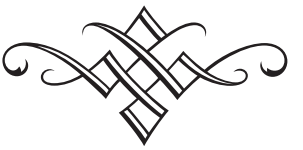
The Constitutionalism of American States

Edited By

George E. Connor and Christopher W. Hammond

The CONSTITUTIONALISM *of* AMERICAN STATES



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The CONSTITUTIONALISM *of* AMERICAN STATES

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George E. Connor and
Christopher W. Hammons

Foreword by

Donald S. Lutz

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This volume is dedicated to
Donald S. Lutz,
Professor of Political Science
at the University of Houston:
Scholar, colleague, teacher,
mentor, friend

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DONALD S. LUTZ

The Genesis of a Research Agenda; or, The Story of Four Unbidden Muses

The concept of a Festschrift was first explained to me in third-year German class as a posthumous honoring of someone. There are obvious advantages to the honoree if the Festschrift is not posthumous, but a possible disadvantage is that the honoree might be asked to contribute something, as is the case here. A certain embarrassment ensues, but out of friendship for the editors and because it provides an opportunity to praise and honor others deserving of such, I will here describe how I came to be so interested in American constitutionalism, especially state constitutions, and particularly in their colonial precedents.

My German professor, Anton Lange, also taught me that a muse is someone called upon for assistance in doing something creative, such as writing a poem, composing a symphony, or writing a book. A different muse supports each creative activity. A muse supposedly helps the writer to begin and to continue writing through the difficult parts and guides his or her hand in the selection of words and syntax, serving, in short, as an inspiration and guide. As it turns out, my life's research and writing agenda have been inspired and guided by four "muses," all of whom appeared without being called upon. It is my pleasure to thank these people, for the first time, in print.

It all began, implausibly enough, in third grade, when one day, in October 1951, Miss Benedict walked up to my desk in room 5 of Whitmore-Bolles Grade School in Dearborn, Michigan, and placed on my desk a copy of the Mayflower Compact. What possessed her to do so I will never know, but that document, as if dropped from Mars, immediately captured my fancy and led me to read everything I could find about it or its authors. I became almost obsessed with the document. The interest would never quite go away, since the Mayflower Compact would later figure in eight of my books, twenty-

three articles, and thirty-five chapters written for books edited by others. Now, a half century later, the Mayflower Compact is still the touchstone for my analyses of colonial American constitutionalism and the state and national constitutions that followed. And so, Miss Benedict, even though I do not know your first name, I send praise and honor in your direction for serving as the first unbidden muse for my writing all of these years.

A second muse appeared about eleven years later when this physics major first encountered George Carey in September 1962. I was a student in Professor Carey's course, Introduction to American Government, a course I would never have taken had it not been required of all undergraduates in the College of Arts and Sciences at Georgetown University. Professor Carey made the *Federalist Papers* so compellingly interesting that I signed up for his course American Political Theory the following semester because of his assurances that he would discuss the *Federalist Papers* in their entirety. The course was fateful in at least four respects. First of all, I would leave the course as a political science major with a focus in political theory and could no longer be a physics major. Second, as a student and later a professor of political theory, my research and publication agenda would be extensions of what George Carey taught me in this course and in his publications. It is not too strong to say that George Carey set me to my lifework. Third, I would later write my doctoral dissertation on the Madisonian Model as laid out in the *Federalist Papers.* Fourth, I would specialize in American political theory and teach my version of Carey's course at least sixty times, as of this writing.

Now, eighty-six publications and seventy-five semesters of teaching later, I can look back and see how it all came about. In his course on American political theory, George Carey asked us to write a paper on the following topic: "Is the U.S. Constitution the result of a compact among thirteen states or an organic act among the American people?" Blithely unaware of the full implications of the question or of the difficulties attendant upon my methodology, I set out to answer it through a close textual analysis of the text of the U.S. Constitution. The evidence I found there on that reading was almost evenly balanced in supporting both proposed possibilities. Professor Carey observed wryly in his comments that my Solomon-like conclusion of "both" failed to answer the question. Undeterred, I began to read everything I could find that was possibly related, no matter how remotely relevant to the topic—beginning, implausibly enough, with Aristotle's *Politics.* It took two years of work for me to realize that a sensible answer to the question could have averted a civil war and calmed most of the political conflicts in our history, since, as I wrote some forty years later, "American history has at its center a federal design, 'an indestructible Union, composed of indestructible States,' a federal design that serves as the tightly coiled mainspring of American his-

tory that drives institutional development and political processes, generates the major political controversies, tests its best leaders, defies definition, and leaves the dagger of possible state secession lurking at the center of American constitutionalism, all of which make the U.S. political system unique" and, I could have added, endlessly fascinating for former physics majors.[1]

About a decade after I graduated with a degree in government, Professor Carey published a book cowritten with his friend Willmoore Kendall, *The Basic Symbols of American Political Thought,* which taught me where to begin to look for the answer to his question—in American colonial documents, using categories of analysis developed by Eric Voegelin. Before I could read these documents, I had to collect them and learn how to be a historian. These documents, in turn, led me to the state constitutions adopted between 1776 and 1787. An analysis of these state constitutions became my first book in 1980, and the collected colonial documents eventually became, in 1998, my tenth book. Other publications on colonial documents, state constitutions, and American constitutionalism intervened. No one has more reason than I to honor George Carey as a teacher and scholar, although many of us owe him a debt for his ability to ask precise, thought-provoking questions. We are also indebted to him for his ability to point unerringly in the right direction for useful answers to these questions and for helping to provide for us a high-quality, disciplined outlet for our answers in the *Political Science Reviewer.* He has badgered us to move beyond the commonly accepted views, especially as presented by historians. As to his question—was the U.S. Constitution a compact or an organic act?—after all these years, I have to say that precisely because the American constitutional system is so profoundly federal, the answer, I firmly believe, is still *both.*

And I also firmly believe it is essential that I must thank George Carey not only for being my second unbidden muse but also for introducing me to my third muse. The last thing George Carey did for me at Georgetown was to send me to Indiana University to study under Charles Hyneman, who had been Carey's mentor as Carey studied for his doctorate at the University of Illinois. Since Hyneman had moved to Indiana, that is where I went, and Hyneman then became my doctoral mentor. Not only did Charles Hyneman guide my graduate career, but we also formed a strong, continuing relationship until his death in 1985. We enjoyed a ten-year collaboration on a book project, during which time he led me to read all the political pamphlets, reprinted sermons, and newspaper articles surrounding the writing, adoption, and operation of the first 24 state constitutions. Thus armed with a secure sense of the importance of state constitutions, I began to read the rest of the 154 state constitutions written between 1776 and 1980.

1. Lutz, "Why Federalism?" *William and Mary Quarterly* 61, no. 3 (July 2004): 588.

My fourth muse arrived as unexpectedly as my first. In October 1978, I received a letter from Daniel J. Elazar inviting me to a Liberty Fund symposium on covenants. He asked that I write a paper for the symposium on the covenant background to the early state constitutions and suggested that the paper might, if it passed a peer-review process, be later published in *Publius: The Journal of Federalism.* I wrote the paper, it passed the review, and it was published. I went to the symposium, where in October 1981 I met Daniel Elazar for the first time. During our many conversations between 1968 and 1985, Charles Hyneman had thoroughly prepared me as an advocate of federalism, so when I met Elazar, known by many as "Mr. Federalism," it was like at first sight. Elazar replaced Hyneman as my primary intellectual tutor and close associate and mentor until Elazar's death in 1999. If Hyneman had urged me to research and write about state constitutions, Elazar virtually drove me to do so, although by this time the topic had become so compellingly interesting to me that I might have written what I did without encouragement, since my idea of a good time is to curl up on the sofa to read a newly discovered constitution. My curriculum vitae shows a rapid, unbroken string of publications on state constitutions during Elazar's tutelage between 1982 and 1999. He also helped me learn to analyze constitutions empirically and comparatively. He led me from state constitutions to cross-national constitutions, as reflected in my writing during that period. I still am not certain what led Daniel Elazar to write to me, seemingly out of the blue, although when I asked him he said he could not remember how he had heard of me and my interests—perhaps it had been the book Hyneman induced me to write. So, indirectly, Elazar may have become one of my muses because of Hyneman, and Hyneman became one of my muses because George Carey sent me to him. And Carey became one of my muses because he taught a course required for graduation. Even so, I might well have taken his course in American political theory because it was the only one that might help me to understand this strange colonial document that Miss Benedict had once placed on my desk that had so captured my fancy.

If I were to meet Professor Anton Lange again, the first thing I would ask him is if a muse can be a muse if she or he is not first invoked, called upon, or asked for assistance. Regardless, these four names, Benedict, Carey, Hyneman, and Elazar, are ones I continue to invoke and thank for leading me to the study of state constitutions—in short, for guiding me to a lifelong research agenda that I have found to be absorbing, rewarding, and, I hope, useful.

Preface

GEORGE E. CONNOR AND CHRISTOPHER W. HAMMONS

The Constitutionalism of American States

The study of state constitutions, indeed the study of constitutionalism in general, suffers from being caught between the natural preferences of empiricists and theorists. Theorists prefer to discuss the political philosophy and origins of constitutionalism as a concept. Empiricists prefer to analyze the institutions and power arrangements that come out of constitutions. The result is that written constitutions—the actual documents, that is—often receive less attention in terms of design and function. One of the appealing aspects of Donald S. Lutz's work is his success in blending both halves of the discipline—theoretical and empirical—to create a better understanding of constitutions themselves, or what he often refers to as "constitutional design."

Lutz has argued that there are actually two constitutional traditions that run through early American history. "The first tradition can be found in the charters, letters-patent, and instructions for the colonists written in England. In certain respects, the United States Constitution favors this tradition. The second tradition is found in the covenants, compacts, agreements, ordinances, codes, and oaths written by the colonists themselves. While the U.S. Constitution embodies aspects of this tradition as well, it is in the early state constitutions that we find the full flowering of this second tradition." Lutz maintains that these two traditions "were blended to produce a constitutional perspective uniquely American."[1]

One important aspect of constitutionalism in America is the fact that it began very early in the colonial period. For example, the Pilgrim Law Code

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1. Lutz, *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998), xxi.

(1636), Fundamental Orders of Connecticut (1639), Rhode Island Acts and Orders (1647), and Fundamentals of West New Jersey (1681) all contained the basic elements of constitutional design.[2] One obvious, but often overlooked, component of this aspect of American constitutionalism is the fact that state constitutionalism preceded national constitution-making.[3] In other words, the development of state constitutions laid the foundation for the U.S. Constitution, not the reverse, as is often asserted.

Illustrating a second aspect of America's unique constitutionalism, Lutz reminds us that

> any essay on this topic must face the fact that those writing state constitutions in the United States do so in a double capacity. First, state constitutions must contain all that is necessary for any true constitution. That is, the framers are called upon to create a document that would be recognized as a workable constitution in any context. Second, the framers of a state constitution operate within the context defined by the United States Constitution. Thus, they must write a document that is appropriate to the federal system created by that national document. This double context results in American state constitutions having a rather complex set of purposes.[4]

Although this double context may be more important for some states than others, the following chapters acknowledge this complexity and, in some cases, use it to demonstrate unique aspects of state constitutionalism.

One final aspect of American constitutionalism that is inextricably tied to the first two is the textual relationship between the national and state constitutions. One could argue that the state constitutions *enable* the federal constitution. John Kincaid notes that "the framers would surely have failed if they had to formulate a complete national constitution settling all matters of fundamental law for 13 diverse states." One could also contend that the state constitutions actually *complete* the national text. Lutz argues that "the [U.S.] constitution is incomplete because a significant number of questions we can bring to it are not answerable using the one document alone."[5]

2. Ibid., 61–67, 210–15, 178–203, 263–65.

3. Lawrence M. Friedman, "State Constitutions in Historical Perspective," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 12–22; Robert F. Williams, "Evolving State Legislative and Executive Power in the Founding Decade," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 43–53.

4. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 3.

5. Kincaid, "State Constitutions in the Federal System," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 15; Lutz, "The United States Constitution as an Incomplete Text," *Annals of the American Academy of Political and Social Science* 496 (March 1988): 32.

In recognizing the complexity of state constitutionalism, the editors and authors of this work are inspired by Lutz's eight-part theory of constitutional design that provides a unique paradigm for understanding the purposes of American state constitutions. Each chapter of the text illustrates the manner and extent to which each state constitution fulfills Lutz's eight purposes of a written constitution. Within these editorial parameters, however, each chapter remains unique because the constitutional history of each state is unique. Each author was free to apply or utilize the framework as he or she saw fit. Lutz's eight functions of a written constitution are as follows:

1. Define a way of life—the moral values, major principles, and definition of justice toward which a people aims
2. Create and/or define the people of the community so directed
3. Define the political institutions, the process of collective decision making, to be instrumental in achieving the way of life—in other words, define a form of government
4. Define the regime, the public, and citizenship
5. Establish the basis for the authority of the regime
6. Distribute political power
7. Structure conflict so it can be managed
8. Limit governmental power[6]

The Constitutionalism of American States hence presents a comparative and comprehensive discussion of American state constitutions, inspired by Lutz's work. The text offers fifty chapters on the constitutional development and constitutional design of each state. Each chapter addresses the evolution of each state constitution from the perspective of the same theoretical parameters.

The specific utility of this text is that it provides scholars with a unique theoretical framework that can be applied to the comparative study of state constitutions. It also provides an eminently workable framework for comparing individual state constitutions to the U.S. Constitution. Even when a state has a relatively stable constitutional history, Lutz's framework can be utilized to measure the evolving meaning of state constitutions. This evolution is especially noteworthy when discussing how a state constitution defines "a people."

Beyond the specific comparison of state constitutions, the text promises to be useful in other areas as well. Scholars who are interested in comparative state institutions will find a plethora of useful material. Those who are interested in historical and contemporary issues of federalism will be af-

6. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16.

forded a unique approach to their endeavors. Scholars interested in the concept of political culture and its continued relevance will be able to trace its evolution in a comprehensive fashion. The application of "differentiation" and "self-illumination" in Lutz's original work and here, specifically applied in the Wisconsin chapter, will be of interest to Voegelin scholars.

State Constitutional Literature

Students seeking additional background on state constitutions should consult some of the wonderful works that have been produced in the past few years. An invaluable resource for students seeking a general understanding of the form and function of state constitutions can be found in G. Alan Tarr's *Understanding State Constitutions.* Tarr's multidisciplinary approach combines history, law, and political science to provide the reader with a general understanding of the uniqueness, development, and evolution of state constitutions. The book is organized by topic and chronological eras of constitutional development rather than offering a state-by-state analysis. Robert L. Maddex's *State Constitutions of the United States* offers state-by-state constitutional profiles of the fifty states and three U.S. territories.[7] In a single volume, Maddex provides a brief constitutional history and a summary of key constitutional provisions as well as some very accessible comparative material.

Students interested in more specific aspects of state constitutionalism should consult some of the insightful empirical studies that attempt to quantify various elements of state-constitutional design. Lutz, for instance, develops and empirically tests a theory of constitutional amendment using the constitutions of the fifty U.S. states. John R. Vile conducts an empirical analysis of constitutional change and argues that the method of change—formal amendment, judicial interpretation, or alteration by the executive or legislative branch—greatly influences the type and magnitude of change in content. Christopher W. Hammons examines constitution length and content to determine whether these aspects of constitutional design affect the longevity of the document itself. Hammons concludes that at the state level, lengthier, more policy-laden constitutions tend to last longer than shorter, framework-oriented documents.[8]

7. Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998); Maddex, *State Constitutions of the United States* (Washington, D.C.: Congressional Quarterly, 2005).

8. Lutz, "Toward a Theory of Constitutional Amendment," *American Political Science Review* 88, no. 2 (1994): 355–71; Vile, *Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and*

One of the most recent and comprehensive examinations of American state constitutionalism is John J. Dinan's study of state constitutional conventions. Underlying our theoretical argument that state constitutions reflect the unique characteristics of each state, he argues that "state conventions have been a forum for reconsidering, and ultimately revising or rejecting, a number of governing principles and institutions that were adopted by the federal convention of 1787 and that have remained relatively unchanged at the national level." He concludes, echoing the argument of Lutz, that "the principal benefit of examining these state convention debates is that they provide a better expression of the American constitutional tradition than is yielded by a study of the origin and development of the federal constitution alone."[9]

For students looking for data on state constitutions rather than the documents themselves, Professors Albert Sturm and Janice May have provided a wealth of quantitative data on state constitutions in their *Book of the States*.[10] This annual volume on state government provides information on constitutional length, methods and frequency of modification, proposed amendments, dates of adoption, as well as brief constitutional histories of the states. Whereas the collection of data is invaluable in the study of state constitutions, the editors' own analysis is limited primarily to illustrative comparisons and remains largely untapped with respect to studying the empirical regularities of state constitutions.

For students of state constitutionalism seeking to conduct original research on their own, Oceana Publications' *Constitutions of the United States: National and State* provides one of the few bound collections of all fifty state constitutions, including constitutions for territorial jurisdictions such as Puerto Rico and American Samoa.[11] Although most state constitutions are easily available online, the real value of this collection stems from the separate comprehensive index. The indexes allow students to cross-reference constitutional provisions among states by topic. For example, researchers interested in gubernatorial powers are provided the relevant article and section number for each state constitution.

Perhaps even more valuable is Oceana Publications' companion set of historical state constitutions. Collected in this volume are 145 American state

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Executive Actions (Westport, Conn.: Praeger, 1994); Hammons, "Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions," *American Political Science Review* 93, no. 4 (1999): 837–49.

9. Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2006), 4.

10. Sturm and May, "State Constitutions and Constitutional Revision," in *Book of the States* (Lexington, Ky.: Council of State Governments, published annually).

11. *Constitutions of the United States* (Dobbs Ferry, N.Y.: Oceana Publications, 1962–1969).

constitutions written since 1776. Massachusetts has retained a single constitution since 1776, while Louisiana holds the record, currently on its eleventh constitution since entering the Union. *Sources and Documents of United States Constitutions,* edited by William Swindler of the College of William and Mary, provides the definitive reference for constitutions that are no longer in effect.[12] Swindler also includes a cross-referencing index for all the constitutions from each particular state (but not across states) as well as additional historical documents of interest such as various convention records, constitutional drafts, and ratification documents.

In addition to this literature, there are two reference series available to scholars studying state constitutions. First and foremost is the Greenwood Press series Reference Guides to the State Constitutions of the United States. Although different in purpose from the present work, the material available in the texts published thus far is invaluable. Impressed by the scholarship of this series, the editors of this volume recruited a number of authors from the Greenwood series.[13] Similarly, scholars have benefited greatly by the University of Nebraska Press series Politics and Government of the American States, from which we have also recruited chapter authors.[14]

This text attempts to fill in some of the gaps in the comparative reference literature on state constitutions by providing a state-by-state analysis of all fifty state constitutions. Inspired by Lutz's scholarship defining both the common purposes of state constitutions as well as their inherent uniqueness, we hope that this work allows the reader to see not only the similarities among state constitutions but also the unique elements of each document that are reflective of the particular time, place, and people from which it was manifested. In short, we hope that this work will allow the reader to see both the proverbial trees and the forest at the same time.

A Scholarly Disagreement

As a general rule, one should not step into an academic debate without a certain degree of scholarly trepidation. The scholarly debate in question here regards the value of state constitutionalism. If the debate can be neatly divided into two camps and personified, they would include those such

12. Swindler, *Sources and Documents of United States Constitutions,* 10 vols. (Dobbs Ferry, N.Y.: Oceana Publications, 1973–1988).

13. They include Melvin B. Hill Jr. (Georgia), Anne Feder Lee (Hawaii), Francis H. Heller (Kansas), John V. Orth (North Carolina), Lewis Laska (Tennessee), and Hugh Spitzer (Washington).

14. They are Penny M. Miller (Kentucky), and Kenneth T. Palmer (Maine), and Elmer Cornwell (Rhode Island).

as James A. Gardner who doubt the theoretical value of studying state constitutions and those who embrace the value of state constitutional studies, such as G. Alan Tarr.[15]

We would agree with Gardner that "the central premise of state constitutionalism is that a state constitution reflects the fundamental values, and ultimately the character, of the people of the state that adopted it." However, unlike Gardner, who ultimately rejects the central premise of state constitutionalism, we endorse it and agree with Tarr that state constitutions constitute "a crucial scholarly resource for historians and political scientists, because political disputes in the states often had a constitutional dimension, and the texts of state constitutions record those conflicts and their outcomes."[16]

Though siding with Tarr, the editors and authors of this volume take Gardner's critique of state constitutional studies seriously. Whereas one could point to recent state votes on school funding and gay marriage in an attempt to refute Gardner's argument, the chapters that follow offer a conversation rather than a refutation. Rather than simply denying his contention that there is a "poverty of state constitutional discourse," or "the lack of language in which participants in the legal system can debate the meaning of the state constitution," we suggest that this volume provides, or at least begins to provide, just such a language. Similarly, Gardner maintains that "you have no sense of the history of the state constitution," that "you do not know the identity of the founders, their purposes in creating the constitution, or the specific events that may have shaped their thinking," and that "state constitutions are hard-pressed to generate epics to give them meaning. . . . The stories to which they lend themselves are not stories of principle and integrity, but stories of expediency and compromise at best, foolishness and inconstancy at worst."[17] This volume provides such a constitutional history. Perhaps not epics, the chapters that follow, though admitting to some "foolishness and inconstancy," do offer compelling stories, rich with meaning, principle, and integrity.

Finally, and most important, Gardner insists that "you are able to form no conception of the character or fundamental values of the people of the state, and no idea how to mount an argument that certain things are more

15. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90, no. 4 (1992): 761–837. One could also certainly include Paul W. Kahn, "Interpretation and Authority in State Constitutionalism," *Harvard Law Review* 106 (March 1993): 1147–68. On the other side would be Tarr, *Understanding State Constitutions;* and Daniel J. Elazar, "A Response to James Gardner's 'The Failed Discourse of State Constitutionalism,'" *Rutgers Law Journal* 24 (Summer 1993): 975–84.

16. Gardner, "Failed Discourse," 764; Tarr, *Understanding State Constitutions,* 3.

17. Gardner, "Failed Discourse," 766, 765, 822.

important to the people than others." We would argue, and the chapters that follow demonstrate, that the character of a state can indeed be found in its constitution. Even in the states that steadfastly follow the federal model—even in the states whose constitutions borrow heavily from their brethren—one can discover the seed of fundamental values. The history and development of state constitutions provide a mirror of fundamental values, but you have to look beyond the texts themselves because "state constitutions are as significant for what they reveal as for what the prescribe."[18] However, in order to discern these fundamental values, one needs an appropriate methodology. The editors and the chapter authors believe the most appropriate methodology is the one offered by Lutz's comparative framework.

We are not denying Gardner's assertion that state constitutions are influenced "by imperatives laid at the feet of the state polity by political groupings that are in some sense external to the state." This is undoubtedly true and is actually demonstrated in some of the chapters that follow. Moreover, we are not insisting that "the content of a state constitution is dictated *solely* by the desires and self-understandings of a state."[19] Although we believe that most of the chapters do, in fact, demonstrate such an understanding, we would not extend this argument into a blanket assertion. We observe here that both Lutz and Gardner recognize the double context of state constitutions. We offer Lutz's framework as a mechanism for measuring and understanding the balance between federal externalities and state self-determination both between states and their respective constitutions and within states and their constitutional evolution.

Note on Style and Organization

Given the size and scope of a project such as this, the editors have adopted certain editorial guidelines for the basic format of each chapter. Whereas Lutz's theoretical framework suggests a template by which authors could approach each state, we have not necessarily encouraged chapter authors to mimic Lutz too closely. Fifty chapters with nearly identical headings and subheadings would severely tax the stamina of even the most diligent reader. On the other hand, each chapter does conform to editorial guidelines with respect to style. We have made one exception to the conventional footnote style, however. Due to the extraordinary number of direct references to state constitutions, we have adopted an in-text format for these citations

18. Ibid., 765; Tarr, *Understanding State Constitutions,* 3.

19. Gardner, *Interpreting State Constitutions: A Jurisprudence of Function in a Federal System* (Chicago: University of Chicago Press, 2005), 121 (emphasis added).

(Article X, Section Y), so as not to add unnecessary length to an already substantial project.

Even after adopting style guidelines and a common theoretical framework, there is still a myriad of approaches to organizing a volume such as this one. However, competing organizational principles presuppose assumptions that the editors wanted chapter authors and, of course, readers to judge for themselves.[20] We have, therefore, chosen to organize these chapters by a fairly traditional regional grouping of states and their constitutions. Lutz, organizing colonial predecessors to state constitutions, maintained that the geographic grouping of colonies and states was "universal and essentially invariant." Although we, here again, follow the lead of Lutz, just "because it's always been done that way" hardly means that the system is empirical or theoretical. Moreover, there are those, like Gardner, who reject the regional grouping of states, an approach that he labels the "dead end of romantic subnationalism." We cannot deny his assertion that "every American state contains within its borders a considerable diversity of physical and demographic attributes."[21] However, although we acknowledge the problems associated with diversity, we find ample justification for our geographic organizational scheme.

Although primarily theoretical, it is impossible not to recognize the regionalism inherent in Daniel J. Elazar's concept of political culture and his patterns of state constitutional development. Similar geographic patterns are revealed in David Hackett Fisher, Joel Garreau, and Frederick Jackson Turner.[22] Invariably, state-politics scholars also uncover regional patterns.[23] More detailed analysis of state constitutions reinforces the same geograph-

20. See, for example, Elazar's concept of political culture or his patterns of state constitutional development in *The Cities of the Prairie: The Metropolitan Frontier and American Politics* (New York: Basic Books, 1970) and *The American Constitutional Tradition* (Lincoln: University of Nebraska Press, 1988), 115–20. One could also use Robert A. Dahl's effectiveness criteria in "Thinking about Democratic Constitutions: Conclusions from Democratic Experiences," in *Nomos 38,* ed. Ian Shapiro (New York: New York University Press, 1996), 175–206; or Tarr's developmental model in "State Constitutional Politics: An Historical Perspective," in *Constitutional Politics in the States,* ed. Tarr (Westport, Conn.: Greenwood Press, 1996), 5.

21. Lutz, *Colonial Origins,* xxxix; Gardner, *Interpreting State Constitutions,* 53, 68.

22. Fisher, *Albion's Seed: Four British Folkways in America* (New York: Oxford University Press, 1989); Garreau, *The Nine Nations of North America* (Boston: Houghton Mifflin, 1981); as cited by Gardner, Turner, *The Significance of Sections in American History* (New York: Henry Holt, 1932).

23. John H. Fenton, *Midwest Politics* (New York: Holt, Rinehart, and Winston, 1966) and *Politics in the Border States* (New Orleans: Hauser Press, 1957); Duane Lockard, *New England State Politics* (Princeton: Princeton University Press, 1959); Joel Paddock, *State and National Parties and American Democracy* (New York: Peter Lang Publishing, 2005).

ic groupings.[24] Finally, it must be said that the following chapters grouped themselves.

Our Contributors

Including a state supreme court chief justice, a former state representative, a former university president, and a state parliamentarian, our authors run the gamut of academic career choices. From professors emeritus to graduate students, our authors span the range of academic ranks and career stages. From political science, history, business, and law, our authors come from a wide range of academic backgrounds and disciplines.

For many of our authors there is a direct, personal connection to Don Lutz. Like the editors, many are former students. Current and former colleagues are amply represented as well. For those authors without a personal connection, there is a linkage through the admiration for Don's contributions in the field. It is, in large part, because of these connections that all proceeds from the sale of this book that would ordinarily go to editors and authors will be donated to the Institute for Rehabilitation and Research in Houston, Texas, that provided Don treatment after his stroke and continues to work with him on his rehabilitation.

Inspired by Lutz and guided by his theoretical framework, the authors and editors of this volume are united by a level of "discipline" that is appropriate for the study at hand, united, to again borrow Lutz's terms, in "a joint enterprise engaged in by a number of people who have undergone a certain intellectual formation so that they understand the common questions defining the enterprise, have a comprehensive familiarity with the relevant literature and materials, and know how to use the methodologies appropriate for advancing that literature."[25]

Although Lutz-inspired, we owe a debt of gratitude to a great number of people who helped us develop the project. Specifically, we would like to thank editor in chief Beverly Jarrett and our editor, Sara Davis, for their support, encouragement, and seemingly endless patience. We are also very grateful for the painstaking editing by our copy editor, Annette Wenda. We

24. Don E. Fehrenbacher, *Sectional Crisis and Southern Constitutionalism* (Baton Rouge: Louisiana State University Press, 1989); John D. Hicks, *The Constitutions of the Northwest States,* University Studies of the University of Nebraska 23 (January–April 1924); Gordon Morris Bakken, *Rocky Mountain Constitution-Making, 1850–1912* (New York: Greenwood Press, 1987); David Alan Johnson, *Founding the Far West: California, Oregon, and Nevada, 1840–1890* (Berkeley and Los Angeles: University of California Press, 1992).

25. Lutz, *A Preface to American Political Theory* (Lawrence: University Press of Kansas, 1992), 2.

sincerely appreciate permission from Deborah Carter at Louisiana State University Press and John Kincaid, the editor of *Publius: The Journal of Federalism,* to post some of Don's earlier work on our developmental Web site. Luke Reven was instrumental in the creation of our Web site. For help in identifying potential authors and with providing editorial solace, we are very thankful for the assistance of Donald Lutz, the late Ross Lence, Bruce Oppenheimer, Howard Leichter, Hans Eicholz, Joel Paddock, and Stacy Ulbig. We are grateful for the comments, both positive and negative, from three anonymous reviewers. Our universities have been most generous with their resources, and we are grateful for the indulgence of Beat Kernen and Lorene Stone at Missouri State and the administration and faculty at Houston Baptist University. Most important, we owe an inestimable debt to our respective families: Mary, Emily, and Anne and Daniela, Emilie, and Nathaniel.

The CONSTITUTIONALISM *of* AMERICAN STATES

NEW ENGLAND STATES

The colonial depth of New England's constitutional tradition lays the foundation for national constitution-making.

The Connecticut chapter, for example, demonstrates the richness of state contributions to the idea of constitutional government and the role of cultural values, especially with respect to the question of religion at the nation's founding. Although Massachusetts possesses the oldest state constitution, the author of this chapter demonstrates the contemporary relevance of state constitutionalism by using the thread of the 2003 *Goodridge* decision to weave the constitutional history of the state.

Within the regional similarities there are, of course, interesting differences. For example, the tension that arose between Massachusetts and Maine, which eventually led to the separation of the latter from the former, stands in marked contrast to the vehement contempt in which New Yorkers were held by the citizens of Vermont.

Rhode Island, as usual, sets its own course. Independent of its New England neighbors and the nation as a whole, Rhode Island's constitutionalism arose from primarily local needs and desires.

CONNECTICUT

ELIZABETH BEAUMONT

The Slow Evolution of the "Constitution State"

In the early winter weeks of 1639, a small group of Puritans living in three small towns "upon the river of Connectecotte" adopted the Fundamental Orders, marking the beginning of an unmatched nearly 370-year constitutional history.[1] The Orders lack several key features of modern constitutions, such as a bill of rights, yet they meet Donald Lutz's eight constitutional purposes and are recognized as the first written constitution to create popular self-government. Despite this distinction, scholars have long overlooked the contributions of the "Constitution State," placing much more emphasis on constitutional development in Massachusetts and Virginia.[2] This slight is a mistake: although Connecticut never aimed to be revolutionary, its isolated political and religious culture nurtured the development of several core constitutional principles we now take for granted. These include written social contracts and the idea of a "higher law" derived from popular consent; relatively broad suffrage, including elections for all major governing officials; and popular control of government through limitations on public officials and governing bodies. But that same isolated culture also produced constitutional features contravening modern principles of separation of powers: separation of church and state; one man, one vote; and individual rights. Connecticut's history challenges the common assumption that the nascency of American constitutionalism emanated from the desire to protect abstract rights to life, liberty, and property, since that aspiration did not strongly emerge until well after the principles of popular control and consent had cast the first constitutional foundations.

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1. The Fundamental Orders are dated January 1638 under the Julian calendar then in use, which began its year in March. This was January 1639 by the modern Gregorian calendar.

2. Historians typically describe Connecticut as having contributed little beyond what the colonies of Plymouth, Virginia, and Massachusetts achieved.

The First Written Constitution: The Fundamental Orders

"Dissenting dissenters" who began migrating outside the Massachusetts Bay Colony in 1634 launched the first stage of Connecticut's constitutional history. Their motivations emerged not from religious differences but rather from a desire for better land and political frustration over the limited franchise and power monopoly held by a handful of Puritan leaders in the Bay Colony.[3] The initial status of the new settlements in the Connecticut River valley was uncertain. Native Mohegan, Pequot, and Paugussett tribes were scattered across the region, and both the Bay Colony and English Puritans claimed the land, resulting in a temporary compromise under which the Bay Colony appointed the settlements' governors.[4]

When that agreement expired, the Connecticut Puritans asserted independence by placing all political power in the hands of locally selected citizen leaders, creating a government significantly more popular than that of oligarchic Massachusetts or any other government then in place.[5] Each town (four, at the time) selected a committee of men who then chose magistrates from their town to govern as a "General Court" holding all political power. These actions initiated an exceptional, persistent degree of independence from England. The new colony's considerable isolation and autonomy also produced a number of liberal political features codified in its first constitution, the Fundamental Orders of 1639, including popular control of government and broad suffrage and political liberty.

Popular Consent and Higher Law: Constituting a People, a Way of Life, and Political Authority

The first spring after the settlement's move for independence, Reverend Thomas Hooker, a leader of the Connecticut migration, gave an election sermon to the adjourned General Court. He emphasized three governing prin-

3. The Bay Colony's first trading-company charter permitted a council of eight essentially self-appointed freemen to wield all political power as a council working with the governor and deputy governor (freemen being stockholders in the company who were entitled to vote).

4. Charles Andrews, "On Some Early Aspects of Connecticut History," *New England Quarterly* 17, no. 1 (March 1944): 3–24; Gilbert Perry Miller, "Thomas Hooker and the Democracy of Early Connecticut," *New England Quarterly* 4, no. 4 (October 1931): 663–712; Herbert Osgood, "Connecticut as a Corporate Colony," *Political Science Quarterly* 14, no. 2 (June 1899): 251–80.

5. This included England and the Virginia and Maryland colonies, the other colonies in place when Connecticut was founded. In the early colonial period, the only colony to provide a similar if not larger degree of popular control over government was Rhode Island, which was a self-governing colony like Connecticut.

ciples: "the foundation of authority is laid in the free consent of the people," the extent of this civil authority should be documented by elected leaders in a written frame of government, and suffrage should be expanded. This philosophy of self-government based on limited popular control, so common today, was radical in the 1600s and was not yet fully practiced in any developed political state. England, greater Europe, and much of Asia were still ruled by monarchs and warlords whose authority was generally justified—if at all—through divine right, custom, or sheer might. And another fifty years would pass before John Locke, then just a boy of eight, published his influential theory of social contract in *Two Treatises of Government.* Although Thomas Hooker's philosophy of self-government derived from established Puritan ideals, his rendering broke with Puritan orthodoxy and was considerably more liberal than those manifested in the Virginia or Massachusetts colonies' early governing practices.[6] His insistence that those who select officers also have the power to *limit* them was a pointed response to the nearly complete discretion enjoyed by the Bay Colony's magistrates.[7] Hooker's liberal adaptation of Congregationalist covenant theology inspired the Fundamental Orders and provided the foundation for the significantly more popular and limited government they initially produced.

Religious Covenant as the Authority of the Regime

The Fundamental Orders of Connecticut were adopted six months after Hooker's sermon, just as the first rumblings emerged of an English civil war over principles of free government. They are succinct—just eleven orders, written in simple English. Both in style and in content they mark a clear departure from the governing patents and charters held by other New World colonies. Remarkably, the general framework of government created by the Orders persisted for more than 150 years, remaining largely unchanged by the 1662 royal charter that served as Connecticut's constitution until a postindependence state constitution was finally drafted in 1818.

The Orders begin with a preamble that simultaneously establishes the authority of the regime and defines a people and their way of life, three purposes of a written constitution. Echoing Thomas Hooker's philosophy, the language of the preamble invokes the principle that civil authority rests entirely with the consent of the people, with God as the only superior power. The members of the Connecticut settlements have come together to create, sui generis, an independent civil community "established according to God,"

6. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 17.

7. Miller, "Thomas Hooker," 708.

in which the members of the commonwealth "enter into Combination and Confederation together, to maintain and preserve the liberty and purity of the Gospel of our Lord Jesus" (Article I, Sections 20–21).[8]

Those who read the Fundamental Orders are immediately struck that, unlike other early colonial charters, there is not a single reference to "our dread sovereign," the king, nor to the mother country or sister colony from which the members of the new settlements had come (and, technically, owed allegiance).[9] In fact, the Orders do not refer to any political or legal antecedents. Instead, they seem to tacitly renounce prior political affiliations, even though the settlers' political ideas and structures owed much to England, still more to the Bay Colony, from which they would borrow many civil and ecclesiastical laws over time.[10] Whereas the Massachusetts Bay Colony's charter was a business agreement authorized by the English Crown, and most other English colonies were similarly established as trading companies subservient to other political or corporate bodies, the Orders mark the first commonwealth created solely through a written covenant of mutual agreement, establishing political authority independent of any higher human power.[11] The entire authority of the political regime rests on a combination of popular consent and higher law: the people's agreement to join in a confederation that will be "guided and governed according to such Laws, Rules, Orders, and Decrees as shall be made, ordered, and decreed as followeth" as well as the perceived will of God for an "orderly and decent government" (Article I, Sections 20–21). This first written constitution was a religiously based covenant invoking a social contract under which people living in an unorganized state agree to be governed for the common good, under a higher law.

The People of the Bible Commonwealth

The preamble also defines a people and their way of life by instantiating religious principles as the ultimate authority and guide for justice—the Fundamental Orders map out an explicitly religious polity created by and

8. Fundamental Orders, in *Public Records of the Colony of Connecticut,* ed. J. H. Trumbull (1850–1859).

9. For example, the "Oath of Fidelity" that admitted inhabitants must take is a pledge of allegiance to the commonwealth, not the monarchy.

10. David Fowler, "Connecticut's Freemen: The First Forty Years," *William and Mary Quarterly* 15, no. 3 (July 1958): 312–33.

11. The Bay Colony's 1629 charter was similar to the third charter issued to Virginia in 1612. The most important difference, which may have been an oversight, was that the Bay Colony's charter did not require the colony's seat of government to remain in England, permitting more local control in Massachusetts than in Virginia.

for Puritans seeking to protect their culture. The preamble establishes a covenant among those who share the Congregationalists' values: the guiding purpose of the members entering into the confederation is "to maintain the liberty and purity of the Gospel of our Lord Jesus . . . [and] also the discipline of the Churches . . . now practiced amongst us" (Article I, Sections 20–21). Although the Fundamental Orders do not establish a theocracy, they reflect the belief that church and state should cooperate in serving God and may be the strongest illustration of the Puritan ideal of a "Bible commonwealth" or "Heavenly City of God."[12]

The religious culture outlined in the preamble threads through the eleven sections of the Orders that frame the colony's government—organization of the General Court, eligibility for voting and leadership, lawmaking procedures, and the content of laws. The first Order notes that the General Assembly or Court has "the power to administer justice according to the Laws here established, and for want thereof, according to the rule of the Word of God," indicating that religion will supplement and guide secular law in defining justice. And, following the Bay Colony, Puritan religious interpretation did play a prominent role in colonial governance: when Connecticut established capital laws a few years later, in 1642, all capital crimes except treason, ranging from witchcraft and blasphemy to murder and rape, were justified with two or more biblical precepts.[13]

Today we assume that liberal democratic constitutions require strong separation of religious and political power—a view demonstrated in concerns about the religious character of the newly drafted Afghan constitution, which states that no law can be contrary to "the beliefs and provisions" of Islam.[14] But this first American constitution and nearly all other colonial charters and early state constitutions saw no predicament with the intermingling of religion and politics (so long as the religion was of the approved variety), and, like Afghanistan, made religious law an arbiter of human law. Although the Puritans had fled the severe ecclesiastical establishment in England, they had no desire to abolish religious establishment, which had been the norm in Christendom since Constantine and which they still considered desirable for civil stability. In seventeenth-century Connecticut and elsewhere, religion and government were viewed as mutually enhancing domains: religious culture was considered essential for public order, and government was both an outgrowth of religious belief and a means for protecting religious convictions and promoting the spiritual health of the poli-

12. Andrews, "Early Aspects of Connecticut History," 3–24.

13. Miller, "Thomas Hooker," 692.

14. J. Alexander Their, "Attacking Democracy from the Bench," *New York Times,* January 26, 2004, A27.

ty. The modern constitutional principle of a Jeffersonian "wall of separation" between church and state would not begin to take firm hold in Connecticut until well into the 1800s.[15]

Defining and Limiting Political Power as a Means of Managing Conflict

The Orders, which were probably enacted by the General Court, were structured as statutes, in the sense that they could be and were occasionally amended through regular legislation as the colony grew and circumstances changed. They preceded, by more than a century, the American-born principle that, as fundamental law, constitutions should be drafted and adopted through distinctive bodies and extraordinary methods that set them apart from standard legislation. The Orders also preceded the principle espoused in *Marbury v. Madison* (1803) that constitutional law stands supreme over regular legislation and requires specially devised measures for amendment.[16] But although the Fundamental Orders could be—and were—amended through regular legislation, the general framework of government they created persisted for more than 150 years, confirming that they were not mere statutes but a genuine constitutional arrangement.

In defining political power, the Fundamental Orders mainly codified the political institutions and processes under which the colony had been operating for two years. Although the preamble is unique to Connecticut, the eleven Orders include some features that loosely follow the pattern of the Bay Colony's governing system and share common characteristics with other colonies. In other cases, however, the Orders include distinctive adaptations that made Connecticut's governing structures significantly more popular (or inclusive) and more limited than those of Massachusetts and other early colonies. This included establishing systems of nominations and direct elections for all colonial-level officials, setting term limits for the governor, eliminating church-membership requirements for freemen (voters with full political privileges), requiring regular meetings of the General Court (the legislative assembly), and empowering freemen to call the court or convene one of their own devising if necessary.[17]

In many cases, particular choices made in defining, distributing, and lim-

15. Donald Gerardi, "Zephaniah Swift and Connecticut's Standing Order: Skepticism, Conservatism, and Religious Liberty in the Early Republic," *New England Quarterly* 67, no. 2 (June 1994): 234–56.

16. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era,* trans. Rita Kimber and Robert Kimber (Chapel Hill: University of North Carolina Press, 1980), 66.

17. Osgood, "Connecticut as a Corporate Colony," 259–61.

iting power through the Orders—three related purposes of written constitutions—were aimed at addressing what the founders considered the most serious threats facing the commonwealth, a fourth constitutional purpose. Based on what they had seen in England and Massachusetts, the Orders' drafters feared a set of dangerous political problems, many of which overlapped: lack of popular control over governing officials, unresponsive legislatures possessing arbitrary power, destructive quarrels between the executive and legislative branches, divisive religious conflict, and a failure of civil life to conform to religious principles.

The first Order establishes a biannual General Court consisting of a governor and six magistrates, plus four local deputies chosen by ballot in each of the four towns. The General Court is directed to meet each April for elections, when the governor and colonial-level public officials are selected and sworn in. The court meets a second time each September "for making of laws, and any other public occasions, which concerns the good of the Commonwealth" (Order 5). The governor and a majority of magistrates can call additional meetings of the General Court beyond the required biannual gatherings, so long as they provide justification to the town deputies. This early system of public notice helped prevent arbitrary rule and protect local control by prohibiting the court from holding secret, private, or impromptu meetings excluding the town deputies.

The Orders' requirement of regular General Court meetings was far different from England, where parliamentary sessions were sporadic from the fifteenth to the seventeenth centuries, and Charles I had disbanded Parliament in 1629, ruling autocratically for the next eleven years. This requirement also differs from the weak or optional provisions for government assembly included in other colonial charters, such as the Massachusetts Bay Colony Charter, which recommends that the General Court "shall or maie" hold four meetings each year and gives latitude to the governor and his assistants to meet independently of the court "at their Pleasures" for corporate colonial decision making.[18]

Unlike modern constitutions, the Orders do not divide power into executive, legislative, and judicial arenas, and instead emulate the Massachusetts Bay Colony by creating a unicameral governing body as the "supreme power of the Commonwealth." This constitutional feature persisted until Connecticut adopted an official state constitution in 1818. Although separation of powers was praised as part of the beneficial "mixed" character of the unwritten English constitutional order, Connecticut and other colonies opted to maintain political power in a single supreme agency. This was perhaps be-

18. *The Charter of Massachusetts Bay, 1629: The Avalon Project at Yale Law School,* http://www.yale.edu/lawweb/avalon/states/mass03.htm.

cause they had seen that the English system of separation had done little to prevent the monarchy from wielding disproportionate power or to prohibit the legislature from acting arbitrarily. Or it may have been that, since Connecticut's government was meant to represent only one constituency—the people who created the commonwealth through consent—as opposed to England's three "estates," each possessing different political interests, an undivided form of government was considered most appropriate for upholding the singular "common good" of the colony.[19]

Although the Orders place more limitations on government than was typical in the early English colonies, they grant the unicameral governing assembly very extensive powers compared to royal charters and modern constitutions. The explicit grant of powers, which included powers over taxes and expenditures as well as the right to initiate legislation rather than merely act on proposals of the governor, codified a system of autonomous self-government apart from England. In addition to specific authority over lawmaking, taxation, admitting freemen (those who could vote for colonial leaders), allotting land, and dealing with criminal infractions, the power granted to the General Court includes broad unspecified powers, since it "also may deal in any other matter that concerns the good of this Commonwealth." There is only one explicit limitation to these powers—it may not interfere with "election of Magistrates, which shall be done by the whole body of Freemen" (Order 10).

As this exception indicates, although the Orders do not separate government powers, they do provide for the distribution of and limitation on power, including several provisions that respond to perceived abuses by the English Parliament and Bay Colony magistrates. Many of these features were quite liberal for their time, including direct elections of colonial officers and a strong degree of local town control over the governing General Court.

The main division of power in the Orders is between town and colonial government. As in many New World colonies, townships were the main political unit of Connecticut, a constitutional trait that remained generally intact until the mid-twentieth century. Guaranteeing the four towns constituting the colony equal representation in the General Court through their deputies was a method for sharing power with colonial-level magistrates in a "protofederal" system as well as a means for providing an internal check on the court. In 1639, automatically providing each town with four deputies made sense, since towns had roughly equal populations, but making individual townships rather than people the unit of representation became much less equitable as the commonwealth grew. Eventually, this constitutional feature produced a problematic system somewhat like that of En-

19. Adams, *First American Constitutions,* 260.

gland's "rotten boroughs," where some regions were greatly overrepresented in government, others severely underrepresented.

Town deputies were also authorized to meet in caucus before any General Court to consult on public business and could not be shut out or ignored by the governor or colonial magistrates, preventing the court from operating with the arbitrary nature of the English Parliament or the Bay Colony's eight-man council. In addition, although there was only one legislative body, passing laws required majority approval from both magistrates and town deputies. And since magistrates held no "negative" or veto over the town deputies, towns wielded substantial local power, ensuring more popular control within Connecticut's early colonial legislature than was true elsewhere.

Perhaps the most unusual provision in the Orders allows the freemen to petition the court if it refuses to convene as prescribed and to call the town constables for aid in this process. If all else fails, the freemen can constitute themselves as a General Court, with "the power to . . . meet together, and . . . proceed to do any act of power which any other General Courts may" (Order 6). This is a remarkable measure designed to ensure that colonial officials could not abuse their power or dismiss local concerns by disbanding the court.

Other important limitations on the unicameral General Court—preventing it from acting with unrestricted discretion—included direct election for all colonial officers by the freemen of Connecticut combined with short terms for all colonial officers. Both institutions offered potential for a considerable degree of local town control over the actions of the colonial-level government. The freemen elected the town deputies sent to the court semiannually and elected the governor and six magistrates annually. An early version of term limits, forcing rotation in office, allowed the governor to sit for only two consecutive terms and prohibited him from succeeding himself as governor. Importantly, the Orders do not include any minimum property requirements for colonial officials, doing away with the English requirement that candidates for the House of Commons possess considerable wealth (an annual income of at least three hundred pounds, a significant sum).

Popular elections for all colonial officials represented a change from the common colonial practice of an appointed governor's councils. It was also very different from England's system of appointed and inherited political positions, such as in the House of Lords, which included many hereditary seats and all Anglican bishops as voting members. Short governing terms represented another departure from English practice, where parliamentary representatives held office for seven years. The more liberal system of annual elections for colonial officials became a common practice in many colo-

nial governments and was included in many early state constitutions. The Orders also subject Connecticut's magistrates to greater popular control than even the Bay Colony magistrates by requiring that they be nominated by freemen at the General Court six months prior to their election.

Responding to a long history of abuses by the English Crown, the Orders provide the governor with very limited political powers. Connecticut's governor was still an important political figurehead with much informal influence, but he wielded little formal political power. Unlike the supreme power of the Crown vis-à-vis Parliament, which had caused many problems in England, the Connecticut governor could not adjourn or dissolve the General Court and had no veto power over it, though he could act as a tie-breaking vote. In combination, the small range of power permitted to the governor, the creation of term limits for the governor, and the ability of freemen to call or constitute the General Court were methods for managing potential conflict between executive and legislative branches and for preventing autocratic rule like that of Charles I.

Taken as a whole, the Orders attempt to protect popular control and reduce the risk of an unresponsive legislative body through several explicit institutional structures. One is authorizing each town to send four freemen as deputies to the General Court, to "advise and consult" with them. By granting Connecticut freemen the power to call the court to convene if it failed to do so, regular procedures for decision making were ensured, preventing the problem of infrequent or aborted meetings of the English Parliament.

In addition to creating a system of annual elections for colonial-level positions, the Orders devote nearly half their space to specifying how the nomination and election process will work for each office, including the first set of constitutional processes for popular nomination of elected officials and election by secret paper ballot. The lack of secret ballots in England had long prevented free and fair elections, since the ability of influential politicians or patrons to examine an individual's vote prior to its casting prevented many electors from voting according to their own preferences. Creating these clear structures protected the exercise of popular electoral power and reduced the chance that elections would be corrupted or public offices abused. The Orders also forbid court interference in the election of magistrates, protecting fair elections and local control over the selection of colonial rulers.

However, the Orders' potential for local control of colonial government through annual elections was much stronger in theory than in practice throughout Connecticut's colonial and early state history. Term limits on the governor, for example, were quickly circumvented: in the early years after the Orders' adoption, Governor John Haynes simply rotated offices with the deputy governor each year (mimicking the practice of John Winthrop and

others in Massachusetts), and the term limits were repealed in 1660. In the seventeenth century, no Connecticut governors were ever turned out of office, and even in the eighteenth century only two Connecticut governors failed to be reelected. And there are only two instances of magistrates failing to gain reelection.[20] It is ironic that Connecticut's founding constitutional order, which was created and structured largely in response to dissatisfaction with the Bay Colony's oligarchy, did not prevent a similar power monopoly from emerging in the new colony, initially in the form of a small number of Puritan leaders and later, after American independence, evolving into a band of powerful Federalists.

Finally, the Orders attempt to thwart the kinds of religious conflict that had plagued England and to prevent deviation from Puritan principles by creating a homogenous religious commonwealth, adopting a doctrine of the unity of church and state in the preamble, and naming biblical law and the will of God as explicit guides and supplements for civil law. Although the Orders depart sharply from Puritan orthodoxy by not requiring full church "membership" as a condition of freemanship or full political privileges (church membership indicating a special Puritan category held by relatively few churchgoers), they do require an "Oath of Fidelity" that could be taken in good faith only by Christians. Requiring the governor to be a Congregationalist church member eliminated the possibility of a less committed or less esteemed member of the Puritan community gaining that position. And it also prevented adherents from any competing faith from ever becoming governor, ensuring the executive could never be used to advance "popery" or create friction over religious practices, as had occurred with Charles I and Mary Queen of Scots in England.

Although the Orders do not grant the executive many explicit powers, the governor is the most visible colonial official, and, particularly in conservative New England, he holds a bully pulpit in both religious and political arenas. The governor also has important powers as the moderator of the General Court, with the ability to "give liberty of speech, and silence unseasonable and disorderly speakings, to put all things to vote." This, too, helps ensure that any perceived threats to Congregationalist religious and political orthodoxy can be controlled.

Because the Orders were established as a religiously based political covenant, constitutional features we now consider illiberal—such as the semi-religious "Oath of Fidelity" required for local political participation, the religious requirement for holding the governorship, and the ability of the governor to give or retract "liberty of speech" within the court—were considered not only acceptable but desirable as well. Religious persecution had

20. Andrews, "Early Aspects of Connecticut History," 17.

been a concern for Puritans in England, but they did not believe in complete religious tolerance, or in free speech, or full political liberties for all adults (or even all adult white males). This helps explain why, like other early colonial charters, the Fundamental Orders do not contain the limit on government most people regard as essential to liberal constitutions: a bill of rights protecting fundamental freedoms. In the nineteenth and twentieth centuries, protection of individual rights emerged as a foremost constitutional purpose, but the Fundamental Orders are all but silent on the subject. They do protect suffrage and a relatively strong degree of representative government, and thus are primarily concerned with "popular consent and control" and political privileges rather than individual rights.[21] The idea of "rights," however, was not yet strongly in the political vernacular, and even a century later voting was frequently referred to by Connecticut colonists as a fundamental "privilege" rather than a right.[22] Connecticut later declared some individual liberties through statutes, beginning with a declaration of rights in Ludlow's Code of Laws of 1650, adopted verbatim from the Massachusetts 1641 Body of Liberties. Yet these liberties were always conditional, and were not treated as modern constitutional rights that were legally enforceable and capable of trumping or constraining ordinary legislation.[23] The Connecticut tradition of declaring liberties and rights through statutes, rather than as part of a constitutional structure, continued until the commonwealth adopted an official state constitution in 1818.

Defining Citizenship and Political Participation: Limited Democracy

The Orders fulfill an eighth constitutional purpose by defining the citizenship and electorate of the new colony. On parchment, the Orders establish highly progressive voting laws, theoretically providing for nearly universal manhood suffrage, a notion considered dangerously radical at the time. As was generally true throughout the Western world, the Orders bar women from the political sphere by identifying only men as voters, but they do not specify the kinds of age, race, religious, and property qualifications that prevailed in seventeenth- and eighteenth-century England and Ameri-

21. Donald S. Lutz, *Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions* (Baton Rouge: Louisiana State University Press, 1980).

22. Bruce Stark, "'A Factious Spirit': Constitutional Theory and Political Practice in Connecticut, c. 1740," *William and Mary Quarterly* 47, no. 3 (July 1990): 391–410.

23. Wesley Horton, *The Connecticut State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993), 62; Christopher Collier, "The Connecticut Declaration of Rights before the Constitution of 1818: A Victim of Revolutionary Redefinition," *Connecticut Law Review* 15, no. 8 (1982): 87–91.

ca.[24] In contrast to Massachusetts and New Haven, Connecticut's Orders do not include restrictions based on full church membership, a major barrier to suffrage in most North American colonies.[25] The only exception is a requirement that the governor must "be always a member of some approved congregation," limiting that leadership role to committed Puritans (Order 4). The lack of high-level religious qualifications for other public offices and political participation stemmed not from principles of religious tolerance, however, but from a desire to extend the franchise to a larger number of Puritans who made up the entire population of the colony in 1639.

The Orders codify, without explaining, a system of dual citizenship and voting borrowed from the Massachusetts Bay Colony. This bifurcated voting system, which persisted throughout Connecticut's colonial period, distinguished between "admitted inhabitants" with limited political privileges, who could participate in local town government and select town deputies, and a smaller group of "freemen" with full political privileges, who could also vote for corporate colonial leaders and were eligible to become political leaders themselves. "Admitted inhabitants" who possessed local political privileges included most adult white men who were not paupers or dependents. And the original Orders seem to permit freemanship's full political privileges to a similarly large group, since the only requirements are that they must have taken the Oath of Fidelity, "cohabit within this Jurisdiction," and been admitted by the General Court, requiring their attendance and acceptance there.[26] It is not clear how many freemen existed in Connecticut when the Orders were adopted, but one careful study suggests that probably about 50 percent of adult white men were freemen or eligible for freemanship during the earliest colonial period. Restrictive by modern standards, this rate is much higher than suffrage rates in England, which were less than 10 percent in many regions. It was also considerably higher than levels of voter eligi-

24. In England, the system for granting voting privileges first established in the Middle Ages was still intact, tying voting either to landownership or to representation of the boroughs or towns.

25. Fowler, "Connecticut's Freemen," 313.

26. Generally, all adult white men who were not paupers or dependents were qualified to participate and vote in town meetings in Connecticut's earliest colonial period (although townships voted on whether to "admit" inhabitants and could deny "admittance" to residents who were considered undesirable or unfit for sharing in government). "Freemen" were a smaller proportion of adult white men who were accepted as qualified to vote in colonial-level elections—electing deputies to the General Court and nominating and voting for the governor and other colonial-level public figures—with membership initially controlled by the General Court and later shifted to control by the towns. The early system for admittance required prospective freemen to travel to Hartford to be personally admitted by the General Court, which was very burdensome, and later a personal property requirement of thirty pounds was passed, which was quite high for the time.

bility or freemanship in most early North American colonies, including Massachusetts, where only a small number of full church members were permitted the full political liberties of freemen until 1647.[27]

Extraconstitutional Barriers to Participation

Although the Orders themselves create few explicit barriers to freemanship, or full political privileges, there were significant obstacles, some of which existed in practice though not on paper, and some of which came through later amendments to the Orders or subsequent legislation. Practical barriers included the considerable time, distance, and expense often involved in traveling to the General Court to gain admittance as a freeman and participate in colonial elections—towns far from the General Court tended to have much lower rates of freemen during the colonial period. Still other unspoken obstacles were class based, preventing white apprentices and indentured servants from seeking or gaining the political status of freemen, based on the Whig and republican principle that economic independence and a financial stake in the community are necessary for sound political judgment and responsible action.[28]

And even though full membership in a Puritan congregation was never a requirement for voting, Puritans who were not full church members may have been hesitant to petition for admittance as freemen in a colony where nearly all public officials (and always the governor) held this high status. The political opportunities were even more limited for non-Puritans, who were perceived as a threat to Congregationalist orthodoxy. There is little chance that non-Congregationalists could gain acceptance as freemen in Connecticut's early colonial period. In addition to the threshold presented by the semireligious Oath of Fidelity that the 1639 Orders required for political liberties, when Quakers, Jews, Ranters, Adamites, and other religious groups began to arrive in 1656 the General Court added a new provision to the Orders requiring that freemen obtain a certificate of "peaceable and honest

27. Fowler, "Connecticut's Freemen," 323–33. In 1669, the first year with intact records for Connecticut, there were 1,789 qualified voters in an adult white male population of more than 3,000, or more than 50 percent, but these percentages were not consistent across the colony and were much lower in newer towns farther from Hartford. Scholars suggest that in seventeenth-century England, fewer than 10 percent of the adult white male population had the franchise.

28. Bernard Bailyn, *The Origins of American Politics* (New York: Alfred A. Knopf, 1968); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton: Princeton University Press, 1975).

conversation" signed by their town deputies, a measure designed to prevent those deemed "troublesome" from gaining suffrage.[29]

Race and slavery were final unspoken barriers to citizenship and franchise in Connecticut's colonial period, lasting well into statehood. As was the case with non-Congregationalists, the Orders do not explicitly disenfranchise nonwhites. Rather, it was the racism embedded in Connecticut's cultural orthodoxy that essentially excluded all blacks and Native Americans from freemanship—there are no records that any nonwhite ever tried to vote in the colony. The Orders (and later the royal charter that replaced them) are also silent on slavery—unlike many other early state constitutions and the federal constitution. The absence of formal constitutional sanction did nothing to hamper slavery in Connecticut. Since Puritanism condoned slavery, the practice flourished without legal or cultural restrictions for more than a century until 1774, when the colony took its first limited action by prohibiting any further import of slaves. At that point, the economic strength of Connecticut's significant middle class made it the largest slaveholding colony in New England (possessing sixty-five hundred slaves, or about 3 percent of the population), although there were many fewer slaves in Connecticut than in southern colonies.[30] In Connecticut's conservative Puritan culture, where it was common for Congregationalist leaders and ministers to hold slaves during and after the colonial period, strong moral and political resolve against slavery emerged slowly, and slavery was not fully banned until 1848.[31]

29. Andrews, "Early Aspects of Connecticut History," 15.

30. Unfortunately, Puritanism did not share the Society of Friends' (Quaker) condemnation of slavery, and by the early 1700s New England was the main slave-trading region in the New World. Quakers began prohibiting slavery among their members in 1776. In contrast, Puritans had, since the earliest colonial settlements, justified slavery on spiritual grounds—as "chosen people," they considered enslavement of blacks and Native peoples a sacred privilege given to them by God, and believed they were saving them from heathenism. Between 1756 and 1774, when Connecticut prohibited further importation of slaves, the proportion of slave to free population in Connecticut increased by 40 percent. See Jackson Turner Main, "Standards of Living and the Life Cycle in Colonial Connecticut," *Journal of Economic History* 43, no. 1 (March 1983): 159–65.

31. By 1774, half of all Connecticut ministers, lawyers, and public officials owned slaves, as did one-third of all doctors (ibid). Even though prominent Connecticut leaders helped found the early abolitionist movement, such as the 1791 formation of the Society for the Abolition of Slavery by Noah Webster, the government was extremely cautious about taking action against slavery, and Connecticut was not a leader in abolishing slavery. See Edgar J. McManus, *Black Bondage in the North* (New York: Syracuse University Press, 1973). Emancipation bills were rejected by the Connecticut legislature in 1777, 1779, and 1780. Finally, in 1784, Connecticut passed a law providing gradual emancipation by freeing slaves born after 1784 at age twenty-five. The age of emancipation was reduced to twenty-one five years later.

Connecticut's constitution under the Orders was based on popular consent, and created unprecedented levels of suffrage and local control over government. Yet it was not a democracy as we understand it, given the Orders' considerable limitations on self-government. Those who voted for the colony's leaders were not "the people" of Connecticut but the much smaller group of white men admitted as freemen by an act of the General Court, which met and acted completely independently of the town meetings.

The Royal Charter of 1662: Continuing Self-Government through Royal Imprimatur

In 1662, the Fundamental Orders were superseded by a corporate patent or charter, which essentially legitimated and only slightly revised the Orders' governing framework. The Connecticut General Court drafted this charter itself and successfully petitioned King Charles II to accept the colony as "a little branch of yor mighty Empire," bringing Connecticut under English protection. In the decades since the adoption of the Fundamental Orders, Connecticut's well-being had come under threat: the colony was not officially recognized by the newly restored monarchy, the Dutch were expanding into nearby lands, and there were conflicts with Native Americans and neighboring colonies over boundaries and land-use rights.

Although the move from popular covenant to royal charter would seem drastic, in fact the structure of government it confirmed was little different from the Orders. As a result, the colony remained essentially self-governing: the king had no power to appoint leaders or interfere in legislation, and instead nearly all major points of self-government established by the Orders were retained (the right to select the governor and public officials, pass laws, establish judicial tribunals and mete out justice, raise its own revenues, and admit freemen).[32] The charter also gave the Connecticut colonists all "liberties and immunities" of the realm of England.

Among the charter's few significant deviations from the Orders was the expansion of the colony's borders to include New Haven (against its will). Also significant was eliminating the power of freemen to compel the General Court, now called the General Assembly, to meet. New voting restrictions permitted only freemen to elect town deputies to the General Assem-

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See E. B. Bronson, "Notes on Connecticut as a Slave State," *Journal of Negro History* 2, no. 1 (1917): 79–82.

32. Andrews, "Early Aspects of Connecticut History," 14.

bly, previously a privilege of the much larger class of "admitted inhabitants."[33]

For the hundred-plus-year period from the adoption of the charter in 1662 until the American Revolution, Connecticut maintained general autonomy from England, with little communication between them, and never came under strict royal control, as did most other colonies.[34] Although they went to considerable lengths for the royal charter—sending Governor John Winthrop Jr. on the treacherous Atlantic crossing to England to obtain it—members of the Connecticut commonwealth never treated it as the source of, or authority for, their government. Rather, the colony seemed to consider the charter a necessary but supplementary protection for the system of self-government that had existed for twenty years under the Orders. In fact, Connecticut resisted at least seven attempts to revoke its liberal corporate charter in favor of a standard royal charter, and generally ignored royal authority when it differed from local practice or preference, treating its charter as a confirmation of the colony's independent authority.[35]

Charter Government Persists after American Independence

Connecticut's interpretation of its royal charter as a confirmation of ongoing local autonomy initiated by the Orders is best evidenced by the colony's response to independence. When the Continental Congress recommended that all former colonies adopt new state constitutions befitting independent republics in 1776, most followed suit. But Connecticut, which had essentially been self-governing since its creation, thought a new constitution unnecessary: there was such little public desire for change in Connecticut's political culture that only one newspaper article urged a completely new constitution. Instead, the General Assembly simply passed a law voiding references to the Crown from the 1662 royal charter.[36]

Thus, while other states took pains to create new constitutions and bills

33. Fowler, "Connecticut's Freemen," 315. This reduced somewhat the degree of popular control over colonial government, but it is not clear from the records how drastic the decrease was, since between 51 percent and 67 percent of adult white men were freemen in 1669.

34. Andrews, "Early Aspects of Connecticut History," 3–6.

35. This attitude characterized a number of colonial government actions, including amending the royal charter legislatively, without the Crown's approval, when Connecticut replaced its unicameral general assembly with a bicameral assembly in 1698. Moreover, Connecticut did not accept English statutes as directly binding unless its own general assembly also formally passed them.

36. Adams, *First American Constitutions,* 52–66.

of rights, often using drafting conventions and special procedures to gain public approval, Connecticut maintained its former governing framework without even submitting this action to the people. Aside from Rhode Island, Connecticut was the only state that took this conservative, backward-facing path. As a result of these decisions, Connecticut retained its Congregationalist orthodoxy well after the Revolution, including the established church and the patterns of social and political thought embedded in Puritan culture. Although many changes had occurred since Connecticut's founding, the basic framework of government, virtually identical to the deputy-magistrate system first established under the Fundamental Orders, remained in place.

A Modern Constitutional Convention

Both within states and at the national level, American constitutional history is often portrayed as a tale of expanding political liberty. In Connecticut's constitutional development, however, the story of suffrage is nearly the reverse. Rather than maintaining the Orders' open suffrage provisions and expanding the franchise, the commonwealth instead gradually increased the number of explicit barriers to franchise for both classes of voters (admitted inhabitants qualified to participate in town politics and freemen qualified to participate in colonial-level politics), including new poll taxes and property requirements.[37] As a result, fewer than 50 percent of adult white men were eligible to vote in Connecticut in 1816, a level of suffrage that was lower than that in 1640 when the Orders were adopted. Under the stronger democratic principles at work in nineteenth-century America, this was scandalous.[38]

Connecticut finally held its first constitutional convention in 1818, more than thirty years after the adoption of the federal constitution and forty years after the adoption of the first state constitutions in 1776. Social and economic inequality had risen during the eighteenth century, and popular conflicts were emerging over the entrenched power held by conservative Federalists (who had replaced Puritans as the ruling class), religious freedom, limited suffrage, and separation of powers—particularly political in-

37. The earliest restrictions included demanding proof of good behavior, and later restrictions added property qualifications. In 1659, legislation required freemen to be twenty-one years of age and to possess thirty English pounds in personal property aside from real estate, a property requirement that was then quite high, though it was lowered in the following years to twenty pounds, and later to ten. Similarly, an order of 1657 required that "admitted inhabitants" qualified to vote in town meetings be twenty-one, have "bore office," or have an estate worth thirty pounds.

38. Horton, *Connecticut State Constitution,* 11.

terference in judicial affairs—all of which stimulated great interest in a new state constitution.[39]

Rather than modeling its new state constitution on its royal charter, Connecticut borrowed liberally, and often with little or no debate, from the recently enacted Mississippi state constitution of 1817. Although this choice of model is somewhat surprising, the new constitution did respond to popular complaints regarding religious freedom, voting restrictions for whites, and separation of powers.[40] Unfortunately, Connecticut's strong caste structure prevented any move to fully abolish slavery in the new constitution, and free blacks were denied the franchise. Several important elements of the Orders' original governing structure remained—the legislature retained unenumerated legislative powers, annual elections were kept for members of the General Assembly, and townships remained the primary unit of legislative representation, even though this system had not reflected actual population distribution for at least fifty years.[41] As a result of this apportionment system, small rural towns were overrepresented in selecting leaders, whereas large cities such as Hartford were underrepresented, making Connecticut's government increasingly undemocratic over time.[42]

Once the new state constitution was adopted, Connecticut favored tinkering around the margins rather than undertaking wholesale constitutional change, amending the 1818 constitution fifty-nine times from 1818 until the adoption of the current 1965 constitution.[43] The provisions creating gross malapportionment remained in place, with disparities growing to more than eight to one in 1960. Connecticut was finally forced to deal with this problem when the Supreme Court established the one man, one vote

39. Ibid., 6–8; Bruce Daniels, "Connecticut's Villages Become Mature Towns: The Complexity of Local Institutions, 1676 to 1776," *William and Mary Quarterly* 34, no. 1 (1977): 83–103.

40. Christianity remained the official religion, but the Congregational Church was disestablished. The constitution enfranchised all adult white men who had lived in the state at least six months, possessed a freehold estate worth seven dollars, had paid taxes, or had served in the militia. The new constitution also included a Declaration of Rights, though, in keeping with Puritan constraints on individual freedom, many rights were explicitly limited.

41. Christopher Collier, "Sleeping with Ghosts: Myth and Public Policy in Connecticut, 1634–1991," *New England Quarterly* 65, no. 2 (1992): 184; G. Alan Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998), 102–3.

42. Despite debate about the problem of skewed apportionment, Connecticut's 1818 constitution maintained a form of representation very similar to that established under the Orders, giving each Connecticut town two votes (except the newest towns, which held one) for choosing members of the lower house.

43. Nearly three-quarters of the amendments came before 1955, when all prior amendments were codified into the constitution.

principle in *Baker v. Carr* (1962). When it became clear in 1964 that Connecticut would have to act to prevent the federal courts from directing their reapportionment process, the General Assembly called a constitutional convention and created the current 1965 constitution to comply with *Baker*.[44]

Conclusion

Connecticut's constitutional development was partly shaped by its age, but was also an evolutionary product of its local culture and circumstances. Although Connecticut's first constitution, the Fundamental Orders, was quite liberal for its time, the conservatism of the "land of steady habits" consistently thwarted its progressive potential, and the slow pace of constitutional change impeded Connecticut's movement toward full democratic liberty and equality. There was only a very gradual evolution from covenant under the Fundamental Orders of 1639 to royal charter in 1662 to a "dethroned" charter in 1776 (with references to the Crown removed) to, finally, adoption of a modern state constitution in 1818—the last of the original thirteen colonies to do so save Rhode Island. Isolation and autonomy acted as a double-edged sword, promoting the early development of liberal constitutional principles, but also generating a persistent political and cultural conservatism that created significant gaps between constitutional rhetoric and practice. Over time, Connecticut shifted from a colony initially founded on broad popular consent and control, including broad franchise, no explicit property requirements, and relatively even apportionment, to a state with restrictive franchise, high property requirements, and a skewed system of apportionment.

44. Since 1965, Connecticut's constitution has been amended twenty-eight times. The state returned to the issue of apportionment three more times. Other significant amendments added coverage for sex (in 1974) and physical and mental disabilities (in 1984) into the equal-protection clause, making Connecticut's provisions for equal protection more liberal than those of the U.S. Constitution.

KENNETH T. PALMER AND JONATHAN THOMAS

The Maine Constitution

A Tradition of Consensus

Like all state constitutions, Maine's fundamental law sets out the structural arrangements under which its politics and policy making take place.[1] Maine operates under its original charter first approved by the voters in 1819. It was written over three weeks in 1819 by a convention of delegates during the statehood movement that followed the Revolutionary War. Congress subsequently admitted Maine into the Union as part of the famous Missouri Compromise of 1820.

Today, Maine's constitution reflects some enduring features. One is political moderation. Maine tends to eschew extremes in politics and ideology, and to find solutions in the center of the political spectrum. Consequently, in altering their constitution Mainers have regularly tried to maintain balance among the various institutions of governance, and in the relation of those institutions to the people. Closely related is Maine's general consensus on constitutional matters. Although controversy has grown somewhat in the past decade, voters have typically approved most amendments proposed by the legislature. Finally, constitutional amending has mostly in-

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1. This paper draws on some of the first author's earlier writings, including Palmer and Marcus A. LiBrizzi, "Development of the Maine Constitution: The Long Tradition, 1819–1988," *Maine Historical Society Quarterly* 28, no. 3 (1899–1889): 126–45 (portions of which are reprinted with permission of the journal); Palmer, "The Maine Constitution," paper presented at the annual meeting of the American Political Science Association, Atlanta, August 31–September 3, 1989; and Palmer, G. Thomas Taylor, and LiBrizzi, "The Constitutional Tradition," in *Maine Politics and Government* (Lincoln: University of Nebraska Press, 1972), 52–64.

volved issues of governmental structure and political suffrage. Amendments have rarely spoken to questions of public policy.

History and Structure

Because Maine was for nearly a century part of Massachusetts (the "District of Maine"), the experience and language of the Massachusetts Constitution found their way into Maine's charter. The influence of the Massachusetts Constitution was particularly important because it was an innovative document that had been drafted by John Adams in 1780. As one of the members of the constitutional convention in 1819 in Portland observed, "I say taking the constitution of Massachusetts as a basis, because it is already rooted in the good feeling and affections of the public, and practical politicians ought always to keep an eye to public sentiment." One particular—and in its time unusual—feature of the Massachusetts instrument was its creation of a government with effective powers in an age when political thought emphasized individual rights. As one scholar has written, "The political theory of the Massachusetts charter of 1780 subordinates the individual to society."[2] Further, most state constitutions written immediately after the Revolutionary War were committed to the idea of legislative supremacy, providing state executives with little independent authority. Maine's charter followed that pattern in providing for a more balanced separation-of-powers system.

Yet the Maine Constitution differed in some significant ways from the Massachusetts document. The variations reflected the way in which Maine was settled and the way politics had played out in the District of Maine during the years preceding the constitutional convention. Maine was mostly a frontier area, where pioneers moved eastward (instead of westward) to settle in new land. Many of the settlers tended toward the Democratic-Republican Party, even as Massachusetts was generally in the hands of Federalist politicians. Tensions arose during the War of 1812, which Massachusetts generally favored but which took a heavy toll on the livelihood of Maine's coastal inhabitants. District residents also wanted to democratize some of the economic and political arrangements of the parent state they regarded as elitist.[3]

Similar to other New England charters, the Maine Constitution broadly

2. Ronald F. Banks, *Maine Becomes a State: The Movement to Separate Maine from Massachusetts, 1785–1820* (Middletown, Conn.: Wesleyan University Press, 1970), 153; Ronald M. Peters Jr., *The Massachusetts Constitution of 1780: A Social Compact* (Amherst: University of Massachusetts Press, 1978), 193.

3. Edith M. Hary, "We the People: The Maine Constitution," in *Maine: How We Govern* (Augusta: Maine Department of Educational and Cultural Services, 1977), 6.

defines the rights of the people and the responsibilities of their governing institutions. The generality of language has permitted the updating of the document through piecemeal amendment. Although provisions exist for calling a constitutional convention, they have never been executed. Two constitutional commissions have been summoned in the state's history—in 1876 and in 1962—but neither led to major revisions in the structure of the charter. It is worth noting that the only state constitutions older than Maine's are those of Massachusetts (which is the oldest), New Hampshire, and Vermont. The English sense of gradualism in the development of the fundamental law of the community appears to have influenced all these New England states.

The Maine Constitution has ten articles covering three broad subjects: the rights of the people, the structure of the governing institutions, and the public policies the government is expected to pursue.

The first article, the Declaration of Rights, resembles closely the Bill of Rights in the U.S. Constitution. Citizens are guaranteed free speech and a free press. In that regard, Maine went beyond the Massachusetts model, which had guaranteed only freedom of the press. Other differences centered on the role of religion in public life. Unlike the Massachusetts document, Maine's charter did not require church attendance or the worship of a "Supreme Being," nor did it impose taxation for the support of Protestant churches. The state would treat all religious groups, including Catholics and Jews, equally. In other provisions, citizens were guaranteed freedom from "unreasonable searches and seizures." In all criminal prosecutions, they would have the right to a "speedy, public and impartial trial." Nor would they be compelled to give evidence against themselves.

The Declaration of Rights has been only slightly amended.[4] Further, Maine courts have generally depended on the interpretations of the U.S. Supreme Court of the national Bill of Rights for the application of its provisions. The idea of the new judicial federalism, whereby a state supreme court sets out a higher standard of civil liberty than does the federal Supreme Court, has seen little manifestation in the jurisprudence of Maine courts.

The second article, which deals with suffrage, reveals again some interesting differences with the Massachusetts Constitution. Maine provided universal suffrage for all males over twenty-one years, with the exception of "paupers, persons under guardianship . . . Indians not taxed," and persons who had lived in the state for less than three months. Reflecting an earlier

4. Marshall J. Tinkle, *The Maine State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1992). This excellent source provides a detailed guide to the Maine Constitution and its amendments.

period, the Massachusetts Constitution had set an estate of sixty pounds or an annual income of three pounds or more as a prerequisite for voting.

Maine's constitutional delegates were so committed to the idea of separation of powers that they created a short section (Article III), specifying that it was the frame of government they preferred.

Article IV concerned the legislature, where particular attention was given to the matter of apportionment. Maine's large geography and many small towns (the state currently has nearly five hundred municipalities) made the issue of representation in the Maine House and Senate difficult. Another complicating factor was the desire to modify practices in the Massachusetts Constitution that the convention regarded as undemocratic. The delegates determined that house districts would be formed in a way to provide representation to groups of towns, but not to every town individually. (That practice in Massachusetts had led to a Great and General Court of seven hundred members.) For the senate, districts were assigned by county, but Maine departed from Massachusetts's practice of apportioning districts by county wealth. Instead, population was made the only criterion. In terms of legislative procedure, democratic influence was seen in such provisions as the requirement imposed on the house that it "keep a journal" and "from time to time . . . publish its proceedings." However, the restraints placed on the legislature were relatively few.

Article V concerned the governorship. Like the Massachusetts instrument, the constitution provided for a fairly strong governor, unlike the charters of most other states at that time. The governor was the only statewide elected official, and had some appointive powers, including the naming of the attorney general (a power that would later be transferred to the legislature). The governor also had veto power, which was a departure from some early state charters. There was no lieutenant governor. Constitutional convention delegates regarded that office as "useless" and specified that the president of the senate would fill the governorship should it be vacated during a governor's term. That provision was most recently exercised in December 1959 when senate president John Reed succeeded Governor Clinton Clausen, who died suddenly of a heart attack.

The primary limitation on the governor's power was the Executive Council. This seven-member body, elected in a joint meeting of the two houses of the legislature, was empowered to "advise the Governor in the executive part of the government." The Executive Council was a vestige of the colonial suspicion of centralized power, and appeared in the constitutions of other New England states. The council became a major obstacle in the period beginning in the 1950s when Maine became a two-party state. The party controlling the legislature was able to frequently use the council and its powers,

which included participation in budgetary and personnel decisions, to restrict the authority of a governor of the opposing political party.

Article VI delegated judicial power to the Supreme Judicial Court and to "such other courts as the Legislature shall . . . establish." Justices were to be named by the governor, and they held office "during good behavior" until the age of seventy. Except for the imposition of an age limit, these provisions followed those in the U.S. and Massachusetts Constitutions.

The remaining articles dealt with the role of the state in education (prompted in part by the U.S. Supreme Court decision in *Dartmouth College v. Woodward* [1816] that fueled a struggle over the control of Bowdoin College, which the state then was helping to finance), the organization of the state militia, and other housekeeping matters. The delegates must have closely conformed to public sentiment on constitutional questions, since the document was ratified in a referendum in December 1819 by a margin of ten to one.

Amending the Constitution

An understanding of the present-day Maine Constitution focuses on the amendments, which in 2006 numbered 171. The state has never held a second constitutional convention. It has convened two constitutional commissions, in 1876 and 1962, both of which generated a few additional amendments. However, neither commission led to fundamental alterations in the document. Historically, the amending process has produced an average of 1 amendment per year, but the rate has noticeably quickened in the past four decades. As recently as 1962 the constitution had 85 amendments, about half of the current total.

For the most part amendments have not generated political controversy. They have been declarations that have commanded wide public support at the time of their adoption. In Maine, amendments must be proposed by a two-thirds vote of each house of the legislature, and win approval in a popular referendum. The constitutional areas especially affected have been suffrage, state institutions (including state-local relations), and to a more limited extent public policy.

Suffrage

One of Maine's most interesting amendments is the seventh, passed in 1848, which sets the manner of electing state legislators. Originally, the state constitution required winning candidates for seats in the state house, in the

senate, and for the governorship to gain a majority of all votes cast in the election. In the absence of a majority, reballoting was necessary in the case of the house. The senate itself decided elections in which no candidate for that chamber obtained a majority. In the case of the governorship, the entire legislature was responsible for settling the contest. After the arrival of third parties in state politics in the 1830s and 1840s, the majoritarian system began to collapse. In 1846, nearly half of all house districts had no majority winner.[5] The solution was the institution of plurality elections, but the process of change was slow. Although it was used in the house after 1848, the procedure was not accepted by the senate until 1875. Gubernatorial elections remained under the majoritarian system until 1880, when voters approved (in the Twenty-fourth Amendment) a plurality arrangement after three successive gubernatorial races had failed to produce a majority winner and wound up in the hands of the legislature.

Many amendments have redefined the right to vote. Generally, though not always, they have expanded suffrage. Originally, electors were restricted to male citizens twenty-one years of age or older (excepting paupers and Indians) who were residents of the state at least three months preceding an election. All of those provisions have been modified. The voting age was lowered to twenty in 1969 and then to eighteen in 1971. Residency requirements were lengthened during the Great Depression, but then dropped from the constitution in 1974. All the state's Native Americans were guaranteed the right to vote under an amendment approved in 1954. Paupers gained suffrage in 1965. Despite its generally inclusive record on voting, Maine failed to adopt a women's suffrage amendment prior to the adoption of the Nineteenth Amendment to the U.S. Constitution.

One amendment important in the evolution of Maine's cultural diversity was the twenty-ninth, approved in 1893, which required that voters be able to read the Maine Constitution in English. Already-enrolled voters were exempted. Taking place during the immigration of thousands of French Canadians, the amendment was seen as nativist in French communities and strongly resented.

Initiative and Referendum

With the passage of the Thirty-first Amendment in 1909, Maine became the first eastern state to adopt the direct initiative and referendum.[6] Short-

5. Peter Neil Barry, "Nineteenth-Century Constitutional Amendments in Maine" (master's thesis, University of Maine, 1965), 60–61.

6. Lawrence Lee Pelletier, *The Initiative and Referendum in Maine* (Brunswick, Maine: Bureau for Research in Municipal Government, 1951), 8.

ly after the turn of the century, the idea of popular lawmaking became part of the state Democratic platform, and included constitutional amendments as well as statutes. In 1906, the Republican and Prohibition Parties supported the idea, but opposed allowing the constitution to be changed by referendum. The Prohibition Party in particular worried that an existing amendment banning liquor might be removed. The Republican-dominated legislature endorsed the initiative and referendum as applied to statutes, and Maine voters overwhelmingly ratified the proposal.

Recently, usage of the initiative and referendum has risen rapidly in state politics. Only six initiated measures were placed before the electorate in the 1910–1970 period, or about one per decade. In contrast, between 1971 and 2003 voters were asked to decide on some thirty proposals, or about one per year. The increase in popular lawmaking has reflected the growth of citizen groups connected to specific causes and issues such as, most recently, gay rights, property-tax limitation, and casino gambling. Some observers believe the reliance on referenda also grows from an estrangement between Maine voters and their legislature, which has become more professionalized in the past two decades. The state imposed a limitation on state legislative terms in 1993, becoming the only northeastern state to do so. Because of the greater incidence of popular lawmaking, some constitutional restrictions have been imposed. For instance, amendments have increased the number of required signatures for both the initiative and the referendum. In 1981, voters approved an amendment that further stipulated that any signature on an initiative petition older than one year would not be valid.

Governing Institutions

Maine created a strong legislature in the constitution, and over the years it has generally gained strength. A large share of the amendments has concerned the legislature's authority to issue bonds and to alter the debt ceiling. Between 1848 and 1950, most of them constituted an exception to the Sixth Amendment (added in 1848 in response to a financial crisis) that forbade the loaning of state credit and limited the state debt to three hundred thousand dollars. The original constitution had not set a debt limit. Since 1950 the legislature has been able to issue bonds with the approval of the voters, and has not needed to change the constitution to do so. However, some procedural restrictions have been placed on the legislature's financial powers. Statements of the state's outstanding debts must accompany all proposals to the voters for the issuance of new state bonds. In the 1980s, amendments decreased the bonding power of the Maine School Building Authority and limited the life of authorized bonds.

The Maine executive branch has also undergone a modest degree of

change from its initial form. In the middle of the nineteenth century, a protracted battle raged over executive powers. Initially, the governor had extensive appointment powers that included the naming of judicial, civilian, and military personnel. In the 1850s, under the leadership of the Whig Party, several offices were made subject to popular election, including judges of probate, registers of probate, municipal judges, and county sheriffs. In the same decades, the legislature was given authority to name the adjutant and quartermasters general, the land agent, and the attorney general.

In the 1870s, state politicians reconsidered some of the decisions restricting the executive appointment power. A major difficulty was that the chief executive had no direct power to appoint certain officials for whose actions he was responsible. Under the Sixteenth Amendment, in 1876, the naming of judges of municipal and police courts reverted to the governor. In 1893 he gained authority to appoint the adjutant and quartermasters general. The office of land agent was constitutionally abolished in 1875. In 1917, the governor was empowered to remove county sheriffs under certain circumstances, a recognition of the chief executive's role as the official primarily responsible for law enforcement throughout the state. The amendment was added after it was discovered that the Cumberland County (Portland) sheriff was not enforcing Prohibition laws. In 1929, the governor won the power to fill vacancies in the Executive Council "with the advice and consent" of the council. Previously, the only mode of selection of executive councillors was through the legislature.

In the past half century the governor has continued to gain new authority. In 1957, the term of office was extended from two to four years. In 1975, the Executive Council was abolished. Some functions (such as fiscal management) were assigned to the governor, whereas others (such as confirming gubernatorial nominations) were assigned to the state senate. In the following year, in recognition of the growing complexity of state government, the 131st Amendment gave the governor ten days to act on legislation, instead of the earlier five. Critical to the governor's management of the executive department, Maine provided the governor with a cabinet form of government in 1971. Cabinet officers are nominated by and serve at the governor's pleasure. The governor's power has been strengthened, perhaps more than by any other factor, by the huge rise in the size of the state budget in the past four decades.

Although many states have incorporated into their constitutions detailed provisions concerning the structure of their executive branch, Maine's charter says relatively little on the matter. The attorney general's appointment has been altered, and the state treasurer has gained a longer term of office. The office of justice of the peace has been removed from the constitution. Most of the broad changes in the state executive branch, particularly its

growth from a handful of employees to the approximately ten thousand in its current workforce, have been achieved through statutory revision.

Of the three branches, the smallest amount of constitutional modification has taken place with respect to the courts. The state has been able to establish new courts and new levels of courts without resorting to the amendment process. The only court officially sanctioned is the Maine Supreme Judicial Court. The major changes that have occurred in that court involving constitutional amendment have been concerned with judicial tenure. Originally, the justices served "during good behavior" until the age of seventy. In 1840, under the Third Amendment, they were given seven-year terms, and the age limit was removed. Under the 132nd Amendment, in 1976, justices began to be allowed to serve for six months after the expiration of their terms, or until their successors were named, whichever occurs first.

Maine is one of a handful of states (the others are also mostly New England states) whose constitutions sanction advisory opinions on the part of the state supreme court. In Maine the governor or either house of the legislature may ask the seven members of the Supreme Judicial Court to "give their opinion upon important questions of law, and upon solemn occasions" (Article VI, Section 3). The legislature typically asks for about one advisory opinion per session. In recent years, opinions have addressed issues such as the legislative procedures involved in overriding the governor's veto and the constitutionality of a proposed tax cap originating as a direct initiative. The process seems to contribute at least in part to the top court only rarely finding it necessary to invalidate a Maine statute.

One interesting authority assigned to the Maine Supreme Judicial Court by an 1876 amendment involves codifying the constitution. Every ten years the chief justice has the duty of placing into the text of the document all amendments that have been added in the previous decade and deleting repealed or unnecessary provisions. The result is a constitution containing no list of numbered amendments at the end. Persons who pick up a pamphlet copy of the constitution (at the office of the secretary of state) find the most recently adopted amendments, that is, those not yet codified, printed on sheets of paper contained in a pocket attached to the back inside cover.

Although the original constitution was silent on the question of state-local relations, several amendments have subsequently structured that relationship. One, the twenty-second in 1878, prohibited municipalities from creating debts that exceeded 5 percent of their property valuations. The legislature had sometime earlier allowed localities to sell a limited amount of bonds for the purpose of attracting railroad lines. Pressures on the legislature to relax the credit limitation for individual communities became so intense that the amendment was needed to regulate the situation. In more recent times, the legislature has raised the debt limit, and another amendment

required the state to partially reimburse municipalities for losses caused by state tax exemptions and credits.

Generally, the amendments to the constitution affecting localities have expanded the latter's powers. In 1969, the 111th Amendment provided home rule to municipalities. Under its provisions, local inhabitants "shall have the power to alter and amend their charters on all matters, not prohibited by constitution or general law, which are local and municipal in character." Previously, all changes in municipal charters had to be approved by the legislature, and the last month of the session was usually clogged with such bills.

Public Policy

A major reason that the Maine Constitution has remained relatively brief is that it has only infrequently tried to shape public policy. Still, some amendments have reflected concerns over certain matters of policy. Although few in number, they have revealed some key moral attitudes and principles. One of the most interesting was the Twenty-sixth Amendment that, in 1885, "forever prohibited" the use of intoxicating liquor. The amendment was the outgrowth of a powerful temperance movement in Maine, led by one Neal Dow, a Portland businessman and philanthropist who in the 1850s won legislative enactment of a Prohibition law often referred to as the Maine Law because it was copied widely by other states. Partisan differences over the issue caused the policy to rest on an uncertain foundation as long as it depended on a statute. Supporters thus successfully pursued the amendment process. The Prohibition amendment was repealed in 1934.

Another important policy provision involved the Fourteenth Amendment. Approved in 1875, this act pledged that charters of incorporation would be created not under special legislation but instead under general laws. Since the 1830s, the legislature had heard the arguments for general incorporation laws—that they would help curtail privilege, favoritism, and monopoly and that with their passage legislative time would no longer be wasted dealing with "ambitious individuals and greedy corporations."[7] The Maine legislature enacted a statute to that effect in 1870, but few corporations were formed under it until the policy was embodied in the Fourteenth Amendment.

Unlike many other state constitutions, Maine's fundamental law includes only a few examples of provisions protecting the goals of specific interest groups. One is the Sixty-second Amendment, which was pressed by highway organizations. Adopted in 1944, it prohibits the diversion of gasoline tax revenues for any use other than the construction and maintenance of roads

7. Barry, "Nineteenth-Century Constitutional Amendments," 123–25.

and bridges. Related amendments are the ones restricting the use of moneys held by the Maine State Retirement System to retirement purposes and requiring a two-thirds vote in the legislature to expend funds derived from the mining excise tax.

Current Issues

Although the constitution has generally not been at the center of political controversies in Maine, the expansion of state government in recent decades has raised questions about its institutional arrangements. Maine experienced a particularly high level of partisan conflict in 1991 when the Republican governor and Democrat-controlled legislature reached an impasse over the state budget. The upshot was the shutting down of state government for three weeks in July, leading to widespread citizen protests across the state. Partly as a result of the crisis, Maine voters imposed term limits on state legislators with a 1993 referendum and elected an independent as governor in 1994. Some citizens urged that the constitution itself be examined and possibly rewritten entirely in a constitutional convention. In their editorials Maine newspapers generally found little need for such a convention. As Portland's *Maine Sunday Telegram* stated, "The fact that Mainers have been able to make timely and necessary changes (and even a few popular but unnecessary ones) says that the constitution is serving us well."[8] Still, suggestions for change have flourished.

One topic concerns an issue debated just a century ago, namely, whether the process of initiative and referendum should apply to constitutional amendments. As we have noted, the popular lawmaking provisions exclude amendments to the charter from their reach. The reason then was fear that the Prohibition amendment would be repealed. In recent legislative sessions, bills have appeared to permit the public to initiate amendments, usually with the proviso that such proposals would also need to gain the support of the legislature prior to being placed before the electorate. Thus far, the legislature has refused to approve such proposals.

Another development has been the overruling of a provision in the Maine Constitution by a federal district court. In 1997 and again in 2000, Mainers were asked to consider removing language from the constitution that disqualified all persons under guardianship for reasons of mental illness from voting. Shortly after voters rejected the amendment for the second time, the Disability Rights Center of Maine, the state's designated protection and advocacy agency, filed a lawsuit in federal court on behalf of three individuals under guardianship due to mental illness. The court overturned the provi-

8. Editorial, *Maine Sunday Telegram,* January 27, 1994.

sion as violative of the Fourteenth Amendment to the U.S. Constitution and the Americans with Disabilities Act. The court found that Maine's provision targeted "a subset of mentally ill citizens based on a stereotype rather than any actual, relevant incapacity."[9]

Conclusion

Probably the most salient feature of the Maine Constitution has been its durability over nearly two centuries despite vast changes in the government it shapes. For instance, annual state revenues have increased from less than thirty thousand dollars in Maine's first year of statehood to nearly three billion dollars in the current decade. The need for constitutional revision has been persistent, but it has always proceeded in the form of piecemeal amendments, not through a wholesale rewriting of the fundamental law. To be sure, occasional calls for a constitutional convention have been heard, as we noted, most recently during the budget crisis of 1991. Yet the state has never found a convention necessary. Instead, constitutional commissions have handled the problem of revision during those periods when the need for change was particularly intense.

Mainers' satisfaction with their charter has resulted in popular approval of nearly 90 percent of all proposed amendments. Factors fostering that high level of acceptance have been the state's moderate political culture and the general political congruence between its elected officials and the voters. However, the primary reason seems to be the nature of the constitution itself, which is general in language, inclusive in defining the people and their liberties, and supportive of a carefully balanced separation-of-powers system. The framers in 1819 were surely farsighted in sketching only the basics of governing arrangements, leaving to later generations the task of making necessary adjustments. That strategy has long been effective in a political community where citizens, with fairly few exceptions, have found ways to agree on the fundamentals.

9. News release, Disabled Action Committee, http://members.aol.com/DAC4VA/main.htm. See also *Doe v. Rose,* 156 F.Supp.2d 35 (D. Me. 2001).

KENNETH L. MANNING

The Massachusetts Constitution

Liberty and Equality in the Commonwealth

They sought a routine license. The state's fee for it was the modest sum of four dollars, and the receipt of it was not contingent upon any skill or training. Indeed, thousands of the permits were regularly handed out each year. However, Julie and Hillary Goodridge, two women from Boston, were denied a license to marry in the state of Massachusetts because they were both female. It was this rejection that laid the foundation for a legal challenge involving the Massachusetts Constitution, the interpretation of which would ultimately reverberate around the world. At its very core, the constitutional debate was surprisingly straightforward: on what grounds could Massachusetts limit the issuance of a marriage license? The Massachusetts Supreme Judicial Court answered this question in its landmark 2003 ruling in *Goodridge v. Department of Public Health.*[1] The court's response sparked an important debate and had potentially profound legal, political, and cultural ramifications both in Massachusetts and throughout the United States.

It is not surprising that such an important constitutional question would emerge from Massachusetts. Few, if any, states enjoy a constitutional history as rich and significant as that of the Bay State. From the establishment of the Massachusetts Bay Colony in 1630 to the current same-sex marriage debate, Massachusetts has for four centuries exerted an outsized influence on U.S. constitutional tradition. The current question about marriage, which rests to a significant extent on an understanding of the Bay State's constitution, carries on the major constitutional contributions that Massachusetts has made in American history.

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1. *Hillary Goodridge & Others v. Department of Public Health & Another,* MA Sup. Jud. Ct. SJC-08860 (2003).

Citizenship and Equality

It has been said that the state constitutions form the basis for the U.S. Constitution.[2] But it is arguably the Massachusetts constitutional tradition that served as a wellspring for constitutional thought in the American states during the early days of the Republic.

The founders of the Bay State established a constitution for the "Commonwealth of Massachusetts" in 1780. The "Commonwealth" moniker distinguished the 1780 constitution from earlier drafts—which had been rejected—that referred to the "State of Massachusetts Bay."[3] After numerous changes and interpretations over more than two centuries, the same constitution is still in effect today. The Bay State thus currently holds the distinction of having the oldest continuously governing written constitution in the world. Penned seven years before the Constitutional Convention in Philadelphia in 1787, the Bay State's charter was, in fact, a model for the U.S. Constitution.[4]

This longevity is not due to a lack of innovation or progressive thinking. Rather, the durability of the Bay State's charter is a remarkable testament to the flexibility written into the original document, a competent state judiciary that has effectively applied the document in countless ways, and an amendment process that has produced changes that, on the whole, have generally been positive. The success of the constitution is evidenced by the leading position that the Bay State today occupies among the fifty states. Massachusetts consistently ranks among the highest in terms of personal income, educational attainment, quality of life, and a variety of other socioeconomic indicators.[5]

Though it has been enduring, the Bay State's constitution was not a wholly new creation that organically emerged in 1780. In drawing up the state constitution, the Massachusetts founders had a number of antecedents from which they could draw, including the Pilgrim Code of Law (1636), the Massachusetts Body of Liberties (1641), the Puritan Laws and Liberties (1658),

2. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

3. Three other states—Kentucky, Pennsylvania, and Virginia—later also adopted the "commonwealth" moniker. Other than semantics, the title represents no distinction whatsoever from other states.

4. The term *charter* is used herein synonymously with *constitution* when referring to the Massachusetts Constitution of 1780, unless specified otherwise. For more on the nuances between these and other labels, see Lutz, *Origins of American Constitutionalism,* 16–22.

5. See, for example, G. Scott Thomas, *The Rating Guide to Life in America's Fifty States* (Amherst, N.Y.: Prometheus Books, 1994). Using a wide variety of objective criteria, Thomas ranks Massachusetts as the best "large state" in the nation.

the Massachusetts Charter of 1691, and the Massachusetts Explanatory Charter (1725). The constitution of 1780 can thus be viewed, at least to some extent, as an evolutionary document that drew upon prior thought and experience. It was also a cooperative effort. The constitution was composed through a lengthy debate that included input from towns throughout the state. It is, however, John Adams, who would later go on to become the second U.S. president, who is generally regarded as the principal author of the Massachusetts Constitution.[6]

One of the important goals of a constitution is to define the body politic. In many states, the matters of race and slavery made this task a complex one, and the tragedy of racism embodied in slavery left indelible stains on America's constitutional development. The defining of a people in the Bay State was accomplished with greater ease than in many states, though it was not without some early debate. At least one early draft of the constitution of 1780 withheld the vote from "Indians, mulattoes, and blacks," thereby relegating these individuals to a subjugated status. However, though this stipulation enjoyed some support, a much greater number of citizens objected to the provision, and it was ultimately rejected. It is somewhat unclear when Massachusetts rejected slavery; some pointed to the constitution of 1780, whereas others pointed to preceding common law. Regardless, it was universally recognized that slavery had been abolished in the Bay State at the time of the adoption of its constitution. Massachusetts thus entered the Union as an unequivocally free state with no constitutionally codified racial barriers.[7]

Though Massachusetts may not have had the same experience as other states with regard to matters of race, the Bay State did make distinctions among citizens along other criteria. As was common during the period, the initial document stipulated that voting rights—and, hence, full political participation—were contingent on property-ownership requirements. Political participation was also limited to men, and voters defeated a proposed amendment in 1915 that would have expanded voting rights to women.

Perhaps most notable were the significant religious provisions in Massachusetts's constitution. In numerous instances the original text recognizes the prominence of religion, specifically Christianity, in the Bay State. Though these provisions have subsequently been removed or rendered moot by judicial decisions, the constitution provides for the "public worship

6. For more on the early history of the Massachusetts Constitution, see Louis Frothingham, *A Brief History of the Constitution and Government of Massachusetts* (Cambridge: Harvard University Press, 1916).

7. This paragraph draws from Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era,* trans. Rita Kimber and Robert Kimber (Chapel Hill: University of North Carolina Press, 1980), 182–83.

of God" and the "Maintenance of public Protestant teachers of piety" (Part I, Article III), that the governor "shall declare himself to be of the Christian religion" (Part II, Chapter II, Section I, Article II), and the requirement that elected state officeholders declare that they "believe the Christian religion" (Part II, Chapter IV, Article I). The original charter, therefore, defined a body politic that was notably (or so it was hoped) devout.

Beyond faithful worship of the Almighty, however, there was another goal underlying this push for piety—good citizenship. The Bay State's charter commands that "it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth . . . to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people" (Part II, Chapter V, Section II). It is clear that the constitution's objective was to promote what political scientist Daniel Elazar identifies as a *moralistic* political culture, that is, a society that believes that government should embody the public's values and highest aspirations while exercising its power for the betterment of the community at large.[8] The installation of religious beliefs in the citizenry, it was viewed, would help achieve this political objective.

Since 1780, subsequent constitutional amendments, laws, and judicial rulings have generally widened the separation between government and religion in Massachusetts.[9] That is not to say, of course, that there is a complete absence of political-religious debate in the Bay State today. The 2002–2004 child sex-abuse scandals involving Catholic clergy led to the resignation—and, in many instances, prosecution—of numerous church officials, including a cardinal, at least two bishops, and a number of parish priests. Though the scandal has not resulted in any major political fallout, the state has opened investigations and pursued prosecutions, and the revelations have reverberated powerfully throughout a state where Roman Catholicism is the dominant religious affiliation.[10] Overall, however, despite Massachusetts's constitutional origins, the state today is generally not considered to be a hotbed of political-religious fervor.

Beyond the role of defining the body politic, it is also an important aim of the constitution to provide security through the formation of a govern-

8. Daniel J. Elazar, *American Federalism: A View from the States,* 3rd ed. (New York: HarperCollins, 1984).

9. George M. Jarnis, *The Massachusetts Constitution: A Citizen's Guide* (Newton Centre, Mass.: Government Research Publications, 1987), 31.

10. Sacha Pfeiffer and Kevin Cullen, "AG Wants Church to Report Past Sex Abuse," *Boston Globe,* February 17, 2002; Walter V. Robinson, "Grand Jury Is Said to Call Law," *Boston Globe,* December 12, 2002.

ment for the people who constitute the state. The provision of security through the rule of law is one of the bedrock responsibilities of government. Massachusetts's founders clearly believed this, and the preamble of their constitution stipulates the goals of the charter as it formulates the creation of a government.[11] "It is the duty of the people, therefore, in framing a Constitution of Government, to provide for the equitable mode of making laws, as well as for an impartial interpretation, and faithful execution of them; that every man may, at all times, find his security in them" (Preamble, Paragraph 1). In this manner, the constitution seeks to bring about equity and impartiality as a means of securing the stability of the political system and its ultimate survival.

Gay Marriage and Equality in Massachusetts

The importance of impartiality and equity was clearly on display in the *Goodridge* gay-marriage case. The justices of the Massachusetts Supreme Judicial Court were asked to apply a new understanding to the constitutional requirement that the laws be applied in a nondiscriminatory fashion. The *Goodridge* plaintiffs argued that the denial of a marriage license to a same-sex couple constituted unjustifiable discrimination on behalf of the state. This, of course, sought to overturn the centuries-old notion that marriage was limited to male-female couples. Opponents, on the other hand, argued that a prohibition against gay marriage would further the state's interest in preserving family structure and promoting family life.[12]

Given that equal-protection claims were fundamental to African Americans in their struggle for political equality, supporters of homosexual rights point to the U.S. civil rights movement as a guide in their attempt to achieve greater legal recognition and protection. The *Goodridge* case was framed as a debate about the right of a minority group to marry. And just as civil rights activists in the 1960s saw the U.S. Supreme Court's decision in *Loving v. Virginia* as expanding the rights of a people by striking down state antimiscegenation laws, gay-rights supporters looked to the Massachusetts Supreme Judicial Court's ruling in *Goodridge* as a similar victory for the inclusion of members of a disadvantaged group into the full rights of persons.[13]

In a ruling that provoked impassioned responses on both sides of the debate, the court ultimately agreed with the *Goodridge* plaintiffs. The majori-

11. Though some have pointed out that preambles do not technically have constitutional status, they are nonetheless important statements of constitutional goals and objectives. See Lutz, *Origins of American Constitutionalism,* 9.

12. For more on the response by gay-marriage foes, see Raphael Lewis, "Groups Muster to Fight Gay Marriage in Massachusetts," *Boston Globe,* November 20, 2003.

13. *Loving v. Virginia,* 388 U.S. 1 (1967).

ty based their decision on the equal-protection and due-process provisions of the Massachusetts Constitution, saying that they guarantee the right for same-sex couples to marry: "The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens."[14]

Furthermore, the court found that the prohibition against gay marriage, like earlier restrictions on interracial marriage, was rooted in prejudice: "The marriage ban works a deep and scarring hardship on a very real segment of the community for no rational reason. The absence of any reasonable relationship between, on the one hand, an absolute disqualification of same-sex couples who wish to enter into civil marriage and, on the other, protection of public health, safety, or general welfare, suggests that the marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual."[15] Thus, the *Goodridge* decision can be seen as an expansion of the state's definition of who constitutes a "people" in the Commonwealth of Massachusetts, as well as an extension of state protection to these members of the body politic.

Government and Power: Managing Conflict

Like all state constitutions, Massachusetts's charter lays out the basic structure of state government. The organic document is composed of a preamble and two parts. The first part (or, in the original syntax, "Part of the First") constitutes the state's bill of rights, listed in the form of thirty articles. The second part consists of six chapters, divided into sections and subdivided into articles. These six chapters lay out the composition of state government institutions and establish specific practices and procedures.

The Massachusetts Bill of Rights is a delineation of citizen protections in the commonwealth. A number of these rights are similar to guarantees found in the U.S. Bill of Rights. For example, Massachusetts guarantees that "every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions" (Part I, Article XIV) and that "the people have a right to keep and to bear arms for the common defence" (Part I, Article XVII). Also included are protections of the freedom of speech and of the press, as well as religious liberty. But in contrast with the U.S. Constitution, the Bay State's bill of rights also incorporates language similar to that found in the Declaration of Independence and thus extends some of its language to citizens of Massachusetts: "All men

14. *Goodridge v. Department of Public Health,* 3.
15. Ibid., 58.

are born free and equal, and have certain natural, essential, and unalienable rights" (Part I, Article I),[16] and "The people alone have an incontestable, unalienable, and indefeasible right to institute government; and to reform, alter, or totally change the same, when their protection, safety, prosperity and happiness require it" (Part I, Article VII).

One of the most unusual provisions in the bill of rights is the separation-of-powers requirement. Of course, separation of powers with checks and balances has been widely used in the American constitutional tradition in order to limit the power of government, and Massachusetts is no exception. Like many other state constitutions, Massachusetts's document provides for a distinct separation of governmental powers, with the objective being the removal of arbitrariness from the exercise of authority: "The legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men" (Part I, Article XXX). But although the language of this requirement is relatively straightforward, the location of the mandate in the Massachusetts charter is particularly noteworthy. The constitution specifically spells out separation of powers as part of the bill of rights, rather than in the second part, which delineates political institutions and practices, and where some might expect to find such a provision.

The inclusion of the separation-of-powers clause in the bill of rights carries significant symbolic meaning. The Massachusetts founders recognized that potential abuse of governmental power posed a mortal threat to democratic government. By specifically providing for the separation of powers within the declaration of citizens' rights, the Bay State founders provided a telling indication of the importance of limiting government as a means of protecting citizens' liberties. Beyond the simple listing of individual limitations on state power that are common to declarations of rights, this separation-of-powers provision recognizes that the guarantee of liberties is contingent upon the proper structure and execution of state authority.

Part II of the Massachusetts Constitution outlines the structure of state government. It is typical among American constitutions in establishing legislative, executive, and judicial branches.

The legislature, or General Court, as it is known, is divided into a house and senate, and as a means of checking legislative power the constitution demands that each chamber "shall have a negative on the other" (Chapter I, Section I, Article I). The legislature has historically been an active one; Mas-

16. In an effort to remove gender-specific language, this language was amended to change the word *men* to *people* (Article CVI).

sachusetts was one of the earliest states to require that its legislature meet annually. In fact, yearly legislative sessions, now commonplace in the United States, were found in only six states as late as 1900. Not surprisingly, the legislature has a long tradition of being the focal point of state government. That is not to say, however, that the legislature has sole lawmaking authority. Whereas the General Court possesses legislative authority, the people of the Bay State maintain the power of initiative and referendum as a result of changes adopted in 1917. This allows for the submission of a proposal to a direct vote by the people and serves as a check on the authority of the legislature.[17]

In keeping with the vision of state government as an active promoter and protector of the common good, the Massachusetts legislature is considered by political scientists to be a professional one. The job of a representative or senator requires a full-time commitment, they are accorded relatively high pay, and they are provided with significant staff and resources.[18] These points are significant ones to consider, since studies have suggested that legislative professionalism has important political ramifications, and these ramifications may be manifested in Bay State politics. For example, some research has indicated that professional state legislatures tend to have lower rates of turnover and that their members are more insulated from political and economic developments.[19] Perhaps it is not all that surprising, therefore, to know that Massachusetts legislators tend to enjoy very high reelection rates.[20]

Massachusetts's governorship is a moderately powerful position when compared to other state executives.[21] The governor holds significant appointment powers, the most notable of which includes the power to select state judges (as discussed in greater depth later in this chapter). The gover-

17. It is important to note, however, that once passed, ballot questions are subject to legal challenge. In 2002, voters approved a proposal to eliminate bilingual educational programs in public schools. Following the proposal's passage, however, a suit was filed that challenged it, and the programs were preserved in some communities. See Anand Vaishnav and Michele Kurtz, "Courts Could Trump Voters: In Some Cities, Orders May Keep Bilingual Classes," *Boston Globe,* November 8, 2002, B1.

18. See Thomas R. Dye and Susan A. MacManus, *Politics in States and Communities,* 11th ed. (Upper Saddle River, N.J.: Prentice Hall, 2003).

19. William D. Berry, Michael B. Berkman, and Stuart Schneiderman, "Legislative Professionalism and Incumbent Reflection," *American Political Science Review* 94, no. 4 (2000): 859–65.

20. For more on the regular workings of Bay State politics, see Richard A. Hogarty, *Massachusetts Politics and Public Policy: Studies in Power and Leadership* (Amherst: University of Massachusetts Press, 2002).

21. For a ranking of state gubernatorial powers, see Kendra A. Hovey and Harold A. Hovey, *CQ's State Fact Finder, 2005: Rankings across America* (Washington, D.C.: CQ Press, 2005).

nor also possesses line-item veto power, but his veto may be overridden by a two-thirds vote of the legislature.[22]

The governor is not the only elected executive authority in the state. The 1780 constitution provided for the additional election of a lieutenant governor, and the two executive positions were elected independently. However, in 1966 the constitution was amended to allow the governor and lieutenant governor to be elected together. Thus, rather than creating a potential rivalry between the two positions, the lieutenant governor is considered a part of the governor's team, and the two officials belong to the same political party. Today, the lieutenant governor is largely a ceremonial position, and the occupant holds no position in the legislature. Beyond these top positions, the state attorney general, auditor, treasurer, secretary, and Governor's Council are also elected.[23] With the exception of the low-profile Governor's Council, the structure of the executive branch is fairly consistent with that found in other states, and the Massachusetts executive does not enjoy any particularly extraordinary powers compared to his or her fellow chief executives. The governor's primary responsibility is to work with the legislature in a lawmaking capacity. In practice, this has often centered on developing spending plans and the inevitable budget battles that such plans entail.

One of the primary responsibilities of American courts is to resolve disputes, and the Massachusetts courts are no exception. The judiciary in the Bay State follows the elemental three-tier structure (trials courts, intermediate appellate courts, and a court of last resort) that is utilized in most U.S.

22. The party politics of the Bay State has often limited the governor's veto authority. Massachusetts has, for a number of years, been a state dominated by one party. For more than two hundred years the state was dominated by the Federalist, Whig, and, later, Republican Parties. Then, in the early twentieth century in response to the changing demographic politics of the state, Massachusetts became a state dominated by the Democratic Party, which is still largely in control. In recent years, however, Republicans have been remarkably successful in winning gubernatorial elections. Indeed, the most recent Democrat to sit in the governor's chair was Michael Dukakis, who was last elected in 1986. Once in office, however, Republican governors have often been stymied by a legislature overwhelmingly controlled by the other party. This has often rendered the governor's veto pen of limited use by the chief executive, since the Democrats have generally enjoyed—and often used—their veto-proof majority to override the governor's objections. Indeed, the governor's ability to effectively lead has frequently rested to a large extent on his or her ability to work in an amicable fashion with the powerful legislative leaders—the Speaker of the house and the senate president. The end result is a tendency to reinforce the prominence and importance of the legislature.

23. The Governor's Council consists of nine individuals: eight persons elected every two years from districts statewide and the lieutenant governor. In addition to its role approving gubernatorial appointments to the judiciary, the council is also responsible for criminal pardons and commutations. In practice, the council has typically been an inconspicuous institution.

states. However, two important distinctions regarding the Massachusetts courts set them apart from those found in most other states: the extent to which judges are able to hand down rulings in an independent fashion and the authority of the state's high court to render advisory opinions. As it turns out, both of these peculiarities played a role in the *Goodridge* decision, and they both affect the means by which courts are able to manage conflict in Massachusetts.

Massachusetts is somewhat unusual among the states in mandating a judicial selection process that is similar to that found at the federal level. Unlike the systems utilized in many states, which provide for some form of electoral connection—either through direct election or retention votes—between the public and the composition of the judiciary, state judges in Massachusetts are appointed by the governor and approved by the Governor's Council. Once appointed, judges hold their office "during good behavior" (Part II, Chapter III, Article I) until they reach a mandatory retirement age of seventy.[24]

The amount of independence that state judges should enjoy has, of course, been a long-running debate in the United States. Whereas many states have moved to create a direct linkage between the public and the judiciary through the judicial selection process, Massachusetts has generally resisted such attempts and in doing so has produced a remarkably independent state court system.[25] The importance of judicial independence to the preservation of liberty can hardly be overstated. Indeed, recent research suggests that judicial independence is vital in protecting political rights in democratic government around the world.[26] It is upon these rights, of course, that democracy rests. The lesson is clear: when courts lose their independence, citizen rights are at risk. The independence possessed by the Massachusetts judiciary stands as a testament to the commitment to liberty that Bay Staters have displayed throughout their history.

Another exceptional characteristic exhibited by the judiciary is the provision for the rendering of advisory opinions by the Supreme Judicial Court.

24. A constitutional amendment passed in 1970 (Article XVIII) imposed the age limit. Other than retirement due to age or physical or mental inability to complete the task, judges may be removed in three possible ways: upon impeachment by the house and conviction by the senate; upon a finding by the state's commission on judicial conduct of an instance of significant judicial misconduct, the commission may recommend to the Supreme Judicial Court that a judge be removed from office; and the governor, with the consent of the Governor's Council and both chambers of the legislature, may remove a judge from office.

25. For more on the judicial selection process and judicial independence, see Robert A. Carp, Ronald Stidham, and Kenneth L. Manning, *Judicial Process in America,* 6th ed. (Washington, D.C.: CQ Press, 2004), chap. 5.

26. See Robert M. Howard and Henry F. Carey, "Is an Independent Judiciary Necessary for Democracy?" *Judicature* 87 (May–June 2004): 274–83.

Though this power is not unique to the Bay State, it is somewhat unusual—only ten states provide for such opinions. This power enables the court to provide legal guidance to the legislative and executive branches outside of the traditionally adversarial litigation process. Some scholars have suggested that advisory opinions provide legislatures with distinct benefits, though the effects of advisory opinions on judicial authority are less clear.[27] It is clear, however, that the authority to hand down advisory opinions allows the Supreme Judicial Court to play a more active role in the policy-making process than the courts of last resort in most other states. Having the power to render advisory decisions enables the judiciary to serve as an influential legal guide to other policy makers.

The Massachusetts Government Responds to *Goodridge*

On November 18, 2003, the Massachusetts Supreme Judicial Court delivered its long-awaited decision in *Goodridge.* Because the ruling was handed down some eight months after oral arguments had been heard, and four months after the court's own self-imposed deadline for a decision had passed, state political figures had braced for the decision.[28] The three most powerful and prominent political figures on Beacon Hill—Governor Mitt Romney, Speaker of the House Thomas Finneran, and Senate President Robert Travaglini—were united in their opposition to same-sex marriage.

However, this unanimity at the top echelon of state government was not particularly representative of statewide sentiment, nor was it reflective of the opinion of all state lawmakers. Rank-and-file members of the house and senate were evenly divided in their response to the landmark judgment. Furthermore, a poll taken soon after the *Goodridge* ruling was issued found that Bay Staters favored the decision by a twelve-point margin: 50 percent of those polled supported the decision, whereas 38 percent opposed it.[29] In fact, the lack of consensus among legislators reflected the diversity of opinion that citizens of the state had about the issue. The top three political lead-

27. Seven state constitutions (Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota) empower their courts to render advisory opinions. Alabama and Delaware have statutes authorizing such opinions, whereas courts in North Carolina have upheld the practice in judicial rulings. See James R. Rogers and Georg Vanberg, "Judicial Advisory Opinions and Legislative Outcomes in Comparative Perspective," *American Journal of Political Science* 46, no. 2 (2002): 379–97.

28. Kathleen Burge, "Gays Have Right to Marry, SJC Says in Historic Ruling," *Boston Globe,* November 19, 2003.

29. Frank Phillips and Rick Klein, "Lawmakers Are Divided on Response," *Boston Globe,* November 19, 2003; Phillips and Klein, "50% in Poll Back SJC Ruling on Gay Marriage," *Boston Globe,* November 23, 2003.

ers in the Bay State may have been in general agreement about the issue, but few others were.

Political leaders were also limited in their ability to direct any adverse reaction toward the judiciary. Partisan politics were notably off the table; the majority opinion of the court included appointees from both political parties. Indeed, three of the four jurists in the majority were appointed by Republican governors. More important, the independence that judges enjoy in Massachusetts undoubtedly allowed the justices of the state's high court to hand down a decision in *Goodridge* while knowing that the governor and other opponents of gay marriage could not attempt to derail the jurists' careers.

Compare this, however, to the fate of Tennessee Supreme Court Justice Penny White. Justice White lost her position in 1996 on that state's high court after an intensive effort by then governor Don Sundquist and the Tennessee Conservative Union to remove her from office. Justice White's opponents were angry because of her ruling in a high-profile death-penalty case that was favorable to the defendant. In response to her action, they engaged in a successful public campaign to press voters to remove her from her position on the Tennessee Supreme Court.[30] Massachusetts voters upset over the high court's ruling in *Goodridge* did not have a similar option.

After the Supreme Judicial Court's ruling allowing same-sex unions, the legislature responded by expressing an interest in adopting "civil union" legislation that would provide legal recognition and equality to gay couples. Similar legislation went into effect in Vermont in 2000 when that state was the first, and only, to recognize same-sex relationships. However, like the Vermont law, the proposed Massachusetts legislation would have continued to deny gays and lesbians access to marriage as it has been traditionally defined. The Supreme Judicial Court was asked by the legislature for an advisory opinion: would a civil-union bill pass muster with the court and bring the state into compliance with the *Goodridge* ruling?

As it turned out, an advisory opinion became critically important in the gay-marriage debate since the opinion enabled the state to avoid another round of protracted legal debate and allowed for a final decision by the state court to be handed down rather promptly. The court's advisory opinion rendered on February 4, 2004, was clear: civil unions constituted "an unconstitutional, inferior, and discriminatory status for same-sex couples. . . . [S]eparate is seldom, if ever, equal."[31] The court thus upheld its initial deci-

30. For more on the White controversy, see Penny J. White, "An America without Judicial Independence," *Judicature* 80 (January–February 1997): 174–77.

31. See Raphael Lewis, "SJC Affirms Gay Marriage: Court Deems Civil Unions Insufficient," *Boston Globe,* February 5, 2004.

sion that effective May 17, 2004, same-sex couples could not be denied a marriage license in the Commonwealth of Massachusetts.

Gay-rights supporters lauded the decision as an important step toward political equality for gays and lesbians. Opponents, however, argued that it was an example of judicial activists overturning centuries-old law by legislating from the bench. And their next step was to attempt to overturn the court's decision by passing a constitutional amendment.

Resolving Disputes and Moving Forward

Constitutional change, whether via amendment or judicial interpretation, is an important substantive and symbolic means of managing political conflict. The need to change a constitution from time to time has long been recognized in American politics. Indeed, the ability to change the wording of a written constitution through amendment was an important innovation in constitutional development that was institutionalized by the American founders, who viewed the process as crucial to the endurance of democratic government.[32] It has been an innovation employed throughout the states, and its significance can hardly be overstated. The state constitutional amendment process plays an important role in helping to mediate political disputes in the United States.

Amending the Massachusetts Constitution is no speedy task. The legislature, with both chambers convened together in a constitutional convention to consider amendments, must pass a proposed amendment in two successive sessions. Upon legislative approval, the amendment must go before the voters for their approval or rejection. This means, therefore, that at least two to three years typically elapse between initial proposal and final approval.

When the Supreme Judicial Court handed down its *Goodridge* ruling, opponents of gay marriage, including Governor Romney, announced that they would attempt to amend the constitution to limit marriage in the Bay State. The legislature convened in a constitutional convention and on March 29, 2004, approved by a vote of 105–92 a constitutional ban on gay marriage.[33] The legislators included language in the proposed amendment that would authorize Vermont-style civil-union status for same-sex couples in the Bay State. This did not, however, put an end to the dispute. In order for it to become law, the amendment would have to be approved once again in the

32. See Adams, *First American Constitutions.*

33. Rick Klein, "Vote Ties Civil Unions to Gay-Marriage Ban," *Boston Globe,* March 30, 2004.

2005–2006 legislative session, and then placed on the November 2006 ballot for voter approval.

By then, of course, gay couples would have enjoyed the right to marry in Massachusetts for almost two and a half years, per the court's original ruling. To prevent this, the governor requested that Attorney General Thomas Reilly petition the court to stay its ruling until the voters had the opportunity to cast their ballots on the issue. However, this attempt was essentially quashed when Reilly refused to seek petition, asserting that the governor had no valid legal basis to seek the stay. With that, gay-marriage opponents saw their efforts to prevent same-sex couples from marrying in the Bay State come to an effective end. On May 17, 2004, more than one thousand gay couples poured into government offices, seeking licenses to marry.[34] In Boston, Mayor Thomas Menino personally greeted couples and gave them a wedding-cake reception at city hall. The Bay State became the first in the nation to allow same-sex marriage.

To be sure, the issue is far from settled in Massachusetts. If the constitutional amendment approved by the legislature in 2004 is to go before the voters, it must again be approved by the legislature. The first count was close; a swing of just 7 votes out of the 197 cast would have changed the outcome. Furthermore, the state political landscape is a changing one. Speaker Thomas Finneran, a gay-marriage foe and amendment supporter, left the legislature in 2004. The new Speaker, Salvatore DiMasi, opposed the amendment, and he installed a leadership team that is more liberal on social issues. Furthermore, there is evidence indicating that support for the amendment among legislators may be waning.[35] And, needless to say, nothing guarantees that Bay State voters would ultimately approve the controversial amendment.

It is clear, however, that the move by Massachusetts ignited a national debate. The Bay State has, for example, opened the door to litigation challenging the 1996 federal Defense of Marriage Act (DOMA).[36] DOMA allows states to refuse to recognize same-sex marriages performed in other states, and it thus limits the transferability of marriage status outside of Massachusetts. Of course, it is possible that DOMA could be found unconstitutional by the federal courts. In order to prevent such an occurrence, President George W. Bush attempted to take the law one step beyond DOMA by calling for a federal constitutional amendment banning gay marriage. This, of

34. Ibid.; Yvonne Abraham and Michael Paulson, "Wedding Day: First Gays Marry; Many Seek Licenses," *Boston Globe,* May 18, 2004, A1.

35. Frank Phillips, "DiMasi Bends House to the Left," *Boston Globe,* February 8, 2005; Phillips, "Bid Seen Weakening to Ban Gay Marriage," *Boston Globe,* January 18, 2005.

36. Emily Bazelon, "The Same-Sex Marriage Argument That Justice Scalia Fears," *Boston Globe,* May 16, 2004.

course, added another dimension to the ongoing national debate. And in another development, a California judge has ruled that the Golden State may not prohibit same-sex couples from marrying, opening the door to a potentially protracted legal battle in that state.[37]

Ultimately, this debate over the Massachusetts Constitution has served a useful purpose, as it has allowed the state and nation to discuss an issue of great importance to a large number of citizens. Obviously, there will never be universal agreement on this—or just about any other—issue. Regardless of how this issue is ultimately resolved, however, there is little dispute that Massachusetts's constitutional tradition has left an important mark on American politics. Nearly 230 years after it was initially adopted, the Bay State's constitution continues to have an extraordinary impact on American life.

37. Elisabeth Bumiller, "Same-Sex Marriage: The President; Bush Backs Ban in Constitution on Gay Marriage," *New York Times,* February 25, 2004, A1; Dean E. Murphy, "Judge in California Voids Ban on Same-Sex Marriage," *New York Times,* March 15, 2005, A16.

B. THOMAS SCHUMAN

New Hampshire and the Constitutional Movement

> The doctrine of nonresistance against arbitrary power and oppression is absurd, slavish and destructive of the good and happiness of mankind.
>
> —Excerpt, New Hampshire Constitution, Part I, Article 10

The seeds of the revolutionary spirit in New Hampshire were sown long before they came to life in the state's bill of rights. New Hampshire was established as a commercial venture (unlike other New England colonies settled by religious dissenters), and its early colonists reflected an uncommon egalitarian bent, a strong sense of self-determination rising from their tradition of local control of town governments, and a culture in which hard labor, frugality, and economic success were the determinants of esteem and rank.[1]

When Britain's Charles II granted a royal charter in 1769 to define New Hampshire as a separate political entity, ten New Hampshire colonists refused to serve as the king's representatives. They assumed their positions "only under the threat that less capable men would be named to serve in their stead."[2]

The record of the royal provincial government over the ensuing nine

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1. See the discussion in chapter 5 of Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988). See also Daniel J. Elazar, *American Federalism: A View from the States,* 3rd ed. (New York: Crowell, 1984).

2. The New Hampshire General Court occasionally releases a booklet that includes an abbreviated constitutional history of the state along with a detailed update of the state constitution. See Lorenca Consuelo Rosal, "Introduction and Overview of Our Constitutional History," in *The New Hampshire Constitution, 2001–2003* (Concord: New Hampshire Department of State, 2001).

decades was an ongoing target for dissatisfied colonists. Slowly, but steadily, a groundswell of anger toward and resistance to British rule rose up from practices of selective representation, nepotism, and taxation without representation. By 1773, Governor John Wentworth was granting representation in the legislative assembly to only 46 of 147 towns, a privilege usually granted on the basis of pro-British patronage. The record of favoritism and nepotism in the appointment of officers of government and the military had been a persistent grievance. And with the Stamp Act of 1765, New Hampshire colonists finally found common ground with Massachusetts revolutionaries ready to challenge the "arbitrary power and oppression" of the Crown.[3]

The first open act of rebellion by New Hampshire patriots came with Paul Revere's 1774 ride to warn of a British invasion of New Hampshire. Local citizens organized the "Powder Raid" to establish "ownership" of the contents of the arsenal at Fort William and Mary at Portsmouth. Governor Wentworth's position was further undermined with the militia's refusal to pursue or arrest the raiders. Then, in June 1774, Wentworth was confronted with a cannon at his front door in Portsmouth as a crowd protested the seating of a pro-British assemblyman. After Wentworth again dissolved the recalcitrant legislature, the colonists organized a Provincial Congress representing 85 New Hampshire towns that began meeting during July 1774. Wentworth and his family abandoned New Hampshire in August 1774.[4]

For the New Hampshire colonists, the question was how to contend with their new circumstances. The absence of a royal governor and a charter placed them in a power vacuum that would demand decisive and inventive action.

To further complicate the colonists' situation, by the 1770s New Hampshire was a socially and economically divided community. The mercantile seacoast economy was driven by shipbuilding, warehousing, and sawmills involving a wealthy class of merchants and a permanent labor class. In the western and central interior, small towns had sprung up to support widespread settlement by farmers, many of whom had migrated to the area from colonies to the south and had little connection to Portsmouth.[5] Any prospect for a government that unified the entire population would be confronted with a population that had a tradition of town-meeting decision making directly responsible to local interests.

3. Ibid.

4. SHG Resources, "New Hampshire Timeline of State History," http://www.shgresources.com.

5. R. Stuart Wallace, *New Hampshire History in Brief,* 8th ed. (Concord: New Hampshire Division of Historical Resources, 1989). Available at http://www.nh.gov/markers/brief.html.

Breaking the Mold: Revolutionary Government and the First State Constitution

Absent royal rule, New Hampshire colonists fell back on the system of town meetings to govern themselves much as they had since the mid-1600s. Through late 1775, this local home rule provided the basic organization and public services to set the stage for a new form of government.

However, the Provincial Congress in Exeter sought some basis for legal authority to act as the government of New Hampshire. The representatives petitioned the Continental Congress in Philadelphia for advice. On December 21, 1775, a congressional committee approved a resolution recommending that New Hampshire establish a state government directed by popular sovereignty. In short order, a committee of the Provincial Congress was directed "to frame or draft a new government." Rather than simply alter the colonial charter, the committee produced a 911-word document that would become the first American state constitution. The entire Fifth Provincial Congress in New Hampshire approved the 1776 constitution by a two-to-one margin.[6]

Though intended as fundamental law only "during the present unhappy and unnatural contest with Great Britain," the document reflects most of the principles of constitutional design. The justification for establishing a new form of government lay in its declaration of the "many grievous and oppressive acts of the British Parliament, depriving us of our natural and constitutional rights and privileges." Further, the absence of royal governance left the former colony "destitute of legislation" and of "executive courts . . . open to punish criminal offenders." The formation of this new government was deemed a necessity to preserve peace and good order, and to provide for the "security of the lives and properties of the inhabitants of this colony."

Implicitly, this document makes clear that, although the state legislature is empowered to make law, its power is derived from the people. Also implicit, "A people is assumed already to exist from colonial times." Further, "The Lockean notion of one agreement creating a people and another creating the government is implicit. . . . The document creates a civil society."[7] The power and rights of the people are largely implicit. The election of popular representatives implies majority rule, and apportionment of the council on the basis of population implies an egalitarian commitment. There is no direct reference to individual protections of rights, but by reference to the rights and privileges of Englishmen it suggests the protections of common law.

6. Rosal, "Introduction and Overview."
7. Lutz, *Origins of American Constitutionalism,* 101–3.

The 1776 document then proceeds to describe the form this new government will take. It establishes a representative assembly elected by adult male taxpayers and a twelve-member council. Noticeably absent is the office of governor. All laws are to be passed by both chambers, and they elect or appoint all officers of the government. Finally, while endowing the legislature with supreme power, the 1776 constitution establishes an annual election cycle to keep the representative body close to its constituents.

Although the original intent had been to operate under the 1776 constitution until the end of the war with Great Britain, New Hampshire citizens soon raised a number of criticisms of the document. In particular, objections were raised to the unclear apportionment of representatives to the lower house, the absence of a statement of guaranteed rights of the people, the lack of a process to amend the document, and the fact that it was never ratified by eligible voters.[8] In February 1778, the two houses of the state legislature jointly voted on and scheduled the world's first constitutional convention, the product of which would require ratification by a two-thirds majority of voters.

The "Permanent" New Hampshire Constitution of 1784

After two failed attempts at ratification, New Hampshire voters endorsed a new constitution that went into effect in June 1784.[9] The first draft, submitted to town meetings in 1782, was returned with enough proposed amendments that the convention opted to redraft the document and resubmit it for public consideration. The redraft was resubmitted to town meetings in late 1782, and again returned with even more proposed changes. It was not until the third draft was considered by town meetings in 1783 that the document was accepted without change.[10]

The repetitive process of ratification requiring a supermajority of eligible voters suggests the intensity of public scrutiny invested in a document that would define the new government of the State of New Hampshire. Unlike the implicit references present in the revolutionary constitution of 1776, public concerns for a system of government that limited and checked the use

8. Rosal, "Introduction and Overview."

9. The official position of the New Hampshire courts is that the 1784 document remains as the state's one and only permanent constitution (see *State v. Saunders,* 66 N.H. 39 [1889] at 72). Despite a record of 237 changes to this document in the past 220 years, forty-two articles in the current constitution have remained unchanged since 1784.

10. See "New Hampshire State and Local Government," http://www.thegreenpapers.com/slg/NH.html.

of power, protected individuals' natural rights and freedoms, and answered to the people were explicitly codified in the 1784 document. Further, it specifically created a mechanism for New Hampshire citizens to alter their fundamental law to address changing conditions. In sum, even with more than two hundred amendments since 1784, the New Hampshire Constitution serves as a document that defines distinct popular beliefs, values, and expectations for government by the people.

The New Hampshire Constitution and Constitutionalism

The essence of constitutionalism as a means to understanding the development of American political theory lies in the degree to which a constitutional document summarizes a people's "commitments and the standards by which we assess, develop, and run our political system." The following evaluation seeks to address this question: to what degree does the New Hampshire Constitution describe how people should treat each other, "the values that form the basis for the people's working relationship," how political forces will be balanced, and a structure for preserving or enhancing that balance?[11]

Defining a Way of Life and Community

Although certainly a reflection of New Hampshire culture, values, and principles informed by the colonists' history under Crown rule, the 1784 constitution was a decidedly unique product. Unlike fundamental documents only minimally altered from their charter form as installed by former colonies to the south, the elected members of the first New Hampshire constitutional convention drafted a groundbreaking declaration of individual rights and the responsibility of government to the people it serves. Further, the first-of-its-kind requirement for ratification by two-thirds of the people ensured the constitution would bear the mark of public morals, values, principles, and expectations.

Predating the U.S. Constitution of 1791 by seven years, the New Hampshire Bill of Rights reflects public insistence for written protections of individual freedoms. This first part of the New Hampshire Constitution precedes any discussion of the institutions, structure, or functions of the citizens' new form of government. In general terms, Part I is a fairly comprehensive, clear, and specific statement of citizen concerns for government

11. Lutz, *Origins of American Constitutionalism*, 3.

controlled by the people and charged with protecting individual rights. The 1784 bill of rights included thirty-eight articles; fifteen of the original articles have since been amended and another four added through 1988.

This part of the New Hampshire Constitution provides clear evidence of the influence of Locke's view of individuals' natural rights and the social contract, as well as the historic and cultural experiences that shaped New Hampshire citizens' morals, values, and principles of egalitarian and democratic governance. The extensive specification of these civil liberties may also be a reflection of public concern for their omission in the revolutionary constitution of 1776.

Articles 1 and 2 of Part I immediately recognize the natural equality, freedom, and independence of all men, the concept of government by the consent of and for the good of the people, and endowment of natural, essential, and inherent individual rights, including life, liberty, property, and the pursuit of happiness.

Having detailed individual assets in the state of nature, Article 3 specifies the organization and purpose of society. "When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others." This restrictive vision of the responsibility of an organized society is further qualified in Articles 3, 4, 5, and 10. Should "society" fail in its responsibility for "protection of others," the surrender is void. Public memory of royal abuse of power is evident in the specification in subsequent articles of key unalienable rights that are excluded from the social contract. These rights include individual rights of conscience (Article 4), religious freedom (Article 5), conscientious objection to bearing arms (Article 13), and free speech and liberty of the press (Article 22). As a final recourse to government abuse of power, Article 10 reserves for the people the right to reform the old or establish a new government if "all other means of redress are ineffectual" (Article 10).

The bill of rights also empowers New Hampshire residents as citizens. As such, the people are granted "the sole and exclusive right of governing themselves as a free, sovereign, and independent state" (Article 7). As citizens, their responsibility should include moral and pious behavior and adherence to social virtues, "with particular regard to all those principles in the choice of their officers and representatives" (Article 6).

The franchise for choosing those elected officials is also included in Part I. In original form, Article 11 granted suffrage to male property holders of twenty-one years of age. Later amendments reveal a record of restriction and expansion of the voting franchise. Literacy requirements were imposed in 1903 followed by voting prohibitions on those convicted of treason, bribery, or violation of election laws. Following federal action to grant female suffrage in 1920, New Hampshire provided for absentee voting (1942, 1956), pre-

vented denial of the right to vote due to nonpayment of taxes, eliminated the literacy requirement, reduced the voting age to eighteen, and, in 1984, provided a constitutional requirement for easy access to all registration and voting places for the disabled and elderly (Article 11).

Several articles also speak to prevailing moral, cultural, and political values, concerns, and principles. Article 6 recognizes the value of a moral and pious society and the need to preserve the self-determination and equal protection of "the several parishes, bodies, corporate, or religious societies," but government will not compel public support of any religious organization or enact any law that will establish one sect dominant over any other (Article 10). Further limits to government action and abuse of power include requirements for public access to government proceedings and records; prohibition on hereditary government employment; taxation through representation; rights to assembly, instruction, and petition; cautious and economical granting of pensions for government service; the right to require of public officials an adherence to constitutional principles and to "justice, moderation, temperance, industry, frugality, and all the social virtues"; and approval by city or town voters of any state law changing their charter or form of government (Articles 8, 9, 28, 36, 38, and 39).

Having endured almost a century of arbitrary and capricious justice that served the whims of royal governors, New Hampshire citizens included in Part I of their constitution their notions of justice and concerns for fair and equal treatment under law. No fewer than ten of the articles of the New Hampshire Bill of Rights address concerns for a system of justice that provides for the protection of society while defending the life, liberty, and property of the individual. Included in Part I are requirements for a justice system that provides free, complete, and prompt legal remedies; protects the rights of the accused; prohibits double jeopardy; provides for penalties proportionate to the offense; requires warrants for search and seizure; and limits excessive bail requirements (Articles 14, 15, 16, 18, 19, and 23).[12] Within the text of these articles is found a strong statement of how New Hampshire citizens define the concept of justice. In this definition, the accused have the right to be informed of charges made against them, are not required to incriminate themselves, are protected from cruel and unusual punishment, and are entitled to due process before any action to deprive them of life, liberty, or property (Article 14).[13]

Article 35 broadly suggests the public sense of what should be expected

12. See also Part I, Articles 17, 20, 21, and 33.

13. Amendments in 1966 and 1984 provided requirements for the right to counsel at state expense if need is shown and reduced legal requirements for proof in insanity hearings.

from the justice system: "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." The legislature is further admonished to fix reasonable penalties for legal offenses: "No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses." For further guidance, Article 18 suggests that "a multitude of sanguinary laws is both impolitic and unjust. The true design of punishments being to reform, not to exterminate mankind."

Balancing Political Forces

Only after specifying the primacy of individual rights and liberties did New Hampshire citizens turn to concerns for the structure of their new form of government. Public concern for abuse of power and later disaffection with the legislative supremacy established under the 1776 constitution resulted in a government that reflected a mix of remedies, some consistent with Madisonian views on the merits of separated powers and representative government, and others more akin to Rousseau's notion of popular democracy. The relevant articles of the constitution make clear that any authority resting in the government is derived from the people, and those citizens retain their recourse to control those institutions through their rights to vote, amend their constitution, gain access to public records and proceedings, and remove government officials they deem unfit. The constitutional preface to forming their government, in Part II, clearly emphasizes this notion of government of, by, and for the people: "The people . . . do hereby solemnly and mutually agree with each other, to form themselves into a free, sovereign and independent body-politic, or state, by the name of THE STATE OF NEW HAMPSHIRE." This clear, concise statement establishes the first "state" in the United States and a government created and defined by the people of that state.

As Crown colonists, New Hampshire citizens were familiar with the concept of separated powers, but equally familiar with the potential for abuse when that structure lacked checks and balances. And though well acquainted with the role of representative legislatures, their tradition of home rule and focus on protections of individual rights and freedoms suggested the benefits of government responsive to the will of the people. The New Hamp-

shire Bill of Rights codifies the merits of this working relationship: "In the government of this state, the three essential powers thereof, to wit, the legislative, executive, and judicial, ought to be kept as separate from, and independent of, each other, as the nature of free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity" (Part I, Article 37).

Part II of the constitution consists of 101 articles defining the institutions, structure, and powers of New Hampshire government, including provisions governing county-level offices, oaths, and constitutional amendment processes.

The legacy of town-meeting governance and citizen participation in public decision making is evident in the structure of the legislative bodies of New Hampshire. The constitution endows lawmaking authority in the General Court, a bicameral body consisting of a senate and house of representatives. Within each chamber rest powers to check each other as well as to check and balance the executive and judicial branches.

The emphasis on establishing and maintaining a citizen legislature dominates Part II references to the General Court. As established by the constitution in 1784, members of *both* the senate and the house are elected every two years for annual sessions, and members are compensated the sum of two hundred dollars plus costs for mileage for their term of office.[14]

Representation in the house is also consistent with public concerns for government close to the people and the legacy of town-hall politics. Membership was initially set at 1 member for each 150 town inhabitants, or for less populated towns or areas 1 member for every 150 inhabitants of a political district composed of contiguous towns, wards, or unincorporated places. Later amendments permitted a mix of single-member and multimember districts, increased district population to 600 (1877), and then established the current size of the house at a limit of 375 to 400 members in 1942. At its current size of 400 members, the New Hampshire House of Representatives is the fourth-largest legislative body in the world behind the Indian and British Parliaments and the U.S. Congress. Though restrictions on membership were limited in comparison to other former colonies at the founding, the 1784 constitution did provide that members required an estate of one hundred pounds and must profess the Protestant faith. By 1877, these provisions had been removed.

14. Article 3 of Part II initially established annual sessions for each chamber but was amended in 1877 to require biennial sessions. It was again amended in 1984 to return to annual sessions. Article 15 defining compensation was amended in 1889 to increase pay for chamber officers to $250 and an added $3 per day for special sessions. In 1960 a limit for mileage payments was set at ninety legislative days (for a biennial session) and reduced in 1984 to a maximum of forty-five days during the annual session.

The senate, as the upper chamber, was initially limited to 12 male citizens, thirty years of age and older, who had paid their own poll tax.[15] The number was increased to its current membership of 24 in 1877. Although the senate membership also stood for reelection on the same schedule as the house and was similarly compensated, design of chamber restrictions on membership and the nature of political districts suggest some effort to design a body more attuned to mercantile interests in the state and less connected to popular pressures. From 1784 to 1964, members were elected from single-member districts proportioned to taxes paid by each district. Following the *Baker v. Carr* and *Reynolds v. Simms* rulings in the early 1960s, senate election districts were defined on the basis of population and the principle of one-person, one-vote.

Correcting the omission of the 1776 constitution, the 1784 document empowers the president as the "supreme executive magistrate." The title of the office was renamed governor in 1792. Specifically, the governor is vested with executive powers and is required to "faithfully execute the laws passed by the General Court, to enforce compliance with any constitutional or legislative mandate, or restrain violation of any constitutional or legislative power, duty, or right, by any officer, department or agency of the state" (Part II, Article 41). In its initial form, Article 41 stipulated that candidates for governor would run for election every year and must be Protestant property holders aged thirty years or older. The property qualification was removed in 1852, and in 1877 terms were expanded to two years and the religious qualification deleted.

The New Hampshire Executive Council is yet another unique and enduring feature of democratic government.[16] In its original form, the council was created by Charles II in 1680 when he established New Hampshire as a colony separate from Massachusetts. The 11-person council served as the upper chamber of the colonial legislature until 1776, when it became the elected upper chamber of the legislature. The 1784 constitution institutionalized the Executive Council as a 5-member executive body with further powers to check the governor's authority.[17] In particular, the council members are a check on the governor's nomination and appointment of judicial officers, the attorney general, and general and field officers of the militia. They must also endorse any executive action to adjourn or call special ses-

15. Article 28 of Part II initially prescribed that senators must be Protestant property holders. The property qualification was deleted in 1852 and the religious qualification removed in 1877.

16. Vermont, Connecticut, Maine, and Massachusetts also employed executive councils in their systems of government. Today, only Massachusetts retains a council, and it is limited to oversight of judicial appointments.

17. See Rosal, "Introduction and Overview."

sions of the legislature, expend public funds, or pardon criminals. Initially, the 5-member council was chosen annually from members of the legislature. In 1792, Article 60 of Part II was amended to reflect their election by voters, and their terms were expanded to two years in 1877.

As a final guarantee that the rule of law would exist to protect New Hampshire society and individual rights and freedoms, the 1784 constitution empowered the General Court to erect and constitute the system of justice. The state judicial system continued to function as a creature of the state legislature until the 1966 amendment to the constitution that vested the judicial power of the state in the supreme court, the superior courts, and "such lower courts as the legislature may establish" (Part II, Article 72-a). The courts were further empowered as a separate branch of government with the 1972 amendment to make court administration a function of the chief justice of the supreme court (Part II, Article 73-a). To further ensure their independence, after nomination and appointment by the governor and Executive Council, justices serve until age seventy (provided, of course, they maintain the standard of "good behavior").

Taken as a whole, these key institutions of state government as defined in the constitution are consistent with public concerns to establish three essential powers separate from, and independent of, each other. Legislative power resides in the General Court, with a house and senate that each "have a negative on the other." The house retains the power to originate all money bills, and all impeachments are made before this chamber. And like the senators, governor, and council members, it has the same powers to elect its own officers, define its chamber rules, and punish misconduct. In addition to its lawmaking duties, the senate is empowered as the court that tries any impeachments by the state house of representatives. In addition to duties as the chief executive empowered to implement laws passed by the General Court and nominate and appoint executive officials, the governor also acts as the New Hampshire commander-in-chief and has the power to pardon offenses. The courts exist to fairly and justly apply the law, and to interpret and explain the state constitution and statutes.

Preserving the Balance of Power

The bill of rights and the institutional structures and powers defined by the 1784 New Hampshire Constitution lay the foundation for a system of internal checks and balances while retaining most of the power in the people of the state. Where the General Court has the power to enact legislation, the governor has the check of the veto. In turn, the legislature can override a veto with a two-thirds vote in each chamber. The courts can also serve as a check

on legislative abuse of power with their ability to interpret the laws and the latter's adherence to constitutional principles. Governors can appoint state officers and expend moneys to conduct the business of the state, but only with the advice and consent of the Executive Council. And officers accused of abusing their power (including judges) may be removed by the governor and Executive Council, or after due process by the legislature.

However, the New Hampshire Constitution also reveals the stamp of a people unwilling to trust internal checks on government power or yield their right and tradition of public decision making. Establishing a representative form of government was consistent with their tradition under the Crown and with the Madisonian arguments suggesting moderating influence on public decision making. However, the large size of the New Hampshire House of Representatives, with the members' correspondingly small constituencies, suggests the goal of creating a lawmaking body close to the public they serve. Along the same vein, the need for legislators, the governor, and the Executive Council to return to the polls every two years serves as a constant reminder that they are answerable to the public. Other limitations to government exercise of power are entered throughout the constitution. These include admonitions to the legislature that pensions for public officers should be reasonable and reflect compensation only for actual service (Part I, Article 36), state retirement funds are not to be diverted for any other purpose (Part I, Article 37), city and town voters must approve any General Court legislation to alter their charter or local form of government (Part I, Article 39), state lottery revenues are to be earmarked for state school districts (Part II, Article 6-b), and "free and fair competition in the trades and industries is an inherent and essential right of the people and should be protected against all monopolies and conspiracies which tend to hinder or destroy it" (Part II, Article 83).

The overriding limit to government power lies in the people's ability to alter their fundamental laws. The constitution codified the people's power to amend the document by permitting the General Court to submit to the public at least every seven years the question of calling a constitutional convention. Under those provisions, should a simple majority of the public approve, delegates to the convention are be chosen at the next regular election. Once convened, amendments supported by three-fifths of the membership of the convention are submitted to voters and take effect if approved by two-thirds of the voting public. The provision was altered in 1964 to change the requirement of calling a convention to every ten years and providing that the General Court could, by separate three-fifths votes in each chamber, propose amendments to be submitted to the people (Part II, Article 100).

Conclusion

Donald Lutz suggests that constitutions use "principles of design for achieving the kind of life envisioned by its authors."[18] With this perspective, constitutions define what people value, how they should govern themselves, what government should do, and how government should be constrained. The New Hampshire Constitution is a reflection of popular aspirations for a safe and secure society, concepts of good government, and concerns to protect hard-won individual rights and freedoms. A product of public input and approval at its inception and through later amendments, the New Hampshire Constitution is truly a popular affirmation of public values and notions of popular governance. The extensive bill of rights, rooted in town-hall traditions and the colonial experience, mirrors the public emphasis on self-reliance, egalitarianism, individual rights and freedoms, and limited government. Grounded in the concept of the social contract, the constitution then establishes legislative, executive, and judicial institutions with separate responsibilities, and each with the ability to check the others. Finally, the bill of rights, several specific constitutional limitations on institutional powers, and public power to amend their governing fundamental law make clear the primacy of the people over their institutions of government.

Although this constitution has been amended 237 times since its inception, these amendments have not substantively changed the tenor of its message or intent, and were considered and adopted in a manner consistent with the political and constitutional traditions of New Hampshire. Taken as a whole, the New Hampshire Constitution stands as a clear and coherent statement—informed by public values, traditions, principles, and political experience—of public desires for government of, by, and for the people, a revolutionary document to govern a revolutionary state.

18. Lutz, *Origins of American Constitutionalism,* 13.

ELMER CORNWELL

Constitutionalism in Rhode Island

Continuity of Colonial Design

To a greater degree than most other states, Rhode Island's political structure and constitution developed almost entirely in response to local needs and desires. Refugees from Massachusetts Bay Colony were the first "Rhode Islanders" whose settlements at the head of Narragansett Bay were largely autonomous. As the following paragraphs will indicate, these settlements gradually coalesced into a loose colonial unit, which was largely ignored by the mother country. The neighboring colonies to the north and west saw Rhode Islanders as "heretics" and as possessed of land they would gladly have split between them.

To a large extent, Rhode Islanders developed their own political system and institutions as they saw fit within the vague terms of the royal charter obtained by colonial request from King Charles II in 1663. Down through the years, the colony (and state after 1776) continued to go its own way governmentally. When changes were made, they stemmed from locally felt needs and compromises, often in reluctant response to pressures generated by profound demographic and economic changes.

Colonial History

The constitutional history and tradition of Rhode Island (officially the State of Rhode Island and Providence Plantations) predate the framing of the U.S. Constitution by 150 years. As with the other twelve colonies-turned-states, it also predates much of the constitutional theory and experience

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available to the states in the latter years of the eighteenth century and the early nineteenth century—for example, such principles as the separation of powers. Rhode Islanders as a people gained their earliest identity as religious dissenters forced to leave the strict Puritan theocracy of the Massachusetts Bay Colony. Yet they were far from being a unified band of refugees. Rather, they established four settlements around Narragansett Bay, each by a group that differed theologically from their fellow settlers. The result was four towns: Providence, settled by Roger Williams in 1636, Portsmouth on Aquidneck Island in 1638, and also Newport on that island in 1639, and on the west side of the bay Warwick in 1642. It was the 1670s before additional towns were settled. It was also a good bit later before the settlers became a more or less united people. This came about largely as a defense against the continuing efforts of the Bay Colony and Connecticut to absorb the slice of territory between them, with its subversive ideas.[1]

As to the way of life that developed in each of the four towns of original settlement, it stressed local autonomy and self-rule. Economically, the history of Rhode Island from earliest times reflected the lack of important natural resources, save for the bay itself. During much of the state's history, Rhode Islanders had to live by their wits. The good harbors that ringed the bay did foster a profitable carrying trade, but smuggling and other sharp practices were common. Subsistence agriculture was, of course, the mainstay in the four towns. Clearly, there was no wealth that motivated the colony's neighbors to covet the territory. Presumably, one motive for the Bay Colony's desire to annex was annoyance at the heretical (and perhaps destabilizing) ideas the Rhode Islanders had espoused.

As time went on, the four original towns did gradually and rather reluctantly move toward achievement of a degree of unity lest they be picked off one at a time. Roger Williams sought to foster this tendency. In 1644 he journeyed to England to secure a patent or charter for the colony. At that point the mother country had experienced civil war and was being governed by Parliament with Oliver Cromwell as Lord Protector. Williams succeeded, but the document did not prove to be a basis for any effective unity.[2]

The year 1660 saw the restoration of the English monarchy, and since charters were historically conferred by the king, it was believed in Rhode Island that the parliamentary patent should be replaced by a royal charter. Dr. John Clarke was commissioned to go to England in quest of royal support

1. Patrick T. Conley, *Democracy in Decline: Rhode Island's Constitutional Development, 1776–1841* (Providence: Rhode Island Historical Society, 1977), 14–20. See also William G. McLoughlin, *Rhode Island: A Bicentennial History* (New York: W. W. Norton, 1978), 3–49.

2. Conley, *Democracy in Decline,* 17–18. See also Henry Chupack, *Roger Williams* (New York: Twayne Publishers, 1969).

and protection against encroaching colonial neighbors. He was quite successful. The document he brought back in 1663 was characterized thus by Professor Patrick T. Conley: "The royal charter of 1663 guaranteed complete religious liberty, established a self-governing colony with great local autonomy and strengthened Rhode Island's territorial claims."[3]

This charter was exceedingly liberal and democratic, amazingly so for the period. The grant of religious freedom was especially surprising. One suspects that the religious strife that had wracked England in those years might have prompted the restored Stuart monarchy to include this unique provision.

Colonial Institutions

Rhode Island's political institutions began to develop in the latter years of the seventeenth century within the generous terms of the new charter. There were the beginnings of political structures in other English colonies on the Atlantic seaboard, but there was no firm model that could have been followed. Nor did the mother country overtly contribute such a model, though the current English parliamentary system offered some ideas. Rhode Island was probably the one colony that was almost completely free to evolve an institutional system on its own.

The provisions for institutional arrangements in the charter of 1663 were quite general and, as noted, remarkably "democratic" for the period.[4] The document created the colony as "a body politic and corporate." The following officers to be elected by the freemen of the colony were provided for: a governor, a deputy governor, and ten assistants, all to serve one-year terms. Then twice a year the freemen of the various towns were to meet and elect deputies. Newport was to have six, the other three four each, and when new towns were set up, each would have two. All of these, the governor, other elected officials, and town deputies, were to meet together as the general assembly.

The assembly was to have the power "to elect and institute or repeal such laws, statutes, orders and ordinances, forms and ceremonies of government

3. Conley, "Rhode Island," in *The Encyclopedia of Colonial and Revolutionary America,* ed. John Mack Faragher (New York: Facts on File, 1990), 369. See also Sydney V. James, *John Clarke and His Legacies: Religion and Law in Colonial Rhode Island, 1638–1750* (University Park: Pennsylvania State University Press, 1999). The full text of the King Charles Charter of 1663 was printed in each edition of the *Rhode Island Manual* until recently.

4. An overview of these institutional arrangements can be found in Conley, *Democracy in Decline,* 36–41; and James Sydney V. James, *The Colonial Metamorphoses in Rhode Island: A Study of Institutions in Change* (Hanover, N.H.: University Press of New England, 2000), 112–36.

and magistracy as to them shall seem meet." The only limit was to make these enactments not to be repugnant to the laws of England. The assembly was also to have the power to constitute courts and make provisions for their operation.

This structural pattern operated with few major changes through the revolutionary period and until the state's first true constitution was adopted in the 1840s. Unlike many of the other colonies, Rhode Island never had a royal governor and enjoyed a very large measure of self-government under locally elected officials. In other words, it had achieved many of the forms and prerogatives of self-rule that the other colonies were fighting to obtain. Rhode Island did, of course, provide troops and other support for the struggle against Britain.

If the state was willing, which it was, to continue to operate under the existing governing institutions, all it had to do upon the declaring of independence was to abolish the oath of allegiance to the Crown that had been taken by its officials. This it did in May 1776, a couple of months before July 4.

Not surprisingly, the traditional pattern of governing institutions that had evolved remained the general model actually down to the present day. A salient feature of that pattern was the continuing importance of the towns as the basic governing units under the state government. Actually, the early years following the granting of the charter saw the continuance of the struggle between town claims of authority and the efforts of the central government to assert its authority.

Governor Samuel Cranston, who served an incredible twenty-nine years, from 1698 to 1727, is credited by historians as having done much to gain authority for the central government. The general assembly was finally able to fully exercise the broad powers it had been given under the charter. Quarrels among the towns were dealt with, and they were "brought under a uniform regulation by law." During Cranston's period in office, he did much to checkmate once and for all the claims of the neighboring colonies for land that Rhode Island insisted belonged to it.[5]

To summarize the state of affairs, and particularly the forms and patterns of governance that had emerged, clearly the predominance of the assembly—the legislative branch—was unquestioned. The governor and the other elected colony officials (the executive branch) were decidedly secondary in importance. The judiciary was, by charter fiat, the creature directly of the general assembly. The towns continued to enjoy the levels of legislative representation that they had been given in the charter. (Actually that document was not always viewed as binding, as when in 1696 the assembly was made bicameral by setting the assistants up as in effect a senate.)

5. Conley, *Democracy in Decline,* 31.

Inadequacies of the Charter

As noted, the Revolution did not bring about any change or apparently any felt need for changing the charter system of government as it had evolved. Thus, the charter remained the constitution of the state well into the nineteenth century. Demands for reform did, however, develop as time went on.

Two major sources of dissatisfaction with the charter system were increasingly recognized. Both emerged as a result of the massive change that took place in the economy of the state. In 1790, one Samuel Slater—who had learned the textile business in England—came to Rhode Island and established the first textile mill that year. The movement thus started took off, and before many years had passed the state became the most industrialized in the nation and a major center for textile manufacturing.[6]

This metamorphosis brought about huge demographic changes, redistributing population within the state and encouraging a flood of immigration. Mills sprang up along the streams that empty into the bay. In the first years of industrialization, the labor force came from the various towns. The rural communities declined in population, whereas the towns in which the mills were located grew rapidly. As time went on, additional sources of mill workers were needed. A half century after the founding of Slater's mill, in the 1840s, the potato famine in Ireland triggered a flood of emigration to the United States, substantial numbers finding their way to Rhode Island, thus augmenting the labor force.[7]

In time, even this source was becoming inadequate, and representatives of the mill owners actually went to Canada and abroad to recruit supplies of labor. These efforts brought large numbers of French Canadians from Quebec to the state, and many from the poorer regions of southern Italy. Before long, the ethnic and religious demography of the state changed from almost entirely Anglo-Saxon Protestant to a growing mixture of Irish, Quebecers, and Italian immigrants who brought with them their Roman Catholic religious affiliations. Woonsocket, a textile city in northern Rhode Island, became a French-speaking community.

The political and governmental impact of these vast changes fostered reform demands. Specifically, there were demands for an updating of the allocation of representation in the general assembly, and also for broadening the franchise. The charter distribution of assembly seats was still in effect, and as long as the state remained a relatively thinly populated agricultural

6. Ibid., 146. See also Daniel P. Jones, *The Economic and Social Transformation of Rural Rhode Island, 1780–1850* (Boston: Northeastern University Press, 1992), 42.

7. Conley, *Democracy in Decline,* 160. See also Peter J. Coleman, *The Transformation of Rhode Island, 1790–1860* (Providence: Brown University Press, 1963), 229–33.

economy, the allocation of six to Newport, four each to the other original towns, and two each to newly established towns served reasonably well. Before the end of the seventeenth century, a half-dozen new towns had been created. By 1790 the total had grown to thirty. In recent years the state has had thirty-nine cities and towns, so, clearly, the rate of new creations diminished sharply.

The population of the state as a whole increased slowly but quite steadily during the eighteenth century. By 1790 it was just under 69,000. By 1840 when the reform movement was coming to a head, it was nearly 109,000 and under the continuing pressure of immigration had quadrupled by 1900. Growth was by no means uniform throughout the state. For example, consider Washington County (usually referred to as South County), which was and remains largely rural, whose population was just over 18,000 in 1790 and a century later, by 1890, had grown by a bit more than 5,000. Providence County, meanwhile, where much of the industrial growth had taken place during that century, grew from 23,000 to 275,000 in 1890.[8]

It was clearly in the interest of the mill owners and the other well-to-do elements in the population to retain the traditional distribution of general assembly seats. For the mill owners, this could give them control of the assembly and enable them to ensure that legislation limiting hours of work, child labor, and the like did not pass. In actuality, they gained much through a system of bribing rural voters and thus controlling elections in the small and declining towns. Given the seat apportionment, this would give them a controllable majority of the assembly. With one senator per town, control of that chamber would be no problem.

In addition to this advantage, these same elements could rely on the property qualification imposed on citizens who sought to vote. Gradually, the franchise was broadened, but it was not until the mid-twentieth century that the last property limitation on the franchise was finally removed. From the framing of the 1843 constitution until then there were property qualifications, poll taxes, and denials of the right to vote in financial town meetings unless one owned property. The most obvious purpose was to limit the voting of mill hands, and in particular to limit the right to vote of the flood of immigrants.

8. The issues of population growth and movement as well as the related issue of apportionment are addressed in Conley, *Democracy in Decline,* 63–73, 150–60; Coleman, *Transformation of Rhode Island,* 218–19; and Lynne Withey, *Urban Growth in Colonial Rhode Island: Newport and Providence in the Eighteenth Century* (Albany: State University of New York Press, 1984).

Rebellion and Reform

The first phase of the struggle for reform has been called the Dorr War, after Thomas Wilson Dorr, who was the central figure in the reform effort.[9] The "war" was a largely bloodless struggle from 1840 to 1843. By 1840, the economic and ethnic changes in the state had reduced the number of eligible voters to no more than one-third of the white male inhabitants. In that year the Rhode Island Suffrage Association was formed to press for reform. The assembly was moved to call a constitutional convention, its delegate elections to be based on the existing franchise. In response, the association called its own convention for whose members all white males could vote. Both bodies met and produced documents—called the Landholders' Constitution and the People's Constitution, respectively. Both offered a limited measure of reform, with the People's going further.

The Peoples draft was placed before the voters first, and it was claimed to have been approved by a majority of the free white males. The reformers then held elections under their own auspices to fill all state offices. The current legislature refused to concede that the new system was legal. When the Landholders' Constitution was put up for a vote, it failed. The existing charter government took steps to prevent those elected under the Peoples Constitution from taking office by threatening charges of treason. Dorr's followers gathered a force to take over the Providence arsenal. Their efforts failed, and no one was injured.

In 1842, the Law and Order Party, which supported the charter government, called another convention that produced a draft similar to the Landholders' Constitution and was duly ratified in 1843 and took effect the following year. At this juncture during these tangled events the state appeared to have two rival governments, one that had long functioned under the royal charter and the one elected pursuant to the Peoples Constitution. Eventually, the question came before the U.S. Supreme Court under the Republican Guarantee clause of the U.S. Constitution in the 1849 precedent-setting case of *Luther v. Borden.*[10] Justice Taney, writing for the Court, held that this was a nonjusticiable political question. In effect, the Court deferred the question of recognition to the president, and he recognized the charter government.

Essentially, the Law and Order constitution remains the state's constitution, though, with successive and somewhat gradual changes, it has been brought into conformity with respect to universal suffrage and constitu-

9. For a summary of Dorr's Rebellion, see Conley, *Democracy in Decline,* 309–79.
10. *Luther v. Borden,* 48 U.S. 1 (1849).

tionally acceptable legislative districts. After aborted attempts by the more liberal reform forces to gain acceptance of a constitution to their liking, the more conservative elements in the population—including those who benefited from the prior state of affairs—succeeded in gaining voter approval of a frame of government to their advantage.

The key aspect of the new constitution was the fact that it retained much of the pattern that had evolved from the charter. In particular, it retained the powerful position of the legislative branch, the general assembly. The apportionment of seats in the house was modernized: each city and town was to have at least one seat, with the remainder of the seventy-two-seat total to be distributed by population. As for the senate, each city and town was to have one senator regardless of size. This scheme, of course, worked to retain control of the assembly in the small towns, and thus to the advantage of those who had been able to manipulate the town elections for the assembly. The constitution did call for a judicial branch separate, to a large extent, from the assembly. In short, the new constitution, although modernized, preserved and incorporated many of the basic features of the charter system.

Patterns of Citizenship

The development process described provides the basis for discussing Rhode Island's political institutions and the complex patterns of citizenship as legal concepts and in other aspects. In earliest times, the individuals who enjoyed the status of freemen were, at least for legal purposes, the citizens of the colony. They could vote, and they assembled in town meetings to conduct the affairs of the town. They also supplied the candidates for elective offices. For some time the status of the freeman and the procedure for becoming one were vague. By 1665, however, possession of a defined amount of property was the criterion adopted.[11]

This rule disenfranchised relatively few males so long as the colony or state remained agricultural, in which property ownership was widespread. With the coming of industrialization, the propertyless segment of the population grew to involve large numbers of mill workers who tended to live in rented quarters provided by the mill owners. As more and more French Canadian, Irish, and Italian immigrants arrived, the portion of the population that did not have citizen status increased greatly. Little incentive was felt, one assumes, among the mill owners to have these newcomers move toward citizenship and the franchise.[12]

11. Conley, *Democracy in Decline,* 47.
12. Ibid., 217–35.

Moreover, though citizenship per se was not involved, the fact that the great bulk of the immigrants were Roman Catholic made them an alien element in the community. Although they enjoyed technical freedom of worship, Protestant prejudice against them was clearly present. The Know-Nothing Party became an important political force, and in 1855 William Hoppin was elected governor as a Know-Nothing candidate. Clearly, this immigrant-native political division reflected an even deeper community split of the sort found in other parts of the country where immigration was important.[13]

As noted earlier, there was a gradual process of granting citizen and voter status to the newcomers, though it was not until 1928 when all citizens, native or immigrant, could vote in all elections, including those for city council. (Only property owners could vote in city council elections until that year, which did much to inhibit the growth of the kind of urban machines found elsewhere.) And it was not until even later that those who did not own property could vote in town meetings on tax and budget strokes. Eventually, the state did have an undifferentiated population with full franchise rights and citizenship for all (Article II, Section 1).

Constitutional and Institutional Change

In broad terms, the constitutional structure and institutions of government in Rhode Island did not really change from the days of the 1663 charter to the present day. However, constitutional amendments did make incremental changes from time to time in the basic institutional structure and operation. In addition to the constitutional amendments, some structural changes were effected through legislative action in response to the Great Depression and the changing political climate in Rhode Island. A brief discussion of the amendments made since the adoption of the constitution in 1844 and the contemporary legislative alterations follows.

Amending the Constitution and Redefining a Way of Life

The state built its beautiful statehouse at the turn of the twentieth century. Until then there had been two capitals, Providence and Newport, each with a small, ancient statehouse. The general assembly met alternately in these two buildings. In 1900 a constitutional amendment was adopted that eliminated this system and prescribed a single annual session at Providence

13. Ibid., 371. See also Coleman, *Transformation of Rhode Island,* 241–48.

in the new capitol (Article IV, Section 3). This brought to an end the pattern of travel the assembly had long observed (actually involving more towns much earlier besides these two). This centralizing of the base and operation of the general assembly probably reflected and symbolized the gradual knitting together of the state and continued the process of elevating the state government over the town governments.

A 1903 amendment provided more comprehensive language defining the role and powers of the state supreme court (Article X, Section 2). The constitution had left it up to the assembly to prescribe the court's jurisdiction by law. Thus, the amendment had the effect of shifting an element of the plenary power of the legislative branch to the judicial branch. A 1909 amendment made major changes relating to the assembly. The size of the house of representatives was increased from seventy-two to one hundred, and it also provided for the drawing up of districts in the towns and cities assigned more than one member. The constitution had stipulated that members were to be elected at large in such communities. By 1966, there was a constitutionally valid system in place (Article VII, Section 1).

Also in 1909 occurred one of the most important changes in the balance of power between the executive (the governor especially) and the legislative branches: the granting to the governor of a veto for the first time (Article IX, Section 14). Until then any piece of legislation that passed both chambers in identical form immediately became law. As with other changes, one senses here too that this was made grudgingly, since instead of following the federal pattern that allows override by a two-thirds vote of both legislative chambers, in Rhode Island the fraction three-fifths was substituted. Actually, the lopsided majorities enjoyed by one party or the other (the Democrats ever since the 1930s) have meant that overrides are easy to achieve. Nevertheless, the very fact that the governor now had a veto shifted the balance of power significantly.

An amendment in 1911 increased the length of terms of members of the general assembly from one year to two years (Article IV, Section 1). Then in 1928 the grip of the small towns on the senate was slightly modified. Until then, the precept of one senator per community regardless of size had remained the rule. The new language was obviously carefully crafted, reflecting the typical reluctance to make a major change. Every city or town with twenty-five thousand qualified electors would now have an additional senator for each additional twenty-five thousand electors (Article VIII, Section 1). This was to give Providence a new total of five senators, and three other cities eventually were able to claim a second, Pawtucket, Cranston, and Warwick. The malapportionment was still egregious, but a small step had been taken.

Another constitutional change that also impacted the position of the general assembly came in 1951 and dealt with "home rule." In light of the early predominance of the towns and the struggle of the central government to assert its authority, it is interesting to find those same small towns and later additions to the corps of towns and cities seeking greater autonomy. Meanwhile, the familiar American principle often labeled the "creature theory" of local government had become fully accepted in Rhode Island. This concept held that all units of local government were the creatures of the state, created by the state, empowered by it, and completely subject to its jurisdiction.

The local governments in Rhode Island and elsewhere bridled under this claim of arbitrary control, at times exercised for political purposes by machine-controlled state governments. "Home rule" was the reformers' answer. This typically meant constitutional language that could place at least some of the powers and functions of local governments beyond legislative reach and in the hands of local officials and voters. This kind of provision was added to the Rhode Island Constitution (Article XIII). The specifics of this new language need not be gone into in detail. For present purposes, however, the impact was certainly to again reduce somewhat the corpus of legislative power, even though it left taxation, borrowing, and related matters exclusively to the assembly.

A couple of constitutional changes that were made in 1973 (following a constitutional convention) were the repeal of a prohibition on lotteries in the state and the conferring on the general assembly of plenary authority over any that might be instituted (Article VI, Section 15). An important simultaneous change came in the adoption of a much less complex and more rapidly achieved procedure for amending the constitution (Article XIV, Section 1). Included with this change was a companion section that required that every ten years the question be placed on the ballot as to whether the voters desired a new constitutional convention (Article XIV, Section 2). In other words, twin avenues would now be open to seek change and reform.

The period of the 1980s saw some acceleration in the process of reform using these new change mechanisms. The 1986 constitutional convention proposed and the voters accepted the confirming in the hands of the governor the compilation of the state budget for submission to the assembly (Article IX, Section 15). Historically, the governor had enjoyed no such authority. The convention also proposed and the voters accepted a provision setting up the most powerful ethics commission to be found in any state (Article XIV, Section 2). It was empowered to adopt a code of ethics, investigate and adjudicate violations, and impose penalties.

During the 1990s the amendment process was used to enact language that, among other things, lengthened the terms of office of the governor and the

other elected state general officers from two years to four years, with a two-term limit (Article IV, Section 1), while leaving the terms of members of the general assembly at two years. Also, at long last, the five-dollar-per-day pay of general assembly members (for only sixty days) was increased to ten thousand dollars per year, with increases based on the cost of living to be added automatically (Article VI, Section 3).

Important language was added to the constitution relating to the selection of judges of all courts. From then on there would be a nonpartisan screening commission that would review the qualifications of individuals who sought judicial office and submit a list of names to the governor from which he would make his choice and submit it to the senate for its approval. The candidates for state supreme court justice would require approval by both the senate and the house of representatives (Article X, Section 4). This had the effect of taking the power of prescribing the procedure for making judicial selections from the assembly and, it was hoped, rendering the process less political.

Structural Change through Legislative Action

The Great Depression brought profound changes in Rhode Island as in the nation. Party followings and thus the distribution of political power shifted sharply in favor of the Democrats. Democratic governors and legislative majorities became the rule. This electoral bonanza enabled the Democratic governor to secure enactment of massive administration-branch reform. All of the boards and commissions were abolished and replaced with a set of departments headed by directors appointed (and removable) by the governor. In terms of the distribution of power within the system, this change had a more profound impact—via legislative action—than prior constitutional changes had had.

Actually, as happened in Washington, it created and built into the system major new elements of power in the form of social welfare policies and regulatory authority. Inevitably, these changes added more to the power of the executive—the governor—than to the legislative branch. The only aspect of these changes that was intended to reduce the power of the general assembly grew out of the practice that was followed in a number of cases as new regulatory agencies were created: to give some representation in their memberships to the assembly via the appointment of assembly members or appointees. In almost all cases the governor appointed most such board and commission members, but a movement was launched in 2002 to give the governor *all* such appointees. A constitutional amendment to this effect was put on the 2004 ballot and was approved. The reformers' rallying cry was separation of powers. But since these regulatory bodies have been given del-

egated legislative, that is, rule-making, power, the assembly has an oversight responsibility and will have to find a new way to exercise it.

Conclusion

A review of this long list of constitutional changes makes it clear that most did impact somewhat the distribution of power in the system. To summarize, there has been little change over the centuries in the basic architecture of Rhode Island's governmental structure. There has, however, been considerable change over time in the distribution of power within it. This was the case in the gradual broadening of the franchise. The fundamental principle of popular rule has, in itself, not changed, but clearly the definition and inclusiveness of "the people" have changed considerably in the direction of full inclusiveness. This has meant, obviously, that groups and categories once denied the franchise—such as those who did not own property—have gained power, as they have become part of the active, empowered electorate.

The way of life in the state has evolved as the economy has undergone profound changes, from rural agricultural to an intensive manufacturing base and, more recently, as the textile industry either died or moved to the South (from which area it is apparently now migrating again overseas), the currently largely service-based economy.

Governing authority was originally and for some time in the hands of the towns, though gradually the state government acquired a progressively larger share of that power. The local communities became subservient to the state government with, more recently, a shift toward a somewhat more balanced distribution with the adoption of home rule in 1950. The state has, of course, also been impacted by the mandates of the federal government such as congressional adoption of a major role in regulating local education in the past few years.

There has been some shifting of power within the state government, particularly from the legislative to the executive resulting from constitutional change, as already noted. Until the 1930s the governor could still claim little authority as the chief executive officer. Most "executing" of the law was vested in the other state constitutional officers and in a jumble of boards and commissions whose members were in most cases appointed by the general assembly. Though perhaps still jumbled, these boards and commissions are now dominated by the governor. During most of the period from the adoption of the constitution until the 1930s, the Republican Party dominated the government and politics of the state. The shift in power within state government has been accompanied by a broader shift in power to the Democratic Party.

The constitutional, institutional, statutory, and partisan changes that have occurred over the past 372 years of Rhode Island's history cannot be described as insignificant. However, these changes notwithstanding, Rhode Island remains, probably more so than any of the other twelve original colonies, solidly grounded in its independent, self-governing colonial origins.

CELISE SCHNEIDER

The Green Mountain Boys Constitute Vermont

By the time Ethan and Ira Allen and the original Green Mountain Boys wrote the first Vermont Constitution in 1777, there was no definitive state to constitute, and there was no territory called "Vermont." At the time, the Green Mountain Boys did not know that they were a driving force in unfolding events, which reverberated in an uncanny way with the continental leadership's pressure to win the American Revolutionary War. What they did know was that improving parcels of land in the gritty Green Mountain frontier bestowed soil rights and that the yeoman farmers of the Connecticut River valley were being evicted from their land illegitimately through the accumulation of fraudulent regranting by Cadwallader Colden, royal lieutenant governor of the state of New York, and Benning Wentworth, royal governor of the state of New Hampshire. The Duke of York had by proclamation fixed the eastern boundary of New York State at the west bank of the Connecticut River in 1664. Nineteen years later New York and Connecticut agreed to move the boundary between them westward to twenty miles east of the Hudson River.[1] Meanwhile, the American Declaration of Independence and aggression in Lexington and Concord that began the American Revolution rendered royal authority in the colonies null and void and placed the colonies in a legally indeterminate state. Tories in the colonies who did not recognize the signs of the coming break were killed or at least ruined.

The conflicting titles to the New England territory between Lake Champlain on the west, the Connecticut River on the east, and the Green Mountains between are a story of land jobbing, fraudulent regranting of previously stolen real estate, splinter groups of splinter groups of Puritan

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1. William Brewster, *The Fourteenth Commonwealths: Vermont and the States That Failed* (Philadelphia: George S. MacManus, 1960). Section I is a fascinating unraveling of the land-tenure contest in the New Hampshire Grants in the seventeenth and eighteenth centuries.

churches during the Great Awakening, the taking of Fort Ticonderoga, the negligence of the Continental Congress to the plight of a nearly uninhabitable northern frontier, and the indomitable persistence of settlers who moved en masse as extended neighborhood groups from England, Ireland, and Scotland to the New Hampshire Grants to establish their old ways of life in a new place where land was extraordinarily cheap.[2] At the center of the geopolitics of soil rights, contested state boundaries, and self-determination in the New Hampshire Grants were Ethan and Ira Allen.

The embellished stories of Ethan Allen's courage and leadership of a righteous band of mountain men defending their properties against the cupidity of royal representatives and their greedy henchmen in New York State and New Hampshire are nothing compared to the man and his documented antics.[3] Ethan Allen was, besides a hard drinker of a local cocktail called "stone fence," also a highly intelligent Paul Bunyan of a man who, when persuasion failed him, was early and often to strip to the waist and threaten fisticuffs.[4] But his most brilliant defense against encroaching New York State authorities was to thoroughly humiliate the individuals with practical jokes, then release them to run back to New York, which killed their political reputations at home, a fate much worse than simply shooting them dead.

By 1777 American founding politics was unified by revolution and the Declaration of Independence. The land tenure in the New Hampshire Grants was deeply confused by title disputes. Moreover, since the court systems and colonial government legitimacy were also in dispute in the new United States in 1777, there was not even a commonly recognized authority

2. See Michael A. Bellesiles, *Revolutionary Outlaws: Ethan Allen and the Struggle for Independence on the Early American Frontier* (Charlottesville: University Press of Virginia, 1993), esp. chap. 2, "No Change Was to Be Expected" (37–39), on immigrant settlement patterns in the Vermont frontier-valley towns. For an extraordinarily well-researched book on the settlement patterns influenced by the Great Awakening in Bennington, see Robert Shalhope, *Bennington and the Green Mountain Boys: The Emergence of Liberal Democracy in Vermont, 1760–1850* (Baltimore: Johns Hopkins University Press, 1996).

3. Bellesiles, *Revolutionary Outlaws.* This is a well-researched book that emphasizes the personalities at the center of Vermont independence, but does not neglect a good account of the New Hampshire Grants contest. It gives excellent coverage of the effects of the Great Awakening on Vermont towns and congregations. There are also engrossing digressions, including Ira Allen's intrigue between the State of New York and the royal British forces during the Revolutionary War. I would disagree with his denoting Ethan Allen an outlaw, since there was little to no Vermont law to act outside before independence. The date of the Vermont declaration of independence is also documented in the endnotes in Hiland Hall, *Why the Early Inhabitants of Vermont Disclaimed the Jurisdiction of New York, and Established an Independent Government: An Address to the New York Historical Society, December 4th, 1860* (Bennington, Vt.: C. A. Pierce, Printers, 1872).

4. For an account of Ethan Allen's ingenious pranks and flamboyant presence, see Brewster, *Fourteenth Commonwealths,* 13–15.

to which the settlers of the New Hampshire Grants could appeal for legitimate title to their lands.

The Green Mountain Boys became Vermont history's answer to land-tenure piracy. It is no wonder that they have been romanticized and carried off as heroes of all later political parties in Vermont. Where Ethan Allen's intelligence and physical prowess ended, Ira Allen's political shrewdness took over.[5] Whereas Ethan Allen and the original Green Mountain Boys are credited with taking Fort Ticonderoga without a shot being fired, Ira, the youngest of the Allen brothers, was the author of a Bismarck-like double cross of the British forces that prevented New York encroachment lest the Green Mountain towns join the royal cause.[6] After all, some of the Green Mountain settlers were veterans of the British side in the French and Indian War. And with Canada to the north of the New Hampshire Grants, a prospective royal province between New York State and New Hampshire was a doable and dangerous risk to New England regional unity. New York could not risk that possibility.

By 1777 Ethan Allen had rebuffed the law enforcement attempts of New York sheriffs, and Ira Allen had gained time enough for the New Hampshire Grants towns to be ruined neither by New York land pirates nor by the British military. Ira took an application for statehood to the Continental Congress and was turned down.[7] Trust was at a premium, and the Continental Congress had more pressing problems: a war and a protoconstitution that could not deliver reliable defense forces or spending.

In answer to being shrugged off by the Continental Congress, the political leadership of the New Hampshire Grants called a general assembly of delegates from the territory's towns. In a series of six conventions between April 1775 and January 1777 the delegates wrote their first constitution, which created the state of Vermont.[8] The new state began to send delegates to the Continental Congress as provided for in its first constitution, as if it was a usual participant of the new United States of America. In fact, the opposition of New York in the Continental Congress and into the U.S. Congress after the writing of the U.S. Constitution prevented Vermont from becoming

5. Ira Allen is treated by both Bellesiles and Brewster. The history of the Allen family can be found in Bellesiles, *Revolutionary Outlaws,* chap. 1. For a discussion of Ira Allen as a shrewd politician, see Brewster, "Intrigues," chap. 5 in *Fourteenth Commonwealths.*

6. On Fort Ticonderoga, see Brewster, *Fourteenth Commonwealths,* 19, 42, 46, 51; and Bellesiles, *Revolutionary Outlaws,* 115–19. On Ira Allen's protracted truce negotiations with Britain, see Bellesiles, *Revolutionary Outlaws,* 205–6.

7. For a characterization of the Continental Congress's responses to Vermont's appeals for aid and admission to the confederacy, see Brewster, *Fourteenth Commonwealths,* chap. 6, esp. 56–57.

8. Bellesiles, *Revolutionary Outlaws,* chap. 6, esp. 133–35.

the fourteenth state. It remained for sixteen years legally an independent republic. The new Vermont Constitution denominated it the "State of New Connecticut." When it was discovered that a nearby New York county was named New Connecticut, the name was immediately changed to the "State of Vermont." Nevertheless, Vermont shares a distinction with California, Texas, and Hawaii of having been an independent republic when admitted to the Union.

Vermont remained an independent republic until 1793, which makes its constitution a recognizable hybrid: it contains a declaration of independence, a description of institutions that had to rely on a very small number of leaders to do double and triple duty in public offices, an incorporated bill of rights, and direct elections.[9] In later constitutions Vermont's electoral systems are republicanized, demonstrating a differentiation that reverses the colonial-state constitutional experience of democratizing a republican way of life with institutions inherited from royal charters.

There were three other contenders for admission as the fourteenth state in the mid-Atlantic region, but these three failed and were incorporated by Pennsylvania, North Carolina, and Kentucky before they could prove their moral and territorial sovereignty.

Vermont's Constitution of 1777

The Vermonters were subsistence farmers. They must have been excellent examples of human metabolism, since they cleared exceptionally heavy forest and plowed resistant soil types (today known as Charlton-Paxton, Weatherfield-Cheshire, Gloucester-Plymouth, and Pittsfield soils, the fact of later naming indicating substantial variation, meaning substantial flexibility required of the settlers) with few and primitive tools.[10] The settlers were subject to devastation by chance of weather or an unexpected death of the head of household, which in a moment could transform their stamina into despair. Though some, less driven by subsistence, were concerned about the wasting of timber resources by the Vermont methods of girding and burning heavily timbered areas, the new settlers had to start quickly if they hoped to survive their first winter in Green Mountain territory.[11] They relied on corn as the staple of their diets, though pigs figured interestingly in local po-

9. The text of the Vermont Constitution of 1777 may be found at the Office of the Vermont Secretary of State, Vermont State Archives, http://vermont-archives.org/govinfo/constitut/con77.htm.

10. For an interesting digression on Vermont soil types, see Bellesiles, *Revolutionary Outlaws,* 46–47.

11. For methods of clearing heavy timber and concern over resources, see ibid., 53.

litical disputes over free-ranging or penning and pounding by a public official called a hogsreave.[12] In an age before the railroad in a territory of harsh winters, Lake Champlain and rivers and streams originating in the Green Mountains froze over. Movement of goods by settlers required permission to navigate the Connecticut River, since the Vermont territory ended at the western bank. Permission granted, the frozen Connecticut River became the north-south route for navigation in summer and sledging in winter. There were at least two east-west routes through the Green Mountains that separated the eastern-slope people from the western-slope people.[13] It is said that Ethan Allen could cross in a day. Even if this is an exaggeration, it suggests that there were accessible east-west routes for the movement of people and goods.

Seeing as how Vermonters had lived for at least twenty-five years under defensive conditions of imminent eviction by land jobbers and dishonest speculators with ambition to make a profit at all cost to the settlers, the first Vermont Constitution was heavily committed to proclaiming a declaration of independence from the king-in-Parliament and documenting oppression by royal authorities of New York State. It was written according to the guiding principles and format of the American Declaration of Independence.

The Vermont list of oppressive tyrannies was a recounting of the fact that New York State offenses and royal offenses were indistinct. It was not a legal matter to the Vermonters, who were suspicious of sophisticated outsiders, especially New York lawyers. The Vermonters had localized Puritan insistence on stable, regulated individual character in place of a well-differentiated legal system.[14] If an individual was disruptive or could not contribute to the locality's common good, he was "warned out," that is, evicted as a member of the town. Ethan Allen is known to have been warned out of at least two Vermont towns for his disruptiveness and his vocal commitment to atheistic deism. The first Vermont Constitution was committed to a single document: the reasons for separation from the United States and Britain, a word-for-word copy of the Pennsylvania Constitution of 1776, including a declaration of rights and a frame of government, with some tinkering to fit a much less developed state of institutions and infrastructure.

A declaration of independence appears in the opening of the 1777 Vermont Constitution. It was of some urgency to the Vermonters, in a place with no clear authority, jurisdiction, or laws, with New York law enforce-

12. For the genuine importance of pig control in early Vermont towns, see ibid., 62.

13. For routes to, and through, the Green Mountains and Vermont frontier, see ibid., 45–46.

14. On Puritan schisms and neighborhood vigilance, see ibid., 66. Shalhope, *Bennington and the Green Mountain Boys,* presents a very careful narrative of the Puritan congregational instability and settlement in Bennington.

ment angling to gain control of the New Hampshire Grants, the Continental Congress preoccupied with war and an inadequately designed confederacy, and the British unsuspicious for the moment of Vermont's fidelity as an ally, that Vermont take its first opportunity at this precise moment in 1777 to assert its sovereignty and submit its causes for separation to the opinions of mankind and give reasons to a candid world.

The thirteen colonies-become-states had the experience, customary practices, and documented royal government designs to guide their constituting of the states of the confederation. The Vermonters, who had none of the advantages of a good political and economic relationship with royal Britain gone bad, had to truncate their political education and adopt from other states a constitutional template and refine it for their unique situation. The most notable feature of Vermont's situation was that it had no royal governor, nor assembly, nor privy council to refine into independent, republican state institutions. Vermont was a state that built its political foundation independent of the typical colonial experience.

The Vermonters chose the 1776 Pennsylvania Constitution as their template.[15] The Vermont Constitution of 1777 is divided into the preamble, which functions as a declaration of independence; Chapter I, titled "A Declaration of the Rights of the Inhabitants of the State of Vermont," with nineteen sections; and Chapter II, titled "Plan or Frame of Government," with forty-four sections.

On the one hand, the Pennsylvania Constitution of 1776 was a good choice as a template for Vermont because of the strong Whiggish control of Pennsylvania politics during the founding era, which comported well with Vermont's distinctively participatory institutions. On the other hand, Pennsylvania was more highly populated, and by comparison had a sophisticated differentiation of public institutions to accommodate a system of boroughs, townships, and counties. Philadelphia had already become the locus of confederal politics and would remain so through the federal founding. Vermont had only towns, which were each divided into self-sufficient Protestant quarters as a result of the Great Awakening, and only twelve counties by 1793.[16] So although the delegates recognized the need for well-developed rights and limited government, they did not have at the outset a state government of their own to limit. They were concerned with limiting New York

15. Bellesiles, *Revolutionary Outlaws,* 137; Shalhope, *Bennington and the Green Mountain Boys,* 171.

16. For a good map of 1795 Vermont, see Edward Connery Lathem and Virginia L. Close, eds., *A Vermont Commemorative of the Two-Hundredth Anniversary of Vermont's Admission to the Union as the Nation's Fourteenth State, 1791–1991* (Burlington: University of Vermont Libraries, 1992), frontispiece.

State's government, preventing it from incorporating Vermont by stealing its land titles.

In rehearsing their plight as victims of land fraud in the opening paragraphs of the 1777 Vermont Constitution, Vermonters demonstrated their bitterness over the meddling of outsiders in their affairs in a veiled reference to the persecution of the Green Mountain Boys by "Yorker" officials. If it had not been for the common enemy Vermonters found in the royal officials of New York, Vermont probably would have become the northeastern counties of that state.

The specific Vermont proclamation of independence appears in the first and seventeenth paragraphs of the preamble, between which are placed the complaints against New York *and* the Crown for neglecting to address New Hampshire grantees' untenable proprietary situation. This declaration may have come as a surprise to any officials who were unconcerned with a disgruntled neighboring population, which was said by some more sophisticated visitors to the Green Mountains to be living in a savage style, in dirty, dark shacks, in primitiveness and insensibility.[17] The Vermonters had no long train of well-documented complaints, petitions treating individual rights of jury trial, representation, quartering, or mercantile opportunism. Ira Allen did write anonymously and distributed one important pamphlet called *The People the Best Governors.*[18]

Vermont's plight was a rehearsal in miniature of local conditions of the American Revolution, in which Yorkers play the part of the oppressive British. This likeness is recognized very early in the literature, and none of the later literature on Vermont political history fails to recognize this pattern.[19] Vermont's local politics was of no concern to the thirteen states or the British. The Vermonters lacked a thoughtful, documented, unfolding experience in which political possibilities were worked out among persons who were classically educated elites. They simply needed assurance of security that could not be provided by anyone but themselves. Ethan Allen had read Locke and was headed for Yale when his father died and he became head of a household of nine members. But for most Vermonters, even in leadership, the state of nature was not a theoretical formulation but a condition of everyday life. If not for the countervailing pressures of the competing Puritan sects, Vermont would quite possibly have remained a frontier for longer

17. Bellesiles, *Revolutionary Outlaws,* 55.

18. Shalhope, *Bennington and the Green Mountain Boys,* 169–70.

19. Hall, *Early Inhabitants of Vermont.* The Hiland Hall Papers are a prominent resource for Shalhope, *Bennington and the Green Mountain Boys;* and Bellesiles, *Revolutionary Outlaws.*

than it did. It remains today one of the most sparsely populated states, with a reputation for slow acceptance of outsiders.

The declaration of independence in the 1777 preamble establishes the basis for the authority of constituting a state in general, finding it in natural rights to safety and happiness bestowed by the "Author of existence." This reference to God is general enough not to be disagreeable to any of the Puritan sects that were multiplying like bacteria in the Vermont towns.[20] Throughout the Vermont Constitution there are several kinds of authority that derive temporally from the inhabitants of the state and divinely from God and scripture. Besides the somewhat republican assembly and local public officials, the "Plan or Frame of Government" establishes the Roman-inspired Council of Censors to judge the conformity of civic institutional operation to the constitution. The Council of Censors is lifted from the Pennsylvanians, who, through experience, thought that seven-year intervals for the meeting of the censors constituted them safe, as well as vigilant, guardians of the state constitution.

Consent of the people to change their government is derived from these natural rights. Already the first paragraph of the preamble references "the people" and the "community." Although this distinction is more probably the result of several hands working out the final form of the first constitution, it hints at an underlying rationality that distinguishes between creating a community and defining the material of the proposed regime, "the people," who are the inhabitants simply of the territory titled the "State of Vermont."

The final paragraph of the preamble makes a further distinction: here "inhabitants," "people," and "community" are differentiated into "We the representatives of the freemen of Vermont." There is not yet a clear distinction among public, people, and citizens at this point in the document, but it will appear in the "Plan or Frame of Government." There is a statement that this constitution will "provide for future improvements, without partiality for, prejudice against, any particular class, sect, or denomination of men whatever," that is, not a naming of the public or the people but a principle of what *not* to do when naming the public or the people.

It is interesting to note that by the last paragraph of the preamble the "Author of existence" is now "the Great Governor of the Universe," a reversal of the traditionally contested formula that patresfamilias constitute the building blocks of government. In 1777 the Vermonters were still mainly British, Scotch-Irish North American immigrants; they had not yet lost the histori-

20. See Bellesiles, *Revolutionary Outlaws,* 48–49, 66–67, and passim on Puritan schism and social regulation. See Shalhope, *Bennington and the Green Mountain Boys,* for the particular Puritan schism and settlement patterns in Bennington.

cal memory of monarchy, not to mention the original troubles of Scottish and Irish independence from England, and its formula that the true patterns for good government are sacred, not temporal, not the family. The male head of the household was, in fact, the only political participant in the outside world. This was true until colonial Americans began to move out to the western and southern frontiers and the Old World's sociopolitical way of life was transformed.[21]

Ethan Allen had carefully worked out and was committed to his own version of deism and was often the target of either evangelizing or warning out as he traveled about the territory. But Ethan Allen was an exceptional character. The social stability of the state rested on the extreme regulation of mores by Puritan congregations that were institutionally also extremely unstable. The Puritan concern for mutual alertness to unsanctified behavior in the local community makes old cold war Soviet informing on neighbors pale by comparison.[22] Church membership was a privilege, not a right, in Vermont in 1777. The congregations were in a constant motion of splintering doctrinally, but the Great Awakening ensured that the Bible would deliver community continuity even if the coming republican social revolution and visible sainthood were continually at loggerheads.[23]

After the preamble the body of the 1777 Vermont Constitution is divided into two chapters. The first is called "A Declaration of the Rights of the Inhabitants of the State of Vermont." This declaration is word-for-word patterned after the Pennsylvania Constitution of 1776. However, there are variations that consistently indicate that the Vermonters intended to republicanize their way of life, which up to that time had been heavily democratic in the sense that they lived in a loose state of nature; they represented only themselves. They wrote a document with constitutional features that was embedded in a civil covenant that announced that the inhabitants of Vermont were a distinct civil community; each had a political bond to every other inhabitant. Any institutional project for Vermont, if not a monarchy, had to become a republican-regime type.

The Vermont declaration of rights contains nineteen sections, whereas the 1776 Pennsylvania Constitution contains sixteen, meaning that although Vermont was way behind Pennsylvania in social, political, and institutional development and practice, its distinct political identity provided for rights that the Pennsylvanians had not yet wanted, or needed, to deliver. For in-

21. For a complete Pulitzer Prize–winning account of the social revolution during the American founding era, see Gordon Wood, *The Radicalism of the American Revolution* (New York: Vintage Books, 1991).

22. Bellesiles, *Revolutionary Outlaws,* 48–49, 66–67, and passim. See also Shalhope, *Bennington and the Green Mountain Boys.*

23. Wood, *American Revolution.*

stance, in Section I, Vermont not only declares the unalienable rights of all men—effectively limiting the power of the prospective government to dispose of personal property and curtail individual liberty—but also prohibits legal slavery, servitude, and apprenticeship of any male over the age of twenty-one or female over the age of eighteen without consent.

Because of Vermonters' history of defense of their land titles, Section II declares the guarantee of compensation in cases that would later be called eminent domain. This is an addition to the Pennsylvania constitutional template. Like Section I, this right of compensation not only limits government power but also structures the conflict between the right to private property title and unknowable overriding needs of the state for future land and infrastructure co-optation. Both constitutions provide that the judiciary shall not keep inherited property in probate so long that the property becomes annexed by the state.

The rest of the declaration of rights contains all the typical rights, principles, and obligations recognized at the time in the first thirteen states: freedom of conscience, accountability of public officials and law enforcement officers to "the people of this State," the principle that the people are the judges of the continuing comportment of government institutions for the public good, taxation for state defense by consent, speedy public jury trial, guarantee against self-incrimination, guarantee against unreasonable search and seizure, freedom of speech and the press, the right to bear arms and to be free of standing armies and their quartering in peacetime, and freedom of movement and assembly.

Besides the sensitive issue of eminent domain in Vermont, there is additional and sufficient concern for three other rights that set the Vermont declaration of rights apart from Pennsylvania's of 1776. First, because the New Hampshire Grants were settled by an ever-increasing number of separating Puritan sects, each claiming more purity than the others, there is the prescription added in Chapter I that "every sect or denomination of people ought to observe the Sabbath or Lord's Day, and keep up some sort of religious worship which to them shall seem most agreeable to the revealed will of God" (Section III). This would appear to us to constitute violation of a freedom from establishment of religion by government. However, this prescription did not present a political threat to the Vermonters; rather, it was an acknowledgment that Vermont Puritan practice, in spite of the splitting of congregations, was credited with lending continuity to communities where no other bonds were available to the Green Mountain settlers in the eighteenth century.

Second, again addressing a continuing anxiety over property title, is Section XII, which does not appear in the Pennsylvania declaration of rights. It

is a provision that guarantees that land cannot be confiscated by creditors without civil due process.

Third, the Vermonters added Section XIX, which provides that no person shall be removed from the state for trial for offenses committed within the state. This addition answers three possible civil rights violations: that the Vermonters had not yet secured themselves against the encroaching jurisdiction of New York State, Ira Allen had parleyed with the British about a possible alliance in the Revolutionary War in order to put New York on notice that Vermont would not tolerate victimization by regrant and eviction threats, and the colonial complaint against nonjury trials in courts-martial in Britain. The Revolutionary War by 1777 was still seven years away from the surrender of Cornwallis. Vermont could not afford to take Machiavelli's advice to declare one's loyalty openly; the safest strategy was to declare independence and press for union with the winner. In any case, smart Britons must have recognized that Adam Smith was surely correct in his estimation that if the American colonies had been granted representation in Parliament or the British had won the American Revolutionary War, both parties would have quickly been ruined.[24]

Chapter II of Vermont's 1777 constitution is named "Plan or Frame of Government." It has forty-four sections. It defines its republican form of government in a general assembly and, like Pennsylvania, is a unicameral, directly elected house of representatives. Citizens, for the purpose of suffrage and qualifications for house members, consist of adult males twenty-one years and older who have lived in the state "one whole year." The character qualification for citizenship is "every man . . . who is of a quiet and peaceable behavior." And again in Section XXI, "No person shall be capable of holding any civil office, in this State, except he has acquired, and maintains good moral character." This requirement appears as a separate section, not incidental to any other institutional plan. Virtue is necessary for Vermont to acquire and maintain itself as a state.

The processes of collective decision making, as in how a bill becomes a law, are found in three sections of the plan of government, Sections II, VIII, and XIV. The first of these creates the house of representatives and commits to paper the derived supreme legislative power. Section VIII lists the legislature's powers to organize its leadership, reserve the power of adjournment to itself, and have some general judiciary powers. Section XIV is particular

24. Smith, "Colonial Policy and Mercantilism," edited selection in *An Inquiry into the Nature and Causes of the Wealth of Nations,* from *The People Shall Judge: Readings in the Formation of American Policy,* ed. Social Science Staff of the University of Chicago (Chicago: University of Chicago Press, 1949), 129–45.

to American state constitutions and provides not only that bills shall be reviewed by the governor and the Governor's Council but also that bills shall be published and distributed for the deliberation of the public, after which a bill cannot be passed until the next session of the assembly. Electoral processes are all direct: choice of governor, lieutenant governor, and a twelve-man Governor's Council (Section XVII). A supreme court and lower courts are proposed for the future needs of structuring conflict, a provision adopted word-for-word from the Pennsylvania Constitution. This borrowing ought to be considered an institutional aspiration for the Vermonters at the time of the 1777 constitution, since their political development was not yet up to even preventing citizens from holding more than one office at a time, except in certain circumstances.

The Vermonters' first frame of government represents a good-enough characterization of distributing power in a state where there were not many inhabitants not engaged full-time in bare subsistence to distribute power to. Direct elections of house members and their leadership established the ultimate basis for temporal authority in Vermont (Section VIII). A series of oaths established the derived legal authority of public officials.

It ought to be kept in mind that for extremist Puritans, involvement with worldly social matters with outsiders constituted a kind of temporal contamination. Establishing a basis for authority of a new regime must be assumed to be directed by divine inspiration. This accounts for a Protestant religious test for public officials. The ultimate political authority of the people was a blessing given by God for the orderliness of an earthly life, which a Puritan, in an Augustinian fashion, was to avoid getting too entangled in. The basis of political authority for the Puritans was a relationship with God. The basis of political authority as such was the people. The authority of house representatives and their leadership, other public officials, and the Council of Censors was derived from the people, provided it was combined with oath taking and good-enough character to be electable.

The first Vermont Constitution, that of 1777, was written hastily, under the conditions of these constraints: constant fear of encroachment by the British army; uncertainty of whether Ira Allen's intrigues with the British, the Canadian governor-general, and the lieutenant governor of New York would turn out to be judged good politics at war's end; a state with few natural resources, few settlers, and primitive technology for the time; an abundance of Puritan competition for God's favor; and a defensive posture toward land tenure. It is to the credit of the Allen brothers that they chose the Pennsylvania Constitution of 1776 as their template, which may have been a convenience rather than a studied directive.

The 1777 constitution qualifies as a constitution because it fulfills all eight of Donald Lutz's constitutional requirements. However, it is imperative to

keep in mind that the document alone gives a false impression of the conditions under which Vermont wrote its first constitution. The Vermont founders borrowed, word-for-word, from the Pennsylvania Constitution, then tinkered with it. Vermont's overriding concerns in 1777 were how to get statewide civil institutions started, how to defend land tenure against the encroachment of their own government or their neighboring states' governments, how to prevent becoming a county of New York or a province of the British when the Revolutionary War would resolve itself, and how to accommodate extremist Puritan towns that were the main organizing principle of Vermont politics in 1777.

It is from these crosscutting pressures that Vermont wrote another constitution in 1786, still seven years before it was admitted as the fourteenth state. The thirteen original states were by this time still living with the confederate plan, although by then it was apparent that not all of the requirements that qualified a document as a constitution were present in the Articles of Confederation.

The Vermont Constitution of 1786

The Vermont Constitution of 1786 was changed little in terms of the amount of text that was added and dropped. There were the same parts and titles of those parts of the constitution of 1777. There were now twenty-three separate sections denoting rights and forty sections designing and regulating the institutions.

The amount of change was small, the substance of the changes subtle but significant. Vermonters were beginning to have a concern for the maintenance of the operation of their institutions rather than the start-up of them. Their disposition toward justice was in language that was more legal than Puritan. In nine years Vermont was apparently more populated, and there was less anxiety over the imminent loss of land titles and more concern with archiving the existing titles. Section XXXII of the "Plan or Frame of Government" established the town clerks' offices as the places where records of deeds and conveyances of land would be placed.

The preamble remained exactly as it was in 1777. This suggests that there had not been a complete generational turnover in population, and that there was still bitter collective memory of the offenses of New York State. The Revolutionary War was now over, and Ira Allen's double cross of the British had paid off; he bet on the winning side. However, Vermont was still not a member of the confederation, and the confederation was about to be co-opted by the U.S. Constitution and a federal union.

The new constitution substantially republicanized the 1777 constitution.

The assembly was now sometimes referred to as the legislature. It remained unicameral. Now the legislature could give consent to confiscate property for public use, provided that compensation was granted—in other words, eminent domain. The legislature now approved taxes, elected all judges and local law enforcement officials, and elected military major generals and brigadier generals. Not only this, but the Vermont Constitution of 1786 had an elastic clause for the legislature, the precise sign that republican government had arrived in Vermont ("Plan or Form of Government," Section IX). Incidentally, it was in the elastic clause that the constitution first called Vermont "a free and sovereign state." Another important addition was the republican necessity to provide immunity to representatives in deliberation ("A Declaration of the Rights of the Inhabitants of the State of Vermont," hereafter "Declaration of Rights," Section XVI).

Notably, the 1786 constitution dropped the legislative requirement to publicly post bills for citizen inspection and deliberation. The governor and Governor's Council were still directly elected, specifically by plurality. But the governor and council had an absolute veto and a pocket veto on bills presented by the legislature.

Now the Vermont Constitution was using more legalistic vocabulary: all persons should find justice "conformab[le] to the laws." Vermont was approaching the *Gideon v. Wainwright* federal question by proclaiming that justice should not be purchasable ("Declaration of Rights," Section IV).[25] The people no longer directly regulated the police power of the state, but regulation was by the people's "legal representatives" ("Declaration of Rights," Section V). Vermont was now a sovereign state, and the legislature effectively had a loophole for emergency powers: martial law ("Declaration of Rights," Section XVII). The formula used here was aimed at executive encroachment on legislative power. But the formula was oblique and gave with one clause what it took away with another: "The power of suspending laws, or the execution of laws, ought never to be exercised by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for." The connotation was that laws may be suspended or executed only in single, presumably extraordinary, instances. But like Zeno's paradox, to suspend civil laws wholesale, or line by line, can, for individuals without good moral character and the heaviness of Puritan regulation of the community's way of life, become the same thing.

The 1786 constitution had four more outstanding characteristics. First, the legislature would choose delegates to "Congress." One assumes that this referred to the Continental Congress ("Plan or Frame of Government," Section IX). Vermont may have declared sovereignty, but the state was clearly

25. *Gideon v. Wainwright,* 372 U.S. 335 (1963).

still invested in becoming a member of the confederacy. Second, the frame of government now proclaimed separation of powers ("Plan or Frame of Government," Section VI). Absent were checks-and-balances operations and shared powers that would give separation of powers teeth. Third, the religious test for office remained, but the requirement to be of and maintain good moral character for office holding was dropped. This makes sense, since passing a religious test could entail good moral character. Fourth, there were restrictions against holding more than one kind of public office. This suggests an enlargement of the pool of political participants. The population was increasing in the northern frontier.

The 1786 Vermont Constitution did not substantially alter its qualifications as a constitution. What it did do is demonstrate a bigger inventory of political ways of life to draw from. Vermonters were now more republican, were somewhat less anxious about land titles, had an interested population to let the legislature more thoroughly represent the people, and were aiming for a more differentiated, legalist politics. The most noticeable quality of the text is that the second constitution was distinctly more sophisticated in the text of its "Declaration of the Rights of the Inhabitants of the State of Vermont" and "Plan or Frame of Government." Even so, the second Vermont Constitution clung to the original land-tenure offenses that unified the inhabitants of Vermont in the first place.

The Vermont Constitution of 1793

In seven years the U.S. Constitution had superseded the Articles of Confederation. Vermont had been a state of the federal system for two years. The bitterness of what originally united the Vermont inhabitants—the defense against New York authorities and the fear of a British garrison—was fading. The antics of Ethan Allen and the intrigues of Ira Allen were becoming part of the Vermont founding story.

The Vermont Constitution had visibly changed by 1793. The preamble that functioned as the state's declaration of independence dropped away completely. There was no need for it because the U.S. Declaration of Independence took its moral position, even though it could never replace the Vermont Preamble historically. The rights were now titled "articles," and all roman numbering had converted to arabic numerals.

The assembly, still sometimes called the legislature, was still unicameral. Now it had formal powers of appropriation as well as taxing ("Plan or Frame of Government," Section 17). Residency qualifications had been adjusted for some officials. The requirement that attachment (the taking of property liens) be proved necessary by a creditor in order to confiscate property col-

lateral had dropped out. Vermonters were no longer troubled by land tenure, and they trusted their legislative representatives enough to give them more derived powers.

The most significant changes in the 1793 constitution were the removal of the Vermont declaration of independence, that is, the preamble, and the dropping of the religious test as a requirement for holding public office. These changes alone suggest that Vermont politics was differentiating. It was secularizing and losing its historical memory of the conditions of its founding. Yet one very important principle remained in all of the state's constitutions: that a "frequent recurrence to fundamental principles, and a firm adherence to justice, moderation, temperance, industry, and frugality are absolutely necessary to preserve the blessings of liberty" ("Declaration of Rights," Article 18). By 1793 Vermonters had fundamental principles and virtues to recur to that were not mediated by the form of the Pennsylvania Constitution of 1776.

The Vermont Constitution of 1995

The 1995 Vermont Constitution is an amended version of the 1793 constitution. The changes that appeared in 1995 were legalistic, clarifying, and secularizing. The "Plan or Frame of Government" continues to be republican in the strict nature of representative institutions, but it is not clear from the document that contemporary Vermonters live the life of traditional republicanism: interdependent civic and social relationships, a knitting together of the inhabitants by interlocking duties and civic dignity, and the social habits of a people with customary practices and deference. The 1995 constitution had lost its traces of social context or competing social pressures.

The assembly is now bicameral, with a house of representatives and a senate. The Governor's Council and the Council of Censors have disappeared. A state supreme court is placed at the head of a "unified judicial system."

There is now a martial-law restriction that closes the loophole created by the power of the legislature to suspend laws ("Declaration of Rights," Article 17). The "Plan or Frame of Government" now limits the total number of seats in the state legislature to 150 (Section 13); this requires apportionment procedures, which have been added. There is a guarantee against the suspension of habeas corpus ("Plan or Frame of Government," Section 41).

The most significant addition to the 1995 Vermont Constitution is an amendment that provides procedures for amending the state constitution ("Plan or Frame of Government," Section 72). All other alterations are in arrangement, numbering, and subheadings.

These changes do not handicap the document as a constitution accord-

ing to Lutz's requirements. The current Vermont Constitution fulfills the requirements of a "good-enough characterization" of how to tell when one is looking at a constitution or not. Interestingly, the 1995 constitution suggests that the citizens of contemporary Vermont, still traditionally one of the sparsest-populated states, need more direction and clues than ever before as to how to read and interpret their constitution. Each section number is now followed by a bracketed summary of the substance of the section. This is simply a device for busy people to refrain from having to read the text of the section to apprehend its meaning. Vermont history is the repository of the document's political significance.

Conclusion

The 1995 constitution is remarkably faithful to the founding needs of a sparse but hardy population in a political condition of statelessness during dramatic revolution in the social ways of life and in the middle of a war on the larger political stage of the life of the confederated states. The leading Vermonters, notably Ethan and Ira Allen, necessarily became resourceful, self-reliant, and responsive to the needs of frontier identity and defense. They took good constitutional account of the Great Awakening without crippling the first constitution's function as a political document. The 1995 Vermont Constitution is not as different from the 1777 constitution as one might expect.

The name "Ethan Allen" has become shorthand for all that is spirited, ingenious, charismatic, and persistent in an underdog facing off with arrogant, powerful opponents who want more than their share in all things material. Vermont is still a sparsely populated state, and its inhabitants perpetuate the state character of individual hardiness, conviction, privacy, and a taciturn style that rebuffs newcomers. On account of its history of thriving under adversity, Vermont is a border state between New England and the distinctive cultures of New York and Massachusetts.

There is no room for doubt that the Vermont Constitution of 1777 arises to the name of a "constitution" according to the framework honored by this volume. It is now up to the frequent recurrence to fundamental principles and a firm adherence to the virtues of the traditional meaning of common sense that can secure the blessings of liberty to the state of Vermont.

MID-ATLANTIC STATES

Like their New England cousins, the Mid-Atlantic states have contributed significantly to the development of constitutionalism at the national level. The historical pedigree of Maryland, New Jersey, New York, and Pennsylvania suggests, in contrast to those who find the origins of American constitutionalism across the Atlantic, that the wellspring of constitutionalism in America is organic.

The New Jersey chapter demonstrates, on one hand, that the failure to clearly define constitutional purposes led the citizens of that state to question the legitimacy of their political foundation. On the other hand, the exercise of sovereignty illustrated by the people of New Jersey in the ratification of the 1948 constitution demonstrates the success of constitutionalism at the state level.

The Pennsylvania chapter offers a spirited defense of New Federalism. The author argues that the constitutional experience in that state, in particular the three threads of virtue, liberty, and independence, continues to represent a laboratory for other states, as well as the national government.

THOMAS F. SCHALLER

Pioneer and Outlier

Maryland Constitutionalism in Its Third Century

Maryland's constitutional history is unique. As one of the founding states of the Republic, Maryland had a seminal influence on state constitutionalism, and influenced the form and ultimate fate of the national charter as well. Maryland's current (fourth) constitution is typical of state constitutions in many ways. Yet in other respects, it remains an outlier.

Directly or indirectly, Marylanders were instrumental in the drafting and ratification of the U.S. Constitution.[1] In 1786, a twelve-member, five-state delegation that included James Madison and Alexander Hamilton convened in Annapolis to issue the first formal call to replace the failed Articles of Confederation. After delegates to the 1787 Philadelphia convention drafted the Constitution, worries voiced during the ratification process by Maryland's William Paca and other Anti-Federalists compelled the first Congress, in 1789, to propose the Bill of Rights amendments. Maryland's ratification of the Constitution in April 1788—the seventh overall of the nine states initially needed to adopt—provided legitimacy and momentum at a time when the Constitution's fate remained uncertain. Fittingly, Maryland also gave credence to the Bill of Rights amendments it helped make possible when, in December 1789, it became the second state to ratify these important com-

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1. Gregory Stiverson, "Necessity, the Mother of Union: Maryland and the Constitution, 1785–1789," in *The Constitution and the States,* ed. Patrick T. Conley and John P. Kaminski (Madison, Wis.: Madison House, 1988), 131–52. Stiverson is a former assistant state archivist of Maryland.

promises.[2] The fingerprints left on American constitutionalism by Marylanders were plainly visible during colonial times, and can still be seen today.

Since the colonial period, transformations in the Maryland Constitution have mirrored the American constitutional experience of the past two centuries: a steady, if sporadic, expansion of human rights, coupled with periodic changes in the structures and functions of state-government actors and institutions—all punctuated by a period of constitutional upheaval in the middle of each of the past two centuries. Despite these parallels, in many important respects Maryland's modern constitution is unique.

In the first part of this chapter, I provide a brief historical overview of the state's constitutional history since the adoption, in 1776, of Maryland's first postcolonial constitution. In the second part, I examine and discuss the significance of key features of the state's current constitution as they relate to human-rights protections, the assignment of power and duties to the three branches of government, the prescription and proscription of local governance, and the ability to change the constitution by amendment.

A Brief History of the Maryland State Constitution

In 1776, Maryland and nine other states adopted what Donald S. Lutz calls the "first wave" of state constitutions, those drafted and ratified in the heady months following the signing of the Declaration of Independence.[3] In many ways, according to Lutz, Maryland's first constitution was typical of the colonial models adopted by the other states, prescribing a bicameral legislature chosen by and composed of free white men of either property or certifiable minimum wealth who, in turn, chose the state's governor each year and appointed its judges.[4]

2. Paca merits special mention. According to Stiverson (ibid., 135–37), at Maryland's 1788 ratification convention Paca was joined by Samuel Chase and Luther Martin in agitating for inclusion of a federal declaration of rights similar to the one Paca had helped draft for inclusion in Maryland's 1776 constitution. As a strategic compromise, Paca was the only Maryland antifederalist who voted to ratify the U.S. Constitution—but did so only after promises from the federalist delegate majority that a rights declaration would be addressed by the first Congress.

3. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 103–4. Constitutional government in Maryland, broadly defined, actually dates back to the Charter of Maryland, adopted in 1632.

4. Lutz, "Political Participation in Eighteenth-Century America," in *Toward a Usable Past: Liberty under State Constitutions,* ed. Paul Finkleman and Stephen E. Gottlieb (Athens: University of Georgia Press, 1991), 19–49. Lutz emphasizes (23–24) that the wealth or property-holding requirements or both established by state constitutions were often easy to meet or

But Maryland was exceptional among its "first wave" peers in some of the specifics. Though it included an extensive declaration of rights, according to state constitutional expert Dan Friedman Maryland's constitution was one of the more conservative of the postrevolutionary charters.[5] Senators were selected by an electoral college composed of electors from each county, and served five-year terms—as compared to one-year terms for the Maryland House of Delegates and, in most states, both chambers. Delegates were apportioned by county and senators by region, thereby inflating the power of the state's less populated rural areas and setting the stage for repeated apportionment battles during the next two centuries.[6]

As in many other states,[7] Maryland experienced its first major period of constitutional turbulence during the decades leading up to and immediately following the Civil War. Indeed, Maryland adopted a spate of constitutional amendments in 1838, only to soon thereafter ratify in rapid succession new constitutions in 1851, 1864, and 1867.[8] The significant changes during this period, many of which pertained to suffrage and apportionment, can be summarized as follows:

- Although the original property qualifications to vote or run for office were removed shortly after the turn of the eighteenth century, changes adopted in 1838 during the Jacksonian era expanded popular control over the selection of government officials. The governor was chosen popularly, and the term of office was increased to three years; senate terms were increased to six years, and staggered in three electoral classes similar to the U.S. Senate format. For the first time, house seats were apportioned based on a rough, albeit not precisely proportional, population basis.[9]

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circumvent, allowing a surprisingly high percentage of white males access to the ballot, either as voters or as candidates. The original minimum thresholds for white men were thirty pounds to be eligible to vote, five hundred to serve in the Maryland House of Delegates, one thousand for the senate, and five thousand for governor.

5. Friedman, "The History, Development, and Interpretation of the Maryland Declaration of Rights," *Temple Law Review* 71 (Fall 1997): 637–707.

6. Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era,* trans. Rita Kimber and Robert Kimber (1980; reprint, Lanham, Md.: Rowman and Littlefield, 2001). Adams explains (237) that Maryland was similar to other mid-Atlantic and southern slave states in its use of the "county" system for apportionment, whereas towns (also disproportionate, but a different unit of analysis) were more commonly used in the northern states.

7. See G. Alan Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998).

8. Richard R. Duncan, "The Era of the Civil War," in *Maryland: A History,* ed. Richard Walsh and William Lloyd Fox (Annapolis: Hall of Records Commission, Maryland Department of General Services, 1983), 309–95.

9. *Maryland Legislator's Handbook,* Legislative Handbook Series, vol. 1, 2002, published

- The 1851 constitution presaged the nation's looming constitutional crisis. With popular majorities threatening to dominate the slave-dependent, less populated regions in Maryland, a constitutional compromise retained the split between county-based senate apportionment and population-based house apportionment, with some slaves counted in order to inflate the representation of the rural slaveholding areas of the state.[10]
- Although short-lived, the 1864 constitution represented a dramatic shift toward popular governance. Written by Union loyalists, it ended the state's awkward position as a pro-Union slaveholding state by abolishing slavery. The constitution specifically enfranchised Union soldiers while disenfranchising anyone refusing to sign a past-and-future Union loyalty oath.[11] With the slave-sympathetic areas of southern Maryland and the Eastern Shore in electoral chains, the Unconditional Unionists dominated. The newer, more egalitarian apportionment formula was mooted, however, because the 1864 constitution was replaced before the 1870 census was taken.[12]
- After the war, the 1867 constitution again reapportioned the legislature to more closely approach (but not quite achieve) proportionality. For the first time, the governor had the power to veto legislation passed by the General Assembly[13]—a constitutional provision common among Reconstruction-era constitutions written by reformists who were wary of the dangers of legislative partisanship.[14]

Clearly, the root of these Civil War–era controversies was the political struggle over the slavery question in particular, and the broader issue of the urban-rural balance of power.

A century later, the civil rights movement, coupled with the U.S. Supreme Court's malapportionment rulings, plunged Maryland into a second period of constitutional introspection. Despite resistance from the general assembly, in 1964 Governor J. Millard Tawes appointed a twenty-seven-member statewide Constitutional Convention Commission to revisit the state's charter.[15] For its part, the general assembly commissioned an independent study

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quadrennially by the Maryland General Assembly's Department of Legislative Services, Annapolis, 131–32.

10. Ibid., 132–33.

11. Duncan, "Era of the Civil War," 377–92.

12. *Maryland Legislator's Handbook,* 133–34.

13. Ibid., 134–35.

14. Randy J. Holland, "State Constitutions: Purpose and Function," *Temple Law Review* 69 (Fall 1996): 989–1006.

15. Ironically, Tawes was from the rural waterman town of Crisfield, in Somerset County on the Eastern Shore. Thus, the collapse of the county-based apportionment system in favor of the one-person, one-vote standard came at the expense of the incumbent governor's rural, underpopulated home county and region.

to examine the legislature's structures, organization, and rules.[16] In May 1966 the legislature proposed, and in September the voters quickly approved, the creation of a constitutional convention tasked with drafting a new state charter.[17]

The convention met during late 1967 and early 1968. Among other suggested changes, it recommended eliminating the offices of attorney general and comptroller and the influential Board of Public Works, extending suffrage to eighteen to twenty year olds in advance of the Twenty-sixth Amendment to the U.S. Constitution, constitutionalizing many of the nascent federal rights and liberties that had recently been incorporated into the Bill of Rights via the U.S. Constitution's Fourteenth Amendment, and fundamentally restructuring the state's outdated court system.[18] Despite the strong support of Maryland's political and economic elite—including Republican governor Spiro Agnew and all living former governors—a 56.4 percent majority of Maryland voters rejected the plan in May 1968. The entire episode was deemed a "magnificent failure."[19]

Friedman has cataloged the reasons offered by scholars and political observers to explain the stunning rejection, including suggestions that the proposed changes were "too liberal and intellectual" for mainstream Marylanders, that overconfident state leaders did not sufficiently advocate on behalf of their proposed changes, that racism in the wake of rising tensions over the civil rights movement doomed the charter, and, more generally, that the changes were simply too sweeping to adopt all at once. Yet Friedman cautions against dismissing the episode as a total failure, because many of the convention's recommendations were later adopted, albeit piecemeal, via amendment in the years during or immediately following this period of constitutional reexamination.[20]

Maryland's rapid succession of new constitutions in the mid-nineteenth century, followed by a twentieth century during which the state's charter was

16. Alan Rosenthal, *Strengthening the Maryland Legislature: An Eagleton Study and Report* (New Brunswick: Rutgers University Press, 1968). The study was conduced by Rutgers University's Eagleton Institute of Politics. Although he lives and teaches in New Jersey, political scientist Alan Rosenthal of the Eagleton Institute supervised that study and became, as he remains to this day, one of the leading experts on legislatures generally, the Maryland General Assembly in particular.

17. Chaired by Baltimore attorney H. Vernon Eney, the commission came to be known informally as the Eney Commission.

18. *Report of the Constitutional Convention Commission,* (Annapolis: Office of the Secretary of State, August 25, 1967).

19. John P. Wheeler and Melissa Kinsey, *Magnificent Failure: The Maryland Constitutional Convention of 1967–1968* (New York: National Municipal League, 1970).

20. Dan Friedman, "The Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998," *Maryland Law Review* 58 (Spring 1998): 528–99.

amended repeatedly yet never replaced, conforms with patterns of constitutional change in many other states.[21] The 1867 constitution remains in effect today—although, as Michael Carlton Tolley points out, it has been amended nearly two hundred times since.[22]

The Contemporary Maryland Constitution

Marylanders often refer to their state as "America in miniature."[23] As the slogan implies, the state views itself as a microcosm of the country in terms of its geography, demography, economy, and other features. Maryland's constitution is hardly the U.S. Constitution in miniature, however. Nor is it representative of state constitutions.

There are general similarities, of course: the Maryland charter prescribes the rights and protections of its citizenry; defines the selection of, and powers assigned to, its government officials; empowers, and limits, local government rule; and establishes the process by which the constitution itself can be changed. In these ways, Maryland's constitution is microcosmic. But other features—taken either singly, and certainly as a composite—make Maryland unique.

In this section, I describe the basic parameters of the Maryland Constitution, with a special eye on the charter's important, and often uncommon, features.

Human Rights and Protections

As Maryland state archivist Edward C. Papenfuse has noted, on September 17, 1776—exactly eleven years, to the day, before the U.S. Constitution was signed and sent to the states for ratification—a Maryland state constitutional convention drafted a resolution that included a declaration of rights for its citizens.[24] The 1867 Maryland Constitution affirmed and extended

21. See Tarr, *Understanding State Constitutions,* 170, on the differences in manner by which state constitutions were changed in the nineteenth century, when conventions dominated, to the past century: "In the twentieth century, far fewer conventions have been called, and their character has changed. Typically, it has been political elites and professional reformers who have campaigned for constitutional revision, with the populace reduced to rejecting convention calls and proposed constitutions to register its distrust of a process that it not longer feels it controls."

22. Tolley, *State Constitutionalism in Maryland* (New York: Garland Publishing, 1992), 27.

23. In 1939, newly elected governor Herbert R. O'Conor created a new state Publicity Commission, which came up with the phrase as part of a promotional campaign (Duncan, "Era of the Civil War," 782).

24. Papenfuse, "The 'Amending Fathers' and the Constitution: Changing Perceptions of

many of these protections in its forty-five-article declaration of rights; although two articles have since been added, another vacated, and several others updated by amendment, more than a century later the declaration's forty-six current articles remain largely intact.

Nevertheless, several important changes to the declaration have been made. Though the national Equal Rights Amendment failed, Maryland not only ratified the proposed amendment but also took the further step of amending the state's constitution to ensure that equal rights not be "abridged or denied because of sex."[25] As of 1996, Maryland was one of only seventeen states with such a constitutional guarantee.[26] In 1994, voters ratified a new article that established rights for victims of crimes, and in 1998 they approved an amendment that raised to ten thousand dollars the minimum amount for guaranteeing a jury trial in civil cases.[27] The Maryland Constitution may have been among the more conservative colonial charters, but today it reflects the state's more progressive tradition.

The Governor

By almost every measure, from budgetary influence to appointment powers, Maryland has one of the most powerful chief executives in the country. The governor's influence derives from nonconstitutional sources, of course.[28] For example, prior to the 2002 election of Republican Robert L. Ehrlich Jr., for three decades Democratic governors benefited extraconstitutionally from having a unified Democratic legislature. Still, the power of Maryland's governor resides in the constitution. Political scientist Thad Beyle quantifies gubernatorial power based on institutional factors, including term length and limits, veto powers, appointment powers, and the degree of influence the governor exercises in state budgeting.[29] Across these

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Home Rule and Who Should Rule at Home," in *The South's Role in the Creation of the Bill of Rights* (Jackson: University Press of Mississippi, 1991), 59–60.

25. Added by Chapter 366, Acts of 1972, and ratified November 7, 1972, and later amended by Chapter 681, Acts of 1977, and ratified November 7, 1978.

26. Carrie Hillyard, "The History of Suffrage and Equal Rights Provisions in State Constitutions," *Brigham Young University Journal of Public Law* 10, no. 1 (1996): 117–37.

27. Chapter 102, Acts of 1994, ratified November 8, 1994; Chapter 322, Acts of 1998, ratified November 3, 1998.

28. George H. Callcott, "The Governors and the Constitution," in *The Sense of the People: Papers from a Conference on the Maryland Constitution, October 7, 1989* (Salisbury, Md.: Salisbury State University, 1989), 15–18.

29. Beyle, "The Governors," in *Politics in the American States: A Comparative Analysis*, ed. Virginia Gray et al. (Washington, D.C.: CQ Press, 1999), 191–231. Beyle's composite scale ranges from a low of 2.7 (Alabama) to a high of 4.1, which Maryland shares with Hawaii, New Jersey, New York, Ohio, and Pennsylvania. However, it should be noted that Beyle's rat-

criteria, Beyle rates Maryland as having one of the most powerful governorships in the United States.[30]

Maryland's governor serves the same four-year term as every member of both chambers of the general assembly (Article II, Sections 1 and 2). Prior to 1924, when Governor Albert C. Ritchie was elected to the first of four consecutive terms, Maryland's governors generally adhered to the tradition of single-term service. Ritchie's tenure, coupled with a national term-limit trend triggered at midcentury by President Franklin D. Roosevelt's fourth election, prompted Marylanders to ratify a constitutional amendment in 1948 to limit the governor to a non-lifetime ban of two consecutive terms.[31] Ironically, with the notable exception of Republican Spiro T. Agnew—who resigned in January 1969 to become Richard Nixon's first vice president—every governor elected since 1948 has been reelected to a second term. In terms of partisan control, Agnew's departure was followed by a continuous string of Democratic governors until 2002, when Ehrlich combined his appeal among independents and conservative Democrats in the Baltimore suburbs with support from the Republican strongholds in western Maryland, southern Maryland, and the Eastern Shore to beat then incumbent lieutenant governor and Democrat Kathleen Kennedy Townsend.[32]

Because the lieutenant governor runs on the same slate as the governor, the comptroller and attorney general are the only other statewide elected officials. The governor appoints the remainder of the executive branch, including the secretary of state and other cabinet officials, plus the heads of the state militia and state police (Article II, Sections 23, 8, and 10)—though always with senate confirmation (Article II, Section 13). With the important exception of the state treasurer, who is chosen jointly by the general assembly (Article VI, Section 1), these broad appointment powers magnify the power of a governor who is also broadly empowered to reorganize the executive branch and "faithfully execute" state law (Article II, Sections 24 and 9).[33]

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ing system incorporates the extraconstitutional factor of party control of the legislature and was calculated for Maryland when Governor Parris Glendening, a Democrat, was in office. Republican governor Robert L. Ehrlich Jr. presently faces Democratic majorities in both chambers.

30. Ibid., 210–11, table 6.5.

31. Joseph Kallenbach, "Constitutional Limitations on Reeligibility of National and State Chief Executives," *American Political Science Review* 46, no. 2 (1952): 438–54; amendment added to Article II, Section 1, by Chapter 109, Acts of 1947, and ratified on November 2, 1948.

32. Thomas F. Schaller, "Apparently, Maryland Looks Like This," *Washington Post,* November 10, 2002.

33. The language of Section 1 specifies that the treasurer be selected by "a joint ballot" of the two chambers, meaning that all 188 legislators vote together, rather than as separate chambers—thereby inflating the power of the more numerous Maryland House of Delegates.

Oddly enough, Maryland did not even have a lieutenant governor until the 1970s.[34] Upon Republican Agnew's resignation, the general assembly elevated Democratic House Speaker Marvin Mandel into the governorship, raising anew the long-dormant issue of having a second in command. The state quickly ratified a constitutional amendment to reestablish the office in time for the 1970 elections. None of the five men and one woman who served in the office has been elected governor.[35]

As a result of a 1916 amendment, the constitution confers upon the governor inordinate influence over the budget process. Most notably, except for budgets for the legislature and judiciary, the general assembly may reduce items proposed by the governor in the state's operating budget but cannot increase them (Article III, Section 52.6). The legislature may pass supplementary budgets, but to do so must subsequently receive approval from the state's surprisingly powerful Board of Public Works—a three-member majority-rule panel that includes the governor, state comptroller, and treasurer (Article XII, Section 1 and 2). Moreover, after the legislature has recessed, with the approval of the Board of Public Works the governor can cut as much as 25 percent of state appropriations. The governor also maintains auditing power over the state treasurer and comptroller (Article II, Section 18). The effect of these powers, say Roy T. Meyers and Thomas S. Pilkerton, is that the governor may have too much budgetary influence. Meyers recently testified on behalf of a widely sponsored bill that would amend the constitution to rebalance the executive-legislative relationship in budgeting.[36]

As for general legislation, bills that pass both chambers of the general assembly may be either signed into law by the governor or vetoed. By a two-thirds vote in each chamber, the legislature may override a gubernatorial veto in the next special or regular session. The governor may permit a bill to become law without his signature; an unsigned bill automatically does so thirty days after the legislature passes it. The governor also has "pocket veto" power that allows him to kill any bill passed by the legislature at the end of the legislative session by not signing it, although the bill then returns for

34. The office existed briefly under the 1864 constitution; the 1867 constitution promptly eliminated it.

35. Blair Lee III served as acting governor for most of the remainder of Mandel's second term, after Mandel's conviction (subsequently overturned) for racketeering and mail fraud forced him from office.

36. Roy T. Meyers and Thomas S. Pilkerton, "How Can Maryland's Budget Process Be Improved?" working manuscript (Baltimore: Maryland Institute for Policy Analysis and Research, University of Maryland, 2003). As of this writing, Professor Meyers has testified before the general assembly on behalf of the bill to amend the constitution, HB1247/SB370. The Meyers and Pilkerton paper is unpublished but can be accessed online at http://userpages.umbc.edu/%7Emeyers/improveMD.pdf.

override consideration at the next legislative session, unless there is an intervening election, in which case the pocket veto stands (Article II, Section 17a).[37]

Governors fortunate enough to serve at the start of each decade also exercise formidable control over state legislative redistricting. The constitution charges the governor with submitting the state legislative redistricting plan at the start of the legislative session two years after the census is taken (for example, 1992 and 2002). If the legislature cannot pass its own plan by the forty-fifth day of the legislative session, the governor's plan becomes law by default—barring, of course, successful court challenges (Article III, Section 5).

All told, Maryland's governor is a formidable institutional actor who enjoys a set of constitutional powers that would be the envy of most state chief executives.

The Legislature

The Maryland General Assembly (MGA) is a bicameral legislature with 47 senators and 141 delegates. In terms of its overall capacity, the MGA is generally regarded by state legislative scholars as a semiprofessionalized, or "hybrid," state legislature.[38] That is, in terms of the "five *s*'s" of professionalization—space, structure, staffing, session, and salaries—Maryland's legislature is not as professionalized as, say, California's, Michigan's, or New York's but is more developed than "citizen" legislatures such as New Hampshire's or Wyoming's.[39]

With respect to term lengths, district magnitude and nesting, apportionment, and redistricting, Maryland's electoral system is an outlier. It is but one of only four states that elect every member of both chambers to four-year terms.[40] The elections are not staggered: all 188 legislators are chosen in even-numbered, nonpresidential years. Unlike several states that use some variant of two four-year terms conjoined with one two-year term during each decade, Maryland does not conform its election cycles to the census

37. The governor has one week to veto; otherwise, the bill becomes law without his signature. For bills the General Assembly passes in the final six days of the legislative session, the governor has thirty days to sign or veto (Sections 17b and 17c).

38. James MacGregor Burns, J. W. Peltason, and Thomas E. Cronin, *State and Local Politics: Government by the People,* 9th ed. (Upper Saddle River, N.J.: Prentice Hall, 1998).

39. Alan Rosenthal, *The Decline of Representative Democracy* (Washington, D.C.: CQ Press, 1998).

40. Article XVII was added to the constitution in 1922 to "streamline" elections; thus, beginning with the 1926 election, all nonjudicial state officers were elected simultaneously and for four-year terms.

decade. Because there are five four-year terms and two censuses every twenty years, one set of districts therefore applies for three election cycles, the next for only two, then three again, and so on.[41]

Maryland's 141 state delegates are elected, 3 each, from the same 47 legislative districts that choose 1 senator (Article III, Sections 2 and 3). The constitution is somewhat ambiguous about population variances across districts, or achieving geographic compactness or political integrity in the redistricting process.[42] Although most of Maryland's delegates are elected at large from 3-member districts, special subdistricts are constitutionally permissible (Article III, Section 3), and exist in about one-third of 47 legislative districts. About half of the American states feature some form of multiple-member districting in at least one chamber, yet Maryland's use of "nested" house districts within senate boundaries is uncommon. In recent decades, Democratic governors and legislatures used the subdistricting of house seats selectively, and for partisan advantage.[43] Following the 2000 U.S. Census, however, the Democrats went too far. Nearly a dozen plaintiffs filed suits challenging the constitutionality of the maps, prompting the state's court of appeals to discard the governor's plan and draw its own legislative boundaries.

Convening the second Wednesday of January, the general assembly meets annually for ninety consecutive days (Article III, Sections 14 and 15).[44] One of the most important changes adopted in response to the Eagleton Institute's study was the extension of the annual session from seventy days to ninety days. Still, with agreement of a three-fifths majority in each chamber, the legislature can extend its regular session by an additional thirty days (Article III, Section 15). By a simple majority in each chamber, the legislature may petition the governor to call the legislature into special session at any time during the year (Article III, Section 14). The governor is also empowered to call the legislature into special sessions (Article II, Section 16). New laws can take effect no earlier than June 1 of the year they pass, unless passed

41. For example, the 2000 U.S. Census data apply for the 2002, 2006, and 2010 state elections, whereas the 1990 U.S. Census applied only for 1994 and 1998.

42. Article III, Section 4 states, "Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions." The "substantially equal" standard has been interpreted to allow maximal variations between largest and smallest districts of up to 10 percent. By decade's end, population changes often leave districts with wildly disproportionate populations.

43. Thomas F. Schaller, "State Wastes Black Votes," *Baltimore Sun,* January 20, 2002.

44. As used here, *annually* has a double meaning because the legislature meets once a year for its regular session, and its sessions are annual, as opposed to the biennial sessions used in a handful of state legislatures and the U.S. Congress. One implication of annual sessions is that legislators must reintroduce unpassed bills each year, with new bill numbers.

as an emergency measure by three-fifths supermajorities in both chambers (Article XVI, Section 2).

Technically, the constitution prohibits members from submitting any legislation in the final five weeks of the legislative session, and also requires that every bill address a single subject (Article III, Sections 27 and 29). But a two-thirds vote of both chambers can void the thirty-five-day rule, and the informal power of chamber leaders to circumvent this rule often trumps the constitutional requirement altogether. As for single-subject rule, the provision dates back to the 1851 constitution and, according to M. Albert Figinski, was (and still is) intended to prevent the sort of logrolling and omnibus legislation for which the U.S. Congress is notorious.[45] Finally, the constitution includes an elastic clause, similar to the one in the U.S. Constitution, that empowers the Maryland General Assembly to enact laws "necessary and proper" to carrying out general duties not otherwise prescribed or proscribed (Article III, Section 52.13).

The MGA has rapidly matured in recent decades. Barring an amendment, of course, the governor enjoys the advantaged constitutional position. But structural changes made in response to the legislature's self-examination, coupled with the strong will of several recent legislative leaders—in particular, longtime senate president Thomas V. "Mike" Miller—have bolstered the legislature's stature and effectiveness.[46]

The Judiciary

Maryland has a four-tier state judiciary that was fundamentally restructured during the mid-1960s and early 1970s to improve efficiency. The state's highest court, the Maryland Court of Appeals, is composed of 7 judges chosen from separate jurisdictions (Article IV, Section 14). Initially, judges are appointed by the governor and confirmed by the senate, but thereafter must stand unopposed for "retention" elections to win ten-year terms. The governor also appoints the chief judge. As the court of last resort, the court of appeals may initiate a case for appeal on its own, or by granting an appellate's writ of certiorari. The only cases automatically remanded to the court of appeals are those involving death sentences and redistricting.[47] An inter-

45. Figinski, "Maryland's Constitutional One-Subject Rule: Neither Dead Letter nor an Undue Restriction," *University of Baltimore Law Review* 27 (Spring 1988): 363.

46. According to Miller's chief of staff, Timothy Perry, insofar as the recorded history of the fifty state legislatures is known, Miller—who has served as senate president since January 1987—may be the longest continuous state chamber leader in American history.

47. *Maryland's Criminal and Juvenile Justice Procedure,* Legislative Handbook Series, vol. 9, 2002, published quadrennially by the Maryland General Assembly's Department of Legislative Services, Annapolis, 102–3.

mediate court level created in 1966 to reduce the burden on the court of appeals, the 13-member Maryland Court of Special Appeals is selected by the same appointment-retention process above, although the governor also designates the court's chief. Defendants in circuit court cases have an automatic right of appeal to the court of special appeals, which supervises and rules on the handling of trial court decisions but does not preside over de novo cases.[48]

With 146 judges organized into eight geographic areas, state circuit courts are the highest-level courts of initial jurisdiction. The governor initially appoints circuit court judges, who then must run in the next general election, possibly against an opponent, with the winner seated for a fifteen-year term. Circuit courts have jury trials and exercise exclusive jurisdiction over most felony cases, concurrent jurisdiction over more serious misdemeanors, and civil trials with amounts in controversy greater than twenty-five hundred dollars. Circuit courts also serve as the appellate courts for decisions issued by the district courts, and handle approximately 80,000 cases annually. Created in 1970 to consolidate a jumbled, antiquated set of local courts, the district courts handle the highest volume of cases—about 200,000 annually—most of them related to motor-vehicle infractions and petty misdemeanors and crimes.[49]

By virtue of their selection and retention mechanisms, court scholar Jeffrey Davis rates the Maryland Court of Appeals among the most independent high courts in the nation.[50] In terms of size and caseload of the overall state judiciary, statistics compiled by the Council of State Court Administrators show Maryland to be somewhere in the middle, with 2.7 judges for every 100,000 residents, and an average per-judge caseload of 1,742 cases per year.[51]

In addition to the basic judicial structure, the constitution provides for the statewide election of an attorney general and vests authority in the attorney general's office and the offices of the state's attorney in each county to try the government's cases (Article V).

48. Ibid., 100–102.

49. Ibid., 47–51.

50. Davis, "Judicial Independence and the Protection of Equality in State High Courts" (Ph.D. diss., Georgia State University, 2002).

51. Brian Ostrom, Neal B. Kauder, and Robert C. LaFountain, eds., *Examining the Work of State Courts, 2002: A National Perspective from the Courts Statistics Project* (Williamsburg, Va.: Council of State Court Administrators, 2003). Available online at http://www.ncsconline.org/D;Research/csp/2002;Files/2002;Overview.pdf.

Local Governance

The Maryland Constitution prescribes and proscribes the powers of local governance for the state's 24 political jurisdictions, which include 23 counties and Baltimore City, as well as 156 other municipalities and 241 special districts.[52] Local control within the 24 principal jurisdictions takes one of three forms: charter home rule, code home rule, or county commission governance.[53]

Charter counties. Aside from, and in addition to, the unique case of Baltimore City—an incorporated municipality with an elected mayor and city council that effectively doubles as a chartered county—8 counties, including the state's 6 most populous, have charter forms of government: Anne Arundel, Baltimore, Harford, Howard, Montgomery, Prince George's, Talbot, and Wicomico.[54] Within the boundaries established by the general assembly, charter counties exercise the greatest degree of home rule permitted by the constitution (Article XI-A).

Code counties. In 1965, the state initiated code home rule as an alternative to the charter format. Maryland now has 4 code counties on the Eastern Shore—Caroline, Kent, Queen Anne's, and Worcester—along with Allegany County in western Maryland. Code counties utilize the county commission structure, while retaining many of the powers of charter counties, with two notable exceptions: they are prohibited from imposing any county tax other than those taxes authorized upon their establishment as a code county, and they do not have county policing powers.[55]

Commission counties. Although all counties prior to the middle of the twentieth century used commissions, only 10 Maryland counties still do, and they are among the smaller and more rural counties of the state: Calvert, Carroll, Cecil, Charles, Dorchester, Frederick, Garrett, St. Mary's, Somerset, and Washington. The state retains authority to determine the number, manner, and election of county commissioners. Although local management varies from county to county, the state effectively legislates for the counties (Article VII).

52. *Maryland Local Government: Structure and Powers,* Legislative Handbook Series, vol. 6, 2002, published quadrennially by the Maryland General Assembly's Department of Legislative Services, Annapolis, 1.

53. Article XI actually comprises ten articles, including those numbered Articles XI-A through XI-I.

54. Baltimore City and Baltimore County are discrete political jurisdictions; the former is not circumscribed within, or in any way governed by, the latter. Talbot and Wicomico are the population exceptions and the only two charter counties that (1) are located on the Eastern Shore and (2) do not elect their county executives at large.

55. Article XI-F establishes the general provisions for code home rule, which is specified in greater detail in Article 25A, Section 5(S) of the Annotated Code of Maryland.

According to state legal expert Peter Moser, local governments retain a high degree of autonomy in Maryland, although the state maintains its supremacy in three ways: through control of local taxation and borrowing, the establishment and in-county functioning of state agencies, and the power to itself enact—or permit the subgovernments to enact—"home rule" legislation.[56] Prior to adoption, in 1955, of a municipal home-rule constitutional amendment, the general assembly historically dominated local legislation—or perhaps, given that three-quarters of all legislation the state passed was local in nature, one might say that local matters were dominating the state legislative agenda. Since 1955, says Moser, the share of local legislation steadily decreased as counties began to exercise greater control over their own affairs. Baltimore City receives special constitutional treatment on a wide variety of issues. Indeed, the city is the sole focus of seven constitutional articles—including one dedicated to off-street parking![57]

Referenda and Constitutional Amendments

The state constitution can be amended by a three-fifths vote of both chambers of the Maryland General Assembly, followed by a majority vote from the citizenry in the next general election (Article XIV, Section 1). However, in what may be borrowed inspiration from Thomas Jefferson's famed quote about the need for constitutional overhaul at least once every generation, the constitution provides citizens the opportunity every twenty years (in years ending in zero, beginning in 1890) to vote by simple majority on election day to compel the legislature to initiate a constitutional convention (Article XIV, Section 2). Since the "magnificent failure" of the 1960s, however, in neither the 1970 nor 1990 elections did voters call for a constitutional convention.

By a narrow 50.6 percent margin, Marylanders in 2002 approved a constitutional amendment passed with overwhelming majorities by both chambers of the legislature that waives the regular June 1 start date applied to enactment of other state legislation for any law the legislature passes "creating or abolishing any office or changing the term or duties of any officer" (Article XVI). Proposed in the first session following the September 11 attacks, the amendment gives the legislature immediate powers to alter the state's administrative structure.

Citizens may also pass referenda to invalidate state laws (Article XVI). A

56. M. Peter Moser, "Local Government in Maryland," in *Sense of the People,* 7–14.

57. Article XI-A (general provisions), Article XI-B (land use), Article XI-C (off-street parking), Article XI-D (Port of Baltimore), and Articles XI-G, -H and -I (commercial, residential, and industrial loans).

referendum requires the signatures of 3 percent of the state's voters to be proposed, and a majority vote on the ballot measure at the next congressional election day.[58] The constitution prohibits use of the state referendum for matters relating to local control of the sale of alcoholic beverages (Article XVI, Section 6). Local referenda proposed by the counties or Baltimore City may be proposed and adopted by the same method, except that the signature threshold is 10 percent (Article XVI, Section 3a).

Conclusion

The Maryland constitutional experience is part and parcel to American constitutional history. Along with the other colonial constitutions, Maryland's charter predates the U.S. Constitution, and influential Marylanders played important roles in shaping both documents. The original 1776 constitution was amended significantly in the early decades of the nineteenth century, and then replaced three times within an eighteen-year period during the Civil War era. Despite nearly being supplanted again in the 1960s, and enduring almost two hundred amendments since its ratification in 1867, the state's fourth constitution remains in effect today.

In its current form, the Maryland Constitution reflects the state's progressive tradition, with a strong and expansive declaration of rights. Although the importance of the Maryland General Assembly should in no way be discounted, the balance of power among the elected branches clearly favors the governor. To the state's benefit, the judicial system was restructured during the 1960s and 1970s to account for and adapt to the needs of a modern legal system. The constitution grants local governments, within reasonable limits, an increasing degree of autonomy over their internal affairs. And the constitution itself remains vibrant, changing via amendment with almost every election.

Whether Maryland's constitution fits the state's "America in miniature" motto is a matter of dispute. What's clear, however, is that Maryland's constitutional experience has paralleled the national experience for more than two centuries, yet the current charter is distinct from other state constitutions in many important ways. As a pioneer at the start of the Republic and outlier at present, Maryland provides a useful lens through which to view the full panorama of American constitutionalism.

58. And the unit of analysis is *voters,* not registrants or citizens. The 3 percent standard is based on the total votes cast in the most recent gubernatorial election. A recommendation by the Eney Commission to raise the signature threshold to 5 percent was never adopted.

MELISSA SCHEIER

Constitutionalism in New Jersey

Constitutional Failures in a Changing Political Environment

> Constitutionalism then stands for the rare moment in a nation's history when deep principled discussion transcends the log-rolling and horse trading of everyday politics, the objects of these debates being the principles which are to constrain the future majority decisions.
>
> —Jon Elster and Rune Slagstad, *Constitutionalism and Democracy*

Donald S. Lutz argues that constitutions fulfill essential functions within democratic regimes.[1] Regimes can, and frequently do, limp along with constitutions that fall short of these functions. The New Jersey constitutional experience provides us with an example of how poor constitutions, ones that do not fulfill their prescribed functions, can cause political inefficiency.[2] Lutz's

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1. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

2. Robert Dahl, "Thinking about Democratic Constitutions: Conclusions from Democratic Experiences," in *Nomos 38,* ed. Ian Shapiro (New York: New York University Press, 1996), 175–206. Dahl lists eleven criteria for judging the effectiveness of constitutional arrangements. These criteria also serve to show the multiple roles constitutions play in democracies. These criteria include: (1) contributing to the stability of institutions, (2) protecting majority and minority rights and duties, (3) maintaining neutrality, (4) preserving accountability, (5) providing fair representation, (6) aiding integration of interests, (7) providing effective government, (8) facilitating competent decisions, (9) operating with transparency and comprehensibility, (10) being adaptive and resilient, and (11) contributing to legitimacy.

contribution to the literature stems not only from providing scholars with a framework within which constitutions can be discussed and compared but also from suggesting when constitutional change is necessary and possibly imminent. Given the recent global emphasis on constitutional development, Lutz's work on constitutional functions and amendment should be considered a guide to efficient constitutionalism.

The early constitutional framing processes for American colonists were undertaken with little previous experience and few examples to follow. However, drawing from covenants, charters, compacts, contracts, and fundamentals, the newly liberated colonies were able to frame constitutions. The difference between these types of documents is that constitutions are about founding a people and a way of life in a purposeful manner that institutionalizes patterns of political power. "In summary, *constitution* has to do with making or establishing something, giving it legal status, describing the mode of organization, locating sovereignty, establishing limits, and describing fundamental principles."[3] Lutz formulates eight purposes of written constitutions that are identified in the preface of this volume.

Lutz argues that although the purposes of the constitution may remain constant, existing documents may need to be altered based on both failures in the existing document and changing environments.[4] It is clear in the constitutional history of New Jersey that both failures in existing documents and changes in the political environment drove the amendment procedure and the drafting of two post-1776 constitutions. This chapter will trace the drafting, amendment, and ratification of the three constitutions—1776, 1844, and 1947—of New Jersey. Failure to carefully delineate each of the eight purposes, as discussed by Lutz, leads the people to reconsider their founding document. Specifically, early New Jersey Constitutions failed to adequately remove key processes from political conflict. Little consensus existed on the definitions and institutions as established. Issues remained regarding the separation of powers between the executive and legislative branches.

A Brief History of the New Jersey Constitutional Experience

Expedience explains the first New Jersey Constitution. Leaders in the state were engaged in the Revolution, and the emphasis was on the quick ratifi-

3. Lutz, *Origins of American Constitutionalism,* 21. The other types of early documents discussed by Lutz all represent more limited concepts of legal interactions between people(s).

4. Lutz, "Toward a Theory of Constitutional Amendment," *American Political Science Review* 88, no. 2 (1994): 355–70.

cation of a document rather that its drafting. The New Jersey Constitution of 1776 is primarily attributed to Jonathan Dickinson Sergeant, a Princeton-educated lawyer and attendee of the Continental Congress in Philadelphia. Sergeant's constitution, drafted prior to New Jersey's Provincial Congress, contained few elements of the radical philosophy of democracy propounded by Adams and Jefferson, though Sergeant had been exposed to the work of those two statesmen.[5] Based on New Jersey's colonial charter, the 1776 constitution "reflected the general revolutionary philosophy of legislative supremacy and is probably one of the most extreme examples of 'legislative omnipotence.' New Jersey did not, however, adopt the radically democratic constitutional ideals (one-house legislature, no checks and balances, [no bill of rights], etc.) that were current in Pennsylvania." According to Julian P. Boyd, "In common with other states they [delegates to the Provincial Congress] reflected their old fears of abuse of executive power by stripping the office of governor of almost all but the title of the 'supreme executive power.' The governor was elected by the legislature, he could not make an appointment to a single office, and he possessed no veto."[6] With the signing of the peace treaty with England in 1782, states turned their attention to domestic matters, and shortcomings in the New Jersey Constitution became evident.

After the Revolution, New Jersey faced political, social, and economic cleavages as well as a depleted and destroyed infrastructure. Cleavages arose not only between East and West but also between British loyalists and supporters of the Revolution. These cleavages, frequent elections, and disproportional representation in the state led to the formation of strong party machines and frequent accusations of electoral impropriety and corruption.[7] The legislature, vested with supreme control,[8] faced problems of in-

5. Julian P. Boyd, *Fundamental Laws and Constitutions of New Jersey* (Princeton: D. Van Nostrand, 1964); Robert F. Williams, *The New Jersey State Constitution: A Reference Guide* (New York: Greenwood Press, 1990).

6. Williams, *New Jersey State Constitution,* 2; Boyd, *Fundamental Laws,* 26.

7. See Richard P. McCormick, *Experiment in Independence: New Jersey in the Critical Period 1781–1789* (New Brunswick: Rutgers University Press, 1950). There were also restrictions to citizenship and suffrage of women and blacks.

8. According to Charles R. Erdman Jr., "This doctrine of annual elections derived its importance from the fact that the Colonists believed that their liberties were guaranteed by the opportunity to resort to the polls rather than specific limitations upon the legislative power set forth in the instrument of government. Indeed, as it will later appear, there is reason to believe that the lawyers of the time looked upon the legislature as the counterpart of the British Parliament and that accordingly no restriction in the constitution upon its power could have any legal effect" (*The New Jersey Constitution of 1776* [Princeton: Princeton University Press, 1929], 57–58).

stability and legitimacy.[9] Further, legislative instability and frequent turnover meant that essential postwar legislation was rarely passed. Foreign trade, tariffs, property rights, and industrial developments were hotly contested in the legislature throughout the 1780s, but the legislature, lacking the necessary unity for decisive legislation, was unable to make significant progress in these areas. With an ineffective constitution and heightened interest sparked by the redrafting of the Articles of Confederation, New Jersey legislators looked for the first time to initiate a formal, deliberate drafting process for the state's own constitution.

Although significant changes to the existing constitution were both merited and called for, legislators questioned their own power to revisit the issue.[10] Because the 1776 document was silent on the issue of constitutional revision, the determination was played out in the courts. Working from the theory that ultimate sovereignty is vested in the citizens rather than the legislature, the legitimacy of the 1776 constitution (never ratified by the public) was questioned, and a referendum was called. Whatever weaknesses the constitution had, the people of New Jersey refused to support a new constitutional convention and defeated the referendum to that effect in 1800. "Once again, in 1837, the question of constitutional revision was agitated and even brought before the House, where it suffered the usual fate and was 'pigeon-holed.' However, a practical, rather than a theoretical defect in the constitution was now making itself felt and opened a breach through which the reformers gained their objective of a constitutional convention." Circumnavigating public debate and judicial and legislative indecision, Governor William Pennington asked the legislative council to appoint a constitutional committee in 1843.[11]

The fifty-eight delegates of the constitutional convention produced an improved document and New Jersey's first publicly ratified constitution.[12] The drafters clearly attempted to remedy previous defects, included a bill of rights, made the office of governor an elected rather than appointed position (limited to a three-year term) with weak veto power (Article V),[13] in-

9. "In view of the many possibilities for corruption and manipulation inherent in the crude voting machinery, it is not surprising that scarcely a year passed without the legislature having to decide one or more cases of contested elections" (McCormick, *Experiment in Independence,* 91).

10. William Griffin in 1797 published a series of articles pointing out the major deficiencies in the 1776 constitution and called for a new convention (see Boyd, *Fundamental Laws*).

11. Erdman, *New Jersey Constitution,* 136–37.

12. Williams, *New Jersey State Constitution.*

13. The veto power is considered weak because it required only a majority in both houses to overturn. The 1947 constitution strengthened the veto power by requiring a three-fifths vote in each house and allowed for a "conditional" veto.

cluded avenues for constitutional amendment, and limited the powers of the legislature.[14] Article I, "Rights and Privileges," in the 1844 constitution focused on the freedom of religion, speech, press, privacy, and assembly as well as due-process provisions. The right to suffrage was granted in Article II to white males for whom the previous property qualifications were dropped.[15]

Although this new constitution went partway toward redressing the imbalance of power between the legislative and executive branches, it ignored changes necessary in the judicial branch.[16] "It represented no fundamental or drastic break with the past. The weak veto given to the governor, the diffusion of the appointive power and the retention of equal representation granted to each county in the upper house indicated the conservative structure of the new government."[17] These weaknesses led to a flurry of constitutional commissions and amendments between 1873 and 1940. In 1875, twenty-eight amendments, ranging from limitations on special legislation to public schools and property assessment, were added to the constitution.[18] Shortly thereafter, the New Jersey Supreme Court "struck down the use of single member districts," calls were made for women's suffrage and changes to the gambling laws, and debate continued as to the advisability of changing the constitutional amendment procedure.

The heavily amended 1844 constitution, like its predecessor, failed to institutionalize key aspects of constitutionalism. As Lutz would predict, these shortcomings led to continuing conflict, as no consensus regarding the rules of the game existed. The key failings of the 1776 and 1844 (with amendments) constitutions spanned the range of the list of purposes Lutz discusses in *The Origins of American Constitutionalism.* The most notable problems surrounded the creation and definition of a people, values, and way of life as well as the institutional distribution, structure, and limiting of power. Given that officials in New Jersey in the 1940s recognized the need for a significantly revised and efficient constitution, it remains to be seen whether the 1947 constitution corrected for these shortcomings.

The 1947 Constitution

Clearly, although the 1844 constitution was an improvement over the 1776 version, amendments to the existing document could not adequately ad-

14. According to Article IV, Paragraph VI, "The legislature shall not in any manner create any debt or debts." The legislature was further restricted from drafting legislation permitting divorce, lottery, or attainder. See Williams, *New Jersey State Constitution.*

15. The complete text of the 1844 constitution is available in Boyd, *Fundamental Laws.*

16. Williams, *New Jersey State Constitution.*

17. Boyd, *Fundamental Laws,* 36.

18. Williams, *New Jersey State Constitution.*

dress the scope of changes necessary. To that end, several constitutional commissions were formed in the early 1940s to determine the nature and scope of changes needed. The most notable was the Hendrickson Commission whose draft formed the bases of debate both inside and outside the legislature for the next four years.[19] Under the leadership of Governor Walter Edge,[20] the legislature and then the people of New Jersey approved legislation authorizing the legislature to hold a constitutional convention.[21] A slightly revised edition of the document drafted by the Hendrickson Commission passed both houses; however, stiff opposition from Jersey City mayor Frank Hague resulted in the rejection of the constitution by the public.[22] Hague claimed that the Hendrickson draft was a partisan document aimed at limiting the power of northern municipal governments.[23]

In order to quiet partisan debate, Governor Alfred E. Driscoll, Edge's replacement, called for a constitutional convention made up of "distinguished scholars, lawyers and officials" to be held at Rutgers University in June 1947. Committee hearings were open to the public, and "over two hundred persons accepted the invitation to be heard at the committee hearings."[24] The public nature of the debates calmed the partisan nature of earlier efforts, and the constitution was adopted by an overwhelming majority of convention members and was publicly ratified on November 4, 1947. The constitution of 1947 contained some key differences from the earlier draft submitted by the Hendrickson Commission but maintained the spirit of redressing centuries-old debates on the distribution and limitations of governmental power.

However, the question remains as to whether New Jersey's new constitution offered adequate solutions to past problems. If so, each of the constitutional functions as outlined by Lutz should be sufficiently delineated. The following sections are an attempt to assess the 1947 New Jersey Constitution utilizing Lutz's schema of constitutional functions.

19. Ibid.

20. Edge, *A Jerseyman's Journal* (Princeton: Princeton University Press, 1948), is a delightful and illuminating autobiographical look into seventy years of New Jersey politics.

21. Boyd, *Fundamental Laws.*

22. Hague was a Democratic Party boss with much influence (Boyd, *Fundamental Laws*). "While I could never accept Hague's philosophy of government—which was to divert public power and party revenues to maintain his organization—as a newspaper publisher and advertising man I had to admire the masterful way in which he brought about the defeat of the Constitution. He kept quiet for nearly seven months after the measure passed the legislature, thereby lulling its proponents into a false sense of security. About four weeks before the election, however, the Hague machine opened fire on the Constitution from every conceivable point of attack" (Edge, *A Jerseyman's Journal,* 281).

23. Boyd, *Fundamental Laws.*

24. Ibid., 45–46.

"Define a Way of Life—the Moral Values, Major Principles, and Definition of Justice toward which a People Aims"

Clearly, the conflictual history of New Jersey's constitutional experience points toward an active public debate about the "good life" and the principles that underlie the collective life of the state. I believe that rather than finding a clear discussion of these principles and values within the text of the constitution, we see this as the debate, drafting, and ratification of the constitution itself. The citizens of New Jersey demanded a democratic, participatory, and nonpartisan constitutional process. This process reflects the principles of democracy espoused by Adams and Jefferson but ignored in earlier drafts. The process undertaken in 1947 in Princeton also shows that justice is defined as the process of sovereign citizens determining for themselves the collective institutions of government. Governor Driscoll opened the constitutional convention of 1947 with these words:

> [Drafting a constitution] is part of our tradition, and a valuable tradition it is, that when we revert to fundamentals in government we look for the highest form of representative democracy, as well as the ultimate consent of the governed expressed through the process of free elections. It is only fair to say that great work is expected of you. While this State has lived under the same Constitution, with but little change, for over a century, its people, their life and work have undergone the effects of a civil war, of two world wars, and of industrial and social revolutions since our present Constitution was adopted in 1844. It is your task to appraise these great forces in terms of present constitutional standards, to test what we have against what we need, to retain what has withstood the test of time and to re-examine and discard what is no longer acceptable, to build in new fields which were unknown a century ago.[25]

The elected representatives to the convention understood that they were doing more than reorganizing the institutions of government. The public of New Jersey for the first time was to have a constitution that in its inception represented the democratic way of life.

"Create and/or Define the People of the Community So Directed" and "Define the Regime, the Republic, and Citizenship"

The 1947 constitution defines the people, regime, and citizens of the state. The people of the state are referred to throughout the constitution; however, citizenship is specifically granted to U.S. citizens eighteen years of age

25. Proceedings of the New Jersey Constitutional Convention, 1947. Available at http://www.njstatelib.org/plweb-dbs/constitutionv1/outputs/v1/NJConst1nvii.html.

who have resided in the state or county or both thirty days prior to an election (Article II, Section 1.3). Borrowing from Aristotle, if we define a citizen as one who can both rule and be ruled, citizenship as defined in the constitution is more restrictive. There are increased age and residency restrictions for members of both houses as well as the governor, although no such restrictions apply to justices or public officers. Full citizenship is denied to U.S. military personnel stationed in New Jersey, "idiot or insane" persons, and persons convicted of specific crimes as designated by the legislature (Article II, Sections 1.5 and 1.6).

People of the state, regardless of their citizenship, are "by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying or defending life and liberty, of acquiring, possessing, or protecting property, and of pursuing and obtaining safety and happiness" (Article I, Section 1). Robert F. Williams points out the phrase "all persons" replaced the phrase "all men" in the 1844 constitution.[26] Although this included women, there is no equal-protection clause, allowing for judicial interpretation of New Jersey's Article I, Section 1. Without a specific equal-protection clause, discrimination on the basis of sex, race, ethnicity, and so on is, on its own, not a violation of New Jersey constitutional law. Rather, discrimination must be coupled with a violation of some other right or provision.

The regime type is a democratic republic. Although this is not explicitly stated, several articles—those on citizen sovereignty, voting and elections, and the representation of the people via the legislature—follow the theory of republican government.

"Define the Political Institutions, the Process of Collective Decision Making, to Be Instrumental in Achieving the Way of Life" and "Establish the Basis for the Authority of the Regime"

The basis of political authority is the people of the state of New Jersey. Section 2 of Article I states, "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it." This section is identical to the 1844 constitution and was used by proponents of the new constitution as the basis to legitimate the constitutional convention.

The process of collective decision making is afforded through the election and legislative processes. The citizens of the state make their will known through regularly scheduled elections for both houses as well as the gover-

26. See Williams, *New Jersey State Constitution.*

nor. "General elections shall be held annually on the first Tuesday after the first Monday in November; but the time of holding such elections may be altered by law. The Governor and members of the Legislature shall be chosen at general elections. Local elective officers shall be chosen at general elections or at such other times as shall be provided by law" (Article II, Section 1.1).

The citizens of New Jersey are also guaranteed a part in the decision-making process in Article II, Section 1.2: "All questions submitted to the people of the entire State shall be voted upon at the general election next occurring. . . . The text of any such question shall be published at least once in one or more newspapers of each county." The right to referenda on constitutional amendment as well as special budgetary issues not only grants the people an avenue into public debate but also further vests the sovereignty of government in the people. Elected officials must return to the people for approval in areas considered to be most fundamental.

Collective decision making in the state is also channeled through the legislature. Section 4.6 of Article IV stipulates that all bills must be read three times in each house with at least one calendar day between the second and third readings. "This provision is aimed at ensuring a careful and informed deliberation on legislation, together with public awareness, and passage when a quorum is present."[27]

The constitution also acts to limit collective decision making in the legislature by removing certain issues from the public realm. The legislature is restricted from granting divorce (Article IV, Section 7.1), authorizing gambling without the permission of the people (Article IV, Section 7.2), enacting bills of attainder or ex post facto laws (Article IV, Section 7.3), and passing private, special, or local laws (Article IV, Sections 7.7, 7.8, and 7.9).

"Distribute Political Power"

Article III outlines the distribution of political power: "The powers of government shall be divided among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any powers properly belonging to either of the others, except as expressly provided by the constitution." Again, this section is identical to that of the 1844 constitution.

The distribution of political power in the state follows closely the theory of separation of powers. The bicameral legislative branch has the responsibility for creation of legislation with "all bills for raising revenue" originating in the general assembly (Article IV, Section 6.1). Executive power is vested in the governor. Section 1.11 of Article V outlines the power of the

27. Ibid., 65.

executive: "The Governor shall take care that the laws are properly executed. To this end he shall have the power, by appropriate action or in the courts brought in the name of the State, to enforce compliance with any constitutional or legislative mandate, or to restrain any violation of any constitutional or legislative power or duty, by any officer, department or agency of the State; but this power shall not be construed to authorize and action or proceeding against the Legislature." The governor is also designated as the commander-in-chief of the military and navy (Article V, Section 1.12), possesses veto power (Article V, Section 1.14b2), may grant pardons and reprieves (Article V, Section 2.1), supervises the offices that make up the executive branch (Article V, Section 4.2), and has appointive and investigatory powers (Article V, Sections 4.2, 4.3, 4.4, and 4.5).

The judicial branch is divided into a supreme court with appellate court jurisdiction as a court of last resort and a superior court with original jurisdiction. The superior court is divided into an "Appellate Division, a Law Division and a Chancery Division, which shall include a family part" (Article VI, Section 3.3).[28]

"Limit Governmental Power"

The limitation of government powers is a fundamental component of constitutionalism. On a very basic level, all constitutions reflect the central tenets of constitutionalism.[29] Constitutionalism is based on the principle of "rule of law."[30] "Constitutionalism is the historical doctrine that recommends certain principles that should govern the interaction between the principal and the agent in politics—such as separation of powers, accountability, predictability, legality, checks and balances, fundamental rights, and duties—with the aim of constraining the agent in accordance of the wishes of the principal."[31]

28. The structure of the judiciary as discussed in the 1947 constitution was significantly different from that outlined in previous constitutions. The number of supreme court justices needed to make a quorum was reduced, the supreme court was granted rule-making power, and the jurisdiction of each court was clarified.

29. For clarity, the word *constitution* is used to refer to the actual legal document or set of legal documents, whereas *constitutionalism* refers to a theoretical construct that includes the precepts of higher law and limited government.

30. The word *constitution* "derives originally, of course, from constituere, 'to set up, establish, erect, construct, arrange, to settle or determine,' and constitutio is the noun form. A constitutio becomes a 'regulation,' 'order,' or 'decree' as a result of some arrangement, or some establishment being made" (Graham Maddox, "A Note on the Meaning of 'Constitution,'" *American Political Science Review* 76, no. 4 [1982]: 806).

31. Jan-Eric Lane, *Constitutions and Political Theory* (New York: Manchester University Press, 1996), 184.

Government power is restrained based on an appeal to higher law and constitutionalism. All members of the legislature and the governor swear an oath to the U.S. Constitution and the New Jersey Constitution, and all power vested in the three branches is constrained to that which is detailed in the constitution. Further, constraints are placed via the separation-of-powers and checks-and-balances provisions. Government power, as discussed above, is divided into three branches of government. The division of power is further ensured by the bicameral legislative structure, executive veto, and inclusion of a supreme court.

Possibly the most important constraint of government power comes from the clear vesting of sovereignty in the citizens and from the bill of rights. The New Jersey Bill of Rights, or Article I, was included in the 1844 constitution. With the exception of the right of private and public employees to organize and collectively bargain, all of the rights enumerated were carried over from earlier constitutions. Nonetheless, these twenty rights clearly demarcate the private from the public space. Each right details an area in which citizens can have a reasonable expectation to be free from the government.

The rights guaranteed to the people of New Jersey are based on the theory of natural rights and are predominantly negative, first-generation rights. The list of guarantees includes privacy; choice of religion; freedom of speech; free press, assembly, petition, and conscience; collective bargaining; and due process. These rights, however, are not meant to be exhaustive. Section 21 of Article I reads, "This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."

Lessons from the Past, Lessons for the Future

Governor Edge, when discussing his reentry into state politics and the failure of the ratification of the Hendrickson Commission's constitution, called New Jersey politics "old wine in new bottles." The above discussion does call into question whether the 1947 constitution provided any substantive improvements over older versions. Clearly, the public drafting and ratification process led to a sense that the constitution was legitimate in a way that older documents were not. This legitimacy also acted to remove the previously politicized elements of early documents, repeated in the 1947 version, from contestation. But what, if anything, in the substance of the document really changed?

Robert F. Williams's close textual analysis is extremely useful here in tracking the exact changes between the 1947 constitution and its predecessors. Summarizing, the significant changes include (but are not limited to) the following:

- The inclusion of the right to collective bargaining.
- Protection of women's right to suffrage and, therefore, full citizenship.
- Legislative powers increased so that the houses may set their own rate of compensation and create committees to aid in their duties.
- Legislative power decreased in that the legislature is explicitly restricted from electing or appointing executive, administrative, or judicial offices. The legislature must not create special or private laws (including the sale of property to minors and taxation) and must put legislation concerning gambling before the citizens.
- Expansion of executive power by extending term for three to four years, requires two-thirds rather than a majority of both houses to override a veto, and stipulates governor as supervisor of executive branch and administration with investigatory and disciplinary powers.
- Restructuring of the judiciary to create a unitary structure with clearly delineated jurisdictions. The supreme court is vested with rule-making power, and the term of office for supreme court justices is limited to seven years.
- New procedures for amending the constitution. Amendments must be presented by one of the two houses, and said amendment must be presented to the other house within twenty days of a vote. If the amendment receives three-fifths approval of both houses, it must then be presented to the people.[32]

The 1776 constitution and that of 1844 lacked a clear division of power to adequately channel conflict. The restructuring of the judiciary, expansion of executive powers, and limitations on the legislature certainly helped to clarify the duties and powers of each branch. These changes also represented a distinct break with the legislative omnipotence of the first constitution. Convention members identified the need for an empowered executive branch given the modern and complex nature of politics.

The inclusion of an amendment procedure was a significant advancement. Problems in earlier constitutions were rarely resolved through amendment because no clear amendment procedure existed. This meant that constitutional change was highly conflictual and involved a series of mandates, committees, and convention. The amendment process also allowed for a series of important amendments in the 1960s. The most important of these amendments ended the decadelong struggle for proportional representation. The 1966 amendment created a forty-seat senate based on the proportion of inhabitants. Related amendments included provisions for redistricting, an apportionment committee, and an eighty-member general

32. Williams, *New Jersey State Constitution.*

assembly. Essentially, the amendment breakthrough in 1947 allowed the legislature and people of New Jersey to restructure their system of representation. The previous system had caused serious geographic and economic cleavages and overpoliticized many state policies and legislation.

Even with these improvements, the public, open nature of the constitutional convention, I believe, represents the most fundamental change. For the first time, citizens could view their constitution as both organic and legitimate. The exercise of sovereignty is never as great as when the people take back into their hands control of the government. "Upon the Forfeiture of their Rulers, or at the determination of the Time set, it [political power] reverts to the society, and the People have a Right to act as a Supreme, and continue the Legislative in themselves, or erect a new Form, or under the old form place it in new hands, as they think good."[33]

33. John Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988), 243.

HOWARD L. LUBERT

The New York Constitution

Emerging Principles in American Constitutional Thought

When New York State ratified the U.S. Constitution, it boasted a constitution of its own that, as Alexander Hamilton asserted in "Federalist no. 26," "has been justly celebrated both in Europe and America as one of the best of the forms of government established in this country."[1] Hamilton's claim was not unfounded. New York's constitution, approved by the state's Fourth Provincial Congress (FPC) in April 1777, was one of the most forward-looking constitutions of the revolutionary era, and scholars have long noted its influence on the U.S. Constitution, particularly with respect to the executive power.[2]

The 1777 constitution lacked some structural attributes that Americans would soon associate with constitutions: it was written by a sitting legislature rather than by a special convention, it was not submitted to the people for ratification, it had no formal bill of rights, and it lacked an amendment procedure. But although the constitution was not submitted to the people for their approval, it repeatedly proclaimed them to be the legitimate source

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1. Alexander Hamilton, James Madison, and John Jay, *The Federalist,* ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961), 167.

2. See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era,* trans. Rita Kimber and Robert Kimber (1980; reprint, Lanham, Md.: Rowman and Littlefield, 2001), 266, 293–95; Max Farrand, *The Framing of the Constitution of the United States* (1913; reprint, New Haven: Yale University Press, 1972), 129; Charles C. Thatch Jr., *The Creation of the Presidency, 1775–1789* (1923; reprint, Baltimore: Johns Hopkins University Press, 1969), 176; and M. J. C. Vile, *Constitutionalism and the Separation of Powers* (1967; reprint, Indianapolis: Liberty Fund, 1998), 162, 173 (suggesting the state's influence on the doctrines of checks and balances and judicial review).

of political authority. Similarly, the constitution protected private rights, though not through a bill of rights. Viewed functionally, the 1777 constitution and those that succeeded it are constitutions.

In this essay I use Donald S. Lutz's framework to compare New York's constitutions and to show how they fulfill the core functions that constitutions perform in the life of a political community. In doing so I also show how New York's constitution pointed toward emerging principles in American constitutional thought. I likewise note how changes in New York's constitution were often a manifestation of broader trends in American constitutionalism. Indeed, the state's constitutional history is worthy of close study precisely because it has influenced and reflected constitutional change in the nation as a whole.

Specifically, New Yorkers' preference for a strong executive is a prominent characteristic of their constitutional tradition and in 1777 marked an important break from other contemporary state constitutions in which the legislative branch dominated. Moreover, democratic politics in 1770s New York was pluralistic, not monolithic, and the structural features of the 1777 constitution reflected public acceptance of a politics of competing interests. These two aspects of the state's constitutional order were early articulations of principles that would come to define American constitutional politics.

In other ways, constitutional change in New York has reflected national political trends. For example, when in 1821 New York removed its freehold requirement for suffrage, it followed in the footsteps of many states that had already eliminated their property requirements. Moreover, as with most states, New York's nod toward the principle of universal manhood suffrage also exposed the racist underbelly of American democracy. Similarly, as with many states, New York's constitution has grown longer over time, often from the same impetuses. A number of reasons account for this trend, but two are of particular import here. The public has periodically placed additional restrictions on the legislature, thereby signaling a continuing cultural jealousy of governmental—particularly legislative—power. Additionally, the constitution has grown longer as the public has committed the state to a greater role in promoting the health, welfare, and education of the people. Changes in the constitution's length thus reflect changes in the way New Yorkers (and Americans generally) define a way of life for their community.

The 1777 Constitution

Though the 1777 constitution was drafted and ratified by the FPC, it was firmly grounded in the doctrine of popular sovereignty. Article I declares, "In the name and by the authority of the good people of this State . . . no au-

thority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them."[3] The phrase "in the name and by the authority of the good people of this State" appears twelve times in the document. The constitution also contained an enacting clause for legislative statutes.[4] Moreover, the FPC was acting under a special charge. The Third Provincial Congress (TPC) was seated when in May 1776 the Continental Congress called on the colonies to form state governments. Unsure of its authority to draft a constitution, the TPC called for the election of a new Provincial Congress specifically empowered to do so. The resolution calling for that election and a statement acknowledging the "special trust" the people had thereby given the FPC are contained in the constitution's preamble.

The preamble is long and includes the entire Declaration of Independence and Congress's resolution calling for the creation of state governments. These documents helped identify a new people. In its resolution Congress stated that the "King-in-Parliament" had "excluded the inhabitants of these united colonies from the protection of his Crown." This act destroyed the reciprocal bond of allegiance and, along with the abuses detailed in the Declaration, created an irreparable rift in the British polity. Cast out, denied the liberties they enjoyed by British and natural birthright, the colonists perceived themselves as a new people and found it "necessary . . . to dissolve the political bands which have connected them with another [people]."

The preamble also identified core values for the community of New York. Chief among these was a commitment to the preservation of personal liberties. To that end, the constitution limited the government's power by de-

3. Francis N. Thorpe, *The Federal and State Constitutions,* vol. 5 (1909; reprint, Buffalo: W. S. Hein, 1993), 2628. (Unless otherwise noted, references to New York's constitutions will hereinafter refer to this volume, citing constitutional provision and year.) In 1777 the arguments for special conventions and popular ratification had not yet become accepted constitutional axioms; however, the ideas were circulating. In New York the Committee of Mechanics sent a letter to the Provincial Congress insisting on the people's natural right to ratify a constitution. Similar calls, including the oft-anthologized October 1776 resolutions of the Concord, Massachusetts, town meeting, were voiced in other colonies. See Adams, *First American Constitutions,* 82–87; and Bernard Mason, *The Road to Independence: The Revolutionary Movement in New York, 1773–1777* (Lexington: University Press of Kentucky, 1966), 155–59. Mason provides a good account of the state's constitutional politics in this period. See also Edward Countryman, *A People in Revolution: The American Revolution and Political Society in New York, 1760–1790* (1981; reprint, New York: W. W. Norton, 1989). For a comprehensive account of New York's constitutional history, see Peter J. Galie, *Ordered Liberty: A Constitutional History of New York* (New York: Fordham University Press, 1996).

4. Article XXXI (1777). The enacting clause required all laws to begin: "Be it enacted by the people of the State of New York, represented in senate and assembly."

claring some rights off-limits to governmental interference, including the right to trial by jury (Article XLI). Additionally, the British common law as it existed on April 19, 1775, remained part of the state law, thereby continuing important traditional rights.[5] The constitution also prohibited acts of attainder and held that "no member of this State shall be disenfranchised, or deprived of any [of] the rights or privileges secured to the subjects of this State by this constitution, unless by the law of the land, or the judgment of his peers."[6] Like the prohibition against bills of attainder, this due-process "law of the land" requirement did not define specific rights. Rather, it prevented legislative abuse of rights by requiring that one's rights could not be infringed upon without a prior determination in a court of law.

The constitution also provided for liberty of conscience. It abrogated any part of the common and statutory law that could be "construed to establish or maintain any particular denomination of Christians or their ministers." It also included a conscientious-objector clause that allowed the legislature to exempt Quakers from service in the state militia.[7] Article XXXVIII was remarkable as much for its language as for its content. It declared that the "benevolent principles of rational liberty" made it essential to guard against religious and well as civil tyranny, decried the "spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind," and provided that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind."[8] The constitution thus guaranteed the right to freely exercise one's religious beliefs while providing for the disestablishment of church and state. In doing so, it also promoted political stability by removing a long-standing source of conflict in New York political life.[9]

5. Article XXXV (1777). The Delaware, Maryland, and New Jersey Constitutions also expressly embodied the common law. April 19, 1775, was, of course, the date of the Battles of Lexington and Concord.

6. The prohibition against acts of attainder applied only to crimes committed *after* the cessation of hostilities with Great Britain. The state legislature attainted fifty-eight loyalists on October 23, 1779. See Thorpe, *Federal and State Constitutions,* Article XLI (1777) at note b. Soon thereafter, the legislature passed a bill, overriding a veto by the Council of Revision, clearing the way for the sale of the estates of fifty-five of those attainted individuals. See Alfred F. Young, *The Democratic Republicans of New York: The Origins, 1763–1797* (Chapel Hill: University of North Carolina Press, 1967), 29.

7. Articles XXXV and XL (1777). But objectors had to pay "such sums of money" as the legislature deemed equivalent to personal service. The exemption fee was statutorily set in 1778 at ten pounds annually.

8. But "liberty of conscience" was not to be construed "as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

9. On the link between religious and political factionalism in revolutionary New York,

The commitment to religious liberty and the perceived clerical threat affected the constitution's definition of citizenship.[10] The constitution prohibited ministers of the gospel and priests "of any denomination whatsoever" from holding civil and military office.[11] For nonclergy, property requirements were key to citizenship. Property qualifications for voting in assembly elections were lowered from their colonial levels, while more stringent property qualifications reduced the number of men who could vote in senate and gubernatorial races.[12] Women were barred from voting. Interestingly, senators and governors had to be freeholders, but no requirement was specified for assemblymen. Read strictly, the constitution permitted a man to pursue an assembly seat for which he could not vote. Significantly, the constitution did not define electoral rights in terms of "race." Free blacks and whites faced the same suffrage rules. Slavery, however, remained legal. Thus, the constitution accorded rights of citizenship to some blacks while allowing the continued enslavement of others.[13]

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see Patricia U. Bonomi, *A Factious People: Politics and Society in Colonial New York* (New York: Columbia University Press, 1971), 237–39, 248–54; Charles H. Levermore, "The Whigs of Colonial New York," *American Historical Review* 1 (January 1896): 238–50; and Mason, *Road to Independence,* 5–7.

10. For this essay I define a citizen as a member of a community who enjoys full political rights—including the rights to vote, hold political office, and sit on juries—and the right to the fruits of his or her labor.

11. Article XXXIX (1777). The South Carolina, Delaware, North Carolina, and Georgia Constitutions had similar provisions.

12. Articles VII, X, and XVII (1777). The property requirement for assembly elections was reduced from forty pounds to twenty pounds freehold and was waived for anyone who was "a freeman of the city of Albany" on or before April 20, 1777, or who had been a freeman of New York City on or before October 14, 1775. Persons renting land valued at forty shillings annually could also vote. The requirement for senate and gubernatorial elections was raised from forty pounds to one hundred pounds. Still, the New York Constitution was the first to call for the popular election of the governor (Rhode Island and Connecticut did not write new constitutions in this period, but under their existing charters voters directly elected the governors). For a recent, exhaustive treatment of suffrage in American history, see Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books, 2001). For a discussion of the role of conservatives and popular Whigs in drafting the 1777 document, see Young, *Democratic Republicans of New York,* 17–22; and Mason, *Road to Independence,* 213–49.

13. In 1781 the legislature manumitted slaves who had served with the state militia, but the first general abolition law was not enacted until 1799, and it called only for the emancipation of children born into slavery after July 4 of that year. Moreover, such children were required to serve their masters for a period of years. Slavery was not finally abolished until July 4, 1827. A provision drafted by Gouverneur Morris and calling on future legislatures to take steps toward the abolition of slavery gained initial support from the FPC but was not included in the 1777 constitution. See David N. Gellman and David Quigley, *Jim Crow New York: A Documentary History of Race and Citizenship, 1777–1877* (New York: New York Uni-

Structurally, the bicameral legislature included an assembly of seventy members serving one-year terms and a senate of twenty-four members serving four-year terms—the longest senate terms in the Union. Moreover, senate terms were staggered so that only one-fourth of the seats were filled annually, and senators would be elected from "four great [multiple-county] districts."[14] There was no provision explicitly establishing courts of law, but provisions covering appointments assumed a court of chancery, a supreme court, county courts, and probate and admiralty courts. Judges served "during good behavior," but were required to retire at the age of sixty.[15] The governor served a three-year term, was reeligible for office, and wielded considerable power. The governor had a qualified veto (as a member of the Council of Revision) and was given the constitutional duties "to inform the legislature, at every session, of the condition of the State" and "to recommend such matters to their consideration as shall appear to him to concern its good government, welfare, and prosperity."[16] The governor was commander-in-chief of the militia and admiral of the navy, could grant pardons and reprieves, and was a member (along with four senators) of a council empowered to appoint constitutional officers.[17]

The power granted to the governor is a leading feature of the 1777 constitution and marks a departure from a strict conception of separation of powers that characterized other state constitutions adopted in 1776 and 1777. Those constitutions rejected to varying degrees the concept of checks and balances, and their institutional structures were driven by a fear of executive

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versity Press, 2003), 26, 52–55, 67–72; and Edgar J. McManus, "Antislavery Legislation in New York," *Journal of Negro History* 46 (October 1961): 207–16. I have used scare quotes around the word *race* here to remind the reader that "race" is a social construct, not a biological fact.

14. Articles XI and XII (1777). District elections would be at large, with seats apportioned to the districts by population.

15. Articles XXV and XXVII (1777). The age limitation was later raised to seventy by amendment (Article VI, Section 13 [1876]) and then to seventy-six (Article VI, Section 25[c] [1925]). The mandatory retirement provision, however, has run afoul of congressional statute. See Peter J. Galie, *The New York State Constitution: A Reference Guide* (New York: Greenwood Press, 1991), 153. This work is an invaluable resource and one to which this essay is indebted.

16. Articles III, XVIII, and XIX (1777). The council consisted of the governor, chancellor, and supreme court judges, a majority of whom could issue vetoes. A legislative override vote required a two-thirds majority in both chambers.

17. Articles XVIII and XXIII (1777). Each senator would represent one of the four senatorial districts. Ambiguous language soon led to controversy over whether the nominating power was shared or controlled by the governor alone (with the senators merely affirming or rejecting the nominees). The controversy was settled by amendment in 1801, vesting the nominating power in the council collectively. Alexander Hamilton offered a scathing critique of the council in "Federalist no. 77," in *The Federalist,* by Hamilton, Madison, and Jay, 517–19.

tyranny. Hence, in most cases their executives were selected by the legislature, served one-year terms, and were stripped of veto and appointment powers. New York's constitution was the first to recognize the need for checks and balances, particularly as a way to control the legislature. Indeed, Article III justified the veto, stating that without it, "laws inconsistent with the spirit of this constitution, or with the public good, may be hastily and unadvisedly passed."

In sum, New York's constitution was more sober than other state constitutions in its view of legislative power. It rejected the idea that the legislature ought to be the mere handmaiden of popular opinion and the related doctrine of legislative supremacy. Indeed, the need to check political authority generally is a central theme in the constitution. Thus, the constitution balanced a more democratic assembly with a senate with longer and scattered terms, and with a judiciary and executive whose powers and independence were unmatched by the other extant state constitutions. It would be wrong, however, to conclude that this arrangement was simply antipopular in origin. Eighteenth-century New York politics was for its time remarkably inclusive. The rich diversity among the populace produced a political norm accepting of interest-group conflict. Indeed, political factionalism had already gained legitimacy among New Yorkers as a mechanism for checking political power.[18] Hence, the point in 1777 was not to keep popular voices out of politics, but rather to regulate them. The constitution was not designed to suppress group conflict; it was designed to check it, to reconcile it with the public good. Similarly, institutional structures such as the Council of Revision and appointment grew out of a shared belief in the need for interbranch checks on power. The result was a distribution of political power that moderated its exercise while providing for the institutionalization of conflict.

The 1821 Constitution

The 1821 constitution brought key changes to the definition of the public and the distribution of and restriction on political power. The most important and contentious debate at the convention involved suffrage. Conservatives, led by Chancellor James Kent, sought to retain existing qualifications. Kent railed against those who proposed "to annihilate, at one stroke, all

18. Milton Klein, "Shaping the American Tradition: The Microcosm of Colonial New York," *New York History* 59 (1978): 173–97; Bonomi, *Factious People.* Bonomi presents an important revision of Carl L. Becker's classic work *The History of Political Parties in the Province of New York, 1760–1776* (1909; reprint, Madison: University of Wisconsin Press, 1960).

those property distinctions and to bow before the idol of universal suffrage." He foresaw that America was "fast becoming a great [commercial] nation," one with a growing "disproportion between the men of property, and the men of no property." A freehold requirement that ensured property holders "exclusive possession of a branch in the legislature" was necessary to protect those interests from the poor—that "motley," covetous majority that in every age had shown a willingness to "jeopardize the rights of property, and the principles of liberty."[19] Only by retaining an institutional balance of power could government preserve the rights of a free society.

This older, republican "stake-in-society" argument—that only people with property should participate in elections—was challenged by other delegates who argued to broaden the franchise, but who also maintained a variation of the "stake-in-society" idea. These delegates agreed that voters needed to have an interest in the community and to demonstrate independence of will; now, though, the measure of one's interest and independence was redefined to include all men at least twenty-one years of age who were taxpayers, served in the militia, or "labored upon the public highways" (Article I, Section 1). The freehold was no longer the sole measure of one's stake in society or of one's independence of judgment.[20]

This changing idea of citizenship and this new understanding of what it meant to have a stake in society did not include blacks. The 1821 convention was thus a harbinger of a nascent Jacksonian ideology, simultaneously encompassing a predominant concern for democracy and the common man along with a virulent racism that denied equality to nonwhites. Narrowly rejecting a proposal to bar all blacks from voting, the convention settled on restricting their access to the ballot. In order to vote, "men of color" now had to possess a freehold estate of $250 "over and above all debts and incumbrances charged thereon" (Article II). As a result, by 1825 only a few hundred of the state's six thousand free adult black males could vote.[21]

19. Nathaniel H. Carter and William L. Stone, eds., *Reports of the Proceedings and Debates of the New York Constitutional Convention of 1821* (1821; reprint, New York: Da Capo Press, 1970), 220–21.

20. For a good discussion of the 1821 convention debate over suffrage, see James A. Henretta, "The Rise and Decline of 'Democratic-Republicanism': Political Rights in New York and the Several States, 1800–1915," in *Toward a Usable Past: Liberty under State Constitutions,* ed. Paul Finkleman and Stephen E. Gottlieb (Athens: University of Georgia Press, 1991), 55–57; and Marvin Meyers, *The Jacksonian Persuasion: Politics and Belief* (New York: Vintage Books, 1960), 237–49. See Keyssar, *Right to Vote,* 26–52, for analysis of the expansion of the vote nationally in this period. As Keyssar notes, New York was one of a number of states that added a taxpaying requirement even as they eliminated the freehold requirement (ibid., 29 and table A.2).

21. Men of color also faced more stringent residency requirements. Although the freehold requirement did not prohibit blacks from voting per se, the provision was clearly motivat-

The push for broader popular control of government resulted in other significant constitutional changes. The constitution now included an amendment process. Amendments required the approval of two successive, independently elected legislatures—passage in the second requiring a two-thirds majority in both chambers—followed by the approval of the electorate (Article VIII). Moreover, the 1821 constitution was submitted to the people for ratification, thereby "establishing the tradition in New York of making constitutional conventions the creature of the people, not of the legislature" and providing additional constitutional forums for the peaceful management of conflict.[22]

The growing pressure to democratize government also affected the executive branch. The convention reduced the governor's term from three years to two, stripped him of the power to prorogue the legislature, and greatly weakened his appointment power by making many positions either elective or subject to senate approval.[23] Substantial debate arose over the executive veto. The issue was not whether to keep the Council of Revision—its fate

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ed by racism. Indeed, a 1785 motion to end slavery in the state was accompanied by a proposal to deny blacks equal civil and political rights, and an 1811 statute imposed certification and filing fees on blacks seeking to vote. For many of the state's white citizens, the idea that blacks might share equally in governing was anathema. Moreover, New York City boasted a large community of free blacks. Convention delegates who favored disenfranchisement mixed racial arguments depicting blacks as incapable of self-government with traditional republican arguments that city dwellers were a sore on the body politic. Politics, too, affected the debate as Republican delegates—a majority at the convention—sought to disenfranchise blacks who, they noted, tended to support the Federalist Party. Altogether, race, ideology, and political self-interest worked to disenfranchise black men, in contradistinction to the democratizing impulse in the convention. See Phyllis F. Field, *The Politics of Race in New York: The Struggle for Black Suffrage in the Civil War Era* (Ithaca: Cornell University Press, 1982), 35–37; Gellman and Quigley, *Jim Crow New York,* 64–66, 75–78; Winthrop D. Jordan, *White over Black: American Attitudes toward the Negro, 1550–1812* (1968; reprint, Chapel Hill: University of North Carolina Press, 1977), 413–14; and Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* (Chicago: University of Chicago Press, 1967), 147–50. For a discussion of the movement to disenfranchise blacks nationally in this period, see Keyssar, *Right to Vote,* 54–59.

22. Galie, *New York State Constitution,* 7. Five amendments were adopted in 1801 without popular ratification, suggesting an original understanding that the amending power was to be legislatively controlled.

23. Article III, Section 1 (1821). New age, residency, and citizenship requirements limited eligibility for the governorship (Article III, Section 3 [1821]). By 1821 the Council of Appointment controlled thousands of appointments, many of them for local offices such as sheriff and coroner (Article XXVI [1777]). Popular opinion favored its elimination, a sentiment shared by the delegates who abolished it and then popularized and localized the appointment process, basing some offices on local popular election (for example, sheriff [Article IV, Section 8 (1821)]) and others on appointment by local bodies (such as justices of the peace [Article IV, Section 7 (1821)]). See Henretta, "Rise and Decline," 69–71.

was clear—but whether to retain the executive veto at all. Some delegates insisted that the legislature would embody the will and virtue of the people. It would never "deliberately pass a law against the public interest" or "persevere in the passage of [such] a law."[24] Giving the governor a majority-proof veto was undemocratic and unnecessary; at most, an override vote should require a simple legislative majority.[25] Other delegates argued successfully to place the veto with the governor and to retain the two-thirds override rule. The veto, they argued, had been a useful deterrent against bad legislation, a check on excessive lawmaking, was essential to preserve separation of powers, and cohered with democratic principles. Popularly elected, the governor was "the man of the people" and thus "identified with their interests."[26]

The veto debate revealed that many delegates perceived a gap between the popular and the legislative will, a perception that fueled new restrictions on the legislature. One reason delegates were unwilling to unleash the legislature in the wake of more electoral democracy was because of scandals involving the chartering of banks and the amassing of debt tied to canal construction. A provision was accordingly added requiring a two-thirds vote in both chambers for bills appropriating public money or property "for local or private purposes," while another mandated the legislature to dedicate certain sums to paying off the debt on canal construction. As Peter Galie has noted, the latter provision set a precedent: thereafter, groups would routinely pursue policy goals through constitutional rather than statutory provision.[27]

The placement of these two provisions in Article VII is noteworthy. Article VII was a bill of rights. Placing these legislative restrictions in an article dedicated to a bill of rights suggests that preserving public resources was perceived as a public imperative, much like the protection of private rights. Indeed, the article proclaims that trial by jury "shall remain inviolate forever" and, similarly, that revenue from canal tolls shall be "inviolably appropriated" to the completion of, and repaying the debt on, those canals.

24. Peter Livingston, September 5, 1821, in *Reports of the Proceedings and Debates,* ed. Carter and Stone, 51–52.

25. Compare Livingston's proposed amendment to the fourth standing committee's report, September 4, 1821, in ibid., 48, 43, respectively. At least one delegate opposed placing veto power in the hands of the governor alone. See Daniel Tompkins, September 6, 1821, in ibid., 79, 82.

26. Ogden Edwards, September 5, 1821, in ibid., 59–60. See also Judge Jonas Platt and Chancellor James Kent, in ibid., 56, 63–64; and Rufus King, September 6, 1821, in ibid., 76–78.

27. Galie, *New York State Constitution,* 9. The two provisions are found in Article VII, Sections 9 and 10 (1821).

Article VII also expanded the personal liberties guaranteed under the constitution. For the first time, laws restraining or abridging the liberty of speech or press were prohibited; so, too, were laws subjecting a criminal defendant to double jeopardy, laws compelling a criminal defendant to "be a witness against himself," and laws denying criminal defendants counsel (Sections 7 and 8).[28] Although many of these provisions were provided under a bill of rights adopted legislatively in 1787, the 1821 constitution placed these rights beyond legislative control, thus constructing a particular view of the well-ordered polity.

That vision continued to promote religious liberty as a primary political and moral value. Article VI prohibited religious tests for political office, a provision absent from the 1777 document. The Article VII provisions excluding clergy from holding civil or military office, guaranteeing the free exercise of religion "without discrimination or preference," and exempting conscientious objectors from military service—now extended to members of "any religious denomination whatever"—continued the state's constitutional commitment to religious liberty.

The 1846 Constitution

The push for greater popular control of government continued unabated for the next quarter century. An 1826 amendment expanded the white franchise by abolishing the requirement that white voters be taxpayers. Amendments adopted in 1826 and 1839 made election of justices of the peace and mayors popular. In 1845 property holdings were removed as a requirement for holding public office. The 1846 constitution embodied these democratic changes and more, subjecting most judicial offices as well as the offices of treasurer, secretary of state, comptroller, and attorney general to popular vote. The constitution reduced the terms for the latter three offices and cut senate terms in half. Lest there be any doubt about where ultimate authority lay, the constitution required an enacting clause for all laws (a requirement left out of the 1821 constitution), explicitly declared that the "People of this State" possess the "right of sovereignty" over "all lands within the jurisdiction of the State," and gave the people real constituent power by providing that beginning with the 1866 general election, and every twenty years

28. The counsel provision applied only to criminal trials requiring indictment. Libel was protected only if the published material appeared true and "was published with good motives and for justifiable ends." Habeas corpus was guaranteed (Section 6), too, as was private property (Section 7).

thereafter, electors would have the power to call for a constitutional convention.[29]

These provisions established the basis of political authority in the state and redefined political citizenship by extending the rights to vote and hold political office to all white males meeting residency requirements. These and other electoral changes, such as the new requirement that members of the assembly and senate be elected in single-member districts, further placed meaningful political power in the people.[30] Additionally, the provision permitting constitutional conventions to be called by popular vote was both a source of conflict management and a way to limit legislative power, as it overcame what was perceived as legislative foot-dragging in the face of strong public pressure to convene a convention in the decade prior to 1846.[31]

The achievement of full white male suffrage, of course, excluded women and blacks. But if voting was an inherent right, as many Americans now believed, why restrict the vote? The answer rested on perceptions of difference: neither women nor blacks were capable of exercising political power responsibly. In fact, little consideration was given to women's suffrage. Debate over black male suffrage was more substantial, and some delegates argued for their equal enfranchisement. Others, however, rejected the idea, arguing that "Negroes were aliens—aliens, not by mere accident of foreign birth . . . but by the broad distinction of race—a distinction that neither education, nor intercourse, nor time could remove." Ultimately, although the convention retained the property requirement for black voters (that is, blacks were not disenfranchised by race per se), its definition of citizenship was rooted in racism and wrote African Americans out of the political community.[32]

29. The 1846 provisions include Article VI, Sections 2, 12, 14, and 17 (judicial elections); Article V, Section 1 (election and terms of the comptroller and so on); Article III, Section 2 (senate terms); Article III, Section 14 (enacting clause); Article I, Section 11 (popular sovereignty); and Article XIII, Section 2 (conventions).

30. Article II, Section 3 (1846). The 1821 constitution had retained the large multiple-county "senate district" principle established by the 1777 constitution. It also maintained countywide assembly races, even for counties apportioned multiple assembly seats. See Article I, Sections 5 and 7 (1821); and note 14, above.

31. Galie, *New York State Constitution,* 11. In this period, other state legislatures similarly resisted and then succumbed to mounting popular pressure to convene constitutional conventions. See Henretta, "Rise and Decline," 62.

32. John Hunt, September 30, 1846, in *Debates and Proceedings in the New-York State Convention for the Revision of the Constitution,* ed. S. Crosswell and R. Sutton (Albany: Albany Argus, 1846), 786. Thus, Hunt stated, "If any good could come of wishing, he could wish as heartily as any one that the Ethiopian might change his skin and become a part of the body politic" (ibid.). The decision to keep the freehold requirement reflects the tension between the delegates' democratic principles and their racist attitudes. That their racism was indica-

The bill of rights was now placed in Article I, immediately after the preamble, following the form of many state constitutions and symbolizing the state's commitment to individual liberty. More important, Article I affected the definition of political citizenship, in particular by expanding those rights associated with religious liberty. It declared that the right to testify could not be abridged on account of one's "opinions on matters of religious belief," thereby ensuring that under the law one's rights to due process could not be denied because of one's religious faith. It also abolished the civil disability that had impaired the political rights of clergy since 1777 by removing the prohibition against their holding office.[33]

In addition to its significant redefinition of citizenship, the 1846 constitution also placed a multitude of new restrictions on the legislature. A financial crisis had gripped the state in 1837, for which the public blamed the legislature's excessive spending. Indeed, by 1846 the state was heavily in debt, having spent millions of dollars on new canals and on aid to private business. An 1842 statute sought to reduce this debt by suspending most canal work and establishing a process for paying off the debt. The 1846 convention constitutionalized this policy.

For example, Article VII provided that revenues from state canals would be collected annually and "sacredly applied" as a sinking fund to pay off the debt from canal construction, with unused revenue from the fund being applied to the general debt, including debt "for [bad] loans of the State credit to rail road companies." It prohibited the legislature from passing special charters for banks and from passing laws that sanctioned, either directly or indirectly, "the suspension of specie payments, by any person, association or corporation issuing bank notes of any description." Corporations had to be formed under general laws, not by special act. The convention also took steps to restrict the state's ability to borrow money. Each debt contracted by the state had to be expressly authorized by statute, and each new debt required its own statute. Statutes assuming new debts had to provide for their discharge within eighteen years. No such law could take effect until a majority of voters approved it at the next general election, and only one such law could be put before the voters in any single election. The assault on debts and deficit spending even affected home rule, as the legislature was given the

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tive of a prevailing social norm is evident in the voters' overwhelming rejection of a separate referendum that, if approved, would have granted blacks equal suffrage. In 1860 and 1869 voters again rejected proposed amendments that would have granted equal suffrage to black men. See Field, *Politics of Race,* 61–62, 126–27, 199; and Henretta, "Rise and Decline," 53–54.

33. Article I, Section 3 (1846). Section 1 of Article XI expanded the rights of conscientious objectors by removing constitutional language requiring objectors to pay the state an equivalent in money.

duty to restrict the power of cities and incorporated villages to borrow money and contract debt.[34]

The 1846 constitution was very much a Jacksonian document, one that embodied a fundamentally new conception of the proper role of government. Government was no longer to take an active role in economic development. It would be smaller, more frugal. The constitution would liberate the common man from the burden of heavy taxes born of profligate spending by an overactive, irresponsible, and corrupt government. It would give the common man a fair shake by preventing the privileged treatment of corporations. Democratizing the electoral process—broadening suffrage and reducing terms in office—was one way to rein in government. But as one convention delegate proclaimed, the primary means of control was to "tie up the power of the legislature" and to limit "the large discretion now exercised by them."[35] In short, the constitution redefined the public and the role of government, and with these new conceptions came new delimitations on governmental power.

The 1894 Constitution

Between 1846 and 1894 various amendments were adopted. In 1874 property requirements for black voters were removed from Article II,[36] power

34. Article VII, Sections 1 and 2; Article VIII, Sections 4 and 5; Article VIII, Section 1; Article VII, Section 12; and Article VIII, Section 9, respectively.

35. Robert Morris, July 11, 1846, in *Debates and Proceedings,* ed. Crosswell and R. Sutton, 225, quoted in Meyers, *Jacksonian Persuasion,* 260–61. The long list of constitutional restrictions added in 1846 was typical among state constitutions in the second half of the nineteenth century, and state constitutions accordingly grew much longer. See Galie, *New York State Constitution,* 13–14.

36. The constitution now granted the vote to "every male citizen" meeting the age and residency requirements. But the change in language was ostensibly required by the adoption of the Fifteenth Amendment to the U.S. Constitution (1870), which legally superseded any state provision that facially discriminated against the African American vote. Nonfacially discriminatory means might still be used to suppress the vote. For example, the literacy test as a means to abridge the vote among "undesirables" predated the Civil War, and in 1921 an amendment to the New York Constitution instituted a literacy requirement that disenfranchised hundreds of thousands of Yiddish-speaking Jews and thousands of recently enfranchised women. Indeed, national political forces, rather than a sudden change in public opinion, likely explain why New York voters rejected the 1869 proposed amendment (see note 32, above), only to have equal suffrage imposed by the Republican-dominated state legislature the very next year. See Field, *Politics of Race,* 181–86; and Keyssar, *Right to Vote,* 86, 145–46. See also Henretta, "Rise and Decline," 64–65, for a brief discussion of a proposed 1877 amendment that would have imposed severe property requirements on voters in municipal elections.

was redistributed with the adoption of the executive line-item veto (Article IV, Section 9), and the legislature's power to enact private bills was restricted (Article III, Section 18). Demands for additional reforms, in particular for women's suffrage and home rule, underlay the public's call for a convention in 1886. When the convention finally convened in 1894, a strong reformist sentiment also dominated the agenda.

The convention again denied women the franchise, but proponents of home rule were more successful. The 1894 constitution gave local officials, under certain conditions, the power to veto laws passed by the general legislature that affected their particular cities. The power was modest but symbolically important.[37] For the first time, the commitment to home rule was given constitutional status. The text identified other new commitments, including a civil-service component that required civil-service appointments to be made according to merit and adjudged by competitive exams. The civil-service provision also required the state to give preference in appointment and promotion to soldiers and sailors honorably discharged "in the late civil war," a requirement that redefined citizenship through the creation of exclusive civil privileges and identified a public commitment to the welfare of a particular class of people within the state.[38]

Other changes also aimed at curtailing political corruption. State contracts for work on canals now had to be made with contractors offering the lowest bids (Article VII, Section 9). More important, no bill could become law unless a printed copy of it in its final form was "upon the desks" of legislators at least three days prior to final passage, nor were amendments to a bill permitted upon its last reading (Article III, Section 15). These provisions would encourage the legislature to carefully consider the wisdom of proposed policies while deterring it from adopting last-minute riders favored by special interests. The three-day printed-bill requirement would also promote public scrutiny and accountability, an added incentive for legislative responsibility.

Reformers also realized key changes in electoral rules. Concern over immigration and election fraud produced a requirement that in villages and cities with at least five thousand inhabitants voters self-register at least ten days prior to an election. In addition, one now had to be a citizen for nine-

37. Article XII, Section 2 (1894). Cities were classified according to population. General laws affected all cities in a particular class; special laws related only to one or some (but not all) of the cities in a class. Special laws were subject to a veto by local officials, but the general legislature could override that veto by a simple majority vote.

38. Article V, Section 9 (1894). New York was the first state to constitutionally mandate a merit-based civil-service system. The constitution continues to advantage veterans for civil-service posts. See Galie, *New York State Constitution,* 113–14.

ty days, instead of ten, before acquiring the vote. The legislature was directed to enact laws disenfranchising people convicted of bribery or any infamous crime. Provision was made for the use of voting machines, "provided that secrecy in voting be preserved." To further thwart election fraud, a bipartisan election board was created, giving political parties a constitutional role in elections and in effect recognizing a two-party system.[39]

The constitution included new commitments to forest conservation and public education, the former by requiring the preservation of the Adirondack forest preserve in its wild state, the latter by requiring the legislature to support a system of free common schools and by instituting the state university system. It also contained a new but limited social-welfare role, permitting the legislature to provide for the support of the "blind, deaf, and dumb" and juvenile delinquents while mandating a regulatory role through the creation of a state board of charities, a state commission to oversee the treatment of the mentally ill, and a state commission of prisons.[40]

The constitution also strengthened its commitment to the separation of church and state by prohibiting local government from funding religious instruction for children in public or private orphanages and correctional institutions. Moreover, it prohibited state and local governments from funding, either "directly or indirectly . . . other than for examination or inspection . . . any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught."[41] Thus, public aid to charitable institutions run by religious organizations was permitted, but such aid could not be used for the religious education of youth, nor could any aid be given to religious schools.

Of course, the strict ban on funding to religious schools—a ban that prima facie goes beyond the mandate of the First Amendment to the U.S. Constitution—was in large part a response to the rapid increase in the number

39. The Article II provisions are Section 1 (citizenship requirement), Section 2 (disenfranchisement), Section 4 (registration), Section 5 (secret ballot), and Section 6 (board of elections). Seats on the board would be divided equally between "the two political parties" that received "the highest and the next highest number of votes" in the preceding general election.

40. Section 7 of Article VII constitutionalized the Adirondack preserve, which was established by statute in 1885. The other provisions are Article IX, Sections 1 and 2 (education); and Article VIII, Section 11 (regulatory roles) and Section 14 (support for the blind and so on). New York was one of many states that by the end of the century had created state boards of charity, reflecting a nascent social-welfare movement. See Edward Berkowitz and Kim McQuaid, *Creating the Welfare State: The Political Economy of Twentieth-Century Reform* (Lawrence: University Press of Kansas, 1992), 36.

41. Article VIII, Section 14; and Article IX, Section 4 (1894).

of Catholic immigrants settling downstate.[42] Indeed, this provision underscores how a confluence of forces—anti-immigrant, anti-Catholic, and reformist—converged with a strong upstate-downstate partisan split to produce particular constitutional rules. Upstate Republicans, who dominated the convention and sought to undermine Democratic strength in urban areas (especially New York City), found themselves aligned with reformers, including some antimachine Democrats, who perceived the new class of urban immigrants to be a ready source of political corruption. The new registration and naturalization rules resulted. Similarly, the Republican-led convention significantly rewrote the rules for apportionment. Conflict over apportionment between upstate (rural) and downstate (urban) delegates and voters was not new. Indeed, controversy over apportionment visited every convention since 1821, but in 1894 the controversy was especially acute. Voting along straight party lines, Republicans increased the size of the assembly and ensured that all state counties, regardless of (low) population, would receive at least one seat. The senate was enlarged to fifty members; furthermore, no single county was permitted to possess more than one-third of the senate seats, provisions that again advantaged rural areas and ensured that the downstate (Democratic) counties would not dominate the legislature.[43]

Ultimately, the new major provisions in the 1894 text are notable because they reflect a public divided. The upstate populace, largely rural, Protestant, and Republican, viewed with distrust and fear a downstate population that was increasingly urban, ethnic, Catholic, and Democratic. New York City was perceived as a political monster that would dominate state politics if not constitutionally tamed. The result, as Peter Galie has argued, was a convention that pursued "a policy of placing constitutional restraints" on New York City, a policy that "characterized New York's constitutional tradition well into the twentieth century."[44]

42. The provision, one of many so-called Blaine amendments incorporated into state constitutions toward the end of the nineteenth century, remains in the constitution, but with language added in 1938 explicitly permitting the use of state funds for the "transportation of children to and from any school or institution of learning" (renumbered Article XI, Section 3). Moreover, the provision has been interpreted in a manner much more accommodating to religious institutions than the provision's language seemingly mandates. See Galie, *New York State Constitution,* 20–21, 234.

43. Article III, Sections 2 and 4 (1894). See Galie, *New York State Constitution,* 18; and Henretta, "Rise and Decline," 66–67.

44. Galie, *New York State Constitution,* 22.

Post-1894 Developments

The 1894 text remains the basic framework of the New York Constitution. Conventions in 1915 and 1967 produced drafts that were resoundingly rejected by the public. The 1938 convention had more success, putting nine amendments before the voters, who approved six. Moreover, the constitution has continually been amended over the past century. Between 1894 and 1915 it was amended twenty-two times; between 1915 and 1935, forty-six times; between 1939 and 1966, ninety-three; between 1967 and 1990, thirty-five. The numerous amendments demonstrate the relative ease with which constitutional changes can be brought and the willingness of the public to use that power. Indeed, the constitutional process and the requirement that voters approve most debt-producing legislation give considerable political power directly to the public.

The most important constitutional changes in the twentieth century involved the definition of the citizenry, the further strengthening of the executive, and the values to which the community was dedicated. The franchise was granted to women in 1917 and to citizens at least eighteen years of age in 1971.[45] These expansions of the public coincided with a changing conception of equality as a core communal value. In 1938 voters approved an equal-protection provision that prohibited *private* individuals and institutions as well as public entities from discriminating against people because of race, color, creed, or religion (Article I, Section 11). New criminal due-process rights were also written into the state's fundamental law.[46]

Other constitutional values included home rule, labor rights, and workers' welfare. Although modest home rule was granted in 1894, additional powers have been granted to local governments since 1938, including a bill of rights for local governments adopted in 1963 and a variety of provisions easing debt restrictions on local governments.[47] The move to constitutionally recognize workers' rights began in 1905, when an amendment gave the

45. The state constitution granted women the vote two years prior to ratification of the Nineteenth Amendment to the U.S. Constitution. The Twenty-sixth Amendment to the U.S. Constitution, which New York ratified on June 2, 1971, lowered the voting age to eighteen.

46. Most notably, Section 12 of Article I guaranteed the right against unreasonable searches and seizures, *and* it mandated the use of warrants in wiretaps. A provision that called for the exclusion at trial of illegally obtained evidence, however, was rejected. See ibid., 25–26, 58–59. Cf. *Olmstead v. United States,* 277 U.S. 438 (1928); and *Katz v. United States,* 389 U.S. 347 (1967). See also Article I, Section 2 (1938).

47. See Articles VIII and IX, along with editor's commentary, in Galie, *New York State Constitution,* 184–222.

legislature the power to regulate the wages and hours of workers. A 1913 amendment gave the legislature the power to create a workers' compensation program.[48] In 1938 a provision was added to the bill of rights declaring "labor not a commodity," guaranteeing workers the right to organize and bargain collectively, and guaranteeing public-works employees an eight-hour, five-day workweek at the "prevailing" wage.[49] Significant provisions were adopted to create a social safety net for the state's needy. Article XVII's Section 1 created a "positive right" for state care of its citizens, declaring the "aid, care and support of the needy [to be] public concerns." The promotion of public health was also declared to be a matter of "public concern," and Section 1 of Article XVIII empowered the legislature to provide low-rent housing and nursing-home accommodations for people of low income (as defined by law).[50]

Finally, a 1937 constitutional amendment extended the governor's term to four years. Moreover, a 1927 amendment gave the governor primary responsibility for preparing the state's budget. Other changes, including increases in the governor's appointment power, have reaffirmed the state's traditional commitment to a strong executive.[51] These increases in the governor's powers conformed to an expanding public understanding of the role of the state. Confronted with a rapidly increasing number of complex social problems, New Yorkers no longer sought to restrict governmental power but instead sought to provide for the efficient and effective application of that power to solve the perceived needs of the state. The desire for greater efficiency and effectiveness in government revived support for a strong, accountable executive.[52]

48. New York was one of many states to enact social-welfare policies, including a women's hour law, a mothers' pension law, and workers' compensation between 1911 and 1920. See Berkowitz and McQuaid, *Creating the Welfare State,* 35–40; Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Harvard University Press, Belknap Press, 1992), 256–61, 294, 379–82, 424–79; and Irwin Yellowitz, *Labor and the Progressive Movement in New York State, 1897–1916* (Ithaca: Cornell University Press, 1965), 101–18.

49. See Article I, Section 19 (1913; renumbered Article I, Section 18 [1938]); and Article I, Section 17 (1938).

50. The addition of these new social responsibilities resulted in a constitution more than fifteen thousand words longer than its predecessor (Galie, *New York State Constitution,* 27).

51. Article IV, Section 1 (1938); Article VII-A, Sections 1–4 (1927; renumbered Article VII, Sections 1–5 [1938]); Article IV, Sections 3, 4, and 7 (1938); Article V, Section 3 (1938).

52. Galie, *New York State Constitution,* 24–25, 27; Henretta, "Rise and Decline," 78–81.

Conclusion

Constitutions perform particular functions, and in their commitment to a strong executive, New Yorkers embrace one constitutional approach to the distribution of political power. Indeed, the strong executive is one of New York's lasting and more notable constitutional features. New Yorkers have consistently supported a strong executive, and in doing so, and through their early advancement of a modern conception of checks and balances, they distributed political power in a way that has proved to be something of a bellwether for American constitutionalism.

That emerging doctrine of checks and balances would serve a number of constitutional functions. Its basis in a pluralistic model of competing interests pointed to a modern constitutional means of managing political conflict. Checks and balances were also seen as a way to limit the exercise of power. Moreover, the notion that government power must be limited indicates a particular vision of the well-ordered polity—one shared by all the states—while the different ways the states constitutionally limit power denote important aspects of each community's moral and political principles.

Other features of the New York Constitution also serve multiple functions. For instance, requiring that voters approve the legislative assumption of new debt created a new policy-making process. But it also gave voters a new way to limit the legislative exercise of power, and it gave the public a recurring voice in defining an overarching vision of the good life for their community, since the decision of whether to take on new debt involves public deliberation about the relative value of competing public policies. Similarly, the amendment process has been repeatedly used to limit governmental power, to articulate community values, to restructure political institutions, and to redefine the public.

Finally, constitutional development in New York has often paralleled change in other states. Nowhere has this been more evident or more important than in the state's constitutional definition of the public. In New York, debates over how to constitutionally construct the public often embodied a tension between an ethos of democratic egalitarianism and countervailing attitudes of patriarchy and racial animus. Those tensions and the political conflict they often produced lie at the core of America's constitutional tradition.

JEFFREY P. BAUMAN

Pennsylvania

Virtue, Liberty, and Independence

To the extent that any one notion or common theme can attempt to describe a state's entire constitutional tradition, in the Commonwealth of Pennsylvania, the constitutional experience might very well be summarized by its motto, adopted in 1778, only two years after the proclamation of the first Pennsylvania Constitution: Virtue, Liberty, and Independence. In the trajectory from its historic beginnings during the American Revolution to modern times, the Pennsylvania Constitution, and the judiciary's interpretation of that document, has evidenced attributes that can be characterized as embodying virtue, through the example of Pennsylvania's uniquely strong notion of religious freedom; liberty, as demonstrated by its early battles against internal political tyranny; and independence, as exemplified by Pennsylvania's adoption of a formal and distinct means of interpreting its constitution, ensuring an integrity of state constitutional jurisprudence that is uniquely separate and insulated from our federal government's interpretation of its organic document.

Although the Pennsylvania constitutional experience should not be beatified, in terms of Professor Donald S. Lutz's "purpose" construct, and as demonstrated by the three examples below, it satisfies the purposes for which a people create that advanced political technology called a written constitution. Indeed, all eight purposes of a constitution are more than adequately satisfied by the Pennsylvania Constitution, and thereby, as suggested by Professor Lutz, fulfill the more specific purpose of completing the

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constitutional foundation within the federal system.[1] The Pennsylvania Constitution describes and defines, inter alia, its people, its people's relationship to their government, and, perhaps most fundamentally, a way of life. Thus, although the Pennsylvania constitutional experience has at times been characterized by cynicism and disdain, it has also rightfully been marked by pride and admiration, as demonstrated below.

The Pennsylvania constitutional experience is a laboratory in which one of many constitutional experiments is conducted, one hopes to the benefit of the citizens of the commonwealth, as well as the country.[2] As such, it is a work in progress, as exemplified by its five constitutions, that has led to the rejection of certain principles and the preservation of others. Perhaps, in the end, the ongoing Pennsylvania constitutional experience is one of the noblest of dreams and the greatest of aspirations, characterized by common threads of virtue, liberty, and independence. As it sets the stage for demonstrations of independence and virtue, the concept of liberty, as exemplified by the 1776 constitution's establishment of the *public,* will be considered first.

Liberty: The Pennsylvania Constitution of 1776 and the Defining of the People's Relationship to the Government

Due to its unique origins, Pennsylvania's first constitution can be described in one sense as ensuring liberty from internal political inequality, all while set in the context of a nation debating its independence from British rule. Indeed, the beginning of the constitutional experience in the Commonwealth of Pennsylvania exemplifies what Aristotle explained as the Greek meaning of the relationship between the *polis,* the way of life; the *public,* those who stand in political relationship to each other; and the *politeia,* the plan for the way of life. This relationship manifested itself in the first Pennsylvania Constitution.

Specifically, the Pennsylvania Constitution of 1776 focused on the structure of government and which groups would have the dominant policy-

1. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 42.

2. *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Justice Louis Brandeis, dissenting): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

making role in that government.[3] Though deriving much of its components from earlier contracts and charters offered by the colony's founder, William Penn, the Pennsylvania Constitution of 1776 established a new political organization and was representative of unique political thinking, culminating in a "radical" plan.[4] This to a large extent was a product of the special times in which the Pennsylvania Constitution was born.

Indeed, although the setting in which the first Pennsylvania Constitution was drafted was tense—a nation at war with Britain and invasion of the capital, Philadelphia, imminent—it was the festering political controversies regarding unique sectional social, economic, and religious differences, including the Quaker refusal to bear arms, that had existed in the colony for some time that fueled the constitutional convention.

During the early years of the colony, eastern Quakers and other wealthy merchants held dominant positions in the government. To the immediate west of the three original counties of Philadelphia, Chester and Bucks, German farmers of Reformed or Lutheran religious background made a comfortable living but followed the Quakers in politics. Yet to the far west, inhabited mainly by Scotch-Irish Presbyterians, lived small farmers who struggled under the burden of debt. Property qualification left many inhabitants unable to participate in politics and the general assembly, being heavily weighted to the eastern ruling oligarchy, which had twice the number of representatives as the west. This was even though the three eastern counties had scarcely more than the western counties in population. This lack of representation triggered calls for important reform within the colony by "radical elements"—inhabitants who were not from the eastern part of the colony. These unrepresented inhabitants over a period of time began not

3. Robert F. Williams, "The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism," *Temple Law Review* 62 (Summer 1989): 541, 544.

4. John L. Gedid, "History of the Pennsylvania Constitution," in *The Pennsylvania Constitution: A Treatise on Rights and Liberties,* ed. Ken Gormley et al. (Philadelphia: George T. Bisel, 2004), 32–37; Robert F. Williams, "Experience Must Be Our Only Guide: The State Constitutional Experience of the Framers of the Federal Constitution," *Hastings Constitutional Law Quarterly* 15 (Spring 1988): 403, 414. Many of the liberties that became a part of the first Pennsylvania Constitution had as their source the expressions of civil liberties that English citizens enjoyed as well as the documents drafted by William Penn, the sole proprietor of the land that included the colony of Pennsylvania. Such sources included the Magna Carta, signed in 1215, subjecting the sovereign to the law; the Petition of Right, signed in 1628; the English Bill of Rights of 1689; the Frame of Government of 1682; and the Charter of Privileges of 1701, all of which demonstrated Penn's goal of the formation of a democracy in Pennsylvania and his strong notion of individual liberties and formed the foundation of the constitution of 1776.

only to raise their voices in protest but also to organize politically, ultimately during the drafting of a new constitution.[5]

An additional ingredient in this constitution-making was the Whig theory of government, as advocated by Thomas Paine in *Common Sense,* which argued for "establishing simple, republican governments, operated by unicameral legislatures with a wide elective franchise in each of the colonies" and for a "utopian image of an egalitarian republican society." The keystone of this approach was the formation of a government consisting of a unicameral legislature, often attributed to Benjamin Franklin, which would be close to, and virtually represent, the people.[6] This approach was undergirded by the belief that there existed a tug-of-war between the people, who desired to expand their liberties, and the government, which sought to acquire more power. The Whigs also believed in the inherent possession of natural rights. Thus, even if the legislature did not recognize these rights, they existed and could not be stripped from the citizenry.[7] This concept of government played an important role in the first constitution. Thus, it was in these circumstances of inner turmoil, the cry for renunciation of the English monarchy, and the adoption of Whig notions of government that the first Pennsylvania Constitution was forged.

After the Continental Congress adopted a resolution that called for the colonies to reject English rule and adopt their own constitutions, Pennsylvanians were called on to separate from Britain, to elect representatives to draft a constitution, and to form a government "under the authority of the people."[8] After the drafting of the document that emerged as a result of the Pennsylvania Constitutional Convention was completed, the convention unanimously adopted it and proclaimed it as the Constitution of Pennsylvania. The citizenry did not vote on the Pennsylvania Constitution of 1776.[9]

The preamble of this first constitution expressed the purpose as the protection of the community and individuals who, it expressly provided, possessed "natural rights." Further emphasizing its focus on the individual, and the events that precipitated the document, the new government was to func-

5. Rosalind L. Branning, *Pennsylvania Constitutional Development* (Pittsburgh: University of Pittsburgh Press, 1960), 9–11.

6. Williams, "State Constitutions," 551, 556.

7. Gedid, "Pennsylvania Constitution," 39–40.

8. Thomas Raeburn White, *Commentaries on the Constitution of Pennsylvania* (Philadelphia: T and J. W. Johnson, 1907), xxii. The resolution provided: "*Resolved,* that it be recommended to the respective conventions of the united colonies, where no government sufficient to the exigencies of their affairs has been hitherto established, to adopt such government as shall, in the opinion of the representatives of the people, best conduce to the happiness and safety of their constituents in particular and America in general" (ibid.).

9. Branning, *Pennsylvania Constitutional Development,* 15–16.

tion without "partiality or prejudice" to any "particular class, sect, or denomination," and the constitution provided that the document could be amended only by the "authority of the people, fairly delegated."[10] Thus, the preamble embraced the Lockean (and later Whig) notion that popular sovereignty was the basis for the government and that the government derives all of its power from the consent of the people. Though well known in the colonies, this expression of Locke's social compact took on special meaning in Pennsylvania in light of the ongoing political tyranny existing in the commonwealth.[11]

The constitution also contained a declaration of rights that created numerous rights and duties for the people.[12] First, it set forth numerous and significant rights, both those then enjoyed by British citizens and new freedoms. These included the right to life, liberty, property, happiness, and safety; to assemble to discuss grievances and politics; to bear arms; and, perhaps most important, to religious freedom. Additionally, it described the duties of the citizenry, inter alia, to pay just taxes, to serve in the military, and to "continually oversee" state officials. Moreover, and importantly for Professor Lutz's "purpose" construct, the declaration of rights also contained general descriptions of the people's relationship to their government, and the nature of political authority in Pennsylvania.[13]

These provisions provided the fundamental Lockean and Whig notions that governmental power rests in the people. Thus, the government must be for the common benefit, not for any single part of the community; the community retains the power to change or abolish the constitution; the police power exclusively and inherently belongs to the people of the state; and all power of the state is derived from the people.[14]

Though some of these concepts were borrowed from the recently adopted Virginia Constitution, many were innovative or constituted a fresh approach to existing statements of individual liberties. Indeed, the declaration of the freedom of religion, more fully discussed below, was the most vigorous statement of the protection of religious liberty found in the newly emancipated colonies, and the provision for exemption from military service for conscientious objectors was a constitutional first. Finally, the con-

10. Gedid, "Pennsylvania Constitution," 42, citing "Concessions to the Province of Pennsylvania—1681," reprinted in William F. Swindler, ed., *Sources and Documents of United States Constitutions,* 10 vols. (Dobbs Ferry, N.Y.: Oceana Publications, 1979), 8:250–52.

11. Gedid, "Pennsylvania Constitution," 44–45.

12. For the complete text of the Declaration of Rights, as well as all of Pennsylvania's five constitutions, see the Pennsylvania Constitution Web page at the Duquesne University School of Law (http://www.paconstitution.duq.edu).

13. Gedid, "Pennsylvania Constitution," 42–43.

14. Ibid.

stitution contained a "Frame of Government" that contained structural provisions, born of the drafters' Whig ideas about the nature of government, namely, an elected unicameral house of representatives would exercise legislative power, and a president and council would exercise the executive power. Importantly, for purposes of defining the *public,* and in further recognition of the internal chaos in the commonwealth, anyone who paid taxes and met minimal residency requirements was entitled to vote, and the Frame of Government also mandated regular reapportionment. These provisions, and others, confirmed that the legislature was born of the people, and constituted protection against tyranny. As such, the only check on this "voice of the people" was the constitution itself.[15]

In the end, the Pennsylvania Constitution of 1776 was novel and distinct. On the one hand, the constitution provided a basis for the idea that a democratic constitution could be created that would contain no elements of "aristocracy" and the argument for a "simple people's government."[16] Yet it also served as a bellwether for the need for checks and balances on the legislature, and such checks were written into later state constitutions and into the U.S. Constitution. This perception was critical in constitution-making in that it made clear that a "majority could behave tyrannically, just the same as a monarch, and this forced the makers of later state constitutions and the federal Constitution to face the problem of controlling government power and preventing abuses of that power by not only power-seeking individual government officers, but also by government officials representing a majority of citizens who sought to take away the rights of minority groups in society."[17]

Though its provisions relative to the legislature and executive branch proved to be flawed, they were consequences of both the prevailing Whig view of government and the inner turmoil experienced by Pennsylvanians at this time. The concepts of representational proportionality as well as increased power of the franchise defined the *public.* Similarly, the Pennsylvania Declaration of Rights, one of the most influential of constitutional events in U.S. history, as well as the Frame of Government, defined not only the relation between the government and the people but also a way of life and a plan for a way of life. Indeed, the state's declaration of rights has been described as "exceedingly democratic."[18] Not only did the Pennsylvania Constitution embrace the notion of individual natural rights, but its adoption of this theory also had a profound influence on the citizens of Penn-

15. Ibid., 43–44, 45–49.
16. Williams, "State Constitutions," 547.
17. Gedid, "Pennsylvania Constitution," 49–52.
18. Ibid., 50.

sylvania as well as numerous state constitutions and the drafting of the U.S. Constitution.[19]

Independence: *Commonwealth v. Edmunds* as a Construct to Define a People through Their State Constitution

Related to the concept of liberty, as manifested in freedom from political tyranny through the creation of the first Pennsylvania Constitution, is the idea of independence, in this instance exemplified by state independence from federal domination. Drawing life from this earliest of constitutions, the Pennsylvania Supreme Court, the oldest court in North America, reinvigorated its creator through the seminal decision in *Commonwealth v. Edmunds,* and by doing so became one of the leaders in the New Federalism, the movement giving independent significance to state constitutional law.[20] This in turn directly impacted the citizens of the commonwealth and defined their way of life.

In 1991, in *Edmunds,* the Pennsylvania high court found that the "good-faith exception" to the exclusionary rule—a doctrine adopted by a majority of the United States Supreme Court in *United States v. Leon*—was at odds with the separate and distinct privacy guarantee of Article I, Section 8, of the Pennsylvania Constitution.[21] Although this holding was significant in and of itself, *Edmunds* set forth a construct by which litigants and courts, in both criminal and civil matters, would analyze state constitutional issues.[22]

Specifically, then justice, now chief justice, Ralph J. Cappy wrote for six of seven justices, rejecting *Leon,* and in doing so reaffirmed the critical importance of the Pennsylvania Constitution for the commonwealth's citizens and their way of life. The *Edmunds* court reaffirmed the core of the then emerging doctrine known as the "New Judicial Federalism" by explaining that states are free to "go beyond the minimum floor established by the federal Constitution." Justice Cappy stressed that it had become "both important

19. Williams, "State Constitutions," 561–80.

20. *Commonwealth v. Edmunds,* 586 A.2d 887 (Pa. 1991); Ken Gormley, "Foreword: A New Constitutional Vigor for the Nation's Oldest Court," *Temple Law Review* 64, no. 1 (1991): 215.

21. *United States v. Leon,* 468 U.S. 897 (1984); *Edmunds,* 586 A.2d at 888. In *Edmunds,* police arrested Louis Edmunds for possession of marijuana found in a greenhouse on his land (888–89). Though acknowledging that the search warrant at issue was defective on its face, the lower tribunals concluded that although the warrant was defective, the officers had relied in "good faith" on a warrant issued by a neutral and detached magistrate, and, thus, the federal "good faith exception" was satisfied.

22. See Ken Gormley, "Overview of Pennsylvania Constitutional Law," in *Pennsylvania Constitution,* ed. Gormley et al., 1–16.

and necessary that we undertake an independent analysis of the Pennsylvania Constitution each time a provision of that fundamental document is implicated."[23] Consistent with its three hundred–year heritage as a court protective of Pennsylvania's unique body of jurisprudence, the Pennsylvania Supreme Court in clear and unmistakable terms set forth a new paradigm consisting of four parts. This protocol, which was to be applied in all future cases in which constitutional issues were raised, offered the following unique factors for analysis: (1) text of the Pennsylvania constitutional provision, (2) history of the provision, including Pennsylvania case law, (3) related case law from other states, and (4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.[24]

Using this four-factor construct, the court in *Edmunds* concluded that the "good-faith exception" to the exclusionary rule would frustrate the guarantees found in the Pennsylvania Constitution's Article I, Section 8. The court, after noting the similarities in the federal constitutional text and the Pennsylvania text, but not considering itself to be bound thereby, stressed the historical constitutional embodiment of a strong notion of privacy. It thus rejected the then prevailing approach of the United States Supreme Court under the Fourth Amendment to the U.S. Constitution and reaffirmed a steadily emerging case law under the Pennsylvania Constitution emphasizing a right of privacy in the commonwealth that was dissimilar to and independent of concepts of deterring unlawful police conduct that was central to the U.S. Constitution's protections.[25]

The *Edmunds* construct contains critical aspects of state constitutionalism. The unique text of the organic document, as well as the historic underpinnings of the particular provision, serves to contextualize and give meaning to the subject at issue. Relevant decisions from sister states offer the results of laboratory experiments conducted elsewhere; they can be embraced or rejected or modified to suit the needs of the state. Finally, policy concerns are considered, including those local or regional in nature, that influence the interpretation of the constitution and offer the more practical aspects of a particular choice in terms of constitutional jurisprudence. These factors in turn directly impact the citizens' relationship to their government as well as their way of life as manifested by substantive decisions regarding constitutional law.

23. William J. Brennan Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90 (1977): 489; Ken Gormley, "New Judicial Federalism in a National Perspective," in *Pennsylvania Constitution,* ed. Gormley et al., 17–30; *Edmunds,* 586 A.2d at 894–95, citing *Commonwealth v. Sell,* 470 A.2d 457, 467 (1983).

24. *Edmunds,* 586 A.2d at 895.

25. Ibid., 888, 896–99.

What is particularly unique about the Pennsylvania Supreme Court's announcement in *Edmunds,* however, is that it represents a continuation in the ongoing distinct history of Pennsylvania constitutional adjudication. Whereas many other states were cutting their teeth with independent state constitutional law and New Judicial Federalism for the first time in the late 1970s, the Pennsylvania experience was not of such recent vintage. In numerous cases of import spanning the court's three hundred–year history, the court has continuously articulated and conducted an independent analysis of the commonwealth's constitution.[26] Subjects analyzed on state constitutional grounds, found primarily in the constitution's declaration of rights, most directly impact individuals' liberty interests. These topics include free speech[27] and press,[28] freedom of conscience and religion,[29] trial by jury,[30] right to counsel,[31] face-to-face confrontation of witnesses,[32] victim-impact statements,[33] the right to a speedy trial,[34] equal protection of the laws,[35] and, perhaps most commonly, freedom from unreasonable searches and seizures[36] as well as other topics regarding individual liberty.[37]

26. See Gormley, "Overview," 3–9.

27. See, for example, *Pap's A.M. v. City of Erie,* 812 A.2d 591 (Pa. 2002), striking public-indecency ordinance.

28. See, for example, *Respublica v. Oswald,* 1 Dallas 319 (1788), in which the publisher was not protected by the free-speech clause.

29. See, for example, *Brown v. Hummel,* 6 Pa. 86 (1847), in which a law enabling Lutheran synods to control a fund for orphans unconstitutionally prefers a particular religious sect.

30. See, for example, *Commonwealth v. Tharp,* 754 A.2d 1251 (Pa. 2000), regarding the commonwealth's right to trial by jury; and *Smith v. The Times,* 36 A. 296 (Pa. 1896), in which the trial-by-jury requirement was met even though the defendant left the courtroom before being charged.

31. See, for example, *Commonwealth v. Richman,* 320 A.2d 351 (Pa. 1974), regarding waiver of right to counsel; and *Stewart v. Commonwealth,* 11 A.370, 370 (1887), stipulating that the right to counsel applies to all criminal prosecutions.

32. See, for example, *Commonwealth v. Zorambo,* 205 Pa. 109, 54 A.716, 717–18 (Pa. 1903), ruling that evidence taken by deposition or commission is not admissible in criminal trials and that the prosecution's witness must be physically present in court.

33. See *Commonwealth v. Means,* 773 A.2d 143 (Pa. 2001), regarding victim-impact statements.

34. See *Commonwealth v. Hamilton,* 297 A.2d 127 (Pa. 1972), regarding the right to a speedy trial.

35. See, for example, *Limestone Co. v. Fagley,* 40 A. 977, 978 (Pa. 1898), ruling that a tax imposed on alien laborers violates the equal-protection clause of the Fourteenth Amendment as well as the "uniform tax" provision in the Pennsylvania Constitution.

36. See, for example, *Commonwealth v. Sell,* 470 A.2d 457 (Pa. 1977), regarding the "automatic standing" rule; *Commonwealth v. DeJohn,* 403 A.2d 1283 (Pa. 1979), involving the privacy of bank records; *In the Interest of D.M.,* 781 A.2d 1161 (Pa. 2001), regarding investigative stops; and *Commonwealth v. Rekasie,* 778 A.2d 624 (Pa. 2001), regarding electronic surveillance.

37. See, generally, Gormley, "Overview," 6–7.

Although in many cases the Pennsylvania Supreme Court has engaged in an *Edmunds*-type analysis yet has reached the same conclusions as the United States Supreme Court on a particular issue, this does not negate the state constitutional aspect of the decision.[38] Rather, it puts into place the distinct state constitutional interpretation so that if future federal case law would be inconsistent with guarantees found under the Pennsylvania Constitution, the state constitutional precedent would remain manifest and determine the outcome. Thus, the state constitutional decisions under *Edmunds* should be viewed not as reactionary to federal precedent but rather as a body of constitutional law that is independent and distinct from federal decisions and consistent with the parallel role for states in the New Judicial Federalism.[39]

The impact of *Edmunds,* not surprisingly, has transcended the borders of the commonwealth. *Edmunds* has been influential in assisting sister states in formulating their own brands of state constitutional justice.[40] For example, in Kentucky, where the Pennsylvania Constitution of 1790 served as the template for the declaration of rights of the Kentucky Constitution, the Kentucky Supreme Court has declared that Pennsylvania constitutional precedent is "uniquely persuasive" in analyzing its own state constitutional provisions. More recently, Minnesota was inspired by and embraced *Edmunds*'s groundbreaking approach to state constitutional law.[41]

Thus, though not embodied in the constitution itself, the Pennsylvania Supreme Court's decision in *Edmunds* has offered a construct by which to interpret the Pennsylvania Constitution. Furthermore, it has been the en-

38. See, for example, *Commonwealth v. Yastrop,* 768 A.2d 318 (Pa. 2001), regarding DUI roadblocks; and *Commonwealth v. Zhahir,* 751 A.2d 1153 (2000), regarding the "plain touch" exception.

39. Gormley, "Overview," 8.

40. *People v. Camarella,* 818 P.2d 63, 72–73 (Cal. 1991) (Mosk, J., dissenting), urging the state supreme court to follow the lead of *Edmunds* and other state decisions rejecting the good-faith exception to the exclusionary rule; *People v. Bullock,* 485 N.W. 2d 866, 871n10 (Mich. 1992), citing *Edmunds* in concluding that overreliance on federal precedent is an "obsolete" approach; *Davenport v. Garcia,* 834 S.W. 2d 4, 13n23, 20n53, 38n11 (Tex. 1992), citing *Edmunds* for the proposition that the court should look to federal precedent as persuasive authority only but ultimately rely on the state constitution; *Amberboy v. Societe de Banque Privee,* 831 S.W. 2d 793, 799 (Tex. 1992), citing *Edmunds* regarding the "independent vitality" of the Texas Constitution; *State v. Oakes,* 598 A.2d 119, 121n3 (Vt. 1991), citing *Edmunds* in rejecting good-faith exception to the exclusionary rule; *Saldana v. State,* 846 P.2d 604, 636–37, 655–56 (Wyo. 1993) (Urbigkit, J., dissenting).

41. See Ken Gormley and Rhonda G. Hartman, "The Kentucky Bill of Rights: A Bicentennial Celebration," *Kentucky Law Journal* 80, no. 1 (1991–1992): 1, 3–5; *Commonwealth v. Wasson,* 842 S.W. 2d 487, 492, 498 (Ky. 1993): "Because of the common heritage shared by the Kentucky Bill of Rights of 1792 and the Pennsylvania Bill of Rights of 1790 . . . [d]ecisions of the Pennsylvania Supreme Court interpreting like clauses in the Pennsylvania Constitution are uniquely persuasive"; and *Kahn v. City of Minneapolis,* 701 N.W. 2d 815 (Minn. 2005).

gine, albeit not the only engine, that has driven the growth of an independent, solidly constructed body of state constitutional law throughout the country. This independent approach to constitutional jurisprudence, with its focus on the unique nature of the state charter, has in turn affected the citizens of Pennsylvania and other states. Through the interpretation and protection of, inter alia, the individual liberties contained in the Pennsylvania Declaration of Rights, independent constitutional analysis has directly impacted the inhabitants of Pennsylvania and has served to define their way of life.

Virtue: The Right of Conscience as Defining a Way of Life

Every grade school student knows that the desire for religious freedom was the inspiration that drove the founding of the American colonies. All state constitutions limit the relationship between church and state and protect the individual's freedom of religious thought and practice,[42] but few know that the Pennsylvania Constitution was a pioneer with respect to religious liberty and was, is, and promises to be uniquely and fiercely protective of the commonwealth's inhabitants' right of conscience.[43]

The Pennsylvania Constitution has embraced and protected religious liberty through a variety of provisions that have evolved over time. In tracing the continuum regarding Pennsylvania's unique experience concerning religious freedom, the fingerprints of Pennsylvania's founder, William Penn, are evident. Stated another way, to understand Pennsylvania's view of religious freedom and how it defines a way of life in the commonwealth, it is essential to understand Penn's view of religious liberty.

Penn espoused the view that religious obligations should be outside of the control of the state and that political stability does not rely on one religious belief but would prosper if religious tolerance and liberty of conscience were embraced.[44] Penn learned firsthand the pain of religious intolerance. In England in 1670, when only twenty-five years old, Penn (a newly converted Quaker) and a friend criticized the Conventicle Act, which was an attempt to ensure the dominance of the Church of England. The men were prose-

42. Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses,* 2d ed. (Charlottesville, Va.: Michie, 1996), 205.

43. See William Bentley Ball, "The Religion Clauses of the Pennsylvania Constitution," *Widener Journal of Public Law* 3, no. 709 (1994); and Gary S. Gilden, "Religious Freedom," in *Pennsylvania Constitution,* ed. Gormley et al.

44. Gary S. Gilden, "Coda to William Penn's Overture: Safeguarding Non-Mainstream Religious Liberty under the Pennsylvania Constitution," *University of Pennsylvania Journal of Constitutional Law* 4, no. 1 (2001): 81, 91.

cuted for their actions, which by law were punishable by death. What should have been an easy case for the prosecutors led to the accused and the jurors being imprisoned when the jury would not return a verdict against Penn and his friend. Ultimately, the jury was freed after their writ of habeas corpus was granted and the verdict in favor of Penn upheld. This experience, one of six times Penn was imprisoned for expressing his views on religious tolerance, galvanized Penn's views on the right of conscience.

The laboratory for these views was established when Penn received a charter to Pennsylvania from the king—Penn's "Holy Experiment." Not only did Penn's colony promise religious freedom without fear of retribution, but Penn also sought out and became a safe harbor for the religiously repressed in addition to Quakers. Those partaking in Penn's "Holy Experiment" included Lutherans, Baptists, and various German sects as well as Roman Catholics who were unwelcome in Puritan New England.

Indeed, the predecessor documents to the commonwealth's first constitution made manifest Penn's dream that absent compelling reasons, toleration, that is, freedom from interference with religious worship, would rule the day and do so for the betterment of the society. These included Penn's Charter of Privileges in 1701 that guaranteed freedom of worship to those who believed in "One almighty God" and went as far as providing that "all persons who also profess to believe in Jesus Christ, the Saviour of the World, shall be capable . . . to serve this Government in any Capacity, both legislatively and executively." Similarly, the Body of Laws, adopted in 1682, offered that no one was to be discriminated against for his or her religious observations, yet, interestingly, the same document made observance of the Lord's Day binding on all and for the express reason that "Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province." Finally, the 1701 Pennsylvania Charter of Privileges went even further, providing that "all persons who profess to believe in Jesus Christ the Saviour of the World, shall be capable to serve this government in any capacity, both legislatively and executively." Thus, colonial Pennsylvania was a haven for religious tolerance, but it was unmistakable that it was religion and religious liberty that were the focus of these precursors to the Pennsylvania Constitution.[45]

That Pennsylvania's first constitution of 1776 drew heavily from the citizenry's deeply held religious practices and belief in the right of conscience comes as no surprise. Specifically, in the preamble to the 1776 constitution,

45. Ball, "Religion Clauses," 710. Ball incorrectly attributes the quotation to the Frame of Government of Pennsylvania of 1682. It is from the Delaware charter of 1701. For an in-depth discussion of these colonial precursors to the Pennsylvania Constitution, see Gilden, "Coda to Penn's Overture," 93–100.

the members of the constitutional convention set forth their purpose as constructing a governmental framework "confessing the goodness of the great Governor of the Universe (who alone knows to what degree of earthly happiness mankind may attain, by perfecting the arts of government)." Today's preamble, a product of the 1874 framers, continues to acknowledge the importance of religious liberty in the commonwealth: "We, the people of the Commonwealth of Pennsylvania, grateful to Almighty God for the blessings of civil and religious liberty, and humbly invoking His guidance, do ordain and establish this Constitution." This was not meant as meaningless window dressing; it was an intentional act on the part of the members of the convention, as "it was the desire of the members of the convention to go on record as recognizing the omnipotence and watchful care of the Almighty and to express gratitude for the protection which he had given them and to their forefathers."[46]

Stemming from its Quaker influence, and a constitutional first in the colonies, Section 8 of the original Pennsylvania Constitution dealt with a unique aspect of the right of conscience: "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent."[47] This protection of the conscientious objector remains part of the Pennsylvania Constitution today in Article III, Section 16, which provides for the general assembly to maintain a National Guard but "may exempt from State military service persons having conscientious scruples against bearing arms." Indeed, at the 1873 convention during which the current preamble was adopted, the framers rejected the requirement that an individual exempted as an objector to military service must pay an equivalent for personal services as well as an amendment that would have denied the objector the right to vote.[48] Thus, this provision makes manifest Pennsylvania's respect for the individual's religious faith and, more important, protection of the integrity of minority faiths, even over the government's interest in the security of the commonwealth itself.

Finally, and most important, it was Section 2 of the Pennsylvania Constitution of 1776 that declared religious freedom for the commonwealth's citizens—but only to a certain extent.[49] Focusing on the protection of religious

46. White, *Commentaries on the Constitution,* 29.

47. Ball, "Religion Clauses," 714.

48. Gilden, "Coda to Penn's Overture," 112–13.

49. Section 2 provided as follows: "That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding: And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent: Nor can any man, who acknowledges the being of God, be justly deprived or abridged of any civil right as a citizen, on account of his religious senti-

worship, this provision spoke in broad terms, offering that there exists an "unalienable right to worship Almighty God," prohibiting compulsory worship, and denying interference with respect to "the right of conscience in the . . . exercise of . . . worship." Deprivation of any civil right as a citizen on account of religious sentiments was prohibited, conditioned, however, upon the citizen acknowledging the being of God. This core recognition of the "indefeasible" right of religious conscience continues in even greater strength today.

Section 3 of Article I is the keystone regarding religious liberty in the current Pennsylvania Constitution: "All men having a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship; or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship." Through this positive statement of religious liberty,[50] Pennsylvania has embraced what can be considered as one of the broadest views of religious freedom in the United States and certainly one independent of the free-exercise clause of the U.S. Constitution.[51]

Evolving over time, this core liberty-of-conscience clause has continued largely unchanged. Although the provision implicitly limiting the protection of civil rights to those who acknowledged the existence of God was omitted in the constitution of 1790, this evidences only a broader, stronger protection of religious liberty. Indeed, unlike the U.S. Constitution, the Pennsylvania Constitution, like certain other state constitutions, speaks in terms of the "rights of conscience," which could possibly connote some kinds of deeply valued moral convictions, not religious in nature per se but nevertheless included in the constitutional prohibition on interference.[52]

This potentiality of an expanded view of protection for religious liberty, including minority faiths or nontraditional religious practices, has emerging support in Pennsylvania case law interpreting the constitution. Indeed, though beyond the scope of this chapter, not only has the Pennsylvania Constitution been interpreted independent of its federal counterpart, but Pennsylvania courts have also required greater than a mere rational basis for up-

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ments or peculiar mode of religious worship: And that no authority can or ought to be vested in, or assumed by any power whatever, that shall in any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship."

50. This can be compared to the First Amendment's limiting language that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

51. Gilden, "Coda to Penn's Overture," 114–15.

52. Friesen, *State Constitutional Law,* 4–5.

holding laws that have conflicted with an individual's right of conscience. Thus, the commonwealth must establish a compelling interest and the least-restrictive alternatives before infringing upon one's religious liberty.[53] Pennsylvania's nonpareil protection of the liberty of conscience is a product of the visionary William Penn. His "Holy Experiment" that is Pennsylvania is unique in terms of its history but continues as a haven for minority faiths, and perhaps even nonreligious liberty of conscience, which certainly defines a way of life in the commonwealth.

Conclusion

Pennsylvania's motto, Virtue, Liberty, and Independence, may be used to highlight Pennsylvania's unique constitutional experience. Exemplified by the quest for liberty in terms of the establishment of the *public,* independence in terms of constitutional thought that is separate from that of the U.S. Constitution in defining a people, and virtue in terms of Penn's "Holy Experiment"—a sanctuary for nonmainstream faith, in defining a way of life—the constitutional experience of Pennsylvania serves as a distinct and ongoing contributor to the constitutionalism of American states.

53. Gilden, "Coda to Penn's Overture," 123–24.

BORDER STATES

While the North and South moved in distinct historical directions, the border states wrestled with conflicting constitutional traditions in the same way that they wrestled with their place in the Union before, during, and after the Civil War.

Although similar in some respects to the constitutional separation of Maine from Massachusetts and Vermont from New York, the political separation of West Virginia from Virginia offers a case study in the constitutionalism of a border state. Although the westerners were mollified to a certain extent by the convention of 1851, the issue of slavery led to an irreconcilable divide between the East and the West.

The inclusion of Delaware in this section may surprise a few readers. Whereas Delaware's constitutionalism is rooted in Pennsylvania and the mid-Atlantic, its constitutional evolution is more reflective of a border state. Perhaps more so than any other state, the North-South divisions *within* the state of Delaware offer a unique opportunity to examine the issues that divided the nation as well as the resistance to the lure of the Confederacy.

DELAWARE

CAROL E. HOFFECKER AND BARBARA E. BENSON

Festina Lente

The Development of Constitutionalism in Delaware

Delawareans are used to the question of "Dela-where?" Their tiny state, which hugs the western shore of the Delaware Bay and River, is surrounded by the larger and better-known states of Pennsylvania, Maryland, and New Jersey. Delaware is the second-smallest state in landmass; it has only three counties, fewer than any other state; and its population is less than that of our nation's ten-largest cities. But Delawareans are proud to point out, and their license plate proclaims, that Delaware is "The First State," a distinction it earned in 1787 when the little state was the first to ratify the U.S. Constitution.

Within the context of Donald S. Lutz's theory of constitutionalism, Delaware's history is both complex and unique. It is a state in the Middle Atlantic region with both strong rural and urban elements that was also a border state during America's Civil War. Delaware's four adopted and two rejected constitutions tell the story of the journey of this one small state and its people from the seventeenth century into the twenty-first century.

Delaware was a small, obscure proprietary colony that developed its peculiar political and social traditions in harmony with loose and benign proprietary leadership. During the revolutionary era, Delaware's constitutional leaders maintained a conservative approach to governance, with the acquiescence of the general population. That conservative approach to governance still resonates over the centuries, for to this day the people have no direct power over their constitution.

There was nothing unique in the historic timing of Delaware's efforts to create and revise its frame of government during the past three hundred

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years, but the state's approach to constitution-making and the issues it considered or chose not to consider, approved or rejected, are a mirror of Delaware's particular history. Indicative of its border-state status, the demands of the southern, rural portion of the state to maintain its dominance over a growing urban, industrial, and ethnically diverse population in the northern portion of the state played out in the constitutions created or rejected during the nineteenth century. Over time, Delaware has made a journey toward democratization, yet as Richard Lynch Mumford, the state's closest reader of its constitutions and its constitutional conventions, has written, Delaware has consistently demonstrated "a reluctance to innovate" and a proclivity for "sectional clashes that have maintained the conservatism of its state constitutions."[1]

Colonial History

Unlike most of the thirteen colonies that formed the United States, Delaware was not initially English. In the seventeenth century the first European settlers of what became Delaware were Dutch and Swedes, sent by their respective countries to establish colonies in the New World. Both nations' colonies were ruled by governors who represented national or business interests or both that gave no thought to constitutionalism. In 1664 the English, led by James, Duke of York, the younger brother of King Charles II, gained control of New Amsterdam. The duke's men then sent a force to the Delaware River to conquer the Swedish and Dutch settlers there. The duke's government did nothing to establish a constitutional government in the Delaware colony, but English law was introduced. The three counties that Delawareans know today began to take their present form as courts created to administer the laws.[2]

1. Mumford, "Constitutional Development in the State of Delaware" (Ph.D. diss., University of Delaware, 1968), 4–6. Mumford's work continues to provide scholars with the most detailed description and analysis of Delaware's constitutions and the social and political milieu in which they were created. To understand Delaware's constitutional development in a broader historical and philosophical context, see Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988); and John Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2006).

2. For histories of the early settlement and governance of the territory that became Delaware, see Amandus Johnson, *The Swedish Settlements on the Delaware: Their History and Relation to the Indians, Dutch, and English, 1634–1664,* 2 vols. (New York: D. Appleton, 1911); John A. Munroe, *Colonial Delaware: A History* (Millwood, N.J.: KTO Press, 1978), chaps. 1–3; and C. A. Weslager, *Dutch Explorers, Traders, and Settlers in the Delaware Valley, 1609–1664*

In 1681 Charles II granted a huge piece of land to the Quaker proprietor William Penn. Penn's Province was to be located on the western side of the Delaware River north of the duke's "three counties." Thus, the duke's land separated Penn's Pennsylvania from the Atlantic Ocean. At Penn's request, in 1682 the Duke of York ceded his lands along the Delaware to Penn. The Quaker proprietor called this separate grant his "Territories," or his "Three Lower Counties on Delaware." Under Penn's management, Delaware's constitutional history was about to begin.[3]

Even as he was negotiating to acquire a colony in America, William Penn was giving a great deal of thought to the creation of its constitution, which he called the "Frame of Government." He consulted with men he respected and made a number of drafts of the frame before setting out for America with his fellow Quakers in August 1682. Penn was an idealist who had seen enough of the world to temper his idealism with realism. He consciously created a written constitution to be an improvement on Britain's unwritten fundamental law. As a member of a persecuted sect, religious liberty was his first and most important aim. He was also determined to provide a government that would balance his own powers and interests as proprietor with the liberties and needs of both ordinary citizens and more wealthy colonists.[4]

In the spring of 1682 Penn published his first Frame of Government.[5] It began with a preface that was in fact a tract on political philosophy and a justification for government. Mankind needs government, he said, to control evil and to move society toward God's ways of goodness. To succeed in

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(Philadelphia: University of Pennsylvania Press, 1961) and *The English on the Delaware, 1610–1664* (New Brunswick: Rutgers University Press, 1967).

3. The transfer of the Three Lower Counties on the Delaware was complicated because the Duke of York held those lands through conquest, not royal charter. This "clouded" title, as John A. Munroe delicately phrases it, required an arrangement of both deeds and leases, as well as a royal charter to the lands made to the Duke of York months after the transfer to Penn. The issue of title continues to reverberate in the current U.S. Supreme Court case of *New Jersey v. Delaware.* See Munroe, *History of Delaware,* 2d ed. (Newark: University of Delaware Press, 1984), 37–40; Munroe, *Colonial Delaware: A History,* 79–87; Charter Documents, RG 0000, ser. 006, Delaware Public Archives, Dover; and *New Jersey v. Delaware,* 126 S.Ct. 713 (2005).

4. From the summer of 1681 to the spring of 1682, Penn and his advisers drafted, critiqued, and redrafted the Frame of Government at least twenty times. Several of those drafts are included as Documents 26 and 27 in *William Penn and the Founding of Pennsylvania, 1680–1684: A Documentary History,* ed. Jean Soderlund (Philadelphia: University of Pennsylvania Press, 1983), 96–111.

5. The pamphlet was titled *The Frame of the Government of the Province of Pennsilvania in America: Together with certain Laws Agreed upon in by the Governour and Divers Free-men of the aforesaid Province* and is reprinted with annotation as Document 30 in *Penn and the Founding of Pennsylvania,* ed. Soderlund, 118–33.

meeting that goal would require more than just finding a balance among the three elements of monarchy, aristocracy, and democracy that vie for supremacy. "Any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion. . . . Governments, like clocks, go from the motion men give them. . . . [G]overnments rather depend upon men, than men upon governments. Let men be good, and the government cannot be bad."[6]

Penn's frame was forward thinking, combining his political theories with a progressive political framework. It established the principles of popular sovereignty and separation of powers. It included features such as a bicameral legislature, term limits, and, for the first time in history, a formal amendment process. It was, in the words of Donald S. Lutz, an "impressive" document that facilitated the rise of a "prosperous, highly diverse constitutional democracy." Voltaire, one of the greatest philosophers of the Enlightenment, admiringly credited Penn with bringing about a "golden age . . . so often talked so much about, and which has probably only ever existed in Pennsylvania."[7] Through his documents, Penn created a new polity, an alternative society that was more egalitarian than others, religiously tolerant, and pacifistic.

Yet for all his philosophizing about the goals of government and efforts to construct a workable frame, Penn's first effort was unrealistic. The proprietor envisioned a three-tier structure with himself at the top, as governor, joined to two lawmaking bodies elected by the colonists: a council and a general assembly. The council, the more powerful of the two, was to consist of seventy-two members. The assembly, as the democratic expression of the government, was to be a huge body of two hundred members. This was just too much, the colonists said, and in March 1683 Governor Penn, the Provincial Council, and the assembly agreed on a "Bill of Settlement" that included a reduction of the sizes of the legislative bodies to eighteen and thirty-six, respectively.[8]

The addition of the Three Lower Counties to Penn's domain did not appear to him to be a problem. Penn believed that he could fuse his province and his territories into a single whole. Pennsylvania was then divided into

6. Document 30 in *Penn and the Founding of Pennsylvania,* ed. Soderlund, 122.

7. Lutz, *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998), 271; Voltaire, *Letters on England,* trans. Leonard Tancock (Harmondsworth, England: Penguin Books, 1980), 34.

8. Document 62 in *Penn and the Founding of Pennsylvania,* ed. Soderlund, 240–14. For a fuller analysis of the complex interactions of Penn and the development of society and governments in his colony and territories, see Gary B. Nash, *Quakers and Politics in Pennsylvania* (Boston: Northeastern University Press, 1993).

three counties, which meant that Pennsylvania and the Lower Counties would have equal representation in the general assembly. In response to the proprietor's promise of liberties and of equality with the Pennsylvanians, the representatives elected from the Lower Counties agreed to an "Act of Union."[9]

The goodwill that characterized the early general assemblies could not be sustained. The two colonies did not grow together, but became ever more unlike one another. Pennsylvania attracted large numbers of Quaker settlers who built a strong economy based on commercial farming of grain, especially wheat, milling, and shipping from their fast-growing town of Philadelphia. Delawareans represented greater ethnic, religious, and economic diversity.

Delaware's three counties are stacked one upon another, each having the bay or river as its eastern border. Penn named the most southerly county Sussex and the middle county Kent. The most northerly, New Castle County, took its name from the town already established before Penn's arrival on the Delaware River. The northern part of New Castle County shares the same hilly landscape as that of southeastern Pennsylvania. Like southeastern Pennsylvania, its landscape is marked by rapid-flowing streams capable of sustaining mills. Its principal town of Wilmington became a smaller version of the commercial city of Philadelphia.

Most of Delaware's land, however, is flat coastal plain similar to Maryland's Eastern Shore, which borders Delaware to the west and south. Maryland's proprietors, the Calvert family, disputed Penn's claims to that land and awarded portions of it to settlers who created tobacco farms manned by slave laborers. Even after those settlers accepted the legitimacy of Penn's title, they continued to create a society similar to that of the Chesapeake Bay region.

Historic as well as geographical factors added to the emerging differences between Pennsylvania and the Lower Counties. With the Glorious Revolution of 1688 that toppled James II and brought William and Mary to the throne, England went to war with France. French privateers and pirates attacked the undefended coastline of the Delaware Bay and even ventured up the Delaware River as far north as the town of New Castle. Delawareans demanded defenses, but the Quakers who dominated the politics of Pennsylvania demurred.[10]

9. The Act of Union took effect in December 1982 (Document 50 in *Penn and the Founding of Pennsylvania,* ed. Soderlund, 192–93), and those "territories thereunto annexed" were duly included in the Second Frame of Government, a document initiated by the legislature and not Penn (Document 63 in ibid., 265–73; quote on p. 267).

10. For a concise summary of the development of Penn's Three Lower Counties, see Munroe, *Colonial Delaware: A History,* chaps. 4–5; and, particularly for its evolution of gov-

In the meantime, while William Penn was spending most of his time in England supporting his claim to Delaware against the Calverts, he gradually made concessions to his colonists respecting the Frame of Government.[11] Initially, the council shared many powers with the governor. Together they appointed judges, managed the treasury, and proposed legislation. The assembly had no powers except to vote up or down the bills sent to it. Those restrictions chafed assemblymen greatly, and in 1695 they defied the frame by taking up some measures on their own. Within a year, fearful of the consequences of the Glorious Revolution on his proprietorship to the Lower Counties, Penn granted the assembly the rights it demanded. Under the new frame of 1696 the assembly took on rights similar to those of the House of Commons in England. The assembly could now initiate legislation. It could also elect its Speaker, judge the qualifications of its members, and decide its time of adjournment.[12]

The reforms failed, however, to address the hostility that continued to fester between Pennsylvanians and Delawareans. When an increasingly disillusioned Penn returned to America in 1699 he found the situation so dire that he saw no way to reconciliation. In 1701 he issued a new Charter of Privileges. The charter altered the role of the council and enhanced the power of the assembly. Henceforth, the council would be advisory to the governor, but have no legislative power. In addition to granting the assembly exclusive legislative authority, the new charter permitted the representatives in the assembly from the Lower Counties and from Pennsylvania to meet as separate bodies if they could not reconcile their differences.[13] Thus, in 1704 Delaware's general assembly met for the first time as an official, constitutionally valid legislative body.

Delaware was unusual among England's American colonies in having a unicameral legislature.[14] In 1704, the council, which continued to be a vital

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ernment, Carol E. Hoffecker, *Democracy in Delaware: The Story of the First State's General Assembly* (Wilmington: Cedar Tree Press, 2004), 7–20.

11. Penn's battles with the British government, particularly the Board of Trade, Lord Baltimore, and the increasingly restive colonists in both his colony and his territories, and the resultant consequences to governmental structure, can be followed in Richard S. Dunn and Mary Maples Dunn, eds., *The Papers of William Penn,* 5 vols. (Philadelphia: University of Pennsylvania Press, 1981–1986), 3:439–94 (Documents 132–49, with annotation and analysis); Nash, *Quakers and Politics,* 89–206; and I. K. Steele, "The Board of Trade, the Quakers, and Resumption of Colonial Charters, 1699–1702," *William and Mary Quarterly,* 3d ser., 23, no. 4 (October 1966): 596–619.

12. Hoffecker, *Democracy in Delaware,* 14–15; Dunn and Dunn, *Papers of Penn,* Document 136, 3:456–66.

13. Dunn and Dunn, *Papers of Penn,* Document 30, 4:104–10.

14. Georgia's legislature was unicameral, as was Pennsylvania's after the council lost its legislative function in the Charter of Privileges of 1701.

part of the government of Pennsylvania, simply disappeared from the organization of the Lower Counties. Both colonies continued to have the same governor. Sometimes he was a member of the Penn family, sometimes someone William Penn or his descendants chose to represent them.

Delaware's assembly consisted of eighteen men, six chosen by the freemen in each county. In addition to being a free white male of at least twenty-one years of age, a voter was required to own fifty or more acres of land, including twelve or more cleared acres, or other valuables worth at least forty pounds. The voters gathered in their respective county seats to select their representatives. There were no election districts, which is to say that the elections were at large. A qualified voter could cast his ballot for any qualified resident of his county.

The assembly met annually in the town of New Castle. The body had the power to choose its Speaker, to judge the qualifications of its members, to appoint committees, to prepare and pass legislation, to determine its time of adjournment, and to utilize "all other Powers and Privileges of an Assembly according to the Rights of free-born subjects of England."[15] In addition to passing laws, the assembly chose the county judges, established county offices, and raised and managed the colony's modest finances.

Those powers were, of course, subject to the approbation of the governor. Each year he came down from Philadelphia to address the assembly's leaders, negotiate the adoption of legislation, and place the Penn family's seal on those bills that he approved, thereby turning bills passed by the assembly into law. His veto was absolute.

The system worked to the satisfaction of the colony's freemen until the disruptions in English-colonial relations that led to the American Revolution. Delaware was an obscure colony, hardly noticed in London. Its people had little reason to chafe under the Penn family's rule. Their representatives in the assembly did, however, object strongly to the Stamp Act as well as other usurpations of the colonial assembly's sole right to tax its people.[16]

Revolutionary Delaware

In the seven decades between Delaware's semiseparation from Pennsylvania and the breakdown of British rule, the population of the Lower Coun-

15. Hoffecker, *Democracy in Delaware,* 20–23; *Laws of the Government of New Castle, Kent and Sussex Upon Delaware* (Philadelphia: B. Franklin and D. Hall, 1752), 120–24 (quote on p. 124).

16. Munroe, *Colonial Delaware: A History,* chap. 6; Hoffecker, *Democracy in Delaware,* 28–40; Mumford, "Constitutional Development," 28–46.

ties increased to about thirty-seven thousand, including seven thousand people of African descent, and the society became more legally sophisticated. By the 1770s lawyers joined with farmers, doctors, and merchant-manufacturers in the assembly. It was those with legal experience as lawyers or judges who became the colony's major political leaders during the revolutionary era.

The Continental Congress voted on May 10, 1776, to adopt a new government. Delaware's assembly followed with its vote to separate from England a month later, on June 15. With that vote, Delaware ended its political connection not only to the British Empire but also to the Penn family, thus severing the new state's tie to Pennsylvania.

As elsewhere in the infant nation, Delaware's leaders moved quickly to create a state constitution. Believing that the assembly was not the proper place to create a new government, the assemblymen met in a special session and voted to call elections for delegates to a convention that was empowered to write a constitution. This step of "separating the fundamental law from ordinary legislation," in the words of Willi Paul Adams, was a great step forward in the practical development of modern constitutionalism.[17]

Most of those elected to attend the convention had been members of the assembly and were practical, pragmatic men, not firebrands. The leaders of the convention, George Read and Thomas McKean, both former assemblymen, were lawyers who lived in New Castle but had practiced their profession in the courts of all three counties.[18]

The convention met from August 27 through September 21, 1776. As was commonly done among the constitution-writing conventions in other states, its members created two committees: one to draft a declaration of rights, the other to draft the plan of government. There was much overlap among the members of both committees.

The document that emerged from their work bore resemblance to the constitutions being drafted in other states. That is hardly surprising, given the urgent need to act quickly to demonstrate the embodiment of the new states' and nation's goals while fighting a war against a powerful invader. Delaware's declaration of rights was pieced together from those recently

17. Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era,* trans. Rita Kimber and Robert Kimber (1980; reprint, Lanham, Md.: Roman and Littlefield, 2001).

18. Hoffecker, *Democracy in Delaware,* 42. Read and McKean, as well as Caesar Rodney, the three Delaware signers of the Declaration of Independence, had interacted with the leading colonial political thinkers of the 1760s and 1770s, including John Dickinson of Delaware and Pennsylvania, but in their words and actions they represented the dominant pragmatism of colonial leadership noted by Adams as a hallmark of eighteenth-century constitution-building (*First American Constitutions,* 118).

composed in Maryland and Pennsylvania. In other respects as well, the Delaware document bore resemblance to those of other states.

Delaware's constitution of 1776 is a relatively brief document of thirty articles. The men who created it were part of the revolutionary generation that sought to reform government by limiting its exercise of power. Their work, like that for the other emerging states, emphasized citizens' rights over government power, provided for separation of powers, and created a strong legislature coupled with a weak chief executive.[19]

Article I of the document proclaimed the new government's name as "the Delaware State," just in case anyone might doubt that the former Penn Territories was an independent sovereignty.[20] The constitution made no change in the qualifications to be a voter. This was to remain a government by and for white male owners of land or its equivalent.

Delaware was to have a two-house legislature, or general assembly, its members elected at large by county, as in the past. The lower house, called the house of assembly, was to consist of seven representatives from each county chosen for one-year terms. The upper house, called the council, was to consist of three members from each county chosen for three-year terms. Both houses were to elect the state's chief executive, called the president, whose term was for three years (Article VII).

The president had almost no independent powers. He could not veto legislation, and he was to be constrained by a privy council composed of two members selected by each house of the legislature. Should the legislators choose men among themselves to be privy councillors, they relinquished their seats in the general assembly. The president needed the consent of the privy councillors to call up the militia or to call the assembly into special session. The legislators, not the president, were to appoint the militia's generals and other field officers (Article IX).

The president and the two houses of the assembly by joint ballot were to appoint a statewide supreme court consisting of three justices as well as four justices per county for both the court of common pleas and the orphans' courts. The selection of justices of the peace was particularly complicated.

19. Hoffecker, *Democracy in Delaware,* 44; Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969), chap. 4.

20. *In Convention at New-Castle for the Delaware State Begun the 27th Day of August, 1776* . . . , (Wilmington: James Adams, 1776) (one of the few of the earliest printed copies of the document remaining is held by the Historical Society of Delaware, Wilmington); Harvey Rubenstein et al., eds., *The Delaware Constitution of 1897: The First Hundred Years* (Wilmington: Delaware Bar Association, 1997). For a full analysis of the constitution of 1776 in a broad political context, see Mumford, "Constitutional Development," 63–71. See also Randy J. Holland, *The Delaware State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 2002), 1–5.

The house of assembly was to nominate twenty-four persons for each county, and then the president, with the consent of the privy council, was to select twelve (Articles XII and XIII).

Although the constitution proclaimed religious liberty for Delaware's citizens, officeholders were required to take an oath attesting to their belief in the Trinity and in the divine inspiration of the Old and New Testaments (Article XXII). On a more liberal note, Delaware led the nation with a declaration written into its constitution that "no person hereafter imported into this state from Africa ought to be held in slavery . . . and no Negro, Indian, or Mulatto Slave ought to be brought into this State for sale from any part of the World" (Article XXIX).

There was to be no ratification process. The delegates simply mandated when the constitution was to go into effect and then ordered that nine hundred copies of the approved document be printed.[21] The constitution concluded in Article XXX with an innovation: an itemization of articles that were inalienable to citizens and unchangeable, as well as a process for amending those sections not protected. The amending process, the careful, conservative delegates decided, would not be easy: it required the assent of five-sevenths of the house of assembly and seven of the nine members of the council.[22] Their work completed, the delegates went home, passing state governance into the hands of the new general assembly to be elected in about six weeks' time.

When the war ended, tiny Delaware, hemmed in on all sides by larger states, championed a stronger national government where it would have equal power. The state's delegates played active roles in the Constitutional Convention held in Philadelphia during the summer of 1787. Delawareans pushed for equality among the states in the federal legislative branch, but were content to accept the compromise that gave the small states equal power in the United States Senate. Believing that it had gained as much as it could in convention, Delaware was eager to see the new federal government go into effect, helping that effort by becoming the first state to ratify the U.S. Constitution on December 7, 1787.[23]

21. Mumford, "Constitutional Development," 62–65.

22. Delaware and New Jersey were the first conventions that dealt explicitly with the issue of constitutional amendment (Adams, *First American Constitutions,* 137).

23. Hoffecker, *Democracy in Delaware,* 55–56; Munroe, *History of Delaware,* 77–80.

Constitutional Change

Initial Reform

Historic developments in both the state and the nation soon proved the weaknesses as well as the strengths of the constitution of 1776. As Delawareans saw their state government enmeshed in financial and administrative difficulties, it became clear that constitutional reforms were needed. Technically, that step was illegal since the constitution of 1776 offered only a process for constitutional amendment and not a mechanism for creating a new document. Yet the need was believed by so many to be so great as to justify such action. For Delawareans, "this right to change the fundamental frame of government . . . emerged . . . from the basic nature of society, the inherent right of the people, and the failure of the existing system."[24] With the U.S. Constitution and Pennsylvania's new constitution of 1790 as positive examples and guides, in 1791 the Delaware General Assembly called for the election of delegates to a constitutional convention. For the first time in the state's election history, any taxpaying, free, white male citizen was eligible to vote for delegates. The principles of county equality and at-large voting remained in place, however.

The thirty delegates, ten representing each county, met in Dover on November 29, 1791. It was a group experienced in governance and generally wealthy.[25] The most outstanding member was John Dickinson, a London-trained lawyer, Wilmington resident, and owner of large farms in Kent County who had played a leading role in the government of Delaware and the nation during the Revolutionary War era.

There was much on which most delegates could agree. They recognized the wisdom of the U.S. Constitution's emphasis on creating checks and balances among the three branches of government. They knew that the administration of the state required a stronger, more independent executive. There was no opposition to changing the name of the executive from president to governor or the houses of the legislature from house of assembly to house of representatives and council to senate in conformity with the practice of other states and the U.S. Constitution. The state's name was changed from the Delaware State to the State of Delaware.[26]

24. Mumford, "Constitutional Development," 104–12 (quote on p. 111).

25. For a detailed analysis of the delegates, see ibid., 113–20.

26. *Minutes of the Convention of the Delaware State, which Commenced at Dover on Tuesday the 29th Day of November, 1791* (Wilmington: Peter Brynberg and Samuel Adams, 1792); *Constitution of the State of Delaware, Adopted 1792,* printed in *Delaware Constitution of 1897,* ed. Rubenstein et al., appendix, 297–312.

To create a more balanced government, the convention increased the executive authority (Article III). They eliminated the privy council as an anachronistic encumbrance and increased the governor's authority to appoint officials and administer the state's business. The governor was given exclusive authority to appoint judges. The judiciary system was streamlined, and a new, separate Court of Chancery, a hallmark of the Delaware judiciary ever since, was added (Article VI).[27] The delegates refused, however, to give the governor the veto, and they made the state treasurer an appointee of the general assembly and answerable to the legislators.

Debate centered on issues that touched on the emerging differences between the more conservative, rural counties of Kent and Sussex and New Castle County, which already showed the signs of developing protourban, commercial, and industrial characteristics. It was the two lower counties that demanded the continuation of countywide elections, for to create election districts might have been a step away from the principle of county equality. A majority of the delegates from the southern counties also took a more conservative stance regarding extending the electorate to include nonlandowners. The delegates compromised by giving the vote to all white male taxpaying citizens, while creating property holding as a qualification for election to the senate. Delegates from Kent and Sussex also voted down efforts to include antislavery language in the document, even removing the statements against the slave trade that had been included in the constitution of 1776.[28]

When completed, the constitution of 1792 was longer, "more carefully written, more explicit, and better organized than that of 1776."[29] Like its predecessor, the constitution of 1792 was not made subject to a ratification process. The delegates did add a mechanism for subsequent constitutional conventions: the assembly could propose a convention, but the proposal then had to be voted on by the electorate at a general election. This mechanism maintained the principle that changes to the Frame of Government resided in the "authority of the people" (Article X). Amending the constitution remained in the hands of the legislators, but the document did add a level of indirect voter participation. Proposed amendments had to be printed and distributed three to six months before the general election held between the two legislative sessions mandated by the constitution. If voters felt

27. Holland, *Delaware State Constitution,* 7–8; William T. Quillen and Michael Hanrahan, "A Short History of the Delaware Court of Chancery," in *Court of Chancery of the State of Delaware, 1792–1992* (n.p., 1992).

28. Mumford, "Constitutional Development," 125–27.

29. Ibid., 146.

strongly on a proposed amendment, they could vote for legislators who reflected their sentiment.

It is clear that the delegates were familiar with Pennsylvania's constitution of 1790, even to the point of lifting some language directly from that document, but, as in their previous constitution, Delaware's convention produced a more conservative document. For example, the Delawareans ignored the Quaker State's inclusion of public education as a part of their new constitution. The constitution of 1792 reflected both the changing needs of society and the creation of the U.S. Constitution in 1787. Although there were additions to or deletions from the previous state constitution that suggested increasing democratization, Delaware's new constitution resulted more from practical than from liberal impulses. Strengthening executive powers, reorganizing the judiciary, and tightening requirements for legislative office would all fall into that category.[30]

Political Maturation and Constitutional Rejection

The constitution of 1792 proved more successful than its predecessor, but by 1830 newspaper editors were campaigning for revisions in the organization of the state's courts. In 1831 the general assembly acquiesced to those demands. Once more, citizens went to their respective county seats to elect ten delegates from each county to attend a convention to consider revisions to the constitution.

National and state politics had matured a great deal by the 1830s. This was the Jacksonian era, a time marked by the spirit of expanding democracy that produced a clear division between Old Hickory's populist reform-oriented Democrats and the more conservative anti-Jackson faction, who were soon to call themselves "Whigs." Those political divisions were strongly felt in Delaware, where the Democrats dominated in New Castle County, but the Whigs, led by John M. Clayton, the state's most powerful politician, outvoted them in Kent and Sussex.[31]

The delegates spent a great deal of time debating issues concerning the democratization of the government, such as whether to remove the taxpay-

30. Ibid., 135–46. Delaware's declaration of rights was not the focus of the constitutional convention, although there was some rewording to reflect, or copy, the federal Bill of Rights. Three notable deletions from the declaration of rights of 1776 were an independent judiciary, rights of the accused, and religious tests for public office. The new declaration appeared in nineteen sections as Article I, and the rights, like their predecessors, were declared as reserved powers.

31. Munroe, *History of Delaware,* 114–17; Mumford, "Constitutional Development," 154–71; Holland, *Delaware State Constitution,* 8–12.

er requirement for voters and the property-holding requirements for senators and some officeholders. Some delegates spoke out for democratization, but the more traditional, conservative approach almost always prevailed. The convention agreed to remove property limitations on officeholders but to retain them on members of the upper house. They modified, but did not remove, the poll-tax requirement for voters. Several proposed reforms went nowhere. A measure to afford blacks the right to jury trials was voted down by a large majority, allegedly on the grounds of economy. An effort by a few delegates to remove imprisonment for debt from state law also lost. Major reform issues of national interest such as public improvements, education, and temperance never reached the convention floor in Delaware. In short, as constitutional scholar Richard L. Mumford concludes, "The basic structure of Delaware government remained the same from 1792 to 1897 with the minor exception of a reorganized judiciary in 1831."[32] One of the provisions of the constitution of 1831 that helped ensure a continuation of the status quo was a revision of the process for initiating a constitutional convention. Article IX of the constitution made it necessary for a majority of all eligible voters, not just a majority of those who voted, to vote at a special, not a general, election to approve the calling of a constitutional convention. John M. Clayton championed this change, which he saw as raising the sovereignty of the people over political parties, but the end result simply fueled partisan fighting and public confusion for the rest of the century.[33] Despite that concern for popular sovereignty, the convention ignored the legislature's suggestion that its work be submitted to the voters for approval. It did as all previous conventions had done: simply passed the new constitution into law.

In the next two decades reform-minded politicians and newsmen persisted in their demands for change, especially to eliminate the poll tax and to reapportion the legislature to reflect the growing disparity in population between the more urban, industrial New Castle County and rural Kent and Sussex Counties. In 1852 during a brief period of Democratic ascendancy in the general assembly, a call went out for a new constitutional convention.[34]

32. Mumford, "Constitutional Development," 153, 198. See also *Debates of the Delaware Convention for Revising the Constitution of the State of Delaware or Adopting a New One* (Wilmington: Samuel Harker, 1831); and *Amended Constitution of the State of Delaware* (Wilmington: R. Porter and Son, 1831), reprinted in *Delaware Constitution of 1897,* ed. Rubenstein et al., appendix, 313–33. Other changes included reducing meetings of the General Assembly from an annual to biennial cycle and lengthening the terms of governor and senators from two to four years (Hoffecker, *Democracy in Delaware,* 88).

33. For a fuller discussion of this debate, see Mumford, "Constitutional Development," 189–93.

34. The General Assembly followed the requirement in Article IX of the constitution for a referendum on its proposal for a constitutional convention. The voters approved the mea-

When the delegates to the convention were chosen, however, the Whigs were in control, which meant that the majority represented the party that had opposed the very creation of the convention.

Political and sectional differences among the delegates produced bitter battles, particularly over reapportionment and the question of whether the general assembly should be allowed the power to abolish slavery. The majority voted to create legislative districts and to give New Castle County a larger proportion of legislators, though not as many as the northern county's population warranted. The delegates approved a number of progressive or populist measures, including abolition of the poll tax, popular election of the judiciary, and easier processes for amending the constitution or calling constitutional conventions. On the other hand, they refused to take away the legislature's authority over slavery.[35]

For the first and only time, Delaware's voters were given the opportunity to ratify the completed constitution. Since the document contained something for political leaders of both parties to hate or fear, they roused the state's voters to reject the constitution of 1852.

Civil War Constitutionalism

The Civil War and Reconstruction period, which saw significant rewriting of state constitutions in the South, passed by in Delaware without the state initiating any alterations in its fundamental law. Delaware remained loyal to the Union, but the state's general assembly, its majority controlled by rural legislators from Kent and Sussex Counties, rejected all attempts to vote down slavery.[36] President Lincoln's Emancipation Proclamation ended slavery only in the rebellious states. The border states of Maryland and Missouri ended slavery on their own. Delaware and Kentucky share the dubious distinction of being the only states where slavery remained legal until the passage of the Thirteenth Amendment to the U.S. Constitution in 1865.

The late nineteenth century saw the maturation of iron- and coal-based, steam-powered industry in the United States. Wilmington, Delaware, shared in the nation's industrial development. The city lay along a major rail net-

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sure, but not at the level required by Article IX. After legislative debate, the Democratic majority forced approval of the convention call. That inability to comply fully with Article IX helped doom the effort (Holland, *Delaware State Constitution,* 12–13; Munroe, *History of Delaware,* 121).

35. *Debates and Proceedings of the Constitutional Convention of the State of Delaware* (Dover: G. W. S. Nicholson, 1853); Holland, *Delaware State Convention,* 13–15; Munroe, *History of Delaware,* 122–23.

36. Hoffecker, *Democracy in Delaware,* 99–115.

work and had direct access to ocean shipping via the Delaware River. Wilmington's factories produced railroad equipment, tanned goods, and steam-powered ships. The city attracted immigrants from Europe as well as migrants from nearby rural areas. The rest of Delaware remained an environment of small towns, farms, tidal marshes, and forests.

By 1890 the inequality in representation in the general assembly compared to the population in the counties had reached scandalous proportions. Of the 168,493 persons who populated the state, 58 percent lived in New Castle County. Wilmingtonians made up 63 percent of the residents of their county. Put another way, the combined populations of Kent and Sussex Counties represented 42 percent of the state's population but controlled 66 percent of the votes in both houses of the assembly.[37]

The issue of inequality of representation was a major reason to rewrite the state constitution, but there were other reasons as well. There were growing demands on the state government to take responsibility for improving public education, for building and maintaining a prison and a mental hospital, and for protecting farmers from diseases to their crops and herds. Compared to the constitution of 1776, the constitution of 1831 had empowered the executive, but it was becoming necessary to enhance the governor's powers further by making the office of governor more congruent with that of most other governors and that of the president of the United States.

Two other matters that demanded changes in Delaware's constitution grew out of scandals that wracked state politics in the 1890s: notorious vote buying and manipulation of the legislature to provide specially designed charters to individual corporations. The man who personified those problems was a political carpetbagger, a gasworks owner from Philadelphia named John Edward O'Sullivan Addicks. He created a faction within the Republican Party in Delaware through vote buying. His goal, ultimately futile, was to secure election to the U.S. Senate through the Delaware General Assembly.[38]

The restrictive process put in place in the constitution of 1831 required the legislature to go through the three-year process to amend the constitution to move the time of the required referendum from a special to a general election. That accomplished, in 1893 the general assembly enacted the enabling legislation to begin the constitutional revision process. When voters went to the polls for the regularly scheduled election of 1894, they also voted on the

37. Munroe, *History of Delaware,* appendix 1, 273.

38. In Delaware the General Assembly chose the state's U.S. senators until the Seventeenth Amendment to the U.S. Constitution was added in 1913, which mandated popular election of senators.

question of holding a constitutional convention. With the voters' approval, the assembly mandated the usual ten-delegates-per-county at-large format to select the members of the convention.[39]

The convention met in the statehouse in Dover from December 1896 through June 4, 1897. The delegates met far longer than those of any of the previous conventions, and they eventually produced a constitution far longer and more detailed than any of its predecessors. The convention's published minutes show that most of the discussion focused on the issues of reapportionment and the reformation of the political process.[40] The delegates also listened respectfully to speakers for groups that came before them, particularly advocates of the single tax and women's rights. Speakers for woman suffrage included Carrie Chapman Catt, the leader of the national movement, but in the end the men were not persuaded by their arguments but remained convinced that women should stay in their homebound "sphere."[41]

The constitution of 1897 rebalanced the powers of the three branches of government to conform more closely to the federal model. The document created the office of lieutenant governor to parallel the role of the vice president in the national government (Article III). Article III also enlarged the power of the governor to include the veto. The delegates from the southern counties agreed to accept that addition to gubernatorial power only with a proviso to reduce the number of legislative votes needed to override a veto to three-fifths, rather than the more common two-thirds.

After much discussion the delegates adopted several measures designed to restore integrity to the state government. In hopes of ensuring the "purity of the ballot," they did away with the poll tax and created a rather cumbersome process to prosecute those accused of bribing voters (Article V, Section 1). The constitution called for the general assembly to cease granting

39. Holland, *Delaware State Constitution,* 16; Munroe, *History of Delaware,* 166; Mumford, "Constitutional Development," 299–300.

40. In addition to the published record of the convention (*Debates and Proceedings of the Constitutional Convention of the State of Delaware,* 5 vols. [Milford, Del.: Milford Chronicle Publishing, 1958]), readers can turn to briefer summaries, and analyses, including Mumford, "Constitutional Development," 321–69; Holland, *Delaware State Constitution,* 16–21; and Hoffecker, *Democracy in Delaware,* 128–35. The constitution of 1897 moved beyond a bill of rights and the traditional articles delineating the three branches of government to add sections on corporations (Article IX), education (Article X), agriculture (Article XI), and health (Article XII). Those new areas reflected increasing state interest and responsibility. In all, the constitution of 1897 contained sixteen articles.

41. In 1920 the General Assembly again rejected woman suffrage by failing to ratify the Eighteenth Amendment to the U.S. Constitution, but it became the law of the land without the First State's support. See Carol E. Hoffecker, "Delaware's Woman Suffrage Campaign," *Delaware History* 20 (Spring–Summer 1983): 164.

special acts of incorporation and to adopt a general incorporation statute at its next meeting (Article IX). In the interest of fairness and professionalism, the constitutional writers also removed the assembly's power to grant divorces and placed that power in the courts (Article II).

The constitution of 1897 made only minor changes in the organization of the state courts. It replaced the Delaware Court of Errors and Appeals with a supreme court to be composed of a chief justice and two other judges who had not heard the case being appealed. The constitution maintained the chancellor's responsibility for the orphans' court. It increased the state judiciary from five to six members, all to be chosen by the governor and confirmed by the senate. In place of the previous appointment of judges for good behavior, the 1897 document created renewable terms of twelve years (Article IV).

The most important change written into the new constitution was the creation of districts for the purpose of electing members of both houses of the general assembly, coupled with a tiny step toward the principle of fairer representation. The new senate was to have seventeen members, five each from the three counties plus two from the city of Wilmington. The Delaware House of Representatives would have thirty-five members, ten from each county plus five from Wilmington. Countywide at-large elections were replaced by election from districts. The district lines were explicitly defined in the constitution itself (Article II). That scheme ensured that a rural minority would continue to control the legislature. It was, in the words of John A. Munroe, "a defensive bulwark thrown up by old, rural, agrarian Delaware against the new, urban, industrial elements of the state, a defense of the few against the many, of the poor against the rich, of the traditional against the innovative."[42]

Perhaps the most unusual elements in the constitution of 1897 lay in the formulas it established for the constitution's acceptance and revision. In keeping with Delaware's past procedures, there was to be no opportunity for the voters to accept or reject the finished document. The delegates could satisfy themselves with their appeal to past precedent on this vital matter, but what really must have concerned them was the near certainty that if put to a vote, a majority of New Castle County residents, and most especially those who lived in Wilmington, would reject the document for its extremely unfair distribution of legislative seats. To make it nearly impossible for the northern county to revise that imbalance, the constitution provided a daunting amendment process. First, a proposed amendment had to pass with a two-thirds majority in the general assembly. Then the contents of the amendment had to be advertised in the press before the next election. Fi-

42. Munroe, *History of Delaware,* 168.

nally, the next legislature had to pass the amendment, again by a two-thirds majority. Furthermore, it would take a two-thirds vote in the general assembly to call a convention to revise the constitution, and that convention would be constituted so as to maintain the majority of Kent and Sussex Counties (Article XVI).

Contemporary Constitutionalism

Rural-urban conflict is, of course, a staple of the internal politics in many states. In 1962 the U.S. Supreme Court ruled in a landmark case, *Baker v. Carr,* that the state of Tennessee must reapportion its legislative districts to achieve the goal of "one man, one vote" that the Court found inherent in the equal-protection clause of the Fourteenth Amendment. Delaware responded by proposing a legislative alignment based on the federal analogy whereby seats in the house of representatives would reflect the state's population, whereas in the senate the counties would have equal representation. After all, the state's lawyers argued, Delaware had historically been the "Three Lower Counties." Writing for the majority in the case *Roman v. Sincock,* Chief Justice Earl Warren dismissed such reasoning, saying that "there never was much and there is now no sovereignty in the Counties of Delaware."[43] Subsequently, Delaware's legislative districts have been redrawn each decade to reflect the most recent U.S. Census.

The constitution of 1897 was written at a time when the state faced many issues and problems, some of which were particular to that moment in time. The section on local option (Article XIII), for example, provided for the possibility that liquor laws might differ in jurisdictions throughout the state. In time, this as well as many other sections of the constitution came to seem anachronistic. To the twentieth-century mind the document was too long, too detailed, too old-fashioned in its language, and in some places just plain out of date.

By the mid-1960s the constitution of 1897 had been amended more than forty times, which led to a consensus within the state's legal community, with which leading political figures concurred, that it was time to rewrite the constitution. With the one-man, one-vote issue off the table, the general assembly agreed. But this time the general assembly decided to use the amendment process to, in essence, create a new frame of government through textual change rather than proceed with the more cumbersome constitutional convention process. To that end, the legislature passed a bill, approved by the governor, establishing the Delaware Constitutional Revision Commission.

43. *Baker v. Carr* 369 U.S. 186 (1962); *Roman v. Sincock,* 377 U.S. 695, 709 (1964).

The commission was composed of fifteen members selected by the governor and by legislative leaders to represent the three counties and Wilmington. Thus, a commission of fifteen appointed members was to substitute for the thirty-member convention mandated in the constitution of 1897. The argument for this procedure was that the smaller commission could encourage public participation while being more efficient.[44] The commission members worked assiduously throughout 1968 and early 1969 to create a new document designed to preserve the main features of the current constitution while adding some amendments and discarding those parts that the members considered outmoded or unnecessary.

Governor Russell W. Peterson called the general assembly into special session on October 9, 1969, to consider the commissioners' recommendations. Two-thirds of the legislators approved twenty-four of the sixty-six proposals put before them.[45] The revised constitution had passed its first hurdle. In 1971 two-thirds of the successive legislature agreed. It looked as if Delaware had a new constitution, but the state supreme court thought otherwise. It ruled that the document had not been published properly within the constitutional requirements. On those grounds, the court declared the new constitution to be invalid.[46] As a former state governor and a legal scholar who observed the document's demise have noted, "The proposed constitution never became law but instead died quietly."[47]

Thus, Delaware has chosen to retain its constitution of 1897. The document has been amended to overcome its most flagrant anachronisms and to bring the state government into line with modern life. Despite the changes in the state's population and development of its economy that have brought new needs and problems to be resolved by the government, there has been no impetus to revise the state constitution since the ill-favored effort of 1968–1970. Delawareans have simply learned to make the best use of their verbose and antiquated, but serviceable, basic law. When someday Delaware does create a new constitution, it might well do so under precedent dating back to 1776: enactment without voter approval.

44. Elbert N. Carvel and Helen L. Winslow, "Constitutional Revision Commission of 1968–69," in *Delaware Constitution of 1897,* ed. Rubenstein et al., 225; William F. Swindler, ed., *Sources and Documents of United States Constitutions,* 10 vols. (Dobbs Ferry, N.Y.: Oceana Publications, 1973–1988), 2:270; William W. Boyer, *Governing Delaware: Policy Problems in the First State* (Newark: University of Delaware Press, 2000), 74.

45. Carvel and Winslow, "Constitutional Revision Commission," 228.

46. "Opinions of Justices," 330 A.2d 764 (Del. Sup. Ct. 1974).

47. Carvel and Winslow, "Constitutional Revision Commission," 228.

PENNY M. MILLER AND AMANDA L. COOPER

Constitutionalism in Kentucky

Adapting an Archaic Charter

Throughout Kentucky's divisive and tumultuous history, its southern political culture has affected its constitutions and constitution-making.[1] In most of this predominantly rural state, Kentucky presents the classic example of the traditionalistic political culture in which government is permitted an active role, primarily that of maintaining the old social order and the patriarchal status quo.[2] As in most southern states, the political culture of the commonwealth has not fostered major political and social change. Instead, political affairs have remained chiefly in the hands of established elites, whose members claim the right to govern through familial ties or social and economic position. A persistent feature of Kentucky's traditionalistic political culture is a highly personalistic rather than ideological brand of politics.

Much of present-day Kentucky, its vegetation, demographics, culture, and politics, reflects its border-state position, lying just below the Mason-Dixon line and stretching from the Allegheny Mountains to the Mississippi River. Louisville, Lexington, and the metropolitan areas of northern Kentucky just across the river from Cincinnati have a flavor of northern urban areas, whereas eastern Kentucky is mired in poverty, and the rest of the state clings to its southern traditions. The state, with its nearly four million residents, has long lacked a well-diversified economy, being heavily dependent on coal, agriculture (especially tobacco), whiskey, and spotty manufacturing. Al-

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1. This chapter draws on an earlier one: Penny M. Miller, "Kentucky's Constitutions and Constitution Making," in *Kentucky Politics and Government: Do We Stand United?* (Lincoln: University of Nebraska Press, 1994), 81–98.

2. Daniel J. Elazar, *American Federalism: A View from the States,* 3d ed. (New York: Harper and Row, 1984), 118–19.

though the years since 1990 have brought major growth in the service industries, Kentucky still lags behind most of the country in its efforts to diversify.

Kentucky's four constitutions—1792, 1799, 1850, and 1891—each reflected the state's then current economic base and distinctive political culture. Often there were classic examples of the traditionalistic mode, with occasional reflections of the individualistic political culture of the Ohio River cities.[3] According to Daniel J. Elazar, Kentucky's pattern of constitution-making most resembles the "southern contractual pattern," "which began with a general penchant for changing constitutions and was enhanced to do so because of the disruption of constitutional continuity caused by the Civil War." Elsewhere, Elazar states,

> Kentucky's first constitution [1792] was fully within the eighteenth-century tradition of sharp, spare liberal documents. Its subsequent constitutions not only followed the accepted nineteenth-century patterns but accepted the southern version of those patterns, increasingly adopting the southern model of constitutions and constitution making. Because Kentucky did not secede during the Civil War, it did not go through the radical constitutional changes of secession, reconstruction, and restoration that sister states in the South did. But by the end of the century it had incorporated the same changes as the other Southern constitutions did.[4]

Typical of southern state politics, Kentucky witnessed swings between oligarchy and factionalism, and Kentucky particularly overcompensated by adopting constitutional rules usually reserved for ordinary legislation.

Although at least forty states have replaced or significantly revised their existing constitutions since 1950, Kentucky's 113-year-old constitution has eluded wholesale revision by voters five times since 1931. The implication should not be that what persists is an entirely antediluvian, ineffectual document. On the contrary, the document has been repeatedly rendered applicable to contemporary times and issues, particularly through employment of the amendment process and by court decision. Exploring the effectiveness of the present constitution of Kentucky first requires an examination of this document relative to its historical evolution.

3. Ibid., 115–17.

4. Elazar, "The Principles and Traditions Underlying State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 20–21; quote by Elazar in Miller, *Kentucky Politics and Government,* xx.

The Evolution of the Kentucky Constitution

The Constitution of 1792

After almost a decade of heated negotiations, Kentucky and Virginia finally came to terms on their legal separation.[5] In drafting the constitution, the popularly elected, politically inexperienced delegates borrowed extensively from provisions in other state constitutions. In fact, "a full 75 of the 107 sections of the constitution were taken, verbatim or substantially, from the Pennsylvania charter [of 1790]."[6] A recent arrival from Virginia, slave owner and attorney George Nicholas wrote most of the original constitution, a brief eighteen-page document with a minimum of legislative detail, modeled on the U.S. Constitution. Thomas Jefferson wrote Kentucky's separation-of-powers clauses, drawn heavily from proposals rejected in Philadelphia.[7] Kentucky would have a legislature, a judiciary, and an executive, and these branches would have distinct powers.[8]

In terms of limitations placed on the government, the legislature appears to be the most constrained. Unlike the U.S. Constitution, the Kentucky Constitution of 1792 attempted to curb legislative power and the common people by requiring the senate's election (like the governor's) indirectly by an electoral college.[9]

For the first time in any American state, the constitution of 1792 gave the elective franchise free of property qualifications, provided for a secret ballot, and granted all free males over the age of twenty-one the right to vote,

5. "As the constitutional debate began in 1790, Kentucky remained an inchoate society. There had been no long period of seasoning in which people of different origins might form social and political networks. Political institutions were weak, political experience scanty. Bitter divisions had submerged the political fortunes of the few gentlemen who had engaged in any constitutional explorations" (Joan W. Coward, *Kentucky in the New Republic* [Lexington: University Press of Kentucky, 1979], 12).

6. Robert M. Ireland, *The Kentucky State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1999), 2.

7. Sheryl G. Snyder and Robert M. Ireland, "The Separation of Governmental Powers under the Constitution of Kentucky: A Legal and Historical Analysis of *L.R.C. v. Brown*," *Kentucky Law Journal* 73 (1984–1985): 206.

8. As written in Section 27, "Powers of government divided among legislative, executive and judicial departments. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another." As written in Section 28, "One department not to exercise power belonging to another. No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances herein expressly directed or permitted."

9. Miller, *Kentucky Politics and Government,* 83.

which, even if by technicality, included Kentucky's small population of free black males. In addition, religious tests for public office were prohibited. To make voting accessible, the delegates included a stipulation that elections might extend over a period of as much as three days in order to allow citizens outside the towns an effective franchise.[10]

The framers included a broad bill of rights at the end of the document; twenty-seven of the twenty-eight sections were borrowed from the Pennsylvania Constitution of 1790. The individual liberties granted in this constitution have solidly remained, as "the Bill of Rights has changed little since its incorporation into the first constitution."[11]

As a majority of the forty-five delegates were slave owners, "slavery clearly became one of the most important issues in the 1792 convention, with the only roll-call vote taken upon its constitutional guarantee." Unlike the Virginia Charter's clause, the Kentucky model became, "all men, when they form a social compact, are equal."[12] Emancipation was not prohibited but was allowed only within a limited scope of application. Article IX prohibited the general assembly from providing for the emancipation of slaves without the consent of, and full compensation to, the owner. The legislature had the right to prohibit the domestic as well as the foreign slave trade.[13] "Other slave states found Kentucky's model so useful that virtually every southern state that joined the Union after 1800 contained both Kentucky's version of the Bill of Rights and Kentucky's section on slave emancipation."[14]

The drafters of the first constitution anticipated an early dissatisfaction with the charter's doctrines. Although there was no provision for adding individual amendments, a provision was included for a reexamination of its terms after five years by another convention. The 1792 constitution would remain, in its entirety, until "the overwhelming popular endorsement of a convention call in the legislatively decreed referenda of 1797 and 1798."[15]

10. Furthermore, restrictions were placed on candidates for sheriff, senator, and representative. These potential officeholders were prevented from campaigning to reduce the possibility of corruption in the election process (Carl P. Chelf, "The Kentucky Constitution," in *Kentucky Government and Politics,* ed. Joel Goldstein [Bloomington, Ind.: College Town Press, 1964], 22). See also George L. Willis, *History of Kentucky Constitutions and Constitutional Conventions* (Frankfort, Ky.: State Journal, 1937).

11. Ireland, *Kentucky State Constitution,* 23.

12. Coward, *Kentucky in the New Republic,* 36, 42–43. The Virginia Charter states that "all men, equally free and independent, enter into a state of society."

13. Further, a clause that required humanity toward the slaves, by its mere inclusion in the constitution, solidified the continuing presence of slavery as an institution in Kentucky (Richard P. Dietzman, "The Four Constitutions of Kentucky," *Kentucky Law Journal* 15 [January 1927]: 118).

14. Coward, *Kentucky in the New Republic,* 166.

15. Ireland, *Kentucky State Constitution,* 5.

The Constitution of 1799

Numerous social, economic, and political factors contributed to the call for wholesale constitutional revision. Kentucky's population had increased yearly by 27 percent during the first eight years of statehood.[16] Furthermore, all three branches of government created by the first constitution came under attack in the years immediately following its inception. The judiciary found itself censured for improper involvement in land deals. Thus, when the gubernatorial election of 1796 was contested due to an ambiguous constitutional provision, the court of appeals did not have the moral authority to settle the issue. In addition, the Kentucky Senate had "approved a controversial land sale (never approved by the House), delayed passage of a popular land claimants statute, and approved a legislative pay raise."[17]

Most of the delegates at the monthlong convention in July 1799 were typical nineteenth-century politicians—property owners, farmers and planters, and respected leaders in their own counties; all but one were slaveholders. The most dramatic result was, again ironically, a profound dedication to slavery that was perceived as essential to proper exploitation of the land.[18] The delegates adopted almost verbatim the original constitution's slavery protections.

Several regressive features were incorporated into the 1799 constitution. "The right to vote that had been allowed to free blacks, mulattoes, and Indians under the first constitution was taken away."[19] The method of voting was changed from the secret ballot to viva voce, and the bans that had been placed on canvassing for elective offices were lifted. In short, prior measures taken to defend against corruption in elections were reversed.

Several appointive local offices—sheriffs, county attorneys, jailers, and coroners—were created; power was returned to the county courts. The theretofore-abandoned Virginia model of local government was now perceived by convention members "to provide cheaper and more efficient government."[20] The electoral college was abolished, and the people (that is, free

16. *The Constitution of the Commonwealth of Kentucky,* Information Bulletin no. 59 (Frankfort, Ky.: Legislative Research Commission, 2002), 1.

17. Ireland, *Kentucky State Constitution,* 5. To the people, the senate had become a privileged, yet undemocratically elected, club for the rich.

18. Having gained government experience in local offices and state legislative positions, many were now primarily concerned with advancing their "ambitions, both for themselves and for Kentucky, which required a continued expansion of the economy and of the labor force to work it" (Miller, *Kentucky Politics and Government,* 84).

19. Chelf, "The Kentucky Constitution," 23.

20. Coward, *Kentucky in the New Republic,* 163–64. For an in-depth analysis of the power of county governments, see Robert M. Ireland, *The County Courts in Antebellum Kentucky* (Lexington: University Press of Kentucky, 1972).

white male voters) now would elect the governor, the lieutenant governor (a new office), and members of the state senate. Though suffrage was denied anyone except free white males, that guarantee was "made broad and precise: The Constitution of 1799 was the first state charter to define precisely how the principle of representation by numbers could be implemented."[21]

The legislature was now propelled to the forefront of the government. Although the executive veto was upheld in the second constitution, its override was now allowed by a simple majority of each chamber of the legislature. Judges were still appointive offices to be filled by the governor, with the consent of the senate. In response to its controversial decisions in land dealings, the court of appeals was removed of its original jurisdiction in such matters.[22]

The framers of the second constitution made modification of their final product more difficult than their predecessors.[23] The voters, "fearing that a constitutional convention would abolish slavery," rejected the call of a referendum law passed by the legislature in 1837.[24] Approval for a new convention call would not be met again until 1849.

The Constitution of 1850

In an environment of increasing violent conflicts over slavery, strengthening of oligarchic county courts, and escalating state debts, voters approved convention-call referenda in 1847 and 1848, and the delegates convened in 1849 to draft the third constitution of Kentucky.[25] As in the two previous conventions, most of the ninety-eight delegates were slave owners. Further support to the institution of slavery was lent in a new section to the bill of rights: "Not even the largest majority can exercise arbitrary power over the lives, liberty and property of free men."[26] Suffrage was again restricted to free white males.

With the creation of county courts in the second constitution and the new

21. Coward, *Kentucky in the New Republic,* 167.

22. Chelf, "The Kentucky Constitution," 24.

23. "A majority of the total membership of each legislative house needed to approve a call within 20 days of the beginning of a session, and a majority of all citizens casting votes in the annual legislative election needed to approve a call in two successive years" (Ireland, *Kentucky State Constitution,* 5).

24. Ibid., 5–6.

25. Sources for the constitution of 1850 include Carl R. Field, "Making Kentucky's Third Constitution" (Ph.D. diss., University of Kentucky, 1951); Ireland, *County Courts;* and Albert D. Kirwan and John J. Crittenden, *The Struggle for the Union* (Lexington: University Press of Kentucky, 1962).

26. Ireland, *Kentucky State Constitution,* 8.

emphasis placed on local government, local oligarchies flourished. Local and state officials, too, became sources of frustration due to the proliferation of nepotism. Through Kentucky's continuing practice of "musical chairs," politicians in both state and local governments rotated from office to office and to appointive positions when they lost elections. With the adoption of the long ballot, the framers sought to avoid these undemocratic phenomena by classifying all state and local positions, except for the secretary of state, adjutant general, and the latter's staff, as elective offices.[27]

Distrust of the legislature emerged again. A sixty-day limit on legislative sessions was imposed. One-half of the thirty-eight senators and one hundred representatives were to be elected biennially. Some special legislation was prohibited for the first time; however, small-town delegates defeated proposals directed at further limiting the legislature because they found their own legislators could wield influence for the benefit of rural constituents.[28] The legislature was also authorized to make state criminal law and procedures more uniform.[29]

Another issue the delegates faced was the incursion of debt on the state and local levels for infrastructural improvements. Since the state had invested in a myriad of disastrous transportation projects, the framers placed a limit of five hundred thousand dollars on contracted debts by the legislature.[30] In regards to public education, the third constitution designated that the superintendent of public instruction become a popularly elected statewide officeholder.[31] In addition, a stipulation was attached to the Common School Fund whereby each county would receive an equitable share of the fund, strictly for matters of education.[32]

Once again, no provision for piecemeal amendment of the document was included. A constitutional convention would remain as the only available means of enacting reform. However, for the first time in the constitutional

27. In addition, all state officials except the treasurer (who would serve two years) would be subject to four-year terms, and the governor would, as before, be barred from succeeding himself. A prerequisite was also set that all court-of-appeals and circuit-court judges should be lawyers.

28. *Official Report of the Proceedings and Debates in the Convention to Adopt, Amend, or Change the Constitution of the State of Kentucky* (Frankfort, Ky., 1850), 786–88.

29. The General Assembly was granted the power to afford appellate jurisdiction over felony cases to the court of appeals. In conjunction with this grant, the General Assembly was also given a directive to appoint commissioners to organize a statewide code of criminal procedure (Ireland, *Kentucky State Constitution,* 7).

30. Chelf, "The Kentucky Constitution," 24.

31. This attention to public education marked its first appearance as a constitutional issue.

32. Miller, *Kentucky Politics and Government,* 86–87.

history of Kentucky, the document was submitted to the voters, who overwhelmingly ratified the constitution in 1850.[33]

The Constitution of 1891

As early as 1867, the governor sought a new constitutional convention because many details of the third constitution became obsolete, especially regarding slavery. In this rural state still torn by lingering hatreds from the Civil War, three problems predominated: new private industrial forces, government corruption, and central legislative power. "Corporations [particularly railroads] were becoming a new and powerful entity; the state treasurer had recently absconded with most of the treasury; the General Assembly was passing out special legislation." In fact, "the General Assembly of 1883–1884 generated a typical legislative work product. Of the 1,540 statutes enacted . . . nearly ninety-four percent concerned local or private matters."[34] Moreover, counties were created at will with barely enough revenue to sustain autonomous existence.

In an atmosphere of violence and division, the framers of the constitution of 1891 produced a "rambling document designed to curb government rather than to guide it, a collection of restrictive statutes rather than an outline of principles." Seven times longer than the U.S. Constitution, the fourth charter is "marked by neither its wisdom nor its grace."[35] The mostly rural, politically experienced delegates met for eight months and drafted a massive document that was composed of 272 sections with 22 different headings. "The document defined and distributed the powers of the state among its governmental branches, set forth the powers and duties of local government, and the rights of individuals. In addition, it contained a mass of legislative detail."[36]

The current fourth charter meets the constitutional requirements identified in Lutz's theoretical framework. The following is a more detailed analysis of the constitution of 1891 and its amendments.

Establishing Democracy in a Traditionalistic Environment

The Kentucky Constitution of 1891 established a democracy based on the ideals of republicanism. It adhered closely to the basic framework for Ken-

33. Dietzman, "Four Constitutions of Kentucky," 123.

34. J. William Howerton, "Constitution Reform: A Mission Impossible," *Kentucky Journal* (May 1989): 17; Snyder and Ireland, "Separation of Powers," 168–69.

35. John Ed Pearce, *Divide and Dissent: Kentucky Politics, 1930–1963* (Lexington: University Press of Kentucky, 1987), 14–15.

36. *Constitution of Kentucky,* Information Bulletin no. 59, 6.

tucky government that was provided in the first three charters. Jefferson's provisions about the separation of powers were readopted (Sections 27 and 28). Regarding local government, "counties, cities, and school districts, are legally subdivisions of the state government. They derive their power from the state, and can do only those things specifically permitted by the Constitution and the General Assembly."[37]

The legislature. Sections 29–68 of the constitution of 1891 dealt specifically with the legislative body. According to Section 29, "The legislative power shall be vested in a House of Representatives and a Senate, which, together, shall be styled the General Assembly of the Commonwealth of Kentucky." The general assembly was delegated the responsibility of dividing the state into one hundred representative districts and thirty-eight senatorial districts, with one general assembly member elected to represent each district (Sections 33 and 35).[38]

The executive. Sections 69–108 of the constitution of 1891 concerned the executive branch of government. Section 69 stated, "The supreme executive power of the Commonwealth shall be vested in a Chief Magistrate, who shall be styled the "Governor of the Commonwealth of Kentucky." Section 72 detailed the qualifications for the office of governor.[39] The fourth charter "enlarged the power of the Governor.[40] More importantly, the Constitution gave future Governors, faced with much greater and unforeseen demands on state government, the opportunity to expand significantly the powers of their office."[41] The governor was given a bolstered line-item veto whereby he would "have the power to disapprove any part or parts of appropriation bills embracing distinct items." In addition to the governor and lieutenant governor (Section 70), the constitution of 1891 provided for a host of other constitutional executive officers: treasurer; auditor of public accounts; secretary of state; commissioner of agriculture, labor, and statistics; and attorney general (Section 91).

37. Ibid., 10.

38. Qualifications for the office of representative require candidates to be at least twenty-four years of age and to have resided in the state for at least two years. Further, the candidate must have resided in his representative district for one year at minimum (Section 32). The prerequisites for the office of senator are quite similar; however, a candidate must be at least thirty years of age and have resided in the state for six years prior to his election to office (Section 32).

39. Any gubernatorial candidate must be at least thirty years of age and have been a citizen and resident of Kentucky for at least six years prior to his election.

40. The governor was delegated the ability to appoint other inferior officials as deemed necessary (Section 93). The governor was also given the duty of informing the General Assembly on the state of the commonwealth and of making recommendations for their legislative action in an approaching legislative session (Section 79).

41. Snyder and Ireland, "Separation of Powers," 171–74.

The judiciary. The constitution of 1891 vested the crux of judicial action in a court of appeals. The general assembly was forbidden from creating any courts in addition to those provided for in the constitution, so the former superior court was abolished. Furthermore, the framers of the 1891 constitution "provided for a somewhat overlapping set of quarterly courts, county courts, justice of the peace courts, and police courts."[42] Although courts were established with respective governmental powers and a sort of judicial organization was set, it was a complicated, oftentimes legally redundant system that would ultimately find itself in need of a major overhaul by a constitutional amendment in 1975.

Following the Southern Contractual Model

The document ratified in 1891 readily filled its constitutional function in defining the parameters of its regime and establishing the basis of authority for that regime. The three previous constitutions differed greatly from the fourth in their language regarding both the state itself and from what mandate the state would derive its power. The preamble to the constitution of 1792 read as follows: "We, the representatives of the people of the State of Kentucky, in Convention assembled, do ordain and establish this Constitution for its government." The constitution of 1799 did little to elaborate on the previous preamble, except to add a further purpose of the document, that being "to secure to all the citizens thereof the enjoyment of the right of life, liberty, and property, and of pursuing happiness." The constitution of 1850 adopted the language of the previous document verbatim. The constitution of 1891, however, made three distinct alterations to the model set forth in the previous three constitutions. The preamble to the 1891 document asserts: "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution."[43]

The first three charters referred to the representatives of the people as being the authority from which the words set out in each document were derived. The fourth charter, however, omitted the term *representatives* and adhered strictly to the ideal that the people are the constructors of their own regime. The label "state" was no longer applied to the entity the constitution would govern; rather, Kentucky was now labeled a "commonwealth."

This basic tenet of republicanism is also found in the bill of rights in both

42. *Constitution of Kentucky,* Information Bulletin no. 59, 8.

43. *A Citizen's Guide to the Kentucky Constitution,* Research Report no. 137 (Frankfort, Ky.: Legislative Research Commission, 2005), 3.

its preamble and Section 4. The preamble states "that the great and essential principles of liberty and free government may be recognized and established." Section 4 declares, "All power is inherent in the people, and all free governments are founded on their authority."[44]

Also included in the fourth document for the first time in the constitutional history of Kentucky was reference to a religious authority as being the grantor from whom all rights, including individual rights as well as the basic ability to assemble any sort of government, are resultant. Though a sort of religious authority was cited, a careful separation of church and state was respected as well. Section 1 of the bill of rights, second subsection, provides people the "right of worshipping Almighty God according to the dictates of their consciences." In addition, Section 5 of the bill of rights reinforces freedom of conscience to an even greater degree.[45]

Limiting Government Power in an Atmosphere of Violence and Division

The constitution of 1891 fulfills its function of limiting the power of government. The bill of rights has endured minimal change over the course of the constitutional evolution of the state. However, "the framers placed the Bill of Rights first, not last as in the previous constitutions, in order to emphasize the importance of individual liberties."[46] The bill of rights contains twenty-six sections that protect individual liberties against governmental interference.[47] Additionally, any law found to be contrary to the constitution shall be considered void.

44. Ibid., 6.

45. Ibid., 7. "No preference shall ever be given by law to any religious sect, society or Denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed; and the civil rights, privileges or capacities of no person shall be taken away, or in anywise diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience."

46. Ireland, *Kentucky State Constitution,* 23.

47. Section 1 of the Bill of Rights outlines the precise inalienable rights of the people that include rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceable assembly, redress of grievances, and bearing arms. The people are also granted the right to privacy against unreasonable searches and seizures (Section 10). Section 6 guarantees that all elections shall be conducted in such a manner that facilitates their being free and equal to all citizens. Section 3 prohibits any exclusive privilege from being endowed to any individual or group of individuals. The quartering of soldiers is also prohibited (Section 22). Section 7 as well as Sections 11–21 concern the legal rights retained by the people. Included in these are the right to trial by jury, the right to a day in court,

The constitution of 1891 set out to curtail the perceived failures of the general assembly. The fourth charter prohibited most types of local and private legislation by proscribing twenty-eight types of such legislation and by generally making most other types of local and private laws difficult to enact (Section 59). Laws that the legislature was not trusted to pass were locating or changing a county seat, regulating trade or labor, regulating interest rates, and granting a charter to any corporation (Section 59). Limitations were placed on the future establishment of counties. Legislative sessions were still to be held biennially and could not exceed sixty days (Section 36); only the governor could call special sessions and determine their agenda. Whereas the first three constitutions had provided that "all laws for raising revenue shall originate in the House of Representatives," the fourth constitution was more specific. It required that taxes "shall be uniform on all property." The constitution also set a state debt limit of five hundred thousand dollars and a ceiling of five thousand dollars on salaries of state employees.

The Slavery-Citizenship Disconnect

Kentucky's current constitution defines citizenship by defining voter qualifications. In the first three charters, the issue of citizenship largely revolved around the issue of slavery. However, since the fourth charter was ratified after the Civil War, Section 25 of the bill of rights was added, declaring, "Slavery and involuntary servitude in this State are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted."[48] The ratification of the Fourteenth, Fifteenth, Nineteenth, and Twenty-sixth Amendments to the U.S. Constitution have affected Kentucky's definition of citizenship, as blacks, women, and those eighteen and older have been given the right to vote.[49] According to Section 145, "Every citizen of the United States of the age of eighteen years who has resided in the state one year and in the county six months" shall be afforded the right to vote provided he or

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and the rights to reasonable bail and the freedom from cruel punishments. Also included in this range of protections is the proscription of ex post facto laws and a protection of habeas corpus unless in times of war.

48. This clause should not suggest that former slaves and all free blacks were then guaranteed the right to vote; however, its inclusion in the constitution of 1891 implies a federally mandated move toward equality and citizenship for the black male population of Kentucky. "The authors of the 1891 Constitution of Kentucky never attempted to circumvent the 15th Amendment, as some states have done, by the use of burdensome residence and registration requirements" (*Constitution of Kentucky,* Information Bulletin no. 59, 14).

49. Citizenship as defined by the constitution of 1891, though of a more expansive nature than in past documents, was still limited to males. According to Section 145, "Every male citizen of the United States of the age of twenty-one years who has resided in the state one year, and in the county six months," shall be afforded the right to vote.

she is registered. The list of those prohibited from voting includes persons convicted of treason, a felony, or bribery in an election; persons incarcerated at the time of an election; or persons judged mentally incompetent.

Managing Intergovernmental Conflict and Establishing an Amendment Process

While the constitution of 1891 protects the rights of the people against governmental intrusion, it also provides for the management of any conflict that may arise between the branches of government. The constitution of 1891 creates three distinct branches of government, each of which has its own operational boundaries (Section 27). In addition, the document declares that no one department of government shall retain any power belonging to another branch: "No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted" (Section 28). Although the separation of powers is evident, the constitution of 1891 also provides for a system of checks and balances.

Further observance of this system of checks and balances can be found in the constitutional language referring to each of the three departments. For example, bills must pass through and be signed by both the senate and the house of representatives before they are submitted to the governor for signature (Sections 46 and 56). The governor is also furnished the right to reject entire bills or specific items within bills as he deems proper. However, he is given a time frame of ten days to do so. Otherwise, the bill shall be law. In addition, the general assembly is given the ability to reconvene after the governor rejects a bill, and if the bill is again approved by a majority of each of the chambers, the bill shall become law regardless (Section 88).

The constitution of 1891 also provides for an amendment process for reform. Amendments must originate within the general assembly. Any proposed amendments must be published ninety days prior to the date when a vote is to be taken on them (Section 257). The method of revision by constitutional convention is also retained. A majority of the members of each chamber of the legislature must concur that a convention is needed, and then voters must also agree (Section 258). The amendment process has been the overwhelming choice for reform, and that process itself has even been the subject of reform.

Reform Since 1891: Lack of Change and Absence of Political Activism

The constitution of 1891 has changed fundamentally on many occasions, mainly through the amendment process. Overall, seventy-six amendments

have been proposed since 1891. Of these proposals, thirty-nine have passed. Court decisions have also played a major role in bringing the constitution up to date with contemporary times and issues.

Although the constitution of 1891 provides for wholesale revision by constitutional convention, this mode of change has been unsuccessful. The first attempt to secure a constitutional convention came in 1931 and failed by a vote of nearly four to one. Attempts to call a convention were also met with resistance in 1947 and 1960. In addition to the convention, an interesting hybrid method of amendment has failed consistently: efforts to propose wholesale revisions through the work of appointed bodies, but not formal convention. The general assembly created a constitutional review commission, but this commission was abolished in 1956. Voters rejected the proposals of the fifty-member Constitution Revision Assembly in 1966. Yet another attempt at revision by commission failed in 1977. In 1987, the Special Commission on Constitutional Review was created by the Legislative Research Commission. However, in 1988, "the General Assembly approved (at the governor's request) the amendment to repeal the ban on lotteries, and ignored the other 76 proposals of the Constitutional Review Commission."[50]

The Role of Constitutional Amendments

Where wholesale constitutional revision has failed, revision by piecemeal amendment has succeeded.[51] The most significant of these reforms will be detailed at length. As early as 1903, the first amendment to the constitution of 1891 was passed. This amendment authorized the general assembly to provide by general law for the levying of license fees and franchise taxes by cities and counties based on the income derived from property or other resources. Indeed, "local government and taxation constitute the categories that most frequently serve as the subject of proposed amendments."[52] In 1984 voters approved an amendment allowing for the succession of sheriffs, and in 1986 they approved an amendment permitting most statewide mayors to serve three successive terms. In addition, voters accepted an omnibus reform of local government structure and financing provisions in 1994.

50. Malcolm E. Jewell, "Reviewing the Constitution," *Kentucky Journal* (May 1989): 2. For additional information, see *Report of the Special Commission on Constitutional Review,* Research Report no. 226 (Frankfort, Ky.: Legislative Research Commission, 1987).

51. Amendments can be proposed by members in either house of the legislature. If approved by a three-fifths majority in both houses, amendments are submitted to the voters for ratification in the next election for members of the house. If approved by a majority of those voting, amendments become a part of the constitution.

52. Ireland, *Kentucky State Constitution,* 14.

Voting has also served as a frequent subject of amendments. In 1941 voters approved the use of voting machines, and in 1945 they authorized the general assembly to provide for absentee voting. In 1955 voters approved lowering the legal voting age to eighteen and passed another provision, which had been rejected in 1923, that removed the word *male* from the suffrage clause. In 1979, voters lent their support to an amendment that would increase the number of amendments to be voted on in one election to four, and "rendered the amendment process even more flexible by providing that a single amendment could cover several related subjects."[53]

The executive branch has also been significantly reformed by constitutional amendment. In 1992, a major omnibus reform of the executive branch and election schedule was approved, including succession for all statewide officers, joint election of governor and lieutenant governor, even-year elections for all but statewide officers, and abolition of the position of elected superintendent of public instruction. In addition, in 1949, voters approved an amendment providing higher limits for the salaries of statewide officials.

The legislative branch has also been meaningfully affected by the amendment process. In 1979, the voters approved the Kenton Amendment that "institutionalized the interim committee system which is the bedrock of legislative independence."[54] In addition, voters approved an amendment specifying that all legislators were to be elected in even-numbered years.[55] In 2000, voters passed an amendment establishing annual legislative sessions, to be held in odd-numbered years, for a period of thirty days. In addition to procedural changes made within the legislative department, voters also approved mandates to that department, such as a 1935 amendment requiring the general assembly to sanction old-age pensions.

Although no area of the government has been left untouched, the judiciary has been the branch most profoundly affected by constitutional amendment. In 1975, the entire state court system was restructured and unified. "In one swift step, Kentucky moved from the ranks of the nation's most outdated judicial systems to one of its most progressive."[56] A four-tier structure was set in place, with the state supreme court as the court of highest authority, to be followed by the court of appeals, the circuit courts, and the district courts. The chief justice of the supreme court was given authority over both the executive and the administrative functions of the system. What had

53. Ibid., 16.

54. Miller, *Kentucky Politics and Government,* 90.

55. This amendment would also allow for the regular legislative session to last for sixty days over a span of three and a half months.

56. Paul J. Weber and Delta S. Felts, "The History of Structures of Kentucky's Court System," in *Kentucky Government and Politics,* ed. Goldstein, 107; see also pp. 106–16.

once been the court of appeals now became the supreme court. A new court of appeals was to be composed of two judges from each of the state's seven appellate districts. This court, typically in panels of three judges, would hear appeals from the circuit courts.

The county courts, police courts, and quarterly courts that had been established in the constitution of 1891 were abolished and replaced by the circuit and district courts. In this system, one district court was to be included within each circuit court division. District courts were to be separated into distinct divisions—probate, civil, small claims, and criminal, among others—where all divisions would be presided over by the same judges with assistance from the same clerks. This new system would allot every party to litigation the right to at least one appeal, from the district court to the circuit court or from the circuit court to the court of appeals. Also, in 2002, an amendment was ratified that permitted the supreme court to designate family court divisions within judicial circuits.

The Role of the Judiciary

The courts have provided another safety valve to allow constitutional development without a new constitution. The Kentucky Constitution of 1891 has been effectively changed by U.S. Supreme Court decisions that either directly or indirectly declared certain Kentucky constitutional provisions to be in violation of the U.S. Constitution or of federal law. Such voided provisions include those regarding separate schools for black and white children, apportionment of the state legislature, a permissive local poll tax, and lengthy residency requirements for voting.

Kentucky Supreme Court decisions have also served as catalysts for reform that otherwise would not have occurred. The court's alterations to the state charter are extraordinarily important. In general, it is not excessive hyperbole to say that "courts have performed spectacular legal gymnastics to make the Constitution workable in today's world. 'Judicial interpretation' might more accurately be called 'judicial stretching.'" Barriers created by the 1891 constitution, which was principally concerned with an effort to rein in the powers of government, are especially subject to this treatment of "judicial stretching." In *City of Louisville v. Sebree* (1948), for example, the court allowed local government to tax professions, based on their income, despite a specific constitutional prohibition of income taxes. In *Matthews v. Allen,* the court allowed the legislature to raise the salaries of officers whose salaries were limited by the constitution, permitting a "rubber dollar" computation, under which the increase in the consumer price index can be added to the constitution's salary limits. Many of the constitution makers' clear but rigid

proscriptions have been avoided by grafting legal "logic" onto otherwise rigid language.[57]

No better example of the court's variation from inflexible enforcement to practical accommodation can be found than in the area most central to the court itself: the relationship between the judicial branch and the other branches of government. In the case of *Ex parte Farley* (1978), the supreme court restricted the power of the general assembly. The case involved the Open Records Law, which required all government agencies to operate in full public view. The court found, however, that the records "generated by the courts in the course of their work are inseparable from the judicial function itself, and are not subject to statutory regulation." Similarly, in the case of *Ex parte Auditor of Public Accounts* (1980), the supreme court noted that although it sometimes allows the legislature to govern in its sole province as a matter of comity, this case would not be held as such. In essence, the "auditor's attempt to audit the accounts of the Kentucky Bar Association was an unabashed attempt by an executive officer to interfere in the judicial process."[58]

Perhaps the most notable of the separation-of-power cases was *Legislative Research Commission v. Brown* (1984) in which the Kentucky Supreme Court held that the general assembly "may not perform or undertake to perform the executive or judicial act of government." The general assembly was not permitted to constitute the Legislative Research Commission "as a fourth branch of government, and empower that fourth branch to supervise the executive during the interim between legislatures."[59] Thus, a limiting function with regard to the legislature was performed by the court.

Social change has also been mandated by the Kentucky Supreme Court by enforcing long-ignored constitutional provisions. The most profound example is the court's decision in *Rose v. Council* (1989), declaring unconstitutional the state's entire educational system. The issue of education was neglected in the constitutional history of Kentucky on the whole, with it being recognized as a noteworthy issue only in the constitution of 1850. And although the constitution of 1891 established a superintendent of public instruction and built strict guidelines for the dissemination of the Common School Fund, no other educational matters of significance were mentioned.

57. Howerton, "Constitution Reform," 17; *City of Louisville v. Sebree,* 308 Ky. 420, 214 S.W.2d 248 (1948); *Matthews v. Allen,* 360 S.W.2d 135 (1962).

58. *Ex parte Farley,* 570 S.W.2d 617 (1978); *Ex parte Auditor of Public Accounts,* 609 S.W.2d 682 (1980).

59. *Legislative Research Commission ex rel. Prather v. Brown,* 664 S.W.2d 907 (1984). See also Snyder and Ireland, "Separation of Powers," 167–233.

The *Rose v. Council* ruling has been noted as a "direct assault on local control of schools, a hallowed Kentucky tradition."[60] If not for this ruling, the Kentucky Education Reform Act (KERA) of 1990 would have been neither written nor passed. KERA detailed a comprehensive plan for reform of the state's primary and secondary educational systems.[61]

Gap-Filling Generally

The courts of Kentucky have also altered the relations among the state's bases of power when constitutional provisions were apparently silent. The general assembly authorized the merger of the City of Lexington and Fayette County governments, creating an entity as foreign to the thought of 1890 as the Internet. The courts were sympathetic to the idea of merger, and found no constitutional prohibition (*Pinchback v. Stephens* [1972] and *Holsclaw v. Stephens* [1973]).[62] Merger of county and city governments has been subsequently adopted in the Louisville metropolitan area.

The governors have filled constitutional gaps as well. An incoming governor's "State of the Commonwealth" address is nowhere mentioned in the constitution, but it has become a traditional agenda-setting start of the regular legislative session. This reflects an expanded role of Kentucky's governors in the legislative process, which is largely informal and political. It seems fair to say that each of Kentucky's constitutions is a more or less accurate snapshot of the perceived economic needs and the political culture of the day. It is also clear that when social forces built to an obvious pitch, the constitutions were changed—somewhat slower than the needs that the people perceived, but always in the direction required by the apparent abuses. But the converse is also true. When the abuses were not obvious to Kentuckians, their innate conservatism and general political apathy kept the constitution in place.

All of this is no less true of the 1891 constitution—as amended thirty-nine times. In this view, the 113-year-old document is not inhibiting progress. On

60. Miller, *Kentucky Politics and Government,* 252.

61. *Rose v. Council for Better Education, Inc.,* 790 S.W.2d 186, 189 (1989). The thought for this reform was taken from the court's enumeration of the following capacities of education in *Rose:* "Kentucky school children should have communication skills to enable students to function in a complex and rapidly changing civilization; they should have knowledge of economic, social and political systems and understanding of governmental processes; they should possess self-knowledge and knowledge of his or her mental and physical wellness; they should have sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states."

62. *Pinchback v. Stephens,* 484 S.W.2d 327 (1972); *Holsclaw v. Stephens,* 507 S.W.2d 462 (1973).

the contrary, it has changed fundamentally on many occasions—whether by amendment or by court decision or by the adoption of practices not actually prohibited in 1891. The constitution has not inhibited Kentucky's development in the most fundamental way. Rather, it is far more true to say that Kentucky's lack of economic and cultural change and absence of political activism on many issues have preserved the constitution.

RONALD BRECKE AND GREG PLUMB

Missouri Constitutionalism

Meandering toward Progress, 1820–2004

Constitutions perform the important roles of describing and prescribing how a people are to achieve the goals they have set for themselves as participants in a political entity. This would include limiting government and establishing essential rights for citizens.[1] Missouri constitution-making cannot be said to have taken the most direct path toward true constitutionalism.[2] Although advances are notable since 1820, we demonstrate that Missouri, true to its "Show Me" attitude, moved cautiously.

The journey began in 1820 with a constitution that was rather unremarkable by nineteenth-century standards. Most of the document was taken up with defining political institutions, distributing political power, limiting governmental power, and, in some respects, structuring conflict. None of this is at all unusual for a basic government-forming document.

A constitutional convention was called in 1845, and a revamped version of the 1820 creation was presented to the people in a special election. The scheme for reapportionment seems to be the main reason that the voters in a special election in 1846 rejected the proposed constitution.[3] In 1865, however, Radical Reconstructionists produced a constitution that refined governing institutions but restricted certain basic rights of those who happened

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1. Donald S. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 36.

2. George E. Connor, "Defining State Politics: The Missouri Constitution," in *Reinventing Missouri Government: A Case Study in State Experiments at Work,* ed. Denny E. Pilant (Fort Worth: Harcourt Brace Custom Publishing, 1994).

3. Robert F. Karsch, *The Government of Missouri* (Columbia, Mo.: Lucas Brothers Publishers, 1971), 1.

to be on the losing side of the Civil War. This was certainly a departure from progress toward true constitutionalism.

Within ten years, Missourians noted the error of their ways with a new constitution. Removing the oppressive qualifications for citizenship (for males, at least), the 1875 document went on to apply much of the bill of rights to state government. Beyond protecting citizens from governmental interference, this constitution also recognized the need for municipal governments. It streamlined some of the procedures in the three branches of government as well.

Seventy years later, Missouri again took up the task of constitutional change. The 1945 constitution solidified gains made in 1875, restructured and modernized the executive and judicial branches, and gave recognition to women as citizens. Since then, the constitution has been amended several times. Some of these amendments have added to the progress of Missouri government, whereas others have reflected a deep conservative ethos regarding the purposes of government.

The Constitution of 1820

Out of the crucible of the Missouri Compromise, wherein Maine was accepted into the Union as a free state and Missouri as a state that could be free of restrictions on slavery,[4] came the Missouri Constitution of 1820. Borrowing from the national instrument, its own laws as a territory, congressional direction, and other state constitutions, the bulk of the document was taken up with describing the distribution of powers, defining political institutions, and specifying the limits on governing power. Along the way, however, citizenship and the basis for authority were also outlined. The management of conflict was only intermittently confronted.

Of course, separation of powers into three branches was the model followed. Other provisions included terms of office, the bases of constituency, checks and balances, a judicial system, the process for making internal improvements, and the methods for amending the constitution itself. The legislative branch held the bulk of the power due to the "revolutionary model of great trust in the legislative body," and was the sole source for changing the constitution.[5]

4. Susan B. Dixon, *History of the Missouri Compromise and Slavery in American Politics* (New York: Johnson Reprint, 2003).

5. Roy Blunt and Larry Whatley, "The Constitution of Missouri," in *Missouri Government and Politics,* ed. Richard J. Hardy, Richard R. Dohm, and David A. Leuthold (Columbia: University of Missouri Press, 1995), 88.

Of note is that the "powers" sections of Article III began with specific denials of powers to the legislature, particularly regarding slavery. To wit, the legislature was prevented from emancipating slaves without the consent of their owners, and from passing laws preventing the importation of slaves (Section 26). In the same section, the legislature was given the power to pass laws to prohibit slaves convicted of crimes elsewhere, prohibit in-state slave trading, and prohibit the emancipation of slaves who may then become public charges. Moreover, this section directed the legislature to pass laws preventing any freed slaves from settling in the state, but also to pass laws forcing owners to treat slaves "with humanity."

Having established the form of government, the 1820 constitution then turned to education in Missouri. Article VI ordered that "schools, and the means of education, shall forever be encouraged in this state" (Section 1). Funding was to be stewarded by the legislature from lands granted for such purposes by the United States as well as from other funds provided by the legislature (Sections 1 and 2). This concern for public education would continue and grow in succeeding constitutions.

Although some state constitutions presented protections for civil rights and civil liberties early in their texts (as Missouri's subsequent constitutions did), the 1820 constitution waited until the end to establish the rights of its citizens. Article XIII was called the "Declaration of Rights" and proclaimed that the "essential principles of liberty and free government" were protected here. Protections granted by this constitution included peaceful assembly, the right to bear arms, religious toleration, the rights of the accused, rights against unreasonable searches and seizures, and freedom of speech and print. Citizenship was restricted to "free white males" (Article III, Section 4). The enumeration for legislative districts was to record the number of free white male inhabitants. A qualified elector was one who was a citizen of the United States, a free white male at least twenty-one years of age, who had resided in the state for one year and in the county for three months prior to an election. However, no one in the regular army or navy of the United States was eligible to vote (Section 10).

Notably, if being prosecuted for a crime can be said to be part of citizenship, slaves were guaranteed an impartial jury, counsel for their defense, and in capital offenses "shall suffer the same degree of punishment, and no other that would be inflicted upon a free white person for a like offence" (Section 27). No doubt this provided great comfort to those finding themselves in the position of being a slave.

Thus, given the political, social, and economic milieu of 1820, this constitution was a competent approach to designing a state government. There is nothing here that broke new ground, but it was comparable to what many

other states had forged. Missouri was on its way to becoming a centrist member of the Republic.

The "compromise" that failed miserably led to the Civil War. Missouri found itself divided against itself in many ways. Southern proslavery settlers were in conflict with antislavery immigrant settlers. For ten years before the war, battles raged along the Missouri-Kansas border over slavery in Kansas.[6] Eventually, federal troops controlled Missouri, allowing Reconstructionists to control politics in the state following the war.

The Constitution of 1865

Charles Drake, a transplanted Ohioan, would be a major force in Missouri politics immediately following the Civil War. A forceful state representative, Drake took his legislative skills to the Missouri Constitutional Convention of 1865, which was dominated by so-called Radical Republicans. Reconstruction was on its way not only in the Deep South but in Missouri as well. The "Drake Constitution," as it became derisively known, had a much different view of the purposes of government than did the preceding or succeeding constitutions in Missouri.[7]

The preamble gave a preview of how this constitution adhered to the supremacy clause of the U.S. Constitution. It thanked "Almighty God" for the state government, liberty, and "our connection to the American Union." No longer did the framers seek to create a "free and independent republic," as they did in 1820.

The opening article was called the "Declaration of Rights," which was not found until Article XIII of the 1820 document. Clearly, limiting government had taken precedence over establishing political institutions and distributing political power to those institutions. Moreover, Article I quickly established that the values of belonging to the "Union and government of the United States" were paramount. It reminded the citizens that these rights "should be exercised in pursuance of law and consistently with the constitution of the United States" (Section 5). This theme ran consistently throughout this document. Section 6 set forth that Missouri "shall ever remain a member of the American Union" and that any efforts to end that re-

6. Christopher Phillips and William E. Foley, *Missouri's Confederate: Claiborne Fox Jackson and the Creation of Southern Identity in the Border West* (Columbia: University of Missouri Press, 2000).

7. R. E. Burnett and Cordell E. Smith, "Missourians and Political Parties," in *Missouri Government and Politics,* ed. Hardy, Dohm, and Leuthold, 58.

lationship or the union must be "resisted with the whole power of the state." Each citizen of Missouri owed first allegiance to the United States, and no law could be enforced that contravened the U.S. Constitution or laws (Section 8).

The authority for government came from the people and was "instituted for the good of the whole" (Section 6). Borrowing from the Declaration of Independence, Section 1 held that people had been endowed by a Creator with inalienable rights such as life, liberty, the pursuit of happiness, and, additionally, "the enjoyment of the fruits of their own labor." The first limit on government was the abolishment of slavery (Article II). Furthermore, color was to be no barrier to contractual arrangements, being a witness in court, owning property, religious worship, or education. Nor was color permitted to be a basis for exercising rights (Section 3).

Article II, defining citizenship, was the most controversial section of the new constitution and the reason it would be replaced ten short years later. The convention delegates disenfranchised all inhabitants who fought for the Confederacy, and in no uncertain terms. Section 3 described qualified voters for any election. It is worthwhile to quote at length:

> No person shall be deemed a qualified voter, who has ever been in armed hostility to the United States, or to the lawful authorities thereof, or to the government of this state, or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; or has ever, in any manner, adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending within their lines money, goods, letters or information; or has ever disloyally held communication with such enemies, or has ever advised, or aided any person to enter the service of such enemies; or has ever, by act or word, manifested his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in exciting or carrying on rebellion against the United States; or has ever, except under overpowering compulsion, submitted to the authority or been in the service of the so-called "Confederate States of America;" or has ever left this state and gone within the lines of the armies of the so-called "Confederate States of America," with the purpose of adhering to said states or armies, or has ever been a member of, or connected with, any order, society, or organization inimical to the government of the United States, or to the government of this state; or has ever been engaged in guerilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as "bushwhacking;" or has ever knowingly and willingly harbored, aided, or countenanced any person so engaged; or has ever come into, or has left this state for the purpose of avoiding enrollment for, or draft into, the military service of the United States; or has ever, with a view to avoid enrollment in the militia of this state, or to escape the performance of duty therein, or for any other purpose, en-

> rolled himself, or authorized himself to be enrolled, by or before any officer as disloyal or as a Southern sympathizer, or in any other terms indicating his disaffection to the government of the United States in its contest with rebellion, or his sympathy with those engaged in such rebellion, or having ever voted at any election by the people in this state, or in any other of the United States, or in any of their territories, or held office in this state, or in any other of the United States, or in any of their territories, or under the United States, shall thereafter have sought or received, under claim of alienage, the protection of any foreign government, through any consul or other officer thereof, in order to secure exemption from military duty in the militia of this state, or in the army of the United States: nor shall any such person be capable of holding in this state any office of honor, trust or profit under its authority; or of being an officer, councilman, director, trustee or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school; or of holding any real estate or other property in trust for the use of any church, religious society, or congregation.

Such minute description left very little leeway—and this is possibly the only time that the term *bushwhacker* has been used in a constitution.

The article went on to require an "oath of loyalty," known as the Ironclad Oath, for those registering to vote. The oath required that you swore you had never committed any of the acts described in Article II, Section 3, and that you would "bear true faith and allegiance to the United States . . . protect and defend the Union . . . and support the constitution of Missouri" (Sections 5 and 6). Jurors were to take the same oath (Section 11). Officeholders were required to do the same (Section 7) and, somewhat redundantly, were also to take an oath to discharge the duties of office according to the laws and constitution of the state (Section 13). Fines and imprisonment awaited those officeholders failing to take the oath or who did so dishonestly (Section 14). Even beyond these public offices, however, the oath was required of all attorneys, bishops, deacons, or other clergy of any religion (Section 9). One wonders at the enforcement problems of these latter requirements. Section 17 prohibited those wagering on the outcome of an election from voting in that election.

Voting was still restricted to "white male citizens of the United States" (the word *free* was dropped from the 1820 description) and white males of foreign birth who had declared their intention of becoming citizens (Section 18). Beginning in 1866 there were to be the added qualifications of being able to read and write (Section 19).

The new constitution established new and separated executive offices, removed overt control over the court system from the governor's office, and expanded the system of education. It also changed the method of revising

the constitution by allowing a majority of voters to call for a constitutional convention. Thus, the method for the rapid replacement of this constitution by the voters just ten years later was put in place. The new constitution, instead of being an instrument to establish freedom and rights, had become a cudgel with which losers in a war were to be beaten into compliance and stripped of their basic agencies of citizenship.

The document of 1865 created quite a different state government than the original 1820 constitution. Disenfranchising a sizable proportion of citizens, the 1865 constitution also expanded the concept of citizenship at the same time. Subdued by the victorious Union, the framers at times seemed obsequious to the national government. But they also enlarged the role played by the citizens in controlling their government. Nevertheless, the document became odious to a significant number of inhabitants, and in a short period of time, they were to try their hand at writing a new instrument of government.

The Constitution of 1875

What a difference a decade makes. The shift in tone and substance of the Missouri Constitution between 1865 and 1875 was quite remarkable. Whereas the 1865 document focused a great deal of attention on the aftermath of the Civil War, ten years later emphasis had shifted to the routine of devising a mechanism for governing. Gone were the references to slavery and the not-so-veiled condemnations of the Confederacy. Replacing the invective were plans for modernizing structures and procedures to produce good government in Missouri. Gone, too, was the deference paid to the "American Union," replaced with the details necessary for a growing state with urban areas. Missouri was once again ready to return to the path of true constitutionalism.

The preamble still expressed "profound reverence for the Supreme Ruler of the Universe," but rather than speaking to how Missouri government accorded with the American Union, it simply referred to establishing a constitution "for the better government of the State." As if to reestablish some independence, Article II, Section 3, declares that to keep freedom, neither the legislature nor its people can give assent to any amendment to the U.S. Constitution that would "impair the right of local self-government." The purposes here were twofold: to preserve the power of states as a check on the federal government and to indicate that this document was going to eschew political rhetoric and concentrate on structure and process, particularly regarding local government.

The basic rights guaranteed in the 1865 constitution were kept here, in-

cluding the admonition that "the enumeration in this Constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people" (Article III). Another important addition was made. Citizens retained the right to bear arms for personal defense or to aid civil power. However, a section appearing here and in the subsequent 1945 constitution stated that it was not intended "to justify the practice of wearing concealed weapons" (Section 17). This section is particularly significant because it was at the heart of a legal challenge to a "conceal and carry" law passed in Missouri in 2003. The state supreme court determined that the constitution did not, in fact, prohibit the carrying of concealed weapons. Although the court ruled that the statute may violate the balanced-budget amendment to the constitution, it ruled that the general assembly "retains its plenary power to enact legislation regarding the use and regulation of concealed weapons."[8]

The basic distribution of powers among the three branches of government retained the 1865 description. The significant changes that occurred in 1875 were due to additions. Article IV, "The Legislature," began by outlining how representation was to take place. No doubt taking notice of the increasing population, the provisions called for reapportionment following the decennial census by the federal government and an increase of the number of house members from 143 to 200 (Sections 2 and 8). The size of the senate was fixed at 34 (Section 5). Of note is the provision that required the governor, secretary of state, and attorney general to reapportion should the assembly fail to do so before adjourning the session following the census.

Provisions for citizenship were found in Article VIII. Considerably more generous than the Radical Republican restrictions of 1865, Section 2 gave voting rights to all resident males over twenty-one, except those residing in poorhouses, asylums, or prison.

It was in Article IX that the 1875 constitution provided the most new material. It was the recognition that the state was changing and that the increase in population and its density in certain areas required provisions for a more detailed set of local structures. Even beyond requiring all officeholders to devote their time to the performance of their duties (Article II, Section 18), this constitution reflected a reform type of mentality in terms of local government.[9] In perhaps a Jeffersonian view of the value of the governments closest to the people, this constitution prohibited the state government from passing laws affecting local governments without a thirty-day notice of the intention to introduce such legislation (Article IV, Section 54).

Counties became fully recognized legal entities (Article IX, Section 1), and

8. *Brooks v. Missouri,* 128 S.W.3d 844 (Mo. 2004).

9. Blunt and Whatley, "The Constitution of Missouri," 88.

provisions for townships were made (Section 8). Cities of more than one hundred thousand inhabitants were permitted to consolidate with the county (Section 15). Furthermore, cities of one hundred thousand or more could create their own charters of government if ratified by four-sevenths of the voters, in other words, a home-rule charter (Section 16). St. Louis, in particular, was given the power to expand its physical limits and create its own charter (Sections 20–23). This devolution of power continued in Article X, with taxing authority being granted to counties and municipalities (Section 1).

Municipal indebtedness was restricted in size and purpose and was required to have a two-thirds majority vote by eligible voters in a special election (Section 12). This two-thirds majority required for local finances is a theme that was to be played out again one hundred years thence. The "low-tax, low-service" approach in Missouri has resulted in the requirement of extraordinary majorities to raise taxes (as discussed below).

Although other changes were made, they appear minor and of little concern here. It is clear that Missouri reached a watershed during the decade. The Civil War was in the past, and it was time to move on and establish political institutions, citizenship, and methods for containing conflict that would serve the needs of a postwar state and economy. But events outstripped this constitution, and after trying to keep up by means of amendments, finally a new constitutional convention was called.[10]

The Constitution of 1945

Perhaps the evolution of state constitutionalism in the United States has no better single example than Missouri. Early constitutions from the original colonies may be compared with constitutions of those territories that became states in more recent times, and the changes could be examined from that perspective. However, that method lacks the continuity that can be seen in the revamping of a single state's constitution over a period of 125 years.

By the time Missourians took a comprehensive look at their basic document for the fourth time, it was clear that many matters were already settled. The 1945 constitution embarked on few dramatic changes, encompassed various amendments made since 1875, and made some language changes to acknowledge women as full citizens. One might term many of the changes made as clarifying rather than transforming.[11]

10. Karsch, *The Government of Missouri,* 3.

11. Martin Faust, *Constitution Making in Missouri: The Convention of 1943–1944* (New York: National Municipal League, 1971).

The preamble was not changed, but gone was an article describing the state's boundaries. Again, if placement is important, then a high priority was given to rights, as Article I presented the bill of rights. The people were still seen as the source of all political power (Section 1), and government was meant to promote the general welfare (Section 2), as in 1875. Added, however, was the idea that "all persons are created equal and are entitled to equal rights and opportunity under the law" (Section 2). Yet although this seems to cover a wide range of issues and law, Missouri would maintain separate institutions of learning for blacks and whites until *Brown v. Board of Education* in 1954.

Still claiming the inherent and exclusive right to regulate the state internally (Section 3), gone was the vigorous exclamation that states' rights were necessary for a strong Union and that the state would never assent to any change in the U.S. Constitution that would impair the right of local government. Instead, the state now declared that such changes "should be submitted to conventions of the people" (Section 4).

Freedom of speech was modernized to include any means of communication (Section 8) rather than just speech or writing. Rights of assembly, petition, due process of law, and habeas corpus and protections against ex post facto laws and unreasonable searches and seizures were maintained (Sections 9–15). Rights of the accused were preserved with the additions that women could serve on juries and the defendant could waive a jury trial in favor of a bench trial (Sections 16–22). The right to bear arms was guaranteed as well, with the admonishment repeated from 1875 that this did not mean concealed arms (Section 23). Two other protections were added to the bill of rights: collective bargaining was established as a right (Section 29), and administrative agencies were prohibited from using fines or imprisonment as punishment for violation of their rules (Section 31).

Article II now described the distribution of power and was unchanged from the description of 1875. Article III provided for the legislature and established new rules for apportionment in both houses (Sections 2 and 7), and it dropped the word *male* as a qualification for office (Sections 4 and 6). In some aspects, modernization was not complete, however. The legislative branch was not "professionalized," and Section 17 limited the number of legislative employees. This was in part due to a basic conservatism and an antipatronage ideal. Section 20 restricted the length of the legislative session to about five months in even-numbered years and six months in odd-numbered years.

As populism and reformism swept the country, Missouri responded by granting the people expanded powers to pass laws themselves as a means of challenging recalcitrant legislatures. Great detail was given over to the initiative and referendum (Articles XLIX–LIII). The direct democracy provi-

sions have had, as will be discussed below, significant influence on further developments in state government in Missouri, acting as a brake on impulses to expand the government's role.

Some significant changes were made to the governor's office by 1945 (Article IV). The governor's powers were expanded to include the initiation of the budget process (Section 24), and the ability to control the rate of spending as well as to unilaterally reduce expenditures if a revenue shortfall occurred (Section 27).

The organizations within the executive branch were altered and expanded also. The qualifications and duties of the state auditor were described for the first time (Section 13). New departments included revenue (which centralized all tax collecting) (Section 22), highways and transportation (Section 29), agriculture (Section 35), social services (Section 37), and a conservation commission (including the power of eminent domain) (Section 40). A merit system, required for some offices but available to all, was also set in place (Section 19).

In 1940, after years of "bossism" in Kansas City and St. Louis, a "nonpartisan" plan for the selection of judges was created and enabled. In 1942, this plan successfully survived an effort to repeal the plan and return to elected judges. The 1945 constitution retained this new plan, which applied to the supreme court, the court of appeals, and the circuit courts in St. Louis and Jackson County. This plan called for a judicial nominating commission composed of lawyers and nonlawyers, with a judge chairing the commission. The commission recommended candidates to the governor, who would then appoint one of the candidates. The public then voted at the next general election to retain or discharge that judge. At the end of each term, each judge of the designated courts would be subject to the same review by the public.

Local governments were given more prerogatives under this document. Taking note of the differences in the growth of counties, Section 8 of Article VI called for a classification scheme for counties, with as many as four possible classes. Alternative forms of county government could also be created (Section 7). Special charters were allowed for counties having more than eighty-five thousand inhabitants. These charters allowed counties to formulate their own governments, subject to the limits of the constitution (Section 18). Thus, counties were given a good deal of flexibility for governance if they so chose. A petition by 20 percent of the number of votes for governor in the county would create a charter commission in the county to frame the charter. A majority of voters was needed to approve the charter (Section 18).

Local governments were also permitted to cooperate on public improvements and common services (Section 16) and to consolidate with other mu-

nicipalities or a county (Section 17). Charter cities and counties were authorized to use eminent domain for redevelopment or rehabilitation of "blighted areas" (Section 21). Cities were able to increase their indebtedness beyond normal constitutional limits for improving roads and sewers. However, a special assessment was to be laid on the area being improved to retire the extra debt. These areas were to be known as "Benefit Districts" (Section 26). All indebtedness was to be retired within twenty years (Section 26).

Thus, the county and municipal forms of government evolved from being mere creatures of the state in 1821 to full-fledged partners in the practice of democracy in Missouri in 1945.

Amendments to the Constitutions

Missouri voters have repeatedly used the state constitution to limit the powers of the state and local governments. This has resulted in a state department that is virtually free of fiscal restraints and the negotiating activities of the general assembly. In 1936, 71 percent of Missouri voters approved an amendment to the state constitution, which established the Missouri Conservation Commission and the Department of Conservation. This amendment restricted the control the general assembly had over conservation issues.[12]

In November 1980, the voters of Missouri approved two different constitutional amendments that have had long-lasting effects on state government operation. One, commonly referred to as the Hancock Amendment, was designed to limit the ability of government to raise taxes without approval by the voters.[13] Article X, Sections 16–24, contain these provisions. The text of Section 16 clearly demonstrates the limitations placed on state government:

> Property taxes and other local taxes and state taxation and spending may not be increased above the limitations specified herein without direct voter approval as provided by this constitution. The state is prohibited from requiring any new or expanded activities by counties and other political subdivisions without full state financing, or from shifting the tax burden to counties and other political subdivisions. A provision for emergency conditions is established and the repayment of voter approved bonded indebtedness is guar-

12. Jerald D. Brekke, *Understanding the Missouri Constitution* (Dubuque, Iowa: Kendall/Hunt Publishing, 1991), 48.

13. Richard R. Dohm, "Political Culture of Missouri," in *Missouri Government and Politics,* ed. Hardy, Dohm, and Leuthold, 26–27.

anteed. Implementation of this section is specified in sections 17 through 24, inclusive, of this article.[14]

The second amendment established a one-eighth of 1 percent sales tax, the proceeds of which were to be used by the Missouri Conservation Commission and the Department of Conservation to conserve the state's natural heritage. This provision (Article IV, Section 43) limited the general assembly's authority to use this part of state revenue.[15]

The Missouri Supreme Court showed its deference to the restrictions on government created by the voters in *Conservation Federation of Missouri v. Hanson* (1999), in which the court gave supremacy to the conservation provision over the Hancock provision because more voters had voted for the conservation provision than for the Hancock provision.[16]

A more recent example of the voters making significant changes in the constitution by amendment rather than by convention was a vote in November 1992 in which 63 percent of the voters approved a referendum revising the constitutional prohibition against gaming. The ballot language authorized "riverboat gambling excursions on the Mississippi and Missouri Rivers, regulated by the State Tourism Commission. Excursions may originate where locally approved by the voters. Five hundred dollar maximum loss limit per person per excursion. The proposal is intended to produce increased General Revenue." This appears to have been more a type of legislation than a provision of a state constitution.

Initiative and referendum issues regularly appear on statewide ballots, with the timing of the vote on these issues often becoming a political issue itself. This recently occurred when the question was placed before the voters of whether gay marriages should be banned. Considerable partisan wrangling occurred over whether this question should be placed on the statewide primary-election ballot in August or the statewide general-election ballot in November. Both the state Republican and the state Democratic Parties saw advantages and disadvantages to its candidates in the timing of the vote on this question. The issue was placed on the August ballot, and gay marriages were banned in Missouri by an overwhelming majority.[17]

This periodic amending of the 1945 constitution will no doubt continue, making the calling of a state constitutional convention unlikely for many

14. *Vernon's Annotated Missouri Statutes,* vols. 1, 1A, and 2 (Minneapolis: West Publishing, 2004, including updates).

15. Ibid.

16. *Conservation Federation of Missouri v. Hanson,* 994 S.W.2d 27 (Mo. 1999).

17. Missouri Secretary of State, official Web site, http://www.sos.mo.gov/, August 30, 2004.

years. But this is perhaps as it should be in Missouri. Settled by people who required that they be shown that something works before they tried it, the piecemeal, incremental, and cumbersome process of amending the constitution is probably more compatible than the vast changes that might be wrought with constitutional conventions.

ROBERT E. DiCLERICO

The West Virginia Constitution

Securing the Popular Interest

Historical Overview

It was described by one historian as "the only successful example of secession in American history"—the western part of Virginia severing its connection with the rest of the state in 1861 and two years later receiving formal recognition from Congress as a separate state.[1] Although the proximate cause of this rupture was the slavery issue, there were a number of factors that stoked the fires of resentment. Western Virginia came to be populated partly by yeomen who had left the propertied classes of the East in search of a better life. There was also an influx of people into western Virginia from states above it—people whose customs and values were decidedly different from those of the tidewater region. The Virginia Constitution of 1776 was yet another source of irritation. It provided for the inclusion of slaves in apportioning the legislature, and restriction of the franchise to white males owning at least fifty acres, both of which requirements ensured that the state's legislature would be dominated by eastern interests.[2] Nor were matters helped by the fact that this unrepresentative legislature selected both the governor and members of the judiciary. These issues were raised by the westerners at a constitutional convention held in 1829–1830, but apart from a small accommodation on the property qualification for voting, conservatives from the eastern part of the state managed to beat down proposals to

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1. John Alexander Williams, *West Virginia: A History* (New York: W. W. Norton, 1984), 86.

2. Oscar Doane Lambert, *West Virginia and Its Government* (Westport, Conn.: Greenwood Press, 1972), 91, 92.

revamp the system of representation and the selection of state officers. There were some minor reforms, however, including changes in the age qualification of delegates, the number of delegates to be chosen by district rather than county, the governor's term of service, and viva voce voting.

The convention's failure to address western concerns, along with growing frustration that the western region was not receiving funding for education and internal improvements commensurate with the taxes they were paying, only served to further heighten sectional antagonisms. Other forces, however, were destined to compel the East to give a more attentive ear to the concerns of their western brethren. By 1840, not only was the West growing ever more prosperous, but it was now more populated than the East as well. Though these changes had not moved the general assembly to reapportion accordingly, the spirit of Jacksonian democracy, now in full flower, persuaded some eastern Virginians to see the merits of reforms sought by the western counties. Other easterners, meanwhile, saw the benefits of trying to shape those reforms while they still had the power to do so.[3] Accordingly, another constitutional convention was held in 1851, this time with results more favorable to the westerners.

Not without difficulty, and despite several threats to disband, the constitutional convention of 1851 extended suffrage to include all white males; representation in the general assembly was to be based on the white population, thereby giving the West control. The state senate was kept as it was, but the West insisted and won agreement to have it reapportioned by the general assembly after 1865, and in the event of the assembly's failure to act authorized the governor to submit the issue to the people. The general assembly was also circumscribed in a number of ways, including prohibitions against the assumption of private debts, chartering of religious groups, granting of divorces, freeing of slaves, lotteries, and configuring of counties in ways other than prescribed. In keeping with the Jacksonian spirit, the convention also called for the popular election of state officers and local government officials, as well as members of the supreme court and circuit judges. On a delicate issue relating to slavery, however, delegates from the East, where most of the state's slave population was located, won a significant victory. Specifically, all property was to be assessed at true value except for slaves. If under the age of twelve, they were not to be taxed at all; otherwise, the assessment could not exceed three hundred dollars. This arrangement understandably

3. Robert M. Bastress, *The West Virginia State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1995), 8; Claude J. Davis et al., *West Virginia State and Local Government* (Morgantown: Bureau for Government Research, West Virginia University, 1963), 34, 35.

grated on westerners, who saw their land and livestock being taxed at full freight, even as eastern slaveholders were paying but a small part of what their human property was worth.[4]

Over the next decade the slavery issue would lead to an irreconcilable divide between northern and southern states, prompting the governor of Virginia to summon the general assembly into special session to determine where the state should stand. The assembly called for the election of delegates to a special convention, which, on April 17, 1861, passed a motion of secession from the Union, to take effect upon majority approval in a referendum held on May 23. A majority of convention delegates from western counties voted against the motion, and would weigh in heavily against the referendum as well. Despite the fact that the heavily antireferendum votes of northwestern counties were not included in the final results, on June 14 Governor John Letcher went ahead anyway and announced passage of the referendum, proclaiming that Virginia was now governed by the Confederate Constitution.[5]

Even before results of the referendum were known, representatives from the western counties convened in Clarksburg to show their loyalty to the Union and call for delegates to be sent to a convention held in Wheeling on May 13, 1861. With more than four hundred delegates in attendance, the convention was wholly in support of remaining in the Union but divided on how to proceed, with some advocating a new state immediately, whereas others cautioned against hasty action. They finally agreed that an election should be held on June 4 for the purpose of selecting delegates to a second Wheeling convention that convened on June 11, and voted to create the Re-Organized Government of Virginia. Temporary state officers were appointed, and the legislature was ordered to convene soon to fill the offices of government; a plan was drawn up for a new state to be called "Kanawha," consisting of thirty-nine counties west of the Alleghenies. This plan was to be submitted to the voters for their approval, at which time they would also elect delegates to the state's first constitutional convention.

Convening in the city of Wheeling, the constitutional convention of 1862 ultimately decided that the state should be called West Virginia instead of Kanawha, and expanded it to include several additional counties in the south, and the valley region bordering the Potomac. Those counties now composing West Virginia's eastern panhandle were afforded the opportunity to become part of the state at a later date. The delegates also decided to

4. Davis et al., *West Virginia Government,* 35, 36; Bastress, *West Virginia State Constitution,* 8, 9.

5. Davis et al., *West Virginia Government,* 37, 38.

apportion both houses of the legislature on the basis of population; required that they meet annually, with delegates and senators serving one- and two-year terms, respectively, and both reeligible; extended the vote to adult white males and required that it be exercised by ballot; stipulated that all property was to be taxed equally; established the office of governor and other state officers (excepting lieutenant governor), who were to be elected to two-year terms and were reeligible; called for establishing free schools; incorporated a bill of rights; and did away with the county court system, which in Virginia exercised legislative, executive, and judicial authority, replacing it with townships. On the slavery issue, the convention had to engage in some delicate maneuvering. Although northern counties were vigorously opposed to the institution, in the southern counties and eastern panhandle where slaves were held, abolition was not welcomed. Accordingly, the delegates agreed to a compromise that barred slaves or free persons of color from being brought into the state.[6]

The proposed constitution was put to a vote in April 1862 and adopted overwhelmingly, but with the participation of only twenty-six of the proposed fifty-one counties—the others having been prevented from doing so because of ongoing military conflict. The Congress of the United States ultimately approved the bill for statehood but only on the condition that its citizens agree to revise the constitution to abolish slavery. President Lincoln also signed the legislation but not before he and his cabinet had resolved lingering doubts about the legality of the vote for statehood. Nearly two weeks later, the constitutional convention gathered again in the city of Wheeling, made the change required by Congress, and submitted the revised constitution to a vote of the people on March 26. This time there were nine counties, all under control of the Confederates, that did not report votes, but the others overwhelmingly approved the revised constitution (28,321 to 572), with Union troops supplying some 25 percent of the votes in favor.[7]

The state of West Virginia contained within its newly created boundaries a not insignificant number of individuals who had been sympathetic to the Confederate cause and opposed to the separation from Virginia. Toward them, the Radical Republicans were not in a forgiving mood. The acts of retribution by the Republican legislature included forfeiture of property (1863); a test oath for voting (1865) and a voter-registration system, both designed to screen out Confederates; a constitutional amendment disenfranchising those who had aided the Confederate cause (1866); the imposition of a disproportionately high tax burden on those counties in league with the

6. Bastress, *West Virginia State Constitution,* 10–13.
7. Ibid., 14.

Confederates; and suits for damages against Confederate officers who had caused injury to loyal citizens during the war.[8]

These heavy-handed actions, needless to say, engendered strong animosity not only among the Democrats but even within Republican ranks. Among the latter was one William Stevenson who, upon gaining the governorship, called for ratification of the Fifteenth Amendment, believing it would be the salvation of the state's politically disenfranchised whites. Taking its cue from the governor, the legislature also turned more conciliatory, proposing in 1870 an amendment repealing the disenfranchisement of Confederates and their sympathizers, and restoring the original grant of the vote to all adults. This amendment also took out the word *white* preceding *adult,* thereby granting the franchise to blacks as well. Voters gave overwhelming approval to this constitutional change in April 1871.

It was the Fifteenth Amendment, however, that took effect in March 1870 that provided ex-Confederate West Virginians with the most immediate relief against the obstacles placed in their path to the ballot box. The Democrats, challenging the state's contrived voter-registration system, were successful in persuading a federal district court judge to declare the system a violation of the Fifteenth Amendment—a decision that enabled a turnout of Democrats in the 1870 election sufficient to win control of the governorship, legislature, and West Virginia's congressional seats.[9]

One of the major items on the Democratic agenda was to call for yet another constitutional convention on the grounds that the current constitution had serious flaws and had been approved "without the consent of the whole people."[10] Delegates assembled in Charleston, West Virginia, in January 1872, completed their work by April, and secured voter approval of the document in August. Containing fourteen articles and close to two hundred sections, the constitution of 1872, along with subsequent amendments, is the system of government under which West Virginians now live.

State Constitutionalism

Having presented an overview of the constitutional history of West Virginia, the remainder of this chapter will focus on how the West Virginia Constitution manifests the purposes of constitutions as developed by Donald S. Lutz in his seminal examination of constitutionalism.[11]

8. Williams, *West Virginia: A History,* 89; Bastress, *West Virginia State Constitution,* 16, 17.

9. Williams, *West Virginia: A History,* 90, 91; Bastress, *West Virginia State Constitution,* 17, 18.

10. Davis et al., *West Virginia Government,* 47.

11. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16.

Defining a Way of Life

The state seal of West Virginia, "Montani Semper Liberi" (Mountaineers Are Always Free), appears in Article II, Section 7, of the 1872 West Virginia Constitution, thereby constitutionalizing a joint resolution that had been passed by the legislature back in 1863. This phrase embodies what West Virginians saw as the sine qua non of a meaningful life. Reflective of John Locke's thinking on natural law and the inherent rights of man, Article III, Section 1, makes clear that this freedom grants West Virginians "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety" and cannot be abridged by any compact when "they enter into a state of society."[12]

Although constitutional democracy was seen as indispensable to preserving that freedom, Article III's Section 20 points out that free government depends crucially on the moral character of its people, noting that "Free Government and Liberty can be preserved to any people only by firm adherence to justice, moderation, temperance, frugality and virtue." The view that republican government peculiarly required a virtuous population to work was not, it should be noted, original to West Virginians, but rather was a generally accepted assumption among eighteenth-century thinkers.[13]

Defining the Regime and the Basis of Its Authority

In accordance with Article II, Section 2, the regime governing the state of West Virginia is to be republican in form, with the powers of government ultimately "residing in all the citizens of the state" and capable of exercise "only in accordance with their will and appointment." The bill of rights (Article Ill) further reinforces the point that the source of the government's authority is the people of West Virginia. Section 2 states that "all power is vested in, and consequently derived from the people. Magistrates [defined at the time as public officials] are their trustees and servants, and at all times amenable to them." The following section declares that the purpose of government is to benefit, protect, and secure the community, and failing such, the people have an "indubitable, inalienable, and indefeasible right to reform, alter or abolish it." Both Sections 2 and 3 are taken almost word for word from the influential Virginia Declaration of Rights (1776).[14]

12. See Locke, *The Second Treatise on Government* (Indianapolis: Bobbs-Merrill, 1952), 4.

13. On this point, see Gordon Wood, *The Creation of the American Republic* (Chapel Hill: University of North Carolina Press, 1969), 65–70.

14. Bastress, *West Virginia State Constitution,* 47, 48.

Defining Community, Citizenship, and the Public

The constitution of 1872 defines the state of West Virginia as consisting of fifty-four counties (Article II, Section 1). The fifty-fifth (Mingo County) was carved out of already-existing Logan County in 1895 by an act of the legislature.[15] The citizenry is defined as those residing in the state who were born or naturalized in the United States. Removed from this section is a provision that appeared in the constitution of 1863 denying citizenship to anyone in the armed services whose residency was due exclusively to being stationed in the state. This restriction still appears, however, under qualifications for voting (as discussed below).

Lutz notes that constitutions distinguish between the people (citizens) and the public—the latter designation being reserved for those who have the right to participate in the governing of the polity, whether as office-holders or as voters.[16] In this connection, the West Virginia Constitution (Article IV, Section 4) specifies that only those eligible to vote may be appointed or elected to public office. Thus, the criteria for voter eligibility in Section 1 became doubly important. Those qualified to vote were males (the descriptor *white* contained in the 1863 version was removed), twenty-one years of age and older, provided they were not declared mentally incompetent; paupers; convicted of treason, a felony, or election bribery; or residents in the state only because of being stationed there by the military. In addition, voter eligibility was contingent upon residency in the state for one year, and the county for sixty days. Prohibited under this constitution was registration of voters (Article VI, Section 43)—a procedure that had been included in the 1863 version of the constitution to deter secessionists from being able to vote.[17] Reflective of the Progressive Era's campaign to stamp out political corruption, and, one suspects, the desire of some white politicians to impede blacks from voting, an amendment was passed in 1902 empowering the state legislature to enact voter-registration requirements. In 1994 the state through amendment brought Section 1 into conformity with the U.S. Constitution on women's suffrage and the eighteen-year-old vote. In addition, it reduced state and county residency to thirty days, and was one of the last states to remove the pauper restriction on voting.[18]

As for the act of voting itself, the West Virginia Constitution requires that

15. Darrell E. Holmes, ed., *West Virginia Blue Book* (Charleston, W.Va.: Chapman Printing, 2004), 373.

16. Lutz, *Origins of American Constitutionalism,* 14.

17. Richard A. Brisbin Jr. et al., *West Virginia Politics and Government* (Lincoln: University of Nebraska Press, 1996), 73.

18. Alan Reitman and Robert B. Davidson, *The Election Process: Voting Laws and Procedures* (Dobbs Ferry, N.Y.: Oceana Publications, 1972), 28.

all votes be cast by ballot, but is unusual in giving citizens the right to cast either an open or a secret ballot (Article IV, Section 3). This practice of an open ballot dates all the way back to the Virginia Constitution of 1830 that required viva voce voting. Fearing the potential for intimidation of voters, delegates to West Virginia's 1861 constitutional convention decided to abandon the practice, but in a compromise reached in the 1872 revision agreed to include the option of allowing the vote to be cast openly by ballot.[19]

Distributing Political Power

The second section of Article II affirms how West Virginians saw the nature of the power relationship between the federal and state governments. It declares that the national government possesses only specifically enumerated powers, whereas those not so delegated, and not denied the states, are reserved to the states. This section further asserts that it is the responsibility of West Virginia's departments of government "to guard and protect the people of this State from all encroachments upon the rights so reserved." This rather strong defense of states' rights, it should be noted, appears oblivious to Supreme Court rulings, most notably in *McCullough v. Maryland* (1819).

The power relationship between the state and local governments is specified across several articles in the West Virginia Constitution. Article VI, Section 39, gives the legislature authority to establish local governments. The home-rule amendment added in 1936 (Section 39a), however, accords municipalities with a population in excess of two thousand the right to choose their form of government. County governments, meanwhile, are addressed in Article VIII, Section 5, which establishes a county court system, and the entirety of Article IX, which mandates a plan of county organization.[20]

The principle that undergirds the distribution of power among the three departments of government is laid out in Article V, Section 1. As if to underline its importance, Section 1 appears as the only section in this article. It states, "The legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time," excepting justices of the peace who may serve in the legislature.

19. Bastress, *West Virginia State Constitution,* 114.

20. Albert L. Sturm, *Major Constitutional Issues in West Virginia* (Morgantown, W.Va.: Bureau for Government Research, 1961), 99–102.

Legislature

Legislative power (Article VI) is vested in a bicameral legislature consisting of a house of delegates and a senate to be called the "Legislature of West Virginia" (Section 1). Representation in both houses is based on population, but with an option for proportional representation in the senate (Section 50). Redistricting and reapportionment are provided for following each decennial census (Sections 6–10). The house of delegates, initially set at sixty-five, now stands at one hundred; and the senate, originally at twenty-four, has expanded to thirty-four (Section 2). Concerned over the number of state employees holding legislative seats, the 1970 Legislative Improvement Amendment disqualified all state employees from serving in the legislature, while also removing from the constitution an archaic provision barring all salaried officers of railroad companies from serving (Section 13). Reflective of their skepticism of legislative power, the 1872 constitution stipulated that the legislature was to convene biennially and for only forty-five days, unless two-thirds of the membership voted for an extension. Revised four different times (1919, 1927, 1954, and 1970), sessions were made annual in 1954, and as part of the Legislative Improvement Amendment ratified in 1970, they were expanded to sixty days, with further extensions possible by a two-thirds vote of both houses (Section 22).

Executive

Article VII, Section 5, vests the executive power in a governor charged with executing the laws, yet the executive department is defined in Section 1 as the governor, secretary of state, state superintendent of free schools (deleted in 1958), auditor, treasurer, commissioner of agriculture (added in 1934), and attorney general, thereby diffusing rather than unifying executive power. Further diluting their accountability to the governor is the fact that all of these officers are elected by the people, except for the secretary of state, who was not added to the list of elected officials until 1902 (Section 2). These executive officers are elected to four-year terms, and all except the governor may be reelected without restriction. The governor, however, was restricted to one term, a limitation that prevailed until 1970 when he or she was allowed to serve two successive terms, with the right to run again after sitting out a term (Section 4).

If a plural executive weakened the administrative role of the governor, so too did the fact that the constitution of 1872 made no provision for a state budget. Indeed, not until passage of the Budget Amendment in 1918 did the state achieve something resembling an "executive budget." Drawing on the Maryland Constitution, the amendment gave responsibility for formulating

a budget to the Board of Public Works, composed of the state's executive officers, which at the time numbered seven.[21] Only with the passage of the Modern Budget Amendment in 1968 was the governor given the sole responsibility for developing and submitting a budget (Article VI, Section 51).

Nor was the constitution of 1872 especially generous in equipping the governor to do battle with the legislature. On all bills other than appropriations, the governor's veto can be overridden by a simple majority of each house, in contrast to most states, which require an override majority of two-thirds.[22] Moreover, if the governor takes no action on a bill, and the legislature adjourns, the bill automatically becomes law, thereby denying the governor a pocket veto (Article VII, Section 14). With respect to appropriations, the governor was accorded a line-item veto, but this was largely vitiated by the Budget Amendment of 1918 that stated that a budget bill could become law without being sent to the governor, provided it passed both houses.[23] With passage of the Budget Improvement Amendment in 1968, however, the budget bill was required to be presented to the governor, and also a two-thirds majority was required to override a line-item veto (Sections 14 and 15).

Judiciary

Second only to the legislative article (Article VI) in length, Article VIII vests the judicial power in a supreme court of appeals, circuit courts, and justices of the peace (Section 1), as well as county courts. The supreme court is to consist of four people elected directly by the people to twelve-year staggered terms—among the longer terms provided for judges in state constitutions (Section 2).[24]

Subsequent amendments have altered some of the above provisions. In 1902 the number of supreme court judges was raised to five, and the Judicial Reorganization Amendment of 1974 required that they have been admitted to the practice of law for at least ten years prior to election, prohibited them from becoming candidates for elective office (Article VIII, Section 7), converted county courts into county commissions (Article IX, Sections 9–12), replaced justices of the peace with magistrate courts (Article VIII, Sections 10 and 15), and gave the legislature the authority to require the election of supreme court justices on a nonpartisan basis—a power legislators have shown no inclination to use.

21. Bastress, *West Virginia State Constitution,* 179.
22. Ibid., 198.
23. Sturm, *Major Constitutional Issues,* 66.
24. Ibid., 91.

Limiting the Power of Government

Very early in the document (Article I, Section 3) the West Virginia Constitution offers a general and forceful statement about government's limited powers, asserting that neither the national government nor the state may exceed its powers even during times of great exigency, "for any departure therefrom, or violation thereof, under the plea of necessity, or any other plea, is subversive of good government, and tends to anarchy and despotism."

Article III of the West Virginia Constitution, like all state constitutions, limits the power of government by guaranteeing to its citizens certain procedural and substantive rights, most of which may be found in the U.S. Constitution as well. Regarding procedural guarantees, West Virginians are guaranteed writ of habeas corpus (Section 4), but unlike the federal and other state constitutions, West Virginia's does *not* permit the suspension of that right during times of insurrection or domestic rebellion.[25] The constitution also protects against cruel and unusual punishment (Section 5), but goes further by specifically stating that the punishment must be proportional to "the character and degree of the offense." It also specifically prohibits as criminal punishment the banishment of an individual from the state—a provision that is also incorporated into fifteen other state constitutions.[26]

Like the U.S. Constitution, West Virginia's grants a number of substantive rights, one of which, equal representation, is located in Article II, Section 4. The others are contained in Article III, including prohibitions against corruption of blood or forfeiture of estate through conviction (Section 18), and hereditary emoluments, honors, and privileges (Section 19). Also guaranteed, of course, are freedom of speech and press (Section 7), with specific exceptions for obscenity, and also for libel and defamation of character, unless the motives are "good" and the ends "justifiable" (Section 8). Freedom of religion is protected in a rather elaborate statement (Section 15), part of which is taken from Jefferson's Bill for Establishing Religious Freedom (1779). Section 15 was amended in 1984 to require that public schools accord students the daily right to voluntary meditation or prayer. One year later, however, a federal court found this requirement a violation of the First Amendment to the U.S. Constitution.

Two other substantive rights are rooted directly in the state's experience with the Civil War. Section 11 prohibits the use of political tests as a condition for the exercise of political and civil rights. Unique to the West Virginia Constitution, this provision grew out of attempts to disenfranchise and otherwise punish those residing within the newly created state of West Virginia who had aligned themselves with the Confederate cause, as discussed earli-

25. Bastress, *West Virginia State Constitution,* 196.
26. Ibid., 63.

er. The treatment of onetime Confederates by the Union army no doubt also spawned Section 12, which requires that civil authority be supreme over military authority, warning that "standing armies in a time of peace should be avoided as dangerous to liberty."[27] One other substantive right would be added to Article III of the West Virginia Constitution but not until 1986, when voters ratified an amendment guaranteeing each individual the right to keep and bear arms for the purpose of defending self, family, home, and state, as well as for hunting and recreation (Section 22). Unlike the Second Amendment of U.S. Constitution, this one leaves no room for debate on whether this right inheres to the individual or, alternatively, to the states as maintainers of state militias.

Not included among the substantive rights in the West Virginia Constitution was equal protection of the laws. African Americans, moreover, were prohibited from attending the same schools as whites (Article XII, Section 8), a provision nullified by the U.S. Supreme Court in 1954, and tardily removed from the constitution by West Virginians in a 1994 amendment.

Limitations on government action in the West Virginia Constitution do not end with provisions for procedural and substantive rights. Under Article VI, the legislature is prohibited from the following: making the state a defendant in any court case of law or equity;[28] authorizing lotteries or gift enterprises except when regulated by the state (Section 36); passing local or special laws on eighteen specific subjects (Section 39);[29] passing special laws incorporating cities and towns, or amending their charters (Section 39a); using revenues derived from motor vehicles and motor fuels for any purposes other than improvement of roads (Section 52); and using severance tax on harvested trees for any purpose other than those related to the Division of Forestry (Section 53). In Article X the state is, except under special circumstances, prohibited from incurring debt (Sections 4 and 51) and from extending its credit to any individual or jurisdiction (Section 6). Finally, there are also limits imposed on the taxing power of state and local governments. Article VI, Section 48, providing a tax exemption on the forced sale of a homestead and personal property, was amended in 1973 to raise the homestead exemption to five thousand dollars and the personal property to one thousand dollars. Article X, Section 1, contains the Tax Limitation Amendment passed in 1932 that imposed limits on tax rates for both real and personal property—limits that may be overcome only by a special levy re-

27. Ibid., 93, 94.

28. Only five other states have a provision for sovereign immunity in their constitutions.

29. This prohibition refers to laws that target specific individuals, groups of individuals, or specific locales within the state, and on such subjects as granting of divorces, regulating the rate of interest, and changing the location of the county seat.

quiring the support of at least 60 percent of the voters residing in counties and municipalities and, as amended in 1982, 50 percent in school districts (Section 10).

The Management of Conflict

An eminent scholar of American politics has observed that far from structuring a government characterized by separation of powers, our founding fathers actually "created a government of separated institutions *sharing* powers."[30] No less true of the West Virginia Constitution than of its U.S. counterpart, power sharing serves to manage conflict by forcing the branches to balance out competing interests and reach consensus.

The "sharing" built into the West Virginia Constitution is manifest in a number of ways. The legislature is charged with passing laws, but the governor is mandated annually to submit a budget (Article VI, Section 51), can make other recommendations (Article VII, Section 6), can call the legislature into special session (Section 7), and can sign or veto bills passed (Article VI, Section 51; Article VII, Section 14). The legislature, of course, has the option of overriding a veto (Article VII, Sections 14 and 15). Although members of the supreme court of appeals are directly elected, the governor is authorized to fill vacancies on the court (Article VIII, Section 7), and the court is empowered to rule on the constitutionality and legality of actions taken by the executive and legislature (Article VIII, Section 3). The house of delegates, meanwhile, is given the authority to impeach, and the senate, with the chief justice of the supreme court of appeals presiding, the power to remove from office members of both the executive and the judicial branches (Article IV, Section 9).

In addition to providing for the management of conflict between and among the institutions of government, the West Virginia Constitution provides for the management of conflict *within* the branches. It is least intrusive in connection with the executive, not going beyond requiring executive officers to keep records pertaining to their offices and to report to the governor, and authorizing the governor to require from them information in writing and under oath (Article VII, Sections 1, 17, and 18). Regarding the supreme court of appeals, the constitution defines a quorum, number of court terms, steps to be followed in the event of a justice's disqualification or temporary incapacity, and procedures for hearing appeals (Article VIII, Sections, 2, 3, and 4). Finally, for the legislative branch, the constitution goes into very considerable detail for managing conflict. Indeed, nine of the fifty-

30. Richard E. Neustadt, *Presidential Power: The Politics of Leadership* (New York: John Wiley and Sons, 1960), 33.

four sections in Article VI address directly rules and procedures for conducting legislative business, ranging from quorums, appointment of officers, and punishment of members to the maintenance of records and the origination, reading, amending, and titling of bills.

Like all American constitutions, West Virginia's also provides for the management of conflict by affording its citizens the opportunity, through amendment, to make changes in their "rules of the game." Since the constitution's adoption in 1872, up through 2005, there have been 118 amendments, 69 of which have been ratified. For reasons not altogether apparent, 17 of these are placed at the end of the constitution, whereas the remaining 54 are incorporated as modifications of the provisions they are changing.

There are two different routes to amending the constitution, both of which begin with the legislature. Under the first, a majority of legislators in each house must vote to propose a constitutional convention, and then within three months place that proposal before the voters, a majority of whom must approve. One month later voters select delegates to attend a convention, which proposes amendments, and submits them to the voters for majority approval. The second route is decidedly less cumbersome and calls for the legislature to propose an amendment by a two-thirds vote in each house, to be followed three months later by a vote, with a majority required for approval.

Conclusion

Unlike a number of other states, West Virginia has not held a constitutional convention since its constitution was adopted in 1872. This fact should not, however, be taken as an indicator of unqualified support for the document. On the contrary, one scholar writing just thirty years after its adoption asserted, "It has proven a most unsatisfactory instrument of government. Clamor against it from the day of its submission to the present time has never ceased, and doubtless will not cease until a new instrument takes its place free from the inhibitions which this one places in the way of just legislation."[31] In 1903, Governor A. B. White appeared to confirm this assessment, observing, "Our Constitution creaks at almost every joint."[32] His call for constitutional revision went unheeded, however, as would those of his two successors, William Dawson and William Glasscock. Not until 1929 was the matter given serious attention when, at the direction of the legisla-

31. Richard E. Fast and Hu Maxwell, *The History and Government of West Virginia* (Morgantown, W.Va.: Acme Publishing, 1901), 179.

32. Sturm, *Major Constitutional Issues,* 19.

ture, Governor William G. Conley appointed an eleven-member commission to consider constitutional changes. Their recommendations were extensive and included municipal home rule, an executive budget, elimination of sovereign immunity, and a total revamping of the judicial article.[33] Unfortunately, the political crosscurrents it generated proved so strong that the legislature declined to accept the commission's report.

It would be 1957 before constitutional revision again received formal attention. This time the impetus came from Governor Okey L. Patterson who, in his biennial message to the legislature, implored it to propose significant constitutional changes, warning that "we are handicapped by an antiquated governmental machinery."[34] The legislature responded by creating the West Virginia Commission on Constitutional Revision, numbering forty-eight individuals from inside and outside of government. Unfortunately, its unwieldy size, constantly changing membership, lack of professional staff support, and failure to educate the public rendered the commission's recommendations less influential than they might otherwise have been.[35] Although the legislature and public ultimately approved the recommendation to add a preamble to the constitution and allowed amendments to address provisions in more than a single article, neither of these changes spoke to the more glaring weaknesses in the document. Rejected was the commission's call for an executive budget, the appointment of most executive officers (secretary of state, treasurer, and secretary of agriculture), and an amendment allowing governors to succeed themselves.[36]

Not having had the benefit of a constitutional convention that would have allowed for a more systematic review of its constitution, West Virginia's approach to constitutional change has been piecemeal in nature. That said, a number of major changes advocated by constitutional commissions did ultimately find their way into the constitution, even if later than many political observers would have liked. These included municipal home rule (1936), an executive budget (1968), governors' succession (1970), and judicial reorganization (1974). Some would argue, however, that even with these amendments, the West Virginia Constitution remains in important ways ill-equipped to cope with the contemporary demands of government. Governors find themselves surrounded by five executives, all elected by the peo-

33. See *The Constitution of West Virginia: Report of the Commission Appointed Pursuant to House Resolution Number Five Adopted by the Legislature of the State of West Virginia, March 9, 1929 to Study the Constitution and to Submit Amendments Thereto,* Articles V–XII.

34. Davis et al., *West Virginia Government,* 54.

35. Sturm, *Major Constitutional Issues,* 24–27.

36. See *Fifth Report of the West Virginia Commission on Constitutional Revision* (S.C.R., no. 5), regular sess., West Virginia legislature, Charleston, 1963, 12–78.

ple, and thus accountable to them, not him. The legislature, meanwhile, continues to be part-time, normally meeting for sixty days, lacking in a professional staff, and circumscribed in its ability to tax and spend—this latter restriction looming even larger for local governments.

The likelihood that any of these perceived deficiencies will soon be addressed through constitutional amendment is not high. The spirit of popular control runs deep in the state's culture. West Virginians want to elect *all* the principal members of all the branches of government, and they continue to believe that the limitations placed on their legislature do more to secure their interests than impede them.

SOUTHERN STATES

From their earliest constitutions the states of the South have had remarkably similar constitutions. Moreover, the post–Civil War South emerged from that conflict with a constitutionalism that was largely defined for them. However, though not evident in all of the former Confederate states, constitutional self-definition has reemerged in the South in the intervening 140 years.

As a group, southern constitutions are characterized by the number of revisions and are often defined by political geography and the issue of citizenship. Virginia, though containing the basic elements of a southern constitution, is especially noteworthy as a window into state constitutionalism in that it drafted one of the earliest constitutions of the founding era as well as one of the more recent constitutions in the latter part of the twentieth century.

Though united with the South in the Confederacy, the states of Florida and Louisiana have unique political histories. Florida's contemporary constitutionalism, unlike its more politically closed neighbors, has evolved with an interest in development and population growth. The chapter on Louisiana, which is perhaps the most difficult state to classify, illustrates the difficulty in fulfilling Donald Lutz's constitutional goals in a state defined by a unique history, politics, and culture.

ANNE PERMALOFF AND CARL GRAFTON

Political Geography and Power Elites

Big Mules and the Alabama Constitution

The state of Alabama has operated under six constitutions, all of which were written in constitutional conventions. The constitution in force today, the constitution of 1901, is infamous for its extraordinary length (including 777 amendments as of March 2007), favored treatment of specific economic interests, and, as its bulk suggests, inclusion of material handled by statute in most other states.[1] The 1901 constitution served several purposes. Most important, it constituted a treaty or letter of agreement between two potentially antagonistic geographical and economic elites: the largest plantation owners (located in a geographical area known as the Black Belt, to be described below) and major mining, manufacturing, shipping, and financial corporations found primarily in the state's urban areas, especially Jefferson County (Birmingham) and Mobile. Many states' politics are defined by rural-versus-urban conflict, and Alabama could easily have fallen into that pattern. But the 1901 constitution virtually erased open rural-urban conflict by establishing a power elite known in Alabama as the Big Mules.[2] The Big Mule alliance dominated the legislature continually and the governor's office for all but a few years from 1901 until the early 1960s, and parts of it remain influential in what is today a more fluid power structure.

The establishment of a power elite in a political system that claims to be

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1. A statutorily authorized recompilation of the document by the Legislative Reference Service was published in the Official Code early in 2005. Volume 1 contains the main body and incorporates changes made by amendments of general application. Volume 2 consists of local amendments listed by county.

2. C. Wright Mills, *The Power Elite* (New York: Oxford University Press, 1956); Carl Grafton and Anne Permaloff, *Big Mules and Branchheads: James E. Folsom and Political Power in Alabama* (Athens: University of Georgia Press, 1985), 265–68.

democratic requires that power be allocated in a grossly unequal but subtle fashion. The genius of the 1901 constitution was that it distributed political, economic, educational, racial, and social advantages and disadvantages in an interlocking, reinforcing manner that in some respects remains in place more than a century later, even though some of its components fell under federal court and congressional attack in the 1960s. The state government that resulted from the 1901 constitution could accomplish little, and local governments could do even less. Blacks and great numbers of working-class whites were effectively prevented from voting, and racial segregation was maintained. Educational opportunities beyond the level of training for menial jobs were almost entirely confined to middle- and upper-middle-class whites. Convicts could be leased to private businesses as de facto slaves.

Because the 1901 constitution contained almost no home-rule authority, it had to be amended hundreds of times just to handle local problems that in most states would be the subject of local ordinances. Many other amendments addressed state government problems that should have been covered by ordinary statutes. Thus, over the years a stiff straitjacket became a tangled web. Either form served Big Mule interests by hampering the political and economic development of the state while protecting the status quo.

Many legislators were widely and correctly viewed as representing particular agricultural or business concerns more than their districts. The combination of ineffectiveness and a casual, widespread, business-as-usual dishonesty on the part of elective officials produced general distrust on the part of the electorate. This distrust, created in large part by the Big Mules who groomed, ran, and controlled legislators, reinforced governmental paralysis.

The state's budgetary process is an example of the inertia produced by distrust. Normal tax increases were not politically viable because the electorate believed that revenues would be wasted. So tax increases often had to be earmarked to particular programs to make their passage possible. Earmarking was a kind of promise from the legislature to the distrustful electorate that funds raised by the tax increase would be spent in particular ways. The result is the highest percentage of earmarked taxes of any state—roughly 90 percent. This means that to a very great degree, budgets are driven not by programmatic needs but by revenues generated by particular taxes.

Several organized efforts aimed at an overhaul of the 1901 constitution or removing special-treatment provisions related to taxation have failed, including the most recent tax-reform effort in 2003. And although the amendment process resulted in a substantial restructuring of the executive branch in 1939 and a major reorganization of the judicial branch in 1973, the existing document also contains many restrictions on governmental power added by amendments designed to protect particular interest groups.

Federal courts were responsible for many changes in the constitution's

content and the enforcement of its more democratic provisions, such as legislative reapportionment after each ten-year census. Federal civil rights and voting rights legislation also protected minority rights and expanded the electorate.

A Note on Geography

Alabama is divided into regions characterized by differing soil quality and geology. These physical differences have strongly influenced their economies and politics.[3] The Black Belt consists of fourteen to twenty-three counties (definitions vary), running east and west to the south of the state's center. Large cotton plantations prospered in the relatively rich soil of the Black Belt. The plantations were worked by large numbers of black slaves and later black sharecroppers. Even today African American populations in Black Belt counties may number 60 percent or more of the total populations, and most of these counties are among the least economically developed in the state and the nation. Southeast Alabama (the Wiregrass region) and North Alabama (the area north of Birmingham) had small farms worked primarily by their relatively poor white owners. Percentages of blacks were and are today very low in these counties. By the late 1800s Birmingham by virtue of its coal and iron mines had become a large industrial center. Mobile is a port city on the Gulf of Mexico in the southwestern corner of the state.

The Earlier Constitutions

The 1901 constitution is the product of the political history and constitutional structures that came before it. The first Alabama state constitution was written in 1819, the year Alabama gained statehood. Congressional enabling legislation specified that Alabama's first constitution be written by forty-five elected delegates. The document this convention created was sent to Congress for approval and was not ratified by the citizenry.[4]

The 1819 Constitution

Although the 1819 document is often described as reflecting the Jacksonian, frontier philosophy of the day, Malcolm Cook McMillan, perhaps the foremost Alabama constitutional historian, notes that the document also re-

3. For a fuller discussion of the political impact, see Grafton and Permaloff, *Big Mules.*
4. Each of Alabama's five constitutions can be found at http://www.legislature.state.al.us.

flected the conservative views of Black Belt planter delegates who dominated the committee that penned the original draft.[5] Still, the final document contained many populist provisions, as the delegates overruled several of the recommendations made by the conservative committee.

The legislative article granted suffrage to all white male U.S. citizens twenty-one years of age and older who had resided in the state for one year and in their legislative district for three months. There were no requirements related to property ownership, militia service, or taxpaying status.

Northern Alabama delegates who represented white-population counties won major contests with the southern plantation counties over the nature of legislative representation. Legislature apportionment was based on the white population of the state, not the federal apportionment formula of three slaves equaling five whites, which South Alabama preferred.

The document created a strong legislature, a relatively weak governor, and no lieutenant governor. The governor was elected by the public but limited to two two-year terms in succession. The legislature by joint ballot of the two houses would elect the secretary of state, state treasurer, and comptroller of public accounts; judges on the supreme, circuit, and inferior courts; and other officials. Judges served for life but could not be elected to office or remain in office when they reached seventy years of age. The legislature would meet annually, with the house members elected annually and senate members elected to three-year terms.

The 1819 constitution devoted one of its six articles to general provisions that included sections in support of public education, allowed for state banks, and guaranteed both slavery and a listing of the rights of slaves that McMillan identifies as "very liberal, when contrasted with constitutional provisions . . . in other states."[6]

A provision for altering the constitution through amendment specified that the legislature had to pass a proposed amendment by a two-thirds vote and submit the proposal to the voters in the next general election. If passed by a majority of the voters, the next legislative session had to approve the proposal by a two-thirds majority for the amendment to take effect. No provision was made for a constitutional convention.

Only three amendments were added to the 1819 constitution. One established six-year terms for judges and judicial impeachment procedures, another created biennial legislative sessions, and a third dealt with terms of office for legislators.

5. McMillan, *Constitutional Development in Alabama, 1789–1901: A Study in Politics, the Negro, and Sectionalism* (Chapel Hill: University of North Carolina Press, 1955), 34, 44–46.

6. Ibid., 43.

The Civil War–Era Constitutions

The state's second (1861), third (1865), and fourth (1868) constitutions dealt with secession and Reconstruction. The constitution of 1868 was created under Reconstruction with input from industrial-urban interests, and it was the first in-state constitution in history to be ratified by the electorate.

Many changes were enacted in the 1868 constitution. It was the first to base state legislative representation on the "whole number of inhabitants" and open legislative office to all, not just whites. It expanded the scope of governmental activity to include support for the poor, provided for universal education, created a popularly elected state board of education, increased the size of state government, made all executive and judicial offices elective, provided for the state's first lieutenant governor, encouraged the development of business and industry, granted a personal property exemption of up to one thousand dollars for sale of debt, created a homestead exemption on sale of debt not to exceed two thousand dollars on eighty rural acres or a city lot and dwelling, granted women limited constitutional rights, and abolished imprisonment for debt. McMillan argues that many of the provisions on education, property exemption, corporations, and the militia in the 1868 constitution borrowed from the constitutions of Michigan, Ohio, Indiana, and Iowa.[7]

The constitution constrained state government in a number of ways. The document contained "the first limit on taxation to be found in any Alabama constitution"—a prohibition limiting legislative grants of taxing authority to municipal corporations to 2 percent of assessed valuation of real and personal property.[8] Restrictions on legislative passage of local and private legislation were deleted from the constitution. Internal improvements were removed from the scope of state authority, and the state could pledge its credit only for the purposes of security and then only by a two-thirds vote of the legislature.

The 1875 Constitution

Created at the end of Reconstruction, the constitution of 1875 was a reactionary document designed to end Reconstruction, limit the political power of the African American population, restrict legislative power, limit the size of state government, lower taxes, and protect Black Belt and fledgling industrial interests in Birmingham. McMillan argues:

7. Ibid., 142–47.
8. Ibid., 137.

> Many prohibitions and regulations were written into the constitution because of the experiences of the people of Alabama with the Carpetbaggers. These new sections made the constitution much longer than any previous one and were to hamper the commercial-industrial growth of the state during the last quarter of the nineteenth century. Many matters formerly provided for by legislative enactment were now made parts of the new constitution. Time was to prove them hard to change by the amending process.[9]

The 1901 constitution would maintain many of these characteristics.

The 1875 constitutional convention followed the 1874 gubernatorial election of Democrat George S. Houston who wrested the office from the Republicans, who based their rule on the votes of native white voters (scalawags), recent white arrivals (carpetbaggers), and freedmen. Houston's campaign focused on the return of state government, calling on native "white Alabamians to put aside historic differences [Unionists versus South Alabama] and unite to 'redeem' the state." His governorship represented the so-called Bourbon Democrats who stood for "conservatism, limited government, honesty, frugality, and white supremacy" and replacing the 1868 Republican constitution.[10]

The Bourbon Democrats vastly outnumbered all other groups in the 1875 constitutional convention. These Democrats were divided along urban and industrial-planter lines, with each side achieving some of its goals. This pattern of Black Belt–Birmingham cooperation was to be repeated and solidified in the writing of the 1901 constitution. The resulting constitution of 1875 provided for segregated schools and abolition of the state board of education. It reapportioned the legislature to reduce the number of Republican members who came mainly from the Black Belt, prohibited legislative passage of local and special legislation, and set biennial sessions of the legislature at fifty days. State, county, and city taxes were limited, and the same entities were forbidden from aiding corporations and prohibited from engaging in or lending money or credit to works of internal improvements. Residency requirements for holding office were tightened and numerous offices abolished, including commissioner of industrial resources.

No suffrage-requirement changes were placed in the 1875 constitution. There were several reasons for this apparent omission by the forces of reaction. In the attempt to gain votes for the constitutional convention, the Democratic leadership had promised that no property and educational qualifications for voting would be placed in the constitution. According to

9. Ibid., 210.

10. William Warren Rogers, "George S. Houston, 1874–1978," in *Alabama Governors: A Political History of the State,* ed. Samuel L. Webb and Margaret E. Armbrester (Tuscaloosa: University of Alabama Press, 2001), 103.

McMillan, the Democratic leadership did not tinker with universal manhood suffrage for fear of federal government intervention.[11] However, by the early 1880s, planters in many Black Belt counties held sway over votes of their former slaves.[12] They used economic and physical coercion as well as bribery and ballot rigging to accomplish this control.

The year 1879 saw passage of election laws designed to diminish the size of the electorate. One statute required that the ballot be blank, making voting difficult for the largely illiterate black and poor white populations. Another change eliminated the need for correspondence between a voter's ballot number and poll number. The rich opportunities for Black Belt vote fraud offered by these changes were not lost on North Alabamians, but their attempts to reverse them in 1881 were defeated by Black Belt legislators.

The 1901 Constitution

Many interests, especially those wanting infrastructural development and educational improvement, quickly became dissatisfied with the 1875 constitution. Others opposed criminal-justice abuses such as the convict-lease system. Black Belt plantation owners and Birmingham and Mobile businesses probably could have blocked the movement for a constitutional convention, but instead they hijacked it.

Sheldon Hackney categorizes the convention delegates as Bosses, Planters, Agrarians, and Progressives. The Bosses, coming mainly from the Black Belt, Birmingham, and Mobile, represented a fully functioning alliance of the largest industrial and plantation interests. In terms of its power and longevity, this urban-rural alliance may be unique in U.S. state government history. Hackney describes the Boss delegates' behavior during the convention in this way:

> Generally, [they] voted for lower tax rates and lower levels of government spending; they strongly opposed any stricter regulation of railroads or any change in the system of leasing county convicts to corporations operating outside the county; and they consistently objected to changes that might upset the established system of winning and holding office. With a few exceptions, they usually voted against any change, the chief exception being the change to a more restricted electorate.[13]

11. McMillan, *Constitutional Development,* 217.

12. Rogers, "George S. Houston," 105; Harvey H. Jackson III, "White Supremacy Triumphant," in *A Century of Controversy: Constitutional Reform in Alabama,* ed. H. Bailey Thomson (Tuscaloosa: University of Alabama Press, 2002), 18.

13. Hackney, *Populism to Progressivism in Alabama* (Princeton: Princeton University Press, 1969), 212.

The Bosses dominated the convention, even though there were only 60 Bosses out of a total of 155 delegates. The president of the convention was John B. Knox, a leading railroad lawyer. Committee chairmanships were confined to Bosses, with the appointment of T. W. Coleman, a former slaveholder, as chairman of the Committee on Suffrage and Elections being typical.

Hackney's Planter category numbering 37 delegates encompassed relatively small Black Belt plantation owners. Planters differed from Bosses only regarding business regulation. In particular, Planters favored regulation of rail transport.

Agrarians, another Hackney category, numbered only approximately 25 and included Democrats, Republicans, and Populists. Agrarians opposed further suffrage restriction and favored reform of the convict-lease system. However, like the Planters, the Agrarians sometimes voted with the Bosses. According to Hackney, "The Agrarians were not interested in railroad reform; instead they steadfastly advocated lower limits on taxation, debt, and spending. Ignoring the realities of a modern industrial state, they [preferred] . . . a small passive referee state."[14]

The Progressives numbered 32 and were mostly small businessmen. They sought convict-lease reform and antilynching laws. In addition,

> Their mixture of votes was a compound of humanitarianism, concern for clean government, a felt need for government regulation of powerful concentrations of wealth and a desire for increased public services. That the Progressives knew the cost of progress and were willing to pay it was reflected in their distinctive advocacy of higher debt, taxation and spending levels. They also wanted the state government to step in and regulate railroad rates so that some of the profits of progress would stay at home rather than flowing into the coffers of Northern corporations.[15]

The 1901 constitution was written by the Bosses. Even as passed, its legislative apportionment favored the Black Belt and would come to do so more over the years, as the Big Mule–dominated legislature refused to reapportion the legislature and as urbanization and migration reduced the Black Belt's share of the state's total population. The 1901 document made no changes in the convict-leasing system or the 1875 constitution's limits on taxation, which crippled schools. The new constitution also contained severe limits on road construction. Finally, according to J. Morgan Kousser, new suffrage restrictions were added, such as "lengthy residency requirements, a $1.50 cumulative poll tax, and a literacy or property test with temporary ex-

14. Ibid., 211–12.
15. Ibid.

emptions for ex-soldiers, the descendants of ex-soldiers, and men of 'good character.'"[16] More poor whites than blacks were disenfranchised, and the poor whites of North and South Alabama were precisely the kinds of voters the Big Mules wanted removed from the political process.

It is tempting to describe Alabama politics in the first seven decades of the twentieth century as bifactional, featuring Big Mules versus progressives. The two groups certainly disagreed in several important areas, but a bifactional model fails to capture the extent of Big Mule dominance and progressive weakness. Both in social origins and many governmental policies, the two groups were quite similar. On such issues as disenfranchisement of blacks and poor whites, segregation, and labor unions, there was little disagreement between them. In addition, only four governors before the 1960s could be characterized even loosely as progressives, and although they occasionally brought about substantial reforms in education, prisons, welfare, and the like, they did not touch the central structures of power in Alabama.

The 1901 constitution was both created by the Big Mule alliance and created or at least solidified the alliance. The 1901 constitution represented a treaty between two groups that, had they followed the patterns in many other states, would have found themselves in endless conflict. Instead, their partnership benefited both sides, to the detriment of the rest of the state.

Major Criticisms Directed at the 1901 Constitution

Calls for reform of the 1901 constitution began soon after its enactment and slowly intensified throughout much of the twentieth century and into the twenty-first. The constitution can be changed bit by bit through an amendment process, and it can be completely rewritten in a convention.

The amendment process begins with the legislature when each house approves a proposed amendment by a vote of three-fifths of the members of each chamber. The governor is not a formal part of the process, although in practice governors are frequently observed lobbying for or against a proposed amendment. If passed by the legislature, a proposed amendment must be voted on in a referendum; only a simple majority of those voting is required for passage. As evidenced by the constitution's more than 770 amendments, the amendment process is commonly used, and it was employed to restructure the entire judiciary. Judicial interpretation forbids an amendment that completely rewrites the constitution.

The legislature can call a constitutional convention by a vote of a major-

16. Kousser, *The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910* (New Haven: Yale University Press, 1974), 169.

ity of members of each house (18 of 35 senators and 53 of 105 representatives). As with an amendment, the governor plays no formal part in this process. The convention must then be approved by a simple majority in a referendum. Although a constitutional convention has never been held under the 1901 document, it is likely that enabling legislation would include detailed instructions for delegate numbers and selection. An amendment passed in 2002 requires that any new constitution written by a convention or the legislature be submitted to the electorate for ratification.

Criticism of the 1901 constitution centers around at least five closely related points. First, it is a racist document. Second, it is excessively long and burdened by essentially statutory enactments rather than basic law. Third, it is inadequate for an urban, industrialized society. The original document was intended to support a rural lifestyle and agricultural economic base and to hinder industrialization and economic development. Today, the constitution greatly limits state and local taxing power and support for education and economic development. Fourth, it contains no home rule for counties or municipalities, making it difficult for these governmental entities to adapt to a rapidly changing world. And, finally, it creates a tax structure that is regressive and unable to generate the revenues needed for government to adequately address a changing world and gives unfair advantages to agribusiness. Each of these criticisms will be addressed below.

A Racist Document

In a sense, the criticism that the constitution is racist has been neutralized by federal court decisions. However, the intentions of the 1901 framers were made brutally clear by the original wording.[17] In the November 2004 election, the Alabama electorate failed to ratify an amendment to the 1901 constitution that removed from the document all racist language and race-based provisions invalidated by federal actions, such as court decisions and amendments of the U.S. Constitution.[18] Most glaringly, Section 256 of the constitution specifies that "separate schools shall be provided for white and colored children, and no child of either race shall be permitted to attend a school of the other race." In addition to Section 256, the amendment would have removed earlier sections and amendments relating to poll taxes. However, it also would have repealed language in Amendment 111 that stated that "nothing in this Constitution shall be construed as creating or recognizing

17. One of the earliest discussions of this issue (and other restrictive elements) can be found in Albert E. McKinley, "Two New Southern Constitutions," *Political Science Quarterly* 18, no. 3 (1903): 480–511.

18. Ballot title Amendment no. 2.

any right to education or training at public expense." Many antitax and religious organizations opposed the 2004 amendment because, racist language notwithstanding, the Amendment 111 deletion might open the door to judicial activism with respect to school funding and result in court-ordered taxation. Because the amendment failed by approximately two thousand votes, some legislators immediately indicated they would seek passage of the amendment but with the Amendment 111 provision omitted. However, members of the Black Caucus have indicated that the removal of Amendment 111 must be part of any revision because they consider its original adoption to be one of the most racist actions in the fight against desegregation. They, and much of the black electorate, view the removal of all racist language and actions, including Amendment 111, as a crucial symbolic action that must occur.

Excessive Length

The 1901 constitution is the longest state constitution in the United States. This is largely due to the addition of amendments applicable only to specific localities that constitute approximately 70 percent of the document in its current form. Lacking home rule, counties and municipalities will continue to seek authority to operate via amendments. Home rule will be discussed in greater detail later.

The Alabama Constitution's extraordinary length unquestionably flies in the face of a consensus of legal scholars regarding the need for constitutional minimalism. Without singling out Alabama, constitutional specialist G. Alan Tarr criticizes state constitutions as "replete with 'constitutional legislation,' provisions that in their length and detail are indistinguishable from statutes but that nonetheless have been elevated to constitutional status."[19] Tarr cites Donald Lutz's observation that the one reason for state constitutional length is the brevity of the U.S. Constitution, which places responsibility on the states for dealing with the administration of such diverse matters as voting qualifications, education, and local government. Nevertheless, this point cannot explain Alabama constitutional amendment 742, which concerns the phaseout of supernumerary programs in Wilcox County (one of the state's lowest-population counties) and Wilcox County's participation in the state employees' retirement system. Amendment 741 concerns the way vacancies are filled in the Tuscaloosa County Judicial Commission.

Defenders of the status quo maintain that the large number of amendments ratified by the public represents evidence of citizen control and responsiveness to change and, in the words of Robert H. McKenzie, protection

19. Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998), 9.

"from local cliques raising taxes and imposing their wills without adequate safeguards."[20]

Inadequate for a Rapidly Changing Urban, Industrialized Society

J. Foster Clark describes many elements of the Alabama Constitution that prevent the state and localities from responding to economic changes quickly and effectively. He devotes considerable attention to proscribed economic development activities at both levels of government. Although since 1990 Alabama state and local government officeholders have enjoyed considerable success in attracting new industries, they have frequently done so working against the constitution. Clark explains that much of the freedom that state and local officials enjoy in seeking new industry or even running the day-to-day operations of government results from liberal court constitutional interpretations. The Alabama Supreme Court could have interpreted Sections 93 and 94 to prohibit such common undertakings as the acquisition of police cars (because of profits gained by the dealer) or the establishment of vocational-technical colleges where skills useful to private-sector employers would be taught. Instead, according to Clark, the court "has interpreted Sections 93 and 94 and other portions of the Constitution in a manner that avoids such extreme results and has permitted limited governmental involvement in economic development." However, supreme court interpretations have not been entirely consistent over the years. To clarify the legal position of localities with regard to economic development activity, approximately fifty constitutional amendments applied to specific localities have been adopted: "Typical among these amendments are provisions permitting certain counties and cities to acquire land to serve as an industrial site, to prepare the site for industrial and commercial uses and to sell at below-market prices or even donate the improved site to a private industrial user." Clark adds, "The result is that some of our cities and counties have considerably more flexibility than others to offer valuable incentives to new industry and can do so comfortable in the knowledge that their offers and agreements are legal and reliable."[21] Localities without this kind of legal protection are placed at a substantial disadvantage.

Arguments regarding the responsiveness of the constitution to changing

20. McKenzie, "Developing a Fair Hearing on Questions about the Alabama Constitution: Who Are We and What Do We Want to Be?" (Auburn: Alabama Community Leadership Development Institute, 2002), 23.

21. Clark, "Alabama's Existing Constitutional Provisions Impacting Economic Development: A Report by the Technical Advisors Committee for Economic Development," *Cumberland Law Review* 33, no. 2 (2003): 511–59; quotes on 515, 518, 519.

circumstances often relate not to economic development but to social and cultural issues. Various suggestions to streamline the document are viewed with alarm, especially by the Christian Right, as attempts to alter the basic values upon which the document is based. Opponents of constitutional change often point to the preamble, with its invocation of "the favor and guidance of Almighty God" and the "Declaration of Rights" (Article I) that enumerates more rights than those found in the U.S. Constitution. They argue that constitutional revision could result in the removal of the invocation and rights and the inclusion of other rights supporting alternative lifestyles. In addition, the gambling lobby is seen as lying in wait to take advantage of tax-reform attempts to remove language that limits most kinds of gambling.

Lack of Home Rule

Some constitutional constraints on county and city autonomy could be regarded as comical if they did not indicate the 1901 framers' extreme mistrust of local governance. For example, without Amendment 558 local school boards might not be able to expend public funds to purchase "trophies, plaques, academic banquets, and other honors that promote academic excellence in the public schools of Alabama." As we have already seen in other contexts, lack of home rule greatly restricts the decision-making authority of Alabama counties and municipalities. These bodies cannot easily change their governmental structure and are restricted in the kinds and levels of taxes they may levy and the indebtedness allowed. Reliance on the constitutional amendment process makes decision making slow and cumbersome; a change that could be made locally in months could require years, especially if a locality's legislative delegation is not unanimous. It also means that a major portion of the state legislature's time is devoted to the consideration of local issues rather than statewide matters.

Of course, home rule is not universally favored. In the wake of the *Kelo* decision, a panoply of eminent-domain abuses have unfolded before the nation. Additionally, some claim that home rule is simply a way to increase taxes, particularly the property tax. This line of argument often features such statements as: "Unfortunately, Alabama is a poor state. Limits on how government can act, especially in the area of taxation, are necessary protections for individual prosperity."[22] Nevertheless, the benefits of home rule outweigh the potential detriments for both Alabama citizens and their government.

22. *Kelo v. City of New London,* 200 U.S. 321 (2005); McKenzie, "Developing a Fair Hearing," 23.

Tax Biases, Balance, and Inadequacies

Tax structures are often evaluated in terms of equity. The standard of tax equity is a particularly powerful lens through which to view the Alabama Constitution. In Alabama highly regressive consumption taxes (sales and excise taxes) generate roughly half of state and local government revenue. The individual income tax, which was established and structured in Amendment 25 of the constitution, produces roughly one-quarter of state and local revenue and approaches being a flat tax as it is administered in Alabama.[23] The property tax produces only 14 percent of state and local government revenue and is constitutionally and statutorily structured to protect agribusiness, including the timber industry.

Income and property taxes cannot be increased without constitutional amendment. Because the sales tax is not part of the constitution (except for a few amendments relating to localities), the major barrier to raising sales taxes is political, not constitutional. As Bruce P. Ely and Howard P. Walthall note, "Many observers believe that is why the State—and localities—have become so heavily dependent on the sales tax: no statewide referendum is required to increase the sales and use tax at either the state or local level."[24] The ease with which the sales tax can be increased and its regressivity are probably related. The validity of this observation is reinforced by an examination of the constitutional provisions that define the property tax.

No elements of the Alabama Constitution more clearly reveal the politics of constitutional law and constitutional reform than those parts that deal with property taxation. Amendment 373 contains governing authority for the property or ad valorem tax. We believe that it is not accidental that the property tax is the tax most tightly constrained by the constitution as well as the most complex. It seems designed to prevent comprehension by the average citizen or citizen-legislator. It is too complex to be fully described here, but we will touch on a few features that convey a sense of the whole.

The constitution (Section 217b and Amendment 373) divides property into four classes: utilities; agricultural, forest, and owner-occupied residences; private passenger vehicles; and all other property. Each class is treated differently, with utilities and business properties most heavily taxed, assuming that assessments are fair. In addition, the constitution includes limits on each class that establish maximum percentages of market value

23. Carl Grafton and Anne Permaloff, "Tax and Constitutional Reform," in *Alabama Issues, 2002,* ed. Jim Seroka and Thomas Vocino (Auburn and Montgomery: Auburn University CGS and AUM Outreach, 2002), 9–11, 14–16.

24. Ely and Walthall, "State Constitutional Limitations on Taxing and Spending: A Comparison of the Alabama Constitution of 1901 to Its Counterparts," *Cumberland Law Review* 33, no. 2 (2003): 469.

that property may be taxed.[25] Furthermore, agricultural and forest lands are treated much differently than owner-occupied residences, which supposedly occupy the same lowest-tax class.

For all types of property except agricultural and forest lands the property tax is based on the market value of the property, that is, an estimate of the selling price of the property on the open market. But large expanses of valuable agricultural and forest lands are taxed based on a value that is barely related to the market value and is far lower than the market value. This nonmarket-valuation arrangement is referred to as current use. The Current Use Act of 1982 states that valuations will not be based on potential market value. Instead, the current-use valuation is supposedly derived from estimates of the value of harvests, but the result has little or nothing to do with actual crop or timber harvests on particular pieces of land.[26] Although it could be argued that taxation of property based on market value increases the likelihood of environmental destruction, the current taxation policy is simply inadequate.

According to the Alabama Department of Revenue Web site as of November 2003, timberland owners pay $2.19 in taxes per acre per year for good timberland, the most valuable of four categories of timberland.[27] When current use is threatened, agribusiness and timber interest groups mount expensive public relations campaigns, arguing that raising property taxes or altering current use will harm small landowners, destroy the family farm, force timber companies to close their lands to hunters, and hinder business investment in the state. The most recent attack on current use in the form of a package of constitutional amendments was mounted in 2003 by a newly elected and popular Republican governor working with a coalition of business, progressive, and educational groups. Agribusiness and timber groups, with the assistance of a leading Christian Right organization, won overwhelmingly—approximately two-thirds of the public voted against the reforms. All analyses of the vote point to two major reasons for the defeat of the constitutional reform: public distrust of government, especially the legislature, and a lack of governmental accountability. As of 2007, reformers are

25. Keith J. Ward, "Taxes and Finance in the Alabama Constitution" (Birmingham: Alabama Citizens for Constitutional Reform, n.d.), http://www.constitutionalreform.org/symposium/taxes.html.

26. Louis Hyman, "Current Use Taxes in Alabama," in *Alabama's TREASURED Forests* (Montgomery: Alabama Forestry Commission, n.d.), http://member.aol.com/JOSTNIX/curntuse.htm ("TREASURED" stands for Timber, Recreation, Environment, Aesthetics, Sustained, Usable, REsource). See also Purdue University, "Tax Management for Timberland Owners" (West Lafayette, Ind.: Purdue University Cooperative Extension Service, n.d.), http://www.timbertax.org/Ttbrochure3.pdf.

27. http://www.ador.state.al.us.

directing their efforts at achieving a statewide vote on whether a constitutional convention should be called. One of the major barriers they face is concern over potential interest-group domination of any convention.

The Continuity of Alabama Constitutional Politics

It is noteworthy that the divisions that Hackney detects in the convention that produced the 1901 constitution continue little changed a century later. The Big Mule alliance that he calls the Bosses is not as firm as it was then;[28] some in the business community (mainly organizations dependent on economic development for their growth) have deserted the Bosses for the Progressives. And groups such as African Americans, teachers, and trial lawyers exercise power in ways that they did not in 1901. But the manner in which the constitution relates to these groups emphasizes continuity more than change. As much as anything, the 1901 document was intended as a bulwark against blacks and Progressives, and in this it has succeeded brilliantly. Criticisms that the constitution is racist, is too long, fails to provide home rule, is unresponsive to a rapidly changing urban and industrialized society, and protects a regressive tax structure biased in favor of agribusiness would have been regarded as compliments by 1901 Big Mule delegates. These same criticisms are regarded as virtues (or, in the case of the criticism of racism, ignored) by contemporary defenders of the 1901 constitution.

In a meeting attended by one of the authors of this chapter, a leader of a powerful agribusiness interest group observed that he could not understand why people were so concerned by the length of the constitution and the fact that most of the public found it difficult, if not impossible, to read. He asserted that the public does not need to know what is in the constitution—that is what lawyers are for.

No defender of constitutionalism wants a state's or a nation's basic law to bend to every public-opinion breeze. A constitution is supposed to stand against some trends. Virtually the only kinds of social, economic, and political change that the 1901 constitution has been unable to resist are those emanating from the federal government.

28. Anne Permaloff and Carl Grafton, *Political Power in Alabama: The More Things Change . . .* (Athens: University of Georgia Press, 1995).

FRANKLYN C. NILES

Change and Continuity in Arkansas Politics after the 1874 Arkansas State Constitutional Convention

The state of Arkansas has been governed by five constitutions, with the current document dating from 1874. As with most states, each iteration of the Arkansas state constitution was born out of a crisis rooted in political and cultural conflict.[1] The first constitution (1836) was a requirement for statehood. The second constitution (1861) was drafted as a condition for entry into the Confederacy. The 1864 constitution reflected the post–Civil War military rule in the state and was a precondition for readmission to the Union. The fourth constitution (1868) was a requirement of Reconstruction, whereas the current constitution (1874) represents the reaction of disenfranchised Democrats against the corruption and fiscal irresponsibility of the Radical Reconstructionists. This constitution has weathered repeated attempts at replacement, including constitutional conventions in 1918, 1970, 1980, and, most recently, 1996. This is not to say the document has remained static and unchanged. Indeed, eighty amendments have been added since 1874, with the vast majority dealing with state finances, election procedures, and the salaries of public officials. This abundance of amendments is noteworthy for two reasons. First, voters in Arkansas have consistently refused to abandon a document that, by all accounts, is antiquated, cumbersome, and largely ineffectual for governing. As we shall see, because the 1874 constitution was an effort to address many of the excesses of the Reconstruction government, it contains outmoded and outdated provisions that are unnecessarily restrictive and have limited the ability of the state and local gov-

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1. Ralph C. Burnhart, "A New Constitution for Arkansas," *Arkansas Law Review* 17 (Winter 1962–1963): 4.

ernments to respond to new political and social demands.[2] Political scientist Diane Blair, writing in 1988, suggests that the Arkansas Constitution is "still better designed to prevent the recurrence of Reconstruction than to enable a late-twentieth-century government to perform effectively."[3]

Second, because citizens of Arkansas prefer, or at least seem indifferent to,[4] being governed by a document that is functionally anachronistic, state leaders have been forced to revise and streamline the constitution through the piecemeal process of amendment. One scholar suggests that "the [constitutional] history of Arkansas from 1874 to the present has been the passage of amendment after amendment in a desperate attempt to catch up to modernization." And, as noted by Calvin R. Ledbetter Jr. and his colleagues, when compared to earlier constitutions, the 1874 document places severe limitations on governmental power, and is "so detailed that many of the . . . amendments were intended to give some relief from an overly specific constitution." For instance, amendments have been added in order to permit the use of voting machines (Amendment 50), establish a permanent voter-registration system (Amendment 51), create community colleges (Amendment 52), and permit public funding of kindergartens (Amendment 53), and three amendments have been needed to set the salaries of legislators.[5]

Efforts to revise or replace the 1874 constitution have pitted *modernizers* against *traditionalists* in the state. This conflict, described by historian Michael Dougan as "a tug of war . . . between two polar opposites," revolves around competing views concerning the purposes of government and society.[6] Traditionalists embrace many elements of the plantation culture of the past and thus oppose an activist state and any constitutional revisions that would serve to strengthen state government (yet they support local government). Traditionalists also oppose industrial development and funding for education and are religiously pietistic. In contrast, modernizers are often at the forefront of revisionist efforts, believing that state government should play a role in fostering positive social, political, and economic change. Modernizers are also committed to industrial development, free markets, and

2. Robert W. Meriwether, "The Proposed Arkansas Constitution of 1970," *Nebraska Law Review* 4 (1971).

3. Diane D. Blair, *Arkansas Politics and Government: Do the People Really Govern?* (Lincoln: University of Nebraska Press, 1988), 120.

4. Blair argues that "one of the most serious obstacles to constitutional reform is general citizen indifference. . . . [Few are interested in] structural or procedural issues" (ibid., 128).

5. Kay Colett Goss, *The Arkansas State Constitution* (Westport, Conn.: Greenwood Press, 1993), 8; Ledbetter et al., *Politics in Arkansas: The Constitutional Experience* (Little Rock: Academic Press, 1972), 52 (quote), 54. All references to the 1874 Arkansas Constitution are from the version available at http://www.arkleg.state.ar.us/data/constitution/index.html.

6. Dougan, *Arkansas Odyssey* (Little Rock: Rose Publishing, 1994), 7.

egalitarianism. Recent revisionist efforts reflect this conflict. For example, by most accounts the defeat of the proposed 1980 constitution, which would have strengthened the three branches of government, was an important victory for the traditionalists.[7] At the same time, modernizers, despite being consistently defeated in their efforts to replace the 1874 constitution, have been successful at revising the constitution through the amendment process, including, for instance, Amendments 56 and 63 that increased the power and professionalism of the governor. This strategy has resulted in an awkward, patchwork document consistently in need of further revision.[8]

Despite its obvious shortcomings, the 1874 Arkansas Constitution has provided a measure of political stability (especially when compared to the 1868 constitution) that has lasted for more than 130 years. Given the pervasive cultural and political conflict in Arkansas, one might wonder how the constitution has worked to provide this stability (apparent or otherwise). Perhaps the more important question is the following: in what way has the current document contributed to democratic governance, and in the process, achieved sufficient popular support to remain intact (though highly amended)?

Constitutional Development, 1836–1873: Continuity and Change

Prior to becoming a state in 1836, the Arkansas territorial government, which included the governor, secretary of state, and judges, was appointed by the president of the United States.[9] The national government paid the salaries of state officials and funded internal improvements such as railroads, roads, and canals. As noted by Calvin Ledbetter, "Dependence on the national government was so great that on the eve of statehood there was real concern over whether Arkansas could afford to finance its own government."[10]

As a precondition for statehood, the 1836 Arkansas Constitution was similar in many ways to the U.S. Constitution. The document was brief (ninety-

7. Calvin R. Ledbetter Jr., "The Proposed Arkansas Constitution of 1980," *Arkansas Historical Quarterly* 24 (Spring 2001): 53.

8. It is important to note that the 1874 constitution has been revised through a combination of amendments, state and federal court rulings, and state legislative prerogative. This chapter focuses on the influence of the amendment process (although a few notable court cases are mentioned).

9. Much of the material in this section is drawn from Ledbetter et al., *Politics in Arkansas,* 46–55.

10. Ibid., 55.

one hundred words), flexible, and generally effective for governing. It contained a declaration of rights (in twenty-nine sections) that included the right to worship, freedom of the press, freedom from illegal search and seizure, the right to bear arms, and the outlawing of financial monopolies.

In 1861, a new constitution was written prior to Arkansas's entry into the Confederacy. The 1861 constitution was similar to the preceding document save for new provisions to safeguard slavery and the substituting of "Confederate States of America" for "United States of America." The third constitution, adopted in 1864, was a precondition for readmittance into the Union after the Civil War and was essentially a rewrite of the 1836 constitution, save that slavery was abolished, property rights were established for blacks, and allegiance to the Union was reestablished. Suffrage and the right to bear arms were still reserved for white males. Unlike the 1864 constitution, the 1868 document, which was mandated by the federal Reconstruction Acts of 1867, contained significant changes that had far-reaching implications. The new constitution disenfranchised former Confederates, extended suffrage to blacks, and included a broadened bill of rights that provided protection against racial discrimination.[11] The legislature gained important powers under the 1868 constitution, including the ability to restrict cities' powers of taxation, assessment, contracting of debts, and extending of credit. Furthermore, the legislature was given power over state printing, and the establishment and funding of public education were mandated for all persons "between five and twenty-one years of age."[12] The governor was also given broad appointive powers over most state judges, tax assessors, and prosecuting attorneys.[13]

Under the new document, and with Reconstruction in full swing, the legislature used its new powers to increase taxes to build railroads, buildings, dams, and other public works projects. Most of these projects were either fictitious or fraudulently funded. Tax assessors, who were appointed by the governor, received a percentage of taxes levied and thus had a strong incentive to significantly raise taxes, with few public services provided to account for the increase. As one scholar has noted, these conditions resulted in "a depressed self-image" for many Arkansans.[14]

Increasing state debt, economic hardship, government corruption, high taxes, and black suffrage aroused enormous resentment among conservative

11. Robert E. Leflar, "Arkansas: A Survey of Her Constitutions," *Arkansas Gazette* (Little Rock), October 19, 1969, E1.

12. Goss, *The Arkansas State Constitution,* 6.

13. Burnhart, "New Constitution," 4.

14. Goss, *The Arkansas State Constitution,* 7, 5.

voters who desired fiscal accountability and a change in political control.[15] Perhaps most important, many former Confederates believed the 1868 constitution was a "symbol of Radical Reconstruction, carpetbaggers, and scalawags," and was thus in need of revision.[16]

The Constitution of 1874: A Response to Reconstruction Excesses

Amid quarreling within the Republican Party, Democrats won control of the general assembly in a special election in November 1873, and promptly called for a constitutional convention that was approved by voters 80,259 to 8,547. Ninety-one delegates were selected, and by October 1874 the fifth Arkansas state constitution was ratified with the support of sixty-seven out of seventy-three counties.[17] The 1874 constitution contained more changes than any of the previous four, and the new provisions were for the most part "highly rural, restrictive, and negative in nature."[18] The document was intended to prohibit the abuse of governmental power and the fiscal irresponsibility that had characterized the Reconstruction era. The constitution, especially for Democrats, was "a reaction against the government which preceded it with all of the abuses and dissatisfactions fresh in mind."[19] As a result, distrust of government is evident in nearly every section of the constitution.[20]

Furthermore, the document is lengthy (originally twenty-six thousand words, compared with the U.S. Constitution's sixty-seven hundred, with amendments adding twenty thousand more) and extraordinarily detailed and restrictive, and many of the provisions are outdated (for example, Article XIX, Section 2, deems dueling illegal). As noted earlier, this has made the document incredibly cumbersome to use—"obsolete and unworkable," in the words of one scholar—and has necessitated extensive revision through the amendment process. If evaluated by the standard set by Chief Justice John Marshall in *McCulloch v. Maryland* (1819)—that constitutions should contain only "the great outlines of government"—the Arkansas Constitution is seriously wanting.[21]

15. Ledbetter Jr. et al., *Politics in Arkansas,* 51.

16. Walter Nunn, "The Constitutional Convention of 1874," *Arkansas Historical Quarterly* 27 (Autumn 1968): 181.

17. Ledbetter Jr. et al., *Politics in Arkansas,* 53.

18. Goss, *The Arkansas State Constitution,* 8.

19. Ledbetter Jr. et al., *Politics in Arkansas,* 52.

20. Blair, *Arkansas Politics,* 122.

21. *McCulloch v. Maryland,* 17 U.S. 316 (1819).

Constitutional Design in Post-Reconstructionist Arkansas: Secular Authority Amid Moral Traditionalism

According to Donald S. Lutz, constitutions create a vision of the "good life" and "describe what that life should be like and the institutions by means of which will be achieved that way of life. A constitution enunciates the values that support the good life . . . and also describes the political offices [including terms, powers, eligibility, and how collective decisions are made] of the state . . . [and is] in effect, a design for the distribution of power."[22] Furthermore, a constitution establishes the locus of authority of the regime. In this section, the focus is on understanding the values and principles that undergird the 1874 Arkansas Constitution, and examining how interpretation and implementation of these principles have changed over time. We will also consider where the authority of the regime resides.

The preamble of the 1874 Arkansas Constitution states, "We, the people of the State of Arkansas, grateful to Almighty God for the privilege of choosing our own form of government, for our civil and religious liberty, and desiring to perpetuate its blessings . . . " Unlike the U.S. Constitution, but similar to that of many states, Arkansas's constitution invokes God as the one who ordains and sustains life. Liberty is discussed, but a clear purpose of government is not enumerated. The Arkansas Constitution reflects values shared by most Americans: faith in God and belief in the sovereignty of God.[23] At the same time, the document fails to define precisely "the good life."

Traditionalist Religious Influences

Although this ambiguity has left goal definition open to interpretation (which has often resulted in conflict), one can gain a sense of the guiding vision of the framers elsewhere in the document. A quick analysis of the constitution reveals that pietistic religious values are animating forces in Arkansas politics. For example, Article II, Section 24 (in the bill of rights), in addition to guaranteeing religious freedom, states that "all men have a natural . . . right to worship Almighty God . . . [and] no authority can . . . control or interfere with the right of conscience." Furthermore, in Section 25 of the same article, "religion, morality, and knowledge" are established as being "essential to good government," and, thus, the legislature should "enact suitable laws to protect every religious denomination." The constitution also denies the right to hold office or testify in court to any person "who de-

22. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University, 1988), 13.

23. Goss, *The Arkansas State Constitution,* 25.

nies the being of a God" (Article XXIV, Section 1). Though atheists have been unsuccessful in their challenge of this provision, it is most likely unconstitutional following the Supreme Court's ruling in *Torasco v. Watkins* (1961) and the later Arkansas case that was decided on the issue of standing, *Flora v. White* (1982).[24]

To further illustrate the importance of religion in Arkansas government, it is noteworthy that opponents to the proposed 1970 Arkansas state constitution argued the document was "atheistic" because "Almighty God" was removed from the bill of rights. In response to this accusation, proponents reinserted the phrase in the preamble, but the proposal was defeated nonetheless. More recently, with the addition of Amendment 68 in 1988—an initiative supported by religious conservatives—public funding of abortion is outlawed, and Arkansas is mandated "to protect the life of every unborn child from conception until birth." Clearly, the 1874 constitution, and the vision it promulgates, is firmly rooted in the religiously conservative soil of Arkansas's political culture.[25]

Political Authority

Despite the religious references contained in the preamble, governmental power in Arkansas is based on the secular authority that resides with *the people.* According to Article II, Section 1, "All political power is inherent in the people, and government is instituted for their protection, security, and benefit; and they have the right to alter, reaffirm or abolish the same in such manner as they may think proper." When this section is evaluated in light of the preamble, it is evident that the will of the people establishes the regime (as well as the constitution), and its continued existence is contingent upon a continuing flow of positive evaluations.

To highlight the secular characteristics of state authority, it is useful to recognize that the constitution establishes the equal treatment of religions and the separation of church and state, yet, when compelling reasons exist, the state may encroach on religious rights. For example, whereas Article II, Section 24, states, "No preference shall ever be given, by law, to any religious establishment, denomination, or mode of worship above any other," this provision has been interpreted by the courts to allow the state to compel children to be vaccinated even if contrary to their family's religious beliefs.[26] Furthermore, the Arkansas Constitution prohibits the use of religious tests

24. Ibid., 106; *Torasco v. Watkins,* 367 U.S. 488 (1961); *Flora v. White,* 692 F.2d 53 (1982).

25. It is interesting to note that another abortion-related amendment (the Unborn Child Amendment) was proposed by initiative in 1984. It failed at the polls.

26. *Cude v. State,* 237 Ark. 927, 377 S.W.2d 816 (1964).

(other than nonbelief [Article XIX, Section 1]) as a precondition to holding office or serving as a witness.

Although state authority is based on consent of the governed, and religious tests have been ruled unconstitutional, religion is nonetheless woven into the fabric of public life in Arkansas. As one scholar argues, religion is "an important qualification" for holding office: nearly 100 percent of state legislators are affiliated with a religious tradition (denomination), and, typically, two-thirds are Baptist or Methodist.[27] This closely mirrors the religious orientation of the majority of Arkansans. Almost 60 percent of state residents claim a religious affiliation, and among this group, well over 50 percent claim to be Baptist.[28]

Political Power and Citizenship in Arkansas

At the core of political authority and the distribution of political power is the notion of citizenship. All constitutions must define who holds full political rights and how those rights are to be exercised. According to Aristotle, and recently restated by Lutz, a citizen is one who is able to hold office as well as determine who holds office (often through elections).[29] In this way, citizens are able to actively participate in the political life of the state. Minimally, this includes voting.

As a post-Reconstruction document, the 1874 Arkansas Constitution extended suffrage to "every male citizen of the United States, or male person who has declared his intention on becoming a citizen . . . of the age of 21," and who had resided in the state twelve months (Article II, Section 1). Moreover, elections were to be free and equal. This relatively restrictive view of voting rights has evolved over time. Indeed, the franchise was eventually extended to all citizens of the state, including women, who were twenty-one years or older (Amendment 8). The poll tax was repealed in 1964 (Amendment 51, Section 17), and, as provided by Amendment 26 of the U.S. Constitution, in 1971 the right to vote was extended to persons eighteen years and older.

The constitution also guarantees that all persons will be equally recognized before the law and thus will not be "deprived of any right, privilege . . . on account of race, color, or previous condition" (Article II, Section 3). This

27. Blair, *Arkansas Politics,* 163.

28. Dale E. Jones et al., *Religious Congregations and Memberships in the United States, 2000* (Nashville: Glenmary Research Center, 2002), 59.

29. Recall that Aristotle considers a citizen one "who has the power to take part in the deliberative or judicial administration of the state" (*Politics,* in *Introduction to Political Thinkers,* ed. Alan Ebenstein, 2d ed. [New York: Harcourt College Publishers, 2002], 77). See also Lutz, *Origins of American Constitutionalism,* 14.

provision requires that "the state must establish a compelling interest for classifications in legislation" (*Boshears v. Arkansas Racing Commission* [1975]).[30] Each of these provisions was intended to democratize the electoral process and to guarantee equal protection under the law.

The notion that all citizens *should* possess *full* political rights (beyond just voting) has not gone unchallenged, and is not fully elaborated in the Arkansas Constitution. For example, in response to the Little Rock Central High School crisis of 1957—when President Eisenhower authorized the use of National Guard troops to assist in integrating the school after Governor Faubus had refused to do so—a states' rights amendment was drafted (Amendment 41). The amendment was intended to establish state supremacy (Section 1) and make segregation statutes legal (Section 3). The latter provision was subsequently deemed unconstitutional,[31] and the entire amendment was repealed in 1990. Regardless, the Arkansas Constitution seems to promote a narrow definition of citizenship that includes primarily voting rights. There are few positive definitions of citizenship, and other than prohibiting slavery (Article II, Section 27), gender-based property discrimination, and race-based discrimination (Article II, Section 3), there are no explicit provisions barring other class-based discrimination. Furthermore, when one considers that abortion rights have been recently restricted in Arkansas, it seems highly likely that notions of political and social rights will continue to be redefined, through either constitutional change or the legislative process, for some time.

Political Institutions and the Distribution of Political Power

While constitutions allocate political power through defining citizenship, they also do so through the definition of political institutions and the distribution of offices. If, as Lutz argues, "constitutionalism is an advanced technique for handling conflict," one of the primary ways this is accomplished is through the formal allocation of powers to governmental entities. This is accomplished in two ways. First, constitutions define "the range of activities on which the political institutions will bear," and, second, "they determine which institutions have how much say in a given area of public concern."[32] In essence, these two provisions establish both a form of government and the process of collective decision making.

30. Goss, *The Arkansas State Constitution,* 30; *Boshears v. Arkansas Racing Commission,* 258 Ark. 741, 528 S.W.2d 646 (Ark. 1975).

31. *Garrett v. Faubus,* 230 Ark. 445, 323 S.W.2d 877 (1959).

32. Lutz, *Origins of American Constitutionalism,* 14.

The Arkansas Constitution establishes three separate and independent departments of government: the executive, legislative, and judiciary (Article IV, Section 1). According to the constitution, none of the three departments is subordinate to any other. For example, legislative prerogatives are not dependent on the judiciary, and the legislature is not subject to a judicial writ of mandamus.[33] In this way, the constitution establishes a clear separation of powers.

The Arkansas Constitution also contains a "federal framework," with much political power originally delegated to county courts and officials. Counties are political entities that presumably provide more efficient administration and justice where local affairs are concerned. With the emphasis on county-level politics, according to Robert Leflar, the 1874 constitution "almost ignored the problems of cities and towns." This makes sense when one remembers that Arkansas was largely rural and undeveloped: there were simply few municipal problems. As a result, local government is centered on the county level. Still, because counties derived all of their political power from the general assembly, county government reflected "Little Rock," rather than "home rule."[34] However, as will be seen, as a result of Amendment 55 county government was significantly reorganized, with a larger measure of legislative authority given to county quorum courts.

Legislature

Pervasive distrust of government is evident in the restrictions placed on legislators. For instance, in an effort to prevent "excessive and unwise lawmaking," the legislature is limited to biennial sixty-day sessions (Article V, Sections 2 and 17).[35] To oppose secrecy, deliberations are to be open (Sections 12 and 13), voting is to be conducted verbally (Sections 14 and 22), and "every bill shall be read at length on three different days in each house . . . and no bill shall become a law unless the names of the persons voting for and against . . . be entered on the journal" (Section 22). Furthermore, in an effort to democratize the legislative process, the constitution requires only a simple majority in both houses for a bill (including amendments) to become law, and in order to encourage fiscal responsibility and accountability, legislators' salaries are fixed (Section 16) and there are severe limitations on taxation and borrowing (Article XVI, Sections 6–8). Finally, so as to prevent corrupt omnibus appropriation bills, Article V, Section 30, requires all

33. Goss, *The Arkansas State Constitution,* 45; *Wells v. Purcell,* 267 Ark. 456, 592 S.W.2d 100 (1979).

34. Leflar, "Arkansas," E6.

35. Blair, *Arkansas Politics,* 122.

such bills to be limited to providing for the "ordinary expenses of the executive, legislative, and judicial departments. . . . [A]ll other appropriations shall be made by separate bills, each embracing only one subject."

Amendment provisions have also affected the policy process. For instance, in an effort to restrict excessive taxation, Amendment 19, Section 38, states, "None of the rates for property, excise, privilege or personal taxes, now levied shall be increased by the General Assembly" except as approved by voters or, in the event of an emergency, three-fourths of the house. The legislature has been able to surmount this constitutional obstacle by increasing the sales tax, which is not levied, with a simple majority vote. This strategy has been used extensively to fund major educational reform initiatives in Arkansas.[36]

Finally, amendments to the 1874 Arkansas Constitution have imposed procedural changes, including provisions in Amendment 19 requiring a majority vote in both chambers to pass a law. This provision replaced the presumably less representative quorum vote that occasionally occurred.

Some of the collective decision-making power of the general assembly has been transferred to the citizens of Arkansas by the popular initiative and referendum provisions contained in Amendment 7 (1920). According to this amendment, the "legislative power of the people of the State shall be vested in a General Assembly . . . but the people reserve to themselves the power to propose legislative measures, laws, and amendments to the Constitution." In addition, voters are able to accept or reject such measures independent of the general assembly. This has been an important avenue of constitutional change: although the majority of the eighty amendments were initiated by the legislature (which is authorized to propose three new amendments each legislative session), more than twenty-five have been the result of initiative efforts.

Further illustrating the democratic nature of Arkansas state politics, the constitution, unlike in most states, is easy to amend. Rather than supermajorities or approvals of two legislative sessions, a simple majority in both chambers is sufficient. Still, as will be discussed in detail below, not all constitutional provisions ease the passing of laws: the approval of three-quarters of legislators is needed for a tax increase (Amendment 19, Section 38).

Executive

One of the primary goals of the 1874 constitution was to keep the office of governor structurally weak. According to Article VI, Section 1, the execu-

36. Goss, *The Arkansas State Constitution,* 142.

tive department consists of the "Governor, Secretary of State, Treasurer of State, Auditor of the State, and Attorney General." To limit the power of these offices, terms were limited to two years, and voting procedures were extremely detailed, even to instructing that ballots be "sealed up separately." The governor is the chief executive and must be at least thirty years of age and a resident of the state for seven years. The governor signs bills into law (Articles VI, Section 15) and possesses line-item veto power (Section 16); however, if he does not exercise this power within five days, the bill automatically becomes law (Section 15). Furthermore, the governor cannot veto a resolution containing a proposed constitutional amendment, but he may, under extraordinary circumstances, convene a special legislative session (Section 19). Finally, to further limit the power of the governor, Article II, Section 12, prohibits the governor from granting clemency in cases other than criminal offenses, which might include "general amnesty, [or] relief from civil penalties or forfeitures."

Important changes to the structure of the executive branch have occurred through the amendment process. Perhaps most important, Amendment 6 (1914) established the office of lieutenant governor. Illustrating the difficulty of adapting a rigid and overly specific constitution to new political demands, Kay Goss notes that Amendment 6 "was probably superseded by Amendment 37, Section 1, which, in turn, was repealed by Amendment 56, Section 5, and replaced by Section 1 of Amendment 56," with the latter being "superseded by Amendment 65, Section 1."[37] In any event, in an effort to ease demands on the governor, and to provide for succession of office in the event of death or impeachment, the office of lieutenant governor was created. Elected via plurality vote, fulfilling the same age and residency requirements as the governor, the lieutenant governor is the president of the senate, casting a vote in the event of a tie (Amendment 37, Section 5). To provide a greater measure of political continuity and professionalism, the terms of each office within the executive branch have been increased from two to four years (Amendment 63, 1984), and salaries have been adjusted to reflect economic demands (Amendment 56, Section 2 [1976]).

Judicial

Perhaps most noteworthy is the dominant role that judges play in local politics. Because in the latter half of the nineteenth century local government in Arkansas was centered at the county level, towns were largely ignored in the 1874 constitution. As a result, most governmental authority was given to county officials (although it could be abrogated by legislative over-

37. Ibid., 125.

sight). Contrary to the separation of powers established elsewhere in the constitution, the county judge (who is still popularly elected), presiding over a court that could disburse money "for county purposes, and in every other case that may be necessary to the internal improvement and local concerns" (Article VII, Section 28), had expansive power, including executive, legislative, and judicial.[38]

Recalling that under the 1874 constitution county judges performed legislative, executive, and judicial functions, in an effort to reduce the likelihood of judicial abuse, Amendment 55 was proposed by a house resolution in 1973. A provision in this amendment requires that local legislative authority be vested in quorum courts. Furthermore, county courts are able to adjudicate only criminal cases that explicitly relate to "county affairs" (Amendment 55, Section 1b). According to this amendment, the county judge presides over the quorum court yet is a nonvoting member (the judge does retain veto power). The judge is also authorized only to "approve disbursement of county funds; operate the system of county roads, administer ordinances enacted by the Quorum Court . . . [and] hire county employees" (Amendment 55, Section 3). In this way, the power of county judges was significantly reduced. As one scholar argues, because of Amendment 55, the duties of the county court judge changed from being a "judicial officer to those of an officer who pays claims as an administrative officer."[39]

Limitations on Governmental Power under the 1874 Arkansas State Constitution

Given the pervasive corruption of the Reconstruction government, the 1874 Arkansas Constitution was designed to protect citizens from further abuse and "possible oppression by their own state government."[40] Beyond establishing a clear rule of law and defining governmental institutions, the constitutional framers endeavored to further limit the power of government by enumerating a range of inviolable rights and placing explicit restrictions on government institutions.

Declaration of Rights

A bill of rights identifies a range of claims that persons can make as citizens of a state, claims that cannot be abrogated by government officials or

38. See Leflar, "Arkansas," E6.
39. Goss, *The Arkansas State Constitution,* 191.
40. Blair, *Arkansas Politics,* 122.

other citizens. The 1874 Arkansas Constitution contains a bill of rights (Section 2, called "Declaration of Rights") in twenty-nine sections. Unlike the U.S. Constitution, Arkansas's current bill of rights is a section of the original document. Because the Declaration of Rights establishes that the authority of the power of government resides with the people (Article II, Section 1), it is integral, rather than additional, to establishing a form of government. Like its federal counterpart, however, the Arkansas Constitution guarantees that citizens have the right to bear arms (Article II, Section 3), the right to assemble (Section 4), freedom of religion and worship (Sections 24), and freedom of the press (Section 6).

The Arkansas Constitution's bill of rights is far more detailed than that of the federal constitution. Given the abuses of the Reconstruction government, this makes sense. For instance, to guarantee due process and to protect against false imprisonment, nine sections deal with criminal or legal proceedings. These include, for example, the right to trial by jury (Article II, Section 11) and the right of habeas corpus (Section 11), protection against excessive bail (Section 9), the right to a speedy trial (Section 10), and protection against imprisonment for civil debt (Section 16). Furthermore, the government has limited power to issue search warrants and engage in search and seizure of property. According to Article II, Section 15, people of the state have the right to secure their belongings from unreasonable searches, and warrants cannot be issued without probable cause. Over the years, court decisions have helped to rectify some of the restrictiveness of this provision. For instance, Section 15 has been interpreted to mean that government may compel corporations within the state to produce books during an investigation (*Hammond Packing Company v. Arkansas* [1908]), and a warrant is not required for inspections of regulated businesses (*Hosto v. Brickell* [1979]). Still, not all warrants are illegal (only those deemed unreasonable [*Mann v. City of Heber Springs* (1965)]), and the state must produce a search warrant concerning evidence used at a trial (*Russ v. City of Camden* [1974]).[41]

The establishment and protection of property rights are also a dominant theme in the Arkansas Constitution. According to Article II, Section 22, the right of property is "before and higher than any constitutional sanction; and property shall not be taken . . . without just compensation." This provision has been interpreted to mean that property cannot be taken away through eminent domain for private use (*Ozark Coal Co. v. Pennsylvania Anthracite*

41. Goss, *The Arkansas State Constitution,* 34; *Hammond Packing Company v. Arkansas,* 212 U.S. 322 (1908); *Hosto v. Brickell,* 265 Ark. 147, 577 S.W.2d 401 (Ark. 1979); *Mann v. City of Heber Springs,* 239 Ark. 969, 395 S.W.2d 557 (Ark. 1965); *Russ v. City of Camden,* 256 Ark. 215, 506 S.W.2d 530 (Ark. 1974).

R.R. [1911]).[42] To further protect the economic well-being of state residents against organized interests, monopolies are ruled unconstitutional (Article II, Section 19).

Finally, the current constitution prohibits any government authority other than the general assembly from "[setting] aside the law or laws of the State" (Article II, Section 12). This is an attempt to limit the power of the governor, and, among other things, has been interpreted to mean that the power of the governor to grant clemency is limited to individuals charged with a crime, but does not extend to general amnesty or relief from civil penalties (*Hutton v. McCleskey* [1918]).[43]

Institutional Limitations

As has been previously discussed, to ensure popular control of government officials, under the 1874 constitution legislative and executive terms were reduced, and many previously appointed offices are now elective, which provides voters with forty-four rather than fourteen (as under the 1868 constitution) opportunities to express their electoral will in a four-year period. Legislative sessions were fixed at sixty days, salaries for all state and county official were fixed, and "elaborate statutory detail on . . . conduct of elections to the times and places of circuit court meetings and procedures for state printing contracts were included to leave little leeway to any state official tempted to abuse his powers."[44] Perhaps most important, taxing and spending powers of the state government were limited. Indeed, among the 261 sections of the 1874 constitution, 69 sections address financial matters, with most restricting government activity.[45] For example, Article XVI limits the ability of governments in the state to loan credit with the following provision: "Neither the State nor any city, county, town or other municipality. . . shall ever loan its credit for any purpose whatever; nor shall . . . [they] ever issue any interest-bearing evidences of indebtedness" (Section 1). Given its restrictive nature, subsequent court cases have helped broaden this provision. For instance, localities are able to donate money for public projects, and municipal districts may levy assessments based on consent of two-thirds of property holders.[46] At the same time, counties are severely re-

42. *Ozark Coal Co. v. Pennsylvania Anthracite R.R.,* 97 Ark. 495, 501, 134 S.W. 634 (1911).

43. *Hutton v. McCleskey,* 132 Ark. 391, 200 S.W. 1032 (1918).

44. Blair, *Arkansas Politics,* 122.

45. Walter Nunn, "The Negativism of the 1974 Constitution," in *Readings in Arkansas Government,* ed. Nunn (Little Rock: Rose Publishers, 1973), 21–25.

46. Respectively, the cases are *Kerr v. East Central Arkansas Housing Authority,* 208 Ark. 625, 187 S.W.2d 189 (1945); and *Ray v. Mountain Homes,* 228 Ark. 885, 311 S.W.2d 163 (1958).

stricted in their ability to tax, except in cases arising from existing contracts (Article XVI, Section 3).

The stricture on government taxation has come at a cost. Educational funding is severely limited under the constitution. According to Article XIV, Section 3, the general assembly may authorize local school districts, subsequent to an affirmative vote of electors, to levy a district tax not to exceed five mills on the dollar in any year for educational purposes. This provision has been amended twice, with the current amendment (40) authorizing school districts to levy a tax to cover expenditures. In the event the tax is not supported by a majority of voters, the tax reverts to the rate approved at the last annual school election. In effect, Amendment 40 provides a financial safety net for school districts: in the event a mill tax increase is defeated, the existing rate remains in effect. The constitution has also been amended to address more general needs, including a provision that authorizes county quorum courts to levy annually a county road tax not to exceed three mills of taxable property (Amendment 61 [1982]). Again, this is an attempt to insulate infrastructural development from the vagaries of electoral outcomes: prior to this amendment, voters had to approve a road tax every two years.

Evaluation

Arkansas's constitutional history is rooted in political and cultural conflict. Most scholars acknowledge that the ongoing conflict between modernizers and traditionalists has left its mark on the 1874 state constitution, and as a result, the document contains both progressive and traditionalistic elements. One of the goals of the constitutional framers was to increase popular control over government. In this way, the document is remarkably democratic: unlike many states that require extraordinary legislative majorities to pass amendments initiated in the legislature, Arkansas requires only simple majorities in both chambers. By some estimates, only five other states have constitutions as easy to amend as Arkansas, and only sixteen states permit voters to initiate constitutional amendments.[47]

At the same time, the constitution is extraordinarily restrictive, and by most accounts outdated and contradictory. For example, Amendment 42 (1952) requires that no more than one of the state highway commissioners can be elected from each district. In 1952 there were five congressional districts; there are now four, making it impossible to legally implement this

47. The other five states that have easy amendment requirements include Arizona, Missouri, North Dakota, Oklahoma, and Oregon (Robert W. Meriwether, "The Amending Process," in *Readings in Arkansas Government,* ed. Nunn, 55).

provision. Furthermore, in an effort to minimize the likelihood of government oppression, the document places severe structural and functional limitations on most governmental institutions, and makes permanent what many state constitutions leave to be decided through the legislative process. As we have seen, these restrictions have resulted in a document that is inflexible and ill-suited for governing a state facing increased public needs and expectations, and thus are serious impediments to modern governance.

With the goal of streamlining and simplifying the constitution, a series of efforts to replace the document have occurred over the years. Each of these proposals was rejected by voters. Reformers have been forced to use the amendment process as an alternative route for constitutional change. In one regard, this process has been incredibly successful: many of the changes proposed in the new constitutions, especially the 1918 effort, have been adopted through the amendment process. These include women's suffrage, the initiative and referendum, increased salaries for state officials, and elimination of the general property tax as a method of financing state government.[48]

The ease and frequency of amending the constitution, however, have incurred some significant costs. Perhaps most important, rather than streamlining and simplifying the document, amendments have added to the length, complexity, and statutory detail of the document, creating the need for constant updating of the constitution as new political demands arise. For example, Amendment 62 (1984) repealed four earlier provisions that restricted the ability of local governments to issue capital development bonds, and as we have seen, Amendment 63 (1984) increased the governor's term to four years, a move previously found advisable by forty-six other states.[49]

Beyond amending the constitution, government officials have used other methods to surmount the restrictive provisions in the document. For instance, changes have been made through simple statutory action, including a statewide code of ethics, executive reorganization, and enlarging the power of municipalities. Another less formal method is to simply ignore time-bound provisions (Amendment 42 is typically ignored) and implement expedient procedures that technically comply with constitutional mandates. The general assembly, for example, frequently exceeds sixty-day sessions. Legislators regularly vote to extend the session, the frequency of which is not restricted by the constitution, and often "recess" rather than adjourn so that they are able reconvene without governor initiation.[50]

This piecemeal approach to constitutional reform has its drawbacks. Leg-

48. Leflar, "Arkansas," E6.
49. Blair, *Arkansas Politics,* 133.
50. Ibid., 131, 133.

islators are limited to three submissions for amendments in each session, and as a result, as noted by Diane Blair, the "submissions are just as likely to reflect a power legislator's pet proposal as to address a fundamental flaw in the constitution."[51] Use of the amendment process also fails to advance a cohesive vision of the state. For example, although the amended constitution has removed many of the shackles from state officials, there is still opposition to an activist state, with especially stiff resistance against raising taxes to fund public projects. Third, though the initiative process appears democratic, it tends to be more accessible to individuals and groups with preexisting social and political networks, distinct ideological commitments, or economic resources. Finally, amending the constitution has, by some accounts, failed to fully allocate social and political rights, especially in terms of rectifying lingering racial discrimination. Recently, the Eighth U.S. Circuit Court of Appeals in St. Louis upheld a ruling that removes Little Rock schools from desegregation monitoring (the district has been in litigation over this issue since 1957 when President Eisenhower sent federal troops to help desegregate Little Rock's Central High School). Some see this ruling as an affront to a lawsuit filed in 1982, wherein the plaintiffs argued the school system discriminated against minority students. Responding to the current ruling, attorney John Walker, who represents black students and parents, argued that when the case began, the purpose was to overcome "notions of racial inferiority and superiority," and "for a brief while, we were on that path. But we have now reverted almost full circle to the point where we began."[52]

The theoretical framework employed in this chapter is useful for evaluating how the 1874 Arkansas Constitution has structured political conflict over the past 130 years. We have seen how the political milieu in which the constitution developed as well as the specific guiding ideals that animated the document have affected its performance and evolution over time. More generally, the functional perspective also illuminates the challenges that reformers face as they attempt to modernize—either through revision or replacement—the constitution. Whereas frequent amending of the constitution has created a political climate more amendable to constitutional change, the conflict between traditionalists' and modernizers' politics remains an important obstacle to constitutional change, and thus stands in the way of more efficient government, economic development, and a clearly articulated range of political and social rights.

51. Ibid., 133.

52. See "Achievement, Not Numbers, Focus of District's Desegregation," http://www.cnn.com/2004/LAW/05/15/little.rock.schools.suit/index.html.

REBECCA MAE SALOKAR

Florida

Defining and Redefining Citizen and Community

V. O. Key Jr.'s assessment of Florida as a "political curiosity" is as true today as it was when he wrote in the late 1940s, as it was at the time of the Confederacy, or as it was in 1845, the year Florida became a state.[1] Florida continually evolves and reconstructs itself, yet it remains the same—multifaceted and politically important. Its complexity is rooted both in its past as a southern state and in its dynamic present as a gateway to Latin America and the Caribbean. Its most basic law—the state constitution—embodies the state's tendencies to be traditional yet creative, responsive while resistant, and forward looking but firmly rooted in its history.

Donald S. Lutz posits that constitutions serve a number of purposes, which include creating and/or defining the people of the community served, its public and its citizens.[2] But to study a state's constitution at a single moment in time provides only a limited snapshot of the purposes and values of the writers of that constitution. To understand how Florida has used its constitutional experience to define its citizens and community, one must undertake a longitudinal examination of this state's constitutional history, a history that includes six constitutions and their numerous amendments since its admission to statehood in 1838.

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1. Key, *Southern Politics in State and Nation* (Knoxville: University of Tennessee Press, 1984), 83.

2. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16.

Florida's History and Constitutional Experience

Florida will forever be a southern state; that fate was sealed with its admission to the Union as a slave state in 1845.[3] Politically, culturally, and economically, however, Florida is an enigma. Although it is southern in location and seceded from the Union in 1861, it not historically considered the Deep South. Some scholars of southern history refer to Florida as a member of the Rim South, along with Arkansas, North Carolina, Tennessee, Texas, and Virginia.[4] Although Floridians embraced slavery, the institution's influence was never as important economically or politically as it was to the states of the Deep South, and Florida's history as a slave state was relatively short-lived. Other factors also distinguish Florida from its southern neighbors, including a long-lasting Spanish influence and the state's early experiences under British and Spanish rule. Immigration from other states and from abroad also played a significant role in Florida's history both before and after statehood.

The state's development since the Civil War moved some areas of Florida even further from its shallow agrarian southern roots. Trade with Cuba, Mexico, and other countries influenced the citizens of Key West more than the politics of their fellow citizens to the north. As transportation improved in the late 1800s and early 1900s with the extension of the railroad, white European immigrants and northern investors who sought cheap land found their way to the more southern reaches of the state. They had not experienced the Civil War or Reconstruction years, had no familial ties to the practices of slavery, and had not been socialized into the practices of Jim Crow.

The Bulldozer Revolution, identified by scholars as the economic transformation of the South in the 1950s and 1960s, actually began much earlier in Florida. Key notes that Florida was the only one of the eleven southern states that was more than 50 percent urban by 1940, and its population continued to grow in the years following World War II, as returning veterans utilized government benefits to move their families to Florida. Due to the settlement patterns of liberal northerners, midwestern veterans, and immigrants and refugees from Cuba and other Latin American countries, South Florida developed a distinctive nouveau culture that blends southern economic values (weak labor unions and permissive business practices) with a northern moral code (individual liberty), crossed with an individualist ten-

3. I rely on the work of Talbot D'Alemberte, *The Florida State Constitution: A Reference Guide* (New York: Greenwood Press, 1991); and Charlton W. Tebeau, *A History of Florida* (Coral Gables: University of Miami Press, 1971), for much of the historical background in this chapter.

4. Numan V. Bartley and Hugh D. Graham, *Southern Politics and the Second Reconstruction* (Baltimore: Johns Hopkins University Press, 1975), 12.

dency toward limited government (low taxes and minimal social services).[5] As a result, contemporary regional distinctions follow a north-central-south divide.

Although these factors distinguish Florida from other southern states, they also translate into a high level of tolerance—for internal regional differences, for religious diversity, for foreigners whether they are immigrants or refugees, and for constant change. This tolerance appears in the state's constitutional development in various forms, but is most visible in the state's embrace of constitutional change and evolution.

Like many states, Florida has a rich and varied constitutional experience, which includes the adoption of six distinctive constitutions since statehood. The first, the constitution of 1838, was drafted by convention in advance of Florida's admission to statehood. The convention met over a period of one month, and all but one of the delegates present on signing day supported the resulting document. Most of the delegates were originally from other states; only three were Florida-born, and four were from abroad. Constitutional ratification did not earn strong support when Floridians voted on the proposed document five months after the convention ended.[6] Modeled on the constitutions of other southern states, Florida's first constitution most closely resembled the basic law of Alabama.

The constitution of 1838 remained in effect until the Secession Convention of 1861, when Florida became the third state to leave the Union and join the Confederacy. The constitution of 1861 virtually mirrored the state's original document, with references to the Confederacy substituted for the United States. The Ordinance of Secession became the preamble to the document. The legislative article contained a provision for special tribunals for crimes committed by slaves, and a new clause was added that prohibited state citizenship rights to anyone who was a citizen of a Union state (Article IV, Section 27; and Article VI, Section 19, respectively). The 1861 constitution was short-lived, however, due to the defeat of the South in the Civil War.

Florida adopted its first Reconstruction constitution in 1865. The state's third constitution also paralleled the constitution of 1838, but with several distinctions. Omitted was the right to bear arms, a right that had previously been limited to white men. References to freemen also remained within the document, although a new article clearly condemned slavery. Though the constitution continued to specify that only white men could serve in political office or on juries, the right of "colored persons" to testify was broad-

5. Ibid., *Southern Politics,* 19; Key, *Southern Politics,* 510; Daniel J. Elazar, *American Federalism: A View from the States* (New York: Thomas Y. Crowell, 1972), 100.

6. Tebeau, *A History of Florida,* 126. The vote spread was a mere 100 hundred votes, "some of them questioned" (130).

ened slightly to include trials where a colored person was injured. Like other southern states, Florida's constitution of 1865 did not go far enough in providing political equality and liberty for former slaves. Thus, the U.S. Congress ultimately rejected the new state government, and Florida witnessed a second military occupation in 1867.

Florida's fourth constitution was crafted in 1867–1868, and significant changes had taken place. For the first time in the state's history, blacks outnumbered whites on the registration rolls for the election of convention delegates. Blacks not only participated in the electoral process but also successfully stood for election as delegates to the convention. Of the 46 delegates elected, 18 were black. Despite creative parliamentary shenanigans to forestall the convention meetings, the delegates managed to adopt a constitution that included the enfranchisement of blacks. Florida voters ratified the constitution of 1868—14,530 to 9,491—and elected a new administration that promptly ratified the Fourteenth Amendment to the U.S. Constitution. In July of that year, Florida was readmitted to the Union.

The constitution of 1868 reflects advancement in constitution-writing in Florida. The organizational template used in previous constitutions was enhanced with details not previously seen, which resulted in a more modern constitutional document. Even the language defining the state's boundaries became more detailed and contemporary, as it abandoned references to the treaties with Spain and the territories of East and West Florida. Changes of a more general nature included a homestead exemption, a limited capitation tax, and the addition of state-based public services, including public education, care for the infirm and disabled, and a prison. The new constitution also provided legislative representation for the Seminole Indians located in South Florida, a right that would not be retained in future constitutions.

This second Reconstruction constitution served the state during an era of moderate population growth, economic development, and increased ease of transportation.[7] By 1884, however, the Republicans had lost much of their political control to the Democrats and a growing number of independents. Some of the mechanisms instituted in the constitution of 1868 that had limited the political power of blacks had also negatively affected whites, who wanted more control of local government. White residents also believed that it was time to cast off a significant remnant of the Reconstruction era, the constitution of 1868. A call for a constitutional convention was successful, and the 108 delegates selected to attend the 1884 convention differed significantly from their predecessors. Nearly one-third of the delegates were native-born, and one-third of the delegates were veterans of the Confeder-

7. Florida's population grew from 140,424 in 1860 to 269,500 in 1880.

acy. More important, Democrats controlled an overwhelming 80 votes and were successful in shaping the constitution to their liking.[8]

Floridians ratified the constitution of 1885 by a vote of 31,803 to 21,243.[9] More detail was specified in the judicial article, and a separate article on local government delineated local officers and the relationship between local government and the state legislature. Whereas some offices at the local level became elective, county commissioners remained appointed by the governor. The new constitution also included mechanisms blatantly designed to thwart the black vote and subordinate people of color in society. Finally, the convention drafted three new articles to address contemporary concerns: the property rights of married women, the development of a state public health organization, and a local option to permit county commissioners to ban alcohol sales.

The constitution of 1885 became the longest-standing constitution in the state's history, in force from 1885 to 1968. Given its duration, it is not surprising that it was subject to repeated amendments. By 1955, the state legislature and the Florida Bar were frustrated by the difficulty of working around more than 94 amendments that contained outdated language and gave rise to conflicts between provisions. Legislation to establish a Florida Constitution Advisory Commission was adopted to revise the 1885 constitution and to report its recommendations to the legislature and the governor.[10] The commission obliged and in 1956 presented 14 measures that would have revised the entire constitution. However, the Florida Supreme Court struck down the revision strategy as unconstitutional in a 1957 decision, *Rivera-Cruz v. Gray.*[11] In 1964, the state legislature proposed and balloted an amendment to Article XVII of the Florida Constitution that would permit the legislature to engage in a wholesale revision of the state's constitution without requiring a full-blown convention.[12] The voters agreed. By the time the legislative revision commission finished its work in 1967, the constitution of 1885 had been amended 147 times.[13]

The constitution of 1968 brought Florida's government into the modern era while maintaining several characteristics of the state's historical constitutional experience. These include the plural executive, multiple methods of constitutional revision, limits and controls on taxation, a civil rights measure, local home rule, and a modernized legislative system. Soon after the constitution's adoption, the single article that had not received revision at-

8. Ibid., 289.
9. Ibid., 290.
10. SCR 555 (1955).
11. *Rivera-Cruz v. Gray,* 104 So.2d 501 (Fla. 1958).
12. HJR 368 (1963).
13. D'Alemberte, *Florida State Constitution,* 9.

tention, the judicial article, was the subject of a legislative task force, and in 1972 Florida adopted a new, streamlined judicial organization.

The 1968 constitution continues to serve the state of Florida today. But it, too, has seen more than its fair share of amendments, revisions, and initiatives. In fact, the current constitution is on pace to surpass Florida's 1885 constitution in terms of change. As of the 2006 general election, Floridians had adopted 108 amendments or revisions to the thirty-six-year-old document at a rate that is, on average, 1 more amendment per year than under its previous constitution.[14] Of those, 76 amendments stemmed from legislative proposals, 22 originated from citizen initiatives, 8 revisions were proposed by the Constitutional Revision Commission, and the Tax and Budget Commission placed 2 proposals on the ballot. In short, Floridians have no compunction about tweaking their constitution or discarding it entirely in favor of a new fundamental law. The following sections focus on how the state has defined and redefined its understandings of citizen and community by examining how people of color, women, and foreigners have been treated constitutionally.

Slavery's Shadow over Community and Citizen

Florida's status as a southern state meant that it wholly embraced slavery prior to the Civil War and that it worked to maintain the subordinate status of blacks in the political, social, and economic spheres long after the war had ended. Florida's constitutional treatment of blacks parallels practices adopted in other slave states where mechanisms were instituted to disenfranchise blacks, to socially segregate the communities, and to treat blacks as less than full citizens despite language to the contrary. Although the Reconstruction Acts attempted to force political change on the South through formal constitutional and legislative measures, informal practices and traditions undermined the goals of liberty and equality for people of color and their supporters.

Florida's first constitution contained clear references that indicated that individual rights and the franchise were exclusively limited. Due process was afforded only to "freemen," only free white men had the right to keep and bear arms, and, not surprisingly, legislative service was limited to white men (Article I, Sections 8 and 21; Article IV, Sections 4–5). The franchise was limited to free white men aged twenty-one and older who had resided in the

14. As of this writing, 142 measures have been proposed; voters rejected 34 of them. In its eighty-three-year history, the constitution of 1885 was amended an average of 1.77 times per year. The constitution of 1968 has averaged 2.84 amendments per year.

state at least two years, but an 1847 amendment eased the residency requirement to one year, permitting more newcomers to the state to participate in the electoral process. For purposes of legislative apportionment and population surveys, slaves were counted as three-fifths of a person. Slavery was constitutionalized with its inclusion in the state's basic law, and its abolition was put beyond the state's legislative powers. The legislature was also empowered to "prevent free negroes, mulattoes, and other persons of color from emigrating to this State" (constitution of 1838, Article XVI, Section 3).

Although the constitution adopted upon Florida's secession changed little from the original, it did include a provision that established legislatively empowered county courts to deal specifically with crimes committed by "slaves, free negroes and mulattoes." Defendants appearing before these courts were afforded a jury of twelve citizens, but they were not provided the safety of a grand jury indictment that was otherwise provided by the constitution in the declaration of rights. People of color could be tried merely on the basis of an allegation meeting no standard of probable cause or review (constitution of 1861, Article IV, Section 27). Not surprisingly, this provision was as short-lived in Florida as the Confederacy itself.

At the end of the Civil War, the requirements of Reconstruction imposed by the U.S. Congress mandated not only that Southern states abolish slavery but also that blacks be treated equally before the law and provided the rights of citizenship. Florida, like other states, made a halfhearted effort at meeting the Reconstruction standards, as evidenced by the constitution of 1865. Language was included that acknowledged, almost reluctantly, the end of slavery in the state; that it was not included as part of the declaration of rights is telling. "Whereas, slavery has been destroyed in this State by the Government of the United States; therefore, neither slavery nor involuntary servitude shall in future exist in this State, except as a punishment for crimes, whereof the party shall have been convicted by the courts of the State, and all the inhabitants of the State, without distinction of color, are free, and shall enjoy the rights of person and property without distinction of color" (Article XVI, Section 1). The constitution also provided that blacks could testify "competently" in criminal proceedings "founded upon injury to a colored person, and in all cases affecting the rights and remedies of colored persons," but not in any other case (Article XVI, Section 2).

This was as far as Florida went, however, in embracing the freedom and citizenship of its former slaves. Other aspects of the earlier constitutions remained, such as references to "freemen" and that only white men could serve in legislative office. The authority for special criminal tribunals for people of color that appeared in the Confederate constitution was removed from the legislative article. However, the declaration of rights provision ensuring grand jury indictments was modified to allow the state legislature to exempt

the requirement except in capital cases. More significantly, only white men could vote and serve as jurors, and blacks continued to be counted as less than whole persons.

Because Florida failed to meet the Reconstruction requirements, it faced a second military occupation. Three years later, Florida revisited its constitution once again. The language and tone of the constitution of 1868 had evolved, although the subtleties of discrimination had simply become more sophisticated and informal. The preamble boasted of "guaranteeing equal civil and political rights to all," but history has proved otherwise. Distinctions between freemen and others were abandoned, and the three-fifths rule was gone. Suffrage was extended to all men, "of whatever race, color, nationality, or previous condition," and the state was obligated to provide for the education of children, "without distinction or preference" (Article XIV, Section 1; Article VIII, Section 1). But buried in the suffrage article was an educational requirement that would go into effect in 1880 and a directive that the state legislature establish registration procedures in the counties. These registration processes and literacy tests soon became the vehicles for disenfranchising blacks in the South.

The census of Florida in 1870 reported a population of just over 187,000 residents, and nearly 47 percent were black. Three years earlier, in advance of voting for the 1868 constitutional convention, more blacks had registered to vote than whites.[15] The potential for black control of political power existed, and constitutional drafters realized that devices were necessary to limit that potential while ensuring Republican control under Reconstruction. One way of accomplishing this was by stipulating that the governor appoint local political officers rather than allow them to be elected. This also served to reinforce the political stronghold of Republicans in heavily populated white Democratic counties. Representational thresholds to the state assembly were instituted that gave each county at least one representative, but no county, regardless of population, had more than three representatives. Senate seats were determined by districts that paired counties with large black populations with predominately white counties. Ultimately, the goal was to allow blacks to participate in the political process to the extent that their participation supported the Republican Party though did not control it. The strategy worked for a time, but the mid-1870s saw the return of Democrats to power in Florida. Discriminatory practices outside the scope of law and other intimidation had largely deterred blacks from the polls.

When it became apparent that blacks would not be a political threat, Floridians no longer needed discriminatory constitutional devices to curtail their political power. The constitution of 1885 did include a grant of legisla-

15. Tebeau, *A History of Florida,* 257, 248.

tive authority to establish a "capitation" tax as a prerequisite to voting and allowed for multiple ballots and polling locations, devices meant to frustrate uneducated and poor voters. Instead of sophisticated political controls, restrictions of a social nature found their way into the 1885 constitution. Florida, which was rather progressive with respect to public education relative to its neighboring southern states, adopted a detailed constitutional article on public education that included a mandate to establish segregated schools. "White and colored children shall not be taught in the same school, but impartial provision shall be made for both" (Article XII, Section 12). In addition, the drafters included restrictions on interracial marriages: "All marriages between a white person and a negro, or between a white person and a person of negro descent to the fourth generation, inclusive, are hereby forever prohibited" (Article XVI). Beyond these two provisions, discriminatory practices against blacks were left to be implemented through legislation and informal local practices.

Of the southern states, Florida was the first to revise its constitution in the wake of the Supreme Court's decisions and national constitutional amendments of the 1950s and 1960s on reapportionment, school segregation, interracial marriage, poll taxes, and literacy tests. Thus, it was the first of the southern states to wipe away de facto racial discrimination in its constitution. The constitution of 1968 included a broad affirmative statement on race in the new declaration of rights where none had appeared before: "No person shall be deprived of any right because of race or religion" (Article I, Section 2). This brought to an end Florida's practice of using a constitution to both politically and legally discriminate against people of color.

Recently, Florida and other states have been criticized for maintaining a constitutional device that arguably results in de jure discrimination. Florida prohibits convicted felons from enjoying full civil rights—including the right to vote—except on petition for a restoration of rights, which must be approved by the governor and three members of the cabinet. The history of this practice in Florida dates back to the state's first constitution, the constitution of 1838, which stipulated that a citizen would lose the right to vote if convicted of "bribery, perjury or other infamous crime" (Article VI, Section 13). The two subsequent constitutions (1861 and 1865) included identical language. In 1868, the provision was modified to, "nor shall any person convicted of felony be qualified to vote at any election unless restored to civil rights" and retained in the 1885 constitution (Article XIV, Section 2).

Today, Florida's constitution states, "No person convicted of a felony . . . shall be qualified to vote or hold office until restoration of civil rights" (Article VI, Section 4). Studies show that few convicted felons, in Florida or elsewhere, ever petition for a restoration of rights. Others suggest that the effect of this suffrage restriction unfairly impacts the voting power of minorities,

particularly people of color. An initiative proposal that would have automatically restored civil rights for felony convicts upon the completion of their sentences failed to get enough signatures to make the ballot in 2006. However, Florida's Board of Executive Clemency approved a change in state policy in 2007. Under the new clemency policy, felons, with the exception of convicted murderers and sex offenders, will have their voting rights automatically restored upon the completion of their sentences.

Women: Of Community and as Citizen

The image is hard to erase. There stands the classic southern belle on the veranda with other women in hoop skirts and mint juleps in hand, whilst the men huddle in the corner debating the pressing issues of the day. The vision of Scarlett O'Hara is certainly dated, but it partially explains the difficulty that women have encountered in becoming full members of civic society in southern states. Florida has been no exception. In fact, this state was slower to recognize formally women's full equality in its constitution than it was to embrace racial equality. Only in 1998 did Floridians specifically recognize women as "natural persons" entitled to the basic rights outlined in the constitution.

Women were not mentioned in Florida's first constitution. The only acknowledgment that they might possibly exist in the public realm can be teased from a provision that permitted divorces upon court order. The secession constitution, however, contained an interesting restriction on the legislative body that is telling of the status of women (and children) under the Confederacy. "No law shall be made allowing married women or minors to contract or to manage their estates, or to legitimate bastards" (constitution of 1861, Article IV, Section 21). The restriction did not hold long, however, for in the first Reconstruction constitution of 1865, the reference to married women was removed (as was the reference to illegitimate children).

Three years later, married women found their way into the 1868 constitution as property owners in three places. A one-sentence provision in the legislative article recognized a married woman's right not only to hold property separate from her husband but also for her property to be safe from any claims made against the husband's debts. This provision was further developed in the 1885 constitution. An entire article, titled "Married Women's Property," gave women explicit rights to use their property to generate income or credit, to sell, and to enter into agreements concerning real and personal property. But they could not vote.

The 1868 constitution also provided for a widow's tax exemption and laid

the groundwork for women's equal rights to the family residence. A newly crafted article on homestead rights gave wives an equal voice with their husbands in consenting to the sale of the family residence. This provision has remained intact in subsequent constitutions; homestead rights are one of the highly valued features of Florida law. That women found their way into the Florida Constitution this early in its history is likely the result of the Civil War, when women became the heads of households while husbands, fathers, and brothers served in the military. It may have simply been a matter of convenience that women were able to buy, sell, and develop real property in Florida. It should be noted, however, that every reference to women was only in the context of marriage and in conferring rights to wives.[16]

In 1892, the state legislature proposed a change in the homestead exemption that would have limited a widow's right to her primary residence by forcing her to share it with her children. The voters rejected the amendment, and it never returned to the state's electoral ballot.

The early history of the women's suffrage movement in the state is tied to the upstate-downstate division that marks Florida politics.[17] The population migration from northeastern states to the urban areas of Florida located in the southern and central parts of the state sparked a late (relative to the national movement) interest in women's voting rights. Florida suffragists not only strategically sought support for a national constitutional amendment but also urged the adoption of a state constitutional amendment providing women the vote. A state proposal was introduced in the Florida House in 1913, and failed despite the unanimous support of members from the southern and central counties. Only 27 percent of the representatives from the northern counties supported the amendment. The measure was introduced in each subsequent legislative session with similar results.

Research suggests that Florida legislators were fearful not only that the vote would transform the southern woman, home, and family but also that a large voting bloc of black women would also be empowered.[18] White political Democratic power brokers in the South had worked diligently be-

16. Girls were also implicitly included in the 1868 constitution through a new article on education that provided for a free, public education for all children in the state (Article VIII, Sections 1–2).

17. The historical data for this discussion are drawn in part from Joan S. Carver, "Women in Florida," *Journal of Politics* 41, no. 3 (1979): 941–55, which relies on the work of Kenneth R. Johnson, "The Woman Suffrage Movement in Florida" (Ph.D. diss., Florida State University, 1966) and "Florida Women Get the Vote," *Florida Historical Quarterly* 48 (January 1970): 229–312.

18. Carver, "Women in Florida," 949.

tween 1890 and 1903 to circumvent the suffrage rights of black men afforded by the Fifteenth Amendment to the U.S. Constitution.[19] To allow black women who may vote Republican the franchise was simply not politically wise in the eyes of those who held political power in the state.

When the Nineteenth Amendment to the U.S. Constitution granting women the right to vote was formally sent to the states for ratification, the Florida legislature was out of session. By the time it met again, the amendment had been ratified by a sufficient number of states and had become the law of the land. The Florida legislature saw no reason to add its voice to the ratification chorus.[20] In fact, the Florida legislature formally ratified the Nineteenth Amendment only in 1969, and then it did it as a symbolic gesture and political ploy to earn support from women at the polls.

Every other substantive effort to advance the rights of women in the Florida Constitution through legislative action has failed. When the legislative revision commission met in the mid-1960s, the women's rights movement had not yet achieved the visibility that it would gain in the 1970s. The commission drafted and the voters adopted a "rule of construction" that recognized that women were implicitly included in the 1968 constitution. The rule merely stated, "Unless qualified in the text . . . [t]he masculine includes the feminine" (Article X, Section 12c). Another interesting change in the 1968 constitution may be viewed as a modernizing feature whereby earlier references to "wives" in the articles addressing homestead exemptions were replaced by the generic "spouses" or "individuals," and a section on property stated, "There will be no distinction between married women and married men" in property matters (Article VII, Section 6; Article X, Section 4; and Article X, Section 5, respectively). But no explicit recognition of women as citizens would be added to the state constitution for at least another twenty years.

Florida's first experiment with a constitutional revision commission in the late 1970s was a failure if one measures success by the number of revisions adopted by the voters. The citizens of Florida rejected every one of the eight revisions placed before them in 1978 by the innovative commission revision process. Included was an addition to the basic-rights clause of the state constitution that would have specifically protected women from discrimination: "No person shall be deprived of any right because of race, religion, sex, or physical handicap" (proposed Revision I to the constitution of 1968, Article I, Section 2). Because the language was bundled into an omnibus revision that affected nearly every article in the constitution, how much of a role the equality measure played in its defeat is difficult to deter-

19. Key, *Southern Politics,* 531.
20. Tebeau, *A History of Florida,* 368.

mine. The rhetoric of the day in opposition to the omnibus measure expressed fears that sexual equality would lead to unisex bathrooms and gay rights. Subsequent efforts to move the language through the legislative amendment process were also unsuccessful.

In the early 1980s, the Florida legislature failed to ratify the national Equal Rights Amendment (ERA), and a proposed state constitutional amendment modeled on the ERA was also rejected. Equality on the basis of sex finally found its way onto the ballot as a constitutional matter again in 1998, and, once again, it was the result of the constitutional revision process. This time the voters adopted the provision with little resistance, bringing women under the umbrella of rights and adding "national origin" to the nondiscrimination clause. But the revision resulted in what is probably one of the most awkward wordings of sexual equality found in any state constitution. The particular phrasing "female and male alike" was a compromise wording used to avoid any suggestion or implication that gay rights or gay marriages might be protected under Florida's constitution. As adopted, Article I, Section 2, of the Florida Constitution now states, in relevant part, "Basic Rights.—All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property. . . . No person shall be deprived of any right because of race, religion, national origin, or physical disability."

A campaign to revive the ratification of the national ERA was initiated at the turn of the new century, but the core resistance has been southern in nature: nine of the fifteen nonratifying states are in the South; only two of the eleven southern states ratified the ERA (Texas and Tennessee). Florida is one of the states targeted by women's groups as a potential addition to the ratification roster. Given its history and more recent partisan political leanings, however, it is very unlikely that the ERA will ever see the other side of Florida's legislative process. When it comes to women, Florida has been slow to recognize their full equality.

Foreigners and Immigrants

The final subject for investigation in this chapter is Florida's constitutional treatment of outsiders, specifically those who immigrated freely or arrived in Florida as refugees from abroad. Several historical and geographical factors prompted me to examine this aspect of Florida's constitutional development. First, the state's history is intimately tied to international events—from the Seven Years' War between England and France in the 1750s to the battles between Spain and England in the 1780s, the War for Cuban

Independence in the late 1890s, and the Bay of Pigs in the 1960s. Second, Florida's port facilities and geographical proximity to Central America, South America, and the Caribbean have meant that some regions of the state maintain a strong trade relationship with foreign countries and companies. Finally, Florida was one of the later southern states to join the Union, and it was relatively underpopulated. Economically, the early years of territorial status and statehood required that Florida encourage settlers to make their home in the state. Often, these settlers came not from the colonial states but from abroad. This suggests that Florida's constitutional development might reflect an acceptance and welcoming of foreigners. I examine several aspects of constitutional development that potentially give us some insight: the residency requirement for citizenship, the rights of foreigners to hold property, and general immigration concerns.

Residency requirements for citizenship and suffrage purposes can serve as barriers for immigrants, and may symbolically represent the degree to which a government welcomes newcomers. The constitution of 1838 imposed a two-year residency requirement for citizenship, but it was soon reduced to one year by an amendment in 1847. Since then, Florida residency has remained at one year—a moderate but reasonable period of time relative to other states' requirements, which range from six months to a year.

The earliest state constitution made specific references to immigrants only in the context of slavery by prohibiting the state legislature from making any laws "to prevent emigrants to this State, from bringing with them, such persons as may be deemed slaves, by the laws of any one of the United States" (constitution of 1838, Article XVI, Section 2), and by empowering the legislature to "pass laws to prevent free negroes, mulattoes and other persons of color, from emigrating to this State, or from being discharged from on board any vessel, in any of the ports of Florida" (Article XVI, Section 3). Anyone holding a position in a foreign government was not eligible for election to state office, but, surprisingly, they could serve in "the office of Justice of the Peace, notary public, constable and militia offices" (Article VI, Section 18). This exception was deleted in 1861, and the prohibition of dual service was forever extended to the governor's office and all other offices of the state.

At the onset of the Civil War and throughout its duration, Florida suffered economically. It had not been a well-developed and -populated area, and was working toward increasing its population and tax base by opening up lands for settlement. But the high costs of war were anticipated, and in 1861 a constitutional measure was included that permitted the state legislature to "tax lands and slaves of non residents higher than the like property of residents," despite an apparently contradictory provision that required "an equal and uniform mode of taxation" (constitution of 1861, Article IV,

Section 22; and Article VIII, Section 1, respectively). This discriminatory practice was short-lived. The constitution of 1865 contained no such discrimination against nonresidents, and by 1868 there even appeared a clause in the declaration of rights that specifically afforded foreigners with the "same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens" (constitution of 1868, Article I, Section 17). Immigration had become critically important to Florida in the Reconstruction years and remained a state priority through the 1950s. Nowhere is this more evident than in the constitutional designation of a commissioner of immigration in 1868. As one of an eight-member cabinet of administrative officers, the commissioner was responsible for organizing the Bureau of Immigration "for the purposes of furnishing information, and the encouragement of immigration" (Article VII, Section 1).[21] The position was modified by constitutional amendment in 1871, when immigration and the surveyor's general office were consolidated into the office of commissioner of lands and immigration. Immigration moved again in 1885 to the new Florida Department of Agriculture, and remained an important aspect of state government until 1925.

The 1920s was a decade of contrast for the state of Florida. In the wake of World War I, nationalism had taken hold, and suspicion of foreigners had increased across the country. The early years of the decade brought tremendous growth in Florida's population, land sales, and illegal activities such as rum-running and gambling. But by 1928, several hurricanes had made landfall in the state, the boom in land sales went bust, and Florida found itself in an economic depression that predated the national crisis by three years. Nationalism or the influence of organized crime may explain a constitutional amendment that was adopted in 1926, which refined and narrowed the rights to property ownership by some foreigners in the state. The amendment distinguished between foreigners "who are eligible to become citizens of the United States under the provisions of the laws and treaties of the United States" and those who were not eligible for U.S. citizenship (constitution of 1885, Article I, Section 18, as amended by HJR 750). With respect to the latter category, the state legislature was granted the authority to "limit, regulate and prohibit the ownership, inheritance, disposition, possession and enjoyment of real estate in the State of Florida" (Article I, Section 18). This distinction survived the legislative revision process that resulted in the adoption of the 1968 constitution, but in slightly different form. The restriction on alien ownership was moved to the general rights statement at

21. An interesting facet of this development is that it contained a constitutional sunset provision, whereby the office would expire after fifteen years unless legislatively authorized.

the beginning of the declaration of rights, in order to clarify that not all "natural persons" have the right to "acquire, possess and protect property."[22]

Florida experienced an influx of immigrants from Cuba, Haiti, and South and Central Americas from the 1950s through the 1990s. This ethnic transformation took place largely in South Florida, but the effects have been felt throughout the state, particularly as Hispanic political power has grown. In the late 1980s, an initiative drive to designate English as the official language of the state was started, and Florida voters adopted the measure in 1988. The amendment granted the legislature the power to craft legislation, but to date it has had little or no effect on the operations of state government. Ultimately, the amendment has remained largely symbolic in its impact.

Florida's historical interest in development and population growth seems to have distinguished it constitutionally from the traditional culture of southern states as relatively closed societies. Immigrants and nonresidents were welcomed in Florida and afforded liberal rights to property when it was in the state's interest to encourage development. The relatively recent experience with the English-only amendment may have been designed as a "not welcome" sign to foreigners, but its lack of implementation has neutralized any such message.

Conclusion

G. Alan Tarr observes that state constitutions in the twentieth century were shaped significantly by the increased influence of federal constitutionalism, which displaced many issues traditionally viewed as state matters.[23] For southern states, federal influence began even earlier with the end of slavery and Reconstruction. Florida is a prime example. Significant changes in Florida's constitutions took place with the adoption of the two Reconstruction constitutions and the revision that resulted in the 1968 constitution. Each time, Florida was responding to federal mandates. Reconstruction and the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution precipitated the 1865 and 1868 constitutions in Flori-

22. In its entirety: "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law" (Article I, Section 2).

23. Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998), 171.

da. U.S. Supreme Court decisions regarding apportionment, educational integration, and antimiscegenation laws made the 1885 constitution even more out of date than the multiplicity of amendments that were passed during its eighty-three-year life and provided some of the impetus for Florida's revision efforts in the mid-1960s. As noted elsewhere, the Court's apportionment laws also provided the mechanism necessary to transform the membership in state legislatures.[24] Elections after apportionment provided more representation to cities and urban areas in Florida and reduced the political muscle of the "Old South" from northern Florida that argued for the status quo. This change in membership gave the state legislature the will for constitutional change in the 1960s.

My examination of Florida's constitutional development with respect to its treatment of blacks, women, and foreigners suggests that Florida's constitutional evolution is typical of a state whose history is tied to the Confederacy. Florida did only what it could minimally do constitutionally to be released from the grips of Reconstruction. And it is has not been on the forefront in setting the pace on women's rights. Its treatment of foreigners, however, reflects a value system that is less entrenched in tradition and, perhaps, more utilitarian in nature. Florida needed settlers and investors, and its laws reflected a willingness to forego the homogeneity typical of southern culture in order to improve its economic status. Floridians may have also been more open to the influence of northerners who found themselves in the South during the Reconstruction years as well as those who came during the land boom that began in the late 1880s. But Florida's history as an occupied territory, by Spain in particular, as well as its proximity to Cuba, is likely a primary reason for the state's attitude toward immigrants. Geographical location and historical experiences shape social and political values that will then find their way into the state's constitution.

This narrow survey of Florida's constitutions over time portrays a picture of slow, deliberate, incremental change in each of these three areas. Revolutionary new practices and policies did not spring from Florida's constitutional conventions or through the amendment process. Despite having six different constitutions since 1838 with hundreds of changes and opportunities for many more, the organization and even the language of the state's basic law remained fairly constant, constitution to constitution. Like society itself, change in state constitutions seems to come slowly and generally in

24. D'Alemberte, *Florida State Constitution,* 12; Henrik N. Dullea, *Charter Revision in the Empire State: The Politics of New York's 1967 Constitutional Convention* (Albany: Rockefeller Institute Press, 1997), 68–69; Tarr, "The Montana Constitution: A National Perspective," *Montana Law Review* 64, no. 1 (2003): 11.

response to external shifts that have already occurred. Constitutional reform is needed when a state's basic law is out of step with the community; it tends to be responsive rather than proactive. Reforms do not typically set an agenda for the future, although they will undoubtedly affect the future in new and unanticipated ways.

MELVIN B. HILL JR. AND LAVERNE WILLIAMSON HILL

Georgia

Tectonic Plates Shifting

Near the largest city in the largest county in the largest state east of the Mississippi River lies the seven hundred–square-mile Okefenokee Swamp, teeming with natural wonders and wildlife, including more than two hundred varieties of birds and sixty kinds of reptiles. The Seminole Indians gave this huge tract of land the name "Okefenokee," which means the "land of trembling earth."

This description fits the state of Georgia in the first years of the twenty-first century, at least for the members and supporters of the Democratic Party. November 2, 2004, marked an important day in the life and history of the state. On this day, for the first time in 137 years, both houses of the Georgia General Assembly turned red.[1] On this day, Democratic dominance in Georgia state government ended.

This day was foreshadowed in the November 2002 election, when Georgia voters elected the first Republican governor since Reconstruction. The shift to the ideological right of the Georgia legislature was slower in coming than it was in Alabama or Mississippi, having begun in 2002, when Republican gubernatorial candidate Sonny Perdue unseated powerful incumbent Democratic governor Roy Barnes in a surprise upset victory. So unexpected was the outcome that some observers quipped that, on the day after that election, the two most surprised people in Georgia were Roy Barnes and Sonny Perdue.

Governor Perdue wasted no time in consolidating power. With some

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1. In 1868 the Republicans controlled both houses of the General Assembly. That fall, Democrats regained control of the house, although the senate remained Republican into 1869.

good old-fashioned southern gubernatorial arm-twisting, he convinced four Democratic senators to switch parties, thereby giving Republicans control of the senate in the Georgia General Assembly. The impact of this change was felt most directly by the Democratic lieutenant governor, Mark Taylor, who was stripped of his power to appoint senate committees. Though a state constitutional officer, the lieutenant governor has limited duties under the constitution itself, namely, to be the presiding officer of the senate and "have such executive duties as prescribed by the Governor and as may be prescribed by law not inconsistent with the powers of the Governor or other provisions of this Constitution" (Article V, Section 1.3). However, with control of the senate, the governor was able to accomplish only what the house agreed to. On November 2, 2004, that equation changed. The governor now had a clear majority in both houses. Life under the Gold Dome will never be the same.

Of course, change has been no stranger to Georgia government and politics. Georgia's rich state constitutional history is a history of rejection, revision, and reclamation. As the proverbial "winds of political change" have blown, they have often blown harder and more frequently in this keystone southern state than elsewhere. The constitutional changes produced present a unique political landscape reflective of Georgia's changing political and cultural values.

Underscoring this point, G. Alan Tarr, in *Understanding State Constitutions,* has noted that "perhaps the most salient difference between state constitutionalism and national constitutionalism, as well as the one with the broadest implications, is the frequency of state constitutional change through constitutional amendment and constitutional revision."[2] Indeed, one may argue that state constitutions are best understood with reference to their historical roots. Tarr and others have argued that a number of explanations can be advanced to explain frequent state constitutional change: changing political and public attitudes within the states, the relative ease of the amendment and revision process in the states, difficulties within the states in dealing with problems, the detailed nature of state constitutions, and the imposition of federal requirements on state constitutions.

A review of the history and development of Georgia's ten constitutions illustrates the influences of these factors and provides a concise retelling of Georgia's political, economic, and social histories. Indeed, the variety and magnitude of these changes might even lead one to wonder how the state was able to maintain such a long period of one-party dominance. Georgia's constitutional history also illustrates the various methods by which a con-

2. Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998), 29.

stitution may be written or revised. In total, Georgia has used three different methods of constitutional revision—seven by constitutional conventions, two by constitutional commissions, and one, in 1976, by the Office of Legislative Counsel of the Georgia General Assembly, a staff support office made up of primarily lawyers and generally charged with drafting proposed legislation. The development or revision of a state constitution is often stimulated by major political events in the state's development. The same is true of Georgia.[3]

Early Georgia Constitutional History

Following several revolutionary mass meetings in the state, Georgia's first attempt at constitutional government was initiated by the colony's trustees' Provincial Congress in April 1776. This document provided a framework for Georgia's transition from colony to state. Following the movement of fellow colonies toward independence with its acceptance of the Declaration of Independence, Georgia's first constitutional convention was organized soon after. Completed in February 1777, and not submitted to voters for ratification, this constitution remained in effect for twelve years. It vested most governmental authority in a state legislative body, declared the separation-of-powers doctrine, and included a number of basic rights heralded among citizens in Georgia and other states such as free exercise of religion, freedom of the press, and trial by jury.

On January 2, 1788, Georgia became the fourth state to ratify the U.S. Constitution. In October of the same year Georgia began a revision of its state constitution in convention in order to ensure conformity with the federal document. The shortest of Georgia's constitutions, the constitution of 1789 was modeled after the federal constitution, providing for a bicameral legislature, an executive branch, and a judicial branch. The legislature, or "general assembly," was elected and had the power to select a governor. As in the federal constitution, the judicial branch received little attention. Protections normally found in a bill of rights were also included in the constitution. The brevity of this constitution, coupled with public outrage over the involvement of state legislators in the Yazoo land frauds, made early revision inevitable.[4]

3. For additional information about Georgia constitutional history, see Melvin B. Hill Jr., *The Georgia State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1994). For a detailed history of the Georgia Constitution prior to the constitution of 1945, see Ethel Kime Ware, *A Constitutional History of Georgia* (New York: Columbia University Press, 1947).

4. In the Yazoo land frauds, state legislators were found to have profited from the sale of state land. See http://www.georgiaencyclopedia.org, s.v. "Yazoo Land Fraud."

Whereas seven of Georgia's constitutions were directly associated with war-related periods—1777, 1789, 1861, 1865, 1866, 1877, and 1945—the constitution of 1798 was one of only two documents forged completely under peaceful conditions and was in effect for sixty-three years. This constitution was almost twice as long as the one of 1789 and contained much detail. Provisions of the previous constitution were clarified, and, in response to the Yazoo land frauds, legislative power was more carefully defined and restricted. In retrospect, it seems clear that many of the provisions included in this constitution more properly belonged in the state code. Although the legislature continued to be the dominant branch of government, the language used clearly struck a more realistic balance of power between the state governmental branches. The governor would now be popularly elected, and a state supreme court was authorized (though not established until 1846). Until this time Georgia had relied on the work of local courts with no formal system of review, a probable reaction to the U.S. Supreme Court decision in *Chisholm v. Georgia*.[5] Although slavery continued under the new constitution, the importation of slaves was prohibited after 1798.

Civil War–Era Constitutions

During the post–Civil War era, four new constitutions were written by conventions and approved by the people. The new constitutions represented rapid changes in state governmental control during the war and the Reconstruction period. Constitutions were written and approved in 1861, 1865, 1868, and 1877.

As a response to concerns that the federal government would outlaw slavery or disturb the delicate state balance by admitting New Mexico or California to the Union, a state convention was assembled in Milledgeville in 1850 at the behest of the state legislature. This convention issued the Georgia platform that threatened secession, with a second convention in 1861 adopting the Ordinance of Secession. A meeting of the seceded states in 1861 adopted the constitution of the Confederate States of America, a document written by Thomas R. R. Cobb, a prominent Georgia lawyer. Patterned largely after the Confederate constitution, the Georgia Constitution of 1861 was the first state constitution to be submitted to the people for ratification. It was also the first Georgia Constitution to incorporate a lengthy bill of rights; earlier constitutions had enumerated only four or five personal liberties.[6]

5. *Chisholm v. Georgia,* 2 U.S. 419 (1793).

6. Individual rights have been a high priority on the public agenda in Georgia for a long time. In fact, the Georgia Supreme Court was the first state court in the nation to recognize

Adopted as Article I, much of this portion of the constitution remains a part of the state constitution today. Among other things, the concepts of due process and judicial review were included for the first time.

Following the end of the Civil War in 1865, provisional governor James Johnson called for another constitutional convention. As in other seceded states, this convention was charged with the responsibility of framing a state constitution that would be acceptable to the federal government. The document had to include a repeal of the Ordinance of Secession, the abolition of slavery, and a repudiation of the war debt. The constitution of 1865 was similar to the one of 1861. It continued the bill of rights and made no significant changes to the legislature. But it prohibited slavery and limited the governor to two two-year terms. In a move to provide for more separation of the judicial and executive branches, judges of all courts, except the supreme court and the superior courts who were selected by the legislature, would be elected by the people. The legislature was given the right to grant the power to tax to county and municipal authorities, thus enlarging home rule. In November 1866 the Georgia legislature refused to ratify the Fourteenth Amendment to the U.S. Constitution, a specific condition for readmission to the Union. The constitution of 1865 was therefore rejected, and Georgia was placed under federal military control.

Following the establishment of congressional Reconstruction and military rule in 1867, a group of elected delegates met in yet another constitutional convention. Meeting from December 1867 to March 1868, the convention was dominated by northerners or Northern sympathizers. Nevertheless, the principal leaders of the convention had resided in Georgia long enough to develop a specific interest in the state's welfare. But the makeup of the convention led some to label it the "Unconstitutional Convention." Major issues debated included the Fourteenth Amendment, qualifications of the electorate (particularly black suffrage), debts and the relief of debtors, and the separation of powers. The relief of debt occupied the most attention, with the final version of the constitution including the first prohibition against imprisonment for debt, and amnesty from debts contracted prior to June 1865. But Congress rejected these clauses except for debts regarding the price of slaves or assistance with the rebellion. The bill of rights was expanded, including the substance of the first paragraph of the Fourteenth Amendment. Suffrage was extended to all male citizens. The legislature remained essentially the same, with representation in the state house changed to reflect population. The governor's term was increased to four years with no prohibition against reelection, and the pardon power was moved from the general

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the right of privacy, in a 1904 decision, *Pavesich v. New England Life Insurance Co.* (122 Ga. 190).

assembly to the governor. The appointment power of the governor was expanded, the state judicial system was simplified, and the general assembly was directed to provide a system of free general education to all children of the state, a "primary obligation of the State of Georgia" that continues today (Article VIII, Section 1). Following a dispute regarding the seating of black representatives, Georgia regained its position in the Congress. But it would be 1872 before Georgia participated in a free election for state officers.

As Georgia recovered from the war and Reconstruction and the "New South" began to emerge, support for a new state constitution began to build. A popular vote calling for a constitutional convention provided the final impetus for constitutional revision. In July 1877, 193 elected members began work on a new state constitution. Having used a committee system for division of the work and debated extensively, the convention completed its work in August 1877. The document was ratified by the voters in December. In response to post-Reconstruction concerns, the new constitution included much more detail in almost all of its articles—restricting both individuals and institutions. Such detail made additional amendments necessary; this constitution was amended 301 times.

Contemporary Constitutions

Power limitations and continuing amendments made calls for revision inevitable, particularly as the state continued to grow and develop. In 1931 the Institute of Public Affairs at the University of Georgia published *A Proposed Constitution for Georgia*. Though the document was produced for discussion purposes only, it helped to prompt a call for revision by the state legislature and by then governor Ellis Arnall. The resulting 23-member commission was appointed by the governor and included representatives from all three branches of government. Approval of the legislature and the voters was required.

Working primarily in subcommittees for two years, the commission completed the final document in January 1945. The state house and senate held public hearings to allow group and individual input. Governor Arnall supported the inclusion of home rule, the merit system for state employees, and a prison board to oversee the state correctional system. The constitution of 1945 was approved by the public in August 1945. Despite the new issues covered, the new constitution was considered "streamlined," with changes confined primarily to form and organization. Approximately 90 percent of the provisions, however, were taken from the constitution of 1877. Significant changes included the addition of the office of lieutenant governor, new constitutional officers, the creation of a state board of corrections and a state

department of veterans service, the authorization for jury service for women, and the increase of the number of justices in the state supreme court to seven, all changes common to state constitutional revision in the era. But the lack of substantive revision led to concerns about both the revision process and the substance of the constitution of 1945 itself over the next thirty years.

Efforts to revise the constitution of 1945 began as early as 1963. A revised version drafted by a new revision commission was approved by the general assembly in 1964, but it was never submitted to the people due to a legal challenge claiming that it was the product of a malapportioned legislature.[7] Another major effort began in 1969 with the creation of yet another constitutional revision commission by the legislature. The resulting document received the approval of the house in 1970 but not the senate. George Busbee was a member of the general assembly during this failed attempt at revision and became convinced that revision of the entire document at one time was too difficult an undertaking. In 1974 he ran for governor, calling for the revision of the state constitution. He proposed an article-by-article revision. Upon election he requested that the Office of Legislative Counsel prepare a "new" constitution for submission to the voters in the 1976 election. The office's charge was to reorganize the document only, making no substantive changes. The revised document was easily approved by the state legislature and by Georgia voters. Although not a substantive revision, this effort paved the way for a more thorough revision of the state's constitution.

The Constitution of 1983, the Current Document

In 1977, following the ratification of the 1976 constitution, the general assembly created the Select Committee on Constitutional Revision. Members included the governor as chair, lieutenant governor, Speaker of the house, attorney general, representatives from the house and senate, and members of the judicial branch. Beginning its work in 1977, the committee members agreed to a total revision, but utilizing a different model: each article would be drafted and approved individually by the Select Committee and by the general assembly. Each "article committee" would be composed of approximately 25 citizens, representing a wide range of governmental and nongovernmental interests, including elected state and local government officials, business representatives, community leaders, and persons having an interest in the revision of the particular article (members of the League of Women Voters, local Chambers of Commerce, teachers, and others). They

7. An appellate court later overturned this lower-court decision, but not in time to allow for a vote on the proposed constitution in the 1964 general election.

were to be given a "free hand" to draft an article that would best represent the interests of Georgians today. As Donald S. Lutz observes, "A constitution provides a definition for a way of life. It contains the essential political commitments of a people and is a collective, public expression of particular importance. . . . A constitution, a document of political founding or refounding . . . amounts to a comprehensive picture of a people at a given time."[8] This was certainly the case in Georgia, where more than 250 people were appointed to these respective article committees and served as the true "framers" of the 1983 constitution.

Following a series of detailed and public meetings by the Select Committee and the respective article committees, and by a new special Legislative Overview Committee on Constitutional Revision, agreement on a proposed new constitution was reached in late August 1981. Supported by leadership from all three branches of state government and bolstered by a significant public education effort spearheaded by the Select Committee concerning its content, the constitution of 1983 was overwhelmingly approved by voters and became effective on July 1, 1983.

Fortunately (or unfortunately),[9] the deliberations of the Select Committee, of all of the article committees and subcommittees, and of the Legislative Overview Committee were recorded, published, and indexed, and are available in the state law library and in the respective law school libraries. Over time, they will have whatever "weight" of legal authority that the courts choose to give them.

The "rallying cry" of the Select Committee on Constitutional Revision had been "brevity, clarity, and flexibility." The final product reflected this goal. The document as ratified was about one-half as long as the 1976 constitution, it was better organized and wherever possible used simple modern English in place of arcane and cumbersome terminology, and it gave the general assembly greater flexibility to deal with many matters by statute that theretofore were set forth in the constitution itself. By far the most significant change between the 1976 and the 1983 constitutions was the prohibition on the adoption of any further local constitutional amendments, relating to only a particular city, county, or other local political subdivision. Commenting on the number of general amendments and local amendments proposed in 1960, for example, the late Albert Saye observed, "This is probably

8. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 3.

9. Two attorneys in the Georgia Attorney General's Office independently requested copies of transcripts of certain meetings. The reaction of the first was, in essence, that the transcripts were meaningless, because the people involved in the discussions were not lawyers and thus did not know what they were talking about. The reaction of the second was that the transcripts were invaluable, because they were a record of "the people" talking.

a record in world history for any state pretending to maintain constitutional government."[10]

Partly in response to the criticism by Saye and others, the framers of the 1983 constitution decided to prohibit the adoption of any more local constitutional amendments in the future. They were faced with the problem of what to do with the 974 of them that had already been ratified, and they came up with a novel solution: all existing local amendments were to be continued in force and effect for a four-year grace period, after which time they would be automatically repealed unless the general assembly (or the local government affected) passed a law to keep them alive (Article XI, Section 1.4). As the result of a constitutional amendment approved in 1996, the repeal of any such law requires referendum approval in the jurisdiction affected (Article XI, Section 1.4b). Thus, in 1998 the people of Macon and Bibb County, for example, had to vote on the repeal of a local constitutional amendment relating to the composition of the Macon–Bibb County Board of Health, an amendment that had originally been ratified back in 1953.

The 1983 constitution was thus the first truly "new" constitution since 1877. It was the culmination of almost twenty years of discussion, debate, and compromise. It was a mixture of old and new, containing provisions that first appeared in the constitution of 1877 and incorporating other provisions that had never existed before, such as a new "equal protection" clause, a division of the courts into seven distinct classes, a requirement for uniform court rules and record-keeping rules by class for all classes of courts, and nonpartisan election of judges. Like the nine constitutions preceding it, the constitution of 1983 was, and is, a reflection of the state's rich political and social history. But it is also a reflection of the newly emphasized principles of "brevity, clarity, and flexibility" in government practice and concept.

Constitutional Amendments since 1983

In a 1982 discussion of a proposed balanced-budget amendment to the U.S. Constitution, one commentator noted, "The Constitution of the United States is the fundamental political agreement among Americans—an agreement that binds together not only living citizens but also the past and future generations. And a constitutional amendment, by altering that agreement, is the single most solemn political action that one generation can take."[11] The same can be said of the Georgia Constitution for Georgians.

10. Saye, "Constitutional Law," *Mercer Law Review* 12, no. 1 (1960): 28.
11. "The Talk of the Town: Notes and Comments," *New Yorker,* August 2, 1982, 25.

Like most constitutions, the Georgia Constitution provides the means for its own amendment. Article X of the constitution provides that amendments to the constitution or a new constitution can be proposed in only one of two ways: either by the general assembly or by a constitutional convention called by the general assembly. In either case, the proposal requires the approval of two-thirds of the members of each house of the state legislature (in the case of the state senate, this means two-thirds of 56 members, or 38 members, and in the case of the state house of representatives, this means two-thirds of 180 members, or 120 members). Following approval by the legislature (or by a convention), the proposal must be submitted to the people for ratification or rejection at the next general election, held in even-numbered years. Prior to the election, the proposal must be advertised in the official legal organ of the county, and the text must be made generally available to the public for review.

Affirming G. Alan Tarr's comments noted earlier relative to constitutional amendments, the 1983 constitution has been amended often since its approval. Georgia's first state constitution was adopted in 1777, and in the following century there were a total of thirty-five amendments to the various Georgia constitutions. However, during the next one hundred years, from 1877–1977, Georgia's constitution was amended more than fourteen hundred times! Prior to 1983, the single factor accounting for most of these changes was the anomaly of local constitutional amendments, as discussed above. Nevertheless, despite the prohibition on future local constitutional amendments, Georgia's constitution continues to be amended at every general election.

Thus, in the twenty-five years following its ratification, the "new" Georgia Constitution of 1983 has been amended sixty-seven times. What accounts for this constant tinkering with the basic charter? Why have there been so many amendments? There are several reasons, and they fall into three general categories: procedural, substantive, and political. Many of the reasons reflect the values that Georgians hold dear.

Procedural Reasons for Constitutional Amendments

Unlike the federal amending process, which requires two-thirds majorities for Congress to propose and three-fourths of the states to ratify constitutional amendments, changing the Georgia Constitution requires two-thirds approval in the general assembly, followed by ratification by a simple majority of those who vote on that amendment in the general election. This makes amending the state constitution a fairly easy process, at least procedurally. Compounding the problem, Georgia's general assembly historically has not had a special constitutional oversight committee with specific re-

sponsibility for helping ensure that proposed constitutional amendments are of true constitutional significance and are consistent with other constitutional provisions. Moreover, there are no rules limiting the number of proposed amendments that are placed before the voters on any general election ballot. This process seems to solidify and even encourage popular participation in "constitution-making." Unlike the U.S. Constitution, public input is often sought at the ballot box, by a simple flip of the voting lever, or, as of 2004, the touch of an electronic screen.

Of course, the ease of amending Georgia's constitution also gives legislators a ready excuse to "pass the buck" from time to time. Legislators (and others) often believe that a constitutional amendment is the safest way to proceed legally, even though the desired action could probably be accomplished through simple enactment of a statute. Thus, a tradition has developed that says, in essence, "When in doubt, amend the constitution." The result has been a growing amount of statutory detail in Georgia's constitution. Unfortunately, statutory detail begets more statutory detail.

Similarly, because constitutional amendments frequently involve complex legal issues, legislators may not understand what a particular amendment would do or why it is needed. So, in such cases they may pass the issue on to the voters in the hope that they will resolve the issue without the legislature having to do so. Of course, most voters have even less comprehension of the issues involved than the legislators do, but they vote for the amendment assuming that legislators must have thought it was a good idea in proposing it! As a result, except for controversial issues, Georgia voters seldom reject an amendment proposed by the general assembly.

Substantive Reasons for Constitutional Amendments

By far, the most common—and obvious—reason for new constitutional amendments has been the desire by some person or group to do something not allowed by the Georgia Constitution, that is, to overcome a concrete or substantive obstacle. The following constitutional provisions, for example, have prompted many such amendments, both before and since the approval of the 1983 constitution.

Gratuities Prohibition

Article III, Section VI, Paragraph VI, provides as follows: "*Gratuities.* (a) Except as otherwise provided in the Constitution, (1) the General Assembly shall not have the power to grant any donation or gratuity or to forgive any debt or obligation owing to the public." Prompted by the Yazoo land fraud mentioned earlier, this provision is intended to keep a lid on the state trea-

sury. It has led to amendments authorizing very specific programs, such as programs of indemnification for emergency medical technicians killed in the line of duty, purchase of health insurance premiums for children and spouses of retired schoolteachers, and compensation for innocent victims of crime, among others.

"No-Earmarking" Provisions

Article III, Section IX, Paragraph VI (a), provides that "no appropriation shall allocate to any object the proceeds of any particular tax or fund or a part or percentage thereof." Article VII, Section III, Paragraph II (a), provides that "except as otherwise provided in this Constitution, all revenue collected from taxes, fees, and assessments for state purposes . . . shall be paid into the general fund of the state treasury." Taken together, these provisions are intended to prevent the state legislature from circumventing the usual requirements for passage of the general appropriations act each year (Article III, Section 9). This has prompted many amendments, however, when special "earmarked" funds are desired, such as for a special "workmen's compensation trust fund" and other worthy causes.

Uniformity-of-Taxation Provisions

Article VII, Section I, Paragraph III (a), provides as follows: "All taxes shall be levied and collected under general laws and for public purposes only. Except as otherwise provided [herein], all taxation shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." The "uniformity-of-taxation" requirement has been the subject of many amendments, usually for the purpose of creating a "special class" of taxation for a specific type of vehicle. In the 2000 election, for example, the people were asked whether the constitution should be amended to allow for a separate class of property for "marine vessels," and in 2002 they were asked to approve a separate class of property for "commercial dockside facilities." In both cases, the people said yes.

Political Reasons for Constitutional Amendments

Many of the reasons for constitutional amendments reflect the values that Georgians believe in. A strong belief in popular control of government officials is one of them.

Like most Americans, Georgians have a love-hate relationship with their government. On one hand, the most popular target for ridicule and criticism in any election is the government itself. Perceived government waste,

inefficiency, incompetence, overspending, cronyism, and duplication and overlap of services are fodder for nonincumbents of either party. Nevertheless, Georgians have a way of springing to the defense of the status quo, particularly when it comes to protecting their right to vote. Whether they actually vote or not, Georgians like their elections, even if they do not know much about the candidates. At the state government level, for example, all of the following executive officials are elected: governor, lieutenant governor, secretary of state, attorney general, commissioner of agriculture, commissioner of insurance, commissioner of labor, and state school superintendent. Most of these positions are filled by gubernatorial appointment in other states. Efforts to provide for appointment of some of these officials in Georgia have not been successful, however. The position of state school superintendent is an excellent case in point. In 1988, as part of an educational reform initiative to promote greater professionalism of candidates for the position of state school superintendent and to foster a more harmonious relationship between the Georgia Board of Education and the superintendent (who serves as executive director of the board), Governor Joe Frank Harris offered a proposed constitutional amendment to convert the office to one appointed by the board. Although the governor actively campaigned for the proposal's passage, the people said, "No!" In 1996, under Democratic governor Zell Miller, the conflicts between the appointed board and the elected superintendent (coincidentally, the first female Republican elected to statewide office in Georgia history) became so serious and debilitating that Governor Miller asked all of the appointed board members to resign so that he could try again.[12]

This same pattern is mirrored in Georgia local government elections. County residents in Georgia elect all of the following officials every four years, in addition to members of the county governing authority: the sheriff, clerk of the superior court, judge of the probate court, tax receiver and tax collector or both as tax commissioner, coroner, and surveyor. Many "good government" proponents would argue that administrators of government programs should be appointed by an elected executive, or by the county manager in a county-manager form of government, based on expertise and competence, rather than being elected in a political campaign by the people. Georgians, however, appear to prefer more direct control of their representatives.

The desire for popular control of elected officials may now even be said to extend to the judicial branch. In the 2002 general assembly, a proposed amendment was introduced and passed to establish a constitutional ban on

12. See Dale Krane, Platon N. Rigos, and Melvin B. Hill Jr., *Home Rule in America: A Fifty State Handbook* (Washington, D.C.: CQ Press, 2001).

"gay marriage." Some commentators argued that, since such a prohibition already existed in state law, the real intent of the proposal was in fact to rein in the judges and make sure that they read the constitution "correctly" in the future! Then Senator Mike Crotts, who proposed the amendment, actively campaigned for its passage using this argument.[13]

Of course, some constitutional amendments occur because they involve issues not addressed by the constitution of 1983, and thus there is no other way to act, short of amending the constitution. When Governor Zell Miller proposed establishing a state lottery to support public education, for example, a new constitutional amendment was needed.[14]

Finally, although purists might argue that the constitution should be viewed as a legal charter above politics, ultimately it is a political document. Amendments are sometimes, if not often, proposed because of dissatisfaction with a particular constitutional official or agency, due to a desire to protect a particular program from the legislature or the governor, or for other reasons of a political nature. Certainly, the politically charged issue of "gay marriage" is a recent case in point.

The Genius of American Democracy

The Great Seal of the State of Georgia depicts an arch, supported by three pillars. The pillars represent the three branches of state government and incorporate the state motto, Wisdom, Justice, and Moderation. The motto is intended to reflect what is hoped for in each branch—wisdom in the legislative branch, justice in the judicial branch, and moderation in the executive branch. The arch itself represents the Georgia Constitution.

Article I, Paragraph I, of the constitution of Georgia of 1861 proclaims, "The fundamental principles of Free Government cannot be too well understood, nor too often recurred to." One of the bulwarks of this "Free Government" in the American intergovernmental system is the state constitution itself. The Tenth Amendment of the U.S. Constitution provides the framework: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Although the Tenth Amendment does not receive as much popular at-

13. The ban on gay marriage effectively barred "civil unions" as well and is being challenged by its opponents on procedural grounds. Georgia was one of eleven states that approved such a measure in the 2004 general election.

14. A new amendment was needed for another reason, also: the 1983 constitution continued forward a specific prohibition on "state lotteries" that had been included as part of the constitution of 1945.

tention or scrutiny as either the First Amendment (freedom of religion, freedom of speech and press, and freedom of assembly) or the Fourteenth Amendment (due process and equal protection), it may arguably be the most important one in terms of preserving the freedoms of the people. Citizens of the United States are in fact citizens of two separate and interrelated governmental "sovereigns," the United States and the state in which they reside. Power is divided not only among the legislative, executive, and judicial branches of government in each state but also between the federal and state governments themselves. This means that governmental power is never consolidated in any one individual or party, but rather is diffused and dispersed throughout the system. This was a brilliant concept when it was first introduced, and it is brilliant today. As Donald S. Lutz so aptly observes, "Reading properly and carefully, one can glean from a constitution the balance of political forces, a structure for preserving or enhancing that balance, a statement of the way people should treat each other, and the values that form the basis for the people's working relationship, as well as the serious, remaining problems in the political order."[15]

15. Lutz, *Origins of American Constitutionalism,* 3.

AMY GOSSETT

The Louisiana Experience

Culture, Clashes, and Codification

Louisiana is recognized for its colorful history, politics, and customs. The people are known to be a passionate menagerie in which the love of sounds, sights, and tastes plays a more important role perhaps in people's lives than do the workings of their constitution. Whereas other states saw great influxes of various nationalities in the nineteenth century, Louisiana already had great diversity in its parish populations. Partly due to its various sovereigns, Louisiana was the depository for many immigrant populations fleeing political strife in their home countries. French, Spanish, German, Acadians, African, British, Irish, and Italians all lived in what would eventually become the state.[1] However, the French culture and political structure provided the greatest influence on state character. Two of the most obvious examples to visitors are Louisiana's use of parishes instead of counties and the Napoleonic Civil Code rather than common law.[2] In total, the land that is now Louisiana has flown ten different flags since the sixteenth century and had eleven different constitutions since joining the United States in 1812.

As early as 1541 the Louisiana territory was being settled and ruled by the

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1. Today there are still parts of the state with strong ties to these various ethnicities, such as the German coast area, the Acadiana region, the British influence north of Lake Pontchartrain, and the Spanish parishes below New Orleans (Kimberly Hanger, *A Medley of Cultures: Louisiana History at the Cabildo* [Baton Rouge: Louisiana State University Press, 1992]).

2. In 1769 the Spanish governor established what would become the equivalent to county districts for Louisiana, the parish system. Although there are references to counties in documents from 1803 to 1807, the first territorial legislature formally abolished the county court system and created the parish courts, thereby reestablishing the preferred terminology (Ben Robertson Miller, *The Louisiana Judiciary* [Baton Rouge: Louisiana State University Press, 1932], 10).

Spanish. The French followed in 1682 and founded New Orleans in 1718.[3] Then the land was given back to Spain in 1762 as a gift from Louis XV to his cousin Charles III.[4] In 1764 the first Acadian families arrived in Louisiana from New York, and the Florida parishes were ceded to England after the Seven Years' War. In 1800 Spain officially gave the lands back to France, due to its costliness and the Spanish fear that it might have to soon fight the Americans in order to keep the territory.

France remained an absent landlord until it sold the territory to the United States in 1803 for fifteen million dollars.[5] By 1810, the American settlers in Spain's West Florida overthrew the government and declared themselves an independent, and distinctly U.S.-friendly, republic. This development made the Louisiana transition to statehood easier for the American government. The entire territory was eventually divided among thirteen new states.[6]

Louisiana's decidedly French and Spanish system of governance was well entrenched by the time of American ownership of the territory. The primary goal then for the French-speaking inhabitants was to maintain their customs and power within the new state. Many of the early constitutions reflect this clash of cultures. Historians and legal scholars argue that many of Louisiana's constitutions contain statutory provisions rather than guiding principles of governance. This strategy was necessary so that the old inhabitants, as they were called, would retain power and influence in spite of American rule. During early constitutional conventions, not only were most delegates of French ancestry, due in large part to property ownership, but French was the only language spoken during convention discussion as well. It is therefore not surprising that the codification of French power continued through constitutional means, in spite of protest from American governors of the time.

Possible actions of subsequent legislatures or gubernatorial appointments caused great anxiety for the French and led to many long and detailed

3. John Kendall, *History of New Orleans* (Chicago: Lewis Publishing, 1922). Jean-Baptiste Le Moyne, sieur de Bienville, began building New Orleans as a company town for the Company of the West. By 1721 New Orleans had a population of more than 370 people: 147 male colonists, 65 female colonists, 73 slaves, 38 children, 28 servants, and 21 Indians.

4. Ibid. It was almost two years later that the Louisiana inhabitants learned they were no longer French subjects.

5. The culture, religion, and people were quickly and radically urged to change. Only two years later, in 1805, the first Protestant church was built in Louisiana. Catholicism was so entrenched until that point that fewer than twenty years earlier the headquarters for the Catholic dioceses was moved from Havana, Cuba, to New Orleans (http://www.sos.louisiana.gov/around/brief/brief-1.htm, n.p.).

6. Peter Kastor, ed., *The Louisiana Purchase: Emergence of a Nation* (Washington, D.C.: CQ Press, 2002).

statutory documents. The number of articles in the 1812 Louisiana Constitution was merely 7 and resembled other state constitutions of the time. However, it would be the shortest of the nine constitutions that followed. The 1974 document in effect today contains 108 pages, 14 articles, and 310 provisions.[7] Arguably, the current constitution follows an infamous trend in Louisiana: many special-interest provisions rather than a conceptual framework of government.[8]

Cultural Division

The most interesting period in Louisiana's fledgling beginning was the time between the purchase and the first constitution for admission to the States. If, as Donald S. Lutz argues, a constitution defines a people, Louisiana had the most difficult time with this decision. The people primarily were two: the old inhabitants who spoke French or Spanish and the Americans who wished to mold citizens according to their definitions of governance.[9] In particular, it was no small challenge to force the natives to accept the legal precepts of the Americans.[10] Therefore, during the time between purchase and statehood, cultural contestation became more and more prevalent in Louisiana politics.

Language and legal doctrine were the two largest obstacles to Louisiana statehood. The ancients were mostly of French origin and language. The Acadians were the second-largest French-speaking group who arrived in a steady stream from the 1760s through the 1790s. The Spanish sanctioned this immigration because the Acadians were "hardy, uncomplaining, and nonpolitical."[11] They were also an important "source of mass support in the political effort to perpetuate French culture and French institutions in

7. Governor Edwin Edwards remarked to the 1974 convention upon reading the new document, "What criticisms I have . . . arise . . . from your failure to recognize that you were here to write a constitution, rather than to serve as legislators" (Mark T. Carleton, "Fundamental Special Interests: The Constitution of 1974," in *In Search of Fundamental Law: Louisiana's Constitutions, 1812–1974,* ed. Warren M. Billings and Edward F. Haas [Lafayette: Center for Louisiana Studies, 1993], 147). This same comment could be made regarding most of Louisiana's constitutions.

8. Judith K. Schafer, "Reform or Experiment? The Constitution of 1845," in ibid., 21; Carleton, "Fundamental Special Interests," 142.

9. Cecil Morgan, *The First Constitution of the State of Louisiana* (Baton Rouge: Louisiana State University Press, 1975), xii.

10. There is some amount of irony in the idea of forcing a people toward a particular vision of liberty.

11. The Acadian people were expelled from Nova Scotia because they would not choose sides in a war between Britain and France.

Louisiana" against encroaching American culture. The third French enclave was newly arrived from France, and these immigrants quickly became important figures in the community due to their education and wealth. The fourth and final wave of French immigrants arrived in 1809 as "refugees from the West Indies [and] added substantially to the French majority."[12]

Other dominant cultural groups included the Germans and the Spanish. German immigrants were recruited in the early 1700s by controlling interests in Louisiana due to their perceived strong work ethic. Spain moved settlers from the Canary Islands to Louisiana in 1788 to establish greater Spanish presence in the area. Interestingly, all of these groups joined in common European political identity against impending American encroachment.[13]

In addition to the language barriers encountered during the political wrangling of 1803–1812, legal differences prevented progress in the creation of a constitution of which the U.S. government would approve.[14] The first territorial legislature in 1806 proposed a legal structure that was immediately vetoed by Governor William Claiborne, who opposed the distinctly Roman design of the system.[15] He, as well as those in Washington, D.C., demanded that Anglo-American, judge-made common law be codified in Louisiana.[16] Neither side appeared willing to concede. Those already living in Louisiana were a proud people accustomed to an established system of governance, regardless of the flag overhead. Each previous ruler had similar Roman-law origins and a lack of direct interference.

Legal proceedings throughout Louisiana were ultimately turned on their head. A judge's ruling often depended on what language he himself spoke. If each party spoke a different language—as was often the case—the judge would simply rule in favor of the person whom he could understand.[17] The ancients were confused and angered by the lack of clear prescriptions to follow. The French and Spanish system was a simple code of rules that judges enforced, thereby making the role of lawyers unnecessary.[18] However, once the Americans began to govern, the common-law system, or judge-made

12. George Dargo, *Jefferson's Louisiana* (Cambridge: Harvard University Press, 1975), 8, 10.

13. Ibid., 9.

14. Ibid., 15.

15. Shael Herman, David Combe, and Thomas Carboneau, *The Louisiana Civil Code: A Humanistic Appraisal* (New Orleans: Tulane Law School, 1981), 7–10.

16. Mitchell Franklin, "The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana," *Tulane Law Review* 16, no. 3 (1942): 322.

17. Dargo, *Jefferson's Louisiana,* 112.

18. The people wanted nothing to do with lawyers or American litigiousness. George Dargo cogently states, "The sudden appearance of what seemed to be 'swarms' of lawyers reinforced local fears that Louisiana was about to be sacrificed to the rapacity of an unscrupulous cadre of common law attorneys ready to take advantage of the people's ignorance" (ibid., 17).

law, outraged the old inhabitants, who now needed to hire someone to interpret the mountains of case law and precedent necessary to argue a case. To summarize the difference between the doctrines, "Both systems attempted to achieve a just solution in every legal contest, but where the common law taught that it could only be secured through faithful observance of proper form, the civilian tradition more willingly sacrificed procedural regularity to the interests of substantial justice."[19]

Until some uniform code could be determined, the national government refused to allow the territory into the Union. In its view, Louisiana was simply not ready to be a state until it had accepted the methods and principles of the other seventeen states and the federal government. It insisted that habeas corpus and trial by jury be introduced immediately.[20] The inhabitants resisted introduction of juries in civil trials because people "no better than themselves" should not be deciding such questions. Previously, the presiding Spanish commandants had acted as "notary, sheriff, land agent, coroner, auctioneer and justice of the peace," which greatly simplified procedural governance in the territory. Conversely, the citizens welcomed the change to juries in criminal proceedings because the Spanish system had been known for corruption and brutality.[21]

Only a year after the purchase, a manifesto listing the grievances of the inhabitants was circulated and signed. Called the "Louisiana Remonstrance," it delineated many of the legal problems and chaos found in the lower territory. This list, and a request that the territory be granted immediate statehood, was presented to Congress in November 1804. In French minds, admission would mean self-governance once more.[22] Their request was denied, and the legal confusion and conflict steadily grew.

In 1806, the first Territory of New Orleans legislature passed a bill stating that all laws in effect at the time of the Louisiana Purchase shall remain in effect. Governor Claiborne quickly vetoed the measure. This action prompted the legislature to authorize James Brown, an American, and Louis Moreau-Lislet, born in Haiti, to begin a compilation of the existing civil laws in use within the territory. Louisiana leaders wanted to illustrate that if the existing code did not conflict with the U.S. Constitution, there should be no problem in its continuance. The result was the *Digest* or *Civil Code of 1808* adopted by the legislature and, surprisingly, signed by Claiborne.[23]

19. Ibid., 16–17.

20. Morgan, *First Constitution of Louisiana,* 29.

21. Laura Porteous, "Torture in Spanish Criminal Procedure in Louisiana, 1771," *Louisiana Historical Quarterly* 8, no. 1 (1925): 5–22.

22. Dargo, *Jefferson's Louisiana,* 119–20.

23. John Tucker Jr., "Source Books of Louisiana Law, Part I: The Civil Code of Louisiana," *Tulane Law Review* 6, no. 2 (1932): 280–300; Herman, Combe, and Carboneau, *Louisiana*

As a uniform code of law could now be presented to Congress, the legislature once again petitioned the federal government for admission to the Union in 1809, and once again did so over Claiborne's objections. Congress granted the enabling legislation for Louisiana to compose its constitution finally in 1811.[24]

A Litany of Constitutions

Over the next 160 years, legislators would create many lengthy and prescriptive documents in an attempt to define a people and a regime.[25] In the pre–Civil War years, the ancients struggled to remain the ruling class. During the Civil War, the United States imposed its decision-making processes on the conquered state. Contemporary constitutions, too, struggled to distinguish constitutional principles from constitutional statutes. Although Louisiana fulfills the spirit of Lutz's theory in that all of the constitutions have been reflections of the state, Louisiana appears to be more concerned with the legal codification of the prevailing cultural, political, or economic power of the time rather than the specific embodiment of constitutional principles as outlined by Lutz.

Some of the recurring themes found in the 1812, and practically all later, convention records are the discussion of the capital location, the judicial selection process, and the preservation of New Orleans's economic and political strength. The argument over capital location particularly was a continual, and colorful, part of many constitutional convention debates over the years.[26] Under foreign rulerships, the capital cities had been Biloxi, now located in Mississippi, and New Orleans. Donaldsonville, Baton Rouge, and New Orleans housed the capital during the 1800s. The battle was unofficially settled when Huey Long built the tallest state capitol building in the United States in Baton Rouge in 1932.

Civil Code, 24–27. It remains unclear whether Claiborne had a change or heart or was simply worn down by the persistence of the old inhabitants.

24. Warren M. Billings, "From This Seed: The Constitution of 1812," in *In Search of Fundamental Law,* ed. Billings and Haas, 8.

25. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16.

26. Over the years, the excesses of New Orleans prompted the move of both the constitutional conventions and the state capital itself. During many conventions, newspapers reported that the delegates were partaking of the "distractions" and "strong waters" of the city. Most notably, at the convention of 1864, delegates spent $9,421 on alcohol and cigars (Charles M. Vincent, "Black Constitution Makers: The Constitution of 1868," in *In Search of Fundamental Law,* ed. Billings and Haas, 65–66).

The Ancient Regime

The 1812 document was a staggering legal compromise. The people would accept the definitions of American criminal law, the jury system, and the "unaccustomed rights of *habeas corpus*." However, the convention refused to adopt the civil precepts of the Americans. Article IV, Section 11, states, "The existing laws in this territory when this constitution goes into effect, shall continue to be in force until altered or abolished by the legislature." In what amounted to a huge capitulation, Claiborne and the Americans allowed the people to preserve more than one hundred years of governance.[27]

In another show of independence, the only copy of the 1812 constitution signed by convention delegates was written in French. The document submitted to the U.S. Congress for official admission to the Union was a translated copy of the original from French to English. Only one of the delegates bothered to sign this particular copy. A convention clerk wrote the English version, signed the delegates' names, and sent the draft to Washington.[28]

Further, at the 1812 convention, all proceedings took place in French, much to the frustration of the Americans. Although U.S. authority mandated the use of English, it did not prevent the use of French, and until the constitution of 1868, all acts of the legislature were distributed in both French and English. Formal provision for the use of French was even included in both the constitution of 1845 and the constitution of 1852 (Articles 132 and 129, respectively).[29]

In addition to preserving the language through legislative means, other 1812 provisions ensured that the French would maintain much of the political power in the state.[30] In order to hold office in the house or senate, one had to possess land valued at five hundred dollars or one thousand dollars, respectively, among other qualifications (Article II, Sections 4 and 12). The governor was the only statewide elected officer, and he was to possess a land-

27. Morgan, *First Constitution of Louisiana,* 29. The preservation of local governance is interesting as well. The 1812 constitution says nothing regarding county or local government characteristics. Therefore, citizens began creating committees empowered to perform specific tasks in a "novel use of the newly found jury" (14). *Police jury* remains the term for local government councils.

28. Ibid., 7.

29. The Civil War ended this official practice. The constitutions of 1868, 1879, 1898, and 1913 mandated the promulgation and preservation of state documents in English only. In spite of this directive, the legislature continued to openly speak French during debate for much of the twentieth century.

30. Political control was kept through other means as well. For many decades, during election season, the French would initiate rumors of an impending yellow-fever outbreak. The Americans would subsequently flee, and the French would be the only residents to vote on election day (Schafer, "Reform or Experiment?" 25).

ed estate worth five thousand dollars (Article III, Section 4). This criterion favored the ancients who had lived in the territory long enough to acquire such property holdings. It would be a successful, if not temporary, attempt at preserving *l'ancien régime.*

Unlike other constitutions, the amendment process of the 1812 document was all but prohibitive. Article VII, Section 1, states that in order to make any changes to the constitution,

> a majority of all the members elected to each house of the general assembly, shall, within the first twenty days of their stated annual session, concur in passing a law, specifying the alterations intended to be made, for taking the sense of the good people of this state, as to the necessity and expediency of calling a convention, it shall be the duty of the several returning officers, at the next general election which shall be held for Representatives after the passage of such law, to open a poll for, and make a return to the secretary for the time being, of the names of all those entitled to vote for Representatives, who have voted for calling a convention; and if thereupon, it shall appear that a majority of all the citizens of this state, entitled to vote for Representatives, have voted for a convention, the general assembly, shall direct that a similar poll shall be opened, and taken for the next year; and if thereupon, it shall appear that a majority of all the citizens of this state entitled to vote for Representatives, have voted for a convention, the general assembly shall, at their next session, call a convention to consist of as many members as there shall be in the general assembly, and no more, to be chosen in the same manner and proportion, at the same places and at the same time, that Representatives are, by citizens entitled to vote for Representatives; and to meet within three months after the said election, for the purpose of re-adopting, amending, or changing this constitution.

As one might suspect, the 1812 document was never amended. The process prevented the inevitable need for conflict management, a central part of any successful constitutional structure. It did, however, remain in effect for thirty-three years, until a new convention was eventually called in 1845.[31]

A fundamental difference between this and the previous document was the prevailing shift of dominant regime and distribution of power. The constitution of 1845 embodied much of the Jacksonian rhetoric of the time. The 1812 document was seen as too aristocratic; therefore, many provisions reflected the desire to limit state and legislative powers. One of the fiercest convention battles was among those delegates from the New Orleans region and those from the rural areas.[32] In order to limit and disperse New Orleans po-

31. Lutz, *Origins of American Constitutionalism,* 14; Morgan, *First Constitution of Louisiana,* 10.

32. Schafer, "Reform or Experiment?" 21, 29.

litical power, the number of senators from the area was limited to one-eighth the total number of senators, and the basis of apportionment in the state senate would include the total population, that is, slaves and voteless free blacks in addition to whites.[33] Delegates also voted to move the capital "at least 60 miles from New Orleans" (Title VI, Article 112) in order to avoid the "seductions" of the city.[34]

Other procedures and structures were also changed to reflect more democratic ideals. First, the new constitution abolished the property requirement for voting (Title II, Article 10) and for holding office.[35] Second, it limited the legislative session to sixty days.[36] Third, the office of lieutenant governor was created, codifying a succession of power (Title III, Articles 38–46).[37] Fourth, criminal appeals could now be heard by the state supreme court.[38] Last, a compromise among delegates stated that judges would be appointed, but the term of office was limited to eight years (Title IV, Article 65).

Public schools were also discussed for the first time in the 1845 document. In an effort to combat abolitionist views, delegates argued that the only way for Louisiana children to have a proper understanding of the institution of slavery was to be educated within the state. The consensus was that "Southern men should have Southern heads and hearts," and therefore a system of free public schools, funded with property taxes, must be created.[39]

The political power struggle continued between New Orleans and the rural parishes in the constitution of 1852.[40] The delegation narrowly decided that the number of representatives in both houses, not merely the senate,

33. Under the Spanish system, slaves had the right to self-purchase and property. The Americans had no such system, thus creating the ironic circumstance of defining the slave population as "people" for representation purposes only. Delegates were even called abolitionists if they argued *against* including this provision (ibid., 27–29).

34. One delegate noted that if the capital city moved, "there will be no more fine dinners, no more fine wines, that can be brought to bear on the legislature" (ibid., 30).

35. Ibid., 21. Although the property requirement was eliminated, there remained very long residency requirements for candidate qualification.

36. Ibid., 34. As one delegate remarked, "We have had enough legislation to last us half a century. A body composed of half French, half Spanish, and half Yankees could do no harm in a session of but 60 days."

37. Ibid.

38. Ibid., 33.

39. Parenthetically, public school legislation also called for the teaching of both French and English (ibid.).

40. In fact, this struggle was even reflected in the final adoption of the document. In the final count, New Orleans gained approval for the constitution by fewer than thirty-two hundred votes (Wayne M. Everard, "Louisiana's 'Whig' Constitution Revisited: The Constitution of 1852," in *In Search of Fundamental Law,* ed. Billings and Haas, 44).

would now be based on total population. New Orleans was able to recover much of its political clout, however, due to its growing economic significance. In the prior constitution, the legislature placed many limits on banking charters and business subsidies. By 1852, New Orleans rivaled New York City in commercial importance, and many of those restrictions were subsequently lifted to facilitate this development.[41]

Some of the procedural changes included the lengthening of the legislative session because the "business of governing had become too complex to be conducted properly under that time constraint." All tax revenue was now to be distributed equally among the parishes. The delegates also decided to simplify the amendment process of the document, finally addressing the need to improve conflict management. As mentioned above, changes often took as long as five years.[42]

Two judiciary changes are also worth noting. Once again the delegates argued whether judges should be appointed or elected. After much debate, it was decided that Louisiana's judges would be popularly elected. The second issue regarded the supreme court. The number of justices at that time was four, leading to many tied decisions that by default let the lower court's decision stand. Therefore, in the 1852 constitution, the number of justices was increased to five.[43]

Secession and Reconstruction

Upon Louisiana's secession from the Union in 1861, no new constitution was written. The 1852 constitution was simply rewritten without any references to the United States. This particular version would last only three years. In 1864, occupied Louisiana was ordered by President Lincoln to create yet another constitution. At this convention, only the nineteen federally controlled parishes were in attendance.[44] In spite of the limited turnout, major changes were made to broaden or redefine "the people."[45] Although the slave population was emancipated in the state, this constitution failed to provide for the enfranchisement of the newly freed blacks.[46] Strangely, in

41. Ibid., 43, 45–48.

42. Ibid., 38, 40, 49, 47.

43. Ibid., 44; Miller, *The Louisiana Judiciary,* 32.

44. Their small number did not prevent the delegates from falling prey to the same seductions of the city. Newspapers reported that delegates were drunk, fighting, throwing chairs, and consuming "costly wine, and fourth-proof brandies" (Kathryn Page, "A First Born Child of Liberty: The Constitution of 1864," in *In Search of Fundamental Law,* ed. Billings and Haas, 63).

45. Lutz, *Origins of American Constitutionalism,* 14.

46. Page, "A First Born Child," 53.

lieu of suffrage, it provided revenue for the public education of black and whites.[47]

Other provisions were more indirect consequences of wartime occupation. The Americans were finally able to "remove the requirement that officers of the legislature be conversant in French and English." Representation in the legislature would now be based on registered voters rather than total number of inhabitants. The elected judiciary was also abolished for fear that elected judges would either not uphold Union directives or exact retribution on those delegates who voted for emancipation.[48]

Further, the document contained some rather radical provisions for the time period. It established a minimum wage and nine-hour workday. It authorized the creation of lotteries and gambling houses. Article 117 of the new constitution also allowed the legislature, for the first time, to have jurisdiction over divorces, adoption, and the emancipation of minors.[49]

For a variety of reasons, the 1864 constitution would never be seen as legitimate, either by Louisiana citizens or by the federal government. Only twenty parishes were part of the ratification vote, all in occupied territory. The glaring absence of enfranchisement for freed slaves led to a bloody race riot in New Orleans in 1867. Congress then was prompted to pass the Military Reconstruction Acts.[50] Readmission to the Union, and removal of federal troops, was now contingent upon each state enacting a constitution suitable to the federal government.

The resulting Louisiana Constitution of 1868 was therefore both an amazing advancement for the civil rights of all Louisiana citizens and an end to French political dominance within the state.[51] The Carpetbagger Constitution, as it was called by natives, was constructed by exactly forty-nine black and forty-nine white convention delegates. It was the first of Louisiana's constitutions to include a bill of rights, prohibit racial segregation in public

47. The funding was long overdue. Prior to the Civil War, free blacks were among Louisiana's largest landowners due to the Spanish and French tradition of allowing slaves to purchase their freedom and own property. Paying property taxes was therefore not a new concept for Louisiana blacks, but receiving public revenue for education was. See Mary Gehman, *The Free People of Color of New Orleans: An Introduction* (New Orleans: Margaret Media, 1994).

48. Page, "A First Born Child," 52, 64, 60.

49. Ibid., 68, 64. The new gambling houses were required to be on the first floor of buildings and keep their doors open. This statute let the public "keep an eye on activities" (ibid., 64).

50. Joe Gray Taylor, *Louisiana Reconstructed, 1862–1877* (Baton Rouge: Louisiana State University Press, 1975), 106.

51. Prior to this constitution, most legal documents were bilingual; English was written on the right side of the paper, whereas French was scribed on the left side of the page (Morgan, *First Constitution of Louisiana,* 5–6).

schools, and provide pensions for veterans, care for the insane, and educational programs for the deaf and blind. It was also the first Louisiana constitution to be overwhelmingly ratified by black citizens, who now made up a majority of voters in the state.[52]

The 1868 constitution would represent the largest shift in political power and the best attempt at a document that deserves to be called a constitution, given Lutz's evaluation schema.[53] This progress did not represent, however, any change among most white residents, and would therefore last only as long as Reconstruction. To illustrate this point, in 1873 Louisiana's governor was a black man.[54] By contrast, it would not be until 1963 that Tulane University would accept African American students. Similarly, there would not be another Republican governor until 1979. Clearly, then, despite all efforts, the Civil War did not change the state's overall political culture.[55]

Within two years after Reconstruction, the 1879 document was written as a direct negation of the Carpetbagger Constitution. Although many of the delegates wished to completely disenfranchise black voters, economic issues dominated the post-Reconstruction document. Louisiana debt was at its worst; it could not afford to pay even the interest on its liabilities. Delegates decided to again create a state lottery and reduce the salary of executive officers by half.[56] In order to attract business interests back to the state, Louisiana also "exempted all manufacturers from taxation for a period of twenty years" (Article 207). Another cost-saving measure entailed moving the capital once again from the decadent New Orleans back to Baton Rouge.[57]

Economic concerns also trumped the desire to eliminate black suffrage entirely. At the end of Reconstruction more than ten thousand African Americans left Louisiana out of fear. As a result, the labor force became scarce and congressional representation decreased. Abolishing all civil rights measures would, then, be economic and political suicide for the state. The convention instead decided to abolish the minimum wage and resegregate the schools.[58]

52. Vincent, "Black Constitution Makers," 69, 73.

53. Lutz, *Origins of American Constitutionalism,* 16.

54. Black politicians filled a variety of government positions from 1868 to 1879, including some in Congress. Many were part of the twenty-four thousand black veterans who joined the federal guard unit immediately after the fall of New Orleans (Vincent, "Black Constitution Makers," 70).

55. In fact, the U.S. Army stayed in Louisiana longer than in any of the former Confederate states, not leaving until 1877 (http://www.sos.louisiana.gov/around/brief/brief-1.htm).

56. Ronald M. Labbe, "That the Reign of Robbery Will Never Return to Louisiana: The Constitution of 1879," in *In Search of Fundamental Law,* ed. Billings and Haas, 82; Morgan, *First Constitution of Louisiana,* 89.

57. Morgan, *First Constitution of Louisiana,* 89, 82.

58. Labbe, "That the Reign of Robbery," 85–86, 88.

By the turn of the century Louisiana politicians feared not an exodus of workers but a coalition of poor blacks and whites. In order to prevent this alliance, Democratic Party leaders began to change delegate selection rules before the next constitutional convention was called to order. Both black and New Orleans machine voters were systematically and successfully eliminated from the drafting process. The 1898 document was simply a product of a Democratic Party "family meeting." The constitution was an unbelievable 326 articles, 165 more than the previous 1868 constitution, and was adopted without going to the voters for approval. The hundreds of provisions codified the party's power and disenfranchised almost all black voters in the state.[59]

Contemporary Constitutions

The first convention of the twentieth century, in 1913, was mandated by the legislature to address only two issues: the refinancing of state debt and "the problem of drainage in New Orleans." Therefore, although items were added, little change was made to the 1898 document itself. One new provision mandated the state to repay a New York bond firm with port revenues before settling other state debts.[60] This pattern of "constitutional statute" and special-interest involvement would lead to the addition of another 140 amendments before Louisiana called another constitutional convention.

At the 1921 meeting, no one really expected the delegates to create a concise or brief document, in spite of a legislative directive to shorten the 1898/1913 constitution. Statutory provisions riddled this constitution just as they had others. One reporter from the *New Orleans Times-Picayune* noted that the state had become "a citizen maker, road builder, health saver, school constructor, and crime preventer." The 1921 constitution actually "exceeded its predecessor in length," and again was never subject to voter approval.[61]

Over the next fifty years, the constitution was amended an astonishing 536 times. During this time, critics argued that "constitutional revision by amendment had become government by constitutional amendment." Therefore, in 1974, the legislature tried yet again to simplify the Louisiana Constitution. At this convention, for the first time since 1879, there were

59. Michael L. Lanza, "Little More than a Family Meeting: The Constitution of 1898," in *In Search of Fundamental Law,* ed. Billings and Haas, 93, 98. African American voter registration fell from 130,344 in 1896 to 1,342 by 1904. Many poor whites also were disenfranchised during this time period, falling from 164,088 to 91,716.

60. Marie Windell, "Can a Legislature Control a Constitutional Convention? The Constitution of 1913," in *In Search of Fundamental Law,* ed. Billings and Haas, 110, 117.

61. *New Orleans Times-Picayune,* May 1, 1921; Matthew J. Schott, "A Legal Monstrosity? The Constitution of 1921," in *In Search of Fundamental Law,* ed. Billings and Haas, 124–33.

black delegates (twelve); since 1898, there were Republican delegates (six); and since 1821, there were females (ten). In spite of more diversity, however, the results were not a radical departure from previous documents. The constitution was "stitched together on the convention floor," as all of the writing and special-interest deals were made by small committees of delegates.[62] For example, far from being a constitutional principle, the document even dictates that there be a "$3 license tag fee for private motor vehicles" (Article VII, Part I, Section 5).

A Legacy of Civil Code

In the final analysis, Louisiana's many documents have largely fallen short of fulfilling the espoused purposes of a written constitution. Nevertheless, consistent with the spirit of Lutz's theory, Louisiana's unique history and European influences have left their mark on the people and their laws. One legacy of the Louisiana founding is the listing of prescriptive rules rather than interpretive principles of governance. Roman law already favored this type of rule making, and what better way to preserve power than through constitutional codification. The long and detailed documents hampered future governments enough that rather than amend the constitution, legislators saw it as necessary to rewrite it altogether.

According to Lutz, a "constitution might denote limits but not at the same time describe fundamental principles."[63] In choosing to focus on the preservation of current power structures, Louisiana's constitutional tradition selects "limits" over "fundamental principles." As a result, none of the eight constitutional purposes is truly served. Conflicting definitions exist for each criterion: justice, a people and public, a way of life, a legitimate basis for authority, and the distribution of political power. Therefore, the primary function of Louisiana's constitutions from the outset was to hamper future regimes and preserve cultural identity.

Over the decades the goal became less about maintaining cultural character and more about protecting special interests. The old inhabitants entrenched much of their culture into the writing of each constitution until 1864. Yet after the Civil War, the statutory tendencies of the Louisiana people would be used to guarantee partiality to a variety of business and political factions. This trend has not come to an end. Although the origins of this

62. Carleton, "Fundamental Special Interests," 141–46. There were a few provisions worth noting. The 1974 constitution contained a bill of rights that prohibited both racial and sexual discrimination. The document also reduced the number of state agencies from 250 to a maximum of 20.

63. Lutz, *Origins of American Constitutionalism*, 22.

tendency may be due to legal legacy, the continuation is due more to the desires of influential factions to reinforce their power within the state. What began as a clash of cultures became a clash of urban and rural districts, a clash of North and South, a clash of political factions, and a clash between special interests and the people.

ANGELA K. LEWIS

Custom, Culture, and Change

The Mississippi Constitutional Experience

Although the study of the federal constitution is deemed to be an important aspect in the study of government, state constitutions have been largely ignored, even though they provide citizens with a myriad of rights that are not found in the U.S. Constitution. State constitutions closely mirror the political and social changes taking place in the state, and they define the way of life for citizens in each state more so than does the federal constitution.

Constitutions often reflect the attitudes of the people in the state. Additionally, according to Donald S. Lutz, constitutions display the culture of society in describing their thoughts and views about power and liberty as well as the type of government that suits their needs. More specifically, constitutions establish the institutions by which conflict is managed. But they also provide limits to those political institutions managing conflict. In short, constitutions define the way of life as well as those institutions that manage life.[1] Mississippi's constitution is no different. From its first constitution of 1817 to the constitution of 1890, all of these documents firmly describe the values of Mississippians.

The focus of this chapter is to examine the development of the Mississippi Constitution as well as to analyze how each document describes Mississippi's culture and way of life. This chapter also seeks to describe the changes in how Mississippi has sought to address the requirements of a written constitution.

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1. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

Mississippi's Journey to Statehood: The Constitution of 1817

The journey to statehood for Mississippi was one of extreme rarity. By the time Mississippi became a state, its residents had been residents of four different nations: France, Britain, Spain, and the United States. However, the state had very favorable circumstances before being admitted to the Union. Economic conditions were good, the population had increased tremendously, and their main crop, cotton, was in high demand and was quite profitable. Additionally, as the twentieth state admitted to the Union, there was great experience among those who participated in drafting Mississippi's first constitution. The forty-eight delegates at the convention were wealthy landowners who were politically experienced, most having held office before.

But Mississippi had been denied statehood in 1812 because of extreme factionalism between the East and West. Those who lived in West Mississippi, or the Natchez, had extremely different lifestyles from those who lived in the East. Inhabitants of the Natchez relied on a plantation economy that produced tobacco, indigo, and cotton through slave labor. Those in the East, however, had fewer slaves and had more farmland than plantations. Not only was Mississippi denied statehood, but the differences between the East and West also had an impact on the way the first constitution was written because a large part of eastern Mississippi was excluded from the convention. In fact, Congress offered statehood only to the western counties, whereas eastern counties were slated to be a part of Alabama.[2]

Most delegates to the convention were not interested in immediately forming a state. Largely a result of the factionalism between the East and West, delegates were more interested in Congress adding the eastern section of the state, including Mobile, back into Mississippi. Thus, delegates attempted to adjourn the convention on two occasions but failed. Later, after promising to place the capital on the Pearl River, half of the delegates met as a committee to write a draft document that was amended and eventually became Mississippi's first constitution.

A major objective of a written constitution is to place limits on governmental authority. As such, the first constitution included a declaration of rights that according to some historians could have been written by Thomas Jefferson himself. For example, the constitution of 1817 contained a statement of social contract theory that is also found in the Declaration of Inde-

2. John Ray Skates, "The Mississippi Constitution of 1817," in *Understanding Mississippi's Constitutions: An Historical Perspective,* ed. Barbara Carpenter (Jackson: Mississippi Humanities Council, 1989).

pendence. Article 1 of the constitution stated, "All political power is inherent in the people, and all free governments are founded on their authority."[3] This statement firmly embraced the fact that a major purpose of a constitution places limits on government authority by including a statement of sovereignty. Moreover, the framers included twenty-nine separate sections outlining the rights of individuals. They included most of the protections provided for in the Bill of Rights, such as the freedom of religion, equality of men, right of self-government, and freedom from unreasonable search and seizure.

Constitutions must establish the basis of the authority for a regime or those who rule, which is found in Article 2. This article describes the composition and duties of the three departments of government, the legislative, executive, and judicial. The first section was "Distribution of Powers," in which a strict separation of powers was spelled out that gave each branch separate authority and prohibited one branch from exercising powers belonging to other branches.

Article 3 created a "general assembly" made up of two houses, directly elected by the people, meeting annually. House members served one-year terms, and senators served three-year terms. Apportionment in the general assembly almost brought the convention to a halt because delegates from the West who relied on slave labor wanted a provision to allow slaves to be counted for representation purposes, but those in the East with few slaves wanted apportionment based on white population, with each county having at least one representative.[4] However, the vote to end the convention ended in a tie, and the convention continued to deliberate. Easterners won the battle, with representation in the house based on white population and each county having at least one representative and in the senate based on white taxable inhabitants.

Article 4 dealt with the executive office of the government. The governor and lieutenant governor were elected officers. The terms for the governor and lieutenant governor were two years with the possibility of reelection. The governor was given typical powers of any chief executive, which included acting as commander-in-chief and calling special sessions of the legislature. The governor was also charged with the execution of the law and given the power to pardon. Other powers given to the governor included the veto and the power to sign bills and orders. However, in comparison to governors in other states, Mississippi's governor was given little control over

3. See Lutz, *Origins of American Constitutionalism,* 13.

4. William H. Hatcher, "Mississippi Constitutions," in *Politics in Mississippi,* ed. Joseph B. Parker (Salem, Wis.: Sheffield Publishing, 1993), 17–38.

other executive offices, such as the elected sheriff and coroner or the state treasurer and auditor, who were appointed by the general assembly.[5]

The judiciary was dealt with in Article 5, which stipulated that between four to eight judges would be appointed to serve on the supreme court. The remainder of the judiciary was left to the general assembly to establish inferior courts as necessary.

According to Lutz, one purpose of a written constitution is to make a distinction between the people, legal inhabitants of the area, and the public, or citizens, those holding full political rights who can take part in all aspects of politics and hold political office. As such, this constitution extended suffrage to all free white males twenty-one and older who either served in the militia or paid a state or county tax.[6] However, there was a distinction within the citizenship because only those white males with property could hold office in either of the branches of the general assembly. Moreover, the document also required officeholders to profess a belief in God, but it did not allow ministers and priests to hold the office of governor or lieutenant governor or become members of the general assembly. Specifically, in the house, in order to hold office, officials had to own 150 acres of property worth five hundred dollars and be at least twenty-two years old. Members of the senate were to hold 300 acres worth one thousand dollars and were to be at least twenty-six years old.[7] Specific qualifications for governor and lieutenant governor included being at least thirty years old, a citizen of the United States for twenty years, and a resident of Mississippi for at least five years. Both executive officers were also required to own 600 acres of land or property worth two thousand dollars. And finally, in the judiciary, judges were chosen by the general assembly and would serve during good behavior until age sixty-five.

Article 6 contained "general provisions" not previously covered, including the oath of office for all elected officials and a provision stating that slaves could not be freed without the consent of the slave owner. The document also forbade the general assembly from denying immigrants the right to bring their slaves to Mississippi with them; however, it did prohibit bringing slaves into the state as merchandise.[8] It also included provisions for amending the constitution. The legislature could, by a two-thirds vote in each house, call a convention to propose amendments once approved by

5. See ibid.

6. See David J. Bodenhamer, "Mississippi and the American Constitutional Tradition," in *Understanding Mississippi's Constitutions,* ed. Carpenter.

7. Skates, "Mississippi Constitution of 1817."

8. See ibid.

voters in a referendum. But there were no provisions for amending the constitution.[9]

The finished document was submitted to Congress and signed by President James Monroe on December 10, 1817, making Mississippi the twentieth state to become a part of the Union.

Constitutional Change in Mississippi

The Constitution of 1832

Calls for a new constitution in Mississippi were largely a result of a general movement for constitutional reform and support for Andrew Jackson as president. Many Mississippians also wanted to make the political process more democratic by abolishing property qualifications for office holding and voting.[10] In short, they wanted to change how the constitution classified citizens, those holding full political rights. Thus, the 1832 constitution contained many reforms that accomplished that objective. However, there were several other events that took place that changed the state and led to writing the new constitution. First and foremost, the population of the state had increased substantially, and many of the new settlers were followers of Jackson, who supported popular participation. Second, the state acquired new land that was formerly owned by Native Americans in northern Mississippi.[11] These two factors made it extremely difficult to deal with elements of the 1817 constitution such as reapportionment and the creation of new courts. As a result, calls for a convention took place from 1825 until November 1830, when the general assembly proposed a convention and placed it on the ballot; a large majority of Mississippians approved it in August 1831.[12]

The convention was to be convened in September 1832 in Jackson, Mississippi. Although the delegates of the convention were not as impressive as the delegates from the previous convention, five delegates from the previous convention attended.[13] And they represented views more in line with Jacksonian principles of democracy and mass participation. Most of the work of

9. See Hatcher, "Mississippi Constitutions."

10. James W. Loewen and W. Charles Sallis, *Mississippi: Conflict and Change* (New York: Pantheon Books, 1974).

11. See Skates, "Mississippi Constitution of 1817."

12. See Robert J. Haws, "Mississippi Constitution of 1832," in *Understanding Mississippi's Constitutions,* ed. Carpenter.

13. See Hatcher, "Mississippi Constitutions."

the convention took place in committees, where delegates were divided into five committees that dealt with the five articles in the existing constitution. In order to expand participation, and thus citizenship, the Declaration of Rights Committee supported the democratization of government by removing property and militia requirements for holding office and for voting. Voting was expanded to include all white males twenty-one and older who were citizens of the country and the state.[14] It also eliminated the ability to pay taxes as a requirement for legislative office. In a humanitarian effort, which demonstrates a change in moral values and the way of life, the new constitution prohibited the sale of slaves as merchandise after 1833. The new document also extended the first constitution's definition of the public by extending rights and privileges to Indians similar to those of whites.

The committee also made most executive offices chosen by election as opposed to being chosen by the general assembly. And unlike the constitution of 1817, in which only the governor and lieutenant governor were directly elected executive officials, now several executive officials were directly elected by the people, including the secretary of state, treasurer, attorney general, and auditor. Although establishing a plural executive with the direct election of these officials, the convention, at the same time, eliminated the office of lieutenant governor, thereby making this branch a plural executive. The convention also required local political offices to be elected. These offices included the sheriff, coroner, treasurer, surveyor, and ranger.

In line with Jacksonian principles of mass participation, the way of life and the values of Mississippians changed drastically. The people of Mississippi not only saw a need to change the definition of the public by extending suffrage rights but also sought to limit the government's power by giving the people more authority in choosing executive officers.

In addition to making most executive offices elected, the convention also limited the powers of the governor. The governor now served a two-year term with the possibility of reelection. The pardon power was also limited now, requiring legislative approval. Provisions barring religious leaders from running for office were dropped, as was the ability to amend the constitution, which allowed for legislative proposal and popular ratification of amendments. They also changed the name of the legislative branch of the government from the "general assembly" to the "legislature" and met biennially as opposed to annual sessions, which also weakened the legislature. And last, to correct errors from the previous constitution, provisions were included to amend the new document to adapt to new situations.

The most salient issue at the convention dealt with the judiciary. Heavy campaigning took place before the convention, which required candidates

14. See Loewen and Sallis, *Mississippi: Conflict and Change.*

to declare a position on the issue. There were three positions: those favoring the election of all judges, those who defended the current system in which judges were appointed, and those supporting a system in which circuit court judges were elected and supreme court judges were appointed. Ultimately, those favoring the election of judges won, and life appointment during good behavior was replaced with fixed terms, making Mississippi the first state to adopt elections for judges, which indicates a change in the way the people wanted to limit and distribute the power of the government.[15]

The Constitution of 1869

In 1861, Mississippi seceded from the Union, ultimately joining the Confederate States of America. A new Confederate constitution, which was almost the same as the constitution of 1832, was adopted, but it claimed allegiance to the Secession Convention as opposed to the United States. In order to be admitted back into the Union, however, Mississippi had to enact a new constitution acceptable to the U.S. Congress that included a return to civil government and the protection of rights of former slaves.

As a result, the constitution of 1869 signified a major change in the culture and way of life in Mississippi. It was heavily influenced by a national Republican agenda, which included the provision to share power between blacks and whites.[16] The convention demonstrated a change in who was considered part of the public in that, for the first time, black delegates were present. In fact, many southern constitutional conventions during the time became known as black-and-tan conventions, as many of the delegates were carpetbaggers, Republicans who came from outside Mississippi to live; scalawags, Mississippians sympathetic to Reconstruction policies; or black. Another indication of a change of values in Mississippi during this time was that a majority of the delegation were those sympathetic to Reconstruction policies. The delegation consisted of twenty-six carpetbaggers, thirty-three scalawags, nineteen conservatives, and sixteen blacks. The makeup of the delegation led to the document being opposed by most Mississippians.[17] The ninety-seven delegates convened on January 7, 1868.

As a result of a more diverse delegation, the new constitution was more similar to northern states' constitutions and the U.S. Constitution than previous constitutions. For example, Article 1 in the new document, referred to

15. See Hatcher, "Mississippi Constitutions"; and Haws, "Mississippi Constitution of 1832."

16. Mary DeLorse Coleman, *Legislators, Law, and Public Policy: Political Change in Mississippi and the South* (Westport, Conn.: Greenwood Press, 1993).

17. See Loewen and Sallis, *Mississippi: Conflict and Change.*

as the "Bill of Rights" as opposed to its earlier heading, the "Declaration of Human Rights," in some sections was taken almost verbatim from the U.S. Constitution, with an expansion of rights. The new constitution prohibited the state from making distinctions between citizens in the appropriations of public money, provided for a system of free public education, promoted the abolition of slavery, and denied any rights or claims for Mississippi to withdraw from the Union or for the citizens to place state allegiance above allegiance to the United States. The document also stipulated that persons residing in Mississippi were citizens of the United States and had equal political and civil rights.[18] It also extended and protected the property rights of women. In short, these additions indicate that the way of life and moral values of Mississippians had changed.

Other changes evident in the document included many changes reverting back to previous documents. For example, the legislature returned to holding annual sessions, and apportionment was based on the number of qualified voters rather than population.[19] The office of the lieutenant governor was reestablished. The governor's term was extended to four years, and the governor gained the power to appoint the judiciary above the county level.[20]

However, despite an extension of rights given by the diverse delegation, there was some dissension when constraints were placed on former Confederates or Confederate sympathizers, causing several delegates to resign. This new document, which was the first and only constitution to be submitted to the voters for ratification, was rejected. Most of the opposition to the constitution came from white supremacists who were Confederate sympathizers. They disliked the fact that the document required voters to swear allegiance to the United States over Mississippi, proclaimed that all men were equal, and disqualified from office those who sympathized or supported the Confederate cause. However, the sections of the document that stirred the most opposition were ultimately omitted, and the final document was resubmitted to voters and ratified in the general election of 1868. Mississippi was readmitted to the Union in 1870 with an expanded public and a more limited government.[21]

18. Ibid.

19. See Haws, "Mississippi Constitution of 1832."

20. See John H. Winkle III, *The Mississippi State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993).

21. Ibid.

The Constitution of 1890

The preamble of the current Mississippi Constitution begins, "We the people of Mississippi in convention, assembled, grateful to Almighty God, and invoking his blessings on our work, do ordain and establish this Constitution." However, "We the people" did not embrace all. Ultimately adopted by the legislature without voter approval, the constitution of 1890 was Mississippi's fourth constitution, which proved to be extremely undemocratic in that it stripped away the power blacks had gained during Reconstruction. It also indicated a change back to the definition of a people and public that existed in its first document by establishing new law governing relationships between blacks and whites, known as Jim Crow, a result of assertions of white supremacy. Democrats regained control of the state government, making appeals for a convention in which the main objective was to restrict the black vote and allow Mississippi to "remain a 'white man's civilization.'"[22] Massive efforts were made to restore white rule because many became fearful of the increasing population of blacks and in the number of black registered voters. Moreover, whites were angry about the constitution of 1868 because it gave blacks too much political power and included provisions that whites believed made them pay for blacks to be educated.[23] The large number of black voters led to violence being used as a method to control the black vote. Many citizens were alarmed at these methods and called for a change in suffrage laws to control black voters. However, blacks protested the movement to disenfranchise the race. Their calls were all but ignored, but supporters of the convention guaranteed that the constitutional rights of blacks would not be abridged.

These calls to disenfranchise blacks led to a convention whose delegates were far different from those attending the previous convention. Of the 134 delegates, there were only two Republicans, including one black, Isaiah T. Montgomery,[24] again a demonstration of a more restricted view of the public. The Democrats controlled the convention, holding 130 seats. The outcome of the convention was obvious from its lack of diversity. The major objective upon which there was agreement was the disenfranchisement of blacks, which was accomplished through various measures, including extended residency requirements, literacy tests, and poll taxes. More specifically, the franchise article in the constitution required a poll tax of two dollars per year, and the receipt was necessary to enter the polls. The literacy test required the voter to be able to read, understand, and interpret parts of

22. W. Charles Sallis, "The Mississippi Constitution of 1890," in *Understanding Mississippi's Constitutions,* ed. Carpenter, 17.

23. See Hatcher, "Mississippi Constitutions."

24. See Sallis, "Mississippi Constitution of 1890."

the constitution. And, last, the constitution required two years of residency in the state and one in the precinct. As a result, black voter participation declined precipitously, and blacks were no longer a part of the public but just the people of Mississippi.

To further the likelihood of diminished black political influence, reapportionment took place. Thirteen seats were added to the house from white counties, and an electoral college was established for the executive offices, by which the candidates had to receive a majority of both the popular vote and the electoral college to be elected. Other measures were also developed to ensure a white majority in the state legislature by guaranteeing that areas where whites lived received more representation. To further eliminate the possibility of black equality, provisions were added to the education article to separate the races. All of these decisions demonstrated constitutionally that the way of life in Mississippi now included separation of the races in education. Although this separation existed before, it is in this constitution that it was defined and firmly entrenched in the values of the citizens of Mississippi.

Race was a predominant factor in the 1890 convention, but other areas of the constitution were also changed and some remained the same; the new constitution kept seventy-three sections from the 1817 document. For example, the judicial articles largely remained the same. However, the judicial article made the clerk of the court an elective office and required all judges to be practicing attorneys and residents of the state. Procedures for constitutional change remained the same as in the 1869 document, which contained no provisions for calling a state constitutional convention.

Most of the major changes in the new document took place in the legislative and executive articles. More important, the Mississippi Constitution of 1890 demonstrates Lutz's principles of constitutionalism, to wit, the power and structure of government are shared with an elected governor as chief executive and a bicameral legislative body that is directly accountable to constituents in their respective districts. Article 4 (Sections 33–115), Article 5 (Sections 116–43), and Article 6 (Sections 144–77A) create and establish the major institutions of government and outline the procedural requirements for decision making. The legislative and executive articles both changed tremendously by expanding powers of both branches of government. The term of office in the house of representatives was increased from two years to four years. The new document also required biennial sessions instead of annual sessions. The governor was not allowed to utilize the line-item veto, which would have given him authority to strike out items in an appropriations bill. Residency requirements of the executive branch were increased, requiring five years of residency instead of two years in previous constitutions, and included other state executives. The new document also

prohibited successive terms of office after one four-year term for most state executive offices.

The article creating the judiciary placed the power of judicial review in the Mississippi Supreme Court. This clearly placed the court on an equal footing with the executive and legislature in reference to interpreting and establishing the principle of law vis-à-vis the resolution of political conflict. Specifically, whereas previous constitutions specifically outlined the separation-of-powers doctrine by listing the powers given to each branch while prohibiting the branches from exercising powers given to the other branches, the 1890 constitution used more restrictive language. For example, it called for an immediate vacancy if an elected official should accept an appointment in another branch of government.

In short, although the basic structure of the government did not change very much, the definition of the citizenry changed drastically from the constitution of 1869. Blacks were no longer a part of the citizenry, and Jim Crow was now embedded in Mississippi by law.

The Challenge of Mississippi's Constitution

There have been many attempts to change the Mississippi Constitution because of the changing culture and values of the people in the state. The first came during the 1930s when the Brookings Institute reviewed the document and suggested changes, very few of which have been implemented. A more recent effort occurred in 1973 when the Mississippi Economic Council published a report summarizing changes that should be incorporated in the document. And last, in 1986 a commission that was not authorized by the state legislature met and drafted a new document. However, the legislature did not call a convention to accept those changes, even though it was attempted in the 1988 session. The changes proposed in the document drafted by the commission would have corrected many of the problems with the 1890 document. For example, the proposed document was shorter in length and consolidated the executive branch of government, limiting it to no more than fifteen departments, with the governor appointing heads and directors. Similar to the federal government, this new document also placed the responsibility of preparing the budget on the governor, whereas the legislature would approve one appropriations bill to run the state government. Furthermore, it proposed to reduce the number of statewide elected executive officials and to limit the governor and lieutenant governor to two full terms and remaining executive officials to three terms. It also changed the judicial system, adding an intermediate court between the trial court and the supreme court. It also required the creation of a commission to fill judicial

vacancies. In short, the proposed document shifted power to the executive, which in essence changed the authority of the political regime. However, none of these proposed changes was adopted.[25]

One structural change that has been adopted was the initiative and referendum process. Proposed in 1992, this constitutional amendment (Section 273) passed by a significant majority. However, the significance of this change has yet to be seen. Only two measures out of the twenty-three proposed, term limits in 1994 and 1997, have reached the ballot through this process. Both proposals were defeated.[26]

Beyond the structural changes, the most important changes that have occurred in reference to the constitution have been a transformation in the identification of the citizenry and the public. As witnessed in the discussion of Mississippi's first constitution and subsequent documents, Mississippi, like other states, for a long period of time limited its definition of the good life and citizenship to whites only. Nevertheless, with the adoption of Civil War–era amendments to the U.S. Constitution and the Nineteenth Amendment, the citizenship and the public now included African Americans and women. Moreover, the political climate and culture today certainly embrace the concept of diversity and shared governance among all Mississippians.

Last, in line with Lutz's requirement of a constitution limiting the powers given to the government, similar to previous documents the current constitution limits state government by including a bill of rights (Article 3, Sections 5–32).[27] Article 3, Section 13, of the constitution affords a number of civil liberty protections to the citizens of Mississippi. In the Mississippi Bill of Rights we see a list of "double safeguards," such as free-expression rights and the rights of the criminally accused. Hence, both the U.S. Constitution and the Mississippi Constitution protect Mississippians' civil liberties and provide a new way of life in Mississippi.

Conclusion

A state constitution is the fundamental law that sets forth the powers and limitations of the state government. The constitutional history of Mississippi began with the adoption of the constitution of 1817. Each of Mississippi's constitutions was centered on the politics of the time. Now Missis-

25. See Hatcher, "Mississippi Constitutions."

26. Mississippi Secretary of State, http://www.sos.state.ms.us/elections/Initiatives/index.asp.

27. There are no Sections 1–4 in Article III.

sippians are governed under a document that became law in 1890. It is composed of fifteen articles that distribute state powers among the three branches of government. Included are a bill of rights and provisions related to the function and powers of state government. Article 15 gives the procedure for amending the constitution. Certainly, the political situation that existed when Mississippi became a state differs radically from what exists today. Today's constitution is a document that has adapted to customs and change, and it displays the drastic changes that have taken place in Mississippians' moral values and way of life. African Americans, whites (with and without property), women, as well as people of other ethnicities are now considered full citizens with the opportunities to vote and run for office. Although Mississippi has seemingly made progress by way of federal constitutional amendments and national policies, much work remains in reference to constitutionalism in the state.

JOHN V. ORTH

North Carolina

Fundamental Principles

Every political society has a constitution, which is nothing more than a description of how that particular society is constituted, that is, how it is put together or formed. The constitutions of traditional societies are often little more than catalogs of officers and their powers. As Aristotle put it in *Politics,* "A constitution is the arrangement of magistracies in a state, especially of the highest of all." Founding the science of comparative constitutionalism, Aristotle himself collected descriptions of the constitutions of the various Greek city-states, an undertaking not unlike the present project. In vain one searches *The Constitution of Athens,* surely one of the philosopher's dullest works, for any reference to the rights of the citizens.[1] Over time, however, the reciprocal relationship between "magistracies" and liberty became clear. Unless the power of the magistrate is limited, the rights of the people are threatened.

As integral parts of the British Empire, the thirteen American colonies that declared independence on July 4, 1776, had experience of a constitution in the old Aristotelian sense, an "arrangement of magistracies." But they were also familiar with the attempts to establish in writing the rights of subjects against the Crown, as in the English Declaration of Rights of 1689.[2] And colonization, as it had been carried out by the British, had involved written charters or instruments of government. Colonial North Carolinians even

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1. Aristotle, *Politics,* in *The Complete Works of Aristotle: The Revised Oxford Translation,* ed. Jonathan Barnes, trans. B. Jowett (Princeton: Princeton University Press, 1984), 2:1986, 2029; Aristotle, *The Constitution of Athens,* in ibid., 2341.

2. 1 W. & M., st. 2, ch. 2, sec. I, cl. 10 (1689).

occasionally referred to the charter as their "constitution."[3] The break with Britain meant severing ties with the traditional magistracies and abrogating the written charters, but it also meant the opportunity to reduce the entire constitution to writing, both the powers of officeholders and the rights of citizens. So convinced of the need to declare rights as well as to arrange offices was the founding generation of North Carolinians that they refused to ratify the U.S. Constitution when it was first presented to them because it lacked a bill of rights. Only in 1789, after the proposal and adoption of the first ten amendments to the U.S. Constitution, did North Carolina finally join the Union, subordinating the state constitution to the supremacy of federal law.[4]

Creating the North Carolina Constitution

A decade after the American Revolution, a North Carolina judge reflected on the catastrophic legal effect of independence on the former colony: "At the time of our separation from Great Britain, we were thrown into a similar situation with a set of people shipwrecked and cast on a marooned island—without laws, without magistrates, without government, or any legal authority. . . . Being thus circumstanced, the people of this country, with a general union of sentiment, by their delegates, met in Congress, and formed that system of those fundamental principles comprised in the Constitution."[5] The country he referred to was North Carolina, and the congress the Fifth Provincial Congress that met in Halifax, North Carolina, in November and December 1776. When choosing their delegates, the voters had been notified that it would be the business of the congress "not only to make laws for the good government of, but also to form a Constitution for, this state."[6] After examining copies of recently adopted constitutions from other states, a committee of the delegates proposed a declaration of rights and a constitution that, although separately adopted by the congress, formed a single whole, the latter expressly declaring the former "part of the Constitution of this State" (Section 44).[7]

3. William S. Powell, *North Carolina through Four Centuries* (Chapel Hill: University of North Carolina Press, 1989), 88.

4. A fuller history of the North Carolina Constitution may be found in John V. Orth, *The North Carolina Constitution: A Reference Guide* (Westport, CT: Greenwood Press, 1993), 1–34.

5. *Bayard v. Singleton,* 1 N.C. 5 (1787).

6. *The Colonial Records of North Carolina,* ed. William L. Saunders (Raleigh: Josephus Daniels, 1886–1890), 10:696 (misnumbered 996).

7. For a tabular comparison of sections of the North Carolina Constitution with those of

With methodical attention to detail, the constitution-makers recognized the importance of the physical boundaries that enclosed the political community of North Carolina: "The property of the soil, in a free government, being one of the essential rights of the collective body of the people, it is necessary, in order to avoid future disputes, that the limits of the State should be ascertained with precision" (Article I, Section 25). Accordingly, a surveyor's description of the former colony, beginning at a certain "cedar stake" on the Atlantic shore, was included in the independence constitution. But "community" is not a mere geographical expression. What turned the "collective body of the people" into a community were the values they shared. Although it reproduced many features of other state constitutions, the new North Carolina document was no mere copy. A lean instrument of government, inspired by the Whiggish values of English constitutionalism, it reflected an almost single-minded concentration on liberty and equality. Magistracies were reconstituted, and "essential rights," such as freedom of the press, assembly, and religion, were enumerated, with particular attention paid to criminal procedure, to avoid the abuses of the colonial administration. The constitution mirrored a people confidently self-reliant, intent on self-government, and reticent about the power of government to improve society. The result is a classic statement of "free government"—a statement that managed to mask at least temporarily the ugly reality of a slave-owning republic.

In 1835 a constitutional convention was convened to rebalance political power in the state to recognize the ever-increasing population in the hinterland, a problem common to many of the old eastern seaboard states at the time. Representation by counties, favoring the small eastern counties, was to be qualified by population. But electoral apportionment forced the delegates to confront the question of how to count the state's many slaves. Their answer was to adopt the formula for the so-called federal population found in the U.S. Constitution: "adding to the whole number of free persons . . . three-fifths of all other persons" (Article I, Section 1.2).[8] At the same time, North Carolina caught up with its southern neighbors by adding a racial qualification for voting.[9] "No free negro, free mulatto, or free person of mixed blood, descended from negro ancestors to the fourth generation inclusive (although one ancestor of each generation may have been a white

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other state constitutions, see John V. Orth, "North Carolina Constitutional History," *North Carolina Law Review* (September 1992): 1759, 1797–1802.

8. Compare U.S. Constitution, Article I, Section 2.3.

9. It is impossible to determine how many blacks voted in North Carolina before 1835, but it is certain that some did vote and that their numbers in a few counties were substantial (John Hope Franklin, *The Free Negro in North Carolina, 1790–1860* [Chapel Hill: University of North Carolina Press, 1943], 105–20).

person) shall vote" (Article I, Section 3.3). The effect, of course, was that free persons of color counted as whole persons for purposes of representation, but could not themselves vote.

How long the 1776 constitution as amended would have remained in effect had it not been for the disruption caused by the Civil War is an intriguing, if unanswerable, question. Out of defeat and Reconstruction came a recognizably modern constitution, one modeled on the constitutions of northern states, adopted by the voters in 1868, incorporating a new commitment to social welfare. Secession was rejected and slavery abolished; otherwise, the bulk of the original declaration of rights was preserved as Article I of the new constitution. Following the federal model, three branches of government were created in successive articles: Article II, legislative; Article III, executive; and Article IV, judicial. In keeping with the fashion of the times, elective offices, including an elective judiciary, were multiplied.[10] Other articles dealt with common issues of state government such as finance, suffrage, eligibility for office, and local government. Particular attention was paid to education, which was declared in a new section in the declaration of rights to be a right of the people and a duty of the state.

Amendments accumulated over the years after 1868. In the era of Jim Crow, racial discrimination reappeared in the constitution. Schools were segregated and interracial marriages prohibited; literacy and poll tax requirements for voting, designed to exclude black voters, were added. Compared to voters in other states, however, North Carolinians approved relatively few amendments, and no significant structural changes. But the success of the national civil rights movement in the mid-twentieth century, combined with a desire to integrate the piecemeal changes that had accumulated over the past hundred years, led to the appointment of the Constitution Study Commission that submitted a draft constitution to the legislature, which in turn presented a final version to the electorate for approval. Unlike its two predecessors, adopted after the turmoil of revolution and civil war, the constitution adopted at the polls in 1970 (effective in 1971) was designed to consolidate and preserve the best features of the past, not to break with it. The state's long-standing commitment to equality now embraced all of its citizens. The arrangement of articles first approved in 1868 was maintained, and the state's judges continued to look to precedents decided under identical provisions of the prior constitution.

10. See John V. Orth, "Tuesday, February 11, 1868: The Day North Carolina Chose Direct Election of Judges," *North Carolina Law Review* 70 (September 1992): 1825–51.

The North Carolina Constitution of 1971

The current North Carolina Constitution is a composite document, reflecting the enduring concerns expressed at crucial moments in state history.[11] Much of Article I, "Declaration of Rights," survives from the independence constitution of 1776, whereas the rest, purged of the racial elements, is largely the Reconstruction constitution of 1868 as amended. Analysis of the constitution in terms of its functions reveals its place not only in North Carolina history and society but also in the national consensus on political organization.

The preservation of liberty is the key function of the North Carolina Constitution. The prologue to the "Declaration of Rights" proclaims this goal: "that the great, general, and essential principles of liberty and free government may be recognized and established." The original declaration's next-to-last section, followed only by the reservation of unenumerated rights to the people, reaffirms that "a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty" (Article I, Section 35).[12] To that end, the declaration proclaims the right to self-government, enumerates specific rights (particularly of criminal defendants), and divides power among the branches of government.

Second only to liberty in rhetorical appeal is the assertion of equality: "We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness" (Article I, Section 1). Similar to the grand claims of the Declaration of Independence, this section was added to the state constitution only in 1868, presumably to provide the philosophical context for the abolition of slavery (Article I, Section 17),[13] which also explains its absence from the state's first constitution, as well as the interpolated assertion of the right to "the enjoyment of the fruits of their own labor," a right slaves notably lacked. In response to the sorry history of racial discrimination that followed the abolition of slavery, a guarantee of equal protection was added in 1971, as was an express prohibition of discrimination based on "race, color, religion, or national origin" (Article I, Section 19).[14]

The constitutional arrangement, though primarily designed to secure the enduring values of liberty and equality, now also recognizes a positive role

11. The text of the North Carolina Constitution of 1971, as amended, is taken from *N.C. Sess. Laws 2001,* 1:xi–lii.

12. In 1996 the Victims' Rights Amendment was added to the Declaration of Rights as a final section (Article I), making the fundamental-principles section the third from the end.

13. See also U.S. Constitution, Thirteenth Amendment.

14. See also U.S. Constitution, Fourteenth Amendment.

for government in securing the well-being of society. Although the independence constitution had declared that "all government . . . is instituted solely for the good of the whole" (Article I, Section 2), a declaration that is repeated in the later constitutions, specific assignments are now included. Social ideals are enunciated in articles devoted to education and social welfare, although it appears that the goal is equality of opportunity, rather than equality of result. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged" (Article IX, Section 1).[15] The state is directed to provide "a general and uniform system of free public schools" (Article IX, Section 2), a requirement that the courts have struggled to define.[16] The aspiration is expressed—"as far as practicable"—to provide higher education through the University of North Carolina and other public institutions "free of expense" (Article IX, Section 9). Although education is largely funded out of tax revenue, an old provision in the constitution appropriates as well "the net proceeds of all sales of the swamp lands belonging to the State" (Article IX, Section 6). Changing environmental sensibilities led to the later insertion in the constitution of a provision favoring conservation of natural resources and declaring it to be "the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry" (Article XIV, Section 5). Useless "swamp lands" have now become valuable "wetlands."

Expressive of the religious idealism of the mid-nineteenth century, the constitution is prefaced with a pious prayer of thanksgiving to "Almighty God, the Sovereign Ruler of Nations, for . . . the existence of our civil, political and religious liberties" and—a sentiment not shared at least at one time by all the state's white inhabitants—"for the preservation of the American Union." In the same spirit, it declares that "beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and Christian state," implicitly presuming North Carolina to be such. To meet this duty, the state is required to create "a board of public welfare," now called the Social Services Commission of the Department of Health and Human Services (Article XI, Section 4). Recognizing the connection between the health of society and criminal activity, the constitution declares the "object of punishments" to be "not only to satisfy justice, but also to reform the offender" (Article XI, Section 2).

However many fundamental principles it declares, a constitution still must perform the essential function of defining a state's political institu-

15. Compare Northwest Ordinance of 1787, 1 U.S. Stats.

16. See *Leandro v. State of North Carolina,* 488 S.E.2d 249 (N.C. 1997).

tions, "the arrangement of magistracies" mentioned so long ago by Aristotle. North Carolina has a republican form of government. "Hereditary emoluments, privileges, or honors" may not be granted (Article I, Section 33). Mindful of the power of the landed aristocracy in England, the drafters of the original declaration of rights, in language carried forward to today, declared that "perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed" (Article I, Section 34). The entailed estate, the original "perpetuity," is thereby disallowed, and implementing legislation, still in effect, was adopted soon thereafter.[17] Legal monopolies are prohibited primarily because of the political consequences of privilege and power, rather than because of their economic inefficiencies.

North Carolina is a representative democracy. No provision is made for legislation by initiative or recall of laws or officers. Doubts have even been expressed about whether an official referendum to determine public opinion about a contentious proposal would be constitutional. Although approval by the voters may be required for certain bond issues (Article V, Section 3), the primary responsibility for legislation remains with the general assembly. Legislation must be by "general laws," that is, "laws uniformly applicable throughout the State," but artful use of classification makes it sometimes difficult to distinguish special laws, applicable to only one locality, from legislation that applies to the whole community (Article II, Section 24; Article XIV, Section 3). Amendment of the constitution may be by convention of the people or legislative initiation (Article XIII, Sections 1–4); neither is simple, and amendments, all by legislative initiation, have been infrequent.

North Carolina's government follows the standard American tripartite division of legislative, executive, and judicial branches. The general assembly is divided into two chambers, the house of representatives and the senate (Article II, Section 1). Although the constitution confers the state's executive power on the governor (Article III, Section 1), it also provides for the independence of the members of the "Council of State," a body of ten officers, including in addition to the governor the lieutenant governor, secretary of state, auditor, treasurer, superintendent of public instruction, attorney general, commissioner of agriculture, commissioner of labor, and commissioner of insurance (Sections 2, 7, and 8). The judicial branch, composed of trial courts (Article IV, Sections 9–10) and a court of appeals (Section 7), is headed by a multimember supreme court (Section 6).[18]

17. See John V. Orth, "Does the Fee Tail Exist in North Carolina?" *Wake Forest Law Review* 23 (Spring 1988): 767–95.

18. See John V. Orth, "Why the North Carolina Court of Appeals Should Have a Procedure for Sitting En Banc," *North Carolina Law Review* 75 (September 1997): 1981–87; and

Executive officers and appellate judges are elected at large, but legislators are elected by districts. In general, districts are apportioned by population, to ensure equality of representation, but the constitution preserves the state's residual commitment to county representation by prohibiting the division of counties in the formation of electoral districts (Article II, Sections 3 and 5). The attempt to achieve equality of representation while respecting county boundaries has led to politically divisive court battles.[19]

North Carolina citizenship is not defined in the state constitution, but taken for granted; or, rather, it is defined for North Carolina and all the states by the Fourteenth Amendment to the U.S. Constitution: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside" (Section 1). Abandoning the surveyor's description of the state boundaries included in the 1776 constitution, the modern constitution simply recites that "the limits and boundaries of the State shall be and remain as they now are" (Article XIV, Section 2). Not all persons residing within the boundaries of North Carolina are citizens; some may be resident aliens. Nor are all citizens entitled to vote in state elections. Voters must be at least eighteen years of age (Article VI, Section 1). Although the state constitution requires residence in the state for one year and in the district for thirty days preceding an election (Article VI, Section 2),[20] and demonstration of the ability "to read and write any section of the Constitution in the English language" (Article VI, Section 4), these requirements have been superseded by federal law requiring thirty days' residence only and prohibiting a literacy test.[21] Convicted felons are disqualified from voting (Article VI, Section 2).[22]

Not all voters are eligible for election to office: the minimum age for office holding in general is twenty-one years (Article VI, Section 6), with higher ages, twenty-five years and thirty years, respectively, required for state senator (Article II, Section 6) and lieutenant governor and governor (Article III, Section 2.2). Officers who have been impeached and removed from office

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Orth, "How Many Judges Does It Take to Make a Supreme Court?" *Constitutional Commentary* 19 (December 2002): 681–92. There is also provision for the extraordinary North Carolina Court for the Trial of Impeachments, composed of the state senate, in Article IV, Section 4.

19. *Stephenson v. Bartlett,* 355 N.C. 354 (2002) (Stephenson I) (holding that county lines must be respected to the maximum extent possible consistent with "one-person, one-vote"); *Stephenson v. Bartlett,* 357 N.C. 301 (2003) (Stephenson II).

20. A voter who moves from one voting district in the state to another within thirty days of an election may vote in the previous district.

21. *Andrews v. Cody,* 327 F. Supp. 793 (M.D.N.C. 1971), aff'd 405 U.S. 1034 (1972). See also *Gaston County v. United States,* 395 U.S. 285 (1969).

22. Legislation may restore the convicted felon's right to vote.

are disqualified from further office holding (Article VI, Section 8). Although this article also disqualifies "any person who shall deny the being of Almighty God,"[23] this provision too has been superseded by federal law that permits no religious test for office.[24]

Political power comes from the sovereign, in North Carolina, as in the United States generally, from the sovereign people. "All political power is vested in and derived from the people; all government of right originates from the people [and] is founded on their will only" (Article I, Section 2). The means by which the people's power is conferred on public officials are elections, which must be frequent and free (Article I, Sections 9–10). Although "frequent elections" have been a constant requirement of North Carolina's successive constitutions, that term's operational meaning has changed over the years: the original plan for one-year terms of office has now been replaced by two-year terms for state senators and representatives (Article II, Section 8), four-year terms for the governor and other executive officers (Article III, Sections 2 and 7), and eight-year terms for judges (Article IV, Section 16).

In a provision dating from the time of the Revolution, the people of North Carolina reserve "the inherent, sole, and exclusive right of regulating the internal government and police thereof, and of altering or abolishing their Constitution and form of government whenever it may be necessary to their safety and happiness." Starting with the 1835 amendments, a formal amendment process was created, regularizing this right of revolution, and defeat in the Civil War led to the addition of an important qualification: "Such right shall be exercised in pursuance of law and consistently with the Constitution of the United States" (Article I, Section 3). Secession is prohibited, and the people of North Carolina are declared to be "part of the American Nation" (Article I, Section 4), owing "paramount allegiance to the Constitution and government of the United States" (Section 5).

The North Carolina Declaration of Rights contains an unusually clear statement of separation of power: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct" (Article I, Section 6).[25] All three branches are directly elected by the voters, although concern about the election of judges in partisan elections has led to some imaginative experiments, including public financing of ju-

23. The religious test in its present form was first added to the North Carolina Constitution in 1868 by delegates convinced that "no oath would bind a man who denied the existence of a higher power" (see Orth, *North Carolina Constitution,* 137).

24. *Torcaso v. Watkins,* 367 U.S. 488 (1961).

25. See John V. Orth, "'Forever Separate and Distinct': Separation of Powers in North Carolina," *North Carolina Law Review* 62 (October 1983): 1–28.

dicial campaigns.[26] So committed was North Carolina to separation of powers that it was the last state in America to give its governor a formal role in the legislative process by arming him with veto power. Only in 1996, by constitutional amendment, did the colonial fear of gubernatorial overreaching yield to the demand of the executive to participate in the legislative process (Article II, Section 22).

As befits a document that dates to the time of the American Revolution, the North Carolina Declaration of Rights expressly disallows the suspension of laws or their execution "by any authority," an abuse of seventeenth-century English kings (Article I, Section 7). It also incorporates the revolutionary slogan "No taxation without representation": "The people of this State shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given" (Section 8). "The power to tax," as U.S. Chief Justice John Marshall famously reminded the world, "involves the power to destroy,"[27] and the North Carolina Constitution expressly requires that the taxing power "be exercised in a just and equitable manner, for public purposes only." To address an abuse of nineteenth-century financiering, when states gave corporations special exemptions, the state's power to tax may "never be surrendered, suspended, or contracted away" (Article V, Section 2). Today, controversy centers around the question of whether public money and benefits may be used to lure businesses to North Carolina.[28]

In a mild gesture toward progressive taxation, the constitution prohibits the levy of a poll or head tax (Article V, Section 1), a flat tax payable by all persons, and authorizes a state income tax. Lest the latter tax be too redistributive, however, the maximum rate is capped at 10 percent (Article V, Section 2.6). In fact, the general assembly, drawing on its general taxing power, raises significant revenue through a nonprogressive sales tax. As in many other states, North Carolina's budget must be balanced; that is, the state must not spend during any fiscal period more than its anticipated revenue. Operationally, the means to this end are to charge the governor with the duty to monitor receipts and make "necessary economies" (Article III, Section 5), a tactical infringement on the legislature's power of the purse. State borrowing is strictly limited, and many bond issues must be approved by the voters (Article V, Section 3).

Private disputes that cannot otherwise be peacefully resolved are to be settled by courts of law. "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have a remedy by

26. See, for example, N.C. Gen. Stats. secs. 163–278.61 to 163–278.70.
27. *McCulloch v. Maryland,* 17 U.S. 316, 431 (1819).
28. See, for example, *Maready v. City of Winston-Salem,* 467 S.E.2d 615 (1996).

due course of law" (Article I, Section 18).[29] Recently, the question has been asked whether this provision would prohibit the state from enacting so-called tort reform, placing monetary limits on recoveries in tort actions, such as for medical malpractice.

Although various civil rights are enumerated in the state's declaration of rights, the single most important guarantee is found in the section preserving the "law of the land": "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land" (Article I, Section 19). This archaic language is derived from the Magna Carta and is the functional equivalent of the more familiar guarantee of due process.[30] Like the better-known clauses of the U.S. Constitution, North Carolina's law-of-the-land section provides textual support for judicial protection of rights not otherwise enumerated. For example, because the state constitution contains no provision comparable to the "Takings Clause" of the U.S. Constitution's Fifth Amendment, state judges have relied on the law-of-the-land section in declaring unconstitutional the taking of private property for public use without just compensation.[31]

Limits on political power are not an afterthought in the North Carolina Constitution. Unlike the U.S. Bill of Rights, added in the form of amendments, the North Carolina Declaration of Rights came first, logically as well as chronologically. In consequence, the relationship between the declaration and the rest of the North Carolina Constitution is not identical to that between the more familiar U.S. Bill of Rights and Constitution. Parts of the North Carolina Declaration of Rights read like guidelines for specific implementation elsewhere in the constitutional text. Self-government, frequent and free elections, and separation of powers are first declared in Article I; their implementation, which has changed over time, is left to later articles. But the proper arrangement of magistracies is not enough. Limits on power are also of the essence, and the balance of the declaration is devoted to the guarantee of fundamental freedoms: freedom of assembly and petition (Article I, Section 2), free exercise of religion (Section 13),[32] and freedom of speech and the press (Section 14).

Lest the magistrates use their powers to oppress, criminal law and proce-

29. See also Article IV, Section 9: "The Superior Court shall be open at all times."

30. See John V. Orth, *Due Process of Law: A Brief History* (Lawrence: University Press of Kansas, 2003), 7–8.

31. The North Carolina Constitution is the only remaining constitution without an express "Takings Clause." See ibid., 94n21.

32. By a quirk of history, the North Carolina Constitution contains no counterpart to the U.S. Bill of Rights' ban on the establishment of religion (Orth, *North Carolina Constitution,* 49).

dure are strictly regulated. "Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted" (Section 16). General warrants, an abuse during colonial days, are "dangerous to liberty and shall not be granted" (Section 20). The writ of habeas corpus is guaranteed to "every person restrained of his liberty" (Section 21). Criminal prosecutions may be commenced only by indictment or presentment (Section 22). A person accused of a crime is guaranteed procedural protections: to be informed of the charge, to confront the accuser(s), to have legal counsel, and not to be compelled to give self-incriminating evidence (Section 23). Trial by jury, "one of the best securities of the rights of the people," is guaranteed in both criminal and civil cases, and the traditional jury of twelve must be unanimous (Sections 24–25).[33] Excessive bail is prohibited, as are "cruel or unusual punishments" (Section 27).[34] The late-eighteenth-century concern with abuse of criminal procedure at the expense of the accused is now complemented by a late-twentieth-century concern that the victims of crime are not adequately considered by the criminal justice system, and the Victims' Rights Amendment, mainly concerned with providing information, was added to the North Carolina Declaration of Rights in 1996 (Section 37).

Conclusion

The North Carolina Constitution is a relatively brief document, largely free of unusual or special provisions. Fundamental principles are clearly stated and the opportunity for their realization created. But a constitution is only a necessary, not a sufficient, cause of the social goods it promises. Liberty and equality of opportunity have not always been enjoyed by all North Carolinians despite the words of the "Declaration of Rights," nor has social idealism always borne fruit, but the North Carolina Constitution has provided a standard against which to measure reality and the means by which the political community can attain it.

33. Technically, only the criminal trial jury is expressly required by the constitutional text to be "unanimous," but by judicial construction the civil trial jury must also be unanimous. See *Rhyne v. Lipscombe,* 29 S.E. 57 (1898).

34. It has not escaped notice that the North Carolina Declaration of Rights, unlike the Fifth Amendment in the U.S. Bill of Rights, prohibits "cruel *or* unusual punishments," as opposed to "cruel *and* unusual punishments." The disjunctive could conceivably make a difference. See *Medley v. Department of Correction,* 412 S.E.2d 654 (1992).

KEVIN HILL

South Carolina

Defining Power, Defining People

Like all states in the Deep South, the constitutions of South Carolina have been influenced by race.[1] The issue of slavery and the power of slaveholders dominated colonial and early state politics in the Palmetto State, as did the influence of post-Reconstruction white supremacy, racial demagoguery, and the civil rights–movement backlash against these institutions.[2] It should come as no surprise to anyone that the early constitutions of the state, written in 1776, 1778, and 1790, were written primarily by coastal plantation owners and those urban dwellers who made their livings indirectly off the plantation system. What the casual reader may *not* know about early South Carolina was that the politics of this state was decidedly regional until the first third of the nineteenth century.[3] Therefore, the first few constitutions of the state (and colony) reflected two mutually reinforcing biases: the role of race and the role of the backcountry versus the low country in the power struggle to control South Carolina. Even after the regional factor was constitutionally resolved by the mid-1800s, the race factor played a role in every constitution the state produced since John Locke wrote the Fundamental Constitutions of the putative colony of Carolina in 1669, one year before the first English settler set foot on dry land near Charleston.

The quasi-aristocratic nature of eighteenth- and nineteenth-century South Carolina politics has even influenced the current constitution, writ-

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1. The Deep South states, which have consistently contained the largest concentrations of African Americans in the South since colonial times, are South Carolina, Georgia, Alabama, Mississippi, and Louisiana.

2. V. O. Key Jr., *Southern Politics in State and Nation* (Knoxville: University of Tennessee Press, 1949).

3. Walter Edgar, *South Carolina: A History* (Columbia: University of South Carolina Press, 1998). Much of the material in this chapter is based on Edgar's work.

ten (as so many southern constitutions were) in the 1890s. With the single exception of the Reconstruction constitution of 1868 (written by a majority black, majority Republican convention), no Palmetto State constitution—including the current one—has ever been submitted to the people for a ratification vote. The people still do not elect the state's judges; in the twenty-first century, even the governor does not have the power to appoint judicial officials on anything but a temporary basis. There is no provision in the current constitution for amendments initiated by the people. To this day, the legislature can actually overturn an affirmative vote of the people to amend the state constitution.[4] Until the 1970s, home rule for counties and cities was practically nonexistent; South Carolina did not even have meaningful locally elected county officials outside of the Charleston City Council until 1868. The legislature of the Palmetto State appointed the governor until 1865. South Carolina was the last state to take away the power to appoint presidential electors from the legislature and give this power to the people, and it took the Reconstruction constitution of 1868 to do so. The state's voters removed the constitutional ban on interracial marriage only in 1998, and even then a substantial minority of the population voted to keep this ban.[5] This chapter will analyze the nine constitutions (seven for the state and two for the colony that preceded it) of South Carolina, paying particular attention to suffrage and office-holding qualifications, the election of state and local officers, and the apportionment of the legislature, with an eye toward understanding the historical context in which these documents were written.

The Colonial Era (1669–1776)

South Carolina was the seventeenth-century brainchild of Anthony, Lord Ashley Cooper, who envisaged a plantation-based colony along the lines of Barbados, then the richest of the British sugar colonies. He and seven other men of wealth, all allies of the restored Stuart monarch Charles II, secured permission from the Crown to become the eight "Lords Proprietors"[6] of the

4. In South Carolina, the constitutional amendment process has three phases. First, all amendments must be proposed by a two-thirds vote of both houses of the General Assembly. Second, the voters must approve such amendments by a majority vote at the polls. Third, the General Assembly elected after the affirmative popular vote must again approve the amendment by a majority vote.

5. In a rather creepy side note to this, the clause of the constitution that banned interracial marriage also set the age of sexual consent for women at fourteen, and that remains the law of the land in South Carolina today.

6. The eight Lords Proprietors have names familiar to anyone who is familiar with place-

Colony of Carolina,[7] named for their monarch. Lord Ashley's secretary was physician, lawyer, and philosopher John Locke, one of the most formidable constitutional minds of the seventeenth century, and an acknowledged influence on the founders of the United States.

In 1669, Locke and Ashley wrote the first of the five Fundamental Constitutions of Carolina, a document spelling out the governance of the new colony. The Proprietors were to be a substantial part of the colonial government, with extraordinary powers to grant titles of nobility (Point 9). Their constitution also contained provisions for generous land grants to not only large, noble landowners but also ordinary farmers. Each freeman who migrated to Carolina was to receive fifty acres of land. Since there was a fifty-acre requirement for voting in colonial elections, South Carolina under the Lords Proprietors had de facto universal white male suffrage decades before any other colony or state (Point 113). The legislature of the colony, although designed to be dominated by the nobility, also allowed these freemen to vote and be represented, though to be a sitting member, one had to own *five hundred* acres of land, not fifty (Point 72). This figure of five hundred acres would continue to influence South Carolina's constitutions until the end of the Civil War in 1865. The Fundamental Constitutions even included a provision that the document would not become law unless ratified by the voters of the colony (Point 76). Although the Fundamental Constitutions were never actually ratified at any point by a popular vote, they nevertheless became important in the future constitutional evolution of the colony and ultimately state of South Carolina.

The company colony envisioned by the Lords Proprietors and their Fundamental Constitutions never really worked in the way laid out by the vision of the Lords and their constitution. By 1721 the colony was under direct Crown rule, though the British government, at least in the first few decades, did not tinker extensively with the hands-off government that existed under the Lords Proprietors. The colony was producing good quantities of rice and indigo, so the government in London let things alone constitutionally.

Crown rule did, however, bring two governmental changes that would influence the subsequent constitutions of the Palmetto State for more than a century. First, the requirement to hold office in the legislature not only was

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names in South Carolina: Anthony Ashley Cooper; John Colleton; John Berkeley; George Carteret; Edward Hyde, Earl of Clarendon; George Monck, Duke of Abermarle; William, Earl of Craven; and William Berkeley.

7. The actual land grant for Carolina was an ambitious one, bounded on the north by the current North Carolina–Virginia border; on the south at about modern-day Orlando, Florida; on the east by the Atlantic Ocean; and on the west by the Pacific Ocean. Were Carolina today to have these boundaries, it would include all or part of fifteen states and a substantial chunk of northern Mexico.

increased to owning five hundred acres of land but also added that the landowner must own at least ten slaves. This office-holding requirement remained in place until 1865, thus guaranteeing that South Carolina's colonial and state governments would be in the hands of slave owners for 144 years; every single person in the legislature of South Carolina from 1721 to 1865 was a slave owner. Second, apportionment of the legislature was equal for each parish or district (the forerunners in South Carolina to counties), regardless of the actual population of those geographic areas.[8] As different parts of South Carolina filled up with different numbers of people, this would lead to a malapportioned legislature right into the nineteenth century. By about 1800, more than 80 percent of South Carolina's population lived in the backcountry areas, even though these areas had far less than 50 percent of the representation in the colony and state's legislature.

The Revolutionary and Early Founding Constitutions (1776, 1778, and 1790)

In March 1776, South Carolina wrote its first revolutionary constitution.[9] The following oath of office, which the 1776 constitution required of members of the legislature, is telling of the temporary nature of the document: "I do swear that I will, to the utmost of my power, support, maintain, and defend the constitution of South Carolina, as established by Congress on the twenty-sixth day of March, one thousand seven hundred and seventy-six, until an accommodation of the differences between Great Britain and America shall take place, or I shall be released from this oath by the legislative authority of the said colony: So help me God" (Article XXXII). This constitution continued the legislative and suffrage qualifications of the colonial charter. However, because the Revolution obviously rejected a Crown-appointed governor and privy council, the new constitution had to make provisions for both of these. The lower house, elected from the same jurisdictions and with the same methods as the colonial legislature (slave-owning planters), would appoint the upper chamber (Article II). It would also appoint a privy council and a president (Article III).[10] This constitution established the precedent that the legislature, not the people, of South Caroli-

8. Counties were created constitutionally in 1865.

9. The constitution of 1776 was written by a renamed version of the elected house of the colonial legislature on March 26, 1776. Note that this date is three months prior to the signing of the Declaration of Independence.

10. A privy council would be the modern equivalent of a president's cabinet. These people would advise the president, but the advice would be nonbinding.

na would elect the executive branch of government. This would remain in constitutional force until the end of the Civil War in 1865.

By 1778, South Carolina needed to write a new constitution in light of the Declaration of Independence. Now there was no question of a temporary situation. The Palmetto State, which had gotten its name in this time period from the wooden-log fortress built near Charleston,[11] had now cast its lot with the United States of America.[12] The constitution written in that year was largely the same as that written in 1776, except that now the upper house (senate) was to be elected by the people on a geographic-unit basis (one senator per parish or district), rather than be appointed by the lower house (Article II). This constitutional provision for the election of the senate would survive for nearly two hundred years, until the U.S. Supreme Court apportionment cases of the 1960s required one-person, one-vote rules for the election of all legislative seats.[13]

In 1790, South Carolina once again had to modify its constitution because of outside circumstances. This time, the constitution had to be brought in line with the newly ratified U.S. Constitution. Rather than simply adapt the existing state constitution to new circumstances, the South Carolina legislature decided to make one substantial change in the document that would affect state politics until the end of the Civil War. The 1790 constitution kept the same fifty-acre requirement for suffrage, but an amendment in 1808 dropped this requirement, making South Carolina the first state in the South to adopt universal white male suffrage. The requirement that members of the state legislature own five hundred acres and ten slaves was preserved, thus ensuring that South Carolina's postindependence governments would continue to reflect the political wishes of plantation owners. The big change was in the apportionment of the lower house of the general assembly, and it is unique in American history. The 1790 constitution fixed the number of members of the house of representatives at 124 members; even today in the twenty-first century, the house contains 124 members. The apportionment of these members was unique, in that 62 (50 percent) were apportioned

11. In late June 1776, British Regulars, with substantial naval support, landed on the Isle of Palms, intent on taking nearby Charleston. A Palmetto log fort was built on Sullivan's Island under the command of South Carolina militia colonel William Moultrie. This fort, given the spongy nature of Palmetto logs, withstood the British onslaught, and the invasion of Charleston was called off.

12. During the next few years, South Carolina would suffer more battles and deprivation than the other twelve states. The Battles of Ninety-six, Cowpens, and Camden taken together demoralized, weakened, and wore down the Crown's land forces.

13. The current constitution of South Carolina still requires one senator per county, even though this provision of the state constitution was superseded by a Supreme Court ruling in the late 1960s.

based on the total white population, and another 62 (the other 50 percent) were apportioned based on the taxable value of land. Thus, South Carolina apportioned its legislature on the dual basis of population and property.[14]

The state also sidestepped the problems of the "three-fifths compromise"; in South Carolina, no blacks were counted for representational purposes, unlike neighboring North Carolina, which did use the three-fifths rationale for its state legislature. Therefore, as long as slavery expanded into newly settled parts of the state, representation would reflect the actual white population expansion, while also giving a representational bonus to slave-owning planters, given the fact that their taxable lands were worth far more money than yeoman farms. If slavery continued to expand into the backcountry, then the state's government would continue to be dominated by the political interests of planters. Between 1800 and 1860, nearly every county in the state became majority black, an indication of the expansion of slavery. As more and more parts of the state became part of the plantation system, the state's constitution made the government reflect the political interests of planters in all corners of the state, to the ultimate detriment of the state as a result of the Civil War.

The Civil War and Reconstruction Constitutions (1861, 1865, and 1868)

When South Carolina became the first state to secede from the United States in December 1860, the constitution of 1790 was continued, with the nineteenth-century equivalent of "search and replace" to substitute "Confederate States" for "United States." No important provisions of the 1790 constitution were replaced in the secession constitution; the requirements for slave owners to sit in the state legislature remained, as did the general assembly's appointment of the governor, the dual population and taxpaying apportionment of the house of representatives, and the unit system for parish or district election of senators.

Cold reality came to the Palmetto State in 1865, when the victorious Union, under the guidance of Tennessee Democratic president Andrew Johnson, set up what we know today as the "soft," or "Johnson," requirements to reenter the Union. Under this plan, the only three things a southern state had to do to reenter the United States as a state were ratify the Thirteenth Amendment, which destroyed slavery in the United States; repudiate all Confederate debts; and have at least 10 percent of the adult white males of the state take a loyalty oath to the United States. South Carolina, like every

14. Ibid.

other rebellious state except Mississippi at the time, jumped to accept these lenient terms. The state further set up a state constitution to guide the new un-Reconstructed government. Under the 1865 constitution, the people of South Carolina were for the first time given the power to elect their governor. The property and (obviously) slaveholding requirements for membership in the general assembly were discarded, and apportionment in the house was finally based on actual population, not a subset of it (whites or taxpaying). Black Codes, restricting the movements and rights of newly freed slaves, were also written into this constitution.[15]

Things drastically changed for all southern states in the period between 1865 and 1867. In 1866, as a result of the congressional elections that year, both houses of Congress became overwhelmingly Republican. In fact, the Republican majority in the House and Senate in 1867 used its powers as the sole judge of congressional elections (U.S. Constitution, Article I, Section 5) to refuse to seat any representatives or senators from any of the southern states, save Tennessee. This, of course, radically reduced the number of Democrats in Congress. As a result, both houses of Congress had Republican majorities of more than two-thirds, thus enabling them to override any veto of their legislation by Democratic president Andrew Johnson. They proceeded to enact several pieces of legislation designed to dismantle the Democratic governments set up in the South between 1865 and 1866 under Johnson's lenient terms. The most important legislation they passed (which Johnson vetoed, and which veto they promptly overrode) was the Military Reconstruction Act of 1867. As a result of this law, South Carolina was placed under the military rule of Major General Dan Sickles, who had the charge of overseeing a new constitutional convention in 1868.[16] The act required that each southern state ratify the Fourteenth Amendment. Today, we see the Fourteenth Amendment as the cornerstone of our definition of citizenship and the equal protection of every citizen under the law. But to the people living in South Carolina in 1868, the amendment's Section 3 effectively barred any former Confederate politician, officer, or noncommissioned officer from standing for election. As a result of this and a general white boycott of the constitutional convention election of 1868, the constitution that resulted that year was written almost exclusively by blacks and Republicans.[17] One must understand this fact when viewing the Reconstruction constitution of 1868 and the post-Reconstruction backlash against it.

15. Ibid.

16. Interestingly, General Sickles was a prominent Democratic politician from New York City, one of the few prominent Democrats among the old General Staff of the Army of the Potomac.

17. Ibid.

The 1868 constitution continued the suffrage and office-holding requirements of the un-Reconstructed constitution of 1865 with one enormously important difference. In the 1868 constitution, suffrage and office holding were based on universal male suffrage, regardless of race (Section 31). In a state that was almost 60 percent black, this was a sea change in politics, to say the least. No one metaphor could possibly account for the fact that, in three years, government went from representing the interests of erstwhile plantation owners to largely representing the interests of men who, three years previously, had been their slaves. One can imagine the astounding differences in the photographs of the general assembly of 1865 (mostly white Democrats) versus 1868 (mostly black and Republican). The constitution of 1868 not only democratized, at least for men, the Palmetto State's government but also provided for locally elected officials for the first time. The 1868 constitution allowed the voters of each South Carolina county to elect their own three county commissioners (Section 19). For the first time in two centuries, South Carolina actually had a constitution that acknowledged locally elected government outside of Charleston.

The Constitution of 1895: South Carolina's Contemporary Governing Document

This chapter is not the place to fully analyze the sad post-Reconstruction years of 1877 to 1900. Suffice it to say that, during this period, the federal government turned a blind eye to political and social injustices done by majority white governments in the South to their black and Republican populations. This self-willing political blindness by federal (Republican) governments led to the southern "Jim Crow" constitutions written in the 1890s, starting with the Mississippi Constitution of 1890. Part of this constitution, known as the "Mississippi Plan," set up a scheme to disenfranchise black men through poll taxes, literacy tests, restrictive voter-registration periods, and "good character" tests, under which a number of white men had to personally vouch for the integrity of any given voter.[18] Nearly every southern state adopted such multilevel disenfranchisement schemes in the 1890s. Additionally, in reaction to the Populist uprising by southern farmers in the 1890s, resurgent Bourbon Democrats enacted laws and constitutional provisions to disenfranchise or at least control poor white voters. Poll taxes, at least in their early years, were the main weapon in keeping poor white vot-

18. For an excellent overview of the post-Reconstruction Jim Crow laws and constitutional changes made in the southern states, see Key, *Southern Politics;* and C. Vann Woodward, *The Strange Career of Jim Crow* (Oxford: Oxford University Press, 1950).

er turnout in the 20–30 percent range. South Carolina was no different, promulgating a new constitution in 1895 to reject the "black Republican" document of 1868. Under the direction of racial demagogue Benjamin Tillman, the former all-powerful governor who had just been appointed U.S. senator by the state's general assembly, the 1895 constitutional convention wrote a document that, on its surface, greatly expanded voter participation in the state's political life. Like all other constitutions except the 1868 Reconstruction document, the 1895 constitution was never submitted to the voters for ratification. It included poll taxes, literacy tests, and good-character requirements in voter registration. The legislature also gave its tacit approval to the Democratic Party, restricting its primaries to whites only. All of these tests and devices have, of course, been altered by Supreme Court decisions and the Twenty-fourth Amendment to the U.S. Constitution in 1964 and suspended by the Voting Rights Act in 1965.[19] Nevertheless, for decades, racial and class restrictions on voting found their legal foundations in the 1895 South Carolina Constitution.

The new constitution of 1895 ostensibly expanded "democracy" by expanding the number of officials elected by the voters of the state. In a state where the governor was not even elected by the people until 1865, this is a significant expansion of liberties, at least on paper, until one realizes that at the same time the number of elected offices expanded, the number of registered voters radically shrank. Under the 1895 constitution, the house of representatives continued to be elected by the voters on the basis of population, whereas the senate continued to be elected based on county units, with one per county (Article III, Section 2; Article III, Section 6). The 1895 constitution expanded the number of locally elected officials. Now, in addition to electing local county councilmen, every elector in a county was given the right to elect a county sheriff, a clerk of the circuit court, and a county coroner (Article V, Section 24). At the state level, the 1895 constitution specified that the following offices would be elected by the people, and the people of the Palmetto State continue to enjoy the right to elect on a statewide basis, the governor, lieutenant governor, secretary of state, attorney general, treasurer, superintendent of education, comptroller general, commissioner of agriculture, and adjutant general of the state militia or National Guard (Article VI, Section 7).

Some important things have changed since the original version of this

19. The white primary was first declared unconstitutional in *Smith v. Allright,* 321 U.S. 649 (1944). On its face, the Twenty-fourth Amendment banned poll taxes only in federal elections. *Harper v. Virginia Board of Elections* (383 U.S. 663 [1969]) did away with all poll taxes. The Voting Rights Act suspended literacy tests in jurisdictions that had had such a test and had less than 50 percent voter turnout or registration on November 1, 1964. In the 1970s, amendments to the Voting Rights Act banned the practice nationwide.

constitution was adopted in 1895. The appointment of all judges remained in the hands of the general assembly; the governor and electors were totally left out of the judicial selection process by the 1895 constitution (Article 5). It was only in 1997 that the constitution was amended to establish the Judicial Merit Selection Commission, which produces a list of qualified nominees from which the general assembly *must* select in order to fill vacant judicial positions (Article V, Section 27). It was not until about 1970 that the 1895 constitution was meaningfully changed to give home rule to large cities. Until then, cities and counties were severely restricted in their bonding powers, and could do little to pass laws that did not deal with infrastructure (Article VIII, Section 7). Thus, the Palmetto State's tradition of legislative supremacy remained intact until the 1970s, when not only did cities and counties get the right to issue bonds autonomously, but the governor could now serve two consecutive terms. The general assembly remains without a doubt the most powerful political institution in South Carolina. It is not, however, still the all-powerful entity it once was, now having to share some of its powers with a stronger governor and local governments with fiscal powers of their own.

The following are some interesting quirks in the current South Carolina Constitution:

- Article III, Section 33—Racial intermarriage was unconstitutional until voters approved an amendment in 1998.
- Article III, Section 33—The legal age of sexual consent for females is fourteen.
- Article VI, Section 2—No person is eligible for any office if he or she denies the existence of a "Supreme Being."
- Article VIII-A, Section 1—Liquor cannot be sold after 7 P.M. or before 9 A.M.
- Article III, Section 33—Confederate pensions and widows' benefits are constitutionally protected.

Conclusion

Like any other state, South Carolina's current government in the twenty-first century is derived from its most recent constitution, which was written more than 110 years ago by a very different set of people than sit in Palmetto State government today. The 1895 constitution was written by people who wanted the state's legislature to have a very large measure of control over every aspect of state government, wanted to empower the Democratic Par-

ty as the only viable political force in the state, and wanted to disenfranchise as many black (and by definition Republican) voters as possible. The flexibility of constitutional arrangements, however, has allowed this same constitution to function today, even though Supreme Court decisions and actions of the federal government have rendered the more discriminatory parts of the 1895 constitution inoperable.

The fact remains, however, that state constitutions do *not* have to follow some predesigned, federally approved template. As long as they do not interfere with the supremacy of the U.S. Constitution and duly enacted U.S. laws, states are free to adopt any nondiscriminatory practices that they choose. The 1895 constitution, and all the ones that preceded it, were indeed designed to reinforce a racial political hierarchy. However, every postindependence constitution has also given huge control over state government to the general assembly, often without checks from any other branch of government. Judges since 1776 have been appointed by the state legislature, with formal input from the governor.[20] All South Carolina constitutions, even the colonial ones, gave very little home-rule powers to counties and municipalities. With the exception of the Reconstruction constitution of 1868, the state government has *never* submitted a constitution to the electors for ratification. Voters have never been allowed to initiate constitutional amendments. South Carolina's constitutions have always reflected legislative supremacy, a distrust of the executive and judiciary, and some disdain for allowing voters to amend the document directly themselves. Those traditions have been with government in the Palmetto State since 1776, and remain in the current governing document.

20. Relatively recent amendments to the 1895 constitution *do* allow the governor to appoint temporary fill-ins for judicial vacancies that will come up for general assembly election in fewer than twelve months.

LEWIS L. LASKA

The Tennessee Constitution

An Unlikely Path toward Conservatism

The seventy-five men who met at the Nashville courthouse in January 1870 to draft a new Tennessee Constitution could not have imagined the present condition of their lives and their state ten years earlier. A revolution had come and gone. They had lost. Twenty-five had served as officers in the Confederate army. Only two can be identified as Radicals, that is, militant Unionists. At the time the delegates were chosen in 1869, the state was only beginning its "redemption," and the delegates were keenly aware that the Texas Constitution had been rejected by Congress as not liberal enough.

The delegates' world was in shambles. The personal property tax base had dropped $117 million (about half), as former slaves migrated from tenant farm to city and back again. Compared to 1860, Tennessee produced 114,622 fewer bales of cotton. The tobacco crop had fallen by one-half. The average value per acre of land was $8.13 in 1860. In seven years it had dropped to $6.09, and assessed real property had declined in value $130 million by 1870.[1] The state was mired in questionable debt because homegrown Radicals under the direction of a Reconstruction governor had issued state-guaranteed bonds to railroads; some bonds gave tax-free status to the railroads.[2]

The delegates had no desire to be creative. The leader of the convention urged caution: "Let us be careful; let us do no more than is absolutely nec-

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1. See Lewis L. Laska, "A History of Personal Income Taxation in Tennessee," *Tennessee Historical Quarterly* 60 (Winter 2001): 221–43.

2. See Lewis L. Laska, "A Legal and Constitutional History of Tennessee, 1772–1972," *Memphis State University Law Review* 6, no. 4 (1976): 563–672, esp. 641; and Laska, "The Tennessee Constitution," in *Tennessee Government and Politics,* ed. John R. Vile and Mark Byrnes (Nashville: Vanderbilt University Press, 1998), 7–24.

essary. In ten years from now all this must be done again."[3] Tennesseans had lost their zeal for innovation in self-government. But it is unlikely they predicted the conservative path upon which they would set the state. The Tennessee Constitution of 1870 remained the nation's oldest unamended constitution, untouched until 1953 and still largely in effect today.[4]

Jacksonian Democracy and Its Roots

Pre-Jacksonian Democracy

Caution was not always the political order. On May 8, 1772, the Watauga Association Compact was signed, fashioning a magistrate court that exercised both judicial and legislative powers. The Watauga Compact was the first written constitution adopted by American-born freemen.[5] Justice Samuel Cole Williams observed that "the spirit of independence and self-aid exhibited in [the Watauga Compact's] formation and . . . its proceedings indeed set the keystone for all later generations of Tennesseans." Moreover, the precedent value of the Watauga Compact was keenly understood by its opponent, Lord Dunmore, the last royal governor of Virginia, who called it a "dangerous example to the people of America, of forming governments distinct from and independent of his majesty's authority."[6]

As the Watauga settlers ventured farther west, they continued the tradition of self-government. When James Robertson and John Donelson led a party of settlers into what is now middle Tennessee in 1780, they created the Cumberland Compact. The Cumberland Compact contained a provision for recall of elected officials that is thought to be the first in the United States.[7] But perhaps the most notable of the prestatehood self-governing attempts was the State of Franklin movement, which from 1784 to 1788 attempted to operate independently of North Carolina with its own constitution and government and unsuccessfully petitioned the U.S. Congress for admission to the Union.

3. Joshua W. Caldwell, *Studies in the Constitutional History of Tennessee,* 2d ed. (Cincinnati: Robert Clarke, 1907), 300.

4. See Lewis L. Laska, *The Tennessee Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1990).

5. Theodore Roosevelt, *The Winning of the West,* Sagamore Series, vols. 8–13 (1900; reprint, New York: Current Literature, 1905), 1:231.

6. Williams, *Dawn of Tennessee Valley and Tennessee History, 1541–1776* (Johnson City, Tenn.: Watauga, 1937), 337; letter from John Murray, Earl of Dunmore, to the Earl of Dartmouth, May 16, 1774, in *Tennessee: The Dangerous Example,* by Mary French Caldwell (Nashville: Aurora Publishers, 1974), 363.

7. J. Caldwell, *Constitutional History of Tennessee,* 37.

By 1796, Tennessee governor William Blount became convinced of the need for statehood since representation in Congress would help ensure a firm policy regarding the Indians. Following a plebiscite supporting statehood, the governor called a constitutional convention. The 1796 constitution was drafted by well-educated leaders including Andrew Jackson, who adopted the best provisions of the Pennsylvania and North Carolina charters. Thomas Jefferson called the document "the least imperfect and most republican of the state constitutions."[8] Suffrage was remarkably democratic, with all freemen (regardless of color) twenty-one and older who owned a freehold or resided in the county six months allowed to vote by balloting. Thus, landownership was not required for all voters, which was a common requirement at the time. The use of the secret ballot was a democratic step much less open to abuse than the viva voce method of voting then universally followed elsewhere.

The legislature was to be the most powerful branch of government not only because of its lawmaking function but also because it possessed the right to appoint all officers "not otherwise directed" (Article VI, Section 3). Practically, this meant that it filled all offices except those of governor, militia officers, and minor country officials like coroners, trustees, constables, sheriffs, and rangers. Thus, the legislature appointed all judicial positions including the justices of the peace who, meeting together, exercised administrative and judicial power at the county level.

The executive power was vested in a governor who was elected by the people instead of the legislature, which was true in only four other states, Massachusetts, Vermont, New Hampshire, and Pennsylvania. This marked a significant democratic advance. The governor was required to own at least five hundred acres of land, a provision that was more liberal than in other jurisdictions.

The 1796 constitution also established a precedent for the difficult constitutional amendment process that has inhibited constitutional change to this day. First, the legislature by a two-thirds vote was to propose to the voters the question of calling a convention. Second, the convention had to be approved in the next general election by a majority of all the citizens of the state voting for representatives.

The practice was established of constitutionalizing taxation policies, which has made tax reform in Tennessee difficult. The primary tax provision was that all privately owned lands were to be taxed uniformly, regardless of their value. The tremendous influx of settlers during this period greatly increased disparities in value between developed and undeveloped regions. This inequality, coupled with the inflexibility of the constitutional

8. Laska, "Legal and Constitutional History," 581, 583.

revision process, was the source of ever-increasing resentment in the western regions, where land values were much lower than the rest of the state. Whether the taxation method was practical or fair, it was inadequate as a revenue producer. By the late 1820s, the legislature was attempting to circumvent the constitution by authorizing counties to tax at different rates than the state and ordering state expenses to be paid principally out of the county treasuries. The attempt to do indirectly what could not be done directly was halted in 1830 by the Tennessee Supreme Court, which made a constitutional amendment on this issue a virtual necessity.[9]

Tennessee's second constitutional convention met in Nashville in 1834. The sixty delegates bravely ignored a cholera epidemic, but were not innovators, vowing to follow the convention president's admonition to "touch the Constitution with a cautious and circumspect hand."[10]

Jacksonian Democracy

The passing of the frontier is best illustrated in the life and expectations of the classic Tennessean, Andrew Jackson. The horseback lawyer and inveterate gambler soon became a judge, storekeeper, and planter.[11] Tennessee had outgrown its rigid tax structure and weak judiciary and needed certainty on such issues as a permanent capital and how to draw new counties. The state's population had grown sixfold between 1800 and 1830, whereas the nation's population only doubled during this period. The Jacksonians were proud of the progress their state had made toward becoming civilized. To ensure that tranquillity endured, the 1834 constitutional convention decided to take away from black men the right to vote and bear arms.

The delegates took characteristic action regarding slavery. A special committee prepared a skillfully drawn report that, although soundly condemning slavery as an evil, stated "to tell how that evil can be removed is a question that the wisest heads and most benevolent hearts have not been able to answer in a satisfactory manner." To be sure, the delegates avoided even looking for an answer. The report continued by asserting that blacks are "doomed to dwell in the suburbs of society" and expressing confidence in the African colonization movement, finally concluding with a warning against any "premature attempt on the part of the benevolent to get rid of

9. J. Caldwell, *Constitutional History of Tennessee,* 144; *Marr v. Enloe,* 9 Tenn. 452 (1830).

10. Laska, "Legal and Constitutional History," 601.

11. Lewis L. Laska, "'The Dam'st Situation Ever Man Was Placed In': Andrew Jackson, David Allison, and the Frontier Economy of 1795," *Tennessee Historical Quarterly* 54 (Winter 1995): 336.

the evils of slavery."[12] The delegates' stance was in accordance with the popular will, according to most scholars, and the modest antislavery memorials represented "nothing of the nature of a popular uprising." Content with their resolution of this issue, the delegates followed through with a predictable provision that forbade passage of laws providing for the emancipation of slaves without the consent of their owners (Article II, Section 31).[13]

The new charter of 1834 offered protection for the common (white) man—no longer could he waste his money on lotteries (firmly outlawed), and the legislature was required to set uniform interest rates. The tax provision was changed to allow taxation on property according to value. The economic diversity developing in the once purely agricultural state was reflected in a provision for the taxation of merchants, peddlers, and privileges. The general assembly was given the power to authorize counties and towns to impose taxes according to the same valuation principles as applied to the state.

By 1834, it was obvious to all that the judicial branch was badly in need of reform. The threat of politically motivated impeachment continually hung over the judges' heads. Furthermore, unsuccessful litigants commonly turned to the general assembly, seeking legislative redress through private acts, an early fixture in Tennessee statutory law. The legislature even felt free to remit criminal fines.

Related to the problem of the judicial system was the growing dissatisfaction with the system of local government. Because the legislature appointed justices of the peace who in turn appointed the county officers, the justices had no direct responsibility to the citizens, and the county courts tended to become authoritarian and unresponsive to the desires of the county. The 1834 convention made the justices of the peace subject to popular suffrage as well as the sheriff, trustee, and register. The supreme court justices and inferior court judges and state's attorneys continued to be appointed by the legislature, but they served terms rather than only during good behavior.

Other provisions that reflected Jacksonian democracy included apportionment now based on qualified voters rather than taxable inhabitants, a change that reversed the old bias in favor of slaveholding counties. The leg-

12. *Journal of the Convention of the State of Tennessee, Convened for the Purpose of Revising and Amending the Constitution Thereof* (Nashville: W. H. Hunt, 1834), 70–72, 87–93.

13. J. Caldwell, *Constitutional History of Tennessee,* 221; S. Rippa, "The Development of Constitutional Democracy in Tennessee," (master's thesis, Vanderbilt University, 1949), 162. The vote on the provision was thirty to twenty-seven. According to Chase C. Mooney, the small margin resulted not from delegates' antipathy for slavery but from their belief that no limitation should be placed on the power of the legislature over slavery ("The Question of Slavery and the Free Negro in the Tennessee Constitutional Convention of 1834," *Journal of Southern History* 12, no. 4 [1946]: 502).

islature was prohibited from suspending any general law for the benefit of any individual or granting any individual privileges or immunities. Also, Tennessee departed from the majority of states and moved toward democratization by dropping property qualifications for voters and officeholders. Perhaps the most important change was the adoption of a separation-of-powers clause in the 1834 document. This provision prevents the general assembly from giving individual legislators slush funds to make charitable contributions to nonprofit, tax-exempt entities in their home districts.[14] Likewise, legislative committees may not disapprove rules adopted by executive agencies.[15]

The 1796 constitution contained a declaration of rights. It had been placed at the end of the 1796 constitution and was now moved to the beginning of the new document and survives virtually unchanged. The document affirmed the compact theory of government by asserting that government was created for the common benefit. To the usual rights of the accused, such as the right to be informed of the charges, the right of confrontation, and freedom from self-incrimination, the draftsmen added important rights not found in the North Carolina document upon which the Tennessee Declaration of Rights was based. These were the rights to be heard for the accused and counsel, compulsory process for obtaining witnesses in favor of the accused, and a "speedy" public trial in the county or district where the crime was committed. The declaration concluded by granting some settlers preemption rights, describing the boundaries of the state, and declaring that free navigation of the Mississippi was an inherent right of Tennessee citizenship not to be "conceded to any prince, potentate, power, person or persons whatever" (Article XI, Section 29). This was a political gesture designed to dramatize the river's importance as the state's economic lifeline.[16]

There are differences between state and federal provisions, however. For example, the state search and seizure provides protection of "possessions," whereas the Fourth Amendment does not. In *Welch,* the term *possessions* was defined as "property, real or personal, actually possessed or occupied."[17] Under the state provision, if the area is found to be a possession or other protected area, a search warrant is required before any evidence found can be used against the individual. Actual possession shown by occupation, enclosure, cultivation, or use is the standard in Tennessee. The federal standard is the individual's legitimate expectation of privacy in the area searched.

Even though the Tennessee Declaration of Rights parallels the U.S. Bill of

14. Attorney General Opinion, 99-40 (February 24, 1999).
15. Attorney General Opinion, 01-86 (May 23, 2001).
16. Laska, "Legal and Constitutional History," 592–96.
17. *Welch v. State,* 154 Tenn. 60, 289 S.W.2d 510 (1926).

Rights, interpretation of the rights reflects issues that are local and regional. Perhaps the most interesting cases under the freedom-of-worship section have dealt with the Holiness Church, whose members handle poisonous snakes as a test of their faith. This practice was challenged under a Tennessee statute that makes it unlawful to "display, exhibit, handle or use [snakes] in such a manner as to endanger the life or health of any person." In *Hardin* and again in *Swann,* the statute was upheld as constitutional. Thus, the rights guaranteed by this section are limited by the right of the state to protect society from a practice that is dangerous to life and health.[18]

Some of the provisions of the declaration make sense only in the context of history. A universal favorite is the language that says that "the doctrine of nonresistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind" (Article I, Section 29). The governor and general assembly who thought it meant that Tennessee could secede from the Union found out differently at Shiloh, Franklin, and Lookout Mountain. A cultural favorite is the ruling in 1872, apparently still the law, giving any person the right to carry an "army pistol openly in his hand."[19]

The 1834 constitution was irregularly amended in 1865 to abolish slavery. To the amendments was attached a "schedule" that contained several matters of substantive law. First, the Secession Ordinance and the military league were repudiated. Second, statutes of limitations operating after May 6, 1861, were inoperative until such time as the legislature might act on the matter. Third, acts of the secessionist general assembly were voided, as were its debts. Fourth, military governor Andrew Johnson's civilian and military appointments were ratified, and incumbents were to hold office until successors were elected. Finally, and perhaps most important of all because of the bearing it was to have on constitutional development, a clause was inserted delegating to the first general assembly meeting under the revised constitution the power to determine "the qualifications of voters and limitation of the elective franchise." These amendments and the schedule were offered to the public in what was most certainly the most absurd election in the state's history, with many counties not voting and many communities in West Tennessee never even notified of the election. The amendments and schedule were ratified by a vote of 21,104 to 40.[20]

18. *Hardin v. State,* 216 S.W.2d 708 (Tenn. 1949); *State ex. rel. Swann v. Pack,* 527 S.W.2d 99 (1975).

19. *State v. Wilburn,* 66 Tenn. 57 (1872). See also *A Compilation of the Statute Laws of the State of Tennessee of a General and Permanent Nature: Compiled on the Basis of the Code of Tennessee, with Notes and References, Including Acts of Session of 1870–71,* comp. Seymour D. Thompson and Thomas M. Steger (St. Louis: W. J. Gilbert, 1871–1872), chap. 90.

20. Charles A. Miller, *The Official and Political Manual of the State of Tennessee, 1890* (Nashville: Marshall and Bruce, 1890), 100.

Post–Civil War Conservatism

In 1870, constitutional innovation was a luxury the state's leadership could not afford. The main goal was simply to reinstate "proper" government. This meant a clean break from the past. But the past was not 1834, it was 1865. An irregular group under the direction of newly elected vice president Andrew Johnson was supposed to meet in order to choose delegates for a constitutional convention, but they declared themselves a convention at Johnson's urging. They officially abolished slavery and slave-related laws and decided that only loyalists would be allowed to hold office or vote. This loyalty oath tended to bar former Confederates from voting. Until 1869, Tennesseans were led by a homegrown Radical governor, William G. Brownlow, whom most detested, and a legislature widely influenced by financial interests. The election of Brownlow to the U.S. Senate in 1869 opened the door for Redeemers (as they liked to be called) to bring conservative democracy back to life.

The seemingly natural tendency for constitutional conventions to overstep their bounds is exemplified by the constitution of 1870, too. Because of its conservative membership, the convention's overreaching was manifested by numerous provisions that would have been better reserved for statutes than frozen into constitutional rigidity. This is the chief criticism of the 1870 constitution by most scholars.[21] The delegates properly understood that the purpose of a state constitution is to protect the people from tyrannical government. With the memory of Brownlowism indelibly stamped on their minds, they zealously sought to achieve this end.

The constitution of 1870, which largely still governs Tennessee, defined the voting public as males age twenty-one and older, regardless of race.[22] The constitution said that payment of one's poll tax could be made a condition of actual voting—but this device was not actually put in place until 1890. In time, many opposed it because it affected poor whites as well as blacks. Technically, a poll tax is simply a tax on people or things and has nothing to do with voting or voting places. To illustrate, before abolition each person had to pay a poll tax on himself and on certain possessions—for instance, each slave and horse. For example, in 1792, Andrew Jackson paid a poll tax of twelve and one-half cents on each of his slaves and two more payments of twenty-five cents each on himself and Samuel Donelson.

Because of the various oaths demanded by Radicals in 1865 as a condition

21. J. Caldwell, *Constitutional History of Tennessee,* 312; Walton Alton Loveless, "A History of the Constitutional Conventions of Tennessee" (master's thesis, George Peabody College, 1930), 76.

22. Black males had gained the right to vote by statute in 1867.

to voting, the delegates wrote that no man could be denied the right to vote except after conviction for an infamous crime. This provision remains in the document today, having the effect of falling more harshly on African Americans, although a statutory right to redeem one's voting rights by court action is granted.

Like diligent workmen going about remodeling the storm-damaged house of state, the delegates examined and revised any article that needed a rebuild, but fully revised none. For example, the maximum interest rate was limited to 10 percent. This limit remained until 1977 when the power to set the maximum interest rate was given to the legislature.[23] The requirement that the legislature maintain a maximum interest rate was considered a victory for consumers. The state's obligation on defaulted railroad bonds would become the chief political issue for the next twenty-five years, but at least no more such bonds could be issued, concluded the delegates. They effectively limited the time the general assembly could remain in session by limiting the number of days the members could be paid—and the pay, namely, four dollars per day, would stay the same until 1953.

The limitation of the governor's powers was the delegates' major concern. The new constitution required all county offices created by the legislature to be filled by election. This was to limit the power of the governor, who had misused the power of appointment during the Union-control period. Because Governor Brownlow had called out the militia at will in order to intimidate voters, the delegates forbade any future governor from doing so without legislative approval. But simply because a provision exists in a constitution does not necessarily make it the law. Governors have routinely called out the National Guard in times of strife without getting legislative approval, notably in nineteenth-century labor disturbances, and as late as threatened rioting following the assassination of Dr. Martin Luther King Jr. in 1968. Still, the delegates kept an eye on midcentury constitutional development. By this time most governors had veto power. Henceforth, the Tennessee chief executive would enjoy this too.

The governor's veto power does not extend to every action the legislature takes. The constitution specifically excepts proposed amendments to the constitution and the adjournment of the legislature from the veto. Matters of purely formal procedure are the exclusive realm of the legislature. For example, a joint resolution fixing the date on which the general assembly will appoint officers is not subject to veto. One of the controversies of the 1977 convention was whether the call for the convention should be submitted to the governor. It was determined that it was necessary, but the failure to send

23. Lewis L. Laska, "The 1977 Limited Constitutional Convention," *Tennessee Law Review* 61 (Winter 1994): 485–572, esp. 507.

it to the governor would not invalidate the amendments once they were approved by the people.[24]

Changing "Grandpa's Constitution"

The 1870 constitution was not amended until 1953, largely due to the difficult procedure required to change it. Direct amendment required concurrence of two general assemblies by two-thirds vote and then approval by a majority of at least as many citizens as voted for governor in the last general election. This was all but impossible to achieve. The 1870 constitution added another option to change the constitution by allowing the legislature to submit a call for a convention to the people for approval. Conventions were voted down consistently due to a fear that the convention, once gathered, would have a free hand to amend the constitution however it saw fit. In 1949, the Tennessee Supreme Court ruled that the legislature could submit to the people a call for a limited constitutional convention to propose amendments to specific sections of the constitution, and the convention would be limited thereby. The 1953 changes included validating limited constitutional conventions. Conventions, however, were restricted to once every six years. Tennessee's most recent, as well as longest and most expensive, limited constitutional convention came in 1977 and was prompted by a Tennessee Supreme Court decision saying that the 10 percent–interest ceiling in the 1870 constitution really meant 10 percent.[25] In an era of double-digit inflation, this meant Tennessee money lenders could not survive. They pushed for a convention to consider this issue, plus a grab bag of other matters, ranging from race relations to education.

The Governmental Structure

Most authority for the Tennessee legislature is found in Article II. It divides state government into the legislative, executive, and judicial branches and prohibits any person with powers in one branch from exercising powers belonging to another. According to most political observers, the only two important elected officials in the state are the governor and the sheriff. The supreme court appoints the attorney general for an eight-year term, a provision unique to Tennessee. Unlike virtually every other state, neither the

24. *Crenshaw v. Blanton,* 606 S.W.2d 285 (Tenn. Ct. App. 1980), cert. denied, 451 U.S. 939 (1981).

25. Laska, "The Tennessee Constitution," in *Tennessee Government and Politics,* ed. Vile and Byrnes, 12.

governor nor the attorney general has independent power to seek prosecutions or supervise local district attorneys; thus, Tennessee has no top law enforcement officer.

The Tennessee attorney general does, however, play an important role in construing the Tennessee Constitution because that office has issued hundreds of opinions on pending legislation. For example, in 1996 the legislature wanted to exempt from barbershop regulation anyone who had been a barber for twenty-five years and whose father had been a barber for twenty-five years. The attorney general opined that this was improper class legislation under Article XI, Section 8.[26]

Legislative authority in the state belongs to the general assembly, which consists of the senate and house of representatives. Each house elects a speaker as its leader. Representatives are elected to terms of two years, senators to terms of four. The constitution specifically states that the house shall seat ninety-nine representatives. It further specifies that the number of senators shall not exceed one-third the number of representatives, and the number thirty-three has been used since 1884. The general assembly's power is limited only by express and implied restrictions of the state and federal constitutions.[27] Tennessee has no provision for an initiative or referendum.[28]

The constitution limits the general assembly's power to spend the state's money by requiring that expenses in any given year not exceed revenues and reserves. Concerns that tax revenues were growing faster than personal income and that the legislature was requiring local governments to supply services without providing funding for them precipitated an innovation in the Tennessee Constitution in 1977. A so-called state spending limitation mandates that appropriations from state revenue must not exceed "the growth of the state's economy." This so-called ceiling on tax spending was one of the first in the nation but has several times been broken since 1978.[29]

The constitution sets forth the general provisions for taxation. The section regarding taxation and valuation of property is so long and specific that courts have generally restricted the general assembly from taxing anything not specifically mentioned in the constitution. This section has been the traditional reason for not instituting a personal income tax on wages, thus allowing only a tax on income from stocks and bonds.

The taxation of wages was argued before the Tennessee Supreme Court, which determined that realizing or receiving income was something that everyone was entitled to do, and was therefore not taxable as a privilege. The

26. Attorney General Opinion, 96-107 (August 20, 1996).
27. *Bell v. Bank of Nashville,* 7 Tenn. 269 (1823).
28. *Vincent v. State,* 21 TAM 20-16 (Tenn. Ct. App. 1996), appeal dismissed.
29. Laska, "Limited Constitutional Convention," 531.

legality of an income tax on wages has been considered by the attorney general's office several times, with varying outcomes. In 1976, the attorney general decided that the only limitation on an income tax on wages was that a graduated personal income tax was not permissible because of the requirement that all property taxes be equal and uniform. In 1999 he opined that any income tax was constitutional. Legal scholars now tend to think that an income tax is constitutional without a constitutional amendment.[30]

The current taxation scheme says that all property is subject to taxation according to value, which is to be uniform across the state for each property class and subclass. Certain exemptions are allowed for personal checking and savings accounts, products of the soil, and property held by certain organizations. There is also provision for taxes on merchants, peddlers, privileges, and income from stocks and bonds, as the legislature provides. Taxes on the stock and deposits of banks and other financial institutions are limited in that the tax must be on banks or on stockholders and depositors, not both. Double taxation is, therefore, prevented.[31]

Tennessee's existing judicial article has not been revised since 1870, and the judicial system is a patchwork of unusual courts (such as chancery courts) and legal provisions (for example, fines in excess of fifty dollars have to be assessed by a jury, and the supreme court has to hold sessions in Knoxville, Nashville, and Jackson).[32] Uniquely, the constitution recognizes three "grand divisions" within the state: east, middle, and west. No more than two of the supreme court judges may be from the same grand division. During the 1977 convention, reformers argued that the state needed a truly unified court system based on population, with uniform practice rules promulgated by the supreme court and judges either appointed by the governor or elected on nonpartisan ballots.

Some of these reform provisions were incorporated into the convention's proposed amendments. All trial courts were to have uniform jurisdiction, and the legislature was restricted in creating new types of courts; the "Missouri Plan" was approved for appellate judges.[33] Provision was made for a

30. Attorney General Opinion 76-67 (March 3, 1976); Attorney General Opinion 99-217 (October 28, 1999); Laska, "History of Personal Income Taxation," 221–43; John J. Harrington, "A Review of the Struggle for Tennessee Tax Reform," *Tennessee Law Review* 60 (Summer 1993): 43; Alice M. Pettigrew, "The Constitutionality of an Income Tax," *University of Memphis Law Review* 10 (Winter 2000): 337.

31. *City of Lewisburg v. First National Bank of Lewisburg,* 563 S.W.2d 891 (Tenn. 1978).

32. Doug Hamill, "The Fifty-Dollar Fines Clause Re-emerges after Thirty-five Years of Slumber," *Tennessee Law Review* 70 (Spring 2003): 887.

33. The Missouri Plan (naturally called the Tennessee Plan in Tennessee) had already provided for retention election of appellate judges, and has been upheld as constitutional despite nothing in the Tennessee Constitution allowing for it.

chief court administrator. The legislature was required to set up a statewide public-defender program.

The judiciary reform proposals' defeat was due to two controversial issues. First, the charter required the court rules of procedure to be furnished to the general assembly for approval, which could disapprove them in whole or in part or simply repeal them by statute. Critics viewed this as trammeling the independence of the judiciary. Second, critics argued that the new article failed to include the existing prohibition on raising or lowering sitting judges' salaries.

The defeat of the proposed changes to the judiciary article left unresolved all the defects that caused their inclusion in the convention call. Although some of the provisions, such as a statewide public-defender system, have been enacted by the legislature, others wait for a future convention.

Tennessee Citizenship

The provisions of Article I, Section 5, that guarantee suffrage for everyone eighteen years old and older unless he or she has been convicted of an infamous crime are not self-executing. Rather, they require legislative action to enforce them. A statute prohibits felons from voting. It makes no difference that the case is on appeal or the defendant is out on bond.[34] Although more blacks than whites may be convicted of a felony, there is no violation of Section 2 of the Fourteenth Amendment.[35] During the 1870 convention, despite the spirit of generosity and liberality seen in the changes to the declaration of rights, racial tensions were running high, and the passions of the Civil War were far from cooling. The 1865 antislavery amendments were readopted and incorporated at the end of the article. However, interracial schools were barred, and interracial marriages were banned, provisions not removed until 1977. The 1953 convention removed the effect of the poll tax on voting by deleting the provision. Also, the right of women to vote, long since guaranteed by the Nineteenth Amendment to the U.S. Constitution, was guaranteed in Tennessee by extending the protections to "every person" instead of to "every male person."

Distributing Political Power

In an effort to secure more substantial local control over local affairs and to make local government less vulnerable to usurpation by the general assembly, the 1953 amendments prohibited private acts to remove an incum-

34. Attorney General Opinion 126 (April 26, 1982).

35. *Wesley v. Collins,* 605 F. Supp. 802 (M.D. Tenn. 1985), aff'd 791 F.2d 1255 (6th Cir. 1986).

bent from any municipal or county office, abridge the term of office, or alter the salary prior to the expiration of the term of a municipal or county officer. Local government was further buttressed by authorizing municipalities to establish home rule by approval in a local referendum. Home-rule municipalities thus established would no longer be subject to special acts of the legislature, but only to laws of a general nature. Special acts to create, merge, consolidate, or dissolve municipalities or to alter their boundaries were barred, and general laws to accomplish these ends were to be provided. Also, a provision was added for the establishment of a metropolitan government by the merger of some or all of the governmental functions of a county with those of any municipality located therein. Approval of a merger was required from a majority of those within the municipality as well as a majority of those within the county outside the municipality. The Metropolitan Government of Nashville and Davidson County became the first countywide metropolitan government in the United States in 1962.

The 1965 convention was prompted by the U.S. Supreme Court's 1962 decision in *Baker v. Carr,* which held that the general assembly's failure to reapportion itself under the Apportionment Act of 1901 presented a justiciable issue entitling the plaintiff-citizens to appropriate relief in a district court concerning the equal-protection provision.[36] Apportionment of both representatives and senators was amended to be based on population as determined by the U.S. Census rather than qualified voters, as had been provided in earlier documents. The convention took a conservative approach by including in the proposal a clause allowing apportionment of "one House of the general assembly using geography, political subdivisions, substantially equal populations and other criteria as factors" if the U.S. Constitution were amended or interpreted to so allow.

Limiting Government

Article I, Section 1, states that all power is inherent in the people. Once the people adopt an amendment, it is their intent in such adoption that must prevail when the provision is interpreted.[37] "The court must indulge every reasonable presumption of law and fact in favor of the validity of a constitutional amendment after it has been ratified by the people."[38] Of course, not every person has the power to influence law. Duelists and atheists are still barred from holding any "office" in Tennessee (Article IX, Sections 1–

36. *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

37. *Williams v. Carr,* 218 Tenn. 564, 404 S.W.2d 522 (Tenn. 1966).

38. *Snow v. City of Memphis,* 527 S.W.2d 55 (Tenn. 1975); appeal dismissed, 423 U.S. 1083, 96 S.Ct. 873, 47 L.Ed.2d 95; rehearing denied, 424 U.S. 979, 96 S.Ct. 1487, 47 L.Ed.2d 750 (1976).

2).[39] The 1977 convention adopted a provision requiring a balanced budget and limiting spending according to a formula tied to growth in the state's economy. An escape valve was built in: the general assembly could enact a separate law, "containing no other subject matter," providing appropriations in excess of the limitation. Fiscal responsibility was to be further enhanced by provisions that current operations could not be funded by bonds, that the legislature must provide first-year funding for any new program, and that the legislature may not impose increased expenditures on cities and counties unless the state pays its share of the costs.[40]

Conclusion: Conservatism Unbound

In 2000, Tennessee voters rejected their native son for the presidency—just as they had done with James K. Polk in 1844. Earlier, thinking the law favored the wrong side, they approved a "Rights of Victims of Crime" amendment that included the right to confer with the prosecution and the right to restitution from the offender (Article I, Section 35).[41] In 2002, the charter was amended to allow for a public lottery, chiefly to benefit higher education (Article XI, Section 5). By November 2004, Tennessee was firmly a "red" state, with a second consecutive victory for the Republican presidential candidate and, more important, a Republican general assembly for the first time. In this political environment, lawmakers have seriously proposed constitutional amendments abolishing any right to an abortion and a provision firmly barring a personal income tax. Not surprisingly, Tennesseans declared the "one-man and one-woman" bond the only legally recognized marital contract in 2006 (Article XI, Section 18). The circumspection of the 1834 convention and the return to "proper" government in the convention of 1870 had finally led to a point where Tennessee conservatism had been enshrined in the legislature, the constitution, and the character of the state.

39. The U.S. Supreme Court struck down the provision barring "Ministers of the Gospel" from the General Assembly (*Paty v. McDaniel,* 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed. 593 [1978]).

40. Laska, "Limited Constitutional Convention," 532.

41. This was the first amendment to the Declaration of Rights since 1870.

JAMES E. ANDERSON

The Texas Constitution

Formal and Informal

In 1876 when the current Texas Constitution was adopted, the population of the mostly rural state was 1.5 million, and it was mostly Anglo. Although there were some large ranching operations, most people made their living by subsistence farming and ranching. Much of the western part of the state was sparsely settled, if at all. The last major Indian uprising had been quelled only a couple of years earlier, and it would be a few more years before order was completely imposed on the plains. Texas political culture in the nineteenth century was a combination of traditionalistic and individualistic elements. These included a preference for minimal government, and distrust of that; a focus on private initiative and action; limited political participation and rule by the "better sort" of people; and protection of the existing social order. In all, Texas was a conservative place.

Compare this to the present. Texas now has a population of 22 million, with more than 80 percent of the people residing in urban areas. The population has become more diverse; in a few years Anglos will be in the minority. Three of the nation's largest cities—Houston, San Antonio, and Dallas—are in the state, and others are growing. Manufacturing and commerce have surpassed agriculture in economic importance. Much change has occurred. However, Texas remains a conservative state with a traditionalistic-individualistic political culture,[1] with some modification for life in the twenty-first century, and it continues to be governed under the constitution of 1876. As Professor Gary M. Halter remarks, "The current constitution is very compatible with the political culture of the state."[2]

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1. Daniel J. Elazar, *The Cities of the Prairie: The Metropolitan Frontier and American Politics* (New York: Basic Books, 1970).

2. Halter, *Government and Politics of Texas,* 4th ed. (New York: McGraw-Hill, 2003), 21.

In the following pages I will look at its antecedents, discuss its content and modification, and account for its length and longevity. The discussion will indicate that the constitution has created a governmental system, allocated power, defined citizenship, imposed limits on government, and provided for the management of political conflict, the criteria that Donald S. Lutz sets for state constitutions.[3] Also, we will see that the nominal and real, or formal and informal, constitutions of a society may differ. Thus, the nominal, written, Texas Constitution provides for extensive popular participation in and control of government, whereas the real, or informal, constitution directs attention to where power actually resides and what really occurs. In Texas, the possession of power and governmental practice are not always congruent with the written constitution. Consequently, Texas constitutionalism sometimes diverges from Lutz's theory.

Constitutional History

Early on, Texans had much experience in writing constitutions. In its first forty years of existence, initially as an independent nation and then as a member of the Union, Texas went through five constitutions before producing the constitution of 1876, which is still in being. The first five constitutions will be surveyed in this section.[4]

The constitution of 1836 drew ideas from the constitutions of the United States and several southern states, from whence most Texans had emigrated. With strong sentiment toward joining the United States and the consequent fear of running afoul of the U.S. prohibition on the importation of slaves, slavery was legalized, but the importation of slaves was permitted only from the United States. Strong sentiment existed among Texans for annexation by the United States. For several years, however, antislavery forces in the United States were able to block annexation of another slave state. Annexation became a major issue in the 1844 presidential campaign. Democrat James K. Polk, who favored annexation, defeated Henry Clay, who opposed it. This paved the way for Texas to enter the Union in December 1845.

One of the conditions for Texas's admission to the Union was the adoption of a state constitution based on republican principles. The result was the constitution of 1845, viewed by historians and others as a good constitution because it focused on the fundamentals of government organization

3. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 27–41.

4. This section draws on Janice C. May, *The Texas Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1996), 1–35.

and operation. A bicameral legislature was created, with house members serving two-year terms and senators four-year terms. The governor and lieutenant governor were the only elected executive officials and were restricted to two terms. Judges were appointed by the governor with senatorial consent. Other provisions dealt with slavery, education, the state militia, and the General Land Office. (Texas was permitted to retain its public lands on entering the Union.) It also provided protection for homesteads and banned the chartering of banks.[5] Historian Joe B. Frantz has written that it "worked so well that after several intervening constitutions, the people of Texas recopied it almost *in toto* as the Constitution of 1876."[6]

A new constitution was called for in 1861 when Texas seceded from the Union and joined the Confederacy. Much of the 1845 constitution was retained. The new constitution included provisions requiring state officials to swear loyalty to the Confederacy, protecting slavery, and prohibiting the freeing of slaves.

The Civil War established that states had no right of secession. To meet the requirements of Reconstruction initiated by President Abraham Lincoln and his successor, Andrew Johnson, and to reenter the Union, Texas had to make changes in its constitution. New provisions in the constitution of 1866 nullified secession, removed references to the Confederacy, repudiated the Confederate war debt, abolished slavery, granted some rights to freedmen (not including the right to vote or hold office), gave the governor the line-item veto, and created a state board of education. Governmental structure was much the same as it had been under the 1845 and 1861 constitutions. However, the constitution of 1866 was short-lived. It was proclaimed illegal under the Reconstruction Acts passed by the Radical Republicans, who had gained control of Congress in the 1866 elections. Military rule was instituted in Texas. Then, under the Reconstruction Act of 1867 a constitutional convention was convened to write a new constitution that, among other things, would provide for black male suffrage.[7]

The convention, which assembled in Austin in June 1868, was dominated by Republicans, only a few of whom have been classified as "carpetbaggers." Completed in early 1869 and approved by a popular vote of 72,466 to 4,929, the constitution of 1869 was a mixture of new and traditional elements. Much power was vested in the governor, who was assigned a four-year term. He could appoint state judges and major executive officials. The bicameral

5. L. Tucker Gibson Jr. and Clay Robison, *Government and Politics in the Lone Star State,* 5th ed. (Upper Saddle River, N.J.: Pearson Prentice Hall, 2005), 44–45.

6. Frantz, *Texas: A Bicentennial History* (New York: W. W. Norton, 1976), 73.

7. Rupert N. Richardson et al., *Texas: The Lone Star State,* 9th ed. (Upper Saddle River, N.J.: Pearson Prentice Hall, 2005), 224–29.

legislature was to meet annually, with senators and representatives serving six- and two-year terms, respectively. Some major changes from previous constitutional practice included guarantee of the right of black men to vote, centralization of political authority in the state government, and the creation of a state public school system featuring compulsory attendance and the use of educational funds to provide schools for both blacks and whites.

Initially, state government under this new constitution was dominated by the Republicans. E. J. Davis, a member of the Radical Republican faction, was elected governor by a narrow margin in a bitterly contested election. Davis has been described as "able and honest but tactless and uncompromising." Most of the white Democrats in the state were unhappy with Davis, the Davis regime, and the constitution of 1869. Davis was criticized for the establishment and use of a state police force, the imposition of martial law to maintain order in some counties, soaring taxes, and various forms of corruption. Accomplishments such as the enactment of a homestead-protection law and the creation of a free public school system were given little credit.[8]

In 1872 the Democrats regained control of the legislature and the next year elected the governor and other state officials. They then turned their attention to the despised state constitution, a symbol of carpetbagger rule and Republicanism. In 1875 the legislature adopted a resolution calling for a constitutional convention, subject to voter approval. The voters readily agreed and elected three delegates from each of the thirty senatorial districts to a state constitutional convention, which met in Austin in the fall of 1875.

Of the ninety convention delegates, seventy-six were Democrats and fourteen Republicans (including five blacks). Forty-one delegates were farmers, twenty-nine were lawyers, and more than twenty had been officers in the Confederate army.[9] None had been involved in writing the constitution of 1869. Significantly, more than forty were members of the Society of Patrons of Husbandry (more simply, the Grange), a farm organization that had gained much strength in Texas as a consequence of the panic of 1873. The Grangers, advocating "retrenchment and reform," were the dominant faction in the convention. The parsimonious orientation of the delegates was revealed by their refusal to hire a stenographer (at a cost of ten dollars a day) or have the proceedings published.

The delegates at the constitutional convention produced a document that was much longer and more detailed than the previous constitutions, including many provisions on matters that previously had been left to the dis-

8. T. R. Fehrenbach, *Lone Star: A History of Texas and Texans* (New York: American Legacy Press, 1983), chap. 22.

9. Joe E. Ericson, "The Delegates to the Convention of 1875: A Reappraisal," *Southwestern Historical Quarterly* 67 (July 1963): 22–27.

cretion of the legislature. Generally, the constitution provided for a governmental system characterized by greater popular control, less authority to govern, and more economy in operation than had been the case under the constitution of 1869. State officials, including judges, were to be elected for short terms of office, and were provided with limited authority and meager compensation. Many procedural and substantive limitations were imposed on the legislature. State debt was limited to two hundred thousand dollars. Provisions reflecting frontier radicalism authorized the regulation of railroads and corporations and banned the chartering of banks. After some debate, authorization was included for a public school system, but compulsory attendance was dropped, school funding was limited, the office of state superintendent was abolished, and segregated schools were mandated.

Rupert N. Richardson provides this commentary on the work of the convention:

> All in all, the constitution complied with public opinion quite faithfully. Biennial sessions of the legislature, low salaries, no registration for voters, precinct voting [the previous constitution had required voting at the county seat], abolition of the road tax and a return to the road-working system, a homestead exemption clause, guarantees of a low tax rate, a more economical [and segregated] school system under local control, a less expensive court system, popular election of officials—all these were popular measures with Texas in 1876. The constitution was a logical product of its era. It was to be expected that men who were disgusted with the vagaries of a radical regime would design a government that was extremely conservative. Furthermore, the low prices and low wages of hard times had created a demand for the severest economy in government.[10]

Although there was substantial opposition to the proposed constitution, rural voters tended to approve of its restrictive and economical character. In February 1876 it was handily ratified by a vote of 136,606 to 56,652. Rural voters carried the day.

Constitutional Development

The meaning of a formal constitution can be changed, new authorizations added, restrictions imposed, or other changes made in various ways to meet new needs and conditions. Modes of change include general revision, formal amendment, judicial interpretation, custom and usage, and statutory elaboration. All of these except general revision have had an impact on

10. Richardson, *Texas: The Lone Star State,* 2d ed. (Englewood Cliffs, N.J.: Prentice Hall, 1958), 228.

the Texas Constitution. Formal amendment appears to have been most important, but before turning to it examples of informal change by custom and usage and judicial interpretation are presented.

Article IV provides, "There also shall be a Lieutenant Governor" who shall be president of the Texas Senate and vote to break ties and become governor when that office becomes vacant. Until the mid-twentieth century, the position of lieutenant governor was essentially honorific, being possessed of minimal political power. Occupied by activists in the 1940s and 1950s, the position was transformed—a process that has never been fully explained—into one of much power. Senate rules were changed to give the lieutenant governor authority to appoint legislative committees and their chairs and to control the senate agenda. The lieutenant governor is now sometimes called the most powerful official in state government, a far remove from the weak official anticipated by the framers.

The Texas courts have never been thought of as particularly imaginative or adventurous in interpreting the constitution. One exception involves public school financing. Article VII on education opens with the statement, "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Following the lead of a state district judge, in 1989 the Texas Supreme Court used this provision to unanimously declare unconstitutional the state's long-standing public school financing system. According to the court, the school system was not "efficient" because inequality in school financing did not ensure "a general diffusion of knowledge."[11] In this instance, the formal constitution superseded the informal, most likely because of the gross inequities that characterized public school financing.

We turn now to constitutional amendments. Amendments can be proposed only by a two-thirds vote of the elected members of each house of the legislature, in either a regular or a special session. Approval by the governor is not needed. The ratification of proposed amendments is assigned to the state's voters, at either a regular or a special election, as determined by the legislature. In recent decades the legislature has shown a distinct preference for special (off-year) elections, which have the effect of depressing voter turnout. Typically, less than 10 percent of the voting-age population choose to participate. Most amendments do not attract much voter attention. Nor is information on the actual content and likely consequences of proposed amendments abundant. Lack of information coupled with low turnout essentially guarantees that the informal constitution retains control.

11. *Edgewood Independent School District v. Kirby,* 777 S.W.2d 391 (Tex. 1989).

Since the constitution was adopted in 1876, 605 amendments have been proposed and 432 have been adopted. The pace of the amending process has increased in recent decades: in 2003 there were 22 amendments on the ballot, all of which won approval; in 2005, 9 amendments were added to the constitution. Following a pattern similar to that in other southern states, over the years amendments have added significantly to the bulk and detail of the constitution.[12]

Amendments have been adopted for a variety of purposes: to make changes in local governments, impose limits on government, overcome court decisions, avoid financial restrictions on government, and authorize government, that is, the legislature, to act on some matter. An important amendment, which was narrowly approved in 2003, authorized the legislature to set limits on awards for noneconomic damages in medical malpractice and other lawsuits. This overcame a Texas Supreme Court ruling that an earlier law limiting liability claims violated the "open courts" provision of the Texas Bill of Rights. It states, "All courts shall be open, and every person for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law." The amendment was supposed to remedy a medical malpractice–claims crisis.[13] Approximately 12 percent of the state's voters turned out for the special election that was held in mid-September.

State constitutions generally do not need to authorize the enactment of particular laws. They are constitutions of general powers, unlike the U.S. Constitution that embodies the concept of delegated powers. Constitutional practice in Texas, however, has created a paradox. As the detail in the constitution has proliferated, as the constitution has become more complex, the notion has taken hold, because so many kinds of legislation are authorized, that specific authorization is necessary to ensure the constitutionality of laws.[14] Detail begets detail. Also, of course, many groups prefer the greater permanence provided by constitutional inclusion of provisions for their programs and protections than would be the case under statutes.

Many groups over the years have been "remembered" in the constitution through amendments. In 1981, for example, livestock and poultry were exempted from all taxation. Earlier, timber companies had secured exclusion for trees. In 1987, oil producers secured tax exemption for some inactive offshore-drilling equipment. Noncommercial travel trailers that were not permanent residences were exempted from property taxes in 2003, to encour-

12. Daniel J. Elazar, "The Principles and Traditions Underlying State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 20–21.

13. Ralph Blumenthal, "Hue and Cry Replaces Yawns in Vote on Texas Constitution," *New York Times,* September 13, 2003, 1.

14. Duane Lockard, *The Politics of State and Local Government* (New York: Macmillan, 1963), 89.

age "winter Texans" to spend the winter months in South Texas, where they are a "cash crop." And so it goes. The constitution reflects the interests of those with sufficient power or influence to gain remembrance and bring the formal constitution to their aid.

The Bill of Rights and Citizenship

The thirty-one sections in Article I of the constitution of 1876 constitute the Texas Bill of Rights.[15] The bill of rights contains first statements of political philosophy and values. Thus, it is stated that "Texas is a free and independent state" and that "all political power is inherent in the people." Also, it is averred that "all freemen, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." These statements, which express the concept of popular sovereignty and compact theory, could well have been included in the preamble. They do not set forth enforceable rights, however noble and inspiring they might be.

The bill of rights includes all of the substantive and procedural rights found in the U.S. Constitution and most state constitutions. Some are spelled out in more detail, such as the right to bail. Religion receives considerable attention. The constitution's one-sentence preamble states, "Humbly invoking the blessings of Almighty God, the people of the State of Texas do ordain and establish this Constitution." Section 4 of the bill of rights provides, however, that "no religious test shall ever be required as a qualification to any office or public trust, in this State; nor shall anyone be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being." The last proviso is now of doubtful validity. Other sections provide for the free exercise of religion and prohibit the government from appropriating money or property for "the benefit of any sect, or religious society, theological or religious seminary." The intent of the framers here seems to have been to clearly and sharply separate church and state.

In one sense, anyone who resides in Texas, and who is neither just passing through nor an alien, is a Texas citizen. In another sense, a citizen is anyone who can share in the exercise of political power, that is, who can vote if he or she chooses. There is no formal definition of Texas citizenship. The 1876 constitution provided that all adult males, including aliens, who were

15. This discussion of the Texas Constitution draws on James E. Anderson, Richard W. Murray, and Edward L. Farley, *Texas Politics: An Introduction,* 6th ed. (New York: HarperCollins, 1992), 7–21.

twenty-one years of age and older could vote. There was little support for women's suffrage at the convention. The delegates did reject a proposal for a poll tax, which was intended to indirectly disenfranchise blacks. Later, the state did resort to the poll tax, the white primary, and other means to disenfranchise blacks, and many low-income people as well. In 1972 an equal-rights amendment was added to the constitution with little controversy. It reads, "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin. This amendment is self-operative." Nothing happens, however, unless those adversely affected take legal action to protect their equal rights.

The Structure of Government

The separation of powers became a prominent feature of American governments in the eighteenth century. The Texas Constitution spells out the separation of powers in precise terms in its Article II thusly: "The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be provided to a separate body of magistry, to wit: Those which are Legislative to one; those which are Executive to another; and those which are Judicial to another; and no person, or collection of persons, being of one of those departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." The constitution goes on to provide for some checks and balances, although they are not so designated. Thus, the governor can veto legislation, but the legislature can override a veto by a two-thirds vote of the members of each house. The courts, as part of the judicial power, can declare laws unconstitutional. Appointments made by the governor, and there are many, require confirmation by two-thirds of the senate. The legislature can impeach, convict, and remove from office the governor and some other officials.

In 1917 Governor James ("Pa") Ferguson was impeached, convicted, and removed from office as the consequence of a dispute with the legislature over governance of the University of Texas. His wife, Miriam ("Ma") Ferguson, was elected governor in 1932. The Fergusons used the campaign slogan "Two Governors for the Price of One." The political exploits of the Fergusons gave rise to the comment that bedfellows can make strange politics.

The courts have been inclined to construe the separation of powers narrowly. In 1987 the Texas Court of Criminal Appeals struck down a statute providing that juries must be instructed on the effects of parole. This somehow infringed on the clemency authority of the governor and Texas Board

of Paroles and Pardons. No explanation was provided. This decision was overcome by a constitutional amendment.[16]

The Legislature

The framers of the constitution clearly desired a part-time citizen legislature. They provided that it should meet in biennial sessions of no more that 140 days' duration. Attempts to provide annual sessions have been rejected by the voters. Only the governor can call the legislature into special sessions, which are limited to 30 days. Then, the legislature can consider only topics specified by the governor.

To encourage legislators to get on with their business and get out of town, the constitution originally set their compensation at no more than five dollars per day for the first 60 days of a session and no more than two dollars per day for the remainder of the session. The constitution has been amended several times to increase legislators' compensation, most recently in 1975, when it was set at six hundred dollars per month. The Texas Ethics Commission was created by amendment in 1991. It can recommend legislative pay increases subject to voter approval but has yet to do so. The lawmakers have provided themselves with a generous retirement plan, which does not require voter approval. The commission has set a substantial per diem expense allowance for members when the legislature is in session.

Twenty-one sections in Article III prescribe legislative procedures. For instance, a bill cannot be so amended as to change its original purpose. Only appropriation bills can "contain more than one subject." Moreover, it is required that "the subject of each bill be expressed in its title in a manner that gives the legislature and the public reasonable notice of that subject." Only "emergency" bills can be passed during the first 60 days of a session.

Section 56 lists thirty topics on which the legislature cannot enact local or special laws. Examples include exempting property from taxation, changing the venue of court cases, regulating local business activity, vacating roads or streets, regulating the affairs of local governments, and "incorporating cities, towns, or villages, or changing their charters." General legislation is permitted.

The legislature, or individual members thereof, has an inclination to dabble in local affairs, perhaps urged by some local faction or group. The ban on local or special legislation in the formal constitution can be circumvented by the enactment of "bracket legislation," which looks general but applies

16. Ibid., 13.

to only one or a few localities because of precise population or other specifications. When challenged, the courts have declared some of these enactments unconstitutional.[17]

The Executive

The constitution, in Article IV, creates a plural executive: "The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General." All except the secretary of state, who is appointed by the governor, are elected by the voters for four-year terms. Prior to a 1972 amendment, they served two-year terms.

The governor is directed to "cause the laws to be faithfully executed." The constitution, however, provides little formal power to fulfill this mandate. He or she is given little in the way of directive or budgetary powers. Although the governor can appoint many officials to state boards and commissions, he or she must gain the consent of the senate. Governors can remove from office only those whom they have personally appointed, and then only with the consent of two-thirds of the senate. This has been an unworkable arrangement. The legislature could, if it so chose, provide that appointees to state boards and agencies serve at the pleasure of the governor. The legislature, however, has generally been disinclined to do anything to enhance gubernatorial power.

The governor is better equipped, constitutionally, to exert legislative leadership. First, the governor is authorized to send messages to the legislation. Next, the governor has veto power, which includes the line-item veto on appropriation (or budgetary) legislation. Legislative overrides of gubernatorial vetoes are extremely rare. On the other hand, the legislature has reduced the number of budgetary items. Finally, the governor can call special sessions and specify their agendas. The legislature has reduced the potency of the line-item veto, however, by enacting lump-sum appropriations for many state agencies.

Thad L. Beyle has made a careful comparative assessment of the formal powers of American governors, focusing on five areas: tenure potential (length of term and possibility of reelection), appointive power, budgetary power, veto power, and party-control power (extent of control of the legislature by the governor's political party). Beyle places the Texas governor in

17. Texas Legislative Council, *Drafting Manual* (Austin: Texas Legislative Council, January 20, 2003), Appendix 7.

the bottom quintile.[18] To be influential, a Texas governor would need to draw substantially on informal and political power and, if he or she has it, charisma.

The Judiciary

Article V begins with this statement: "The judicial power of this State shall be vested in one Supreme Court, in one Court of Criminal Appeals, in Courts of Appeals, in District Courts, in County Courts, in Commissioners Courts [these are mostly administrative entities], in courts of Justices of the Peace, and in such other courts as may be provided by law." The last clause takes in municipal courts. The constitution thus provides for a complex five-level system of courts. At the apex are two supreme courts: the Texas Supreme Court for civil and juvenile matters and the Texas Court of Criminal Appeals for criminal cases.

Under the constitution of 1869 and the E. J. Davis regime, judges were appointed by the governor. In reaction to this experience, the constitution of 1876 made judges independently elected officials. Despite criticism and proposals for reform, the practice persists. All judges in the state, except municipal court judges, are elected. Terms are four years for trial judges and six years for appellate judges. Although the constitution is silent on this point, these are partisan elections.[19] Once, most judges in the state were Democrats. Now, because of the resurgence of the Republican Party, nearly two-thirds of the judges of district and higher-level courts are Republicans.[20] There appears to be little interest among Texans in changing the system of judicial selection.

The attorney general is the state's chief legal officer and is directed by the constitution to "give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law." Over time, the practice has developed for the legislature and state agencies to seek the attorney general's advice on the constitutionality of legislative proposals, administrative rules, and statutes. The attorney general's opinions are customarily accepted as binding, rarely being challenged in the courts. This procedure is a quicker and much less ex-

18. Beyle, "Governors: The Middlemen and Women in Our Political System," in *Politics in the American States,* ed. Virginia Gray, Herbert Jacob, and Kenneth N. Vines (Washington, D.C.: CQ Press, 1996).

19. Anthony Champagne, "Judicial Selection in Texas: Democracy's Deadlock," in *Texas Politics: A Reader,* ed. Champagne and Edward J. Harpham (New York: W. W. Norton, 1997), chap. 7.

20. Gibson and Robison, *Government and Politics,* 340.

pensive way of getting judgments on constitutional and legal issues than resorting to the courts.[21] Informal practice has solidified into accepted procedure and real power for the attorney general.

Local Government

The constitution of 1876, in its original form, provided for a decentralized governmental system. Counties, municipalities, and independent school districts were authorized. In recent decades amendments have empowered the legislature to create a variety of special districts—hospital districts, airport authorities, conservation and reclamation districts, and more. As one might guess, what these can do or how they can operate is spelled out in some detail. The 1997 federal census of governments reported that in Texas there were 254 counties, 1,177 cities, 1,087 school districts, and 2,182 special districts. Collectively, they elected nearly 26,000 officials with very little direct supervision by state officials. As the situation now stands, counties can do only what they are specifically authorized to do by state law. They have no general ordinance-making authority. Until the legislature says otherwise, they, for example, cannot regulate the sale of fireworks or real estate developments, which is what some people would prefer.

Constitutional Revision

Critics of the Texas Constitution—scholars, public officials, interested citizens—have long favored replacing it with a new constitution more in line with the needs of governance in a modern industrial, urban society.[22] Complaints about the Texas Constitution include that it is too long, detailed, badly written, and poorly organized; that it is not confined to fundamental matters; and, importantly, that its restrictive orientation hampers government and impedes its ability to serve the needs of a modern society. More than half of the sixty-four sections in the legislature article, for example, impose restrictions on the legislature.

The constitution is not without its supporters, however. Many groups and interests benefit from programs and policies embedded in and protected by it. Major constitutional change could jeopardize their advantages. Moreover, the members of the legislature, which is the dominant branch of the

21. Richard H. Kraemer, Charldean Newell, and David F. Prindle, *Texas Politics,* 8th ed. (Belmont, Calif.: Wadsworth, 2002), 284.

22. In this section I rely substantially on Anderson, Murray, and Farley, *Texas Politics: An Introduction,* 17–20.

state government, have been uninterested in changes that would reduce their power or increase that of the governor. Many people apparently approve of the constitution's restrictive orientation because of their preference for minimal government.

An impediment to revision was the fact that the constitution did not contain explicit authorization for calling a constitutional convention, though such authority is generally thought to be inherent in legislatures. In 1971, partly because of a reform mood generated by some political scandals, the legislature proposed a constitutional amendment containing provisions that the members of the Sixty-third Texas Legislature, elected in 1972, would meet as a constitutional convention in January 1974 and that the legislature in January 1973 would create the Constitutional Revision Commission that would make recommendations to the legislature. That the 181 members of the legislature would be the delegates to the constitutional convention was in effect its "price" for proposing the amendment. It readily won approval at the polls in November 1972 by a margin of 1,579,982 to 985,282.

The Constitutional Revision Commission was appointed in the spring of 1973. It commissioned studies, held public hearings across the state, and did a thorough review of the constitution. Then it drafted a new, shorter, more generally phrased constitution. Major changes included enhanced administrative powers for the governor, annual legislative sessions, appointment of appellate court judges by the governor, provision for county home rule, and deletion of much of the statutory content of the existing constitution.[23]

In January 1974 the members of the legislature gathered in Austin in their roles as constitutional convention delegates to consider the revision commission's handiwork. Predictably, the constitutional convention in operation looked and behaved much like the legislature. Interest groups lobbied the "delegates" much as they would have legislators, unsurprisingly, to protect their favored provisions. In early July the convention completed work on a proposed eleven-article constitution that omitted some of the changes favored by the revision commission. To be submitted to the voters the new constitution had to win approval of two-thirds of the legislator-delegates. Minutes before the convention was required to adjourn on July 30, a final version of the constitution received 118 votes, 3 fewer than needed for approval.

The issue on which the convention ultimately foundered was right-to-work. (The Texas right-to-work law, as in other states, prohibits union membership or nonmembership as a condition of employment.) Conservative

23. Constitutional Revision Commission, *A New Constitution for Texas: Text, Explanation, Commentary* (Austin: Constitutional Revision Commission, 1973).

delegates refused to vote for a constitution that did not include a right-to-work provision, while many liberal or prolabor delegates refused to vote for one that did. The right-to-work issue was symbolic, and something of a red herring, because the guarantee has no more impact in the constitution than in statute law, and in either case its validity depends on its authorization in national labor legislation. Nonetheless, compromise proved impossible. The final version of the constitution, which contained a right-to-work provision, failed by a vote of 118 to 62. The negative votes came mostly from liberal-labor delegates. They were joined by a few conservatives, dubbed "cockroaches," who had strived throughout the convention to block revision.

The drive for constitutional revision resumed when the legislature convened in 1975. Under the leadership of the presiding officers of the two houses, the "lege" considered many proposals for constitutional revision, finally settling on an article-by-article approach. In April, eight propositions collectively containing ten articles were approved for submission to the voters in a special election in November. Each proposition took the form of a proposed amendment—together they formed a new constitution except for the Texas Bill of Rights, which was retained. The content of the ten articles was much the same as what the convention had rejected the previous July, but the right-to-work provision was omitted. According to one authority, the new constitution, if adopted, would be "among the best, perhaps the best drafted state constitution in the nation."[24] Many public officials, most state newspapers, the League of Women Voters, and the Texas Bar supported the revision effort. Opposition came from the governor, county officials, and some business groups. On election day, approximately 25 percent of the registered voters went to the polls and rejected all eight propositions by margins of three to one. Once again, constitutional revision failed.

Although a few state legislators took an interest in constitutional revision in the 1990s, nothing resulted from their efforts. Neither other members of the legislature nor the public displayed much interest or enthusiasm for revision, and it failed to gain a prominent place on the political agenda. Piecemeal tinkering with the constitution through the amendment process has become the accepted approach to constitutional change in Texas.

Conclusion

The length of the Texas Constitution stems in large part from the essentially statutory material that is incorporated in it. Many amendments to the

24. Janice C. May, "The Proposed 1975 Revision of the Texas Constitution," *Public Affairs Comment* 21 (August 1975): 1.

constitution go beyond authorizing action on a problem and actually set forth public policy to deal with it. The amending process becomes, in effect, an alternative to the legislative process. Of course, the original framers of the constitution also contributed to its length, detail, and cumbersome nature.

Among the topics treated at some length are public education, higher education, taxation, welfare programs, veterans' programs, public lands, conservation and resource development, retirement programs for teachers and public officials, liquor control, bond issues for water projects and programs, hospital districts, and borrowing using home equity as collateral. Much of this is clearly not of a fundamental nature.

An egregious example of legislating by amending involves Article XVI, Section 50, titled "Homestead: Protection from Forced Sale; Mortgages, Trust Deeds, and Liens." It is longer than the entire U.S. Constitution and rivals insurance policies in its density. Essentially, it permits homeowners to borrow money based on home equity. Prior to the amendment of Section 50 in 2001, which was strongly supported by the financial community, such borrowing was not possible in Texas. Section 50 does not simply authorize legislative action; rather, it is also replete with qualifications, limitations, and procedural requirements. It includes a lengthy notice of rights that must be sent verbatim to borrowers. It also lacks clarity. When public policies are encrusted in the constitution, they can be changed, when necessary, only by additional amendments. This is a rather slow and clumsy way of policy making, but it has become standard practice in the Lone Star State.

The Texas Constitution, as it now stands, provides for a representative, democratic political system. A large number of officials—state and local, legislative, executive, and judicial—are elected. Moreover, it is now easy for people to register and vote. Political participation, however, is low. In presidential election years somewhere between 40 and 50 percent of the voters turn out. In other elections, participation goes down. In some local elections for city officials and school boards, it may drop below 5 percent. Large numbers of Texans choose not to exercise voting rights as citizens. The consequence is that power is often exercised by something akin to an "establishment" rather than the people generally, as the constitution formally ordains.

The distinction that I have made between the formal and informal Texas Constitutions poses a challenge to Donald S. Lutz's theory of state constitutions. The Texas Constitution does not fulfill all of the constitutional requirements that he specifies. Probably, this holds for some other state constitutions as well. Still, Lutz's theory provides us with a set of tools for dissecting a state constitution, for assessing how far it departs from the ideal, and for comparing one constitution to another.

JOHN J. DINAN

The Development of the Virginia Constitution

State constitutions have generally been rewritten much more frequently than the U.S. Constitution, but this is particularly true of the Virginia Constitution. Only four states have held more constitutional conventions than Virginia, whose nine conventions include an inaugural convention in 1776; revision conventions in 1829–1830, 1850–1851, 1861, 1864, 1867–1868, and 1901–1902; and limited conventions in 1945 and 1956.[1] Only three states have enacted more constitutions than Virginia, whose six constitutions took effect in 1776, 1830, 1851, 1870, 1902, and 1971.[2] In fact, Virginia's experience with constitutional revision spans a wider time frame than any other state, given that only two states enacted constitutions prior to Virginia's inaugural 1776 constitution,[3] and only three states have adopted constitutions since Virginia's 1971 constitution took effect.[4] Virginia constitution-makers have therefore had abundant opportunities to register changes and currents in

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1. New Hampshire has held seventeen conventions; Georgia and Louisiana have each held twelve; and Vermont has held eleven. New York has also held nine conventions, along with Virginia. Updated from Albert L. Sturm, "The Development of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 57, 82.

2. Louisiana has had eleven constitutions, Georgia has had ten constitutions, and South Carolina has had seven constitutions. Alabama and Florida have each had six constitutions, along with Virginia. Updated from ibid., 75–76.

3. The New Hampshire Constitution was adopted on January 5, 1776, followed by the South Carolina Constitution, which was adopted on March 26, 1776. The Virginia Constitution was adopted on June 29, 1776. See Willi Paul Adams, *The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era,* trans. Rita Kimber and Robert Kimber (1980; reprint, Lanham, Md.: Rowman and Littlefield, 2001), 66–71.

4. The Montana Constitution of 1972, Louisiana Constitution of 1974, and Georgia Constitution of 1983 have taken effect more recently. Illinois and North Carolina also adopted constitutions that took effect on July 1, 1971, along with Virginia. See Robert L. Maddex, *State Constitutions of the United States* (Washington, D.C.: CQ Press, 1998), 406.

political thought and development throughout the course of American history, whether in regard to defining a way of life, establishing citizenship, distributing political power, limiting governmental power, or managing conflict.[5]

For the most part, Virginia constitution-makers have adopted institutions and provisions that are broadly in keeping with other state constitutions. Thus, the first Virginia Constitution embodied the natural-rights philosophy that was also influential in the drafting of other eighteenth-century state constitutions. The framers of Virginia's mid-nineteenth-century constitutions were concerned with resolving the same sorts of sectional disputes and enacting similar kinds of restrictions on legislative power as in other state conventions of the mid-nineteenth century. Similarly, the drafters of each of Virginia's post–Civil War constitutions struggled with issues of equality for African Americans in much the same fashion as other southern constitution-makers throughout this period.

In several respects, though, Virginia constitution-makers have taken a distinctive approach and have made decisions not widely shared by other states. In defining a way of life, for instance, the Virginia Constitution contains clauses that are as explicit as any state constitution in outlining the fundamental goals of the polity and prescribing the characteristics of a virtuous citizenry. In distributing political power, Virginia was one of the last states in the nineteenth century to provide for the direct election of the governor and the executive veto, and it is currently the only state to prohibit the governor from serving more than a single consecutive term. Moreover, in the twenty-first century Virginia is the only state to provide for legislative nomination and election of all judges.

Defining a Way of Life: Natural Rights, Republicanism, and Citizen Virtue

Whereas the drafters of the U.S. Constitution refrained from spelling out the various principles underlying the regime, in part because the Declaration of Independence had already done so, state constitution-makers have generally been more explicit about specifying the fundamental goals of the polity and the virtues needed to sustain it. The Virginia Constitution is as explicit as any state constitution in defining these goals and virtues.

Given that the Virginia Constitution was adopted less than a week before

5. For a discussion of these changes and currents throughout Virginia constitutional development, see A. E. Dick Howard, *Commentaries on the Constitution of Virginia,* 2 vols. (Charlottesville: University Press of Virginia, 1974).

the Declaration of Independence, it is no surprise that the natural-rights philosophy that was embodied in Jefferson's Declaration of Independence was also influential in George Mason's Virginia Bill of Rights. The first provision of the 1776 constitution's bill of rights therefore stipulates "that all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety" (Article I, Section 1). Subsequent provisions of the Virginia Bill of Rights go on to declare that the only acceptable form of government is republicanism, and that the people retain the right to change a government that ceases to be republican in form: "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them" (Article I, Section 2). And in language that also echoes the Declaration of Independence, "Government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . . and, when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish it, in such manner as shall be judged most conducive to the public weal" (Article I, Section 3).

Although these types of provisions were included in a number of other original state constitutions, Virginia constitution-makers have gone further than most in recognizing that republican government depends for its sustenance on the encouragement of certain virtues and discouragement of various vices. Benjamin Franklin is said to have responded to a query about what type of government the federal convention delegates had created by saying, "A republic, if you can keep it." Along these lines, Virginia constitution-makers were intent on providing explicit guidance to future generations about how a republic could be kept. Thus, a provision of the Virginia Bill of Rights that has seen only minor changes from the 1776 constitution to the present stipulates "that no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles" (Article I, Section 15). In addition, in a clause that was embedded in the religious-liberty provision of the bill of rights and has remained unchanged since 1776, Virginians are counseled that "it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other" (Article I, Section 16).

Through the years, Virginia constitution-makers have also taken specific steps to promote a virtuous citizenry. Virginia is one of the vast majority of states that adopted prohibitions on lotteries in the mid-nineteenth century,

out of a desire to discourage vices associated with games of chance (constitution of 1851, Article IV, Section 33).[6] Virginia also joined a number of late-nineteenth- and early-twentieth-century constitution-makers in ensuring that the legislature possessed adequate power to regulate or prohibit liquor consumption and thereby reduce the attendant vices (constitution of 1902, Article IV, Section 62). Beginning in the late nineteenth century, Virginia constitution-makers also sought to compel parents to allow their children to avail themselves of an education and the accompanying development of character traits.[7]

Establishing Citizenship: Struggles over Property Requirements and Racial Equality

Questions of citizenship, and in particular suffrage, have been among the most contentious of any issue faced by Virginia constitution-makers. For the first three quarters of a century, Virginia constitution-makers were preoccupied, along with their counterparts in other states, with the question of whether suffrage and representation should depend in any way on property holding.[8] Specifically, they were concerned with whether to require property holding as a condition for voting and whether to apportion legislative districts, in part, on the basis of taxation. In fact, these were the central questions debated at the 1829–1830 convention, which included former presidents James Madison and James Monroe, future president John Tyler, sitting U.S. chief justice John Marshall, future associate justice Philip Barbour, and past and future congressman John Randolph. During an extended debate that delved into fundamental questions that had gone largely unaddressed in the federal convention of 1787, a number of delegates to the Virginia convention of 1829–1830 argued that property was entitled to rep-

6. This provision was eliminated in the 1971 constitution.

7. Along these lines, the 1870 constitution granted the general assembly the power, "after a full introduction of the public free-school system, to make such laws as shall not permit parents and guardians to allow their children to grow up in ignorance and vagrancy" (Article VIII, Section 4). The 1902 constitution went on to permit the general assembly, "in its discretion," to "provide for the compulsory education of children between the ages of eight and twelve years" (Article IX, Section 138). The 1971 constitution is even more firm in declaring that it shall be a mandatory policy that the general assembly "shall provide for the compulsory elementary and secondary education of every eligible child of appropriate age" (Article VIII, Section 3).

8. See Merrill D. Peterson, ed., *Democracy, Liberty, and Property: The State Constitutional Conventions of the 1820s* (Indianapolis: Bobbs-Merrill, 1966); and Laura J. Scalia, *America's Jeffersonian Experiment: Remaking State Constitutions, 1820–1850* (De Kalb: Northern Illinois University Press, 1999).

resentation. For instance, Abel Upshur argued, "The very idea of society, carries with it the idea of property, as its necessary and inseparable attendant. History cannot show any form of the social compact, at any time, or in any place, into which property did not enter as a constituent element, not one in which that element did not enjoy protection in a greater or less degree. Nor was there ever a society in which the protection once extended to property, was afterwards withdrawn, which did not fall an easy prey to violence and disorder." On the other hand, several delegates contended, along with John Cooke, that "the Bill of Rights declares, that *the people* are the only legitimate source and fountain of political power" and that "in apportioning representation, or political power, regard shall be had to *the people* exclusively. Not to wealth, not to overgrown sectional interests, not to the supposed rights of the counties; but to the white population; to *the people* only." The convention ultimately adjourned without making much progress toward eliminating the landholding requirement or moving in the direction of a more equitable apportionment.[9] As a result, these same questions were again taken up at the 1850–1851 convention, at which time delegates from the West finally prevailed over their counterparts from the East and adopted white-manhood suffrage, as well as a legislative apportionment scheme that came closer to being based on population.[10]

An equally contentious question, which was debated at length in the conventions of 1867–1868 and 1901–1902, concerned the rights of African Americans. The drafters of the 1870 constitution added a section to the bill of rights guaranteeing "equal civil and political rights and public privileges" (Article I, Section 20).[11] As was the case in many southern states, however, African Americans did not attain full equality for another century, due in large part to a series of disenfranchisement provisions that were adopted in a series of turn-of-the-twentieth-century conventions. The crucial steps to-

9. *Proceedings and Debates of the Virginia State Convention of 1829–30* (Richmond: Ritchie and Cook, 1830), 70, 58 (emphasis in original). On these debates in the 1829–1830 convention, see Dickson D. Bruce, *The Rhetoric of Conservatism: The Virginia Convention of 1829–30 and the Conservative Tradition in the South* (San Marino, Calif.: Huntington Library, 1982); and Robert P. Sutton, *Revolution to Secession: Constitution Making in the Old Dominion* (Charlottesville: University Press of Virginia, 1989).

10. On the 1850–1851 convention, see Frances Pendleton Gaines, "The Virginia Constitutional Convention of 1850–1851: A Study in Sectionalism" (Ph.D. diss., University of Virginia, 1950).

11. Then, so as to leave no doubt about the effect of this provision, delegates to the convention of 1867–1868 added another clause stating, "The declaration of the political rights and privileges of the inhabitants of this State is hereby declared to be a part of the constitution of this commonwealth, and shall not be violated on any pretence whatever" (Article I, Section 21). On the 1867–1868 convention, see James D. Smith, "The Virginia Constitutional Convention of 1867–1868" (master's thesis, University of Virginia, 1956).

ward the disenfranchisement of African Americans in Virginia were taken in the 1901–1902 convention. In an effort to reduce African American voter turnout, and out of a concern with addressing increasing instances of voter fraud, convention delegates considered a number of proposals before deciding to require all voters to pay a poll tax to "give a reasonable explanation" of any section of the constitution when asked to do so by a voting registrar (Article II, Section 19).[12] On its face, this provision would not necessarily have a discriminatory effect, but as delegate Alfred P. Thom made clear in the convention proceedings, "I do not expect an understanding clause to be administered with any degree of friendship by the white man to the suffrage of the black man." As he explained, "We do not come here prompted by an impartial purpose in reference to negro suffrage. We come here to sweep the field of expedients for the purpose of finding some constitutional method of ridding ourselves of it forever."[13] These restrictions, which had their intended effect of disenfranchising significant numbers of African American voters but also depressed white turnout over the next several decades, were not fully overcome until the issuance of several federal statutes and court rulings in the 1960s.

The only remaining suffrage limitations in the 1971 Virginia Constitution at the present time, aside from the standard age and residency requirements, concern felony convictions and mental competency. Felons are disenfranchised unless their "civil rights have been restored by the Governor or other appropriate authority." And "no person adjudicated to be mentally incompetent shall be qualified to vote until his competency has been reestablished" (Article II, Section 1).

Creating a Form of Government and Distributing Political Power: Variations on Executive Power and Judicial Selection

Virginians have followed the general patterns of constitution-making in most other states in creating a form of government and distributing political power, but they have also charted their own path in several areas, particularly in regard to the executive and judiciary.

As was made clear in the bill of rights, the only acceptable form of government for Virginia is a republic, which is understood to be distinct not

12. Analyses of the 1901–1902 convention include Wythe Holt, *Virginia's Constitutional Convention of 1901–1902* (New York: Garland Publishing, 1990); and Ralph Clipman McDanel, *The Virginia Constitutional Convention of 1901–1902* (Baltimore: Johns Hopkins University Press, 1928).

13. *Report of the Proceedings and Debates of the Constitutional Convention, State of Virginia, 1901–1902,* 2 vols. (Richmond: J. H. Lindsay, 1906), 2972–73.

only from a monarchy but also from a direct democracy. Although just over half of the states permit citizens to participate directly in governance through the initiative, referendum, or recall, Virginia constitution-makers have rejected any such departures from a republican form of government. Initiative and referendum proposals were introduced in Virginia during the Progressive Era, as they were in so many states across the country, but they were no more successful in Virginia than in other southern states during this period.[14] As a result, opportunities for direct participation in governance have been limited to several exceptional cases in which Virginia constitution-makers concluded that popular referenda could supplement representative institutions. For instance, drafters of the 1851 constitution were at a loss about how to resolve the long-standing dispute between eastern and western counties regarding the basis of legislative apportionment, and, after much debate, they turned to a popular referendum to settle the matter. Thus, in a section that was repealed before it could actually come into play, it was provided that in case the general assembly failed to agree on an apportionment plan at a future date, the people would be asked to select from among various possible rules of apportionment in a statewide referendum (Article IV, Section 5). A more enduring referendum provision was adopted in 1928 and has been retained in the current constitution and prevents the legislature from authorizing debt for capital projects without first obtaining the approval of the people (constitution of 1971, Article X, Section 9[b]).

Turning to the distribution of power among the legislature, executive, and judiciary, Virginia constitution-makers have occasionally experimented with a different set of institutional arrangements than are found in the vast majority of states. In regard to the executive branch, Virginia was much more reluctant than other states to provide for the independence and power of the governor. It was not until 1851, after all but one other state had already made such a change, that the governor ceased to be appointed by the legislature and became an elective officer.[15] Moreover, it was not until 1870, after all but five other states had taken such a step, that the governor was given veto power.[16] By the turn of the twentieth century, though, the position of the governor had been strengthened to the point that it had been brought in line with governors in other states. In fact, in 1902 Virginia not only adopt-

14. See David D. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* (Philadelphia: Temple University Press, 1989), 271.

15. South Carolina was the last state to make this change, in 1865. See Howard, *Constitution of Virginia,* 2:577.

16. Only West Virginia, Delaware, Ohio, Rhode Island, and North Carolina waited longer to adopt the veto. See John A. Fairlie, "The Veto Power of the State Governor," *American Political Science Review* 11 (August 1917): 473, 476–77.

ed the line-item veto but also became one of the first two states to provide for the amendatory veto, which empowers the governor to return bills to the legislature with specific recommendations for items he wants changed (Article V, Section 76).[17] Although the executive article in the Virginia Constitution is now quite similar to other state constitutions, in one important respect it is unique, in that Virginia is now the only state that prohibits governors from serving a second consecutive term (constitution of 1971, Article V, Section 1).[18]

The judiciary article in the Virginia Constitution is also distinctive, particularly in regard to the mode of selection of judges. Originally, Virginia provided that judges would be appointed by the legislature and would serve during good behavior. The logic of this approach was best expressed by Lucas Thompson when the issue of judicial selection arose in the convention of 1829–1830:

> The question was, what body was the safest depository for the appointing power? Certainly not the people; for they were not in a situation to perform the duty. In what body, then, was the trust to be reposed? There were objections to each. He had once thought it best to give it (after the example of some other States, and of the United States), to the Governor and Senate; but he had heard strong objections to this plan, and recent events in the Federal Government had discouraged such an idea. Then, it must be given to the Legislative body.[19]

As was the case with nearly all states that held conventions in the mid-nineteenth century, the 1851 constitution introduced popular election of judges and also established twelve-year terms for supreme court judges and eight-year terms for judges on other courts of record. Although many states continued to provide for partisan or nonpartisan judicial elections, this arrangement did not last for long in Virginia. The 1870 constitution retained the limited terms of office but reverted to legislative election of judges. Despite some debate among Virginia constitution-makers in the twentieth century about adopting various other modes of judicial selection, such as gubernatorial appointment or a merit selection system, Virginia is the only state that currently provides for legislative nomination and election of judges (constitution of 1971, Article IV, Section 7).[20]

17. Alabama was the first state to adopt the amendatory veto, in 1901, and Virginia followed suit the next year.

18. Kentucky eliminated its one-term limit in 1992, leaving Virginia as the only state with such a provision.

19. *Proceedings and Debates of 1829–30,* 602.

20. In Connecticut, the legislature appoints judges from a list of names submitted by the governor, which in turn comes from a list identified by a nominating commission. In South

Limiting Governmental Power: Procedural and Substantive Restrictions and Communitarian and Positive-Rights Provisions

The Virginia Constitution, as with most state constitutions, contains more limits on governmental power than are found in the U.S. Constitution. This is due in part to the fact that in seeking to restrain a government of plenary, rather than enumerated, powers, Virginia constitution-makers have found it necessary to make explicit mention of any restrictions on governmental power. The greater number of constitutional limitations can also be attributed to the frequency with which Virginians have revised their constitution throughout the years. These numerous opportunities for revision have provided more chances to circumscribe governmental, specifically legislative, power in response to developments that have been shown to be inimical to the public interest.

The Virginia Constitution contains a variety of procedural limitations intended to ensure that laws are enacted in a public, general, and deliberate fashion. The 1851 constitution was one of many mid-nineteenth-century state constitutions to require bills to encompass a single subject and to include an accurate and complete title (Article IV, Section 16). Meanwhile, the 1902 constitution followed a number of late-nineteenth-century state constitutions in prohibiting the enactment of local, special, or private legislation in a wide range of areas (Article IV, Section 63). In these respects, Virginia constitutional development parallels the vast majority of states. In one sense, though, Virginia has gone further than many states in providing a particularly detailed set of constitutional restrictions on the process by which bills are enacted. In addition to the usual three-reading requirement, the Virginia Constitution also provides that no bill shall become law unless it has been "referred to a committee of each house, considered by such committee in session, and reported," as well as "printed by the house in which it originated prior to its passage," among other rules (constitution of 1971, Article IV, Section 11).

Virginia constitution-makers have also enacted several substantive limits that prohibit the legislature from taking any action at all in certain areas in which legislatures are seen as incapable of acting in the public interest. The 1851 constitution was the first to adopt a restriction of this sort, when Virginia constitution-makers found it necessary to respond to significant increases in public debt that were attributed to legislative participation in in-

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Carolina, the legislature elects judges from a list of names identified by a nominating commission. Only Virginia provides for legislative nomination and election. See *The Book of the States, 2002* (Lexington, Ky.: Council of State Governments, 2002), 34:209–11.

ternal improvements. At the time, the principal concern was with ensuring that the legislature could not "pledge the faith of the State, or bind it in any form, for the debts or obligations of any company or corporation" (Article IV, Section 28). Drafters of the 1870 constitution went even further in limiting internal improvements and state debt. The legislature was prohibited from granting the credit of the state "to, or in aid of, any person, association, or corporation," from "subscrib[ing] to or becom[ing] interested in the stock of any company, association, or corporation," or "be[ing] a party to or becom[ing] interested in any work of internal improvement." In addition, "No other or greater amount of tax or revenue shall at any time be levied than may be required for the necessary expenses of the government, or to pay the existing indebtedness of the State." Finally, "No debt shall be contracted by this State except to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war" (Article X, Sections 7, 12, 14, 15, and 20). An additional step was taken along these lines in 1928 to impose various limits on state debt for capital projects. These limitations have generally been retained in the current constitution, though some have been modified and still others have been added (constitution of 1971, Article X, Section 9).

The Virginia Bill of Rights was the first such document drafted during the founding era, and it had an influence not only on the Declaration of Independence but also on other state bills of rights.[21] For the most part, succeeding generations of Virginia constitution-makers have declined to make significant alterations to the original document. Various clauses were added in the 1870 constitution to achieve particular purposes such as the abolition of slavery, but these were largely eliminated in the 1902 constitution. Rights of free speech (1830) and assembly (1971) were also added throughout the years, as was an explicit guarantee of the right to keep and bear arms (1971). In general, though, the Virginia Bill of Rights has not departed significantly from its original provisions, nor has it deviated from the general patterns found in other state bills of rights through the years.

As is common in a number of other states, Virginia constitution-makers have framed several rights provisions in communitarian rather than libertarian terms, insofar as they recognize limits and responsibilities associated with the granting of rights. The free-speech clause in the current Virginia Constitution, for instance, states, in language that first appeared in 1870, "that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right" (constitution of 1971, Article I, Section 12). In addition, the 1971 constitution added to the provi-

21. The two states that adopted constitutions prior to Virginia (New Hampshire and South Carolina) had not drafted bills of rights. See Howard, *Constitution of Virginia,* 1:35.

sion titled "Qualities Necessary to Preservation of Free Government" a statement to the effect that a free government depends on "the recognition by all citizens that they have duties as well as rights, and that such rights cannot be enjoyed save in a society where law is respected and due process is observed" (Article I, Section 15). As the 1969 Constitutional Revision Commission explained, in regard to the origin of this clause, "The Commission recognizes that citizenship implies duties as well as rights and believes that in a time of increasing tempo of social change language regarding respect for orderly processes of change is merited."[22]

Virginia has also followed a number of other states in providing more detailed and strict prohibitions on governmental support of religious institutions than are found in the U.S. Constitution. Not only does the religious-liberty clause in the Virginia Bill of Rights prohibit the conferring of "any peculiar privileges or advantages on any sect or denomination" (constitution of 1971, Article I, Section 16), but an additional clause in the current legislative article (first added in 1902) goes on to prevent the general assembly from "mak[ing] any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society" (constitution of 1971, Article IV, Section 16).

Finally, during the late twentieth century, Virginia, to a limited extent, joined a number of other states in providing for the protection of positive rights, which depend for their enforcement on governmental action. For instance, the 1971 constitution requires the creation of "an effective system of education throughout the Commonwealth" (Article I, Section 15), and it also commits the commonwealth to "protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people" (Article XI, Section 1). Moreover, in an amendment that took effect in 1997, Virginia joined a number of states that have sought in recent years to protect the rights of crime victims to go along with the existing fair-trial guarantees for criminal defendants. In particular, the clause provided, in part, that "in criminal prosecutions, the victim shall be accorded fairness, dignity and respect by the officers, employees and agents of the Commonwealth and its political subdivisions and officers of the courts" (Article I, Section 8-A). Another amendment that was added to the body of the constitution in 2001 and has also enjoyed increased support in several state constitutions in recent years guarantees that "the people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the general assembly may prescribe by law" (Article XI, Section 4).

22. *Report of the Commission on Constitutional Revision* (Charlottesville: Michie, 1969), 99.

Managing Conflict: Innovations in Constitutional Revision

When it comes to creating a mechanism for managing conflict and providing for change, Virginia constitution-makers have experimented with various approaches over the years. One approach, which was followed for nearly a century, was simply not to provide any formal mechanism for constitutional change. The 1776 constitution did not make any such provision, but it was not alone in this regard among the original states.[23] However, even as these states moved to amendment and revision procedures in the late eighteenth and early nineteenth centuries, Virginia constitution-makers continued to reject any formal proposals to provide for future constitutional changes. As John Randolph argued when the issue surfaced in the 1829–1830 convention,

> Gentlemen, as if they were afraid that this besetting sin of Republican Governments, this *rerum novarum lubido,* this *maggot* of innovation, . . . would cease to bite, are here gravely making provision, that this Constitution, which we should consider as a remedy for all the ills of the body politic, may itself be amended or modified at any future time. Sir, I am against any such provision, I should as soon think of introducing into a marriage contract a provision for divorce; and thus poisoning the greatest blessing of mankind at its very source—at its fountain head.[24]

Of course, the fact that multiple conventions were held during this period indicates that the lack of a formal revision procedure did not prevent legislatures from calling conventions. Nevertheless, it was not until 1870 that the Virginia Constitution included a provision titled "Future Changes in the Constitution" (Article XII).

The 1870 constitution not only permitted amendments but also contained a convention procedure that had its origins in Thomas Jefferson's belief that each generation should have the chance to remake its constitution. Jefferson had written in a 1789 letter to Madison that "no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation." Based on his calculation that a generation passed every nineteen years, he concluded, "Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right."[25] Several states in the late eighteenth and early nine-

23. John R. Vile, *The Constitutional Amending Process in American Political Thought* (New York: Praeger, 1992), 25.

24. *Proceedings and Debates of 1829–30,* 789.

25. Jefferson to Madison, September 6, 1789, in *The Papers of Thomas Jefferson,* ed. Julian Boyd et al. (Princeton: Princeton University Press, 1958), 15:396.

teenth centuries had adopted some version of this Jeffersonian theory, permitting the people to vote at periodic intervals on whether to call a constitutional convention. Virginia constitution-makers eventually came around to the wisdom of such a provision, albeit for only a brief period, when they drafted the 1870 constitution. In particular, they mandated that the people would have the opportunity to vote, "in each twentieth year," on the following question: "Shall there be a convention to revise the constitution and amend the same?" (Article XII). This requirement for periodic submission of a convention question is now found in fourteen state constitutions, but it did not survive for long in Virginia, as it was eliminated by a 1901–1902 convention that was so unwilling to permit popular participation in constitutional change that it did not even submit its own work to the people for ratification.[26]

The possibility that the legislature might call a constitutional convention was retained, however, and at the present time conventions can be called by a two-thirds vote in both houses of the general assembly, and the work of the convention must then be submitted to the people for ratification (Article XII, Section 2). In addition, amendments can be approved by securing a majority vote in both houses in consecutive sessions that are separated by an intervening election, and then by securing the approval of a majority of voters casting ballots on the question (Article XII, Section 1).

Conclusion

James Quayle Dealey remarked in the early twentieth century that "from state constitutions far better than from the national constitution can be traced the really important stages in the march of American democracy since 1776," whether in regard to the "growth in the notion of rights," the "rise of manhood suffrage," or the "developing emphasis on morals," among other advances.[27] The development of the Virginia Constitution is particularly illustrative in this regard, given that Virginians drafted one of the earliest constitutions in the founding era, as well as one of the most recent constitutions in the latter part of the twentieth century. In the 1776 constitution one encounters an explicit statement of the natural-rights philosophy underlying both state and federal governments. Drafters of the 1829–1830 and

26. On this mode of constitutional revision, see Robert J. Martineau, "The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People's Right to Reform Their Government," *Ohio State Law Journal* 31 (1970): 421–55.

27. Dealey, *Growth of American State Constitutions from 1776 to the End of the Year 1914* (Boston: Ginn, 1915), 11, cited in G. Alan Tarr, *Understanding State Constitutions* (Princeton: Princeton University Press, 1998), 4n12.

1850–1851 constitutions undertook extended debates about fundamental concepts such as suffrage and representation, particularly in regard to property and geography. Framers of the 1870 and 1901–1902 constitutions continued to struggle with these same issues, albeit in regard to African Americans. Finally, the 1971 constitution brought about a modernization of governing institutions in a number of respects.

MID-WESTERN STATES

United by common roots in the Northwest Ordinance, the states of the Midwest wrote constitutions that were defined by the parameters of the ordinance yet reflected the unique cultural and political realities within each state.

The Indiana chapter challenges individualistic assumptions about liberal constitutional theory that, in turn, pose a challenge to individualistic assumptions about the region. Specifically, the author argues that Indiana constitutionalism is animated by the premise that citizenship is grounded on individual responsibility. This premise, in turn, shapes the other elements of Indian's constitution.

For those familiar with Wisconsin's political history, its constitutionalism and its classification here may be a bit surprising. In the case of Wisconsin, it is apparent that the seed of progressivism, which took root in the state's western neighbors, lay dormant in the state until the political environment allowed it to develop. Arguing that documents rejected by a people tell as much as those accepted by them, the author suggests that the constitution of 1848 reflected practical considerations and strategic decisions more than progressive principles.

JEREMY WALLING

Understatement and the Development of Illinois Constitutionalism

Illinois adopted three constitutions in the fifty-two years between the state's founding and the ratification of a post–Civil War constitution in 1870.[1] In 1870, the state convention produced and Illinois voters ratified a document that proved extremely resistant to change. The 1870 constitution required amendments to be passed by a majority of citizens voting in the election. Voting reforms adopted in Illinois in the late 1800s included the introduction of the Australian ballot. Although voters under a straight-ticket election regime would vote along with the party's stance on amendments, following the 1891 reform, amendments would be voted on separately. Thus, the increase in the denominator combined with voter roll-off made amendment ratification extremely difficult. Citizens rejected a proposed constitution in 1922, and a 1934 convention referendum failed. The 1950 "gateway" amendment eased amendment requirements by allowing approval either by two-thirds of those voting on the amendment or by a majority of those voting in the overall election. One hundred years of stunted attempts at constitutional change culminated in the passage of the state's fourth constitution in 1970.

The evolution of the Illinois Constitution includes six conventions and four documents. Practical success in Illinois constitutional development appears dependent on the lack of overt partisanship and, eventually, the veto power of Chicago. Theoretical success is judged by the fulfillment of the principles enumerated in the template established by Donald S. Lutz.[2] The

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1. Many of the references to the dates of constitutional revision in Illinois were extracted from Cynthia Browne, *State Constitutional Conventions: From Independence to the Completion of the Present Union, 1776–1959* (Westport, Conn.: Greenwood Press, 1977).

2. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State Uni-

1818 and 1970 Illinois Constitutions, as the foundation and contemporary documents, respectively, are examined using this unique approach. In addition, fundamental changes and innovations of the 1848 and 1870 constitutions will be presented. Finally, state history and political culture will be used to inform a discussion of the major reforms and political battles that punctuated constitutional development in Illinois.

States in the U.S. Constitution

The U.S. Constitution's framers' ostensible purpose was to delineate and limit the national government. As a result, the Constitution contains very little information regarding the states. What little is mentioned pertains to the promotion of amity between states and the creation and admission of new states. The "full faith and credit" and "privileges and immunities clauses" of Article IV seem designed not only to encourage harmonious relations between states but also to promote seamless intercourse for citizens dealing with multiple states. Article IV, Section 3, outlines the vague manner in which new states will be accepted into the Union by Congress. The only direct order with respect to the acceptable structural form of state governments is that they be republican (Article IV, Section 4).

"Federalist no. 39" contains Madison's hard sell to the states regarding their apparently monumental impact on the creation and maintenance of the U.S. government. States were initially responsible for determining the composition of the U.S. Senate (Article I, Section 3). However, the Seventeenth Amendment, ratified in 1913, reassigned this duty to the people by instituting direct election. Article II, Section 1, charges states with organizing and overseeing presidential electors. In addition, states are collectively responsible for approving changes to the Constitution (Article V). Finally, the Tenth Amendment grants states a vague mass of "reserved" power. However, reserved powers can be unequivocally trumped by the supremacy clause (Article VI). Ultimately, a fundamental impact of the U.S. Constitution on state constitutions is its capacity to act as a paragon for fledgling territories with the lofty goal of statehood. Illinois constitutional history is replete with examples of wholesale theft, not only from the U.S. Constitution but also from the constitutions of its neighbors.

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versity Press, 1988) and "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 27–44.

The Evolution of the Illinois Constitution

A fraction of the geography that became Illinois was formally instituted as a Virginia county in December 1778. The bulk of the inhabitants were Native Americans, although French, Spanish, and British settlers claimed much of the land. The white population of the region was estimated to be about two thousand. In 1794, Virginia ceded its claim on the region to the United States, primarily due to Virginia's lack of adequate governance over the county and the ensuing state of anarchy. The costs of dealing with insistent squatters, countless land claims, Indian hostility, and Spain's repeated blockade of the Mississippi hardly outweighed the benefits of the natural resources and landmass. The chaotic settlement lost population between 1765 and 1790. However, the Northwest Territory, as the region was formally identified, seated a delegate in the U.S. Congress in December 1799. In 1812, the territory elected its first legislature, which almost immediately set liberal suffrage requirements for freemen.[3] This provision would carry over into the state's initial constitution.

In December 1817, the Illinois territorial legislature submitted to Congress a petition to advance to statehood. The request was preceded by the formal acceptance of its regional neighbors into the United States: Kentucky in 1792, Ohio in 1803, and Indiana in 1816. In addition, Missouri had begun the process of applying for statehood. The regional race to statehood provided the territory of Illinois both the impetus and the template for its own development. The first constitutional convention of Illinois assembled in August 1818. Illinois subsequently held constitutional conventions in June 1847, January 1862, December 1869, January 1920, and December 1969. The 1818, 1848, and 1870 constitutions exhibit experimentation with respect to the distribution of government power, the pendulum swinging from legislative to executive dominance. In addition, the issue of citizenship in general, and slavery specifically, proved a formidable obstacle to the design of the state's first three constitutions. The failed attempts at constitutional revision in 1862 and 1920 reveal public dissatisfaction with the appearance of excessive partisanship in the convention process.[4] The current Illinois Constitution conspicuously suggests the century that intervened since the adoption of the prior constitution in 1870. However, with one hundred years of social, political, and technological advancement taken into account, a striking amount of the original 1818 model remains in the 1970 document.

3. Arthur Clinton Boggess, *The Settlement of Illinois, 1778–1830* (Freeport, N.Y.: Books for Libraries Press, 1908), 12, 45, 70, 114.

4. Janet Cornelius, *Constitution Making in Illinois, 1818–1970* (Urbana: University of Illinois Press, 1972), xiv.

The Constitution of 1818

Janet Cornelius argues that the 1818 Illinois Constitution was characteristic of frontier constitutions, in that it was "short and rudimentary" and the document's framers exhibited "impatience" and "improvisation." Furthermore, the eagerness of the convention to draft a constitution quickly led to the pilfering of preexisting constitutions. The preamble and Article I, which delineates the separation of powers, "strongly resemble the wording of corresponding provisions in the Indiana and Kentucky constitutions." Arthur Clinton Boggess suggests that "the character of the state government of Illinois shows the character of the settlers." Most state officers and congressional delegations were southern, many of them hailing from Kentucky.[5] It should be remembered that Illinois developed from its southern Egypt region toward the north as Chicago morphed into a monstrous financial and industrial powerhouse that would eventually dominate and occasionally disrupt state politics. That the framers' concerns in 1817 were primarily agrarian is exhibited in the nature of the founding document.

The Role of the People in the Constitution

The people of Illinois assert their authority in the preamble of the 1818 constitution. Much of the preamble to the U.S. Constitution was lifted by the Illinois framers, with the slight modification of a word or two. It is clearly stated in the preamble that the people "ordain and establish" the constitution, and do "mutually agree with each other to form themselves into a free and independent state, by the name of the State of Illinois." However, republican government is implied in that the people took this action "by their representatives in convention."[6] The authority of the people is further evident in Article II, Section 17, which mandates that state laws will begin with these words: "Be it enacted by the people of the State of Illinois, represented in the General Assembly." All writs and prosecutions are to begin in similar fashion. Finally, the state's bill of rights declares, "All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness" (Article VIII, Section 2). The Illinois framers punctuated the initial constitution with repeated references to the ultimate authority of the people, as tempered by the imposition of republican government.

A constitution should provide "the technology for achieving the good life."[7] It does so by defining values and outlining the method of justice. The

5. Ibid., 11; Boggess, *Settlement of Illinois,* 145.
6. Boggess, *Settlement of Illinois,* 145.
7. Lutz, "Purposes of State Constitutions," 31.

value stated most frequently, and with the most clarity, in the 1818 Illinois Constitution is freedom. The stated purpose of the bill of rights is to secure "the general, great and essential principles of liberty and free government" (Article VIII). The bill of rights submits that "all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness" (Section 1). Section 2 argues that free government is created to ensure "peace, safety, and happiness." The right of religious freedom, both expression and protection from compulsion, is supported by Section 3. Section 18 states, "A frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty." Justice and fairness are evident in Section 14: "All penalties shall be proportioned to the nature of the offense, the true design of all punishments being to reform, not to exterminate mankind." Despite its vagueness, this clause indicates that the Illinois framers supported the value of reform and a sense of just penalties for crimes.

As discussed above, the freedoms of expression found in the First Amendment of the U.S. Constitution are restated throughout the 1818 Illinois Bill of Rights. The criminal protections enumerated in the U.S. Bill of Rights and later incorporated by the U.S. Supreme Court were also discussed above. A way of life is vaguely described in the bill of rights of the 1818 Illinois Constitution. Freedom is to be prized, a higher power is acknowledged, and people are to be protected from improper government action. The chief problem with this way of life, incrementally clarified by later revisions of the constitution, is that it was not inclusive.

A constitution should also distinguish between a people and a public. The people participate and share in the way of life described in the constitution. The public has the responsibility for governing. A full citizen "can hold office as well as help determine who holds office."[8] Article II, Section 27, states that voters must be white, male, at least twenty-one years old, and a state resident for six months. Section 31 mandates that all white inhabitants be counted every five years. In addition to nonwhites and women, the general assembly reserved the right to exclude convicts from the electoral process (Section 30). These individuals were ostensibly included in the people, but were not part of the public. However, since the state would be admitted as a free state that preserved existing slavery property rights, slaves did not enjoy the liberty championed throughout the 1818 document. The children of slaves were to become free at the age of twenty-one for males and eighteen for females (Article VI, Section 3).

8. Ibid.

Lutz defines a citizen as one who can both elect and be elected. Therefore, the definition of citizenship in the 1818 Illinois Constitution was extremely limited. The qualifications for members of the general assembly were U.S. citizenship, state and electoral district residency, and the age of twenty-one for the house and twenty-five for the senate. The governor and lieutenant governor were to be thirty years old and U.S. citizens for thirty years. Thus, full citizens included only white males ages thirty and above who were inhabitants of Illinois and longtime citizens of the United States. The state, along with the United States, would struggle with redefining citizenship over the next one hundred years.

The Structure and Function of Government

The 1818 preamble implied the republican guarantee found in Article IV of the U.S. Constitution. Illinois government would be representative. Following the preamble, the constitution proper immediately separated the powers of government. Article I, Section 1, divided governmental power into legislative, executive, and judicial branches. Section 2 enforced the separation, prohibiting a member of any branch from enjoying powers distinctly granted to another. Theodore Calvin Pease argues that "territorial experience with governors and judiciaries united with current political theory to leave the judiciary subject to the regulation of the legislature and to entrust the governor and judges sitting as a Council of Revision only a veto power that could be and usually was overridden by a majority of members elected to the legislature."[9] The Illinois framers utilized this territorial constitution paradigm.

Unsurprisingly, the Illinois legislature mirrored the U.S. Congress. Article II, Section 1, stated that the legislature, called the general assembly, would consist of a popularly elected senate and house of representatives. Each house was to be led by a Speaker, the lieutenant governor serving as the Speaker of the senate (Section 7). The size of the house was to be fixed by the general assembly, and was to be set at between twenty-seven and thirty-six (Section 5). The number of senators was mandated to be between one-third and one-half the size of the house. Representatives were required to be twenty-one years old, U.S. citizens, inhabitants of the state, and residents of their district for one year (Section 2). Senators were required to be twenty-five years old (Section 6). House members were elected to two-year terms, whereas senators enjoyed four-year staggered terms. Thus, the notion of the senate as the upper house, apparent in the U.S. Constitution, was reflected in the Illinois legislature. The general assembly was charged with setting the

9. Pease, *The Story of Illinois* (Chicago: University of Chicago Press, 1925), 76.

pay of executive officers (Section 18). As at the national level, the house was given the power of impeachment and the senate the power of judgment (Section 22). In another bit of theft from the U.S. Constitution, the house alone had the power to raise revenue (Section 32).

The 1818 constitution designed a limited chief executive. The governor enjoyed a four-year term, but was not allowed immediate succession (Article III, Section 3). Governors were required to be thirty years old, citizens of the United States for thirty years, and inhabitants of Illinois for two years. The governor was granted the power to provide a state-of-the-state address (Section 4), to grant pardons and reprieves (Section 5), and to call special sessions of the general assembly on "extraordinary occasions" (Section 9). Finally, the governor was commander-in-chief of the state militia (Section 10). Section 13 mandated that the lieutenant governor be elected independently, for the same term length, and have the same minimum qualifications as the governor. As Speaker of the senate, the lieutenant governor was charged with breaking ties (Section 14). The governor appointed, and the senate subsequently approved, a secretary of state (Section 20) and other unspecified executive officers (Section 22). However, the general assembly was given the power to appoint the treasurer and state printer (Section 21). Furthermore, late in the constitution's schedule, the general assembly was given the power to appoint a public auditor and attorney general "if necessary" (Schedule, Section 10).

A particularly restrictive aspect of the governor's power under the 1818 constitution was his seat on the Illinois Council of Revision with the state supreme court justices (Section 19). Rather than give the power of signing or vetoing bills solely to the governor, Illinois framers designed a board charged with collectively considering the merits of potential legislation. The council would send its objections to the house in which a bill originated. The bill could subsequently be passed by a simple majority vote of both houses of the general assembly. Thus, the Illinois governor's veto power was to be shared with the state supreme court. Furthermore, the might of the veto was seriously hampered by the requirement of a simple majority to pass the bill following revision.

Article IV, Section 1, of the 1818 constitution was lifted directly from Article III of the U.S. Constitution. The Illinois Supreme Court was to have appellate jurisdiction and original jurisdiction in cases dealing with revenue, mandamus, and impeachment when required (Section 2). Although the number could eventually be altered by the general assembly, the initial supreme court consisted of a chief justice and three associates (Section 3). Justices were appointed by the general assembly and commissioned by the governor (Section 4). Article IV also mandated the appointment by the general assembly of county justices of the peace (Section 8).

The Extent and Limits of Government Power

The powers of Illinois government were primarily limited by the inclusion of a bill of rights (Article VIII). Many of the limits on government reflected those established by the framers of the U.S. Constitution. Illinois citizens' guarantee of life, liberty, and the pursuit of property was ensured (Article VIII, Section 1). Section 3 echoed the free exercise and establishment clauses of the First Amendment to the U.S. Constitution. In addition, the First Amendment freedoms of speech, press (Section 22), and assembly (Section 19) were secured. The state bill of rights also guaranteed such criminal protections as the right to trial by jury (Section 6), the right to a speedy and public trial (Section 9), protection from self-incrimination (Section 9), protection from unreasonable search and seizure (Section 7), and protection from double jeopardy (Section 11). The bill of rights ensured the privilege of writ of habeas corpus (Section 13) and the guarantee that no ex post facto laws would be passed (Section 16).

A constitution is "an advanced technique for handling conflict."[10] The 1818 Illinois Constitution provided for conflict management by clearly separating and distributing powers (Article I). Within the general assembly, conflict was managed by recording votes and disputes in each chamber's journal. Article II, Section 9, stated, "Any two members of either house shall have liberty to dissent and protest against any act or resolution which they may think injurious to the public, or to any individual, and have the reasons for their dissent entered on the journals." In addition, each chamber adopted rules to allow for unruly members to be disciplined (Article II, Section 10). In the case of ties and contested gubernatorial elections, the general assembly was charged with selecting the governor (Article III, Section 2). Furthermore, the general assembly was charged with impeaching the governor. In the event that the general assembly could not agree when to adjourn, the governor would call to adjourn the legislature (Article III, Section 12). The legislative process required bicameral support for bill approval. As noted above, the constitution delineated the process whereby the Illinois Council of Revision could object to bills and the general assembly could deal with those objections (Article III, Section 19).

In addition to conflict management as a result of checks and balances inherent in the separation of powers, the 1818 constitution provided for conflict management through the amendment and convention processes (Article V). Amendments and conventions were proposed by a two-thirds vote of the general assembly and submitted for approval by a majority of the vot-

10. Lutz, *Origins of American Constitutionalism*, 14.

ers. Upon acceptance by the people, a convention would be called to alter or amend the constitution within three months following the vote.

The Constitution of 1848

The growth of Chicago, an influx of immigrants, and rising state debt led to a failed convention call in 1842, the stench of strong partisanship frightening voters. Voters subsequently approved a convention in 1846. The Illinois Constitution of 1848 slightly redistributed the balance of power in the state. Under the 1818 document, the general assembly dominated its relationship with the other branches. The 1848 constitution abolished the Illinois Council of Revision and granted veto power to the governor. Although this clearly increased the power of the governor, the veto could be overridden by a simple majority of both houses of the legislature. Other executive officers, appointed by both the governor and the general assembly under the 1818 system, were responsible to the electorate in the 1848 constitution.[11] In addition, the electoral principle was extended to the state supreme court. Ultimately, the people benefited from the shift in the balance of power in the 1848 constitution. In an effort to engender more democratic control, the 1848 constitution mandated that "practically all elections, even judicial ones, were to be made by the people."[12]

Pease argues that "the framers of the constitution had their eyes on the age that was passing and not on that which was entering."[13] Despite the increased popular control of the government, the state of what constituted a citizen regressed in the 1848 document. Until revision, all white male inhabitants who had attained the age of twenty-one were given the privilege to vote. A convention battle between Democrats and Whigs focused on the status of foreign inhabitants of Illinois. Whigs succeeded in supplanting the original, more inclusive clause with the more nationalist "all white male citizens." An article voted on separately halted African American immigration into Illinois. According to Cornelius, its passage indicated that "although [voters] were opposed to slavery they did not want blacks in Illinois."[14]

The Constitution of 1870

With the Civil War as a backdrop, Illinois citizens approved a convention to revise the 1848 constitution. The 1862 convention produced a document

11. Cornelius, *Constitution Making,* 27, 34, 35.
12. Pease, *The Story of Illinois,* 145.
13. Ibid.
14. Cornelius, *Constitution Making,* 37, 44.

"written to uphold Democratic party principles and maintain the power of the party without compromise." The proposed constitution proscribed acts of private incorporation and banned the creation of new banks. The document was thought to "appeal to the poorer classes."[15] Prior to this exhibition of intense partisanship, the 1859 Democratic general assembly presented a gerrymandered redistricting plan that was rejected. Seen as another example of partisan monkeyshines, the 1862 constitution was summarily rejected. Cornelius argues that the "loyalty issue," the fact that some Democratic convention members were cast by the media as secessionists, was the largest contributing factor to the 1862 defeat. A separate article that prevented black immigration, barred blacks from holding public office, and granted the general assembly constitutional authority to enforce the article was approved.[16] However, its overall passage was contingent upon the approval of the constitution. Despite the reluctance of the people of Illinois to be more racially inclusive, the conclusion of the Civil War brought the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments to the U.S. Constitution, in 1865, 1868, and 1870, respectively. African Americans were granted liberty, suffrage, due process, and equal protection under the laws. The next Illinois Constitution would necessarily reflect these changes.

The 1870 Illinois Constitution featured no significant changes to governmental design; the preamble and bill of rights were virtually identical to the previous constitution. Ultimately, the convention delegates aimed to continue the power shift begun in the 1848 constitution. The override threshold for the governor's veto was increased to a two-thirds vote in both houses. Furthermore, the clause prohibiting the governor from succession was lifted. The constitution placed limits on the content of bills and the frequency of private bills passed by the general assembly. To address the geographic partisan concentration in the state, the 1870 constitution introduced cumulative voting. Cumulative voting encouraged minority representation by allowing that voters "'may cast as many votes for one candidate as there are representatives to be elected'—in this case three in each district—so that a candidate could receive from each voter either one, one and one-half, or three votes."[17] This multimember electoral system remained until abolished by an amendment in 1980.

The voting population defined in the 1870 constitution included all male citizens ages twenty-one and over. This change reflected national policy. However, women and foreign inhabitants were still excluded. The 1870 constitution contained allusions to two separate principles in the form of edu-

15. Ibid., 53; Pease, *The Story of Illinois,* 145.
16. Cornelius, *Constitution Making,* 54, 53.
17. Ibid., 65, 66.

cational policy: defining a way of life and limiting government. The first decreed that the state "provide a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education." In addition, the constitution prohibited the use of public state funds to support religious schools. Thus, Illinois codified the duty of the state to provide education while simultaneously affirming the establishment clause in its own bill of rights. According to Cornelius, the 1870 constitution's strong public support was a result of negative public sentiment regarding the state government in general and support for the apparent spirit of bipartisanship under which the document was written.[18]

The Constitution of 1970

The 1870 constitution's resistance to change complicated the hope for progressive government policy. Pease states:

> The constitution of 1870, ably framed for the Illinois of its day, an agricultural community with one large city, was quite inadequate for a commonwealth as much interested in manufacture and commerce as in agriculture and containing a world metropolis. The framers of the constitution, satisfied with the work of their hands, had made amendment difficult; an amendment must be submitted by two-thirds of each house of the General Assembly and ratified by a majority of those voting in the next election.[19]

Between 1878 and 1970, only fifteen amendments to the 1870 constitution were ratified.[20] The required two-thirds majority was nearly impossible due to the rigid divisiveness of opposition groups in the legislature. Various interest factions and state sectional divisions "were likely to be engaged pro or con on any given amendment." Furthermore, the Illinois state population in 1870 was less than the 1950 population of Chicago. State policy and progress were heavily impacted by the "farmers' traditional animus toward the city."[21] As the population and industrial center of the state, Chicago (and Cook County) was destined to drive Illinois politics. The state's constitution did not proportionately factor the impact of Chicago into the fortunes of the state. The Republican Party dominated Illinois politics from the Civil War

18. Ibid., 73, 83.

19. Pease, *The Story of Illinois,* 219.

20. Harry Hansen, ed., *Illinois: A Descriptive and Historical Guide* (New York: Hastings House, 1974), 19.

21. Pease, *The Story of Illinois,* 219; Jean H. Baker, *The Stevensons: A Biography of an American Family* (New York: W. W. Norton, 1996), 34.

until the Great Depression. However, the partisanship of Chicago began to swing in the 1920s from Republican to Democrat.[22]

In keeping with Illinois citizens' opposition to highly partisan constitutional revision, the 1922 document was popularly rejected due to the perceived impact of a strongly Republican convention delegation.[23] The document was opposed by leading liberal advocacy groups, former state executives, Hearst newspapers, and labor groups.[24] The chief objection was that the geometric growth of Cook County was overlooked by a state legislature and constitutional convention in which it was underrepresented. The document sought to preserve the antiquated relationship between Chicago and "downstate" (non-Chicago) regions. Growing dissatisfaction with the resistance of the constitution to change could not trump the aversion of the people and the media to the appearance of partisanship.

By the early 1930s, the Democratic Party controlled Chicago politics. As a result, Democrats acquired a practical veto of statewide policy. Milton L. Rakove states, "The history of the relationship of the Chicago Democratic machine to the Democratic party in the state of Illinois is a record of subordinating statewide Democratic interests to the interests of the Chicago machine. The major thrust of the Chicago machine's policies toward downstate Democrats has been to try to make sure that no powerful statewide organization is created as a countervailing power center to the Chicago organization." As candidate for governor, Adlai Stevenson campaigned for the need for a new constitution. Following his election, Stevenson faced a Chicago political machine that ensured support for a convention call in exchange for his opposition to an anticrime bill.[25] As he also campaigned on a "clean-up government" plank, Stevenson balked, and the convention call failed. Attempts to pass a "gateway" amendment, which would allow amendment passage by the traditional method of a majority of all voters voting in the election or by two-thirds of individuals voting on the measure itself, were finally successful in 1950. However, this victory did little to modernize a rapidly aging constitution.

From 1950 to 1986, forty states engaged in constitutional revision.[26] Illi-

22. Donald F. Tingley, *The Structuring of a State: The History of Illinois, 1899 to 1928* (Urbana: University of Illinois Press, 1980), 359.

23. Cornelius, *Constitution Making,* 115.

24. Tingley, *Structuring of a State,* 373.

25. Rakove, *Don't Make No Waves, Don't Back No Losers: An Insider's Analysis of the Daley Machine* (Bloomington: Indiana University Press, 1975), 149; Baker, *Stevensons,* 35.

26. George E. Connor, "Defining State Politics," in *Reinventing Missouri Government: A Case Study in State Experiments at Work,* ed. Denny E. Pilant (Fort Worth: Harcourt Brace Custom Publishing, 1994).

nois voters approved a convention call in 1969. The delegates looked back on a century of upheaval and advancement. Carl E. Van Horn notes that "for more than two generations, from the 1930s to the 1960s, state governments languished in relative obscurity."[27] The national government's reaction to the Great Depression altered the federalism relationship. A vast federal bureaucracy bled into states, requiring them to "cooperate" in administering social programs. Technological advancement and industrialization contributed to environmental concerns. National citizenship was expanded by enfranchising women in 1920 with the Nineteenth Amendment. *Brown v. Board of Education* (1954) galvanized the civil rights movement, punctuating the post–Civil War amendments with an exclamation mark. African American status and suffrage were further promoted by the Civil Rights Act of 1964 and the Voting Rights Act of 1965. The impact of all of these factors is evident in the 1970 Illinois Constitution.

A More Inclusive Role of the People in Government

The stated authority of government has remained largely unchanged since the state's 1818 founding. The people still maintain their authority in the preamble to the 1970 constitution, purporting to "ordain and establish" the document. Support for popular sovereignty is restated in Article I, Section 1. This first section of the bill of rights acknowledges that government is granted power by "the consent of the governed." In addition, an overt reference to a higher power, included in the 1848 constitution and left intact in 1970, claims that the people are "grateful to Almighty God for the civil, political and religious liberty which He has permitted us to enjoy and seeking His blessing upon our endeavors."

The 1970 Illinois Constitution retained a substantial portion of the bill of rights of prior constitutions. Many of the values, principles, and references to freedom and justice apparent in earlier documents are merely elaborated upon. For example, the reference to God-given liberty inserted in the 1848 constitution remains in the 1970 preamble. The establishment and free-exercise clauses appear in the bill of rights. However, Article X, Section 3, clarifies the establishment clause by prohibiting public funds from being used to support religious schools. The 1970 constitution also enumerates state values that were not previously stated. Article X, Section 1, maintains that free education to "all persons to the limits of their capacities" is a fundamental goal of state government. Environmental challenges arising in the

27. Van Horn, "The Quiet Revolution," in *The State of the States,* ed. Van Horn (Washington, D.C.: CQ Press, 1993), 1.

twentieth century are evident in Article XI, Section 1, which states, "The public policy of the State and duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations." The article further claims that all people have the right to a healthy environment. The civil rights movement is reflected in the constitution's inclusion of protections for women, minorities, and disabled individuals. In addition to the specific protected groups mentioned, Article I, Section 20, states, "To promote individual dignity, communications that portray criminality, depravity or lack of virtue in, or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned." The way of life defined in the 1970 constitution is not drastically different from that described in the 1818 document. The values of freedom, justice, and fairness remain fundamental. However, delegates at the 1969–1970 convention were impacted by greater global complexity, technological change, and diversity in the electorate. The primary elements of constitutional change reflect that awareness.

The most fundamental difference between the 1970 constitution and prior constitutions is its definition of citizenship. The people share in the way of life described above, while the public is eligible to govern. The people are free, have access to public education, and enjoy other privileges offered by the state. The public might be divided into the voting public and the governing public. U.S. citizens who are at least eighteen years old and have been residents of Illinois for thirty days compose the voting public. State inhabitants under the age of eighteen and ex-convicts of any age would be considered part of the people, but not the public.[28] The composition governing the public is contingent upon the office to which one wishes to be elected. Members of the legislature must be U.S. citizens, at least twenty-one years old, and residents of the state for two years. Executive branch officers are required to be American citizens, twenty-five years old, and state residents for three years. There is no age requirement for judges, but a judge must be an American citizen, a resident of Illinois, and a licensed lawyer.

Citizenship is considerably more inclusive in the 1970 constitution. The 1818 and 1848 constitutions were vague on residency requirements, but only white males could be citizens. The 1870 constitution included African American males, but excluded females and legal aliens from full citizenship. The intervention of the Nineteenth Amendment to the U.S. Constitution and the American civil rights movement required delegates of the 1969–1970 convention to catch up to national policy. The only individuals excluded from

28. Ex-convicts are prohibited from holding public office.

suffrage in the 1970 constitution are persons under the age of eighteen and those incarcerated at the time of the election (Article III, Section 2).

The Structure and Function of Government

Thad L. Beyle notes that the constitutional reforms of the 1960s and 1970s expanded "gubernatorial and legislative abilities to lead the states in more progressive directions."[29] The 1970 Illinois Constitution retained the same structural design as prior constitutions. The composition bicameral legislature is determined by voters in fifty-nine legislative districts, each consisting of one senator and two representatives (Article IV, Section 2). Senators and representatives are required to be at least twenty-one years old and residents of the districts they represent for at least two years. In contrast to the Missouri Constitution, which mandates that an independent board is responsible for redistricting the state legislature, the Illinois General Assembly reapportions itself (Article IV, Section 3). If the legislature fails to do so, a bipartisan commission is formed to complete the redistricting plan. The 1818 constitution named the lieutenant governor as Speaker of the state senate. The 1970 constitution mandates that the secretary of state convene the senate to elect a Speaker from the membership (Article VI, Section 6).

The Illinois executive branch had previously been appointed, with the exception of the governor and lieutenant governor, who were separately elected. As of 1970, the governor, attorney general, secretary of state, and treasurer are all elected. In addition, the office of state auditor, initially appointed by the general assembly and eventually elected, was changed to comptroller by the 1970 constitution (Article V, Section 1). Finally, the governor and lieutenant governor would be elected jointly (Section 4). The formal authority of the governor was increased by the introduction of a line-item veto with the power to reduce appropriations. The 1970 constitution allows the governor to reorganize the executive branch by executive order (Section 11). If reassignment or reorganization would violate statutory arrangements, the governor is required to present the plan before the general assembly. Finally, the 1970 constitution mandates the preparation and presentation of an executive budget (Article VIII, Section 2). The budget is constitutionally required to be balanced.

Cornelius notes that "with the exception of the judicial branch of government, which underwent reorganization following the adoption of the Judicial Amendment in 1962, Illinois's basic government remained static from 1870 to 1970." Like the U.S. Constitution, the 1818 Illinois Constitution cre-

29. Beyle, "Being Governor," in ibid., 81.

ated a supreme court and made vague mention of inferior courts to be determined later. The 1848 convention included the general assembly's design of the judiciary in the constitution. Due to the actions of the 1848 convention, the judiciary article featured "unnecessary detail."[30] The Illinois judiciary comprises a supreme court, an appellate court, and circuit courts (Article VI). All judges are elected. Unlike the U.S. Constitution, which prescribes no formal qualifications for judges, the Illinois Constitution requires that a judge be a licensed attorney, a U.S. citizen, and a resident of the judicial district from which he or she is selected.[31] The chief change in the 1970 constitution was the creation of a Judicial Inquiry Board to hear complaints about judges and conduct investigations. Furthermore, the 1970 constitution established a Courts Commission to take action on the recommendations of the Judicial Inquiry Board. The membership of both bodies includes judges, lawyers, and nonlawyer citizens (Article VI, Section 12).

Although the structure of state government changed very little in the 1970 constitution, local government power and autonomy increased dramatically with the introduction of home rule. Home rule allows local governments to "exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare to license; to tax; and to incur debt" (Article VII, Section 6). Counties with an elected chief executive officer and municipalities with populations of twenty-five thousand or more are automatically designated by the constitution to be home-rule units. Other municipalities can become home-rule units through the referendum process.

The Extent and Limits of Government Power

The limits placed on Illinois government in the form of civil liberties and civil rights in prior incarnations of a bill of rights remain in the 1970 constitution. In addition, the 1970 document prohibits discrimination on the basis of gender (Article I, Section 18). The constitution protects individuals with mental or physical disabilities from discrimination in hiring and promotion in employment (Article I, Section 19). Furthermore, disabled individuals are protected from discrimination in the realm of property sale or rental. State government is also limited by the availability of mechanisms of grassroots democracy. Article VII, Section 11, indicates that Illinois citizens have access to the initiative petition. However, Article XIV, Section 3, man-

30. Cornelius, *Constitution Making,* xiii, 36.

31. Article VI, Section 2, divides the state into five judicial districts. Cook County itself is a district. The other four shall be "substantially equal in population."

dates that initiative-ballot petitions can be used only for constitutional amendments. Furthermore, citizen initiatives are limited to amendments affecting the legislative article only.[32]

The 1970 constitution contains structural components that contribute to conflict management similar to those in earlier documents. Separation of powers, bicameralism, the legislative power of impeachment, and the executive veto all serve to deal with conflict. However, the 1970 constitution provides citizens with the most direct electoral control over the composition of government. Earlier constitutions violated the separation of powers by allowing the legislature to appoint members of the executive branch. Popular elections serve to alleviate that potential conflict. By allowing the governor to reduce appropriations initially approved by the general assembly, the possibility of conflict is enhanced. However, the 1970 convention attempts to manage this conflict by lowering the veto override threshold from a two-thirds vote in both houses to three-fifths (Article IV, Section 9).

As discussed above, amendments and conventions are another mechanism of conflict management. The 1970 constitution altered the amendment process by allowing citizens to propose binding amendments on the legislative article of the constitution. In addition, the 1950 "gateway" amendment allowed amendment passage by a majority of voters in the overall election or two-thirds of the voters on the specific measure. The 1970 constitution lowered the voter-approval threshold to three-fifths. Convention calls can be proposed by a three-fifths vote in both houses of the legislature or by the secretary of state if twenty years have elapsed since the previous convention-call question (Article XIV, Section 1). Constitutional revision proposed by a convention is adopted if approved by a simple majority of those voting on the measure.

Conclusion

In an example of unmitigated theft, Article I, Section 24, of the Illinois Constitution states, "The enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the individual citizens of the State." This virtually verbatim restatement of the Ninth Amendment to the U.S. Constitution is a tacit implication of the possibility of reform. However, the 1970 Illinois Constitution has been amended just ten times in thirty-eight years, only once as the result of citizen initiative.

32. The First Amendment to the 1970 constitution, which decreased the number of members in the general assembly and abolished the cumulative voting procedure adopted in the prior constitution, was proposed by initiative petition.

Furthermore, a 1988 proposed convention call was defeated by a margin of three to one.[33] After the state's initial flurry of constitutional revision, the 1870 constitution lasted one hundred years. Between 1870 and 1970, citizens rejected a proposed constitution in 1922 and a convention call in 1934. Illinois citizens have rejected constitutions due to the appearance of overt partisanship and staunch opposition from the print media.[34] The diversity and growth of Chicago (compared to "downstate") and the disproportionate impact of machine politics combined to act as a veto over the balance of the state. A lack of interest and inadequate public education have led to failures of other revision mechanisms. Of course, the limitations on direct citizen impact could contribute to the lack of successful revision attempts. Prior to the "gateway" amendment, amendments required a majority of all participants in the election to approve amendments and revisions. The 1934 convention call was approved by a majority of voters on that issue, but the increased denominator as a result of considerable voter roll-off led to its overall failure. Although citizen impact is potentially greater now, the supermajority threshold makes passage more difficult to achieve.

The eight purposes of constitutions proposed by Lutz are evident in all four Illinois Constitutions. However, the extent to which each purpose has been fulfilled has varied over time. Illinois framers successfully defined political institutions and distributed power in all constitutions. The judiciary was not adequately defined in the 1818 constitution, but neither is it clearly delineated in the U.S. Constitution. More detail and definition were given to the judicial branch in the 1848 constitution. The constitutions all establish authority in the people. However, the 1848 preamble stated an appreciation of Almighty God for the "civil, political, and religious liberty which he hath so long permitted us to enjoy." Despite this reference to the blessings of liberty, the 1970 constitution imposes a strict line between church and state by prohibiting public funds from being used for religious education. All Illinois constitutions have limited the authority of government by the inclusion of a bill of rights. The bill of rights became more expansive, including protections from discrimination for women, minorities, and disabled individuals. Furthermore, criminal protections, largely adopted from the U.S. Bill of Rights, were incrementally expanded over the four constitutions. Conflict management has been provided by such structural components as bicameralism, republicanism, and separation of powers.

Illinois fundamentally altered its definitions of citizenship, of a people and public, and of a way of life over its four constitutions. Citizenship

33. Jesse White, *Illinois Handbook of Government, 2001–2002* (Springfield: Office of the Secretary of State), 102.

34. Cornelius, *Constitution Making*, 115.

changed significantly over time, moving from only white males aged twenty-one and over to anyone over the age of eighteen who is not incarcerated. The state's definition of a governing public was altered by lowering the qualifying ages for service in state offices. Finally, the values promoted in the first constitution essentially consisted of liberty and justice. Later constitutions expanded the definition of a way of life by expanding civil rights and liberties, by classifying free education as a fundamental right of an Illinois inhabitant, and by explicitly stating that the people of Illinois have a right to a healthy environment. Although the state was consistently adequate in the more structural purposes of constitutions (defining political institutions and distributing power), the state produced four constitutions before clearly and completely elucidating the more abstract purposes.

JORDAN B. BARKALOW

Justice, Order, and Liberty

Responsible Citizenship in Indiana

Despite not including provisions for the initiative and referendum, the Indiana Constitution is highly democratic. From the right to choose their own form of government to the awarding of tenure to their supreme court justices, Hoosiers are at the nexus of almost all political decisions. As such, they are expected to behave in such a way as to warrant the responsibilities of self-government. This is to say, Hoosiers must exercise responsible citizenship. As the following analysis demonstrates, the Indiana Constitution's fundamental premise is a theory of citizenship grounded in an understanding of individual responsibility. It is this premise that animates the whole of the Indiana Constitution and serves as its primary contribution to theories of constitutionalism.

In order to understand the centrality of the theory of citizenship premised in the Indiana Constitution, it is first necessary to consider the objectives of Hoosiers and their government.[1] Having identified these objectives, it is then possible to identify the theory of citizenship of primary concern and show how this theory shapes one's understanding of other key elements of the Indiana Constitution—managing conflict and limiting government.

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1. On how to subject constitutions to textual analysis, see Donald S. Lutz, *A Preface to American Political Theory* (Lawrence: University Press of Kansas, 1992), 47. For a similar understanding, see Aristotle, *The Politics,* ed. Carnes Lord (Chicago: University of Chicago Press, 1984), 1253a20–25. I follow the Bekker formula of citing Aristotle.

Political Objectives and Individual Responsibility

The objectives Hoosiers and their government pursue are contained in the Indiana Constitution's preamble and bill of rights. The preamble maintains that the end of government is to establish justice, maintain public order, and perpetuate liberty. The preamble speaks of these as the singular end that government is to pursue. This suggests that justice, order, and liberty are three interrelated concepts. But what is the nature of their relationship? The ordering of the three concepts is helpful. In placing justice first, the Indiana Constitution indicates that justice is the highest objective that government is to pursue. In order to secure justice, public order is necessary. As Article I, Section 1, makes clear, government is necessary for the peace, safety, and well-being of the people of Indiana. This suggests that, in the absence of order, liberty is not possible. It is not possible because in the absence of order and justice, liberty degenerates into license. In a state of license, no rights are secure. Thus, justice comes to be defined in terms of the protection of private rights such as those contained in the Indiana Bill of Rights. Locating these concerns in the bill of rights suggests that this interpretation is warranted.[2]

Further support is provided when one considers the preamble to the 1816 constitution. There, no mention was made of maintaining public order. It spoke of promoting the "welfare" of the state in addition to establishing justice and securing liberty. The inability of the original Indiana Constitution to maintain sufficient order led to the need to change the document. This change occurred in 1851 when the current constitution was originally drafted in response to the insecurity felt as a result of Indiana's poor economic conditions. At this time, Indiana reeled under the weight of bankruptcy caused by improvident internal-improvement schemes. The 1816 constitution also suffered from a more fundamental problem in not satisfying a necessary precondition of good government—it was not popularly ratified.[3]

A necessary precondition for this understanding of justice is identified in the preamble, namely, that "the *People* of the *State* of *Indiana*" are free to "exercise" the "right to choose their own form of government." The right to choose harks back to the language of natural rights and popular sovereignty, which are fundamental elements of the Declaration of Independence and

2. This is the same understanding of justice suggested in the U.S. Constitution and more fully developed in *The Federalist.* See David F. Epstein, *The Political Theory of "The Federalist"* (Chicago: University of Chicago Press, 1984), 162–63.

3. For the most part, the 1816 constitution was simply copied from the Ohio Constitution of 1802 and the Kentucky Constitution of 1799. The 1816 constitution was never submitted to the people for ratification. Instead, it went directly into effect the day the convention adjourned.

the earliest American political documents.[4] Such an understanding is reinforced by the declaration "that all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being" (Article I, Section 1). Justice is contingent upon popular sovereignty, which makes the defining of the people and citizens of Indiana so important. The Indiana Constitution must rest on a theory of citizenship that makes possible its reliance on popular sovereignty.

The people of Indiana are defined by the geographic boundaries provided in Article XIV. On the east, the western border of Ohio defines the state. The Ohio River defines the southern boundary from the mouth of the Great Miami River to the mouth of the Wabash River. An artificial line is drawn down the middle of the Wabash River, and this line constitutes Indiana's western boundary.[5] Finally, the northern boundary intersects the western and eastern boundaries through a point ten miles north of the southern extreme of Lake Michigan.

Aside from defining the geographic territory the people of Indiana inhabit, the Indiana Constitution provides that all people are to share certain inalienable rights (life, liberty, and the pursuit of happiness) (Article I, Section 1). Hoosiers are also to enjoy the natural rights of freedom of conscience and "the free interchange of thought and opinion" (Article I, Sections 2 and 9). Guarantee of these rights does not give the people of Indiana unlimited liberty. The Indiana Constitution reinforces the theme of liberty with responsibility as a defining characteristic of Hoosiers. Article I, Section 9, provides for the following: "but for the abuse of that right, every person shall be responsible." Notice that the general term *person* is used in this passage. Use of this form indicates that every person is to exercise his or her liberty responsibly. "Every person," according to Article I, Section 37, includes African Americans.

Indiana's emphasis on responsible citizenship finds its source in the composition of its earliest settlers. The first settlers to migrate to Indiana floated down the Ohio River from Pennsylvania and settled in southern Indi-

4. See Michael P. Zuckert, *The Natural Rights Republic* (South Bend: University of Notre Dame Press, 1996), 13–40, 56–89; Lutz, *Preface to Political Theory,* 28, 108, 118, 149; and Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 81–90.

5. Indiana shares concurrent jurisdiction with Kentucky in civil and criminal cases on the Ohio River, according to Article XIV, Section 2. Likewise, Indiana shares concurrent jurisdiction with Illinois on the Wabash River.

ana.[6] The independent spirit of Pennsylvanians is well established in the earliest of Pennsylvania's political documents. The Quaker State's commitment to religious freedom, for example, was quite extensive when compared to the other colonies at that time. This commitment, however, was not absolute, as Pennsylvania's call for religious toleration was coupled with the belief that liberty, political virtue, and civil justice rested on Christian principles.[7] As such, settlers from Pennsylvania carried with them the tradition that liberties needed to be exercised responsibly as commanded by scripture.[8]

The religious foundation for responsibility was reinforced by the second great migration into Indiana after the War of 1812. Settlers came from Virginia, North Carolina, and the eastern portions of Kentucky and Tennessee. Almost all of these settlers came from agricultural families, and, given their points of departure, one can conclude they were accustomed to the rigors of frontier living. These settlers were also highly religious and overwhelmingly Protestant, with Methodists, Presbyterians, and Baptists among the earliest and most numerous.[9]

As Christians, the earliest Hoosiers would have been expected to walk in the path of God. According to Romans 13:14, to walk properly in the path of God is to live a life pleasing to God. This entails that one's outward behavior, one's actions and deeds, serves as a manifestation of the inner reality of a redeemed life (see Rom. 6:4, 8:4; Luke 1:6; Gal. 5:16, 25; 1 Pet. 2:12; 1 John 2:6; and 2 John 4:6). Thus, being a good Christian allows Hoosiers to behave responsibly. This is why the Indiana Constitution points to religion as a necessary component of a moral education and, as a result, a necessary prerequisite for successful self-government.

Article VIII, Section 1, of the Indiana Constitution states that "knowledge and learning are essential to the preservation of free government." In providing for a "general and uniform system of Common Schools," the Indiana Constitution holds that there should be no tuition, and access to education should be equally open to all. It also states that the objective of education is to encourage moral, intellectual, scientific, and agricultural improvement. The emphasis on education in the Indiana Constitution, in light of its concern with liberty with responsibility, suggests the presence of a rather robust understanding of citizenship. Citizens are to be educated in such a way as to

6. Roman Catholics are the oldest group in Indiana. They settled in Vincennes prior to 1750, when French traders occupied the Old Northwest.

7. See "An Act for Freedom of Conscience," in *Colonial Origins of the American Constitution,* ed. Donald S. Lutz (Indianapolis: Liberty Fund, 1998), 287–89.

8. On the need for responsible behavior in purchasing and managing one's property, see "Concessions to the Province of Pennsylvania," in ibid., 267.

9. Other Protestant sects in Indiana by 1840 included the Quakers, United Brethren, Episcopalians, Lutherans, and Unitarians.

develop the necessary moral qualities required for self-government. The ordering of the Indiana Bill of Rights indicates that the moral requirements for self-government are best understood in religious terms. Sections 2–8 of Article I all speak to the sanctity of religion. Only after establishing this moral foundation does the Indiana Constitution speak of the right to vote, in Article II.

This stands in contrast to the U.S. Constitution, which failed to define citizenship until ratification of the Fourteenth, Fifteenth, Nineteenth, and Twenty-sixth Amendments. When the U.S. Constitution does come to define citizenship, it offers a rather thin definition in terms of political participation.[10] Although Article II, Sections 1–2, of the Indiana Constitution defines citizenship in this way as well, one needs to consider the fact that it is of secondary significance to the importance placed on developing the necessary moral qualities for successful and effective self-government.

In this, the Indiana Constitution recognizes what Alexis de Tocqueville identified in 1835: that liberal democracies need to learn standards of excellence that exert an upward pull against the demand of physical gratification. The emphasis on liberty with responsibility found in the Indiana Constitution serves as recognition of the fact that self-interest must be prevented from degenerating into what Tocqueville called egoism.[11] In this, the Indiana Constitution provides for a greater popular role in government than does the U.S. Constitution.[12]

In providing for a greater popular role, the Indiana Constitution leaves no doubt as to where the authority of government rests. Such an emphasis is consistent with the Indiana Constitution's commitment to popular sovereignty. According to the preamble, the people of Indiana are "grateful to ALMIGHTY GOD for the free exercise of the right to choose their own form of

10. Such a definition misses the importance of the idea of citizen as wage earner and how this understanding is related to U.S. conceptions of liberty and self-discovery. See Judith N. Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge: Harvard University Press, 1991).

11. See Tocqueville, *Democracy in America,* ed. Harvey Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2000), 11, 228, 501–6. On Tocqueville, see Martin Diamond, *As Far as Republican Principles Will Admit,* ed. William Schambra (Washington, D.C.: AEI Press, 1992), 160–62.

12. Elsewhere, the Indiana Constitution goes beyond the U.S. Constitution's rather limited understanding of suffrage. Article VI, Section 1, provides for the popular election of top administrative agents (secretary, auditor, and treasurer). Not only are justices to the Indiana Supreme Court awarded tenure by means of popular election (as will be discussed later), but justices to the court of appeals are also awarded tenure in the same manner, with the sole difference being that the electorate is defined geographically (Article VII, Sections 5 and 11). Hoosiers also elect one judge to each judicial circuit for a six-year term without any term limitations (Article VII, Section 7).

government." Article I, Section 1, provides, "All power is inherent in the people." Section 1 continues, "All free governments are and ought to be founded on the authority of the people," and the people have a "right to alter and reform their government." These are clear statements of popular sovereignty. Notice the limitations the people place on themselves. They have the right only to alter and reform their government. Hoosiers do not have the right to abolish that form of government as found in the Declaration of Independence.[13] This limitation reinforces the belief that government is necessary for the peace, safety, and well-being of the people (Article I, Section 1). It also moves the Indiana Bill of Rights closer to the U.S. Bill of Rights. This is evident in the difference between Madison's "right of the people to reform or change their government" and the Declaration's "right of a people to alter or abolish it."[14]

Thus, the Indiana Constitution avoids the ambiguity that plagues the U.S. Constitution. One reading of the U.S. Constitution and its supporting documents suggests that the people of the United States, in their collective capacity, retain the ultimate political authority.[15] Another reading suggests that this authority resides in the states.[16] The founders' inability to reconcile this tension served as a key factor contributing to the tensions leading to the Civil War. This tension is nowhere to be found in the Indiana Constitution.

13. The Declaration reads: "Governments are instituted among Men, deriving their just Powers from the consent of the Governed, that whenever any Form of Government becomes destructive to these Ends, it is the Right of the People to alter or to abolish it."

14. See Madison, "Amendments to the Constitution," in *The Papers of James Madison,* ed. Charles F. Hobson and Robert A. Rutland (Charlottesville: University Press of Virginia, 1979), 12:200. This difference is fundamental to the debate over the bill of rights between federalists and antifederalists. See Herbert J. Storing, "The Constitution and the Bill of Rights," in *How Does the Constitution Secure Rights?* ed. Robert A. Godwin and William Schambra (Washington, D.C.: AEI Press, 1985), 30–32.

15. See Lutz, *Preface to Political Theory,* 28, 108, 118, 149; Lutz, *Origins of American Constitutionalism,* 81–90; Richard Sinopoli, *The Foundations of American Citizenship: Liberalism, the Constitution, and Civic Virtue* (New York: Oxford University Press, 1992); John Patrick Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (New York: Basic Books, 1984); and Thomas L. Pangle, *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (Chicago: University of Chicago Press, 1988).

16. There are numerous statements on the U.S. Constitution being founded on a theory of state sovereignty. Senator Robert Hayne of South Carolina and the writings of John C. Calhoun provide two of the best. See Hayne, *The Webster-Hayne Debate on the Nature of the Union,* ed. Herman Belz (Indianapolis: Liberty Fund, 2000), 3–13, 35–80, 155–83; and Calhoun, "A Discourse on the Constitution and Government of the United States," in *Union and Liberty: The Political Philosophy of John C. Calhoun,* ed. Ross M. Lence (Indianapolis: Liberty Fund, 1992), 79–284.

Responsible Citizenship and Conflict Management

Like the U.S. Constitution, the Indiana Constitution establishes a republican form of government.[17] According to Article III, the powers of the state of Indiana are to be divided into three separate departments: legislative, executive, and judicial. The creation of a republican form of government requires that the Indiana Constitution provide for means of managing conflict among the three branches. How the Indiana Constitution manages to accomplish this objective is clarified over the course of Articles IV–VII.

Article IV, Section 17, provides that all legislation must be bicameral. The governor is given the power to veto legislation, and the legislature can override the veto by a majority vote in both chambers (Article V, Section 14). Like the president of the United States, the governor of Indiana appoints justices to a supreme court (Article VII, Section 10). Unlike the president's, the governor's appointments do not require the advice and consent of the senate.[18] Instead, the governor selects from a list of three candidates provided by the Judicial Nominating Commission.[19] This method of appointing judges is designed to avoid the partisan conflict that characterizes the nomination process at the national level. The nonpartisan approach is consistent with the provision that no "justice or judge shall, during his term of office, engage in the practice of law, run for elective office other than a judicial office, directly or indirectly make any contribution to, or hold any office in, a political party or organization or take part in any political campaign" (Article VII, Section 7). The nonpartisan quality is also seen in the Article VII, Section 11, requirement that justices be awarded tenure through popular vote.

17. A republican form of government can be understood in the following terms: "A Republic, by which I mean a government in which the scheme of representation takes place" (Madison, "Federalist no. 10," in *The Federalist,* ed. George W. Carey and James McClellan [Indianapolis: Liberty Fund, 2001], 46).

18. This stands in contrast to the Article V, Section 7, requirement of the 1816 constitution that the senate approve all judicial appointments. Removing the senate from the confirmation process has the effect of making the process less partisan and, as such, assists in the management of conflict.

19. Article VII, Section 9, establishes the Judicial Nomination Commission. The commission consists of seven members, and a majority constitutes a quorum. The first member of the commission is the chief justice or a supreme court justice appointed by the chief. The chief or his or her designee serves as chairman of the commission. Members two through four are individuals elected by those admitted to the practice of law in Indiana. Members five through seven are citizens appointed by the governor not admitted to the practice of law. No member of the panel, other than the chairman, may hold public office or an office in any political party or organization. According to Article VIII, Section 10, the governor has sixty days to make this appointment. If the governor fails to make the appointment, the chief justice of the supreme court or the acting chief justice shall make the appointment. The selection must be made from the same list given to the governor.

Another form of conflict management found in the Indiana Constitution is the power of removal. Article II, Section 6, contains a very specific announcement of this power with regard to electoral corruption: "Every person shall be disqualified from office, during the term for which he may have been elected, who shall have given or offered a bribe, threat, or reward, to procure his election." The disqualification can take one of two forms, impeachment or joint resolution. Article VI, Section 7, states that all "state officials shall, for crime, incapacity, or negligence, be liable to be removed from office, either by impeachment by the House of Representatives, to be tried by the Senate, or by a joint resolution of the general assembly; two-thirds of the members elected to each voting, in either case, therefore."[20] The impeachment process contained in the Indiana Constitution mirrors that provided in Article I, Sections 2–3, of the U.S. Constitution. The ability to remove someone from office through a joint resolution is not contained in the U.S. Constitution.

The final form of conflict resolution found in the Indiana Constitution is the amendment process. The amendment process, like much of the Indiana Constitution, reinforces a commitment to popular sovereignty. Article XI, Section 1, begins the amendment process by granting either branch of the general assembly the power to propose constitutional amendments.[21] If a majority of both houses votes in favor of the amendment, it remains on the books until after the next general election. After this election, both houses reconsider the amendment.[22] If approved by a majority of both houses, the amendment goes to the electors of the state, who vote on it during the next general election.[23] If a majority of Indiana voters approve the amendment, it becomes part of the state constitution.

20. Article VI, Section 8, extends the power of removal to all county, township, and town officers in such a manner as prescribed by law. The ability to remove officials from office in one of two ways is a change from the 1816 constitution in which officials could be removed only through the impeachment process (Article III, Section 23).

21. The Indiana Constitution, unlike the U.S. Constitution and many state constitutions, does not provide for constitutional conventions. Although this appears to counter the claim that the Indiana Constitution is firmly committed to popular sovereignty, one must conclude otherwise when one considers the amendment process in its entirety. Indiana did allow constitutional conventions at one time, however. As provided by Article VIII, Section 1, of the 1816 constitution, every twelve years the electors of the state could vote to call a constitutional convention. In this convention the electors of Indiana could consider any question with the single exception of slavery.

22. By allowing for an intervening election, the Indiana Constitution allows candidates to make the amendment a campaign issue. As a campaign issue, voters are given the opportunity to select officials based on their stand on the proposed amendment.

23. If there is more than one amendment, Article XVI, Section 2, provides that they are to be voted on separately.

Responsible Citizenship and Limited Government

The most general way government can be limited is by establishing a "rule of law."[24] Here, one may understand rule of law to simply mean a defined process of decision making that limits government. In the Indiana Constitution, this defined process is contained in Article II's provisions for suffrage and election, Article III's distribution of political powers, Article IV's structuring of the legislative process, Article V's limitations on the executive power, and Article VII's creation of Indiana's judicial system. Simply stated, the fact that Indiana has a written constitution means that it limits government in this first sense.[25]

The second sense of limiting government occurs when government is restricted to actions that the population has directly approved. This is to say, the people give direct consent on an issue-by-issue basis. The Indiana Constitution limits government in this way in two areas. As already discussed, the amendment process fits this understanding of limiting government. Requiring all amendments to be approved by two consecutive sessions of the general assembly gives voters the opportunity to "quiz" their legislators (Article XVI, Section 1). Requiring final approval of amendments to come from popular elections gives the voters of Indiana one final opportunity to give or withhold their consent.

The legislative process is another way the Indiana Constitution limits government in this second sense. Article IV, Section 19, stipulates that an act "is to be confined to one subject matter properly connected therewith."[26] Confining acts to a single related subject facilitates the public's ability to be familiar with the content of legislation.[27] Access to the content of legislation is necessary because "acts must be circulated before they become a law" (Article IV, Section 28). The circulation requirement gives the public the opportunity to voice its satisfaction or dissatisfaction that, in theory, may influence the decision of the elected officials.

The third way government may be limited concerns the content of legislation. Here, one is talking about codified prohibitions. Such prohibitions are generally found in a bill of rights or other express limits on the power of government or both.[28]

24. Lutz, *Origins of American Constitutionalism,* 15.

25. Lutz asserts, "Writing a constitution implies automatically only the first sense" (ibid.).

26. There are three exceptions according to Article IV, Section 19: the codification, revision, or rearrangement of laws.

27. Another constitutional provision giving the public greater access to the content of legislation is the Article IV, Section 20, requirement that every act, as far as practicable, avoid using technical terms.

28. Lutz, *Origins of American Constitutionalism,* 15.

As previously discussed, the Indiana Bill of Rights, in Article I, limits what government may do to persons and not just citizens. Employing the natural-rights language of the Declaration of Independence, the Indiana Bill of Rights protects the "natural freedom of conscience" and the "free exercise and enjoyment" of religion (Sections 2–3). These rights are protected by prohibiting the state from giving preference to any one religion, making it unconstitutional to compel people to "attend, erect, or support, any place of worship, or to maintain a ministry, against his consent" (Section 4). Neither can the state require religious tests for holding office, nor can one be declared an incompetent witness because of one's religious beliefs (Sections 5 and 7). Finally, the state is prohibited from using any state moneys to benefit any religious or theological institution (Section 6). Cumulatively, the Indiana Constitution constructs a firm wall between the state and an individual's conscience.

The procedural guarantees of the U.S. Constitution's Fourth and Fifth Amendments are contained in the Indiana Bill of Rights as well. Article I, Section 11, protects individuals from unreasonable searches and seizures. Section 12 broadly claims that "nobody can be denied remedy by due process of law." Section 14 contains protections against double jeopardy and self-incrimination. Section 16 prohibits excessive bail, fines, and cruel and unusual punishment. It also declares that penalties ought to be "proportioned to the nature of the offense." The procedural protections even shape the scope of protections provided victims. Article I, Section 13, declares that victims have the right to be treated with fairness, dignity, and respect throughout the criminal process. As such, they may be present and informed during public hearings. They may also confer with the prosecution. Victims may do these things only to the extent that "exercising these rights does not infringe upon the constitutional rights of the accused."

Direct prohibitions extend beyond freedom of conscience and due-process guarantees in the Indiana Constitution. They extend to the creation and maintenance of its own federal system. This is to say, the Indiana Constitution contains express prohibitions regarding what the state government may do with regard to county and township governments.[29] The objective

29. The state government is prohibited from acting in the following areas: the punishment of crimes and misdemeanors; the practices in courts of justice; changing the venue in civil and criminal cases; granting divorces; changing the names of persons; providing for laying out, opening, and working on highways; the election or appointment of supervisors; vacating roads, town plats, streets, alleys, and public squares; summoning and impaneling grand and petit juries, and providing for their compensation; regulating county and township business; regulating the election of county and township offices and their compensation; providing for the assessment and collection of taxes for state, county, township, or road purposes; relating to fees or salaries, except that laws may be so made as to grade the com-

of these restrictions on the power of the general assembly is to ensure that the power retained by county and township governments is not usurped by the general assembly.

Finally, the fourth understanding of limiting government extends to the authority of the people. There are certain things so sacred that not even the people can infringe upon these rights. Removing these rights from the scope of the power retained by the people raises them to the status of higher law. Thus, it is possible to view these rights as inalienable.[30] As previously discussed, the inalienable rights expressly mentioned in the Indiana Constitution are those mentioned in the Declaration of Independence (Article I, Section 1). In addition to these rights, the Indiana Constitution elevates religious conscience and due-process protections to the status of higher law. As such, the people of Indiana "declare, that every thing in this article, is . . . inviolable" (1816 constitution, Article I, Section 24).

Conclusion

The fundamental premise of the Indiana Constitution is a theory of responsible citizenship. As the foregoing analysis demonstrates, this theory shapes two of the Indiana Constitution's key elements: the ability to manage conflict and the ability to limit government.

With regard to conflict management, the Indiana Constitution seeks to create a nonpartisan environment for judicial decision making. This is achieved, first, by the creation of the Judicial Nomination Commission and, second, by awarding judicial tenure through popular election. Together, these constitutional provisions allow judges to approach the bench from a neutral position. The amendment process, though forgoing the more traditional route of constitutional conventions, contains procedural requirements that give both electors and elected time to soberly consider the proposed amendment(s). This ensures that changes to the Indiana Constitution are not the result of light and transient causes. That this does not happen is suggested by the fact that of the seventy amendments proposed since 1851, only thirty-eight have been ratified by the people.[31]

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pensation of officers in proportion to the population and the necessary service required; relating to interest on money; providing for opening and conducting elections of state, county, or township officers, and designating places of voting; and providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administers, guardians, or trustees.

30. See ibid.

31. See Council of State Governments, *The Book of States* (Lexington, Ky.: Council of State Governments, 2002), 14–15.

A similar pattern is found in the way the Indiana Constitution limits government. What is striking about the four ways the Indiana Constitution limits government is the intimate connection to popular sovereignty. The amendment process, for example, creates a framework whereby Hoosiers are given two opportunities to voice their opinions about proposed amendments. The legislative process facilitates popular sovereignty by making legislation accessible to the people. The people of Indiana place the protections provided in the bill of rights out of their own reach. In linking the limits placed on government with a theory of popular sovereignty, the Indiana Constitution reinforces its democratic commitments and the centrality of its theory of citizenship. The people of Indiana are the primary safeguards of their rights and liberties. Justice is placed in the hands of the people. They are not to rely on the ability of political institutions to shape the actions of elected officials for the common good. Hoosiers are to shape the common good themselves.

Thus, the theory of citizenship identified in the Indiana Constitution poses a challenge to the assertion that liberal constitutional theory embodies and depends on commercial-acquisitive interests.[32] Instead, the analysis presented here demonstrates that liberal theory, institutions, and society embody—and depend on—virtue as manifested in a theory of responsible citizenship. Unlike C. B. Macpherson's possessive individual, Hoosiers are not characterized by "narrowly calculating selfishness," and they are "able to respect themselves and be useful to one another in both public and private life."[33] The theory of citizenship identified in the Indiana Constitution rejects the notion that effective self-government is possible with "a citizenry without public spirit, without self-restraint, and without intelligence." To paraphrase Thomas Pangle, the Indiana Constitution's theory of responsible citizenship shows one what is required to ennoble democracy.[34]

32. See Albert O. Hirschman, *The Passions and the Interests* (Chicago: University of Chicago Press, 1977).

33. C. B. Macpherson, *Political Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962); Nathan Tarcov, *Locke's Education for Liberty* (Chicago: University of Chicago Press, 1984), 137.

34. Thomas Spragens, "Reconstructing Liberal Theory: Reason and Liberal Culture," in *Liberals and Liberalism,* ed. Douglas MacLean and Claudia Mills (Totowa, N.J.: Rowan and Littlefield, 1986), 43; Pangle, *The Ennobling of Democracy: The Challenge of the Postmodern Age* (Baltimore: Johns Hopkins University Press, 1992).

DAVID HOUGHTON

Michigan

Four Constitutions, Four New Beginnings

Michigan's four constitutions, dating from 1835, cover the evolution of the state from its agricultural and rural beginnings to its present industrial-technological and urban settings. The first constitutional convention was dominated by farmers, and that group was present in smaller numbers at each of the succeeding conventions. The first constitution was also much shorter in length than all of the succeeding constitutions, as it tended to state general principles while avoiding detailed specifications as to how these principles would be applied. In this chapter, some brief notes on Michigan's four constitutions will be presented as well as the new directions given the 1963 state constitution via successful amendments to date. Three unique features of Michigan's constitutions will be analyzed: a passion for education, a passion for justice, and the establishment of the Civil Service Commission that put the state in the forefront of merit in state government. Throughout this chapter, references will be made to how Michigan's constitutions uniquely fulfill the purposes that all constitutions fulfill as discussed by Donald S. Lutz in *The Origins of American Constitutionalism.*[1]

Throughout this chapter, *The Model Constitution* is frequently utilized to compare and contrast provisions in the four constitutions in Michigan. *The Model Constitution,* first published in 1921 by the National Municipal League, have been written by a large number of scholars and practitioners over the course of its many editions. The idea behind the model is to bring together in a document some of the best thinking and observations about

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1. Lutz, *Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

state constitutions. The model can then be used to compare and contrast existing state constitutions as well as to assist constitution convention delegates in various states in drafting new language as well as encouraging the retention of existing language in new proposed constitutions. The model also provides a rationale for each of its recommendations, and it covers all of the basic areas that constitutions traditionally encompass as well as having some recommendations that few or not any currently have in order to stimulate creative debate and encourage new directions. *The Model Constitution* can assist us in evaluating whether certain elements in state constitutions are helping or hindering the realization of the purposes that Lutz discusses.

Michigan's Four Constitutions

The dates of Michigan's constitutions are 1835, 1850, 1908, and 1963. The first three constitutions were ratified by substantial margins, whereas the current constitution, on a recount, barely surpassed 50 percent. There have been two other proposed constitutions submitted to the voters, in 1868 and in 1874, and neither was ratified. Since the ratification of the current constitution, voters in Michigan have, by substantial margins, voted down the calling of a constitutional convention in both 1978 and in 1994. These votes were conducted at sixteen-year intervals as established by the current constitution. The sixteen-year provision actually dates back to the constitution of 1850 and was replicated in the 1908 constitution. In total, there have been eleven occasions when the calling of a convention was not successful.

It is important to note that the 1850 and 1908 constitutions made it extremely difficult to call a convention due to the constitutional stipulation that a majority of those voting at the election was required to call a convention rather than a majority voting on the actual question of constitutional ratification. This series of frustrations fueled the move to amend the 1908 constitution to permit the calling of a convention by a majority of those voting on the question rather than those voting at the election. It would seem that Lutz would, likewise, lend support to a majority of those voting on the question so that the purposes for which constitutions are written would, in fact, be fulfilled. The "gateway" amendment was ratified in 1960 by a comfortable majority of 1,312,215 voting in favor and 959,527 voting against for a favorable vote of 58 percent. The amendment also provided for an election in 1961 on calling a constitutional convention. The votes in favor were 596,433 and those against 573,012, for a very narrow approval rate of 51 percent. The current constitution, as noted, was also very narrowly ratified by

the voters in 1963.[2] The next vote for calling a convention, as set in the constitution, is 2010 or earlier, by either legislative action or citizen initiative.

Unique Features of Michigan Constitutions

Michigan's constitutions fulfill a number of purposes, such as defining citizenship and distributing political power. But some of the unique features of Michigan's constitutions also serve the purpose of providing a plan for a way of life that enables the values that are written into the constitutions to be realized. Two unique features will be discussed here as they relate to a plan for a way of life in Michigan. These unique features are a passion for education, which was clearly established in the constitution of 1835 and has been continued through subsequent constitutions, and a passion for justice that resulted in Michigan being the first state to abolish capital punishment. Capital punishment was first abolished by legislative statute in 1846, and it retained its legislative status until it was included in Michigan's 1963 constitution. "On March 1, 1847, when the law went into effect, Michigan became the first English-speaking state to adopt the reform."[3]

A Passion for Education

Education was considered to be of the utmost importance as a means to a successful way of life both to Michigan's first constitutional convention delegates as well as to those who were to implement such provisions. A major educational provision in the 1835 constitution was also a first in the United States: a state superintendent of public instruction appointed by the governor (Article X, Section 1). The office had a constitutional guarantee. The first appointed superintendent, John D. Pierce, was a perfect fit for what was contemplated for the office. He was a Brown University graduate, "familiar with the most advanced principles of pedagogy of the time and his thorough program of supervision welded the existing school districts, with their limited facilities, into an effective system." Pierce himself was to recall the favorable conditions under which he began his work as superintendent: "The field was clear, there were no old institutions and deep-rooted prejudices to be encountered and removed." Also, it was fortuitous that most residents of

2. Citizens Research Council of Michigan, *The November 1994 Ballot Question and a Brief Michigan Constitutional History,* report no. 313-2 (Detroit: Citizens Research Council of Michigan, July 1994). Statistics in this section are drawn from this report.

3. David Brian Davis, "The Movement to Abolish Capital Punishment in America, 1787–1861," *American Historical Review* 63 (October 1957): 43.

the state at its achievement of statehood in 1835 came from New England or New York, where schools were well established. Edward W. Bennett estimates that, in these early years, two-thirds of Michigan's population came from these two areas.[4] In this 1835 constitution, provision was also made for a major legislative role in schools: "The Legislature shall encourage by all suitable means, the promotion of Intellectual, Scientifical, and Agricultural improvement." The sale of federal lands was earmarked as part of a "perpetual fund" for education. The proceeds from the sale of federal lands were to go directly to the state and then be dispersed so that a form of equalization was realized (Article X, Section 2). A system of common schools open at least three months each year was to be established (Article X, Section 3). State support for a university was also provided (Article X, Section 4).

In the 1850 constitution, Michigan continued to set high standards in education as a way of life for its citizens and to set itself apart nationally as well. Another first for Michigan education was the provision for the establishment of an agricultural school, which was created by the legislature in 1855 (Article XIII, Section 11). Land was provided to be sold to finance, in part, this new school. This school, the Michigan Agricultural College, is now Michigan State University. Until the Morrill Act of 1862 that granted states land for what became known as land-grant colleges, the Michigan Agricultural College received all of its funding from the state. Other provisions in the 1850 constitution provided for a system of primary schools not charging tuition for at least three months each year (Article XIII, Section 4) and an elected superintendent of public instruction and determined that the superintendent would have the general supervision of public instruction (Article XIII, Section 1).

The 1908 constitution, for the most part, did not alter the educational provisions of the 1850 constitution. A strong endorsement for education was made in the first section of the Education Article of the constitution: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged" (Article XI, Section 1). The provision for election of the superintendent of public instruction was continued from the 1850 constitution, as was the stipulation that the superintendent "shall have supervision of public instruction in the state" (Article XI, Section 2). Provision was now made for all school districts "to maintain a school within its borders as pre-

4. M. M. Quaife and Sidney Glaser, *Michigan: From Primitive Wilderness to Industrial Commonwealth* (New York: Prentice Hall, 1954), 193; Pierce, "Present at the Creation," in *The Making of Michigan, 1820–1860: A Prairie Anthology,* ed. Justin L. Kestenbaum (Detroit: Wayne State University, 1990), 226; Bennett, "The Reasons for Michigan's Abolition of Capital Punishment," *Michigan History* 62 (November–December 1978): 43, 55.

scribed by law for at least 5 months in each year" (Article XI, Section 9). This provision extended the school year from a minimum of three months as specified in the 1850 constitution. Also, continuing from the 1850 constitution was a guarantee that "proceeds from the sale of all lands . . . granted by the United States to the state for educational purposes . . . shall . . . remain a perpetual fund" (Article XI, Section 11). Edward Bennett sums up the history of education in Michigan: "Michigan's oft-cited generosity in providing for public instruction has served to make the intellectual and material advantages of education available to all."[5]

The 1963 constitution reiterated the encouragement for education in the same words used in the 1908 constitution (Article VIII, Section 1). The state board of education was expanded (it remained elective), and now it appointed a superintendent of public instruction. The state board would "serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith" (Article VIII, Section 3). It is also stated in the same section that "the power of the boards of institutions of higher education provided in this constitution to supervise their respective institutions and control and direct the expenditure of the institutions' funds shall not be limited by this section." According to one source, "The Michigan Supreme Court in *Regents of the University of Michigan* v. *States,* found that the state board of education's authority is advisory and the autonomy of the universities remained unchanged." Provision was also made for financial support of public community and junior colleges in the 1963 constitution (Article VIII, Section 7). "The framers of the 1963 Constitution had high expectations for the State Board of Education and its oversight role. . . . The board was given, what appeared to be, a broad grant of constitutional authority over all public education. There has been a general dissatisfaction with the existing governance system at the state level as it relates to K–12 education, and it would probably receive a thorough review in a constitutional convention."[6]

A Passion for Justice

"In 1846, a concerted popular drive in Michigan forced through state legislation to take effect on March 1, 1847, which provided for an abandonment of the death penalty for murder in the first degree and the substitution there-

5. Bennett, "Reasons for Michigan's Abolition," 55.

6. Citizens Research Council of Michigan, *Education,* report no. 313-7 (Detroit: Citizens Research Council of Michigan, September 1994).

fore of solitary confinement at hard labor in the state prison for life.'"[7] What kind of justice was Michigan seeking if it was substituting solitary confinement for life (and at hard labor) for capital punishment? Was the substitution worse than the former system? It should first be noted that there had not been any executions in Michigan since 1830. Abolishing capital punishment had been debated at Michigan's first constitutional convention in 1835 and had been defeated by a close vote of thirty-eight to thirty-three. In early 1843, the Michigan House passed a bill that prohibited capital punishment but, in place of it, required solitary confinement. The state senate, though, did not pass the bill. In 1844, another version of the bill was defeated in the house. In 1846, the house amended the senate version of the bill, which required solitary confinement, with a provision that added hard labor for life. This is how the first bill was enacted.[8] Suffice it to say that Michigan did not have the cell space for those requiring solitary confinement, and when such cells were provided, the dire consequences of such incarceration were totally debilitating for the inmates; by 1861 solitary confinement was ended except for extraordinary circumstances. The "hard labor for life" never worked at all in solitary confinement. Michigan is known worldwide for its statutory abandonment of capital punishment in 1846.

But why was Michigan the first state to abandon capital punishment? Edward W. Bennett offers three reasons for Michigan's action:

> First of all, economic and social conditions in Michigan did not favor deference to authority. There did exist an elite in Detroit. . . . But the nature of the economy and society did not permit this elite to succeed in imposing its views. . . . The overwhelming majority of the Michigan population lived on family farms, owned by the occupants. . . .
>
> Second, among the distinguishing features of Michigan, there was little sense of external or internal danger, such as might have provided an occasion for authoritative methods. . . .
>
> Third, the Yankee background of so many early Michigan settlers made them susceptible to proposals for secular reform. . . . Those Yankees who remained in New England were more likely to have a stake in the status quo and a fear of social change, and this may explain why Massachusetts, despite much agitation, did not give up capital punishment. . . . But the frontier Yankees of Michigan, most of them the product of three successive rejections of—or by—an existing social order, had little deference for tradition and a new society to build. And with their pride in their educational level, and their belief

7. Harold M. Helfman, "A Forgotten Aftermath to Michigan's Abolition of Capital Punishment," *Michigan History* 40 (June 1956): 203.

8. Albert Post, "Michigan Abolishes Capital Punishment," *Michigan History* 29 (January 1945): 49, 48.

> in a New Jerusalem in their green and pleasant peninsula, they were highly receptive to the argument that the abolition of capital punishment was the enlightened, progressive policy.[9]

So the conditions were right in Michigan for capital punishment to be abolished. There would be other efforts to bring back the death penalty, in 1848, 1849, 1851, 1859, in the 1920s, and in 1931. All were defeated.

In 1963, for the first time in Michigan's four constitutions (1835, 1850, 1908, and 1963), the death penalty was prohibited by a constitutional provision. That provision simply states, "No law shall be enacted providing for the penalty of death" (Article IV, Section 46). Since the provision has become constitutional, there have been a number of attempts to amend the constitution to allow for a death penalty. None of these attempts has made it to the ballot, as they have all fallen short due to either a lack of the required number of signatures of registered voters needed for a constitutional initiative to be successful or failure to meet the deadline for collecting signatures. At a time in which many states have had to rewrite their state laws to ensure fairness in applying the death penalty, Michigan has retained its support, which began in 1846, for the abolition of capital punishment. This support, which is now a part of the Michigan Constitution, appears to give additional strength to the historical longevity of the opposition to the death penalty in the state.

The Merit System and Constitutional Limitations

The utilization of the spoils system became intolerable in Michigan in the 1930s as the Republican and Democratic Parties changed governors every two years, creating a revolving door in the bureaucracy. In 1940, in an effort to better establish a regime "bound by a set of procedures embodied in a publicly recognized set of political institutions," Michigan voters, using the initiative, created the Civil Service Commission. The major provisions in the initiative are also in the 1963 constitution. The civil service is provided for in a very long and detailed section of the constitution. This section is in stark contrast to that suggested in Article X of *The Model Constitution:* "Section 10.01. Merit System. The legislators shall provide for the establishment and administration of a system of personnel administration in the civil service of the state and its civil divisions. Appointments and promotions shall be based on merit and fitness, demonstrated by examination or by the evidence of competence." *The Model Constitution,* as we might expect, sets out general principles so as to expedite flexibility in execution. The civil service sec-

9. Bennett, "Reasons for Michigan's Abolition," 51, 53–55.

tion in the Michigan Constitution is more than fifteen times the length of the recommendation of the model. Applying Lutz's constitutional purpose of "defining a range of activities," one might agree with the model's view that the important purpose of limiting government power has gone too far in this example. The detail in the 1963 constitution limits the governmental power of both the legislature and the governor. Until 1978, the Civil Service Commission fixed "rates of compensation for all classes of positions" (Article XI, Section 5). In 1978, an opinion by the state attorney general stated that the "Civil Service Commission did possess the authority to grant collective bargaining to classified employees."[10] The legislature was excluded from the area of compensation involving substantial amounts of money. Also, the civil service is provided with an operational budget, in the constitution, to be "not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year" (Article XI, Section 5). This, again, takes away from the legislature an item that would normally be a part of its appropriation process. The governor and each principal department are given a specified number of exempt positions. But are these the best "working numbers" for the governor and department heads to get the job done? These set numbers have most certainly disadvantaged some of these officials.

Similar examples of limitations on governmental power that Lutz would argue would be "best left to the legislature" include an uncanny ability of the first constitutions in Michigan to limit salaries by stating the salary in the constitution.[11] For example, in 1835, legislators were never to exceed three dollars a day in compensation (Article IV, Section 18). The amount was exactly three dollars per day in the 1850 constitution (Article IV, Section 15). The 1850 constitution specified exact dollar amounts for a number of state offices, including governor, judge of the circuit court, state treasurer, superintendent of public instruction, secretary of state, attorney general, and commissioner of the land office. It was noted that "it shall not be competent for the legislature to increase the salaries herein provided" (Article IV, Section 1). These provisions go a lot further than the often-cited constitutional stipulations today to not allow increases in salary during the term of the incumbents.

Although the 1835 constitution encouraged internal improvements (Article XII, Section 3), just fifteen years later, after the panic of 1837, the legislature was severely limited in what it could do in the area of internal im-

10. Donald S. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 33; *Model State Constitution,* 6th ed. (New York: National Municipal League, 1968), 19; Lutz, "Purposes of State Constitutions," 33; Citizens Research Council of Michigan, *The Executive Branch,* report no. 313-5 (Detroit: Citizens Research Council of Michigan, August 1994).

11. Lutz, "Purposes of State Constitutions," 37.

provements by the 1850 constitution: "The state shall not be a part to, nor interested in, any work or internal improvement, nor engaged in carrying on any such work, except in the improvement of the public wagon roads and in the expenditure of grants to the state of land or other property" (Article XIV, Section 9). It should be noted that the building of roads was added to the 1850 constitution by amendment in 1905.

Other restrictions included a term-limit amendment to the Michigan Constitution of 1963 (in 1992). The governor, lieutenant governor, secretary of state, and attorney general were limited to two four-year terms, state representatives to three two-year terms, and state senators to two four-year terms. An amendment in 1978, aimed at limiting taxes and at least indirectly at limiting legislative spending, received the support of Michigan voters. The amendment "limited state revenues to a fixed percentage (9.49 percent) of state personal income; required the state to maintain at least the proportion of spending paid to local units in 1978."[12] Earmarking of state revenues is present in all of Michigan's constitutions, and it amounted to more than half of all revenues in the 1908 constitution.

Where Political Power Resides

Lutz notes that one of the primary purposes of a constitution is to distribute political power. Accordingly, there are a number of constitutional provisions that are advocated by the model that are found in some of Michigan's constitutions. The model supports a document that is similar in design to the U.S. Constitution:

> The departure of many state constitutions from the simplicity and clarity of the national prototype prepared by the convention of 1787 has been due, of course, to a number of causes, perhaps the least of which has been unclear thinking and bungling workmanship. For the most part, the overelaboration of checks and balances, the built-in weaknesses in all branches of government, and the proliferation of "thou shalt nots" on the one hand and of essentially statutory declarations of public policy in the guise of constitutional provision on the other stems from disillusionment with representative institutions and the desire either to prevent sin or to enforce the good (as seen by those making the constitutions).[13]

The model is most explicit in its recommendation of a unicameral legislature:

12. Citizens Research Council of Michigan, *Finance and Taxation,* report no. 313-10 (Detroit: Citizens Research Council of Michigan, October 1994).

13. Lutz, "Purposes of State Constitutions," 33; Citizens Research Council of Michigan, *Finance and Taxation,* viii.

> A continuing criticism of state legislatures has been the complexity and confusion resulting from the operation of bicameral bodies. . . . Most of the claimed virtues of unicameralism have been realized in the Nebraska experience during the past 30 years. Nebraska's single house with 49 members has permitted more easily the pinpointing of legislative responsibility than in sprawling two-house legislatures. Fewer bills have been introduced and a higher percentage of them passed. The prestige of membership has risen and in the view of many observers so has the quality of candidates. On the other hand, and in spite of the far more extensive experience with the bicameral system there are no data to support the claim that two houses result in better policies and more carefully written laws. There are no data to support the claim that the second house is a constructive check against hasty action.[14]

However, across the United States and in Michigan, the model's recommendation has not been adopted. Although Michigan's territorial government had a unicameral legislature, legislative political power is found in bicameral legislatures in each of Michigan's four constitutions.

In addition to the broad distribution of power among branches, Lutz maintains that constitutions also address the "process of collective decision making," or the distribution of power within institutions. Looking specifically at how political power is distributed in the legislative area, power is distributed disproportionately among senators and members of the house. The model recommends that "the number of senators shall not exceed one-third, as near as may be, the number of assemblymen." The rationale is to "avoid making one a mere carbon copy of the other."[15] Michigan was far ahead of the model when, in the 1835 constitution, it was stated that "the Senate shall at all times equal in number one third of the house of representatives, as nearly as may be" (Article IV, Section 2). The constitutions of 1850 and 1908 allow variable numbers for the state house, but one-third could easily be the ratio. At any rate, the 1963 constitution almost perfectly meets the ratio, with 38 senators and 110 representatives provided for (Article IV, Sections 2 and 3). The model would still prefer the 1835 constitution over the other three because it does not like stated numbers of members to be put in constitutions, preferring to allow for flexibility.

As far as terms of office go, the model, as noted, recommends a two-year term for house members and a six-year term for senate members. Michigan's 1963 constitution most closely approximates this, as it was the first, one of four, to recommend other than a two-year term for both houses. In 1963, the term for senators was increased from two years to four years. The model strongly recommends the legislative appointment of an auditor general.

14. *Model State Constitution,* 43.
15. Lutz, "Purposes of State Constitutions," 36; *Model State Constitution,* 42, 43.

This was satisfied with Michigan's first and last constitutions, but the 1850 and 1908 constitutions provided for the election of this office.

The governor has more centralized control in the 1963 constitution than in either the 1850 or the 1908 constitution but less control than in the 1835 document. In 1835, the governor appointed all state officers except for the treasurer (legislative appointment) and the lieutenant governor (elected). The supreme court justices were appointed by the governor. Both the secretary of state and the attorney general were appointed by the governor. These provisions closely parallel *The Model Constitution,* which provides for only one elected statewide official, the governor. In 1963, the constitution reduced the number of elected officials as stipulated in the 1850 and 1908 constitutions.

After some administrative reorganization in the executive branch by the governor, Michigan now has "18 principal departments: three are headed by constitutionally elected officials (attorney general, secretary of state, and State Board of Education); 11 department heads are directly appointed by the Governor; and four are appointed by boards or commissions appointed by the Governor."[16] This is the same number of departments stipulated in the model. The model rarely uses specific numbers and notes that there should be up to 20, and in a number of states many fewer than 20 might suffice. Setting the number of departments at 20 in Michigan was directly aimed at reducing and reorganizing the 120 existing executive agencies. Those who support centralized authority under the governor would prefer to have the secretary of state and the attorney general appointed by the governor. These have, since 1850, been elective offices, and in recent years the governor has often had to work with both of these officials elected from the other political party. Others view this as a check on too much power being centralized in the office of the governor.

The distribution of political power in the judicial branch is divided among different levels of courts, each with its own jurisdiction. The 1963 constitution presents a delineation of these courts: "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house" (Article VI).[17]

In Michigan, the first and fourth constitutions are much more similar in their provisions and more closely follow *The Model Constitution* than the second and third constitutions. A number of such examples have been cit-

16. Citizens Research Council of Michigan, *The Executive Branch.*
17. Ibid.

ed in this section. It seems that the distribution of political power as found in the first and fourth constitutions is more conducive to enabling the state to differentiate its distribution of political power, enhance governmental accountability, as well as "be instrumental in achieving [a] way of life."[18]

Legitimacy, Authority, and Expanding Citizenship

Michigan's first constitution was written while Michigan was still a territory within the Northwest Ordinance of 1787. The first constitution was passed in 1835, but Michigan was not admitted as a state until 1837, following the resolution of a boundary dispute with Ohio. Thus, Michigan's preamble, which establishes the authority of government, was somewhat different from what other states would have: "We, the PEOPLE of the territory of Michigan . . . believing that the time has arrived when our present political condition ought to cease, and the right of self-government be asserted . . . do, by our delegates in convention assembled, mutually agree to form ourselves into a free and independent state, by the style and title of 'The State of Michigan,' and do ordain and establish the following constitution for the government of the same." By the second constitution, in 1850, the preamble was short and directly to the point: "The People of the State of Michigan do ordain this Constitution." The two most recent contributions, in 1908 and 1963, both used identical language in the preambles: "We, the people of the State of Michigan, grateful to Almighty God for the blessings of freedom, and earnestly desiring to secure these blessings undiminished to ourselves and our posterity, do ordain and establish this constitution."

It is truly an evolutionary process to trace the growing inclusiveness of citizenship as one constitution is replaced by the next one.[19] In the first constitution, in 1835, the franchise was reserved to those white males who were "above the age of twenty-one years, having resided in the state six months next preceding any election" (Article II, Section 1). Property holding as a requirement to vote was much debated at the convention but was, in the end, defeated, and this meant that Michigan met the current requirements in most other states at the time. Women, Indians, and blacks were excluded from voting. Blacks were allowed to vote only in New England at this time. White aliens were permitted to vote in Michigan, putting Michigan ahead of some other states. The constitution of 1850 allowed Indians to vote but only if they were "a native of the United States and not a member of any tribe" (Article VII, Section 1). "Aliens who had declared their intention of becoming United States citizens were given the right to vote. . . . But the same

18. Lutz, "Purposes of State Constitutions," 36.

19. Lutz categorizes the definition of citizenship as "essential" (ibid., 32).

right was not extended to black males." Blacks had been given the right to vote via amendment to the state constitution in 1869, just one year before the Fifteenth Amendment to the U.S. Constitution was ratified. In the 1908 constitution "women's suffrage was turned down, but women taxpayers were allowed to vote on bond issues." In 1918, an amendment to the Michigan Constitution gave women the vote with some restrictions, which were erased when the Nineteenth Amendment to the U.S. Constitution, granting women the right to vote, was adopted in 1920.[20] The constitution of 1963 continued the age requirement of at least twenty-one years to vote, but this was superseded by the Twenty-sixth Amendment to the U.S. Constitution, which was adopted in 1971.

Forms of Government and Conflict Management

In the federal system of government in the United States there is the national level and the state level, but there is also a very large number of local units. The model "mandates the existence of only counties and cities, and flexibility is preserved by not specifying other forms of local government such as towns, villages, special districts, etc., although the legislature is left free to create them (including entirely new types) as it sees fit."[21] Michigan has provided in its various constitutions for counties and cities as well as for townships, villages, and metropolitan governments and authorities. Cities were given the right to home rule in the 1908 constitution, as were counties in the 1963 constitution. A board of supervisors had been utilized in counties in Michigan. The boards consisted of "one member from each organized township and such representation from cities as provided by law" (Article VII, Section 7). These boards were declared to be in violation of the "one person, one vote" rule by the U.S. Supreme Court in *Avery v. Midland County, Texas* (1968). A question that might be considered at a future constitutional convention in Michigan would be: "Is the present basic organizational structure of local government adequate to meet the needs of today and tomorrow? There are 1,859 overlapping counties, townships, cities, and villages, more than 60 percent of which serve fewer than 2,500 people, providing local services and using scarce public resources."[22]

Lutz argues that "any constitution which fails to provide a means for man-

20. Willis F. Dunbar and George S. May, *Michigan: A History of the Wolverine State,* 3d ed. (Grand Rapids: William B. Eerdmans Publishing, 1995), 207, 313 ("Aliens" quote), 382, 446 ("women's suffrage" quote), 473.

21. *Model State Constitution,* 95.

22. Citizens Research Council of Michigan, *System of Local Government,* report no. 313-9 (Detroit: Citizens Research Council of Michigan, October 1994).

aging conflict efficiently and effectively is seriously flawed."[23] Like most states, Michigan's constitutions have provided for the management of conflict with a separation of powers and a number of checks and balances among the legislative, executive, and judicial branches, which are found in different configurations in each of the four constitutions. The constitution itself can be amended by legislative action or the use of the initiative, each of which requires a majority of those voting on the amendment at the time of the election. Also, a constitutional convention can be called after a proposal by the legislature or by citizen initiative, or by the constitutionally mandated vote taken at sixteen-year intervals. With the availability of the initiative, there is always an opportunity for petitioners to have direct input into the system. Since the 1963 constitution, there have been twenty-two amendments initiated, although just six have been approved by the voters.

Revisiting the Way of Life: Education

Since the ratification of Michigan's most recent constitution in 1963 there have been sixty-six proposed amendments, twenty-seven of which were approved by the voters. Education has been a passionate concern for Michiganians in all of the state's constitutions, and this has continued since 1963. From 1963 through the November 2, 2004, election, about 20 percent of all amendments have focused, at least in part, on various educational provisions. There have been three proposed amendments that have been concerned with the allotment of public funds to nonprofit schools. The strong public school tradition throughout Michigan's history led to a rejection vote in each case. One of the proposals would have established a voucher system for use in both public and nonpublic schools. This was rejected by about a three-to-one ratio.

Nine proposed amendments concerned efforts to reduce property taxes and aid schools at the same time, and five proposals concerned raising the sales tax to, in part, finance education. Some of the proposals combined both property tax and sales tax concerns. In short, eight of the nine property tax proposals and four of the five sales tax proposals were not approved by the voters. Although supportive of education, voters were not satisfied that the right mix of taxes and other reforms was included in any of these proposals. The great breakthrough in achieving more consistent funding for education and also to achieve an equalization of funding was finally approved by the voters in an amendment approved in 1994. A major problem in Michigan was a concern that property taxes needed to be reduced and another

23. Lutz, "Purposes of State Constitutions," 33.

form of revenue used to offset the reductions. Residential property owners saw their "tax rates soar as the state-equalized valuation of nonexempt property rose by 291 percent between 1970 and 1991." By 1990–1991 school districts received "$5.1 billion from the property tax, over 60 percent of the total funding for public schools." Because of disparities in property values among different communities, the property tax generated very uneven collections and distributions by the different school districts. Finally, in 1993, the Michigan legislature "passed a motion eliminating property taxes as the major support for school expenditures." Six billion dollars was thus cut, and Michigan voters handily amended the 1963 state constitution on March 15, 1994, to increase the state sales tax from 4 to 6 percent, with the new revenue all being used to ensure that all school districts received a basic grant of five thousand dollars per student.[24] Only time will tell how effective these changes will be, but after tinkering with a whole gamut of short-term fixes over a long period of time, a decision to put forth a major solution was finally enacted.

Although a pressing matter in many other states, education is the primary concern for many in the state today, and it will continue to be. This passion for education, and its manifestation in the state's four constitutions, sets Michigan apart, distinguishing it from other states. Perhaps more important, it is this distinction that helps demonstrate the applicability of Lutz's framework for delineating the purposes of all constitutions, especially with respect to how constitutions define a way of life. With the aid of *The Model Constitution,* a number of these purposes have been discussed in this chapter. It is now important to take this to a second stage: to compare and contrast the purposes, as delineated from the constitutions of other states, to enable us to visualize the framework as it has actually evolved across the United States. This task has not been comprehensively undertaken previously, and the results should encourage further comparative work on state constitutions.

24. Dunbar and May, *Michigan,* 653, 654, 657–58.

OHIO

JAMES L. WALKER

The Ohio Constitution

Normatively and Empirically Distinctive

From the very beginning of the United States the seminal argument of politics was the proper distribution of political power between the states and the federal government. Even before the Philadelphia convention that "repaired" the Articles of Confederation, there was an ongoing argument over whether the United States was to be formed by the people or by the states. "We the people" created the United States, but in doing so we preserved the states as independent polities, and their constitutions as living documents. To say otherwise is to deny plain history. Unlike any other federal country, the United States is both a compact among states and an enterprise of the American people writ large. This is the genius of American federalism. In this chapter, I hope to shed light on this brilliant and effective power-sharing arrangement through the lens of Ohio, which was one of the early additions to the Union and has the second-oldest organic state constitution outside of New England.

State Constitutionalism in General

According to Lutz's model, that the polity must be uniquely defined is a given, since the institution of federalism requires that each citizen of the United States will also be, perforce, a citizen of a state (or a district or protectorate) depending on his or her residency. This does not, however, logically preclude multiple residencies for legal purposes on the part of an individual citizen.

The fact that every state has a constitution is the beginning of a conver-

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sation, not an end. The existence of the document is necessary, but not sufficient to demonstrate state constitutionalism. State constitutionalism, as Lutz has suggested, means much more than the existence of a written document. It means an ongoing engagement of the citizens and their government with the letter and the spirit of that constitution. To better understand this engagement, the Lutz model has both normative and empirical components. Among the normative predicates are whether there ought to be an independent *people* of Ohio, differentiable from the mass of U.S. citizens as a whole, and whether the important public issues affecting that *people* should be decided under a state, rather than a federal, regime. Another predicate is that freedom, creativity, and prosperity are better nurtured under a diverse set of polities rather than under one unitary government. Clearly, the value statements implicit in the Lutz model are among the traditionally strongest arguments for the existence of federalism. Some would say they underpin the absolute necessity of federalism in a democratic government as large as this one.

Among the empirical dimensions to the model there are measurable things that can be used to support the existence of constitutionalism. But as with all empirical approaches, the key to good results is the measure chosen. There are two measures that are inappropriate but have gained considerable purchase in the legal literature. These are, first, whether litigation under a state constitution is carried out in the same way that it is in federal courts, and whether the results of that litigation have the same impact on state government as the U.S. Constitution has on the national government.[1] The second measure is whether the state constitution allows for, and actually results in, significant departures from the rights guarantees of the U.S. Constitution.[2] One could conclude, using either of these two measures, that state constitutionalism does not exist, is not necessary, and may even be harmful. Some have done so, but it is a somewhat unfair judgment.

The whole point of the federal structure is to divide power in a way unique to all federal states. The states (and the people) delegate specific powers to the federal government and reserve the residuum to themselves. The powers delegated are beyond the purview of the state constitutions, and the powers reserved are just that. Yet some commentators insist on reading this arrangement out of the U.S. Constitution entirely. Naturally enough, if one assumes that, contrary to the plain language of the U.S. Constitution, it is the *states* that have delegated powers and the federal government the re-

1. James A. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90, no. 4 (1992): 761–837.

2. Robert F. Utter and Sanford E. Pittler, "Presenting a State Constitutional Argument: Comment on Theory and Technique," *Indiana Law Review* 20, no. 3 (1987): 635, 636.

served powers, then, mirabile dictu, state constitutions can be relegated to the dustbin of history. Unfortunately for these critics, the record of history is that representatives of independent states met in Philadelphia, and the document they crafted was presented to each state for ratification. They did not, thereby, vote themselves out of existence.

Of course, some analysts prefer to deny that the states are polities at all. Hans A. Linde, himself one of the most prominent proponents of "New Federalism," describes them as "a territorially defined legal system." Edward L. Rubin and Malcolm Feeley notoriously refer to them this way: "Most of our states, the alleged political communities that federalism would preserve, are mere administrative units, rectangular swatches of the prairie with nothing but their legal definitions to distinguish them from one another."[3] Naturally, if the state is unimportant, backward, or even nonexistent, how relevant can its constitution be? Despite the calls for states to be more aggressive in interpreting their own constitutions to protect individual rights,[4] numerous commentators have claimed that the enterprise has not been successful because, more often than not, state courts tend to interpret their own constitutions in lockstep with federal court interpretations of the U.S. Constitution, even where the wording of the state constitutions is significantly different from the coordinate passage in the federal constitution, or have not developed a coherent mode of interpretation under the state constitution.[5]

In order to assess both the normative and the empirical dimensions of Ohio's constitutionalism, we turn to a brief history of the state's constitution.

The History and Structure of the Ohio Constitution

Ohio constitutionalism has its roots in the Northwest Ordinance, adopted by Congress operating under the Articles of Confederation. The ordi-

3. Hans A. Linde, "State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse," *Rutgers Law Review* 24 (1993): 932; Rubin and Feeley, "Federalism: Some Notes on a National Neurosis," *UCLA Law Review* 41 (April 1994): 944.

4. William J. Brennan Jr., "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90, no. 3 (1977): 489, 503. See also Paul W. Kahn, "State Constitutionalism and the Problems of Fairness," *Valparaiso University Law Review* 30 (1996): 459, 464; and Earl M. Maltz, "False Prophet: Justice Brennan and the Theory of State Constitutional Law," *Hastings Constitutional Law Quarterly* 15 (1988): 429.

5. Gardner, "Failed Discourse." For a full discussion of these issues, see James A. Gardner, "Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions," *Georgetown Law Journal* 91 (2003): 1003–64; Jack L. Landau, "Hurrah for Revolution: A Critical Assessment of State Constitutional Interpretation," *Oregon Law Review* 79 (2000): 793; and Michael E. Solimine and James L. Walker, "Federalism, Liberty, and State Constitutional Law," *Ohio Northern University Law Review* 23 (1997): 1457.

nance, which was adopted in 1787, was heavily influenced by Thomas Jefferson's earlier plan for the westward expansion of the population. It was very much a Jeffersonian document and contained farsighted and even revolutionary elements. One commentator has referred to it as "magnanimous."[6] It was arguably the most successful piece of legislation adopted under the articles.

Among the elements of this precursor to the state of Ohio was a complete bill of rights, including trial by jury, habeas corpus, and freedom of religion. Article 6 of the ordinance also forbade slavery in the entire Northwest Territory. It is surprising to realize that this ordinance was adopted about the same time that the "Miracle at Philadelphia" was taking place, a convention that, although very successful, did not itself come up with a bill of rights. Finally, there was a substantive part of the ordinance that promised more than protection from government intrusion—for example, the oft-quoted "Religion Morality and Knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged" (Article 3). And although the definition of *encouraged* did not include the promise of any hard cash, the commitment to free public education was implied.

Because of its proximity to major avenues of transportation, mainly the Ohio River, and its abundance of natural resources, Ohio soon attracted enough immigrants to meet the conditions for statehood. But not everyone wanted to enter that process immediately. In fact, there were deep divisions between the arch-Federalist territorial governor and the Jeffersonian Republican advocates for statehood.[7] Arthur St. Clair, the territorial governor, had described the occupants of the Ohio Territory in less-than-flattering terms, at one point referring to them as a "multitude of indigent and ignorant people."[8] He adamantly opposed statehood and tried maneuvers to keep the statehood movement at bay. However, the settlers were infuriated at his attitude and were even more emboldened to press on for statehood. Since the federal government was by this time completely dominated by Jeffersonians, there was no problem in getting Congress to pass an enabling act on April 30, 1802, and the rush to statehood began apace.

Statehood

The enabling act set out the borders for the state and the requirements for participation in the first constitutional convention. All property restrictions

6. George W. Knepper, *Ohio and Its People* (Kent: Kent State University Press, 1997), 59.
7. Ibid., 89–93.
8. Stephen H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 2004), 7.

were removed in the voting for delegates, making it more likely that a clear majority would be anti-Federalist in outlook. It also made provisions for revenue from each township to support local schools and provide other revenue streams for the new state government.[9]

After the delegates were chosen, it took them only twenty-nine days to complete their work. Upon reflection, it might have been better had they tarried a bit. The two most notable debates during the whirlwind meetings were whether to proceed to statehood at all and the role African Americans would play in the new polity. On the first issue, there was near unanimity, but on the second there was a tragic split and an opportunity lost. Although only one diehard Federalist delegate opposed moving to statehood, the convention narrowly failed to admit its free black citizens to equal political standing, allegedly because of fear of attracting slaves from other states. It put no explicit restraints on the civil rights of blacks, but invited the legislature to do even further harm through legislation, which it eventually did.

One commentator describes the mood of the delegates as "re-enacting the American Revolution." The constitution enabled Ohio, which had been largely "unpopulated by white people in 1787," to become "a state co-equal with all others by 1802." Because of its failure to guarantee equal rights while vastly increasing suffrage, one historian describes it as a Republican paradise for white men.[10] In short, the resultant constitution was an homage to the past, not a good road map for the future.

The major problem of the 1802 constitution was the absolute supremacy of the legislature. If there were ever an example of putting all one's political eggs in one basket, this was it. Since the state had chafed under the authoritarian rule of the Federalists, it was natural that they would adopt the Republican strategy of giving increased power to the elected representatives of the people. However, in making the legislature totally supreme, and allowing it not only to appoint the governor's cabinet but also to appoint and dismiss judges, it created no check on legislative power. There were no practical restraints on the elected representatives. They carved out their own districts; created counties at will with officials dependent on them for their jobs; favored corporations, especially banks, with their policies sometimes participating in the resulting profits; appointed all the state officials save the governor; and had complete control over any constitutional changes that might curb their power and influence. Other than that, the cynic might say, it was a fine document.

9. Act of April 30, 1802, chap. 40, 2 Stat. 173 (amended 1803).

10. Andrew R. L. Cayton, "Law and Authority in the Northwest Territory," in *The History of Ohio Law,* ed. Michael Les Benedict and John F. Winkler (Athens: Ohio University Press, 2004), 36 (quotes); Barbara A. Terzian, "Ohio's Constitutional Conventions and Constitutions," in ibid., 49.

Special interests in the state, especially corporations and banks eager to make money in the population boom, soon discovered that it was much easier to bribe one branch of government than to bribe all three. Special legislation grew apace. In 1833 the legislature passed 30 bills of general interest and 250 pieces of special legislation. The low point for the operation of the Ohio Constitution came in 1837 when the state legislature, without having to worry about a veto from a politically impotent governor, passed the Loan Act of 1837.[11] The law became popularly, and appropriately, known as the Plunder Law, because it emptied the treasury to the benefit of transportation interests and plunged the state into enormous debt. Amid the ruins, citizens of both the Democratic and the Whig persuasion could be heard to mutter the timeless refrain: "No man's purse is safe so long as the state legislature is sitting."

Although the law was repealed in 1840, public opinion began to favor a more permanent solution to the problem of legislative irresponsibility. Calls for constitutional reform became so loud that the legislature could no longer ignore them. By the time of the vote in 1850, forty-eight years after statehood, 73 percent of the citizens approved of a constitutional convention.[12]

The Constitution of 1851

This convention was Jacksonian rather than Jeffersonian in tenor. Its leitmotif was a palpable distrust of corporations and banks.[13] It even contained an article specifically dedicated to the subject of corporations. The citizens and the delegates both approached the convention with a great deal of optimism, believing, as one delegate put it, that "the people now have it in their power to change the state constitution so as to make it conform to the progressive spirit of the age . . . to simplify their state government . . . make it less costly to the taxpayer, and . . . better protect the citizen in his rights." Such sentiments helped fuel the public support for the convention, for as C. B. Galbreath drolly remarked, "There is a wonderfully attractive power in the things that are cheap and free."[14]

Given the fact that the Democrats dominated the delegation, and that the radical wing of that party, including the Locofocos, was in the majority, the resulting document could have been much more adventurous than it turned

11. Steinglass and Scarselli, *Ohio State Constitution,* 17.

12. Terzian, "Ohio's Constitutional Conventions," 52.

13. Steinglass and Scarselli, *Ohio State Constitution,* 21.

14. Galbreath, *The Constitutional Conventions of Ohio* (Columbus: State Library of Ohio, 1911), 22.

out to be.[15] It was moderated by the fact that several conservative Democrats were joined by several Whigs who wanted to preserve many corporate privileges. Together, they managed to defeat the more outré proposals, among them the abolition of capital punishment and the guarantee of secure home ownership. But the document as written does cure most of the major ills of the 1802 constitution and contains a lot of the progressive agenda. Its success might be measured by the fact that it is the last constitution Ohio has adopted and, although amended profusely over the years, remains the basic law of the state today.

Compared to the breakneck speed of the 1802 group, the 1850 convention was positively leisurely in its pace. It did its work in 163 days, not including a 5-month hiatus forced upon it by a cholera epidemic. The final document was completed on March 9, 1851, in Cincinnati and was sent to the voters. The vote was fairly close, but not a nail-biter. The ayes had it, 53 percent to 47 percent. What the voters approved was a document that was much more likely to result in prudent and efficient government than the constitution of 1802. It was consistent with the Jacksonian ideal of broadening the franchise and making more offices elective rather than appointive. The poll tax was eliminated, and there were no property requirements for voting (Article 12, Section 1; and Article 5, Section 1, respectively).

The legislature was significantly weakened. The trust that the polity of 1802 had put in a directly elected, unrestrained "people's body" had been vitiated by decades of corruption and malfeasance. All appointment power was taken away from the legislature. This meant that all statewide officers, as well as judges, were to be elected (Article 4, Section 6). Furthermore, there were substantive limits placed on the powers of the general assembly and senate, especially in the area of special legislation, where they were forbidden to grant privileges and immunities that could not be changed or taken away (Article 1, Section 2). There was an entire section that dealt with corporations. The first section of that article said the legislature "shall pass no special act conferring special corporate powers" (Article 13, Section 1). The second section went on to require that all incorporations take place under the rubric of general rather than special legislation. There were even requirements that stockholders in corporations have personal liability for the corporations' actions, and that corporations be subject to taxes in the same way that individuals are. An echo of the 1837 panic can be found in the requirement that the legislature refrain from "authorizing associations with

15. "Locofocos" was the name of the radical part of the Democratic Party; the word literally means "an incendiary device."

banking powers" absent a referendum to the people of the state (Article 13, Section 7).

Articles 8 and 12, dealing with finance and taxation, respectively, also curtailed the formerly freewheeling behavior of the legislature. Article 8 is the longest of all articles and with its many amendments is longer than the remainder of the constitution by far. By these articles, all property had to be taxed uniformly, and banks had to be subject to taxation. Article 8 placed strict limits on the state's ability to incur debt, limiting the amount to $750,000, except for emergencies such as invasion or insurrection. A sinking fund was established to retire the debt accumulated to that point, and provisos outlawing joint government-corporate ventures were included.

The new constitution also put severe restrictions on the legislature's ability to gerrymander its districts (Article 11). Strict guidelines, as well as the level of participation by other elected officials in the process, were set out. Lawmakers were also restrained in their ability to form new counties (Article 2, Section 30), and were thus limited somewhat in creating patronage positions. Only one county has been added to the state since the adoption of this section.

In order to address the terrible backlog of cases and provide a more efficient system of justice, the new constitution completely revamped the judicial system. In Article 14, Section 1, it vests the "judicial power" in existing common pleas and other courts, and those that the legislature may from time to time establish. An intermediate level of appeals courts was created, called the district courts of appeal. It made the supreme court a court of final review and sharply limited its original jurisdiction cases to habeas proceedings. The five justices were to be elected at large rather than appointed. The justices were not relieved of the burden of "riding circuit," but came to ignore the requirement after an amendment abolishing the practice failed in 1857.[16]

The offices of state treasurer, auditor, attorney general, and lieutenant governor were added to the executive branch to join the governor and secretary of state. But the executive was not strengthened dramatically. No veto power was given to the governor. The closest that the convention came to strengthening the office was a proposal to allow a veto that could then be overturned by a simple majority of the legislators. Even that failed, and the governor's office remained essentially the same as it had been under the 1802 compact.

In the original, Jeffersonian, constitution of 1802, the bill of rights came at the end of the document. It was not an afterthought or add-on, but it was clearly not the first thing on the framers' minds. In the 1851, current, consti-

16. Steinglass and Scarselli, *Ohio State Constitution,* 26.

tution, befitting the Jacksonian model, the bill of rights precedes both the letter and the spirit of the parts of the constitution granting power to the different branches. In substance, however, there is very little difference between the two bills of rights. The only contentious issue in the debates was the proposal to limit the power of the legislature to grant immutable privileges to corporations. The convention debated this for more than a month, with the Democrats eventually carrying the day over the Whigs. The actual rule applied only prospectively, of course, since the U.S. Supreme Court had already declared that corporate charters were contracts that could not be simply legislated away.[17]

One thing that clearly did not change was the constitution's preference for white citizens and males. Attempts to eliminate the word *white* from the document in both suffrage and militia sections were defeated soundly. Proposals to include women in the political structure met with a similar fate. Only the very progressive delegates from the Western Addition, that part of the state that was ceded to the Northwest Territories by Connecticut, voted in favor of the proposals.

Unlike the 1802 document that was extremely hard to amend, by 1851 it had become relatively easy. Article 16 of the constitution gives several ways for amendments to be proposed. The legislature at any time may submit amendments to the people for their approval (Section 1). It is also free to call a constitutional convention at any time (Section 2), but it is mandated to vote at least every twenty years on the question of whether a constitutional convention is required. And, if the vote is in the affirmative by a two-thirds vote, the legislature must call one (Section 3). The people may also propose amendments to the constitution through the initiative process (Article 2, Section 1), and they have done so many times since 1851.

In fact, the process of amendment has, together with judicial review, constituted virtually all of the constitutional history of Ohio since 1851. There were two additional constitutional conventions, in 1873 and again in 1912. But the citizens of the state have not gathered in convention to deal with the basic document since that time, even though the constitution requires that a convention be considered every twenty years (Article 16, Section 3).

The 1873 convention might charitably be called a failure. It was probably doomed from the start by the fact that it took too long to complete, was dominated by lawyers, and coughed up a document more than two and a half times longer than the 1851 constitution, containing reams of special-

17. *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1812). The case was limited by *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 36 U.S. 420 (1837). In the latter case, the court said that all charters must be strictly construed, eliminating the possibility of implied rights of contract with the state.

interest items that could have been dealt with legislatively if they should have been dealt with at all.[18] There were some key constitutional issues that came up, including women's suffrage (which did not make it out of committee).[19] But by and large the enterprise became a waste of time and effort. Unlike the 1851 convention, which was dealing with core governance problems, the 1873 convention could have addressed the most pressing issues without creating such a monstrosity.[20] With public interest having abated, and with a document containing at least one thing to unnerve everyone, the polity did the right thing: the new constitution was rejected by a vote of 250,169 to 102,885.

Calls for Reform

During the period between the 1873 and the 1912 conventions, several of the ideas that had been included in the 1874 constitution were presented to the voters as separate amendments. One that was a classic catch-22 was the problem of making the constitution easier to amend. In order to make the constitution easier to amend, you had to first amend it. Amendments required what amounted to a supermajority. This is because the 1851 document said that any amendment presented to the voters had to receive a majority of the votes *cast at the election.* Eleven amendments were approved, but nineteen were turned down, even though thirteen of the nineteen had majority approval of those voting on the amendment.[21]

This was done, presumably, to ensure that a constitutional amendment could not be approved by a small, determined minority of voters. However, many people who went to the polls simply voted on the other ballot issues and skipped the amendments, perhaps because they did not understand them or had not heard of them before.[22] Thus, from inception to 1911, the 1851 constitution was amended only eleven times. Some of these were important, such as the veto power for the governor passed in 1895. But the inability to deal with the major problems of the judiciary, the Progressive movement sweeping the nation, as well as a decidedly anti-Progressive Ohio Supreme Court led to the 1912 constitutional convention.[23]

18. Isaac F. Patterson, *The Constitutions of Ohio: Amendments and Proposed Amendments* (Cleveland: Arthur H. Clark, 1912).

19. Terzian, "Ohio's Constitutional Conventions," 54.

20. Patterson, *Constitutions of Ohio,* 36.

21. Steinglass and Scarselli, *Ohio State Constitution,* 43.

22. This phenomenon, called roll-off, still occurs. In the 2005 election, the number of votes cast for the constitutional amendments was less than the total number of votes cast, even though there was almost nothing else on the ballot.

23. From 1895 to 1909 the court overturned numerous progressive laws on state constitu-

There were numerous major interests that wanted the chance to change the constitution, including the women's suffrage movement, labor, court reformers, and municipal home-rule advocates. But just three major interest groups dominated the call: the Direct Legislation League, the Ohio State Board of Commerce, and the liquor industry. Each met with varying degrees of success in seeing its interests dealt with.[24]

The convention took place in January 1912 and presented its product to the people in September of that same year. What is remarkable about this convention is that it decided not to draft a new constitution, as the failed convention of 1873 had done. Instead, it attacked the problems piecemeal and presented a package of amendments to the voters, on each of which they could vote up or down. This turned out to be a stroke of genius, as the amendments that were eventually approved changed the character of the constitution to a great degree but did not add significantly to its size or complexity.

In all, the convention presented forty-two amendments to the people in an election held on September 3, 1912. Voters approved thirty-four of them.[25] Among the many important innovations contained in those amendments were the initiative and referendum, municipal home rule, elimination of the supermajority requirement for *all* constitutional amendments, rules making it harder for the Ohio Supreme Court to overrule legislation, and seven amendments that directly negated decisions of that court. The voters also approved other changes such as in the judicial system to improve its fairness and efficiency, direct primary elections for most offices, and the creation of a superintendent of public instruction. No major changes to the tax system were proposed, which mightily displeased the business interests that had pushed so hard for the convention in the first place.

Among the important amendments rejected by the voters were women's suffrage, expanding the debt limit for roads, and limiting the use of injunctions in labor disputes. The voters even rejected eliminating the word *white* in voter qualifications, even though the section had been made moot by the passage of the Fifteenth Amendment to the U.S. Constitution.

No constitutional convention has been held in Ohio since 1912. Even though the issue has been (by constitutional mandate) revisited every twen-

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tional grounds, including safety regulations, labor laws, pensions for teachers, workers' compensation, and even voting machines.

24. Hoyt Landon Warner, *Progressivism in Ohio, 1897–1917* (Columbus: Ohio State University Press, 1964), 295.

25. It is important to note that the "supermajority" requirement did not apply to amendments presented to the people from a constitutional convention.

ty years since, the voters have rejected calls for a convention whenever asked. Instead, constitutional change has taken place by a combination of legislative action, citizen initiative, and judicial interpretation. From 1913 to 2004, 198 amendments were presented to the voters, and they approved 109, or 55 percent. This contrasts to the 1852 to 1911 period, when only 27.5 percent of amendments were approved.

Many of the amendments passed during this period dealt with important issues, and changed behaviors significantly, but none altered the basic governmental structure that was established by the adoption of the progressive amendments of 1912. The relative balance of power between the branches of government has remained the same. Where significant changes have occurred, they were instigated by federal mandate, including the elimination of racial, gender, and age restrictions in voting and military service. Ohio, along with many other states, had to change its apportionment methods to conform with the "one man, one vote" requirement of the U.S. Supreme Court.[26]

Finally, in 1969, the state legislature actually created the Constitutional Revision Commission to look at needed changes in the constitution. This was done since there was a mandated vote on a constitutional convention scheduled for 1972. The commission recommendations resulted in fifteen amendments being approved by the voters, but none of them made major changes to the constitutional structure.

Modern and Contemporary Ohio Constitutionalism

No scholar claims that states are completely sovereign polities. There are too many areas where they may not choose their own destiny because they are part of an indissoluble Union. Nevertheless, it has been demonstrated that despite the claims of the most ardent critics of federalism and state constitutionalism, Ohio both lives under the constitution of 1851 as amended and conducts the business of the state under that document. All three branches of government, not just the judiciary, have a day-to-day relationship with the constitution and are both infused with the power of the people that it grants and restrained by the limitations the people have imposed on their government through it. In every city and village of the state there are officials, petty and not so petty, who hold meetings, make decisions, keep records, write regulations, and enforce laws that are shaped and restrained by the state constitution. The first place these officials look for guidance is that document, not the one in the National Archives in Washington, D.C.

26. *Reynolds v. Sims,* 377 U.S. 533 (1964).

Does the state constitution define Ohio the way that the U.S. Constitution defines the United States? The implication of this question is that only a constitution of a sovereign republic is such a document. It seems clear that the history and operation of the Ohio Constitution indicate the people of Ohio thought it was a constitution in full; they believed that it would be the final say in the areas in which it had jurisdiction. They certainly saw the constitution, and the amending process, as one that would make a difference in their lives and not be just some symbolic gesture on their part.

A great deal has been made of the fact that people do not express a reverence for the state constitution as they do for the U.S. Constitution and that they have little knowledge of the operation of the state constitution. And it must be readily conceded that knowledge of the U.S. Constitution is more widespread in Ohio than knowledge of the state constitution. But more's the pity that *both* levels of knowledge are inadequate to an educated citizenry. It is not the passive knowledge but the active use and appreciation of the constitution by those citizens who choose to be involved that must be the measure of any constitution.

JOHN ZUMBRUNNEN

Wisconsin

Rejection, Ratification, and the Evolution of a People

Wisconsin's Two Constitutions

In *A Preface to American Political Theory,* Donald S. Lutz counsels against approaching the U.S. Constitution as an "ideal, complete and timeless text." As Lutz's own attempt to create a complete text of the Bill of Rights makes clear, the work of the late 1780s and early 1790s drew upon a rich history of constitutional thinking and practice.[1] But the openness of any constitutional text points us forward as well as backward in time, calling us to consider not only formal constitutional amendments but also the myriad ways in which constitutions change through political and legal processes. And when we turn to the state level, the challenge of choosing a "text" for analysis becomes even more complex, since most states have in the course of their history had multiple constitutions.

From this point of view, Wisconsin would seem a relatively easy case, for the constitution ratified by its citizens upon attaining statehood remains in effect today. This marks it as one of the oldest standing constitutions among the American states.[2] On the other hand, in Wisconsin, as in other states, the initial process of constitution-writing required multiple attempts. The present constitution was written in convention in 1847 and submitted for popular vote in 1848; it was approved by a broad margin, with 72 percent voting

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1. Lutz, *A Preface to American Political Theory* (Lawrence: University Press of Kansas, 1992), 42, chap. 3.

2. Eighteen other states retain their original constitutions. Only five New England states have standing constitutions older than Wisconsin's. See Jack Stark, *The Wisconsin State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1997), xviii.

in favor of ratification. Wisconsin had, though, held its first constitutional convention in 1846. The constitution produced by that convention was put before voters on April 6, 1847.[3] Nearly thirty-five thousand citizens turned out for this first ratification vote, more than ten thousand more than would vote in 1848, but 59 percent voted against the controversial document.[4]

An obvious first question is why Wisconsin voters rejected the constitution of 1846 and approved the constitution of 1848. After all, as Lutz reminds us, the constitutional tradition rests on the importance of consent.[5] Particularly given the decisive margins in both Wisconsin ratification votes, we can usefully compare the two constitutions as a way of understanding which ways of thinking about themselves and their politics early Wisconsinites would accept and which they would not. I, in fact, pursue this line of questioning in what follows, as have many others. Yet Lutz also suggests that the evolving political self-definition of a people involves something rather more complex than a simple choosing between two (or more) well-defined, mutually exclusive paths. Drawing on Eric Voegelin, Lutz asserts that "foundation documents evolve over time and tend to elaborate upon what is contained embryonically in earlier documents."[6] Rather than seeing sharp, revolutionary breaks with the past, we ought, then, to look for change in the context of a greater continuity. That the constitution ratified in 1848 in many respects closely resembles the constitution rejected in 1847 suggests that such was the case in Wisconsin. Beyond this, I want to suggest that elements found in the earlier document but expunged by the second convention seem to have lingered in some extraconstitutional embryonic fashion in the Wisconsin political imagination, only to reemerge some fifty years later in a (re)defining moment in Wisconsin politics: the Progressive Era.

3. For simplicity's sake, I refer throughout to the two constitutions as the constitution of 1846 and the constitution of 1848. This avoids the potential confusion of referring to the busy political year of 1847, during which Wisconsinites both rejected the constitution of 1846 at the polls and wrote the constitution of 1848 in convention. The text of the constitution of 1846 is reprinted in Milo M. Quaife, ed., *The Convention of 1846* (Madison: State Historical Society of Wisconsin, 1918), 732–55. I have relied on the text of the constitution of 1848 printed in Henry Casson, ed., *Constitution of the State of Wisconsin with a Brief History of the Admission of Wisconsin to the Union* (Madison: Democrat Printing, Wisconsin State Printer, 1898), 9–37.

4. Precise vote totals for both ratification elections can be found in Stark, *Wisconsin Constitution,* 4, 8.

5. See esp. Lutz, *Preface to Political Theory,* 42–45.

6. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 3.

Economic Justice and Self-Government—or Individual Liberty?

The common explanation for Wisconsin voters' rejection of the constitution of 1846 rests on the presence of three controversial provisions in that document. First, after much debate, the convention of 1846 voted to include, as Article X, a complete prohibition on banks and banking activities in the new state.[7] Second, Section 1 of Article XIV provided for the protection of the property rights of married women, ensuring that "all property, real and personal, of the wife, owned by her at the time of her marriage, and also that acquired by her after marriage . . . shall be her separate property." Finally, Section 2 of Article XIV mandated a homestead exemption, protecting forty acres of property, "selected by the owner thereof," from "forced sale" for the repayment of debts. The controversy spurred by these issues, evident during the convention itself, spilled forth in the pages of Wisconsin's newspapers during the ratification debate. No doubt, this controversy helps to account for the large turnout for the vote on ratification, and for the defeat of the constitution of 1846. The issues of banking, women's property rights, and the homestead exemption had hardly disappeared when the convention of 1847 met. Delegates at the latter convention considered all three issues again, but, as we will see, they chose to finesse, compromise, or ignore these issues in the constitution they produced.

Again, a seemingly obvious explanation for the different manner in which the two conventions handled these controversial issues suggests itself. By all accounts, the convention of 1846 was more divisively partisan, in general given to greater tumult, and, above all, less rational in its proceedings than the convention of 1847. In 1846, 103 Democratic delegates were arrayed against only 18 Whigs and 3 independents.[8] The Democrats, we are told, "ranged all over the political spectrum."[9] Indeed, although the three controversial provisions cited above today seem obviously to follow along Jacksonian Democratic lines, the votes on them in the convention were considerably closer than the vast Democratic majority would suggest. By contrast, Democrats outnumbered Whigs in the 1847 convention by only 46 to 23, causing them "to become more conciliatory." Beyond these matters of partisanship, Ray

7. Records of debates on banking and other issues can be found in the journals of the respective conventions, reprinted in full in Quaife, *The Convention of 1846;* and Milo M. Quaife, ed., *The Attainment of Statehood* (Madison: State Historical Society of Wisconsin, 1928).

8. Alice E. Smith, *The History of Wisconsin,* Vol. 1, *From Exploration to Statehood* (Madison: State Historical Society of Wisconsin, 1973), 655.

9. Stark, *Wisconsin Constitution,* 4. In *The Convention of 1846* and *The Attainment of Statehood,* Quaife offers brief biographical sketches of the delegates to each convention.

A. Brown suggests that the 1846 convention suffered from its "unwieldy size," whereas the later convention benefited from having just over half as many members. Milo M. Quaife asserts that in the wake of the failure of the constitution of 1846, it was "clear that with a convention more wisely organized than the first had been . . . a document might be drafted which would meet with general acceptance." And Brown, again, assures us that the convention of 1847 "was a disciplined and rational body."[10]

In Lutz's terms, we might say generally that the constitution of 1846, whether because of its makeup, disorganization, or general temper, failed in its attempt to define the "way of life" of the Wisconsin people. In its three most controversial provisions, that constitution aimed to enshrine an understanding of "the values that support the good life" that could not, in fact, win the approval of a majority of Wisconsin voters. More specifically, the 1846 constitution emphasized a set of values centering on equality and security in the economic realm—I shall refer to this as a concern with economic justice—upon which the voting citizens of Wisconsin were not sufficiently united.

This lack of unity among voting citizens most certainly reflected the economic diversity of the people being grouped together in the new state and thus defined by whatever constitution it ratified. The Wisconsin population at the time varied from the merchants and financiers of the eastern port cities to the laborers of the extensive mining region in the southwest quadrant of the territory, the growing number of debt-ridden farmers very slowly spreading from the already populated southern sections, and the increasingly deforested northern reaches of the soon-to-be state.[11] Beyond matters of partisanship, size, and temper, no doubt part of the wisdom of the 1847 convention lay in the delegates' recognition of the divisiveness of the fundamental economic issues that the 1846 constitution had sought to address so definitively. Rather than treating these issues as matters of fundamental principles that united the Wisconsin people, the delegates in 1847 dealt with them chiefly as problems in the distribution of political power, as we will see presently.

In offering its own account of the Wisconsin people and their way of life, the 1847 convention clearly emphasized freedom and individual rights. This is apparent in the first two paragraphs of the constitution of 1848, which

10. Stark, *Wisconsin Constitution,* 5; Brown, "The Making of the Wisconsin Constitution, Part I," *Wisconsin Law Review* 23 (1949); Quaife, *The Attainment of Statehood,* v; Brown, "The Making of the Wisconsin Constitution, Part II," *Wisconsin Law Review* 27 (1952).

11. In chap. 2 of *A Short History of Wisconsin* (Madison: State Historical Society of Wisconsin, 1962), Larry Gara offers a concise account of the settlement of Wisconsin in the first half of the nineteenth century. Smith, in *The History of Wisconsin,* offers a more detailed account.

constitute the preamble and the first section of the declaration of rights. In both cases, comparison with the constitution of 1846 proves revealing. The 1848 preamble reads as follows: "We, the people of Wisconsin, grateful to Almighty God for our freedom; in order to secure its blessings, form a more perfect government, insure domestic tranquility and promote the general welfare; do establish this Constitution." The 1846 preamble is a good deal longer, containing a reference to the authority of the U.S. Constitution and the Northwest Ordinance. It, too, sets as a goal securing "the blessings of liberty," along with promoting the general welfare and establishing justice. But it begins by thanking God not for freedom but for his "grace and beneficence . . . in permitting us to make choice of our form of government."[12] Before the later mention of liberty, welfare, and justice, the preamble proclaims that "the time has arrived" for "the right of self-government to be asserted." In short, where the 1848 preamble places freedom first and foremost, the 1846 constitution emphasizes self-government.

This difference in emphasis continues in the two constitutions' enumerations of rights. In general, the declaration of rights in the 1848 constitution closely resembles the bill of rights in the 1846 constitution. Here as elsewhere, the 1847 delegates clearly started from the work done in 1846. In the 1848 constitution, the declaration of rights stands as Article I, immediately following the preamble—as is the case in many state constitutions. By contrast, the 1846 constitution leaves the bill of rights until Article XIV, near the end of the document. The comparative effect is the foregrounding of citizens' rights in the constitution of 1848 and the institutions of representative government in 1846. Something similar can be said of subtle differences in the opening sections of the two bills of rights. The 1848 declaration of rights opens with a close paraphrasing of the U.S. Declaration of Independence: "Section 1. All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness: to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed." Section 1 of the 1846 bill of rights opens with the same clause, but proceeds immediately to a statement of self- government and contains no mention of individual rights: "Section 1. All men are born equally free and independent; all power is inherent in and government originates with the people, is founded in their authority and instituted for their peace, safety and happiness."[13] Nuanced though they

12. During debate, Lorenzo Bevans introduced an amendment to the preamble that would have had the people of Wisconsin thanking God not for the right of self-government but above all for "prosperity and freedom." The amendment was soundly defeated. See Quaife, *The Convention of 1846,* 389.

13. The *Madison Express* of November 10, 1846, reported that Neely Gray moved "to strike

are, the changes from 1846 to 1848, taken together, again point toward an emphasis on different fundamental principles.

On the evidence presented so far, we might say that the 1848 constitution with its emphasis on rights and liberty appears to envision a way of life that we might identify as classically liberal, whereas the 1846 constitution, with its emphasis on self-government and a particular vision of economic justice, appears to lean on more specifically populist values. Of course, neither document falls neatly into such categories. The declaration of rights in the 1848 constitution, for example, ends with a section that embodies a sense of civic virtue we might well associate with classical republicanism: "Section 17. The blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."[14] We would do well here to keep in mind Lutz's admonition that "the utility of intellectual traditions for describing and explaining American political theory is severely limited."[15] Yet although we cannot simply categorize either constitution, it seems clear that the two documents emphasize different values, all of which may well be at work in the ongoing definition and redefinition of the way of life that unites the people of Wisconsin. In turning to consider the remaining constitutional functions, I will, then, work from the basic premise that 1846 saw the forwarding of a document emphasizing economic justice and self-government, whereas the 1847 convention produced a document emphasizing the protection of individual rights.

Self-Governing Citizens or Rights-Bearing Individuals?

Beyond economic concerns, issues of suffrage roiled both of Wisconsin's constitutional conventions. Debates over who would receive the right to vote marked the chief controversy in the process of defining citizenship in early Wisconsin. As Lutz makes clear, the definition of citizenship entwines with a number of other basic constitutional functions.[16] Citizens taken together constitute the public; the "regime" is that subset of the public that actually

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out the syllable 'in' so that the first section [of the bill of rights] would read 'All men are born free and dependent,' etc., which was rejected" (quoted in Quaife, *The Convention of 1846,* 365).

14. In 1846, an initial committee report included a very similar section, calling for a "frequent recurrence to fundamental principles" and "a constant adherence to justice" to preserve "good government" (Quaife, *The Convention of 1846,* 303). The section was apparently removed by a select committee appointed to "revise and correct" the bill of rights (385).

15. Lutz, *Preface to Political Theory,* 113–14.

16. Lutz, *Origins of American Constitutionalism,* 13–14.

rules. In a political system where the form of government is representative, the constitution establishes the authority of the regime by rooting it in the expression of the will of the public through elections. In this section, then, I explore issues of the public, the regime, and the form of government by thinking first about the definition of citizenship—again, using similarities and differences between the constitutions of 1846 and 1848 for leverage.

Both constitutions devote separate articles to suffrage: Article VIII in 1846 and Article III in 1848. The articles share several provisions, and they give a clear indication of who would be considered a voting citizen. Since both constitutions make every "qualified elector" eligible to hold state legislative and executive offices, these provisions also in effect identify those who are at least potential members of the regime. The two suffrage articles begin with nearly identical language. I quote here from Article III of the constitution of 1848: "Section 1. Every male person of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided in the State for one year next preceding any election, shall be deemed a qualified elector at such election."[17] Each of the suffrage articles then lists four "classes" of citizens. Three of these classes are identical in the two constitutions. "All white citizens of the United States" who meet the general requirements already listed are identified as electors. So, too, are two sorts of Native Americans: those made citizens by an act of Congress and "all civilized persons of the Indian blood, not members of any tribe of Indians." There are more nuances, if not significant differences, regarding the fourth class of electors. Wisconsin saw rapid population growth in the mid-1800s, in large part through immigration. And so both constitutions grant suffrage to "white persons of foreign birth who shall have declared their intention to become citizens."[18] The difference lies in the requirement imposed by the constitution of 1846 that immigrants take an oath of loyalty to the federal and state constitutions.

Both constitutions also specifically exclude the mentally ill, U.S. soldiers stationed in the state temporarily, and those who would wager on elections. Leaving until later the most controversial class of persons excluded from suf-

17. The 1846 suffrage article differs insofar as it refers not to "every male person" but to "all male persons." It thus ends by defining "the qualified electors" rather than "a qualified elector." Though I do not emphasize this point in the main text, the difference here seems to accord with the 1848 constitution's broad focus on individual liberty and rights and the 1846 constitution's focus on self-government as a collective matter.

18. On this point, see Gordon B. Baldwin, "Celebrating Wisconsin's Constitution 150 Years Later," *Wisconsin Law Review* (1998): 672. Brown reports that the population of Wisconsin grew from just 30,000 in 1840 to 155,000 in 1846 to more than 300,000 in 1850 ("Making of the Wisconsin Constitution, Part I," 649). According to the 1850 census, about one-third of Wisconsin residents were immigrants (652).

frage—African Americans—the two constitutions, then, basically agree on who should vote: white males and "civilized" Native Americans. But the 1846 suffrage article contains some intriguing provisions that reinforce the sense of important underlying differences in the orientation of the two documents. In Section 3, it specifically provides that although an elector can vote in local elections only in the "district, county or township for which he shall have actually resided for ten days next preceding such elections," any elector may vote "anywhere in the state for state officers." Section 6 prohibits the arrest of any elector "during their attendance at elections, and in going to and returning from the same," except for treason, felony, or "breach of the peace." These seemingly minor points suggest a concern that voters might be kept by illicit means from actually exercising the franchise. Along similar lines, the 1846 suffrage article declares in Section 7 that electors cannot be "obliged to do militia duty on days of election." All these protections have the effect of emphasizing the *act* of voting—the fundamental act of self-government in a representative system; by contrast, the 1848 suffrage article seems concerned more simply with establishing the *right* to vote.[19]

The constitution of 1848 does not have the final protection just mentioned—against requiring voters to perform militia duty on election day—in large part because it does not require participation in the state militia. By comparison, Article XIII, Section 1, of the constitution of 1846 provides that all "free, able-bodied male persons (negroes and mulattoes excepted)" between the ages of eighteen and forty-five will constitute the state militia. Beyond granting the right of suffrage, then, the constitution of 1846 imposes a compulsory civic duty on citizens and, in fact, widens the definition of citizens to include white males eighteen to twenty-one years old. The 1846 militia article goes on to describe in some detail the command structure of the state militia, though it leaves various other organizational matters up to the legislature. The key point here is that the constitution of 1848, in the next-to-last section of the article on the legislature, leaves *all* matters pertaining to the militia in the hands of future legislators. The second constitutional convention did, we should note, consider the 1846 militia article, the exact text of which was reported out of committee to the convention floor. After a brief speech by Warren Chase arguing that the state could rely on a system of volunteers to be determined later, the delegates voted overwhelmingly to exclude the militia article from the final document.[20]

19. As originally reported from committee to the 1847 convention, the article on suffrage in fact included sections offering these same protections. These sections were struck out by amendments fashioned by the convention sitting as the committee of the whole (Quaife, *The Attainment of Statehood,* 334). The journal contains no account of debate on these amendments.

20. The 1846 convention considered and rejected an amendment offered by Thomas Cru-

Overall, the treatment of suffrage and, more generally, citizenship in the two constitutions accords with the broad sense of differences in emphasis discussed in the preceding section. The constitution of 1846 again emphasizes self-government, envisioning citizens protected in the basic exercise of self-government through voting and actively engaged in the defense of the state as well. Despite significant similarities in defining who will have the right to vote, the constitution of 1848 ultimately views suffrage more as a right than an action and imposes no corresponding duties on those it identifies as citizens. In short, it suggests a more passive definition of citizenship focusing on the enjoyment of individual liberty.

Something similar can be said of the manner in which the two constitutions define the process of governmental decision making. Again here, much remains the same from 1846 to 1848. Broadly speaking, of course, both constitutions outline a representative form of government, with three branches, including a bicameral legislature.[21] Both, too, show a clear concern with keeping institutions tied closely to the people. After much debate, both conventions settled on an elected judiciary.[22] And both opted for short terms for the executive and legislative branches and thus for frequent elections, setting the governor's term at two years and dictating annual elections—the Anti-Federalist ideal—for all members of the state legislature.

The only significant institutional difference between the two constitutions concerns the size of the legislature. The constitution of 1846 provides for a house of representatives with between 60 and 120 members and a senate between one-third and one-fourth the size of the house (Article V, Section 2); the constitution of 1848 sets the number of members as between 54 and 100 in the assembly and, again, between one-third and one-fourth the number of assembly members for the senate (Article IV, Section 2). At most, then, the two constitutions differ by 20 members of the lower house and an even smaller number of senators. Yet, as in the debate over the ratification of the U.S. Constitution, these seemingly small differences were debated fiercely in both conventions, with delegates from the sparsely populated northern reaches of Wisconsin particularly concerned to have a legislative body large enough to ensure meaningful representation for their con-

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son that would have left organization of the militia up to the legislature, just as the constitution of 1847 eventually did (Quaife, *The Convention of 1846,* 305–6).

21. In the constitution of 1846, Articles III and IV deal with the executive branch, Articles V and VI with the legislative, and Article VII with the judiciary. In the constitution of 1848, Article IV concerns the legislature, Articles V and VI the executive, and Article VII the judiciary.

22. In "Making of the Wisconsin Constitution, Part I" (665–69) and "Making of the Wisconsin Constitution, Part II" (36–41), Brown reviews the debates over the judiciary in, respectively, the 1846 and 1847 conventions.

stituents.[23] In this context, the slightly larger house and senate provided by the 1846 constitution point toward a more expansive sense of representation.

This, I think, points once more to the overriding importance to the 1846 constitution of self-government as a matter of actual citizen action. It also suggests an interesting way to read another seemingly minor difference in the legislative articles of the two constitutions. The constitution of 1846 states that "the style of the laws of this state shall be: 'It is enacted by the legislature of the state of Wisconsin, as follows'" (Article V, Section 14). The 1848 constitution, on the other hand, states that "the people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows" (Article IV, Section 17). On the surface, the latter emphasizes a basic fact of popular sovereignty or self-government: that all power comes from the people. But, in a sense, the constitution of 1846 is more honest, making no attempt to conflate regime and people. The style of laws it dictates reminds us that even in a system of self-government through representative institutions, a regime will inevitably form. It suggests, in other words, that the governing regime will differ not only from the people broadly speaking but from those identified as citizens as well. Indeed, the journal reports that Warren Chase made precisely this point in the 1847 convention as he "moved to amend the . . . section relating to the style of enactment so that it would read 'Be it enacted by the legislature of the state of Wisconsin' instead of 'The people of the state of Wisconsin, represented in senate and assembly,' etc." Explaining his reasoning, Chase argued that "the enacting clause as it stood in the section would declare that the people enacted so and so, which was not true; it was the legislature which enacted the laws, and oftentimes they enacted laws which the people did not want and which they should not be charged with having enacted."[24] Chase's amendment was easily defeated, but the survival of his argument points to a willingness on the part of the convention of 1847 to elide the distinction among people, public, and regime and thus between the actions of self-governing citizens and the decisions of an elected body that may or may not reflect the popular will.

Constitutional Decrees or Political Conflict?

In distributing power within the system of representative institutions, the two Wisconsin constitutions are in basic harmony. Both make broad grants of all legislative power to the two houses of the state legislature and all ex-

23. See Brown, "Making of the Wisconsin Constitution, Part I," 663–64; and "Making of the Wisconsin Constitution, Part II," 29–31.

24. Quaife, *The Attainment of Statehood,* 421, 422.

ecutive power to the state governor. As Brown notes, this is to be compared, for example, to the more specific grants of particular legislative powers to Congress.[25] As we shall see in the next section, though, both Wisconsin constitutions, like the U.S. Constitution as amended in the Bill of Rights, place significant limits on the exercise of governmental power. Beyond these broad grants of power, both constitutions give significant power to the state legislature in crafting the details of the state courts and their jurisdictions and in specifying the form of county and local governments. And both create and structure conflict between the legislative and executive branches through the veto.

We find more significant differences in the way the two constitutions distribute power and structure conflict in another important area: the amendment process. Both constitutions recognize two paths for constitutional change: through amendments initiated in the state legislature and through constitutional conventions.[26] In both cases, the constitution of 1848 raises higher barriers against the public's power to make constitutional changes by giving the state legislature greater power. It thus requires any amendment approved by both the house and the senate to be submitted to the legislature a second time, after an intervening election. Only after this second approval is the amendment to be voted upon by citizens. By contrast, the constitution of 1846 requires only one vote in the legislature, albeit with the requirement that two-thirds of each house approve sending it to the people for ratification. Similarly, the constitution of 1848 puts the power to decide whether to call a new constitutional convention entirely in the hands of legislators. The constitution of 1846, on the other hand, requires that the legislature schedule a popular vote "every tenth year" on whether to hold such a convention. In short, in both cases, the constitution of 1846, once again in accord with its overall emphasis on self-government, puts control over the process of constitutional change more securely in the hands of the people.

With this emphasis in mind, we can return to the three controversial issues that, according to most observers, doomed the constitution of 1846. Again, that constitution includes an absolute protection for the property rights of married women, a homestead exemption, and a prohibition on the chartering of any banks and, indeed, on any banking activity. Like its predecessor, the convention of 1847 agonized over these issues, ultimately settling on a different way of avoiding each. The delegates thus considered an amendment that would have placed in the 1848 constitution the same pro-

25. Brown, "Making of the Wisconsin Constitution, Part II," 32.

26. The amendment process is described in Article XVIII of the constitution of 1846 and Article XII of the constitution of 1848.

tection for married women's property rights, soundly voting it down. In the end, they simply ignored the issue altogether, making no mention of it in the final document. They likewise heard reported from committee an article with the same provisions for a homestead exemption found in the 1846 constitution.[27] Here, after many stops and starts, they agreed late in the convention to include a broad provision in the 1848 bill of rights that set no specific level of exemption: "Section 17. The privilege of the debtor to enjoy the necessary comforts of life, shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure, or sale for the payment of any debt, or liability hereafter contracted." Thus, legislators and ultimately the state courts found themselves in possession of the power to determine the operative meanings of "wholesome" and "reasonable." As for the conflict over banks, the constitution of 1848 settles on yet another expedient: placing power in the hands of the people. Section 5 of Article XI, the article devoted generally to corporations, thus states, "The Legislature may submit to the voters, at any general election, the question of 'BANK' or 'NO BANK,' and if at any such election a number of votes equal to a majority of all the votes cast at such an election on that subject shall be in favor of Banks, then the Legislature shall have power to grant Bank charters." It would be more than fifty years before Wisconsin voters, in 1902, gave the legislature authority to pass a general banking law.[28]

No doubt the convention of 1847 made wise strategic decisions on each of these three issues by, in effect, choosing not to make decisions. For their part, delegates at the 1846 convention—or at least some of them—clearly recognized that the constitution they were fashioning aimed to resolve matters that might well be thought of as properly legislative rather than constitutional. Thus, in reacting to the inclusion in the constitution of very specific penalties for banking activities, Theodore Prentiss believed that a constitution "should consist of few, single, and fundamental principles, and not of matters of questionable expediency or doubtful policy." But the view of Edward Ryan, who said that "he wished the constitution in a great measure to be the law, without reference to the legislature," seems to have prevailed.[29]

27. Quaife, *The Attainment of Statehood,* 840–81, 473.

28. See Stark, *Wisconsin Constitution,* 201–2. The reluctance of Wisconsinites to sanction banking in part reflects broader national political battles over banking and in part follows from the experience of the Wisconsin Territory, which chartered three banks that failed with "disastrous results" (Brown, "Making of the Wisconsin Constitution, Part I," 653). See also Smith, *The History of Wisconsin,* 657–58.

29. *Wisconsin Democrat,* October 31, 1846, quoted in Quaife, *The Convention of 1846,* 116; *Madison Express,* October 12, 1846, quoted in Quaife, *The Convention of 1846,* 87. Prentiss was a Whig delegate from Jefferson County, Wisconsin, and rarely appears in the reports of the

In aiming to decide the controversial issues of women's property rights, protection of debtors, and banking, the delegates of the 1846 convention acted as Lutz suggests constitution-writers will: "Since the regime writes and approves the constitution, we can expect them to formalize their rule in the constitution, just as the constitution will embody their vision of the good life."[30] Along these lines, we might simply say that the 1846 convention misunderstood the extent and nature of its mandate to act as a governing regime. It overreached, and its work met failure at the polls as a result. There is, though, a deeper irony here as well. The same delegates who fashioned a constitution that emphasizes self-government agreed, on these three issues of economic justice, to preempt the processes of popular, representative government by means of constitutional decree. In this light, the failure of the 1846 constitution may have followed as much from a disagreement about the practice of constitution-writing in a self-governing state, and how power ought to be distributed and conflict structured in such a state, as from particular substantive disputes.

On a final controversial issue the convention of 1846 did in fact determine the expedient of a popular vote. After heated debate, the convention voted to hold, at the same time as the vote on ratification, a referendum on whether to include a separate article extending voting rights to free male African Americans. That referendum failed by a wide margin, with 15,415 votes against and only 7,664 votes in favor. The convention of 1847 also took up the issue. It, too, settled on a popular vote on the matter. This time, though, the issue of African American suffrage was included in the constitution itself. Article I of the 1848 suffrage article thus provides "that the legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election." Jack Stark suggests that the placement of the issue in the constitution itself—rather than in a separate article pending popular approval—represented "slight progress."[31] Despite this, though, the 1848 constitution in fact imposed a higher barrier to African American suffrage by requiring approval not only by popular vote but also, first, by the state legislature. And the reference to "persons not herein enumerated," with its refusal to acknowledge specifically the denial of voting rights to African Americans, recalls the weighty and ominous

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1846 convention other than to speak on the issue of banking. Ryan, a Democrat from Racine, chaired the committee on banking at the convention of 1846 and personally drafted and introduced the antibanking article.

30. Lutz, *Origins of American Constitutionalism,* 13.

31. Stark, *Wisconsin Constitution,* 7.

silence of the reference to "other persons" in the three-fifths compromise written into the U.S. Constitution.

Limiting Power and Ensuring Accountability

I have so far pursued an argument that the two Wisconsin constitutions emphasize different political principles. In addition to its focus on economic justice, the constitution of 1846 places at the fore matters of self-government; by contrast, the constitution of 1848 emphasizes individual liberty. When we turn to the constitutional function of limiting power, we are reminded that a focus on self-government and a focus on individual liberty are hardly mutually exclusive. They are, of course, complementary parts of American political thinking. Both work in their own ways to limit the power of the regime. From this perspective, it is hardly surprising that the constitutions of 1846 and 1848 agree nearly word for word on many explicit limits on political power.

I have noted above the differences in the opening articles of the enumeration of rights in the two constitutions. The lists of rights that follow, though, are remarkably similar. Both constitutions forbid slavery. Both provide explicit protection against laws that "restrain or abridge the liberty of speech," though both also make citizens "responsible for the abuse of that right." Both provide extensive protections for the rights of the accused, establish firm separation between church and state, and place the military under "strict subordination" to the civil power. In short, both reflect the limitations on governmental power familiar from many other American political documents.

In two areas, the limitation of governmental power takes on a particular flavor that will be important in the later history of Wisconsin. First, both constitutions show a clear concern with financial corruption among elected officials. We see this concern in part in the wariness with which they approach the subject of internal-improvement projects, which were seen by many as a prime source of public corruption.[32] In Article XI, Section 1, the constitution of 1846 lays out an absolute position: "The state shall encourage internal improvements by individuals, associations, and corporations, but shall not carry on, or be a party in carrying on, any work of internal improvement." The constitution of 1848 follows suit in Article VIII, and like its predecessor also specifically forbids the contracting of debt for internal improvements. More generally, both constitutions show great concern with governmental debt. They explicitly forbid the paying of state money with-

32. On this point, see Brown, "Making of the Wisconsin Constitution, Part I," 675–76.

out legal appropriation—suggesting a concern that state funds might be used illicitly. They limit state borrowing to extraordinary cases, including war, invasion, and insurrection. And they insist that in the event the state runs a deficit in any given year, taxes will be raised in following years to pay off the debt.[33]

In a similar spirit of financial concern, the constitution of 1846 imposes a precise duty on the state treasurer: "There shall be published by the treasurer, in at least one newspaper printed at the seat of government during the first week in January in each year and in the next volume of the acts of the legislature, a detailed statement of all moneys drawn from the treasury during the preceding year, for what purpose and to whom paid, and by what law authorized" (Article XII, Section 4). The constitution of 1848 contains no such specific requirement, but like the 1846 document, it includes a variety of provisions that insist upon open government. Both houses of the legislature are required to keep and publish journals (Article IV, Section 10). Votes in the legislature in general are to be recorded in the journal upon the request of one-sixth of the members (Article IV, Section 20). The governor is required to report "the condition of the State" to each session of the legislature (Article V, Section 4). When the governor vetoes a bill, his objections must be entered in the legislature's journal (Article V, Section 10). The secretary of state "shall keep a fair record of the official acts of the Legislature and Executive department of the State" (Article VI, Section 1). In short, beyond placing explicit limits on the government's actions and seeking to stem financial excess and corruption, the constitutions of Wisconsin seek to limit power by casting upon it the light of publicity.

Conclusion: Toward the Progressive Era

The similarities in how the two Wisconsin constitutions seek to limit power bring us back to Lutz's Voegelin-inspired musings on political self-definition and, in particular, on the process by which parts of collective identity that are only "embryonic" in early documents are "differentiated" later. Along these lines, the clear concern both constitutions show with limiting governmental corruption and ensuring governmental openness thus points the way toward one of the chief political pillars of the Progressive movement. That movement traces its roots in considerable part to Wisconsin and, in particular, to the crusades of Robert La Follette, who served as governor of the state from 1901 to 1906 and as a U.S. senator from 1906 until 1925. Fol-

33. These provisions are found in Article XII of the constitution of 1846 and Article VIII of the constitution of 1848.

lowing Lutz, we can read one of La Follette's key reforms, the establishment of a civil service system in Wisconsin, as a clear reflection of the deep-seated concern with propriety in government shown in the state's earliest days.[34] Along similar lines, we can see the fact that the 1848 constitution mandates the creation of a public university at the seat of government (Article X, Section 6) as paving the way for the partnership between the Wisconsin Progressives and academics at the University of Wisconsin–Madison.[35] La Follette in fact credited his professors at the university with inspiring his reformist ideas, and the faculty at Madison long showed a collective commitment to the "Wisconsin Idea: the belief that the University of Wisconsin should serve the state."[36]

Although both constitutions thus contain the seeds of the Progressive Era's focus on "good government," the constitution of 1846 in fact gestures toward other elements of the Progressive platform. The particular issues of a homestead exemption, women's property rights, and banking had, of course, faded by the turn of the twentieth century. But the broad concern with economic justice shown by the constitution of 1846 would take new form in, for example, the Progressives' determination to improve working conditions, create workers' compensation laws, and enact the nation's first workable state income tax as a way to spread the tax burden to corporations with intangible assets not subject to property tax.[37] Likewise, we can see the focus on self-government present in the 1846 constitution reflected in the Progressives' drive for primary elections as a way to break the power of party machines.[38]

34. On the rise and reign of the Progressives in Wisconsin generally, see John D. Buenker, *The History of Wisconsin,* Vol. 4, *The Progressive Era, 1893–1914* (Madison: State Historical Society of Wisconsin, 1998), esp. chaps. 9–13. On the specific issue of corruption, see Joseph A. Ranney, "Law and the Progressive Era, Part 1: The Good Government Movement in Wisconsin, 1891–1921," *Wisconsin Lawyer* 67 (June 1994): 24–27, 65.

35. The constitution of 1846 contains no provision for the creation of a state university. Unlike the constitution of 1848, though, it does require the legislature to "provide for the establishment of libraries, one at least in each town and city" (Article IX, Section 5). It is tempting to suggest that the idea of public libraries in every town reflects the populist tendencies of the 1846 document—more so, at least, than the provision for a public university that, particularly in its earliest days, surely could have been expected to serve chiefly members of the new state's elite.

36. Stark, *Wisconsin Constitution,* 2. On La Follette's experience at and dedication to the University of Wisconsin–Madison, see Nancy C. Unger, *Fighting Bob La Follette: The Righteous Reformer* (Chapel Hill: University of North Carolina Press, 2000), esp. chap. 3.

37. See Joseph A. Ranney, "Law and the Progressive Era, Part 2: The Transformation of Wisconsin's Tax System, 1897–1925," *Wisconsin Lawyer* 67 (August 1994): 22–25, 62–63; and "Law and the Progressive Era, Part 3: Reforming the Workplace, 1867–1925," *Wisconsin Lawyer* 67 (October 1994): 16–19, 55.

38. See Buenker, *The History of Wisconsin,* 461–62.

In short, although Wisconsin voters rejected the constitution of 1846, the principles it emphasized apparently have deep roots in the political culture of the state. With the proper political context, those roots blossomed in a movement that for a time put Wisconsin at the forefront of American political development. The case of Wisconsin, then, suggests the complexity of the process by which the people of a state define and redefine themselves. We learn from this case, in particular, that documents *rejected* by a people may tell us as much as documents accepted. But more generally, Wisconsin reminds us that the process of political self-definition does not proceed in a straight line.

THE PLAINS STATES

The Plains states, both high and low, developed a constitutionalism that was historically rooted in Progressivism and Populism and, sometimes, in the clash between these two ideologies. Although a broad expanse of geography, from Oklahoma to Minnesota, is covered by these seven states, the common elements of their constitutions unite them.

Like other Plains states, the Progressive traditions and institutional arrangements are embedded in the Oklahoma Constitution. Utilizing the initiative and referendum process, the people of Oklahoma have had to, ironically, rely on this Progressive mechanism to address the defects of Progressivism. The author also suggests that these Progressive traditions have enabled conservative majorities to define contemporary constitutionalism in the state. However, he maintains that that is what constitutions are supposed to do: allow for the evolving expression of the character of a people.

It is not hyperbole to say that Minnesota may have the most interesting constitutional history of any state in this volume. As the author of this chapter notes, Minnesota stands out as a study in adaptation. This is certainly true with respect to borrowing from Progressive constitutional neighbors. Minnesota is unique, however, in that ballot language for admission and ratification has led to the simultaneous existence of two distinct constitutions. Minnesotans are fortunate indeed, then, to have a political culture that enjoys spirited disagreement as well as the spirit of compromise.

DONALD P. RACHETER

The Iowa Constitution

Rights over Mechanics

For the scholar who wishes to compare and contrast the constitutions of the fifty American states themselves rather than relying on secondary sources such as this volume, they can be found conveniently in one place courtesy of Iowa's Public Interest Institute. If you look at each of them you will find unique elements of both style and substance, but a similar overall plan to set forth the rights and responsibilities of both the states' citizenry and their elected officials. Following the example of the U.S. Constitution, each provides for federalism, separation of powers, checks and balances, and bicameralism (with the exception of Nebraska) as methods to prevent tyranny. The purposes of such constitutions, according to Donald S. Lutz, are eightfold.[1]

The Iowa Constitution, like those of the several states that entered the Union immediately prior to and after it, follows a general pattern that embraces elements of all eight of Lutz's purposes and, much more than the national constitution from which they take their lead, emphasizes rights over mechanics. The national constitution starts with the composition and duties of the three branches, and only gets to a bill of rights in the amendments. State constitutions generally start with an article entitled a bill of rights, and often set forth many more rights than the ten originally added to the national document.

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1. See Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988) and "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 27–44.

Preamble

The moral values, major principles, and definition of justice toward which the founding fathers of the Iowa Constitution aimed are contained in the preamble of the document: "WE THE PEOPLE OF THE STATE OF IOWA, grateful to the Supreme Being for the blessings hitherto enjoyed, and feeling our dependence on Him for a continuation of those blessings, do ordain and establish a free and independent government, by the name of the State of Iowa." As were the founding fathers of the U.S. Constitution, the Iowa founders were religious, and more specifically Christian, in their backgrounds and orientation to public life. They were also typically American in their optimism, and their gratefulness for the blessing of life, liberty, and property that had been bestowed upon them, and sought God's assistance in continuing such a way of life. Although it is not explicitly spelled out, it is reasonable to assume their definition of justice was that contained in the Bible and the U.S. Constitution.

State Boundaries

To define the people of the community of the state of Iowa, the writers took a simple geographical approach in the preamble:

> Beginning in the middle of the main channel of the Mississippi River, at a point due East of the middle of the mouth of the main channel of the Des Moines River, thence up the middle of the main channel of the said Des Moines River, to a point on said river where the Northern boundary line of the State of Missouri—as established by the constitution of that State—adopted June 12th, 1820—crosses the said middle of the main channel of the said Des Moines River; thence westwardly along the said Northern boundary line of the State of Missouri, as established at the time aforesaid, until an extension of said line intersects the middle of the main channel of the Missouri River; thence up the middle of the main channel of the said Missouri River to a point opposite the middle of the main channel of the Big Sioux River, according to Nicollett's Map; thence up the main channel of the said Big Sioux River, according to the said map, until it is intersected by the parallel of forty three degrees and thirty minutes North latitude; thence East along said parallel of forty three degrees and thirty minutes until said parallel intersects the middle of the main channel of the Mississippi River; thence down the middle of the main channel of said Mississippi River to the place of beginning.

This approach included a number of individuals such as Native Americans and recent immigrants who may not have considered themselves Ameri-

cans, let alone Iowans. However, there was never any attempt to either increase or decrease the boundaries of the state after the founding, and no attempt by any group to succeed or overturn the established order. Although people left the state to move farther west as the frontier continued to open, or to return to family or previous homes back east, most were happy to remain Iowans.

Form of Government

The form of government set forth in the Iowa Constitution of 1857 follows that of the U.S. Constitution of 1787 in dividing the government into legislative, executive, and judicial branches and having a bicameral legislature. Article III, "Of the Distribution of Powers," states, "The powers of the government of Iowa shall be divided into three separate departments —the legislative, the executive, and the judicial: and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted" (Section 1). The prohibition on serving in more than one branch at a time was designed to prevent a parliamentary-style government from emerging and to provide for the checks and balances so popular over the years in the United States.

Article III goes on to describe in detail the legislative branch, the "first branch" in Iowa as it was in America, the "people's branch," which is charged with the authority to make law and policy for the state. This branch also controls the budget, the power to tax and spend on public objectives. So although the governor can proclaim an Iowa Ringworm Prevention Week, not much is likely to happen to accomplish that noble objective unless the legislature appropriates funds to carry it into execution.

The number of senators and representatives is set in the Iowa Constitution at fifty and one hundred, respectively, with each senatorial district composed of two representative districts (Article III, Section 34). Senators serve four-year terms, half being up for election every two years (Article III, Section 5), and representatives serve two-year terms (Article III, Section 3). The qualifications for representatives are set forth in Section 4 of Article III: "No person shall be a member of the House of Representatives who shall not have attained the age of twenty-one years, be a citizen of the United States, and shall have been an inhabitant of this state one year next preceding his election, and at the time of his election shall have had an actual residence of sixty days in the county, or district he may have been chosen to represent." The qualifications of senators are set forth in Section 5, the major distinction being that they must be twenty-five, rather than the minimum age of twenty-

one set forth for representatives. As provided in Section 7 of Article III, each house of the Iowa legislature is given the authority to choose its own officers.

Again following the national lead, the executive branch is detailed second, in Article IV, and the judicial branch third, in Article V. To be eligible to be elected governor or lieutenant governor of the state of Iowa, a person must be a citizen of the United States, a resident of the state two years next preceding the election, and thirty years old at the time of the election (Article IV, Section 6). The constitution was amended in 1988 to provide that the governor and lieutenant governor would be elected jointly by vote of the people so that the death, resignation, or impeachment of a governor would not result in a person of the opposition party ascending to the office, and the previous role of the lieutenant governor as the presiding officer of the state senate was abolished at the same time (Article IV, Sections 3 and 18). In the extremely unlikely case of a tie in the results of the general election for the executive team, the general assembly is given the power by the Iowa Constitution to elect the governor and lieutenant governor (Article IV, Section 4).

Article IV establishes both the powers and the duties of the governor. The duties of the governor include serving as commander-in-chief of the state's military forces (Section 7), transacting all executive business (Section 8), and taking care that the laws are faithfully executed (Section 9). He has the power to call special sessions of the general assembly (Section 11), and if the houses are divided, he or she can adjourn the legislature (Section 13). The governor is given the power to grant reprieves, commutations, and pardons for all offenses except treason and impeachment (Section 16).

Article V, Section 1, states that the judicial power of the state of Iowa shall be vested in a supreme court, district courts, and such other courts, inferior to the supreme court, as the general assembly may, from time to time, establish.[2] Iowa uses the "Missouri Plan" for the selection and retention of its judges, that is, the governor appoints from a list provided by special nominating commissions (Article V, Section 16), and then the judge has to stand for retention at the next regular election and every six or eight years thereafter (Article V, Section 17). All judges in Iowa, with the exception of magistrates, must be members of the Iowa Bar. Judges must retire at age seventy, but can continue to serve part-time in "senior status" as a way to increase their pensions, and can be retired involuntarily at any age by the supreme court for disability (Article V, Section 18, 19).

2. As time passed and the workload of the supreme court increased, the justices petitioned the legislature to create an Iowa appeals court. On July 1, 1999, the number of justices on the supreme court was reduced from nine to seven, and the number of judges on the court of appeals was increased from six to nine.

The process of collective decision making follows the national government example, with the executive having the power of the veto over the legislative enactments and the legislature having the power to override such vetoes by a two-thirds majority (Article III, Section 16). The supreme court is not explicitly given the power of judicial review, but as with the federal courts, this power has emerged with the passage of time.[3]

This bare-bones outline of the formal decision-making process obscures the rich interplay of political forces that actually results in the establishment of public policy in the state of Iowa. Political parties, interest groups, the media, campaign consultants and contributors, "courthouse gangs," voters, and government workers all play varying roles depending on the topic at hand. Some of the basics about these political players are contained in a recent text that I wrote, *Iowa Government and Politics,* but to get a feel for various case studies of specific policy enactments, one would have to consult media treatments of the same. References and links to such documents are therein contained.[4]

Iowa Citizenship

Iowa citizenship is defined in Section 1 of Article II of the Iowa Constitution:

> Every citizen of the United States of the age of twenty-one years, who shall have been a resident of this state for such period of time as shall be provided by law and of the county in which he claims his vote for such period of time as shall be provided by law, shall be entitled to vote at all elections which are now or hereafter may be authorized by law. The general assembly may provide by law for different periods of residence in order to vote for various officers or in order to vote in various elections. The required periods of residence shall not exceed six months in this state and sixty days in the county.[5]

While the U.S. citizenship status of African Americans was being denied in the *Dred Scott* decision[6] in the same year as the adoption of Iowa's constitution, the latter was crystal clear on the subject of slavery—it was prohib-

3. Donald P. Racheter, *Iowa Government and Politics* (Muscatine, Iowa: Octagon Press, 2004), 39–50.

4. Ibid.

5. With the passage of the Twenty-sixth Amendment to the U.S. Constitution in 1971, the voting age for Iowans was also lowered to eighteen. Though women were considered citizens from the adoption of the Iowa Constitution in 1857, they were denied the vote until the passage of the Nineteenth Amendment to the U.S. Constitution in 1920.

6. See http://www.pbs.org/wgbh/aia/part4/4h2933t.html.

ited in Iowa eleven years before the adoption of the Fourteenth Amendment to the U.S. Constitution overturned the *Dred Scott* decision (Article I, Section 23).

The Iowa Constitution explicitly recognizes that there can be members of the public who are not citizens: "Foreigners who are, or may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment and descent of property, as native born citizens" (Article I, Section 22). The Iowa Constitution also makes clear that the political regime of the state is to be a democratic republic, or representative democracy: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it" (Article I, Section 22). As discussed above, the power to make law was vested by Article III in the legislative branch, rather than being exercised directly by the people.

Regime Legitimacy

Although the passage from Section 2 of Article I cited in the preceding paragraph asserts that the basis for the authority for the regime is the people of the state of Iowa, in fact the situation is a bit more complex, as are most political matters. The Iowa Territory was a possession of the United States flowing from the Louisiana Purchase in 1803, and the settlers of the state had to secure the permission of the U.S. Congress in order for the Iowa Constitution to go into effect.[7]

Therefore, though it is correct to state that Iowa has a republican form of government based on the consent of the governed, that it is a representative democracy whose legitimacy flows from its adoption by representatives of the citizenry in 1857, it must also be acknowledged that this is part and parcel of the requirement in the U.S. Constitution that "the United States shall guarantee to every State in this Union a Republican Form of Government" (Article IV, Section 4).

Political Power

The distribution of political power is likewise a complex issue, as discussed above. Formally, the people possessed all political power, but for the sake of convenience, they have delegated its exercise to their elected repre-

7. Racheter, *Iowa Government and Politics,* 1–3.

sentatives in the branches of the Iowa government established in the constitution that they have adopted. However, representatives cannot secure public office without the endorsement of a political party, vetting by the media, support from campaign contributors and political action committees, and so on.

The governor can veto and, if not overridden, block action by the legislature. Other groups possess an informal veto over the adoption of legislation that would affect them as well. In general, in Iowa politics as in American politics more generally, it is easier to block action than to secure it. The national and state founders were suspicious of power, and were willing to give up the power to easily "do good" in order to prevent the accumulation of the power to "do evil."

Structural features of the government reinforce these tendencies. Even when both houses of the legislature and the governorship are controlled by the same political party, it is often very difficult to get policy adopted because of the differing time frames, constituency pressures, and institutional jealousies of the key actors. Historically, there has been a rural-urban split in the Iowa legislature that can be a cross-cutting cleavage to partisanship, and more recently there have been conflicts between the "center" and the "periphery" of the state, with legislators not from the Des Moines area thinking it gets more than its fair share of governmental largesse.

Interest groups that can mobilize a significant portion of the electorate, particularly activists and contributors, to bring pressure on their local legislators can often thwart the will of the governor and legislative leaders combined.[8] An aggrieved citizen, a crusading journalist, or a "politician on the make" can all upset the applecart of "politics as usual" in Iowa due to the openness and complexity of the political process.

Managing Inevitable Conflict

The framers of the Iowa Constitution created a number of structural devices to provide for separation of powers and checks and balances and thus to help manage political conflict in the state. In the very first section of the very first article of the constitution they stated, "All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing

8. For example, the group Iowans for Tax Relief was able to block a proposal of Republican governor Terry Branstad and Democratic Speaker of the House Donald Avenson to eliminate federal deductibility on Iowa income taxes. See http://www.taxrelief.org/ for more information about this fifty thousand–member taxpayer group.

and protecting property, and pursuing and obtaining safety and happiness." Knowing citizens possess these rights and that the courts would be bound to uphold them, political elites have been less likely to try to abridge them, thus preventing fundamental conflict from arising.

In Sections 3 and 4 of the same first article, the framers prohibited the establishment of a religion or interference with the free exercise thereof, or any religious test as a qualification for any office or public trust in the state. This eliminated a major source of conflict seen in many European nations of the time, and in most parts of the globe subsequently. In Section 6 of the first article, they also eliminated a major potential source of conflict when they prohibited the enactment of laws that would treat any citizen or class of citizens unequally.

In Sections 8 and 9, Iowans were guaranteed the right to be secure in their persons, houses, papers, and effects and the right to not be deprived of life, liberty, or property without due process of law. More affirmatively, Section 7 gives every person (not just citizens) the right to speak and write his or her sentiments on all subjects, and Section 20 gives the people (again, not just citizens) the right to freely assemble and to make known to their representatives their opinions about any actual or potential grievance. Such an ability to easily communicate about conflictual issues is a good way to settle grievances without resorting to violence.

If conflict should arise that the current constitutional provisions do not provide a mechanism to manage, Iowans can amend their fundamental document to adapt to the changed circumstances not foreseen by the founders. There are two ways to propose amendments, neither of them very easy to accomplish. The first, provided for in Section 1 of Article X, is for a member of the Iowa General Assembly to make such a proposal and secure the support of a simple majority in both houses in two succeeding sessions. If adopted in this difficult fashion by the legislature, the proposed amendment must then be put to the people of the state of Iowa in the next general election, or a special election at the discretion of the general assembly, and it becomes the law of the land only if passed by a majority of those voting in such election.

The second way to propose an amendment to the Iowa Constitution is even more difficult to accomplish—indeed, it has never been used since it was made a part of the document in the 1960s—and this is by the public voting for the following proposition that must be put on the general election ballot in every year evenly divisible by ten: "Shall there be a convention to revise the constitution, and propose amendment or amendments to same?" (Article X, Section 3).

Groups such as Iowans for Tax Relief and the Iowa Farm Bureau, in frus-

tration at not being able to get the legislature to pass very popular (75 percent to 88 percent in the polls) proposals such as a tax-and-spending limit or property tax relief, have sought to add the initiative and referendum to the Iowa Constitution, but the legislature is no more inclined to make such a procedural change than it is to adopt the substantive ones.

Limiting Governmental Power

It is instructive that the U.S. Bill of Rights contains only ten provisions and was adopted after the ratification of the original document, but the Iowa Bill of Rights constitutes the very first article of the document and contains twenty-five provisions! As Section 2 makes clear, the people have the right, at all times, to alter or reform the government if they see fit to do so. Government is limited to the protection, security, and benefit of the people, contrary to the claims of the "divine right of Kings" being asserted elsewhere on the globe at the time of ratification of the Iowa Constitution.

All ten of the provisions of the U.S. Bill of Rights are repeated in the Iowa Bill of Rights because at the time of adoption, the process of "incorporation" of the Bill of Rights through the Fourteenth Amendment had not yet taken place (indeed, it would be another eleven years before this amendment was even adopted!), and the prevailing wisdom was that such prohibitions ran only against the national, and not the state, government. Other provisions of the original U.S. Constitution, such as the narrow definition of treason in Section 3 of Article III and the prohibition of suspension of the writ of habeas corpus contained in Section 9 of Article I, are incorporated in the Iowa Bill of Rights as well. Persons accused of crimes are afforded rights similar to those found in the U.S. Bill of Rights (Article X, Section 10). Trial by jury is to remain inviolate in Iowa, but the general assembly can provide for juries of fewer than twelve people in the "inferior courts" (Article I, Section 9).

Reflecting the unique importance of land in both the economic and the political life of Iowans, the bill of rights stipulates that "no lease or grant of agricultural lands shall be valid for a longer period than twenty years" (Article I, Section 24). Taken from the New York Constitution, this section affords "protection against feudal tenures and makes the exchange of land easier." In trying to balance the "rights of individuals and the needs of the community," the bill of rights also grants that the general assembly "may pass laws permitting the owners of lands to construct drains, ditches, and levees for agricultural, sanitary or mining purposes across the lands of others" and "may provide by law for the condemnation of such real estate" (Article I, Section 18). Like the section on agricultural leases, this exception to

the normal constitutional provision regarding eminent domain also "reflects the importance of agriculture in the state's economy and the effect on it of Iowa's rivers, lakes, and wetlands."[9]

Notable by its absence in the bill of rights is a right to "keep and bear arms" as provided in the Second Amendment to the U.S. Constitution, but such a right can be inferred in the last section of Article I in Iowa's bill of rights, which states, "This enumeration of rights shall not be construed to impair or deny others, retained by the people." The general assembly has provided by law that Iowans may use "reasonable force" (including "deadly force") to protect both their persons and their property.[10]

Conclusion

Unlike the United States, which has had two constitutions—the Articles of Confederation and our current document produced by the Philadelphia convention of 1787—and some of its neighboring states, which have had more than one constitutional convention and fundamental law (for example, Missouri has had four), Iowa has had only the one basic document, although it has been amended from time to time.

This is evidence that the framers did an exceptional job, or that the process for convening a second convention is too difficult, or a combination of the two. In any case, the majority of the citizens of the state appear to be satisfied with the constitution under which they live, and the document appears to meet all eight of the purposes set forth by Professor Donald S. Lutz in his seminal work.

In comparing the amendment process in Iowa with that in Missouri, Arkansas, Michigan, Florida, and Texas, the five states that entered the Union just before Iowa, and with the amendment process in Wisconsin, California, Minnesota, Oregon, and Kansas, the five states admitted right after Iowa, it appears to me that the Iowa system of proposing amendments to the constitution is uniquely difficult. A number of these states, unlike Iowa, allow for constitutional amendments or constitutional conventions to be proposed through the initiative process.

Instead of a simple majority of both houses of the state legislature (as in Missouri, Arkansas, Wisconsin, Minnesota, and Oregon) or a three-fifths majority (Florida) or a two-thirds majority (Michigan, Texas, California, and Kansas) sending a proposal to a vote of the people, Iowa requires a sim-

9. Jack Stark, *The Iowa State Constitution* (Westport, Conn.: Greenwood Press, 1998), 66, 5.

10. See http://www.legis.state.ia.us/IACODE/2003SUPPLEMENT/704/3.html.

ple majority of both houses in two adjoining, but separated by a general election, sessions of the legislature (Article X, Section 1).

This "Iowa method" of proposing constitutional amendments allows politicians to play games with the voters, by having the house vote favorably in one session, but not the senate, and vice versa in the next session, so that everyone can go back and campaign as a "supporter" of whatever the popular issue is without it ever getting to the citizenry for their ultimate decision.

Because of dissatisfaction with the difficulty of the Iowa amendment process, the Iowa Constitution was amended in 1964 to add a second method of proposing amendments that bypassed the legislature. Starting in 1970, and in each general election ten years following, the people were to be asked if they wanted to convene a constitutional convention on the fall general election ballot (Article X, Section 3).

The one time this was seriously tried, in 1980 by Iowans for Tax Relief through an advertising campaign to convince a majority of Iowans to vote yes so that a taxpayers' rights amendment to the state constitution (which had been introduced many times in the Iowa legislature but bottled up by hostile leadership) could be considered by the citizenry, a coalition of "tax eaters" groups defeated the attempt, and it has not been pushed since. Nonetheless, the question regularly appears on the ballot, and fails to win the necessary majority through a combination of inertia, fear of the unknown, and satisfaction with things as they are.

Which brings us back to the observation at the outset of this conclusion: Iowans are not unhappy enough with the work of their constitutional drafters to insist on substantial change. The purposes that they want their fundamental document to serve are, in the minds of the majority, being served by the current document. And if a "hot button" issue such as the definition of marriage as being between one man and one woman should emerge, it will be handled on a case-by-case basis rather than through calling another constitutional convention or the proposal of wholesale changes to the existing document.[11]

11. At the time this chapter was written, such a proposal had been approved by one house.

FRANCIS H. HELLER AND PAUL D. SCHUMAKER

The Kansas Constitution

Conservative Politics through Republican Dominance

Whereas many states have discarded their original constitutions and adopted new ones, the original state constitution of Kansas has never been repealed. But because the Kansas Constitution has been amended ninety times and went through a period of wholesale revision by the incremental method more than thirty years ago, "little of the original Wyandotte Constitution remains in effect today."[1] Despite these revisions, the basic public philosophy that animated the original constitution continues to influence Kansas politics to this day.

As this is being written, Kathleen Sebelius is the governor of Kansas, the forty-fourth since statehood was achieved. She is a Democrat, only the eleventh member of that party to be elected to be the state's chief executive. All other elected officers in the executive branch are Republicans. Both houses of the legislature have substantial Republican majorities. Most Kansas judges are Republicans. Kansas is a Republican state. And it was intended to be that way.

Kansas was left free by the Kansas-Nebraska Act of 1854 to choose to be a free state or one allowing slavery, resulting in the territory becoming a battleground leading up to the Civil War. Republicans dominated the convention that drafted the constitution that was ratified by Congress on January

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1. James W. Drury, *The Government of Kansas,* 6th ed. (Topeka: Public Management Center of the University of Kansas, 2001), 24. See also Francis Heller, *The Kansas State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1992), which provides a comprehensive treatment of the Kansas Constitution. The reform of the constitution through "wholesale revision by the incremental method" is discussed on pages 25–28 of Heller's book.

29, 1861, permitting the admission of "Bleeding Kansas" into the Union. Not a single Democrat at the convention voted to adopt the new constitution. No Democrat would be selected to statewide office for more than two decades. Nearly a hundred years would pass before Democrats would win local office in many counties. "The new Constitution had indeed assured Republican dominance for a long time to come."[2]

To ensure this predominance, the Wyandotte convention made it difficult to change the constitution. One alternative was to call a new convention. In the early days, there were repeated efforts to resort to this method, but none of these efforts obtained the necessary votes in the legislature. During the past century, only the period immediately after World War II witnessed efforts to call a constitutional convention, and these too failed. The alternative was made so difficult that it was seldom used to bring about significant changes for many years. If a proposed amendment gained the qualified number of votes in both houses of the legislature, it could be put to the voters. The record shows that, on average, 6.2 proposals were considered by voters during each of the state's first nine decades, but a closer perusal shows that few, if any, of these proposals aimed at matters of constitutional significance.[3]

The Kansas Constitution was (and is) not that much different from others written in the post-Jacksonian era. But Kansas was born in bloody battle and, in its early years, resorted to arms over such local matters as the location of the county seat ("the county seat wars"). When Populists gained a majority of seats in the state house of representatives, the Republicans denied them access to the legislature by calling out the Topeka militia ("the state house war").[4] Such conflicts gave rise to many reform efforts to revise the constitution.

In this chapter, we discuss the history of the Kansas Constitution and then analyze changes to it using the conceptual framework provided by Donald S. Lutz.[5] Like many other state constitutions, the original Kansas Constitution and many amendments to it deal with matters that perhaps do not belong in a constitution. Lutz's conceptual framework permits us to look beyond such "constitutional clutter" in order to focus on how the state has dealt with matters fundamental to its prevailing public philosophy.

2. Heller, *Kansas State Constitution,* 8.

3. Ibid., 10.

4. James A. Schellenberg, *Conflict between Communities: American County Seat Wars* (New York: Paragon House, 1987).

5. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 13–16.

A Brief History of the Kansas Constitution

The Kansas-Nebraska Act of 1854 created the territory of Kansas (and Nebraska) but left unresolved whether a subsequent state of Kansas would be one that permitted slavery, leaving that decision to the residents of the new territory. Both proslavery and antislavery ("free-state") forces migrated to the new Kansas Territory and engaged in often bloody conflict over its future. When proslavery forces convened the first territorial legislature, the free-state forces gathered in Topeka in 1855 to write an initial state constitution that would ban slavery in Kansas forever. Proslavery forces rejected this Topeka Constitution, and convened in 1857 to write a proslavery alternative, the Lecompton Constitution. Both documents were submitted to the U.S. Congress, but the fact that territorial votes on both documents were marred by boycotts contributed to Congress's decision to send the issue back to the territory for further resolution and vote by its residents. A third constitutional convention convened in 1858 and produced the Leavenworth Constitution, which resembled the free-state Topeka Constitution, but Congress also failed to act on it.

On March 28, 1859, the residents of the territory voted on the statehood issue and strongly affirmed that they indeed wanted a new constitution, leading to a fourth and final constitutional convention in Wyandotte (now part of Kansas City, Kansas). Delegates drew extensively on the new Ohio Constitution of 1850, but also incorporated features of the constitutions of Indiana, Iowa, and other midwestern and northern states in their work.[6] The convention was nearly unanimous in declaring that slavery should be prohibited, but efforts to incorporate other free-state sentiments (such as putting the state at odds with the federal Fugitive Slave Act and integrating schools) were abandoned. After a bitter partisan debate, the Republicans prevailed in a territory-wide public vote on October 4, 1859, by a margin of almost two to one, and the Wyandotte Constitution was submitted to Washington. Whereas the U.S. House of Representatives approved Kansas statehood under the Wyandotte Constitution on February 15, 1860, passage in the Senate was delayed until January 1861, when the withdrawal of senators from four southern states resulted in a majority for the bill. President Buchanan signed the bill on January 29, 1861, and Kansas became the thirty-fourth state.

During the first century of Kansas statehood, this original Wyandotte Constitution was amended forty-eight times, in each case by the method of having both the Kansas House of Representatives and the Kansas Senate ap-

6. The influences of other states on the Kansas Constitution are discussed in Heller, *Kansas State Constitution,* 8–9.

prove amendments by a two-thirds supermajority and then having the public approve these amendments by majority vote. By approving almost twice as many amendments as they rejected, that is, twenty-five, during this period, Kansas voters showed themselves amenable to constitutional reform. But even frequent constitutional amendments could not thwart the perception that more fundamental and extensive revisions were needed, as urbanization accelerated after World War II. Thus, the alternative method of constitutional change, by a constitutional convention, was considered as a means of thorough revision. However, the legislature rejected resolutions for a convention for several years, perhaps fearing that its loss of the capacity to control the initiation and contents of proposed amendments would lead to changes in the Kansas Constitution that would undermine rural, conservative, and Republican interests.

In 1956, the first Democratic governor in twenty years, George Docking, appointed the Commission on Constitutional Revision to consider both substantive changes in the Kansas Constitution and a method for achieving recommended changes. During the next twelve years, two more commissions succeeded the original commission, with the third Citizens' Committee on Constitutional Revision recommending that reform be accomplished by an accelerated process of legislative and public approval of amendments, rather than by calling a constitutional convention. Because the Wyandotte Constitution said that no more than three amendments could be submitted to voters at one time and that such votes could occur only simultaneously with general elections, the commission proposed initial amendments to allow five constitutional amendments at one time and to permit votes to occur at times other than general elections (for example, in conjunction with primary elections). In 1970, these amendments were passed. Along with a court ruling that entire articles of the constitution could be considered amendments, the stage was set for the wholesale revision of the Kansas Constitution to be accomplished during several elections in 1972 and 1974.

Changes in the Kansas Constitution by Function

This brief overview of Kansas constitutional history suggests the utility of examining the Kansas Constitution using Lutz's eight functional areas to describe the original Wyandotte Constitution and those amendments to that constitution that occurred during three periods: (1) the first century of Kansas statehood, from roughly 1861 to 1965; (2) the period of wholesale constitutional revision that occurred between 1965 and 1974; and (3) a contemporary period beginning in 1975 and extending to the present.

Kansas as a Free State

According to Lutz, the first purpose for which people write a constitution is to "define a way of life," which he elaborates as specifying the "moral values, major principles, and definitions of justice toward which a people aims."[7] In addition to such a communitarian conception of "a way of life," constitutions may embody a more liberal approach to "the ways of life" to be tolerated within a state. Thus, a dominant liberal public philosophy in a state may seek constitutional provisions that are neutral with regard to fundamental moral questions and merely provide a secure environment in which each person can pursue his or her own conception of the good life with as little public interference as possible.[8] The preamble to the original Wyandotte Constitution of Kansas is particularly sparse, and thus arguably liberal, in this regard, as it declares its purpose is "to insure the full enjoyment of our rights as American citizens." A more specific and detailed understanding of the "way of life" that Kansas citizens hoped to further in their constitution requires interpreting the intentions of its founders in adopting various articles.

Without question, being a "free state" was the defining issue in constructing the original Wyandotte Constitution. Immediately following the preamble, the Kansas Constitution contains a bill of rights. Section 6 of this article prohibits slavery, but Section 1, which mirrors the U.S. Declaration of Independence in asserting the equal and inalienable natural rights of all citizens, was not interpreted by its founders or subsequent Kansas courts as unequivocally guaranteeing the rights of freed slaves; after all, the Wyandotte Constitution did not provide voting rights for blacks. The equal rights of blacks would await the adoption of the Fifteenth Amendment to the U.S. Constitution in 1870 and later developments.

The original Wyandotte Constitution also understood Kansas to be a rural state, and was concerned with protecting family farmers from "the machinations of speculators," bankers, and corporations.[9] To provide some such protection, the constitution included such provisions as holding corporate stockholders liable for double the amount of their investments and exempting 160 acres of agricultural homesteads from debt collection in the state.

The most general set of values that ran through the Wyandotte Constitution was a "spirit of governmental minimalism," and thus the libertarian

7. Lutz, *Origins of American Constitutionalism,* 16.

8. The enormous literature on communitarian and liberal approaches to principles of morality and justice is admirably summarized in Will Kymlicka, *Contemporary Political Philosophy: An Introduction,* 2d ed. (New York: Oxford University Press, 2002), 53–165, 208–83.

9. Heller, *Kansas State Constitution,* 5.

strain of political liberalism.[10] Two examples illustrate this minimalism. First was the prohibition against state participation in works of public improvements, a restriction that required constitutional amendments to enable subsequent state involvement in building roads and highways and in flood-control projects. Second was the failure of the original constitution to prohibit the sale of liquor in the state. Although this issue was extensively discussed in Wyandotte, the delegates to that convention agreed that the subject was not appropriate for inclusion in the constitution, a decision that suggests that, at least initially, a libertarian public philosophy prevailed over communitarian impulses.

Few of the forty-eight amendments that were adopted during the first hundred years of the Kansas Constitution were obvious expressions of fundamental "way of life" values. However, two amendments during this period can probably be characterized as such. First, in 1880 Kansas demonstrated an emerging communitarian ethos by becoming the first state to enshrine Prohibition in its constitution when its citizens adopted the Eleventh Amendment, prohibiting the manufacture and sale of intoxicating liquors. Prohibition remained part of its constitution for sixty-eight years (compared with the fourteen-year period between passage of the Eighteenth and Twenty-first Amendments to the U.S. Constitution, enacting and then repealing Prohibition at the national level). Although Prohibition was abandoned nationally in 1933, Kansas continued its complete Prohibition until 1948, when a constitutional amendment replaced Prohibition with a provision that enabled introduction of the sale of liquor in those localities supporting such sales, directed the legislature to regulate and tax the sale of liquor, but prohibited the "open saloon" (taverns open to the general public).

Another "way of life" amendment occurred just prior to Kansas's first centennial. In 1958, by a vote of 395,839 to 307,176, Kansans approved a "right-to-work" amendment. This amendment ensured that "no person shall be denied the opportunity to retain employment because of membership or nonmembership in any labor organization." This provision, of course, prohibited the mandatory payment of union dues and the "agency shop"—adding a constitutional basis to anti–labor union sentiment in the state.

Although the subsequent period in Kansas constitutional history saw wholesale modifications in the Kansas Constitution, it is hard to find in any of the amendments passed in the 1960s or 1970s fundamental alterations in the "way of life" being pursued by Kansans. During the past quarter century, passage of a couple of amendments may signify a liberalization of Kansas culture, and both of these were adopted in 1986. First, the ban on the "open saloon" was dropped. Second, earlier bans on gambling were eliminated, as

10. Ibid., 25.

amendments authorizing the legislature to establish a state lottery and a system of parimutuel wagering on horse and dog races were passed.

In summary, Kansas has not incorporated a large number of moral and justice principles in its constitution, and no consistent ideological strain is evident in the "ways of life" that have been incorporated in the constitution. From its initial "liberal" antislavery provisions, Kansans shifted toward a more communitarian approach with its long history of Prohibition. Only in recent years is there some evidence of Kansas swinging back to a more libertarian orientation in its constitutional amendments.

Geography and the Exclusion of Democrats

Lutz's second function of a constitution is to define the people who will share in the "way of life" defined in the first function. Put another way, who are the residents to be governed by the laws of the state, as determined by its geographic boundaries? This question has eluded philosophical analysis.[11] Instead of being determined by philosophical concerns, the question of who constitute the people of a state has largely been resolved in ways that satisfy the interests and identities of those with predominant power.

This issue was extremely important when writing the initial Wyandotte Constitution, which put the matter to rest. The Kansas-Nebraska Act of 1854 created the territories of Kansas and Nebraska in what had been regarded as "Indian country" between the western boundaries of the existing states of Missouri and Iowa (much of which was demarcated by the Missouri River) and the Continental Divide. Thus, the eastern border of Kansas was predetermined, but it remained for the delegates to the Wyandotte convention to establish the northern, southern, and western borders of the new state. One possibility was to create an expansive state of Kansas, one that included not only the present state but also the southern third of Nebraska and the eastern half of Colorado, including what are now Denver, Boulder, Colorado Springs, Pikes Peak, and much of Rocky Mountain National Park. Earlier, in order to ensure that the new state contained the minimum number of residents that Congress required for statehood, that is, ninety-three thousand, the Kansas territorial legislature had declared the Platte River (flowing through what is now Nebraska) to be the state's northern boundary. But most residents in that area were Democrats, and the Republicans who controlled the Wyandotte convention wanted to exclude this region from the state (as well as from the convention) and thus established the fortieth par-

11. Ronald M. Dworkin, *Empire's Law* (Cambridge: Harvard University Press, 1986), 208; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1971), 277; Robert A. Dahl, *Democracy and Its Critics* (New Haven: Yale University Press, 1989), 291–93.

allel of latitude as the state's northern boundary (which is where Congress had originally established the boundary between the Kansas and Nebraska Territories). The western boundary was set at the twenty-fifth meridian longitude, due to political considerations concerning the anticipated location of the state capital. Delegates from the Manhattan region, some one hundred miles west of Kansas City, urged the Continental Divide as the western boundary, on the assumption that this would enhance Manhattan's chances of being selected as the capital. But delegates from eastern cities such as Topeka and Lawrence opposed this westward expansion, believing that the more restricted boundary would enhance their chances of being the seat of Kansas government. The thirty-seventh parallel of latitude was selected as the new state's southern boundary, apparently because it was the border dividing the Osage and Cherokee Indian Reservations. When the Osage Indians agreed to be included in the state of Kansas in 1867, the boundaries of the state were settled and have not reappeared as an issue in Kansas constitutional history. Thus, the territorial boundaries of the state reflected the interests of delegates who wanted to ensure control of a smaller territory rather than a vision of a larger and presumably more powerful state within the evolving federal system.

People and Public

Lutz stresses the crucial "distinction between a people and a public. The former share in the moral life of the community, while the latter participate in governing." The public comprises those residents who are citizens, having rights to vote and to hold public office. Although democratic norms have evolved to provide citizenship to all residents except the immature, criminals, and those institutionalized, such universal rights have not always been central to a state's public philosophy.[12]

In the Wyandotte Constitution, only "white male persons of 21 years and upward" were designated as public citizens with the right to vote, despite efforts to extend voting rights to both nonwhites and women. A motion to strike the word *white* received only three (of a possible fifty-four) affirmative votes, and pleas to include women's suffrage in the constitution or to authorize the legislature to submit the question of women's suffrage to a public vote were tabled.

Of course, these issues remained important in the years following ratification of the original Kansas Constitution. In 1867, Kansas voters rejected—by margins of about two to one—amendments that would have extended voting rights to nonwhites and women. The passage of the Fifteenth Amend-

12. Lutz, *Origins of American Constitutionalism,* 14; Dahl, *Democracy and Its Critics,* 119–31.

ment of the U.S. Constitution in 1870 made moot the issue of nonwhite suffrage in the Kansas Constitution, but the "white only" language was retained until 1918. Due to raising patriotic sentiments accompanying U.S. entry into World War I, an amendment to Section 1 of Article 5 on suffrage limited voting participation in Kansas state and local elections to U.S. citizens, but the "white only" restriction in the original Wyandotte Constitution was finally deleted.

The question of women's suffrage was more often a significant issue in Kansas constitutional history. For many years after women's suffrage was defeated in 1867, efforts to resubmit the matter to the public were rejected by the Republican legislature. However, when the Populist Party gained prominence in the early 1890s, the legislature agreed to once again submit the amendment for public vote. However, the amendment failed in 1893, by a vote of 95,302 to 130,139. It was not until 1911 that equal voting rights were extended to women, when a slim majority (51.5 percent) approved the measure.

Sovereignty and Legitimacy

Lutz lists another function of a constitution to be the establishment of the moral authority of government. While the legitimacy of government can be based on claims that the constitution empowers those with divine knowledge or political expertise, democratic constitutions base their authority on the sovereignty of the people. The Kansas Constitution follows the U.S. Constitution and other state constitutions in basing its authority on such popular sovereignty.

Popular sovereignty presumes that all citizens are equally affected by state policies and regulations and each citizen's views about such laws merit equal consideration. Thus, the first provision of the Kansas Constitution following its preamble is an equal-rights provision that was regarded by the drafters of the constitution and subsequent Kansas courts as "affirming the sovereignty of the people."[13] Immediately following this provision is an even more explicit expression of popular sovereignty, as Section 2 declares that "all political power is inherent in the people, and all free governments are founded on their authority, and are instituted for their equal protection and benefit."

To prevent popular sovereignty being usurped by religious authorities, the Kansas Constitution provides for extensive religious freedom. Compared to the brief assertion in the First Amendment to the U.S. Constitution, Section 7 of the Kansas Bill of Rights on religious liberty is much more

13. Heller, *Kansas State Constitution,* 48.

detailed. For example, it provides that "the right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship. . . . No religious test or property qualification shall be required for any office of public trust."

As in other state constitutions, there are numerous provisions in the Kansas Constitution designed to prevent popular sovereignty from being abridged by governmental officials. For example, Section 20 of the Kansas Bill of Rights is titled "Powers Retained by People" and asserts, "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people." The much greater length of the Kansas Constitution than the federal one can be interpreted as an effort to limit the authority and discretion of governmental officials, but Kansans may in fact have been less distrustful of governmental officials than citizens in other states, as its state constitution is relatively "brief to begin with, and it has generally avoided the proliferation of detailed proscriptions so frequently found elsewhere."[14]

Delineation of Authority

Lutz stresses that "placing limits on political power is another major purpose of a constitution," and delineates various "senses in which we can use the term *limited government.*"[15] The first sense is to define a process of decision making that binds officials to designated constitutional procedures. So important is this limitation that Lutz lists it as a separate function of constitutions, one that will be considered in the next section. The other limitations on governmental power concern explicit constitutional prohibitions, restrictions that government officials can overcome only by submitting their actions for direct popular approval (through constitutional amendment). Clearly, the extent to which a state has such restrictions indicates whether the public philosophy of the state supports more extensive government programs to address public problems and provide collective goods or whether the state regards such programs as infringements on individual freedoms and property rights.

Following the example of other post-Jacksonian constitutions, the first section of the Wyandotte Constitution contained twenty sections delineating the rights of Kansans against oppressive governmental powers. Both the placement of the bill of rights at the beginning of the constitution and the great specificity of citizens' rights in the Kansas Constitution suggest Kansans' distrust of governmental power and desire to limit governmental

14. Ibid., 29–30.
15. Lutz, *Origins of American Constitutionalism,* 14–15.

authority. Because the bill of rights is the main feature of the original Wyandotte Constitution that remains intact, we can assume that limiting governmental authority remains a key feature of the public philosophy of Kansans.

The authority of Kansas governments to be involved in education, welfare, militia, and business activities was provided in Articles 6, 7, 8, 12, and 13 of the original Wyandotte Constitution, and their authority to generate revenue was provided in Article 11 of that constitution. However, such authority was clearly limited. Article 6 on education provided for "a system of common schools, and schools of a higher grade, embracing normal, preparatory, collegiate, and university departments," and for a state superintendent of public instruction, but education was initially regarded as a local function.[16] Article 12 enabled the state to create corporations, but most of the original constitutional provisions dealt with restrictions on such corporations and on the legislature's ability to grant special corporate power. For example, it required full compensation for any right of way appropriated for use by any corporation. Article 13 prohibited the state from being a stockholder in any banking institution. Article 9 instructed the legislature to organize counties and to provide for county and township officers as necessary, but the authority of local governments remained at the discretion of the legislature until home-rule amendments were adopted in 1953 and 1960.

The general authority of the government in these areas was constrained by limitations on its taxing powers. Initially, taxes were limited to those on property. Property taxes were to be "uniform and equal," and the first two hundred dollars of property value was exempt from taxation. The state was authorized to incur public debts to a maximum of one million dollars to cover extraordinary expenses and public improvements, but only if such indebtedness was approved by a majority of voters in a general election. Such limitations on the authority and capacities of Kansas government were the subject of many constitutional amendments during the state's first one hundred years of existence.

Despite dependence on often inadequate local property taxes, schools remained largely a local function. A 1918 amendment authorized the legislature to levy a permanent tax to support schools, but more significant changes awaited a 1966 amendment that provided centralized authority over the nearly three thousand school districts that had emerged. The 1966 amendment created an elected ten-member state board of education to exercise general supervision and control of public schools (K–12 and the junior colleges) and gave constitutional status to a state board of regents (appointed by the governor) to provide general direction to the state's universities. It also directed the legislature to levy a permanent tax to finance

16. Heller, *Kansas State Constitution,* 98.

higher education and to make suitable provision for financing of the educational interests of the state—a provision that, as we will see, has generated significant conflict and perhaps a constitutional crisis. Since 1966, there have been regular skirmishes between these educational boards and the legislature over control of educational policy. An amendment intended to reassert legislative control over public education was defeated in 1986, and thus the balance of power between the state legislature and the state board of education continues to be an unresolved issue.[17]

Initially, local governments and charitable organizations provided most welfare programs. However, during an agricultural depression in 1921, an amendment was passed authorizing a state program to aid in the purchase of farm homes. A more significant amendment was approved in 1936 that permitted the state to participate in the federal Social Security and unemployment compensation programs that had emerged as part of the New Deal.

Limitations on the state's tax authority were a major device that controlled government activity. During the early part of the twentieth century, progressives had sought a state income tax, but such a proposal was defeated by voters in 1913, 1919, and 1930. However, economic decline prompted voters to endorse an amendment creating a state income tax in 1931. For the most part, revenues for governmental improvements were made available by constitutional amendments that authorized specific levies for specific purposes, such as the 1917 levy to support public education, the 1928 tax on motor vehicles and fuels to support a state highway system, and a 1951 levy to finance state institutions for the mentally ill and handicapped.

The urbanization that accelerated as Kansas approached its centennial prompted perceptions that larger cities needed authority to do things that the rural-dominated legislature was reluctant to authorize on a statewide basis. Controversies over the constitutionality of allowing the legislature to enact "special" legislation pertaining to "urban areas" were finally resolved in 1960 by passage of a general home-rule amendment. This enabled cities to determine the structure of local governmental institutions and gave cities wider latitude in enacting local policies and programs, but the state has retained the power to enact general legislation that supersedes local ordinances. For example, several cities in the Kansas City metropolitan area passed ordinances during 2003 and 2004 permitting liquor sales on Sunday, prompting the legislature to consider (though fail to enact) a bill prohibiting such sales. Such legislative powers have been regularly used and upheld by Kansas courts.

The massive constitutional revisions that occurred between 1965 and 1975

17. Ibid., 99.

dealt mostly with the institutions and procedures of government and the election of public officials—and not with specific delegations of authority or limits on the authority of state government. During the contemporary period, amendments have again been passed that revised state governmental authority.

One issue of particular concern to many Kansans was the original constitutional provision that all property be taxed uniformly and equally. Over the years, this provision had generated significant controversy due to demands for tax relief from those whose property remained unused and generated little income under conditions of economic distress. For example, instability in crop prices resulted in Populists seeking lower taxes on farm property, but voters resisted such appeals for many years. Only in 1923 did a constitutional amendment pass that gave some tax relief to those in the state's depressed coal industry and other businesses whose property holdings were offset by extensive debts on those holdings. More general reclassification of property had to await amendments passed in 1976 and 1986. The 1976 amendment included provisions lowering assessment rates on agricultural property, and that of 1986 created several property classifications, while sanctioning the accelerating practices of local governments to provide tax abatements to stimulate economic development.

Institutional Modification

Clearly, a major feature of all constitutions is the enumerations of governmental institutions and offices and the procedures used for filling these offices and operating these institutions. Political philosophers regard this feature as necessary for achieving "pure procedural justice."[18] As long as there is agreement on the basic fairness of the structures and processes of policy making, whatever policies are produced by these institutions are just. Of course, these institutions and processes can be created so as to make difficult the exercise of collective power, as illustrated by decentralized arrangements involving the separation of powers and many "checks and balances." Alternatively, more centralized arrangements can facilitate collective power.

The first three articles of the Wyandotte Constitute defined the powers and duties of the executive, the legislature, and the judiciary and their fundamental operating procedures. The fourth article regarding elections defined the procedures for selecting such officials. By designating the governor as the "supreme executive power of the state who shall see that the laws are faithfully executed," by providing a bicameral legislature in which both a house and a senate approve legislation by majority vote, and by providing

18. Rawls, *Political Liberalism,* 74–76.

for a three-member supreme court with various original and appellate jurisdictions, the political institutions specified by the Wyandotte Constitution followed models established by the U.S. Constitution and the states that preceded Kansas into the Union. Even controversial subjects at the Wyandotte convention—such as whether the governor should possess veto power—were resolved in unremarkable ways. Nevertheless, the specific provisions for the governmental institutions and processes were found to be inadequate, both during the first hundred years of Kansas's constitutional history and by the Commissions for Constitutional Revision that proposed numerous structural changes during the 1950s and '60s.

The modifications approved by constitutional amendment during the first hundred years included the following:

- An amendment in 1873 fixed the size of the senate at 40 members and the house at 125 members and provided that each county would have at least one representative in the house. This amendment was to be significant in ensuring a malapportioned house in which rural (and Republican) counties were vastly overrepresented.
- Amendments limiting the legislature to biennial (rather than annual) sessions passed in 1875 and limiting sessions to ninety days passed in 1900. These reforms reflected the progressive goal of shortening legislative sessions to make them accessible to "ordinary citizens," but they proved cumbersome. Further amendments were thus passed in 1954 reestablishing annual sessions (albeit a shorter sixty-day "budget session") and in 1966 (which authorized the legislature to deal with nonbudgetary issues each year).
- An amendment extending the governor's veto power to include line-item vetoes on appropriation bills was passed in 1903.
- A Wyandotte provision that limited the tenure of administrative offices to four years was amended in 1939 to create civil service positions having merit-based job security, in order to enable state participation in federal welfare programs.
- An amendment to increase the size of the supreme court from three to seven judges was passed in 1899, after many years of legislative actions to address the overcrowded dockets, including establishment of an intermediate court of appeals.
- An amendment in 1958 changed the process of selecting supreme court judges, from general elections for six-year terms to "the Missouri Plan," involving a nonpartisan nominating commission, gubernatorial appointment, and public retention (or rejection).

During the 1960s and '70s, the original Wyandotte definitions of governmental institutions and processes were much more thoroughly revised, as voters approved in 1972 and 1974 amendments containing wholesale replacements of the articles on the executive, legislature, and judicial branches of the government and elections. The changes in the executive branch strengthened the position of the governor, extending the term of office from two to four years, having the governor and lieutenant governor elected as a team, giving the governor the authority to appoint several executive officials—such as the secretaries of state and treasury—that were previously directly elected, and authorizing the governor to reorganize the executive branch (subject to legislative veto). The provision that each county be represented in the house was deleted, as it had been made inoperative by the 1964 U.S. Supreme Court ruling in *Reynolds v. Sims* upholding the "one-person, one-vote" principle for state legislatures.[19] The 1958 provision for using the Missouri Plan to select supreme court justices was extended, on an optional basis, to the selection of appellate and district court judges. The many other changes that occurred during this period dealt with a general updating of these institutions and procedures, such as extending the time periods given the governor to sign or veto legislation, changing provisions for a state census, and modifying the oaths of office. The effectiveness of such changes is suggested by the fact that the amendments considered during the contemporary period have dealt with matters other than the basic operations of governmental institutions.

Republican and Rural Dominance

Lutz argues that constitutions "allocate political power through the distribution of offices and citizenship." And although it is naive to believe that constitutions will be neutral or unbiased in these distributions, creating decision-making institutions and procedures without any "built-in advantages" that empower one type of person over another remains an important democratic ideal.[20]

Our earlier discussion "defining citizenship" indicates how Kansans have sought more equal power distribution. Amendments granting nonwhites, women, and persons eighteen years of age the right to vote surely increased the political power of those who were previously disenfranchised. But perhaps the most important issues regarding the distribution of power in

19. *Reynolds v. Sims,* 377 U.S. 533 (1964).

20. Lutz, *Origins of American Constitutionalism,* 14; Charles Beitz, "Procedural Equality in Democratic Theory: A Preliminary Inquiry," in *Nomos XXV,* ed. J. Roland Pennock and John W. Chapman (New York: New York University Press, 1983).

Kansas concern those between the Republican and Democratic Parties and between rural and urban interests.

The Wyandotte Constitution ensured Republican predominance in the state of Kansas for many years.[21] It did so by establishing state boundaries to include areas where Republicans were dominant and to exclude areas where Democrats were more prevalent. It drew the lines of the original electoral districts so as to minimize the Democrats' chances of election. Even the initial provision that bills must be initiated in the house was intended to ensure Republican control—as it was believed that Democrats would have a much more difficult time acquiring a majority in the house than in the senate. With these sorts of initial provisions, Democrats have—with rare exception—been a minority party within the state.

The provision that every county be represented in the house ensured rural dominance of the legislature for more than a century. Even the reapportionment that has occurred since 1962 and the heavy urbanization that has occurred in eastern Kansas, primarily in the Kansas City metropolitan area around Johnson County and in the Wichita area, have done little to alter the extensive rural influence in Kansas politics.

The Question of Conflict

By creating legislatures to resolve policy issues, an executive branch to administer the law, and a judicial branch to resolve disputes, and by establishing electoral procedures for selecting those public officials who deal with such matters, constitutions, of course, provide basic instruments for managing social conflict. Moreover, by providing for public participation in amending the constitution, an ultimate method for resolving conflict is inferred. But it is not clear that the Kansas Constitution, or any constitution, can effectively resolve all social conflict.

Kansas has been strongly divided in the past by such issues as women's rights, Prohibition, and gambling, and a strain in the state's public philosophy has insisted that such major conflicts are best resolved by having voters adopt or reject constitutional amendments. Even though Section 2 of Article 14 of the Kansas Constitution on constitutional amendment and revision specifies that the legislature can call a constitutional convention for such purposes, this method has never been employed. Instead, Kansans have turned to Section 1 of that article, which calls for propositions for the amendment of the constitution to be approved by two-thirds of each branch of the legislature and by a majority of voters. Although such a procedure might seem a thoroughly democratic method of managing and resolving

21. Heller, *Kansas State Constitution,* 3–8.

conflict, it is not entirely clear that it leads to effective politics—or properly understood "democratic politics" involving such matters as minority rights and public deliberation.

On the one hand, raising both technical and emotional issues to constitutional amendments requiring public resolution may be dubious. The 1986 amendment dealing with the classification and reappraisal of property was highly complex, and it is far from obvious that the public understood this issue and was able to resolve it effectively and fairly. In 2004, the Kansas legislature had difficult financial issues to resolve, but many of its members were eager to duck such concerns and turn their attention to morality issues, such as a constitutional amendment banning gay marriages.[22] Although this amendment was narrowly defeated in the 2004 legislative session, the matter became a major political issue that resulted in a more Republican and conservative legislature after the November 2004 election. An amendment banning gay marriages was passed by the legislature in January and by the public in April 2005. It is certainly arguable that such issues involving minority rights are best left to court interpretations of broader equal-rights provisions in the constitution than to resolution by public majorities and that the legislature should focus its attention on less emotional issues.

On the other hand, constitutional provisions may precipitate conflicts that are extremely difficult to resolve—though by no means best to avoid. For example, in December 2003, District Judge Terry Bullock ruled in *Montoy et al. v. State of Kansas et al.* that the Kansas legislature had failed its constitutional duty, as specified in Article 6, Section 6(b), to "make suitable provision for finance of the educational interests of the state." The upshot of Bullock's ruling was to instruct the legislature to fix what he saw as an "unconstitutional school finance system."[23] His ruling asserted both that the distribution of state funds among the 301 school districts was unfair and that total state funding was inadequate by almost $1 billion. In 2001, the legislature had authorized a study to determine the costs of the constitutionally mandated adequate funding of public schools, and this study had recommended a 40 percent increase in state aid, from its 2004 base of $3,863 per pupil, a base that had increased only $263 per pupil since 1992. Bullock's decision was upheld by the Kansas Supreme Court, which ordered the legislature to remedy the situation by April 2005.[24] Because of several tax cuts in recent years and a stagnant economy and because voters had elected in 2004 a strongly Republican legislature, the 2005 legislative session was character-

22. Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America* (New York: Metropolitan Books, Henry Holt, 2004).

23. *Montoy et al. v. State of Kansas et al.,* 275 Kan. 145, 62 P.3d 228 (2003 Kan.).

24. Ibid., 278 Kan. 769, 102 P.3d 1160 (2005 Kan.).

ized by extensive partisan division and legislative defiance of the courts. At the end of its regular session, the legislature reluctantly approved a $142 million increase in school funding, to be financed out of reserve funds in the state treasury and allowing school districts to increase spending through higher property taxes. In early June 2005, the Kansas Supreme Court ruled this an inadequate response and demanded that the legislature double this amount by July 1.[25] This ruling accelerated talk of a constitutional battle over the separation of powers, and many Republican legislators indicated a willingness to defy the court order. When a special session of the legislature failed to meet the court's July 1 deadline, the court set a July 8 hearing to consider closing the state's school system for the coming year. This resulted in a coalition of Democrats and moderate Republicans agreeing to add another $148 million for education (bringing its total increase in 2005 to $290 million), and to consider additional enhancements during the 2006 legislative session. With the threat of supreme court intervention hanging over its head, the legislature in May 2006 added $541 million to education over a three-year period. In July 2006 the court found this response adequate to dismiss the case that had prompted its intervention in the issue, thus defusing the immediate crisis. But staunch conservatives still seethe over the court's intervention, and the larger question of the court's capacity to direct the legislature to fulfill its constitutional responsibilities remains unresolved.

Conclusion

Additional chapters of Kansas's constitutional history are still to be written, but the history thus far can be well understood through the conceptual framework of state constitutions provided by Don Lutz, which directs attention to central issues regarding how the people of a state codify their public philosophies into overarching guidelines for their governance.

Although Kansas is widely regarded as a conservative state, a conservative public philosophy is only weakly evident in its constitution. By initially drawing the boundaries of the state and creating institutions in ways that strengthened Republican and rural influences, the constitution has facilitated conservative politics. The most conservative feature of its constitution has been its long history of prohibiting and limiting the consumption of alcohol, but such provisions were rejected at its founding and have receded into the dustbin of Kansas's constitutional history. By limiting the authority of government to carefully specified areas and codifying many citizen

25. Ibid., 279 Kan. 817, 112 P.3d 923 (2005 Kan.).

rights, the Kansas Constitution reflects the contemporary conservative philosophy of minimal government, but Kansans have been willing to amend their constitution to facilitate a growing role of the state as the public has accepted the need for greater collective action in such areas as highways, education, and welfare.

BARBARA ALLEN

Framing Government for a Frontier Commonwealth

The Minnesota Constitution (s)

In climates where a Siberian air mass occasionally plunges actual temperatures to forty degrees below zero Fahrenheit and wind chills routinely fall to such levels during "real winter," cooperation, collaboration, and compromise become crucial to survival. Flourishing in a difficult physical environment has long been a source of pride to Minnesotans, whose political culture of mutual aid still sustains the vast reserves of social capital for which the state is known. Minnesota's heritage of communalism and self-help is a story of institutional as well as individual resilience, qualities illustrated by the history of the state's founding document—or, shall we say, *documents.*

In 1857, on the eve of Southern secession and Civil War, Minnesotans approved two versions of their state constitution, one Republican and one Democratic, and immediately encountered a political battleground as they sought entry to an increasingly imperiled union of states. Their initial plan of government and the state's continuing constitutional development are worth studying for several reasons. As political scientist Donald S. Lutz has shown, constitutions define a way of life as well as distribute and limit government powers. In America, moreover, the fifty state constitutions complete the U.S. Constitution, which refers to their texts explicitly or by implication in forty-two separate sections and relies on their debt to an even broader legacy of colonial political experience.[1]

Constitutionalism in Minnesota tells us about a people's values and hopes, revealing enduring principles that, from the start, informed institutional change in a fractious national context. Likewise, the Minnesota Con-

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1. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16, 97–98. See also Lutz, *A Preface to American Political Theory* (Lawrence: University Press of Kansas, 1992), 42, 68.

stitution joins the fundamental laws of other states in articulating terms and conditions of citizenship—including qualifications for office holding—and limitations on government powers that bear directly on the national scene.[2] The Minnesota case exemplifies many other aspects of institutional development identified by Lutz as worthy of study, including the American penchant for blending the ideals of government by covenant or compact with the more contractual elements of charters and frames; the apparent ease with which Americans appropriate, abbreviate, and amalgamate a variety of (sometimes contradictory) theories and practices; and the apparently archetypal statement of American political theory, "Experience must be our guide."[3]

Constitutional history is above all a history of intellectual development. Constitutions are technologies.[4] And the development and implementation of any technology depend in part on the shared understandings of designer and user. For more than a century and a half, the Minnesota Supreme Court has ruled on the differences between the state's two constitutional documents without serious controversy, producing a body of law from the experience of self-government. In the 1970s, continuing discussion of fundamental law led the state legislature to reorganize the documents for legislative purposes (as distinct from judicial decision making). In effect, Minnesotans today have three constitutions in use. Experience has indeed guided citizens and their representatives in making constitutional choices—among them, a change from one of the easiest to one of the most difficult processes of constitutional amendment found in the fifty states. We begin our brief survey of constitutional and intellectual developments in Minnesota by looking at the documents that set the legal context for constituting the North Star State. We next turn to the political context for constitutional choice and the principles of institutional design that guided constitutional framers. Finally, we consider the problems of constitutional choices in an ever-changing social, economic, and political environment, focusing on the lessons on constitutional amendment taught by the Minnesota case.

2. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 27–44.

3. American framers borrowed the words of David Hume in elevating practical experience to the highest principle of the art and science of governance. See John Dickinson, "Madison's Notes of 13 August," quoted in *Records of the Federal Convention of 1787,* by Max Farrand, 3 vols. (New Haven: Yale University Press, 1923), 2:278. See also Douglass Adair, "'Experience Must Be Our Only Guide': History, Democratic Theory, and the United States Constitution," in *Fame and the Founding Fathers: Essays by Douglass Adair,* ed. Trevor Colbourn (Indianapolis: Liberty Fund, 1974), 152–75. "Experience" in all cases includes the delegates' reading of history, as Lutz emphasizes in *Preface to Political Theory,* 115–17.

4. Lutz, "Purposes of State Constitutions," 28–29.

Constitutional Documents Founding Minnesota

The constitutions reported to the people by the Democrat and Republican delegations on August 29, 1857, joined several other documents shaping fundamental law in Minnesota. The Northwest Ordinance (1787), U.S. Constitution (1789), Act to Establish the Territorial Government of Minnesota (Organic Act of 1849), Enabling Act for a State of Minnesota (1857), and Act of Admission of Minnesota into the Union (1858) not only set the stage for statehood but also enumerated rights, duties, and protections that were incorporated as constitutional provisions. Today the secretary of state publishes biennially the official manual of state government containing all of these documents, underscoring their continuing significance in state law.

The Northwest Ordinance enacted by the Confederation Congress on July 13, 1787, established a governing framework for the territory north of the Ohio River and east of the Mississippi River. This founding document not only prohibited slavery and secured other basic liberties for the people of the territories but also extended principles of federalism to the frontier by allowing settlers of the new territories to be allowed to form their own governments and enter the Union on an equal footing with the existing confederation states. As remarkable as the narrative of an ever-expanding federal republic is, however, the story has another side. The Northwest Territories were occupied lands whose self-governing societies were forcibly removed—often under the cover of law—to make way for the new democracy.[5] Although treaties between the United States and the Ojibwa and Dakota of the northern territories suggest that in some cases voluntary arrangements replaced conquest and force as the main means of gaining possession of Indian lands, few scholars today (and, indeed, few nineteenth-century observers) would reckon these agreements as the result of fair or, indeed, peaceable negotiations.

Establishing a Territorial Government of Minnesota: The Organic Act of 1849

When Iowa and Wisconsin were admitted to statehood (in 1846 and 1848, respectively) portions of their former territory soon to be called "Minneso-

5. On the radical vision of the Northwest Ordinance, see Peter S. Onuf, "The Northwest Ordinance, Commentary," in *Roots of the Republic: American Founding Documents Interpreted,* ed. Stephen L. Schechter (Madison, Wis.: Madison House Publishers, 1990), 249–58; and Daniel J. Elazar, *Covenant and Constitutionalism: The Great Frontier and the Matrix of Federal Democracy* (New Brunswick, N.J.: Transaction Publishers, 1998), 87–91.

ta" were left without an established government. The little settlements that had once looked south to Iowa for government joined the people of St. Paul and Stillwater—formerly part of the Wisconsin Territory—to discuss their situation. Calling themselves "citizens of the Minnesota Territory," sixty-one delegates from across present-day Minnesota convened in Stillwater on August 26, 1848, to organize and gain congressional recognition for a territorial government. Minnesotans established their government and gained representation in Congress within six months of the Stillwater Convention. The Organic Act (to establish the territory) passed on March 3, 1849, becoming the polity's next constitutional instrument.

This legislation conveyed to the territory well-established provisions for republican government, including principles of majority rule and separation of powers, by prohibiting election or appointment to more than one government office at a time. The measure moreover articulated federal principles of shared powers in establishing an independent judiciary and checks and balances to the executive and legislative bodies. With the advice and consent of the U.S. Senate, President Zachary Taylor appointed Pennsylvanian Alexander Ramsey territorial governor. Following the constitutionally mandated census of territorial residents, qualified voters in each newly designated county elected representatives to their bicameral legislature. The governor and legislature provided for the election or appointment of township, district, and county officers. Free white male inhabitants twenty-one and older who were citizens of the United States or had declared by oath to become a citizen and sworn an oath to defend the U.S. Constitution could vote and hold office in the territory. The Organic Act served as the territorial constitution for the next nine years until Congress passed the Enabling Act for a State of Minnesota (February 26, 1857) and admitted Minnesota to the Union in 1858.

The Enabling Act: National Politics and Territorial Ambitions

The five sections of the Enabling Act published the boundaries of the proposed state, called for voters to elect two delegates from each of the present territorial districts to a legislative assembly, and empowered that specially elected body to decide by majority vote whether the people of the state wished to be admitted to the Union. If the representatives received the people's approval, they were to proceed in writing a constitution to establish a state government conforming to the federal constitution, subject to its ratification by majority vote of the people of the proposed state. The Enabling Act also provided for a census to determine congressional representation, by district, for the state.

Basic principles of federalism—limited, distributed, shared constitutional power—evident in the specific provisions of the Northwest Ordinance, Organic Act, and Enabling Act continued to inform the constitutional documents sent to voters in 1857. Looking back, the steps to statehood appear logical; their ultimate result—another new state—seems unremarkable. But we should not treat this outcome casually. State formation by reflection and choice was as rare in the nineteenth century as it is today. Minnesotans especially had cause to wonder if their constitutional choices would lead to statehood; the fate of the Union, which they hoped to join, was also anything but clear.

The Partisan Conventions and Constitutional Compromises

The clear procedures articulated by the Enabling Act did not prevent partisan maneuvering within the territories or shield territorial inhabitants from the power brokers and sectional rivalries within Congress.[6] In 1854, Congress had stunned inhabitants of the Northwest Territories with the Kansas-Nebraska Act, repealing the 1850 Missouri Compromise. By opening Kansas to slavery and apparently threatening Nebraska with the same fate, Minnesota became an island of antislavery belief in the westward expansion. Whigs, including Alexander Ramsey, joined antislavery Democrats to protest congressional action, later adopting the name "Republican" and convening the first territory-wide Republican caucus in 1855. The convention platform affirmed the Republicans' purpose, "to array the moral and political powers of Minnesota . . . on the side of freedom . . . and to aid in wielding the whole constitutional force of the Federal government . . . against . . .

6. The history presented here is indebted to William Anderson, *The History of the Constitution of Minnesota* (Minneapolis: University of Minnesota, 1921). For a political analysis of Anderson's history, see Daniel J. Elazar, Virginia Gray, and Wyman Spano, *Minnesota Politics and Government* (Lincoln: University of Nebraska Press, 1999), esp. chap. 3 on the Minnesota Constitution. Also important to my account of the history of party formation in the state is the unpublished manuscript of nineteenth-century newspaper publisher John Phillips Owens (1818–1884), available in the Minnesota Historical Society Archives as John P. Owens, "Political History of Minnesota from 1847 to 1862." The Minnesota Historical Society also holds the original Republican and Democratic versions of the constitutions as well as the published proceedings of the delegations' debates. See T. F. Andrews, Official Reporter to the Convention, *Debates and Proceedings of the Constitutional Convention for the Territory of Minnesota* [Republican wing] (St. Paul: G. W. Moore, Printer, Minnesotian Office, 1858); and Francis H. Smith, Official Reporter to the Convention, *Debates and Proceedings of the Minnesota Constitutional Convention* [Democratic wing] (St. Paul: E. S. Goodrich, Territorial Printer, Pioneer and Democratic Office, 1857).

slavery."[7] Many of the new association's members had recently emigrated from New England, bringing with them the covenant ways, antislavery stance, and other political beliefs of their Congregationalist forebears. Ministers and teachers among their ranks also conveyed the new thinking of nineteenth-century urban reformers as champions of the final resolution on the Republican platform: to prohibit the traffic of liquor throughout the territory. When candidates of the nascent Republican Party won the lower house in the territorial legislature in 1856, Democrats recognized the power of the twin moral issues of the age: abolishing human bondage and "slavery" to liquor.

Partisans in the world beyond Minnesota also realized opportunities for organizing interests in the territories. Complex issues were often reduced to epithet and slogan as the growing bitterness pitted two "goods" against each other: the moral cause of abolition and for many the equally compelling moral ideal of the Union. Propagandists for the Democrats denounced Republicans as disunionists and nativists. In St. Paul, residents of Irish and German settlements were incited against "Black Republicans," portrayed as exponents of Negro suffrage who denied opportunities to (white) European immigrants, aiming their pious politics of Prohibition and abolition at the urban working poor. For their part, Republican propagandists refused to distinguish Minnesota Democrats from the partisans of slavery in the South. They portrayed Democrats as debauched defenders of slaveholders and beneficiaries of corrupt federal patronage, the fur traders and Indian agents, whom they stigmatized as "Moccasin Democrats."[8] Such rhetoric reveals widely shared racialist sentiments that could be used to unite the diverse inhabitants of the frontier in shared mistrust or drive them further apart.

7. "Republican Party of Minnesota Platform, 1857," as cited in Anderson, *History of the Constitution of Minnesota,* 38. See also Owens, "Political History of Minnesota," 232–57, on Ramsey and the formation of the Republican Party.

8. In fact, the two leading statesmen of the period, Henry W. Sibley and Henry M. Rice, led rival factions of the Democratic Party during the period framed by the Organic Act. Their competition was apparently spurred by contesting claims to the Indian trade. See Owens, "Political History of Minnesota," 89–94. On the contrasting interpretations of the U.S. Constitution presented by Abraham Lincoln and John C. Calhoun (as a covenant or as a compact among states) and the various theories of abolition, see Barbara Allen, "Martin Luther King's Civil Disobedience and the American Covenant Tradition," *Publius: The Journal of Federalism* 30 (Fall 2000): 71–113. On the expressions of these ideas in Minnesota politics, see Anderson, *History of the Constitution of Minnesota,* 37–41.

Apportionment and Delegate Selection for the Constitutional Convention

As the constitutional convention commenced, the U.S. Supreme Court was considering the fate of Dred Scott, a black slave whose master had brought him to Fort Snelling, claiming Scott a free man on the grounds that Minnesota was a free territory. In the ruling that set the stage for the Civil War, the Court, headed by Chief Justice Roger Taney, held that slaves were not persons under the U.S. Constitution, but were instead property and could not claim the protection of law or sue for their freedom.[9] The decision was a final stroke in a cascade of federal actions that drove abolitionist forces in the Republican Party and helped elect Abraham Lincoln as the Union-preserving, antislavery president in 1860. In Minnesota, partisan animosities increased, as did the number of abolitionist settlers. The partisan division of the constitutional convention might have been avoided if an adequate census and fair reapportionment had been conducted to reflect these immense increases in population.

Delegate Selection and Political Division

As the destiny of the Union became the focus of political contest and, frequently, armed combat, thousands of homesteaders came to Minnesota. The territory's population tripled between 1855 (the date of the last fair apportionment) and 1857, rising to more than 150,000, with the largest influx of settlers coming in the region bounded on the north and east by Stillwater, St. Paul, and St. Anthony (Minneapolis) and to the south and west by Winona and St. Peter. Whig-Democrats who hoped to maintain their thin majority in the legislature refused to take up the question of apportionment before the constitutional convention. Based on the 1857 census, one calculation suggests that Republicans should have been able to elect 70 of the 108 delegates to be seated for the convention. As it turned out, 50 Democrats and 58 Republicans initially received certificates of election. Political maneuvering also included questionable districting, as Democrats stretched the borders of one region to include inhabitants living outside the proposed state boundaries. Election fraud and mob control of some polls additionally brought many delegates' certifications under suspicion. The legal and public relations battles that followed produced 55 Democratic delegates and 59 Republicans. In total, 7 delegates served without credentials in a convention numbering 114, not 108; throughout the proceedings, Democrats claimed that their 55 delegates gave them a majority at the convention.[10] In this case,

9. *Dred Scott v. Sandford,* 60 U.S. 393 (1857).
10. Anderson, *History of the Constitution of Minnesota,* 69–71.

the federal powers scarcely provided republican government for the territory's inhabitants, and it was left for shared interests of another sort to motivate a compromise.

As Democrats challenged various election results throughout the territory, the Republican delegation began arriving in St. Paul to begin the convention on July 13, as stipulated in the Enabling Act. Partisan division continued, with the leadership of the well-organized, experienced delegation of Democrats refusing to agree with their Republican counterparts on the time for an opening session. Reports of the first fifteen minutes of the session detail the masterstroke of parliamentarian manipulation that cleaved the convention in half. As 45 Democrats entered the house of representatives en masse, the secretary of the territory, Charles L. Chase, a Democrat whose convention credentials were in dispute, swiftly called the meeting to order. Republican John North leaped to the Speaker's stand and nominated Republican colleague Thomas Galbraith as president pro tem. As this vote was being taken, Democrat Willis Gorman, the territory's former governor, moved for adjournment. Just as North declared Galbraith's election and the president pro tem mounted to the Speaker's platform, Chase announced that the motion to adjourn had carried, and the Democrats rose and departed as one. The two parties never again met as one body.

Differences in Style and Substance in the Two Conventions: Bridging Political Cultures

Students of Minnesota's constitutional history contrast the demography of the Republican and Democratic enclaves, emphasizing the relative youth and negligible political experience of the Republican delegates in explaining the outcome of constitutional compromise.[11] Indeed, comparisons of the two delegations' proposals with the compromise text show most of the frame of government to have originated in the Democratic caucus.[12] Of greater significance than the mean ages of the two delegations, however, are the different approaches to governance and constitutional architecture evident in the discourses of the two conventions. These distinctions perhaps had more to do with the types of "political" experience represented in delegations whose members emigrated to the territory from different political cultures and different eras of American history.

In the Republican Convention, ideas and institutions reflecting the colonial

11. Anderson contests this portrayal, noting that the two delegations differed little in mean age (36.2 years for Republicans and 37.3 years for Democrats) or the age range (23 to 54 years for Republicans and 26 to 53 years for Democrats) (ibid., 87).

12. Ibid., 115–32.

and early state-formation experiences of New England covenanters joined the more pluralist commercial culture of the Middle Atlantic settlements of Pennsylvania, New York, and New Jersey. The preponderance of Republicans came directly to the territory from New England (26), while the second-largest group (18) emigrated from Middle Atlantic states; most of the Republican delegation had arrived in the territory between 1855 and 1857. About a half dozen listed themselves as ministers or claimed some training for religious office; farmers (16), attorneys (15), and craftsmen (13) joined merchants and millers in the Republican deliberations. In addition to the experience with collective problem solving that such individuals doubtless had obtained, about a dozen of the Republican delegates had held county, town, or municipal offices. For most of them, then, political experience had been direct—and local.

This newly formed fusion of political cultures confronted the frontier political experience of Democratic delegates, almost a quarter of whom had been born in the Northwest Territory and many of whom had served in high territorial office. Besides the former governor, congressmen, treasurer, and attorney general for the territory, the members of the Democratic delegation had also served as Indian agents, land managers, and traders under federal contracts.

These differences showed in the style and substance of deliberations recorded by each convention. Where Republicans met in two daily sessions, the Democrats often failed to maintain a quorum for their proceedings. Whereas Republicans created several committees with overlapping membership and mandates, read each measure twice, printed and read it again before voting, and often debated and decided questions, only to reopen an issue to further discussion at a delegate's request, Democrats delegated the work to the leaders of a few discrete committees, assembling as a whole primarily to accept their subcommittees' recommendations.[13] The Republican meetings took on the qualities of a New England town meeting. Modalities of collective inquiry pervaded their discussions, as did a sense that, given enough time and the proper processes, humanity can make significant headway in discerning and acting for the greater good.

Democrats, by contrast, worked quickly in their small groups on the nuts and bolts of institutional design. Such a focus should not suggest that Democrats ignored principle; their records in fact reveal a very sophisticated understanding of institutional design and practice. The proceedings of the two

13. Ibid. For an example of reopening a settled question, see Andrews, *Debates and Proceedings,* 158. On the political culture of covenant and charter, see Barbara Allen, *Tocqueville, Covenant, and the Democratic Revolution: Harmonizing Earth with Heaven* (Lanham, Md.: Lexington Press, 2005); and Lutz, *Origins of American Constitutionalism,* 13–35.

conventions suggest that a wide range of agreement on most ideas about the frame of government facilitated the work of the Committee on Compromise. It seemed that the Republicans spent most of their time thinking about the preamble and bill of rights, whereas Democrats concentrated on framing the state's legislative, executive, and judicial powers—a division of labor that again highlights the distinctive yet equally significant contributions of New Englanders and frontiersmen.[14]

The Compromise Constitution

The Republican preamble, which still opens the constitution, followed a covenantal form, identifying God as the source of civil and religious liberty and expressing gratitude and hope for the continued beneficence of their Creator.[15] In drafting the bill of rights, Republicans drew careful distinctions between the foundational guarantees appropriate for a constitution and the particularities of law that should be left to ordinary legislation.[16] They alone proposed to prohibit the imprisonment of debtors, religious tests for voters, property tests for suffrage and office holding, and the use of public funds for religious purposes. Their bill of rights also uniquely contained guarantees of a jury trial in civil suits, regardless of the amount in contest, a statement regarding the equal protection of the laws, and an equal right to "obtain justice freely . . . and without delay." These rights they won, but the Committee on Compromise refused several other of their proposals, including prohibitions on dueling, a guarantee of full property rights to resident aliens, a guarantee to right the writs of error, the right to bear arms, and a statement that the criminal code must rest on principles of reformation and justice.[17] Both Republicans and Democrats adopted in similar language other familiar rights, including free speech and assembly. The latter right was inexplicably omitted from the final compromise documents, however, and remains a freedom enjoyed by Minnesotans primarily as a result of federal constitutional protections.

Perhaps the greatest differences in the two delegations' ideas about government appeared in their designs for the legislature. Republicans described two small bodies working in very short legislative sessions, empowered to refer any enactments to the people for their approval. Democrats pressed for larger bodies and longer sessions, while opposing the referendum measure. Both delegations proposed one-year terms for representatives and two-year

14. Andrews, *Debates and Proceedings;* Smith, *Debates and Proceedings.* Cf. W. W. Folwell, *Minnesota, the North Star State* (Boston: Houghton Mifflin, 1908), 140.

15. Andrews, *Debates and Proceedings,* 60–90; Smith, *Debates and Proceedings,* 203.

16. See, for example, Andrews, *Debates and Proceedings,* 148–51.

17. Anderson, *History of the Constitution of Minnesota,* 118.

terms for senators, a provision that the compromise committee omitted but voters quickly addressed by constitutional amendment. Democrats saw most of their plan for a powerful legislature realized. Republicans introduced the idea of staggered terms (putting the brakes on majoritarian dominance by preventing the legislature from turning over at once), which was accepted by the Committee on Compromise. Constitutional amendment also soon brought limits to the length of legislative sessions (1860), as Republicans had desired. Later amendments established biennial sessions for the legislature and extended the terms of office for representatives and senators to two and four years, respectively (1877).

Differences also emerge in the comparison of the two delegations' plans for the executive and judicial branches. Democrats offered a separate statement concerning the distribution of powers (Article III), with Republicans discussing the idea as a "miscellaneous provision" only at the end of their proceedings. Republicans appear to have envisioned a powerful executive, with the power to appoint the auditor, secretary of state, treasurer, attorney general, and superintendent of public instruction. Democrats put forth the plan adopted by the compromise committee, calling for the election of these other officers. Amendments in 1883 established a system of biennial elections and reconciled odd-numbered terms of office to conform to the new system. The present election schedule provides for gubernatorial elections in the off-year (nonpresidential) contests, potentially increasing voter interest in the state executive, maintaining the independence of state party organizations from their national affiliates, and invigorating third-party candidacies.

The judiciary received the least attention from the Republican delegation, allowing the Democrats to see much of their plan adopted. Their design included a supreme court, district courts, courts of probate, and justices of the peace and permitted the legislature to create other special-purpose inferior courts. The compromise committee accepted these ideas, specifying five judicial districts to be managed by district judges elected for seven-year terms. Judicial reform came to Minnesota by way of constitutional amendment in 1972. Gone are the justices of the peace; "streamlined" are the jurisdictions and powers of probate courts. Formerly elected clerks are now appointed, and supreme court judges serve according to a modified version of the "Missouri Plan," satisfying aims for a "strongly integrated and administratively unified system" and an electoral method that would guarantee judicial independence.[18]

18. The characterization of judicial reform comes from the eminent constitutional analyst G. Theodore Mitau in his "Constitutional Change by Amendment: Recommendations of the Minnesota Constitutional Commission in Ten Years' Perspective," *Minnesota Law Re-*

The amendment process enabling these corrections in the early years of constitutional development also emerged as the means that ultimately made compromise possible. Knowing that a provision for Negro suffrage could not gain sufficient support from the compromise committee, Republicans agreed to accept a proposal that allowed a single legislature by a simple majority to submit a constitutional amendment to the voters, and incorporated such amendments directly into the constitution if they were approved by a majority of the electors voting on the question. The articles governing the franchise in Minnesota, Republicans believed, would be easily changed to extend the vote to African American males if such an amendment process were adopted. They were right, but before they could be proved so, they still had a new constitution to ratify and unforeseen hurdles to surmount in their quest for statehood.

Ratifying the New Constitution

Even as this compromise committee reached agreement on all questions, party spirit prevailed. On August 29, 1857, the Constitution of the State of Minnesota was represented to voters in two documents: Republican and Democratic versions of the compromise committee's work. The nearly unanimous vote for ratification by the people of the Minnesota Territory two months later failed to resolve the ambiguous concordance produced by compromises laced with partisan division. In accepting the compromise committee's demand for a simultaneous vote on ratification *and* the constitutional officers of the proposed state, Minnesotans found themselves in the unusual position of voting for candidates whose offices neither they nor the U.S. Congress had yet approved. When each political party followed the customary practice of preparing a ballot for its schedule of candidates, with the words "For the Constitution" heading each slate, voters who disapproved either the constitution or the larger effort to enter the Union were forced to write in their negative. The affirmative votes (which, not surprisingly under these circumstances, topped 98 percent) conveyed an ambiguous mandate to would-be state officials and Congress, since approval had not been granted to either of the two documents. Congress delayed action on the bill admitting Minnesota to the Union, as national events—this time the "Kansas

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view 44 (1960): 472. In the Missouri Plan, judges serve first as gubernatorial appointments selected from a list supplied by a nonpartisan judicial commission appointed by the legislature; they next stand for reelection once and, if successful, are retained in office according to the electorate's response to the question, "Shall [incumbent] continue in office?"

question"—again influenced the timing of admission for "free" and "slave" states.[19]

Meanwhile, governance in Minnesota continued—conducted by the newly elected legislature under the president pro tem and later "president of the senate," an office not found in the constitution, along with the territorial administration of the governor. The newly elected governor and lieutenant governor prudently waited to assume their offices, forestalling the most direct conflict with Congress. The first state legislature operated on the theory that the language of the Enabling Act granted statehood when voters approved a constitution, a view at odds with procedures used in Wisconsin and other territories constituted by the Northwest Ordinance.

The Minnesota House and Senate enacted more than one hundred laws, elected two U.S. senators, and passed two constitutional amendments in its first months of existence. In addition to the special election to approve the railroad-funds amendment, voters also amended their constitution to allow state executive officers to assume their offices on May 1, 1858, whether the state had been admitted to the Union or not. The latter amendment added to Minnesota's reputation for "radicalism" and has fueled controversy about when Minnesota became a state: when the constitution was adopted on October 13, 1857, or, with admission to the Union on May 11, 1858? No one disputed the legitimacy of the laws enacted in the seven months following ratification, and Congress apparently granted statehood based on the Minnesota Constitution as amended, with the first two amendments coming before admission to the Union.

Constitutional Development through Amendment, Convention, and Reform

The constitutional amendment continued to play an important role in Minnesota's early development, permitting corrections to the original design and allowing sufficient flexibility to meet the significant financial and social challenges faced by the new state. But the simple amendment procedures also raised questions about when a bare majority of voters in a regular election could so easily change a polity's fundamental law.

19. In Kansas, the proslavery Lecompton Constitution was ratified in 1857 after an election in which voters were given a choice only between limited and unlimited slavery and "free state" voters refused to cast their ballots. When President James Buchanan urged Congress to admit Kansas as a slave state under the Lecompton Constitution, southern senators refused to consider the Minnesota bill until the Senate took up the Kansas question.

Extending the Franchise

In 1868, two years before the Fifteenth Amendment to the U.S. Constitution enfranchised African Americans, Minnesotans struck the word *white* from the qualifications for voters. The simple means of constitutional amendment also allowed Minnesota voters to authorize the legislature to grant women limited suffrage, which the legislature accomplished in 1876 along with giving women the right to hold school offices. Minnesotans rejected a proposed amendment to authorize women to vote in any election "upon the question of selling, or restraining the sale, or licensing the selling, or of the manufacture, of intoxicating liquors"—a proposal obviously plying women's support of temperance. An 1898 amendment extended to women the right to vote and hold office in matters pertaining to libraries and made the various measures related to their enfranchisement a matter of constitutional right, independent of legislative actions.

Overshadowing these extensions of rights and duties came the disenfranchisement of thousands in 1896 when a narrow segment of Minnesotans constituted the majority voting to end resident-alien suffrage. Aliens residing in Minnesota who had declared their intention to become U.S. citizens were allowed to vote on the same terms as citizens throughout the territorial period and, despite Republican opposition, maintained the right under the 1857 constitution. The prohibition on resident-alien voting, which appeared along with seven other proposals of progressive reformers, garnered the fewest votes of any measure; less than half of the people voting in the 1896 election marked their ballots on this question, allowing less than 30 percent of voters to carry the measure into law. In the election that followed two years later, Minnesotans amended the amendment process itself, making it far more difficult for a minority of voting citizens to change their fundamental law.[20]

Amending the Amendment Procedure: The Effects of Constitutional Reform

In 1898 Minnesotans approved an amendment that required a majority of those voting in a general election to pass an amendment to the constitution. Under this "extraordinary majority" rule, the failure to vote on the amendment is interpreted as rejecting the amendment; a nonvote counts as a "no" vote. Historians of the constitution and later critics of this relatively high bar to constitutional change are quick to point out that the 1898 amendment was affirmed by fewer than 28 percent of those voting in the general election that

20. Anderson, *History of the Constitution of Minnesota*, 179–81.

year and, thus, would have failed under the new rule. Though maintaining the simplest and easiest amendment process in the United States between 1858 and 1898, Minnesotans considered sixty-six constitutional amendments, accepting forty-eight (73 percent) and rejecting eighteen. In the first two decades of operation under the new supermajority rule, only eleven of forty-eight proposed amendments (23 percent) were adopted.

The percentage of proposals accepted varied in subsequent decades: in the 1920s, twelve amendments were proposed, half passed, including the "Babcock Amendment," supplying one of the most valuable developments of the state's infrastructure, a universally acclaimed public highway system, "located, constructed, reconstructed, improved, and forever maintained . . . in the state of Minnesota." In the 1930s, five of sixteen proposed amendments were accepted; in the 1940s, eight amendments were proposed, and four gained the extraordinary majority. Among the failed measures in 1948 was a plan authorizing the legislature to place multiple amendments on the ballot without requiring voters to vote separately on each and an amendment authorizing two-thirds of the legislature to call for a constitutional convention without submitting the question to the voters. Such proposals suggest that legislators thought something was wrong with the constitution and its amendment procedure.

The 1948 Constitutional Commission

In 1947, the state legislature created the Minnesota Constitutional Commission (MCC) to study the 1857 constitution and its amendments in relation to ever-changing political, economic, and social circumstances as a basis for making recommendations in the next legislative session.[21] The twenty-one-member MCC advocated adding six new sections to the constitution and making major changes in thirty-four sections, and suggested minor changes to seventy-eight other sections. Recommendations concerning the legislature included measures to increase the flexibility of the legislative session and reduce obstacles to multiple office holding (a hindrance to national political careers). Reapportionment, which had been stalled for nearly four decades, was another subject of reformers, who suggested changes in language aimed at producing equitable representation for an increasingly populous and diverse state and plans for reapportionment fol-

21. This discussion relies on the detailed analysis found in Mitau, "Constitutional Change by Amendment"; Betty Kane et al., "Minnesota Constitutional Study Commission Amendment Process Committee Report," Mss. Collection (St. Paul: Minnesota State Library, 1972); and Diana E. Murphy et al., "Minnesota Constitutional Study Commission Bill of Rights Committee Report," Mss. Collection (St. Paul: Minnesota State Library, 1972).

lowing each census. Several measures were also recommended to strengthen the executive, including reducing constitutional offices, from six to three (governor, lieutenant governor, and attorney general), and extending their terms from two to four years. The most far-reaching changes recommended by the MCC concerned unifying the judiciary and adopting the Missouri Plan for judicial elections. Although it took more than two decades to achieve this aim, the judiciary today stands as an exemplary model of administrative unity attuned to the particularities of local circumstances.[22] The MCC also recommended changes facilitating home rule and autonomy for local governments, balancing federal principles of local liberty against necessary limitations on special elections—a concern from the start.

The 1948 commission advised major changes to the amendment process itself. The report called for a return to the original approval by a simple majority of those voting on the measure, coupled with a two-thirds legislative majority vote in order to submit an amendment for popular vote. The MCC also recommended the following:

> (1) Not later than 1960 and every twenty years thereafter, the question of a constitutional convention is to be submitted to the electorate. (2) If a majority of those voting on the question declare in favor of a convention, the legislature must provide for the calling of one. (3) Upon completion of the convention session and submission of its draft to the public, an election must be held on the proposed constitution or amendments—this to take place not less than sixty days, nor more than six months, following adjournment. (4) If a majority of those voting on the proposals approve, they shall take effect.[23]

In the next two decades, many of the MCC proposals were accepted as amendments. Eighteen proposals came before voters in the 1950s: ten were accepted, including the recommended changes to strengthen the executive (1954 and 1958); reorganize the judiciary (1956); revise provisions relating to local government, home rule, and special legislation (1958); address issues related to state highways (1956); and "provide for a 60 percent popular vote before a new state constitution can be ratified and to remove the constitutional bar precluding members of the legislature from serving in a constitutional convention" (1954). During the 1960s, nine of twelve proposed amendments were accepted, including an amendment easing voter registration and eliminating offensive language and restrictions on the voting rights of "persons of Indian blood" (1960). Still, citizens and their representatives asked if their constitution needed more substantial revision.

22. Elazar, Gray, and Spano, *Minnesota Politics and Government.*
23. Mitau, "Constitutional Change by Amendment," 478.

The 1972 Constitutional Study Commission Recommendations

For many, progress was not coming quickly enough. In 1972 the Minnesota Constitutional Study Commission was appointed, with the charge of deciding "whether constitutional change would be better effected though a constitutional convention or by separate amendments to our present document." The commission cited the speedy amendment procedures and consequent "modernizing" that other states enjoyed, noting that Minnesota was among a minority of states (twenty at the time) still operating under its original constitution. Longevity itself seemed to condemn the document, and the commission hypothesized that a completely new document would "be briefer, more flexible, freer of statutory detail, better written—in a phrase, more organic—than the result of patchwork, skilled though it be." Citizen education was cited as the most compelling argument for a "citizen convention to produce a new document." The commission envisioned a convention as a "dramatic action-filled event" to which news media would give "wide and interest-filled coverage." Open decision making in citizen forums, the report extolled, would bring into the process citizens presently alienated from the activities of government.[24] Despite these potential benefits, the commission did not recommend such a convention: no "good government" groups were pressing for such a convention, interest was low, and legislative obstacles were high. Instead, the commission recommended that the 1973 legislature start comprehensive constitutional revision through phased amendments, starting with a "gateway" amendment.

Under the proposed plan, a simple majority of the legislature could submit proposed amendments to voters, to be approved by a majority of those voting on the question. Amendments approved by a two-thirds majority of the legislature could be put forward for public consideration in a special election. The commission also recommended that the legislative requirement for submitting a proposal for a constitutional convention be reduced from a two-thirds majority of both houses to a three-fifths majority of both houses, with the popular majority required to approve the call from a majority voting in the election to three-fifths of those voting on the question. The commission recommended against the initiative and the mandatory periodic submission of the question of calling a constitutional convention.

Reviewing the bill of rights, the commission noted that the Minnesota Constitution omitted the constitutional guarantee for the right of assembly, viewing the apparent oversight as at most a surprise—not a crisis—needing correction. The commission recommended that the right be added, fol-

24. Kane et al., "Constitutional Study Commission," 1, 9.

lowing the form recommended by the 1948 MCC report, which uses the same language as the U.S. Constitution. Twenty-five amendments have been proposed to voters since 1972; a constitutional right of assembly has not been among them.[25] The commission also recommended amendments guaranteeing the right to bear arms, subject to the police power of the state; the rights of the mentally disabled, guarantees of the "inviolability of the body" prohibiting compulsory medical treatments, including surgery, restraint or confinement, and electroshock therapy; and a "right to know" if any entity is keeping a file on an individual.[26] Several of these recommendations have become part of Minnesota statutes, including those concerned with bodily integrity in medical and institutional settings, the rights of disabled persons, and privacy protections for individuals.

Constitutional Amendment Procedures in the Last Quarter of the Twentieth Century

The 1970s proved a favorable time for amendment, with 8 of 10 proposed amendments gaining necessary popular support. The ratified amendments included many of the remaining 1948 and new 1972 constitutional study recommendations, including the reorganization of the state judicial system. Notably, voters rejected a proposal to ease requirements for amending the constitution. Lawmakers have continued to use a process of planned amendment instead of calling for a constitutional convention to revisit the document as a whole. In the 1980s, 10 of 14 such proposals gained acceptance. Additional reforms included campaign spending limits for executive and legislative offices. Six of 7 proposed amendments were accepted by voters in the 1990s, including provisions for recalling elected state officials and, in 1998, the last year in which any amendments were ratified, a measure to "preserve the state's hunting and fishing heritage," which proponents regarded as necessary to meet supposed threats to sport hunting and fishing.

In total, voters have considered 178 different amendments, of which 119, or 66.8 percent (subtracting multiple submissions of the same amendment), have been adopted.[27] After an initial dramatic decline in the adoption rate, acceptance of proposed amendments stabilized, so that 49 percent of the proposed amendments since 1900 (following the change to the extraordinary majority rule) have been adopted. Ratification would have increased from 49

25. Minnesota Constitutional Study Commission Bill of Rights Committee, "Note: An Effort to Revise the Minnesota Bill of Rights," *Minnesota Law Review* 58 (1973): 158.

26. Murphy et al., "Constitutional Study Commission," 23–24.

27. A total of 211 amendments have been sent to voters. Counting multiple submissions, the "acceptance rate" is 56 percent.

to 57 percent under a simple majority rule.[28] Given the opportunity to resubmit proposed amendments to voters, however, it is unclear how important this eight-point difference in rejection rate has been. Minnesotans have scrupulously distinguished those matters meriting constitutional change from choices better made through ordinary legislative action. They have also checked the powers of a voting majority, rejecting proposals for the initiative and referendum (1914, 1916, and 1980) and, until accepting an amendment in 1996, denying themselves the power to recall elected state officials.

Minnesotans have resisted some efforts to enhance legislative power, twice rejecting amendments to remove time limitations from legislative sessions (1881, *before* the more restrictive amendment procedure, and in 1960) or extend the legislative session (1960) and agreeing to the present system of flexibly scheduled 120-day biennial sessions only in the last third of the twentieth century.[29] In 1954 voters approved an amendment to the constitution precluding members of the legislature from serving in a constitutional convention, but rejected a proposal authorizing two-thirds of the legislature to call for such a convention without submitting the question to the voters. Minnesota voters also rejected several proposals to eliminate restrictions on holding multiple offices before accepting an amendment "to allow legislators to assume another elective or appointive office upon resignation from the legislature." (Beginning with the 1849 Organic Act, legislators had been barred from holding any additional state or federal office, other than postmaster.) Although the legislature has consolidated the provisions of the 1858 constitution into fourteen sections for its use in legislative discussions, the original document(s) encompassing many provisions taken from the Organic Act and the Enabling Act remains in force—a testament not only to the prescience of its framers but also to the spirit of compromise and common sense of Minnesota voters.

28. Deborah K. McKnight et al., *Minnesota State Constitutional Amendments: Frequency, Number, and Ratification Rates: An Analysis* (St. Paul: House Research Department Publications, 1999), 4.

29. According to the constitution, the legislature must meet in regular session each biennium and must adjourn the regular session in a year by the first Monday after the third Saturday in May. The constitution forbids either house to adjourn for more than 3 calendar days (excepting Sunday) without the consent of the other house and, furthermore, limits each biennial regular session to 120 "legislative days," as defined by law. The legislature may meet "at times prescribed by law" and, having met, "adjourn to another time." Current law requires the legislature to meet in each odd-numbered year on the first Tuesday after the first Monday in January, defines a legislative day as a period "when either house of the legislature is called to order," and otherwise permits the legislature to schedule its regular sessions as it pleases. Since the 1972 amendment enabling flexible scheduling, the legislature has met in both years of the biennium and no legislature has used all of its 120 legislative days (Article IV, Section 12; Minn. Stat., sec. 3.001, 3.012).

Conclusion

The Minnesota Constitution not only joins forty-nine other state constitutions to complete the U.S. Constitution but also stands out as a study in adaptation and amalgamation. Original constitutional framers borrowed from institutional forms from the contemporaneous founding documents of Wisconsin and Iowa; they blended assumptions about government, community, and commerce taken from the much earlier experiences of Massachusetts covenanters and enterprising pluralists from Pennsylvania and New York. These ideas and forms were grafted onto measures found in their existing governing documents: the Northwest Ordinance, the Organic Act establishing the territory, and the Enabling Act for statehood. Later legislators, constitutional study commissions, and voters have accepted the premises of the original frame of government and the values that it reflects. As Donald Lutz has explained, constitutions can help manage conflict—a critical aim when the governing frame specifies separated and *shared* powers. But law alone cannot structure conflict for effective management. Political culture informs constitutionalism, and Minnesotans have been fortunate to enjoy spirited disagreement and a spirit of compromise from the first. Constitutional change can be contemplated and carried out with due consideration of what has "worked," especially to enable the frame of government to encourage a culture of reflection and compromise. In all, Minnesotans have thought about matters of constitutional choice practically. The spirit in which they have approached their fundamental law is perhaps best summarized in the title given to a League of Women Voters' education pamphlet during the 1972 constitutional reform discussion: "Well, what d'ya know . . . Minnesota has a constitution!" The constitution facilitates but does not create the community it directs; it enables collective deliberation and choice, but the spirit of the law remains in a people for whom thoughtful compromise is a primary value.

CHRISTOPHER W. LARIMER

A Self-Righteous and Self-Sufficient Method for Governing

How the Nebraska Constitution Preserves a Way of Life

The Evolution of the Nebraska State Constitution

Approved on October 12, 1875, the Nebraska Constitution experienced a tumultuous beginning. Prior to approving a state constitution, the people of Nebraska endured three attempts at statehood and two constitutional conventions. During the twentieth century alone, the state of Nebraska formally engaged in three institutional reviews of the 1875 constitution.[1] Moreover, following the constitutional convention of 1919–1920, the Nebraska state legislature provided for the establishment of the Nebraska Constitutional Revision Commission, convening twice since 1969, for the specific purpose of "simplifying and condensing the Constitution of 1875."[2] As such, since 1875, 224 amendments have been approved and incorporated in the state constitution, suggesting that the Nebraska Constitution, while serving as a framework for governance, also proves to be a highly malleable and highly adaptable document in accordance with the political culture of the state.

Despite its seemingly irregular and inconsistent pattern, the Nebraska Constitution serves an important role as a repository of the values and beliefs deemed significant to Nebraskans. Indeed, three general themes emerge from the Nebraska Constitution of 1875: the importance of securing direct

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1. Robert D. Miewald and Peter J. Longo, *The Nebraska State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993); *Nebraska Blue Book* (Lincoln: Unicameral Information Office, Office of the Clerk of the Nebraska Legislature, 2002–2003).

2. Miewald and Longo, *Nebraska State Constitution,* 11.

citizen power while emphasizing individual responsibility, maintaining political accountability, and providing for substantive restrictions on political and economic power through moral and religious undertones. As others have argued, the Nebraska Constitution tends to reflect the "independent" and "individualistic" character of its citizens.[3] By establishing the structures through which citizens and government interact, the Nebraska Constitution defines the mechanisms through which citizens develop and express attitudes toward political institutions. While the values and beliefs of Nebraskans may conflict with one another, they do serve to provide an overarching theme regarding the role of government as well as changes to existing constitutional provisions. In order to appreciate these themes, however, it is necessary to engage in a brief historical analysis regarding the origins and development of the Nebraska Constitution.

In the first part of this chapter, I examine the historical roots of the Nebraska Constitution, noting themes that emerge to define later constitutional debates. Following this discussion, I provide a more in-depth analysis of existing constitutional provisions, detailing how the independent and moral nature of the Nebraskan citizenry is borne out through constitutional text and amendments. In particular, discussion will be geared toward the unique ability of the Nebraska Constitution to balance a strong moral conviction with a deep-seated concern for preserving direct legislative power for its citizenry. As discussed throughout the chapter, these two themes not only serve as the foundation for formal modifications to the existing document but also interact to produce major changes in the overall structure of the constitution in order to reflect and reinforce the primary values and beliefs of Nebraskans. Given that I emphasize how such themes emerge in various constitutional provisions, footnotes relating to each section provide a more detailed analysis of specific provisions. Finally, I conclude with an overview regarding the role the Nebraska Constitution serves in providing an institutionalized legacy of the norms and traditions of its citizenry.

Statehood

Nebraska's early attempts at statehood primarily centered on the distribution and scope of political power within the state, as well as the values and beliefs of its citizens. Following the enactment of the Kansas-Nebraska Act in 1854, Congress permitted Nebraska, upon achieving statehood, to enter the Union "with or without slavery." However, due to fears surrounding the costs of an independent state government as well as uncertainties regarding financial support from Washington following the transition from territory

3. Ibid., xxvi.

to state, Nebraska voters rejected this first attempt at statehood by a vote of 2,372 to 2,094 on March 5, 1860, thereby providing the first indication of a strong desire to limit the cost of government, a theme that reemerged in later constitutional debates.[4]

Despite this initial failure at statehood, the Nebraska Enabling Act of 1864 established the conditions under which voters were able to elect convention representatives for the explicit purpose of writing a state constitution, seemingly easing the transition to statehood. Despite frustration with the territorial vote of 1860, however, members of the convention were unable to form a constitution prior to adjourning. As before, fears arose, primarily among Democrats at the convention, as to the cost and size of an independent state government.[5] Thus, Nebraska's second attempt at statehood also floundered on the grounds of fiscal uncertainty, illustrating the difficulties of establishing a system of government that violates the established culture of a state, namely, an emphasis on providing cheap government.

Frustrated by two previous attempts at statehood, Republicans decided to take matters into their own hands. In February 1866 the territorial legislature, under auspicious circumstances, passed a joint resolution approving that a constitution, upon passage by the legislature, was to be immediately submitted to the people of Nebraska.[6] By limiting the scope of government, as well as the level of participation among Nebraskans fearful of a costly and expansive government, the legislature expeditiously drafted and approved a constitution for submission to the people. On June 2, 1866, the citizens narrowly endorsed the constitution by a vote of 3,938 to 3,838. The constitution of 1866, although clearly a function of the fiscal attitudes of Nebraskans as well as a clandestine legislative process, also seriously addressed definitions of citizenship. Limiting suffrage to "free white males," the constitution of 1866, despite a congressional bill admitting Nebraska to the Union according to the existing exclusionary language, ultimately led President Johnson to withhold his signature.[7] Thus, although successful in terms of establishing a limited framework for government, the constitution of 1866 served to delay statehood.

Following President Johnson's pocket veto, Congress reconvened in order to address the issue of slavery and black rights, and to force Nebraska to amend its constitution on the basis of providing more inclusive statutes regarding individuals of color. Passed on January 15, 1867, a congressional bill

4. Ibid., 3, 4; *Nebraska Blue Book,* 208.

5. A. B. Winter, "The State Constitution," in *Nebraska Government and Politics,* ed. Robert D. Miewald (Lincoln: University of Nebraska Press, 1984).

6. Miewald and Longo, *Nebraska State Constitution,* 7.

7. *Nebraska Blue Book,* 208, 207.

provided for the admission of Nebraska to the Union upon a condition requiring the state to change its constitution to prevent the "abridgment or denial of the exercise of the elective franchise or any other right to any person by reason of race or color, excepting Indians not taxed." Despite a presidential veto, Congress was able to override executive authority, and on March 1, 1867, President Johnson was forced to proclaim Nebraska a state.[8] Thus, Nebraska's quest for statehood hinged on definitions of citizenship, particularly black suffrage, as well as fiscal uncertainties regarding the size and scope of an independent state government, issues that defined later debates regarding constitutional design.

The Constitutional Convention of 1871

Although voters approved the proposal for the constitutional convention of 1871 almost two years prior, the impeachment of Governor David Butler in 1871 for mishandling public funds reinforced the need for a more stringent framework for government.[9] As in earlier constitutional debates, definitions of citizenship and preserving political and economic accountability dominated the discourse at the convention. Despite the state being admitted to the Union as a Republican state, the constitution of 1867 settled little in terms of providing the type of strict moral and fiscal accountability sought by Nebraskans. Rather than setting a specific framework for governance, the constitution of 1867 focused solely on limiting government spending.[10] Thus, although it paved the way to statehood, Nebraska's first constitution provided only a "skeletal" form of government, lacking specific provisions regarding the actual act of governance.[11]

Adopting the Illinois Constitution as a model, state legislators attempted to rein in mounting frustration stemming from what many considered to be an incomplete document.[12] Of primary concern was providing a means for governmental reform while establishing concrete definitions of citizenship. Despite forty-seven days of intense debate on proposals concerning women's suffrage, Prohibition, compulsory education, municipal aid to corporations, railroad rights-of-way, and the liability of stockholders, however,

8. Ibid., 208, 209.

9. Miewald and Longo, *Nebraska State Constitution,* 11; *Nebraska Blue Book,* 209.

10. Robert L. Maddex, *State Constitutions of the United States* (Washington, D.C.: CQ Press, 1998), 232.

11. James C. Olson, *History of Nebraska* (Lincoln: University of Nebraska Press, 1966), 143. Though drafted and approved in 1866, the constitution of 1866 is formally recognized as the constitution of 1867 since it was contingent upon statehood (Winter, "The State Constitution"; Miewald and Longo, *Nebraska State Constitution*).

12. Winter, "The State Constitution."

voters rejected this attempt at a revised constitution by a vote of 8,627 to 7,896.[13] Thus, despite growing dissatisfaction with the constitution of 1867, followed by an overwhelming vote in favor of the convention, Nebraskans were unable to agree on any of the convention's proposals.

The Constitutional Convention of 1875

Following continual frustration with a directionless and vague government, legislators once again put to the voters a proposal for another constitutional convention, with the specific purposes of addressing the needs of Nebraskans and providing for a more concrete blueprint of government. Given a high degree of citizen and governmental disgruntlement following the economic fallout of the grasshopper invasion of 1874, intensified political bickering, public immorality, and growing bankruptcy among local governments, the voters overwhelmingly approved the convention proposition by a vote of 18,067 to 3,880.[14]

The sixty-nine-member convention meeting in Lincoln was primarily interested in modernizing the state government in order to provide for more responsive institutions as well as limiting executive and legislative power. In particular, and as noted in the 1871 provisions, of primary concern to the state legislature were excesses of corporate power and the potential for economic corruption. As a result, the legislative branch was granted the explicit power to "pass laws to correct abuses and prevent unjust discrimination and extortion in all charges of express, telegraph and railroad companies of this state" (Article XI, Section 7). Further, although the executive, legislative, and judicial departments were enlarged and salaries increased, special legislative sessions were prohibited, and state officers were forbidden from appropriating fees for their own use.[15]

On October 12, 1875, the voters resoundingly endorsed the actions of the convention, approving the new constitution with a vote of 30,332 to 5,474.[16] Thus, the framework for a system of government and governance was finally set. Whereas early debates centered on definitions of citizenship, later debates tended to highlight the moralistic and independent nature of Nebraska citizens, namely, their skeptical and frugal nature regarding the size of government as well as strong moral dispositions with regards to corporate

13. *Nebraska Blue Book,* 209.

14. Miewald and Longo, *Nebraska State Constitution,* 11; Olson, *History of Nebraska,* 143.

15. Additionally, provisions stemming from the original document of 1875 established Lincoln as the site of the state capital, limited the indebtedness of the state government to no more than one hundred thousand dollars, and set the boundaries of state senate and house legislative districts (*Nebraska Blue Book,* 209).

16. Ibid., 210.

and government regulation. More important, however, the constitution of 1875 was critical in terms of defining political institutions and governmental structures deemed amenable to the attitudes and beliefs of Nebraskans, thereby providing a sense of relief among Nebraskans fearful of a limitless and monolithic government.[17]

The Constitutional Convention of 1919–1920

The constitutional convention of 1919–1920, spurred by "Progressive reformers" under the so-called Nebraska Popular Government League, is regarded as a significant turning point in Nebraska constitutional history, producing some of the most dramatic changes to the Nebraska Constitution.[18] Prior attempts at integrating merit systems, establishing a one-house legislative body, modernizing the tax system, and refining judicial procedures sent clear signals to Nebraska legislators regarding public sentiments toward government. Following a vote at the general election on November 5, 1918, in which voters expressed widespread support for the convention by a vote of 121,830 to 44,941, one hundred delegates met in Lincoln from December 2, 1919, to March 25, 1920, in order to redress the limitations of the 1875 constitution.[19]

Once again, the predominant themes associated with these changes were reflections of the political culture of the state. The policy of the majority at the convention established that the convention limit changes to the 1875 constitution while encouraging "conciliation" among rival factions in order to "prevent defeat" upon possible submission of the new constitution to the people. However, prior to votes being cast on potential changes, contentious

17. Winter, "The State Constitution," 19.

18. Miewald and Longo, *Nebraska State Constitution,* 16. Despite widespread acceptance of the 1875 constitution, thirty-nine amendments were submitted to the people during the period between 1875 and the second constitutional convention of 1919–1920. Because Article XV of the 1875 constitution required amendments to receive a majority of all the votes cast in the election, however, only one out of twenty-three proposals submitted to the people was approved between 1882 and 1904, an amendment in 1886 increasing the pay of legislators. In 1901, however, the "party circle law" provided for party conventions to take a position on proposed amendments, permitting straight-ticket votes to be counted as votes for the amendment, thus easing the threshold for amendment adoption. Subsequently, from 1906 to 1918, ten out of sixteen amendments were approved for incorporation into the constitution, most notably a provision in 1912 and amended in 1920 establishing the initiative and referendum process, thereby providing for enhanced citizen accountability via direct democracy. The "party circle law" was abolished by the constitutional convention of 1919–1920 (15).

19. Ibid.; Addison E. Sheldon, "The Nebraska Constitutional Convention, 1919–1920," *American Political Science Review* 3, no. 3 (1909): 393; *Nebraska Blue Book,* 211.

debates once again emerged on definitions of citizenship. In particular, convention members were torn between permitting women to vote on constitutional amendments or allowing women to vote, provided it was done in a separate ballot box.[20] Despite a final provision permitting women to vote in separate ballot boxes across the state on amendments submitted by the legislature, the debate reflects the contentious nature of citizenship definition among Nebraskans at the time.

Ultimately, of the forty-one amendments submitted to the people, all forty-one were adopted and incorporated into the 1875 constitution. It is worth noting, however, that according to the 1875 constitution, all amendments proposed by constitutional convention need be approved only by a majority of those voting on the amendment, not a majority of the electorate, thus easing the amendment process. Prior to 1920, amendments proposed by the legislature required approval by a majority of the people voting in the election, explaining why relatively few amendments were adopted between 1875 and 1920.[21] In order to redress this inconsistency, an amendment stemming from the convention changed this requirement, establishing that an amendment need receive approval only by a majority of those voting on the amendment provided that the majority represented at least 35 percent of the total vote in the election.[22] Probably the most significant change stemming from the convention, this amendment not only signals a dramatic shift in legislative power but also reflects the independent and individualistic nature of Nebraska citizens by easing the process for direct citizen involvement, a recurrent theme throughout the Nebraska Constitution.[23]

20. Sheldon, "Nebraska Constitutional Convention," 393, 394.

21. *Nebraska Blue Book,* 254.

22. Winter, "The State Constitution"; *Nebraska Blue Book,* 254.

23. Additional changes emanating from the 1919–1920 convention include provisions providing for the creation of "new executive officers" upon a two-thirds vote by the legislature, the permission of taxation on "intangible property," the creation of an industrial commission to regulate labor disputes and profiteering, and "elections by single districts of members to the legislature, regents of the state university, and judges of the supreme court outside of the chief justice" (Sheldon, "Nebraska Constitutional Convention," 393). Accompanied by changes in the initiative and referendum process, the above-mentioned provisions provide for dramatic changes in the system of governance. Furthermore, despite paving the way for the establishment of a state income tax through taxation of "intangible property," amendments adopted were reflections of the conservative nature of Nebraska citizens. Proposals including provisions establishing "single tax" legislation, increasing state ownership of property, and expanding the limits of state debt from one hundred thousand dollars to 1 to 2 percent of the state's assessed value were overwhelmingly rejected in test votes by convention members. Thus, given the nature of changes incorporated into the new constitution, the constitutional convention of 1919–1920 reflected widely held values of Nebraskans at the time, in particular providing for a limited and accountable system of government while maintaining an independent citizenry. See ibid., 395.

The Constitution of 1875

Ultimately, the constitution of 1867, despite providing a basic form of government, was overshadowed by a mishandling of public funds, political corruption, and a sheer lack of specific governmental provisions. Furthermore, the public immorality of early executives served to shape Nebraskans' fears of executive authority lacking sufficient checks from the masses. As a result, the constitution of 1875 provides for direct citizen power while limiting the size and shape of government activities. Given the historical context of the current constitution, the following represents a more formal contextual analysis of how the constitution of 1875 fulfills the necessary functions of state constitutions.[24]

A Unique Framework for Governance

The Nebraska Constitution reflects the U.S. Constitution's adherence to the tenets and principles of the "separation of powers" doctrine. Article II, Section 1, establishes that "the powers of government are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others." Despite numerous amendments to the constitution of 1875, it remains a reflection of Nebraskans' desire for an accountable and limited form of government. More important, as stated in the preamble of the constitution and will be discussed later, the people remain a vital source of political power within the state of Nebraska.[25]

Beyond distributing political power, state constitutions must also provide for collective decision-making processes.[26] That is, state constitutions define the institutional structures necessary for effective governance. Furthermore, state constitutions must provide for continual adaptation among political institutions in order to reflect changes in the composition of the citizens.[27] The following represents a more detailed analysis of how the Ne-

24. Though Donald S. Lutz identifies eight purposes that state constitutions must fulfill ("The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 [Winter 1982]: 27–44), the following represents an analysis of how the Nebraska Constitution of 1875 fulfills seven functions; two are combined for purposes of simplification. The following discussion is based on the Nebraska Constitution of 1875, including amendments through November 30, 2002.

25. Miewald and Longo, *Nebraska State Constitution,* 29.

26. Lutz, "Purposes of State Constitutions," 38.

27. John C. Comer, "The Citizens: Their Political Attitudes and Behavior," in *Nebraska Government and Politics,* ed. Miewald, 146.

braska Constitution of 1875 divides power among the three branches of government, as well as the specific provisions relating to government activities within the three main political institutions of the state.

The Unicameral Legislature

The Nebraska legislature represents one of the most unusual aspects in all of state government. As amended in 1934, Article III, Section 1, states that "commencing with the regular session of the Legislature to be held in January, nineteen hundred thirty seven, the legislative authority of the state shall be vested in a Legislature consisting of one chamber." Initially established as a bicameral legislature by the constitution of 1875, the push for a unicameral legislature was primarily the result of Progressive movement legislators demanding improvements in state government. In particular, U.S. Senator George W. Norris provided staunch support for the unicameral legislature, emphasizing its committee efficiency and improved accountability, providing for more open debate as well as more effective oversight.[28] Following a series of unsuccessful proposals dating back to 1915, as well as subpar performances by individual legislators in the 1932 Nebraska legislature, citizens were finally able to amend the constitution on November 6, 1934, by a vote of 286,086 to 193,152 in favor of establishing a single-house legislative body.[29] More important, however, the unicameral legislature provides for a more effective and cost-efficient government, conforming to Nebraskans' values emphasizing cheap and efficient governance.

Additionally, the initiative amendment establishing the unicameral legislature requires the state legislature to be divided according to at least thirty legislative districts, but not more than fifty (Article III, Section 6).[30] Furthermore, Section 7 establishes that following the 1966 election, all members of the legislature "shall be elected for a term of four years," and that "each

28. Miewald and Longo, *Nebraska State Constitution,* 19.

29. *Nebraska Blue Book,* 285.

30. Additionally, Article III, Section 5, states that "one member of the Legislature shall be elected from each such district," creating "separate and distinct legislative districts as nearly equal in population as may be." Currently, the unicameral legislature consists of forty-nine members, referred to as senators, each serving a constituency base of approximately thirty-five thousand people (*Nebraska Blue Book,* 286). Article III, Section 8, provides the qualifications of state senators, establishing that all senators must be registered voters, have "attained the age of twenty-one years," and have resided in their respective districts for at least one year prior to election. Additionally, Section 10 establishes that "regular sessions of the legislature shall be held annually" and that the "duration of regular sessions shall not exceed ninety legislative days in odd-numbered years . . . and shall not exceed sixty days in even-numbered years."

member shall be nominated and elected in a nonpartisan manner without any indication on the ballot that he or she is affiliated with or endorsed by any political party or organization." This provision has been further amended by establishing term limits for state legislators, "providing that no member of the Legislature shall be eligible to serve as a member of the Legislature for four years next after the expiration of two consecutive terms" (Article III, Section 12).[31] These latter provisions reinforce Nebraskans' desire for a more accountable and open system of governance by eliminating mechanisms linked to partisan politics, indicating an independent state of mind with regard to political ideology.

Finally, although Article III, Section 17, provides the legislature with the "sole power of impeachment," Nebraska remains unique in its impeachment process. Upon recommendation by a majority of the legislature, the supreme court must reach two-thirds "concurrence" regarding the impeachment, from which the public official is removed and subsequently disqualified from state office (Article III, Section 17). Ultimately, given the impeachment of Nebraska's first governor, David Butler, the legislature felt it necessary to establish the impeachment process as a joint legislative and judicial function as a means of removing partisan influence.[32] Thus, taken as a whole, the legislative authority of the state is not at odds with the values of its citizens. Moreover, they illustrate the independent mind-set of Nebraskans.[33]

Executive Privilege

Article IV, Section 1, as amended eleven times since 1920, provides that the executive officers of the state shall be the governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, attorney general, and all other heads of executive departments deemed necessary by law. Additionally, Section 1 establishes that the governor and lieutenant governor shall be elected "jointly," and that the governor "shall be ineligible to the office of Governor after the expiration of two consecutive terms" of four years each. Furthermore, Article IV, Section 6, as amended in 1920, establishes that "the supreme executive power shall be vested in the governor." Though the Constitutional Revision Commission of 1997 sought to rephrase this section, it remains unchanged since the constitution of 1875.

In accordance with Nebraskans' desire for strict fiscal accountability, Ar-

31. Effective January 1, 2001, service prior to this date shall not be counted for purposes of counting consecutive terms. Service in office for more than one-half of a term is considered service for an entire term (Article III, Section 12.2).

32. Miewald and Longo, *Nebraska State Constitution,* 69.

33. Comer, "Citizens," 138.

ticle IV, Section 3, also sets term limits on the state treasurer for purposes of preventing monetary impropriety. Furthermore, as amended in 1996, Section 28 establishes the Tax Equalization and Review Commission, whereby the governor reserves the right to appoint a tax commissioner for the specific purposes of having "jurisdiction over the administration of revenue laws of the state" and the power to "review and equalize assessments of property for purposes of taxation" (Article IV, Section 28). In other words, the governor remains the "major actor in the budgetary process."[34]

Thus, the legislature remains in a reactive position with regards to the state budget. Section 7 establishes that the governor shall "complete an itemized budget" of the state to be submitted to the Speaker of the legislature, and that all appropriations in excess of the governor's recommendations require three-fifths approval by the legislature, subject to gubernatorial veto. Furthermore, Section 15 establishes that the governor shall have veto power over "every bill passed by the Legislature," wherein the governor also retains "line-item" veto power over all appropriation bills passed by the legislature (Article IV, Section 15), thereby establishing the governor as the supreme guardian over budgetary politics. Thus, despite past abuses of executive authority, Article IV provides the governor with enormous discretionary power regarding the dispersion of state funds, suggesting either a shift in citizen priorities or a reflection of the complex nature of Nebraskans' attitudes.

Judicial Restraint

As amended in 1990, Article V, Section 1, establishes the judicial power of Nebraska "to be vested in a Supreme Court, an appellate court, district courts, county courts, in and for each county . . . and such other courts inferior to the Supreme Court as may be created by law."[35] Further, Section 1 provides that the "administrative authority over all courts in the state shall be vested in the Supreme Court and shall be exercised by the Chief Justice," while Section 2 provides the courts with the power of judicial review.[36]

34. Miewald and Longo, *Nebraska State Constitution,* 85.

35. Sections 2 and 3 establish that the supreme court shall consist of seven judges, convening at least two terms of each year. The seven judges represent a single justice from six districts of equal population as established in Article V, Section 5, in addition to the chief justice. Additionally, Section 7 provides qualifications for serving on the Nebraska Supreme Court as being at least thirty years old, a U.S. citizen, and a resident of the district from which one is selected for at least three years preceding one's selection. As of November 30, 2002, the Nebraska court system consists of twelve judicial districts, each comprising seventeen counties and a total of fifty-nine county court judges, and fifty-five district judges serving ninety-three counties (*Nebraska Blue Book,* 799–800).

36. Nevertheless, the Nebraska Supreme Court has held that "courts will not declare an

Beyond the formal powers as stated above, Article V, Section 21, of the Nebraska Constitution also provides for the adoption of the "Missouri Plan" regarding judicial nominees and membership. Section 21 reads that all vacancies on the supreme court "shall be filled by the Governor" and that "at the next general election following the expiration of three years . . . and every six years thereafter as long as such judge retains office, each Justice or Judge of the Supreme Court shall have his right to remain in office subject to approval or rejection by the electorate." Additionally, as adopted in 1966 and amended in 1980, Section 28 provides for the establishment of the Commission on Judicial Qualifications for the specific purposes of disciplining and removing judges from office due to public immorality. Though these two sections provide for direct citizen accountability over the judicial system, retention rates remain extremely high, accompanied by large gaps in minority and gender service within the Nebraska judicial system.[37] Taken with the provisions outlining executive authority, Articles IV and V of the constitution suggest that despite favoring limits on governmental discretion, the independent nature of Nebraskans indicates less of a concern with enforcing checks on political power than providing the means for such checks.

Citizens as Legislators

The processes limiting governmental decision making remain some of the "most appreciated aspects" of constitutions.[38] Despite establishing the unicameral legislature as the "legislative authority" of the state, Article III was amended in 1912 in order to provide citizens with direct legislative power. Article III, Section 1, specifies that "the people reserve for themselves . . . the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature." By placing the provisions for amending the constitution beyond the sole authority of the legislature, Sections 2, 3, and 4 of Article III in the Nebraska Constitution subsequently limit the political power of the state by providing additional

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act of the Legislature unconstitutional except as a last resort" (Winter, "The State Constitution," 29). Between 1871 and 1980, the Nebraska Supreme Court struck down 162 statutes, representing only 5.9 percent of all Nebraska constitutional law cases (32).

37. Miewald and Longo, *Nebraska State Constitution,* 109.

38. Lutz, "Purposes of State Constitutions," 32. The subheading for this section is borrowed from Shaun Bowler, Todd Donovan, and Caroline Tolbert, eds., *Citizens as Legislators: Direct Democracy in the United States* (Columbus: Ohio State University Press, 1998).

methods for direct democracy, thereby reinforcing the independent and individualistic nature of Nebraska citizens.

Section 2 establishes that "the first power reserved by the people is the initiative whereby laws may be enacted and constitutional amendments adopted by the people independently of the Legislature." Originally adopted in 1912, this section was amended during the constitutional convention of 1919–1920 in order to read that the number of signatures required for placing a citizen initiative on the ballot be changed from "5 percent of legal voters" to "7 percent of electors."[39] In 1988, an amendment further relaxed this restriction by changing "electors" to "registered voters" (Article III, Section 2). Additionally, Article III, Section 2, provides that petitions pertaining to constitutional amendments require 10 percent of registered voters in order to achieve ballot status, with all initiatives being limited to a single subject.

Section 3 provides that "the second power reserved is the referendum which may be invoked, by petition, against any act or part of any act of the Legislature." Adopted in 1912, requirements regarding signatures were amended in 1920 to read as "5 percent of electors" rather than 10 percent of "legal voters" and again in 1988 to read as "5 percent of registered voters."[40] Like initiatives, Article III, Section 3, limits referenda to a single act of the legislature, also removing them from gubernatorial veto. Thus, Section 3 establishes that citizens have the power to check acts by the legislature, reinforcing Nebraskans' belief in a limited and accountable form of governance. Furthermore, given Nebraskans' desire for a less partisan and more accessible government, allowing for direct citizen influence ensures a civilian stake in the legislative process. Moreover, by providing for initiative and referendum processes, Sections 2 and 3 of Article III reinforce the self-governing nature of Nebraska citizens. Nevertheless, and as will be discussed below, political efficacy among Nebraskans remains low.[41] Despite securing the means for direct citizen power, Nebraskans appear to be more interested in providing the means for direct political influence as opposed to exercising direct political influence.

An Impressionable Document

The Nebraska Constitution of 1875 provides three formal mechanisms for amending the constitution: constitutional amendments, constitutional con-

39. *Nebraska Blue Book,* 215.

40. Kate Gaul, ed., *The Nebraska Constitution, 1866–1997* (Lincoln: Legislative Research Division and the Nebraska Constitutional Revision Commission, 1997), 103.

41. Comer, "Citizens," 137.

vention, and constitutional initiatives. Additionally, the Nebraska state legislature on two separate occasions has also provided for a constitutional revision commission to simplify and condense the constitution of 1875. As evidenced by the following discussion, the three aforementioned constitutional provisions, in addition to legislative activism, not only provide formal structures for amending the constitution but also serve to assuage citizens' fears of a nonmalleable governmental structure.

Article XVI, Section 1, provides that the legislature may amend the constitution if three-fifths of its members agree on such changes. Following a three-fifths vote of approval by the unicameral legislature, the proposed amendments are published across the state in each county three weeks prior to the next election of state legislators and, finally, submitted to the voters for approval on a separate ballot from candidates running for legislative office (Article XVI, Section 1).[42]

Amendments to the constitution can also be recommended via constitutional convention. Upon approval by three-fifths of the legislature, voters must first approve the calling of such a convention; elect members to the convention, provided that "the convention consist of no more than one-hundred members"; and, finally, vote on any proposals or recommendations stemming from the convention (Article XVI, Section 2). Only twice have Nebraskans felt it necessary to engage in this tripartite constitutional excursion to the polls.

Additionally, the citizens of Nebraska have the opportunity of taking it upon themselves to formally amend the constitution. A petition must be signed by 10 percent of the voters in order to be placed on the ballot, "provided that the signatures are distributed in such a way to include five percent of the voters at the next general election" (Article III, Section 4). Upon validation of the signatures, the secretary of state must place the initiative, in a nonpartisan manner, on the ballot at the next general election. Article III, Section 4, establishes that such initiatives are immune from governmental veto. Once again, however, this mechanism remains a rarely utilized, and even less effective, device for exerting direct citizen power over the constitution.

The final means for amending the constitution was established by the Nebraska state legislature. In 1969, Legislative Bill 244 stated that the primary purpose of the Constitutional Revision Commission was to focus on "sim-

42. Additionally, Section 1 also provides for a special election to be called, given four-fifths approval by members of the legislature, for the specific purposes of submitting proposals to the voters for amending the constitution. Proposed changes are ultimately approved if a majority of voters on the specific issue favor such changes and the majority constitutes 35 percent of the total number of votes cast in the election.

plifying and condensing" the constitution of 1875. Following a year of intensive debate, the 1969–1970 commission submitted more than one hundred suggestions to the legislature, of which forty-nine were submitted to the people. During three consecutive elections from 1970 to 1972, thirty-eight of the legislature's proposals were approved by the people and incorporated in the constitution, most notably that revenue and appropriation issues be removed from the initiative and referendum process and that state and local entities be free to engage in intergovernmental cooperation on any functions deemed necessary and not prohibited by the legislature (Article XV, Section 18). Like the previous commission, the 1995–1997 commission was to "place special emphasis on simplifying and condensing the constitution."[43] Although less dramatic than the 1969 commission, the 1995–1997 commission put forth to the Nebraska legislature thirty-two recommended changes to the existing constitution, primarily focusing on providing for broader legislative power and flexibility as a means to discourage piecemeal changes.[44]

Ultimately, in order to reflect shifts in the political culture among the population, amendments serve as valuable tools in bringing the institutional structures of a state in line with its citizenry. Prior to 1920, constitutional amendments required approval by a majority of voters so long as it constituted a majority of the votes cast in the election, resulting in relatively few amendments (11 out of 39 proposals) between 1875 and 1920.[45] However, since the 1919–1920 constitutional convention established that a majority need constitute only 35 percent of the total votes cast to be in favor of the proposed changes, 172 amendments have been adopted and incorporated into the constitution, resulting in an approval rating of 67.5 percent. Some of the most "distasteful" topics, yet most popular, have been those changes dealing with legislative compensation, taxation, and property assessment.[46] Thus, constitutional amendments via legislative action remain a highly popular means for amending the Nebraska Constitution.

Despite these changes, however, only once did Nebraskans call for a constitutional convention during the twentieth century, and only twice has the legislature approved the use of a constitutional revision commission, the latter of which rarely results in significant changes beyond simplifying lan-

43. Gaul, *Nebraska Constitution,* ii.

44. Dick Herman, *Report of the Nebraska Constitutional Revision Commission: Submitted to the People of the State of Nebraska* (Lincoln: Nebraska Constitutional Revision Commission, 1997), 3. The results of the 1995–1997 Constitutional Revision Commission were insignificant, rarely emphasizing anything other than language simplification (*Nebraska Blue Book,* 285–86).

45. Winter, "The State Constitution," 22.

46. Miewald and Longo, *Nebraska State Constitution,* 22.

guage in the existing constitution. Moreover, though citizen-initiative constitutional amendments remain a distinct institutional arrangement unique to Nebraska, this mechanism has rarely been used. From 1875 to 1992, of the 290 propositions put to the voters regarding changes in the constitution, only 20 constituted citizen-based initiatives, of which only 8 passed, all primarily dealing with "lifestyle" issues, such as the abolition of closed shops, the right to bear arms, taxes, and gambling.[47] Consequently, although it can be said that Nebraska provides distinct institutional mechanisms for revising its constitution, rarely do these changes result from means other than legislative action. In other words, the independent and autonomous nature of Nebraskans is best reflected in the institutionalized means provided for in the constitution rather than as an observable phenomenon.

A Moral and Religious Foundation

The Nebraska Constitution, like its federal counterpart, establishes the basis for authority with the people. The preamble of the 1875 constitution, left untouched since its inception, reads, "We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska." This reference to religion is further expanded upon in Section 4, which establishes in part that "all persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences." Thus, despite the basis for authority resting with the people of Nebraska, the constitution of 1875 is firmly grounded in moral and religious undertones.

The demarcation between church and state is further complicated by Article VII, Section 11. As amended in 1972 following the recommendations of the Constitutional Revision Commission, Section 11 permits the state to disperse federal funds to schools not entirely controlled by the state under the accordance of federal law. Additionally, Section 11, as amended in 1976, also provides for the state to enter into contracts with "nonsectarian" institutions for the purposes of providing education to handicapped children. Thus, although Section 11 states that "all public schools shall be free of sectarian instruction," prohibiting the use of religious tests by teachers in public schools, it also provides for the distribution of resources to non-state-controlled educational institutions, provided that the funds emanate from federal, not state, origins. Nevertheless, despite an obvious lack of clarity regarding the language surrounding the separation between church and state, the Ne-

47. Ibid., 22–23.

braska Supreme Court has held that "the Constitution of Nebraska does not permit an examination of secular and sectarian purposes. . . . There is no ambiguity in our constitutional provision."[48]

Public Life and Private Values

Prior to federal amendments granting universal suffrage, the protracted nature by which the U.S. Constitution established definitions of citizenship—in particular, who is and who is not able to participate in the political process—was purposefully left to the states.[49] As noted earlier, definitions of citizenship often constituted the most contentious topics in Nebraska state history, delaying statehood and often defining the nature of constitutional debates. Though Nebraska voters remain defined according to the provisions set in the U.S. Constitution, the Nebraska Constitution establishes that voter qualifications shall be defined by the calendar year of an individual's eighteenth birthday rather than their exact date of birth. Article VI, Section 1, permits civilians to vote in the primary election in May so long as they become eighteen by the general election in November.[50] Thus, although the Nebraska Constitution, like the U.S. Constitution, establishes definitions of citizenship according to voter qualifications, there remain important differences in terms of when individuals become citizens, thereby inheriting the right to participate in the political process.

By enforcing the norms of political culture, state constitutions serve to shape and define a way of life. Though we usually view bills of rights as serving to limit governmental power, "they also often serve as a means of defining a way of life."[51] Article I, Section 1, defines the fundamental rights of all Nebraskans: "All persons are by nature free and independent, and have certain inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof." Thus, specific provisions in a state's bill of rights represent clear signals as to the relationship between considerations of justice and state priorities. Indeed, court decisions inter-

48. *Gaffney v. State Department of Education,* quoted in ibid., 127.

49. Lutz, "Purposes of State Constitutions."

50. Additionally, Article VI, Section 2, establishes that individuals convicted of treason or a felony and the mentally incompetent, or "non compos mentis," are disqualified from voting.

51. Lutz, "Purposes of State Constitutions," 36.

preting articles of the Nebraska Constitution overwhelmingly deal with provisions relating to Article I, Section 1, "Bill of Rights."[52]

Though the Nebraska Bill of Rights tends to dovetail the U.S. Bill of Rights, there remain important differences between the two documents in terms of the timing of specific provisions. Amended in 1988 as part of a citizen initiative, Article I, Section 1, provides for "the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use." Additionally, as amended in 1998, Section 3 now provides for both "due process" and "equal treatment" under the law, and Section 9 now prohibits the suspension of habeas corpus under all circumstances. Finally, Article I, Section 27, establishes English as the official language of the state. Taken together, these three provisions clearly indicate a strong desire on the part of Nebraskans to maintain their independent and autonomous nature absent any external interference.

Additional amendments, though not explicitly part of Article I, also serve to define a way of life in Nebraska. For instance, Article XI, Section 2, regarding "municipal home rule," permits all cities with a population greater than five thousand to freely establish a charter for governance independent of the state legislature. Despite the amendment's "meaningless" nature due to court decisions restricting charters to purely "municipal" matters, the original intent of providing constitutional authority, or "home rule," to all municipalities meeting said requirements certainly reflects the self-governing nature of Nebraskans.[53] Indeed, the Nebraska Constitution further defines a community by providing formal provisions regarding the establishment of county governance. Article IX of the constitution, "Counties," in part serves to limit the size of state counties in Nebraska to no less than four hundred square miles, provide for the division and consolidation of counties, as well as specify the means to organize a township organization. Moreover, although the legislature is given the power to determine county responsibilities, Article IX, Section 1, prohibits the legislature from making major adjustments to county boundaries. As Robert D. Miewald and Peter J. Longo point out, "Township government was important enough in rural Nebraska in the nineteenth century for the framers of 1871 and 1875 to include it in their Constitution," further reflecting the value Nebraskans place on ensuring the means for self-governing authority.[54]

Conventional family values along with self-determining fiscal attitudes also remain consistent with the beliefs of Nebraska citizens. Article XII, Sec-

52. Winter, "The State Constitution," 30.

53. Miewald and Longo, *Nebraska State Constitution,* 155.

54. Ibid., 149. Article IX has never been amended; since 1913, Nebraska has been limited to ninety-three counties (147).

tion 8, as adopted in 1982 and known simply as the "Family Farm Amendment," prohibits corporate ownership of family farms and ranches, while Section 1 provides for direct governmental regulation of various segments of the economy. Additionally, Article XIII, Section 1, as amended eleven times since 1920, provides for a uniform and proportionate clause regarding taxation on real property, whereas Section 1a prohibits the state from "levying a property tax for state purposes."[55] Finally, Section 3 provides for the redemption of property upon failure to pay taxes to favor owners and "persons interested in such real estate" upon payment of all taxes, interest, and costs to the county, indicating stringent fiscal attitudes.

In other words, the frugal nature of Nebraska citizens is institutionalized through highly restrictive taxation procedures limiting governmental intrusiveness for the purposes of taxation while maintaining strict fiscal accountability. No doubt, these provisions stem from early experiences dealing with political corruption and public immorality. More recently, Article I, Section 29, of the Nebraska Bill of Rights establishes that "only marriage between a man and woman shall be valid and recognized in Nebraska." Taken as a whole, the aforementioned provisions reflect the traditionalistic culture of Nebraskans, providing for autonomous local governance while combining strict fiscal accountability with traditional family values.

Conclusion

Though this chapter by no means represents a complete and absolute analysis of the Nebraska Constitution, it is clear from the arguments presented here that state constitutions serve as institutional guardians of a state's political culture. The emphasis in Nebraska, a predominantly conservative state, on traditional family values is borne out in the state constitution through such provisions as the Family Farm Amendment and recent amendments regarding same-sex marriages and restrictions on taxation procedures. Yet despite an emphasis on conventional public values, the Nebraska Constitution remains an innovative blueprint for governance, as evidenced by provisions providing for direct democracy and a unicameral legislature. Moreover, formal mechanisms restraining the scope of government are a direct result of a tumultuous rise to statehood set against the backdrop of widespread political corruption and public immorality. Thus, the politi-

55. Additionally, given Nebraska's unique status of having all electrical power supplied by public power organizations, Article XIII, Section 11, provides for public entities supplying electrical power in the state to make payments, for the purpose of taxation, only to the counties in which they operate.

cally conservative nature of the state stems from environmental influences, suggesting that a state constitution serves as much in a reactive role as it does a proactive reference for government activity.

In other words, state constitutions supplement notions of political culture by acting as repositories of a population's values and beliefs. Drawing from Aristotle, Daniel J. Elazar argues that state constitutions are critical in determining "what life should be like and [as] a description of the institutions which will be instrumental in achieving that way of life."[56] In particular, the Nebraska Constitution reflects the values and beliefs of a self-governing citizenry by institutionalizing mechanisms that reinforce their autonomous and self-determining nature—for example, a one-house, nonpartisan state legislature; initiative and referendum processes; term limits; and township governance. Moreover, in fulfilling the eight functions deemed essential to effective governance, the Nebraska Constitution reflects the political culture of the state, namely, a distrust of government while providing for direct citizen authority over government activities.

Ultimately, a state constitution serves as a formal written document outlining a state's design for governmental institutions and effective state governance.[57] As demonstrated here, state constitutions serve not only to define government activities but also to reinforce the norms of political culture. Thus, institutional structures within the state are forced to continually adjust to changes in the political culture across the state.[58] Though relatively short as compared to other state constitutions, the Nebraska Constitution provides for a limited and unique form of government, establishes the basis for authority with the people, reinforces traditional family values, secures direct citizen power, and provides for municipal home rule, all while maintaining a strict moral and fiscal accountability over state-level governance.[59] In other words, the institutionalized legacy of the Nebraska Constitution serves not only to structure governmental activities but also to shape patterns of political behavior by reinforcing the values and beliefs deemed significant to Nebraskans.

56. Elazar, "Principles Underlying State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 32.

57. Winter, "The State Constitution"; Lutz, "Purposes of State Constitutions."

58. Comer, "Citizens."

59. The Nebraska Constitution of 1875 constitutes approximately twenty thousand words (Maddex, *State Constitutions,* 232).

THEODORE B. PEDELISKI

North Dakota

A Constitution Implements Popular Democracy

North Dakota's State Constitution: A Blend of Patterns

North Dakota still operates under the original constitution of statehood drafted in 1889. Although it has undergone extensive amendment (some 129 amendments from 1889 to 2003), the changes have been consistent with the values, and the political culture, reflected in the original constitution. Daniel J. Elazar has studied the development of state constitutions and has identified six constitutional patterns. Of the six patterns, two are particularly relevant for North Dakota. One is the commonwealth pattern forged in New England that establishes a theory of republican government, setting limits on government, guarding against corruption in government, and making government accountable to the people. A commonwealth pattern also directs government to "take care" of certain needs for the public good. The second pattern, called the "commercial republic," reflects a series of compromises between citizens and commercial interests who seek legal protection of their economic interests.[1]

In the case of North Dakota, the state reflects an initial tension between the adoption of a commonwealth model and a commercial republic model. In the early twentieth century, constitutional changes were implemented that introduced elements of an entirely different constitutional pattern, a popular democracy model.[2]

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1. Daniel Elazar, Virginia Gray, and Wyman Spano, *Minnesota Politics and Government* (Lincoln: University of Nebraska Press, 1999). See "Constitutionalism," xvi–xviii.

2. One might use the term *Populist pattern,* since many of the changes came out of the Populist Movement of 1880–1910, or *reformist pattern,* since the changes were proposed as

The state's current constitution thus reflects a blend of several patterns. Clearly, this blending of patterns distinguishes the constitution of North Dakota with respect to the functional purposes of all constitutions. The initial tension between the commonwealth and commercial republic patterns has been reinforced by the introduction of elements of popular democracy. As the discussion that follows illustrates, the tension inherent in the 1889 constitution defines North Dakota's constitutionalism.

Citizen Delegates and Railroad Scholars in 1889

The congressional Enabling Act that admitted North Dakota and four sister states into the Union put few requirements on the content of the constitution except for the requirement that it be republican in form and make no distinction in civil and political rights on account of race or color (except Indians not taxed). The drafters also had the opportunity to draw on the experience of all preceding states, including their midwestern neighbors.

The constitutional convention held in the summer of 1889 welcomed seventy-five delegates who were chosen in district elections in May, three delegates from each of twenty-five districts. They included fifty-one Republicans, nineteen Democrats, two Prohibitionists, two Populists, and one independent.[3] One-third of the convention were lawyers,[4] but twenty-nine farmers were included, the rest being merchants, bankers, newspapermen, land dealers, and a doctor. The assemblage was a youthful group, only nine being more than fifty years of age. Some forty-six came from the six counties of the Red River Valley, twenty-three came from the central plains, and only six came from the area west of the Missouri River.[5]

The delegates were largely of Anglo-American descent who came from the Midwest, the New England states, and Canada.[6] They represented good

"reforms" to the state constitutions of that time. I prefer the term *popular democracy* to reflect the breadth of citizen participation in not only governmental decision making but also the councils of state and local government.

3. See "Officers and Members of the North Dakota Constitutional Convention of 1889," in *Proceedings and Debates of the First Constitutional Convention in North Dakota* (Bismarck: Tribune State Printers, 1889), i, ii. Some nineteen Democratic delegates were elected because of a system guaranteed to provide minority-party representation.

4. This represented the highest proportion of lawyers that would ever serve in a constitutional or legislative assembly in the state's history. Even to this day, lawyers constitute less than 10 percent of the legislative complement.

5. R. M. Black, "History of the State Constitutional Convention of 1889," in *Collections* (Bismarck: State Historical Society, 1915), 111–57.

6. See biographies of the delegates, *Bismarck Tribune,* July 6, 1889, 2–4. There were twenty delegates who had migrated from Wisconsin, Iowa, and Minnesota, and twelve who had

Yankee, strict Protestant stock for the most part, with Scandinavian reinforcement. The preamble made clear their religious sensitivities: "We the people of North Dakota, grateful to Almighty God for the blessings of civil and religious liberty, do ordain and establish this constitution." This made for a highly moralistic community.[7] They envisioned a Jeffersonian type of society that rested on the strength of agrarian, self-sufficient, and family-centered "homesteads." They sought to build a moral civic community in which evil, corruption, and injustice would not be tolerated (Article VIII, Section 149).

When the convention met, it had several sources on which to frame its discussions and base its own document. One was the constitution of South Dakota, the so-called Sioux Falls Constitution.[8] Another complete constitution (the famous File 106) was presented to the convention by a delegate from Bismarck, Erastus Williams. He hinted that it had been the product of an eastern legal scholar. Fifteen years later, historian Clement C. Lounsberry revealed that Henry Villard, finance officer for the Northern Pacific Railway, and the corporation's law firm had approached the distinguished legal scholar James Bradley Thayer of Harvard to draft a model constitution for the state.[9] Thayer's contribution was questioned by his son, who doubted that the draft represented his father's work since Thayer held the view that constitutions should be short statements of principle, leaving most issues to legislative control. A hundred years later, the mystery of Thayer's role was finally solved with the release of Thayer's papers at Harvard.[10] The Harvard contributions were edited and changed by the railroad lawyer W. F. Peddrick, and the tampering was so pervasive that Thayer eventually rejected the final drafts and concluded, "I must disavow the instrument in its present shape and request if I am to have any responsibility for it or to be in any way con-

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migrated from the New England states and Pennsylvania, all states that followed a commonwealth pattern in constitution-building.

7. For a study of migrational streams and their relation to regional political cultures, see Daniel Elazar, *The Cities of the Prairie: The Metropolitan Frontier and American Politics* (New York: Basic Books, 1970), chap. 4. See also Appendix C.

8. The residents of the southern part of Dakota Territory had held a constitutional convention without the authorization of Congress at Huron in 1883 and in Sioux Falls in 1885. When the two states were admitted, the constitutional conventions of each state were permitted to consider the revised 1885 constitution.

9. Clement C. Lounsberry, *History of North Dakota* (Chicago: S. J. Clarke Publishing, 1917), 1:393–94.

10. Hon. Herbert L. Meschke and Lawrence D. Spears, "Digging for Roots: The North Dakota Constitution and the Thayer Correspondence," *North Dakota Law Review* 65, no. 3 (1990). See the appendix, "The Thayer Correspondence," 383–409. See also Robert Vogel, "Sources of the 1889 North Dakota State Constitution," *North Dakota Law Review* 65, no. 3 (1989): 331–42.

nected with it, that it be restored to the shape in which I left it."[11] The research confirms the strong role of the Northern Pacific Railroad in the draft of the constitution.[12]

The debates reveal much heated debate on issues of concern to the railroads: taxation, public-debt limits, and regulation of railroad rates. On the question of whether a gross-earnings tax might be imposed on railroads in lieu of property taxes, the convention finally accepted with undisguised reluctance a provision that permitted a future legislature to impose a gross-earnings tax.[13] A heated struggle also took place in regard to the fixing of railroad rates. Here the railroad interests were successful in permitting appeal to the courts to determine if rates as fixed by legislatures gave railroads a fair and reasonable return.[14] The delegates may have recognized that constitutionalizing restrictions on the railroad acted as a two-edged sword. As delegate Samuel Moer of Lamoure indicated, "I want to see the state of North Dakota built up and nothing can build it up as fast as railroad corporations."[15] Reflecting the tension between an agricultural ideal and commercial influence, the railroad provisions follow the pattern of a "commercial republic."

Two other issues figured prominently at the convention: Prohibition and women's suffrage. The issue of Prohibition was left as a separate article to be voted on by the electorate. In the case of women's suffrage, the legislature was empowered to expand suffrage without regard to sex but was required to then submit the issue to the people for approval. These controversies raised the issue of popular supremacy (ultimate appeal to the electorate). Debates focused on whether the legislature or the electorate could bind the

11. Meschke and Spears, "Digging for Roots," 402–3.

12. The railroads had a big stake in the future of the state. They owned 24 percent of the state's lands (sixteen thousand square miles) in federal land grants. They owned more than 120 town sites and were prime developers in bringing settlers to the state. Before statehood, the Northern Pacific Railroad had manipulated the transfer of the territorial capital to Bismarck (in a sparsely settled area but on its own line) and had opposed statehood because it preferred more lenient territorial laws (Elwyn B. Robinson, *History of North Dakota* [Lincoln: University of Nebraska Press, 1969], 202).

13. The greatest concern was that taxes be equitably levied. As delegate William Lauder noted, "There can be no harm in putting the railroads on the same footing with everyone else here. . . . There can be no system preferable to a system that is uniform—that assesses the property of a millionaire the same as the property of the railroad or a farmer—put them all on the ground floor where there will be no advantage of one over the other" (*Proceedings and Debates,* 465–66).

14. A comparison of the five state constitutions drafted in 1889 reveals that the Washington, South Dakota, Montana, and Idaho Constitutions allowed more regulation of railroads than North Dakota's (John D. Hicks, "The Constitutions of the Northwest States," *University Studies of the University of Nebraska* 23 [January–April 1924]).

15. *Proceedings and Debates,* 390.

state with a rule. Again and again, the question was posed, "Why permit the legislature of the incoming state to pass any law of importance without submitting the question to the people?"[16]

The convention delegates had an optimistic vision of the state's growth with an eye to its population escalating to two million or even five million. Such a state would require prolific public institutions. They also believed that government services and institutions should be accessible to all citizens and that as many communities as possible be given the prestige of hosting a state institution. They created a network of colleges and public institutions that was constitutionally protected against abolition or relocation. From the onset, the political system embarked on a course of action that has been defined as the "too much mistake."[17] A system of institutions unsuitable for the Great Plains environment was implanted.[18]

The final constitutional provisions represented a statement of values that appear to be as viable today as the day they were considered. One is struck by the fact that the North Dakota Constitution expresses a general distrust of governmental power in general and legislative power in particular.[19] Several restraining provisions were incorporated to both limit legislative power and deter corrupt behavior. One "moralistic" provision prohibited vote trading, or logrolling. The trading of votes was in fact termed bribery, and discovery was grounds for expulsion from the legislature (Article II, Section 40). Other watchdog provisions included the provision that a legislator could not be appointed or elected to an office that had been created or for which emoluments shall have been increased during the term for which he was elected. Members of the legislature who had personal or private interests in any measure were obliged to disclose the fact to the house and not vote on the measure without consent of their house (Article II, Section 43). A major restraint on the scope of the legislature's powers was indicated in a

16. Remarks of delegate Pollock, ibid., 278.

17. This thesis was developed by Elwyn Robinson, eminent state historian, who noted that the state proliferated institutions in many sectors to allow for accessibility of civil amenities. As a result, the state established too many counties, cities, school districts, courts, institutions of higher learning, churches, elevators, and so on ("The Themes of North Dakota History," *North Dakota History* 26, no. 1 [1959]: 5–24).

18. See Carl Frederick Kraenzel, "Unsuitable Institutions for the Great Plains," chap. 13 of *The Great Plains in Transition* (Norman: University of Oklahoma Press, 1955), which focuses specifically on North Dakota.

19. The delegates appeared to heed the advice of territorial governor A. C. Mellette, who was invited to address the convention and stated, "One of the greatest evils is excessive legislating and constant changes every two years of the laws and the squabbles and debates over the different questions that constantly arise. It is wise in my judgement after the people have decided in which direction their interests lie to embody them in a fundamental law of the land and make it permanent" (*Proceedings and Debates,* 44–45).

provision that listed thirty-five subjects on which the legislature could not enact special or local legislation (Article II, Section 69).[20] The constitution also emphasized frugality and the notion of public service without enrichment by insisting on a five-dollar-per-day salary limit for legislators (Article II, Section 45).[21]

Executive provisions provided for a weak executive with limited appointive powers. A list of elective executive offices was provided, with powers and duties to be prescribed by the legislature. The governor was in effect removed from the administration of most government departments. Restrictions similar to those put on legislators were put on the governor. Governors were prevented from receiving any consideration in conjunction with an action or decision, and governors were constitutionally prevented from promising appointments or threatening removal of persons from office to obtain legislative support. In fact, no governor could even threaten use of the veto to influence the legislative process (Article III, Section 81).[22]

The judiciary was also made elective. To indulge sectional demand for judicial accessibility, the supreme court was to rotate its terms of courts among Bismarck, Fargo, and Grand Forks. All these officials were subject to removal from office, grounds for removal including the usual categories of corruption as well as "habitual drunkenness" (Article IV, Section 197).[23]

Consistent with a strong commitment to public frugality, a great deal of attention was paid to debt limitation. The state was allowed to encumber deficits of only two hundred thousand dollars or less. This initial provision was later amended to mandate balanced budgeting. The idea of state indebtedness was so unsettling to the delegates that they insisted on mandatory levies to remove public debt. Cities and counties were also limited in the debts they might assume. The provisions reflected a commitment to frugality, self-sufficiency, and tax minimization (Article XII, Sections 182–85; Amendment 31, approved June 1918; Amendment 42, approved March 1924).

The provisions on taxation generally tied taxation to egalitarian values.

20. This was interpreted at the time as a strong statement against the demonstration of any favoritism to any city or locality.

21. This provisional salary limit was not constitutionally changed until 1984.

22. When a new executive article was put into the constitution in 1996 (North Dakota, *Session Laws, 1996,* chap. 568, 1977), these original and stringent provisions that would appear to rule out gubernatorial bargaining in the legislative process were carried over en toto.

23. This provision represented a resurrection of the Prohibition issue. As delegate O'Brien indicated, "I don't see what good it would do us to say in the constitution that any man who gets drunk two or three times a week should be removed from the legislature and it is left so that the legislature can fix the number of times that a man must get drunk to constitute habitual drunkenness" (*Proceedings and Debates,* 158).

Property ownership was seen as carrying the obligation to pay taxes, and the convention provided that all taxes be governed by a uniform rule according to the true value in money (Article X, Section 176).[24] It was intended to lay the greatest tax burdens on corporations.

The original constitution also included "take care" commitments associated with the commonwealth model. The constitution voiced a strong commitment to education. The education article made clear the goals of free education at the elementary and secondary levels; the promotion of literacy; the inculcation of virtues; the freedom of schools from sectarian control; promotion of industrial, scientific, and agricultural training; and accessibility to higher education in every region of the state. Proceeds from the sale of state lands were to be invested in permanent trust funds dedicated to financing education. Institutions were established to provide for the blind, the deaf, the mentally ill, the mentally deficient, and invalid veterans. One of the miscellaneous provisions protected heads of families from forced sale of their homesteads and seizure of personal property required for living (Article I, Section 10; Article XVIII, Section 208).

The North Dakota Constitution was characterized as a "reform constitution." There were, however, few true reform provisions, which, for the most part, were set in the miscellaneous section. The original constitution began with a declaration of rights. Though modeled on the U.S. Constitution's Bill of Rights, there were differences in emphasis. There was a strong free-exercise clause that added the caveat that liberty of conscience shall not be construed to excuse acts of licentiousness. The free-speech clause focused on defenses against libel. Provisions on rights of the accused emphasized the right of trial by jury, but there was no right against self-incrimination. Also, child labor was prohibited in mines, factories, and workshops. A woman's property possessed before marriage could not be attached to pay a husband's debts. Following the advice of Major John Leslie Powell, the delegates included a provision making the state's waters a public resource (Article XVII, Section 210). But major reform ideas such as a unicameral legislature, woman suffrage, or state arbitration of labor disputes were glossed over or rejected.[25] Although the state at the time saw a lively movement of agrarian radicalism, at most only six members of the Farmers' Alliance, the organization seeking reform through the constitutional convention, were elected

24. All property in whatever form would be subject to the same mill levy. It was argued that all taxes—property, sales, income, and excise—would have to be uniform. Thus, if the property tax allowed a levy equal to 4 percent of valuation, then sales, income, and excise taxes could also not exceed 4 percent. In 1914 this provision was amended to require uniform rates of taxation only on the same class of property.

25. Vogel, "Sources of the 1889 Constitution," 342.

as convention delegates.[26] The transcribed debates of the convention also show that these same delegates were very independent, often taking positions in opposition to the platforms of the Farmers' Alliance. Although the state was a base for populist sentiment, it was hesitant in writing a truly progressive document.

Constitutional Change, 1889–1972: Piecemeal Success and Wholesale Failure

From 1880 to 1918, a constitutional amendment required that a constitutional proposal be passed in two consecutive legislative sessions and then be presented for approval to the state's electorate.[27] Despite this gauntlet, some twenty-five articles were added to the constitution in this period. These articles included further reflection of the sectarian moral climate of the populace. Article I indicated the legislature would have no power to authorize lotteries or gift enterprises. Article II defined state citizenship, indicating state citizenship for all male citizens twenty-one and older who were citizens of the United States,[28] and it extended citizenship to "civilized persons of Indian descent who had severed their tribal relations." There were further amendments to weaken the governor's powers. The pardon power was not to be left in the sole hands of the governor but was to be exercised by a pardon board, including the chief justice of the supreme court and two appointed laypeople (amendments, Article III, approved 1900).[29] Quite a few amendments dealt with the proper management of the state's lands and the investment of its funds and fairness standards for taxation, especially of agricultural property. One amendment relating to the sale of state lands was intended to give farmers an advantage by giving the successful bidder a requirement of paying only one-fifth down and then paying interest and the remaining fifths in five-year intervals (amendments, Article XI, approved

26. Glenn L. Brudvig, "The Farmers Alliance and the Populist Movement in North Dakota, 1884–1896" (master's thesis, University of North Dakota, 1956), 119.

27. This gauntlet was supported by Prohibition interests who believed that legislators should be subject to possible electoral removal for even initiating a constitutional repeal of the Prohibition article.

28. The original constitution actually extended state citizenship to persons of foreign birth who had declared the intention to become a U.S. citizen after a year of residence (Article V, Section 121). This may have been a friendly gesture to immigrant settlers.

29. Until 1918, new amendments to the constitution were labeled in *Compiled Laws of North Dakota* as "Article ___."

1910).[30] Provisions associated with the commercial republic pattern now reached out to protect agrarian economic interests.

Elements of popular democracy such as popular initiation of ordinary legislation (the initiative), popular rejection of legislation (the referendum), and the popular initiation of constitutional amendments began during the reform period after 1906, but resistance by Prohibition forces delayed the legislative proposal of these constitutional changes until 1911. The 1911 legislature mandated that the 1913 legislature vote on the 1911 proposals (without change) and if passed would submit those constitutional changes to the people in the 1914 general election. These measures as well as a constitutional measure giving women the right to vote were approved by the electorate. Also approved in the 1914 election was an amendment authorizing the legislature to establish a state-owned mill and elevator. The electorate soon took advantage of their newfound constitutional powers to change the very provisions dealing with the initiative, referendum, and constitutional amendment. With the backing of the Non-Partisan League, the people petitioned to ease the signature requirements for all three procedures, requiring only seven thousand signatures for a referral, ten thousand signatures for a legislative initiative, and twenty thousand for a constitutional proposal. These were put on the 1918 general election ballot and passed easily.[31] In the 1920 general election, the electorate also approved an amendment to allow for recall of elected officials (congressional, state, legislative, judicial, county, or city) upon petition of 30 percent of the voters in the appropriate jurisdiction. The North Dakota Constitution thus amended embraced as a central talisman the concept of popular democracy. This provision was immediately implemented in 1921 when the governor, attorney general, and commissioner of agriculture and labor were all recalled in a special election.[32]

The passage of these proposals for involvement of the electorate in legislative and constitutional initiative and the approval by the electorate of the State Mill and Elevator and the Bank of North Dakota (the latter was ap-

30. The policy underlying this amendment antedated by twenty-three years the long-term mortgage policies introduced by the Home Loan Mortgage Board of the New Deal.

31. Article XVI, approved in 1914, required the signatures of 25 percent of the electorate in a majority of counties to put a proposed amendment on the ballot. The 1914 provisions also required the signatures of 10 percent of the voting electorate to put an initiated measure or referral of a legislative measure on the ballot.

32. These three elected officials were the ex-officio members of the Industrial Commission, which administered the state-owned enterprises that had been created as a part of the program of the Non-Partisan League. Allegations of mismanagement and corruption were attached to the three officials in their management of the North Dakota State Bank and other enterprises.

proved by voters in 1919 in a referral of a statutory measure) were portrayed as examples of prairie radicalism—agrarian interests taking a rebellious and irrational turn to the left in the face of economic depression and perceived exploitation by corporate and outside interests.[33] The turbulent politics that produced these changes in North Dakota might give this impression, but the constitutional and policy changes in North Dakota reflected less an embrace of radical ideas than a strong trust in the electoral process that provided electoral checks and balances and electoral fiscal controls at both the constitutional and the legislative levels. This was historically exhibited when in 1921 the electorate recalled the governor and two other state officers, and then elected officials and a legislature put the brakes on further expansion of state enterprises and programs.[34]

The expanding and "patchwork" character of the constitution invited attempts at wholesale revision, and several such attempts were made. The legislature set up constitutional commissions to study and recommend changes in 1931 and in 1941, but the Great Depression and then World War II derailed any progress. The legislature returned to the issue in 1957 when it directed its Legislative Research Council (LRC) to study constitutional revision. A committee of the LRC recommended deletion and simplification of obsolete language, transfer of many provisions to the statutory code, reduction of the number of constitutionally elected offices, revision of initiative and referral provisions, and adoption of the "Missouri Plan" for the selection of judges. The legislature submitted, on a provision-by-provision basis, many constitutional changes to the voters. But the voters in the next decade rejected all the legislative proposals for fundamental constitutional change. The original constitution had developed a mystique of guardianship of popular interests, and attempts to change the constitution were viewed with suspicion.[35] The legislature in 1969 finally placed before the voters a constitutional amendment calling for a constitutional convention. In the 1970 primary, the voters approved the measure. The legislature in 1971 set the procedures for the convention. To ensure that the convention would not be

33. This was the thesis of Walter Prescott Webb, *The Great Plains* (New York: Grosset and Dunlap, 1961), 502–3. For a discussion of the Webb thesis and constitution-building, see Edward W. Chester, "Great Plains State Constitutions and the Webb Thesis," *Great Plains Journal* 10, no. 2 (1971): 71–82.

34. The constitutional provisions for initiative, referendum, constitutional initiation and approval, and recall of all elected officials are now in Article III, "Powers Reserved to the People." The supremacy of the electorate as final arbiters is stressed in language that all provisions are mandatory and self-executing and that laws may be enacted to facilitate and safeguard but not hamper, restrict, or impair such powers.

35. See Marilyn Guttromson, "Historical Sketch of Major Constitutional Revision Efforts in North Dakota, 1889–1973" (unpublished manuscript, State Library, Bismarck).

captured by special interests or ideologues, a nominating commission consisting of the governor (Democrat), the lieutenant governor (Republican), and the attorney general (Republican) consulted community and political leaders across the state and drew up a slate of ninety-eight delegates to run in forty-nine districts. The list constituted a "who's who" of the state, as responsible, civic-minded, and respected a group as one could find. Anyone could challenge the selections from his district and place himself on the ballot with 150 signatures, and 141 challengers did file; some 24 were successful.

This aggregation of delegates expressed a preconvention orientation to significant change. An attitudinal profile of the delegates revealed that the majority of delegates held moderate and pragmatic attitudes.[36] The convention considered and proposed articles that introduced the short ballot (reducing elected state executives from fourteen to seven and giving the governor more appointive power), the Missouri Plan for selecting judges, a state ombudsman, a recognition of a "right to a healthful environment," and a nonpartisan reapportionment commission. They removed the stringent debt limits (although the state could assume a debt only on a three-fifths vote of the legislature), the five-dollar-per-day limitation on legislative salaries, and the provisions aimed at the more benign forms of political dealing. Another change allowed political subdivisions to adopt home rule or alternative structures of local government. They also added provisions expanding civil rights with nondiscriminatory public accommodations and employment provisions and took the first step in constitutionalizing open public meetings.

The most controversial issues were left to the voters to decide in separate submissions. The issues of a unicameral legislature; increases in the signature requirements of proposed initiatives, referrals, and constitutional amendments; the eighteen-year-old suffrage extension; and a continuation of the prohibition on lotteries were to be submitted to the people in conjunction with the main constitution. Unless the constitution was approved, the results on the four separate issues would be invalid. The convention followed the example of the original 1889 convention.

The constitution was overwhelmingly approved by the delegates (ninety-one to four). The document was supported by key interest groups such as the Greater North Dakota Association, Farm Bureau, and Farmers

36. Questionnaires and direct interviews with all delegates were conducted. Delegates were tested against Elazar's moralistic culture scale, an idealist-pragmatist-realist scale, and delegate-politico-trustee scale. See Cynthia Rothe, "Political Attitudes and Constitutional Revision: A Study of Delegate Attitudes at the 1972 North Dakota Constitutional Convention" (master's thesis, University of North Dakota, 1972). In choosing among convention objectives, the delegates ranked last "putting more governmental decisions into the hands of the people."

Union. On the eve of the election, polls indicated an edge for those supporting the new constitution.[37] But the proponents were to be in for a rude awakening.

Opposition came from several camps. Conservative legislators, the attorney general, and the state auditor came out against the document "because it gave almost dictatorial powers to the governor and the legislature." Scores of ad hoc opponents voiced opposition because they felt threatened by one or another new provision.[38] Even interests without specific objections said, "If it ain't broke, why fix it? The one we've got serves just fine." Finally, Robert P. McCarney, a populist political gadfly who had initiated numerous petition drives to refer state laws, came out against the document. In statewide broadcasts on the eve of the election, he voiced his objections to the new constitution. On April 28, 1972, the electorate defeated the constitution by a vote of 107,643 to 64,073. Only two urban counties gave a majority for the document. The electorate heavily weighed in on an existing system where policy making was subject to stringent restraints and where political power was diffuse, shared, and held in check.[39]

Constitutional Change, 1972 to the Present

The defeat of the 1972 constitution did not end attempts to modernize the constitution. The legislature still had the power to place before the people constitutional amendments for their approval. William Kretschmar and Frank Wenstrom, delegates at the 1972 convention and legislators, began to update the constitution through incremental legislative initiative. Each legislative session, Kretschmar introduced constitutional measures, many taken from the 1972 constitution draft, shepherding them through the legislative process and clothing them with a strong legislative consensus. From 1972 to 2003, the legislature put thirty-eight constitutional proposals on the bal-

37. A North Dakota newspaper poll (ten newspapers) on April 20, 1972, one week before the election, showed 42.3 percent for the main proposition, 36.6 percent against, and 21.1 percent undecided.

38. For instance, the AFL-CIO (American Federation of Labor and Congress of Industrial Organizations) was against the constitution because it retained a right-to-work clause. School boards felt threatened by creation of a state board of education. Rural interests believed that they could not drill water wells because subsurface waters would become the property of the state.

39. For a full record of the constitutional convention of 1972 and public reactions, see *The North Dakota Constitutional Convention of 1972: A Newspaper Account,* 4 vols. (Bismarck: North Dakota State Library Commission, 1974).

lot, twenty-four of them either identical or closely analogous to provisions within the 1972 constitution draft.[40] The success of these proposals varied.

The electorate approved of amendments that allowed the legislature to reduce the size of trial juries, put the governor and lieutenant governor on a joint ballot, established a new judicial article, lengthened legislative sessions,[41] and allowed for home rule of political subdivisions (Article VI).[42] The voters in 1978 even allowed for an increase in the signature requirements for initiatives and referrals.[43] On the other hand, other proposals that had their source in the 1972 constitution were rejected by the voters. Attempts to introduce a new executive article, to create a state board of public education, and to make major alterations to the state board of higher education went down to defeat. Surprisingly, certain proposals that carried a symbolic affirmation of both popular or frugal government were disapproved. Some constitutional proposals were seen by voters as threats to parochial interests. A review of the propositions submitted indicates that success of these revisions was highly unpredictable and close to pure chance. Most of these measures went before the people without any informational campaigns. Newspaper editorials may have provided some information, but voters generally reacted to the measures with minimal information. William Kretschmar ventured the opinion that economic and social mood swings were critical in affecting the vote. If times were good, voters tended to approve blocs of changes. If times were bad, voters felt uncertain and viewed basic changes as threatening. In economically depressed times, voters were prone to see a price tag attached to governmental change per se.[44]

40. Lynn M. Boughey, "An Introduction to North Dakota Constitutional Law: Content and Methods of Interpretation," *North Dakota Law Review* 63 (Summer 1987): 224–53. See esp. "Subsequent Amendments to the 1972 Constitutional Convention," 249–53.

41. This amendment extended the session to eighty days, allowed for a three-day organizing session, allowed for the prefiling of bills, and by inclusion finally eliminated the penurious five-dollar-per-day salary limit for legislators, the latter constitutional change having failed four times previously when proposed as a single issue.

42. See *Laws of North Dakota, 1983,* chap. 718. This was probably the most significant constitutional amendment of the post-1972 period. In the original constitution, counties and cities were creatures of the state and severely limited in their functions, their choice of officers, and their legislative and taxing powers. The 1982 amendment gave both counties and cities the option of home rule, the authority to restructure their offices, and greater latitude in levying taxes. The change was consistent with the state's political culture, which had expressed a preference for independent, autonomous local government.

43. Instead of the ten thousand (initiative) and twenty thousand (constitutional amendment) required signatures, the requirements became 1 percent of the electorate for initiatives and 2 percent for constitutional amendments.

44. Kretschmar, interview by author, Grand Forks, N.D., March 1988.

In 1988 the legislature proposed measures to offset the consequences of referrals. These measures would have allowed the legislature to override the results of a referral by passing the same measure with a two-thirds vote in both houses and the state to collect taxes on tax laws referred to the voters until elections were held. These were resoundingly defeated. The people's powers were not to be eroded.

Of course, constitutional changes not linked to the 1972 draft constitution have also taken place, but most of these have tended to be incremental, housekeeping measures. A review of some of the more recent constitutional changes, especially those proposed by the legislature, highlights a trend of the legislature to expand its own powers at the sufferance of the governor. A new judicial article proposed by the legislature in 1975 and approved in 1976 limited the governor's judicial appointment power to names from a list chosen by a nominating committee.[45] Another amendment also provided for a legislative role in the gubernatorial appointment process for members for the state board of higher education.[46] They also took away the power of the governor to issue writs of election where legislative vacancies occurred.[47]

Constitutional provisions can also carry out another function, that of protecting the status quo as it may relate to an advantage in the distribution of political power or to a cultural norm.[48] The North Dakota legislature, with strong Republican legislative majorities in the 1995 session, put before the voters an amendment that extended the terms of state representatives to four years and authorized the legislative assembly to establish procedures for electing half of the senate and half of the house biennially.[49] Narrowly approved by the electorate, the amendment and its implementing legislation make it much more difficult for an opposition party to capture control of either chamber of the legislature.

Constitutional change through grassroots efforts (constitutional initiative) is more difficult. There have been only some forty-two attempts since

45. North Dakota, *Session Laws, 1977,* chap. 599, "Judicial Article."

46. Ibid., chap. 566. The amendment placed the president pro tem and the Speaker of the house on the nominating committee for board members.

47. North Dakota, *Session Laws, 1999,* chap. 566. Under the authority provided by this amendment, the legislature then moved to put its legislative council chair in charge of filling vacancies, directing the district committee of the predecessor's party to appoint a successor. If the predecessor was an independent, the legislative council chair, a legislator, would fill the vacancy. No special election would be called.

48. Examples from the U.S. Constitution include the three-fifths representation rule for "other persons" and the three-fourths-of-the-state amendment-ratification provision that provided built-in political protection for states permitting slavery.

49. *Laws of North Dakota, 1997,* chap. 570. The amendment was approved by voters on November 6, 1996, by a vote of 132,718 to 112,047. Almost no attention was given in preelection public debate to the effect of the provision on party competitiveness.

1918 to put constitutional measures on the ballot through petition. Many of these petition efforts have been directed to morally and emotionally charged issues such as what enterprises may be open on Sunday. Gaming issues were on the public's but not the legislature's agenda: legalizing horse track betting, authorizing charitable gaming,[50] authorizing video gaming, or authorizing the state's membership in a multistate lottery. The electorate has walked a narrow line on gaming measures, approving of charitable gaming, rejecting other forms, and finally approving the state's participation in multistate lotteries.[51] Two grassroots petition efforts in 2004 had different results. A conservative group attempted to put on the ballot an amendment that would have required state and local governments to have all tax increases put on the ballot for voter approval, with approval only by 60 percent of the electorate. That failed to get sufficient signatures. But a proposed amendment to restrict marriage to a union between a man and a woman generated forty thousand signatures in sixty days to make it onto the 2004 general election ballot. The amendment passed with 73 percent of the vote (Article XI, Section 28).

Conclusion

North Dakota's constitution represents a close fit with the state's political culture. The original constitutional drafters, reading the mood of the agrarian-settler citizenry, developed a document that, following the commonwealth pattern, held government officers to high ethical standards and mandated a stewardship that emphasized thrift, fiduciary trust, and high accountability of public funds. The early constitution gave favorable consideration to certain commercial interests, not industrial but agrarian. The constitutional pattern changed in 1918 when the electorate was given the powers of initiating constitutional amendments as well as exercising the initiative and referendum. This deviated from the commonwealth pattern of republican government; the legislature was not to be trusted and was to have the check of the people. With fiscal matters so broadly and specifically covered within the constitution, the electorate, with its aversion to debt and its inclination to protect, conserve, and even hoard public resources, was put into the position of holding the strings of the public purse as well as the legislature. Similarly, since the original constitution so closely prescribed the offices of gov-

50. "Charitable gaming" allows clubs and organizations to run games of chance if they pay state taxes on their proceeds and also direct a percentage of their take to civic or charitable causes.

51. North Dakota, *Session Laws, 2003,* chap. 573.

ernment, any changes in powers or prerogatives of officials brought the electorate into administrative restructuring and personnel management of the polity. Similarly, the strictures of the constitution left the making of fundamental decisions in higher education to the electorate.

The role given the electorate in policy making cannot be minimized. Since 1889, 247 of 475 ballot measures (that is, 52 percent) were placed on the ballot through voter petition. Of these measures, the electorate has voted on 42 constitutional amendments, 131 initiated measures on every conceivable subject of legislation, and 74 referrals of legislative acts.[52] One cannot help but note that this issue has persisted from admission to statehood to the present. A review of the debates of the first constitutional convention reveals time and again debate over whether a question should be left to the people to finally settle or whether the legislature might deal with it and have the power to repeal it if need be; whether a constitutional provision would tie the hands of the legislature or whether it might tie the hands of the people or impede their electoral choice; whether a governor or executives could be trusted to make decisions or whether the legislature had to be involved in some fashion. Contemporary constitutional debates sound very familiar. These constitutional tensions continue.

52. *North Dakota Blue Book* (Bismarck: Office of the Secretary of State, 2005), 441.

RONALD M. PETERS JR. AND MICHAEL K. AVERY

Oklahoma's Statutory Constitution

> Until changed by the Legislature, the flash test provided for under the laws of Oklahoma Territory for all kerosene oil for illuminating purposes shall be 115 degrees Fahrenheit; and the specific gravity for all such oil shall be 40 degrees Baume.
>
> —Oklahoma Constitution, Article XX, Section 2

The provision of the Oklahoma Constitution in the epigraph is not as silly as it may first appear.[1] During the territorial period, unscrupulous vendors mixed gasoline with kerosene in order to make more money, and in the years leading up to statehood there had been unsuccessful attempts to strengthen the regulation of kerosene. In one instance, gasified kerosene had exploded, destroying a substantial part of the town of Orlando, Oklahoma.[2] It is not surprising, then, that the drafters of the Oklahoma Constitution wanted to take out a little constitutional insurance to prevent such accidents and the skullduggery that led to it. But in this respect, the Oklahoma Constitution's notorious kerosene provision is emblematic of the constitution itself. Among American state constitutions, Oklahoma's is now a remaining exemplar of the "statutory" constitution, one that blends structural and statutory provisions.

Oklahoma's statutory constitution was initially the product of the state's

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2. Danny Goble, *Progressive Oklahoma* (Norman: University of Oklahoma Press, 1980), 108. The authors would like to thank Professor Goble for his comments on this article. We would also like to thank U.S. Appellate Court Justice Robert Henry for his comments.

progressive tradition, and has subsequently endured due to the political schisms that have defined state politics. Fundamental to its history is the role of the initiative and referendum as the sole means by which it has been (frequently) altered. In this chapter we describe the constitution as it was originally drafted, discuss its evolution through the use of the initiative and referendum, consider why fundamental constitutional revision has not been attained in Oklahoma, and assess the Oklahoma Constitution in light of the fundamental purposes that constitutions serve.[3]

The Original Oklahoma Constitution

During the territorial period, Oklahoma politics was dominated by the Republicans, who controlled such patronage as was available in the Oklahoma Territory due to the party's control of the national administration. The Democratic Party first took root in Indian Territory where, in 1905, a convention was held in Muskogee that produced a draft constitution for a new state that would encompass the Indian Territory and be called Sequoyah. The Roosevelt administration turned aside this step toward separate states, and in 1906 Congress passed the Enabling Act, which provided for a constitutional convention including delegates from the Indian Territory, the Oklahoma Territory, and the Osage Nation. In the election for seats at the constitutional convention, the Republicans paid the price for their reliance on federal patronage rather than grassroots organization. The Democrats, drawing on their organizing experience at the Sequoyah Convention, elected 99 of 112 delegates, and were in a position to dictate the terms of the new constitution.

Inspiration for the Democrats came from many sources. Though heavily influenced by a letter to the convention by William Jennings Bryan and a state Democratic platform, they took much of their direction from the "Shawnee Demands." These demands came from the August 1906 meeting dubbed the Fourth Annual Convention of the Oklahoma State Federation of Labor. These sixteen legislative demands and eight prohibitive demands laid out a Progressive agenda for the convention, with goals ranging from direct democracy to consumer and worker protection from corporations.[4]

On November 20, 1906, the delegates met in Guthrie at the Brooks Opera

3. Our discussion will, of necessity, touch upon only major analytical points. One by-product of Oklahoma's statutory constitution is that it is not possible to tell the constitution's story without recounting the entire political history of the state. Readers excessively stimulated by this discussion may consult the raw inventory of Oklahoma's constitutional development at http://www.sos.state.ok.us/exec;legis/InitlistAll.asp.

4. Goble, *Progressive Oklahoma,* 218.

House to convene the Oklahoma Constitutional Convention. After having swept the delegate elections, the Democrats were eager to use their supermajority status. They were easily able to control the proceedings, and as a result the only major fight at the convention was over the designation of county lines and seats. The bulk of the document was written and adopted by a convention of delegates largely reading from the Progressive page. The result of this unanimity was a document rich with the protections that Progressives sought to provide "the people" from their government and from industry. The Oklahoma Constitution created a legislature hamstrung by statutory constitutional provisions, a weak executive with little power over the executive establishment, an elected judiciary vulnerable to public opinion and equally the captive of constitutional specifications, and a far-flung array of independent boards and commissions destined to empower and reflect local areas and special interests.

The most obvious manifestation of the Progressive mood lies in the provisions governing corporate activity. These restrictions are found in both Article II (the Oklahoma Bill of Rights) and Article IX ("Corporations") of the document. Article IX is devoted entirely to corporate regulation and grants the enforcement powers to the Corporation Commission, created by Section 14. The powers granted to the commission are sweeping and often exact. Article IX shows the constitution's framers thinking like the policy makers they were. They recognized that it was necessary for the railroads to cooperate in order to extend transportation routes throughout the state, but they did not trust the railroads and wanted to make sure that they did not combine in restraint of trade. Thus, Article IX presented two contrary tendencies, one to insist on cooperation, the other to prevent consolidation. The framers wanted to make sure that the national railroad companies ("foreign companies," in their parlance) would be subject to Oklahoma law and regulation. Action by both the legislature and the Corporation Commission was required before one company could acquire the assets of another, and all corporations doing business in the state were required to maintain offices in the state with open records.

In another famously statutory clause of the constitution, Section 40 of Article IX declares that "no corporation organized or doing business in this State shall be permitted to influence election or official duty by contributions of money or anything of value." Article IX, Section 47, of the Oklahoma Constitution grants the government the right to revoke the articles of corporation for any business, at any time it sees fit, so long as the government does not deem its action injurious to any of the incorporators. Perhaps the most bizarre feature of the constitution, when taken from the point of view of constitutionalism itself, is Article IX, Section 35, which grants to the legislature itself the power to "from time to time, alter, amend, revise, or repeal

sections from eighteen to thirty-four, inclusive, of this article, or any of them, or any amendments thereof." Drawing on this grant of power, the legislature has itself amended the constitution on several occasions, the legislative acts having been incorporated into the body of the constitution itself. In this provision, as in the case of the kerosene provision, it is apparent that the constitution's framers were torn between the desire to do what they then thought right and the recognition that some allowance had to be made for future contingencies. The distinction between constitutional and statute law was apparently blurred.

For all of this, it was the bill of rights, or Article II, that represented the greatest triumph of the Progressives. The Oklahoma conception of rights extends to matters that elsewhere might be regarded as matters of policy. Here again, it is affirmed that corporate records must be open to the state (Section 28). In Section 31, the state threatens to go into business against corporations, because the right "to engage in any occupation or business for public purposes shall not be denied or prohibited" (Section 31, agriculture excepted). Section 32 rails against monopolies. Section 25 restricts corporate access to injunctive relief against labor strikes. Section 27 provides immunity for testimony against corporations.

Other articles of the original Oklahoma Constitution appear more "constitutional," even if somewhat convoluted, due to the state's entry into the Union and its prior territorial history. Article I lays out federal relations. Article II, the Oklahoma Bill of Rights, offers the usual fare, augmented by a number of curious provisions in addition to those affecting corporations. Article III provides for the initiative and referendum. Article IV simply states the principle of separation of powers. Articles V, VI, and VII set out the three branches of government. Most noteworthy is the creation of the "long ballot" in Article VI, with its long list of secondary positions and constitutionally established agencies. Article VII's provision for an elected judiciary would lead to a demand for judiciary reform a half century later. Article VIII deals with impeachments and removals from office, Article IX with corporations, Article X with revenue and taxation, Article XI with state and school lands, Article XII with homestead exemptions, Article XIII with education, Article XIV with banks and banking, Article XV with the oath of office, Article XVI with public roads and highways, Article XVII with counties, Article XVIII with municipal corporations, Article XIX with insurance, Article XX with manufacture and commerce, Article XXI with public institutions, Article XXII with alien and corporate ownership of lands, and Article XXIII with a variety of miscellaneous provisions that the convention wanted to ensure in fundamental law, such as child labor, convict labor, definition of races, and so forth. This constitutional potpourri includes elements that might obviously have been left to legislative determination, but many oth-

ers that the founders might reasonably have assumed to be their obligation. State governments are, after all, possessed of general sovereignty (unlike the enumerated powers given under the federal constitution) and have an obligation to deal with fundamental questions such as the structure of local and county government.[5]

The most important stamp the Progressives would leave on the Oklahoma Constitution centered on its future amendment, in Articles V and XXIV. In its most explicit provision, the constitution calls for a popular referendum every twenty years on the calling of a constitutional convention. As discussed below, this provision has never led to the calling of such a convention. Instead, except for the occasional legislative amendments, the Oklahoma Constitution has been amended only through the initiative and referendum processes. At the time of the Oklahoma Constitutional Convention, the concepts of the initiative and referendum were gaining favor across the country as the Progressive agenda spread. However, they were a relatively unknown quantity because they had not as yet been implemented in many states or countries. Article V lays out the basic procedures of the initiative and referendum, and provides in Section 1 that these processes can be used for the purpose of amending the constitution. Article XXIV, Section 1, of the Oklahoma Constitution lays out the method by which the legislature is able to propose amendments to the constitution via referendum. Measures proposed by the legislature as constitutional referenda are to be voted on in the next general election unless a two-thirds majority in each house declares a special election necessary.

It is in Article V, Section 2, of the Oklahoma Constitution that the people are empowered to amend the document using the popular initiative. If 15 percent of the voters sign an initiative petition and the government certifies that number, then the proposed amendment is placed before the voters. Initiative petitions are by default placed on the general election ballot unless the governor declares a special election necessary. Both of these measures were considered highly progressive at the time of their inception into Oklahoma politics. As this chapter will detail, their use since statehood has dominated the landscape of Oklahoma constitutional politics.

Revisions to the Oklahoma Constitution

Revision of the Oklahoma Constitution has been undertaken entirely via the initiative or referendum processes, and often. Since 1908, when the first

5. Ann-Marie Szymanski, "Oklahoma Constitutional Revision, Revisited," *Oklahoma Policy Studies Review* 2 (Spring–Summer 2001): 13–16.

Table 1. Amendments to Oklahoma Constitution, 1910–2004

DECADE	REJECTED	APPROVED	TOTAL	PERCENTAGE APPROVED
1910–1919	28	7/8	35	20.0
1920–1929	12	0/3	12	0.0
1930–1939	19	4/5	23	17.4
1940–1949	7	18	25	72.0
1950–1959	14	11	25	44.0
1960–1969	23	33	56	58.9
1970–1979	20	25	45	55.6
1980–1989	23	28	51	54.9
1990–1999	12	27	39	69.2
2000–	6	14	20	70.0
Total	164	167/172	331/336	50.5/51.2

Sources: Oklahoma Department of Libraries, *Directory of Oklahoma, 1992;* Oklahoma Department of Libraries, *Oklahoma Almanac, 2003–2004;* Oklahoma Secretary of State Web site, List of State Questions, http://www.sos.state.ok.us/exec;legis/initListAll.asp.

Note: Table 1 indicates the 5 successful constitutional ballot initiatives between 1910 and 1936 that were subsequently invalidated by federal or state courts and did not become part of the constitution by placing them to the left of the slash marks, and showing the total number of amendments and percentage approved accordingly.

referendum proposing to alter the constitution was proposed, Oklahoma voters have been asked to address 336 initiative or referendum proposals to alter the constitution, and have approved 172. However, 5 of these amendments were struck down by federal or state courts, leaving 167 of 331 amendments applied to the constitution, as table 1 indicates.

These statistics suggest that the number of state questions submitted and approved has been more numerous in more recent decades than during the first decades of statehood, when the Progressive instinct was predominant. The actual extent of Oklahoma voters' willingness to make changes in their constitution is even greater than these statistics suggest. Until changed by a constitutional amendment in 1974, the courts had held that ballot questions must receive a majority of the votes cast at that election, taking as the appropriate number the total votes cast for the office recording the highest vote total. Since many voters chose to vote for contested political offices but cast no vote on the ballot questions, such voters became in effect silent opponents of the ballot questions on which they chose not to vote. The "silent

vote" led to the defeat of 31 constitutional amendments that received a majority of votes cast on the amendments themselves. This means that of the 336 constitutional amendments considered by Oklahoma voters, 203 received a majority of votes cast, or 60.4 percent.[6]

Thus, Oklahomans have been quite willing to alter their constitution. But behind these statistics lies a tale of two Oklahomas: one agrarian, the other industrial; one rural, the other urban; one progressive, the other corporatist; one Democrat, the other Republican. These schisms, which reflect Daniel Elazar's distinction between traditional and modernist cultures, have pervaded Oklahoma politics.[7] This fundamental and overlapping set of cleavages has defined Oklahoma since statehood and has shaped the path of its constitutional evolution. The interplay of these forces has produced a dynamic governing the process of constitutional change: since statehood, the people have not trusted the legislature, the legislature has not trusted the executive, the executive has not trusted subordinate state officials, and subordinate state officials have not trusted independent agencies. Oklahoma politics has been a politics of distrust, not in the Madisonian sense of distrusting human nature, but in the more specific sense of some Oklahomans not trusting others.

Efforts to amend the Oklahoma Constitution began before its ink was dry. During the state's first decade the battles were over the state's progressive, anticorporatist provisions and over restrictions on suffrage. Underlying these debates was a fight for political control of the state. One fight was between the Democrats and the odd coalition of Republicans and Socialists. The Democrats had sought to disenfranchise blacks in the constitution itself, but President Roosevelt would not allow it. As soon as the legislature organized under Democratic control, it proposed a constitutional amendment to impose a grandfather clause, that is, a literacy test, for voting. Socialists opposed this provision on principle. Republicans opposed it because most blacks would vote the party of Lincoln. The amendment passed, but was later struck down by the U.S. Supreme Court. A subsequent amendment shorn of the grandfather clause but adhering to the literacy test survived judicial scrutiny. A second fight was between the Democrats and the railroad interests, also allied with the Republicans. Here the issue was whether the national railroads would be able to operate in Oklahoma at all under the constitution's various restrictions. Local carriers shared this concern because they wanted to be able to sell unprofitable lines to the big companies, and the constitution required both legislative and Corporation Commission approval. A series of amendments sought to revise the manner in which the

6. This figure includes the 5 amendments later disqualified by the courts.

7. Elazar, *American Federalism: A View from the States* (New York: Harper and Row, 1984).

constitution treated corporations, but the only change actually adopted removed the legislature from the process of approving corporate acquisitions, leaving that to the Corporation Commission. The original concern animating Title IX, regarding railroads, diminished as the railroad system was nationalized under the supervision of the Interstate Commerce Commission. Thereafter, the Corporation Commission became a more significant power center in regulating corporate activities in Oklahoma, especially public utilities and energy interests.[8]

By 1940, only 16 amendments had been adopted, reflecting the fact that Oklahoma remained a rural state dominated by the Democratic Party. There was little incentive to change the constitution in a largely agrarian state with little in the way of state governmental activity. After 1940, amendments and proposed amendments to the constitution came much more frequently in response to three principal forces: the force of federal policy, including the New Deal's transformation of the relationship between the federal and state governments; the need to raise revenue to meet the needs of an increasingly urban and industrial state; and scandal in state administration. With respect to federal policy, the state came into compliance with suffrage for women and eighteen-year-old voters, desegregation of schools, and reapportionment. Confronted by the New Deal, the state resisted implementation of federal welfare programs through two gubernatorial administrations before finally amending the constitution to create a state welfare department in 1936. Thereafter, ballot initiatives sought to enhance various pensions provided by the state.

With respect to revenue, a variety of revenue bonds, new sales taxes, enhanced sales taxes, and millage levies were submitted to popular vote, some making their way into the constitution. In order to win voter approval, bond issues and tax increases were typically designated for particular purposes, most notoriously the earmarking of the 2 percent state sales tax for the welfare department in 1936. Each such earmarking made necessary new ballot initiatives to meet other needs.[9] Over time, state tax policy became deeply

8. Has Title IX proved to be a vehicle to extend the power of the courts over the Corporation Commission? The constitution assigns original jurisdiction over the Corporation Commission to the state supreme court. A search of the court's case database produces only twenty-five cases dealing with the Corporation Commission. The court has generally upheld the Corporation Commission's jurisdiction and decisions. Whereas public utility, oil, and gas cases dominate the Corporation Commission's work today, it still occasionally takes up the railroads. As recently as 1983 the courts declined to override a decision of the Corporation Commission relating to railroad agents. See *Atchison, Topeka & Santa Fe Ry. Co. v. Corporation Commission,* 658 P.2d 479 (1983).

9. James R. Scales and Danny Goble, *Oklahoma Politics: A History* (Norman: University of Oklahoma Press, 1982), 193–94, 246.

embedded in the constitution, such that attempts to raise new revenues for schools, construction, welfare needs, or transportation often required voter approval. One force driving this pattern of development was the division between the rural and urban areas. After World War II urban areas sought to expand their municipal services in such areas as public libraries and health care, and were thwarted by the rural forces controlling the legislature. This dynamic applied to industrial development proposals as well. This resulted in ballot initiatives designed to enable urban majorities to override the legislature's truculence.[10]

Of course, the initiative could be used to restrict as well as to expand the revenue power of government. The interface of revenue policy and the constitution culminated in 1992 with the passage of State Question 640, which denied to the legislature the power to raise income tax rates or initiate new taxes without a supermajority vote or a vote of the people. This amendment differed from previous amendments in that it sought to restrict the state's capacity to tax. It was a Republican-inspired measure that reflected the modern Grand Old Party belief that economic development is better served by a low tax base than by the provision of public services or development incentives.

The scope of constitutional preoccupation with revenue and finance issues is best indicated by a simple statistic: The original Oklahoma Constitution devoted twenty-eight pages to Article IX, dealing with corporate regulation (essentially railroads and utilities). Article X of today's Oklahoma Constitution, labeled "Revenue and Taxation," runs to sixty-two pages.

Response to scandal and abuse of power occupies its own chapter in the ongoing evolution of the Oklahoma Constitution. Beginning in the 1940s, a series of constitutional amendments were enacted designed to clean up state government. Facing evidence that paroles were being purchased by political or monetary favors, a state pardon and parole board was created in 1944. When Governors Bill Murray and Leon "Red" Phillips intruded on the in-

10. State questions addressing ad valorem questions prior to World War II generally sought to place limits on or provide for exemptions to ad valorem rates. Beginning in 1944, a series of ad valorem questions (for example, State Questions 314, 319, and 327) were approved by voters that generally increased millage levels or permitted local jurisdictions to increase millages by a limited amount. In 1959, voters approved two state questions. State Question 391 provided for the creation of industrial development authority. State Question 392 provided for funding for public libraries. Both were responsive to the needs of more urbanized areas. The impact of the Oklahoma Constitution on the state's economic development continues to be a matter of discussion. A recent discussion is found in Oklahoma 2000, *State Policy and Economic Development in Oklahoma, 2000* (Oklahoma City: Oklahoma 2000, 2000). This study concludes that the state's populist tradition, expressed through its constitution, has placed severe constraints on the state's capacity for economic development.

dependence of the state's colleges and universities, an independent higher-education system with appointed but independent regental boards was established in 1944. Confronted with evidence of bribes and kickbacks in the purchasing of school textbooks, a state textbook commission was founded in 1946. In the 1960s, charges of bribery and corruption led to comprehensive reform of the state judiciary. A decade later, abuse of office by the state labor commissioner led that and several other subordinate state offices to become appointive rather than elective positions, thus shortening the Oklahoma ballot.[11]

Steps to make structural change in state government were only occasionally successful unless attached to scandal or initiated as the result of the expansion of government responsibilities due to federal policy. The state legislature was affected by several constitutional provisions directed to the salaries of legislators, the legislative calendar, and legislative term limits. The large number of executive boards and commissions led to constitutional tinkering. Government regulatory policy shaped the state Corporation Commission's powers by constitutional amendment on occasion. State finance was a recurring focus of constitutional change.

Attempts at Fundamental Revision

Why have the people of Oklahoma remained wedded to their statutory constitution? An answer to this question requires consideration of the several attempts to bring about fundamental reform. The Sooner State's first century witnessed several comprehensive studies, each of which recommended fundamental reform. In the 1930s, Governor E. W. Marland commissioned (and paid for) a lengthy study by the Brookings Institute. In the 1940s, the state League of Women Voters chapter produced a study and pamphlet recommending basic changes. In 1950, the University of Oklahoma's Bureau of Government Research published a detailed study and recommendation sponsored by the State Legislative Research Council. In the 1960s, a legislatively commissioned state constitutional task force called for fundamental change. In the 1980s, Governor Henry Bellmon established a commission that conducted an in-depth study and brought forward three ballot initiatives. In the 1990s, Governor Frank Keating commissioned a study from a national accounting firm.[12] The Oklahoma Constitution

11. In the 1970s, the offices of labor and insurance commissioners were once again made elective. In 2004, the elected insurance commissioner resigned after being impeached and prior to a senate vote on removal. And so it goes in Oklahoma.

12. Brookings Institution, *Report on a Survey of Organization and Administration in*

stands firmly (if not proudly) in refutation of all this work; reports come and go, but the Oklahoma Constitution just keeps rolling on.

Several of these reports were undertaken in anticipation of possible calls for a state constitutional convention. As noted, the constitution provides for a referendum every twenty years on a convention call. Referenda were in fact undertaken in 1926, 1950, and 1970. All were defeated. Governor Bellmon decided on a set of ballot initiatives in the 1980s rather than to launch a drive for a constitutional convention in 1990. Reluctance to call a constitutional convention derives from the fear of what such a meeting might produce. During most of the state's history, rural forces had every reason to resist changes in governmental structure that might empower their urban counterparts. After the New Deal, liberal defenders of the welfare state sought refuge in constitutional provisions that funded and empowered the state welfare department. Throughout the state, the political collaboration of state legislators and county courthouse rings was protected by a constitution that limited executive power. Democrats feared the influence of the Republican urban press; Republicans feared the power of the Democratic courthouse rings. In Oklahoma, nobody trusted anybody else. This mistrust has led to a general attitude best expressed by one observer as follows: "Having a convention would be like putting a patient on an operating table and opening him up when you don't know what you are going to find or what you are going to improve."[13]

Absent the sort of comprehensive reform that only a constitutional convention could rationally produce (assuming, that is, rationality on its part), Oklahoma has been forced to settle for incremental change. Aside from the numerous policy-oriented changes in the Oklahoma Constitution, some constitutional amendments have sought to improve the operation of state government in one way or another, as we have seen. The most fundamental reform issues, however, relate to the basic allocation of power by the constitution between the legislature and the governor. The original Oklahoma Constitution set up a weak executive, and the major thrust of serious reform

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Oklahoma (Oklahoma City: Harlow Publishing, 1935); Margret K. Galley, *The Need for Constitutional Revision in Oklahoma* (Oklahoma City: League of Women Voters, 1946); Oklahoma State Legislative Council, *Oklahoma Constitutional Studies of the Oklahoma Constitutional Survey and Citizens' Advisory Committees,* ed. H. V. Thornton (Guthrie: Cooperative Publishing, 1950); Oklahoma Legislative Council, *Revising the Oklahoma Constitution* (Oklahoma City: Oklahoma Legislative Council, 1968); Danny Goble, "The Oklahoma State Constitution: When It's Broke, Fix It!" *Oklahoma City University Law Review* 16 (Fall 1991): 515–40 (Attorney General Robert Henry was instrumental in initiating the Bellmon effort); Governor's Commission on Government Performance, *A Government as Good as Our People* (Oklahoma City: Governor's Commission on Government Performance, 1995).

13. Quoted in Szymanski, "Oklahoma Constitutional Revision, Revisited," 15.

efforts has aimed to strengthen the executive branch. To some extent, these efforts have cut across party lines: the arch-conservative populist "Alfalfa Bill" Murray, the New Deal liberal E. W. Marland, Democratic New Frontiersman J. Howard Edmundson, Republican moderate Henry Bellmon (in the 1960s and again in the 1980s), moderate Democrat David Boren, and conservative Republican Frank Keating have all bent their oars attempting to strengthen the governor's office vis-à-vis the legislature or vis-à-vis the secondary state offices or both.[14] At the same time, abuses by governors such as Murray and Phillips led Governor Robert S. Kerr to support constitutional revisions reducing the governor's power over pardons and paroles and the state's higher-education system.

A major obstacle to comprehensive constitutional reform is the "one-subject rule," in which the constitution provides that constitutional amendments can address only a single topic (Article XXIV, Section 1, adopted in 1952). Although the language of Section 1 would appear to provide that a single article of amendment might broach a general subject that deals comprehensively with, say, the executive branch, the state supreme court in 1989 ruled otherwise.

Since this episode appears to forestall any systematic constitutional change absent a convention, it is worth explicating. Governor Bellmon's constitutional revision commission came to the same conclusion as all of its predecessors: the Oklahoma Constitution is too long, too cumbersome, and too infused with statutory detail, and it sets up a weak government in which executive power and efficiency are sacrificed to the inevitably more parochial interests of the legislature. Although the commission recommended a variety of structural changes in the constitution, as a strategic matter it was decided to focus on just two: reform of the executive branch (Article VI) and revision of Article IX to modernize the state's approach to corporate governance. These were the two most urgently needed reforms, in the commission's view. However, at the last minute, it was decided to add a third measure creating the state Ethics Commission. The addition of the Ethics Commission as a new article to be attached to the constitution was largely strategic. In a state whose history was dotted by scandal and corruption, there was no scandal in the news in 1989. It was thought that the aura of reform would attach to all three proposals and thus enhance the prospects for voter approval of them all.[15]

The voters were not given the chance. In a surprising decision, the state supreme court ruled that the proposed revisions of Articles VI and IX vio-

14. Melissa Mager, "Revision of the Executive Branch Articles of the Oklahoma Constitution: An Overview," *Oklahoma City University Law Review* 17 (Spring 1992): 131–76.

15. Goble, "Oklahoma State Constitution."

lated the "one-subject" rule of Article XXIV and were thus unconstitutional. Since these proposed amendments sought to systematically revise entire articles of the constitution embracing single broad topics, it is difficult to see how any fundamental constitutional revision can be attained by the amendment process, since comprehensive change of any article would perforce violate the one-subject rule. Ironically, the judges let the Ethics Commission proposal go to the voters, and it was approved. Thus, the effort to tighten the constitution led only to an extension of its length, and in the process the court placed an apparently insuperable obstacle in front of fundamental constitutional reform. Future reformers will have to amend Article XXIV, Section 1 (once again), before having a shot at other articles.[16]

The fact remains, however, that there is not now and has never been an appetite for serious and systematic constitutional reform. During the state's early decades, constitutional squabbles focused on the legacy of Progressivism. During the state's middle decades, local interests sought advantage through the constitution. In the past three decades, two-party competition has emerged, and the constitution has been availed to advance partisan or policy objectives, as witness the term-limit and tax-limitation provisions. At each step along the way, concern for constitutionalism as such has been subordinated to partisan or other political objectives. Because the Oklahoma Constitution fuses statutory and constitutional functions, Oklahomans simply view it as an alternative (and often a preferred mechanism) for attaining political or policy goals. Imagine that, at halftime of a University of Oklahoma football game, it would be possible to circulate an initiative petition among the crowd leading to a vote to change the rules for the second half—that would be constitutionalism, Oklahoma style.

Does Oklahoma's statutory constitution matter? How important is revision of it? Although the constitution's statutory character is the usual focal point of criticism, in fact the statutory features do not appear to matter much. If these provisions were shipped into statute, policy debate would be less constrained by the constitution, but difficult decisions would still likely be sent to the people given the state's long reliance on initiative and referendum. It is the structural provisions of the constitution that matter. Oklahoma's Progressive founders distrusted government and distrusted executive power. The state's fragmented system of authority and its weak executive have led to an inefficient government system, one that often does not respond to the needs of the people. Constitutional revisions that would modernize and streamline state government would matter; unfortunately,

16. Robert H. Henry, "The Oklahoma Constitutional Revision Commission: A Call to Arms or the Sounding of Retreat?" *Oklahoma City University Law Review* 17 (Spring 1992): 177–200.

many Oklahomans are indifferent or even hostile to a more efficient and effective government.

The Oklahoma Constitution in Perspective

On November 2, 2004, the good citizens of Oklahoma flexed their muscles at the polls and approved six amendments to their state constitution. These amendments dealt with issues as diverse as a state lottery, same-sex marriage, the constitutional "rainy day" fund, economic development, and property tax exemptions for elderly voters. Whether these various alterations to the state's fundamental law will endure, or whether they will improve the quality of life for Oklahomans, cannot now be known. What can be known is that the Oklahoma Constitution is now, once again, longer than it was before.

As Donald S. Lutz has observed, constitutions serve many purposes, and an array of purposes is revealed in these emendations to the Oklahoma Constitution. Like other states, Oklahoma had to define its evolving relationship to the federal government, had to adapt to changing social and economic circumstances, had to overcome the legacy of Jim Crow, and had to cope with the legacy of the state's progressive roots. Progressivism in Oklahoma is a dual-edged sword. On the one hand, the progressive traditions and institutional arrangements that have marked the state since its territorial days remain embedded in the constitution, often, it seems, at the expense of effective and efficient government. On the other hand, the principal means for revising the constitution has been by the initiative and referendum. So Oklahomans have had to rely on progressive arrangements to address the defects of progressivism itself. The length and complexity of the Oklahoma Constitution testify that reform has been only imperfectly achieved.

Constitutions do more than put in place institutional arrangements. They also serve to define values and express the sense of the community. Over the past half century, Oklahoma has evolved from its progressive roots and Democratic tradition to become an increasingly conservative and Republican state. The name "Oklahoma" comes from the Choctaw, "Red People."[17] In the old days, the University of Oklahoma's mascot was a Native American character called "Little Red." Little Red went away a long time ago, but in today's parlance Oklahoma is a very red state. Oklahoma's progressive constitution has facilitated this transformation in political culture by en-

17. Angie Debo, *Oklahoma: Foot-Loose and Fancy-Free* (1949; reprint, Norman: University of Oklahoma Press, 1987), 21. This book is the place to begin in understanding Oklahoma politics during the state's first half century.

abling conservative majorities to define values, practices, and arrangements in the state's fundamental law.

Thus, the Oklahoma Constitution, like an ancient and gnarled oak, continues to grow even as many of its older branches fall into desuetude. It stands today as an evolving expression of the character of the people of Oklahoma, and this is clearly what constitutions are supposed to do. It is old, and it is cumbersome, but it is ours.

MICHAEL MULLIN AND JON LAUCK

South Dakota's Constitution

Harkening Backward, Foreshadowing a Future

Examining South Dakota's constitutional development shows how the state's founders used a language that tapped a long-standing understanding of American political theory to promote statehood; they also created a constitution that gave its citizens a legislative power that scholars associate with the later Progressive Movement. Although it might be true that the men who created the constitution lacked "altruistic motives in their struggle" for statehood, it is not true that the men were devoid of thought regarding what was important for a constitution to succeed.[1] As one delegate noted, "statehood should first be secured" before political ideology got written into the document.[2] The outcome was a constitution that, according to one newspaper, contained "the best elements to be extracted from the constitutions of thirty-seven states."[3] If anything, South Dakota's founding generation thought of its constitution as a model that incorporated the best of the old states and the protective devices of the new states. Examining the events leading up to the three constitutional conventions South Dakota held, in 1883, 1885, and 1887, shows the founders maintained a consistency of thought on certain principles regarding what was important in a constitution, and a willingness to change to meet the changing America that South Dakotans foresaw in the late nineteenth century.

The first step in constitutional development was an effort to identify a

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1. Howard R. Lamar, *Dakota Territory, 1861–1889: A Study of Frontier Politics* (1956; reprint, New Haven: Yale University Press, 1966), 244.

2. *Proceedings of the South Dakota Constitutional Convention of 1883,* as recorded by George W. Kingsbury (Pierre: South Dakota Centennial Commission, 1988), 1697.

3. *Press and Dakotaian* (Yankton, S.D.), October 4, 1883.

common community that would become South Dakota. This effort was not as straightforward as some might think. Geography, politics, and culture all worked to thwart the settlers of the territory from thinking of themselves as a single, unified community. This was no easy task, for the Dakota Territory was, as one writer put it, "too big and unwieldy for either the United States government, the territorial government, or the scattering of citizens to cope with successfully."[4] The region's boundaries and identity were neither well defined nor consistently expressed. If the southern portion of the territory was to become a state, then, the political movers of the region were going to have to define what constituted "South Dakota."

Defining a Community

The origins of the Dakota statehood movement fit nicely Donald S. Lutz's assertion that a primary reason for constitutional development is to place limits on existing "political power." The limits on political power came in the debate over territorial-versus-statehood status. During the course of these debates, the founders of South Dakota both defined the community of South Dakota and structured the conflict of the debate so they could manage it. In this sense, South Dakota fits Lutz's eight reasons people write constitutions.[5] Using the language of pre–Civil War America, the founders of South Dakota talked about statehood as an alternative to the demeaning limits placed on the people of Dakota Territory. In articulating what South Dakota was, the founders deliberately set out to define themselves as a community apart from their northern neighbors.[6] In this effort, the founders articulated Lutz's second criterion for constitution-making.[7] In the years that followed, the supporters of "South Dakota" did other things that Lutz suggests are necessary for a truly American constitutionalism. Before these other issues can be addressed, however, an understanding of why South Dakota might create the political confusion it did is necessary.

Migrants moving into the region from the North and South, and a complementary movement of people from the East and West, clearly impacted the development of the Dakota Territory. These movements, however, worked against developing a cohesive identity of its people. What would

4. Helen Graham Rezatto, *The Making of Two Dakotas: A Centennial History* (Lincoln: Media Publishing, 1989), 158.

5. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 14, 16.

6. See, for example, Lamar, *Dakota Territory,* 197.

7. Lutz, *Origins of American Constitutionalism,* 16.

trappers, miners, and farmers have in common? But where one would think that commonality might occur between farmers in the North and South, differences persisted. Doane Robinson, one of South Dakota's first historians, characterized the southern portion of the state as being settled by "homesteaders, who brought with them the conservative notions of small farmers, about public and private economy, morality, and education." As for those in the North, they were "bonanza farmers, captains of industry, who came with large means, buying great areas of land and farming upon extensive lands." The traditions of these northerners were "at variance with those of the homesteaders of the South, and the result was constant friction between the two elements."[8] What Robinson left out, however, was that it was not only differing cultural attitudes that made the development of a single community difficult.

With the Platte River offering an easier, faster, and safer route westward, the Missouri River became a hindrance to the development of a single "Dakota." Instead of settlers moving westward and gradually filling in the region, settlement proceeded as an envelopment rather than as a linear movement. Miners settled the Black Hills region, and farmers gradually moved up the Missouri (or came west from southwestern Minnesota), settling the southeastern portion of the state. What could miners and farmers possibly have in common? Farther to the north, bonanza farmers were filling in. Could nineteenth-century corporate agriculture coexist with the traditional family farmer in the southern portions? Complicating all of this was the fact that the Missouri River effectively cut the territory into two distinct areas. No railroad crossed the Missouri in the southern portion of the territory until after statehood.[9] Add to this the presence of the Dakota Territory's indigenous peoples and the great Sioux Reservation separating east from west, and the territory was anything but unified.

A Populist and Progressive Precursor

Ironically, although the reservation hindered the development of a sense of community, its presence engendered the first expression of what would become one of the defining elements of South Dakota constitutionalism. The reservation offered officials an opportunity to line their pockets through graft, larceny, and theft. Associated with the Gilded Age in general,

8. Robinson, *A Brief History of South Dakota* (New York: American Book Company, 1905), 171–72.

9. Herbert T. Hoover et al., *A New South Dakota History* (Sioux Falls: Center for Western Studies, Augustana College, 2005), 488–89.

corruption was endemic in the reservation system, and Rutherford B. Hayes's administration promised to clean up the Indian service and its endemic corruption in 1876.[10] Inspector General W. H. Hammond ordered the arrest of various Indian agents and asked the U.S. attorney for the territory, Hugh J. Campbell, to begin prosecuting the arrested men. Juries found the accused innocent of most charges, but Campbell's actions earned him the reputation of a "reformer."[11] When the debate over why statehood was preferred to continued territorial status, Campbell's words carried a force often overlooked today. Campbell represented a type of "good government" reformer. His efforts against the corruption in the Indian department foreshadowed later efforts of Progressives to bring clean government to citizens. Indeed, John D. Hicks notes that South Dakota's final constitutional convention met while the nation was "conscious and ashamed of . . . political corruption" and working to end "corporate exploitation."[12]

This notion of clean government made its way into various anticorruption elements of South Dakota's constitutional development. In 1882, a convention of the Citizens Constitutional Association called for the protection of school lands because other states had lost them "to waste and fraud" as a result of "fraudulent schemes."[13] Offering an institutional method for dealing with political corruption, as well as managing conflict, South Dakota's founders also gave voters the power of "initiative and recall."[14] Each of the constitutional conventions of 1883, 1885, and 1889 allowed supporters of various causes—Prohibition, woman suffrage, immigration reform—an opportunity to try to implement their agenda. At the 1885 constitutional convention in Sioux Falls, for example, delegates debated the "Dakota Plan" regarding railroad regulation. Delegates decided to let the people decide the issue via a referendum. The voters, outside the constitutional context, decided to adopt restrictions on railroad corporations.[15] When the 1889 constitution was printed, Articles XXIV and XXV, which dealt with Prohibition and minority representation, respectively, were drawn up for inclusion in

10. Hans Janssen, "Bishop Marty in the Dakotas," *American-German Review* (June–July 1961): 24.

11. Lamar, *Dakota Territory,* 184, 188.

12. Hicks, "The Constitutions of the Northwest States," *University Studies of the University of Nebraska* 23 (January–April 1924), 31.

13. "Proceedings of the Convention of the Citizens Constitutional Association of Dakota, 1882," in *Twenty Million Acres: The Story of America's First Conservationist, William Henry Harrison Beadle,* by Barrett Lowe (Mitchell, S.Dak.: Educator Supply Company, 1937), 451.

14. Lutz, *Origins of American Constitutionalism,* 16; *Journal of the Constitutional Convention of South Dakota, July 1889* (Sioux Falls: Brown and Saenger, 1889), 178.

15. Jon Lauck, John E. Miller, and Edward Hogan, "The Contours of South Dakota Political Culture," *South Dakota History* 34 (Summer 2004): 160.

the constitution, but were to "be submitted to a separate vote as provided by the schedule and ordinance."[16] Regardless of the outcome of these individual measures, collectively South Dakota's founders predated the alliance William L. O'Neill articulates for the birth of "Wisconsin progressivism."[17]

Similarly, although we generally consider railroad regulation a hallmark of the Populist and Progressive period, here again, the South Dakota Constitution portends later national trends. Why this aspect of South Dakota constitutionalism has been overlooked is, perhaps, that the standard interpretation of the founders is of men who represented a "distinct social class" in the territories, a class that supposedly promoted railroad development. Though it is true that the most famous founders were not tied to farming directly, it is incorrect to assume that agricultural interests were not integral to Dakota constitutional development. Forty-one of the 123 conventioneers in 1883 were farmers. The *Chicago Inter-Ocean Correspondence* commented that "the number of farmers, newspaper men and solid citizens generally present showed the movement to spring from the people." Whereas lawyers and others might want to create a constitution that saw "government as a wing of the business structure of the Territory," these same men went to great lengths to point out that the "rights of the people are carefully guarded and protected against the encroachments of railroads, corporations, and the schemes of lobbyists."[18] Supporters of the constitution argued that the proposed constitution was stronger than either Iowa's or Pennsylvania's when it came to protecting citizens from railroad interests. This was important because South Dakotans saw Iowa as a state with "the strongest agrarian legislation against railroads of any state in the union." Perhaps more important, South Dakota's rules were stronger than Pennsylvania's, which had written a new constitution only a year earlier, and the convention had met under the cry of reforming the "long abuses practiced by the Pennsylvania railroad company."[19]

A Commonwealth Document

Language constituted an important element of South Dakota's constitutional evolution. In calling for statehood, and writing the constitution,

16. *Journal of the Constitutional Convention,* 210, 211.

17. O'Neill, *The Progressive Years: America Comes of Age* (New York: Harper and Row, 1975), 12.

18. Lamar, *Dakota Territory,* 244–46; *Press and Dakotaian,* October 18, 1883.

19. "An Address from the State Executive Committee" (Bartlett Tripp, chair), *Press and Dakotaian* (Yankton, S.D.), October 25, 1883.

founders often invoked terms that modern society pays little attention to but were important markers for the people of the nineteenth century. The use of the word *commonwealth* was an essential element of South Dakota's constitutional story. They were, in the nineteenth century, words loaded with meaning, and were a shorthand for certain beliefs, much the way *liberal* and *conservative* are today. Examining how these words were used in the constitutional story of South Dakota gives the reader a more complete picture than has hitherto been described elsewhere.

When the pastor at the First Congregational Church used the phrase "redound to the glory of the commonwealth," he was not using a rhetorical flourish.[20] He was tapping into a language that suggested the territorial government was neither representative nor limited in its power. This was a bedrock foundation of classical republicanism.[21] Since before the American Revolution, English-language writers had used the term *commonwealth* to denote specific things. This language is important because it helps, in part, to explain why southern Dakotans wanted a state separate from their northern counterparts.

Commonwealth writers such as Algernon Sidney and James Harrington had argued that government tended toward tyranny. What gave Sidney and Harrington such strength was their description of how one could tell the government was lurching toward tyranny. An enlarged franchise and representative government were the best means of preventing this movement.[22] For South Dakotans, recent events suggested that territorial governments, not the monarchial governments Harrington and Sidney discussed, might also naturally tip toward tyranny. Governor Ordway's actions, particularly regarding the transference of the territorial capital, suggested that the territorial government had begun tilting toward secrecy and tyranny. In 1883, the *Press and Dakotaian,* Dakota's most powerful newspaper, began publishing "examples of bribery or corrupt bargains" that occurred under the territorial system in general, and Ordway in particular.[23] Using the language of Locke, Jefferson, and the commonwealth men, South Dakota's founders made statehood an alternative to Gilded Age cronyism. The people would have a say in the election of officials and recourse for corrupt bargains, such as moving the state capital for personal gain. A constitution would force the governor, any governor, to operate in the open. It would also give the people an opportunity to choose their leaders.

20. George W. Kingsbury, *History of Dakota Territory* (Chicago: S. J. Clarke, 1915), 2:1670.

21. Algernon Sidney, *Discourses Concerning Government,* ed. Thomas G. West (Indianapolis: Liberty Classics, 1990), xxiv.

22. Edmund S. Morgan, *American Slavery, American Freedom: The Ordeal of Colonial Virginia* (New York: W. W. Norton, 1975), 369, 370.

23. Lamar, *Dakota Territory,* 220.

But there was more to the term *commonwealth* than the opposition to tyranny. For a generation of men who had experienced the American Civil War, the commonwealth ideal had special meaning. From a northern and western perspective, slave owners had concentrated landholding among a select few in the years preceding the conflict. Was not secession the ultimate act of selfishness? Was a single state's desire more important than the needs and wishes and aspirations of the nation as a whole? Transferred to South Dakota's constitutional setting, the commonwealth ideal meant writing a constitution that gave power to the citizens, not to a particular group of people.

Surely, southern farmers in Dakota understood why its antimonopoly provisions differed from those ultimately developed in North Dakota. In the southern portion of the territory, small farmers, merchants, mechanics, and others lived together in harmony, whereas the bonanza farms of the North created an "oligarchy" controlled by the Northern Pacific Railroad and absentee landlords. Radical control was necessary there because the northern territory consisted primarily of "wanderers" who came "from the slums of the lowest" elements of American cities.[24] What makes this description so interesting is that not only does it justify the commonwealth ideal, but it also separates southern Dakota as a recognizable community from that of the North.

At the root of the commonwealth language is the question of education. Republican thinkers had always argued for a connection between republicanism and education. This connection was not theoretical in the late nineteenth century. At the national level, the Republican Party had endorsed the importance of education in the political evolution of the African American, and its freedman schools showed how committed the party was toward education. Indian education had created its own reform movement that focused on education. For South Dakota, statehood became not an end but a means to ensuring education's survival on the Plains.

W. H. H. Beadle, the Dakota Territory's superintendent of public instruction, is given credit for organizing the movement that eventually led to South Dakota statehood, and the foundation of the movement was concern over lands set aside for public education. By 1879 two sections of each congressional district were set aside for public education. These sections were to be sold and the proceeds set aside to create a permanent fund for public education.[25] Also, the 1885 and 1889 constitutions specifically mentioned that "the stability of a republican form of government depends on the morality and intelligence of the people," and ordered the state to "establish

24. *Press and Dakotaian,* October 18, 1883.
25. Robinson, *Brief History of South Dakota,* 166–67.

and maintain a general uniform system of public schools."[26] South Dakotans intertwined the political philosophy of republicanism with their analysis of education's importance to the creation of a commonwealth. The state's constitution noted that republics were dependent on educated citizens.

More Legislative than Constitutional

Article VIII of the constitution, "Education and School Lands," serves as a good example of how the founders placed "legislation in the constitution."[27] Though some commentators were dubious of South Dakota's effort to create a constitution that made "certain forms of legislation . . . a permanent character" of the document, Arthur Mellette, the state's first governor, told colleagues, "If you know the proper things to embrace in a constitution, the more there is in it the better. One of the greatest evils is excessive legislation—the constant change of laws every two years, and the squabbles and debates over the different questions that constantly arise."[28] Article VIII deals with school lands and funding. This type of focus shows the legislative nature of South Dakota's constitution. It stipulates the minimum purchase price for the land, the amount of land that can be sold, and how the money is to be invested. Both the 1883 and the 1889 constitutions set strict limits on corporations and prevented any business entity from being granted a charter "by special laws."[29]

As the specificity of educational provisions illustrates, South Dakota's constitution was designed as a legislative document that embodied "the bare outlines of State governmental machinery, including only the most general principles," more than following a constitutional model.[30] This same pattern of legislative specificity was applied to the institutional arrangements in the constitution as well. The 1889 constitution immediately divided the powers of government into three branches, and then set out to define "the powers of each" in "this Constitution."[31] Each governmental branch had its powers and duties specified in minute detail. For example, in the section dealing with the judiciary, the founders specified a minimum number of times a supreme court would meet, what powers the court possessed, the

26. *Journal of the Constitutional Convention,* 182.

27. Hicks, "Constitutions of the Northwest States," 88.

28. George M. Smith and Clark Young, *History and Government of South Dakota,* rev. ed. (New York: American Book Company, 1904), 86.

29. *Constitutional Debates of South Dakota, 1885, 1889* (Huron, S.D.: Huronite Printing, 1907), Article XV, 35; *Journal of the Constitutional Convention,* Article XVII, 198.

30. Smith and Young, *History and Government,* 86.

31. *Journal of the Constitutional Convention,* 163.

maximum number of justices, who would appoint them, and who should serve. The constitution also defined where the state's circuit courts were to be divided, and how an enlargement of the circuit court system might occur. Following this came descriptions of the county court system, and then a listing of what offices might be considered part of the judiciary branch of government.[32] Similarly specified models, often borrowed from recently revised or written state constitutions, were used for the executive and legislative branches of government. Using the judiciary again as an example, South Dakota's court structure was modeled after those of California and New York.[33] This conscious design of legislative specificity, as illustrated by both the educational and the institutional features of the constitution, may explain why Howard Lamar complains that the state's founders lacked "any altruistic motives" when it came to statehood.[34] Lamar fails to classify South Dakota within an emerging notion of what constitutions ought to be and do.

In addition to Mellette's practical argument noted above, there is another reason the South Dakota Constitution was a legislative rather than a "constitutional" document. South Dakotans, under the direction of Hugh Campbell, had begun to articulate a "we are a state" doctrine. Campbell argued that the federal government acquired territories with the express purpose of eventually making them states. Therefore, the federal government could not hold a region in territorial bondage forever. For Washington politicians, the "we are a state" argument "bore some similarity to those producing the nullification doctrine."[35] Although Washington officials might worry about the implications of "we are a state," it played well in the territory itself.

Whether labeled "we are a state" or, simply, "home rule," South Dakota's constitution and the question of statehood forced congressmen to ask an important theoretical question: "Could a Territory voluntarily, of its own motion, throw off its Territorial form of government and assume the form and powers of a State?"[36] Here is the question of power that all constitutions deal with, and in the case of South Dakota, to refuse statehood was to raise the specter of tyranny—what the commonwealth men had all argued against.

Because South Dakota did not write its initial constitutions with the U.S. government's consent, delegates went to great lengths to justify and estab-

32. Ibid., Article V, 171–77.

33. Marie Louise Lotze, "How South Dakota Became a State," *South Dakota Historical Collections* 14 (1928): 474.

34. Lamar, *Dakota Territory,* 244.

35. Ibid., 223–24, 244 (quote).

36. Smith and Young, *History and Government,* 82.

lish their authority to write a constitution. President of the convention A. J. Edgerton made this point explicitly when, in his opening address to delegates, he said, "We have met here under peculiar circumstances. Congress has passed no enabling act."[37] This fact was brought up again in 1889, when a minority of the Judiciary Committee inserted their own report into the constitutional record, claiming they were "unable to find any provision or authority in either [the 1885 constitution or 1888 Omnibus Bill], by which this Convention can provide by ordinance or otherwise for the election of any other than State officers at the election held for the adoption of the Constitution."[38]

Years earlier, South Dakotans had argued their constitution was necessary because Congress had failed to act on a petition of statehood. Instead, "an Executive appointed from abroad, and not in accord with the people," had been assigned the territory by congressional dictate. As a result, the people had taken up the statehood debate on their own. This was not unusual, Mellette argued, since eleven other states had been admitted to the Union without an enabling act. Moreover, South Dakotans had voted in favor of statehood in greater numbers than other states such as Iowa and Oregon. Would the federal government deny the people of Dakota statehood? Would Congress "deny nearly a half million of their fellow citizens the right of self-government, and compel a continuance in a state of semi-vassalage?"[39] Both the 1883 and the 1885 constitutions had been set before the people and received favorable responses. Would Congress now, for purely partisan reasons, deny the legitimacy of South Dakota's constitution?[40]

Though perhaps more legislative than theoretical, the evolution of the state's three constitutions enables the comparison of the three documents in an effort to identify what remained consistent in South Dakota's constitutional development and what changed. The most salient points of comparison are the stated purposes of the constitution, the placement of the declaration of rights, and the source of constitutional authority.

One obvious difference between the first constitutional convention and the last is found in the preamble of the two constitutions. In 1883, when the founders were unclear about what constituted South Dakota, the preamble began by articulating where South Dakota is located. It then stated why

37. *Constitutional Debates,* 1:59.

38. *Journal of the Constitutional Convention,* 110.

39. *Presentation of Dakota's Claims, and Memorial Praying for Admission* (Sioux Falls: S. T. Clover, 1885), 2, 3, 7, 9.

40. Hoover et al., *New South Dakota History,* 115–16. For a quick view of how national politics impacted South Dakota statehood, see Robinson, *Brief History of South Dakota,* 170; and Lamar, *Dakota Territory,* 256.

Dakotans were entitled to form "a State Constitution and government."[41] The 1889 constitution preamble did neither thing. Instead, this constitution's preamble explained the benefits of statehood itself. No justification of their action was necessary in 1889; the two Dakotas were now clearly separate entities, as suggested by North Dakota's constitutional convention. Nor was any definition of what South Dakota entailed required. Here, statehood allowed the founders to "form a more perfect and independent government, establish justice, insure tranquility . . . [and] promote the general welfare" of all.[42]

As part of their efforts to form a "more perfect government" and "promote the general welfare," the South Dakota founders included a declaration of rights in the constitution. This section entailed a twenty-eight-part enumeration of the rights of South Dakotans under statehood.[43] In 1883, the people were given these specific rights before the institutions of government were defined in the constitution. Citizens did not have these rights under the territorial system. The constitution, thereby, placed limits on what the state government could and could not do. Donald S. Lutz argues that people create constitutions to limit government power, and this is what the South Dakota constitution aimed to do.[44] South Dakota's later constitutions also maintained bills of rights, but these came after the powers of the legislative, executive, and judicial branches had been articulated.

Regardless of the location of the declaration of rights, there is clear continuity in South Dakota's constitutional evolution with respect to where the founders claimed power derived from. Although Howard Lamar argues that fewer "than two hundred men achieved statehood for North and South Dakota," this is unfair.[45] Though a small cadre of men may have driven the constitutional work, they never claimed to be working on their own, or for themselves. First, they claimed that constitutional authority came as a gift from God, verified by the people of the territory.[46] It was only after the people decided "nothing was left for action but the procedure, originating and carried forward by, the people concerned, acting in their primary capacity," that a constitutional convention convened.[47] The people, not politicians, were where power lay, and this is one reason the "right of petition" was so important.[48]

41. *Constitutional Debates,* 1:9.
42. *Journal of the Constitutional Convention,* 2, 162.
43. *Constitutional Debates,* 1:10.
44. Lutz, *Origins of American Constitutionalism,* 16.
45. Lamar, *Dakota Territory,* 244.
46. *Constitutional Debates,* 1:9; *Journal of the Constitutional Convention,* 162.
47. *Presentation of Dakota's Claims,* 2.
48. *Journal of the Constitutional Convention,* 178.

Conclusion

South Dakota's constitution might be, as some have argued, the product of "agrarian conservatism," but it is also true that the founders were interested in a well-regulated government.[49] By giving power to the people, via the right of petition, the founders foreshadowed the later Progressive Movement. By regulating the railroads, the constitution did not deny state government the right to regulate. The emerging Farmers' Alliance movement made sure of that.[50] Perhaps we should not be surprised at the stodgy nature of South Dakota's constitution, at least when compared with its northern neighbor. After all, even the most recent history of South Dakota talks about its Yankee settlement in relationship to later ethnic arrivals.[51] The immigrants to northern Dakota, with their different ethnic composition and bonanza farms, were different from their southern neighbors. With America's national parties evenly divided, a Republican South Dakota and Democratic North Dakota offered a continuation of the status quo at the national level, and removed a significant plank of the Republican Party platform, a plank that had helped Benjamin Harrison win the presidency. Howard Lamar has argued that Grover Cleveland finally relented on the statehood issue in hopes of breaking the Republican stranglehold in South Dakota.[52]

Whatever the reason South Dakota was admitted into the Union, its constitution remained, through three different constitutional conventions, relatively consistent. Its basic outline detailed the various branches of government, their powers and limitations, and defined not only "the regime" but also what constituted "the public and citizenship." Using the language of an earlier period, and writing a document that recognized the changing nature of the United States, the founders brought together a disparate coalition. They haggled over suffrage, Prohibition, and regulation, but in the end, everything gave way to statehood. Over the course of this decadelong struggle, the founders and the constitutions they created determined what it meant to be a "South Dakotan" and convinced the rest of the nation that they were, in fact, different from their northern neighbors. A reading of the document shows how the document does present "a picture of a people at a given time," just as Donald Lutz argues a constitution should.[53]

49. Lauck, Miller, and Hogan, "Contours of Culture," 158.
50. Lamar, *Dakota Territory,* 274–77.
51. Hoover et al., "Yankee and European Settlement," chap. 8 of *New South Dakota History.*
52. Lamar, *Dakota Territory,* 265–66.
53. Lutz, *Origins of American Constitutionalism,* 16, 3.

MOUNTAIN WEST STATES

Perhaps more than any other region, the Mountain West is defined by its physical landscape. More often in spite of geography, rather than because of geography, the states of the Mountain West were able to define their individual constitutional identities.

The Idaho chapter begins with the assumption that the U.S. Constitution is incomplete. The author proceeds by arguing that, despite the natural circumstances of the state, the electors of Idaho defined a constitutionalism that was rooted in law-and-order populism and the development of the state's natural resources. Although the Idaho electors themselves have changed since 1889, the author demonstrates that Idaho constitutionalism has not.

Utah's constitution, probably more than that of any other state, demonstrates the potential inadequacy of Lutz's theory with respect to the definition of a people. At the time of Utah's admission to the Union, its people and culture were well defined and distinct, yet this cultural distinctiveness is not reflected in the constitution of 1896. The authors of this chapter argue that the Mormon people's initial desire for statehood and relative autonomy was superseded by a sincere desire to join the mainstream.

VICKY BOLLENBACHER

Two Sides of Colorado, Amplified through Constitutional Redesign

Becoming a People

Colorado's political history and its people's far predate its establishment as the thirty-eighth state in 1876. Present-day Colorado was home to the ancient cliff-dwelling, agricultural civilization of the Anasazi, who disappeared around 1300 C.E. after a two thousand–year history. Subsequently, numerous Native American tribes inhabited Colorado—the Utes, Cheyenne, Arapahoe, Kiowas, Comanches, Pawnee, and Sioux—dating to as early as 1500 C.E. Native American inhabitants were numerous throughout the 1800s. Conflicts with white settlers escalated throughout the 1860s prior to statehood and did not end until 1888. Native American peoples were not included as citizens in the original Colorado Constitution.[1]

Furthermore, portions of the land now called Colorado once belonged to a number of different countries. The first European explorer to claim part of Colorado was René-Robert La Salle, who appropriated all of the area east of the Rocky Mountains for France. Most of this land was acquired by the United States through the Louisiana Purchase in 1803. During the late 1700s and early 1800s, Spaniards settled southern Colorado. Texas's independence in 1836 brought its claim to a portion of the land in present-day southern Colorado as its own. Mexico issued land grants to its people in southern Colorado in the 1840s, hoping to secure claims against Texas and the United States.[2]

By 1850, however, the United States purchased all claims. The first permanent U.S. settlement, along with a fort for defense from Native Ameri-

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1. Colorado State Archives, http://www.archives.state.co.us/legis.html.

2. Ibid.

cans, was established in 1851 in southern Colorado.[3] Four territories—Kansas, Utah, Nebraska, and New Mexico—had jurisdiction over the people settling the land known as Colorado.[4] However, it was not until the discovery of gold in 1858 near present-day Denver that settlement of the land exploded and the jurisdiction over land and people became a question. Indeed, the identity and creation of the people of Colorado began to coalesce.

In 1859 people from four western territories of the United States joined to form the territory of Colorado.[5] Although this 1859 territorial constitution first laid out formally the creation of the people of Colorado, it was perhaps not a legal document, as the people of Colorado had not been authorized to create it.[6] Kansas, Utah, Nebraska, and New Mexico Territories had legal jurisdiction over the land and the people calling themselves Coloradans, and those territories had not ceded those rights. However, with those four territorial government seats hundreds of miles away, the people of Colorado had through necessity come to see themselves as a distinct people. These people had needs not being met by those territorial governments. The discovery of gold in 1858 had resulted in a gold rush in which new towns and settlements emerged rapidly all along the eastern slopes of the Rocky Mountains near present-day Denver. Those new towns and settlements needed government of closer proximity to define and protect property rights. The people of these new towns and settlements of the four existing territories took it upon themselves to create the government that they needed. The 1859 territorial constitution of Colorado marks the creation of the people of Colorado in their formal acknowledgment of their need for shared governance.

The U.S. Congress soon after recognized this new territorial people and created Colorado Territory in 1861, just before the start of the American Civil War. The Colorado Territory created in 1861 had the same boundaries as the present state of Colorado, covering more than one hundred thousand square miles. Colorado remained a territory for more than a decade. During the 1860s President Johnson three times vetoed Colorado's admission to the Union as a state, uncertain of the political role Colorado would play in national politics during the turbulent 1860s following the Civil War. Finally, the constitutional convention of 1874 produced the Colorado state constitution that has been used since Colorado's admission to the Union in 1876.

3. Ibid.

4. Robert S. Lorch, *Colorado's Government: Structure, Politics, and Administration,* 7th ed. (Colorado Springs: Center for the Study of Government and the Individual, 2003), 13.

5. This territorial constitution actually marked a provisional territorial government called the Territory of Jefferson.

6. Ibid., 13.

Creation of a Document and Early State Political History

The first state constitution remains the law of the state of Colorado. It has been amended numerous times and has survived modern proposals to write a completely new constitution for the state.[7] The original state constitution, longer than the U.S. Constitution, contained some twenty-three thousand words.[8] Amendments bring the Colorado Constitution to more than forty-five thousand words and more than eleven hundred provisions, making it about one-third longer than the average state constitution in the United States and, like most state constitutions, longer than the U.S. Constitution.[9]

Colorado became a state on August 1, 1876, a presidential election year, one characterized by post–Civil War politics. Colorado, with mere months behind it as a state, played a decisive and rather undemocratic, but probably not unconstitutional, role in the 1876 presidential election. Colorado's constitution explicitly addressed the issue of presidential electors for the 1876 election. Section 19 of the state constitution's schedule anticipated and made provisions for this first presidential election in which the state would participate. It stated that electors were to be chosen by the general assembly rather than by the people.

Thus, Colorado secured its place in the election of the president that year. However, the 1876 presidential election turned out not to be as routine as most. Controversy surrounded the process and the outcome of the 1876 election, much like the 2000 presidential election, with contested state winners of the electoral college vote. The outcome was ultimately decided by a congressional commission that awarded the contested electoral college votes. The outcome that was determined was that Rutherford B. Hayes had won the electoral college by one vote, although Samuel Tilden had won the pop-

7. Notably, in 1987 Coloradans debated whether to rewrite the Colorado Constitution completely. For a discussion of the debate, see Donald S. Lutz, *Cautions for Constitution-Makers,* which cautions against rewriting the Colorado Constitution as a panacea for political problems or as a method by which reform may be forced or political culture changed (issue paper no. 12-87, ed. John K. Andrews [Golden, Colo.: Independence Institute, 1987]). For a discussion of the relative lack of merit for rewriting lengthy state constitutions, see Christopher W. Hammons, "State Constitutional Reform: Is It Necessary?" *Albany Law Review* 64, no. 4 (2001): 1327–53.

8. Lorch, *Colorado's Government,* 18.

9. Hammons, "State Constitutional Reform," table 1; see Hammons also for a discussion of why state constitutions tend by nature of their function to be longer than national constitutions. For a refutation of the long-standing Madisonian argument that longer constitutions, like Colorado's, prove less durable or stable, see Christopher W. Hammons, "Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions," *American Political Science Review* 93, no. 4 (1999): 837–49.

ular vote.[10] It might be said that Colorado helped to hand that election to Hayes. Or, more accurately, the Colorado General Assembly handed the presidency to Hayes. Subsequent to the 1876 election, all electors in Colorado have been chosen by direct vote of the people, as stipulated in the original Colorado Constitution (Schedule, Section 20). The power conferred on the general assembly to choose electors was a onetime power to ensure that Colorado participated in the 1876 presidential election.

Colorado entered national politics against the backdrop of the women's suffrage movement. The issue of women's suffrage was an important political issue from the beginning for the state and was debated during the constitutional convention. However, women's suffrage proponents were not successful in achieving voting rights for Colorado's female inhabitants. Article VII of the Colorado Constitution, "Suffrage and Elections," defines the public and citizenship for the state. The original Colorado Constitution did not grant the franchise to women, African Americans, or Native Americans. It granted suffrage to most others over the age of eighteen.

Although women were not granted suffrage in the 1876 constitution, Article VII, Section 2, explicitly addressed the question of women's suffrage as one that was not to be determined by the original constitution but may be approved and perhaps should be considered. "The General Assembly shall, at the first session thereof, and may at any subsequent session, enact laws to extend the right of suffrage to women of lawful age." Although the vote failed to pass a popular referendum in 1877, in 1893 the general assembly was able to gain the approval of the voters for a law passed in the general assembly granting suffrage to women. Colorado became the second state to pass a law granting suffrage to women, twenty-seven years before the Nineteenth Amendment to the U.S. Constitution guaranteeing suffrage for women across all states.[11] The next year Colorado women elected the first three female state legislators in U.S. history.

Two Sides of Colorado: Polarized Ideology Reflected

Founding documents of Colorado illuminate who the people of Colorado were at the founding and who they set out to be in the future. A review of the constitution shows that there has been historically and contin-

10. Roy Morris Jr., *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876* (New York: Simon and Schuster, 2003).

11. Utah and Washington Territories had earlier granted the franchise to women. However, in 1887 the U.S. Congress rescinded women's suffrage in Utah and the territorial supreme court rescinded women's suffrage in Washington Territory.

ues to be both a strong conservative and a strong liberal political culture in the state. Both constituencies have been successful in influencing the original constitution and the constitution as it stands amended. It may be argued that conservatives have recently been more successful in Colorado politics, having passed influential amendments to the Colorado Constitution such as the Taxpayer's Bill of Rights (TABOR) and have been more successful in winning statewide political offices generally in recent elections. Interestingly, it is some of the more liberal provisions of the constitution that have provided the mechanism by which conservatives have had their recent successes in amending the constitution. A review of the constitution makes clear that liberal interests have won many constitutional battles in Colorado politics and have a vocal presence, making Colorado indeed a "sharply polarized state."[12]

Liberal and conservative interests in Colorado squared off from the beginning. The first battle was over the creation of the preamble to the constitution and the question of God's place in it. Conservative interests prevailed. The preamble makes explicit reference to God, a reference absent from the U.S. Constitution. The preamble of the Colorado Constitution begins, "We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe . . ." This reference was vigorously debated during the constitutional convention.[13] The religious debates during the constitutional convention divided along north and south sectionalism, with southern Colorado characterized by more religious, particularly Catholic, delegates. Religious sectionalism has hardly subsided in Colorado since its founding. Indeed, it experienced resurgence in the 1980s. Dozens upon dozens of national and international ministries began to flock to Colorado Springs during this period. Colorado Springs is a well-known center of Religious Right organizations and activism, including Focus on the Family and the Center for Family Values. *U.S. News and World Report* called Colorado Springs the "Vatican of evangelical Christianity."[14] This influx of Religious Right organizations and members into Colorado Springs has left its imprint on Colorado politics ever since.

In 1984 Coloradans amended their constitution to ban the public funding of abortions, and thus the values of religious conservatives continued to shape Colorado's politics in the twentieth century (Article V, Section 50). Subsequently, this constitutional amendment was found to violate federal

12. Nicholas Johnson, Carol Hedges, and Jim Zelinski, *Colorado's Fiscal Problems Severe and Are Likely to Continue,* Policy Report (Washington, D.C.: Center on Budget and Policy Priorities, 2004), 10.

13. Lorch, *Colorado's Government,* 18.

14. Jim Impoco, "Fatigue on the Right," *U.S. New and World Report,* October 23, 1995.

Medicaid law that Colorado is compelled to comply with as a condition of participation in the federal Medicaid program.[15]

An additional example of the influence of the ideological Right on the Colorado Constitution may be found in the 1992 bill of rights amendment to the constitution to prohibit protected status based on homosexual, lesbian, or bisexual orientation (Article II, Section 30b). The amendment sought to repeal local ordinances in Denver, Boulder, and Aspen that were intended to protect persons who are homosexual, lesbian, or bisexual in orientation and to prevent the passage of such ordinances in the future. This amendment prohibiting protected status was subsequently found by the U.S. Supreme Court to violate the U.S. Constitution.[16]

However, just as early Colorado did not have a monolithic political culture—witness the debate between the more Catholic and conservative southern portion of the state and the rest of the state on the subject of whether God should have a role in the preamble to the constitution—today's political culture is just as wide-ranging in the state. Although religious conservatives play a strong role in state politics and have had successes in passing amendments to the constitution, liberals in the state have had notable influence on Colorado's political culture as well. Boulder, a liberal and countercultural mecca since the 1960s, provides the counterpoise to Colorado Springs's religious conservatism.[17] Boulder is home to the fully accredited Buddhist university Naropa University, which offers degrees in contemplative psychotherapy, somatic psychology, and transpersonal psychology. In 1974 Allen Ginsberg and Anne Waldman created the Jack Kerouac School of Disembodied Poetics at Naropa. The Boulder City Council more recently passed a city ordinance that pet owners should be called "guardians." It has similarly protected pigeons. Furthermore, Boulder has declared itself a nuclear-free zone, passes foreign policy resolutions, and passed a resolution opposing the USA PATRIOT Act and affirming commitment to human rights. Since the 1970s, Boulder has passed stringent growth limits in terms of new housing development, requirements for green space, limits on the number of employees businesses can employ, and a fifty-five-foot height limit on buildings. Although Boulder may be the center of Far Left politics in the state, Denver secured itself a place in the national spotlight in 2003 for a noticeably Far Left proposal by a former transcendental meditation teacher. He collected enough signatures to put a proposal on the November 2003 ballot to reduce stress in the city by requiring the

15. See *Hern v. Beye,* 57 F.3d 906 (1995).

16. *Evans v. Romer,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

17. Burt Hubbard, "Liberal History a Short One: Boulder Is a Former Bastion of Prohibition and Key H-bomb Site," *Rocky Mountain News,* October 12, 2003.

city council to defuse political, religious, and ethnic tensions worldwide. It failed by a two-to-one margin. However, in 2005 Denver passed by 54 percent a ballot issue legalizing possession of one ounce or less of marijuana for those over the age of twenty-one.[18]

An analysis of the constitution, however, shows that the regional liberal bastions—Boulder and Aspen—have not been as successful in the past thirty years at influencing the constitution as they have been in injecting their ideology into local ordinances. One of the more notable recent liberal amendments to the constitution allows the medical use of marijuana, passed by initiative (Article XVIII, Section 14). The Colorado Constitution authorizes a patient or a doctor who has been issued a Medical Marijuana Registry identification card to possess no more than two ounces of a usable form of marijuana and not more than six marijuana plants, with three or fewer being mature flowering plants that are producing a usable form of marijuana. Patients with debilitating conditions as described in the constitution may apply for the authorization to possess and use marijuana. Colorado is among a minority of states that allow medical use of marijuana. It remains a federal offense but has not been locally prosecuted when use falls under medical marijuana protections. This change to the constitution, though liberal, has limited ramifications for Colorado politics and certainly does not have the procedural, structural, and compounding effects of conservative-backed amendments such as the Taxpayer's Bill of Rights.

Dual Concerns: Industry and Environment

From the founding of Colorado, mining was a major industry that shaped economic development and a way of life, and it was addressed explicitly in the constitution in Article XVI. Section 1 of Article XVI provides that "there shall be established and maintained the office of commissioner of mines, the duties and salaries of which shall be prescribed by law." Additionally, the legislature should ensure that mining and metallurgy are taught "in one or more of the institutions of learning under the patronage of the state" (Article XVI, Section 4). Mining jobs and prospecting brought many settlers to Colorado and resulted in the development of the Front Range cities, including cities such as Denver, and the development of mining towns and settlements throughout the Colorado Rocky Mountains.

As important as mining was as a way of life and as a major industry shap-

18. Karen E. Crummy, "Foes of Stress-Cutting Initiative Can Relax," *Denver Post,* November 5, 2003, A1; Associated Press, "Denver Voters OK Marijuana Measure," November 2, 2005.

ing Colorado at its founding, the original Colorado Constitution placed limits on the conduct of this industry. Article XVI, Section 2, prescribed that the legislature should provide for general occupational health and safety in the mines. It prohibited the employment of children, predating federal legislation and most state legislation prohibiting child labor.[19] "The general assembly shall provide by law for the proper ventilation of mines, the construction of escapement shafts, and such other appliances as may be necessary to protect the health and secure the safety of the workmen therein; and shall prohibit the employment in the mines of children under twelve years of age."

Although mining was a major industry competing with the preservation of the forested mountains, the people of Colorado seemed to understand from the beginning that its forests should be preserved for the benefit of the public. The beauty of the land of Colorado, including the spectacular Rocky Mountains that cover nearly two-thirds of the state, has been the inspiration for both national songs and a beloved state identity.[20] Furthermore, those forests and public lands help to support the major industry of tourism in the state. The original constitution vests the general assembly with the duty of "enact[ing] laws in order to prevent the destruction of, and to keep in good preservation, the forests upon the lands of the state, or upon lands of the public domain, the control of which shall be conferred by Congress upon the state" (Article XVI, Section 6). A subsequent amendment to the constitution in 1993 provides a special program titled "Great Outdoors Colorado," funded by the Colorado lottery, meant to protect public lands (Article XXVII). Colorado stands unique in dedicating its lottery to environmental preservation of public lands, with most states choosing to dedicate lottery proceeds to education or the general fund. This program provides for preservation of all lands in Colorado, not just specifically forests. "The people of the State of Colorado intend that the net proceeds of every state-supervised lottery game operated under the authority of Article XVIII, Section 2 shall be guaranteed and permanently dedicated to the preservation, protection, enhancement and management of the state's wildlife, park, river, trail and open space heritage, except as specifically provided in this article. Accordingly, there shall be established the Great Outdoors Colorado Program to preserve, protect, enhance and manage the state's wildlife, park, river, trail and open space heritage" (Article XXVI, Section 1). Funds are held in trust by constitutional mandate under this article (Article XXVI, Section

19. The Fair Labor Standards Act, 1938, for the first time explicitly limited child labor, although many state legislatures began banning child labor during the Progressive Era.

20. Katharine Lee Bates wrote "America the Beautiful," inspired by a visit to Pikes Peak in Colorado in 1893.

2). According to the directive, these funds are to remain inviolate and are to be held in addition to any other funds or appropriations for preservation of public lands in Colorado (Article XXVII, Sections 4 and 8). Industry and environmental concerns continue to compete for influence in Colorado politics.

Democratic Reforms

Perhaps the most striking features in the Colorado Constitution are the ones designed to limit governmental power. These reforms, many first spurred as part of the Progressive and Populist Movements, were designed to place more control in the hands of citizens and limit the power of perhaps corrupt legislatures and narrowly interested big-business influence on legislative agendas. The first state to pass democratizing reforms was South Dakota in 1898. Colorado soon followed, in 1910.[21] That era brought the referendum, initiative, and recall to the Colorado Constitution. The early 1990s brought terms limits to the constitution and TABOR. Both were made possible by the earlier democratizing reforms placing greater control in the hands of voters.

TABOR, or the Taxpayer's Bill of Rights, one of the most far-reaching and democratizing amendments to the Colorado Constitution, was enacted through the initiative method. TABOR now drives budgetary and consequently public-policy decision making in the state of Colorado.[22] TABOR was passed as an amendment to the constitution in 1992 (Article X, Section 20).

This constitutional amendment states that its purpose is to restrain the growth of government (Article X, Section 20.1). That restraint on growth is accomplished in a number of ways. Existing limits on taxation may be weakened only with voter approval. Thus, any tax increase or any other revenue-raising method for existing programs at any level of Colorado government—including special districts such as fire departments, school districts, municipalities, counties, and the state itself—must face voter approval. Second, when revenue limits are exceeded, refunds are issued to the taxpayers. Excess revenue never stays in Colorado's coffers. Third, voters must approve new taxes for any new project or program. Finally, there are formula limits, or ceilings, to annual increases in state spending. "The maximum annual

21. Daniel A. Smith, *Tax Crusaders and the Politics of Direct Democracy* (New York: Routledge, 1998), 5.

22. For a comprehensive analysis of TABOR's impacts, see the nonpartisan publication *Ten Years of TABOR: A Study of Colorado's Taxpayer's Bill of Rights* (Denver: Bell Policy Center, 2003).

percentage change in state fiscal year spending equals inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991. Population shall be determined by annual federal census estimates and such number shall be adjusted every decade to match the federal census" (Article X, Section 20.7a). Thus, programs cannot grow faster than the population growth rate plus the inflation rate. This growth-plus-inflation ceiling formula for budget increases cannot be breached even to recover programs and spending levels after a recession or to meet costs that outpace inflation, the most notable example being health care costs.

Perhaps the most constraining aspect of TABOR that is unmatched by any other state is its "ratcheting" effect. When revenue falls, as in a recession, revenue is permanently ratcheted down to those recessionary levels and cannot be raised again to rebound with the economy without explicit voter approval. Furthermore, there is no automatic mechanism to elicit voter approval. Postrecessionary budget restoration may be sought by the legislature only through a referendum or by the people only through an initiative. So revenue limits are set at the recessionary level for subsequent years and remain constrained by the inflationary growth-ceiling formula unless a change, an increase, is actively sought. Thus, TABOR strictly limits state revenue in that it does not respond to economic cycles. When the economy improves and revenues increase, those increased revenues are refunded to the public as tax refunds—Coloradans get checks in the mail—and the programs remain cut. Because of this ratcheting provision, TABOR is perhaps the most draconian of all similar growth-control and tax-control provisions found in other states. As evidence of the problems the "ratchet" creates, no states pursuing TABOR-like provisions in the 2005 election cycle included the "ratchet" in their proposals to voters.

Furthermore, TABOR contains strong enforcement provisions. "Individual or class action enforcement suits may be filed and shall have the highest civil priority of resolution." Additionally, although citizen plaintiffs are "allowed costs and reasonable attorney fees," the state is not unless the suit is ruled frivolous (Article X, Section 20). Colorado citizens exert more power over revenue decisions at the state and local levels than perhaps citizens of any other state.

Dangerous Democracy

The mechanisms in place in Colorado government that are meant to limit governmental power and increase democratic control have resulted in Colorado's constitution functioning in a significantly hamstrung fashion

and have provided the avenue for a tyranny of dueling minorities—the Far Left and the Far Right—with the Right enjoying many of the latest successes on the state level. Many would argue that these democratizing reforms have not served the people of Colorado well and that most people in Colorado remain unaware of what term limits and TABOR have meant for governing, budget, and programs in Colorado other than the fact that voters have fairly regularly received refund checks in the mail at tax season. Legislators from both sides of the aisle and the Republican governor have complained that they are unable to make fiscal policy for the state.

Subsequent to TABOR's passage in 1992, Coloradans met their first recession and budgetary shortfall in fiscal year 2000–2001. It is this recession and the years of subsequent recession that have revealed the problems created by the TABOR constitutional amendment. In 2000–2001, the Colorado state budget was more than one billion dollars short. Under TABOR, that one billion–dollar shortfall means a permanent ratchet downward of one billion for the state that will never be restored. Each subsequent year of recession further permanently ratchets down the state budget.

Further complicating Colorado's budget is Amendment 23, passed by the voters. Meant to protect K–12 education from TABOR's chopping block, it mandates regular increases to K–12 funding each year. Thus, combined with TABOR's requirements, all other programs can only shrink. Fiscal year 2001–2002 brought another shortfall to the already ratcheted-down 2000–2001 levels. Further ratcheting from the already depressed 2000–2001 level occurred as required by TABOR. Amendment 23 brought increases to K–12 education and concomitant reductions to other unprotected programs. Again in each subsequent year during the recession, the state budget has continued to be ratcheted down based on the previous year's already ratcheted-down budget levels and has been further constrained by the mandated increases to K–12 educational funding.

Thus, a hamstrung budget has been made even more damaged through conflicting constitutional voter mandates, one from the Right and one from the Left. These two provisions—TABOR and Amendment 23—work together to ensure that each year K–12 educational budgets increase only by taking funding from other programs. The onset of the first recession since the passage of TABOR has placed many state programs in crisis, as the state labors to continue existing programs under the constitutionally voter-mandated and conflicting budget priorities. Most federally mandated funding has been cut as much as possible. Lawmakers have turned to nonmandated funding to find places to cut and meet TABOR's requirements.

Furthermore, recessions bring increased program demands to many programs such as Medicaid and Human Services, with rising caseloads and costs. However, TABOR does not take into account increased demand from

the existing population, only population increases. Moreover, TABOR does not take into account program cost increases that outpace inflation. Increases in the budget may be achieved only through the formula of population increase plus inflation. Therefore, Medicaid and Human Services, along with a host of programs such as prenatal health and childhood immunization, have been cut to the bone or eliminated. One measurable result has been regular outbreaks of whooping cough, or pertussis, in several Colorado counties. Colorado has the lowest rate of childhood immunization in the country. Thirty-seven percent of its children are underimmunized.[23] Immunization rates dropped a precipitous 15 percent in 2002. The proportion of low-income persons enrolled in Medicaid is lower than in all but five other states. Colorado dropped from twenty-third to forth-eighth in prenatal-care access.[24]

Colorado higher education reached budgetary crisis levels by fiscal year 2004–2005. Higher education is the largest portion of the state budget unprotected by federal program mandates or by special protections like Amendment 23, and it received the largest cuts. Additionally, tuition levels had been kept low for years because tuition increases counted as increased state spending under TABOR and were not allowed unless balanced out by spending reductions elsewhere or by refunds to taxpayers. General appropriations for higher education reached their lowest level in more than twenty years. Colorado ranks forty-eighth in the amount of state tax devoted to higher education as a proportion of state personal income. By 2005 state support for community colleges declined to 1998 levels, despite increased enrollments. Now most funding for colleges consists of nonpublic dollars, or tuition and fees.[25] In response to the crisis that developed, in 2004 the general assembly allowed all state colleges and universities to become enterprises, defined as a government-owned business. This allowed colleges and universities to circumvent TABOR requirements, opening the door for higher education perhaps to be able to survive ever-shrinking funding. Under enterprise status, the enterprise must receive less than 10 percent of its revenue from state and local governments. All but two state-funded colleges chose enterprise status. Students were given a voucher of twenty-four hundred dollars per year beginning in fall 2005.

According to the Center for Budget and Policy Priorities, the state of Col-

23. See the National Immunization Survey, table 72, http://www.cdc.gov/nchs/data/hus/tables/2003/03hus072.pdf.

24. Bell Action Network, the Bell Policy Center, "TABOR and Public Services," TABOR Briefs, March 10, 2005, http://www.thebell.org.

25. Ibid.

orado dropped to forty-eighth in state funding for higher education.[26] Colorado colleges and universities have limited options in their efforts to compensate for lost state revenue. One option is the admitting of more out-of-state students, with their higher tuition rates, while displacing Colorado students. The most viable option, however, has been simply to pass along the cost of higher education to the students themselves through tuition increases. For example, the University of Colorado increased its tuition by 24 percent in 2005.[27] Students returning to the Boulder campus in the fall of 2007 saw yet another tuition increase of 14.6 percent.[28] Similarly, in June 2007, Colorado State University increased its tuition by 17 percent.[29]

Transportation was hit similarly hard, as it is a major nonmandated portion of the budget. By 2005 Colorado ranked forty-fourth in highway spending based on spending per mile of highway in poor condition.[30] Seventeen percent of bridges were deemed unsafe and in need of repair. More than 40 percent of its major roads were classified in poor or in mediocre condition.[31]

Colorado's budget and programs were entering uncharted waters by 2005 under the effects of the ratchet and the constitutionally created permanent recession. Even as the economy was expected to rebound, over the next five budgets nearly $2 trillion was expected to be refunded to taxpayers because of the requirements of the permanent ratchet downward of the state budget.[32] By 2005 more than 56 percent of business leaders in Colorado felt that the state's fiscal situation was critical or very critical, and 70 percent thought so for higher-education funding.[33]

Under these conditions, voters passed a temporary solution to TABOR in the November 2005 election. Referendum C, a compromise reached by a Republican governor and a newly elected legislature now in Democratic control for the first time in forty-four years, provides a five-year timeout from the constitutional requirements of TABOR. Passed by voters by 52 percent,

26. See http://www.cbpp.org/ssl-series.htm.

27. Susan C. Thomson, "Is It a Shell Game? Colorado's Controversial New Way of Handing Out Its Higher Education Money," *National Cross Talk* (Winter 2007): 3–5.

28. Berny Morson, "University of Colorado Students Get Tuition Increase," *Rocky Mountain News* (Boulder), June 28, 2007.

29. Associated Press, "CU Considers 14.5 Percent Tuition Increase," *Summit Daily News* (Frisco, Colo.), June 27, 2007.

30. Bell Action Network, the Bell Policy Center, "TABOR and Public Services," n.p.

31. American Society of Civil Engineers, "Infrastructure Report Card," http://www.asce.org.

32. Jim Zelinski, "The 04–05 Budget for Colorado: A Preliminary Study," *Colorado Fiscal Policy Institute* 4 (2004).

33. "TABOR and Public Services."

it specifically earmarks refunds that would have gone to taxpayers for five years to specific projects such as higher education, health care, and transportation. It is projected to cost each taxpayer approximately $450 over a five-year period, money that would have been refunded under TABOR, and was expected to raise $3.7 billion dollars in revenue.[34]

Critically, however, it is a temporary solution. Colorado's constitution remains unchanged by Referendum C's passage. Coloradans will likely face a similar crisis in the future until voters reject and strike from the constitution the ratchet effect and the collision of the ratchet effect with Amendment 23. That sort of solution was not placed before the voters in 2005, with the state facing a fiscal crisis, because it was not predicted to be able to win voter approval. Though most of the public and most of its representatives in Colorado supported Referendum C, a long-term solution would be very hard won. The ratchet continues to receive support from the most ardent tax-opposing conservatives and libertarians who wish, for instance, to see greater successes for privatization in areas such as health care, higher education, and transportation. Notably, however, Referendum C forced a split among Republicans and conservatives, with the Republican governor and the conservative Chamber of Commerce supporting Referendum C. The question remains whether voters are sufficiently informed of these complex budget issues and their ramifications for what may be considered mainstay programs and the economic development and infrastructure of the state.

Conclusion

Direct democracy was not a part of U.S. constitutional design. Coloradans have significantly redesigned their constitution in such a way as to maximize the influence of direct democracy and all its attendant pathologies, including perhaps manipulation by special and narrow interests manufacturing voter approval for little-understood measures on complex budgetary issues. Colorado has always had actively conservative and liberal interests since its founding as a state. Those differences in themselves do not present unmanageable problems for Colorado. Constitutional design can achieve a moderating influence on such differences. Constitutional design features can elicit compromise or can allow greater local control as a means to address differences rather than allowing the current dueling minorities at the state level. Constitutional design can help to achieve rationally planned legislation, prevent amplification of narrow interests, develop experienced

34. As of December 2006, the revenue projection was increased to $5.7 billion (Bell Policy Center, http://www.thebell.org/issues/fiscal/RefC.php, n.p.).

leadership within government to handle complex planning issues, and ultimately achieve moderation and the public good. Under the current constraints, a well-functioning constitution in Colorado appears possible to achieve only through the democratic reforms that have radically altered its processes, policies, and government.

IDAHO

DENNIS C. COLSON

The Constitutional Idahoan

Idaho Electors and Their Way of Life

Professor Donald S. Lutz thought a great deal about state constitutions and their place in the American constitutional tradition. Lutz was most interested in the feature-length-film view of state constitutions. He studied the constitutional documents from the colonies and states that preceded and spawned the U.S. Constitution and the political pamphlets and newspapers discussing those documents. He found in these documents what he called the "origin of American constitutionalism." He concluded that all of the great principles in the federal constitution—sovereignty in the people, federalism with dual citizenship, separation of powers, bicameralism—found their first expressions in the state constitutions. The U.S. Constitution "stands at the apex of American tradition," but it also is "most like an evolved version of state governments."[1]

Lutz found that the American constitutional tradition necessarily included both the state and the federal constitutions. The state constitutions are "referred to directly or by implication more than fifty times in forty-two sections of the U.S. Constitution."[2] The federal constitution was "*by design* an incomplete document"; it did not define who was entitled to vote or a "way of life," two of the most important functions of a constitution. Instead, under the federal design, "each state would be left to define its own way of life,

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1. Lutz, ed., *Documents of Political Foundation Written by Colonial Americans* (Philadelphia: Institute for the Study of Human Issues, 1986); Lutz and Charles S. Hyneman, eds., *American Political Writing during the Founding Era* (Indianapolis: Liberty Press, 1983); Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 3, 159.

2. Lutz, *Origins of American Constitutionalism,* 2.

thus preserving local control over this critical aspect of politics and permitting diversity in constitutional morality to reflect the diversity of the nation."[3]

What can be learned by looking at Idaho's constitutional experience through the lens of Professor Lutz? Who is the Constitutional Idaho? Who is the Idaho citizen, and what way of life does that citizen envision? Two important pictures emerge from the Idaho experience. The first is that the Idaho citizen is much like the citizen in every other state. Today's federal constitution is not as incomplete as the original plan. The power to define citizenship has gradually moved from the states to the federal government, while at the same time the definition has become more universal. The second picture that emerges is a constitutional morality or way of life that is more distinctive. The central character in the Idaho Constitution is a law-and-order populist taxpayer engaged in the complete development of the material resources of the state.[4] This character evolved within the structure established by the founders of Idaho in the Idaho Constitution.

If one sought a state example to support James A. Gardner's thesis that states lack self-identity and independent constitutionalism, Idaho would be a good choice.[5] "If anyone had given thought to Idaho's natural circumstances, neither the territory nor the state would have been created. Idaho was not created with forethought, but rather by historical circumstance and accident." During the constitutional convention the delegates "shared a desire for a constitution that would create a state where none existed [while] [a]t the same time, each delegate had the interests of his constituents in mind and . . . soon discovered that they had many differences." To their collective credit, although the "delegates did not resolve these differences, they

3. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982), 27, 38, 41.

4. Donald Crowley and Florence Heffron see the Constitutional Idahoan differently, instead defined by a "belief in rugged individualism and a basic distrust of government." As evidence of a belief in rugged individualism, they point to "a lengthy declaration of individual rights." The declaration of rights article does contain three sections of extraordinary length; however, each of those sections qualifies or takes away individual rights. Section 4 limits religious liberty, Section 7 limits the right to a jury trial, and Section 14 authorizes the private use of eminent domain at the expense of private property ownership. As evidence of a basic distrust of government, they point to "lengthy articles detailing limits on the powers of all levels of government." Articles VII and VIII are the articles with lengthy limitations. But the limitations are not generally on the powers of government; they are instead limitations on the taxing power of government. Crowley and Heffron, *The Idaho State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press 1994), 20.

5. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90, no. 4 (1992): 761–837.

did establish legal and political institutions for reaching decisions about them."[6]

The Idaho Elector

Professor Lutz was more interested in the two hundred years preceding ratification of the U.S. Constitution than the two hundred years following it. Whereas under the 1787 constitutional scheme states did define who should be considered a citizen, under the 2005 constitutional scheme the national government defines who will be a citizen of the state. The history of the transition in Idaho is the history of the transition in every state.

The 1863 Organic Act of Idaho Territory provided that "every free white male inhabitant above the age of twenty-one years" could vote in the first election and that the qualifications of voters for subsequent elections would be prescribed by the legislative assembly.[7] The first territorial legislature followed the cue in the Organic Act and restricted the right to vote to white males.[8] The Fifteenth Amendment requiring that the right to vote not be abridged because of race, color, or previous condition of servitude was ratified in 1870, and in 1874 the legislative assembly deleted the requirement that voters be white.[9]

Although Idaho defined suffrage in reaction to the Fifteenth Amendment, it was one of the states that precipitated the Nineteenth Amendment, which guaranteed that suffrage could not be denied on account of sex, ratified in 1920.[10] The 1889 constitution permitted women to vote and hold office in school elections (Article VI, Section 2). An 1896 amendment extended the definition of electors to generally include "female citizens."[11]

The 1889 constitution not only defined who could be an elector but also prohibited a broad array of groups from being electors. The groups excluded were: (1) those who were under guardianship, "idiotic," or insane; (2) those who were confined in prison and those convicted of treason, felony, embezzlement of public funds, buying or selling votes, or other infamous crimes whose full citizenship rights had not been restored; (3) those who

6. Dennis C. Colson, *Idaho's Constitution: The Ties That Bind* (Moscow: University of Idaho Press, 1991), ix, 6.

7. Section 5; 12 Stat. L. 808.

8. *1864 Idaho Session Laws* (Lewiston, Idaho: James A. Glascock, 1864), 560.

9. *1874–75 Idaho Session Laws* (Lewiston, Idaho: James A. Glascock, 1875), 684.

10. U.S. Constitution, Amendment 19, Section 1: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."

11. SJR no. 2, *1895 Idaho Session Laws* (Lewiston, Idaho: James A. Glascock, 1895), 232.

practiced bigamy or polygamy (patriarchal, plural, or celestial marriage), those who taught or counseled bigamy or polygamy, and those who belonged to an order or organization that taught or encouraged bigamy or polygamy; (4) persons of Mongolian descent who were not born in the United States; and (5) Indians not taxed who had not severed their tribal relations and adopted the "habits of civilization" (Article VI, Section 3).

Nearly all of these prohibitions have disappeared over the years. The prohibition against Indians was removed in 1950,[12] the prohibition against those of Mongolian descent in 1962,[13] and the prohibition against bigamists and polygamists in 1982.[14] The prohibition against those who were idiotic or insane was removed in 1982 as well, and the prohibition against those under guardianship in 1998.[15] The prohibition against those who have committed crimes was redefined in 1982 to include those convicted of a felony and those confined in prison; this prohibition is the only one remaining in today's constitution.

Idaho most recently amended the constitutional definition of who is qualified to vote by lowering the age from twenty-one years to eighteen. The Twenty-sixth Amendment lowering the voting age to eighteen was ratified in 1971. A proposal to amend the Idaho Constitution was passed in 1971,[16] but repealed and recalled in 1972.[17] The amendment was eventually passed in 1982.[18]

One of the most common and striking themes of the various amendments (after the Bill of Rights) to the U.S. Constitution is the use of national power to extend the right of suffrage: the Fifteenth (race), the Nineteenth (sex), the Twenty-fourth (poll tax), and the Twenty-sixth (age). As a result, the details vary from state to state, but the story repeats itself, and those constitutionally entitled to cast a vote at an Idaho booth look much like every constitutional voter in the land.

Law-and-Order

Whereas the constitutional voter in Idaho has changed significantly in the past century, much of the constitutional morality or way of life in the 1890 constitution remains. Idaho's founders generally drew heavily from the con-

12. HJR no. 2, *1949 Idaho Session Laws* (Boise: Secretary of State, 1949), 597.
13. SJR no. 1, *1961 Idaho Session Laws* (Boise: Secretary of State, 1961), 1073.
14. HJR no. 7, *1981 Idaho Session Laws* (Boise: Secretary of State, 1981), 777.
15. SJR no. 105, *1998 Idaho Session Laws* (Boise: Secretary of State, 1998), 1361.
16. HJR no. 1, *1971 Idaho Session Laws* (Boise: Secretary of State, 1971), 1411.
17. HJR no. 80, *1972 Idaho Session Laws* (Boise: Secretary of State, 1972), 1254.
18. HJR no. 14, *1982 Idaho Session Laws* (Boise: Secretary of State, 1982), 932.

stitutions of older states such as New York and western states like Colorado and California, but on occasion they fashioned innovations that better suited their needs. One of those innovations was designed to make the criminal law more efficacious.[19] William H. Clagett, president of the convention, proposed that Idaho abandon the ancient common-law principle requiring juries of twelve and a unanimous verdict to convict, instead authorizing juries with as few as six members and permitting a verdict to be rendered with a majority of the votes.

Some delegates opposed Clagett, arguing that the weak, the poor, the oppressed, and the innocent needed the guarantees of the common law. J. W. Poe declared, "It is a maxim of law that it is better that ninety-nine guilty men should go unpunished than that one should suffer for a crime of which he is not guilty." He concluded with a plea: "I appeal to you in your magnanimity to consider the many thousands who have suffered ignominious death upon the scaffold or who have eked out a miserable existence in the prison cell." Weldon Heyburn agreed. "It is the strong arm of the law that stands between the weak and the strong, between rich and poor, between oppressed and oppressor."[20]

Clagett defended his proposal with Idaho's law-and-order gusto. He explained the origins of the jury trial in England: "The crown was the stronger, and all the safeguards which grew up under the common law were designed for the express purpose of mitigating this strength so that is should not be exercised tyrannically." But things were different in Idaho, and there were "abuses which have grown up under the changed conditions and circumstances of society." The defendant had the benefit of reasonable doubt and double the number of peremptory challenges. Once acquitted, the defendant could not be tried again, the judge had the power to suspend the verdict, and the governor had the power of pardon. Clagett summed it all up: "Now I ask whether all these things . . . do not constitute too much advantage on the part of the defendant, and whether the strong arm of the state . . . whose function is to protect the people, is not paralyzed by this system of unanimous verdict."[21]

19. Idaho Supreme Court Justice Byron J. Johnson wrote, "Freedom and the common welfare were the guiding principles announced by the drafters of the Idaho Constitution in 1889, and remain so today" (Crowley and Heffron, *Idaho State Constitution,* ix).

20. I. W. Hart, ed., *Proceedings and Debates of the Constitutional Convention of Idaho,* 2 vols. (Caldwell, Idaho: Caxton Printers, 1912), 1:242, 153. The original Idaho Constitution was written in 1889. It has been amended on average about once a year but has never been revised. The *Proceedings and Debates* are a verbatim account of the constitutional convention and a uniquely rich source of constitutional history. For a recounting of the convention debates, see Colson, *Idaho's Constitution.*

21. Hart, *Proceedings and Debates,* 250, 151, 252.

In the end Clagett got only part of what he wanted. The section as adopted at the convention created the possibility that unanimous verdicts would not be required: "[The] legislature may provide that in all cases of misdemeanors five-sixths of the jury may render a verdict." The section also created the possibility for juries with fewer than twelve: "In . . . cases of misdemeanor the jury may consist of twelve or of any number less that twelve upon which the parties may agree in open court." The innovation was developed one step further in 1932 when the section was amended to require that in all cases of misdemeanor, "the jury shall consist of not more than six."[22]

Idahoans have manifested their law-and-order principle in other amendments that have been approved. When the Idaho Supreme Court held that a statute mandating minimum sentences unconstitutionally infringed upon the power of the courts to sentence, the constitution was immediately amended to reverse the decision, "provided, however, that the legislature can provide mandatory minimum sentences for any crimes, and any sentence imposed shall be not less that the mandatory minimum sentence so provided. Any mandatory minimum sentence so imposed shall not be reduced" (Article V, Section 13).[23] The original constitution permitted waiver of the right to jury trial "in all criminal cases not amounting to felony"; a 1982 amendment permitted waiver "in all criminal cases." In 1994 a section on crime victims' rights was attached to the declaration of rights in Article I.[24]

President Clagett thought there existed "too much advantage on the part of the defendant" and wanted a constitution where "the strong arm of the state . . . whose function is to protect the people, is not paralyzed." Clagett claimed the public demanded better law enforcement, because under the current scheme, "term after term and year after year goes by without any practical enforcement of the criminal law, until crime multiplies and criminals increase to such an extent that the whole people rise up . . . in a revolutionary movement." He criticized the lawyers who opposed him: "I have seen all of these same old, ancient stick-in-the-bark legal propositions and sacrifices of substantial justice to mere legal technicality." Because of those lawyers, there was "a widespread conviction throughout the United States that the legal profession itself . . . constitutes one of the things that needs the greatest reformation."[25] The arguments of President Clagett can still be heard to echo distinctly in Idaho's constitutional life.

22. SJR no. 6, *1965 Idaho Session Laws* (Boise: Secretary of State, 1965), 952.

23. HJR no. 6, *1978 Idaho Session Laws* (Boise: Secretary of State, 1978), 1032.

24. SJR no. 112, *1982 Idaho Session Laws,* 931; HJR no. 16, *1994 Idaho Session Laws* (Boise: Secretary of State, 1994), 1498.

25. Hart, *Proceedings and Debates,* 249, 154.

Populist

Popular government has perhaps been an even more prominent principle in the Idaho Constitution than law and order. The Constitutional Idahoan wants to elect as many government officials as possible and wants to elect them as often as possible. For the state government, there are at least 90 but not more than 105 members of the legislature to be elected (Article III, Section 2), 7 executive officers (Article IV, Section 1),[26] 5 supreme court justices (Article V, Section 1), a number of district judges fixed by the legislature (Article V, Section 11), and a clerk of the district court for each of the counties (Article V, Section 16). For each county government, there are 3 county commissioners (Article XVIII, Section 10) and 4 additional officers (Article XVIII, Section 6).[27] In the beginning, all terms in the counties, the executive branch, and the legislative branch (including members of the senate) were two years. The pace of elections slowed a bit when the terms of county commissioners (1934) and the executive officers (1944) were extended to four years. District judge and clerk terms have been four years and supreme court justice terms six years from the beginning.

Although these numbers speak for themselves, the debate concerning selection of supreme court justices at the 1889 convention elaborated the philosophy underlying the selection process. The Judiciary Committee was evenly split on the question: six favored appointment, and six favored election. John Morgan, a strong proponent for elections, reminded the convention of the origins of judicial elections: "Under the original system as it was in England many years ago, everybody was appointed by the crown, and they were the servants of the crown; and in order to get rid of this tyranny and despotism the system of election was invented and was adopted." Willis Sweet testified that the people of Idaho "would absolutely demand of this convention the right to select their own judges. . . . They claim the right to elect every officer that governs them by themselves; and that is a right they are going sooner or later to have for themselves, from president to constable." Although the Judiciary Committee was uncertain whether justices should be elected or appointed, the convention had little doubt. The final vote was thirty-six for election and seven for appointment.[28] After forty years of experience selecting justices, Idahoans decided in 1934 that they

26. Governor, lieutenant governor, secretary of state, state controller, state treasurer, attorney general, and superintendent of public instruction.

27. Sheriff, county assessor, county coroner, and county treasurer (who is also ex-officio public administrator).

28. Hart, *Proceedings and Debates,* 151 (Morgan), 1503 (Sweet), 1519–20.

wanted popular but not partisan elections, and amended the constitution to provide for nonpartisan elections.[29]

The Idaho Constitution has been amended on average one time a year, but there has been only one attempted revision. Reformers in the 1960s proposed to modernize the Idaho Constitution by creating a "short ballot," meaning that the governor and lieutenant governor would be elected from the same party, and the attorney general, comptroller, supreme court justices, district court judges, and others would be appointed. When the question was put to the voters on November 3, 1970, 66 percent voted against the amendment. Idahoans take seriously the second section of their constitution that proclaims, "All political power is inherent in the people."

Taxpayer

No person is more favored by the Idaho Constitution than the taxpayer. An "Address to the People" prepared by the constitutional convention assured Idahoans that "the business and tax-paying portion of our people was especially prominent and watchful of every interest of vital concern." The convention had written a constitution under which many county officials—such as sheriffs, auditors, recorders, probate judges, district attorneys, and district court clerks—were to be paid by the fees charged for their services rather than by a salary funded with tax collections. The delegates were pleased, and announced to the voters: "It affords us great satisfaction to announce to the taxpayers of Idaho that the aggregate cost of the state and county governments under the proposed constitution will be $55,290 less annually than under the present territorial government."[30]

Although the fees-instead-of-salaries scheme did not last long, a number of other constitutional provisions safeguarding taxpayer interests remain prominent in today's constitution. Article VII provides a system of finance and revenue to pay for the current operations of the state government. Expenditures in any fiscal year cannot exceed tax revenues. Property, license, and per capita taxes are authorized, to be assessed in a uniform manner. Public property is exempt, and corporate property must be taxed.

Article VIII governs public indebtedness and subsidies, strictly limiting public officials. Maximum debt limits were established. Even more important, no legislature, or county or municipal government, can incur an in-

29. Proposed by SJR no. 2, *1933 Idaho Session Laws* (Boise: Secretary of State, 1933), 469, and ratified at the general election in November 1934.

30. Hart, *Proceedings and Debates,* 2095, 2093.

debtedness to be paid from tax revenues in future years unless the proposal is approved by two-thirds of the voters voting at a special election. This supermajority requirement is a major bulwark protecting the taxpayers' interests.

There were delegates at the convention who opposed these limitations. Edgar Wilson issued a debtor's manifesto:

> As you all know, these western towns cannot grow except by contracting a large indebtedness. There has not been a western town within the last ten years that has increased to any extent unless they incur large indebtedness. I think, as well shown by writers on political economy, that municipal indebtedness is absolutely necessary for municipal prosperity and . . . I make the assertion that with indebtedness the debtors are those who make vastly more wealth.

But in the end, most delegates agreed with Orlando Batten, who sponsored the limitations and urged the delegates to support them: "If we are going to restrict any state or municipal indebtedness, let's restrict it. Let's not do as did Rip Van Winkle when he made a resolution not to drink anything—keep on drinking and say each drink did not count."[31]

Complete Development

The most frequent argument made by the boomers who supported adoption of the Idaho Constitution in 1890 was that it was necessary in order for Idaho to develop its natural resources and prosper. The *Idaho Daily Statesman* in Boise was anxious for statehood because it would give Idaho a voice in Congress, and every congressman from Idaho should know there was "such a public sentiment here at home as will compel every man, by whatever party elected, to vote, first, last, and all the time, for IRRIGATION, SILVER AND LEAD, the three pillars of Idaho prosperity."[32]

The constitutional commitment to natural-resource development can be seen in several provisions. For example, "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes" (Article XV, Section 3). However, nowhere is the commitment for natural-resource development more visible than in the power of eminent domain created by the convention, which empowers private

31. Ibid., 595, 589.
32. *Idaho Daily Statesman,* September 21, 1889, 4, cols. 1–2.

property owners to take their neighbor's property if necessary for development: "The necessary use of lands [for irrigation and mining] or any other use necessary to the complete development of the material resources of the state . . . is hereby declared to be a public use" (Article I, Section 14).

Centuries of common law had gradually put limits on the power of eminent domain. One of the important limitations was that private property could be taken only for a public purpose. The Idaho convention was proposing a radical departure from the traditional limitation, at the expense of private property ownership. Proponents of the departure argued that it was required by necessity. William Clagett argued, "This provision . . . is absolutely necessary, unless we want to leave the whole domain of this state practically undeveloped." Drew Standrod agreed. "This country has got to be irrigated. A man has to have his ditches and flumes in order to procure water." John S. Gray summarized the argument: "I think the law must yield—even the stubbornness of the law must yield, for the necessities of a country like this."[33] The convention agreed, and a private right of eminent domain for "the complete development of the material resources of the state" was created.

Constitutional Idahoans

The 1889 Constitutional Idahoan was created by a relatively small group of Idaho electors, men twenty-one years of age and older, excluding polygamists, the Chinese, and Indians. By comparison, the group of electors today is broad and inclusive. Even though Idaho electors have been radically redefined since 1889, the Idaho constitutional way of life remains largely unchanged. You can find in the statutes mandatory sentencing and a forty-two-day limitation on appeals of the death penalty. Term limits are popular because they make possible elections of even more candidates more often. The annual legislative session kicks off with a meeting of the Idaho Association of Taxpayers, and public school bonds supported by 60 to 65 percent of the votes cast regularly fail. The Snake River Basin Adjudication is allocating nearly every drop of water in the state to some 150,000 claimants in order to ensure complete development. You can meet a law-and-order populist taxpayer developing material resources on any street corner or at the intersection of any country road in Idaho. Given his studies, Professor Lutz would not be surprised at the meeting, and no doubt would enjoy being there and getting to know the Constitutional Idahoan.

33. Hart, *Proceedings and Debates,* 296 (Clagett and Standrod), 299 (Gray).

GEORGE E. CONNOR

Montana

Community Denied, Constitutionalism Delayed

Perhaps more than most states, Montana deserves the descriptive hyperbole that it engenders. Arguing for Montana statehood before Congress, Joseph K. Toole described a territory "measured by the grandeur of its mountains, the fertility of its valleys, the majesty of its rivers, the splendor and utility of its waterfalls, the richness of its mines, the number and value of its herds and flocks, the wealth and destiny of its forests, [and] the health and vigor of its climate." Reflecting on the impact of this geographic grandeur on its citizens, Congressman Pat Williams maintained that Montana, "the place, molds its people."[1] The land has mythic proportions that are ascribed to its people. However, Montana's vastness and the diversity of its people actually make it quite difficult to define a political community capable of developing its own distinct constitutional identity. This is especially true during the struggle for statehood and the ratification of the first state constitution accepted by Congress in 1889. It would not be until the constitutional convention of 1972 that Montana's political culture would coalesce around what could be defined as state constitutionalism.

Montana's early constitutional development offers a great deal of support for James A. Gardner's thesis that the annals of state constitutions "are not stories of principle and integrity, but stories of expediency and compromise at best, foolishness and inconstancy at worst." Nevertheless, it is argued here that, as its people and its politics matured, Montana developed a unique constitutionalism. If Montana's founders failed to fulfill the promise of state constitutions in 1866, 1884, and 1889, the drafting and the ratification of the

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1. John Morrison and Catherine Wright Morrison, *Mavericks: The Lives and Battles of Montana's Political Legends* (Moscow: University of Idaho Press, 1997), 23, ix.

constitution in 1972 clearly demonstrated this fulfillment as defined by Donald S. Lutz.[2]

This chapter begins by addressing the diversity of Montana's geography, as well as its early settlers, and the difficulty in identifying the character of all Montanans, the problem of "defining a people." The absence of a common understanding of what it means to be a Montanan made it impossible to define a "way of life" that encompassed "the moral values, major principles, and definition of justice toward which a people aims." Consequently, the Montana Constitutions of 1884 and 1889 failed to adequately define political institutions, establish political authority, distribute political power, and limit government.[3] The chapter concludes with a reexamination of the events leading up to the 1972 constitutional convention and the translation of Montana's unique political culture into its constitution.

Defining Montana

Montana's vast territory and its history of population diversity make defining Montana's political culture difficult. Borrowing a descriptive phrase from Henry David Thoreau, Joseph Kinsey Howard maintains that "Montana is, superlatively, the country of broad physical margins." Perhaps superlatively, the landscape and, consequently, the people are hardly homogeneous, however. At first glance, geography dominates. Clark C. Spence observes that "like the Roman god Janus, Montana faces two ways. The eastern three-fifths is plains country. . . . [T]he western two-fifths is dominated by the sprawling Rockies." The physical description of Montana, or the joining of these two "faces," was the result of the establishment of the Idaho Territory. So, rather than a conscious decision to create the Montana Territory, its creation was the result of an "accident" that can largely be attributed to "the advance of the mining frontier."[4]

Often combining geography with population, there have always been broad-stroke platitudes about Montana's people and its distinctive culture. John Steinbeck thought that the "calm of the mountains and the rolling grasslands had got into the inhabitants." Howard asserts that "the elemental

2. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90, no. 4 (1992): 766; Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988).

3. Lutz, *Origins of American Constitutionalism,* 16.

4. Howard, *Montana Margins: A State Anthology* (New Haven: Yale University Press, 1946), ix; Spence, *Montana: A Bicentennial History* (New York: W. W. Norton, 1978), 3–4; Michael P. Malone and Richard B. Roeder, *Montana: A History of Two Centuries* (Seattle: University of Washington Press, 1976), 71.

values of life in this State . . . have been too often overlooked—space and freedom, sun and clean air, the cold majesty of the mountains and the loneliness of the plains, the gayety of a country dance, the easy friendliness of the people."[5] However, if the landscape refuses easy characterization, so do the early settlers of Montana.

It has been argued that, "like every other state, indeed like every other political community, Montana has a distinctive 'political culture' all its own. This political culture arises naturally from the needs, demands, desires, and prejudices of the people and interest groups residing within its borders." Defining these particular groups more specifically, Howard suggests that by the mid-1880s, Montana had "a political culture of its own, a political culture arising out of the needs and demands of its major economic groupings—industrial miners, stockmen, merchants, lumbermen, farmers, and labor leaders."[6] Contrary to the assertions of Michael P. Malone, Richard B. Roeder, and Joseph Kinsey Howard, however, the diversity of Montana's population did not support a distinctive political culture, "a political culture of its own," in the sense defined by Lutz.

As was noted in the territorial census of 1870, the "first Montanans came from every section of the country." In addition to sectional diversity, Montana's settlement drew from a broad range of the economic strata. This was especially true for the first wave of immigrants, the miners, because mining "tended to draw together a diverse, cosmopolitan population." After the miners came the cowboys and, after the cowboys, the homesteaders. Mirroring the first wave of settlers, "Montana's homesteaders were really an American and western European potpourri." Malone and Roeder suggest that "the glitter of gold first attracted significant numbers of white men to this area, and their coming laid the basis of a community."[7] It is more accurate to say that these first settlers, along with the later homesteaders, laid the basis of distinct "communities" and not a distinct "community."

Rather than establishing a single, coherent vision of values and principles, Montana's culture was defined by a pluralistic whorl of competing interests, with few or, more often, no common elements. In the end, the founders of Montana were left with a political culture that was defined by the absence rather than the presence of a common vision. This lack of a common vision had immediate and direct consequences for the legal, political, and constitutional development of Montana.

5. Steinbeck quoted in Spence, *Montana: A Bicentennial History,* 9; Howard, *Montana Margins,* ix.

6. Malone and Roeder, *Montana,* 288; Howard, *High, Wide, and Handsome* (New Haven: Yale University Press, 1943), 86.

7. Malone and Roeder, *Montana,* 74, 53, 187, 51.

Lack of Constitutionalism

It is abundantly clear that the founding fathers of Montana did not have a robust theory of constitutionalism to accompany their deliberations in 1866, 1884, and 1889. This point is easily, and sadly, demonstrated by the loss of Montana's first constitution after the convention in 1866, "never to be seen again."[8] Although remarkable, the loss is a minor illustration of what would become a defining element of Montana's early constitutional history.

Clearly, the Montana Territory needed more consistent and rigorous law enforcement. "The Hanging of 'Captain' Slade" by Thomas Dimsdale is a ruggedly compelling example of the workings of the People's Courts common in the Montana frontier. According to Malone, "When neither federal nor local law provided order, vigilantism and lynch law raised its head." In an effort to bring much-needed order to the territory, Montana wholly copied or copiously borrowed from other states.[9] This pattern of borrowing from other states continued as an integral component of Montana's constitutional development.

In his critique of New Federalism, James A. Gardner maintains that state constitutional law "lacks a discourse of constitutional distinctness." Perhaps no other state better supports this position than Montana. Ignoring the ill-fated constitution of 1866, the proposed constitution of 1884 is hardly innovative. "When the final constitution was drawn up for signatures, it represented a good deal of scissors-and-paste work: Its preamble came from Massachusetts, its judiciary section mainly from California, other portions from Alabama and Minnesota and probably more from Colorado than from all the rest together."[10] Although this constitution was ultimately rejected by the U.S. Senate, that rejection did not dissuade Montana's founders. During the drafting of the 1889 constitution, here again "the convention blended much of the document drafted in 1884 with the California constitution of 1879 to produce an acceptable compromise which limited legislative power and exalted the executive, but contained safeguards to prevent corruption of both—safeguards which time soon proved ineffective."[11] Ironically, these

8. Ibid., 79. See also Clark C. Spence, *Territorial Politics and Government in Montana, 1864–1889* (Urbana: University of Illinois Press, 1975), 293.

9. Howard, *Montana Margins,* 113–22 (on Dimsdale); Malone and Roeder, *Montana,* 61; Spence, *Montana: A Bicentennial History,* 88.

10. Gardner, "Failed Discourse," 793, 792. See also Malone and Roeder, *Montana,* 147–48; and Spence, *Territorial Politics,* 297–300.

11. Spence, *Montana: A Bicentennial History,* 93. See also Malone and Roeder, *Montana,* 149; and Spence, *Territorial Politics,* 305–7. For all of this constitutional plagiarism, it has been noted that "if benefit was derived from the political and governmental example of older commonwealths, it is not often apparent from reading either the history of Montana or

safeguards to prevent corruption proved ineffective because of the corruption of those who could be called Montana's founding fathers.

Although the list of outsized personalities during Montana's formative years is quite long, three names stand, like the Rockies, above the rest: William Andrews Clark, Marcus Daly, and F. Augustus Heinze.[12] These three men did more than any others to usher Montana into the Union and political adolescence. At the same time, for all they did for the composition and ratification of the early constitutions of Montana, these three men, singlehandedly and in consort, did significant damage to the development of Montana constitutionalism. When Joseph Toole presented his case for Montana statehood before Congress, he passionately described its people: "I know their stern integrity, and rugged honesty, their capacity for local self-government, and their deep devotion to the principles of our institutions."[13] If Toole was correct in his assessment of the people of Montana, then Clark, Daly, and Heinze subverted and corrupted these attributes.

In a classic "rags-to-riches" tale, Clark began life in Montana as a prospector, presided over the 1889 constitutional convention, and became a candidate for the U.S. Senate. With respect to his personal attributes, he possessed a "hard and ruthless ambition." Daly developed the Anaconda silver mine and, in conjunction with Standard Oil, organized the gargantuan Amalgamated Copper Company.[14] Daly, known for his mining prowess, was motivated by self-interest and spite and resorted to intimidation in his personal and political feud with Clark, often labeled the "War of the Copper Kings."[15] Unlike Clark and Daly who focused, at least initially, on the extraction of ore, Heinze made his mark in the Montana mining industry in smelting and the treatment of ore. But like Clark and Daly, it was his personality that made a bigger mark. The specific trait that proved "so valuable to him in Butte, [was] a glaring lack of moral scruples."[16] When they were through, these three men had corrupted Montana's constitutions and state political institutions as well as damaged Montana's political representation in Washington, D.C.

Reminiscent of the lost constitution of 1866, the 1889 constitutional con-

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its constitution" (Thomas Payne, "Montana: Politics under the Copper Dome," in *The Politics of the American West,* ed. Frank H. Jonas [Salt Lake City: University of Utah Press, 1969], 203).

12. A more complete list would probably include Sidney Edgerton, Wilbur Sanders, Benjamin Potts, James Ashley, Thomas Meagher, and Jim Hill.

13. Morrison and Morrison, *Mavericks,* 23. See also Spence, *Territorial Politics,* 303.

14. Malone and Roeder, *Montana,* 153; Howard, *High, Wide, and Handsome,* 55.

15. Malone and Roeder, *Montana,* 160 (self-interest and spite); Spence, *Montana: A Bicentennial History,* 97 (intimidation).

16. Malone and Roeder, *Montana,* 161.

vention began with "wrangling—incredibly—over whether a permanent record of its proceedings should be kept." According to Howard, "Appointment of a stenographer and authorization of the record finally carried by a narrow margin after opponents had employed every conceivable argument against these steps, including the claim that such service was too expensive and posterity wouldn't be interested anyway. Actually, it was only too evident that a good many of them dreaded having their names and positions on certain controversial issues placed in a permanent record."[17] Chief among the items the delegates were avoiding "credit" for was the "net proceeds" tax provision that "exempted unmined ore from taxation."[18] Innocuous-sounding enough, in reality this provision "prevented the legislative adjustment of the levy to the property's increase in value on development." In Howard's view, this was a strategic move on the part of the mining corporations, especially William Andrews Clark, because "if they could fix a constitutional pattern for their future contribution to society, they could make it difficult for future legislatures to increase the levy upon them." Indicative of the pervasiveness of corruption, it has been argued that "it took Montana more than thirty years to undo the work of Clark and his lackeys in this constitutional convention, to force even moderate additional taxation."[19]

Beyond the constitutional convention, these same personalities and interests corrupted state politics. Both Daly and Clark owned newspapers that were "often less concerned with reporting the news than with advancing the interests of its owners." This ongoing battle was evident in the permanent location of the state capital. Moreover, it was said that whereas Clark "tampered with the legislature," Heinze corrupted the courts.[20]

Beyond Montana, on three separate occasions, internal political machinations cost Montana both credibility and representation in Washington, D.C. After gaining statehood, state partisanship boiled over to the point that each party sent two senators to Washington. This was just one of a series of events in which "the legislators raised real doubts about their own integrity."[21] The same internal political strife twice cost Montana one of its seats in the U.S. Senate.

The constitutional and political stage had been set, and the welfare and the interests of the people of Montana were secondary to the economic concerns of the mining companies. "Economic warfare and relentless, bare-

17. Howard, *High, Wide, and Handsome,* 61.
18. Malone and Roeder, *Montana,* 149.
19. Howard, *High, Wide, and Handsome,* 62, 61, 64.
20. Malone and Roeder, *Montana,* 160–61, 164, 172.
21. Ibid., 151.

knuckle politics would dominate the late nineteenth and early twentieth centuries in Montana, as massive shock waves generated in Butte and Anaconda would reverberate throughout the state" and beyond. This pattern of corporate influence continued well into the mid- to late twentieth century.[22]

Bedrock: The Constitution of 1889

Given the political history of Montana outlined above, one should not be surprised by the "essentially 'unstructured' nature of its political system." Correspondingly, the Montana Constitution of 1889 "was enacted more as a tool to achieve statehood than to provide a well-thought-out structure of governance." Nevertheless, the constitution of 1889 did impose some order on the rough-and-tumble political life of the state. The essential elements of Montana's government, like those states from which they were borrowed, are defined by separation of powers and checks and balances. Defining the application of these principles in Montana, the state supreme court noted that the "lodgment of all power in the hands of one body" would result in "tyranny and oppression." At the same time, the court recognized that the separation of powers does not mean that there is "no common link or dependence" among the branches.[23]

As was noted above, the constitution of 1889 borrowed heavily from the 1884 document, although it did make some changes in the legislative branch. Most noteworthy of the basic changes were the extension of the legislative session to sixty days and the enlargement of both the house (fifty-five members) and the senate (sixteen members).[24] Recognizing certain deficiencies in its own organization and foreshadowing later more formal constitutional changes, the legislature made two significant structural modifications under the 1889 constitution. First, the Montana Legislative Council was established in 1957.[25] Surviving serious constitutional challenges at its inception, the council has been described as the legislature's "most useful agency." Second, because the legislative process was described as "conspicuously weak in the area of budget and appropriations," the legislature adopted "executive

22. Spence, *Montana: A Bicentennial History,* 95 (quote); Howard, *High, Wide, and Handsome,* 290.

23. Payne, "Copper Dome," 203; Larry M. Elison and Fritz Snyder, *The Montana State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 2001), 4, 90.

24. Elison and Snyder, *Montana State Constitution,* 4.

25. I would like to thank Greg Petesch of the Montana Legislative Council for his assistance in defining the role of the council.

budgeting" in 1959.[26] Although the former change forearmed the legislature against some of the inherent advantages of the executive branch, the latter, in fact, succumbed to the most important one.

Although the balance of power may have tipped toward the executive by the early 1960s, there is little that would be considered remarkable with respect to the executive branch under the 1889 constitution. As did its 1884 predecessor, the 1889 document "minimized the powers of the executive branch and maximized the powers of the legislature."[27] The executive consisted of the governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, auditor, treasurer, and examiner. According to Article VII, Section 1, each of the officers, except the lieutenant governor, was to reside in the "seat of government." In addition to running separately from the governor, the position of lieutenant governor was considered part-time.

Establishing a state-based claim to the power of judicial review, the Montana Supreme Court asserted in 1911 that "the very purpose of a state constitution was to establish an exclusive court of review with all the auxiliary powers necessary to exercise [its] jurisdiction, except insofar as the constitution expressly declared otherwise."[28] As was the case with the executive branch, however, there is nothing remarkable in the 1889 constitution that would distinguish its elected judiciary from other states.

Winds of Change

Like a strong prairie wind or a chinook from the eastern Rockies, the winds of change began to blow in Montana. Some might argue that the winds of change in Montana during the 1970s blew from across the nation.[29] Others would argue that the winds of change blew from within and began to blow as early as the 1930s. For example, Howard maintains that "Montanans have been thinking seriously about water management since about 1937."[30] Regardless of the exact starting point, the salient issue is that Montanans began to think differently about their state government and their constitution. This change so impressed Howard that he titled one of the

26. *State ex rel. James v. Aronson,* 132 Mont. 120, 314 P.2d 849 (1957); Payne, "Copper Dome," 226, 225.

27. Elison and Snyder, *Montana State Constitution,* 4.

28. Ibid., 142.

29. Commissioner of State Lands Ted Schwinden, in Malone and Roeder, *Montana,* 301.

30. Howard, *High, Wide, and Handsome,* 255.

chapters in *High, Wide, and Handsome* "And, at Long Last, Planning." By century's end, no one would disagree that these winds of change had breathed life into the 1972 constitutional convention and, like giant prairie turbines, powered the new constitution.

Like many states, Montana was affected by the U.S. Supreme Court's ruling with respect to voting rights and reapportionment, in particular *Reynolds v. Sims.*[31] The net result of these decisions was to take political power away from overrepresented rural areas and move it to underrepresented urban areas. The impact was felt more keenly in Montana because the 1889 constitution had consciously granted rural areas overrepresentation in the state legislature.[32] Moreover, Montana was one of only seven states that did nothing in response to the Supreme Court's ruling.[33] The issue of reapportionment raises an important question with respect to Gardner's thesis. If the states' redistricting was simply a response to the federal courts' rulings in *Reynolds* and *Baker v. Carr,* then there is little evidence of an independent constitutionalism.[34] In Montana, the evidence is a bit mixed. After the legislature failed to redraw district boundaries, a suit was brought forth by a Montana citizen in federal district court. The court resolved the dispute in favor of the urban areas with its own plan for reapportionment.[35]

A second factor in the changing political climate of Montana was the declining influence of the mining industry. The *Billings Gazette* assessed the influence of the state's four biggest businesses and concluded that, "through lobbying, political contributions, and other methods of 'persuasion,' they have ordinarily gained favorable treatment from the legislature, the State Board of Equalization, the Supreme Court, the Public Service Commission, and from other branches of government."[36] Malone and Roeder suggest, however, that when the *Gazette* concluded that corporations run the state, the newspaper "clearly overstated the case." This is especially true for the declining influence of Anaconda Copper.[37] Unlike the era of Clark, Daly, and Heinze, copper was no longer "king" in Montana.

Along with broad changes wrought by reapportionment and the declining influence of the mining industry, there was one specific precipitant for the 1972 constitutional convention. In 1971, Montana voters "rejected the

31. *Reynolds v. Sims,* 377 U.S. 533 (1964).

32. Malone and Roeder, *Montana,* 149.

33. Payne, "Copper Dome," 225.

34. *Baker v. Carr,* 369 U.S. 186 (1962).

35. Elison and Snyder, *Montana State Constitution,* 7; *Herweg v. Thirty-ninth Legislative Assembly of Montana,* 246 F. Supp. 454 (D. Mont. 1965).

36. Malone and Roeder, *Montana,* 290.

37. Elison and Snyder, *Montana State Constitution,* 8.

Republican-sponsored sales tax by a better than two-to-one margin, and this issue caused an anti-Republican backlash that helps to explain the election of an exceptionally liberal-minded group of delegates to the constitutional convention."[38] In addition to anti-Republican backlash, current members of the legislature were prohibited from serving as delegates to the convention, according to the Montana Supreme Court's interpretation of Article V, Section 7, of the 1889 constitution.[39] This decision led to the presence of a large number of "newcomers." Few delegates, then, "were indebted to special interests or to other delegates."[40]

Collectively, the impact of these changes in the political climate in Montana on the 1972 convention and constitution was significant. To begin with, in contrast to the conventions of 1884 and 1889, the 1972 convention was "open" with respect to all hearings, sessions, and votes. With respect to institutional structure, the 1972 constitution fixed the parameters of the legislature at fifty members for the senate and one hundred members for the house. "The decision limiting the total number to not more than 150 and not less than 120 was an obvious attempt to keep the two chambers small enough to be efficient and at the same time adequately represent the people of the state, according to geographical distribution, special interests, and existing political units."[41] Perhaps more important than these structural changes in the legislature, unlike the era of mining dominance, this convention was able to enact a statewide property tax and actually enhance the power of the legislature.[42]

Robert L. Maddex notes that Montana exercised constitutional independence when drafting institutional powers. Although the 1972 constitution "was drafted well after the more modern state constitutions of New Jersey, Alaska, and Hawaii, it avoids making the governor as dominant in the executive branch by retaining five additional executive officers who are elected statewide." While retaining five constitutional officers, the treasurer and examiner were demoted from constitutional status but were retained, nevertheless, under statutory law.[43] The state bureaucracy is now constitutionally limited to twenty departments.[44] As was suggested above, the budgetary

38. Malone and Roeder, *Montana,* 301. See also Elison and Snyder, *Montana State Constitution,* 8.

39. *Legislative Assembly v. Lemon,* 156 Mont. 416, 481 P.2d 330 (1971).

40. Elison and Snyder, *Montana State Constitution,* 10.

41. Ibid., 108.

42. Malone and Roeder, *Montana,* 302.

43. Maddex, *State Constitutions of the United States* (Washington, D.C.: Congressional Quarterly, 1998), 222; Elison and Snyder, *Montana State Constitution,* 124.

44. Maddex, *State Constitutions,* 226.

powers of the governor were enhanced under Article VI, Section 9.[45] It should also be noted that one significant "political" change accompanied these institutional changes wherein the candidates for governor and lieutenant governor file jointly (Article VI, Section 2).

Along with the institutional differences, Maddex assesses the 1972 constitution overall:

> The constitution contains a number of innovations, especially in its fundamental rights provisions—for example, making human dignity inviolable; giving citizens the right to participate in the operation of public agencies, examine public documents, and observe the deliberations of public bodies; confirming adult rights for persons eighteen years old; and extending fundamental rights to those who are not yet adults. The constitution also provides extensive rights to persons accused of crimes and even to those convicted of crimes.[46]

A more detailed assessment of three of these innovations demonstrates just how innovative Montana was.

The preamble of the 1972 constitution thanks God "for the quiet beauty of our state, the grandeur of our mountains, [and] the vastness of our rolling plains" and acknowledges a desire "to improve the quality of life." The environmental sentiment reflected here is the antithesis of almost the entire history of the state, a history in which "the fur trade began Montana's long and sad history of pillaging the environment."[47] Of course, the translation of this environmental sentiment has been left to the state supreme court. Three decisions suggest that the new constitution has been interpreted, though not without controversy, in such a way as to at least begin the reversal of Montana's environmental history. In *Montana Environmental Information Center [MEIC] v. Department of Environmental Quality,* the court ruled that "strict scrutiny" would be applied to legislative questions regarding the environmental risk.[48] In *Cape-France Enterprises v. Estate of Peed,* the court extended its *MEIC* decision to apply the "right to a clean and healthful environment to a private action involving a contract for sale of real property."[49]

45. G. Alan Tarr demonstrates that these institutional changes were animated by the "managerial constitutionalism" movement ("The Montana Constitution: A National Perspective," *Montana Law Review* 64 [Winter 2003]: 13).

46. Maddex, *State Constitutions,* 226.

47. Malone and Roeder, *Montana,* 33.

48. *Montana Environmental Information Center v. Department of Environmental Quality,* 296 Mont. 207, 988 P.2d 1236 (1999).

49. *Cape-France Enterprises v. Estate of Peed,* 305 Mont. 513, 29 P.3d 1011 (2001); Chase Naber, "Murky Waters: Private Action and the Right to a Clean and Healthful Environment; An Examination of *Cape-France Enterprises v. Estate of Peed,*" *Montana Law Review* 64 (Win-

Most recently, in *Bean Lake III,* the court defined the environmental provisions of the constitution by "recognizing that instream water rights for wildlife and recreation purposes will help protect a major source of income for the future of Montana: its tourism and wildlife/fishing based industries."[50]

The constitution included provisions to prevent the "unreasonable" depletion of resources and to reclaim lands "disturbed by the extraction of natural resources."[51] To restate the preamble, these provisions allowed the citizens of Montana to constitutionally "reclaim" the lands that God had given them. Although this reclamation process reverses the constitutional and political trends of the past, it also reveals some of the constitutional and political tension of the present. For example, Alex Sienkiewicz explores "whether Montana's constitutional guarantee of the right to a clean and healthful environment conflicts with the federal and state mandates of revenue generation from state trust lands for the support of public institutions such as common schools."[52]

The declaration of rights (Article II) defines the relationship between Montana and its citizens. The emphasis on individual rights is divided into "freedom from government intrusion" and the "freedom to choose." Though much of the declaration of rights is either similar or identical to the bills of rights of other states and the U.S. Constitution, the 1972 declaration contains four specific innovations.[53] "Every person was afforded the right to participate in governmental decision-making; the right to examine government documents and observe government deliberations, the right of individual privacy, and the unlimited right to sue government entities and their agents." As Fritz Snyder points out, "Only one other state has even a limited right-to-participate provision in its constitution [and] [o]nly two other

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ter 2003): 358. For a discussion of both *MEIC* and *Cape-France,* see also Bryan P. Wilson, "State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?" *Emory Law Journal* 53 (Spring 2004): 627–56.

50. J. Vincent Jones, "The Bean Lake Saga: The End of the Diversion Requirement in Pre-1973 Water Appropriation Claims in Montana," *Great Plains Natural Resources Journal* 7 (Spring 2003): 70. *Bean Lake III* is formally titled *In re the Adjudication of the Existing Water Rights to the Use of All the Water, Both Surface and Underground, within the Missouri River Drainage Area, Including All Tributaries of the Missouri River in Broadwater, [*133] Cascade, Jefferson, and Lewis and Clark Counties, Montana (Basin 411),* 311 Mont. 327, 55 P.3d 396 (2002).

51. Elison and Snyder, *Montana State Constitution,* 21.

52. Alex Sienkiewicz, "A Battle of Public Goods: Montana's Clean and Healthful Environment Provision and the School Trust Land Question," *Montana Law Review* 67 (Winter 2006): 65.

53. Tarr suggests that these innovations arose from the movement known as "constitutional populism" ("Montana Constitution," 14).

states have a right-to-know provision similar to Montana's." Of course, having these rights is only half of the constitutional equation. Snyder correctly notes that "citizens, in fact, have to be proactive in enforcing their rights" and warns that "often 'transparency' becomes 'translucency.'"[54]

The framers of the 1972 constitution reexamined the place of initiatives and referenda in Montana's constitutionalism. Emphasizing the right to participate, the 1972 constitution relaxed the ballot requirements for initiatives and referenda.[55] Although Montanans "have a long established tradition" of using the initiative and referendum to enact law and amend the constitution, it appears that the changes made in the 1972 constitution have enabled and emboldened Montanans "to suspend and repeal laws enacted by the legislature."[56]

Given the direction taken by other states, as noted elsewhere in this text, Montana's approach to privacy in the declaration of rights is also noteworthy. Admitting that "defining personal autonomy has and continues to challenge courts, philosophers and authors," the Montana Supreme Court has, nevertheless, struck an innovative course. With respect to the right to abortion, the Montana Supreme Court maintained that "Montana adheres to one of the most stringent protections of its citizens' right to privacy. Montana's constitution affords significantly broader protection than does the federal constitution."[57] Similarly, with respect to the rights of homosexuals, Montana's right to privacy was made more explicit and extensive in contrast to, and in advance of, federal precedents. After the U.S. Supreme Court's decision in *Bowers v. Hardwick,* but before the Court's reversal in *Lawrence and Garner v. Texas,* the Montana Supreme Court had extended the state constitutional protection of privacy to include homosexuals: "While society may disapprove of homosexual conduct, society still recognizes [the] expectation of privacy, including private homosexual acts."[58]

Illustrating the often-contentious relationship between courts and contemporary public opinion, in 2004 the voters of Montana overwhelmingly

54. Elison and Snyder, *Montana State Constitution,* 18, 20; Snyder, "The Right to Participate and the Right to Know in Montana," *Montana Law Review* 66 (Summer 2005): 1, 327, 328.

55. Elison and Snyder, *Montana State Constitution,* 11.

56. Jerry Calvert, "Montana," in *State Party Profiles: A 50-State Guide to Development, Organization, and Resources,* ed. Andrew M. Appleton and Daniel S. Ward (Washington, D.C.: Congressional Quarterly, 1997), 184.

57. Elison and Snyder, *Montana State Constitution,* 51. See *Armstrong v. State,* Mont. 261, 989 P.2d 364 (1999).

58. *Bowers v. Hardwick,* 478 U.S. 186 (1986); *Lawrence and Garner v. Texas,* 539 U.S. 558 (2003); Elison and Snyder, *Montana State Constitution,* 50. See *Gryczan v. State,* 283 Mont. 433, 942 P.2d 112 (1997).

approved a marriage amendment that defined marriage as a union between a man and a woman.[59] Despite the passage of the marriage amendment in November 2004, the Montana Supreme Court expanded the constitutional protection of homosexuals in December. In the case of *Snetsinger v. Montana University System,* the court determined that the denial of benefits to same-sex partners violated the equal-protection clause of the state constitution (Article II, Section 4).[60] Here, of course, Montana is part of a much larger national constitutional and political conversation.

Taken together, the renewed concern for the environment and the emphasis on popular participation and individual rights allowed former governor Marc Racicot to conclude that the 1972 constitution "continues today to reflect the special character of this immense landscape, sparsely populated by people whose ancestors were adaptable, ruggedly individualistic, and who, above all, believed in the virtues of the common people."[61] In short, the constitution of 1972 accurately reflects not just the Montana community of 1972 but also the historical Montana community that, heretofore, had been denied constitutional definition.

Accurate reflection or not, the passage of the new constitution was by no means certain. Rather than including controversial items in the constitution that might lessen its chance of passage, the convention submitted the constitution separately from "referenda on a unicameral legislature, on the abolition of the death penalty, and on liberalization of the state's gambling laws." The first two referenda failed, and the constitution itself passed by a margin of less than 3,000 votes out of a total of 240,000 cast. Though perhaps not a ringing endorsement of the new document, it is fairly clear that the new constitutionalism had taken hold. When given the constitutionally mandated option of calling a new constitutional convention in 1990, a resounding 84 percent of Montana voters rejected the opportunity.[62]

59. Lisa M. Polk, "Montana's Marriage Amendment: Unconstitutionally Denying a Fundamental Right," *Montana Law Review* 66 (Summer 2005): 405.

60. *Snetsinger v. Montana University System,* 104 P.3d 445 (Mont. 2004). See also Cassie Coleman, "Love or Confusion? Common Law Marriage, Homosexuality, and the Montana Supreme Court in *Snetsinger v. Montana University System,*" *Montana Law Review* 66 (Summer 2005): 445–74; and Ryan Murphy, "No Real Benefits: How the Montana Supreme Court's Improper Application of Equal Protection Analysis in Establishing Same-Sex Insurance Benefits Created More Confusion than It Resolved," *Rutgers Law Journal* 37 (Summer 2006): 1439–57.

61. Elison and Snyder, *Montana State Constitution,* xv.

62. Tarr, "Montana Constitution," 12 (quote), 6, 21. See also Robert F. Williams, "Is the Wisconsin State Constitution Obsolete? Toward a Twenty-first-Century, Functionalist Assessment," *Marquette Law Review* 90 (Spring 2007): 440–42.

Conclusion

Gardner concludes that "the communities in theory defined by state constitutions simply do not exist." Although the early constitutional history of Montana might support Gardner's thesis, it is suggested here that, by the time of the 1972 constitutional convention, Montana, both its people and its geography, came together to a sufficient degree so as to define a political community. The expression of that community, one that is perfectly consistent with the theory of Donald Lutz, can be found in the 1972 Montana state constitution. James C. Garlington, a delegate to the 1972 constitutional convention, made the following remark: "Consider the Convention: Conceived and born in partisan political strife, it has matured into thoughtful and objective concern for the rightness of things."[63] Although he was specifically referring to the controversy over the call for the 1972 convention, he could have just as easily been referring to the birth of the state: conceived and born in partisan political strife in 1889 and matured into thoughtful and objective concern for the rightness of things in 1972.

63. Gardner, "Failed Discourse," 837; Elison and Snyder, *Montana State Constitution,* 22.

ROBERTA Q. HERZBERG

The Nevada State Constitution

From Polygamy to Prostitution

A short walk down the Las Vegas Strip is enough to suggest to most observers that Nevadans have chosen a different route to define their politics, their culture, and their economy. Although the gambling and glitz that mark modern Nevada are relatively new distinctions, Nevadans' desire for a different path has been present from the beginning. Even before ratifying their constitution in 1864, Nevadans defined their way of life in opposition to the approaches used by other states or territories in the region. They shaped their political structure to counteract efforts to absorb their interests under the umbrella of unfamiliar groups. To break from the powerful local forces who sought their territory, they aligned with a distant ally—the federal government.

The constitution of Nevada directly responded to the local tensions emerging between the Utah territorial government and the federal government, but it also reflected the broader divisions splitting the federal republic around the issues of slavery and states' rights during the 1860s. In summarizing his motivations for putting forward the enabling act for Nevada statehood in Congress, Representative James Ashley of Ohio explained, "My object in drafting and urging passage of those enabling acts was two-fold: one to establish a new principle in the admission of states into the Union, negativing, so far as I could in the enabling acts, the idea of States rights; the other to secure the vote of three more states in case the election of President and Vice-President in the year 1864 should come to the House of Representatives."[1] Specifically, Congress placed two conditions on Nevada for joining the Union: a requirement for religious freedom as a response to Utah

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1. John Reid and Ronald James, eds., *Uncovering Nevada's Past: A Primary Source of the Silver State* (Reno: University of Nevada Press, 2004), 29.

and an antislavery condition linked to broader national interests. Nevada agreed, but went well beyond these conditions in linking to federal objectives. Nevada's long-standing connection to the federal government is perhaps best reflected in its willingness to voluntarily insert and retain the following Paramount Allegiance Clause in its new constitution:[2]

> Article 1, Sec: 2. Purpose of government; paramount allegiance to United States. All political power is inherent in the people[.] Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same whenever the public good may require it. But the Paramount Allegiance of every citizen is due to the Federal Government in the exercise of all its Constitutional powers as the same have been or may be defined by the Supreme Court of the United States; and no power exists in the people of this or any other State of the Federal Union to dissolve their connection therewith or perform any act tending to impair[,] subvert, or resist the Supreme Authority of the government of the United States. The Constitution of the United States confers full power on the Federal Government to maintain and Perpetuate its existance [existence], and whensoever any portion of the States, or people thereof attempt to secede from the Federal Union, or forcibly resist the Execution of its laws, the Federal Government may, by warrant of the Constitution, employ armed force in compelling obedience to its Authority.

Such provisions are reminiscent of the debate over the U.S. Constitution when Anti-Federalists feared a dominant national government overwhelming subordinate states.[3] States at the founding vehemently opposed such an arrangement. By the end of the Civil War, however, Nevada voluntarily accepted the position opposed just decades before as a condition of entry into the Union.

Nevada's relatively quick transition from territory to state at a time of fundamental national crisis helps explain the prominent place of the federal government in Nevada's constitutional debate and creation. Nevadans sought a federal approach because they needed the power of the federal government to balance the more powerful local force of the Utah territorial leadership. At the same time, the federal government needed a local ally in the conflicts it was facing. Lincoln wanted an additional set of Republican

2. Nevada's clause was patterned after Maryland's similar condition, but went well beyond that state's in asserting the federal government's superiority relative to the state in terms of citizen loyalty. Given that Nevada voluntarily included this clause and support at the constitutional convention was one vote shy of unanimity, Nevada's commitment to the federal cause can hardly be questioned.

3. See Herbert Storing, ed., *The Anti-Federalist: An Abridgement of "The Complete Anti-Federalist"* (Chicago: University of Chicago Press, 1985).

supporters in his reelection bid and needed a group who could address the rising Mormon question in the area. As a result, both sides moved quickly from concept to execution, and much of Nevada's cultural definition emerged over the subsequent history of its constitutional evolution.

Building Community and a Nevada Way of Life

The early struggle to establish Nevada as a separate territory and eventually a separate state allowed citizens to define themselves as a community. Nevada began its official place in the United States as the weak and distant partner of its religious and socially conservative neighbor Utah within the large geographic area nominally controlled by the Utah territorial government. From the beginning, the partnership was a tenuous one.

In order to establish operational control over the entire region, Brigham Young and his Mormon followers sent pioneer parties to establish communities within Nevada. The large distance from Salt Lake, conflicting life views, and the difficult conditions they faced led to frustration for both Mormons and non-Mormons alike. Unified communities committed to the Utah cause never really formed within Nevada. Instead, Mormon followers felt isolated from the core of the religious movement and activities in the Salt Lake area, whereas non-Mormons argued that their views and interests were misunderstood and unrepresented at such a distance and across such cultural divides.

In response to complaints from its western areas, the territorial government in Utah experimented with several different ways of representing the interests of settlers from distant corners. They first tried to subsume the Nevada interests under Utah representation by linking the representative districts across the territory with representatives drawn from Utah. Frustration among non-Mormons in northwestern Nevada grew to the extent that they unsuccessfully sought annexation by California. Their shared economic interests with California miners seemed a better fit than the religious focus coming from Utah. Trying to prevent losing control, Utah leaders recognized the need for representation drawn from within the distant communities and changed their representation system to allow the Carson City region its own representatives in the territorial legislature. This solution turned out to be too little, too late and satisfied neither group.

At the same time that Nevadans were becoming more frustrated, circumstances for the Utah territorial government were changing significantly. Maintaining control over Nevada became secondary to more fundamental conflicts between Salt Lake City and Washington, D.C. The Mormon question changed the dynamic in this vast western territory. Instead of continu-

ing to expand into the far reaches of the territory, Utah leadership launched a defensive strategy against opponents in the District of Columbia and the broader territory. Most Mormon settlers returned to the Salt Lake area, and Nevadans began pursuing their own interests separately with the federal government. In a letter to Senator Stephen Douglas, chairman of the Senate Committee on Territories, William Ormsby reflected the concerns of non-Mormon Nevadans who sought a separate way from Utah:

> We have commenced the settlement of a country rich in its natural resources and the protection of Government only is needed to make it the happy home of thousands—we need a government of our own, for it is impossible for us to have the necessary means of communication with any other people for a greater part of the year. . . . On the east of us we have for neighbors a people that are not only our declared enemies, but also the open enemies of the General Government, and if their fast acts indicate anything, we are liable at any time to be driven from our homes and robbed of our property, and we need protection, we are American citizens and are we not entitled to it.[4]

In defining their community and a way of life, early Nevadans focused most on whom they opposed in the region. At the center of their request to formalize a separate position was the fact that they were too distant from California, they were at odds with Utah goals and lifestyle, but they were Americans, so they drew on that connection to define their community. Thus began the extended link to the federal government that continues today, with more than 95 percent of Nevada land federally controlled.

Defining the Scope of Individual Liberty in Nevada

This political history also led the new state citizens to adopt an approach grounded in the broadest definition of individual liberty—an approach that clearly continues today. Having struggled under the governmental regulation of an opposing and foreign culture, the new Nevadans sought rules and regulations under which they all might live comfortably. Most Nevadans' individual protections are contained in Article 1 and serve the important role of limiting the authority of the state, especially before federal protections were extended to the state arena. The Nevada protections parallel federal liberties, and Nevada courts have interpreted them based on Supreme Court interpretations. At virtually every opportunity, Nevada courts have chosen to not press for individual liberties beyond those guaranteed by the U.S. Constitution.

4. Reid and James, *Uncovering Nevada's Past,* 30.

Two liberties in the Nevada Constitution do differ from those in other states and at the federal level: civil jury trials in Nevada require only a three-quarters vote to decide a case, and the right to bear arms has been reinforced by state protection. The jury requirement was included primarily because Nevadans had experienced frustrations with divisions and corruption during their territorial period that they wished to avoid in the future. The gun-rights protection was added in 1982, in response to Supreme Court decisions that allowed states to place restrictions on gun ownership. As the Supreme Court made it clear that it would not impose a federal standard on the states with regard to gun rights, Nevada felt compelled to reinforce the individual right to bear arms. The strong sentiment in favor of the right to bear arms is indicative of the rugged individualist culture that emerged in Nevada's wide-open spaces. It also speaks to an underlying worry about government in general. Access to guns remains, at minimum, a symbolic check on government authority consistent with Nevadans' self-perception.

The wording of certain rights also stands out in the Nevada Constitution. For example, the religious-protection clause mentioned above is significantly different from similar protections in other constitutions. The Nevada founders, confronted with the special religious practices of the adjacent Utah Territory, added the limitations on this liberty right to the provision:

> Article 1, Sec: 4. Liberty of conscience. The free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed in this State, and no person shall be rendered incompetent to be a witness on account of his opinions on matters of his religious belief, but the liberty of consciene [conscience] hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.

This is just one example of the way in which the Nevada Constitution's origins reflected the broader conflicts of the region.

More localized notions of community began emerging in Nevada almost immediately and have continued to evolve throughout the state's constitutional history. One mechanism Nevadans used to define their community was the adoption of a constitutionally specified residency requirement of six months prior to full state citizenship. After the Supreme Court decided in 1972 that such long periods were unconstitutional, Nevada election officials implemented a thirty-day limit. However, the voters rejected an effort to change the constitution to make it consistent with the new policy. Thus, the longer residency requirement remains in words, if not in application (Article 2, Section 1). Such barriers are consistent with attitudes formed out of early concern about being dominated by another group. Nevadans had experienced efforts by Utah Mormon settlement parties to swamp the demo-

cratic process in their communities. Once they had succeeded in forming a separate political community, one can assume that they did not want to lose it to a coordinated immigration effort from without.

The representational problems Nevada confronted during its constitutional evolution tracked those encountered in other states. Nevada's extension of the franchise to excluded groups was consistent with states in the region. As the new kid on the block, Nevada was the first state to ratify the U.S. Constitution's Fifteenth Amendment extending political rights to black males, but Nevadans did not amend their own state constitution to remove the word *white* as a qualifying condition for political participation until 1880. Moreover, Nevadans were slow in extending operational rights to minorities and excluded groups. Nevada included a poll tax in its 1864 constitution that operated as a condition for voting until 1910 and served as a limit on participation for disadvantaged minorities. The tax was not fully removed from the constitution until 1966, although it was delinked from voting after 1910.

A number of other policies, including restrictions on marriage, occupational choice, and freedom of movement, limited opportunities for racial or ethnic minorities. Prominent groups targeted by these legislative limits included Chinese minorities brought in for mining and railroad construction and Native Americans pressed into the state from across the nation. Nothing Nevada did in the arena of civil rights differed much from similar policies in other states, but these policies were sufficient to keep the diversity of Nevada's population quite limited until very recently. Between 1900 and 1950, the proportion of minorities in Nevada declined to 6 percent from 17 percent. By 2000, that percentage was back to 25 percent.[5] Certainly, some of this change was attributable to economic changes within the state, but it can also be explained by policies that define a relatively homogeneous and restricted political community.

Nevada's record on political rights for other groups was mixed as well. Nevada preceded many states in extending the franchise to women by 1914, but it trailed virtually every other state in the region, including Wyoming, Utah, and Montana. In 1971, Nevadans ratified the federal Twenty-sixth Amendment granting eighteen year olds the vote by the slimmest of margins.

Today, Nevada stands out as a state that has used decisions regarding social regulation to define a distinctive way of life. From legalized prostitution

5. Campbell Gibson and Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States,* Working Paper Series no. 56 (Washington, D.C.: Population Division, U.S. Census Bureau, September 2002).

and liberal rules regulating marriage to the extensive presence of legalized gambling, Nevada has chosen a path of individual liberty over social engineering. Over the past fifty years, such decisions became an economic engine for growth and prosperity that have attracted individuals from across the nation and resulted in one of the fastest-growing immigration patterns in the nation. But growth also introduces potential conflict, as those drawn by the economic promise seek to shape the politics to fit their preexisting political goals. With the liberal use of instruments of direct democracy available to them, such as the citizen initiative and referendum, growing populations can quickly change the political landscape.

A Constitutional Hiccup

Building on its swift success with the federal government in obtaining territorial status, Nevada was an independent territory for less than a year when the legislature voted to put the issue of statehood before the voters.[6] Nevadans went to the polls in September 1863 and overwhelmingly voted to seek statehood and authorize thirty-nine men to meet in November and December of that year to draft a constitution.[7]

Despite the general support for statehood, the first constitutional draft found a less-than-favorable reception with voters.[8] Nevada scholars suggest that two features of this first constitution were responsible for the dramatic reversal in voter support.[9] First, the constitutional adoption process confounded constitutional-level questions with operational-level questions intended to address day-to-day policy matters. The constitution contained a list of elected officials who would immediately fill the positions created by the new document. Voters who opposed any or all of the proposed politicians could express their opposition to those candidates only by voting against the general rules of the constitution as well. The almost complete symmetry of the reversal between the vote to seek statehood and the constitutional vote suggests the extent to which general coalitions can be undone by cyclic majorities.

6. The federal government had not authorized the election or constitutional process in 1863.

7. The vote for statehood was 6,600 for, 1,502 opposed, or four to one in favor of seeking statehood.

8. The vote opposing the first-draft constitution was 8,851 against, 2,157 in favor, or four to one against.

9. Several historians and political scientists have examined this era. One of the best treatments can be found in Eleanor Bushnell and Donald Driggs, *The Nevada Constitution: Origin and Growth* (Reno: University of Nevada Press, 1984).

The second policy conflict to emerge in this constitutional debate suggests the role that concentrated economic interests played in Nevada's origin and the role they continue to play to this day. With a small population, Nevada was especially vulnerable to political action targeted at any of those groups key to economic life in Nevada. At the time of this constitutional debate, the key interests in Nevada were mining and ranching. The constitution was derailed in part by a provision to tax mining property at a rate comparable to all other property. Whereas supporters of the plan argued basic fairness across economic occupations, the large number of miners feared being taxed on nonproductive property and the additional economic risks this policy implied. Again, this is an example of policy differences dragging down the more general debate surrounding constitutional questions.

The failure of the leaders of the Nevada Constitutional Convention to recognize the difference between fundamental constitutional questions and the day-to-day decisions of any given regime is reminiscent of Donald S. Lutz's warning: "At least part of the art of constitution making lies in responding to fundamental problems which, if not solved constitutionally, could convulse the political system and seriously degrade the effectiveness and legitimacy of the document, *while at the same time not cluttering up the constitution with provisions which are more properly the province of regular legislation.*"[10] When citizens seek to do too much within the structure of their constitution, they are destined to create a document that will be in constant flux and revision. Nevada's earliest voters were wise enough to reject this route to statehood. They demanded that the different levels of political decision be separated so that more rational outcomes could emerge. Their second constitutional effort in 1864, which had stripped many of the more specific considerations, fared much better, obtaining support from nearly 89 percent of the voters.

Designing Institutions for the Wild and Rugged West

Political institutions in Nevada are organized around the logic of separated powers similar to that developed in the U.S. Constitution: a separate bicameral legislature, executive branch, and judiciary. However, in each branch, citizens have acted to limit the power with additional safeguards. The legislature is organized as an amateur body restricted to regular sessions of no more than 120 days in biennial sessions. Originally, sessions were limited to no more than 60 days, but in 1958 the rule changed, and sessions grew

10. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 37 (emphasis added).

increasingly longer until in 1999 the 120-day limit was adopted as a constitutional limitation. It is testimony to modern Nevadans' views on limited government that they opted to limit the session to 120 days in the face of other states moving toward more permanent and professional legislatures. Nevada's constitutional founders feared an out-of-control legislature, and thus many of the limits on the legislature were included to restrict government activity overall and protect citizens. By restricting the length of the session, these founders hoped that legislators would be constrained from being too active by default.

Today, citizens have adopted a number of constitutional provisions to continue to restrain the legislature in a world of expanded governmental influence. Chief among these new reforms are term limits intended to distribute political power across a broader range of interests and prevent the concentration of power in the hands of a permanent ruling class. In 1994 and 1996 the voters adopted constitutional amendments that limited all elected officials except judges to between eight and twelve years of continuous service.[11] Governors have been limited to two terms since 1970. Today, all but judges are limited to relatively short terms in office.[12] No politician can plan a permanent career in state government unless he or she is willing to move from office to office.

Of course, there are disadvantages to a system that limits elected officials by short sessions and term limits. The complexities of many modern issues facing politicians today require expertise that may be difficult to develop in the short time frame allowed by term and session limits. As a result, more policy mistakes are likely, or, alternatively, permanent professional staff members become disproportionately influential in the decision-making process. Additionally, forced turnover can lead to a revolving door for virtually all politicians, who may use their time in politics to establish relationships with the private sector that can be exploited after leaving office. On the positive side, more frequent turnover can make the legislature more responsive to policy change as new eyes and ears take up the issues. It also may prevent the influence of entrenched interests controlled by the dominant economic groups in the state.

Although the founders were most concerned with the excessive power of the legislature, the reality is that in modern Nevada, the limits on legislative power may in fact lead to even greater unchecked power in the executive or

11. Judges were originally included in the blanket term-limit amendment, but the court ruling required judges' term limits to be separated from other elected offices and voted on separately. When put to the voters, they accepted term limits for legislators and executive offices, but rejected such limits in the courts.

12. Executive-branch officials are limited to two terms including any partial term. Legislators cannot serve more than 12 years in any consecutive period.

judicial branch. As governments take on more responsibility in citizens' lives, some politicians or unelected staff must assume that responsibility year-round. If legislators are not there to make the decisions, then more policy influence must fall to the policy makers who are.

Many powers of the executive in Nevada provide a disproportional influence for this office. First, Nevada's governor may appoint hundreds of department heads, assistant department heads, and commission and board members. Unlike governors in other states, Nevada's governor did not need to obtain legislative approval of his appointments. Because of the short biannual sessions, politicians and voters alike recognized that such oversight was unworkable. However, in 1996 voters did approve new legislative authority to oversee and reject executive department regulations. Second, his or her power to introduce a state budget helps the governor set the agenda throughout the legislative session. Third, access to the media and the public gives the governor the bully pulpit from which to press his or her agenda. Since the legislature is frequently not in session, there is no meaningful counterweight to the executive's direction of state policy.

Nevada's executive, though stronger than originally designed, is still somewhat limited constitutionally. In addition to term limits, the fact that he or she is one of six independently elected executives implies limited control over several aspects of the executive-decision process. No single party has controlled all the executive offices since 1946, so this remains a meaningful check.[13] An additional limit on Nevada's executive is his or her lack of an independent pardon power. Instead, the governor sits as one of nine on the Nevada Board of Pardons, with only a negative power (veto) to set him apart from other members. When given an opportunity to extend the governor's pardon authority in 1960, voters confirmed this limitation on the executive. Again, this suggests the degree to which Nevada voters worry about the powers of government in light of a history of influence by concentrated economic interests. Even a governor was not above suspicion in using specialized powers to protect his cronies.

Similar suspicions have haunted the Nevada judiciary as well. The judiciary has been viewed with a degree of skepticism ever since the territorial era, when decisions by the courts were confounded with issues of religion, mining disputes bred irresolvable conflicts, and opportunities for corruption were rampant. Distrust and conflicts became so extensive during the territorial days that between August and December 1864, Nevada had no judiciary at all. Charges of bribery and corruption excluded the sitting justices from hearing cases. Citizens determined that no justice was better than the

13. See Michael W. Bowers, *Sagebrush State: Nevada's History, Government, and Politics* (Reno: University of Nevada Press, 2002).

corrupt justice they observed. The primary check on the courts has been the electoral mechanism, but elections are also a source of suspicion and scandal for the Nevada courts. Recently, several sitting Nevada Supreme Court justices have faced close electoral challenges as the court has come under greater scrutiny. As elections require more money, the continuing need for justices to face electoral challenge might be expected to continue to raise concerns regarding the legitimacy of Nevada's judiciary.

Narrow Interests and Small Populations

As a small-population state with few concentrated industries dominating the economy at any one time in its history, Nevada's politics can be understood in terms of interests and their influence. Early constitutional history was shaped by the influence of mining and religious interests. The debate over the 1863 constitution exemplifies the extent to which political decisions depended on the power of these concentrated interests. In seeking to establish political authority, constitutional architects were constrained to those options consistent with existing power bases. Any state policy or change that impacted these industries significantly impacted state politics as well. Given the importance of these sectors, politicians and voters have frequently gone along out of their own self-interests.

Nevada has always viewed its relation with government institutions as a necessary evil intended to protect basic individual rights. As such, it has sought limited activity at the state level. This more limited approach at the local level left Nevada open to greater influence from the federal government. For most of its history, however, the federal government was constrained in exercising ongoing influence by its own limited policy role. As these circumstances have changed, so have concerns regarding excessive federal authority. Thus, we can explain the introduction of additional citizen protections that Nevada has pursued.

Today, gambling interests and tourism representatives are the most recognizable power brokers in the state arena. So much of the base public economy depends on these industries that no policy change may be considered without considering the effects in these arenas. One example of this clout in constitutional debate is the provision in Article 4, Section 24, that restricts the ability of government to create a state lottery. Even charitable lotteries were officially disallowed until 1990. Though some states have similar restrictions, it seems surprising to see such a restriction associated with Nevada, where gaming is such a distinctive part of the state culture. Certainly, one explanation of this ban in the absence of a clear moral argument is the power of the private gambling interests. Since so much revenue is raised through

taxes on gambling, a state lottery could cost almost as much in losses in the private sector as it might add from increased direct revenues.

Since their early experiences as the weaker part of the Utah Territory, Nevadans have worried about being excluded from the decisions of government. As such, they have been sensitive in designing a representational scheme that would allow small, isolated communities a voice in governing decisions. One problem that emerged from this desire and required later amendment to correct was the disproportional representation scheme used in the Nevada legislature between 1915 and 1965. This approach resulted in severe underrepresentation of Nevada's two major urban counties and overrepresentation of rural communities. Under the plan, each county sent a single senator, and every county was entitled to at least one representative. This formula coupled with changing demographic patterns resulted in a severely skewed representative structure. The Las Vegas and Reno areas of the state continued to grow at a rapid pace through the twentieth century, whereas the frontier counties were restricted from expansion by severe physical conditions and the predominance of federal lands. As a result, by the 1960s, 75 percent of the population held only 12 percent of the senate seats and only 57 percent of house seats. It was not until the U.S. Supreme Court found such asymmetries unconstitutional that Nevada's legislature chose to correct this representational inequality.[14] Today, decisions in the state reflect the dominance of these two metropolitan areas much more than they have in the past. There are, however, some rules that continue to favor the rural areas. The use of initiative and recall petitions requires that the interests of isolated frontier counties be taken into account. The population centers can pass new policy using such mechanisms, but they cannot get proposals onto the ballot without sufficient support across these geographic boundaries.

Putting a Stamp on Politics: The Nevada Path

As argued above, the push to create a separate Nevada Territory and state was designed largely to address the continuing frustration of Nevadans in conflict culturally and economically with their Utah neighbors. As such, the new constitutional architects sought rules that would prevent such a problem in the future. They created political mechanisms to allow voices to be heard from across geographic and cultural distances. They included procedures for accessing the policy process that could circumvent the established arenas of power. Individuals who feel strongly enough about an issue have

14. *Reynolds v. Sims,* 377 U.S. 533 (1962).

a way of getting that issue onto the political agenda, even if they do not control the mechanisms of power. One important limitation added to this direct approach is the limitation on using the initiative or referendum process to pursue policy activities that require appropriations or expenditures. The architects of this approach saw this as an important check on government power and an access point for groups who felt strongly about an action of government. But as such, it was intended largely as a negative control. With the addition of the explicit restriction against spending through the initiative or referendum in 1972, the constitution maintains this power as a check rather than a new and additional legislative tool: "Article 19, Sec. 6. Limitation on initiative making appropriation or requiring expenditure of money. This Article does not permit the proposal of any statute or statutory amendment which makes an appropriation or otherwise requires the expenditure of money, unless such statute or amendment also imposes a sufficient tax, not prohibited by the Constitution, or otherwise constitutionally provides for raising the necessary revenue." As a result, the initiative remains a mechanism for limiting government and defining a social community. By permitting every group a sense of efficacy in shaping its own political future, this constitutional approach reduces some of the most serious sources of conflict that could undermine support for the political system.

Finally, the Nevada Constitution defines a sufficiently large arena of personal liberty to permit a diverse range of communities to function within the legal boundaries of state policy. Some might argue that Nevada politicians and citizens have pressed the desire for liberty to a libertine level, with legalized prostitution, liberal rules regarding pornography, and, of course, the ever-present role of gambling. Experiencing the efforts by early Mormon settlers to capture the political process and use it to shape their communities led Nevadans to adopt a language of individual rights and limits on government that would prevent any future social engineering. The wide-open space of Nevada at such a distance from its more populous neighbors permitted its citizenry to pursue these individual liberties without creating significant negative externalities for their neighbors. As the population grows, it will be interesting to see to what extent Nevada can protect this heritage of limited government and individual freedom. For example, the passage of the limitation on recognition of marriage amendment (Article 1, Section 21) in 2000 marks a reduction in individual liberty pursued through the more open mechanism of the initiative. It is a further example of the tensions between these competing forces that Nevada has experienced since its origin.

Conclusion

Despite the strong ties to the federal government in early Nevada history and the continued link to the federal government through the extensive federal landholdings in Nevada, the citizenry continues to pursue a political path distinctive from the direction of the rest of the nation. Their path has permitted extensive civil liberties and personal freedoms—distinctive enough to create a curiosity for the other Americans who visit. They have used political and legal mechanisms to press for fair consideration relative to federal decision making and defined their own distinctive social culture through a more open constitution and set of policy mechanisms. The fact that Nevadans have been able to pursue relatively free economic and social activities such as gambling at a time marked by social conservatism in the region and nationally indicates the extent to which a constitution can give meaning to defining culture and limiting government intrusion.

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Utah's Constitution

Distinctively Undistinctive

Utah has a relatively homogeneous population by comparison with most American states, much of which belongs to a distinctive church—the Church of Jesus Christ of Latter-day Saints (LDS, or Mormon Church)[1]—with mores and origin stories that, to some degree, express the normative and historical characteristics that distinguish peoples. One strand of Mormon historiography, for example, portrays the history of Utah as one of settlement by the Mormon people fleeing persecution in the United States followed by extensive legal and some military tension with the federal government.[2] Distinctive Mormon religious and cultural features continue to

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1. The percentage of the population that is LDS has dropped rapidly in the past several decades and is now thought to be about 62 percent (Matt Canham, "Mormon Portion of Utah Population Steadily Sinking," *Salt Lake Tribune,* July 24, 2005, A10).

2. See Edwin B. Firmage and Richard C. Mangrum, *Zion in the Courts: A Legal History of the Church of Jesus Christ of Latter-day Saints, 1830–1900* (Urbana: University of Illinois Press, 1988), 226, 244. In the "Utah War" of 1857–1858, the United States responded to reports that the Mormons were in "substantial rebellion" by sending in armed forces, accusing Mormon leader Brigham Young of treason and removing him from his position as territorial governor. The Nauvoo League, a Mormon force that also served as the territorial militia, fought back, burning two forts and supply trains. Later, the federal government launched a campaign to eradicate polygamy and reduce the power of the LDS Church that by the 1880s included barring polygamists and their supporters from serving on juries, holding public office, and even voting. LDS leaders were imprisoned for polygamy under evidentiary rules that apparently allowed conviction based on reputation with little more, and, in the final

be influential in the state's day-to-day politics. For example, the fact that church members tithe to support church religious, educational, and welfare activities gives church members additional expenses, whereas the fact that they commonly have large families gives the state a distinctive age structure, with more children per taxpayer than any other American state.[3] As a result, Utah's taxpayers sometimes have more needs and fewer resources than is typical.

In addition, for the past several decades, Utah statewide politics has been dominated by a single political party. Salt Lake City, the state's capital and largest city, however, is an exception both demographically and politically. Although it is the headquarters of the LDS Church, its population is more religiously and ethnically diverse, and its voting patterns are more liberal than in other parts of the state. As a result, the disproportionate influence of rural voters, limited in most states by the U.S. Supreme Court's one-person, one-vote cases, remains strong in Utah, as political power is retained by the statewide majority outside the capital, while the Salt Lake City population wields less influence in state government through its minority-party representatives.[4]

The distinctiveness of Utah as a state does not at first glance appear to find expression in the Utah Constitution, the text of which reflects the special history of Utah mainly negatively in the various concessions the Mormon leaders of the original territory made in order to win statehood. These include the state's name, which derives from the name of a local Indian tribe rather than the Mormon name for the region, Deseret, and, most important for purposes of gaining statehood, the constitution's ordinance, which purports to "forever prohibit" "polygamous or plural marriages" (Article III, Section 1).

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stages, the church was disincorporated and threatened with expropriation of most of its extensive property holdings.

3. See Pam Perlich, "Population Growth in Utah, 1970–1995," available at http://governor.utah.gov/dea/Library.html. According to the 2000 U.S. Census, 32.2 percent of Utahns were under the age of eighteen, compared to 25.7 percent in the nation as a whole. Utah's 2002 birthrate among women between the ages of eighteen and forty-four was 90.6 percent (National Center for Health Statistics, http://www.cdc.gov/nchs/births.htm).

4. Utah was no exception to the usual American practices. The original Utah Constitution provided for excessive representation of rural counties, and the unfairness grew worse as the population urbanized and the legislature failed to redistrict. Redistricting occurred in Utah only twice before the courts took action in 1965. See Jean Bickmore White, *Charter for Statehood: The Story of Utah's State Constitution* (Salt Lake City: University of Utah Press, 1996), 96, 97. The state constitution was amended to conform to federal constitutional requirements in 1988. Rural counties are still given formal overrepresentation in the current rules regarding initiatives and referenda, although this is probably less significant than the power that accrues as a result of single-party domination.

Even the compilation method of the Utah Constitution lacks distinction; Utah, like other states that entered the Union in the late nineteenth century, adopted many of the provisions of its original 1896 constitution from those of its sister states. One commentator has accordingly concluded that "it is impossible to say that the Utah Constitution . . . was drafted by Utahns for Utah."[5] As this author acknowledges, however, Utah's 1896 constitution was unique, if not in the text of its provisions, then as the product of Utah's "unusual history and experience" in struggling to become a state and to draft an acceptable statehood charter.[6]

The Struggle for Utah's Statehood and Constitution

The nearly fifty years from Congress's designation of a Utah Territory in 1850 (Organic Act, chap. 5, 9 Stat. 453) to its authorization of Utah's statehood in 1894 (Enabling Act, chap. 138, 28 Stat. 107) saw a series of disputes between the local population and the federal government. The experience of this prolonged controversy and the ultimate necessity of the territory's achieving some manner of reconciliation or accommodation with the nation as a whole in order to gain entry as a state resulted in a state constitution that was intentionally aimed at defining a governing body and its participants in a way that would not only include the population that was already present but also assure potential immigrants, as well as the federal government, that Utah was mainstream America. At the same time, the ongoing existence of the LDS Church as a decision-making and service system for its members has continued to demonstrate that a seemingly run-of-the-mill constitution is entirely compatible with a quite unusual polity.[7]

The members of the LDS Church who originally settled in the Salt Lake

5. John J. Flynn, "Federalism and Viable State Government: The History of Utah's Constitution," *Utah Law Review* 10 (1966): 311, 324.

6. Thus, the Utah Constitution may be an example of the phenomenon explored in Jorge Luis Borges's short story "Pierre Menard, Author of *Don Quixote,*" in which a modern author creates a new version of *Don Quixote,* dramatically different from the original even though the words are identical. See Borges, *Ficciones,* trans. Anthony Kerrigan (New York: Grove Press, 1962).

7. This was so to a degree even before the territory was forced to succumb to federal demands. Indeed, the first proposed constitution of the "State of Deseret," written in 1849 "while the territory was governed as a theocracy," guaranteed freedom of religion in familiar American strong terms (White, *Charter for Statehood,* 21). At the time, the Mormons referred to their polity as "The Kingdom of God and His Laws with the Keys and Powers Thereof, and Judgment in the Hands of His Servants, Ahman Christ," and it was governed by a Council of Fifty, understood to be the "political arm of the Kingdom of God when the Lord finally established his Kingdom on Earth" (Firmage and Mangrum, *Zion in the Courts,* 7).

valley in 1847 had in fact fled to Mexican territory in order to escape the state regimes of New York, Ohio, Missouri, and Illinois. In the early years, the Mormon Church understood itself not only as a faith community but also as a national community with a distinctive history and communal character.[8] At the beginning, Mormons experimented with creating a distinctive new Zion, complete with its own alphabet, extensive communal economic enterprises, and separate legal system (distinctive in both procedure and substantive law) to emphasize their separation from American norms in their new "State of Deseret."[9] Even after these experiments were largely abandoned, the LDS community maintained a sense of itself as a self-governing community with a shared history and mythology different from its neighbors.[10]

After Mexico ceded territory that included the Salt Lake settlement to the United States in 1848, the community determined that the best way to preserve its autonomy was to form its own state government. Over the next thirty-nine years, six separate attempts to draft a state constitution were rejected by the federal government. In contrast to the early Mormon experiments with forms of church-based governance, hostility to law, and collective (or church) ownership of enterprise (which continued in various forms for most of the territorial period),[11] the various draft constitutions show little originality. As one commentator wrote, "Although the social development of the Mormons varied from the usual cultural patterns, their political development [as reflected in their proposed constitutions] tended to parallel that of the rest of the nation."[12] Perhaps the most distinctively particularistic feature of the early attempts was the name of the proposed state,

8. See generally Firmage and Mangrum, *Zion in the Courts.*

9. Ibid., xiii, 14; David L. Bigler, *Forgotten Kingdom: The Mormon Theocracy in the American West, 1847–1896* (Spokane: Arthur H. Clark, 1998), 56. In the early years of settlement in Utah, Mormon leaders preached economic self-sufficiency, going so far as to organize a boycott of all "gentile" (that is, non-LDS) merchants in 1868 and the creation of a church-controlled alternative, the Zion's Cooperative Mercantile Institute, which remains a significant presence in the Utah economy today. The church and its leaders encouraged members to turn their property over to the church for collective operation. At the peak of the "United Order" phase, some towns were entirely collectivized, even to the point of common dining rooms. Collective control diminished in the course of the federal antipolygamy campaign, and by 1884 many of the remnants had been spun off from the church as cooperatives, some of which remain important. The church's expansive modern social-welfare operation may also be a remnant of this era. See Firmage and Mangrum, *Zion in the Courts,* 223, 317.

10. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983).

11. See White, *Charter for Statehood,* 23, 40, describing the "Ghost Government of Deseret"—the Mormon power controlling the territory despite the official rules—in the late 1850s and the theocratic shadow government in Utah as late as the 1880s.

12. Martin Berkeley Hickman, *Utah Constitutional Law* (Ph.D. diss., University of Utah, 1954), 73.

Deseret, taken from Mormon scripture. By the sixth round, in 1882, the convention gave up, accepting that the state, like the territory, would be named after a local Indian tribe, the Utes.[13]

From the earliest drafts, the proposed constitutions are most notable in their conformity to existing state constitutional norms; they simply ignore most of the distinctive Mormon institutions of the territorial period. There is no mention of the famous general assembly of the "Ghost State of Deseret," which had first convened in anticipation of the federal government's acceptance of Utah's third-draft constitution in 1862 and continued meeting after that constitution failed and Utah remained a territory rather than a state. The Ghost assembly convened for several days each year for six years to reenact "in behalf of Deseret the laws passed for the Territory of Utah."[14] There is no discussion of distinctive Mormon economic institutions, including church or cooperatively run irrigation projects, mills, land distribution, and city planning, or the communal "United Order" movement in which LDS members were encouraged to "consecrate" their property by turning it over to communal authorities. Similarly, the proposed constitutions do not reflect in any obvious way the church's historical antipathy toward being bound by the common law. Although Mormons maintained distinctive court systems and procedures for the entire prestate period, these institutions are not mentioned in the constitutions.[15]

13. Flynn, "History of Utah's Constitution," 319. The name change was first proposed in the 1872 constitutional convention (Dale L. Morgan, *The State of Deseret* [Logan: Utah State University Press, 1987], 112–13).

14. Morgan, *The State of Deseret,* 96–101 (quote on 100).

15. After the federal courts were organized in 1855, the LDS Church barred members from using those "foreign" and "ungodly" courts, at least for civil actions between church members, and instead directed Mormons to use church-based procedures emphasizing resolution of conflict through compromise (often imposed by church authorities) and enforced by disfellowship or excommunication. See Firmage and Mangrum, *Zion in the Courts,* 2, 15, 214–16, 218, 263–67, 288. Church courts insisted on their exclusive jurisdiction or supremacy or both until well into the 1890s, and the church did not officially recommend that members use the civil courts to collect debts until 1908. In the event of conflict between church decisions and civil court decisions, the church courts regularly required members to waive their legal rights and follow church rulings. Additionally, the Mormon-controlled territorial legislature created locally staffed "probate courts" (with jurisdiction extending far beyond probate) that did not follow common-law procedures or precedents; these courts continued to be influential at least to statehood. These courts abolished the forms of pleading and the formal authority of precedent, barred attorneys from collecting fees, required lawyers to present facts adverse to their clients, and placed a strong emphasis on resolution of conflict through compromise rather than final adjudication; they thus resembled the Mormon Church adjudicative system more than traditional common-law courts. Although the probate courts formally were part of the federal and territorial judicial systems, in practice church members were expected to take appeals to the parallel church system.

The federal government remained unappeased by the unexceptional character of these proposed constitutions, however, in the face of national hostility toward the Mormon practice of plural marriage, or polygamy, which emerged as the primary obstacle to statehood. Only after the LDS Church officially disavowed the practice in 1890, in the face of federal actions to confiscate church property and divest church members who practiced or espoused polygamy of various political rights, did Congress finally authorize the constitutional convention that would draft what became Utah's 1896 constitution.

By that time, the local population itself had also changed. New Mormon converts had continued to settle in the territory, but so had a substantial number of non-Mormons as well, though the latter remained a minority. The divide between the two groups was expressed through both economic and political competition, with non-Mormons traditionally opposing statehood out of fear of the church's dominance. By the time of the 1895 constitutional convention, however, all parties recognized the necessity of cooperation, both in order to succeed in the final task required to achieve statehood and in order to bring prosperity to the new state. The 107 delegates to the convention included not only prominent LDS leaders but also 29 non-Mormons, or "gentiles," one of whom was a Jew.[16]

The Themes of Acceptance and Inclusiveness Expressed in Utah's Constitution

Thus, whereas Donald S. Lutz has suggested that all state constitutions seek to create or define a people, the 1896 Utah Constitution may be considered one of the more intentional attempts to do so. Of course, like all American states, Utah lacks certain basic prerequisites for defining a people. It lacks control over its immigration policy and so cannot control the composition of its citizenry. Just as important, American norms of governmental neutrality leave states with only limited control over the processes of cultural production that differentiate one people from another and the extent to which a governing group can use governmental power to impose its cultural norms (including its views of history, language, and behavior) on all inhabitants of the polity. Still, Utah's relative isolation, its unusually uniform population in the early years, the Mormon population's sense of itself as a quasi-national community with a distinctive history of persecution and suc-

16. White, *Charter for Statehood,* 50. Mormon tradition refers to all non-Mormons as "gentiles."

cess, and the state's own self-conscious struggle for self-realization make the Lutz framework unusually appropriate.

Two concerns were prominent in the minds of the delegates and, to a large extent, remain manifest in the resulting text as it continues to exist today. The first was the desire to ensure Congress's acceptance of this seventh draft of the Utah Constitution and thus bring to an end the long wait for statehood. The federal Enabling Act for Utah had specified that the new state constitution must include certain provisions that would be "irrevocable without the consent of the United States," including a provision "that polygamous or plural marriages are forever prohibited."[17] Article III of the Utah Constitution for the most part simply incorporates the language of the provisions as set forth in the Enabling Act. In debating whether the Enabling Act actually required that criminal penalties be imposed on the act of polygamy, the delegates concluded that they would meet federal requirements by adopting the federal language stating that "polygamous or plural marriages are forever prohibited."[18] The question of whether this was sufficient arose again when the delegates reached the provision ensuring that the territorial laws then in effect would remain in effect at statehood. Responding to some delegates' concern that the territorial law criminalizing polygamy was preempted by a federal statute and was thus invalid, the convention inserted the statement that the law that "defines and imposes penalties for [polygamy] is hereby declared to be in force in the State of Utah" (Article XXIV, Section 2).[19]

Aside from adhering to the Enabling Act's specific requirements, the delegates also relied on the principle that language imported from other states' constitutions, which Congress had already approved, would serve as a safe harbor, avoiding any potential for federal criticism. Such borrowing "seemed reassuring, not a sign of lack of creativity."[20] Thus, much of the 1896 Utah Constitution was taken from other state constitutions.[21] The statement in Article I, Section 24, that "frequent recurrence to fundamental

17. Chap. 138, Sec. 3, 28 Stat. 107.

18. *Proceedings of the Utah Constitutional Convention,* 2 vols. (Salt Lake City: Star Printing, 1895), 1:811; statement of Mr. Eichnor.

19. Ibid., 2:1736–37.

20. White, *Charter for Statehood,* 52. That the delegates were self-conscious in following this practice is revealed in a contemporary newspaper account, in which one delegate facetiously stated that if a provision were not exactly copied, "I am afraid then we should not adopt it. We must have the exact words of some state constitution" (quoted in White, *Charter for Statehood,* 77).

21. Flynn, "Viable State Government," 323, citing Nevada, Washington, Illinois, and New York as the most common sources for Utah's constitutional provisions.

principles is essential to the security of individual rights and the perpetuity of free government," for example, was copied from the Washington Constitution.[22]

The delegates' second major concern in drafting the 1896 Utah Constitution was to promote an aura of inclusiveness. They sought not only to further ease the divide between Mormons and non-Mormons already resident but also to reassure those contemplating settlement in Utah that they could comfortably live and do business there. The desire to promote the new state as an attractive destination for those who could contribute to its economic prosperity was common in the West. Utah's concern, however, was particularly acute given its negative national image throughout the era of controversy over polygamy and church control. Thus, although the Mormon people's desire for statehood may have originally been motivated in large part by a desire for autonomy, the years of struggle ultimately led to a genuine effort to join the mainstream. The extent to which the inclusiveness expressed in Utah's constitution has been realized in state politics has been a subject of some controversy, but there is no question that the constitutional ideal remains of considerable significance. Although the LDS Church has occasionally wielded political influence overtly, these occasions have been quite rare, leaving the question of why the state has attained such political uniformity a matter of speculation. The constitution is to an extent responsible for structuring political debate—for example, through winner-take-all elections and electoral boundaries that tend to increase the power of local majorities and preclude serious discussion of issues that larger statewide minorities might be able to put on the table—but there is little evidence available, in the proceedings of the constitutional convention or elsewhere, that convention delegates who were church members deliberately set out to construct a constitution that would facilitate church domination.

Not surprisingly, in light of the polygamy controversy, the issue of freedom of religion and conscience received attention in the 1896 constitution, even beyond the requirements of the federal Enabling Act. The standard features of the American political theory of limited government offered a path to compromise the competing goals of autonomy and inclusiveness that the Utah delegates followed apparently without controversy. As one author has observed, "Almost every imaginable protection for religious freedom and injunction against the union of church and state has been included" in Utah's constitution, ranging from the guarantee of the right "to worship according to the dictates" of one's conscience (Article I, Section 1) to the prohibition of religious tests for admission in public schools (Article X, Section 8) and of public aid for the support of church-controlled schools (Article X, Sec-

22. *Proceedings of the Convention,* 1:362.

tion 9).[23] Tellingly, the Utah Constitution is the only state constitution to explicitly forbid "any church [from] dominat[ing] the State or interfer[ing] with its functions" (Article I, Section 4).[24] Further, the delegates' debates clearly indicate that nonreligious belief systems are included within the understanding of freedom of conscience.[25] The Utah Supreme Court has interpreted the state constitution's provisions on religious freedom and freedom of conscience, in light of Utah's history, as evidencing a strict policy of neutrality between religion and nonreligion.[26] This perhaps reflects an ongoing desire to appear all-inclusive and mainstream even as the relationships between state and church, the LDS religion and minority religions, and religion and nonreligion remain relevant to the state's politics.

Other indications of the delegates' intent to make the state attractive to potential settlers appear in the debates over the education and corporations articles. In both of these articles, the desire to promote the state's image had to be balanced against practical concerns about available state resources. In regard to education, one delegate called the provision ensuring public funding of the common schools (Article X, Section 3) "an advertisement worth more to Utah than all the money that has been expended in advertising this Territory in the last year."[27] However, the delegates ultimately acknowledged that the state university and agricultural college could not afford to operate without charging tuition, and state-funded high schools were not provided for in the Education Article until 1906.[28] A surprisingly long debate occurred over the location of the state university and agricultural college,[29] re-

23. Lester J. Mazor, "Notes on a Bill of Rights in a State Constitution," *Utah Law Review* 10 (1966): 326, 331.

24. As Mazor points out, this provision is unusual in that it appears to place a direct prohibition on churches rather than imposing a limitation on government powers, as is customary for bill-of-rights provisions (ibid., 332). See *Proceedings of the Convention,* 1:240, statement of Mr. Kimball acknowledging the role of the declaration of rights as "declaring what the State can do."

25. *Proceedings of the Convention,* 1:240, statement of Mr. Van Horne. The delegates also contemplated extending the prohibition on state support of religious institutions to parallel nonreligious institutions, such as those controlled by Freemasons or atheists, but ultimately rejected the idea (1:245–48).

26. *Society of Separationists, Inc. v. Whitehead,* 870 P.2d 916, 937–38 (Utah 1993). Of course, the constitutional language can have only limited influence on the casual thoughtlessness—generally manifesting itself in an assumption that the entire population, rather than somewhat more than half, observes LDS practices—that is the main practical limit to an aura of inclusiveness in modern Utah. Those are issues of empathy that play out in the political branches.

27. *Proceedings of the Convention,* 1:388, statement of Mr. Goodwin.

28. White, *Charter for Statehood,* 71–72, 94.

29. *Proceedings of the Convention,* 1:368, 2:1231, 1310.

sulting in the schools remaining in separate locations rather than merging into a single institution (Article X, Section 4). Both the state university and the agricultural college were granted "perpetuation" of all their existing "rights, immunities and franchises," which arguably included a large degree of autonomy and academic freedom from legislative interference.[30] Similarly, the original Article X, Section 9 (repealed in 1986), barred legislative interference in textbook selection (more likely to preserve school board than teacher autonomy).

The Corporations Article (Article XII), which was substantially eliminated in 1993, recognized the state's desire to encourage industrial development while also reining in the corporate power emerging in the late nineteenth century. Its detail reveals the delegates' concern that "future legislatures . . . be able to deal with the powerful corporations they hoped to attract." The resulting "balancing act" included provisions mainly reflecting struggles from earlier in the nineteenth century elsewhere in the United States.[31] Thus, we find a ban on special incorporation acts (Article XII, Section 1) and several other forms of special acts (Article VI, Section 26, barring special laws generally), which had been the source of much corruption in mid-nineteenth-century legislatures.[32] Two provisions react to specific U.S. Supreme Court decisions: one responds to the *Dartmouth College* case[33] by explicitly retaining for the legislature the power to modify corporate charters,[34] and another extends the logic of *Charles River Bridge* by barring irrevocable franchises.[35] Reflecting the midcentury railroad-financing crises,

30. The university's constitutional autonomy was limited in the case of *University of Utah v. Shurtleff* (2006 Utah 51, 144 P.3d 1109 [Utah 2006]), where the court rejected the university's ban on firearms.

31. White, *Charter for Statehood,* 74.

32. The fear of corruption can also be seen elsewhere in the original constitution. For example, Article VI, Section 28, originally Section 29, bars the legislature from delegating to any "special commission, private corporation or association, any power to make . . . any municipal improvement . . . to levy taxes . . . or to perform any municipal function." Article XII, Section 17, repealed, barred corporate officers or holders of franchise from serving as officials of the municipality granting the franchise. Article VI, Section 30, repealed in 1972, originally barred bonuses on government contracts.

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

34. *Proceedings of the Convention,* 2:1466–67. Although the relevant provision in Article XII was repealed in 1993, Article I, Section 23, serves the same function, stating that "no law shall be passed granting irrevocably any franchise, privilege or immunity." See ibid., 1:366, statement of Mr. Evans, referring to Dartmouth College in connection with Article I, Section 23.

35. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge,* 36 U.S. (11 Pet.) 420 (1837). According to Article XII, Section 11, repealed, franchises may be taken for public use.

in which local governments had competed for railroad lines by extending credit and financing with disastrous consequences, the constitution bars all lending of public credit for private undertakings.[36] A residual general suspicion of the corporate form can also be seen in provisions designed to limit the life of a corporation,[37] limiting the scope of the internal-affairs doctrine,[38] limiting the ability of corporations to evade liability by certain formal transactions,[39] providing for double liability for bank shareholders,[40] and constitutionalization of the ultra vires doctrine, meant to restrict corporations to limited purposes.[41] The convention also debated, but did not adopt, a general bar on "bounties" or other inducements to attract industry.[42]

Presaging Utah's later labor struggles (Industrial Workers of the World leader Joe Hill was hanged in Salt Lake City in 1915), the original constitution's inclusiveness extended to the working class. The constitution included specific bars on the use of Pinkertons as strikebreakers and blacklists of union organizers[43] and (contra *Lochner*)[44] provided that regulation of the conditions of labor was within the police power.[45] Finally, the constitution contained both a general provision barring "combinations" to control the price of agricultural, commercial, or manufacturing products (but, in con-

36. Article VI, Section 29, originally Section 31, was amended to allow universities to invest in research-based spin-offs. Cf. Hickman, *Utah Constitutional Law,* 19, describing 1837 crises and the suspicions of legislatures that resulted.

37. Article XII, Section 3, repealed, barred the legislature from extending corporate franchises. In 1870, Utah territorial law provided for a maximum duration for a corporation of twenty-five years. In 1880, the period was extended to fifty years. And in 1901, it was again extended, this time to one hundred years (*Keetch v. Cordner,* 90 Utah 423, 62 P.2d 273 [Utah 1936]). Perpetual duration was permitted only in 1957 (1957 Utah Laws, chap. 23, sec. 1). Current law provides for perpetual duration (Utah Stat. 16-10a-302).

38. Article XII, Section 6, repealed, limited privileges of foreign corporations to those granted to domestic ones.

39. Article XII, Section 7, repealed, barred a corporation from leasing or alienating any franchise so as to relieve the leased or alienated property from the liabilities of the corporation.

40. Article XII, Section 18, repealed, imposed double liability for bank shareholders until an amendment in 1941.

41. Article XII, Section 10, repealed, restricted corporations to their stated purposes.

42. *Proceedings of the Convention,* 1:899–90, 904.

43. Article XII, Section 16, repealed, barred Pinkertons. Article XII, Section 19, amended to remove criminality, bars blacklists. Article XVI, Section 4, bars exchanges of blacklists.

44. *Lochner v. New York,* 198 U.S. 45 (1905).

45. Article XVI, Section 1, says the legislature shall protect the rights of labor. Article XVI, Section 3, bars the "political and commercial control of employees," labor and child labor in mines, and convict labor. Article XVI, Section 6, provides for an eight-hour day on public works and permits health and safety regulation in factories and mines.

trast to the common law, not workers)[46] and specific rules to limit railroad exploitation of their customers.[47]

A further signifier of the Utah Constitution's self-conscious inclusiveness is the absence of a provision prohibiting the sale or use of alcohol. Though Mormon doctrine prohibited alcohol and some delegates supported including Prohibition in the 1896 constitution, the convention ultimately rejected the idea, partly out of the desire to stimulate local sugar production and partly out of the recognition that Prohibition would simply be impracticable.[48]

Other provisions of the 1896 constitution firmly situate it in its time and place. Article XVII, Section 1, confirming existing individual water rights, provided that the rights are "for any useful or beneficial purpose," was the product of extensive controversy over the relationship between private property interests and the recognition of water as a limited resource in the West.[49] The requirement in Article XI, Section 6, that municipal corporations preserve waterworks and water rights for the benefit of their inhabitants demonstrates the same concern. Provisions addressing the protection of state forests (Article XVIII, Section 1) and the holding of public lands in trust for the people (Article XX, Section 1) similarly have particular relevance in a western state where a high percentage of the territory remains unpopulated, undeveloped, and under federal or state control. The progressive values evident in many state constitutions of the late nineteenth century are apparent in the Labor Article (Article XVI), in the already-discussed Education Article (Article X) (which originally included a provision, Section 11, requiring teaching of the metric system), and in provisions, now repealed, that required establishment of state-funded "reformatory and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require" (Article XIX, Section 2).

In one highly significant aspect, the original Utah Constitution varied from the dominant spirit of its times. After the "longest fight in the conven-

46. Article XII, Section 20, an antitrust provision, was amended to include reference to the "free market system," to explicitly reference political power as opposed to merely consumer price–manipulation justification of antitrust laws and to remove an implicit distinction between unions and producer combinations.

47. Article XII, Section 15, repealed, authorized the legislature to establish passenger and freight tariffs. Article XII, Section 12, declared railroads common carriers. Article XII, Section 13, barred railroad consolidations. Article XII, Section 14, ensured taxability of railroad rolling stock.

48. White, *Charter for Statehood,* 80–82; *Proceedings of the Convention,* 2:1439. Following the federal lead, a Prohibition section was added to the Utah Constitution in 1919 and repealed in 1934 (Article XXII, Section 3).

49. White, *Charter for Statehood,* 78.

tion" and despite fears that it might endanger congressional approval,[50] women's suffrage won. Moreover, using text borrowed from the Wyoming Constitution, the 1896 constitution included one of the earliest guarantees of equal rights for women (Article IV, Section 1), providing that "male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."[51] Unfortunately, the clarity of this language was promptly marred by a 1915 supreme court decision holding that, the words notwithstanding, this provision did not bar a road poll tax that applied only to men, because "such a [differential] classification [of men and women] has . . . always been made and enforced from time immemorial, and . . . it is a natural and proper one to make" not barred by the express language of the constitution.[52] The constitution also omitted a literacy requirement for enfranchisement,[53] in contrast to other states that were beginning to use this as a device to exclude immigrants and former slaves from political participation.

Defining Governmental Structure

Of course, in addition to its role in ensuring statehood and in promoting the concept of Utah's inclusiveness, the Utah Constitution also establishes the structure of state government. It is in this regard that one scholar criticizes the original 1896 constitution as exhibiting a general hostility toward the authority and role of state government. Of particular concern was the dispersion of executive powers among an "executive 'troika'"—the governor, secretary of state, and attorney general—who together constituted the Utah Board of Examiners, responsible for examining all claims against the state (Article VII, Section 13, repealed).[54] Other executive tasks were performed by other specifically empowered boards composed of the governor and other executive officials. Most of the provisions establishing such

50. Ibid., 54.

51. It is worth noting that the Utah Territory had provided for female suffrage, but this right was repealed by the federal government during the polygamy controversy.

52. *Salt Lake City v. Wilson,* 46 Utah 60, 148 P. 1104 (Utah 1915). Cf. *Dred Scott v. Sandford,* 60 U.S. 393 (1857), similarly using "original intent" and long-standing practices to rule that constitutional provision cannot mean what its words say. Interestingly, the convention itself had rejected an explicit bar on "discrimination in wages on account of sex," suggesting that the delegates as well were unwilling to confront the full implications of the general principles they wrote into law (White, *Charter for Statehood,* 76).

53. As one delegate stated, "It is bad enough to be ignorant without being punished for it" (White, *Charter for Statehood,* 57).

54. Flynn, "Viable State Government," 324–25, 317; White, *Charter for Statehood,* 63.

boards, with the exception of the Utah Board of Pardons and Parole (Article VII, Section 12), were repealed in 1981, with further amendments occurring in 1993. The executive branch retains its decentralized character, however, particularly due to the status of the state attorney general, a separate elected executive official vested with the role of "legal adviser of the State officers" (Article VII, Sections 1 and 16).[55]

The Legislative Department Article (Article VI) establishes a part-time legislature that meets for a limited period beginning in January, originally for sixty days every two years, and currently for forty-five days every year (Sections 2 and 16). In keeping with the wariness of the legislature evidenced by this short term, the restrictions on special legislation (Section 26), and the requirement that each bill contain only one subject clearly stated in the title (Section 22), the constitution was amended in 1900 to provide for the initiative and referendum (Section 1).[56] The article sets forth procedural requirements for election and service of legislators (Sections 3–8 and 13), the passage of legislation (Sections 11–12, 14–16, 22, and 24–26), and the impeachment of executive officers (Sections 17–20) and imposes rules for setting legislators' salaries (Section 9). Originally, it provided for a decennial census and redistricting, but apparently this requirement was simply ignored, and it was eventually repealed.[57] This article specifically prohibits the legislature from authorizing "any game of chance, lottery or gift enterprise" (Section 27), and Utah remains one of only two states (the other being Hawaii) that retains such a restriction.[58]

The Judicial Department Article (Article VIII) provides for a supreme court and district courts, whose members were originally to be elected, but, since 1985, have been appointed by the governor and then retained through retention elections every ten years (for supreme court justices) or shorter terms (for other judges) (Sections 8–9). Along with the change in the method of choosing judges, the 1985 revision established a judicial council with administrative authority for the state courts (Section 12) and a judicial conduct commission to handle disputes over judges' misconduct (Section 13). Perhaps the most interesting clause regarding the courts appears not in this article but in the Utah Declaration of Rights, namely, the Open Courts

55. See Scott M. Matheson Jr., "Constitutional Status and Role of the State Attorney General," *University of Florida Journal of Law and Public Policy* 6 (1993): 1, 6.

56. It was modified in 1998 and 1999 to require a supermajority for changes to hunting regulations. White notes that the convention considered copying such a provision from the Swiss Constitution but rejected the proposal (*Charter for Statehood,* 52). The later amendment appears similar to those adopted contemporaneously in several other U.S. states.

57. Hickman, writing in 1954, notes that no redistricting had taken place since 1931 (*Utah Constitutional Law,* 91–92).

58. White, *Charter for Statehood,* 66.

Clause (Article I, Section 11), which provides an open textured right of redress of injury that has generated much judicial interpretation.

Aside from the establishment of certain public educational institutions in Article X, the state's government framework is made complete with the provision in Article XI for counties (Sections 1–5), municipal corporations (Section 5), special service districts (Section 7), and other government entities, as established by the legislature (Section 8). The constitution puts most of the responsibility for imposing specific requirements on such entities in the hands of the legislature.

Amendments and Implications for Utah's Constitutional Future

The Utah Constitution provides that it may be amended when two-thirds of each legislative house vote in favor of the amendment and the change is then approved by a majority of voters in the next election (Article XXIII). In addition, the Utah legislature established the Constitutional Revision Commission for the purpose of advising the governor and the legislature regarding proposed constitutional amendments.[59] Though Utah has not been as active in amending its constitution as some states, a number of changes have been noted above. Some additional amendments over the past hundred-plus years are of particular interest, with some of them remaining the subject of considerable controversy.

Several amendments have resulted from the practice of constitutionalizing fiscal rules. The original constitution contained specific dollar-denominated limits on debt and legislative pay that eventually became intolerable (Article VI, Section 9; Article XIV, Section 1). In contrast, the original provisions on revenue and taxation were quite simple but have been repeatedly amended to dedicate tax-revenue streams to particular purposes and to constitutionalize various exemptions.[60] For example, the gasoline tax is to be used entirely for highways, driver education, and traffic law enforcement and apparently may not be used even for other transportation needs or mitigation of the detrimental effects of overreliance on automobiles, whereas the income tax is dedicated entirely to public and higher education (Article XIII, Section 5).

For the past third of a century or more, several amendments to the Utah

59. Utah Code Ann. Sections 63-54-1 to 63-54-9.

60. White, *Charter for Statehood,* 67, 80, 93. These currently include authorization for partial or full property tax exemptions for military veterans and their widows, the poor, agricultural land and equipment, and residential property (Article XIII, Section 3).

Constitution have reflected national right-wing political trends with little distinctive Utah or Mormon content. Perhaps the best examples of this tendency are the gun control, victims' rights, and heterosexual marriage amendments. In 1983, the provision guaranteeing the right to bear arms (Article I, Section 6) was amended to make explicit that the right is an individual right and not a right of the militia or the people collectively.[61] The amendment appears to have been a reaction to a Utah Supreme Court decision adopting the mainstream view of the U.S. Constitution's Second Amendment,[62] and to reflect to some degree the concerns and language of the national gun-rights movement under the influence of the National Rifle Association.[63] Interestingly, although the amendment defines the right in extremely broad language (the "individual right . . . to keep and bear arms for security and defense . . . as well as for other lawful purposes shall not be infringed"), its operational language makes the amendment entirely precatory ("Nothing herein shall prevent the legislature from defining the lawful use of arms"). Thus, the import of the provision appears to lie largely in the hands of the Utah legislature. Given the amendment's conscious replication of the U.S. Constitution's "keep and bear arms" language, originalist interpreters may also conclude that the "arms" in question are only those that would have been held by ordinary citizens in the colonial period.

In 1992, the bulk of the original Article XII governing corporations was repealed, replaced with verbatim adoption by statute of the Revised Model Business Corporations Act, a national document that shares little of the original Utah Constitution's fears of corporate political dominance or economic abuse.

In 1994, the Victim Rights Amendment was added, again as part of a national movement to ensure crime victims' right to be present and heard at felony trials and to ensure that character evidence is admissible in noncapital sentencing proceedings.

The Utah definition-of-marriage amendment similarly reflects national movements rather than a particular Utah issue. In 2004, Utah and many other states changed their constitutions to ward off a feared threat that courts

61. The prior text was: "The people have the right to bear arms for their security and defense, but the Legislature may regulate the exercise of this right by law." The amended text states: "The individual right of the people to keep and bear arms for security and defense of self, family, others, property or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms."

62. See *State v. Vlacil,* 645 P.2d 677 (Utah 1982), which holds that the Utah legislature can constitutionally ban aliens from obtaining arms licenses.

63. See M. Truman Hunt, "The Individual Right to Bear Arms: An Illusory Public Pacifier?" *Utah Law Review,* no. 4 (1986): 751, 752.

would require recognition of gay marriages. The Utah legislature and voters added Section 29 to Article I's declaration of rights, stating that "marriage consists only of the legal union between a man and a woman" and that "no other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect." The effect of the new Section 29 is not yet clear. In particular, the meaning of the second clause was hotly disputed during the enactment campaign, with proponents contending that it was merely meant to prevent "marriage under another name" and opponents suggesting that it might bar equal treatment of unmarried couples or even require eliminating well-established legal rights. Predictably, following enactment, positions have shifted. As this chapter was written, an out-of-state antihomosexual group was seeking to use the second clause to challenge the City of Salt Lake's policy of granting employment benefits to domestic partners of employees, even if not married or eligible to be married. If Section 29 is held to have substantive meaning, it will certainly be challenged as a violation of the federal equal-protection clause, since it would then deny legal privileges to some citizens that are granted to others with no obvious basis other than invidious discrimination.

Regardless of the legal effects of Section 29, however, it clearly marks a dramatic step in the ongoing American project of creating an inclusive, democratic polity. For the first time since the demise of the antimiscegenation laws, some American states, including Utah, are explicitly declaring the policy of the state to be to bar certain citizens from marrying others and explicitly taking a stand in favor of maintaining long-standing patterns of discrimination against disfavored groups of citizens. Ironically, Utah's adoption of this trend indicates a reversal of the 1896 constitution's emphasis of inclusiveness even as it continues Utah's efforts to join the mainstream. This new constitutional provision also happens to coincide with the official position of the LDS Church. Meanwhile, at the same time that gay marriage has become an issue, the recent renewal of criminal prosecutions of polygamists[64] has revived the question of what the Utah Constitution's religious-freedom guarantees mean when juxtaposed with the ordinance's explicit "prohibition" of polygamy.[65] It seems that Utah's distinctive history continues to play a role in shaping its otherwise undistinctive constitution.

64. Several small groups that are not affiliated with the LDS Church continue to practice polygamy in Utah. The number of polygamists in the state is estimated at thirty thousand.

65. The Utah Supreme Court upheld the conviction of a member of the Fundamentalist Church of Jesus Christ of Latter-day Saints for unlawful sexual conduct and bigamy (*State v. Holm,* 2006 Utah 31, 137 P.3d 726 (Utah 2006).

BRIAN A. ELLISON

Wyoming

The Equality State

Donald S. Lutz suggests that a "written constitution is a political technology" that defines citizenship, communities, political institutions, processes, and other variables essential to the "authoritative allocation of values for a society"; it is a mechanism that helps maintain a people's vision of themselves and their way of life. Certainly, Madison and Hamilton, writing in *The Federalist,* would have agreed. They saw the U.S. Constitution not only as a rule book for the conduct of politics but also as a technical blueprint for a government that would protect citizens from the "violence of faction" by design. Structure, Madison contended in "Federalist no. 51," would supply, "by opposite and rival interests, the defect of better motives." Indeed, the observation that the framers created a government that resembled a machine led Woodrow Wilson, pushing progressive ideas, to question Hamilton's patriotism and to note, "The Constitution was founded on the law of gravitation. The government was to exist to move by virtue of the efficacy of checks and balances. . . . The trouble with [this] theory is that government is not a machine, but a living thing. It falls, not under the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton."[1]

The problem with Wilson's criticism is that the framers' fundamental task was not to build a government that responded to public whimsy but to build

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1. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federalism* 12 (Winter 1982): 27–44; David Easton, *The Political System* (New York: Alfred A. Knopf, 1960); Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: Bantam Books, 1982), 262–63; Wilson quoted in Ralph A. Rossum, *Federalism, the Supreme Court, and the Seventeenth Amendment: The Irony of Constitutional Democracy* (Lanham, Md.: Lexington Books, 2001), 182.

a machine that would thwart it and provide them with a national economy and a system of national defense. They saw these features—economy and defense—as technical or managerial, rather than political, problems. How many debates are needed to coin money, build roads, or establish a postal system? Of course, we know that the issues that flow from Congress's enumerated powers are highly political, but Madison and Hamilton were not thinking in these terms. The fundamental elements of government, in terms of both democratic tyranny and the delivery of public goods and services, would remain with the states. Thus, as Lutz notes, the U.S. Constitution is an incomplete document by design:[2] it does not define a way of life, a community, a people, and so on, because states would be left to do that job through their own constitutions.[3] That is certainly the case for the people of Wyoming and the Wyoming Constitution.

Wyoming Constitutionalism and Politics

The construction and durability of the Wyoming Constitution is a reflection of the pragmatic, libertarian, and anti–national government impulses that help define the state's political philosophy then and now. The Wyoming Constitution was drafted in just twenty-five days in 1889 after Governor Francis E. Warren called for a constitutional convention without an enabling act from Congress—a tactic designed to push for statehood rather than wait for it. The constitution that emerged was built on pieces borrowed from other state constitutions, specifically from Montana, Idaho, and North Dakota, and inspired by ideas from Colorado, Kansas, Illinois, Missouri, Nebraska, Pennsylvania, Texas, and Washington.[4] Still, the

2. Lutz, "Purposes of State Constitutions," 39–40.

3. Madison's ideas about the Bill of Rights provide further evidence for the Constitution as technology theory. Though Madison initially opposed a Bill of Rights, mainly because these civil liberty issues did not have anything to do with the management problems that the U.S. Constitution was designed to address, he changed his mind because the amendments would make the antifederalists feel better and because they would not affect national operations. From that perspective, the Bill of Rights is both a limitation on national power and a delegation of power to the states. See Rossum, *Federalism,* 127–29.

4. T. A. Larson, *History of Wyoming,* 2d ed. (Lincoln: University of Nebraska Press, 1978), 247. The overall impulse at the convention was to simply follow examples from other states. As George W. Baxter, a former territorial governor, stated at the convention, "We are here for the purpose of framing a constitution for the state of Wyoming. So far as the greater part of our work is concerned we should not be greatly perplexed, because we are traveling over well known ground. From the earliest days of the republic down to the present time the ablest, truest and best men of the several states of this union have been called into the service of the people in formulating into the clearest and most concise language those funda-

Wyoming Constitution also has several provisions that reflect problems unique to the state of Wyoming and is as much "home grown" as it is borrowed.[5]

Wyoming's Republican leaders called for statehood because they believed that federal territorial appointees would never understand the state and therefore would never support policies that would allow the state to develop economically. Governor Thomas Moonlight, for example, a Democrat from Kansas appointed by President Cleveland in 1886, opposed big cattle operations and fencing of the public domain—both critical to the economy—in order to keep the state's prairies open for settlers; he pursued these policies despite their unpopularity in the territory and clear evidence that no frontier family could make it through the Wyoming winters on 160 acres.[6]

Wyoming is high, arid, and barren. Between the 1830s and 1880s, most people came to Wyoming to travel through it. Its original economy was built with land grants to the Union Pacific, which laid the transcontinental railroad across the state's southern tier. Later, other federal initiatives, especially the containment of Native Americans in the North after the Black Hills gold rush, created opportunity for ranchers, farmers, and mining companies. Unfortunately, most of these ventures were dismal failures. Successful agriculture in the state would have to wait for nationalization of the federal water-development program, mining would require more federal giveaways, and the ranching industry demonstrated its vulnerability in the bleak winters of the 1870s. By the late 1880s there were only two things Wyoming's leaders knew for sure: that successful ranching, agriculture, and mining operations would require federal largesse and that the Wyoming Territory had no viable representation in Congress.[7]

Thus, Wyoming's first senators, also leaders of the statehood movement, Joseph M. Carey and Francis E. Warren, began the process of drafting bills and introducing legislation to develop federal resources for a state econo-

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mental principles of liberty, justice and equality, which must of necessity be the foundation of any instrument intended for the government of a free people. It seems to me, therefore, that so far as nine-tenths of our labor is concerned, we have only to exercise an intelligent and discriminating judgment in our study of the work of the constitutional builders who have preceded us" (*Journal of the Debates of the Constitutional Convention of the State of Wyoming* [Cheyenne: Daily Sun Printing, 1893], 347). See also Michael J. Horan, "The Wyoming Constitution: A Centennial Assessment," *Land and Water Law Review* 26, no. 1 (1991): 19n52.

5. Robert B. Keiter and Tim Newcomb, *The Wyoming State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993).

6. Larson, *History of Wyoming*, 151.

7. Ibid.

my—especially in the areas of water reclamation and other natural resources.[8] Even today, the state's economy is heavily dependent on federal subsidies to ranchers, farmers, and mining companies, and being home to the country's first national park (Yellowstone, 1872), first national monument (Devil's Tower, 1906), and first national forest (Shoshone, 1891) helps the state's tourism industry.

Still, the odd twist in Wyoming politics is that although the territory was entirely the creature of congressional initiative and imagination—it was conceived, drawn up, supported, and given life by Washington, D.C.—and its economy is highly dependent on the federal government, its people remain so defiant of federal authority. Perhaps the answer lies in political history. Frontier Wyoming was environmentally vicious. The idea that the federal government was "subsidizing" the ranching industry by allowing cattlemen to graze and fence the public domain was preposterous to people in the territory in the 1870s and 1880s. The frontiersmen lived there; they were building an economy, and they were doing the work. In that environment the federal government was seen as more of a hindrance to progress than a subsidizer of progress. The same is true today when mining corporations—exploiting the federal domain through the Mining Act of 1872—reap whirlwind profits and drive Wyoming's boom-and-bust economy. The corporations provide jobs and opportunity to the people of the state, while the federal government threatens to regulate their livelihoods away.

So how is it that within this context the people of Wyoming maintain their fundamental values—defined earlier as pragmatic, libertarian, and anti–national government? These values can be seen in construction of the Wyoming Constitution and its most "controversial and progressive provisions, including women's suffrage, state ownership of water, and limitations on important local industries."[9] Two of these provisions were unique to Wyoming—women's suffrage and state ownership of water—whereas limitations on corporations reflected broader progressive impulses.

Women's Suffrage

Not only was Wyoming, the Equality State, the first state to give women the right to vote in 1890, but the constitutional provision also followed twenty years of experimentation with women's suffrage. Wyoming was also the

8. Ibid.; T. A. Larson, *Wyoming: A Bicentennial History* (New York: W. W. Norton, 1977). The first reclamation act was named after Senator Carey—the Carey Act—which traded federal land for state aid to irrigation projects.

9. Keiter and Newcomb, *Wyoming State Constitution,* 2.

first territory to enfranchise women in December 1869. From there, Wyoming boasts the first woman to serve as justice of the peace, the first woman bailiff, the first women jurors—all in 1870—to the first woman elected to statewide office in 1894 and the first woman governor, Nellie Tayloe Ross, who served from 1925 to 1927. Wyoming was also a beacon for suffragettes: Susan B. Anthony, Anna Dickinson, Redelia Bates, and other national leaders visited Wyoming to bring attention to the suffrage movement.[10]

Though Wyoming was the first territory and state to grant women the right to vote, its leaders were not the first to think about the prospect. By 1869 the idea of women's suffrage had been discussed in both houses of the U.S. Congress, and many eastern states had granted limited extension of the franchise—such as in school elections. Colorado protected the right of married women to own property and "the enjoyment of the fruits of their labor."[11] And bills to grant women's suffrage had been introduced in other territories—Nebraska in 1856 and Dakota in January 1869—and Utah Territory granted women the right to vote in January 1870. Thus, women's suffrage was clearly an issue that was being discussed, and most westerners were ready for the experiment. But why did Wyoming's leaders decide it was time for them to take the lead?

The answer, according to Wyoming's premier historian, T. A. Larson, is publicity. Though there was opposition to women's suffrage—one legislator introduced an amendment, clearly designed to derail the bill, that would extend the franchise to "all colored women and squaws,"[12] and the second territorial legislature repealed women's suffrage![13]—when it came time to vote, the fact that Wyoming had only one woman for every six men was probably the single most pressing concern. Hence, the *Cheyenne Leader* claimed not only that the act would bring women to Wyoming but also that the move was "nothing more or less than a shrewd advertising dodge. A cunning device to obtain for Wyoming a widespread notoriety." Edward M. Lee wrote in 1872 that the law enfranchising women "was not adopted in obedience to public sentiment, but because the Territorial lawgivers believed it would operate as a 'first-class advertisement'; that their action in the premises would be telegraphed throughout the civilized world, and public interest thereby aroused, resulting in increased immigration and large accretions of capital to their new and comparatively unknown Territory."[14]

10. Larson, *History of Wyoming,* 78–83.

11. Ibid., 78.

12. Larson, *History of Wyoming,* 79.

13. Keiter and Newcomb, *Wyoming State Constitution,* 148. Women kept the franchise because the governor vetoed the bill.

14. *Cheyenne Leader* quoted in Larson, *History of Wyoming,* 80; Lee, "The Woman Movement in Wyoming," *Galaxy* 13 (June 1872): 755–60; Larson, *History of Wyoming,* 81.

By the time the issue was discussed at the Wyoming Constitutional Convention,[15] nearly twenty years later, it was a matter of course that the state would grant women voting rights. Though debate was limited, some delegates "spoke eloquently in favor of the principle of women's suffrage." The only action on the issue came when one delegate—a supporter of women's suffrage—complained that many Wyomingites opposed women's suffrage and deserved to vote on the issue. An amendment calling for a referendum on women's suffrage was rejected by the convention by a vote of twenty to eight.[16]

Water Rights

Whereas the framers of the Wyoming Constitution simply beat other states to the punch, so to speak, with regard to women's suffrage, its system for administering the state's most precious resource—water—was unique. Though other arid states, namely, Colorado and California, had constructed water-rights systems based on the doctrine of prior appropriation and adjudication through water courts, the Wyoming Constitution specifically states that the "water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state" (Article VIII, Section 1). Moreover, the Wyoming Constitution gave the power to administer water rights to a state engineer and board of control, rather than to a special court system (though Wyoming courts do serve as final arbiter in water disputes). The intention and effect of the system were to give engineers and hydrologists, rather than lawyers and politicians, the power to supervise water-resource development. The water-rights system created by the Wyoming Constitution not only was considered progressive in 1889 but has since served as the model for similar types of statutory and constitutional development in the United States, Canada, and Australia.[17]

Why did Wyoming's founders go beyond other states in the area of water ownership and rights? Though complex, there were two large problems with regard to water-resource development with which Wyoming's founders, and other western-state leaders, had to contend. First, the fundamental problem in western states is that water must be diverted for development. In eastern

15. This item deserves to be quoted in full: "Male and female citizens to enjoy equal rights.—The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges" (Article VI, Section 1).

16. Keiter and Newcomb, *Wyoming State Constitution,* 149.

17. Ibid., 181.

states, where water is plentiful, water is distributed according to the doctrine of riparian rights, which gives people with property along a stream, river, or lake the right to simply take water for use on their property. In the West, not only is water scarce, but areas suitable for development usually do not have enough water, whereas rugged mountain rivers and streams are a deluge of snowmelt. These waters—according to the proponents of western development—have to be captured, stored, and diverted. Thus, western water law is built on the doctrine of prior appropriation, which gives developers and cities the ability to claim waters in streams—sometimes hundreds of miles away—for diversion and beneficial use.[18]

The key to the prior appropriation system is that it gives multiple potential users the ability to claim water rights. For example, City A, City B, and Developer C might all claim two hundred acre-feet of water from a resource, such as a lake, with the capacity to provide a single user with two hundred acre-feet per year. The question, however, is who gets to develop the water first. Under prior appropriation, the first to claim the water gets first crack at developing the resource (known as "first in time, first in right"), but a secondary concern ("use it or lose it") states that claimants must either develop the water or lose it. Both components force developers to protect their priority-appropriation dates by conducting due diligence on their water rights, that is, convincing the courts that they are struggling to develop them.[19] From the outside, it is easy to see why public ownership of water is good for citizens, because it pushes developers—including cities and farmers—to compete for limited opportunities and to develop water resources. It is also easy to see how the system could be highly litigious. Thus, Wyoming's founders sought to avoid the troubles of a court system by giving development decisions to a state engineer who could make them according to objective criteria.

The second large problem Wyoming's founders faced was that most of the state—as much as 85 percent—belonged to the federal government. Thus, not only were the conventioneers stating to citizens that the water on their property belonged to the state, but they were also telling the federal government that the water on federal land belonged to the state. This was heady stuff. But it was also quite clear that Wyoming would have no large-scale development without access to water resources on the federal lands. This as-

18. Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* (New York: Penguin Books, 1986); Brian A. Ellison, "Denver Water Politics, Two Forks, and Its Implications for Development on the Great Plains," in *Water and the Great Plains: Issues and Policies,* ed. Peter J. Longo and David W. Yoskowitz (Lubbock: Texas Tech University Press, 2002), 93–115.

19. Reisner, *Cadillac Desert.*

sertion was first addressed by the Wyoming Supreme Court in 1900 when the claimant argued in *Farm Investment Co. v. Carpenter* that "the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across public lands."[20] But the Wyoming Supreme Court disagreed. The judges contended that Wyoming's assertion of state ownership was sanctioned by Congress on two accounts: first, when Wyoming was admitted into the Union and its constitution ratified; and second, through widespread congressional recognition of prior-appropriation systems in other western states.[21]

Still, the U.S. Supreme Court has not accepted these assertions exclusively, though developers in Wyoming and other western states do divert water from federal lands. The U.S. Supreme Court, for example, ruled in *Winters v. United States* (1908) that the water rights needed for a federal reserve—such as an Indian reservation, national park, or military installation—were established when Congress set aside the land. These water rights, known as "federal reserve water rights," are especially contentious because they date from the year Congress created the reserve and exist in perpetuity. Moreover, the U.S. Supreme Court also created a system for quantifying water rights on Indian reservations in *Arizona v. California* (1963)—ruling that Native Americans are entitled to four acre-feet of water for every practicable irrigable acre.[22]

These issues continue to provide ongoing legal and political drama in Wyoming. In the 1970s, environmentalists called on the tribes of the 1.8 million–acre Wind River Indian Reservation—the Eastern Shoshone and Northern Arapahoe—to provide better protection for species and natural habitat by increasing in-stream flows on the reservation.[23] This action, of course, caused a panic among water users in the Big Horn River basin because the tribes' 1868 priority date along with quantification of water based on the practicable irrigable-acreage criteria could strip them of their water

20. Quoted in Keiter and Newcomb, *Wyoming State Constitution,* 179.

21. Ibid.

22. Brian A. Ellison, "Environmental Management and the New Politics of Western Water: The Animas–La Plata Project and Implementation of the Endangered Species Act," *Environmental Management* 23 (May 1999): 429–39; Daniel McCool, *Command of the Waters: Iron Triangles, Federal Water Development, and Indian Water* (Tucson: University of Arizona Press, 1994); Judith Jacobsen, "The Navajo Indian Irrigation Project and Quantification of Navajo *Winters* Rights," *Natural Resources Journal* 32 (1992): 825–853.

23. Many state constitutions that rely on the doctrine of prior appropriation also define beneficial use. In Colorado, for example, beneficial uses of water include municipal, agricultural, and manufacturing purposes (Colorado Constitution, Article XVI, Section 6). The use of water to maintain in-stream flows, that is, leaving enough water in the river for fish to survive, has not historically been recognized as a beneficial use (see McCool, *Command of the Waters;* and Reisner, *Cadillac Desert*).

rights. In response to enabling legislation passed by the state legislature, the state engineer appointed a special master to adjudicate water rights in the Big Horn River basin. The adjudication, challenged in court by private landowners, banks, cattle companies, municipal governments, irrigation districts, and a host of others, ultimately gave the Shoshone and Arapahoe rights to five hundred thousand acre-feet of water in 1988.[24] Although this was ostensibly a victory for the Shoshone and Arapahoe, the Wyoming Supreme Court ruled in a second appeal that the tribes could not unilaterally decide that rights quantified under irrigation criteria could be used for in-stream flows; in essence, they would have to apply to the state engineer for new water rights.[25]

Limitations on Corporations

Though Wyoming's founders relied mostly on pragmatism as a guiding nonideology,[26] so to speak, they were also influenced by the reformist movements of the late 1800s. The conventioneers borrowed from both the progressive and the populist scripts, for example, when they designed their system for controlling water resources: the idea of expert, rather than political, management of a critical resource resounded with progressives, whereas state ownership of water soothed populist sensibilities. The same sort of reformist ideas—Republican progressivism and Democratic populism—can be seen in the convention's struggle to address the excesses of corporate behavior.

Most of the provisions in the Wyoming Constitution that address corporations have their social and economic foundations in the federal government's relationship with the Union Pacific Railroad and its domination of the territory. In 1875 an editorialist in the *Cheyenne Leader* wrote: "It has been the practice of a number of people to cry aloud to the railroad gods, military gods, and political gods to lift the wheels of progress out of the ruts." These gods, the Union Pacific and the federal government, controlled development. As mentioned earlier, the federal government gave the Union Pacific Railroad massive land grants to promote construction of the transcontinental railroad. Though it never lived up to its promise to provide jobs, the

24. *The General Adjudication of All Rights to Use Water in the Big Horn River System and All Other Sources,* Supreme Court of Wyoming, 753 P.2d 76 (1988).

25. Ibid., 835 P.2d 273 (1992).

26. See Larry Hubbell, ed., *The Equality State: Government and Politics in Wyoming,* 4th ed. (Dubuque: Eddie Bowers Publishing, 2000); Keiter and Newcomb, *Wyoming State Constitution;* and Larson, *History of Wyoming.*

Union Pacific did own the land that was to become the cities and towns of the southern tier and most of the land around them, and of course controlled access to markets and transportation. Although it was understandable that the Union Pacific commanded territorial politics and economics, it did so in a heavy-handed, exploitative way that ultimately made it extraordinarily unpopular. The company abused citizens with high prices for freight, passengers, coal, and town lots, while it claimed that it was exempt from local taxes and imported Chinese workers from the West Coast. Moreover, the company continued to extend its monopoly by buying up its competitors, namely, when it took control of the Kansas Pacific and Colorado Central in the late 1870s.[27]

By the late 1880s, however, the state's economy was beginning to diversify. The towns along the southern tier had grown into small cities, relatively speaking,[28] and the successful Indian wars allowed developers to look north toward ranching, mineral extraction, and coal-mining opportunities. Though there were few genuine successes in these industries—save the newfound political power of Wyoming's emerging ranching barons—there were several economic and demographic shifts in the territory and the nation that would significantly reduce the influence of the Union Pacific on Wyoming's constitutional convention in 1889. By 1888, for example, there was enough wealth to justify the creation of five northern counties in the territory to compete with the five "Union Pacific counties"[29] along the state's southern tier. And though the five southern counties were home to three-fourths of the territory's population in 1888, many of them were immigrants and Chinese workers whom the conventioneers were not willing to enfranchise. In contrast to the women's suffrage debate, the conventioneers inserted Article VI, Section 9, into the constitution, which stated, "No person shall have the right to vote who shall not be able to read the constitution of this state." The intention of the section was not to prevent illiterate American-born men and women from voting but to keep "foreign elements" in the Union Pacific mining camps from influencing local elections.[30]

These economic and demographic shifts are also reflected in the membership of the Wyoming Constitutional Convention. Though speculative, if the convention had been held just ten years earlier, in 1879, it would have surely been composed of Union Pacific lawyers. But although several of the convention's forty-nine members were lawyers from Union Pacific counties,

27. Larson, *History of Wyoming,* 109–11 (quote on 109).

28. The population of Wyoming in 2000 was 493,782 persons—the smallest in the United States. The state's two largest cities are Cheyenne (53,011) and Casper (49,644).

29. Ibid., 263.

30. Keiter and Newcomb, *Wyoming State Constitution,* 153. This section has been superseded by the federal Voting Rights Act Amendments of 1970 that prohibit literacy tests.

the convention reflected Wyoming's growing economic diversity, with representation from "bankers, stockgrowers, merchants, farmers, gold miners, [and] coal miners." The conventioneers also reflected the population of the Wyoming Territory: most of them were born in the eastern United States, three were from the South, and six were foreign-born.[31]

Finally, there were national forces afoot that reduced the influence of the Union Pacific in Wyoming. Progressivism in the northeastern United States, expressed by Republican (and some Democratic) calls for more professionalism, ethics, and efficiency in government, gave rise to the federal regulatory state. The simultaneous rise of Populism—expressed vociferously by the Grangers—throughout the midwestern, Rocky Mountain, and northwestern states and territories fueled calls for democratic reform. Ultimately, these forces created a national movement for railroad regulation that led to passage of the Interstate Commerce Act in 1887 and creation of the first federal regulatory agency. And though the Interstate Commerce Commission's regulatory powers were effectively stripped by the courts, and the agency was concomitantly captured by the railroads, it is safe to say that the owners of the Union Pacific Railroad had more on their minds in 1889 than the Wyoming Constitutional Convention.[32]

Indeed, in Wyoming the company was concerned with coal. Along with land grants along the route of the transcontinental railroad, the Union Pacific had also been given access to the massive coal seams that stretch across Wyoming. Though Wyoming coal mining was in its infancy in 1889, the conventioneers knew that coal mining would be the state's most important industry. The Union Pacific's control of transportation, freight, and the coal industry was intolerable. Additionally, controlling Wyoming's corporations, and the Union Pacific in particular, would, according to convention president Melville C. Brown, save the state from "the spectacle of seeing men wearing the brass collars of these companies coming into the legislature and doing their bidding."[33]

Thus, an extensive article for controlling the influence of corporations was included in the Wyoming Constitution. Not only were corporate "charters, franchises, special or exclusive privileges" established by the United States or the territory of Wyoming stripped of their validity (Article X, Sections 3 and 5), but corporations were to remain under the control of the state (Section 2). Though subsequently amended, Article X, Section 4, stated that "no law shall be enacted limiting the amount of [damages] to be recovered

31. Larson, *History of Wyoming,* 244. The countries of the foreign-born conventioneers were Canada, England, Scotland, Wales, Denmark, and Germany (243).

32. See Richard Hofstadter, *The American Political Tradition and the Men Who Made It* (New York: Vintage Books, 1989).

33. Quoted in Keiter and Newcomb, *Wyoming State Constitution,* 191.

for causing the injury or death of any person."[34] Furthermore, though amended, the constitution barred corporations from engaging in more than one type of business (Section 6)[35] and declared "corporations engaged in the transportation of persons, property, mineral oils, and mineral products, news or intelligence, including railroads, telegraphs, express companies, pipe lines and telephones," as common carriers and therefore subject to state regulation (Section 7). The constitution prohibits trusts (Section 8), ensures the state's ability to condemn corporate property for public use (Sections 9 and 14), and gives the state the ability to organize cooperative corporations and associations—public corporations that may well compete with private industry—to deliver services to citizens (Section 10).

Amendments, Declaration of Rights, and Distribution of Powers

Citizens may not directly amend the Wyoming Constitution. Amendments may be proposed by either house of the state legislature, and after approval by two-thirds majorities in both the house and the senate they are referred to the people for ratification by majority vote (Article XX, Section 1). The Wyoming legislature may also call for a constitutional convention using the same procedure (Section 3). Most amendments, in keeping with the pragmatic nature of governing in Wyoming, have been added to address evolutionary trends in politics and culture.[36] The conventioneers, for example, originally wrote in Article XVI, Section 6, that "the state shall not engage in any work of internal improvement unless authorized by a two-thirds majority of the people." In this case, they failed to account for the automobile; air transportation; federal grants to build roads, bridges, reservoirs, and airports; and a host of other changes related to modernity. The constitution was amended to prohibit the use of intoxicating liquors in 1917 and amended again to allow the use of intoxicating liquors in 1934 (both times in Article XX, Section 10).[37]

34. The section was amended in 1914 when the state created a workers' compensation fund, which created speedier payments to injured works and limited liability for companies (Article X, Section 4).

35. Article X, Section 6, was amended in 1960 and reads: "Engaging in more than one line of business.—Corporations shall have power to engage in such and as many lines or departments of businesses as the legislature shall provide."

36. Ibid., 14.

37. These amendments were added in response to the Eighteenth and Twenty-first Amendments to the U.S. Constitution, though it is interesting to note that Prohibition in Wyoming began in 1917 rather than 1919.

Other amendments to the Wyoming Constitution were added to address issues of taxation, public indebtedness, and legislative powers; to change the method of selecting judges; and to adjust the system for funding schools. The constitution was also amended in 1968 to give citizens the power to "propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum" (Article III, Section 52). Interestingly, these powers have been used only twice: once to make in-stream flows a beneficial use in 1986,[38] and again to prevent truckers from using triple trailers on state highways in 1992.

The declaration of rights in the Wyoming Constitution has also been amended three times: to clarify citizen rights to a jury trial in civil cases (Article I, Section 9), clarifying venues for trials (Section 10), and overturning the requirement that "all taxes shall be equal and uniform" (Section 28). Otherwise, the expansive thirty-seven–section article document remains as it was written in 1889. Article I provides citizens with all the fundamental freedoms found in the U.S. Bill of Rights, plus it guarantees that jails shall be "comfortable and safe" (Section 16), bans funding for religious or sectarian societies (Section 19), protects laborers (Section 22), promotes science and art through education (Section 23), and, among other items, gives citizens the right to bear arms for personal defense (Section 24). The declaration also gives citizens the right to "reform or abolish the government in such manner as they may think proper" (Section 1). Though Article I provides an expansive list of freedoms, at least one of its provisions—the ban on aid to religious institutions—was intended to thwart the construction of Catholic parochial schools in the state.[39]

Though the provisions in the declaration of rights are limitations on legislative power, the conventioneers also wrote in Article VII, Section 20, that it is the duty of the legislature to protect and promote the "health and morality of the people." Wyoming Chief Justice Fred H. Blume expounded on this duty: "Giving the legislature the right to enact laws for the health, safety, comfort, moral and general welfare of the people, is an attribute of sovereignty, is essential for every civilized government, is inherent in the legislature except as expressly limited, and no express grant thereof is necessary."[40] Unlike the U.S. Constitution, the Wyoming Constitution does not specifically place limitations on legislative power.[41] Instead, the Wyoming Consti-

38. The Wyoming legislature preempted the 1986 initiative by passing a law making in-stream flows a beneficial use (Wyoming Statutes Annotated, Section 41-3-1001, 1990 Supplement).

39. See Horan, "Wyoming Constitution"; and Larson, *History of Wyoming.*

40. Quoted in Keiter and Newcomb, *Wyoming State Constitution,* 175.

41. U.S. Constitution, Article I, Section 8, Clauses 1–17. See also note 3 above.

tution limits the power of the legislature by limiting its meetings, originally to no more than a sixty-day biennial session. The constitution was amended in 1972 to allow the legislators to meet every year for alternating general and budgetary sessions, provided that "no bills except the budget bill may be introduced [during the budgetary session] unless placed on call by a two-thirds vote of either house" (Article III, Section 6). The amendment also limits legislative sessions to no more than forty legislative days per year. Thus, the legislature's broad sovereignty is fundamentally stymied by severe limitations on its ability to meet and conduct business.[42]

Legislative apportionment was the most debated issue at the Wyoming Constitutional Convention.[43] At issue was how apportionment between the upper and lower houses would be divided, based on population or registered voters, and whether the Wyoming Senate would be conceptually similar to the U.S. Senate—with the senators in Wyoming representing counties similarly to the representation of states by U.S. senators. These issues reflected the tensions between the northern counties and the Union Pacific counties, with representatives from northern counties arguing, for example:

> The people of [the northern counties] . . . cannot and will not accept any proposition that perpetuates the legislature of the territory of Wyoming in the manner and form in which it has been organized in the past years. It is simply expecting them to rivet upon their necks permanently a yoke the temporary wearing of which has galled them so bitterly. . . . [N]o proposition will be acceptable to the people of northern Wyoming that does not remove in some way the balance of power from where it now stands.[44]

In response to this imbalance of power, the northern counties wanted a senate that would be apportioned, like the U.S. Senate, according to equal representation for counties and house apportionment based on population; voter fraud in the southern counties enhanced the number of registered voters. Ultimately, since the southern counties had more representatives at the convention, a deal was struck in which concessions were made to the northern counties while keeping power, at least temporarily, with the southern counties. All apportionment was to be based on population, but each county was to receive at least one senator and one representative. Furthermore, the Wyoming House of Representatives was to be at least two times greater in size than the state senate—not to exceed three times greater—and, bor-

42. See Horan, "Wyoming Constitution."

43. See Keiter and Newcomb, *Wyoming State Constitution;* and Larson, *History of Wyoming.*

44. Quoted in Keiter and Newcomb, *Wyoming State Constitution,* 82.

rowing from the Texas Constitution, members of the lower house would serve two-year terms, whereas senators would serve overlapping four-year terms.[45] Today, in accordance with *Baker v. Carr* and a host of U.S. Supreme Court and Wyoming Supreme Court precedents, the Wyoming legislature is apportioned according to population, with thirty members in the senate and sixty members in the house.[46]

Executive power—as in most states—is fragmented into several competing offices in order to weaken the executive vis-à-vis the legislature. Wyoming's plural executive consists of the governor, secretary of state, auditor, treasurer, and superintendent of public education (Article IV, Sections 1 and 11).[47] Though the governor has broad powers, including the line-item veto in appropriation bills (Section 9), the auditor and treasurer share executive fiscal responsibilities, whereas the legislature remains primarily responsible for budgetary matters. The executive powers remain intact from the 1889 constitution, though they have been amended twice: first in 1982 to allow the state treasurer to seek additional terms, and in 1990 to require a legislative examination of state accounts (Sections 11 and 14).

Contrary to the ho-hum attitude the state legislature has had toward the executive branch, the judicial branch has been the source of political and policy controversy. Delegates to the constitutional convention were not certain that the state would need a supreme court per se—Wyoming Territory had three district judges who occasionally came together to form a supreme court. Some opponents argued that a supreme court would be too costly and that the judges would not have enough work to do. The lawyers at the convention, on the other hand, argued against the inefficiencies of the territorial system and noted that an independent supreme court would be needed to protect civil liberties as the state developed. In the end, the conventioneers settled on a state court system built on justices of the peace, courts of arbitration (district courts), and a supreme court; all justices were selected through contested elections.[48]

In 1972 the court system in Wyoming was scrapped through constitutional amendment, as democratically elected justices were replaced with justices appointed by the governor from a list provided by a judicial nominat-

45. Ibid., 81–84.

46. *Baker v. Carr,* 369 U.S. 186 (1962).

47. The secretary of state serves as acting governor if the governor is "impeached, displaced, resign[s] or die[s], or from mental or physical disease or otherwise become[s] incapable of performing the duties of his office or be absent from the state" (Article IV, Section 6).

48. See Horan, "Wyoming Constitution"; Keiter and Newcomb, *Wyoming State Constitution;* and Larson, *History of Wyoming.*

ing commission (Article V, Section 4). Proponents of the change argued that elected judges—especially the typically nonlawyer justices of the peace—provided inefficient, partisan service to the people of Wyoming, and maintained that retention elections would provide sufficient accountability.[49]

Constitutionalism and Culture in Wyoming

Change and the Wyoming Constitution have gone hand in hand with the pragmatic, libertarian, and anti–national government impulses of Wyomingites and the state's founders. Wyoming constitutionalism has been pragmatic in that the document's founders and subsequent generations of leaders have not been bound by innovative or ideological concerns—rather, they fixed problems, tinkered here and there, and borrowed where they could. Even in cases where it might seem that the founders were being innovative—such as women's suffrage and state ownership of water rights—they were not challenging social or political convention. Both actions reflected the social and physical context in Wyoming—a shortage of women and a shortage of water.

Wyomingites have a pervasive libertarian attitude, reflected in the state constitution's open language, dating from 1889, about sex and race. These, once again, seem to be innovative concessions—especially since many states would spend a good deal of time erecting racial barriers in their state constitutions for much of the next sixty years—but the twist is that they were not necessarily motivated by democratic impulses, especially when it came to racial minorities. These concessions to women and minorities should be considered delegations of responsibility: the constitution forbids discrimination based on sex and race, but women and minorities are also on their own. Thus, women and minorities should not look to the government for any more or less assistance with employment, education, or housing than any other citizen. Wyoming public opinion on abortion, for example, is overwhelmingly prochoice—not because the citizens believe in a woman's right to choose but because they do not like government interference.[50]

The Wyoming Constitution, a product of pragmatic constitutionalism, provides the people of Wyoming with an expression of who they are as a political community—a defiant, unpopulated, isolated enclave in the center of the Rocky Mountain West. There is little wonder why the Wyoming Consti-

49. See Horan, "Wyoming Constitution."
50. See Hubbell, *Equality State.*

tution has stood the test of time, serving the state with few fundamental alterations since the inception of statehood. The document reflects a people who are not particularly interested in governing—at least organized governing. The constitution, like the government, is simply not the center of attention.

WESTERN STATES

In many ways, the West is not constitutionally distinct in that these states borrowed heavily from states with much older constitutional traditions. However, because these states borrowed differently, and in different proportions, they crafted constitutions that were uniquely adapted to their historical situations and people.

The author of the Oregon chapter demonstrates that the state's constitution is unabashedly imitative. This quality is particularly evident with respect to the progressive reforms of initiative, referendum, and recall. Despite critics of its oft-amended constitution, the author asserts that it is these reforms that have allowed Oregonians to remain true to their core political values, in particular, popular participatory constitution-making.

The California chapter asserts that the current constitution, adopted in 1879, is an example of what a constitution should *not* look like. The author rejects claims that the 1849 constitution was inadequate and suggests that the earlier document, however imperfect, was actually closer to fulfilling the constitutional purposes outlined by Donald S. Lutz than is the current state constitution.

SALLY H. CAMPBELL

The Alaska Constitution

Promoting Statehood, Providing Stability

When the Alaska Constitutional Convention convened in November 1955, the makeup of the United States of America had not changed in the previous forty-three years.[1] By the time Alaska was admitted as a state, the United States had been a nation of forty-eight states for forty-seven years. Prior to that, the longest period of such stability had been the fifteen years between the admittance of Missouri in August 1821 and the admittance of Arkansas in June 1836. Just as psychologists say that no two children are ever born into the same family, it may be considered that no two states are ever admitted into the same Union, and certainly the nation in which Alaska aspired to become an equal partner was different from the one that had admitted its first forty-eight members in relatively rapid succession over its first 125 years in existence. In fact, the Alaska Constitution was written during a time when many states were in the process of *re*writing their existing constitutions. Much had changed and much had been learned since the people of New Hampshire adopted their first constitution—only eighty-eight lines long—in 1776.

The framers of the Alaska Constitution availed themselves of the vast materials and experience available to them as relative latecomers to the constitution-writing process. They consulted textbooks, interviewed scholars and members of state governments around the United States, and assembled a team of consultants to work with them on their project.[2]

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1. Arizona became the forty-eighth state on February 14, 1912.

2. Thomas Stewart, "Laying Foundations: Plans and Preparations for Alaska's Constitutional Convention" (unpublished manuscript, 2005); contact Gayle Higgins at Indiana University (ghiggins@indiana.edu).

The Alaska Constitution was written with two distinct purposes in mind. Like the forty-eight before it, it was written to be an effective and lasting constitution for the soon-to-be state, but it was also written for the purpose of "selling" the U.S. Congress on the idea of statehood for Alaska. During the post–World War II period, many states had moved toward a more managerial style of state government, and the Alaskan model reflects an awareness of that trend. It was written based on the advice not of radical revolutionaries or idealistic philosophers but of efficiency-minded public administrators.[3] This is not to say that the writing of the constitution was a purely administrative task. Victor Fischer, who had served as vice president of Operation Statehood and was elected as a delegate to the convention, has said, "The vision was that we were writing for posterity and in a way, the model was the U.S. Constitution of 1787, which had 55 delegates, a number we copied. We were very conscious of the fact that the U.S. Constitution served as the foundation and framework for the evolution of the country through the tremendous changes over two centuries. In the same way, we looked at the Alaska Constitution as something that should be designed in a similar manner, to serve a future that not one of us could really visualize." As Gerald A. McBeath and Thomas A. Morehouse point out, "Knowing that a nationwide audience would judge their performance, the delegates' goal was to produce a document that would be viewed inside and outside Alaska as prudent and responsible." Through the writing of their constitution, Alaskans hoped to demonstrate their political maturity and preparedness for statehood. They were aiming to "convince the Congress and the Eisenhower administration that Alaska stood ready for first-class membership in the Union."[4]

The convention delegates (and the people of Alaska) may have felt that they were fighting a bit of an uphill battle in their pursuit of statehood. When the convention convened in 1955, Hawaii had already had a constitution ready and waiting for statehood for five years. In his 1953 State of the Union address, President Eisenhower had openly supported statehood for Hawaii without mention of the similar aspirations of Alaska. This was taken as a slight by Alaskans and served to bolster the drive for statehood.[5] In the fall of 1954, in what could be construed as a referendum on statehood itself, Alaskan voters took the territorial legislature out of the hands of Re-

3. Gerald A. McBeath and Thomas A. Morehouse, *Alaska Politics and Government* (Lincoln: University of Nebraska Press, 1994), xviii.

4. Fischer quoted in Deborah Tobola, "Writing a Constitution," in *LitSite Alaska,* http://litsite.alaska.edu/uaa/akwrites/constitution.html; McBeath and Morehouse, *Alaska Politics and Government,* 117, 116.

5. Stewart, "Laying Foundations," 44–45.

publicans and put it solidly in the hands of prostatehood Democrats.[6] In 1954 and 1955, Thomas Stewart, former attorney general and then chairman of a joint Alaska House and Senate committee working toward the calling of a constitutional convention, traveled extensively throughout the United States, meeting with scholars, government administrators, politicians, and delegates to the constitutional conventions of states that had recently engaged in the rewriting of their own constitutions.[7] He came home with information and connections that would prove invaluable to the team that would convene later that year.

The Role of the Constitution

The dual purpose of the Alaska Constitution seems evident in its preamble, which states, "We the people of Alaska, grateful to God and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil and religious liberty within the Union of States, do ordain and establish this constitution for the State of Alaska." The inclusion of the phrase "and transmit to succeeding generations" indicates the intention of and desire for political stability and longevity. This intention was certainly something that the Alaskans wanted to convey to the U.S. Congress. Additionally, the reference to "our heritage of political, civil and religious liberty" also serves to convey the idea that these principles of statehood are not new or foreign to the people of Alaska.

Despite the emphasis on the administrative task at hand and the wealth of practical advice they had sought, the constitutional delegates remained fully aware that, in addition to the more mundane functions, such as establishing political institutions and limiting government power, constitutions give shape and meaning to the fundamental ways in which people approach communal life. A constitution articulates the "moral values, moral principles, and definition of justice toward which a people aims," sometimes overtly and sometimes through the necessary overlap that these principles have with the constitutional principle of limitations on government power.[8] Perhaps the most fundamental way that a people defines its moral values and conception of justice is through the rights it grants to members of the com-

6. John S. Whitehead, *Completing the Union: Alaska, Hawai'i, and the Battle for Statehood* (Albuquerque: University of New Mexico Press, 2004), 235.

7. Stewart, "Laying Foundations," 6–13.

8. Donald S. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16.

munity. These basic rights also serve as parameters for the government that is being created. This overlap between the explication of basic human rights and the boundaries of government power is evident in the Alaska Constitution. The constitution begins with a discussion of "inherent rights." These rights are defined as "life, liberty, the pursuit of happiness, and the enjoyment of the rewards of [one's] own industry" (Section 1.1). These rights clearly follow the Lockean tradition that inspired the founders of the United States and have served the nation and the states so well. The framers of the Alaska Constitution were able to benefit from the passage of time (since the adoption of the national constitution) and the resolution of national struggles and thus clearly stated the entitlement of all persons to the same rights, opportunities, and protections under the law in addition to the guarantees of freedom of religion, speech, assembly, and petition. The guarantees of freedom in the Alaska Constitution reflect not only the Bill of Rights of the U.S. Constitution but also the unique diversity of Alaska itself, which comprises a native population (which is itself diverse), settlers from the Lower 48, and transients seeking their fortunes. In the years immediately following World War II, the population of Alaska underwent significant and lasting changes. Although regions that had seen a great influx of both military personnel and civilians during the war saw their populations decrease, many remained well above prewar levels.[9] Though Alaska's native population was growing, the nonnative population was also growing at a much faster rate. Despite the fact that the native population grew in number from 33,863 in 1950 to 43,081 in 1960, it had shrunk from 26 percent of the overall population to 19 percent, and has continued to shrink ever since.[10]

At the time of the original drafting, it was considered a concession to the native population that one not be required to write in English in order to be eligible to vote. An English writing requirement had been a territorial voting requirement, but the only Native Alaskan member of the fifty-five delegates to the constitutional convention, Frank Peratovich, successfully objected to its continuance. English proficiency was nonetheless a requirement, but reading *or* speaking was deemed sufficient. In 1970, a constitutional amendment eliminated the English-language requirement altogether.[11]

The convention delegates declined to address the issue of territorial claims by the native population, deeming it a matter best dealt with at the federal level. This issue came to the fore as the oil business began to boom in Alaska and plans for the pipeline began to take shape. In 1971, the Alaska

9. Whitehead, *Completing the Union,* 99.
10. McBeath and Morehouse, *Alaska Politics and Government,* 235.
11. Ibid., 130–31.

Native Land Claims Settlement Act was passed by Congress, giving the native population a cash settlement of almost one billion dollars and more than forty million acres in land.[12] In 1972, Alaskans ratified a constitutional amendment specifically guaranteeing freedom from discrimination based on race, color, creed, sex, or national origin.

The Structure of the Poststatehood Government

In writing the new constitution, the convention delegates addressed the weaknesses of the territorial government structure. The political institutions of Alaska's state government are carefully spelled out in Articles II through IV. Political power is distributed among the three branches of the state government: an executive branch headed by the governor, a bicameral legislature, and a judicial branch. The state government is federal in nature, with an emphasis on local control. The constitution's Article X vests local political power in the boroughs and cities.

Executive

As a district and later a territory, Alaska had an appointed governor, but executive power was highly fragmented.[13] With the ratification of the state constitution, this became a popularly elected and significantly more powerful position. As the only statewide elected officials, the governor and lieutenant governor run jointly and are elected together. The duties and qualifications of these executive offices are outlined in Article III of the constitution. A candidate for either post must be at least thirty years old and must have been a resident of Alaska and a citizen of the United States for at least seven years. The term of office for both the governor and the lieutenant governor is four years, and, though there is no absolute limit on the number of terms that a governor may serve, Section 5 sets forth that after having served two full terms, one must sit out a full term before being eligible to serve again.

The latter half of Article III describes the duties and responsibilities of the office of governor. The governor is, most generally, "responsible for the faithful execution of the laws" (Section 3.16). Several specific responsibilities of the governor are laid out in subsequent sections. He or she is to provide the legislature with information and recommendations regarding the affairs of the state and may convene one or both houses of the legislature in a spe-

12. Whitehead, *Completing the Union,* 341.
13. McBeath and Morehouse, *Alaska Politics and Government,* 121.

cial session when deemed necessary. The governor is commander-in-chief of the state's armed forces and may proclaim martial law when deemed necessary for a period of up to twenty days, after which time martial law may be continued only with the approval of a majority of both legislative houses. The governor has the power of executive clemency (not extending to matters of impeachment). He or she is responsible for the supervision of all executive departments, which includes the power to appoint the head of each. In addition, the governor may reorganize the departments of the executive branch (through executive order, when required), provided that they do not exceed twenty in number, in order to ensure effective and efficient governance.

Legislature

The First Organic Act of 1884 gave the district of Alaska some governmental structure, but created no legislature. Alaska was governed according to Oregon law. The Second Organic Act of 1912 turned Alaska into a U.S. territory and created its first popularly elected governing body. The bicameral legislature was small (eight seats in the upper house and sixteen in the lower), and its powers were limited. The state constitution created a bicameral legislative body that was more than twice the size of the territorial legislature, but still quite small, with an upper-house membership of twenty and lower-house membership of forty. Though the convention delegates briefly considered the possibility of a unicameral legislature, they opted for the far more common bicameral structure as part of their effort to "fit in" with the other states of the Union.[14] The framers also debated the issue of compensation for legislators. There was concern that a highly paid legislature would not serve the best interests of the citizens,[15] and the framers were committed to the idea of citizen control of and participation in the legislature.

The powers and structure of Alaska's legislative body are outlined in Article II of the constitution. Section 2 details the qualifications for membership in the state legislature: one must be a resident of the state for three years, a resident of the district for one year, and meet all voter qualifications. Members of the upper house must be at least twenty-five years of age, and members of the lower house must be at least twenty-one. The term of office for members of the upper house is four years; for the lower house, it is two years. The qualifications and terms of Alaskan legislators fit squarely within the range of those for other states' legislators.

The state legislature holds annual regular sessions beginning on the

14. Whitehead, *Completing the Union*, 36–42, 241.

15. McBeath and Morehouse, *Alaska Politics and Government*, 121.

fourth Monday in January and lasting a maximum of 120 days. Special sessions may be called, when necessary, either by the governor or by two-thirds of the legislature. The legislature is responsible for the authorship and passage of bills, as well as for determining the procedures by which bills are handled. Though outwardly generic, this simple description of the legislature's role belies an underlying constitutional philosophy. According to former governor Tony Knowles, "Rather than expressing details, as did the constitutions of many states, ours set broad goals for the new state of Alaska. Details would come later during the legislative process."[16] In addition to the passage of bills, the legislature is also responsible for appointing a state auditor (Article IX, Section 14). This legislative authority stands in contrast to states with appointed or elected executive-branch auditors. The houses of the legislature are also responsible for impeachment proceedings, to which all civil officers are subject. Motions for impeachment must come from the senate, whereas actual impeachment trials are conducted by the house.

Judiciary

Prior to statehood, Alaska had no judiciary. The only courts in Alaska during its time as a territory were federal.[17] The Alaska judiciary came into existence with the achievement of statehood. Rather than create a two-level court system with county and state courts, the framers opted for a unified system composed of state superior courts under a state supreme court.[18] As outlined by Article IV of the constitution, the judiciary comprises a supreme (appellate) court, a superior (trial) court, and "the courts established by the legislature" (Section 1). Justices and judges in these two highest courts must be citizens of the United States and of the state of Alaska and must be licensed to practice law in the state. They are appointed by the governor following nomination by the judicial council (Section 5). Though they are appointed by the governor, justices and judges are not insulated from public approval or disapproval. In the first general election held after service of at least three years, each judge or justice appears on the ballot for approval or disapproval. Along these same lines, supreme court justices appear on the ballot for approval or rejection every tenth year, and superior court judges appear on the ballot every sixth year.

Article IV also sets out guidelines for Alaska's Judicial Council. Composed of three attorney members, three nonattorney members, and, ex-officio, the

16. Knowles quoted in Gerald A. McBeath, *The Alaska State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1997), xx.

17. McBeath and Morehouse, *Alaska Politics and Government,* 42.

18. Whitehead, *Completing the Union,* 245.

chief justice of the state supreme court, the Judicial Council is responsible for the nomination of justices and judges (as mentioned above) as well as for conducting studies and making reports and recommendations to the legislature and the supreme court regarding the "improvement of the administration of justice" (Section 9).

With the decision to forgo a county court system came the question of forgoing counties altogether. Delegates wanted to create a form of local government that would be able to serve the vastly different needs of the urban and rural populations. The framers decided to create boroughs, but declined to go into specifics as to how such units would be organized and how they would function. In most of the urban areas, the boroughs have developed into strong countylike organizations, whereas rural boroughs have remained weaker and less tightly organized.[19]

The Power of the Citizens

As a democratic constitution, the Alaska document clearly vests power in the citizens. In addition to the obvious power of electing their representatives, the citizens are endowed with lawmaking power through the use of initiatives and referenda. Section 11 of Article XII states that the lawmaking power granted to the legislature "may be exercised by the people through the initiative, subject to the limitations of Article XI." Article XI endows the people with the power to "propose and enact laws by the initiative, and approve or reject acts of the legislature by the referendum" (Section 1). Putting citizen initiatives on the ballot is a three-step process that begins with an application sponsored by no fewer than one hundred qualified voters followed by a petition signed by (at least) the equivalent of one-tenth of the voter turnout in the previous general election and finally a place on the ballot in a statewide election. Though the lawmaking power of the citizens is somewhat restricted (citizens are prohibited from introducing initiatives in certain policy areas, such as appropriations), citizen initiatives are protected from the gubernatorial veto and, for a period of two years, from repeal by the legislature.

In keeping with its contemporary origins, the regime (those holding public office), the citizenry (those with full political rights), and the public are virtually coterminous. Each group is distinguishable from the others only by qualifications of age and residency. Public officeholders must meet the age and residency required for each particular office (as described above), and the citizenry and the general public are differentiated only by standard

19. Ibid., 254–60.

voting qualifications. Eligibility to vote in the state of Alaska requires that one be eighteen years of age and meet residency requirements. The exceptions are those who have been "convicted of a felony involving moral turpitude" and whose civil rights have not been restored and those who have been judged to be of "unsound mind" (Article V, Section 2). The Alaska Territory had been slightly ahead of its time in granting suffrage to women. Despite (or perhaps because of) its very small female population, Alaska granted women the right to vote in 1913, seven years before the ratification of the Nineteenth Amendment.

The Power of the Government

The Alaska Constitution establishes the authority of the regime explicitly and succinctly. Section 2 of Article I, titled "Source of Government," states that "all political power is inherent in the people. All government originates with the people, is founded upon their will only, and is instituted solely for the good of the people as a whole." One of the concerns that helped to fuel the movement toward statehood was control of natural resources. Many Alaskans felt that both underutilization and exploitation of Alaska's natural resources were the result of federal control, and they viewed statehood as a way of turning that control over to Alaskans.[20] Accordingly, the constitution includes an entire section, Article VIII, dedicated to the use and preservation of natural resources. Section 1 states that the state will make land and resources "available for maximum use *consistent with the public interest*" (emphasis added), and Section 2 states that "the legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, *for the maximum benefit of the people*" (emphasis added). Despite their desire to present Washington with an attractive "proposal," the framers made it clear that Alaska's vast and valuable resources should be under the control of Alaskans.

The constitution itself, as the source of the people's authority, includes provisions for constitutional amendments by the people. If an amendment is proposed by two-thirds of both houses of the legislature, it will appear on the ballot in the next general election (Section 13.1). The constitution has been amended twenty-eight times in its relatively brief history. That constitutes an amendment rate of 1.7 per year. Including the twelve amendment proposals that were rejected by Alaskan voters during the same time period, this reveals a fairly active process. Of course, a number of these amendments dealt with technical issues such as the terms of the judicial-system adminis-

20. McBeath and Morehouse, *Alaska Politics and Government,* 124–25.

trator (Article IV, Section 16). Others, such as the prohibition against sexual discrimination (Article I, Section 3) and the guarantee of the right to privacy (Article I, Section 22), both adopted in 1972, along with the definition of marriage amendment (Article I, Section 25, adopted 1998), represent substantive changes in the state's declaration of rights.

Of the twenty-eight amendments, "perhaps, the most important amendment to the Alaska Constitution was the 1976 establishment of the Permanent Fund." Whereas the principal remains untouched, the oil-lease earnings of the fund are divided between distributions to state residents and state investments. Although the initial distribution program was ruled unconstitutional by the U.S. Supreme Court in 1982, the revised distribution program remains politically sacrosanct. The Permanent Fund affords Alaska a "unique role among American states," where the state is "an investment banker with a direct financial trust relationship with its share-holder citizens."[21]

The legislature also has the power to call a constitutional convention at any time, and Section 13.3 stipulates that if a convention has not been called in a ten-year period, then the ballot in the next general election will carry the question, "Shall there be a Constitutional Convention?" If the majority votes in the affirmative, then convention delegates will be chosen in the next general election. If the majority of votes is negative, then, at a minimum, the question will appear on the ballot again in ten years' time.

Article X, Section 1, constitutionally codifies the principle that "the people will have the greatest powers of self-government at the local level." To express these powers, the delegates established boroughs, the creation of which has been described as "the chief innovation of the constitutional convention." Unlike more traditional boroughs, the innovation "was to create in Alaska an integrated and unified system of local government and to place at its center the borough as the mid-level, general-purpose governmental unit between the state and the cities." Where other states possessed a plethora of overlapping and often conflicting jurisdictions, "boroughs would provide a framework within which city governments, school districts, and other local responsibilities could be administered." In order to preserve local self-control, Gerald A. McBeath notes that this principle was predefined by "liberal construction" in order "to reduce court challenge to and restrictive judicial interpretation of local governmental authority."[22]

21. McBeath, *Alaska State Constitution,* 18; *Zobel v. Williams,* 457 U.S. 55 (1982); McBeath, *Alaska State Constitution,* 19.

22. McBeath, *Alaska State Constitution,* 180–82.

Balancing Interests

As in the U.S. Constitution, the Alaska Constitution limits the power of any one branch of government through a system of checks and balances. All legislative bills must be passed by a majority in both houses of the legislature (with the exception, of course, of those bills passed by citizen initiative). The governor possesses veto power, including that of the line-item veto. A joint session of the legislature has the power to override the governor's veto with a three-fourths majority for appropriation bills and a two-thirds majority for all other bills.

Additionally, as discussed above, legislative power is potentially limited by the citizens through the referendum. Though Alaskans recognized the need to create state government institutions that would be stronger than the territorial institutions had been, they were wary of doing so at the expense of citizens' control. As a result, the Alaska state government was endowed not only with the standard "checks and balances" but also with a means by which the citizens themselves could check government activity. Citizens have the option of creating ballot initiatives, but they also have the opportunity to "override" legislation through the use of the referendum. In order to exercise this power, citizens may file a referendum petition within ninety days of the adjournment of the legislative session during which the act was passed, and a proposition will appear on the ballot in the next statewide election. Through this, the Alaska Constitution gives the citizens a mechanism for ensuring that the legislature represents their interests.

Though we tend to think of constitutions as the documents that empower governments, they are more accurately described as the documents that limit the powers of government. Constitutions limit and define the powers of government in a variety of ways, and the Alaska Constitution demonstrates this. It clearly defines the ways in which laws may be enacted, either through the legislature (with or without gubernatorial support) or through the citizens themselves. These limited methods of lawmaking guard against the arbitrary exercise of political power by distributing legislative power among the legislature, the executive branch, and the citizenry.

The Alaska Constitution also limits the power of government through the role of popular consent. Article I, Section 2, of the constitution places political power squarely in the hands of the people, to be used only for the general public good. Although Alaskans do not have the power to approve individual pieces of legislation before passage, they do have the power of the initiative as well as the option of calling a referendum on any legislation passed. Any legislation with which the people do not agree may, by petition, be brought to the ballot in the next statewide election (Article XI, Section 5).

The government is also limited in the areas in which it may legislate. In

creating a distinction between the public and the private, a constitution may define certain content areas in which the legislature may not restrict the rights of the citizens.[23] The first article of the Alaska Constitution, the declaration of rights, defines these areas. It prohibits the restriction of civil or political rights based on race, color, creed, sex, or national origin (Section 3) and, like the U.S. Bill of Rights, protects freedom of religion, speech, assembly, and petition (Sections 4–6). It also enumerates the rights of those who find themselves in conflict with the government, such as the right to due process and the rights of the accused.

Finally, government may be limited by the recognition of certain inherent and inalienable rights belonging to the people. The Alaska Constitution recognizes these as the "natural rights to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry" (Section 1). In addition, it recognizes the natural equality of all people and thus their entitlement to equality of rights, opportunities, and protections.

Conclusion

In its relatively brief history, the Alaska Constitution has been the subject of some change. However, it continues to exist largely in its original form, with minimal changes to its basic features and governmental structure. Drafted at a time when many states were on the third or fourth iteration of their constitutions, the delegates to the Alaska Constitutional Convention had the benefit of much experience from which to draw. Written as much to prove a point (that Alaska was a good candidate for statehood) as to serve as a framework for state government, the Alaska Constitution has been successful on both counts. In his book on the constitutional convention, Victor Fischer reflects on the role that the push for statehood had on the convention delegates: "That it was written as part of and in furtherance of the statehood movement did, of course, determine to a major extent the character and quality of the Alaska constitution. The idealism inherent in the statehood movement served to greatly inspire the convention delegates and the people of Alaska."[24] The dual-purpose nature of the delegates' task, rather than distracting, proved inspirational.

23. Lutz, *Origins of American Constitutionalism*, 15.

24. Fischer, *Alaska's Constitutional Convention* (Fairbanks: University of Alaska Press, 1975), 185.

HANS L. EICHOLZ

Arizona's Constitution

The Madisonian Hope of a Western Progressive State

Traditional republican theory in America sought to realize the ideal of the rule of law through the formal partition of government power into executive, legislative, and judicial branches. Sovereignty was in the people, but that authority was channeled among distinct offices, and the great hope was to preserve individual liberty in the face of the ultimate power of the majority. As James Madison observed in "Federalist no. 10," "When a majority is . . . a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed." Even Jefferson, often regarded as the leading exponent of democracy in the early Republic, noted that "an elective despotism was not the government we fought for; but one which should . . . be so divided and balanced among several bodies . . . as that no one could transcend their legal limits."[1]

Thus, from the beginning of the Republic, tension has existed between the rights of the minority and the objectives of the majority. Over the years, that tension has changed expression, but never abated, and one of the best ways of observing the process is through the different constitutional regimes of

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1. Alexander Hamilton, James Madison, and John Jay, *The Federalist,* ed. George W. Carey and James McClellan (Indianapolis: Liberty Fund, 2001), 45; Jefferson, *Notes on the State of Virginia,* in *The Portable Thomas Jefferson,* ed. Merrill D. Peterson (New York: Penguin Books, 1988), 164.

the states. Of these, Arizona presents a particularly interesting example, blending older republican forms and objectives with more recent elements of direct democracy, fundamentally altering the traditional means by which constitutions have fulfilled their basic functions.

Like a number of other western states (for example, Oklahoma, Washington, California, Wyoming, and Oregon, all of which were important influences on Arizona's constitutional framers), Arizona institutionalized the reform agenda of the late nineteenth and early twentieth centuries, providing for the referendum, initiative, recall, and accessible means of constitutional amendment to ensure a very direct relationship of government to the community.[2] During the turn of the twentieth century, progressives of both parties attempted to address what they perceived to be the corruption inherent in political institutions too far removed from the controlling oversight of the people. To this end, new states were subjected to intense debate in Congress between conservative and progressive factions, and from this struggle Arizona emerged with one of the most thoroughly democratic constitutions in the Union. By some accounts, this was all the more surprising given the composition of the state's constitutional convention, which was almost entirely Anglo.[3]

Unlike its neighboring territory, New Mexico, Arizona had only one Latin American representative and no Native Americans in the convention assembly. Though some have questioned the legitimacy of so unrepresentative a committee, the clear fact remains that because of the constitution's heavy reliance on democratic processes, Arizona's fundamental document is effectually ratified every time its provisions are employed by voters to enact new laws, pass amendments, or recall elected officials. This chapter will provide a brief introductory analysis of these processes and explain how they shape the fundamental functions of government as outlined above. Necessarily, not all provisions will be discussed, but only the most prominent features, the republican and democratic core of the document that illustrates the essential character of Arizona's fundamental law.[4]

2. John D. Leshy, "The Making of the Arizona Constitution," *Arizona State Law Journal* 20, no. 1 (1988): 1–113.

3. David R. Berman, *Arizona Politics and Government: The Quest for Autonomy, Democracy, and Development* (Lincoln: University of Nebraska Press, 1998), 16–17, 35. It is not surprising that the Mormons, farmers, cattle drivers, and miners brought with them institutions of democratic and representative government. What many do find surprising, however, is the degree to which they fashioned a constitution open to the participation of non-Anglo groups and women.

4. For an excellent overall treatment that examines the workings of each provision, see Toni McClory, *Understanding the Arizona Constitution* (Tucson: University of Arizona Press, 2001).

On the one hand, Arizona's constitution appears to give primary control to the voting populace, but on the other, it has instituted powerful protections of individual rights, and explicitly recognizes the protection of those rights as constituting the primary ends of government. Direct democracy, therefore, is blended with traditional republican mechanisms as one more controlling check on the use of power in both state and society. And "power" is regarded as more than political. It can originate in concentrations of wealth and in the concerted efforts of private associations. Thus, there are provisions for curtailing the influence of corporations, unions, religious institutions, and other groups, as well as provisions that attempt to strike a balance among these various factions. The resulting constitutional regime is a complex array of provisions all aiming to relieve the periodic pressures that arise from a dynamic and diverse population, while maintaining regularity in the administration of justice and the preservation of individual liberty.

Arizona Ways of Life and Community

The first two functions described by Donald S. Lutz, defining a way of life and defining a community, are usually combined in modern constitutions. This was not always the case. Early colonial charters reflected a powerful need to set out communal and religious beliefs among the first European settlers as a precondition for citizenship. Membership in the community was then defined in reference to those who could affirm the fundamental and usually religious purposes for which the political body was called into being.[5] Over time, the growing complexity of societies in America made such a unitary conception of purpose increasingly problematic. As a result, constitutions became less prescriptive in terms of duties and obligations imposed by government (that is, defining a way of life) and more restrictive of governmental powers with respect to specifically delegated functions and the rights retained by individuals (in other words, defining a community or people).

But it was not until late in the nineteenth century that the additional element of democracy came to occupy such a central place in constitutional thinking. Until then, the idea of republican government was as much about filtering democratic excesses from the body politic as it was about representation of the people. With the Populist and Progressive movements after the Civil War, attention was increasingly focused on corrupt backroom-dealing

5. See, for example, some of the early New England charters as collected in Donald S. Lutz, ed., *The Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998).

politicians, bribed legislators, and the need for establishing a powerful popular basis for durable political reform. That trend reached its apogee when Arizona was framing its constitution from 1910 until statehood in 1912.[6]

After 1865, political leaders increasingly recognized that the only truly effective basis for political legitimacy was in the formation of majority coalitions. At this point, the challenge for most reformers was the question of who constituted the people. While the South struggled with Jim Crow, Arizona and the Southwest faced a different reality. Rather than being essentially biracial, they were multiracial polities with large numbers of distinct Native American and Spanish-speaking populations. To complicate matters further, Arizona's "Anglo" majority was itself anything but homogeneous. It was in fact a multitude of different groups, with often profoundly irreconcilable divisions of faith, socioeconomic standing, ethnic origins, and political allegiances. Add to this the fact that economic interests varied across and among members of all ethnic and political groups, and you have very little remaining that can be identified as an organic, unitary Arizonan community.[7]

This is not to imply that there are no special provisions in the Arizona Constitution targeting specific groups. There certainly are, whether you count the positive rights assigned to labor for injury liability or compensation (Article XVIII, Sections 5–8), the restrictions on corporate enterprises (Article XIV, Sections 14–19; Article XV, Sections 1–6), the prohibition of polygamy (Article XX, Section 2), or the illegality of liquor sales to Native tribes (Article XX, Section 3). But these are far from defining a single community of unitary purpose and belief. Among the limited positive attributes that all Arizonans can share, however, is place of residence.

Article I sets out the boundaries of the state as originally defined by its territory. Citizens of the state are first and foremost those who reside within its borders. There is nothing surprising here, but it would be wrong to slight the importance of this provision. In the absence of a single defining faith, ethnicity, or creed for the U.S. states, what unity the states lack in these areas, they have sought to ameliorate through the provision of resources and economic opportunities. In the Southwest, water and railroad routes were particularly important for development, and struggles over Arizona's borders and especially over the rights to the Colorado River have been, and continue to be, intense.[8] Irrigation and transportation are the lifeblood of Ari-

6. John Whiteclay Chambers II, *The Tyranny of Change: America in the Progressive Era* (New Brunswick: Rutgers University Press, 2000). See also Charles M. Price, "The Initiative: A Comparative State Analysis and Reassessment of a Western Phenomenon," *Western Political Quarterly* 28, no. 2 (1975): 243–62.

7. This point is forcefully made in Richard White, "Race Relations in the American West," *American Quarterly* 38, no. 3 (1986): 396–416. See also Berman, *Arizona Politics,* 15–21, 57–73.

8. Berman, *Arizona Politics,* 159–62; Rich Johnson, *The Central Arizona Project, 1918–1968*

zona's local economies, and it is these hard-fought concessions that have contributed to making Arizona among the fastest-growing states in the Union.

It is in Article II, however, that the constitution comes as close to a positive affirmation of community purpose as is possible in the modern era. It expresses the ultimate hope of an older liberalism dating from the national founding that social happiness flourishes most through the pursuits of individuals exercising their personal liberties. Thus, the first section, borrowing language from the Washington Constitution of 1889, affirms a tradition going back to the Virginia Declaration of Rights of 1776: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government."[9] The objective is the securing of individual rights *and* free government. The two are not opposed; rather, they are united without qualification. Individual rights, then, not particular persons or groups, will define the primary object of political authority for which free government is to be conducted. That idea is powerfully elaborated and repeated in Section 2: "All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights."

What follows from this observation is a list of basic rights guaranteed by the state and not to be infringed upon by the government. Most are similar, if somewhat differently phrased, to the rights found in the U.S. Constitution, and are what we would describe today as negative rights, or rights that limit what the state may do to individuals. In certain particulars, the Arizona Constitution goes beyond the federal to recognize, for example, a more explicit right to privacy (Section 8), the right not to be imprisoned for debt (Section 18), and an explicit affirmation of the *individual's* right to bear arms in self-defense (Section 26). More recently, however, a whole new section granting positive rights to victims of crimes (Section 2.1) was added by initiative in 1990. From this beginning, then, the constitution sets out the minimum legal protections that define membership in the "community." These are the entitlements of all individuals who reside within the boundaries of the state of Arizona, whether or not they are eligible for participation in the election process or the holding of office. These last specifications or provisions will come later. Rather, what immediately follows the declaration of rights introduces the issue of checks and balances, or the third category

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(Tucson: University of Arizona Press, 1977); N. D. Houghton, "Problems of the Colorado River as Reflected in Arizona Politics," *Western Political Quarterly* 4, no. 4 (1951): 634–43.

9. John D. Leshy, *The Arizona State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993), 14–15, 37; Stanley G. Feldman and David L. Abney, "The Double Security of Federalism: Protecting Individual Liberty under the Arizona Constitution," *Arizona State Law Journal* 20, no. 1 (1988): 115- 50.

of constitutional purposes enumerated above, the distribution of political power.

Distributing the Political Powers of the State

This ordering is common practice for constitutional composition in the English-speaking world, and makes sense when we consider that these are the principal powers that must be restrained and properly conducted if the enumerated rights are to be effectively protected. On this score, the Arizona Constitution is more traditional in its composition than the U.S. Constitution that puts forward the structure of government first and presents a list of particular rights to be protected second.[10] Where the state constitution differs most fundamentally, however, is in those areas in which access to the legislative process is opened to public scrutiny and participation through the referendum and initiative. Here we see the unusual combination of traditional political institutions—legislative, executive, and judiciary—with a heavy dose of direct democracy. Where traditionally checks and balances are seen to operate among the branches in the interim between elections, Arizona has added the further check and balance of the people, expected to operate throughout the terms of all elected or appointed officials.

Article III encapsulates the core traditional element in republican theory and reads simply: "The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." The point is an ancient one that attempts to guard against tyranny and the abuse of power by dividing the distinct functions of government when it makes law, enforces law, and resolves civil and criminal cases. In every instance, each branch will review the actions of the other two branches. Was the law properly made? Was it properly enforced? Are the judges performing their responsibilities appropriately? All states recognize this basic division of power, and all accept the underlying premise with respect to checks and balances. Where Arizona differs from so many, however, is when it permits the ongoing oversight of the electorate during each process. This is especially so in the case of the legislative branch.

Article IV, Part 1, Section 1, starts off very much like the U.S. Constitution

10. On the traditional structure of chartered English rights documents, see Pauline Maier, *American Scripture: Making the Declaration of Independence* (New York: Alfred A. Knopf, 1997), 57.

in its description of the legislature. The federal constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Arizona's constitution opens with nearly the identical sentence, but then immediately qualifies it: "The legislative authority of the state shall be vested in a legislature, consisting of a senate and a house of representatives, *but the people reserve the power to propose laws and amendments to the constitution and to enact or reject such laws and amendments at the polls, independently of the legislature; and they also reserve, for use at their own option, the power to approve or reject at the polls any act, or item, section, or part of any act, of the legislature*" (emphasis added).

The next fifteen subsections all deal with various aspects of the implementation of these popular powers of initiative and referendum. In the case of the initiative (Subsection 2), voters can propose any measure or law if they have signatures on their petition of at least 10 percent of the total number of votes cast in the last election for governor (Subsection 7). If they wish to propose a constitutional amendment, that number is 15 percent (Subsection 2). Though somewhat higher than other states with an initiative provision, the requirement has not posed a major hurdle to its exercise. The referendum has a qualification of only 5 percent (Subsection 3). The power here is granted to challenge any law or provision passed by the legislature, and to leave no doubt about ultimate authority: neither the governor's veto power nor the legislative power can "repeal or amend" any "initiative or referendum measure approved by a majority of the qualified electors" (Subsection 6). In effect, then, Arizona has three legislative branches, and these can be used, and have been used, to check one another.[11]

In traditional constitutional theory, two legislative houses are supposed to provide greater oversight of legislation by slowing the lawmaking process *and* by exposing legislation to the scrutiny of representatives with different constituencies. Senates, or upper houses, were traditionally seen to be more elite institutions with fewer members based on regional representation. Thus, the U.S. Senate is composed of two senators from each state regardless of population, whereas the lower house is composed of representatives proportionate to population. In the case of Arizona, however, the base is the same for both houses (thirty legislative districts), and the only real difference is in the number assigned to each chamber: one senator from each district, as opposed to two representatives (Article IV, Part 2, Section 1).[12]

11. On the various types of initiative and referendum, the most helpful overview is McClory, *Understanding the Arizona Constitution,* 73–87. See also Leshy, *Arizona State Constitution,* 98–99.

12. Berman, *Arizona Politics,* 95. There is also no difference in length of term (two years) or when they are elected to serve (See Part 2, Sections 3 and 21).

Although there is a procedural check of sorts in the requirement that all laws pass both houses, the real oversight comes into play with the "Third Chamber" of the people. Even though a sizable minority at the state constitutional convention appears to have been in favor of a single house, that is, a unicameral legislature, there was a general feeling that the idea would be too radical for conservatives in the U.S. Congress and would delay statehood. The traditional bicameral form, overlaying an essentially democratic substance, was considered the best alternative, and one representative noted explicitly that with "the initiative and referendum I would be in favor of this."[13]

Article V then establishes the powers and responsibilities of the executive branch. These powers are roughly consonant with the executive provisions of the U.S. Constitution with some very important qualifiers. Unlike the U.S. president, the Arizona governor has a line-item veto over the appropriation of money in addition to a general veto over acts passed by the two houses of the legislature that can be overridden only by a three-fourths vote of both houses. That being the case, the governor does not have the "pocket veto," nor does he or she have any veto over referenda and initiatives, reflecting again the strongly democratic or progressive nature of the constitution (Article IV, Part 1, Section 1, Subsection 6). Moreover, executive authority can be, in a limited fashion, exercised and redistributed by the legislature.

The Arizona Supreme Court has recognized that the governor has oversight of all executive offices created under the state constitution and all executive offices created by the legislature when the legislature has not explicitly denied the governor that responsibility.[14] Thus, the legislature can exercise a very dominant check over the governor, but it must make its intentions clear, spelling out specifically where his or her purview ends and the legislature's begins. This fact, and the corresponding power of the initiative and referendum processes, seem to have made the governorship of less concern to Arizonans for much of the twentieth century. Article V has only recently been the subject of a number of revisions or constitutional amendments.

Soon after ratification of the Arizona Constitution in 1912, the first initiative passed by Arizonans broadened the qualifications for office holding and voting to both genders (Article VII, Section 2) but, ironically, overlooked Section 2 of Article V that limited the governorship to male candidates only. This was changed in 1988 when a woman was already sitting in the highest executive office.[15]

13. John S. Goff, ed., *The Records of the Arizona Constitutional Convention of 1910* (Phoenix: Supreme Court of Arizona, 1995), 580.

14. Leshy, *Arizona State Constitution,* 128–29.

15. Ibid., 127.

Perhaps the best illustration, however, of the ultimate "check and balance" of the voters even over the executive branch comes from the curious case of Governor Evan Mecham. All the powers of direct democracy in the form of both recall and constitutional initiative and the more traditional republican check of impeachment were brought to bear in the controversy surrounding the administration of this peculiar magistrate. After a series of embarrassing remarks and executive orders, such as the cancellation of the state's observance of Martin Luther King's birthday, a recall drive was put into action in the summer of 1987. Then, following allegations of the criminal misdirection of public funds, the legislature also initiated impeachment proceedings in February 1988. Both of these proceeded apace, with the house voting to impeach on February 4, the senate convicting on April 4, and the recall election being scheduled for May 17. This raised a major constitutional challenge. Now that Mecham was convicted of criminal activity and removed from office, could the recall election go forward? If it could, then the law would allow Mecham's name to reappear on the ballots, and that, ironically, could lead to his reinstatement—a very peculiar turn of events! At this point, the state supreme court stepped in and ruled that removal from office made the recall moot, and the process was canceled.[16]

With respect to their constitution, Arizona voters decided that a mere plurality was no longer acceptable for determining the outcome of a gubernatorial election. Mecham was elected with only 40 percent of the total votes cast, and that was out of a pool of less than half of all eligible voters. Consequently, Section 1, Paragraph B, was changed by initiative to require election by a majority of votes, but this too was not without problems. The new provision was put to the test in 1990 when a large number of write-in votes forced a runoff election that delayed occupancy of the office for several months. As a consequence, Arizonans changed their minds about the 1988 changes and passed another initiative that restored the plurality requirement.[17] The Mecham affair thus affords a fascinating glimpse into all the different ways the political institutions of Arizona operate to check and balance each other.

Article VI establishes the powers and responsibilities of the judiciary. Again, like the executive, these portions, though of considerable scope and importance, operate under the watchful eye of the electorate and the powers of the initiative and recall. This was a point of contention at the very outset of statehood. President Taft rejected admission of Arizona in 1911 precisely because the first draft of the constitution presented to him allowed for

16. Paula D. McClain, "Arizona 'High Noon': The Recall and Impeachment of Evan Mecham," *Political Science and Politics* 21, no. 3 (1988): 628–38.

17. Leshy, *Arizona State Constitution,* 126.

judicial recall. Taft believed the provision undermined the independence of judges, a prominent part of the older republican idea that excessive democratic government might lead to the tyranny of the majority, ultimately conflicting with individual rights, such as the right to own property or freedom of thought. According to "Federalist no. 71," an independent judiciary was thought to be a bulwark in the defense of such minority rights. Arizonans promptly excised the offending passage, gaining admission the following year, but then just as quickly reinstated judicial recall at the first general election![18] It was apparent that Arizonans were far more worried about the potential corruption of a few than they were of the authority of the populace in general. That fear was brought out on the floor of the convention itself.

Some debate was had among the delegates over the power of judges, first, to declare laws unconstitutional and, second, to issue injunctions against organized employees who attempted to interfere with the ability of employers to conduct their businesses. Such injunctions were common at a time of increasing unionization. In both cases, however, the majority took comfort in the fact that judges would be elected and subjected to recall if they abused their positions, and this was confirmed by the voters at the first general election. Consequently, Article VI recognizes through implication the power of judicial review, a power that might otherwise be in tension with democratic government. In forty-two sections, the article proceeds to spell out the specific ordering of the courts, their jurisdictions, the selection of judges, and their qualifications for office. The original form of this article sat reasonably well with the electorate for most of the first half of the twentieth century, seeing only two minor alterations made through amendment.[19]

In 1960, however, the Arizona Bar Association, complaining about overwork and delay, pushed for an initiative to "modernize" the courts. This new article entirely replaced the older one, but still incorporated some of its basic features. Among the most notable changes were the following: the integration of the entire court system of the state under the supervision of the state's supreme court with the partial exception of the justices of the peace (Sections 1, 3, and 5, Paragraphs 5, 13, 19, 23, and 24); the increase in the minimum number of supreme court justices from three to five (Section 2); granting the legislature authority to establish a court of appeals between the superior and supreme courts (Section 9); granting the legislature the power to determine the number of residents in a county (Section 10); giving the supreme court the power to select the presiding judge in counties with two or more judges and defining his or her powers (Section 11); granting the leg-

18. Hamilton, Madison, and Jay, *The Federalist,* 405–7; McClain, "Arizona 'High Noon,'" 629; Leshy, *Arizona State Constitution,* 17.

19. Leshy, *Arizona State Constitution,* 194, 140.

islature the authority to expand the jurisdiction of the superior courts (Section 14, Paragraph 11); allowing parties to waive their right to trial by jury in civil cases (Section 17); extending qualifications of judges with respect to age, their fitness to practice law, and their moral character (Section 22); extension of the oath of office to all judges (Section 26); extension of the prohibition on practicing law while serving as a judge (Section 28); and granting the legislature the power to select temporary replacement judges for courts inferior to the supreme court from among qualified members of the state bar, where such power does not conflict with existing municipal provisions (Section 31).

In 1970, voters approved Article VI, Part 1, establishing what was called the Commission on Judicial Qualifications. This new article mandated a special commission to review, upon complaint, whether a judge should be disciplined and, if so, to what extent as a recommendation to the Arizona Supreme Court. The title was amended in 1988 to reflect more accurately the function of the commission, so that it now is named the Commission on Judicial Conduct. All six sections of the article deal with the composition, structure, jurisdiction, powers, and responsibilities of the commission. The commission consists of two court of appeals judges, two superior court judges, one justice of the peace, and one municipal court judge, all appointed by the supreme court, plus two members of the state bar association appointed by the association and three citizens who are not judges appointed by the governor with approval by the senate. Thus, in microcosm, the system by which appointments are made to the commission re-creates a form of checks and balances to guard its own oversight of the judiciary. The fundamental distrust of power evident in traditional republican thought comes to the fore even here, where the essential point is to leave no power of supervision unsupervised.

A further but more critical change was made through amendment in 1974 for implementing the merit selection of judges, largely replacing the longstanding system of elections with recommendations to the governor from special nominating commissions consisting of lawyers and nonlawyers of different political parties, some of whose appointments are by the governor and subject to senate confirmation. The nominees must be from different parties, and the governor must choose from that list. This was originally made mandatory for the state and for all counties with more than 150,000 residents, but in 1992 the provision was revised upward to 250,000, thus making it still applicable to only two of the state's fifteen counties, Maricopa (Phoenix) and Pima (Tucson). These portions (Sections 36, 37, 38, and 39) constituted a modified version of what is called the "Missouri merit selection process," and was originally supposed to be part of the 1960 program of modernization, but that part of the measure did not obtain enough sig-

natures for the ballot until 1974, when it achieved approval by only 54 percent of the voters. These provisions were then supplemented and amended in 1992. The most recent changes include two whole new sections (41 and 42) governing the process of trial-court appointments and an evaluation process for sitting judges.[20]

In the final analysis, these last changes from 1974 to 1992 illustrate nicely the democratic check on the judiciary. Although appointment is a significant alteration from election, it was not a move away from popular oversight. Prior to this system, as noted by John Leshy, most judges left office before their terms expired, resulting in the majority of judges being appointed in any event. Also, Arizonans seemed dissatisfied with the pretense of nonpartisan elections for the judiciary and with the idea of campaigning and its need for funding on behalf of neutral candidates. In the end, the merit system seems to have resulted in a more politically neutral approach. Still, the future of this system is not ensured since there remains a consistent movement to return to the older process. Again, the democratic element in the constitution ensures close popular scrutiny of all branches of government, including the current judiciary.[21]

Thus, in the distribution of power, Arizona has opted for a mixture of traditional republican checks and balances among executive, legislative, and judicial branches, with the additional element of direct democratic oversight via the initiative, referendum, and recall. This has given the voting populace tremendous confidence in experimenting with various institutional arrangements, as seen in the willingness of Arizonans to alter executive and judicial selections. That fact raises, however, the important question of what constitutes the electorate of the state and brings us to the fourth and fifth categories of Lutz's constitutional analysis, the definition of citizenship and the basis for authority. Because of the heavy democratic element in the constitution, these categories are essentially conjoined in Articles VII and VIII, "Suffrage" and "Elections and Removal from Office."

Who Can Vote and the Sources of Political Authority

As noted earlier, Article II sets out a clear mandate for democratic governance. Section 21 even goes so far as to recognize that "all elections shall be free and equal, and no power civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." It is in Article VII, however, that the constitution sets forth who is able to participate in those elections.

20. Ibid., 140–78.
21. Berman, *Arizona Politics,* 132–34.

Originally, Article VII reflected the gender bias of its age, restricting the voting population to male citizens of the United States "of the age of twenty-one years or over." Shortly after statehood, however, voters amended through an initiative the earlier limit and embraced the movement for women's suffrage, adding the following paragraph: "The rights of citizens of the United States to vote and hold office shall not be denied or abridged by the state, or any political division or municipality thereof, on account of sex, and the right to vote and to hold office under any law now in effect, or which may hereafter be enacted, is hereby extended to, and conferred upon males and females alike."

The age restriction was eventually made obsolete in 1971 by the Twenty-sixth Amendment to the U.S. Constitution. The sections that follow this portion of Article VII deal with the nuts and bolts of elections for particular offices. For our consideration, however, it is the inclusiveness of the article that establishes the basis for authority of the state document.

All adults who qualify as citizens of the United States, regardless of race, sex, creed, or ethnic origin, have a right, provided they are not incapacitated by mental disability and meet the age requirements of the state and the residency requirements of the local municipalities and county governments, to participate in the elections of officers for the state of Arizona. This is now the standard definition of state citizenship throughout the United States. Tied with a number of other provisions governing the process of elections, Article VII establishes the foundations of what is considered the ultimate authority of the people in modern democratic societies. The U.S. Supreme Court has further encouraged this development by actively striking any further restrictions such as poll taxes and literacy tests. That being the case, there remain some peculiar characteristics of the article that Arizonans have chosen to retain, even though they have been significantly eviscerated by federal judicial rulings.

Section 13 states, "Questions upon bond issues or special assessments shall be submitted to the vote of real property tax payers, who shall also in all respects be qualified electors of this state, and of the political subdivision thereof affected by such question." Here is another example of the peculiar blending of old and new. The point of this provision in the context of an otherwise majoritarian system is an older republican concern for the rights of property holders. As Madison and others noted in the national founding, democratic governments run the risk of tempting the numerical majority to disregard fundamental rights. Property, as originally conceived, was rooted in the republican idea of self-ownership, the fundamental right of individuals to control themselves, and that required the liberty to control the products of one's own labors and exchanges. Consonant with Madison's point at the convention in Philadelphia that "wherever there is danger of attack there

ought be given a constitutional power of defence," Arizonans attempted to secure some limit to the size of government indebtedness by recognizing the concerns of those who would be asked to bear the burden. These concerns are further underscored in Sections 6 and 8 of Article IX, "Public Debt, Revenue, and Taxation." In 1970, however, the U.S. Supreme Court concluded that the distinction between citizens generally and property owners per se was not sufficiently substantial. The implications of this ruling are still being worked out with respect to bond issues.[22]

In addition to this older republican concern for controlling the power of the majority, there was also strong progressive and labor concern for controlling the influence of concentrated wealth. Hence, corporations were prohibited from giving contributions in any form to influence the outcome of an election (Article XIV, Section 18). The prohibition is part of a larger provision establishing the authority of the state to regulate and otherwise strictly control the activities of corporations within Arizona, reflecting the populist and progressive distrust of railroads, mining corporations, and other interests such as ranching that were actively vying for political influence at the time.[23] Power was to be countered wherever it was found. Read this article in conjunction with Article XVIII regulating the hours of labor, prohibition of child labor and blacklists, and the enforcement of liability upon employers for the injury of their employees, and you have a powerful sense of how the founders of Arizona sought to address what they considered a dangerous imbalance in society with respect to social power. Later, when it was thought to have tipped too far in the other direction, Arizonans in 1946 passed the right-to-work amendment as Article XXV to ensure that "no person shall be denied the opportunity to obtain or retain employment because of non-membership in a labor organization."[24]

Within these parameters, then, Arizonans have established the basis of their political authority in the citizens of the state, organizing that body according to the very minimal restrictions of age, sound mental condition, and residency. Such criteria, as is true with most other states of the Union, accommodate a very diverse population who would otherwise defy common definition as one political people. From this base, the state channels political conflict through a series of traditional republican institutions and the modern processes of direct democracy.

We have examined so far the initiative and referendum, but perhaps the

22. Leshy, *Arizona State Constitution,* 190–91.

23. Senator Albert Beveridge's main fears with respect to admitting Arizona was that it would be too much under the control of monopoly interests. See Leshy, "Making of the Arizona Constitution," 11–12, 17.

24. Leshy, *Arizona State Constitution,* 352.

most telling affirmation of the ultimate sovereignty of the demos is to be found in Article VIII, dealing with the recall of public officers. This was the provision that raised President Taft's ire for its applicability to the judiciary. Despite Taft's fears, the provision was only once invoked to remove a superior court judge, and never successfully applied to an elected statewide official—Governor Mecham's recall having been canceled by his impeachment.[25] Nevertheless, the provision remains a powerful tool with respect to local officials for which the 25 percent signature requirement is more easily met. But the real significance of the article is what it tells us about how Arizonans conceive of the relationship between the people and their elected officials. The latter are always to remain public servants, or, in other words, government is to remain subservient to the ultimate control of the citizens of the state. Regardless, then, of how elected leaders choose to act, or not to act, the people of the state have within their collective purview the power to overrule them all. The fact that it remains a potential hazard of public life exercises its own restraining influence.

This now brings us to the final and perhaps most important of Lutz's categorical functions of a constitution, its ability to limit power and preserve the rule of law. If a constitution cannot do these two things, then it fails to be a constitution. It was this idea that motivated the founders of the American polity to write a formal document presenting the fundamental law that was to govern both the citizenry and the public officers. This hope is exactly that of Arizona's founders and remains a vital interest of the polity today.

Limiting Power and the Rule of Law, Arizona Style

Law is nothing if not bound by some notion of justice. In early American republican thought, the idea was to fix the law as much as possible in a written text, leaving vagaries and discrepancies to the review of judges and the construction of elected lawmakers. Checks and balances among the various branches, it was hoped, would keep officials honest to their constitutional obligations. As noted already, by the late nineteenth century, progressive reformers decried the failure of this approach to stem the tide of backroom dealing and special-interest corruption. Rather than rely on representatives or judges to resolve disputes of a constitutional nature, the Arizona framers gave the voting population far more accessible powers to amend and propose constitutional law than the federal model.[26] Arizona shares this distinction with a number of other states founded around the same time. One

25. Ibid., 195.
26. McClory, *Understanding the Arizona Constitution,* 7–10, 73–77.

might suspect that Madison's problem of majority tyranny would again intrude on the scene, and to a limited degree that was the concern of the conservative Taft.

After nearly a century of existence, however, that fear has been found largely unwarranted. In part, the democracy itself has been tempered in its application of the reform power. Though amendments have been many, they have not always been in favor of simple majoritarianism. The new system of merit selection for judges is a powerful case in point. Another is the recent amendment to Article IV, Section 1, that gives to an independent review panel the responsibility of partitioning voting districts. And often the popular tide swings away from reform. The case of the election process for governor is a good example. Moreover, when progressive elements in the constitution seemed to have gone too far in favoring one group in society over another, Arizonans have been ready to address the imbalance. Here, the right-to-work article is notable with respect to organized labor. And finally, Arizonans have never seen fit to change the affirmation of individual rights on which their constitution is grounded.

The voting majority, however, is rarely the majority of eligible voters, and here Arizona has been consistently on the low end of the participatory spectrum in comparison with other states. This is ironic, given the constitution's democratic nature. Explanations have varied. The mountain states have been higher than the U.S. average on the whole, but as David Berman notes, "Arizona and Nevada have been the principal exceptions, pulling the average down." Among the possible explanations offered have been discouragement of minority participation, particularly that of the Hispanic population, which is far less active politically in Arizona than in New Mexico; a certain degree of traditionalism that encourages working-class citizens to defer to elites when it comes to setting policy; and the young and transient or retired and somewhat indifferent nature of the population.[27] Although these factors should certainly not be discounted, there is yet another possibility, and that arises out of the diversity of the population itself.

Different groups form alliances and become politically active for various reasons at different times when issues arise that are of particular concern to them. These groups are frequently complex and often have multiple reasons for forming coalitions that successfully avail themselves of the referendum, initiative, and recall. Thus, on the question of drug-prescription liberalization, a very diverse swath of Arizonans came out in support and passed the

27. Berman, *Arizona Politics,* 78–80. See also the following Web sites for current data: http://www.census.gov; http://www.azstarnet.com/sn/vote/6444.php; and http://www.fec.gov/votregis/turn/ariz.htm.

measure to the great consternation of federal authorities.[28] In the recall movement and impeachment of Governor Mecham, we saw a powerful coalition that spanned the political spectrum from left to right, and cut across social and ethnic lines as well.[29] There have also been notable exceptions to the argument for social exclusion, such as César Chávez's highly successful 1972 gathering of signatures for a recall of Governor Jack Williams.[30] The effort ultimately failed, but only because Williams completed his term before the courts could resolve a dispute over signatures, which was done finally in Chávez's favor.

What this tells us, then, is significant for how the constitution of Arizona functions to preserve the rule of law. The multiplicity of interests in modern society has produced its own system of checks and balances that fundamentally shapes the functioning of the democratic parts of the polity. Combined with the core elements of republican government, Arizona has produced a very effective system able to address the immediate concerns of the electorate while still, on balance, ensuring justice for individual liberties and regime stability. Madison observed in "Federalist no. 10" that many of the attributes of a federal system developed out of the fractured political landscape of medieval Europe. His desire was to escape the periodic violence of an overly decentralized system but preserve the limitations on government that would allow for the flourishing of individual liberty. To that end, as expressed in "Federalist nos. 46 and 47," he wanted to preserve a polity of checks and balances.[31] That hope has largely been attained in the United States in general, but, as Lutz's categories of analysis make very clear, it has been uniquely and successfully realized in Arizona, though not exactly in the fashion Madison envisioned.

28. Berman, *Arizona Politics,* 84.
29. McClain, "Arizona 'High Noon,'" 637; Berman, *Arizona Politics,* 120–23.
30. Berman, *Arizona Politics,* 82.
31. Hamilton, Madison, and Jay, *The Federalist,* 90–91, 243–47, 249–55.

GORDON LLOYD

The 1849 California Constitution

An Extraordinary Achievement by Dedicated, Ordinary People

The Specter of 1849

The Treaty of Guadalupe Hidalgo in May 1848 transferred Alta California from Mexico to the United States. Under the U.S. Constitution, it was now the responsibility of Congress to provide a territorial government and subsequently to admit California into the Union as a state with equal standing. But Congress failed to provide for a territorial government during both the 1848 and the 1849 sessions: Congress, representing fifteen northern states and fifteen southern states, was hopelessly divided on the issue of slavery in the territories.

Thus, the commander-in-chief of the U.S. armed forces, Bennett Riley, issued a proclamation authorizing the election of delegates to attend a constitutional convention. Riley claimed that California had "a system of laws, which, though somewhat defective, and requiring many changes and amendments, must continue in force till repealed by competent legislative power." It was in his capacity as "the executive of the existing civil government" that Riley authorized the convention. And it was also in this capacity that he called for the publication of the digest of the Mexican Laws of 1837 "that are . . . still in force and adapted to the present condition of California."[1] Finally, in his provision for the selection of delegates, Riley defined "all

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1. J. Ross Browne, *Report of the Debates in the Convention of California, on the Formation of the State Constitution, in September and October, 1849* (Washington, D.C.: J. T. Towers, 1850), 3. For more extensive coverage of the original convention debates, see Gordon Lloyd,

parts of the Territory" in geographical terms rather than in terms of the treaty.

Riley invited the convention "to meet and frame a state constitution or Territorial organization, to be submitted to the people for their ratification, and then proposed to Congress for its approval." Accordingly, the initial task of the gathered delegates was to decide whether to frame a territorial government or a state constitution, and should they frame one designed to secure congressional approval or one designed to solve the national dilemma of slavery? Should they adopt a latitudinally driven boundary that imitated the 36–30 Missouri Compromise line, or should they break new ground and draw a longitudinal boundary on the east that would prevent the spread of slavery to the Pacific? Should they incorporate all of Alta California, or should they adopt Riley's proclamation that California's boundaries should exclude the Arizona, Nevada, New Mexico, Colorado, and Utah areas of Alta California?[2]

The story of the California convention is how dedicated, ordinary people did an extraordinary thing. The delegates were aware of the European "specter" of bloodshed and that Europeans were observing the gold rush that was in full swing in California. Would the deliberations be overwhelmed by class antagonisms, narrow self-interests, and shortsighted considerations? Would California establish a constitution from "reflection and choice," or would it be the result of accident and force? Would the lust for gold demonstrate that "the people are incapable of self-government"?

It turns out that they did what the socialist revolutionaries of Europe were unable to do: create, by deliberation and choice, a constitution dedicated to liberty and order. And these ordinary people did what Henry Clay and others in the U.S. Congress were unable to do: settle the slavery question in the territories. Even more fascinating is that of the forty-eight members in attendance, twenty-two had immigrated to California from northern states, and fifteen had been born and raised in slave states. Of the remainder, three were foreign-born, and eight were native Californians.

Scholars, however, present the 1849 constitution as "a prefabricated structure combining planks from the U.S. Constitution and the state constitutions of New York and Iowa."[3] They also note the rapidity with which the

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"Nature and Convention in the Creation of the 1849 California Constitution," *NeXus: A Journal of Opinion* 6 (Spring 2001).

2. With the discovery of gold, the population increased from 18,000 in 1845 to 100,000 by 1850.

3. See Bernard Hyink and David H. Provost, *Politics and Government in California,* 13th ed. (New York: HarperCollins, 1996), 18.

delegates "compiled" the constitution: it took "only six weeks to frame." But what is not pointed out is that most of the original state constitutions were drafted in less than six weeks! Indeed, the 1846 Iowa Constitution, the supposed model for California, was framed in just over three weeks. The more pertinent question, then, is why did it take *so long* to create the California Constitution given the unanimous agreement that there should be a bill of rights, a bicameral legislature, an elected governor, and an independent judiciary? The answer is that unlike Iowa and New York, the California delegates engaged in an extensive discussion about slavery within the context of the discovery of gold and the presence of a multiracial and multilingual population.

The Constitution of 1849

The 1849 constitution is grounded more in the republican suspicion of the corrupting tendencies of governmental power associated with the Anti-Federalist tradition than it is in the Federalist concern that the majority may be intemperate and tyrannical. The framers of 1849 perceived that the "proper objects" of government—"the protection, security, and benefit of the people"—are in danger if the people fail to "keep a watchful eye on the operations of their government, and hold to strict accountability, those to whom power is delegated." Thus, government is part of the problem—even one elected by the people themselves—and not part of the solution. The corrosive and corrupting impact of political power and the hubris that comes with the acquisition of political power are the dangers to be avoided.

The Bill of Rights

Article I itemized a list of twenty-one rights that limit the government to its "proper objects." The initial report on a bill of rights actually contained only sixteen sections. The first eight were copied from the opening sections of the 1846 New York Constitution, and the last eight were lifted from the closing parts of the 1846 Iowa Constitution. These sixteen were reproductions of earlier versions of state bills of rights that were now standard parts of the American tradition of common law and due process. Absent, however, in the draft was any mention of natural rights with which many of the earlier state bills of rights, such as Virginia, opened and which Iowa had followed.

Ironically, New York native W. E. Shannon proposed that the two opening sections on due process of law and trial by jury found in New York's constitution be placed farther down on the list. He moved to replace them in the top positions with the first two entries from the Iowa Bill of Rights. (New

York was unique among state constitutions for including the entire Declaration of Independence within the very body of the constitution.) Shannon argued that these two entries demonstrated a basic commitment to the doctrine of natural rights as a moral and constitutional restraint on the political conduct of the people and their representatives, while simultaneously confirming that the ultimate political authority rested in the consent of the governed. Shannon proposed Section 1, "All men are, by nature, free and independent, and have certain unalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness," and Section 2, "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right, at all times, to alter or reform the same, whenever the public good may require it."[4] The convention agreed to these amendments, thus placing California squarely within the constitutional tradition of the American founding.

The original draft of the California Bill of Rights was silent on the issue of slavery. Shannon moved to make Section 23 of the Iowa Constitution part of the California Bill of Rights: "Neither slavery nor involuntary servitude, unless for punishment of crimes, shall ever be tolerated in this state." M. McCarver, however, requested that this be amended to include the following: "Nor shall the introduction of free Negroes, under indentures or otherwise, be allowed." O. M. Wozencraft and J. M. Jones provided the "moral justification." The former opposed immigration of free blacks because he wanted to "encourage labor and protect the laboring class. . . . [T]he capitalists will fill the land with these laboring machines, with all their attendant evils." Without a prohibition, "you will see a greater curse than the locusts of Egypt." Jones also did not want to "degrade the white labor of the mines."[5]

On the first reading, the delegates approved McCarver's constitutional directive that the first legislature prohibit "free persons of color" from immigrating to California. On the second reading, however, all mention of constitutionally regulating the immigration of free persons of color was eliminated. The delegates agreed to let the people of California settle the is-

4. Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies* (1909; reprint, Buffalo: William S. Hein, 1993), 2:1123. Shannon, a twenty-seven-year-old lawyer, was born in Ireland. He had been in California for three years.

5. Browne, *Report of the Debates,* 43, 44, 49. McCarver, a forty-two-year-old farmer, was born in Kentucky; he had been a resident of California for one year. Wozencraft, a thirty-four-year-old physician, had resided in California for only four months. Jones was a twenty-five-year-old attorney from Kentucky and Louisiana who had been in California less than four months.

sue by means of future legislation rather than be confined by constitutional prerequisites.

The Right of Suffrage

The original draft guaranteed the right of suffrage to "every white male citizen of the United States" who was at least twenty-one years old. This was directly copied from the Iowa Constitution, which, following Illinois and Indiana, had restricted the franchise to adult white men. After an extensive discussion, the delegates agreed to extend suffrage to include every white male citizen of Mexico, but to *constitutionally exclude* Indians, Africans, and descendants of Africans.

A concerted effort was made during the second reading to modify the provision that excluded Indians from the franchise. Delegate Noriego addressed the convention on behalf of Indians born in California:

> The Convention was now treading upon a point of very great importance to himself and to California—a question as interesting as it was important; and he should be doing a very great injustice to his constituents, did he not speak upon the subject. By the proposed amendment, all Indians were excluded. . . . It had been asserted by some members that Indians are brutal and irrational. Let those gentlemen cast their eyes back for three hundred years and say who were the Indians then. They were a proud and gifted race, capable of forming a government for themselves. . . . He would not carry their recollections back three centuries, but bid them look back but for half a century. All the work that was seen in California, was the work of Indians left by some foreigners. If they were not cultivated and highly civilized, it was because they had been ground down and made slaves of.[6]

Noriego's attempt to secure the constitutional right to vote for Indians fell short by one vote, twenty-one to twenty-two. But the delegates did agree not to foreclose future legislatures from making a *statutory decision* concerning the right of Indians to vote. Concerning this issue, the California Constitution clearly deviated from the New York and Iowa Constitutions, as well as every other state constitution in existence.

6. Ibid., 305. Noriego was one of eight Native Californians at the convention. The others were Jose Antonio Carrillo and Manual Dominguez from Los Angeles, J. M. Covarrubias from San Louis Obispo, P. N. de la Guerra from Santa Barbara, Antonio Pico from San Jose, Jacinto Rodriguez from Monterey, and M. G. Vallejo from Sonoma.

Bicameralism and Separation of Powers

The 1849 framers followed the teaching of the early republicans and equated the "accountability" of the representatives with their "dependency on the people." Accordingly, they emphasized the importance of frequent elections. The delegates saw this as a vital institutional expression of the primacy of the publicly educated citizen in a representative form of government. They also recognized the need for "responsible" leadership, and adopted a bicameral legislature, one that recognized the importance of the senate as a moderating influence on the lower branch.

The doctrine of bicameralism was central to twelve of the original state constitutions, as well as the constitutions of states subsequently admitted to the Union. Among the original thirteen states, only Pennsylvania had a unicameral legislature. The framers of the early state constitutions did not envision the two-branch legislature as an attempt to accommodate two distinct theories of representation—also known as the federal plan after the U.S. House and Senate—one based on the people and the other based in geography. The California framers, like the earlier state framers, saw bicameralism as representing the people of California in two different ways.

Article IV of the 1849 constitution also embodied the republican principle found in the early state constitutions: "where annual elections end, tyranny begins." Accordingly, the assembly "shall be chosen annually." Section 5 followed the custom established in the early state constitutions that the duration of service in the upper house would be longer than service in the lower chamber. We learn, "Senators shall be chosen for the term of two years," and they were to be divided into "two classes. . . . [O]ne half shall be chosen annually." Section 6 declared that "the number of Senators shall not be less than one third, nor more than one half, of that of the Members of the Assembly."

The principle of popular sovereignty in both branches was explicitly stated in Article VI: "The number of Senators and members of the Assembly, shall, at the first session of the Legislature, holden after the enumeration provided for are made, be fixed by the Legislature, and apportioned among the several counties and districts to be established by law, according to the number of white inhabitants." Surprisingly, given their Anti-Federalist concern with the corruption of power, the framers of 1849 made no provision for term limits, recall, rotation, or supermajority voting.

Article V provided for an independently elected executive endowed with traditional executive functions. The executive was elected for a two-year term and subject to "impeachment for any misdemeanor in office." Also instructive is that unlike the later Progressives, the framers of 1849 did not provide for the direct election of the administrative offices within the executive branch. The appointment of administrative officers was deemed to be the

function of elected representatives. The governor, like the president of the United States, was expected to address the condition of the state and send messages to the assembly. Both chief executives had the power to veto a legislative bill before it became law.

Article VI provided for an independent supreme court, but one that was composed of three members elected directly by the people for six-year terms. Elections for the supreme court would occur every two years, with one of the three justices being replaced at that time. This notion of judicial election is a clear deviation from Madisonian constitutionalism and goes beyond what was an accepted feature of most state constitutions, namely, judges were to be nominated by the executive branch and appointed by the state senate. The framers of 1849 were suspicious of the judicial branch; they made it a constitutional requirement that the principle of election pervade the entire judicial structure, from justices of the peace to the clerk of the supreme court.

The Legislature and Economic and Social Issues

Article IV stated that the legislature shall pass no law granting divorces, authorizing a lottery, or granting charters to banks or pass legislation that embraced more than one subject. Considerable discussion took place over the six sections concerning corporations and banking. Rodman Price did not think the committee had gone far enough to prevent "the raising up of any privileged class, or set of men, that may consolidate capital, and thereby monopolize individual capital." W. M. Gwin aimed to "battle for the rights of the people, against monopoly and the legalized association of wealth to appropriate the labor of the many for the benefits of the few." He reminded the delegates, "This is the only country on the globe where labor has the complete control over capital. Let it remain so, if we are to remain free, independent, and prosperous." Charles Botts thought that the delegates had finally "come to a question of the most vital importance to the interest of the community." His "chief object" was to "crush this bank monster."[7] These sections would be revisited by the refounders of 1879 who took the corruption of economic power and the class distinctions between labor and capital even more seriously than did the framers of 1849.

Article VIII restrained the legislature in the area of fiscal policy. If the legislature anticipated exceeding the constitutionally designated debt ceiling, it

7. Ibid., 114, 116, 117, 124. Price was a thirty year old who arrived in California from New York three years earlier. Gwin was a forty-four-year-old farmer who arrived from Tennessee four months earlier. Botts was a forty-year-old attorney who arrived from Virginia sixteen months earlier.

had to submit to the voters an itemized list of the objects to be funded along with the cost of each object. A favorable majority vote of the electorate was needed to implement the proposed policy. Thus, the original constitution of 1849, far from being an unreflective copy of previous constitutions, actually anticipated the spirit of the Progressives and incorporated the people directly in the making of fiscal policy.

Article IX blurred the distinction between constitution-making and policy-making. Education policy was written into the constitution, but without the specificity associated with later California constitutionalism. Provision was made for the direct election of "a superintendent of public instruction, who shall hold his office for three years," and the constitution committed the legislature to funding the "promotion of intellectual, scientific, moral and agricultural improvement."

The Amendment Process

The framers of 1849 made a distinction between amending the existing constitution and revising the constitution, a distinction that is not found in Madisonian constitutionalism. A majority of both branches of the legislature could initiate amendments by submitting proposals for the consideration of the "legislature next to be chosen." If a majority of the newly elected legislature agreed, the proposals were submitted to the people. Again, this turn to the people anticipated the Progressives without falling into the Progressivist tendency to collapse the distinction between extraordinary and ordinary politics.

Article X concluded, "[If] a majority of the electors qualified to vote for members of the legislature" concurred, then the amendments became part of the constitution. Amending the constitution was done in strict conformity to the principle of majority rule, both in the legislature and in the population. By contrast, constitutional revision required initiation by the principle of "supermajorities." If two-thirds of each branch deemed it "necessary to revise and change this entire constitution," then this proposal was placed on the ballot at the next election. If a majority of the electorate concurred, then the legislature would call a constitutional convention. Article X also anticipated a version of the principle now known as the Legislative Constitutional Amendment: two separately elected legislatures submitted amendment proposals to a referendum of the people.

Miscellaneous Provisions

Section 14 stated that "all property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise,

or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well as to her private property. Laws shall also be passed providing for the registration of the wife's separate property." Botts opposed the section because he supported "the despotism of the husband. . . . This doctrine of women's rights is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe." Lippitt feared that the clause would encourage divorce; besides, it was "contrary to nature." Dimmick's argument, however, prevailed. He argued that Section 14 merely repeated "the rights of women" as found in the Mexican Laws of 1837. Besides, they were living in a new age of enlightenment: "As knowledge has become more generally diffused, as the world has become more enlightened, as the influence of free and liberal principles has extended among the nations of the earth, the rights of woman have become generally recognized."[8] This provision was in neither the Iowa nor the New York Constitution. Thirty years later, the refounders of 1879 removed this protection from the California Constitution.

Section 21 declared, "All laws, decrees, regulations, and provisions, which from their nature require publication, shall be in English and Spanish." This provision demonstrates that the original founders understood themselves to be creating a state out of two distinct customs, laws, religions, and languages. The original convention provided interpreters for the Spanish-speaking delegates, translated all resolutions into Spanish, and alternated the daily prayer between a Protestant minister, Reverend S. M. Willey, and a Roman Catholic priest, Padre Antonio Ramirez. Copies of the original debates and the 1849 constitution were published in both English and Spanish. This too was removed in 1879.

The Boundary Question

Article XII defined the boundary of California:

> Commencing at the point of intersection of 42nd degree on north latitude with the 120th degree of longitude west from Greenwich, and running south on the line of said 120th degree of west longitude until it intersects the 39th degree of north latitude; thence running in a straight line in a south easterly direction to the River Colorado, at a point where it intersects the 35th degree of north latitude; thence down the middle of the channel of said river, to the

8. Ibid., 260, 263. The women's movement, to which Folsom and Wright belonged, emerged as a force of its own in 1848 at Seneca Falls, New York. At the convention declaring their independence, the women's movement reaffirmed the centrality of the principles of the Enlightenment.

> boundary line between the United States and Mexico, as established by the Treaty of May 30th, 1848; thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction, and following the direction of the Pacific Coast to the 42nd degree of north latitude, thence on the line of said 42nd degree of north latitude to the place of beginning.

The boundary definition provided the answers to five vital questions: Should the California boundary be identical to the territory formerly known as Alta California? Should the delegates decide whether slavery should be permitted to reach the Pacific? Should the delegates draw a boundary that was likely to be approved by Congress? Should the boundary include the Utah Territory currently being settled by the Mormons, or should the delegates exclude "the Mormon issue" from their deliberations? Should the boundary follow such natural geographical considerations as the location of rivers, mountains, deserts, and oceans?

The original report of the Committee on Boundaries located the eastern boundary at 42 degrees North, 116 degrees West, rather incorporating all of Alta California:

> The present boundary of California comprehends a tract of country entirely too extensive for one State, and that there are various other forcible reasons why that boundary should not be adopted by this Convention. The area of the tract of country included within the present boundary is . . . nearly equal to that of all the non-slaveholding States of the Union, and which deducting the area of Iowa, is greater than that of the residue of the non-slaveholding States.

Representative Halleck stated that the location of the eastern boundary was "the most important question that has yet come up for discussion." Several delegates thought that even this truncated boundary proposal invited congressional rejection and tempted the migration of slaveholders. McCarver warned that southern slave owners were planning to bring slaves to California. He wanted to avoid a "collision between free negroes and white mine workers." Wozencraft agreed; he wanted to protect California from "the monopolies of capitalists who would bring their negroes here." Henry Tefft concurred: "Negro labor, whether slave or free, when opposed to white labor, degrades it." Jacob Snyder added, "I just don't want slaves in California degrading white labor." John McDougal, W. M. Steuart, Charles Botts, J. D. Hoppe, and R. Semple claimed that "Africans 'by nature' will always be subservient to the Caucasian," and that "the two races can never intermingle without mutual injury." McCarver wondered how "this convention is able to settle a question which all the talent and wisdom of Congress could not set-

tle." Snyder said the delegates should stick to practical considerations: "We should be debating what does it take to get California admitted."[9]

In opposition, several delegates urged their colleagues to remember that they were framers with a unique opportunity and obligation: "The eyes of the world are turned towards us. . . . [L]et it not be said that we have attempted to arrest the progress of human freedom." Gilbert challenged the delegates to act in accordance with "the principles of liberal and enlightened freedom" declared in the U.S. Bill of Rights. "Look at the people of Europe," he said. "For what are they battling—for what are they shedding their blood? It is to maintain their rights—it is for liberty they contend." Sherwood argued that "slavery is the demon question" that convulses the nation and the main reason they were meeting in Monterey. He warned, prophetically, that "the moment the North, which is the strongest, vote[s] for their own Presidential candidate, and the South for theirs—that moment your union is lost." Tefft agreed that no other deliberative assembly in "the past fifty years . . . met together under circumstances of greater responsibility—circumstances which place it in their power to work great weal or woe, not only to themselves and those whom they represent, but to the whole Confederacy of which they form a part, than the Convention."[10] Thus, he concluded, the committee recommendation on the eastern boundary was the minimum consistent with the obligation to control the spread of slavery.

The delegates sought a compromise and in the end settled for a fixed and natural boundary along the Sierra Nevada and the Colorado River that was likely to secure congressional approval. Neither the North nor the South would object; nor would the Mormons. This compromise, in turn, prevented the 36–30 line from extending to the Pacific, and thus the delegates excluded slavery from the West Coast.

The work of the convention was over. On October 13, 1849, the delegates signed the constitution and submitted it to the people for ratification. The constitution was ratified one month later, on November 13, by a vote of 12,064 to 811.

9. Ibid., 123, 188, 138, 140, 143, 149, 183. Tefft, a twenty-six-year-old lawyer, originally from New York, had been a resident of California for only four months.

Snyder was a thirty-four-year-old surveyor who arrived from Pennsylvania four years before. McDougal was a thirty-two-year-old merchant who came from Ohio and Indiana four months previously. Steuart was a forty-nine-year-old attorney who emigrated from Maryland one year earlier. Hoppe was a thirty-five-year-old merchant originally from Maryland who arrived in California three years earlier.

10. Ibid., 141, 149, 419, 424.

Undoing the Work of 1849

In March 1878, the assembly passed an act calling for a constitutional convention to "frame a new Constitution." One hundred and fifty-two delegates were elected, and they met in Sacramento in September 1878. The new constitution was submitted to the voters in a special election in May 1879, and the new constitution—containing 22 articles with 233 sections, compared with the 1849 constitution with 13 articles and 156 sections—was adopted by a vote of 77,959 to 67,134.

The refounders of 1879 claimed that California needed "a constitution peculiarly her own, suited to the geography, topography, resources, commercial requirements, and the character of population, and not to the wants of the purely agricultural states after which the constitution of 1849 was copied."[11] As we have seen, however, the California founders of 1849 went far beyond simply copying the constitutions of Iowa and New York. If there were ever a state that had "a constitution peculiarly her own," it was California.

Twentieth-century scholars echo the claim that the 1849 constitution was inadequate to meet the state's new and pressing problems of taxation, banking, big business, land monopolization, and the railroads. How could a constitution adopted in 1849 for a thinly settled mining state of 50,000 people meet the needs of California in the 1870s? In the intervening thirty years, the critics continued, American economic life had become dominated by unregulated business. Furthermore, critics of the 1849 constitution point out, the population had risen from the 50,000–100,000 range to 865,000. Moreover, by the end of the 1870s, there were more than 70,000 Chinese in California.

The 1879 constitution is an excellent example of what a constitution should not look like. The refounding of 1879 constitutionalized the politics of class and race and was less inclusive and liberal than the first. Moreover, by placing constitutional restrictions on the scope of legislative action, the refounders altered the established constitutional relationship between citizens and their elected leaders. First, the 1879 constitution explicitly stated, "All laws of the State of California, and all official writings, and the executive, legislative, and judicial proceedings, shall be conducted, preserved, and published in no other than the English language."[12] The 1849 constitution, by contrast, attempted to incorporate the native California population, along with the nearly successful attempt to incorporate the original Indian

11. Hubert Howe Bancroft, *History of California* (San Francisco: A. L. Bancroft, 1890), 7:371.

12. Thorpe, *Federal and State Constitutions,* 1:419.

population. Second, the explicit restrictions in 1879 on the ability of the Chinese to vote, own property, work in either public or private employment, and immigrate to and live in California constitutionalized racial relations. According to Article II, "No native of China, no idiot, insane person, or person convicted of any infamous crime . . . shall ever exercise the privilege of an elector in this State."[13] And Article XIX was devoted explicitly to the "Chinese problem." These provisions are the result of the Workingmen's Party of California (WPC) agenda to avoid the degradation of "white labor." Denis Kearney, the leader of the WPC, screamed, "The Chinese must go," and welcomed the "new deal in politics." Nowhere in the world, he said, had "labor ever gained such a fight over tyrants and the oppression of the people."[14] Finally, the founders of 1879 were closer to ordinary politicians than they were to remarkable lawgivers; they turned the "organic law" into a legal code and constitutionalized specific policy matters in addition to constitutionalizing class conflict and racial relations. The attempt to enshrine policy proposals in the form of constitutional amendments became a common theme for the next hundred years.

The California Constitution in the twentieth century covered a vast and diverse range of issues with an amazing particularity. Included are specific policies on civil rights, liquor, taxation, and usury. In other words, it was a product of the Progressives, and it invites revision because policy is written into the document. And at the beginning of the twenty-first century, more than half of the budget of California has been predetermined by propositions that exclude certain topics from legislative deliberation. By the early 1960s, 580 amendments to the 1879 constitution had been proposed and 334 adopted. And by the late 1990s, 817 amendments had been proposed and 489 adopted. Over the past twenty years, Californians were asked to vote on nearly 300 ballot propositions. The story of the early twenty-first century is that Californians have declared war on the very idea of old-fashioned representative government: less than one year after they elected the governor to a second term, the voters, in 2003, recalled, for the very first time, their chief executive. And the prognosis is for government by referendum and propositions, rather than a return to the original spirit of constitutional democracy as outlined by Professor Donald S. Lutz. This sort of progressivist constitutionalism fails to pass the Lutz standards for what every constitution should fulfill.

13. For an explanation of the alliances that were formed with and against the WPC, see Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878–79* (1930; reprint, New York: Da Capo Press, 1969).

14. Neil Larry Shumsky, *The Evolution of Political Protest and the Workingmen's Party of California* (Columbus: Ohio State University Press, 1991), 147–65.

The Legacy of the Original Constitution

However imperfect their work, the founders of 1849 aimed to secure the well-being of the political community, and they created institutions that had adequate power and authority to actually govern while trusting the election mechanism to control the abuse of power. They relied on the electorate having sufficient public virtue to restrain their elected representatives; they placed considerable trust in the collective wisdom of the electorate and their representatives. The 1849 framers followed the teaching of the early republicans by equating the "accountability" of the representatives with their "dependency on the people." Accordingly, they emphasized the importance of frequent elections: annual assembly elections, and biennial elections for senators and the governor. The original framers recognized the need for "responsible" leadership. Even though Californians in 1849 were "coming from every part of the world, speaking various languages, and imbued with different feelings and prejudices," they were confident that the deliberative process would, in time, secure the common good. The alternative was the "political fanaticism" and convulsions that were then plaguing Europe.

The address of the delegates to the people of California on completion of their deliberations on October 13 contains an important message for every generation of Californians. The address recaptures the sense of the uniqueness of California, and the delegates recognized their own diversity and differences but still appealed to something called a Californian: "Although born in different climes, coming from different States, imbued with local feelings, and educated perhaps with predilections for peculiar institutions, laws, and customs, the delegates assembled in Convention *as Californians,* and carried on their deliberations in a spirit of amity, compromise and mutual concession for the public weal." Their claim is to have founded a constitution based "on the eternal principles of equity and Justice" and derived from deliberation and reflection while "all Europe is agitated with the convulsive efforts of nations battling for liberty." Semple expressed the same sentiment in his acceptance speech on being named president of the convention on September 4: "We are now, fellow-citizens, occupying a position to which all eyes are turned. The eyes not only of our sister and parent States are upon us, but the eyes of all Europe are now directed toward California. I am satisfied that we can prove to the world that California has not been settled entirely by [the] unintelligent and unlettered."[15]

15. Browne, *Report of the Debates,* 474–75 (emphasis in original), 18.

ANNE FEDER LEE

Hawaii

Centralization in a Multi-island State

History, geography, and political culture have played an important role in shaping Hawaii's constitution and the ways in which it is similar to or different from the U.S. Constitution and other state constitutions. This chapter highlights the following particularly significant features of Hawaii's basic legal document: how it centralizes power at the state level, takes into account the state's geography (that is, its multi-island nature), and incorporates native Hawaiian heritage and culture.

Hawaii's Constitutional History

Even before Hawaii became the nation's youngest state in 1959, it had a long history of constitution-making starting during the time Hawaii was a constitutional monarchy from 1840 to 1893 and continuing while a republic from 1893 to 1898 and a U.S. territory from 1898 to 1959.[1] In 1950, while still a U.S. territory, a constitutional convention was held in Hawaii to draft a document that would facilitate efforts to become a state and would be implemented when statehood was finally realized. The "hope chest" constitution, as the 1950 document is referred to, was intended to show "how thoroughly the people of the islands were imbued with American political and

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1. See Anne Feder Lee, *The Hawaii State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1993), for more about Hawaii's constitutional history, detailed analysis of all sections of the document including why and when amendments were adopted up through 1992, legal decisions interpreting different sections, and an extensive bibliography.

cultural traditions" in order to counter objections expressed by some congressional members against statehood (for example, that Hawaii was too different from the mainland because of its racial and ethnic mix and because of alleged Communist influence in the islands).[2] At the time it was drafted in 1950, that hope-chest constitution received much praise. The National Municipal League said it "set a new high standard in the writing of a modern state constitution by a convention." It was commended for being short, for "sketching the structure of government, positing its powers in general language, and [for] leaving out everything specific that was not essential."[3]

The hope-chest constitution was implemented at the time of statehood in 1959 and remains in effect today. However, it is different from the relatively short and simple document it was then because it has become considerably longer and more detailed. Some changes are the result of amendments proposed by the state legislature and ratified by the voters. But the greater length, detail, and "new" subject matter in the current document are primarily due to numerous amendments proposed by the two constitutional conventions held since statehood, in 1968 and 1978, that were then ratified by the state's voters.

In his seminal work on centralization in Hawaii, Norman Meller points to various factors contributing to its acceptance throughout Hawaii's history. This includes the Kapu system (giving life-and-death decision-making power to the king and chiefs), the concentration of power in a strong monarchy, the oligarchic structure of missionary institutions, the importation of foreign-born plantation workers who were "untrained in the American forms of local government," the economic control exerted by five major companies for many years, the concentration of power in one dominant labor union for a considerable period of time, and, for many years, "the subservience" of Asians brought to the islands who had been "bred in a status society in which the extended family and customary conduct overshadowed individualism." To this list we can add the longtime concentration of large portions of land in a small number of private landowners and one-party control of state government.[4]

2. Norman Meller, *With an Understanding Heart: Constitution Making in Hawaii* (New York: National Municipal League, 1971), 84.

3. Ibid., 5, 85.

4. Meller, "Centralization in Hawaii: Retrospect and Prospect," *American Political Science Review* 52, no. 1 (1958): 100–103. For more on the unusual history of landownership in Hawaii, see George Cooper and Gavan Daws, *Land and Power in Hawaii: The Democratic Years* (Honolulu: Benchmark Books, 1985). From 1900 until the early 1950s, the Republican Party dominated politics, and since 1963 the Democratic Party has dominated. Even though the current governor is the second Republican elected to that position (the first was elected at the time of statehood), the legislature is still controlled by the Democrats. See Anne Fed-

At the time the hope-chest constitution was drafted, centralization was seen as a positive not only within Hawaii but also in public administration literature. Although some changes made to the constitution have weakened the state government's powers, "Hawaii's formal government is the most centralized and its administration the most integrated of all fifty states in the union."[5]

There are a number of places where the constitution leaves it up to the legislature to determine how a constitutional provision is to be implemented by stating that such detail "shall be determined as proved by law." In the section below on distribution of power, I will present one example of the way the legislature has implemented such provisions so as to enhance centralized power.

The state of Hawaii is made up of eight major islands separated by international waters; from largest to smallest in terms of geographical size, they are Hawaii (referred to as the "Big Island"), Maui, Oahu, Kauai, Molokai, Lanai, Niihau, and Kahoolawe.[6] In order to maintain their integrity, the state's constitution includes provisions aimed at ensuring representation on an island or basic island–unit (that is, county) basis in various government institutions. Some of these requirements have been, at times, problematic.

Centralized Power in the Islands

The Hawaii Constitution clearly states that the government gets its authority from the people. This relationship is clarified in the preamble: its first paragraph, borrowed from the preamble of the U.S. Constitution, begins with the phrase, "We, the people," whereas its final paragraph begins with the phrase, "We affirm our belief in a government of the people, by the people and for the people," employing the words immortalized in Lincoln's 1863 Gettysburg Address. The basis for authority is repeated within the body of the document. Section 1 of Article I, the Hawaii Bill of Rights, not only states that all political power is inherent in the people but also declares that, concurrently, the people have the responsibility to exercise this power.

Like the constitutions of the other forty-nine states, Hawaii's defines its

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er Lee, "Hawaii," in *State Party Profiles: A 50-State Guide to Development, Organization, and Resources,* ed. Andrew M. Appleton and Daniel S. Ward (Washington, D.C.: Congressional Quarterly, 1997), 73–82.

5. Meller, "Policy Control: Institutionalized Centralization in the Fiftieth State," in *Politics and Public Policy in Hawaii,* ed. Zachary A. Smith and Richard C. Pratt (Albany: State University of New York Press, 1992), 16, 13 (quote).

6. The ranking in terms of population, from largest to smallest, is Oahu, Hawaii, Maui, Kauai, Molokai, Lanai, Niihau, and Kahoolawe (with zero population).

political institutions and distributes power among them. However, it is atypical in a number of ways. For example, it grants considerable power to the executive branch, confers to the legislature very strong control vis-à-vis the counties (there are only four), and defines and establishes a centralized statewide judicial system. In addition, the constitution establishes one statewide board of education as well as the unique Office of Hawaiian Affairs (OHA).

One way in which the constitution centralizes power in the executive concerns gubernatorial appointments. The constitution does not establish any executive and administrative offices and departments but leaves the creation of them up to the legislature. None of the departmental heads of such offices or departments are elected; rather, all are appointed by the governor (Article V, Section 6). Prior to 1968, the governor was required to obtain senatorial consent not only for appointment of department heads but for their removal as well. This was changed in 1968 via a constitutional amendment that continued senatorial consent for all appointments but deleted consent for removal of all heads except for the attorney general.

Some other appointments made by the governor include filling legislative vacancies and the members of the University of Hawaii Board of Regents. Article III, Section 5, specifies that the legislature is to determine how legislative vacancies are to be filled. The statutory provision actually enhances gubernatorial power by giving the chief executive sole power to appoint a permanent replacement for a house vacancy and a permanent or temporary replacement for a senate vacancy depending on how much time of the senate term is left. There are only two statutory limits placed on the governor's ability to fill such vacancies: the replacement must come from the same party as the departing legislator and must be made within sixty days (Haw. Rev. Stat., Sections 17-3 and 17-4). With respect to the state board of regents of the University of Hawaii, the constitution bestows the power for appointing its members to the governor. The constitution restrains the governor in two ways: requiring senatorial consent and representation of geographic subdivisions for at least part of the membership (Article X, Section 6). The number of regents is left up to the legislature.

The governor also appoints judges. With the consent of the state senate, the governor appoints the chief justice, associate supreme court justices, the intermediate appellate court judges, and the judges of the circuit courts (Article VI, Section 3). However, since 1978, the governor has been limited by having to choose from individuals included on a list presented by a judicial selection commission (Article VI, Section 3). The governor is also included in the selection process for this judicial selection commission (as discussed below).

Hawaii's governor may veto bills passed by the legislature but gains addi-

tional power through the ability to exercise the line-item veto in any bill that appropriates money for specific purposes, except for items appropriated to the judicial and legislative branches (Article III, Section 16).

One of the ways in which the governor's constitutional powers have been weakened is the relatively recent limitation on the number of terms that can be served. From the time of statehood, in 1959, until 1978, governors could serve an unlimited number of four-year terms. However, this was changed in 1978 when a constitutional amendment was ratified that set a limit of two consecutive four-year terms (Article V, Section 1).

Article V, Section 2, sets forth the requirements for the lieutenant governor and requires that the governor and lieutenant governor must be of the same political party; they are thus elected as a "team" at the general election. The individuals who run as a team for governor and lieutenant governor are among the extraordinarily small number of officials for which all voters across the state may cast ballots.[7]

In most respects, Hawaii's legislature operates in the same manner as do other state legislatures. It is made up of a senate with twenty-five members and a house of representatives with fifty-one members (Article III, Section 2). Sessions are sixty days and can be extended.

Article IV details the legislative reapportionment process and establishes a reapportionment commission with the authority to reapportion the legislature and U.S. congressional districts. Whatever districting plans the commission ends up with are final, for there are no provisions requiring approval by either the legislature or the governor. The power to appoint the members is divided among the following: the president of the senate appoints two members, the minority party in the senate appoints two members, the Speaker of the house of representatives appoints two members, the minority party in the house appoints two members, and the eight who have been appointed select the ninth, who is the chair. Thus, the power to reapportion the legislature every ten years is vested in a small group selected by the legislative leadership.

The reapportionment article in the constitution also contains a number of provisions to ensure representation from the various islands in the state legislative chambers. First, it requires the apportionment to be done among the "basic island units," defined as (1) the island of Hawaii; (2) the islands of Maui, Lanai, Molokai, and Kahoolawe; (3) the island of Oahu; and (4) the islands of Kauai and Niihau. These basic island units correspond to the four local government entities (counties) in the state (as discussed below). Sec-

7. In addition to the governor and lieutenant governor elected as a team, the only others elected by voters on a statewide basis are the two U.S. senators and the nine board members of the Office of Hawaiian Affairs.

ond, it requires that no basic island unit shall receive less than one member in each house (Section 4). The requirement for this minimum basic island–unit representation has always been met, but even though the provision was found unconstitutional by a U.S. district court, the language remains.[8] There is also a provision that calls for augmenting representation, with legislators having only factional votes in the legislature in order to make certain that each basic island unit has a minimum of two senators and three representatives. Never implemented, this provision was declared impermissible in a 1970 legal case, but remains in the constitution in spite of efforts to delete it.[9] Third, the article lists some criteria that the commission should follow, the first of which states, "No district shall extend beyond the boundaries of any basic island unit" (Section 6). Because of a 1980 federal court decision, this provision must be ignored if necessary to meet the one-person, one-vote districting principle,[10] and some bicounty districts separated by international waters (or, as they are humorously referred to in Hawaii, canoe districts) have been used since then.

In contrast to other states, with their layers of political subdivisions, the Hawaii Constitution establishes the simplest of systems. The legislature has the power to create counties and may create other subdivisions (Article VIII, Section 1). However, only four local governments have been established: one combined city-county unit (the city and county of Honolulu on the island of Oahu) and three counties (the counties of Hawaii, Kauai, and Maui).[11]

Although called counties, these units of local government are somewhat different from those found elsewhere in the United States. The state government actually performs many functions usually carried out by political subdivisions in other states. For example, the state government administers all public education, provides public welfare services, and is responsible for the single statewide judicial system. At the same time, the counties bear a similarity to cities in other states by, for example, providing such services as fire and police protection, refuse collection, and street maintenance. As a re-

8. *Burns v. Gill,* 316 F. Supp. 1285 (D. Haw. 1970).

9. Ibid.

10. *Travis v. King,* 552 F. Supp. 554 (D. Haw. 1982). For more on this case, see Anne F. Lee and Peter J. Herman, "Ensuring the Right to Equal Representation: How to Prepare or Challenge Legislative Reapportionment Plans," *University of Hawaii Law Review* 5, no. 1 (1983): 1–56.

11. The city and county of Honolulu consist of the island of Oahu (with about 75 percent of the state's population). The county of Hawaii is made up of the island of Hawaii, and Kauai County consists of Kauai and Niihau, whereas Maui County is made up of the islands of Maui, Lanai, and Molokai. There is actually a fifth county, Kalawao, which is composed of the Hansen's disease (that is, leprosy) settlement on the island of Molokai; it is administered by the Hawaii Department of Health.

sult, the state's share of state and local government expenditures in Hawaii is higher than that for the local governments, and this feature is a sharp contrast to the relationship found in other states.

The constitution makes clear that counties do not have any inherent power to tax. Article VIII, Section 3, states, "The taxing power shall be reserved to the State except so much thereof as may be delegated by the legislature to the political subdivisions." In 1978 this section was amended by the addition of a proviso bestowing complete power over real-property taxation to the counties.[12] Another amendment ratified in 1978 states that if the state mandates any new program or an increase in the level of service under an already existing program, it must share the cost with the county or counties affected (Article VIII, Section 5). For the first nine years after statehood, the counties could not frame and adopt their local charters unless the legislature approved. This was changed in 1968 by an amendment allowing them to do so without legislative consent (Article VIII, Section 2). Although these changes have granted the counties "partial home rule," there are some who believe more needs to be done to further enhance county home rule.[13]

Unlike most other states, Hawaii has a statewide centralized judiciary under the administrative control of the supreme court; there are no county or city courts. The constitution specifies that there will be, in addition to a state supreme court, one intermediate appellate court as well as circuit courts and district courts (Article VI, Section 1). Although the document sets the size of the supreme court (a chief justice and four associate justices), it leaves the size of the intermediate appellate court and the number of circuit and district courts up to the legislature (Article VI, Section 2). As seen above, the governor, with senatorial consent, appoints the chief justice, associate supreme court justices, intermediate appellate court judges, and judges of the circuit courts. Judges serving in the district courts are appointed by the chief justice of the supreme court (from a list presented by the judicial selection commission), thus giving the chief justice considerable power. The power of selecting the nine-member judicial selection commission is allocated among the governor (appointing three), the chief justice (appointing two), the senate president and the house Speaker (each appointing one), and the state bar association (electing two of its members) (Article VI, Section 4).

12. At the same time, another amendment was ratified, delaying the complete transfer for eleven years, which meant the counties were not able to actually set their property tax rates until 1989.

13. For more on home rule in Hawaii, see Anne Feder Lee and Norman Meller, "Hawaii," in *Home Rule in America: A Fifty-State Handbook,* ed. Dale Krane, Platon N. Rigos, and Melvin B. Hill Jr. (Washington, D.C.: CQ Press, 2001), 112–19.

Article XII, titled "Hawaiian Affairs," is unique in the American constitutional system for several reasons. It traces its genesis to a series of events dating from at least the first Western contact with Hawaii—a series of complex and controversial events related to the tragic near-demise of an ethnic group. No one is certain what the size of the indigenous population was at the time Captain James Cook arrived in 1778. Conventional estimates range from two to four hundred thousand; however, a 1989 publication concluding that the range was more likely eight hundred thousand to one million provoked considerable controversy.[14] There is no doubt, though, that the indigenous population rapidly declined: by 1896, there were probably no more than forty thousand, including those of mixed ancestry, and not until the 1920 census did figures demonstrate a growth rather than decline. Hoping to reverse this terrible trend, Congress, in 1920, passed the Hawaiian Homes Commission Act (HHCA) to set aside lands to provide rehabilitation for native Hawaiians through homesteading. When the hope-chest constitution was drafted in 1950, it included sections concerning Hawaiian homelands not only because the delegates wanted to make sure the program continued but also because many believed Congress would require it for becoming a state. Although these sections remain in the constitution, new provisions concerning native Hawaiian affairs, added in 1978, have had a significant impact on how power is distributed within Hawaii's political framework. These changes went far beyond the subject of Hawaiian homelands and flowed from a heightened ethnic identity and concern for their rights that developed among persons of native Hawaiian ancestry in the 1970s (often referred to as the Hawaiian renaissance).

Of major consequence is the creation of the Office of Hawaiian Affairs. According to the records of the 1978 constitutional convention, the OHA was needed to provide for "accountability, self-determination, methods for self sufficiency through assets and a land base, and the unification of all native Hawaiian people" and work for the benefit of all persons of native Hawaiian ancestry.[15] It was intended to have the anomalous status of being a state agency, while at the same time being independent from the executive and other branches of the state government.

An elected board of trustees governs the OHA. Although the number of trustees is left to legislative discretion, the constitution specifies that there must be no fewer than nine—the number used ever since the board was created. According to the constitutional language, only qualified voters of native Hawaiian ancestry may vote for board members, and only those of na-

14. David E. Stannard, *Before the Horror: The Population of Hawaii on the Eve of Western Contact* (Honolulu: Social Science Research Institute, University of Hawaii, 1989).

15. 1978 Proceedings I, Standing Committee Report no. 59, 646.

tive Hawaiian ancestry may run for and serve as trustees. However, in 2000, the U.S. Supreme Court held these requirements unconstitutional, with the result that neither voters nor those running for membership, or elected, can be limited to only those of native Hawaiian ancestry.[16]

The constitution provides for the OHA board to have representation based on the state's geography by requiring that each of the following islands must have one representative: Oahu, Kauai, Maui, Molokai, and Hawaii. Members of the board are elected on a statewide basis, but the system is confusing to voters, who can cast ballots for all open positions (that is, for individuals running from their own island, from other islands, and at large).

The OHA's funding has been a source of controversy. The constitution specifies that it will receive a share of the income from certain lands held by the state as a public trust but leaves it to the legislature to determine what that share will be, as well as if the OHA will receive any additional state money. As one critic has pointed out, this raises questions about whether the OHA can be the independent body its framers envisioned, for it cannot be financially independent if it must go though the legislative process to obtain funds.[17]

Hawaii's public school system, one of the oldest in the nation, dates from 1840, during the reign of Kamehameha III. It is unique in its highly centralized nature. Although often criticized, all efforts to make it decentralized have failed, further evidence of a general acceptance of and support for centralized powers lodged in the state government.

The first sentence of Article X, Section 1, states, "The state shall provide for the establishment, support and control of a statewide system of public schools." The result is that all funding for public schools within the state is appropriated by the state legislature. The constitution establishes one school board, elected on a nonpartisan basis, with the number of members left up to the legislature, and it has always required geographical representation on the board. However, the current electoral system used to guarantee the geographical representation is best characterized as problematic, for it is most confusing to voters; at election time, voters cast ballots for candidates not only from their own districts but from some other districts as well.

Who Is Hawaiian?

In defining its people, the state of Hawaii faces a unique situation with respect to those of native Hawaiian ancestry. I have mentioned above the con-

16. *Rice v. Cayetano,* 528 U.S. 495 (2000).

17. Melody Kapilialoha Mackenzie, ed., *Native Hawaiian Rights Handbook* (Honolulu: Native Hawaiian Legal Corp., 1991), 89.

gressional act of 1920 regarding Hawaiian homesteads. That act defined the individuals who could qualify for homesteads as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778," when Captain Cook arrived. Since the constitution stipulates that the HHCA is adopted as a law of the state (Article XII, Sections 1 and 3), this definition is, therefore, accepted as well.

The two amendments concerning the OHA, added in 1978, specifically refer to "native Hawaiians" and "Hawaiians." The 1978 constitutional convention proposed an additional amendment defining these two terms: "native Hawaiians" were defined in the same manner as does the Hawaiian Homes Commission Act (that is, the 50 percent blood quantum), and "Hawaiians" were defined as any descendant of the races inhabiting the Hawaiian Islands previous to 1778 (that is, any blood quantum) with the purpose of ensuring that the OHA would benefit all persons of Hawaiian ancestry and not just those with 50 percent blood quantum. However, this proposal did not become part of the constitution, as it was ruled not validly ratified.[18] The definitions were then codified as statutory law (Haw. Rev. Stat., Section 10-2). Because of the constitutional language, the revenues the OHA receives from the trust lands can be used only on behalf of "native Hawaiians." Since there is no constitutional provision specifying a separate source of funds to be used for "Hawaiians," such funding is left up to legislative discretion. Use of these two terms in the constitution (and statutes) is significant because it results in entitlement to different benefits (or no entitlement to benefits) based on ethnicity. Some have argued that these provisions are discriminatory and violate the Equal Protection Clause of the U.S. Constitution, but so far, except for the case ruling that all qualified voters, regardless of race or ethnicity, may vote in OHA elections, legal challenges on this basis have failed.

In early 1971, Hawaii's legislature became one of the first to vote in favor of the proposed Twenty-sixth Amendment to the U.S. Constitution, extending suffrage rights to eighteen year olds. Shortly after that amendment was ratified by the states, the Hawaii Constitution was also amended in the same way (Article II, Section 1).

With Aloha Spirit

In many ways, the people of Hawaii are tolerant and open-minded in such areas as racial and religious diversity, privacy issues such as abortion rights,

18. *Kahalekai v. Doi,* 60 H. 324, 590 P.2d 543 (1979).

and the rights of those accused of a crime.[19] Although Article I, the bill of rights, of the Hawaii Constitution contains language limiting governmental powers that is almost identical to that found in the U.S. Constitution's Bill of Rights (for instance, freedom of religion, speech, press, assembly, and petition; due process and equal protection; and rights of the accused), it also includes some provisions not found there, expressing a liberal stance, or, as some would say, reflecting the "aloha spirit."[20]

When Congress, in 1972, proposed the Equal Rights Amendment for the U.S. Constitution, Hawaii was the first state to ratify it, with the state legislature voting favorably within the first hour after it had passed the U.S. Senate. Later that year, Hawaii voters overwhelmingly approved the legislature's proposal to add a gender equality-of-rights provision to the state constitution.[21]

Article I, Section 7, concerns unreasonable searches and seizures and is very much like the Fourth Amendment in the U.S. Constitution. However, it includes specific words protecting against unreasonable invasions of privacy that are not found in the federal document. In order to clarify that the right to privacy in Section 7 is limited to criminal cases, another right-to-privacy provision was added in 1978 (Article I, Section 6) as a distinct and separate right to guarantee against such possible abuse as the government's use of highly personal, intimate information. Like the U.S. Constitution, Hawaii's requires a grand jury indictment for capital crimes, although it also has a provision mandating that whenever a grand jury is impaneled, an independent counsel must be appointed to advise the panel regarding matters brought before it (Article I, Sections 10 and 11). This provision is aimed at ensuring that the government, via the prosecutor, does not abuse the grand jury for political or other purposes.

One further "limitation" found in the constitution reflects the longtime strength of labor unions in Hawaii: Article XIII grants the right to strike to public and private employees (Sections 1 and 2).

It is important here to point out something that does not exist in the

19. For example, in 1970, three years before *Roe v. Wade,* 410 U.S. 113 (1973), Hawaii was one of the first states to repeal its antiabortion law. Some might argue that the state deviated from its traditional tolerance when, in 1998, voters ratified a legislatively proposed amendment giving the legislature the power to reserve marriage to opposite-sex couples.

20. The Hawaiian word *aloha* means love, mercy, compassion, and pity; it is also used as a greeting and to say good-bye (Mary Kawena Pukui, Samuel H. Elbert, and Esther T. Mookini, *The Pocket Hawaiian Dictionary* [Honolulu: University of Hawaii Press, 1975], 11).

21. Its first sentence, "Equality of rights under the law shall not be denied or abridged by the State on account of sex," is nearly identical to the amendment proposed for the U.S. Constitution (which was not ratified).

Hawaii Constitution: Hawaii's voters are not able to utilize either the initiative or the referendum process as a means for limiting state government since there are no provisions in the document allowing them. At the county level, two of the four counties have the initiative and referendum, whereas the other two allow only the initiative. A 1989 Hawaii Supreme Court ruling that a state statute is superior to a voter-approved initiative in the City and County of Honolulu demonstrates, as one observer commented, "but another illustration of Hawaii's extreme centralization."[22]

Resolving Differences

The Hawaii Constitution addresses conflict management through, for example, separation of powers, checks and balances, a bicameral legislature, the veto, and veto override. The most important role that state voters play in the management of conflict, in addition to voting for particular candidates, is to approve, or reject, holding periodic constitutional conventions and to approve, or reject, all proposed constitutional amendments.

The legislature may propose amendments during any legislative session after a two-thirds vote in each chamber on final reading and after the governor has at least ten days' written notice of the final form of the proposal, or, with or without such notice, by a majority vote of each chamber on final reading at each of two successive sessions (Article XVII, Section 3).

The legislature may submit to the voters at either a general or special election the question, "Shall there be a convention to propose a revision of amendments to the Constitution?" If any nine-year period passes without the question being put before the voters, the lieutenant governor must put it on the ballot at the first general election to take place after the period has expired (Article XVII, Section 2). Thus, the constitution mandates that the state's voters will have the opportunity to call for a convention at least once every ten years. Since statehood, the question of whether to hold a convention has come before the voters five times—the voters approved only twice, in 1968 and 1978, but rejected the question in 1986, 1996, and 1998.

The Aloha Way of Life

The preamble to the Hawaii Constitution begins, "We, the people of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage

22. Meller, "Policy Control," 20. The case was *Kaiser Hawaii Kai Development Co. v. City and County of Honolulu,* 70 H. 480, 777 P.2d 244 (1989).

and uniqueness as an island State, dedicate our efforts to fulfill the philosophy decreed by the Hawaii State motto, 'Ua mau ke ea o ka aina i ka pono.'" The English translation of the motto is "The life of the land is perpetuated in righteousness." It was born out of traumatic events during the reign of Kamehameha III (1825–1854). In 1843, under threat of imminent attack by the British commander Lord Paulet, the king agreed to a provisional cession, the Hawaiian flag was lowered, and the flag of Great Britain rose in its stead. British rule came to an end almost five months later, when Admiral Thomas arrived and informed the king that Lord Paulet had gone beyond his authority. With the Hawaiian flag flying again, the king exclaimed that, as he had hoped, the life of the land had been restored; his emotion-laden words live on in the motto.

By highlighting the state's native Hawaiian heritage, its uniqueness as an island state, the right of the people to determine their own destiny, the importance of nurturing cultural integrity, the need to preserve a high quality of life, and via inclusion of the state's Hawaiian-language motto, the preamble points to the importance of maintaining a special way of life for all in the islands.

Within the document itself we find further examples of this goal. Hawaii is blessed with beautiful sandy beaches and ocean waters, dramatic coastlines, lush vegetation, and volcanic areas. All these have been and are important in the life of those living in Hawaii for recreation as well as sustenance.

Although there is no specific provision regarding shoreline access in the constitution, the Hawaii Supreme Court has handed down pathbreaking decisions expanding the shoreline areas to which the public has access.[23] These rulings can be seen as flowing from various constitutional provisions including those covering conservation of resources, agricultural lands, and marine and water resources, all of which emphasize the importance of these resources to Hawaii's people.

Hawaii's community is multiethnic and multicultural. The constitution recognizes this diversity as a fundamental component of the state's way of life. For example, one provision declares, "The State shall have the power to preserve and develop the cultural, creative and traditional arts of its various ethnic groups" (Article IX, Section 9).[24]

The state's constitution has always prohibited discrimination—stem-

23. At the 1978 constitutional convention, some delegates wanted to propose a new section on shoreline access, but the idea was defeated, apparently because most delegates thought it unnecessary, given the state supreme court decisions on the issue.

24. You will see the high numbers of individuals in Hawaii who chose more than one race to describe themselves in the 2000 census.

ming from the conviction of the delegates to the 1950 constitutional convention that the document needed to present a strong statement against segregation and discrimination. The state's bill of rights specifies that no person is to be denied the enjoyment of civil rights or be discriminated against because of "race, religion, sex or ancestry" (Article I, Section 5). The bill of rights also states that no citizen may be denied enlistment or be segregated within any state military organization because of race, religious principles, or ancestry (Article I, Section 9). This latter provision clearly reflects the 1950 delegates' distaste for the U.S. military's unequal treatment of Americans of Japanese ancestry, living in Hawaii, during World War II. Discrimination in public educational institutions on the basis of race, religion, or ancestry was prohibited in the document implemented at the time of statehood in 1959; that section was amended in 1978 to prohibit discrimination on the basis of gender as well (Article X, Section 1).

In addition to the OHA, there are additional significant provisos recognizing the importance of, and aimed at preserving, native Hawaiian culture and heritage. The official languages of the state are English and Hawaiian (Article XV, Section 4). One section states that the state reaffirms and shall protect all rights customarily and traditionally exercised for subsistence, cultural, and religious purposes for those who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 (Article XII, Section 7), whereas another provides for a state Hawaiian educational program in the public schools in order to promote the study of native Hawaiian culture, history, and language (Article X, Section 4).[25]

Additionally, we must point to a section of the document that is largely symbolic but also points to the importance of the native Hawaiian heritage. Article IX, Section 10, begins with the words, "The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I—Let every elderly person, woman and child lie by the roadside in safety—shall be a unique and living symbol of the State's concern for public safety." It continues by stating that the state has the power to "provide for the safety of the people from crimes against persons and property." The reference to the law of the splintered paddle is to an episode in the life of Kamehameha I, who united the islands and reigned from 1795 to 1819. Although there are different versions of the incident, said to have taken place circa 1783, the major elements are as follows: As a young chief, Kamehameha embarked on a raid into enemy territory, and when he saw some enemy fisherman, he decided to take

25. For an overview of the Hawaiian sovereignty movement and the many groups hoping for some form of independence for those with native Hawaiian ancestry, see Norman Meller and Anne Feder Lee, "Hawaiian Sovereignty," *Publius: The Journal of Federalism* 27, no. 2 (1997): 167–85.

their catch. Jumping from his canoe in order to chase them, his foot became caught in a crevice of lava rock. Seeing that Kamehameha was defenseless, but not knowing who he was, one of the fishermen hit him on the head with a paddle with such force that the paddle splintered. Kamehameha eventually came to realize that his actions were wrong. Years later, he commemorated the experience by proclaiming the "law of the splintered paddle" to protect individuals from unprovoked physical attack and robbery.

Conclusion

Though the Hawaii Constitution includes many provisions like those found in U.S. Constitution and other state constitutions, it incorporates others that are unusual in the American political system. It thus reflects not only the country's political tradition but also Hawaii's particular history, geography, and political culture.

JOHN BRETTING AND F. CHRIS GARCIA

New Mexico's Constitution

Promoting Pluralism in La Tierra Encantada

The history of the development of the New Mexico Constitution illustrates the unique attributes of the state and its people.[1] New Mexico struggled more than six decades to advance beyond territorial status and became the forty-seventh state in 1912. There are a variety of confounding factors responsible for the sixty-two-year process that New Mexico citizens endured in order to establish statehood, thereby achieving self-governance. Within the context of this chapter we examine the extremely rich history of New Mexico's quest for inclusion into the U.S. federalist system. We attempt to answer the question, "Why was New Mexico's struggle for statehood the longest in the history of the United States, and what were the implications for the state constitution?"

The evolutionary process from territorial status to full partnership illustrates and frames the tricultural and multiethnic citizenry of New Mexico and their diverse way of life. It also calls attention to the variance between the New Mexico Constitution and the other forty-nine. Our careful assessment of all five attempts (1850, 1872, 1889, 1906, and 1910) to achieve state status also examines the functions performed by state constitutions. Finally, we present several observations that address the extent to which the New Mexico Constitution has worked to structure the political environment, define citizenship, and constrain the behavior of citizens.

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1. *La Tierra Entacada* is Spanish for "The Land of Enchantment."

The Struggle for Statehood

The origins of self-governance in New Mexico can be traced to 1821 when Mexico received its independence from Spain. The vast expanses of the modern-day southwestern region of the United States, including New Mexico, became northernmost Mexico. In 1824 the Mexican Constitution was adopted, thereby establishing New Mexico as part of "old" Mexico. The New Mexican portion was ruled by a governor (appointed by Mexico's executive branch), an advisory legislative branch without binding authority, and a plethora of traditional substate units of local governance.[2] The territorial governor, the primary appointed executive, generally ruled in a manner that protected New Mexican interests. The chief executive was traditionally a native of New Mexico, and, consequently, a powerful group of families and representatives of the Catholic Church came to dominate the territory's politics.

Under Mexican rule numerous trade routes traversed the territory, fostering foreign trade and the sporadic influx of Anglo-Americans. All inhabitants of this stark and relatively unpopulated territory, including the indigenous Indians, were granted Mexican citizenship. However, the citizens achieved the right to own property when the governor developed a formal land-grant system consisting of small plots transferred to individuals, and the larger grazing areas were held in common.[3] This system of land tenure, including community-held irrigation canals known as *acequias,* supported a predominantly pastoral existence composed of small-scale farming and subsistence ranching.[4]

The Mexican government's decision to extend citizenship to all the inhabitants of this territory is of particular importance. This singular act served as the primary antecedent responsible for the inherently inclusive nature of the New Mexico Constitution. Said differently, when we apply Donald S. Lutz's framework to the New Mexico Constitution we discover a multiethnic and pluralistic definition of "a people." This unique attribute survived the conquest of U.S. troops and the numerous drafts of a state constitution for close to ninety years.[5]

2. Paul Hain, F. Chris Garcia, and Gilbert K. St. Clair, *New Mexico Government,* 3d ed. (Albuquerque: University of New Mexico Press, 1994), 13–15.

3. These commonly held resources will play a very important role in the future of New Mexico's constitutional development. Traditional concepts, both Spanish and Mexican, of property ownership, the rights of citizens, and limited governance will also have a major impact on the establishment of a way of life and the institutions of governance in New Mexico.

4. Myra Ellen Jenkins and Albert H. Schroeder, *A Brief History of New Mexico* (Albuquerque: University of New Mexico Press, 1974), 22–25.

5. Lutz, "The Purposes of American State Constitutions," *Publius: The Journal of Federal-*

War and the Quest for Inclusion

In 1846 the United States declared war on Mexico and dispatched General Stephen Watts Kearny to Santa Fe. Kearny reassured the inhabitants that their way of life would not be altered in a radical fashion. In September 1846 Kearny appointed civil officials and issued the "Organic Law of the Territory of New Mexico," more popularly know as the Kearny Code. This code was a blend of Spanish-Mexican law, the law of the state of Missouri, and portions of the Livingston Code.[6] The Kearny Code was praised for several enduring provisions: the guarantee of the civil rights of the people; the recognition of the bilingual nature of New Mexico, resulting in the translation of the U.S. Constitution into Spanish; and the articulation of an unequivocal antislavery provision.

In December, President Polk, based on the recommendations of an indignant U.S. Congress, repudiated the power of a general to confer territorial status to any occupied land. General Kearny had overstepped his authority. He usurped the powers of the U.S. Congress by ignoring the Northwest Ordinance of 1787. More important, Kearny's actions were in direct conflict with Article IV, Section 3, of the U.S. Constitution, which provides that Congress should have the power to dispose of and make all the necessary rules and regulations respecting the territory or property belonging to the United States.

Hostilities between the United States and Mexico ceased with the signing of the Treaty of Guadalupe Hidalgo in 1848. Under the terms of the treaty, the conquered people could elect to remain Mexican citizens and continue to reside within the territory. Article IX of the treaty provided that those who did not select to remain Mexican citizens were considered "to have elected" to become citizens of the occupied territory. No matter the choice, their property rights and civil rights provided under Mexican law were guaranteed. However, the existing Spanish-Mexican land-grant protocols distributed grazing parcels as community resources and were held in common. New Mexicans' property rights varied greatly from the English-American conceptualization of private landownership that first made its way into the territory during military occupation. The stark variances between the two were illustrated in the establishment and transferal of property rights. These differences were magnified when, during the summer of 1850, delegates gathered in Santa Fe at the "first" convention to draft New Mexico's state constitution.

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ism 12 (Winter 1982): 27–44. The Mexican Constitution was adopted in 1824; the New Mexico Constitution was adopted in 1912.

6. Robert Larson, *New Mexico's Quest for Statehood, 1846–1912* (Albuquerque: University of New Mexico Press, 1968), 4–5.

Factionalism and conflicts between the recently arrived Anglo-Americans and the native Hispanos were inflicting deep wounds on the political system. The territorialists were closely aligned with the military and depended on resources provided by the federal government. The Hispanos had to fight for representation, and their interests were incorporated into a "state party" organization. After struggling for almost two weeks, the factions agreed to proceed with "constitution-making." The document incorporated the Anglo-American legal and political traditions and also articulated New Mexicans' staunch opposition to slavery. The rights and desires of the majority native population were challenged by the numeric-minority Anglo-American delegates. After much contestation, the demands of the Hispanic "state party" were addressed, including an agreement to publish the U.S. Constitution in both Spanish and English.

The 1850 constitution established the historical and traditional branches of government, with a bicameral legislature, a governor and lieutenant governor, and a court system that called for a division of the new state into three judicial districts.[7] In addition to settling boundary disputes with Texas, other significant provisions of the constitution pertained to the role of the military, the power of the Roman Catholic Church, and the extent to which the indigenous peoples (native Hispanos and Indians) would enjoy political incorporation.

The powers of the military were curtailed, prohibiting any standing army within the state during peacetime. The state legislature would set aside funding for a system of public education to prevent the church from continuing its monopoly of the territory's educational system. Many of the older ways were protected, and Hispanic traditions and civil law not in conflict with the 1850 constitution would remain in effect, along with compatible practices in common law.[8] The trade-offs and decisions are illustrative of one of Lutz's key reasons for writing a constitution, that is, defining a way of life: they describe what life should be like under the constitution of New Mexico. By honoring older traditions and laws, limiting the power of the federal military troops, and establishing a funding mechanism for nonsectarian schools, the convention delegates protected several of the major Hispano interests while eradicating the fears of continued military rule.

All native peoples of New Mexico were extended the franchise, with the exception of "uncivilized Indians."[9] Full citizenship depended on an oath renouncing their allegiance to the Republic of Mexico and one supporting the constitutions of the United States and New Mexico. A proclamation declar-

7. Ibid., 33.
8. Ibid., 35.
9. Specifically meaning the bands of nomadic Navajo and Apache.

ing the right of all Pueblos to vote for or against the adoption of the state constitution or to abstain from voting altogether was passed on June 6, 1850.

On June 20, 1850, the preferences of New Mexicans were revealed. The outcome of the vote displayed very strong support for statehood and overwhelming approval of the new state constitution. Voting for the state constitution were 8,371 people, and only 39 ballots were cast against it. The act of self-governance would not become effective, however, until Congress granted New Mexico statehood. The saliency of the slavery issue and the continued demands by Texas for more territory made most members of Congress quite reluctant to deal with sparsely populated and isolated New Mexico. The sharp differences between the northerners and southerners and the delicate sectional balance had a countervailing impact on Congress. In order to avoid explosive violence, attached to the slavery question, Congress did not approve statehood. They crafted a technical solution: they compromised (known as the Compromise of 1850), and instead of gaining statehood, New Mexico received an Organic Act—establishing its full territorial status.

Trial and Failures

The next major drive for statehood is considered to have paved the way for New Mexico's entry into and exposure to the U.S. political mainstream. After twenty-two years as "an official" territory of the U.S. government, New Mexico was exposed to other models of self-governance, including other states' constitutions, and the traditional peoples of New Mexico were also exposed to "the outside world," including the deliberations of the U.S. House and Senate. The second iteration of the New Mexico Constitution was modeled after the constitution of Illinois, and many argued that it was the best possible state constitution in the United States in the 1870s.[10]

The constitution of 1872 was designed to foster liberal homestead laws and also provided for free public education for all children. This attribute is quite important because a statewide public education system was not in existence. This proposal to establish a statewide system of education created additional controversy and competition between the Anglo-American and Mexican-Spanish cohorts. The reason was that up until this time, the Roman Catholic Church controlled all educational activities, and very limited interaction from secular interests was tolerated. The educational monopoly formulated by the church specified a system of institutions isolated from direct citizen input; rather, these schools relied on the hierarchical rule of the Catholic Church rooted in Spanish and Mexican traditions.

10. Ibid., 100.

Consequently, the Mexican-Spanish residents of the territory perceived this provision as a direct affront against the Catholic Church, and the decision represented institutional change resulting in a major power shift. The close structural relationship between the church and the current agents of governance, especially the territorial governor, had existed for more than two centuries. These networks intertwined families, commercial interests, and religious orders in a variety of legitimate governing bodies.

The other key provision of this draft constitution that contributed to dissension voiced by the indigenous peoples of New Mexico was the respecification of citizenship requirements in an exclusionary and limited fashion. The new legal enfranchisement specifications required all participants to be naturalized citizens. This particular provision would severely curtail "the numbers of legitimate citizens with voting privileges" within the boundaries of New Mexico. It was less inclusive than the earlier extension of citizenship, and it served to ostracize the American Indian and Spanish-Mexican factions.

A popular referendum on this document was held on the second Monday of June 1872. The proconstitution faction engaged in active campaigning and utilized the New Mexican newspapers to a great extent. The anticonstitution forces, utilizing public meetings, insinuated that land, railroad, and development speculators were backing this new statehood movement solely for direct personal and corporate gains.[11] The general assessment, held by both factions, was that the U.S. Congress was currently predisposed to approve New Mexico's admission into the Union if approved by a popular vote.

When the polling places were opened, the precinct judges became quite concerned and were very surprised by the extremely low turnout. One structural impediment in place was a modest one-dollar poll tax levied on all voters to be used to support public schools. The taxation was considered to be one of the primary barriers to a large turnout. Another concern, one of New Mexico's long-term and problematic issues related to demographics and voting behaviors, was first illustrated in 1872. The primarily rural and less populous areas tended to support the constitution, whereas the more concentrated and urbanized center, Bernalillo County, cast the deciding votes, with 674 individuals voting against the proposed constitution and only 24 approving it. The prior hopes and dreams of statehood "received a jolting setback in 1872."[12] Interestingly, this voting gap between the urban and the rural public opinion continues to be present in New Mexico.

New Mexico's third attempt at statehood was influenced by less than de-

11. Ibid., 104.
12. Ibid., 115.

sirable public opinion and biased perceptions, at the national level, concerning the nature and traits of the indigenous peoples. Unfortunately for New Mexico, other territories of the United States were not portrayed in such disparaging terms. The *Chicago Tribune* in 1888 referred to New Mexico's population "as not American, but 'greaser' persons ignorant of our laws, manners, customs, language, and institutions." New Mexicans were accused of being lazy, shiftless, and "grossly illiterate and superstitious.'"[13] To counteract these biased and inaccurate impressions, the delegates to the 1889 convention included the elite citizens of the territory with political connections at the regional and national levels.

The work at this convention was divided into twelve specific committees. Once the rules and formalities were established, the convention had to deal again with the most pressing issue within the territory—public education. The archbishop of Santa Fe intervened and circulated a pastoral letter while the convention was in session. The nature of the letter was to demand a system of elementary education that would provide the citizens of the territory, of every "shade of belief," equal facility to "educate their children in a manner they believed would bring about their happiness." Although the motivation of his letter was unclear, the response from the convention delegates was not. In fact, it was rather strong. In order to reaffirm their position, they included the following clause: "Public education would be under absolute control of the state, and free from sectarian or church control; and no other or different schools shall ever receive any aid or support from public funds."[14] This stern mandate, prohibiting a relationship between religious and public education, was offset by an irrevocable article proclaiming complete religious freedom that naturally pleased the Hispanic factions. However, the article demanding state-controlled public education did not mitigate the growing anti-Hispanic sentiments residing in New Mexico's Anglo population. Many wanted to prevent "Mexican domination" and proposed a restriction curbing "native political power."

The distinctive conflict and competition between the "Anglo axis consisting of prominent Republicans" and the Hispano natives (the state Democratic Party) worked to undermine this attempt at statehood. The constitution of 1889 was rejected by a decisive vote of 16,180 to 7,493. The strong anticonstitutional leaning of native Hispanics was probably influenced by the continued struggles encountered when they attempted to obtain a clear and free title to the land "deeded to them" via the Spanish land grants. This faction, larger than the Anglo one, was fearful of being swindled out of their most precious resource—their land. The bitter and blatantly anti–Mexican-

13. Ibid., 148.
14. Ibid., 159.

Spanish images portrayed by the national newspapers solidified their opposition to the 1889 constitution.

Noting that New Mexicans had not received adequate resources from the federal government because of their continued territorial status, New Mexicans made yet another, and this time quite impressive, push for statehood. The most important rallying call for statehood was the disproportionate number of New Mexicans volunteering for the Spanish-American War. New Mexico mobilized its full quota of troops, requested by President McKinley, in record time, and outpaced the vast majority of states. With President McKinley's appointment of Governor Otero as territorial governor, national-level acceptance of a native New Mexican politician would be tested again. In this instance, several midwestern papers labeled him as American in every way.[15]

With the prospects for statehood appearing to be bright, the delegates from New Mexico, Arizona, and Oklahoma decided to pool their resources and make a collective fight. The result of this effort was the passage of House of Representatives Bill 1253 that enabled the citizens to form constitutions and state governments, and be admitted to the Union. However, when Congress reconvened after the winter recess, the majority report of the conference committee recommended that Oklahoma and the Indian Territory be admitted as one state, and New Mexico and Arizona were withheld indefinitely. This action was predicated on two grounds: the insufficient population in these territories and the criticism that the majority of the people in New Mexico were Spanish and could speak only in their native tongue. Many Anglos opposed the 1889 constitution out of the fear of "Mexican" domination.

Although the collaboration between states did not result in statehood for either the Arizona Territory or the New Mexico Territory, major animosity did not exist between the two territories. However, they both recognized the vastly unique attributes and fundamental differences concerning their people, their businesses, and their social organizations. In early 1906 President Roosevelt announced that he desired for Congress to pass enabling legislation for the adoption of a constitution for a combined New Mexico and Arizona landmass. Neither state was particularly pleased with the idea of joint statehood. Arguments in favor of jointure held it was necessary because of the sparse population in both territories. The cattle barons, railroads, and timber industry were vocally opposed to the jointure movement because they thought the expenses associated with doing business would increase with statehood. Controversy concerning the definition of the citizenry became intense, especially across the territorial boundaries. One Arizona

15. Ibid., 195.

newspaper crudely referred to the citizens of New Mexico "as a mongrel population too ignorant and lazy to assume the privileges of full citizenship."[16]

Different legal systems also worked to divide the states. Arizona's law was based in common law, whereas the legal code in New Mexico was derived from civil law because the native Spanish-speaking people of the territory were accustomed to the laws utilized in Mexico or Spain. Arizona's form of democracy was more progressive and less traditional than New Mexico's. The people of the Arizona Territory had approved primary election laws and also adopted the Australian ballot; neither existed in its sister territory.

In a referendum on November 6, 1906, Arizonans killed the jointure proposal by a vote of 16,265 to 3,141. This outcome represented less than 20 percent of the people of Arizona supporting jointure. In New Mexico, where both the press and the political parties were for the movement, the ballots were 26,195 for statehood, compared to 14,735 against jointure. For New Mexico, the outcome represented a political victory within the territorial boundaries, because both the Republican and the Democratic Parties supported statehood. The combined "defeat" was significant enough to end all future movements for jointure.

Drafting a Constitution, Defining a People

Although the partnership with Arizona had failed, New Mexico still faced drafting its own constitution, one that limited the breadth and scope of state government and still defined a way of life for the people while also defining the political regime. What is distinctive about the long and difficult struggle encountered by New Mexico and its varied people was the continuous competition between the numeric-majority population (native Mexican-Spanish people) and the outspoken and politically organized minority interests (the business sector and the powerful and wealthy Anglo axis). This dynamic represents one of Madison's essential concerns: the fear of the tyranny of the majority and the deprivation of the minority faction(s). We note, however, the interesting juxtaposition. The demographic majority consisted of the Spanish-speaking native New Mexicans with limited financial and political resources. The minority faction, based on a numeric count, held the dominant positions of power, were connected to the national political parties, and were extremely fearful of the "natives" and their predominant and preferred language—Spanish!

Robert A. Dahl provides insight and helps us to reconcile this dilemma. In his critical assessment of Madison's theoretical model, he suggests that

16. Ibid., 244.

James Madison could not reconcile two conflicting goals of a constitution. "On one hand, Madison substantially accepted the idea that all the adult citizens of a republic must be assigned equal rights, including the right to determine the general direction of government policy." From this perspective, majority rule represents the republican principle of a constitutional government. On the other hand, Madison also wished to design a political technology that would guarantee the liberties of specific minorities, which in some instances held greater status, more power, and extraordinary political resources. However, in most circumstances they would probably not be tolerated by the popular majority. From Madison's theoretical position, the popular majorities had to be limited, via the constitutional technology.[17] As we will see, within our discussion of New Mexico's constitutional convention of 1910, an important compromise and some trade-offs were negotiated on the convention floor, resulting in political institutions, a way of life, and a definition of New Mexico's citizenry that were simultaneously democratic, republican in nature, and respectful of native New Mexicans' language, cultural, and religious traditions and heritage.

After several futile attempts and four years of continued debate, both the U.S. House of Representatives and the U.S. Senate approved enabling legislation for the territory of New Mexico. On June 20, 1910, President Taft affixed his signature to the bill.[18] An enabling act was finally achieved in 1910, "only sixty years" after New Mexico's first attempt at statehood was derailed by the passage of the Organic Act of 1850. Almost immediately after the enabling legislation was signed into law, the citizens of the territory began to prepare for the election of delegates. The territorial governor issued a proclamation calling for the election of delegates to a constitutional convention. The twenty-six counties within the territory would select one hundred delegates based on an apportionment formula designed by the governor, the New Mexico chief justice, and the state secretary.

The constitutional convention was convened on Monday, October 3, 1910, and the general environment was one of cooperation. However, this spirit soon diminished because of the controversy inherent within issues such as direct legislation, the method to be utilized to amend the constitution, Prohibition, women's suffrage, the management of public lands and their distribution, and the establishment of legislative and judicial districts. Among these, the issue that reflected the importance of inclusiveness in New Mexico's constitutionalism was the amendment process.

A compromise was crafted that established a unique, differentiated amend-

17. Dahl, *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956), 30–31; Lutz, "Purposes of State Constitutions," 36.

18. Larson, *New Mexico's Quest,* 271.

ment process that fulfilled Lutz's provision of conflict management yet safeguarded the rights of Hispanics. Article XIX, Section 1, of the proposed state constitution provided that a two-thirds majority vote of the entire membership in each house was required for amendments. However, the requirements were made even more stringent with respect to certain specified sections. Article VI, Section 3, provided for the right of citizens to vote regardless of their "religion, race, language, or color and their inability to manage effectively either the English or Spanish languages." In Section 10 of Article XII there was the provision that children of Spanish descent would never be denied their right of admission to the public school system, nor ever be classified into separate schools. The section provided that these students would forever enjoy perfect equality with other children in all public schools. In order to amend these sections, the constitution required the approval of three-fourths of the members of each house, as well as at least three-fourths of those voting in the state.[19] These extraordinary majorities were designed to make amendments to these sections essentially impossible.

These very stringent amendment requirements helped to eradicate the fears and apprehensions of native New Mexicans that they might be discriminated against by the Anglo factions. Additionally, they were also perceived as an important trade-off between the Anglo-Americans' desire that women be permitted to vote in school board elections and the Hispanos' strong adherence to the traditional and gender-based role of women. Furthermore, all the native delegates (Indian and Hispanic), numbering thirty-four out of one hundred delegates, were adamantly opposed to any provision establishing separate schools, even for the very limited number of "Negroes" in the territory.[20]

Convention delegates, wishing to ensure the rights of the native peoples, enacted a bill of rights in which Hispanos received additional guarantees and protections: "The rights, privileges, and immunities, civil, political and religious, guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo, 1848, shall be preserved inviolate."[21] On the last formal day of the convention, November 21, 1910, a roll-call vote was taken, and the draft constitution was adopted by a vote of 79 approvals, 18 disapprovals, and 3 abstentions. On the day after adjournment the governor proclaimed that January 21, 1911, would be election day—when New Mexicans could vote for

19. Lutz, "Purposes of State Constitutions," 36; Larson, *New Mexico's Quest,* 279.

20. Please note the stark contrast between the number of Hispanic delegates to the New Mexico convention (34) and the Arizona convention, where there were only 2 delegates present!

21. Larson, *New Mexico's Quest,* 281.

the ratification or defeat of the New Mexico Constitution with voting occurring in either English or Spanish. The overwhelming desire for statehood was so strong that the document was approved by a statewide vote of 31,742 to 13,399. The final hurdle remaining was congressional and presidential approval.

Senate Joint Resolution no. 57 was approved by a roll-call vote of 53 to 9 in favor of New Mexico's Constitution. The U.S. House of Representative approved the bill without a roll call. On August 21, 1911, President Taft signed the compromise resolution that promised New Mexico statehood if the terms of the resolution were met. The governor of New Mexico issued a proclamation calling for the first state election on November 7, 1911. On January 6, 1912, a delegation from New Mexico gathered at the White House, where they witnessed President Taft's signature to the proclamation granting New Mexico statehood. It is reported that the president turned to the delegation and, smiling, stated, "Well, it is all over. I am glad to give you life. I hope you will be healthy."[22]

Conclusion

Here we offer some reflections concerning the length of New Mexico's quest for statehood and several preliminary propositions with respect to New Mexico's unique distribution of political powers that resulted in the state resembling "a poster child" for tricultural and multiethnic political inclusion. Probably the most prominent reason for the extraordinary delay was that the territory of New Mexico's political inclinations were in direct opposition to the prevalent mood in the United States. The territory's isolation promoted a certain disconnect from national politics. This was compounded by indifference and, oftentimes, direct hostilities focused on New Mexicans, especially the "native peoples" and their aspirations to join the Union.

Outside of New Mexico's territorial boundaries, numerous political forces, especially those located in the eastern portion of the United States, were prejudiced against the indigenous peoples of this "wild and uncivilized" land. Frequently, national newspapers displayed vocal hostilities toward the Spanish-speaking Roman Catholic peoples of New Mexico. Also, the perceptions of uncivilized attributes possessed by American Indians remained. When referring to the peoples of New Mexico, one congressman was quoted as saying, "[They are from] a race speaking an alien language and they did not represent the best blood of the American continent." The un-

22. Ibid., 304.

fortunate distrust of New Mexico's "essentially foreign" culture was probably the most durable obstacle to statehood, used to prevent New Mexico from joining the Union until 1912.[23]

Additionally, the "party line" against admission of the western territories was the insufficient-population argument. This argument, however, did not prevent less populous states such as Montana and the Dakotas from receiving statehood earlier. This inconsistency along with other quirks, such as many New Mexican residents during the period from 1848 to 1889 actually preferring territorial status to statehood, undercut prostatehood supporters and promoters.

It is reasonable for us to conclude that the origin and purpose of the New Mexico Constitution vary greatly from the other forty-nine states'. The values held "near and dear" by New Mexicans have fostered a way of life and a political system dominated by a system of inclusive and racially, ethnically, and culturally diverse political representatives. The institutions of collective decision making in New Mexico have tended to reflect this pluralist orientation for the past ninety-three years. To a great extent the constitutional technology operating in New Mexico protects the "minority interests." One vivid illustration of this is the inclusion of members of the Navajo Nation, who have enjoyed full citizenship since 1948 when a New Mexico district court struck down a provision denying them complete enfranchisement. During the time that many other states, primarily in the South, prevented complete and free access to voting for minority interests via poll taxes and other measures (which became illegal with the passage of the first Voting Rights Act in 1965), New Mexico was actually extending the franchise. In short, echoing President Taft, representative democracy, in its inclusive and multicultural form, in New Mexico has remained healthy.

23. Jenkins and Schroeder, *Brief History,* 76 (quote); Larson, *New Mexico's Quest,* 304.

HOWARD LEICHTER

Oregon's Constitution

A Political Richter Scale

A nineteenth-century incarnation of Donald S. Lutz would have found Oregon's new constitution a thoroughly unoriginal document, likely to contribute little, if anything, to the development of state constitutional practice and theory. And, in this, he would have been absolutely correct. The state's first, and only, constitution, written and ratified in 1857, was singularly, and unabashedly, imitative: 172 of 185 of its sections were copied from other states' constitutions. In fact, the lack of constitutional daring and experimentation was precisely what Oregon's framers wanted; they were looking to preserve an established and idealized, rural, way of life, not provide the blueprint for a new, more modern state. In this sense the Oregon Constitution embodies one of the core purposes identified by Lutz, namely, defining a way of life and a set of institutions and practices to ensure that vision.[1]

One hundred years later, the real Donald Lutz would have found something quite different from the imitative and largely uninspiring original Oregon Constitution. By the latter part of the twentieth century, Oregon's constitution had become, in spirit if not always in content, an important model for constitutional revisionists and state supreme court judges around the nation. David Schuman, a constitutional scholar and Oregon appellate court judge, notes that despite the derivative nature of the original charter, "the Oregon Constitution has played a key role in the twentieth century's most radical and progressive state constitutional developments: The so-called Oregon System of popular democracy, which derives much of its substance and legitimacy from the initiative and referendum provisions of the

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1. Lutz, *The Origins of American Constitutionalism* (Baton Rouge: Louisiana State University Press, 1988), 16.

Oregon Constitution; and the revival of state constitutional rights known as the 'new judicial federalism,' first and most persistently practiced by the Oregon judiciary."[2]

This chapter traces the evolution of the Oregon Constitution from its pedestrian, highly derivative origins to a dynamic and, at times, inspiring document. Yet despite this transformation, the Oregon Constitution has remained remarkably true to the core political values of its framers and the people whom they represented nearly 150 years ago. In fact, even the most significant addition to the basic charter, the introduction of the initiative and referendum in the early twentieth century, was foreshadowed in the constitutional convention debates and in the ratification process. Almost from the beginning, Oregonians have believed in popular participatory constitution-making.

This chapter, like the others in this volume, takes its intellectual inspiration and analytical perspective from the work of Donald S. Lutz, *The Origins of American Constitutionalism,* and particularly the insights his work has provided in our understanding of the purpose and content of state constitutions. I have also been guided by the work of G. Alan Tarr, who has identified three approaches to accounting for "the dynamics of state constitutional politics and constitutional change." These are Daniel J. Elazar's "political-culture" model that, like Lutz, sees state constitutions "as embodying the reigning political culture in the state"; a "historical-movement" model that sees state constitutions as reflecting the national dominant political forces at the time of adoption; and an "ordinary-politics" model in which state constitutions can be understood as "the continuation of ordinary politics in a different arena."[3] Although Tarr sees these as competing theories of constitution-making, my view is that all three, at various times in its history, help explain the Oregon charter.

The 1857 Constitution

The sixty white men who met in Salem in the late summer of 1857 were, like the people they represented, overwhelmingly conservative farmers who were disinclined to engage in constitutional experimentation and disposed toward expediency and economy. One delegate urged his colleagues: "Let us

2. Schuman, "The Creation of the Oregon Constitution," *Oregon Law Review* 74 (1995): 611.

3. Tarr, "State Constitutional Politics: An Historical Perspective," in *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns,* by Tarr (Westport, Conn.: Greenwood Press, 1996), 4.

make a constitution and go home in fifteen days."[4] It took thirty-two days to get the job done. That the document, which was approved by a vote of thirty-five to eleven, was so unexceptional, and written so quickly, was the result of two factors. First, all sixty delegates came from someplace other than Oregon and brought with them a knowledge of, and in some instances experience in writing, other state constitution. Forty-six of the sixty came from just five states (Iowa, Illinois, Missouri, Ohio, and Indiana), and most were relatively new to the territory: 70 percent had been in Oregon nine years or less. At least three members had served as delegates to other state constitutional conventions (one in Ohio and two in Iowa), and, most significantly, one delegate arrived in Salem with a copy of Indiana's constitution. In the end, 172 of the 185 sections of the Oregon Constitution were copied from other, mainly midwestern, states, and 103 of them were identical, or nearly so, to the Indiana document. As Delazon Smith, a major figure in the convention, described it, the Indiana Constitution was "gold refined; it is up with the progress of the age." The influence of the Hoosier State's constitution was dramatic: 31 of the 35 sections of the Oregon Bill of Rights were either identical or similar to Indiana's, and 29 of the 31 sections of the legislative article similarly relied on that constitution.[5]

The second factor accounting for the imitative nature of the Oregon Constitution, and the speed with which it was adopted, was that there was no need or inclination for experimentation in this predominantly agricultural state. According to Helen Leonard Seagraves, "If the problems confronting the Oregon convention had differed from those of the mid-western states, unique solutions might have been produced." But they did not. "The provisions of the Mississippi Valley constitutions, therefore, were generally sufficient to the immediate practical needs of the area."[6]

Despite the derivative and uncontroversial nature of much of the document, the convention was not without conflict, and the resulting constitu-

4. Quoted in Helen Leonard Seagraves, "Oregon's 1857 Constitution," *Reed College Bulletin* 30 (1952): 9. Thirty of the delegates were farmers, with nineteen lawyers constituting the next-largest occupational group. However, as David Alan Johnson notes, at least eight of the lawyers were also farmers (*Founding the Far West: California, Oregon, and Nevada, 1840–1890* [Berkeley and Los Angeles: University of California Press, 1992], 143).

5. For an article-by-article assessment of the origins of the Oregon Constitution, see Charles Henry Carey, *The Oregon Constitution: Proceedings and Debates of the Constitutional Convention of 1857* (Salem: State Printing Department, 1926), 468–82.

6. Seagraves, "Oregon's 1857 Constitution," 9. Some historians refer to the "1857 constitution," whereas the state of Oregon officially cites the "1859 constitution." The former refers to the year the constitution was drafted and approved by the voters, the latter the year Oregon became a state and the constitution went into effect. For purposes of consistency, I will refer to the 1857 constitution.

tion was very much a product of the prevailing, and persisting, political and social values of Oregonians. In the remainder of this section, I will highlight some of the more important of these values.

Defining the People: Race, Gender, and Citizenship

The framers of Oregon's constitution, and the citizens they represented, knew exactly whom they wanted to constitute the political community, namely, white males. Although no one would have confused mid-nineteenth-century Oregon for a cotton- or tobacco-based plantation economy, "The convention members were agreed that slavery was *the* issue facing inhabitants of Oregon, and consequently its representatives."[7] There were at least two reasons that relate to the political forces at work in both the territory and the nation at the time of the convention. First, Oregon's constitutional gathering came just three years after the Kansas-Nebraska Act (1854), and just five months after the *Dred Scott* decision, which overturned the Missouri Compromise and raised the prospect that Oregon could enter the Union as a slave state. Second, Democrats, most of whom were proslavery by personal and political inclination—twenty-seven of the sixty delegates had been born in slave states—were the dominate party at the convention; three-fourths had been chosen on a regular Democratic ticket.[8] Furthermore, the delegates chose a Maryland-born, proslavery delegate, Judge Matthew Deady, as president of the convention. There is, perhaps, a third reason for the attitude of the delegates toward slavery. A former twentieth-century Democratic state legislator suggested, "In retrospect, one could argue that the majority of early Oregonians were not pro-slave, but good old-fashioned bigots."[9]

Whatever the reason, slavery was such a critical and potentially disruptive issue that a preconvention agreement was reached that the question of whether Oregon would be a free or slave state would be voted on directly by the people, as a separate issue, at the time the proposed constitution was submitted to the voters. Ultimately, Oregonians rejected slavery (7,727 to 2,645), but voted even more decisively to keep free blacks from coming into the new state (8,640 against allowing free blacks and only 1,081 in favor). Nevertheless, race continued to crop up during the deliberations, and on each occasion the delegates voted to keep Oregon white. Racial purity ap-

7. Ibid., 15.

8. Address of Hon. John R. McBride, delivered before Oregon Historical Society, December 20, 1902, reprinted in Carey, *Oregon Constitution,* 483.

9. Thomas L. Mason, *Governing Oregon: An Inside Look at Politics in One American State* (Dubuque: Kendall/Hunt Publishing, 1994), 15.

plied not only to blacks but also to Chinese and those of a mixed-race background. Thus, Article II, Section 6, of the constitution read, "No Negro, Chinaman, or Mulatto shall have the right of suffrage." In addition, blacks and "mulattoes" were prohibited from owning property, entering into contracts, or bringing lawsuits (Article I, Section 35). These prohibitions were not repealed until 1926, despite passage of the Fourteenth Amendment in 1867! Racist sentiment, and proscription of rights, extended to the Chinese as well. The convention responded not only to prevailing racist sentiments of the period but also to the economic interests of Oregonians, and particularly those in the southern part of the state, where mining was important to the local economy. The Chinese, who were not residents of the state at the time of adoption of the constitution, were forever prohibited from owning "any real estate, or mining claim, or work any mining claim" (Article XV, Section 8), a provision not formally repealed until 1945. Finally, foreigners could enjoy the full benefits of citizenship, including voting, after fulfilling a residency requirement, and property ownership, as long as they were "white."

Women fared only slightly better than nonwhite men in 1857 when, although not given the right to vote, they were guaranteed protection of their property rights. Specifically, the constitution stated that property owned by a woman, either prior or subsequent to her marriage, could not be confiscated to satisfy her husband's debts, and that "laws shall be passed providing for the registration of the wife's separate property" (Article XV, Section 4). Even this concession to white male dominance was not won without opposition. In a nineteenth-century version of the family-values debate, one delegate introduced a motion to strike the married women's property protection because "in this age of women's rights and insane theories, our legislation should be such as to unite the family circle, and make husband and wife what they should be—bone of one bone, and flesh of one flesh." The delegate worried that the constitutional provision protecting a wife's property would lead to domestic strife and even divorce. The motion to strike was narrowly defeated, twenty-seven to twenty-two.[10]

Separating Church and State

If location is as important in writing a constitution as it is in real estate, then Oregon's framers clearly wanted to "push" separation of church and state. First, in contrast to the preamble to the Indiana Constitution, which begins, "We, the people of the State of Indiana, grateful to Almighty God . . . ," Oregon's constitution is ordained not by God but by the people of the state ("We the people of the State of Oregon to the end that Justice be es-

10. Carey, *Oregon Constitution,* 368.

tablished, order maintained, and liberty perpetuated, do ordain this Constitution").[11] Having banished God from the ordination of the document, Oregonians kept him out of the rest of charter as well. A considerable amount of delegate time was spent discussing the role of religion in politics and government, and six of the first seven sections of the bill of rights (Sections 2–7) deal with keeping state functions and power and religious practices and principles completely separate. In the words of the convention president, there is "a complete separation of church and state." Government may neither interfere with the right of Oregonians to worship God as their consciences dictate nor limit the free exercise thereof (Article I, Sections 2 and 3). No religious test may be applied to anyone holding any public office, or the administering of or affirming any oath, or being a witness or juror in any court proceeding (Sections 4, 6, 7). It is noteworthy that in the latter regard, Oregon went further than the Indiana Constitution by applying the prohibition of religious tests in legal proceedings not only to witnesses but to jurors as well.[12] The framers even went so far as to prohibit spending public money on "any religious, or theological institution," including "payment of religious services in either house of the Legislative Assembly." Finally, Article X, Section 2, permitted Oregonians to refuse to bear arms for moral or religious reasons, although objectors had to "pay an equivalent for personal service."

Why did the framers go beyond the prevailing doctrine and practices of separation of church and state in other states and, indeed, beyond what the First Amendment to the U.S. Constitution provides? The delegates themselves offered some insight into this question during their debate over whether the legislative assembly should employ a chaplain. One argument presented against this was that Oregonians were a religiously heterogeneous lot, made of a diverse group of believers and nonbelievers, and that choosing, and compensating, a chaplain of one group would, in effect, be taxing many Oregonians to support "doctrines that they did not believe." Second, delegates expressed concern about the character of some of the clergy in the state, who were purportedly more interested in feeding at the "government teat" than in saving souls. Delegates alternatively described such men as "stump pulpit orators and fanatical demagogues with which our generation is cursed" and "half-crazy religious" fanatics.[13] A third explanation, and one with a historically more analytical perspective, was presented by L. F. Grover, a delegate who had been born in Maine and moved to the Oregon Territo-

11. Johnson makes this point in *Founding the Far West,* 178.

12. Charles Hinkle, "The Religion Clauses," in *Oregon Constitution: A Survey of Significant Provisions,* ed. George A. Van Hoomissen (Portland: Oregon Law Institute, 1995), 9–20.

13. Carey, *Oregon Constitution,* 300–306.

ry from Pennsylvania just four years earlier. His view was that the newer states of the West had been increasingly distancing themselves from the early New England model, which one newspaper reporter called the "New England theocracy." Whereas New Englanders favored a close identification between church and state, westerners were inclined toward a more distinct separation.[14] The Oregon model, then, represented a more secular vision of society and polity than that found in the earlier state movements. Interestingly enough, this secular orientation continues among Oregonians today: the state has the highest proportion of religiously unaffiliated and self-identified "nonreligious" people of any state in the nation.

"The Domestic Virtues Incident to an Agricultural People"

As noted earlier, at least one-half of the Oregon Constitutional Convention delegates were farmers, and the virtues "incident to an agricultural people" were evident in both the discussions about and the content of the resulting constitution.[15] As summarized by Dorothy O. Johansen and Charles M. Gates, "In its economy-mindedness, in limiting state and county indebtedness, in regulating banks and corporations, it [the constitution] expressed the sentiments of a farming people who had memories of the panic of 1837 and the ensuing depression, and who had no understanding or affection for the emerging industrial influences of their day."[16]

That the framers were a tightfisted lot was made evident in a variety of ways. For example, among the first decisions the delegates took was to refuse to hire either a convention reporter or a chaplain; records of the convention were carried in Oregon and California newspapers. Having thus set a parsimonious tone at the outset, the delegates went on to provide a government worthy of the thrifty and economically cautious farmers many of them were. One way of doing this was to combine certain public offices. Thus, the governor would also be superintendent of public instruction, the secretary of state was (and still is) the auditor, and supreme court justices would, at least temporarily, preside over the circuit courts. In addition, public officials were to be paid economy wages: when one delegate proposed to make the governor's annual salary $1,500, the figure ultimately approved, another moved to make it $500, calling that amount "ample remuneration for the services required." The legislature would meet in biennial sessions, which is still the

14. Ibid., 302.

15. The quotation in the subheading is from convention president Matthew Deady (ibid., 249).

16. Johansen and Gates, *Empire of the Columbia: A History of the Pacific Northwest* (New York: Harper and Brothers, 1957), 320.

case, that were limited to forty days, and legislators would receive $3 per day, not to exceed $120 a year. The result, according to one newspaper account at the time, "will be one of the cheapest State Governments in existence on this continent."[17]

Nowhere, however, were the "virtues" of an agricultural people more in evidence than over questions of public indebtedness and the role of corporations in the lives of Oregonians. Convention president Deady spoke passionately about the corrupting influence that manufacturing and capital would have on the state and its people. He urged his fellow delegates to "contrast your own condition with the countries that have manufactories scattered over them. They have millions of wealth and millions of poor human beings degraded into the condition of mere servants of machinery, overtasked and overworked, and seething in misery and crime from the age of puberty to the grave."[18] This was true, by the way, not only in old England but in New England as well. The anticorporate, antibank bias of Deady and other Democrats was rooted not only in their own agricultural background but in the Jacksonian ideology that guided so many of their decisions as well. Jacksonian Democrats, in general, "attacked the republican system of political economy, the 'commonwealth' ideology that justified state assistance to banks, corporations, and other private enterprise."[19] The result was that "constitutions of this period [the mid-nineteenth century] included provision which tried to regulate the position of corporations within the state."[20] In the case of Oregon, these regulations took the form primarily of restricting state and local involvement in both corporations and banks, limiting public indebtedness, and placing various obligations on companies and corporations.[21] Article XI of the constitution set out a number of restrictions concerning the role of the state with regard to banks, corporations, and public indebtedness, as well as the obligations of corporations. These included prohibiting the legislature from establishing any bank or banking corporation (Section 1), and state and local governments from subscribing to, or be-

17. Claudia Burton, "Newspaper Coverage of the Oregon Constitutional Convention of 1857 and Commentary on the Proposed Constitution" (unpublished, 2003, located in Willamette University College of Law, Salem, Oregon), 369, 160.

18. Carey, *Oregon Constitution,* 248.

19. James A. Henretta, "Foreword: Rethinking the State Constitutional Tradition," *Rutgers Law Journal* 22 (Fall 1991): 833.

20. Seagraves, "Oregon's 1857 Constitution," 5.

21. Schuman notes that the debate over shareholder liability was the only major issue that divided Democrats. Although all brought an essentially corporate antagonism to the debate, the dividing point was who should be protected from corporate liability, workers or farmers. In the end the convention voted to make "all investors equally immune from corporate liability of every kind" ("Creation of the Oregon Constitution," 639).

ing interested in, "the stock of any company, association, or corporation" (Sections 6 and 9). In addition, strict debt limitation was placed on both the state ($50,000) and counties ($5,000), and the state was prohibited from assuming the debts of any county, town, or corporation. "All of these provisions emerged from the 19th century experience in the financing of internal improvements, particularly railroads and canals. Beginning in the 1830s, lack of capital led states and communities to use public financing for railroad improvements or outright donations of municipal or state bonds or cash in order to induce local railroad facility construction."[22]

There was, however, one important concession the convention made to corporate capitalism, despite the prevailing hostility toward the economic transformation that much of the nation was undergoing. In the context of a debate over the desirability, and perhaps inevitability, of attracting corporations and capital to Oregon, the delegates examined the issue of corporate and shareholder liability in the event of corporate failure. In the end, the "modernizers" won on this particular issue, and the convention agreed to limit the liability of stockholders to "the amount of their stock subscribed . . . and no more." Although some delegates would have been happy to ban corporations entirely and forever, the convention ultimately embraced the inevitability of corporations but did so warily.

Popular Sovereignty

The delegates to the Oregon Constitutional Convention brought with them preconceived notions about, and direct experiences with, government structures from the Mississippi Valley. Thus, the separation of powers—the distribution of power among and the functions of the three branches of government—was largely a settled question. What remained unsolved, or at least open to debate, was the issue of how best to ensure popular control over government and what were the proper limits on government. Here, too, Jacksonian principles tended to guide the delegates' decisions. Like other state constitutions written in the 1840s and 1850s, Oregon's charter dispersed power both among and within the three, explicitly separated, branches of government. It also adhered to Jacksonian principles—and Oregon political culture—by providing for numerous popularly elected public officials at both the state and the county levels. In addition to the governor, then, the constitution provided for an elected state treasurer, secretary of state, and state printer. At the county level, the county clerk, treasurer, sheriff,

22. Madelyn F. Wessel and Timothy J. Sercombe, "Constitutional Potpourri," in *Oregon Constitution: A Survey of Significant Provisions,* ed. George A. Van Hoomissen (Portland: Oregon Law Institute, 1995), 3, 33–34.

coroner, and surveyor were all elected. In addition, supreme court, circuit court, and county court judges were elected positions as well.

Popular and procedural checks on the legislature took a variety of forms. In addition to biennial forty-day sessions, the constitution provided for relatively short terms (two years for representatives, four years for senators), and low pay (a maximum of $120 per session), all of which was intended to maintain a citizen legislature, a feature of Oregon politics that continues to occupy a prized place in the state's political folklore. Legislators were restrained from hastily changing the constitution through a provision that required proposed amendments to be approved in two consecutive legislative sessions (in other words, four years would pass between proposal and ratification). Oregonians could also monitor what lawmakers in Salem were doing because the constitution required that all formal actions by the legislative assembly occur through viva voce voting.[23] The constitution even denied the legislature the power of impeachment. Section 19 of the judiciary article (Article VII) provided that "public Officers shall not be impeached, but incompetency, corruption, malfeasance, or delinquency in office may be tried in the same manner as criminal offences, and judgment may be given of dismissal from Office." In other words, public officials could not be removed by other elected officials but only by a jury of the people.

The Oregon System: The Initiative, Referendum, and Recall

No feature of the Oregon Constitution is more emblematic of Oregonians' attachment to participatory and plebiscitary democracy, or more critical to an understanding of the state's constitutional development, than the adoption, and frequent use, of the initiative and referendum. Oregon was not the first state to adopt the initiative process—that honor goes to South Dakota, which established it in 1898—but it was the first state to put it to use and to popularize it. The importance of this for Oregon, and other states as well, cannot be overstated. As described by David Schuman, the adoption of the initiative and referendum in 1902 resulted in Oregon playing "a key role in the twentieth century's most radical and progressive state constitutional developments . . . , which grew out of the initiative and referendum provisions of the Oregon Constitution."[24]

Oregonians were already familiar with the use of referenda to make important political decisions, not only having ratified the 1857 constitution

23. Viva voce voting was also applied to popular elections as well until the legislature decided otherwise. The application of viva voce popular elections had nothing to do with accountability and everything to do with enhancing party discipline and loyalty.

24. Schuman, "Creation of the Oregon Constitution," 611.

but also having banned slavery and the admission of free blacks into the state through a popular election. In fact, the delegates had actually considered including the referendum in the original constitution. At that time, delegate James Kelly, an attorney, favored referring this and subsequent controversial issues to the electorate. "I think that there may be many cases where the people ought to have the right to express their will; where the law ought not to take effect until the vote of the people establishing it decides the point."[25] The idea of providing that "the legislature might have power to enact a law to take effect if the people should vote so" was formally introduced as an amendment several days later but was rejected.

In 1901, following approval in two consecutive legislative sessions, the legislative assembly submitted a proposed constitutional amendment to the voters, the first in the state's forty-four-year history. It stated, "The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly" (Article IV, Section 12). Oregonians approved the measure, in 1902, by the overwhelming majority of 62,024 to 5,668. (Four years later, voters completed the last leg of the triple crown of Progressive Era reform by amending the constitution to allow for popular recall of public officials.)

Oregonians embraced their new power with increasing enthusiasm.[26] In 1904 there were just 2 measures on the ballot—voters overwhelming approved direct popular election of U.S. senators and narrowly approved a local-option liquor law—whereas in 1906 there were 11, followed by 18 in 1908 and 32 in 1910. By the end of the decade Oregonians had voted on 64 ballot measures, approving 31 of them.[27] Among those ratified during this period were amendments to require a popular referendum on any legislative proposal to call a constitutional convention, provide for home rule for cities, abolish capital punishment, require state legislators to vote for the people's choice for U.S. senator (that is, popular election of senators in 1908, five years before adoption of the Seventeenth Amendment), and extend the initiative and referendum to "all local, special and municipal laws." Among the measures that voters rejected were women's suffrage, in 1906, 1908, and 1910; convening a state constitutional convention; and establishing Prohibition.

25. Carey, *Oregon Constitution,* 165.

26. Data and analysis of initiatives and referenda in Oregon are based on information found at the Oregon secretary of state's Web site, http://bluebook.state.or.us/state/elections/elections06.htm.

27. Allen H. Eaton, *The Oregon System: The Story of Direct Legislation in Oregon* (Chicago: A. C. McClurg, 1912), 16.

The initiative and referendum have transformed the Oregon Constitution and constitution-making in several ways. First, in the absence of a constitutional convention to overhaul or replace the 1857 constitution, the process has allowed for the modernization, or at least substantial alteration, of the fundamental law. During the first fifty-two years under the system (1902 to 1954), 27 amendments out of 78 proposed by the initiative, and 65 out of 128 proposed by the legislature, were adopted, nearly doubling the size of the constitution. Oregonians have approved more than 242 amendments since adoption. Some of the changes over the past one hundred years have been of fundamental constitutional importance. These include eliminating the blatantly racist provisions dealing with blacks and Chinese Americans, creating equal legislative districts—a decade before *Baker v. Carr*—banning gay marriages, and creating a victims' bill of rights. Others—such as eliminating the provision making the governor the superintendent of public instruction; establishing an order of succession in the event of the death, resignation, or removal of the governor; and imposing term limits on state legislators (later overturned by the state supreme court)—affected the operation and structure of government.

The real impact of the so-called Oregon system, however, has been to add "greatly to the patchwork style of the constitution and its unnecessary detail and statutory material"; one legal scholar has referred to Oregon's "overamended" constitution.[28] The initiative and referendum have become major vehicles for public policy making in Oregon. This point was already evident at the beginning of the twentieth century. One early-twentieth-century constitutional scholar suggested that the practical effect of the system "in Oregon has been the establishment of another legislative body [that is, the people]." More recently, Hans Linde, a former Oregon state supreme court justice and severe critic of what he sees as the abuse of the initiative process, has argued that since 1995 or so, there has been a "shift from the legislature as the main forum for major policies to initiative mills that pay signature collectors."[29] Recently, Oregon voters, through the initiative, have amended the state constitution to impose a property tax limitation, an amendment that occupies 120 column inches;[30] allow liquor to be sold by the glass; prohibit state employees from applying unused sick leave to the

28. Mrs. J. Richard Nokes, *Oregon's Constitution: A Study and Report of Oregon's Need for Constitutional Revision* (Salem: League of Women Voters of Oregon, 1957), 2; Hans A. Linde, "Taking Oregon's Initiative toward a New Century," *Willamette Law Review* 34 (Summer–Fall 1998): 401.

29. Eaton, *Oregon System,* 9; Linde, "Oregon's Property Rights Debate" (unpublished, Georgetown Environmental Law and Policy Institute, 2002), 7.

30. This point is made in Linde, "*Kadderly* at 100: The Oregon Court's Most Fateful Decision," *Oregon State Bar Bulletin* (October 2003): 19.

date of their retirement; and scores of other provisions that have no place in the fundamental compact of a state. Not only have citizens used the initiative to make policy, but they have also used it to enshrine editorial observations in the state's basic law. Thus, the preamble to a 1994 amendment to the state's bill of rights requiring prisoners in state correctional facilities to "be fully engaged in productive activity" while incarcerated announces that "the people of Oregon find and declare that inmates who are confined in corrections institutions should work as hard as the taxpayers who provide for their upkeep" (Article I, Section 41).

One could argue that the Oregon system itself, aside from any of the specific constitutional changes it has accomplished or values it has codified, by its very use has fundamentally altered the structure of government and the distribution of power in the state by substantially shifting policy making from the legislature to the people. According to Linde, "Direct lawmaking began as a way to supplement representative government and to reform it. Recently the initiative has been distorted into an instrument to displace representative government and make it ineffective." Another commentator makes the point more forcefully. State lawmakers, according to law professor Philip P. Frickey, "have incentives to use direct democracy as a primary driver of their own electoral politics, but that has the effect of undercutting the institutional power of the positions they ultimately achieve." The current governor of Oregon, Ted Kulongoski (D), himself a former state legislator and supreme court justice, shares this view: "I am opposed to using the initiative process to amend the constitution. If we are going to keep putting all these issues in the constitution, it will actually bring down our representative democracy and marginalize the legislative process."[31]

This chapter is not the place to discuss the century-old debate over the merits of constitution-making without legislative deliberation.[32] One point that is beyond dispute is that Oregonians have increasingly turned to the initiative process for purposes of constitutional, as well as statutory, change. In the first five decades of the twentieth century, there were 181 proposed amendments to the Oregon Constitution, 47 percent of which were adopted. In the second half of the century, there were 258 proposals, of which 57 percent became amendments. (These numbers, it should be noted, do not include the more than 260 statutory proposals presented to Oregon voters

31. Linde, "Taking Oregon's Initiative," 396; Frickey, "The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere," *Willamette Law Review* 34 (Summer–Fall 1998): 435; Jeff Mapes, "Kulongoski Favors Limits on Initiatives," *Portland Oregonian,* April 6, 2002, Sunrise Edition.

32. For a superb discussion of the debate in general and its application to Oregon in particular, see Linde, "Taking Oregon's Initiative."

during this period.) Although this does not constitute an abandonment of representative democracy, it certainly represents a shift in that direction, albeit one that is entirely in keeping with Oregonians' historical attachment to participatory and plebiscitary democracy.[33]

By the late 1950s and early 1960s, a number of Oregon scholars, lawyers, judges, and legislators reached the conclusion that the state's constitution, a document that one postwar governor called "more a compilation of by-laws than a constitution," needed revision.[34] Aside from the patchwork quality of the document, and its many anachronistic provisions (for instance, prohibiting people who engage in dueling from holding public office), critics focused on the fragmentation of power and administrative inefficiency within the executive branch, the need for annual legislative sessions and a larger legislature (sixty members of the house and thirty in the senate since 1874) to deal with the problems of the mid-twentieth century, and the desirability of a unified court system, with the selection, rather than election, of judges.

During its centennial celebration in 1959, Oregonians approved a referendum that authorized the legislative assembly to establish a commission on constitutional revision. The commission convened in 1961 and submitted its report to the 1963 legislative assembly. Over the next three, biennial, sessions the two houses debated, compromised on, revised, but ultimately could not muster the two-thirds majority required by the constitution to approve a revised constitution to send to the voters. Finally, in 1969, both houses agreed on a revised constitution and submitted it to the voters in May 1970. The new constitution was rejected by 56 percent of the electorate.

Space does not permit a discussion of the proposed changes or the reasons for the decisive defeat of the proposed new charter. Suffice it to say that a majority of Oregonians were content with a constitution that had what one legislative opponent of revision called an "Oregon flavor," namely, a relatively small and inexpensive citizen legislature that met only every other year, popular election of multiple public officials, and citizen policy making through the initiative and referendum processes. Others were just plain ap-

33. Shortly after the initiative and referendum were adopted, the City of Portland challenged the amendment, in part as an unconstitutional departure from republican government. In an extraordinarily important state supreme court case, *Kadderly v. City of Portland* 44 Or. 118 (1903), the court ruled that despite the fact that the voters could make laws themselves or overturn laws passed by the legislature and approved by the governor, "the legislative and executive departments are not destroyed, nor are their powers or authority materially curtailed" (Linde, "*Kadderly* at 100," 18).

34. Governor Paul Patterson quoted in Thomas J. Owens, *Oregon Constitutional Revision, 1949–1970* (master's thesis, University of Oregon, 1998), 3. Owens's thesis is the best and most comprehensive review of this period available.

athetic and saw no need for the changes that some of the state's political elite deemed necessary.[35] To the extent that change was needed, there was a time-honored and quintessentially Oregonian way of dealing with it. Writing in 1912, Allen H. Eaton, a University of Oregon professor and state legislator, tried to explain why, in 1910, Oregonians rejected, by a better than two-to-one margin, a call for a convention to revise the constitution: "It will be remembered that the people had been practicing the art of constitution-making themselves since 1904, and they did not view with favor the prospect of a convention doing what they could do so satisfactorily themselves."[36] This sentiment apparently has not changed in the intervening decades. Since rejection of the revised constitution in 1970, Oregonians have engaged in constitution-making 110 times.

Conclusion

Since adopting the initiative and referendum in 1902, Oregonians have provided the engine driving constitutional change in the state. As a result, the Oregon Constitution has become a political Richter scale, recording and measuring both changing national historical trends as well as contemporary citizen concerns. This was the case in the beginning of the twentieth century when Oregonians jumped on the Progressive bandwagon and amended their constitution to include primary elections; the initiative, referendum, and recall; popular election of U.S. senators; and home rule for cities. It was also the case at the end of the twentieth century, and the beginning of the twenty-first century, when citizen dissatisfaction led to constitutional amendments limiting property taxes, establishing harsh penalties for repeat offenders ("three strikes and you're out"), creating a victims' bill of rights, and banning gay marriages. Although many political scientists, particularly with the infrequently amended U.S. Constitution as their model, may view with disdain Oregon's participatory constitutional revisionism, it is a system that embodies the core political values that Oregonians have cherished since statehood.

35. Ibid., 94.
36. Eaton, *Oregon System,* 34.

HUGH D. SPITZER

Washington

The Past and Present Populist State

Some commentators have asserted that states do not possess, and state constitutions therefore cannot reflect, fundamentally distinct histories or political cultures and values or contain distinct descriptive or aspirational statements about a way of life.[1] It has been argued that reliance on such perceived distinctions in the judiciary's interpretive process would be based on "an anachronism or romantic myth" and that state constitutions contain such a mishmash of provisions reflecting waves of diverse political movements over time that they cannot constitute coherent statements of political theory.[2] These assertions might be true for some states' basic documents, but they are certainly not true for Washington State's.

Washington's 1889 constitution was, and remains, overwhelmingly "populist" in its orientation, content, and practical effect. Professor Lawrence Goodwyn observes that late-nineteenth-century populism was "something more than a party, something more nearly resembling a mood or, more grandly, an ethos." Vast changes in a state's population, economy, and politics may occur over the course of a century. But the sensibilities, concerns, and ideology entrenched in an original constitution continuously influence court interpretations of that document, the political process, and people's understanding of who they are as a political community. As Robert Schapiro has suggested, when a political ethos becomes enshrined in a state's constitution,

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1. See James A. Gardner, "The Failed Discourse of State Constitutionalism," *Michigan Law Review* 90, no. 4 (1992): 761, 816–18; and Paul W. Kahn, "Interpretation and Authority in State Constitutionalism," *Harvard Law Review* 106 (March 1993): 1147, 1162. See also Robert A. Schapiro, "Identity and Interpretation in State Constitutional Law," *Virginia Law Review* 84, no. 3 (1998): 389.

2. Kahn, "Interpretation and Authority," 1160; Gardner, "Failed Discourse," 818–20.

"fundamental values may be derived from the structure and relationships embodied" in that document, and an understanding of the history and meaning of those aspirational values can be of great importance to judges whose responsibility it is to interpret and apply that state's constitution.[3]

Washington was already fully imbued with the populist ethos when it gained statehood in 1889,[4] even though farmer and labor activists did not formally create the "People's Party" (a.k.a the "Populist Party") as a national institution until three years later.[5] The public's distrust of railroad, mining, and other corporations; concerns about special-interest control of government; and general objection to the concentration of power in elites led to a constitution that imposed numerous restrictions on the legislature, scattered executive authority among independently elected officials, intentionally hamstrung corporations, and provided strong protections of individual liberties. The state's anti-special-interest constitution has not changed appreciably during the past century. It accurately reflected majority sentiment in 1889, and, despite the industrialization and urbanization that occurred in the twentieth century, the constitution's provisions have contributed to Washingtonians' sense of themselves and the type of political community that the state remains today.

Protecting a Self-Sufficient Way of Life

Washington's 1889 constitution confirmed and entrenched an individualistic mentality and a suspicion of established interests. Other than the Native Americans who had survived disease and relocation, the three hundred thousand Washingtonians in 1889 were composed almost entirely of residents who had purposefully cut their family and economic ties, immigrating by ship, wagon train, or (since 1883) rail to homestead or otherwise seek their fortunes in the Pacific Northwest.[6] David Alan Johnson has empha-

3. Goodwyn, *Democratic Promise: The Populist Moment in America* (New York: Oxford University Press, 1976), x; Schapiro, "Identity and Interpretation," 443, 394–95. Schapiro builds his theory partly on Philip Bobbitt, *Constitutional Interpretation* (Oxford: Basil Blackwell, 1991).

4. The Enabling Act, 25 *U.S. Statutes at Large* 180 (1889): 676, provided for Washington's admission along with Montana and the Dakotas. The proclamation declaring Washington a state appears at 26 *U.S. Statutes at Large* 10 (1889).

5. Goodwyn, *Democratic Promise,* 264–72.

6. Wilfred J. Airey, "A History of the Constitution and Government of Washington Territory" (Ph.D. diss., University of Washington, 1945), 436; Dorothy O. Johansen and Charles M. Gates, *Empire of the Columbia: A History of the Pacific Northwest,* 2d ed. (New York: Harper and Row, 1967), 248, 277; James Leonard Fitts, "The Washington Constitutional Convention of 1889" (master's thesis, University of Washington, 1951), 1.

sized the importance, in evaluating neighboring Oregon's constitution, of early settlers' conscious decisions to leave their former homes and seek independent lives far away from the East's growing commercial economy. Johnson's description of a "growing commitment of nineteenth-century men to a natural-rights liberalism defined in terms of individual self-seeking for economic advantage" can be fairly applied to Washington homesteaders.[7] The Washington Constitution was drafted three decades after Oregon's, when "natural-rights liberalism" was reaching a fever pitch in the American West.

Of the seventy-five delegates to the constitutional convention, all but one had been born outside Washington Territory—mostly in states that were predominantly agricultural and whose constitutions had in many cases already undergone agrarian reforms or rewrites.[8] Despite the fact that twenty-two of the convention's members were lawyers and nine were businessmen, they nevertheless reflected the strong populist focus of their mainly farming constituents: protection of a self-sufficient way of life in the face of powerful commercial forces that threatened to manipulate or control the common people.[9]

Agriculturists were concerned about falling prices for farm produce, an insufficient money supply, a huge debt burden, and dependence on monopoly railroads to get their goods to market.[10] Banks were (accurately) blamed for the federal government's tight monetary policy and adherence to gold currency.[11] Railroads were viewed as avoiding their fair share of taxes while gouging farmers through high transportation charges.[12] Farmers' concerns in the late nineteenth century are evidenced, for example, by pro-

7. Johnson, *Founding the Far West: California, Oregon and Nevada, 1840–1890* (Berkeley and Los Angeles: University of California Press, 1992), 139.

8. Airey, "History of the Constitution," 440–43; Arthur S. Beardsley, *Notes on the Sources of the Constitution of the State of Washington, 1889–1939* (Seattle: University of Washington School of Law, 1939). See also the discussion of the influence of Iowa's anticorporate "locofoco" constitution on California in Johnson, *Founding the Far West,* 102. That California 1849 document, as modified in 1879, significantly influenced Washington's constitution.

9. Fitts, "Washington Constitutional Convention," 8–11; Airey, "History of the Constitution," 442.

10. Gordon B. Ridgeway, "Populism in Washington," *Pacific Northwest Quarterly* 39, no. 4 (1948): 284–86; Lawrence Goodwyn, *The Populist Moment: A Short History of the Agrarian Revolt in America* (New York: Oxford University Press, 1978), 9–18; Elizabeth Sanders, *Roots of Reform: Farmers, Workers, and the American State, 1877–1917* (Chicago: University of Chicago Press, 1999), 101–47. For a detailed history of western Washington populism, focusing particularly on Lewis County, see Marilyn Watkins, *Rural Democracy: Family Farmers and Politics in Western Washington, 1890–1925* (Ithaca: Cornell University Press, 1995).

11. Goodwyn, *Populist Moment,* 10–11.

12. Ridgeway, "Populism in Washington," 288.

nouncements from the Grange—never a particularly radical organization.[13] In complaining of a corporate takeover of Columbia River shipping, the 1878 Oregon State Grange declared that this critical waterway had "fallen under the control of a grinding and oppressive monopoly." The 1895 Washington State Grange adopted a resolution urging that the federal government seize the Union Pacific and Central Pacific Railroads "and own and control said roads and run them in the interest of the people."[14]

Throughout the South and the West, these concerns had led to a chain of related political movements involving both farmers and laborers: the Greenback Party in the 1870s, the Union Labor Party and the Farmers' Alliance in the 1880s, and finally the People's Party in 1892.[15] The platforms of Washington's People's Party in the 1890s reflected what had been the key objectives for the agricultural and labor communities for two decades: liberal monetary policy, mortgage relief, higher taxes on business, a ban on union-busting private detectives, railroad-rate controls, public employment offices, workplace-safety laws, free education, and a ban on monopolies.[16] Just seven years after Washington's constitution was adopted, the Populists elected a governor and took control of the state legislature through a fusion with the Democrats and "Silver Republicans."[17]

Many of the concerns of this broad populist movement found their way into the text of the Washington Constitution. The convention delegates started work on July 4, 1889, with a draft conveniently provided by W. Lair Hill, a lawyer-judge-newspaperman who had previously lived and worked

13. The Grange was officially a "nonpolitical" organization (Sanders, *Roots of Reform,* 107). In Washington State there was tension between populist organizers and the more conservative Grange movement (Ridgeway, "Populism in Washington," 292).

14. Harriet P. Crawford, "Grange Attitudes in Washington, 1889–1896," *Pacific Northwest Quarterly* 30, no. 3 (1939): 249–51.

15. See, generally, Goodwyn, *Populist Moment,* 13–19, 25–32; Goodwyn, *Democratic Promise,* 264–72; and Ridgeway, "Populism in Washington," 294–95. Urban laborers active in the Populist Movement shared an anticorporate philosophy with their rural counterparts but sometimes focused on different goals. The People's Party units in Seattle called for public street lighting, a city hospital and morgue, a full-scale fire department, election of all key city officials, the abolition of both private detectives and chain gangs, and enforcement of anti-saloon laws (David Burke Griffiths, "Populism in the Far West, 1890–1900" [Ph.D. diss., University of Washington, 1967], 150).

16. Stephen Henry Peters, "The Populists and the Washington Legislature, 1893–1900" (master's thesis, University of Washington, 1967), 20, 32, 35, 48–51; Carroll H. Wooddy, "Populism in Washington: A Study of the Legislature of 1897," *Washington Historical Quarterly* 21, no. 2 (1930): 109–10. See, generally, Russell Blankenship, "The Political Thought of John R. Rogers," *Pacific Northwest Quarterly* 37, no. 1 (1946).

17. Peters, "Washington Legislature," 64–70; Ridgeway, "Populism in Washington," 298–305.

in both California and Oregon.[18] Six weeks later they finished with a version that still bore the marks of his handiwork.[19] That document reflected the aspiration for independence and self-sufficiency shared by most Washingtonians—people whose willingness to engage in collective action was focused mainly on organizing cooperatives and pushing both major political parties to use government against the business corporations that common people feared would control their lives.[20] Article I, Section 1, began with a forthright Lockean declaration: "All political power is inherent in the people, and governments . . . are established to protect and maintain individual rights." That commitment to individual liberties was supplemented by Article I, Section 30, which intoned that the "enumeration . . . of certain rights shall not be construed to deny others retained by the people."

Many provisions (some tracing their lineage to the Jacksonian period or earlier) were inserted to prevent elected leaders from granting privileges to special interests. Article I, Section 8's ban on any "law granting irrevocably any privilege, franchise or immunity" was directed at favoritism toward railroads and other corporate concentrations. Similarly, Article I, Section 12, provided that "no law shall be passed granting to any citizen, class of citizens or corporations . . . privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."[21] Article I, Section 28, barred hereditary privileges or powers.[22] Article XII, Section 7, provided that local corporations must be permitted to transact business on the

18. Fitts, "Washington Constitutional Convention," 21–22. Hill had edited the *Portland Oregonian* between 1872 and 1877 and was asked by that newspaper's editor to draft a proposed constitution for Washington. The document appeared in the *Oregonian* on the convention's opening day, July 4, 1889, titled "A Constitution Adapted to the Coming State." This proposal is generally referred to as the "Hill Constitution."

19. Beardsley, *Notes on the Sources.* Fitts calculated that fifty-one of Hill's proposed sections were adopted without alteration, and forty-six of his recommendations were approved with minor changes ("Washington Constitutional Convention," 22).

20. Ridgeway, "Populism in Washington," 292–93.

21. Sections 8 and 12 of Article I are both drawn from the 1857 Oregon Constitution and the 1851 Indiana Constitution (Beardsley, *Notes on the Sources*). The Oregon Supreme Court has noted that that state's privileges and immunities language "reflects early egalitarian objections to favoritism and special privileges for a few" (*State v. Clark,* 630 P.2d 810, 814, 291 Ore. 231, 236 [1981]). That clause can be traced far back into English history, and is often understood to protect equal rights of individuals and minority groups as well as preventing special interests from gaining privileges at the expense of the majority. See, for example, *State ex rel. Bacich v. Huse,* 187 Wash. 75, 83–84, 59 P.2d 1101 (1936), overruled on other grounds; *Puget Sound Gillnetters Assoc. v. Moos,* 92 Wn.2d 939, 603 P.2d 819 (1979); and *Tanner v. Oregon Health Sciences Univ.,* 157 Ore. App. 502, 519–25, 971 P.2d 435 (1998).

22. The ban on hereditary privileges is a broader, more Jacksonian version of the prohibition on titles of nobility in the U.S. Constitution, Article I, Section 9, and is virtually identical to comparable provisions in Oregon's 1857 document and in Indiana's 1851 constitution.

same terms as out-of-state entities, and Article XII, Section 15, required that railroad rates be equal for the same classes of freight or passengers.

Article XII contained twenty-two separate sections designed to oversee private business corporations and regulate business: requiring that corporations be formed under general laws rather than special acts (Section 1), permitting the legislature to alter statutes governing corporations at any time (Section 1),[23] prohibiting stock fraud and other manipulative activity (Sections 4, 6, 8, 11, and 12), enabling condemnation of corporate property (Section 10), and combating monopolies and exploitative rates for moving agricultural products and other goods (Sections 14–22).[24] Article II, Section 35, charged the legislature with adopting "necessary laws for the protection of persons working in mines, factories, and other employments dangerous to life or deleterious to health."[25] These were all designed to prevent business elites from maintaining a stranglehold over the state's farmers and laborers. One striking example of the Washington Constitution's simultaneously individualistic and anticorporate spirit was Article I, Section 24, which provided that the "right of *the individual citizen* to bear arms *in defense of himself,* or the state, shall not be impaired, *but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men.*"[26] That last clause was aimed at the notorious business practice of hiring armed "Pinkertons" to break up labor unions.[27]

Another anticorporate provision—one with lasting effects—was the ban on state or local government loans, gifts, or credit support to the private sec-

23. This provision is typical of language inserted into state constitutions since the Jacksonian era in order to subject corporations to ongoing legislative control, notwithstanding the U.S. Supreme Court's holding in *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819). See Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1973), 197–98.

24. Article XII, Section 13, includes the detailed antimonopoly requirement that if competing railroads of the same gauge intersect, they must provide for switches to permit the transfer of freight from one line to another.

25. See John D. Hicks, "The Constitutions of the Northwest States," *University Studies of the University of Nebraska* 23 (January–April 1924), 109. Hicks views this worker-protection language as a corollary to the corporate-control provisions of Article XII. Interestingly, the workplace-protection provisions in Washington's constitution were not effectively implemented until the Progressive Era, when parts of the Populist Movement's unfinished agenda were finally enacted, including those with a more industrial and urban emphasis (Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* [New York: Vintage Books, 1955], 133).

26. Emphasis added. See, generally, Hugh D. Spitzer, "Bearing Arms in Washington State," *Proceedings of the Spring Conference, Washington State Association of Municipal Attorneys* (April 1997).

27. Hicks, "Constitutions of the Northwest States," 116.

tor. This was included in the constitution principally to bar public subsidies to railroads, subsidies that were described by delegates variously as "ill-advised," "vicious," and "entangling people in disastrous schemes."[28] The language has resulted in strict limits on the ability of governments to engage in cooperative ventures with business or to promote economic development.[29]

Hence, the 1889 Washington Constitution set forth the aspirations of the bulk of the population to pursue individual opportunities. At the same time, the delegates' work reflected a popular desire to harness the power of the state to promote opportunity for the "common man" and to reduce the opportunity for special interests to manipulate government for their own ends.

The state's independent ethos was further reflected in the declaration of rights' robust protections of individual freedom. The delegates tended to copy strong rights provisions from other state constitutions rather than the less protective generalities of the U.S. Bill of Rights. The right-to-bear-arms provision quoted above is one example. Another is Article I, Section 7, which granted an express, rather than penumbral, right to privacy: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."[30] The rights of the accused were much more explicit than those in the Bill of Rights (Article I, Section 22). And there was an exceptionally strong guarantee of "absolute freedom of conscience in all matters of religious sentiment, belief and worship" and an equally strong admonition that "no public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment" (Article I, Section 11). Indeed, many of the constitutional convention's freethinking delegates believed that a mention of God had no place in a document meant for business purposes and would itself interfere with religious freedom; after a long and heated debate, the most that the body was able to agree upon was a preamble statement that the people of the state were grateful to the "Supreme Ruler of the Universe" for their liberties.[31]

28. Airey, "History of the Constitution," 481–87; Beverly Paulik Rosenow, ed., *The Journal of the Washington State Constitutional Convention, 1889* (1962; reprint, Buffalo: William S. Hein, 1999), 681–82.

29. Robert Utter and Hugh Spitzer, *The Washington State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 2002), 146–49.

30. This section has, since the 1980s, been interpreted quite independently of the search-and-seizure provision of the U.S. Constitution (Utter and Spitzer, *Washington State Constitution,* 20–22).

31. Fitts, "Washington Constitutional Convention," 25; Lebbeus Knapp, "The Origin of the Constitution of the State of Washington," *Washington Historical Quarterly* 4, no. 4 (1913): 227, 269–70. Although many Washingtonians attended church, there were a large number of "freethinkers," an attitude still reflected in the state's current status of having the lowest,

Apart from protecting individual liberties and shielding citizens' way of life from rapacious businesses, the other key instance in which Washingtonians entrusted an activist role to the state was in guaranteeing educational opportunity. Article IX, Section 1, stated, "It is the *paramount* duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex" (emphasis added). This language repeated the nineteenth-century common school movement's doctrine that a democratic republic requires a broad-based and general educational experience, and the idea that each and every child must be provided an equal opportunity to succeed by being provided with a good educational experience.[32] A related but less powerful mandate required the state government to provide institutions for physically disabled youth and mentally and developmentally disabled persons of all ages as well as reformatories (Article XIII, Section 1).

Though drawn from similar documents in numerous other states, the Washington Constitution more or less successfully presented the ideal of a community of independent farmers, workers, and small-business people, with the government taking a limited role in individuals' lives, other than protecting them from special interests and providing institutions for education and for the aid of those with special needs.[33]

The state's 1889 constitution has seen only modest changes during the past century, perhaps because it is difficult to obtain the required two-thirds approval in each house, plus a majority vote of the electors (Article XXXIII).[34] Yet despite the shift of population from farm to city during the twentieth

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or close to the lowest, church membership in the entire country (U.S. Census Bureau, *Statistical Abstract of the United States, 2000,* table 65; Julia Duin, "Gallup Poll Finds Washington State Least Churchgoing," *Washington Times,* February 15, 1999).

32. Laurie K. Beale, "Charter Schools, Common Schools, and the Washington Constitution," *Washington Law Review* 72 (April 1997): 535, 538–39. Horace Mann, the father of the nineteenth century's common school movement, "conceived of a symbiotic relationship in which neither the republic nor the school could exist without the other" (Jonathan Messerli, *Horace Mann: A Biography* [New York: Alfred A. Knopf, 1972], 281).

33. Business interests were able to influence some portions of Washington's 1889 constitution, such as the harbor and tideland provisions of Articles XV and XVII. See Charles K. Wiggins, "The Battle for the Tidelands in the Constitutional Convention," *Washington State Bar News* 44, nos. 3–5 (March–May 1990). Sections 5 and 7 of Article VIII bar the application of public funds for loans, gifts, or other support of private business, "except for the necessary support of the poor and infirm."

34. Only ninety-six amendments have been approved in Washington—less than one per year. Perhaps the only amendment that can be said to have had a profound impact on the structure of government was Amendment 7, which introduced the initiative and referendum in 1912.

century, the document's populist character echoes the attitude of many Washingtonians today.[35] Washington's constitution reflects little of the social and economic programs of the New Deal, and a component of the state's modern self-image that is absent from the document is a provision entrenching the state's strong outdoor recreation and environmentalist spirit.[36] Still, individualism and suspicion of big business (as well as big government) remain strong in Washington State, and in that respect its constitution continues to reflect popular attitudes.

An Expanding Concept of Citizenship

Washington State's basic document also plays the other key roles that Donald S. Lutz has proposed as definitional elements of a true constitution. The state's geographical boundaries were fixed by Article XXIV. Those physical limits had been earlier determined by treaties with Great Britain and congressional action after roughly seventy-five years of tugging and pulling over how the vast Columbia River watershed would be divided internationally and among newly formed territories and states.[37] But sprinkled throughout the state were many Indian reservations, authority over which the U.S. government expressly retained through the Enabling Act and the "Compact with the United States" enshrined in Article XXVI of the new constitution.[38] In Article XXVI, Washington disclaimed any right to unappropriated federal property and to "all lands . . . owned or held by any Indian or Indian

35. In 1900, at the end of the Populist period, Washington's population was roughly 518,100 people, 59 percent of whom were classified as living in rural areas. By 1920, the total population had doubled, but rural residents dropped to 45 percent. According to the 2000 census, rural dwellers represent only 18 percent of Washington's 5.9 million population.

36. See, for example, the Montana Constitution, Article II, Section 3, which since 1972 has declared an inalienable right "to a clean and healthful environment" and in Article IX, Section 1, requires that the "state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations." Washington's 1889 convention had a difficult time reaching consensus on natural-resource provisions, sidestepping, for example, decisive positions on water rights and tidelands. See Rosenow, *Journal of the Convention,* 76, 327; and Fitts, "Washington Constitutional Convention," 184.

37. Lutz, *Origins of American Constitutionalism,* 16; Johansen and Gates, *Empire of the Columbia,* 197–210, 249, 265–66. A dispute over the international boundary between Washington Territory and British Columbia was not resolved until the end of a twelve-year stalemate (the "Pig War") in 1871. Due to a surveying error, the exact location of the state's northern boundary became the subject of recent litigation, *State v. Norman* 145 Wn.2d 578, 40 P.3d 1161 (2002).

38. Enabling Act, Section 4. It mentions vast other federal lands, too.

tribes." The federal and tribal governments continue to exercise primary control over vast forest-, range-, and other lands—about one-third of the state's area.[39]

Although the outer geographical limits were fixed by 1889, the boundaries of Washington's political community have widened noticeably since admission to the Union. The general public subject to the power and protection of the state was always conceived broadly—witness the explicit inclusion of women and minorities in the educational provision quoted above. But the yeoman farmers who exercised the franchise in Washington Territory and the new state were just that—*men,* and mainly white men at that. There were no property requirements for voting, so in that respect Washington's constitution reflected the political inclusiveness that pertained in most parts of the United States after the Jacksonian revolution of the 1820s through the 1830s.[40] But, again, that inclusiveness applied to men only. Nevertheless, the pioneer women who struggled arm in arm with their male counterparts to settle the Pacific Northwest had forced suffrage onto the political agenda since the beginning of the territory. The vote for women was defeated by just one vote at the first territorial legislature in 1854, and the inclusion of females in the franchise went back and forth during the following decades. In 1889, the all-male convention delegates punted this tough issue to the all-male electorate, which defeated women's suffrage by a two-to-one margin.[41] Women did not gain the vote until 1910 (Amendment 5).[42] The rights of women received an additional boost with the adoption of the state Equal Rights Amendment in 1972 (Amendment 61).

"Indians not taxed" were expressly excluded from the franchise in 1889, and technically remained so until 1975 (Article VI, Section 1).[43] But the most noticeable manifestation of ethnic exclusiveness were a provision banning landownership by aliens other than Canadians (Article II, Section 33)[44] and an 1896 amendment requiring electors to read and speak English (Amend-

39. National Wilderness Institute, "State by State Government Land Ownership," http://www.nwi-org/Maps/LandChArticlehtml.

40. James Gray Pope, "An Approach to State Constitutional Interpretation," *Rutgers Law Journal* 24 (1993): 985, 991. See also James A. Henretta, "Foreword: Rethinking the State Constitutional Tradition," *Rutgers Law Journal* 22 (Fall 1991): 819, 826–29.

41. Utter and Spitzer, *Washington State Constitution,* 119–20.

42. Women had previously been permitted to vote only for school board elections. See the original Washington Constitution, Article VI, Section 2.

43. This section was adjusted by Amendment 63. In 1924, Congress conferred full citizenship on all Indians by chap. 233, 43 Stat. 253. See Utter and Spitzer, *Washington State Constitution,* 121.

44. This section was repealed by Amendment 42 in 1966. The antialien land provision was criticized by one constitutional convention delegate as "backward" (Knapp, "Origin of the Constitution," 272–73; Rosenow, *Journal of the Convention,* 550–51).

ment 2). These provisions were aimed initially at Asian immigrants, although the English-language requirement was later used against Latinos.[45] The English-literacy requirement was effectively blocked by the federal 1965 Voting Rights Act, but remained in the constitution's text until 1974, after the vote was expanded to all U.S. citizens over eighteen years who had resided in the state for thirty days (Amendment 63).[46]

The political boundaries have thus expanded—first to women, then to all Native Americans and the non-English-speaking public. Ironically, although Indians have gained an equal footing as members of the state's political community, they have also increased independent political and economic power within tribal lands and traditional fishing and hunting areas, often at the expense of the state government and non-Indians.[47]

Power Divided among Political Institutions

Reflecting the Populists' distrust of concentrated power, Washington's 1889 constitution scattered political authority among multiple institutions and offices. There was the customary division among three branches, with legislative power exercised by separately elected houses and further shared with the governor through the veto (Article III, Section 12). But the executive was further divided among eight separately elected officials: the governor, lieutenant governor, secretary of state, treasurer, auditor, attorney general, superintendent of public instruction, and commissioner of public

45. Anti-Asian sentiments were ongoing in nineteenth- and twentieth-century Washington. See Murray Morgan, *Skid Road: An Informal Portrait of Seattle* (Seattle: University of Washington Press, 1982), 85–106; and Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (Seattle: University of Washington Press, 1988), 59, 63. The effect of English-language restrictions on Latino voting rights was challenged in *Mexican-American Federation v. Naff,* 299 F. Supp. 587 (E.D. Wash. 1969), vacated by *Jimenez v. Naff,* 400 U.S. 986 (1971).

46. Earlier provisions had required residency in the state for a full year, within a county for ninety days, and within a city and precinct for thirty days prior to an election at which the franchise was to be exercised.

47. Indians within Washington were accorded 50 percent of the salmon catch by *United States v. State of Washington,* 384 F. Supp. 312 (1974), affirmed and remanded by 520 F.2d 676 (9th cir. 1975). Significant Native rights over the shellfish harvest were gained through three cases, each named *United States v. State of Washington,* 873 F. Supp. 1422 (1994); 898 F. Supp. 1453 (1995); and 157 F.3d 630 (9th cir. 1998). See Jason W. Anderson, "The World Is Their Oyster?" *Seattle Law Review* 23, no. 145 (1999); and Bradley J. Nye, "Where Do the Buffalo Roam? Determining the Scope of American Indian Off-Reservation Hunting Rights in the Pacific Northwest," *Washington Law Review* 23, no. 175 (1992). See also *State v. Schmuck,* 121 Wn.2d 373, 850 P.3d 1332 (1993), regarding tribal police power on reservations.

lands (Article III, Section 1).[48] Both the executive branch and the legislature are constrained by judicial review of statutes and the constitution itself. The state supreme court has jealously guarded its authority as the sole arbiter of constitutional disputes and statutory interpretation (Article IV, Section 1).[49] The elective (rather than appointive) process of choosing judges was seen as a mechanism for protecting their independence from the governor, the legislature, and special interests.[50]

Another example of the constitution's principle of keeping power close to the people is the requirement that municipalities be created by voters pursuant to general laws, rather than chartered directly by the legislature (Article XI, Section 10). In his proposal to the 1889 convention, W. Lair Hill observed that in many states, municipal charters were "the footballs of . . . lobbyists, who are sure to besiege the legislature when there is opportunity for plunder."[51] Counties are the only type of political subdivision required by the constitution, and the legislature effectively controls their formation (Article XI, Sections 1–5).[52] But all local governments (including counties) must be granted powers by category rather than through special legislation (Article XI, Sections 10–11), and counties and cities have substantial flexibility in organizing their local governments on a "home rule" basis (Article XI, Sections 4, 10, and 16). The state's penchant for diffusing political authority is further reflected in the substantial reliance on separate special-purpose districts (at least fifty-six varieties) and the sheer number of separate municipal and quasi-municipal corporations (more than two thousand).[53]

48. The state's first legislature entrusted the secretary of state with the responsibility of serving ex officio as "insurance commissioner" (Wash. Laws of 1889–90, at 240–49). In 1907, a separately elected insurance commissioner was added by statute (Wash 1907 Laws, chap. 109). See Wash. Rev. Code, chap. 48.02.

49. See *Washington State Highway Commission v. Pacific Northwest Bell Tel. Co.,* 59 Wn.2d 216, 222, 367 P.2d 605, 609 (1961), regarding the courts' exclusive purview over constitutional interpretation. See also *Seattle School District v. State,* 90 Wn.2d 476, 496–97, 957 P.2d 71, 83–85 (1978).

50. Knapp, "Origin of the Constitution," 237–39; Henretta, "Foreword," 834.

51. Hill Constitution, Article 11 commentary. See also note 18 above.

52. *Freedom County v. Snohomish County,* 95 Wn. App. 839, 977 P.2d 612 (1999), review denied, 139 Wn.2d 1022, 994 P.2d 850 (2000).

53. Municipal Research and Services Center of Washington, "Number and Types of Special Purpose Districts in Washington," http://www.mrsc.org/Subjects/Governance/spd/SPD-Number.aspx. Together with about seventeen hundred special-purpose districts, Washington has 281 cities and towns and 39 counties (ibid.). See also Municipal Research and Services Center of Washington, "Classification of Washington Cities," http://www.mrsc.org/Subjects/Governance/locgov31.aspx; and "History of County Government in Washington," http://www.mrsc.org/Subjects/Governance/locgov6.aspx.

The single most important mechanism for the dispersion of political power under Washington's constitution was adoption of the initiative and referendum (Amendment 7; Article II, Section 1), under which, since 1912, "the people [have reserved] to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature."[54] These tools of popular control had been pushed through earlier by the Populists in Oregon, and were finally enacted in Washington after years of pressure from the Grange, labor unions, and progressive organizations.[55] Although the use of these devices has been cyclical, they have had a significant impact on the political process, with elected lawmakers sometimes fearing the threat of direct legislation.[56] However, Washington rejected the Oregon and California practice of amending constitutions by initiative, with changes to its basic document still requiring the approval of two-thirds of each house of the legislature and the majority vote of the statewide electorate (Article XXIII).[57]

Further Limits on the Legislature

The Washington Constitution contains a number of other provisions placed in other state constitutions after the Jacksonian revolution in order to "safeguard [the] new constitutional order by limiting the power of the state legislatures."[58] Enumerated in Article II, these provisions include requirements for open legislative meetings and written records of proceedings (Section 11), a requirement that each bill must be limited to a single subject reflected in the bill's title (Section 19),[59] a ban on salary increases for legis-

54. The recall was also adopted in 1912 (Amendment 8; Article I, Sections 33 and 34).

55. Claudius O. Johnson, "The Adoption of the Initiative and Referendum in Washington," *Pacific Northwest Quarterly* 35, no. 4 (1944): 291.

56. See, for example, "Eyman Shouldn't Scare Lawmakers," *Seattle Post-Intelligencer* editorial, February 8, 2002, B4; and "If Only the Legislature Had Done Its Job," *Seattle Post-Intelligencer* editorial, August 4, 2002, G2. A detailed analysis of the frequency, subject matters, and success of initiatives and referenda appears at the Washington secretary of state's Web site, http://www.secstate.wa.gov/elections/initiatives/statistics.aspx.

57. C. Johnson, "Adoption of the Initiative and Referendum," 302.

58. Henretta, "Foreword," 834. The demand for controls on legislatures for fear that they would otherwise be manipulated by business interests constituted a rejection of the "legislative hegemony" that Bernard Schwartz has characterized as "the dominant theme at the outset of the nation's formative era" (*The Law in America* [New York: American Heritage Publishing, 1974], 91). See also James Quayle Dealey, *Growth of American State Constitutions from 1776 to the End of the Year 1914* (Houston: Ginn, 1995), 53–55.

59. The single-subject requirement has led to considerable litigation, including successful challenges to initiatives as well as bills enacted by the legislature. See *Amalgamated Transit Union v. State,* 142 Wn.2d 183, 11 P.3d 762 (2000).

lators during their terms (Section 25), a waiting period before the enactment of bills (Section 36), a bar to amendatory legislation without setting forth the changed section in full (Section 37), and a prohibition against most special legislation (Section 28). The ban on special legislation is related to other provisions requiring government actions based on general rules so that there is less opportunity for lawmaker whims or corruption.[60]

Conclusion

Washington's constitution shares many structure-of-government provisions common to American governments, including a governor, a bicameral legislature, and an independent judiciary. The document includes limits on the legislature that have their roots in the Jacksonian era. But half of the constitution's articles—and virtually all of the important ones—exhibit the direct influence of the late nineteenth century's populist movement. It is impossible to properly understand or interpret the document without recognizing the founders' aspirations for an independent lifestyle, their dislike of special privilege, and their profound distrust of large business interests. The populist ethos continues today, both in the state's daily political life and in court decisions construing the state's constitution.

60. See the requirement that municipalities be created locally under general law rather than by legislative charter (Article XI, Section 10), the similar provision for private corporations (Article XII, Section 1), and the general requirement that laws granting privileges be available to all persons and entities within a class (Article I, Section 12).

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