



Vol. 2

State Constitutions

for the Twenty-first Century

Drafting State Constitutions, Revisions, and Amendments



Frank P. Grad and Robert F. Williams

State Constitutions for the
Twenty-first Century,
Volume 2

SUNY series in American Constitutionalism

Robert J. Spitzer, editor

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Preface

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

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

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

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

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

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

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

The impact of the one-person-one-vote decisions was immediate and far reaching. By their very nature the decisions were irreversible, because they left open no way to return to the former status quo, because newly elected legislators had an immediate stake in the continuation of the new representational requirements. Another impact was to give greater influence to union and labor constituencies, which had long agitated and worked on changes in representation which would put greater political power in the hands of urban constituencies, more representative of their interests. Another consequence was the significant change and improvement in state legislatures, which in consequence of the decision became more democratic and representative bodies. In many states it also helped to dislodge traditional and archaic aspects of representation that had been perpetuated in some of the traditional rotten boroughs that has grown up prior to the one-person-one-vote decisions. The decisions also caused a new wave of state constitutional revisions, in that thirteen states revised their charters between 1963 and 1976.¹ The change, it was noted, also served to involve the citizens themselves, reflecting the tradition of activist popular sovereignty.²

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

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

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

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J. P. Chamberlain Professor Emeritus of
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New York, New York
September 2005

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

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

Introduction

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

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

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

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

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

G. Alan Tarr

Chapter 1

Reflection and Restraint in State Constitutional Amendment and Revision

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

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

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

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

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

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

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

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

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