

Chapter 1

Reflection and Restraint in State Constitutional Amendment and Revision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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