an effort to achieve consensus for short-term political advantage, the effort should be resisted, and unambiguous policy directives should be sought. This is clearly a difficult situation for the drafter, a situation that may be resolved by showing that the political ploy is not likely to succeed. This example shows again that formal and substantive aspects of drafting are never wholly distinct.

The formal aspect of constitution drafting is concerned to a large extent with the business of using language, a difficult and not entirely exact tool, to express the agreed-on policies. Form books or legislative style manuals contain the accumulated experience of drafters, insights gained from repeated dealing with recurring problems of expression. Drafters agree on many of the so-called

formal drafting rules, but they by no means agree on all of them. Drafting rules do not represent unchanging laws of nature—they rather represent a set of often helpful conventions, to be used and adapted as appropriate, but not to be viewed as absolutely binding.

In view of the availability of several excellent legislative style manuals,[41] no purpose would be served here by a repetition of their content except in barest outline, so as to afford an opportunity to discuss the relatively few instances in which the conventions of constitution drafting appear to differ from those of legislative drafting generally.

Arrangement and Numbering

The arrangement of constitutional content generally follows what has by now become a fairly common and stable pattern. Although there is nothing sacred about this order, it does seem to reflect a certain logic, and unless there is good reason for changing it, the drafter is probably well advised to follow the common pattern. The general pattern of articles is as follows:

I. Preamble
II. Bill of Rights
III. Powers of the State
IV. Suffrage and Elections
V. The Legislature
VI. The Executive
VII. The Judiciary
VIII. Finance
IX. Local Government
X. Public Education
XI. Civil Service
XII. Intergovernmental Relations
XIII. Constitutional Revision and Amendment
XIV. Schedule

If an article on the initiative and referendum is provided for, it is usually placed immediately before or after the article on the legislature, since it deals with an aspect of the legislative power. Often, legislative apportionment is also a separate article. In any event, the first seven enumerated items on the list commonly follow the precise order indicated. The third heading, Powers of the State, consisting of a reaffirmance of the plenary powers of state government, is sometimes replaced by a provision on the separation of powers, or by some

other theoretical assertion about the nature of state government. In many instances the category could be omitted without loss.

The headings numbered VIII–XII may sometimes appear in a different order, and other non-"core" matter may be interspersed. Often, too, what appears here as a single heading may be split into several. Thus, "finance" may become "taxation," "finance" and "debts" and "local government" may become "counties," "cities," and so forth.

Provisions on amendment and revision usually appear in the last-but-one place, and the schedule consisting of transitional provisions usually appears last.

Within each article of the constitution, and within each section of each article, the usual strictures concerning the logical arrangement of laws generally apply. In a constitution that does not go much beyond the necessary "core" content, arrangement is not a difficult problem, because many of the usual parts of ordinary legislation—such as short title, statement of policy, definitions, penalties, temporary provisions, repeals, savings clauses, effective date and expiration date, or detailed provisions creating administrative agencies and prescribing their duties—will not be encountered.

Certain usual patterns of arrangement within each of the "core" provisions may be mentioned very briefly. In the bill of rights, the enumeration of rights usually follows the national counterpart. In the articles on the three branches of government, the first section usually vests the particular power—legislative, executive, or judicial—in the appropriate organ of government. Subsequent sections then proceed to provide for the manner in which the branch is constituted, then proceed to outline the powers and duties, or the jurisdiction, of the branch, and then continue with miscellaneous items, such as matters of internal procedure and succession.

A recurring problem in the arrangement of constitutional provisions is the placement of matter that cuts across two articles. So, for instance, the governor's part in the law-making process could, with equal logic, be reflected in the article on the legislature, because signing or vetoing of bills is part of the law-making process, or it could become part of the executive article, because it is an executive power. So, too, the governor's duty to submit an annual budget could appear in the executive or in the finance article. The decision must be a matter of judgment, reflecting the main emphasis of the provision and reflecting an expectation that it will be most readily found where it is placed. If the decision is unusually difficult, and in order to avoid confusion, a cross-reference may be inserted in one of the two possible slots.

As to numbering, the most commonly used form is probably satisfactory. Most state constitutions number their articles consecutively in Roman numerals, and their sections consecutively within each article in Arabic numbers, commencing each new article with Section 1. The *Model State Constitution*

follows the common pattern with a slight improvement; although each article is numbered consecutively with a Roman numeral, and although each article starts with a new series of section numbers, the section numbers themselves reflect the article within which the particular section appears. Thus, Section 4.05 is the fifth section in Article IV. A decimal system of numbering, as used in the *Model*, has the advantage of greater flexibility if new matter is added. Further subdivision of sections should rarely be necessary. If it is, the most convenient system is to label subsections with small (lowercase) letters, Section 1.06 (a) and further subdivisions with numerals in parentheses, Section 1.30 (b) (1). Usually, there is little need to go this far, however.

Two kinds of numbering schemes should be avoided, if possible. It is undesirable to number the sections of the constitution consecutively from beginning to end without regard to the breakdown into articles, as is done in the Kentucky constitution. While it may have an attractive simplicity to have only one Section 3 in the entire constitution, if such a form of numbering is adopted, section numbers may well run into three digits and, more important, there will be no room for expansion or amendment unless some troublesome device is adopted, such as labeling a section intervening between 11 and 12 as 11A.

Another undesirable numbering scheme is exemplified by the otherwise well-drawn constitution of New Jersey, which demonstrates the consequences of overelaboration. Each of the articles is numbered with a Roman numeral, then each section is in turn numbered with a Roman numeral, and each section is subdivided into paragraphs, each of which bears an Arabic numeral. Thus a citation to the New Jersey Constitution consists of two Roman and one Arabic set of numbers. Similarly complex citations are necessary in the few states that divide their constitutions into chapters, articles and sections, or other extended series of subdivisions.

As a general matter, the use of Roman numerals for anything but article designations is undesirable. The number of articles in a constitution is usually not large enough to cause any difficulties, but if Roman numerals are used to number amendments in states with hundreds of amendments the difficulties become apparent. An amendment numbered XLIX presents a real challenge to readers who are not hardy Latinists.

To keep the state constitution an up-to-date document, it is probably preferable to integrate amendments into the basic text. Most state constitutions actually do this, but a number follow the federal example in adding them at the end.[42] The more common way has the advantage of always presenting the constitution as an up-to-date document. The method of adding them at the end has the advantage of keeping the original and the amended language side by side, thus affording a better opportunity of reviewing changes. In a frequently amended constitution, however, a number of amendments may refer to

the same section, and tracking down intermediate changes becomes equally troublesome under both systems.

Style and Grammar

In the main, similar basic rules apply to constitutional composition as to legislative. Some of the most important ones bear brief repetition.

Words and phrases must be used consistently—the same word or phrase should carry the same meaning throughout the draft, and one word should not be used to mean different things, nor several words to mean one and the same thing. This is known as the drafter's golden rule. Brevity of expression is a virtue, but not at the cost of understandability; keep drafts as brief as is consistent with comprehension on the part of the reader. As to the order within a sentence, there is some disagreement about whether an exception should precede or follow the general rule; in practice, the ease of expression will dictate the choice in the particular circumstances. In this context, it is urged that the "proviso" form not be used to state exceptions or for any other purpose. If an exception is intended, "except that" or simply "but" is clearer than "provided that." Provisos are undesirable because the words "provided that" may create an ambiguity as to whether a condition or an exception is intended. A proviso usually invites amendments by way of adding new provisos, which gives rise to the question whether an exception to the earlier exception, or another exception to the general provision was intended.

The constitution, just like a statute, speaks in the present tense. It is sometimes necessary to refer to past events, or to the state of the law before the particular provision takes effect, but usually the present tense may still be used. It is permissible, too, to use the past tense to describe past events on which the operative language of the constitutional provision becomes effective. It is recognized, too, that the future tense may in some instances have to be used, but great care ought to be taken not to confuse the imperative "shall" with the future auxiliary "shall."

As to mood, one of the best legislative drafting manuals has this to say:

> The words "shall" and "shall not" normally imply that to accomplish the purpose of the provision someone must act or refrain from acting. Draftsmen often use these words merely to declare a legal result, rather than to prescribe a rule of conduct. In this usage the word "shall" is not only unnecessary, but involves a circumlocution in thought ("false imperative") because the purpose of the provision is achieved in the very act of declaring the legal result. Worse, use of the false imperative (e.g., "Each person shall be required to . . .") may

> create doubt in particular instances whether the result is self-executing, as it is in a declaratory provision, or is effective only when required action is taken.

In declaratory (i.e., self-executing) provisions, therefore, use the indicative rather than the imperative mood.[43]

The preferred usage above indicated as regards the "false imperative" in statutes has not invariably been the preferred usage in constitutions. The contrary may well be the case, beginning with the Federal Constitution, which says that "All legislative Powers herein granted *shall be* vested in a Congress . . ." rather than "are vested." The pattern set by the Federal Constitution is followed in many state constitutions, including the recent ones in New Jersey, Hawaii, with Alaska following the legislatively preferred form and Michigan using both.

In respect to the use of the active or passive voice, legislative drafting manuals generally argue that the active voice should be used when it is important to identify clearly who is to be the actor designated to carry out a constitutional mandate, with Dickerson adding that "The passive voice is acceptable where the actor is unidentified or where it is clear who he is but it would be cumbersome to name him expressly."[44] In the drafting of state constitutions the passive voice may often be preferred because it may be desirable to leave the actor unidentified. The Federal Constitution follows the practice in many particulars—that is, the writ of habeas corpus "shall not be suspended," no tax or duty "shall be laid," receipts and expenditures of all public money "shall be published" from time to time. All well-drawn state constitutions are replete with examples of the use of passive voice. One reason for what amounts, almost, to a preference for the passive voice in constitution drafting is that avoiding the naming of the person, public office, or agency to whom the provision is addressed leads to greater generality in statement—the provision will not need amendment merely because an office has been renamed or a government function has been transferred from one agency to another. For example, when justices of the peace declined in importance in many states, they were harder to dislodge when they had duties specified in the constitution.

The use of the third person, and the use of the singular as far as possible, rather than the plural, is appropriate both in legislative and constitution drafting. As for punctuation, constitutions, like statutes, should follow an acceptable and consistent form, but the meaning of any provision should not depend on punctuation alone; if punctuation is capable of changing the meaning of a provision, it requires redrafting. A number of recent revisions to state constitutions have included conversion to gender neutral language. Use of the singular here, however, causes difficulties because the singular often leads to gender-specific language.

Miscellaneous Formal Problems in Constitution Drafting

What follows is a small miscellany of recurring formal problems in state constitution drafting. Because it is a miscellany, no claim is made either of exhaustiveness or of logic in sequence.

Use of language previously construed. Both in legislative and constitution drafting the drafter must be aware of the special meaning attached to legal or constitutional language by prior interpretation. Because constitutional language is frequently older and has been interpreted more often, it is likely to carry a considerable freight of past meanings. All this will, of course, have been disclosed by earlier substantive research of the specific problem, but it raises problems of formal drafting as well, which need to be considered. The guiding rule for the drafter ought to be that as far as possible the traditional, frequently construed terminology ought to be used in new constitutional provisions unless a change of law or a different meaning is intended. This holds particularly true of amendments to existing constitutions, where the use of a new word or phrase, intended to carry the same meaning as a different word or phrase in another, unamended part of the constitution, may cause confusion and uncertainty of interpretation. It holds true, too, for new constitutions, for no new constitution for an established state is entirely new, and the portions which echo an earlier document, and which are intended to leave the constitutional law in that area unchanged, ought to follow the form of the old constitution in the significant particulars. What has been said is, in effect, an extension of the drafter's "golden rule" of consistency—one word, one meaning; one meaning, one word. The rule should not be misused, however, to preserve archaic language in the constitution forever. If, in the course of revision or formal simplification, archaic words with settled meanings are replaced by more modern usages, however, the record ought to establish that no change in meaning was intended. It might be added that the rule against unnecessary linguistic changes is probably most strongly applicable in relation to the bill of rights, where archaic usages have frequently achieved not only a settled meaning but also considerable popular veneration; hence, any change in that area is likely to be regarded with suspicion, and ought to be undertaken only if a real gain can be achieved.

Of quorums, majorities, and special majorities. A recurring drafting problem of a purely formal kind which seems to have disturbed style and form committees of constitutional conventions is the question of how to express the number of members of the legislature necessary to constitute a quorum, to constitute a majority or special majority for certain purposes. The problem is one of avoiding such ambiguity as to whether "a two-thirds majority" means (1) two-thirds

of a quorum, (2) two-thirds of the members present, or (3) two-thirds of the number of seats in the house.

The rule enunciated by Cooley is still followed:

> A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended.
>
> * * * *
>
> By most of the constitutions either all the laws, or laws on some particular subjects are required to be adopted by a majority vote, or some other proportion of "all the members elected," or of "the whole representation." These and similar phrases require all the members to be taken into account whether present or not.[45]

Following the interpretation of the Federal Constitution, the requirement of a "two-thirds vote of that house" has commonly been interpreted to mean at least two-thirds of a quorum of that chamber.[46]

A reference to the "members," "membership," or "members elected" usually refers to the entire constitutional membership of a house.[47] Thus, "a majority of all the members," "a majority of the membership," or "a majority of the members elected" all mean a constitutional majority, although Texas and Louisiana seem to require the reference to members *elected* to achieve that result.[48] Clarity of intent is not difficult when these potential problems are foreseen by drafters and policy makers. Specific reference to "one more than half of the constitutional membership" of the particular house, or "one more than half a quorum," should eliminate ambiguity.

Whether or not the decrease in the number of representatives by death, resignation, or disqualification affects the number of votes necessary for an absolute majority or two-thirds vote of the "members or members elected" has divided the courts, with some holding that the number is always based on the number of seats in the legislature,[49] while others would base the requirement on the number of elected members *remaining* at the time of the vote.[50] If the matter is considered of sufficient importance, the intention in this regard may either be spelled out, or else the matter may be expressly left to be dealt with by the rules of the legislature. Reference to "members present," on the other hand, seems to mean just that, and the seeming absence of decided cases may indicate that the phrase poses no problem.

Revision

The idea that the drafting of a constitutional provision is a continuous process, rather than a process of chronologically or logically distinct steps, is no less true of revision than of its other phases. In the course of the development of the draft, it undergoes many changes. Some of them, which may take place early in the process when policies first take shape, may be changes in concept, mental revisions of earlier approaches even before the first draft has been written down. As the drafter's task progresses, however, the revision of earlier written drafts becomes a regular part of the work. Commonly, the draft to be first presented to the policy maker for consideration will be labeled "first draft" or even "preliminary draft." In fact, it may be the drafter's fifth or even tenth draft of the proposal. Thus, the label "first draft" simply means that this is the first draft considered adequate for consideration outside the drafter's office.

It should be noted that a first draft is not an incomplete or imperfect draft—it is a draft that is as nearly perfect and as complete as the drafter can make it on the basis of research or investigation, and on the basis of policy advice received, up to that point. If the proposal consists of a single, simple amendment, the policy maker may accept the first draft, and this may conclude the matter. But this is unusual. Normally, the first draft is put forth to draw fire—to be analyzed, criticized, and commented on, both by the policy maker and by others to whom the draft may be distributed for comment at the policy maker's instruction.

Why is it unusual for the first draft distributed to meet with the full approval of the policy maker or advisers? Complex policies may look entirely different when they are considered in purely abstract, inchoate form from when they are later encountered in concrete constitutional or statutory language. The very articulation of the policies may disclose unintended implications, or unsuspected interrelations with other laws, that the policy sponsor may not have previously considered. Inevitably, too, the drafter will have made certain minor, interstitial decisions to fill gaps in policy instructions that, in all likelihood, emerged quite late in the drafting process. Again, the drafter, having informed the policy maker as to the nature of these interstitial decisions, may discover him to have a different view of the matter. Other criticisms may go to the substantive solution. The drafter is not usually a specialist in the practical workings of the area for which he drafts, and it is quite possible that a proposed solution may, in some detail, fail to take account of some aspect of the field which may be readily apparent to the policy maker or to advisers who are specialists. And, finally, there is always the possibility, particularly in a lengthy and complex draft, that the policy maker failed to convey his intentions accurately or that the drafter failed to comprehend them entirely. Revision of drafts may thus reflect a continuing progress in the development and refinement of the policies to be expressed. The preparation of

drafter's notes or commentary, while not a substitute for the analysis and understanding of the actual words used, can help in understanding the constitutional language and the purposes for which it was used. Just as in the case of understanding the meaning of legislative drafts, one may gain substantial assistance in the purpose analysis of constitutional drafts by a full awareness of why it was necessary to amend the constitution or a particular part of it.

The drafter's task is not completed, however, when the draft is wholly satisfactory to the policy maker. A final task of revision remains. It must be checked for internal consistency and accuracy. In Dickerson's terms, having worked on the draft "horizontally," and having developed its contents in a rational progression from beginning to end, the drafter must now check it "vertically."[51] These checks, sometimes referred to as "across-the-board checks," involve checking all cross references, checking definitions, if any, against each instance in which the defined word has been used to assure proper use, and checking recurring words and phrases to see that they have been used consistently throughout the document. To give some examples, a newly revised constitution would be cross-checked for each and every mention of any of the three branches of government; for each and every instance in which units of local government have been referred to making sure that differences in the designation of such units in different parts of the document are intentional, and for each and every mention of fiscal and budgetary matters, to see that different parts of the document are coherent. In the case of an amendment, a similar cross-check is necessary, not only for the draft but for the entire constitution it amends, so as to assure that it has been fully "tailored" to the document as a whole. Special attention ought to be paid to the portions of the document that have undergone the most change in the course of the draft, for it is precisely in those parts of the draft that the drafter has become overly familiar with that errors are likely to pass unobserved. It is a good practice, for the same reason, to put the draft aside for a short while and to try and look at it afresh. This gives the drafter a chance to see what the draft really says, rather than to read again what he or she knows she wrote. Independent review of the draft by others who had less close connection with the task than the drafter serves a similar purpose, and ought to be considered essential. The advent of the computer age obviously makes some of these checks easier.

The importance of the final revision process is not only recognized by drafters. It has been recognized, too, by state constitutional conventions, which have commonly allowed a short period of one to two weeks between the completion of the convention committees' work and the adoption of the final proposal. Such a "drafting recess" is intended to be utilized for the integration and revision of the various committee drafts, so as to weld the convention's product into a unified, coherent, and consistent state constitution.

Chapter 4

Some Implications of State Constitutional Amendment for the Drafter*

Introduction

The length and detail of state constitutions have been repeatedly recognized and discussed as causes of frequent amendment, or "constitutional instability." Considerably less attention has been paid (1) to the impact of the form and content of constitutional amendments as independent causes of further instability, and (2) to the impact of the different constitutional provisions regulating the amendment process on the frequency of amendment. Both of these factors have significant implications for the constitution drafter for the drafting of amendments generally and for the preparation of constitutional provisions on amendment. Current data on each of the states' constitutions, including dates of revision, length, number of amendments, and so on is available in the *Book of the States,* a biennial publication of the Council of State Governments.[1]

Constitutional instability is undesirable, on the one extreme, and constitutional rigidity, or an inability to amend the constitution at all, is also undesirable. Therefore, factors that impel the constitution in either direction ought to be analyzed and understood so that the drafter may take them into account.

Clearly, an important factor in relation to constitutional instability and rigidity will be the length, detail, generality, or inflexibility of the basic document; but while a lengthy, overly specific constitution is a most important cause of constitutional inflexibility, it is the one factor the drafter of constitutional

*Marilyn A. Schiff, Columbia Law '64, contributed greatly to the preparation of the original version of this chapter.

amendments can do the least about—unless he or she is helping to revise the entire document. Consequently, although the nature of the basic document is a factor that cannot be ignored, other factors have been emphasized.[2]

The factors contributing to constitutional instability that will be considered here are: (1) the substantive narrowness of amendments; (2) the subject matter of amendment-breeding amendments; (3) the impact of the uncertainty of court-made state constitutional law on amendment practices. We shall then consider the extent to which the drafter can reduce the amendment-breeding propensity of constitutional amendments by the application of sound substantive and formal drafting skills. We shall further address the extent to which constitutional provisions that limit constitutional amendment are effective—or can be effective—in reducing instability.

Amendment-Connected Causes of Constitutional Instability

The Substantive Narrowness of Amendments

Current state constitutions, for purposes of general discussion, may be divided into two groups: those drafted before the Civil War, and those drafted afterward. The basic difference between the two groups is the extent to which the legislative power is limited. The early documents contain virtually no limitations on the legislature except for the traditional bills of rights, while the later ones, seeking to curb the abuses of the legislatures of the Reconstruction era, outline in detail the powers these bodies may exercise.[3] Thus, almost all of the early documents, because of their relative lack of limitations, are shorter.

Since the last half of the twentieth century witnessed an expansion of governmental functions, we find, as would be expected, that the states with short constitutions that do not limit the legislature have been able to assume these functions without changing their fundamental law. But the states with the long, overly detailed, and therefore inflexible, constitutions have required numerous changes in their fundamental law to adapt to modern conditions.[4]

While the basic pattern holds true, that the constitutions drafted after the Civil War have been more frequently amended than the earlier ones, there are variations within each group that are not explainable by the ease or rigidity of the amendment process. Thus, we must consider factors other than the constitution as originally drafted to explain the disparity in the patterns of amendment.

The type of amendment added to a constitution plays an important role in determining the subsequent pattern of amendment. Regardless of the amount of detail in the original document, if the amendments added to it are

detailed, they will themselves stimulate further changes. The Massachusetts constitution provides an excellent example of this process. One example is the amendment providing that notaries public be appointed by the governor.[5] A subsequent amendment provides that women may hold the office of notary public but that a change of name renders the commission void, although it does not prevent reappointment under the new name.[6] A still later amendment repeals the latter part of the last cited amendment and provides that on change of name a woman must reregister under her new name.[7] It is not clear why the first amendment should ever have been included in the constitution (see chapter 2), but once it was included, the rest of the chain was inevitably bound to follow.

Other states with originally succinct constitutions have, in the main, avoided the pitfall of detailed, substantively narrow amendments, and the problem has been much more severe where the original document was prolix. For example, some state constitutions contain provisions such as "The following property, and no other, shall be exempt from taxation . . ." followed by a list of many specific exemptions. Thus, in order to create a new exemption an amendment must be adopted and such provisions are often amended regularly to add additional specific exemptions. The alternative to this course of action would be an amendment that either vested in the legislature the power to provide for exemptions, or enumerated the broad categories of property that would be exempt.

With the disadvantages, in terms of flexibility and obsolescence, of lengthy, overly specific constitutions, so readily apparent, it would seem reasonable to expect that the amending process might have been used to cure these defects in the original constitution, and yet, more often, it has served to compound them. The most practical way of coping with the excessive detail would have been either to repeal the provisions that proved unworkable, or to replace them with more general amendments where the policy warranted inclusion. However, this has not been done, and amendments are commonly as detailed as the constitution itself.

The whole question of differential property taxation to encourage certain activities provides a good example.[8] With the passage of time such uniformity in taxation requirements of state constitutions had to be modified.

> The rigid uniformity provisions were originally designed to prevent legislative abuses of the taxing power. . . . The open space amendments carve out certain exceptions to these rules. At the same time, however, the amendments confirm the continuing viability of the concept of uniformity by allowing specific deviations from operation of the rules.[9]

Although patterns of narrow amendments similar to the ones just discussed are very common, there are instances, to be sure, where a more farsighted approach has been taken. For example, the Wisconsin Constitution, Article VIII, Section 10, prohibits the legislature from contracting debts for works of internal improvement. After its adoption in 1848, by the 1960s seventy proposals to amend it had been introduced into the legislature, six of which advocated its repeal, while the remainder sought to enlarge the scope of permissible activity by removing a particular activity from its ban.[10] While repeal would have been the most expedient course of action, the five amendments that were in fact adopted, permitting the construction of highways, airports, veterans housing, port facilities, and the development of forests, were sufficiently broad and generally worded to allow adequate legislative discretion within each permissible category.

While it has generally been thought that detailed amendments are due to continuing distrust of the legislature even today,[11] it seems more likely that other reasons, different from those that produced the overly specific constitutions, are responsible for this phenomenon. Constitutions are traditionally drafted by a convention, whose function is to produce a workable document of fundamental law. The drafters are concerned not only with the specific provisions but with the organization and interrelationship of the entire document. While this has not always prevented overspecificity in many areas of the document, it ought to work a tendency toward generality. Amendment on the other hand is generally a piecemeal process. Most amendments are initiated by groups, either private or public, who seek constitutional change to remedy a specific situation that adversely affects them. Such a group will usually suggest an amendment, which although solving its immediate problem, ignores the broader aspects of the same situation,[12] leaving to further detailed amendment matters that could have been resolved with a single more general one, and leaving unresolved the problem of an overly detailed constitution. This can be seen as a particular problem in states where the constitution can be amended through the initiative.

One may wonder why the legislature does not broaden the proposals that unnecessarily increase the prolixity of the constitution without solving the entire problem created by the provision in question. The answer, it would seem, is related to the fact that the legislature is unlikely to act on its own motion on constitutional amendments, and the group or interest seeking the amendment is unlikely to be willing to jeopardize its passage by enlarging its scope, for it is common experience that a narrow amendment will prove less controversial.

A state constitution that departs from the concept of a frame of government, and that is overly specific, detailed, and excessive in length will affect the legislature's attitude to the amendment process in still another way. Requiring many amendments to maintain minimally effective government, such a con-

stitution regularly shifts the place for policy decisions from the legislature to the polls. Part of the resulting legislative irresponsibility is likely to be reflected in a lessening of concern for the constitution as higher law, and a laissez-faire attitude toward constitutional amendment as, in effect, just another form of legislation. In states whose constitutions allow considerable legislative discretion and require only occasional amendment, on the other hand, the legislature, jealous of retaining its power, is more likely to scrutinize amendment proposals before passage.

Another result of legislative indifference toward amendment is the failure to repeal overly amended provisions. This can be attributed to what we may call legislative inertia. Since repeal of a frequently amended provision often necessitates reenactment of its contents into statutory law, it may be easier to pass a single narrow amendment (although the basic constitutional problem remains unsolved) than to repeal the offending provision. But this not only continues the need for amendment of the provision, it also perpetuates outmoded provisions, so that the addition of new amendments may even result in conflicting constitutional provisions. Considerable uncertainty may result as to what is constitutionally allowed and what is prohibited. Rather than taking a chance on making the wrong decision on the state of the law, subsequent amendments in the particular area may then be prefaced with a phrase such as "Nothing in this constitution shall be construed to prohibit . . ." A blatant example of tortuous wording of an amendment to assure its enforcement without courting the danger of its judicial nullification because of contradictory provisions is former Article XII, Section 22 of the California constitution:

> No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Public Utilities Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Public Utilities Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.[13]

Failure to repeal an unworkable provision not only breeds further amendment in that new exceptions to its detailed prescriptions must continue to be added by amendment, but it also necessitates further constitutional proliferation in another, more subtle way. The more inflexible and detailed a constitution has become by overspecific amendment, the greater the chances that a new piece of legislation will conflict with some constitutional mandate. Rather than risk judicial invalidation of legislation, the legislature—again, in lieu of setting in motion the machinery to repeal the constitutional obstacle—will merely pass the

legislation in the form of a proposal for constitutional amendment, which, once adopted, will require additional amendments when a change in the provision becomes necessary.

In states with a history of frequent constitutional amendment, the problem of reversing this cycle is formidable. The habit of working within the limits of a detailed constitution that requires numerous amendments is ingrained in the legislators, with the result that even in the event of a revision, there may be much opposition to a radical change in the type of document.[14] In explaining the failure of the Georgia constitutional commission of 1944 to recommend sweeping deletions of unnecessary matter from its overly detailed constitution, it was said "[W]e should not overlook the force of custom and habit in attempting to explain the continuation of the past constitutional pattern in the new draft. After all, for many years Georgians have been accustomed to a constitution filled with detail and with a very easy amending process."[15] Similarly, the urge to amend a constitution, although it may stem from the detailed content of the constitution, may become an independent cause of amendment. Professor Owen has said in regard to Louisiana, "The urge to amend, however, appears to be a fixed part of the Louisiana political tradition and to be to some extent unrelated to the nature of the fundamental document,"[16] and pointed out that in each of Louisiana's ten (now eleven) constitutions since 1812, amendment has been more frequent than in the preceding one.[17]

Accepting the habit of amending the constitution, and recognizing its ill effects on constitutional stability, the drafters of certain provisions and amendments have attempted to devise safeguards to assure their inviolability. For example, Article XVIII, Section 284 of the 1901 Alabama Constitution stated: "Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendment,"[18] and Article XIX, Section 5 of the New Mexico Constitution provides that "the provisions of [the section authorizing amendment by legislative proposal] shall not be changed, altered or abrogated in any manner except through a general convention called to revise this Constitution as herein provided." Similarly, in California, after the adoption of twenty-three separate amendments authorizing bond issues, an amendment was adopted in 1962, Article XVI, Section 2, which, after repealing several of the prior amendments and providing for broad issues on the basis of a popular referendum, then continued: "No amendment to this constitution which provides for the . . . sale of bonds in the State of California shall hereafter be submitted to the electors, nor shall any such amendment hereafter submitted to or approved by the electors become effective for any purpose." While the simplifying effect of the California amendment as a whole is, of course, recognized, the efficacy of these safeguards against amendment is doubtful, for there is nothing to prevent their repeal or the passage of an amendment specifically overriding the prohibition. However, the mere

existence of the prohibitory provision might engender sufficient controversy to defeat any proposed amendment.

Some Examples of the Subject Matter of Amendment-Breeding Amendments

The failure of the legislature to screen with care proposals for constitutional amendment has also permitted the adoption of unnecessary amendments that might have been passed as statute law. One such category of amendments is that sponsored by interest groups who, taking advantage of the legislative passivity toward amendment, seek to secure constitutional status, and thus relative permanence, for provisions that inure to their benefit. Included in this category are constitutional provisions granting state aid to enumerated colleges and universities, civil service preferences and tax exemptions to veterans, and those granting tax exemptions to certain other groups. The addition of such preferential provisions creates permanence not only for the duration of the existing constitution, but also for a future constitution. Once a group has achieved constitutional protection for its interests, it will resist any attempt either by way of amendment or constitutional revision to remove this protection.[19] This political factor accounts to some extent for the continued existence of outmoded offices that survive because they were once given constitutional status.[20]

The desire to keep certain fields out of the political arena has been responsible for many provisions and amendments containing matter clearly otherwise inappropriate for inclusion in the constitution. Designed to foreclose future legislative action, these provisions often contain minute details and therefore, like other constitutional minutiae, may require frequent amendment. One example is the New York provision prohibiting the clearing of state-owned forest lands.[21] This provision is still useful in preventing lumber interests from calling for more ski trails to justify cutting public forests.

There are certain types of provisions that have proved to give rise to amendment more frequently than others. What has been noted in chapter 3 about the effects of generality and specificity of constitutional provisions is applicable here, too. Overly specific provisions— especially those containing lists of powers or prohibitions—can generally be expected to be amended frequently. For example, the South Carolina Constitution, Article III, Section 34, contains a list of eight numbered categories on which special legislation is prohibited—including the adoption or legitimation of children, protection of game, changing names of persons or places, summoning and empaneling juries—followed by a general statement that "In all other cases, where a general law can be made applicable, no special legislation shall be enacted." This section has been amended several times to authorize the establishment of civil

service commissions by statute in certain cities. It might be noted that this is but another instance where the form of amendment in itself determines the future course of amendment—for if civil service commissions are to be created by state statute in other cities, future amendments will be necessary. The adverse consequences of this type of narrow amendment thus compound the difficulties that arise from the specificity of the original provision.

The provisions most frequently amended are those relating to substantive areas not generally considered to be "core" constitutional content. The most frequently amended provisions were usually included in the constitution either to restrict the powers of a distrusted legislature, or on the urging of a strong interest group, and were for the most part, narrowly conceived to serve only immediate—and what proved to be transient—needs. Thus, given the infrequent repeal of provisions that have once found constitutional protection, and the tendency toward narrow amendments, it is these provisions that are continually being brought up to date by constitutional amendment. Provisions concerning debt limitations and various aspects of taxation are among those most prone to amendment. In states with an established pattern of frequent amendment, we find these provisions being constantly amended for specific purposes.

The Impact of Judicial Decisions on Amendment Practices

The courts have often been criticized for narrowly construing constitutional provisions, thereby necessitating amendments in order to effectuate worthwhile policies. However, courts face a difficult problem when called on to construe narrow constitutional provisions that—unlike provisions drafted with a view to generality—leave little room for flexible interpretation. The choice faced by the courts is often between giving effect to the narrowly limiting effect of the constitutional language (thus nullifying inconsistent laws or other acts of government, and giving rise to the need for amendment), or finding a device to blunt the effect of the constitutional language, such as by regarding it as "merely directory."[22] Instances of this dilemma—with choices falling on either side—are numerous in cases involving constitutional regulation of legislative procedure.[23]

The courts' role in the construction of state constitutional provisions and the resulting lessons for drafters, has been discussed elsewhere.[24] It is clear that we are confronted here with but another instance of the courts' construction following the lead of the constitution: when the constitutional language is narrowly specific, the courts are deprived of the opportunity to further the development of the law that general, prospective provisions afford them.

It would seem that narrow judicial construction of overly specific provisions ought to encourage efforts to simplify the constitution, but it has not, in the main, had this effect; rather it has often prompted the legislature to cir-

cumvent the risk of invalidation, by passing and submitting to the people, as constitutional amendments, legislation whose constitutionality is doubtful—thereby further encumbering the document with unnecessary matter.

While much of the criticism of the judiciary is unwarranted, it is true that during the first three decades of last century judicial conservatism in the face of new social legislation was responsible for the adoption of many amendments. For example, workers' compensation provisions in some constitutions were included to override invalidation of similar legislation by the courts,[25] and several constitutional home-rule provisions had a similar origin.[26] Decisions of this sort, invalidating needed legislation, were not limited to states with overly detailed constitutions (where such an attitude is understandable). Professor Dodd, in condemning what was then the attitude of the judiciary said, "The narrow and illiberal attitude of the courts in interpreting constitutional provisions has done something, and if continued will probably do more, toward turning our constitutions 'from fundamental frames of government into statutory codes.'"[27]

While the attitude of the courts has undergone change,[28] the constitutional amendments adopted in response to narrow judicial rulings continue to be part of many state constitutions, and continue to breed further amendments by reason of their inflexibility and obsolescence.

The Drafters' Role in the Preparation of Constitutional Amendments

The consideration of amendment practices has demonstrated that the cycle of narrow, overspecific constitutional provisions breeding narrow, overspecific amendments, which in turn beget the need for further amendment, is not easily broken. Nevertheless, the drafter may have an opportunity to use his or her skills to that end. It must be remembered in preparing constitutional amendments that they are *constitutional* amendments, and not mere amendments of statute law, for many of the positive virtues of drafting in the context of statutory amendments may become faults in the constitutional context.

It may be necessary, once again, to return to the basic theory of state constitutional law, namely that state government has plenary powers, and that, in consequence, any provision included in the constitution will operate as a limitation on its powers. Thus, when adding any new provision to the constitution, the framer of the amendment, with the advice of the drafter, must apply sound criteria of inclusion and exclusion to the proposal, to determine whether the limitations on state power—in terms of the likelihood of inflexibility and obsolescence of the provision—are warranted by the importance of the proposal and by the likelihood of the enduring worth of its policy.[29] But this, it would

seem, is not quite enough in the context of constitutional amendments, for although the criteria of inclusion and exclusion considered elsewhere may serve to prevent the addition of new matter to existing constitutions, they need to be applied in a particular way in order that *needed* constitutional amendment may also serve the aim of constitutional simplification. A sound approach to the matter involves the application of the "criteria" not only to the proposed amendment, but to an examination of the provision already in the constitution that is proposed to be amended. In view of the fact that the provision has already shown weaknesses by its need for amendment, a full re-evaluation of its soundness may well lead to the conclusion that the whole subject has become—or always has been—inappropriate for inclusion. Putting the matter in a different way, the presumption in relation to amendments ought to be not only against the inclusion of new matter, but there ought to be, if not a presumption, at least a preference in favor of repeal, rather than amendment, of the provision sought to be amended.

As indicated, amendments tend to cluster about certain overly restrictive provisions in particular substantive areas. The pressure for repeated amendment of such provisions by way of special modifications and exceptions is evidence of the fact that the provision, because of its inflexibility or obsolescence, does not meet current needs. While additional amendment may temporarily solve an immediate problem, it will not resolve the underlying difficulty of the restrictive effect of the provision. On the contrary, it may aggravate the problem because a newly added exception, for instance, may create a negative implication that further restricts the scope and flexibility of the amended provision, setting the stage for the next round of amendment.

Short of repeal, the preference ought to be for an amendment that will state the proposition in general, rather than specific and restrictive terms, so as to reinvest the legislature with the power to give meaning to, and to develop constitutional language in accordance with contemporary needs.[30]

It must be noted that the devices suggested to encourage constitutional simplification in the course of needed amendment would be inappropriate or unusual when applied to statutory amendment. An exception to a provision of statute law must be specifically and perhaps even narrowly spelled out, and the problem can not usually be resolved by repealing the entire law, for it is the law that grants the authority to deal with the problem. It is different in the constitutional context, because the constitution does not grant powers, and the repeal of a constitutional provision leaves no gap in the legislature's power to deal with the particular issue, but on the contrary, will give the legislature greater freedom than it had before.

The frequency of state constitutional amendment, and the fact that many amendments are prepared by lawyers for special interest groups or by legislative staff services whose main function is the drafting of ordinary legislation, has a

normal tendency to reflect in such amendments the more narrow and specific drafting techniques that are more appropriate to statutes. The tendency is strengthened by legislative form manuals that treat constitutional amendment as just another form of legislation. There is a clear need for draftsmen to be aware of the far greater implications and consequences of constitutional amendment, and to adopt the drafting process accordingly.

The Effect of Constitutional Restrictions on Legislatively Proposed Amendments

The constitutional amendment procedure ought to be sufficiently difficult to protect the document against frivolous amendments and sufficiently liberal to permit necessary ones. Putting the matter in this fashion is perhaps just another way of stating that the advantages of including rigorous restrictions of the amendment process must be weighed against the disadvantages of inflexibility and obsolescence of the document as a whole; for when we consider the amendment process, we are concerned not only with the generality and inflexibility of the provision itself, but with its effect on the development of the entire document.

Restrictions of the amendment process are in some measure intended to be protections against constitutional instability. They are, in effect, devices to protect the people of the state against themselves. Their effectiveness in protecting against constitutional instability must be considered in coming to a decision on the nature of the provisions on amendment that ought to be included in a state constitution.

The amending process can be divided into two parts: proposal of amendments by the legislature and their adoption by the people.[31] The amendment provisions found in state constitutions differ in four material ways: (1) the size of the legislative vote necessary for proposal; (2) the number of times an amendment must be approved by the legislature before it may be submitted for adoption; (3) limitations on the number and frequency of proposed amendments; (4) the size of the vote necessary for adoption. In addition, a number of states have placed restrictions on the contents or form of amendments, most significantly by a "single subject" limitation.

The Legislative Vote and Number of Passages Necessary to Propose an Amendment

With very few exceptions, amendments may be initiated in either house and must be approved by both houses before they may be submitted to the people. Although it might appear that the requirement of a special majority, present in a number of state constitutions, would curtail amendment, this has not

proved to be the case. Of course, requirement of more than a simple majority will defeat some proposals, but it appears that the number of proposals voted on in all of the states indicates no correlation between the size of the legislative majority required and the number of amendments proposed.[32]

While in most states amendments are proposed by a single legislative passage, in a number of states they must be approved in two consecutive legislative sessions, with most of these states requiring that an election intervene between the two passages. These states vary as to the size of the required legislative majority. The dual passage requirement also does not seem to impede constitutional change, but it does protract it, especially in states with biennial legislative sessions.[33] New Jersey provides that a proposed amendment that receives a three-fifths vote of the members of the legislature goes on the ballot that year; if it receives a majority but less than three-fifths it must be referred to the legislature in the next legislative year, and repassed by a majority before being submitted to the electorate.[34]

When proposed amendments have been passed by two legislatures, and thus presumably given more consideration than in states where but a single passage is required, it might be supposed that the people would more readily acquiesce in the judgment of the legislature and that a higher rate of ratification would prevail. However, this has not proved to be true, and the proportion of proposals ratified is substantially the same in states requiring double passage as in the rest of the country.

It can be said in general that the devices which attempt to restrict amendment at its source in the legislature have not succeeded. The frequency of proposals, in spite of the special majority and dual passage requirements has been attributed to an attitude held by legislators, that constitutional amendment is a responsibility of the people, and that to defeat an amendment in the legislature is to deprive the electorate of the opportunity to carry out this function.

Limitations on Number and Frequency of Amendments

A state constitutional limit on the number of amendments that may be submitted to the electorate at any one time is found in some states. This provision, a purely artificial restraint, does not seem to have stifled amendment. While none of these states has an especially high rate of amendment, the frequency of proposed amendments is not low enough to attribute any substantial limiting effect to these provisions.

A provision limiting the frequency with which amendments may be proposed is found in some states. In Kentucky and Pennsylvania amendments defeated by the electorate may not be resubmitted until five years later, and New Jersey requires a three-year lapse before resubmission of a defeated amend-

ment. Since these limitations apply only to amendments that have been defeated, they clearly do not have any impact on the amendment pattern as a whole, although they do restrict the common practice of resubmission of defeated amendments. An Illinois provision that an amendment to the same provision may not be proposed more often than once every four years seems to fall within this same category. Its effect on the amendment process is not clear, for although the Illinois Constitution has been infrequently amended, it is probably due to the interaction of several restrictions, and not to this one alone.

The Popular Vote Needed for Adoption

Provisions prescribing the size of the vote necessary to adopt a proposed amendment have in some states curtailed constitutional change more than any other part of the amending clause. Most states now provide for adoption by a majority of the votes cast on a proposal; but in some, adoption of a proposed amendment used to require a majority of the votes cast (for any purpose) at the election.[35] Thus, even if a proposition received more affirmative than negative votes it would fail if the number of affirmative votes was fewer than a majority of those cast at the election. In other words, a voter's failure to cast a vote on a proposed amendment had the same effect as a negative vote. Since typically far fewer people vote on amendments than for candidates, this requirement proved in the past to be an obstacle to constitutional change.[36]

Effects of Restrictions

In summarizing the effect of the amendment procedure on the frequency of constitutional change, two points emerge. First, the relationship between ease and frequency of amendment is at best random. None of the states with the most flexible procedures—that is, proposal by a majority of the legislature in one session and adoption by a majority vote on the proposal—are among those with the highest rates of amendment. Second, a specific type of restriction in any state does not materially impede the amendment process. There seems to be no relationship, for example, between the requirement of a special majority or of dual legislative passage and the frequency of amendment. This is evidenced by the fact that the five states with the highest rates of amendment have one of these provisions. On the other hand, the limitations on the number and frequency of proposed amendments and on the resubmission of defeated ones seem to inhibit the natural course of constitutional change to a limited extent. Similarly, even the requirement of adoption by a majority of the votes cast at the election, while still curtailing the amendment process, need no longer stifle it.

Restrictions on Form and Content: The Constitutional Amendment Single Subject Rule

Another kind of restriction of amendments is the limitation on their form and content, namely the "single subject" rule. Some states specifically require that each state constitutional amendment relate to one subject only,[37] and many others require that when two or more amendments are submitted to the electorate at the same time each is to be voted on separately.[38] The latter requirement has sometimes been construed as a single-subject requirement, on the grounds that the rule means that any proposition capable of being voted on separately must be submitted to the voters as a separate amendment. Thus, the question often arises as to what constitutes a single amendment or, in other words, whether a proposed (or already adopted)[39] amendment is in reality one amendment or several amendments. Although the inclusion of the single subject rule (both as to laws and constitutional amendments) has the laudable objective of preventing logrolling,[40] its presence has engendered much needless litigation of a highly technical character. Opponents of an amendment will often challenge its validity on the grounds that its submission violated the single subject rule. If strictly construed, the rule may create formidable obstacles to the amendment process. On a related question, the Hawaii Supreme Court has ruled that its state constitutional amendment provisions do not permit the legislature to submit two similar amendments to the electorate, letting the voters decide which to adopt.[41]

Although the liberal construction of the single subject rule has avoided most of its possibly harsh effects,[42] the provision has to some extent interfered with desirable constitutional change. For example, the increasingly popular practice of seeking constitutional revision through the legislature or by a commission responsible to the legislature, has been said in some instances to be precluded by this provision.[43] Even an amendment proposing the revision of an entire article has been held in some instances to contravene this section; Oklahoma, for instance, found it necessary to amend its constitutional amendment clause to declare that "in the submission of proposals for the amendment of this constitution by articles, which embrace one general subject, each proposed article shall be deemed a single proposal or proposition."[44] The continued existence of the single subject rule in a number of states has, in addition to its intended protection of voters' choice, at least two undesirable consequences. It encourages the adoption of narrowly limited amendments, and it enables the judiciary to exert what may sometimes be viewed as an excessive amount of control over the content of amendments.[45] On balance, the cost of including the single subject rule in the constitution may outweigh its benefits. These benefits, however, include the protection of the voting public from being presented

with more than one substantive change in the highest governing document in their state and being able to cast only a single vote on them.

Although consideration of the merits of the use of the initiative process to amend or revise state constitutions is beyond the scope of this volume, it should be noted that state constitutions provide specific limitations on this process. For example, many states restrict the initiative process to proposed *amendments,* rather than *revisions.*[46] California's famous Proposition 13, a relatively complex, initiated set of changes to California's state constitutional taxation provisions, survived a challenge asserting that it was a revision rather than an amendment, as well as a single-subject attack.[47] Some courts apply the single-subject requirement more rigidly to initiatives than to legislatively proposed state constitutional amendments.[48]

Effective Date

The question of when an amendment takes effect, or when the change accomplished by the amendment shall become operative, can be very important. Failure to address this question, either by a generally applicable, default provision in the constitution itself, or within the specific question on the amendment, can cause unnecessary litigation. For example, when the Wisconsin voters ratified an amendment protecting the right to bear arms, a man was arrested for carrying a concealed weapon three days after election day but before the votes were canvassed and certified. The question had to be resolved by the Wisconsin Supreme Court, which ruled that the amendment did not take effect until the canvass and certification.[49]

Conclusions

Although the original content of a state constitution greatly affects the need for, and the nature of, subsequent amendments, the substantive content of such amendments themselves, as well as their form, frequently compounds the faults of the original document. Just as frequently, constitutional amendments become themselves the cause of inflexibility, obsolescence and constitutional instability. Amendment-breeding amendments, no less than amendment-breeding provisions of the original document, are to blame for the unsatisfactory condition of many state constitutions. The drafter's task in the preparation of constitutional amendments calls for a realization that the preparation of constitutional amendments involves problems different from problems of statutory amendment, and that, in fact, treating constitutional amendments as though they were a species

of statute law will probably contribute to the inflexibility and early obsolescence of the constitution. The drafter's obligation in considering policy choices is to apply the criteria of inclusion and exclusion not to the amendment proposal alone, but to the entire provision that is to be amended, for in the process of amendment, the aim of constitutional simplification ought to be served. This aim, will in many instances be better served by the repeal or revision of an amendment-breeding provision, than by its further amendment. The aim of revision may also be served by recourse to amendments that restate constitutional provisions with greater generality, rather than by recourse to amendments that provide for specific exceptions or specific authorizations to resolve the immediate, and often narrow, problem.

An examination of the restrictions of the amendment process demonstrates that the constitution maker cannot rely on these artificial limitations to preserve a sound measure of constitutional stability. Constitutions that have, in the main, been confined to the "core" constitutional content have not suffered from excessive amendment by reason of an easy amendment procedure. Overly detailed and lengthy constitutions that have suffered obsolescence and inflexibility have not, generally speaking, reduced the volume of amendment by putting obstacles in the path of the amendment process. In the few instances where the amendment process has been so difficult as to block amendment altogether, constitutional stability of a sort has been achieved, but at the cost of threatening the stagnation of state government.

The significance for the constitution maker and drafter is clear. An amendment procedure that places no great difficulties in the path of constitutional amendment involves no risks in the context of a short constitution confined largely to "core" content, and there is no justification for the fear that the old habit of constitutional amendment will soon turn such a document into an overly specific one. An amendment procedure that is not too difficult will, moreover, be of one piece with the rest of a constitution limited in the main to a frame of government, for it will consistently carry through the aim of placing adequate responsibility in the legislature. An easy amendment procedure also is not likely to produce any more amendments in the context of the long and detailed constitutions than are being produced now, even in the presence of seemingly difficult obstacles. Obviously the long and detailed constitution can not afford an amendment provision which will be so difficult as to prevent most, if not all, amendment, for it not only blocks the freedom of government to respond to changing needs, but also prevents the use of the amendment process for constitutional simplification. The absence of any effective and workable safeguards against constitutional instability that can be "built into" the constitution in turn increases the responsibility of the constitution maker and the drafter in the consideration and preparation of constitutional amendments.

Chapter 5

Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions

Introduction

This chapter explores a number of judicial doctrines that courts apply in the interpretation of state constitutions. These doctrines affect the enforcement of state constitutions and are therefore of special interest to drafters or revisers. In other words, certain drafting choices can lead to interpretations by the courts that should be foreseen by drafters. If such interpretational approaches are not desired by those supporting the provision, this knowledge will enable them to anticipate the issue and possibly avoid it.

State constitutions in form often tend to resemble statutes, and many of the ordinary judicial doctrines of statutory interpretation have been applied to the interpretation of state constitutions. Two doctrines selected for discussion here are of this class. Although commonly encountered in both areas, they have particularly significant consequences in a state constitutional context because of the special nature of such constitutions. They are (1) the distinction between "mandatory" and "directory" provisions, and (2) the canon of construction known as *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other). The other doctrines examined in this chapter have been developed and used primarily by the courts in the interpretation of state constitutions. They are (3) the view courts take of state constitutional provisions as reflecting the "voice of the people," because the provisions have been proposed to, and ratified by, the voters; (4) the reliance by courts on state constitutional history, including state constitutional convention or commission

materials, legislative debates and reports, and voters pamphlets and newspapers; (5) the reliance by courts on lessons gleaned from the successive versions of a state constitutional provision as it has evolved over time from one constitution to the next, either through revision or amendment; (6) the doctrine of "contemporaneous construction," that assigns special weight to judicial interpretations rendered soon after the adoption of constitutional provisions; (7) the distinction between self-executing and non-self-executing provisions; and (8) the judicial view that certain interpretation problems arising under state constitutional provisions are not judicially enforceable, or "political," and that courts will therefore not undertake to enforce them.

The standard general work on state constitutional interpretation was Thomas M. Cooley's *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union,* first published in 1868 and updated in numerous subsequent editions. Many courts relied on this work as authority, referring to it simply as "Cooley's Constitutional Limitations." That work, however, is now out of date to the extent that modern state constitutions have evolved to deal with new issues, but it is still fundamentally sound, is relied on by a number of state courts, and will be referred to here.

Many state courts make the statement that the rules of *statutory* construction apply equally to state *constitutional* interpretation.[1] One should, however, be skeptical of this blanket assertion. Other courts, for example, recognize subtle or major differences between statutory and state constitutional interpretation. The Missouri Supreme Court expressed some caution: "Though applied more broadly because of the permanent nature of constitutional provisions, rules of statutory construction apply to interpretation of the constitution."[2] Therefore, a drafter who is familiar with the approaches courts take to interpreting statutes must also consider the special issues surrounding judicial interpretation of state constitutions.

Origins of State Constitutional Provisions: The Voice of the People

Intent of the Voters

State constitutions have unique *origins,* differentiating them in important ways from the federal constitution. State constitutional provisions owe their legal validity and political legitimacy to the state electorate, not to "Framers" or state ratifying conventions as is the case with the federal constitution.[3] State constitutions, ratified by the electorate, are therefore characterized by state courts as the "voice of the people."[4] According to the Michigan Supreme Court:

> When construing a constitution, the Court's task is to "divine the 'common understanding' of the provision, that meaning 'which reasonable minds, the great mass of the people themselves, would give it.'" . . Relevant considerations include the constitutional convention debates, the address to the people, the circumstances leading to the adoption of the provision, and the purpose sought to be accomplished.[5]

This approach is unlike anything in federal constitutional interpretation. State courts often use this view, in the absense of indications that a technical meaning was intended, to support a strong preference for ordinary or plain meaning interpretation,[6] so it has important implications for state constitutional drafters and those proposing and supporting, state constitutional amendments and revisions.

The Supreme Court of Colorado explained:

> To determine intent courts first examine the language of the amendment and give words their plain and commonly understood meaning . . . Courts should not engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the intent of the people.[7]

Many courts, of course, have indicated that while a search for the ordinary meaning of a state constitutional provision is the primary task, it is often difficult to establish plain meaning.[8] Courts have not relied on this preference for reliance on ordinary meaning as a reason to exclude reliance on constitutional history materials.

Because resort to voters' intent is completely foreign to federal constitutional interpretation, the variety of evidence state courts look to in interpreting state constitutional provisions is also quite unheard of in federal constitutional interpretation. Of course, the evidence varies depending on the avenue leading to the provision—constitutional commission or convention, legislative proposal or initiative. Persons involved in state constitutional amendment and revision should know about the courts' utilization of these materials. Often state courts examine, based on arguments submitted by counsel, evidence of the voters' intent derived from official ballot pamphlets and other materials presented to voters prior to the referendum. In this respect, the California Supreme Court noted:

> When, as here, the language of an initiative measure does not point to a definitive resolution of a question of interpretation, "'it is appropriate to consider indicia of the voters' intent other than the language of the provision itself.'. . . Such indicia include the analysis and arguments contained in the official ballot pamphlet."[9]

Another form of official information supplied to voters prior to their consideration of proposed constitutional amendments or revisions is the "Address to the People," which is often drafted by a constitutional convention itself.[10] Even more unusual to those familiar only with federal constitutional interpretation is the rather frequent reference by state courts, as an aid to their interpretation task, to newspaper analysis of the constitutional issue to be voted on.[11] This latter source, of course, is outside the control of the drafter, but nonetheless the tendency toward ordinary meaning interpretation should be kept in mind.

State Constitutional History

Having said that it is the *voters* who adopt the state constitutional provision at a referendum, rather than the *drafters* themselves, whose intent is the judicial focal point of state constitutional interpretation, there is an issue with respect to why constitutional convention or commission, or even legislative, materials are relevant. The Illinois Supreme Court has been particularly concerned with this linkage issue, observing:

> We have previously acknowledged that in construing the Constitution the true inquiry concerns the understanding of the meaning of its provision by the voters who adopted it. However, the practice of consulting the debates of the members of the convention which framed the constitution has long been indulged in by courts in determining the meaning of provisions which are thought to be doubtful.[12]

The Illinois court explained this linkage in a later case:

> The insight provided by these comments is critical to our task of discerning the intent of the drafters'. . . . The reason is that it is only with the consent of the convention that such provisions are submitted to the voters in the first place.[13]

Professor Harold Levinson has also explored this question of possible linkage.[14] He suggested the possibilities that the people conveyed their views to their delegates, who acted as agents of the people,[15] that there was some kind of informal communication from the delegates back to the people prior to the ratification vote, and that the delegates and the people shared a "general understanding of how language was used."[16] In addition, Professor Levinson made an important distinction between a situation where the people cast a single vote for an entire revised state constitution or package of revisions, on the

one hand, and where they voted individually on a single amendment, on the other hand. In the former case, he concluded, the "result is that many electors, in ratifying a package proposal, must have placed considerable trust in the intent of the framers."[17] Finally, in a case of ambiguous state constitutional language where the people's intent is also unclear, the intent of the framers is the only available source of intent and "the most persuasive substitute available."[18]

Some courts insist on the presence of an ambiguity in the state constitutional text as a prerequisite for examining constitutional convention records.[19] Sometimes both the majority and dissenting opinions in state courts rely on the same debate in the state constitutional convention for their differing views.[20] State courts have, on many occasions, referred to the rejection of amendments proposed during a constitutional convention to indicate the meaning of the finally adopted provision.[21] The most common references to state constitutional debates are those where the records indicate the purpose of the provision, such as when the Supreme Court of Montana concluded that "It is clear from the minutes of the Constitutional Convention that the second sentence of Section 16 was in response to our decision."[22] Some state courts have questioned the reliability of state constitutional convention debates, as illustrated by the New Hampshire Supreme Court's observation:

> The statements made by the delegates to the constitutional convention are not always significant in determining the meaning of a particular amendment. To be entitled to consideration, the delegates' statements must interpret the amendment's language in accordance with its plain and common meaning while being reflective of its known purpose or object.[23]

The usual focus, both with respect to ordinary meaning and to reliance on constitutional history materials, is on contemporaneous understandings of meaning and purpose. It is possible, however, for a court to conclude that state constitutional language means, or was intended to mean, an expansive application, capable of covering new developments and problems arising in the future under the constitutional language.

The most common difficulty with state constitutional convention materials arises from the tension, noted earlier, between the pull of ordinary meaning interpretation because voters adopt state constitutional provisions, and the desire to look behind text and rely on indications of intent or purpose expressed at the constitutional convention, commission, or in the legislature. What if these two approaches point in differing directions?

The New York Court of Appeals was faced with construing a state constitutional provision authorizing the legislature to *change* judicial district boundaries.[24]

The question arose as to whether this provision permitted the legislature to *increase* the number of judicial districts. The court rejected such an interpretation, which was based on the possible understanding and discussions of the lawyers on the Judiciary Committee in the 1894 New York Constitutional Convention, including the deletion of language expressly prohibiting the legislature from increasing the number of districts. The court concluded that it would not rely on such technical discussions, nor on a "doubtful implication" arising from the deletion of limiting language, of which the public would have had no knowledge. Judge Irving Lehman cautioned:

> We may not, however, construe the words of the Constitution in exactly the same manner as we would construe the words of a will or contract drafted by careful lawyers, or even a statute enacted by the Legislature. It is the approval of the People of the State which gives force to a provision of the Constitution drafted by the convention, and in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter. A grant of an enlarged power by the People should not rest upon doubtful implication arising from the omission of a previous express limitation, at least unless it appears that the omission and its significance was called to the attention of the People.[25]

Similarly, in the words of the Pennsylvania Supreme Court:

> Where, as here, we must decide between two interpretations of a constitutional provision, we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.[26]

Does this mean that even clear constitutional history ("original intent") cannot overcome an apparent "ordinary meaning" that would have been the understanding of the voters? This is certainly a very real possibility.

Because of the indirect route taken by constitutional changes proposed by commissions, debates and reports of such commissions arguably do not qualify as "constitutional history" in the direct sense that the debates in a constitutional convention, or in the legislature on proposed amendments, would be considered evidence of the "intent of the framers." Technically, and legally, of course, the appointed members of a constitutional commission are not the "framers" of ratified amendments that are based on their recommendations. The commission members do operate under a direct delegation of power from either the

legislature or the governor. Their recommendations often form the origins of state constitutional changes. Of course, neither the legislature nor a constitutional convention is bound to accept the commission's recommendations, nor even to limit their consideration only to those recommendations forwarded by the commission. The legislature or convention is neither limited *by,* nor *to,* such recommendations.[27] Still, courts routinely rely on the materials prepared by state constitutional commissions.[28] Once again, the focus is most often on contemporaneous understandings, but need not be limited in this way.

Changes to State Constitutional Text Over Time

The texts of state constitutions are much more changeable than their federal counterpart because they are subject to amendment and revision from a number of different sources, including legislative proposals, initiative amendments, and proposals submitted to the voters by constitutional conventions. Because of this malleability of state constitutional text, formal amendment and revision is a much greater force for constitutional change at the state level than with respect to the federal constitution.[29] Tracing the evolution of the text under scrutiny may reveal a number of changes over time in the language of the provision. Analyzing the changes leading up to the current text may support a specific judicial interpretation. Such changes in the underlying text are not often present in federal constitutional law because the federal constitution has been so rarely amended.

State courts often refer to the evolution of the state constitutional text over time, concluding that meaning may be derived from this layering of state constitutional text.[30] On the other hand, courts have sometimes found that changes in language do not necessarily indicate a change in meaning.[31] Readoption of a state constitutional provision without change is often seen as adopting the existing judicial interpretations of that provision,[32] a judicial doctrine of particular importance to drafters and advisers on constitutional amendment and revision. The adoption of a later amendment to a state constitution that is inconsistent with an earlier provision constitutes a repeal by implication.[33] State constitutional interpretation may rely on the fact that the provision under review was copied from the federal constitution,[34] or from the constitutions of other states.[35]

Interpreting state constitutional provisions copied from other states can be a very important approach. Courts often conclude that the adopting state accepts the existing judicial interpretations of the state from which the provision was copied.[36] Drafters should be aware of all of these judicial doctrines of interpretation. In a number of these areas, specific drafters' notes or comments might work to reflect the actual intentions of the policy makers.

The Function of State Constitutions: Documents of Limitation

State Constitutions Generally Limit Rather than Grant Powers

One of the major factors distinguishing state constitutions from the federal constitution is that they are often referred to as documents of *limitation* rather than documents *granting* powers.[37] As the Supreme Court of South Dakota noted:

> The constitution is not a grant but a limitation upon the lawmaking power of the state legislature and it may enact any law not expressly or inferentially prohibited by state and federal constitutions.

Thus, the basic *function* of state constitutions differs from that of the federal constitution. Drafters need not enumerate legislative powers. Although this distinction is oversimplified,[38] it does describe a major structural, and therefore interpretational, difference between state and federal constitutions. Limitations in state constitutions may be either express or implied.[39] As Walter Dodd pointed out many years ago, based on this distinction:

> With respect to the United States, emphasis has been upon powers, and perhaps the most important single manifestation of judicial action has been the doctrine of implied powers. With respect to the states, emphasis has been upon limitations, and the most important single manifestation of judicial action has been the doctrine of implied limitations.[40]

By way of illustration of the impact of this distinction it should be recognized that when state constitutional provisions *mandate* legislative action or *grant* authority to a state legislature already vested with plenary power, courts can transform these apparent grants of authority into *limitations* on legislative power. As Professor Frank Grad cautioned:

> It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation.
>
> . . .
>
> In constitutional theory state government is a government of plenary powers, except as limited by the state and federal constitutions. . . . In

> order to give effect to such special authorizations, however, courts have often given them the full effect of negative implication, relying sometimes on the canon of construction *expressio unius est exclusio alterius* (the expression of one is the exclusion of another).[41]

Drafters considering the inclusion of grants of authority, or mandates, in state constitutions must give careful consideration to this judicial tendency.

"Expressio Unius Est Exclusio Alterius" in the State Constitutional Context: Negative Implication

The problem arises from the ancient canon of construction that an express enumeration excludes all items not specifically enumerated, which has found frequent application in the interpretation of statutory language.[42] A familiar maxim, its frequent repetition in judicial opinions signals a recurring type of ambiguity requiring statutory construction. Like other maxims and presumptions, it has been, and is still, used on occasion in *statutory* interpretation, consciously or unconsciously, as a substitute for reasoned inquiry into the legislature's specific intent and purpose, and for the necessary balancing of policies and consequences on which sound interpretation ought to rest. Whether a negative inference ought to be presumed from a positive legislative command, when doubt remains after the indicia of intent and other relevant considerations have been canvassed, is a difficult question that need not be answered here.

The maxim is often applied in the construction of state *constitutions* with similar problems, but it raises special questions in such circumstances because of the distinctive nature of state constitutions. Application of this approach is based on a judicially implied limitation of power.

The state government, having plenary powers, need not look to the state constitution for any specific grant of powers, but must rather look to it for any limitations it may impose on that plenary power. That state governments possess plenary powers would seem to be unassailable, whether we regard the state as the repository of all of the sovereign people's powers under some concept of Social Contract,[43] or whether we regard the state as the successor of the British Crown, or the legislature as a successor to Parliament.[44] In the case of a government of plenary powers, any constitutional enumeration of powers is pointless, for if the powers of the state are truly plenary, an enumeration can neither enlarge nor limit them.

Many state constitutions do, however, contain enumerations of powers, usually out of an abundance of caution or out of a desire to remind the legislature of its responsibilities, but often with no intention of limiting their scope.

To apply *expressio unius* to such an enumeration of powers would, by negative implication, prohibit the legislature from exercising powers not expressed, thereby running directly counter to basic theory of the state government as one of plenary powers. Yet this is precisely the manner in which the maxim has been applied, giving rise frequently to rigid limitations on the freedom of state governments to act, and requiring much additional, otherwise unwarranted, constitutional amendment to overcome the negative implication.

Contemporary state constitutions have gone far beyond their original theoretical role of setting forth the basic structure of government and a bill of rights. The fact that many a state constitution in form and content resembles a loose collection of miscellaneous statutes helps to explain, though it does not excuse, the ready application of rules of construction—such as *expressio unius*—associated with ordinary legislation.

In a few areas of state government the *expressio unius* maxim has been relied on with some regularity as one of the major grounds to invalidate acts of the state legislature under state constitutions. These cases are often a great surprise to drafters. One such area involves constitutional qualifications for state officers: state courts have frequently held that the enumeration of some constitutional qualifications, even a mere statement that only qualified electors are eligible for a certain office,[45] deprives the legislature of all power to set further qualifications.[46] The extent to which perfectly reasonable legislation may be at risk in the face of indiscriminate application of *expressio unius* is demonstrated by the Florida case of *Thomas v. State ex rel. Cobb,*[47] which held unconstitutional a statute requiring county superintendents of public instruction to have had four years of higher education. The decision was based on the ground that the constitution set out specific qualifications for some state offices but none for superintendents of instruction; hence, applying *expressio unius* the court found itself constrained to hold that the legislature was without power to require special qualifications for that office. It is fortunate that not all courts have felt compelled to apply the maxim with equal rigor, even in the case of constitutional qualifications for office.[48]

Another area in which the maxim has been applied frequently involves laws providing for the reimbursement of state legislators' expenses. Many state constitutions provide for the compensation of state legislators at a meager per diem rate, plus mileage for travel from their home to the capital. In most of these cases, neither the daily rate nor the mileage fees has any relation to the contemporary economic situation. To furnish some relief to legislators—and, also, to make it possible for more qualified people to run for legislative office without undue economic sacrifices—many states passed laws to provide for the payment of certain sums to legislators to cover their expenses while attending the legislative session. The prevailing view of the courts that have ruled on the question has been to declare these statutes unconstitutional. In

the courts' view, the application of the maxim *expressio unius* prohibited any other payment of expenses.[49]

Still other courts have rejected the statutory interpretation *expressio unius* approach in the context of interpreting state constitutions. For example, also in the context of compensation of state legislators, the Idaho Supreme Court noted:

> We look to the State Constitution, not to determine what the legislature may do, but to determine what it may not do. . . .
>
> There flows from this fundamental concept, as a matter of logic in its application, the inescapable conclusion that the rule of *expressio unis est exlusio alterius* has no application to the provisions of our State Constitutions.[50]

It is evident that application of the *expressio unius* maxim creates the gravest kind of mischief when it is used to limit state legislative *powers* by virtue of a negative implication from a constitutional enumeration of such powers. The mischief is greater here than in the case of the application of the maxim to ordinary legislation, because of the greater ease of amendment of statutes. Depending on the difficulty of amending the constitution, the result of the negative implication may be to "freeze" the exercise of state power for a long time. To avoid this consequence, a small number of state constitutions expressly reaffirm the plenary nature of state powers, and provide that the enumeration of state or legislative powers is not to be automatically construed as a limitation on other powers or functions not so specified.[51] The Oklahoma provision to this effect has been judicially interpreted on more than one occasion,[52] and has led to findings upholding the existence of certain powers, which absent the provision, would probably have been denied, with the court itself holding that "this provision was incorporated into the construction to exclude the idea of the exclusion of power by implication."[53] The inclusion of such a provision in the state constitution has much to recommend it. Not only is it a protective device against the application of the *expressio unius* maxim to an enumeration of powers, but it also attacks the underlying misconception of the nature of the state constitution that has led to the use of the maxim in constitutional interpretation in the first place. The function of the provision is to reconfirm, both for the benefit of the courts and for the benefit of responsible state government, that the state constitution is not the sole repository of power, and that there is no need for undue timidity in asserting the existence of governmental power. The provision may help, too, to discourage unnecessary and frivolous constitutional amendment.

It is fair to mention that the provision against negative implication will not prevent the application of *expressio unius* in every instance of state constitutional

construction, nor is it intended to. Its impact is limited to enumeration of "any specific grant of authority."[54] The presence of masses of statutory detail of other kinds in state constitutions also invites the application of *expressio unius* and other maxims of statutory construction. In respect to such detail, a negative implication may or may not have been intended, and the honest effort to weigh the pertinent powers should yield neither to a mechanical application of a rule of negative implication nor to its opposite, namely that no negative implication is ever to be drawn. Nor for that matter should the constitutional provision against negative implication in the case of enumeration of powers be expanded to such uses.

The *expressio unius* maxim poses a number of problems for the state constitutional drafter. It is essential here, as in all legislative drafting, to be sensitive to the possibility that negative implications may arise from positive statements, and within the limits of foresight, to examine constitutional proposals with a view to excluding any such unintended implication for the future. Again, there is a question as to how far, or how rigidly *all* negative implications should be avoided, because unforeseen situations may well arise when the courts might need leeway to use negative implications to construe the provision sensibly.

The drafter's task, here as in statutory drafting, is to make the framers' intention explicit. If the constitution contains an enumeration of powers, the provision against negative implication, previously referred to, may be a useful tool. In instances other than the enumeration of powers, where negative implication is not intended, it may be necessary to draft a specific provision to deal with the matter. So, for instance, when a procedure for the accomplishment of a certain end is set forth in a "self-executing" provision, any negative implication might be dispelled by an express statement that the procedure outlines is not exclusive, but that the legislature may authorize other, additional ones.

"Mandatory" and "Directory" Provisions

Courts have frequently distinguished between "mandatory" provisions of a statute or state constitution—that is, provisions that *require* a thing to be done, and "directory" provisions that, in effect, merely *suggest* a procedure for doing it, or indicate a desirable end without dictating the specific means. In the case of statutory provisions, the distinction is one that in earlier days, when courts regarded most legislation with suspicion, enabled the judiciary to rewrite statutes to avoid results considered undesirable or unwarranted; the distinction is still occasionally used for this purpose today, both for statutory and state constitutional provisions.[55] In the case of state constitutional provisions, however, the distinction has frequently been seen by courts as useful to avoid the consequences of overly detailed constitutional mandates in instances when a strict reading would have required the invalidation of legislation that failed to meet the full constitutional prescription in some minute

aspect. In that case, though, the doctrine has been used to save *legislation* at the expense of nullifying the letter of the *constitution*.

In the judicial interpretation of state constitutions, it is commonly stated as the established rule that constitutional provisions are to be treated as mandatory, "unless it appears from their express terms or by necessary implication from the language used that they are intended to be directory only."[56] In this form the rule has even achieved the status of constitutional law, having been directly incorporated in the text of several state constitutions, often in the declaration of rights, as a guiding principle of interpretation.[57]

The reasons for the presumption of a mandatory intent in state constitutional provisions seem clear: the framers of a state constitution ought probably to be assumed, unless after inquiry the context shows otherwise, to have intended to do what constitution-framers usually do—to state binding, fundamental law; as with other kinds of legislation, the law-giving body, be it a convention or a legislature, can hardly be assumed to have used the machinery of lawmaking to make mere suggestions. This rationale will certainly make sense to the users of this volume.

This consideration is even stronger, if anything, in the case of state constitutional provisions dealing, for example, with legislative powers. State constitutions are not, in theory at least, designed as the federal constitution is, to serve as an exclusive source of power; but rather to set limitations on power, whether by restricting otherwise allowable legislative conduct, or by imposing duties on that body. State legislatures, having, in theory, plenary powers, may have little incentive to respect constitutional provisions that are not held mandatory. Failure to treat constitutional language as mandatory is all the more likely, then, to frustrate the carrying out of the constitutional terms, and to deny effect to prescriptions considered by drafters and the people to be of sufficient dignity to be embraced in such a fundamental document.[58]

No less an authority than Judge Cooley has gone very far in arguing against the characterization of constitutional language as "directory" in a passage frequently relied on by courts in finding constitutional requirements to be mandatory:

> But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules by which all departments of the government must at

> all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters, it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation.
>
> * * * *
>
> There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application.[259]

Following Cooley, a number of cases have maintained that constitutional language is *always* mandatory, unless *expressly* permissive, and have suggested that any other interpretation would allow violation of the constitution. These cases follow Cooley, too, in presuming "that the people in their constitution have expressed themselves in careful and measured terms" and that the constitution truly contains only fundamental matter, each provision having been "solemnly weighed and considered."[60] This presumption, unfortunately, because of a lack of self-reflection and deliberation, is contrary to fact in all too many instances. It is well enough known that many state constitutions run to inordinate length, concerning themselves with matters of legislative detail that no observer could rightly regard as fundamental. Drafters and others involved with state constitutional amendment and revision should be aware of the courts' attitudes toward their handiwork.

> A more realistic appraisal of the state constitutions leads to agreement with the statement that the constitution is, of course, the paramount law and must be construed in that light; but, after all, it is an instrument prepared by human beings, and contains within itself all the proof of their frailties . . . although, being a constitution, it should contain only that which is fundamental, we are constantly made aware of the fact that many details are embodied in it which more properly belong in legislation. Because of these facts all that is said in the constitution is not of the same mandatory force; in the nature of things some of the detailed provisions must be treated as directory only.[61]

And as these remarks suggest, a sense of the fallibility of language and of the human mind, failures of human self-reflection and self-restraint, and of the complexity of the matters they must deal with is no less appropriate in reading constitutions than in other kinds of interpretation. It counsels against overstating a presumption of this kind. And such a sense warns against substituting such

a presumption, or letting it distort, the exploration and balancing of intent, policy, and consequence needed to resolve justly the often hard basic question about whether a particular constitutional provision, viewed in context, should be given binding effect with all that implies for inconsistent governmental action.

A finding that a particular constitutional provision is merely directory may be warranted on a weighing of the policy of the constitutional provision against the challenged statute and the consequences of striking it down, but it is in effect a holding, not lightly to be undertaken, that the legislature was justified, under the particular circumstances, in disregarding constitutional terms. In certain areas, the nature of the problem emerges in a striking manner. So, for instance, in an Oregon case in 1936, a clear constitutional direction that the governor's salary be fixed at $1,500 was held only directory,[62] probably because any other result would have been absurd. So, too, in the *Scopes* case,[63] where the highest court of Tennessee held merely directory a constitutional provision that the legislature "cherish literature and science," against the contention that this provision invalidated a legislative mandate against teaching of the scientific theory of evolution. Provisions have also been held directory in other situations where the result of another holding was considered unduly harsh.[64]

The Doctrine of Substantial Compliance

An important mitigating device that permits the court to uphold both the mandatory nature of the constitutional provision and the allegedly conflicting action of the legislature (particularly where the constitution prescribes formalities in relation to the legislative and amendment processes) is the doctrine of "substantial compliance." Under this doctrine, an immaterial variation from the terms of a constitutional mandate in the passage of a law or an amendment does not invalidate the enactment.[65] In the areas of amendment formalities,[66] the doctrine of substantial compliance has been used to uphold an amendment that had not been published prior to the election in accordance with the constitutional mandate. The court held that although the provision in the constitution requiring publication in every county of the state was mandatory, publication of the amendment in all but one county constituted substantial compliance since there had been no fraudulent intent.[67] The justification for allowing substantial compliance with mandatory constitutional provisions has been that unless the required formalities are necessary to achieve the purpose of the constitutional provision, insistence on literal compliance would entail destructive consequences without significantly furthering that purpose.[68] This rationale is very similar to that underlying a conclusion that the provision is only directory. This sort of judicial accommodation, though, can never be counted on by the drafter of state constitutional provisions.

Shall/May

The wording of the constitutional provision at issue may of course have significance for the inquiry into intent and policy. For example, the mandatory nature of a provision is frequently found to be indicated by the use of the imperative word *shall,*[69] and the permissive *may* usually is said to indicate the directory or permissive character of a clause.[70] But use of the words *shall* and *may* is not always conclusive. On the one hand, the word *shall* has received a directory interpretation when the courts find, from the context or from the surrounding circumstances, that a mere direction had been intended.[71] On the other hand, *may* has on occasion been held to be mandatory.[72] In one case, the court held *may* to be imperative, saying that a merely directory interpretation of the constitutional language would have rendered it futile, because the legislature already had the power, even without the provision in question, to do the very thing which the constitution purported to give it permission to do.[73] Such a theory literally applied could be used to turn almost any of the common, if unnecessary, authorizations using the word *may* into a mandatory provision, because, in the absence of express limitation, state legislatures have plenary powers, and ordinarily do not require express authorization for specific exercise of legislative powers. Clearly, this approach would destroy the normal, dictionary meaning of the word *may.*

Constitutionalizing Rules of Interpretation

The makers of state constitutions need to be aware of the mandatory-directory distinction, and its variations, and of the underlying problem it reflects. That problem must be weighed and accounted for at the drafting stage in order to avoid, as far as may be, unnecessary litigation and unintended constitutional interpretations. If no amount of foresight and technical skill can avoid the basic problem entirely, its incidence can at least be significantly reduced.

But no pat interpretive formula or presumption laid down in advance can wholly prevent the problem from arising or suffice to resolve the problem once it has arisen, as has been discovered by some states[74] that have adopted constitutional provisions declaring that every provision of the constitution is mandatory or prohibitory unless it is expressly declared to be directory only.[75] Like other mechanical rules of construction, such a rule fails to come to grips with the particular issue on its own merits, seeking instead to tackle the question at an entirely unfocused level of abstraction. Perhaps some such presumption has a place if applied when doubt remains after prior judicial resort to the analytical and balancing processes earlier referred to. Ultimately, if applied in lieu of,

or to distort, those processes, it operates badly and in unexpected ways because it operates so unselectively. There will, after all, be cases in which the mandatory-directory distinction may represent an accurate conclusion by the courts as to the purpose implied, directly or indirectly, in the constitution.

Drafting Awareness

What the drafter must do, taking the problem into account, is to try to anticipate it, weighing the known contingencies and alternatives in advance, just as with other branches of drafting skill. The mandatory-directory distinction represents, in the end, an aspect of the familiar problem of sanctions, of how and by whom provisions are to be made effective. In determining whether a provision ought to be mandatory, the framers of the constitutional provision ought to consider, for example, whether it may be enforced by the judicial invalidation of inconsistent governmental action and, if so, whether the requirement is important enough to be enforced at that price or whether provision for some other implementation by the courts or another agency should be made. The determination should be based on the nature of the provision, as well as upon the characteristics and relative advantages or disadvantages of the means and agencies available for its enforcement. There are many provisions in state constitutions, for example, that though intended to be mandatory, are not expected to be enforced by the courts, but rather by the normal political processes; many duties imposed on the governor are likely to fall in this category, and most of the duties imposed on the legislature. On the one hand, a requirement, without anything more, that the legislature provide for voter registration or establish a system of home rule charters for municipalities is undoubtedly intended as a real command, but is just as surely not intended to be enforced by the courts.[76] On the other hand, detailed requirements relating to the manner in which laws shall be passed often will be enforced by the courts through the sanction of nullification of statutes passed in a noncomplying manner. The familiar example of the requirement that (with certain stated exceptions) every bill shall be confined to one subject is in point.[77]

"Self-executing" and "Non-self-executing" Provisions

Another relatively common interpretation question in state constitutional law that is rarely ever raised in federal constitutional law is whether a clause is "self-executing." A number of state constitutional provisions have been found

to be non self-executing, and therefore judicially unenforceable and reliant on either legislative or local government implementation.[78] The Kansas Supreme Court stated:

> A self-executing provision of a constitution is a provision requiring no supplementary legislation to make it effective and leaving nothing to be done by the legislature to put it [into] operation.[79]

Sometimes this question can be answered by reference to state constitutional history.[80]

Interestingly, the judicial view of whether a state constitutional provision is self-executing or not has changed as the view of the function of state constitutions has changed. At the beginning of last century, the California Supreme Court stated:

> As to the question whether the provision is self-executing, it is well to note, at the outset, that the presumption is not precisely as it would have been had such a matter been presented for consideration 50 years ago. When the Federal constitution and the first state constitutions were formed, the idea of a constitution was, that it merely outlined a government. . . . The law-making power was vested wholly in the legislature. Save as to the assurances of individual rights against the government, the direct operation of the constitution was upon the government only. And such assurances were themselves in part but limitations upon governmental powers.
>
> Latterly, however, all this has been changed. Through distrust of the legislatures and the natural love of power, the people have inserted in their constitutions many provisions of a statutory character. . . .
>
> Now the presumption is the reverse. Recently adopted state constitutions contain extensive codes of laws, intended to operate directly upon the people as statutes do. To say that these are not self-executing may be to refuse to execute the sovereign will of the people.[81]

Just because a provision of a state constitution is deemed to be self-executing, however, does not mean that the legislature may not pass implementing statutes. Such statutes, of course, may not narrow or contradict the self-executing clause.[82]

Whether a provision is self-executing or non-self-executing is an issue of construction that has been primarily of concern in the state constitutional area,[83] unlike the distinction between mandatory and directory provisions, which has been applied frequently to ordinary legislation as well as to constitutions.[84]

A self-executing provision is supposed to be complete in itself and operative without the aid of supplemental or enabling legislation,[85] though, in fact, the completeness of the provision may be relative, because self-executing provisions like other provisions may well involve more or less reliance on existing law, including existing schemes of legal remedies.[86]

In interpreting constitutions, the courts have frequently said that provisions are self-executing unless a contrary intention appears.[87] This presumption is based, in large measure, on the consideration that non-self-executing provisions, being dependent on further action by the legislature, put the effectiveness of the basic charter at the mercy of that body. When a court holds that a particular provision is self-executing, it treats the state constitution as meaningful and operative law, and prevents the provision from being rendered nugatory by legislative inaction,[88] although, in the process, it may also discourage (through the use of a negative implication), if not prevent, its full implementation by ancillary legislation. On balance, a presumption in favor of self-execution probably tends to be a presumption in favor of effective constitutionalism—though it is difficult to tell whether the traditional distrust of the legislature may not have played a part in its genesis. As a presumption it is subject to many of the strictures earlier laid upon the "mandatory" presumption, if used to substitute for or distort judicial analysis and balancing of relevant basic factors.

There are several kinds of constitutional provisions that create no problem because they are almost uniformly held to be self-executing. The provisions of bills of rights, prohibiting interference with certain personal and political freedoms, are quite properly enforceable without prior action by the legislature as self-executing,[89] though they may be—and sometimes are—implemented by legislative action, as in the civil rights area. This holds true, in the usual case, of most express constitutional prohibitions directed to particular branches of government, and especially to the legislature.[90] On the other hand, such individual rights as voting rights which, though constitutionally protected, require legislative implementation, are treated as non-self-executing. Prohibitions on particular activities by individuals, such as gambling or usury, may or may not be found self-executing, depending on whether or not the constitution provides a scheme for the disposition of the offender, or penalty for the offense.[91] In the ordinary case of prohibitions of particular acts by individuals, whether or not the express prohibition directed against the individual is self-executing, the prohibition is clearly self-executing in its negative effect on the legislature: when the constitution contains a provision that no person shall engage in certain activities, the state legislature could not pass a law providing a legal scheme making such activities permissible under certain circumstances.[92]

Various rules and criteria have been judicially developed in attempting to discern constitutional intent in this area. These criteria are often used alternatively or cumulatively, and frequently form only one of several grounds for

decision. If there is no indication that legislation was contemplated in order to render the particular constitutional provision operative,[93] or "no contingencies or conditions precedent to the effectiveness of the grant are mentioned" and no "language indicates that legislation would be imperatively necessary"[94] then the provision is taken to be self-executing. But if it "contains no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be given the force of law" then it is not self-executing.[95] "The necessity for enabling legislation is to be determined from a construction of the provision and, to be necessary, there must be some indication that something is left for the legislature to do or by its very nature the provision renders such future legislation necessary."[96]

Another formulation frequently quoted, and one that perhaps seems to put greater stress on the problem of enforcement, is that of Judge Cooley:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.[97]

Following this test, courts have distinguished between constitutional provisions that set forth a principle[98] and those which also provide for a means to carry it out.[99]

Although the question whether a constitutional provision is mandatory or directory and whether it is self-executing or non-self-executing may arise in regard to the same provision, these questions raise separate issues, for a provision may be mandatory without being self-executing. This is commonly the case when the constitution requires that something be done in such a manner by another branch of government. For example, in one case the constitution provided that the "term of office" for all judges in the state "shall be six years." In an action to compel compliance with the constitutional requirement, the court held that though mandatory, the provision was not self-executing. Hence no relief could be had, because the beginning and ending of the terms depended on legislative action and the court could not compel the legislature to pass the necessary legislation.[100] The result reached is common in cases in which a mandatory provision is addressed to the legislature,[101] for, though clearly mandatory, such a provision requires legislative action to achieve its full effect and, in reliance on the doctrine of separation of powers and recognition of their own limitations, courts will not issue mandatory injunctions to compel legislative action.[102]

In concluding that appropriate means are provided to make a state constitutional provision "self-executing," the drafter must look not only to the means for its implementation set forth in the provision itself, or elsewhere in the constitution, but also, as has been suggested, to the means available in existing law. In one sense, no constitutional provision is truly "self-executing" because invariably the existing law and legal machinery provide the context in which it must operate. The usual bill of rights provision against unreasonable searches and seizures, for instance, is "self-executing" only because legal means exist, apart from the provision itself, to enjoin officials from taking wrongful action under color of law, because legal means exist to bar the fruits of the illegal search from evidence, because there exists a common law remedy for trespass against the offending officer, and because a judicial system and a system of procedural law make it possible to assert the right to be free from unreasonable searches and seizures. The search for adequate sanctions, here as in statutory drafting, is not a mechanical chore but usually requires an exercise of judgment, informed by knowledge of the operations of state government, of law and of custom. To delegate the pardoning power to the governor and to provide for a method of its exercise requires no further sanctions and involves no substantive risks, for there has never been any question in any state but that governors will do their duty and exercise this power. To impose the duty of periodic apportionment of the legislature on the governor presents an entirely different problem, for governors were known to disregard the duty, just as legislatures did, and, under the principles of separation of powers, the courts would not, until the 1960s, issue orders to compel either the governor or the legislature to do their constitutional duty.

Political Questions and Non-Justiciability

The Political Question Doctrine

In discussing the relationship between the "mandatory-directory" distinction, on the one hand, and the "self-executing—non-self-executing" distinctions, on the other hand, instances were encountered in which courts, though affirming the mandatory nature of a constitutional provision, nevertheless failed to give it effect because to do so would involve the issuance of a mandate to a coequal branch of the government. Sometimes the rationale applied in refusing to grant a judgment compelling the performance of a constitutional duty by the legislature or executive has been to characterize the matter as a political issue, and therefore nonjusticiable because it would require the court to act in the political sphere and outside the area of judicial

competence. It is not necessary, in the framework of this discussion, to decide whether the characterization of a question as a "political issue" reflects a judgment that the issue is truly beyond the court's competence, or whether it is merely a tacit acknowledgment that the court lacks the power to enforce a judgment in that particular controversy. Drafters, however, should be aware of the possibility that certain state constitutional provisions will be rendered unenforceable because of this doctrine.

There are relatively few areas of law in which nonjusticiability by reason of the political nature of the question forms a significant basis for decision. The most important cases in which the doctrine had, until the 1960s, played any significant role are those dealing with legislative apportionment.[103]

The apportionment cases, though representing an especially troublesome substantive category, involved the problem of compelling the legislature to carry out a constitutional direction, namely, to pass a law to apportion and reapportion itself. It is significant that, without exception, state courts held the constitutional requirement that the legislature periodically reapportion itself to be mandatory. Nevertheless, in numerous instances they treated the issue as political and therefore nonjusticiable, or relied on the principle of separation of powers to refuse to entertain the petition. These views, of course, are no longer applicable after the 1960s decisions in *Baker v. Carr* and *Reynolds v. Sims.*

Judicial Approaches to Enforcing State Constitutional Restrictions on Legislative Procedure

State courts have developed a surprisingly wide range of approaches to enforcing restrictions on legislative procedure under circumstances where an act does not carry "its death warrant in its hand," in the sense that the procedural defect is apparent on the face of the act. Even within single jurisdictions, one can detect inconsistent doctrines and a lack of continuity over time. These widely varying judicial doctrines reflect what are essentially political decisions, made in the context of adjudicating actual controversies, about the extent of judicial enforcement of state constitutional norms.

The range of approaches can be viewed as a continuum.[104] At one end of the continuum is the "enrolled bill rule." This is marked by judicial passivity and complete deference to the legislative enactment. At the other end is the "extrinsic evidence rule," characterized by judicial activism and recognition of the written constitution as a binding source of law. In between these two extremes are three intermediate approaches to judicial enforcement.

Awareness By Drafters. It should be obvious, from the brief review to follow, that there is a wide range of judicial attitudes toward enforcing state constitutional restrictions on legislative procedure.[305] This range of possible judicial approaches to interpreting and enforcing legislative procedure requirements in state constitutions should be taken into account by drafters. Of course, specificity on the question of judicial enforcement is within reach of the drafter. For example, Article IV, Section 13 of the Illinois Constitution prohibits the Legislature from passing a special or local law where a general law can be made applicable. It then specifies "Whether a general law is or can be made applicable shall be a matter for judicial determination."

The Enrolled Bill Rule. The enrolled bill rule is also referred to as the "conclusive presumption rule" because when it is operative, it prevents any evidence, other than the final enrolled bill itself, from being produced to show constitutional violations occurring during the process of enactment. Therefore, if the defect in state constitutionally required procedure did not appear on the face of the act itself, the constitutional requirement was judicially unenforced. The most common argument advanced in favor of the rule is the separation of powers doctrine. Because the legislature is a coordinate branch of government, the argument contends that the courts should not question the validity of its certified (enrolled) acts by going behind them to determine compliance with constitutional limitations. Another argument relies on the need for finality with respect to the validity of statutes, and the need for citizens to rely on such finality. These arguments inevitably leave it to the legislature itself to determine whether there has been compliance with limitation contained in the state constitution.

The "Slightly Modified" Enrolled Bill Rule. After observing the enrolled bill rule since 1915, the New Mexico Supreme Court carved out a narrow exception in 1974.[106] The court struck down the statutes in question, enacted after the sixtieth calendar day of the legislative session in violation of Article 4, Section 5 of the New Mexico Constitution. The justices held that courts may examine "the question of whether or not the act or bill purportedly passed by the Legislature within the constitutional time limitation was in truth and in fact passed within that limitation." The court explicitly held that its decision was to be prospective only, and only applicable to alleged violations of Article 4, Section 5 where "[T]he conclusive legal presumption that ordinarily attaches to enrolled bills simply would not attach."[107]

The Modified Enrolled Bill Rule. Another step in eroding the enrolled bill rule is found in the "modified enrolled bill rule" adopted by the Supreme Court of

South Dakota in 1936.[308] Under this rule, the enrolled bill is conclusive of proper enactment except when an alleged violation concerns a provision for which the constitution specifically requires that a journal entry be made. Only under these narrow circumstances will the court look to the journals to determine whether a challenged act was passed improperly.

The Journal Entry Rule. The middle of the continuum is represented by the "journal entry rule." This rule allows a court to consider any evidence appearing in the legislative journals to help determine the validity of a statute that has been challenged on constitutional grounds, with the enrolled bill being considered only *prima facie* valid. Under this view, the journals are at least as reliable as the enrolled bill as evidence of what procedure the legislature actually followed, or did not follow, in enacting legislation.

The Extrinsic Evidence Rule. The other extreme from the enrolled bill rule is the "extrinsic evidence rule." This rule "accords to the enrolled bill a prima facie presumption of validity but permits an attack by 'clear, satisfactory, and convincing' evidence establishing that the constitutional requirements which the court deems mandatory have not been met."[109] This rule was adopted by the Supreme Court of Kentucky in 1980,[110] in a challenge based on Section 46 of the Kentucky Constitution. Although the journals indicated, and all parties conceded, that only forty-eight votes in a one-hundred-member house were cast in favor of a bill containing an appropriation, Section 46 sets out certain procedures, including: "Any act or resolution for the appropriation of money or the creation of debt shall, on its final passage, receive the votes of a majority of all members elected to each house."[111]

Contemporaneous Construction

Drafters should also be aware that a number of state courts have applied the doctrine of "contemporaneous construction" in interpreting state constitutional provisions. This approach reflects deference to the view of the meaning of a state constitutional provision held by other, sometimes nonjudicial, actors in the state government, most often, prior to or soon after the adoption of the provision in question.[112] For example, the Supreme Court of Kentucky stated that judicial interpretations rendered closely after the adoption of a state constitutional provision were entitled to special deference:

> the prevailing political climate at the time of adoption of the 1891 Constitution and the language used permits an inference that the Constitutional Convention desired to impose limitations upon leg-

> islative authority and cases decided contemporaneously or close in time would appear to be persuasive of the Delegates' intent.
>
> * * * *
>
> This Court has endorsed the principle of contemporaneous construction as providing special insight to the Delegates' intent: "The judges recognizing that tradition in their opinions wrote with a direct, firsthand knowledge of the mind set of the constitutional fathers, . . ." . . . Accordingly, our decisions in *Louisville & Nashville R.R. v. Kelly's Adm'x, supra* and *Illinois Central R. Co. v. Stewart, supra,* are entitled to greater weight in our constitutional analysis.[113]

State courts have also expressed deference to interpretation of the state constitution by the state legislature.[114] For example, according to the Supreme Court of North Dakota: "A contemporaneous and long-standing legislative construction of a constitutional provision is entitled to significant weight when we interpret the provision."[115] The Supreme Court of Rhode Island linked legislative interpretation to statutes enacted soon after the adoption of the constitutional amendment:

> In construing a constitutional provision, this court properly consults extrinsic sources, including the proceedings of constitutional conventions and any legislation related to the constitutional provision that was enacted at or near the time of the adoption of the constitutional amendment.[116]

State courts sometimes refer to the doctrine of "practical construction" together with the contemporaneous construction approach. For example, the North Dakota Supreme Court stated:

> And finally, as an elementary rule of construction, we note that which is drawn from contemporaneous and practical constructions, and "where there has been a practical construction which has been acquiesced in for a considerable period considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which is not easy to resist."
>
> A contemporaneous and long-standing legislative construction of a constitutional provision is entitled to significant weight when we interpret the provision.[117]

Some state courts have deferred to even more specific legislative interpretations of the state constitution, going so far as to uphold noncontemporaneous legislative definitions of terms or other interpretations even contrary to prior judicial interpretations. According to the Florida Supreme Court:

> The situation then, as it presents itself in connection with our constitutional provision, is at least that by the decision of the courts of Florida and other jurisdictions the word "lottery" may have either of several meanings, and that either is reasonable and possible. In such a situation, where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh if not completely, controlling.[318]

In another example the Florida Supreme Court had adopted a fairly restrictive definition of the state constitutional term "charitable," limiting it to financial assistance to the poor or other measures to help those unable to help themselves, holding that a Presbyterian home for the aged was not entitled to a tax exemption.[119] Subsequently, the Florida legislature passed a statute[120] specifically exempting homes for the aged, including homes such as those previously denied exemption in *Presbyterian Homes*. When the statute was attacked by tax officials, the Florida Supreme Court held, in *Jasper v. Mease Manor, Inc.,*[121] that the statute constituted a definition by the legislature of "charitable" as used in the constitution and that it was within the legislative prerogative. The court stated that there must be only a reasonable relationship between the specific statutory exemption and a purpose the constitution required to be served.[122] Thus, since the legislature had declared that certain property was used for charitable purposes, the court abandoned its prior judicial definitions.[123]

On various occasions, therefore, the Florida legislature has undertaken to define constitutional terms with regard to tax exemptions. This is not an issue as long as the courts agree with the legislature's definition. In a situation such as was involved in *Mease Manor,*[124] however, the supreme court and the legislature did not initially agree. The court had for several years subscribed to a fairly restrictive definition of "charitable purposes." Then, after the legislature passed a more liberal statute exempting homes for the aged as being used for charitable purposes, the court withdrew from its position and deferred to the legislature.[125]

On the other hand, in *Junkins v. Branstad,*[126] the Iowa Supreme Court dealt with a legislative attempt to define in a statute the term "appropriation

bill" as it was used in the constitutional item veto provision. The court stated:

> Whatever purposes the legislative definition of "appropriation bill" may serve, it does not settle the constitutional question. In this case, determination of the scope of the governor's authority granted by Article III, section 16, as amended, will require a decision whether the bill involved here was an "appropriation bill" as that term is used in our constitution. This determination, notwithstanding the legislative definition, is for the courts.[127]

Other state courts have exhibited substantial deference to the interpretation placed on a state constitutional provision by the executive branch, particularly the governor. The Supreme Court of South Carolina noted:

> As the Governor notes in his brief, the historical evidence in this case is overwhelming. Indeed, the Governor's exhaustive analysis of all available historical evidence compels the following conclusions:
>
> Since the ratification of the 1895 Constitution, the uniform belief of South Carolina's governors has been that a bill they have declined to sign after sine die adjournment does not have the force and effect of law until it is signed, and a bill vetoed in the interim lacks the force and effect of law without a veto override.[128]

All of these possible interpretative approaches should be known to drafters, who may be further stimulated to strive for clarity and the expression of clear intent.

Conclusion

The doctrines of judicial construction discussed raise significant problems for the drafter. They all add to the task of expressing the intention of the framers of the state constitution in such a way as to avoid an invitation to the court to substitute a fixed formula, in Mr. Justice Frankfurter's words, for "the anguish of judgment" in constitutional, no less than statutory construction, involved in making "a delicate judgment, concluding a complicated process of balancing subtle and elusive elements."[129]

As in other phases of this complex skill, the drafter's task is not to supply a bag of tricks to outwit an unwilling court, or to use the court to outwit a recalcitrant legislature. The task is rather to become aware of the purposes of the

framers of constitutional provisions and to consider the problem of effectuating them in the light of their particular purposes. An inquiry into constitutional purposes and into possible sanctions will involve an awareness of interpretation issues, and a study of antecedent law and past constitutional decisions, as well as an awareness of the functioning of state government and of the political processes in the state. In framing a constitutional provision so as to express its true purpose, the drafter must anticipate problems; or, in short, anticipate the "complicated process of balancing subtle and elusive elements" involved in judicial interpretation by engaging in that process ahead of time.

Notes

Notes to Preface

1. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition,* 22 Rutgers L.J. 819, 839 (1991).

2. Albert Sturm, *The Development of American State Constitutions,* 12 Publius: The Journal of Federalism 57, 72–74 (1982).

Notes to Chapter 1

1. Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change,* 1 Hofstra L. & Pol'y. Symp. 1 (1996).

2. G. Alan Tarr, Understanding State Constitutions 25–26, 160–61 (1998). *See also* information at http://www.iandrinstitute.org.

3. *See* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth Century West,* 25 Rutgers L.J. 945, 964–71 (1994); Christian G. Fritz, Book Review, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions,* 26 Rutgers L.J. 969 (1995).

4. Ibid., at 964–65.

5. *See generally*, John Dinan, *Framing a "People's Government": State Constitution-Making in the Progressive Era,* 30 Rutgers L.J. 933 (1999).

6. *See* chapter 2, "The State Constitution: Form and Function."

7. *See* Christopher W. Hammond, *State Constitutional Reform: Is It Necessary?* 64 Albany L. Rev. 1327 (2001); *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions,* 93 Am. Pol. Sci. Rev. 837 (1999).

NOTES TO CHAPTER 2

1. This view was shared, now and in the past, by some academicians. *See*, for example, Munro, *An Ideal State Constitution*, 181 ANNALS 1 (1935); Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission,* 52 FLA. L. REV. 475, 478–79 (2000).

2. Alice M. Rivlin, REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES AND THE FEDERAL GOVERNMENT 82–125 (1992). *See also* Jon C. Teaford, THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT (2002); G. Alan Tarr, *The State of State Constitutions*, 62 LA. L. REV. 3 (2001); John Kincaid, *The State of U.S. Federalism, 2000–2001: Continuity in Crisis,* 31 PUBLIUS: THE JOURNAL OF FEDERALISM 1 (Summer 2001); Ann O'M. Bowman & Richard C. Kearney, THE RESURGENCE OF THE STATES (1986).

3. James Bryce, THE AMERICAN COMMONWEALTH 434 (rev. 2d ed. 1891).

4. On areas of shared jurisdiction, such as transportation of nuclear materials or disposal of nuclear waste, *see* 4 Frank P. Grad, TREATISE ON ENVIRONMENTAL LAW, § 6.03 (2003).

5. *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission,* 461 U.S. 190 (1983).

6. *See*, for example, *New York v. United States,* 505 U.S. 144 (1992).

7. *Reynolds v. Sims,* 377 U.S. 533 (1964); *Baker v. Carr,* 369 U.S. 186 (1962).

8. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition,* 22 RUTGERS L.J. 819, 839 (1991).

9. *See*, for example, California Constitution, Art. IV § 1.5 and § 2 setting term limits for state legislators, and Art. V, § 2 and § 11, setting term limits for the office of governor, as interpreted in *Legislature of State of California v. Eu,* 816 P.2d 1309 (Cal.1991); *Bates v. Jones,* 131 F.3d 843 (9th Cir. 1997).

10. *U.S. Term Limits Inc. v. Thorton,* 514 U.S. 779 (1995), a 5:4 decision holding that no additional qualifications for constitutional offices could be legislated adding to the constitutional qualifications for federal legislators and officers. See also Moncrief, Thomson, Haddon, & Hoyer, *For Whom the Bell Tolls: Term Limits and State Legislatures,* 17 LEGIS. STUDIES. Q. 37 (1992); Alan Rosenthal, THE DECLINE OF REPRESENTATIVE DEMOCRACY 75 (1998) (noting that as of 1997, 19 states had term limits in effect); Gerald Benjamin & Michael J. Malbin, eds., LIMITING LEGISLATIVE TERMS (1992).

11. *See*, for example, *Shaw v. Reno*, 509 U.S. 630 (1993).

12. Samuel Issacharoff, *Gerrymandering and Political Cartels,* 116 HARV. L. REV. 593 (2003).

13. 531 U.S. 98 (2000). *See,* for example, Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy,* 102 COLUM. L. REV. 237 (2002). James A. Gardner, *The Regulatory Role of State Constitu-*

tional Structural Constraints in Presidential Elections, 29 FLA. ST. U.L. REV. 625 (2001); Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore,* 29 FLA. ST. U.L. REV. 661 (2001).

14. Bipartisan Campaign Reform Act of 2002 (BCRA) (Campaign Finance Reform Act) (McCain-Feingold Campaign Finance Reform Act) (Pub. L. 107–155, Mar. 27, 2002, 116 Stat. 81), 2 U.S.C. 441i et seq.

15. For example, Erwin Chermerinsky, *Preserving an Independent Judiciary*: *The Need for Contribution and Expenditure Limits in Judicial Elections,* 74 CHICAGO KENT L. REV. 133 (1998); *Selection of Judges Symposium,* 33 U. TOLEDO L. REV. 287 (2002). The issue has also achieved mention in the daily press raising also the issue of the appropriateness of judicial electioneering in gag rules in judicial elections, *New York Times,* March 20, 2002 at p. A-14. *See also* Mark Andrew Grannis, Note, *Safeguarding the Litigant's Constitutional Right to a Free and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers,* 86 MICH. L. REV. 382 (1987–1988).

16. 410 U.S. 113 (1973).

17. *Maher v. Roe,* 432 U.S. 464 (1977); *Harris v. McRae,* 448 U.S. 297 (1980) (Justices Brennan and Stevens dissented because the decision left poor women subject to discrimination in the distribution of medical benefits).

18. *Hodgson v. Minnesota,* 648 F. Supp. 756, aff'd 827 F.2d 1191–1202, *see* editor's note in 827 F.2d 1192 (1987); *Belloti v. Baird,* 428 U.S. 106 (1976); *City of Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983). *See also* Frank P. Grad, THE PUBLIC HEALTH LAW MANUAL, 48–49 (2d. ed. 1990).

19. For example, *In re T.W.*, 551 So.2d 1186 (Fla.1989).

20. *See*, for example, Robert F. Williams, *Old Constitutions and New Issues: National Lessons from Vermont's State Constitutional Case on Marriage of Same-Sex Couples,* 43 B.C.L. REV. 73 (2001).

21. William T. Pound, *The Fiscal State of the States, New York Times,* January 14, 2002, Op Ed page A-15.

22. Thomas E. Cronin, DIRECT DEMOCRACY (1989); David B. Magleby, DIRECT LEGISLATION: VOTING ON ALL OF PROPOSITIONS IN THE UNITED STATES (1984).

23. *Alden v. Maine,* 527 U.S. 706 (1999); *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Bd.,* 527 U.S. 666 (1999); *Seminole Indian Tribe of Florida v. Florida,* 517 U.S. 44 (1996).

24. Bebout, *The Central Issue, Constitutional Revision—What For?* SALIENT ISSUES OF CONSTITUTIONAL REVISION 165–72 (J. Wheeler, Jr., ed. 1961). Many efforts of constitutional revision did, in fact, begin with such a review of the operations of state government. *See*, for example, MARYLAND CONSTITUTIONAL CONVENTION COMMISSION, REPORT TO THE PEOPLE OF MARYLAND (1967), which relates the operation of government to the constitutional proposals and recommendations to the convention. *See also* EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: THE FINAL REPORT OF THE TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION (1995);

DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK (Gerald Benjamin and Henrik N. Dullea, eds., 1997); CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING GOVERNMENT MORE EFFECTIVE AND RESPONSIVE (Bruce E. Cain and Roger G. Noll, eds., 1995).

25. Daniel J. Elazar, AMERICAN FEDERALISM: A VIEW FROM THE STATES 11–22 (1966).

26. *See*, for example, MODEL STATE CONSTITUTION vii–viii, providing some alternative versions that may be appropriate for different settings and localities.

27. V. O'Rourke & D. Campbell, CONSTITUTION-MAKING IN A DEMOCRACY 198–201 (1943) suggests that this is precisely the use made of the distinction at the 1938 New York Convention.

28. Munro, *An Ideal State Constitution, supra* note 1, at 5.

29. *See*, for example, R. Dishman, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 12 (National Municipal League 1960). *See also,* Little, *supra* note 1.

30. "A constitution is a body of *fundamental* law. It is established for the purpose of providing a set of governmental machinery, on the one hand, and of protecting the citizen from an unfair or improper use of governmental authority, on the other. When we say that the provisions of a constitution are fundamental, we imply that they are relatively more permanent, more stable, and less subject to the need for frequent change, than are the provisions of statutory law." Graves, *What Should a Constitution Contain?* 2 NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947 at 1329 (1951).

31. Address by Oren E. Long, Secretary of Hawaii, in 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 1–2 (1960).

32. 1 CONSTITUTIONAL STUDIES 40–42 (Public Administration Service, 1955).

33. Remarks by Dr. Pollock, 5 JOURNAL OF THE CONSTITUTIONAL CONVENTION 33 (1961):

> Speaking now on the proper attributes of a good state Constitution, all of us agree that a Constitution should be as brief and concise as possible, logically arrange *[sic]* and readable. It should deal only with fundamentals. Obviously, it is a good question as to what is fundamental. But in general I think it is proper to repeat that we should be more concerned with ends rather than means. We should only include what is essential. Unnecessary statutory detail is the curse of most state Constitutions.

34. *But see* Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context,* 50 FLA. L. REV 215, 228–229 (1998) (Opening Speech to 1997–98 Florida Constitution Revision Commission).

35. *See* chapter 4, "Some Implications of State Constitutional Amendment for the Drafter."

36. 1 T. COOLEY, CONSTITUTIONAL LIMITATIONS 91–93 (8th ed. 1927).

37. Ibid. at 91.

38. Graves, supra note 30, at 1330–34.

39. Landers, *Taxation and Finance,* in STATE CONSTITUTIONAL REVISION 225 (W. Graves, ed. 1960); Anderson, *Constitutional Aspects of Revenue and Taxation in Texas,* 35 TEXAS L. REV. 1011 (1957). All of these topics are treated in detail in Volume III, a companion to this volume. *See* note 63, *infra.*

40. G. Alan Tarr, ed, CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS (1996); G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 57–58 (1998); Ian D. Burman, LOBBYING IN THE ILLINOIS CONSTITUTIONAL CONVENTION (1973).

41. *See* T. Allen, Jr. & C. Ransone, Jr., CONSTITUTIONAL REVISION IN THEORY AND PRACTICE 73–76, 128–30 (1962); R. Friedman, THE MICHIGAN CONSTITUTIONAL CONVENTION AND ADMINISTRATIVE ORGANIZATION 30–53 (1963); V. O'Rourke & D. Campbell, *supra* note 27, at 151–91; A. Sturm, CONSTITUTION-MAKING IN MICHIGAN, 1961–1962, at 103–27 (1963); Elmer E. Cornwell, Jr., Jay S. Goodman & Wayne R. Swanson, STATE CONSTITUTIONAL CONVENTIONS; THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 80–83 (1975).

42. Some such factors were operative, for instance, in New Jersey, in the inclusion of a provision prohibiting all gambling unless "the specific kind, restrictions and control thereof have been heretofore submitted to, and authorized by a majority of the votes cast by, the people at a special election." N.J. CONST. Art. IV, § VIII, ¶ 2. The provision implicitly permitted pari-mutual racetrack betting and offered a chance to legalize "Bingo." The gambling issue, which in New Jersey has its economic roots in the geographic location of New Jersey between New York and Philadelphia, and in the resort industry of the state, received more debate on the floor of the convention than any other single provision, and failure to resolve the problem in the opinion of one observer, might have jeopardized the entire revision effort. Baisden, CHARTER FOR NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947 at 25–39 (1952). *See also* Richard C. Connors, THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY: 1940–1947 at 152–55, 170–72 (1970).

43. *See,* for example, ALASKA CONST. Art. XII, § 7; HAWAII CONST. Art. XVI, § 2; N.Y. CONST. Art. V, § 7.

44. *See,* for example, TEX. CONST. Art. V, § 18 (Justices of the Peace); ALA. CONST. § 112 (Sheriff).

45. *See,* for example, McMurray, *Some Tendencies in Constitution Making,* 2 CALIF. L. REV. 203, 209–14 (1914); *see also* Eaton, *Recent State Constitutions,* 6 HARV. L. REV. 53, 109–17 (1892); "One is tempted to inquire whether [the] convention expected the State Legislature to consist of fools and knaves." Ibid. at 117.

46. *See* chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

47. *See* Bruce Adams, *A Model Reapportionment Process: The Continuing Quest for "Fair and Effective Representation,"* 14 HARV. J. LEGIS. 825 (1977); Jeffrey C. Rubin, Note, *The Case for Redistricting Commissions,* 75 TEX. L. REV. 837 (1997).

48. ALASKA CONST. Art. VIII.

49. HAWAII CONST. Art. XII. *See* Hawaii Statehood Act § 4, 73 Stat. 5 (1959), *as amended,* 74 Stat. 422, 423 (1960) (requiring adoption of this provision as a condition to the admission of Hawaii as a state).

50. LOUISIANA STATE LAW INSTITUTE, PROJECT OF A CONSTITUTION FOR THE STATE OF LOUISIANA WITH NOTES AND STUDIES 599–624 (1954).

51. *See*, for example, VA. CONST. Art. IX. *See generally,* Robert L. Stone, *Article Nine of the Constitution of the State of Oklahoma of 1907 and Comparative Constitutional Law,* 17 OKLA. CITY U.L. REV. 89 (1992); Deborah Scott Engelby, *The Corporation Commission: Preserving Its Independence,* 20 ARIZ. ST. L.J. 241 (1988).

52. *See,* for example, OKLA. CONST. Art XIV.

53. *See,* for example, ARK. CONST. Art. 17.

54. *See,* for example, N.Y. CONST. Art. XV.

55. F. Heady, STATE CONSTITUTIONS: THE STRUCTURE OF ADMINISTRATION 8–9, 12–13 (1961); B. Rich, STATE CONSTITUTIONS: THE GOVERNOR 12–16 (1960); Rich, *The Governor as Administrative Head,* in SALIENT ISSUES OF CONSTITUTIONAL REVISION 98–114 (J. Wheeler, ed. 1961).

56. *See* chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

57. *Ives v. South Buffalo Ry.,* 201 N.Y. 271, 94 N.E. 431 (1911). *See* INTER-LAW SCHOOL COMMITTEE, REPORT ON THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION, Staff Report No. 1, Special Legislative Committee on the Revision and Simplification of the Constitution, N.Y. leg. Doc. no. 57, at 52–58 (1958) [hereinafter cited as INTER-LAW SCHOOL COMMITTEE REPORT], discussing the New York workers' compensation amendment, N.Y. CONST. Art. I, § 18.

58. *See,* for example, N.Y. CONST. Art. 1, § 16 (prohibiting abrogation or limitation of the wrongful death action). *See* Robert F. Williams, *Foreword: Tort Reform and State Constitutions,* 32 RUTGERS L. J. 897, 898–99 (2001).

59. *Baehr v. Lewin,* 852 P. 2d 44 (Haw. 1993). A number of states amended their constitutions in November, 2004 to *prevent* such judicial interpretations.

60. Robert F. Williams, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 11, 19, 72–74 (Rev. Ed. 1997).

61. Puerto Rico, Hawaii, and Alaska succeeded for the most part in avoiding the kind of specific, detailed limitations on state or local taxation and borrowing that have interfered with the development of flexible policies in many states. Bebout, *Recent Constitution Writing,* 35 TEXAS L. REV. 1071, 1085 (1957).

62. Consider N.Y. CONST. Art. I, § 9, which prohibits all gambling except parimutual betting on horseraces, and which extends local option on Bingo games run by certain enumerated nonprofit organizations. The provision—which is part of the bill of rights and shares the section with the right to petition and assembly—had its origin in the constitution of 1846, was amended by the constitution of 1894, was retained in the revision of

1938, and had the local option on Bingo added by amendment in 1957. Peter J. Galie, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 53–56 (1991).

63. *See* Richard Briffault, *State and Local Finance,* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME III: THE AGENDA OF STATE CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams, eds., 2006).

64. Ibid.

65. *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat.) 518 (1819).

66. The *Dartmouth College* case held that a corporate charter was a contact, and that in consequence, the state of New Hampshire could not modify it, because to do so would impair the obligation of a contract. Numerous state constitutions thereafter included special provisions reserving the state's power to revoke corporate charters and to modify or repeal general corporation laws. *See*, for example, MD. CONST. Art. III, § 3.48, N.C. CONST. Art. VIII, § 1.

67. William F. Swindler, *State Constitutions for the 20th Century,* 50 NEB. L. REV. 577, 597–98 (1971).

68. A. E. Dick Howard, *Constitutional Revision: Virginia and the Nation,* 9 U. RICHMOND L. REV. 1, 24 (1974).

69. INTER-LAW SCHOOL COMMITTEE REPORT, *supra* note 57, at 6. An earlier commentator had made the interesting point that restrictions intended to operate against abuses of executive power have ended up as restrictions on the legislature. McMurray, *supra* note 45, at 219.

70. INTER-LAW SCHOOL COMMITTEE REPORT, *supra* note 57, at 8. *See also* R. Dishman, *supra* note 29, at 23; J. Fordham, THE STATE LEGISLATIVE INSTITUTION 26 (1959):

> The only conclusion warranted by the realities of the state constitutional order is that the legislatures are hamstrung by numerous limitations on their powers. What we have, in short, is a serious compromise of the philosophy of representative government. There is little prospect of lifting the state legislative institution to the level of quality and performance that we ought to expect of it until we give it man-sized authority. It is responsibility that builds character in individuals and the same can be said of governmental institutions. Responsibility bespeaks commensurate authority.

71. *See* Michael E. Libonati, *Local Government,* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 63.

72. *See,* for example, MICH. CONST. Art. XI, § 5.

73. *See,* for example, N.Y. CONST. Art. V, § 6; N.J. CONST. Art. VII, § I, ¶ 2; OHIO CONST. Art. XV, § 10. In *Matter of Police Sergeant*, 819 A. 2d. 1173 (N.J. 2003) the New Jersey Supreme Court ruled that administering a makeup exam identical to the original exam, where evidence indicated that the questions had been disseminated, violated this state constitutional provision.

74. *See,* for example, ALA. CONST. §112.

75. Many of our present state constitutions were written during the two or three generations when the strength of Jacksonian democracy was at its highest. This was the period when the standard prescription for the ills of democracy was more democracy. It was felt that the way to assure responsiveness to popular wishes was to provide for popular elections. Some of the most important of the early officials of state government, such as the Attorney-General, the Secretary of State, and the Treasurer were subjected to popular election. Then as some of the other functions of state government increased in importance, the heads of the agencies administering these functions were also made elective.

76. Pound, *Organization of Courts,* in 2 NEW JERSEY, CONSTITUTIONAL CONVENTION OF 1947 at 1583, 1588–91 (1951); Romani, *The Courts,* in SALIENT ISSUES OF CONSTITUTIONAL REVISION 115, 117–19 (J. Wheeler, Jr., ed. 1961). *See* G. Alan Tarr, *The Judicial Branch,* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 63.

77. *See* Briffault, *supra* note 63.

78. Chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

79. 185 P.2d 919 (Okla. 1947).

80. *Jefferson County ex rel. Grauman v. Fiscal Court,* 117 S.W.2d 918 (Ky. 1938).

81. See INTER-LAW SCHOOL COMMITTEE REPORT, *supra* note 57, at 22–24.

82. *See*, for example, People *ex rel. Walsh v. Board of Commissioners,* 74 N.E.2d 503 (Ill. 1947), holding invalid a law authorizing county commissioners to appoint a staff of janitors for the court building, since it interfered with the sheriff's common law powers as custodian of the premises. *Accord,* State *ex rel. Johnston v. Melton,* 73 P.2d 1334 (Wash. 1937).

83. *See* chapter 3, "Unique Issues in Drafting State Constitutions."

84. T. Allen, Jr. & C. Ransone, Jr., *supra* note 41, at 135.

85. *Smith v. Allwright,* 32 U.S. 649, 669 (1944) (Roberts, J., dissenting opinion).

86. *Harbert v. County Court,* 39 S.E.2d 177 (W. Va. 1946).

87. The phrase was coined by John Bebout, formerly Executive Director of the New York Temporary Commission on the Revision and Simplification of the Constitution. See chapter 4, "Some Implications of State Constitutional Amendment for the Drafter."

88. *See* chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions" (where it is desired it ought to be made explicit).

99. Ibid.

90. MICH. CONST. Art. II, §8. *See also* N.J. CONST. Art. VIII, § II, ¶ 5 (decisions of Council on Unfunded Local Mandates not judicially reviewable).

91. *Fundamental Constitutions of Carolina,* in SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY, 1606–1775, at 149, 168 (W. MacDonald, ed. 1899).

NOTES TO CHAPTER 3

1. For a very good recent contribution, *see*, Jack Stark, *A Practical Guide to Drafting State Constitutional Provisions,* 73 TEMPLE L. REV. 1061 (2000).

2. Legislative Counsel Committee (Oregon), BILL DRAFTING MANUAL §17.1 (2002). <http://www.lc.state.or.us/draftman.htm>.

3. Dession & Lasswell, *Public Order Under Law: The Role of the Advisor-Draftsman in the Formation of Code or Constitution,* 65 YALE L.J. 174 (1955). *See also,* Arnold B. Kanter and Wayne W. Whalen, *Thoughts on Constitutional Drafting,* 9 HARV. J. LEGIS. 31 (1971). For an important assessment of the role of policy research and drafting by preparatory commissions, *see* Sol Neil Corbin and Louis Lauer, CONSTITUTIONAL CHANGE: A CRITIQUE OF DULLEA'S "CHARTER REVISION IN THE EMPIRE STATE" (2000).

4. H. W. Jones, *Notes for a Legislative Research Check List,* 36 A.B.A.J. 685 (1950); Reed Dickerson, THE FUNDAMENTALS OF LEGAL DRAFTING 71–72 (2d ed. 1986).

5. Most of what is said applies, with modifications so as to require no explanation, when the roles of drafter and policy maker are combined, when as sometimes occurs, a draft reflects the drafter's own policy choice. This is the case, for example, when a convention delegate undertakes to draw an amendment he or she wishes to propose. By and large, however, it is probably better if delegates utilize professional drafting services when these are available.

6. A companion volume provides an up-to-date review of issues in the various areas of state constitutional law. *See* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME III: THE AGENDA OF STATE CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams, eds., 2006). The specific areas of state constitutional law covered in earlier work on state constitutions is still useful today. *See* SALIENT ISSUES OF CONSTITUTIONAL REVISION 165–72 (J. Wheeler, Jr., ed. 1961); W. Brooke Graves, ed., MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION 86 (1960); Robert B. Dishman, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT (1960).

7. Subsection III d, "Study of consistency and interrelation with higher law."

8. *See* Ernest C. Reock, Jr. UNFINISHED BUSINESS: THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1966 (2003) (covering constitutional convention on reapportionment).

9. *See* chapter 2, "The State Constitution: Form and Function."

10. Frank P. Grad, Foreword, to Barbara Faith Sachs, *Fundamental Liberties and Rights: A 50 State Index* at v., New York: Legislative Drafting Research Fund, Columbia University (Oceana Publications, 1980).

11. INDEX DIGEST OF STATE CONSTITUTIONS (Legislative Drafting Research Fund of Columbia University, New York: Oceana Publications, 2d ed., 1959). This remains, after a number of years, a useful but limited source. It was updated through 1964, but a number of provisions have remained unchanged. Its references must be checked against the current state constitutions.

12. Legislative Drafting Research Fund of Columbia University (Abrahamson ed.), CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATE (1962).

13. There are various online sources for the state constitutions. *See* <http://www.constitution.org/cons/usstcons.htm>, <http://www.findlaw.com/11stategov/indexconst.html>, <http://www.paconstitution.duq.edu>, <http://www.camlaw.rutgers.edu/statecon/>.

14. National Municipal League, MODEL STATE CONSTITUTION (6th ed., 1963) [hereinafter cited as MODEL STATE CONSTITUTION]. A number of the lessons reflected in this volume were gained by Frank P. Grad in his work on the sixth edition of the Model State Constitution. The history and influence of the Model State Constitution are discussed in G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS, 137–38, 152–57 (1998).

15. *See,* for example, MARYLAND CONSTITUTIONAL CONVENTION COMMISSION, REPORT TO THE PEOPLE OF MARYLAND (1967) which relates the operation of government to the constitutional proposals and recommendations to the convention. *See also* CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION (Victoria Ranney, ed., 1970); EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: THE FINAL REPORT OF THE TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION (1995); DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK (Gerald Benjamin and Henrik N. Dullea, eds., 1997); CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING GOVERNMENT MORE EFFECTIVE AND RESPONSIVE (Bruce E. Cain and Roger G. Noll, eds., 1995).

16. *See,* for example, ALASKA CONST. Art. IX, § 7. *See also* Stewart E. Stark & Elizabeth Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations,* 1991 WISC. L. REV. 1301 (1991).

17. West Virginia *ex rel. Dyer v. Sims,* 341 U.S. 22 (1950). *See generally* Frank P. Grad, *Federal-State Compact: A New Experiment in Cooperative Federalism,* 63 COLUM. L. REV. 825 (1963); Marian E. Ridgeway, INTERSTATE COMPACTS: A QUESTION OF FEDERALISM (1971). Frederick L. Zimmerman & Mitchell Wendell, *The Interstate Compact and Dyer v. Sims,* 51 COLUM. L. REV. 937 (1951).

18. H. W. Jones, *supra* note 4 at 686.

19. *See,* for example, section 182 of the Alabama Constitution, concerning limitations on voting by those convicted of felonies involving "moral turpitude," declared unconstitutional in *Hunter v. Underwood,* 471 U.S. 222 (1985). Section 182 originated in the 1901 Alabama Constitution.

20. Chapter 4, "Some Implications of State Constitutional Amendment for the Drafter."

21. *See* Martin A. Schwartz, *Claims for Damages for Violations of State Constitutional Rights,* 14 TOURO L. REV. 657 (1998); Gail Donoghue and Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York,* 42 N.Y.L. SCH. L. REV. 447 (1998).

22. *See,* for example, GA. CONST. Art. II, § II; N.C. CONST. Art. V, § 8; N.M. CONST. Art. VIII, § 4.

23. N.Y. CONST. Art. I, § 6.

24. Chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

25. MODEL STATE CONSTITUTION § 4.14.

26. N.J. Stat. Ann. 1:7-1 et seq.

27. Chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

28. *See* chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

29. *See,* for example, TEXAS CONST. Art. III, § 28; OREGON CONST. Art. IV, § 6 (3).

30. ALASKA CONST. Art. III, § 18, HAWAII CONST. Art. IV, § 5.

31. *See,* for example, ALASKA CONST. Art. VI, § 11; ARKANSAS CONST. Art. VIII, §§ 1, 4, Amendment 45 (1, 4); HAWAII CONST. Art. III, § 4; N.Y. CONST. Art III, §§ 4, 5.

32. Dissenting opinion of Frankfurter, J. in *National Mut. Ins. Co. v. Tidewater Transfer Co., Inc.,* 337 U.S. 582, 646–47 (1948). *See also Village of Euclid v. Ambler Realty Corp.,* 272 U.S. 365, 386–87 (1926) (due process applied to ever-changing modern circumstances).

33. Curtis, *A Better Theory of Legal Interpretation,* 3 VAND. L. REV. 407, 425 (1950).

34. Inter-Law School Committee, REPORT ON THE PROBLEM OF SIMPLIFICATION OF THE CONSTITUTION, Staff Report No. 1, Special Legislative Committee on the Revision and Simplification of the Constitution, N.Y. Leg. Doc. No. 57, 16–24 (1958).

35. *See,* for example, ALASKA CONST. Art. VI, § 6; MONT. CONST. Art. V, §14.

36. Chapter 2, "The State Constitution: Form and Function."

37. *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407 (1819).

38. The New Jersey Supreme Court made the distinction between the "great ordinances" and the "less exalted" provisions of state constitutions. *Vreeland v. Byrne,* 370 A. 2d 825, 831–32 (N.J. 1977). The court indicated that these latter types of provisions require "literal adherence to the words of the clause." ibid. *See* James Gray Pope, *An Approach to State Constitutional Interpretation,* 24 RUTGERS L.J. 985 (1993); Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents,* 27 OKLA. CITY U.L. REV. 189, 212–13 (2002).

39. Chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

40. Chapter 2, "The State Constitution: Form and Function."

41. *See,* for example, Dickerson, *supra* note 4; Legislative Counsel Committee, *supra* note 2; Lawrence E. Filson, THE LEGISLATIVE DRAFTER'S DESK REFERENCE (1992); Jack Stark, THE ART OF THE STATUTE (1996).

42. For an analysis of how this would change the Federal Constitution, *See* Edward Hartnett, *A "Uniform and Entire" Constitution; or, What if Madison Had Won?* 15 CONST. COMM. 251 (1998).

43. Dickerson, *supra* note 4, at 126.

44. Ibid., at 186.

45. 1 COOLEY, CONSTITUTIONAL LIMITATIONS 291, n. 2 (8th ed., 1927).

46. *ABC Bonding Co. v. Montgomery County Sur. Comm,* 372 So. 2d 4, 6–7 (Ala. 1979) (Torbert, C. J., concurring).

47. State *ex rel. Peterson v. Hoppe,* 260 N.W. 215 (1935).

48. *See* State *ex rel. Garland v. Guillory,* 166 So. 94, 101–102 (1935); *John v. City of Dublin,* 46 S.W. 3d 401, 406–08 (Tex. App. 2001).

49. State *ex rel. Peterson v. Hoppe,* 260 N.W. 215 (1935).

50. *City of Nevada v. Slemmons,* 59 N.W. 2d 793 (1953); *City of Alamo Heights v. Gerety,* 264 S.W. 2d 778 (Tex. 1954).

51. Dickerson, note 4 *supra,* at 64–65.

NOTES TO CHAPTER 4

1. For a review of the methods of amendment and revision, *see generally,* Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change,* 75 CALIF. L. REV. 1473 (1987); Michael Colantuono, *Pathfinder: Methods of State Constitutional Revision,* 7 LEGAL REF. SERV. Q. 45 (1987).

2. For the latest, somewhat conflicting, views, *see* Donald S. Lutz, "Patterns in the Amending of American State Constitutions," in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 24 (G. Alan Tarr, ed., 1996); Christopher W. Hammond, *State Constitutional Reform: Is It Necessary?* 64 ALBANY L. REV. 1327 (2001); *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Orientated Constitutions,* 93 AM. POL. SCI. REV. 837 (1999). *See also* G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 30–39 (1998).

3. Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement,* 17 PUBLIUS: THE JOURNAL OF FEDERALISM 91, 91–95 (Winter, 1987); Michael E. Libonati, *The Legislative Branch,* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME III: THE AGENDA OF STATE CONSTUTITIONAL REFORM (G. Alan Tarr & Robert F. Williams, eds., 2006).

4. The effect of the constitution on the power of a state to construct airports may be taken as an example: in the Wyoming constitution, drafted in 1890, there is a provi-

sion forbidding the state from engaging in any work of internal improvement unless authorized by a two-thirds vote of the people (Art. XVI, § 6). Thus, to permit the construction of airports without referring each project to the electorate, an amendment creating an exception to the prohibition was adopted in 1948 (Art. XVI, § 11). In Vermont, on the other hand, airports could be constructed with state funds under the provision granting the legislature "all other power necessary for the Legislature of a free and sovereign State" (Ch. II, § 6).

5. MASS. CONST. amendments Art. IV.

6. Ibid., Art. LVII

7. Ibid., Art. LXIX

8. David A. Myers, *Open Space Taxation and State Constitutions*, 33 VAND. L. REV. 837 (1980).

9. Ibid., at 838.

10. Comment, *Wisconsin's Internal Improvements Prohibition: Obsolete in Modern Times?* 1961 WIS. L. REV. 294 (1961). For a more recent account, *see* Jack Stark, *A History of the Internal Improvements Section of the Wisconsin Constitution,* 1998 WIS. L. REV. 829 (1998).

11. Robert F. Williams, *State Constitutional Law Processes,* 24 WM. & MARY L. REV. 169, 201–02 (1983).

12. *See,* for example, S.C. CONST. Art. X, § 5, limiting the amount of bonded indebtedness that may be incurred by political subdivisions of the state. The section has been amended on a number of occasions with most of the amendments naming a particular subdivision to which the section shall not apply.

13. According to McMurray, *Some Tendencies in Constitution Making,* 2 CALIF. L. REV. 202, 214 (1914), under the power granted the legislature by this section—namely, to confer additional powers on the commission, even though they conflict with other provisions of the constitution—it might confer upon the commission powers wholly unrelated to its function, such as judicial powers, with the only recourse against an outrageous delegation being the United States Constitution. Ibid. at 214–15, n. 37. When Article XII was revised, eliminating Section 22, Section 9 stated that the revised article "restated" the earlier provisions and made "no substantive change." Joseph R. Grodin, Calvin R. Massey, Richard B. Cunningham, THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 203, 210 (1993).

14. Since, often, the most active participants in a constitutional convention are the same people who are instrumental in the legislative process, the role of this factor is augmented. Elmer E. Cornwell, Jr. Jay S. Goodman and Wayne R. Swanson, STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES 67–69, 73 (1975).

15. T. Allen, Jr. and C. Ransone, Jr., CONSTITUTIONAL REVISION IN THEORY AND PRACTICE 116 (1962).

16. Owen, *The Need for Constitutional Revision in Louisiana,* 8 LA. L. REV. 1, 47–48 (1947).

17. Ibid. at 48.

18. Opinion of the Justices, 81 So. 2d 881 (1955) (holding that the provision forbidding amendment of the constitutionally prescribed basis for representation may be repealed by a legislatively proposed amendment rather than what the dissenters argued was the exclusive method, a constitutional convention).

19. *See* Allen, Jr. & Ransone, Jr., *supra* note 15, at 73–76, 120–26.

20. Chapter 2, "The State Constitution: Form and Function."

21. *See*, for example, N.Y. CONST. art. XIV, § 1, mandating that the state forest preserve "be forever kept as wild forest lands," and followed by a list of exceptions. Typical of the amendments is one passed in 1941 allowing construction of ski trails "thirty to eighty feet wide on the north, east and northwest slopes of Whiteface Mountain," and another passed in 1947 permitting the construction of a ski trail "thirty to eighty feet wide, together with appurtenances thereto, on the slopes of Belleayre Mountain." Thus, for any new ski trails to be constructed, or for those to be widened, further amendment will be necessary. The situation could have been simplified by one amendment permitting the legislature to provide for the construction of ski trails.

This type of clause, like many environment and natural resource provisions, may seem to go beyond core state constitutional content, but is designed to limit actions of the legislature for the protection of future generations. *See* Barton H. Thompson, Jr., *The Environment and Natural Resources*, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME 3, *supra* note 3.

22. Chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

23. Chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

24. Chapter 5, "Judicial Doctrines of Interpretation Affecting Drafters of State Constitutional Provisions."

25. *See,* for example, *Ives v. South Buffalo Ry. Co.* 201 N.Y. 271, 94 N.E. 431 (1911) invalidating the New York State Workmen's Compensation Law of 1911.

26. *See* Michael E. Libonati, *Local Government,* STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, VOLUME III: THE AGENDA OF STATE CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams, eds., 2006) for a discussion of varying judicial attitudes on the constitutionality of legislatively granted home-rule powers. For other examples of judicial conservatism see Walter Dodd, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 238–40 (1910).

27. Ibid. at 240.

28. William F. Swindler, *State Constitutions for the 20th Century,* 50 NEB. L. REV. 577, 593 (1971).

29. Chapter 2, "The State Constitution: Form and Function."

30. Chapter 3, "Unique Issues in Drafting State Constitutions."

31. Delaware is the only state where the electorate does not vote on proposed amendments. The legislature proposes amendments by a two-thirds vote, and in the next session following an election it may adopt them by another two-thirds vote.

32. For a thorough study of state constitutional amendments proposed by the New York State Legislature, *see* Gerald Benjamin and Melissa Cusa, *Constitutional Amendment Through the Legislature in New York,* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 47 (G. Alan Tarr, ed., 1996). New York's Constitution, despite its relative difficulty of amendment, was amended 207 times between 1895 and 1991. Ibid. at 53.

33. Ibid. at 54.

34. N.J. CONST. Art. IX, ¶ 1.

35. *See generally,* Laughlin, *A Study in Constitutional Rigidity, I,* 10 U. CHI. L. REV. 143 (1943); Sears & Laughlin, *A Study in Constitutional Rigidity, II,* 11 U. CHI. L. REV. 374 (1944); for earlier material see Dodd, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 133–36, 185–201 (1910).

36. Sears & Laughlin, *supra* note 35, *at 422–23.*

37. *See,* for example, KY. CONST. § 256; OKLA. CONST. Art XXIV, § 1. *Swett v. Bradbury,* 43 P.3d 1094 (Oreg. 2002), *League of Oregon Cities v. State,* 56 P.3d 892 (Oreg. 2002).

38. ARK. CONST. Art. XIX, § 22; N. MEX. CONST. Art. XIX, § 1; PA. CONST. Art. 11, § 1.

39. Although many states have adopted the rule that an amendment cannot be challenged after adoption on procedural grounds, violation of the single subject and separate vote rule is considered a substantive defect and thus may be raised at any time. *Moore v. Brown,* 165 S.W. 2d 657 (1942); *Bergdoll v. Kane,* 731 A. 2d 1261 (Pa. 1999).

40. *Kerby v. Luhrs,* 36 P.2d 549 (1934).

41. *Blair v. Cayetano,* 836 P.2d 1066 (Haw. 1992).

42. *See Carter v. Burson,* 198 S.E. 2d 151, 156 (Ga. 1973).

43. *State v. Manley,* 441 So. 2d 864 (Ala. 1983). New Mexico's state constitution now specifically recognizes the role that an appointed commission can play in constitutional revision. N. MEX. CONST. Art. XIX, § 1.

44. OKLA. CONST. Art. XXIV, § 1. Despite the fact that the Oklahoma provision for *legislatively proposed* amendments was liberalized, the single-subject requirement is still strictly enforced for proposals for constitutional change that emanate from the initiative process. In *In re Initiative Petition No. 344,* 797 P.2d 326 (Okla. 1990), and *In re Initiative Petition No. 342,* 797 P.2d 331 (Okla. 1990), the Oklahoma Supreme Court struck from the ballot initiatives that would have revised articles of the Oklahoma Constitution. The court based its decisions on the single-subject rule. *See* Robert H. Henry, *The Oklahoma Constitutional Revision Commission: A Call to Arms or the Sounding of Retreat?,* 17 OKLA. CITY U. L. REV. 177 (1992).

45. *Lee v. State,* 367 P. 2d 861 (Utah 1962) (invalidating as contravening the single subject rule, an amendment—which had been adopted unchallenged in several states—authorizing the legislature to provide for the continuity of state government in the event of enemy attack, and giving it the power to ignore constitutional provisions where necessary to achieve this end during such an attack. Because the amendment, by necessity, affected all branches of state government, it was held to deal with more than a single subject).

46. *Adams v. Gunter,* 238 So. 2d 824 (Fla. 1970); *Raven v. Deukmejian,* 801 P. 2d 1077 (Cal. 1990).

47. *Amador Valley School District v. State Bd. of Equalization,* 583 P. 2d 1281 (Cal. 1978). *See* George LeFloe & Barney Allison, *The Legal Aspects of Proposition 13: The Amador Valley Case,* 53 S. CAL. L. REV. 173 (1979).

48. *Evans v. Firestone,* 457 So. 2d 1351 (Fla. 1984).

49. *State v. Gonzales,* 645 N.W. 2d 264 (Wis. 2002).

NOTES TO CHAPTER 5

1. *Baker v. Miller,* 636 N.E. 2d 551, 554 (Ill. 1994); *Fish Market Nominee Corporation v. G.A.A., Inc.* 650 A.2d 705, 708 (Md. 1994); *State ex rel. Sanstead v. Freed,* 251 N.W. 2d 898, 908 (N.D. 1977); *Louisiana Dept. of Agriculture and Forestry v. Sumrall,* 728 So. 2d 1254, 1258 (La. 1999); *Nevada Mining Ass'n. v. Erdoes,* 26 P.3d 753, 757 (Nev. 2001); State *ex rel. Harvey v. Second Judicial District Court,* 32 P.3d 1263, 1269 (Nev. 2001).

2. *Thompson v. Committee on Legis. Research,* 932 S.W. 2d 392, 395 n. 4 (Mo. 1996).

3. Hans A. Linde, *E Pluribus-Constitutional Theory and State Courts,* 18 GA. L. REV. 165, 197 (1984) ("State constitutions have . . . drafters, yes, but no 'Founders'; no Federalist Papers").

4. The New Jersey Supreme Court put it this way:

> It is a familiar rule of construction that where phraseology is precise and unambiguous there is no room for judicial interpretation or for resort to extrinsic materials. The language speaks for itself, and where found in our State constitution the language is the *voice of the people.*

Vreeland v. Byrne, 370 A.2d 825, 830 (N.J. 1977) (emphasis added). Delaware is the only state that does not require a popular referendum on proposed state constitutional amendments. *See* Opinion of the Justices, 264 A.2d 342 (Del. 1970).

5. *People v. Mezy,* 451 N.W. 2d 389, 393 (Mich. 1996). *See also* State *ex. rel. Sanstead v. Freed,* 251 N.W. 2d 898, 905 (N.D. 1977); Opinion of the Justices, 673 A.2d 1291, 1297 (Me. 1996).

6. *In re Janklow,* 530 N.W. 2d 367, 370 (S.D. 1995). (In the absence of ambiguity, the language in the construction must be applied as it reads); *Frank v. Barker,* 20 S.W. 3d 293, 296 (Ark. 2000).

For a recognition that language was intended to have a technical meaning, *see* Wayne v. Hathcock, 684 N.W. 2d 765, 779–81, 788–99 (Mich. 2004).

7. *Zaner v. City of Brighton,* 917 P.2d 280, 283 (Colo. 1996). Courts will, on occasion, refer to dictionaries to determine ordinary meaning. For a discussion of whether these dictionaries should be legal or not *see* Price v. State, 622 N.E. 2d 954 (Ind. 1993).

8. *McIntyre v. Wick,* 558 N.W. 2d 347 (S.D. 1996).

9. *Hill v. National Collegiate Athletic Assoc.,* 865 P.2d 633, 642 (Cal. 1994).

10. *Wood v. State Administrative Board,* 238 N.W. 16, 17 (Mich. 1931). ("Neither in the debates in the Constitutional Convention . . . nor in the Address to the People was it suggested"). *See also Straus v. Governor,* 592 N.W. 2d 53, 57, n. 2 (Mich. 1999).

11. *Client Follow-up Co. v. Hynes,* 390 N.E. 2d 847, 854 (Ill. 1979); *Lipscomb v. State*, 753 P.2d 939, 944–46 (Oreg. 1988); *State v. Trump Hotels & Casinos Resorts, Inc.*, 734 A.2d 1160, 1182–86 (N.J. 1999); State ex rel. *Sansted v. Freed,* 251 N.W. 2d 898, 907 (N.D. 1965); in re Advisory Opinion to the Governor, 612 A.2d 1, 11 (R.I. 1992); *Westerman v. Cary,* 892 P.2d 1067, 1073 (Wash. 1995); *but see Kalodimos v. Village of Morton Grove,* 470 N.E. 2d 266, 272 (Ill. 1984) (newspaper coverage unreliable where only from one part of the state).

12. *People v. Tisler,* 469 N.E. 2d 147, 161 (Ill. 1984).

13. *Cincinnati Ins. Co. v. Chapman*, 691 N.E. 2d 374, 381 (Ill. 1998). *See also Monaghan v. School District No. 1,* 315 P.2d 797, 801 (Oreg. 1957).

14. L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record,* 6 FLA. ST. U.L. REV. 567 (1978). Debates on *legislatively* proposed state constitutional amendments would produce the more standard materials of "legislative history." *See generally,* Benjamin, Gerald and Melissa Cusa, *Amending the New York State Constitution Through the Legislature,* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK (eds. Gerald Benjamin and Henrik N. Dullea) 385–88.

15. Ibid. at 569. We are indebted to Alan Tarr for pointing out the major distinctions here from the federal constitutional process. There, the state legislatures selected the delegates, and closed debates took place in Philadelphia under a revision mandate rather than a constitutional replacement mandate. Therefore, at the federal level, there was no interaction between voters and delegates the way there is at the state level.

16. Ibid.

17. Ibid. at 570.

18. Ibid.

19. *SJL of Montana Assoc. v. City of Billings,* 867 P.2d 1084, 1088 (Mont. 1993) (Trieweiler, J., dissenting) (disagreement in majority and dissent over presence of ambiguity).

20. *Sheff v. O'Neill,* 678 A.2d 1267 (Conn. 1996).

21. *State v. Rivers,* 921 P.2d 495, 513 (Wash. 1996), (rejected amendment indicates meaning), *Gryczan v. State,* 942 P.2d 112, 123 (Mont. 1997) (rejected amendment does not indicate meaning).

22. *Trankel v. State Department of Military Affairs,* 938 P.2d 614, 621 (Mont. 1997). *See also Polk v. Edwards,* 626 So. 2d 1128, 1137–38 (La. 1993) (constitutional convention records indicate adoption of earlier judicial interpretations); *People v. Diguida,* 604 N.E. 2d 336, 342 (Ill. 1992).

23. *N.H. Mun. Trust Wkr's Comp. Fund v. Flynn,* 573 A.2d 439, 441 (N.H. 1990); *Straus v. Governor,* 592 N.W. 2d 53, 57, n. 2 (Mich. 1999) (constitutional history relied on by both sides, but "too ambiguous and short-lived").

24. *Matter of Kuhn v. Curran,* 61 N.E. 2d 513 (N.Y. 1945). *See generally* Mary Ann Barnard, *Enabling and Implementing Legislation and State Constitutional Convention Committee Reports,* 6 U. HAW. L. REV. 523 (1984).

25. Ibid. at 517–18.

26. *Commonwealth ex rel. Paulinski v. Isaac,* 397 A.2d 760, 766, *cert. denied,* 422 U.S. 918 (1979).

27. For a discussion of role and function of state constitutional commissions, *see* Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change,* 1 HOFSTRA L. & POL'Y SYMP. 1 (1996).

28. *See,* for example, *Snow v. City of Memphis,* 527 S.W. 2d 55, 61 (Tenn. 1975), *appeal dismissed* 423 U.S. 1083 (1976); *State v. Manley,* 441 So. 2d 864, 885 (Ala. 1983) (Beatty, J., dissenting); *Claudio v. State,* 585 A.2d 1278, 1297 (Del. 1991). The Florida Supreme Court relied on the records of the 1966 Constitutional Revision Commission, located in a "special file in the Supreme Court Library." *Hayek v. Lee County,* 231 So. 2d 214, 216 (Fla. 1970).

29. One of the most striking features of state constitutional politics is the tendency to pursue constitutional change through formal mechanisms of constitutional change, through amendment or replacement of the constitution, rather than through litigation. The contrast with federal constitutional politics, in which amendment is rare and revision unheard of, could hardly be sharper.

G. Alan Tarr, *State Constitutional Politics: An Historical Perspective,* in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 3 (G. Alan Tarr, ed. 1996).

30. *Husebye v. Jaeger,* 534 N.W. 2d 811, 814–15 (N.D. 1995) ("We assume that the people's decision to change the language of the constitutional provision was intended to also change the meaning.") *Hunt v. Hubbert,* 588 So. 2d 848 (Ala. 1991), *Advisory Opinion to the Governor,* 626 So. 2d 684, 687–88 (Fla. 1993); *Calvey v. Daxon,* 997 P.2d 164, 169 (Okla. 2000).

31. *Connally v. State,* 458 S.E. 2d 336, 336–37 (Ga. 1995).

32. G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 203–04 (1998). *See also* L. Harold Levinson, *Interpreting State Constitutions By Resort to the Record,* 6 FLA. ST. U.L. REV. 567, 574 (1978); *Williams v. Wilson,* 972 S.W. 2d 260, 273 (Ky. 1998) (Cooper, J., dissenting); *Michigan United Conservation Clubs v. Secretary of State,* 630 N.W. 2d 297, 309 (2001) (Young, J., concurring), 324 (Weaver, J., dissenting); Suzanne L. Abram, Note, *Problems of Contemporaneous Construction in State Constitutional Interpretation,* 38 BRANDEIS L.J. 613, 624, 636–38 (1999–2000).

33. *Duggan v. Beerman,* 515 N.W. 2d 788, 792 (Neb. 1994), *Copeland v. State,* 490 S.E. 2d 68, 71 (Ga. 1997).

34. *State of Hawaii v. Duk Won Lee,* 925 P.2d 1091, 1094, n. 4 (Haw. 1996); *State v. Miyasaki,* 614 P.2d 915, 922 (Haw. 1980).

35. *Westerman v. Cary,* 892 P.2d 1067, 1074 (Wash. 1995); *State v. Wicklund,* 589 N.W. 2d 793, 799 (Minn. 1999). *See* Abram, *supra* note 32, at 636–41. It is not always easy to tell from which state a provision was copied. Ibid. at 638–39. *See* G. Alan Tarr, *Models and Fashions in State Constitutionalism,* 1998 WISC. L. REV. 729, 734 (1998).

36. *See* G. Alan Tarr, *Understanding State Constitutions,* 65 TEMPLE L. REV. 1169, 1190–91 (1992). *But see* Abram, *supra* note 32, at 639 ("implausible" to ascribe knowledge of judicial interpretations of courts in state from which provision was copied).

37. *State v. Hy Vee Food Stores, Inc.,* 533 N.W. 2d 147 (S.D. 1995).

38. *See* Robert F. Williams, *Comment: On the Importance of a Theory of Legislative Power Under State Constitutions,* 15 Q. L. R. 57, 60 (1995); *State Constitutional Law Processes,* 24 WM. & MARY L. REV. 169, 178–79 (1983).

39. *Caddo-Shreveport Sales and Use Tax Commission v. Office of Motor Vehicles Through the Department of Public Safety and Corrections of the State of Louisiana* 710 So. 2d 776, 779–80 (La. 1998). ("a constitutional limitation on legislative power may be either express or implied").

40. Walter Dodd, *Implied Powers and Implied Limitations in Constitutional Law,* 29 YALE L.J. 137, 160 (1919).

41. Frank P. Grad, *The State Constitution: Its Function and Form for Our Time,* 54 VA. L. REV. 928, 964–65, 966 (1968). *See School Committee of Town of York v. Town of York,* 626 A.2d 935 (Me. 1993). For an assessment of "mandates" placed in state constitutions, *see* Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974: How Did They Fare?* 58 LA. L. REV. 389 (1998).

42. 2 Norman J. Singer, Ed., STATUTES AND STATUTORY CONSTRUCTION, § 47.23 (6th ed. 2000).

43. *Client Follow-Up Co. v. Hynes,* 390 N.E. 2d 847, 849 (Ill. 1979); *County of Riverside v. Superior Court,* 66 P. 3d 718, 722 (Cal. 2003).

44. State *ex rel. Schneider v. Kennedy,* 587 P.2d 844, 850 (Kan. 1978).

45. *See,* for example, State *ex rel. Powers v. Welch,* 259 P.2d 112 (Oreg. 1953) (invalidating a law requiring county surveyors to be qualified surveyors or engineers; the constitutional provision that was held to necessitate the result read: "No person shall be elected or appointed to county office who shall not be an elector of the county . . .").

46. *Robison v. First Judicial Circuit Court,* 313 P.2d 436 (Nev. 1957) (limiting statutory mechanisms for removal of state officers).

47. 58 So.2d 173 (Fla. 1952). Colorado followed this approach, in a divided opinion, in 1994. *See Reale v. Board of Real Estate Appraisers,* 800 P.2d 1205 (Colo. 1994).

48. *See*, for example, *Boughton v. Price,* 215 P.2d 286 (Idaho 1950) (construing a requirement that no person be eligible to serve as a district judge "unless he is learned in the law" as a minimum qualification which did not limit the legislature from imposing other, not inconsistent qualifications).

49. *See,* for example, *Peck v. State,* 120 P. 2d 820, 822 (Idaho 1941). For another method of handling this problem, see *Jory v. Martin,* 56 P.2d 1093 (Oreg. 1936) (holding directory a provision fixing the governor's salary at $1,500).

50. *Eberle v. Nielson,* 306 P.2d 1083, 1086 (Idaho 1957). *See also Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.,* 594 P.2d 570, 573–74 (Colo. 1979).

51. *See,* for example, OKLAHOMA CONST. Art. V, § 36—"Extent of Legislative Authority—Specific Grants Not Limitations. The authority of the Legislature shall extend to all rightful subjects of legislation, and any specific grant of authority in this Constitution, upon any subject whatsoever, shall not work a restriction, limitation, or exclusion of such authority upon the same or any other subject or subjects whatsoever."

52. *Anderson v. Ritterbusch,* 98 P. 1002, 1016 (Okla. 1908); State *ex rel. Caldwell v. Hooker,* 98 P. 964, 968 (Okla. 1908).

53. State *ex rel. Caldwell v. Hooker, supra* note 52.

54. OKLAHOMA CONST. Art. V, § 36, *supra* note 51.

55. *Cf.* 1 Cooley, CONSTITUTIONAL LIMITATIONS 154 (8th ed. 1927): "The force of many of the decisions on this subject will be readily assented to by all; while others are sometimes thought to go to the extent of nullifying the intent of the legislature in essential particulars." And, at 159: "the doctrine is one to be applied with much circumspection; for it is not to be denied that the courts have sometimes, in their anxiety to sustain the proceedings of careless or incompetent officers, gone very far in substituting a judicial view of what was essential for that declared by the legislature."

56. State *ex rel. Scott v. Kirkpatrick,* 484 S.W. 2d 161, 163 (Mo. 1972).

57. ARIZONA CONST. Art. II, § 32; CALIFORNIA CONST. Art. I, § 26; NORTH DAKOTA CONST. Art. I, § 24; SOUTH CAROLINA CONST. Art. I, § 23; UTAH CONST. Art. I, § 26; WASHINGTON CONST. Art. I, § 29.

58. 1 Cooley, *supra* note 55, at 159–60; NATIONAL MUNICIPAL LEAGUE, SALIENT ISSUES OF CONSTITUTIONAL REVISION xviii (Wheeler, Jr., ed. 1961).

59. 1 Cooley, *supra* note 55, at 159–60.

60. *Arnette v. Sullivan,* 132 S.W.2d 76, 79 (Ky. 1939).

61. *Armstrong v. King,* 126 A. 263 (Pa. 1924) upholding a state constitutional amendment, already adopted by the voters, in whose enactment some of the procedural requirements relating to amendments had not been strictly observed. *See* Walter Dodd, *Judicially Non-Enforcible Provisions of Constitutions,* 80 U. PA. L. REV. 54, 61–68 (1934) discussing "procedural" provisions and their conflicting interpretations.

62. *Jory v. Martin,* 56 P.2d 1093 (Oreg. 1936).

63. *Scopes v. State,* 289 S.W. 363 (Tenn. 1927). But see State *ex. rel. Fatzer v. Board of Regents,* 207 P. 373 (Kan. 1949) (holding mandatory constitutional provision that "the legislature shall encourage the promotion of intellectual, moral scientific and agricultural improvement").

64. *See*, for example, *Armstrong v. King, supra* note 61.

65. *Arnette v. Sullivan, surpa* note 60, at 80. *See generally,* Dodd, *supra* note 61, at 70–72.

66. *See generally,* Dodd, *supra* note 61, at 73–78.

67. State *ex rel. Morgan v. O'Brien,* 60 S.E.2d 722 (W. Va. 1948). Compare *In re* Opinion of the Justices, 40 So.2d 330 (Ala. 1949) (holding mandatory a constitutional provision that proposed amendments were to be published "in such a manner as the legislature shall direct," but holding that since the act proposing the amendment stated that the general election laws (which provided for publication) were to apply, there was substantial compliance with the mandate); *Whiteside v. Brown,* 214 S.W.2d 844 (Tex. 1948) (where the court declined to decide whether a constitutional provision requiring publication of proposed amendments in all counties was mandatory or directory, but held that even if it were mandatory, substantial compliance would be sufficient, and that failure to publish in 6 of the 254 counties did not invalidate the amendment).

68. *Whiteside v. Brown, supra* note 67. *See also Opinion of the Justices*, 36 So.2d 499 (Ala. 1948) (stating that since the purpose of the constitutional provision requiring publication of proposed amendments was to apprize the voters of their content, publication which achieved this result would be sufficient even if it did not literally comply with the constitutional mandate).

69. *See,* for example, *Jenkins v. Knight,* 293 P.2d 6 (Cal. 1956) (governor "shall issue writs of election" to fill vacancies in the legislature); *Village of Ridgefield Park v. Bergen County Bd. of Taxation,* 162 A.2d 132 (N.J. Super 1960) ("Property shall be assessed for taxation under general laws and by uniform rules," held: "The word 'shall' as used in this section of the Constitution, means 'must'"); State *ex rel. Ogden v. Hunt,* 286 P.2d 1088 (Okla. 1955) (grand jury "shall be ordered . . . upon the filing of a petition therefore signed by one hundred tax payers of the county," held mandatory, the court stating that "the context ought to be very strongly persuasive before it ["shall"] is softened into a mere permission"). *But see Torcaso v. Watkins,* 162 A.2d 438 (Md. 1960), *reversed on other grounds,* 367 U.S. 488 (1961) ("that no religious test *ought* ever to be required as a qualification for any office" held mandatory).

70. *See,* for example, *State v. Toomey,* 335 P. 2d 1051 (Mont. 1958) ("The legislative assembly may levy and collect taxes upon the incomes of persons, firms and corporations for the purpose of replacing property taxes." Held: directory).

71. *See,* for example, *Scopes v. State, supra* note 63 ("it shall be the duty of the General Assembly . . . to cherish literature and science"); *Jory v. Martin, supra* note 62 (provision fixing governor's annual salary at a $1,500); State *ex rel. Bd. of Fund Comm'rs. v. Holman,* 296 S.W.2d 482 (Mo. 1956) ("if possible, each proposed amendment shall be published once a week." Held: because of words "if possible" provision was directory).

72. *See,* for example, *Robison v. Payne,* 66 P.2d 710 (Cal.1937).

73. *Robison v. Payne, supra* note 72.

74. See note 57, *supra*.

75. *See,* for example, *Fresno Nat'l. Bank v. Superior Court,* 24 P. 157 (Cal. 1890).

76. To make such requirements enforceable by the courts, they would clearly have to be cast in a form showing a "self-executing" intent; *see* Section 5, "Self-executing and non-self-executing provisions."

77. Ruud, *No Law Shall Embrace More Than One Subject,* 42 MINN. L. REV. 389 (1958); Martha J. Dragich, *State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges,* 38 HARV. J. ON LEGIS. 103 (2001) (discussing procedural challenges to state legislative process); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement,* 48 U. PITT. L. REV. 797 (1987) (discussing role of constitutionally required procedures in legislative process).

78. Further authority is found in art. 7, § 6 of the Idaho Constitution which permits a municipal corporation to assess and collect taxes for all purposes of the corporation. However, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the legislature.

Idaho Building Contractors Assoc. v. City of Coeur D'Alene, 890 P.2d 326, 328 (Idaho 1995). *See also Johnson v. Wells County Water Resource Bd.,* 410 N.W. 2d 525, 528 (N.D. 1997); Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?* 17 HARV. ENVTL. L. REV. 333 (1993).

79. *Most Worshipful Grand Lodge of Ancient Free and Accepted Masons of Kansas v. Board of County Commissioners of County of Shawnee,* 912 P.2d 708, 712 (Kan. 1996).

80. The record of the debate at the Convention is clear that this was the delegates' intent in amending the provision. The second sentence is mandatory, prohibitive, and self-executing and it prohibits depriving an employee of his full legal redress, recoverable under general tort law, against third parties.

Connery v. Liberty Northwest Ins. Corp., 960 P.2d 288, 290 (Mont. 1998). *See also Cmty. Ins. Co. v. Dep't. of Transp.,* 750 N.E. 2d 573, 581 (Ohio 2001); *Cooper v. Nutley Sun Printing Co.,* 175 A.2d 639 (N.J. 1961).

81. *Rice v. Howard,* 69 P. 77, 78–79 (Cal. 1902). *See generally* Orrin K. McMurray, *Some Tendencies in Constitution Making,* 2 CAL. L. REV. 203, 209–11 (1914); Richard A. Goldberg & Robert F. Williams, *Farm Workers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights,* 18 RUTGERS L.J. 729 (1987).

82. *See Chesney v. Byram,* 101 P.2d 1106, 1108 (Cal. 1940) *quoting* T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 100 (6th ed. 1890):

> However, it does not follow from the determination that the above-mentioned constitutional provision is self-executing, that the legislature did not have the power to enact legislation providing reasonable regulation for the exercise of the right. . . . "but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it."

Baker v. Bosworth, 222 P.2d 416 (Colo. 1950) (where the constitution provided that "at least 8% of the legal voters shall be required to propose any measure by petition," followed by "this section of the constitution shall be in all respects self-executing," held that while legislation might be enacted "to further . . . operation" of the section, an act requiring at least 15% of the voters to sign a petition was unconstitutional as inconsistent with the provision). *Accord, People v. Western Air Lines,* 268 P.2d 723 (Cal. 1954).

83. 1 Cooley, CONSTITUTIONAL LIMITATIONS 165–72 (8th ed. 1927).

84. *See* text at note 55 *supra*.

85. *Most Worshipful Grand Lodge of Ancient Free and Accepted Masons of Kansas v. Bd. of County Commissioners of County of Shawnee,* 912 P. 2d 708, 712 (Kan. 1996).

86. *See* note 82, *supra,* and accompanying text; *Haile v. Foote,* 409 P. 2d 409, 413 (Idaho 1965).

87. *Appeal of Crescent Precision Products*, 516 P. 2d 275, 277 (Okla. 1973); *Gray v. Bryant,* 125 So. 2d 846, 851 (Fla. 1960).

88. *Gray v. Bryant, supra* note 87; *Commonwealth v. National Gettysburg Battlefield Tower, Inc.,* 311 A. 2d 588, 596 (Pa. 1973) (Jones, C.J., dissenting).

89. *King v. South Jersey Nat'l Bank,* 330 A. 2d 1, 9–10 (N.J. 1974); Fernandez, *supra* note 78, at 372, n. 205.

90. *See* text at notes 88–89 *supra*.

91. *See,* for example, *City of Columbus v. Barr,* 115 N.E.2d 391 (Ohio 1953) (no penalty in provision prohibiting lotteries, held: non-self-executing).

92. *Chamberlain v. State,* 624 So. 2d 874, 881–82 (La. 1993).

93. *See,* for example, *People v. Carroll,* 148 N.E. 2d 875 (N.Y. 1958); *Board of Educ. v. Spurlin,* 349 P.2d 358 (Colo. 1960).

94. *People v. Carroll, supra* note 93, at 877.

95. *Robb v. Shockoe Slip Foundation,* 324 S.E. 2d 674, 675 (Va. 1985).

96. *In re Opinion of the Justices*, 40 So.2d 330, 333 (Ala.1949).

97. 1 Cooley, CONSTITUTIONAL LIMITATIONS 167–68 (8th ed. 1927).

98. People *ex rel. Dunbar v. People ex rel.* City and County of Denver, 349 P.2d 142 (Colo.1960) ("The public school fund of the state shall consist of . . . all estates that may escheat to the state." Held: states non-self-executing principle that property defined by the legislature as an "estate" and that the legislature declares to be escheatable to the state shall go to the school fund. "The word 'estates' is amenable to statutory definition"); *Krause v. City of Cleveland,* 94 N.E.2d 914 (Ohio 1950) (provision forbidding lotteries, without specifying a penalty non-self-executing as far as criminal prosecution is concerned, but self-executing in declaring illegality of certain acts).

99. *State v. Mills,* 370 P.2d 946 (Ariz. 1962) ("Trial by jury may be waived . . . by the parties with the consent of the court." Held: self-executing. "It [the provision] is simple, direct and needs no legislative implementation"); *Gray v. Bryant,* 125 So.2d 846 (Fla. 1960) (Held: self-executing "The legislature shall provide for one circuit judge in each circuit for each 50,000 inhabitants or major fraction thereof according to the last census authorized by law." Applying Judge Cooley's rule, the court stated that the provision "lays down a sufficient rule by which the number of circuit judges . . . may be readily determined without enabling action of the legislature," so that when census figures indicated sufficient population to warrant an additional circuit judge, a vacancy in the office of circuit judge existed without any legislative action); State *ex rel. Noble v. Fiorina,* 355 P.2d 497 (N.M. 1960) ("If a vacancy occurs in the office of . . . judge of the supreme court, . . . the governor shall fill such vacancy by appointment, and such appointee shall be chosen at such election, and shall hold office until the expiration of the original term." Held: self-executing as to appointive feature, but not self-executing as to election, since it merely states a general principle and requires legislation to specify the manner of nomination and the conduct of the primary and election.)

100. *Hornsby v. Sessions,* 703 So. 2d 932, 940 (Ala. 1997).

101. *Bandoni v. State,* 715 A. 2d 580, 588–90 (R.I. 1998) (victims' rights amendment to state constitution was mandatory but not self-executing because it was dependent on legislative action).

102. *See,* for example, Pennsylvania, where, in spite of constitutional home rule provisions, adopted by amendment in 1922, municipal home rule was delayed twenty-five years because the legislature did not enact the necessary legislation; Nevada, where home rule has been constitutionally provided for since 1924 but was not implemented by the legislature. Bromage, *Local Government,* in STATE CONSTITUTIONAL REVISION 243 (Graves, ed. 1960). *See generally,* Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974: How Did They Fare?* 58 LA. L. REV. 389 (1998).

103. Lewis, *Legislative Apportionment in the Federal Courts,* 71 HARV. L. REV. 1057, 1066–70 (1958). Dodd, *Judicially Non-Enforcible Provisions of Constitutions,* 80 U. PA. L. REV. 54 (1931). *See generally,* Nat Stern, *The Political Question Doctrine in State Courts,* 35 S.C.L. REV. 405 (1985).

104. 1 Norman J. Singer, Ed. STATUTES AND STATUTORY CONSTRUCTION (6th ed.; 2000), ch. 15.

105. Justice Hans A. Linde of Oregon has noted: "When a law is promulgated without compliance with the rules of legitimate lawmaking, is it not a law? Remarkably, we have no coherent national doctrine on this fundamental question." Hans A. Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 242 (1976).

106. *Dillon v. King,* 529 P.2d 745 (N.M. 1974) (overruling *Earnest, Trav. Auditor v. Sargent, Auditor,* 150 P. 1018 [N.M. 1915]).

107. 529 P.2d at 751–52.

108. The rule was enunciated in *Barnsdall Refining Corporation v. Welsh,* 269 N.W. 853 (S.D. 1936). The rule is discussed in Marion R. Smyser, *Constitutional Limitations on the Enactment of Statutes in South Dakota,* 25 S. DAKOTA L. REV. 33 (1980). *See also Independent Community Bankers Assoc. v. South Dakota,* 346 N.W. 2d 737 (S.D. 1984). Ohio adopted the modified enrolled bill rule in a thoughtful opinion. *Hoover v. Board of County Commissioners,* 482 N.E. 2d 575 (Ohio 1985).

109. 1 Singer, STATUTES AND STATUTORY CONSTRUCTION, *supra* note 305, at § 15.6.

110. *D & W Auto Supply v. Department of Revenue,* 602 S.W. 2d 420 (Ky. 1980). The extrinsic evidence rule is also followed by Illinois. See *Yarger v. Board of Regents of Regency Universities,* 456 N.E. 2d 39, 42–43 (Ill. 1983). See also *Jensen v. Matheson,* 583 P.2d 77, 81–82 (Utah 1978) (Maughan, J., dissenting).

111. 602 S.W. 2d at 422.

112. Suzanne L. Abram, Note, *Problems of Contemporaneous Construction in State Constitutional Interpretation,* 38 BRANDEIS L.J. 613, 615, n. 21 (1999–2000) ("'Contemporaneous construction' is a term used to describe the theory that a constitutional provision should be interpreted according to the understanding of the provision at the time of its adoption"). This approach has an obvious link to original intent. Ibid. at 635.

113. *Williams v. Wilson,* 972 S.W. 2d 260, 267 (Ky. 1998). *But see* ibid. at 273 (Cooper, J., dissenting) (relying on two decisions *prior* to constitutional convention readopting provision "verbatim and without debate"). *See also Lyn-Anna Properties, Ltd., v. Harborview Development Corp.* 678 So. 2d 683, 688 (N.J. 1996) (judges writing early decisions were familiar with constitutional convention); *Municipality of South Bend v. Kimsey,* 781 N.E. 2d 683, 699, n. 5 (Ind. 2003).

114. *State ex rel. Sanstead v. Freed,* 251 N.W. 2d 898, 905–06 (N.D. 1977). *Contra, State ex rel. Oregonian Publishing Co.,* 613 P.2d 23, 27 (Oreg. 1980).

115. *State ex rel. Board of University and School Lands v. City of Sherwood,* 489 N.W. 2d 584, 587 (N.D. 1992).

116. *City of Pawtucket v. Sundlun,* 662 A.2d 40, 45 (R.I. 1995). *See also State v. Hagerty,* 580 N.W. 2d 139, 145 (N.D. 1988); *Brown v. Firestone,* 382 So. 2d 654, 671 (Fla. 1980); *Hornbeck v. Somerset Co. Bd. Ed.,* 458 A.2d 755, 774–75 (Md. 1983); *State*

v. Trump Hotels & Casino Resorts, Inc., 734 A.2d 1160, 1175 (N.J. 1999); *Thompson v. Craney,* 546 N.W. 2d 123, 127 (Wis. 1996):

> In interpreting a constitutional provision, the court turns to three sources in determining the provision's meaning: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption.

117. *State ex rel. Linde v. Robinson,* 160 N.W. 514, 516 (N.D. 1916) (quoting Cooley, A TREATISE ON CONSTITUTIONAL LIMITATIONS (7th ed. 1903]).

118. *Greater Loretta Improvement Ass'n v. Boone,* 234 So. 2d 665, 669–70 (Fla. 1970). *See also State v. Bernier,* 717 A.2d 652, 656 (Conn. 1998) ("We have recognized that 'statutes may . . . help to define the contours of constitutional rights").

119. *Presbyterian Homes of the Synod v. City of Bradenton,* 190 So. 2d 771 (Fla. 1966).

120. Act of June 25, 1965, chs. 65–438, (1965) Fla. Laws 1559.

121. 208 So. 2d 821 (Fla. 1968).

122. Ibid. at 825.

123. Ibid.

124. 208 So. 2d 821 (Fla. 1968).

125. *See State v. Ocean Highway & Port Authority,* 217 So. 2d 103 (Fla. 1968), where the Florida supreme court abandoned its established position that revenue bonds could not be issued to construct industrial plants that were to be leased to private industry, because such was not a public purpose. The court based this decision on Fla. Laws 1967, chs. 67–1748, which stated that the purposed bond issue was for a public purpose.

126. *Junkins v. Branstad,* 421 N.W. 2d 130 (Iowa 1988).

127. Ibid. at 135. *See also Hickel v. Cowper,* 874 P.2d 922, 935–36 (Alas. 1994).

128. *Williams v. Morris,* 464 S.E. 2d 97, 101–02 (S.C. 1995). *See also State ex rel. Twitchell v. Hall,* 171 N.W. 213, 216 (N.D. 1919).

129. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 544 (1947).

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POLITICAL SCIENCE

State Constitutions for the Twenty-first Century

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Frank P. Grad and Robert F. Williams

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