

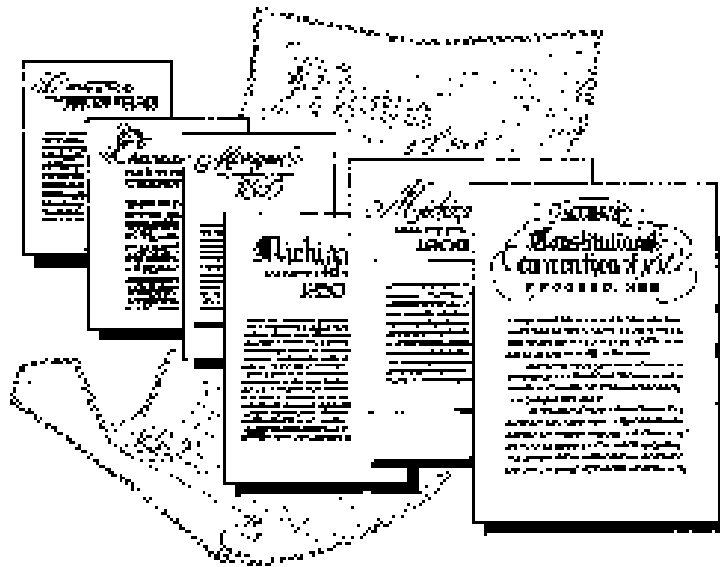
Con-Con
Research Paper
No. 2

THE STATE CONSTITUTION

ITS NATURE AND PURPOSE

by

Paul G. Kauper, J. D.



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Introduction

A convention consisting of popularly elected delegates will soon undertake its important task of studying the Michigan constitution of 1908 and probably, after due deliberation, proposing a revised constitution for submission to the state's electors. Most of the time and energy spent by the delegates will be devoted to the treatment of specific areas and problems involved in restating the state's organic law.

It is important, however, that the delegates in approaching these specific tasks be guided by a sense of perspective and an overall view as to the nature and purpose of a state constitution both in relation to the structure of our federal system and in relation to the internal purposes served by the state's constitution. It is the purpose of this monograph to suggest considerations and standards that may prove helpful in orienting delegates to the nature of the task they face and the decisions they must make.

Any person writing on this subject must at the threshold enter a caveat—there are no scientific norms or pre-determined answers to be elicited from a Delphic oracle in respect to the basic assumptions underlying a state constitution and giving meaning to its status and purpose, to the principles, express or implicit, that should be incorporated in a constitution, and even less to the specific and concrete problems that call for solution. A state constitutional convention elected by the people is free to fashion any kind of document it pleases, subject only to restraints imposed by the constitution of the United States as the supreme law of the land and subject, of course, to having its work ratified by the state's electors. The delegates will find that there are no single, correct answers to most of the large and important questions confronting them. These are matters of opinion and judgment, and honest differences of view can readily be entertained.

In respect also to the fundamental propositions and premises regarding the essential purpose and functions of a state constitution, differences of opinion may exist, and any writer offering suggestions must do so with a sense of modesty and with an awareness that he is at best expressing an opinion and making suggestions. A recognition, however, of the possible diversity of views of a number of matters should not obscure the consideration that history, tradition, experience and current trends in constitution revision, and the informed judgment of scholars and concepts of government fundamental to American consti-

tutional thinking do furnish a basis for opinion and judgment and that on many of these questions a fair degree of consensus is to be found.¹

The Written Constitution

The idea of a written constitution defining the structure of government and enumerating the rights of the people as a limitation on the powers of government is deeply-rooted in Anglo-American history. England, to be sure, has no written constitution in the sense in which Americans conceive of a constitution, but English history furnishes antecedents for the idea of reducing to writing, that all may see and know, fundamental propositions relating to the liberty of the citizen and determining the relationship between the government and the governed.²

Magna Carta, extracted by the barons from King John in 1215, and designed to define the barons' rights which the king agreed to respect, is usually regarded as the first of the significant documents which had a pervasive and enduring influence in the shaping of the constitutional tradition both in England and America. Other notable documents have, over the years, made their contribution to English constitutional history, such as the Bill of Rights of 1628, the Habeas Corpus Act of 1679, and the Bill of Rights of 1689.

These fundamental documents were concerned with asserting the rights of the citizens, and apart from their contribution to the development of specific constitutional liberties both in England and the United States, they have in times of crisis when men's liberties were threatened served as symbols and rallying points in defense of freedom.

American Beginnings

When the colonists came to this country under charters granted by the Crown it became necessary to define, by the terms of the charter the skeleton structure of government. Here was planted the seed of the idea that the fundamental structure and organization of government, as well as a declaration of the rights of the people, should be incorporated in a written document recognized to have a basic and organic character and, indeed, to have the quality of a fundamental law superior to ordinary laws and enactments.

Space does not permit a detailed treatment of the early charters which in retrospect may be viewed as embryonic constitutions. It is enough here to trace briefly the further evolution that saw the rise of indigenous American constitutional documents, and here one may mention particularly the Fundamental Orders of Connecticut of 1639 which Lord Bryce calls "the oldest truly political Constitution in America,"³ and the Frame of Government of Pennsylvania of 1682 which was "in substance a colonial constitution promulgated by Penn as sole proprietor."⁴

Mention should also be made of the significant Mayflower Compact of 1620, signed on shipboard by the Pilgrim Fathers and resting on the assumption that men may by compact among themselves determine how they shall be governed. The notion of a constitution as a compact resting on agreement and consent of the people states a fundamental facet of American political thinking.

Prior to the rupture with England in 1776 the conspicuous elements in the basic documents of the colonial period were the establishment of systems of representative government and the declaration of basic rights. The struggle with England gave great impetus to the process of constitutional development as reflected in the adoption of documents which in their more complete statement of individual rights and the greater elaboration of a form of government resting on the consent of the people furnished the immediate prototype of modern state constitutions. In the years 1776 and 1777, having declared their independence of England, all but two of the thirteen colonies fashioned their own constitutions.⁵ The written constitution, thus, became the expression of popular sovereignty and the people's right of self-government.

Culmination of an Idea

The adoption of the state constitutions preceded the drafting by the Philadelphia convention of 1787 of the constitution of the United States which established the federal system under which we now operate—a system under which governmental power is divided between the federal or central government and the fifty states of the Union. The U. S. constitution and the bill of rights adopted not so long after its ratification may be said to represent the climactic culmination of the idea that the basic frame of government and the reserved rights of the people shall be reduced to writing in a document recognized as the supreme law.

It should be recognized that factors in addition to precedents furnished by English constitutional history and the influence of the colonial charter as a form of

fundamental law contributed to the written constitution as epitomized in the constitution of the United States. This constitution established and structured a federal system of government and was premised on a separation of powers within the federal government. A distribution of powers between a central government and constituent states in a federal system, and a well-defined separation of powers within a government cannot be achieved on a constitutional basis except pursuant to a written document.

The tradition established by the early state constitutions, the precedent furnished by the constitution of the United States, and the situation created by the operation of the federal system, resulted inevitably in the adoption of a written constitution by each new state when it entered the Union. In fact no new state may be admitted into the Union until its constitution is adopted and submitted to congress for approval.

Federalism and the State Constitution

That Michigan is one state among fifty comprising the Federal Union or the United States of America is a paramount consideration in determining the nature and function of its constitution. This a matter that goes to the question of sovereignty and the source of the state's power to adopt its own constitution as well as to limitations that must be recognized on the powers of government exercisable by the state. It has been said that the U. S. constitution "looks to an indestructible Union composed of indestructible States."⁶ But each state of the Union, while indestructible and possessing a distinctive constitutional status and a sphere of constitutional autonomy, is not a completely sovereign state in the usual sense of the word. Because of the delegation of certain powers, express and implied, to the central government, the express denial of certain powers to the states and the implied denial of others, and the recognition in the U. S. constitution of rights of the person that can be enforced as a matter of federal constitutional limitation against the states in dealing with their own citizens, Michigan is not a sovereign entity in the full sense of the word.

On the other hand, the central government does not possess sovereign powers in full measure either. In the sphere of foreign relations and in the handling of foreign affairs it is recognized as a sovereign nation among the family of nations, but internally it is limited by the powers delegated to it under the constitution.

A Sovereign People

The Tenth Amendment makes explicit the theory of federalism on which the constitution rests. “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.” Disregarding theoretical difficulties in the concept of sovereignty, it may be said as a practical matter that in respect to the powers over internal matters, sovereign power in the sense attributable to metaphysical political entities is shared by the central government and the states. But even more realistically, and in recognition of the view that government exists by consent of the people, one may say that all ultimate sovereign power is vested in the people of the United States who ordained and established the constitution of the United States and who by this document allocated the spheres of governmental authority between the central government and the states.⁷

The Power and the Duty

Regardless of the view one takes respecting the place and nature of sovereign power under our federal system, the practical and important consideration emerges that under this system the people of each state are vested with the constitutional power and, indeed, the duty, to fashion a system of government effective within the state’s territorial jurisdiction. This government is to be subject to such restraints as the people see fit to impose as well as to the restraints resulting from the federal character of our system.

It is often said that the states possess the so-called “residual powers”; i.e., the powers of government not expressly or impliedly delegated to the central government. This is not quite accurate since the states may act in some areas of power delegated to the federal government as long as the latter has not acted to pre-empt the field and thereby foreclose state legislation on the subject. Perhaps the most accurate statement of the matter is that each state enjoys the constitutional freedom to exercise the general powers of government subject to the U. S. constitution, the laws enacted by congress in the lawful exercise of its powers, and treaties made under authority of the United States.

The States and the Federal Government

Enough has already been said to demonstrate the important position of the states under our federal system. They have a constitutional status that cannot be impaired by the federal government and exercise far-reaching and important governmental responsibilities. There has been witnessed in recent years, to be sure, a steady and progressive expansion in the powers exercised by the federal government. For many purposes the important locus of power has shifted from the states to the federal government.

Broadened interpretation of the commerce power has resulted in federal hegemony in the regulation of economic affairs.

The broad fiscal authority of the federal government, combining a virtually unlimited power to tax incomes, as well as impose excises of various kinds, with a constitutionally unlimited borrowing power and a broad and indeterminate independent power to spend for the general welfare has resulted in increased reliance on the federal government for its intervention and assistance in areas within the primary jurisdiction of the states.

Moreover, a progressively broadened review by the United States supreme court of state legislative, administrative and judicial acts for the purpose of protecting rights secured on the national level under the Fourteenth Amendment, notably under the due process and equal protection clauses, has resulted in further subordination of the states to the central authority.

In all these aspects the recent decades have witnessed a substantial transformation in the nature of our federal system. These developments have, indeed, created pessimism in certain quarters as to the continued vitality and integrity of the federal system and doubts as to the continuing place of the states within the system. Some may go so far as to say that the federal system with its theory of limited federal powers and recognition of the constitutional status of the states has become obsolete.

Importance of the States

It is easy, however, to develop or portray a distorted or pessimistic picture, The truth is that the states continue to occupy a place of great importance and responsibility in our scheme of things. The bulk of the criminal law and the

whole system of private law and its administration, local government, education, public health, highways and traffic control continue to be primary responsibilities of the states. And the states continue to exercise significant regulatory power in important areas of economic life notwithstanding the controls exercised by the federal government over the vital segments of the national economy.

Each of the states has its own taxing, borrowing and spending powers, subject to such restraints as are imposed by its own constitution. Despite the expanded activities of the federal government, the states continue to find themselves faced with many large tasks and responsibilities. The need for increased regulation resulting from the urbanization and industrialization of our society and the constantly growing demands upon government for additional services to meet public needs—particularly in the fields of education, highways, public health, housing and recreation—have resulted in the intensification of functions performed by the states and their local units. The total taxes exacted annually by state and local units of government have reached a volume which in itself suggests that any requiem over the states and their place in our system is premature.

The Expansion of Federal Power

Several factors have contributed to the expansion of federal power. One is the elementary and indisputable factor that many of our problems requiring governmental attention have grown national in scope and transcend the power of the states to deal with effectively. This is particularly true of the regulation of commerce and business. The expansion of federal power has been commensurate with the nationalization of vital phases of American life. A second and related factor is that as a result of improved means of transportation and communication the nation has shrunk in size with a resulting greater awareness of national needs and interests and a greater sense of national community. State boundary lines have lost significance for many purposes.

Finally, the hard fact must be faced that pressure for federal assistance and intervention, particularly financial assistance, is attributable in substantial measure to the failure of the states to function adequately and effectively in discharging their responsibilities within the spheres of their constitutional competence. This is a point deserving particular emphasis for it bears directly on state constitutions and the need for their revision.

It is safe to predict that the continued vitality and integrity of our federal system, having in mind particularly the position and function of the states, will depend in substantial part on how effectively the states discharge their responsibilities. If the states fail to measure up to their tasks, either through inertia, or because the structure of government is inadequate to meet modern needs, or as the result of disabilities they have inflicted upon themselves in their own constitutions, the movement for increased federal intervention will gain added momentum. At present the fault lies in large part with state constitutions which have not been revised to keep pace with the times.

To establish a form of government responsive to the will of the people, organized to deal effectively with the problems of our day and equipped with powers adequate to meet the state's needs is the sobering responsibility faced by a state constitutional convention. The Michigan constitutional convention in proposing a constitution which when ratified by the people will make possible the kind of government just described will not only make a great contribution to good government in Michigan but in doing so will make a contribution to the continued vitality of our federal system.

The State Constitution – General Principles

American constitutionalism presupposes certain basic principles that find expression either expressly or impliedly in state constitutions as well as the constitution of the United States. Some of these are so fundamental and familiar and their implications so plain that they need not be developed at length. That political power rests ultimately in the people, that the popular will is reflected in the constitution and the institutions of representative government designed to serve the interests and welfare of the people, that the organs of government are subject to the limitations imposed by the people and by the rights retained by them, that a constitution is fundamental and supreme law and that the courts in the exercise of the power of judicial review have the responsibility and the duty to uphold this fundamental law and to refuse to enforce legislative and other acts of government found to be in conflict with it—these are all propositions that need no elaboration. The matters discussed below warrant more extended treatment.

Legislative Powers

A theoretical difference distinguishes the legislative powers of congress under the constitution of the United States from the powers of a state legislature. Subject to an exception recognized by the courts in respect to the handling of foreign affairs, the powers of the federal government are delegated powers, and it must find authority for what it does in express or implied grants of power under the constitution.

Legal Theory. In respect to the states, however, respectable authority supports the theory that, subject only to the restraints derived from the constitution of the United States or from the state's own constitution, the government established by the state's constitution enjoys all the general powers of government, and that, therefore, an express enumeration of legislative powers is not required in a state constitution. To 'put the matter in another way, the state constitution, and this is particularly relevant to the legislative power, is viewed primarily as a limitation on power and not A grant.⁸ In order to justify the exercise of a given power, a legislature established pursuant to a state constitution is not required to point to powers granted to it in the constitution. Theoretically this means that if a state constitution did nothing more than establish a legislative body, this body, despite the absence of any specific grants of authority, can enact general laws in the exercise of the police power, levy taxes of various kinds, borrow and spend money and condemn property for public use, as well as do many other things embraced within the concept of the general powers of government.

This theory has not gone unchallenged, however. The argument is made that under the Tenth Amendment the powers not delegated to the federal government and not prohibited to the states are reserved to the states and to the people; that ultimate sovereign power rests in the people; and that since the organs of state Government must find their authority in powers conferred by the people, there is no basis for assertion of power by an organ of state government except as conferred by the people.⁹ It should be noted, however, that consistent with this idea, it is fair and proper to say that the people of a state in establishing the basic organs of government have impliedly delegated to those organs, including the legislature, the general powers of government within the sphere of the state's constitutional competence, subject to the restraints imposed by the constitution and the other express provisions found in it.¹⁰

Historical Practice. In any event, whatever the correct theory on this matter, it is true as a matter of history and experience that state constitutions are not viewed solely as limitations on power but in respect to many matters are a positive grant of authority. Frequently specific legislative powers are spelled out, often out of an abundance of caution, in order to make clear that no limitations stated in the constitution or rights recognized under it should stand in the way of legislative power to deal with a given problem. Thus, an amendment to the Michigan constitution in 1920 (Article V, Section 29) was prompted by doubts, generated by judicial decisions of that vintage, as to whether the state's police power extended to the regulation of the hours and conditions under which men, women and children might be employed. Frequently, also, provisions designed as limitations, either by their wording or by construction, are found to be limited grants of power to deal with the particular subject. The result then is that state constitutions include both grants and limitations of power.

Detailed Enumeration Unnecessary. As a practical matter it would be a sound principle of constitution making and draftsmanship to spell out the general legislative powers such as the police power and the taxing, borrowing, spending and eminent domain powers in broad terms, subject to limitations expressly stated as limitations or necessarily derived as limitations from the declaration of rights. Enumeration of detailed powers to deal with specific situations should be avoided. An enumeration of detailed powers is unnecessary, adds to the bulk of the instrument, and may also have the unexpected result of being an implied limitation and denial of powers not enumerated. Thus, in regard to the police power it is enough to say in recognition of the reach of this power, as established by modern judicial decisions, that the legislature shall have the power to enact laws it deems necessary and proper to protect and promote the public health, safety, morals, convenience and general welfare. Certainly, it is not necessary to say that the legislature has the power to regulate trade, industry, the professions and use of property.

Unless a constitutional convention undertakes the unnecessary and virtually impossible task of attempting to spell out all the legislative powers, it should be made clear that the enumeration of certain powers shall not be construed as a denial of the overall power of the legislature, subject to limitations stated in the constitution, to enact all laws it deems appropriate to promote the well being and prosperity of the people, including laws necessary and proper to the execution of the enumerated powers.

The Separation of Powers

Based on Montesquieu's celebrated analysis of governmental power, the principle of the separation of powers is a classic part of American constitutional thinking and practice. According to this theory, the powers of government can be classified into three categories—the legislative, the executive, and the judicial powers. In the interests of a wise distribution of power and to assure a system of checks and balances whereby no single department will unduly extend its powers, these three powers are committed to their respective departments, and no department shall exercise powers committed to the other two departments. The theory in its general features is still valid. It is not the business of the executive to enact laws or of the legislature to conduct trials of persons accused of crime. But recognition of validity of the general theory should not obscure the fact that a rigid separation of powers is not possible. Particularly in our day, with the widespread use of administrative agencies that often combine several functions, any theory of complete separation of powers is untenable and unworkable. This situation should be faced when constitutions are revised.

The present Michigan constitution (Article IV) after declaring that the powers of government are divided into three departments: the legislative, executive and judicial, further states that no person belonging to one department shall exercise the power properly belonging to another, except in the cases expressly provided in this constitution. The recognition that exceptional cases may be expressly recognized in the constitution tempers the rigidity of this provision. But constitution makers may not anticipate all the situations where some departure from the separation principle is warranted.

It may be more suitable simply to recognize the separate departments in the constitution, and leave the implications of the separation principle to be worked out on the basis of experience and judicial construction. In any event the constitution should allow for some flexibility here.

Closely related to the separation principle is the principle of non delegability of legislative power. Legislative power is to be exercised by the legislature. The executive and administrative agencies are not to make laws. In the abstract this states an excellent principle. But again, as a practical matter, in view of the necessity of confiding in the executive and in administrative agencies the power to make rules and regulations to implement legislative policies, an absolute adherence to the non-delegation principle is unworkable. Courts now sanction

delegations where the general policy is declared by the legislature and where statutory standards serve to guide and limit the exercise of administrative discretion in the implementation of statutory policy. In view of the vast expansion of the administrative arm of government and the subjection of citizens to the authority of these agencies in areas touching on many vital interests, it would be appropriate to include in a state constitution an express provision stating the general circumstances under which legislative power may be delegated and the limitations to be observed by the legislature in making any delegation.

The Constitution as a Fundamental and Enduring Instrument of Government

The questions of what specifically should be dealt with in a state constitution and the purposes to which a state constitution should be directed are questions which depend for their answer on the choice of a basic approach to constitution making. Most students of the subject agree that the constitution should serve the purpose of a fundamental organic document establishing, defining and limiting the basic organs of power, stating general principles and declaring the rights of the people. This points to the conclusion that the constitution should not be an elaborate document; that it should be relatively compact and economical in its general arrangement and draftsmanship; that details should be avoided; and that matters appropriate for legislation should not be incorporated into the organic document. Chief Justice Marshall stated this idea in classic form in the course of his famous opinion in *McCulloch v. Maryland*:

A Constitution to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves... In considering this question, then, we must never forget that it is a Constitution we are expounding.¹¹

Justice Cardozo stated the matter more succinctly:

A Constitution states or ought to state not rules for the passing hour but principles for an expanding future.¹²

The early state constitutions embodied the idea that a constitution should establish a general frame of government, setting forth general principles and avoiding the detail which mistakes a constitution for a statute or legal code. And the constitution of the United States is a superb model of a compact, organic document that is logically arranged, internally coherent and drafted with the object in mind of stating broad, fundamental, and enduring purposes.

The Trend Toward Detail

Despite the admirable pattern established by the earlier documents, the general trend throughout the nineteenth century was to make state constitutions, by the process either of revision or amendment, much more detailed and elaborate and in many cases prolix documents which incorporated matters that could well have been left for the ordinary law-making processes.¹³ The distinctive character of a constitution as the fundamental or basic law, superior to ordinary laws, underwent a change. A number of factors contributed to this result. Undoubtedly the acceptance of the theory of popular participation in the law-making process played a major part.

It must be remembered that state constitutions, as compared with the constitution of the United States, can be amended with relative ease. In the usual case a state constitution can be amended by affirmative majority vote at a popular election on a proposition placed on the ballot either by the legislature or initiated by citizens by petition. The power to amend the constitution by simple majority vote is no different from the power of the people to vote on legislative propositions submitted for popular referendum or on legislative propositions initiated by citizens' petitions. It is not surprising, therefore, that the distinction between the constitution as fundamental law, on the one hand, and ordinary statutory law, on the other, tended to become lost in the process.

In some situations a relatively simple amendment process offers an easier method for securing legislation than the usual legislative process. Moreover, the tendency toward inclusion of greater detail in state constitutions, and particularly the inclusion of restrictions on the legislative power, notably the taxing, bor-

rowing and spending powers, reflected a distrust of the legislature and an unwillingness to vest it with broad general powers in these areas.

The inclusion of what are essentially statutory matters in a state constitution has its defenders.¹⁴ It is argued that the distinction between what is fundamental and what is non-fundamental is not always clear. No precise or scientific line can be drawn to distinguish and fence off the fundamentals. Moreover, if the people of a state feel that a particular matter, otherwise appropriate for legislative determination, is so important that it should be incorporated into the fundamental law, who can say that they are wrong or unwise? This is a matter of choice and judgment.

The Need for Restraint

Notwithstanding these contentions, a good case can be made for limiting the state constitution to the essentials or fundamentals and avoiding inclusion of matters ordinarily reserved for the legislative process. The state constitution is by definition the state's fundamental law. It is judicially enforceable as the supreme law of the state, subject of course, to federal limitations, and takes precedence over ordinary laws and administrative acts. The purpose of a constitution as historically conceived is to establish the basic order of government. The constitution loses much of its distinctive significance as the basic and enduring instrument of government when the process of constitutional amendment or revision is used as a substitute for legislation.

Furthermore, the effect of incorporating what are essentially legislative matters in a state constitution is to undercut the legislative process and to limit the area of legislative responsibility and discretion. It is more difficult to remove what is essentially a statutory provision from a constitution than it is to incorporate it in the first instance. Despite change of circumstances or results not anticipated, the legislature is powerless to correct the situation. Insofar as these provisions are effective, they often operate with a crippling effect on the power and responsibility of the legislature to deal adequately with problems pressing for solution. The only recourse in this event is again to amend the constitution, and a large part of the prolixity and bulk of state constitutions is attributable to piecemeal and usually detailed amendments spelling out power to deal with specific situations notwithstanding previously imposed limitations that have been demonstrated to be too rigid and unworkable. The inclusion of rigid restrictions on the legislative power creates other problems. History demonstrates that they frequently become a challenge to harassed and well inten-

tioned legislators to find ways and means of circumventing the constitution. Yet a constitution is a document that should be honored and respected.

Placing curbs on governmental power is understandable. This is one of the essential purposes of a constitution and this is a reason for including a declaration of rights. But it is another matter to cripple the legislature in the exercise of essentially legislative powers where judgment and discretion in meeting current problems are required. A state constitution designed to meet modern needs moves in a negative direction if premised on an unwillingness to entrust the people's representatives with powers adequate to their tasks. Improving the legislative process, attracting able men to the legislature and equipping them with the means and facilities conducive to well-informed and responsible discharge of their tasks is a more constructive approach to the problem of responsible government than the process of popular lawmaking by means of constitutional revision or amendment or the placing of rigid constitutional limitations on the exercise of legislative powers.

This is not to suggest that some limitations on generally stated legislative power are not desirable. But any limitations adopted should not be narrowly conceived, should admit of flexibility, should be carefully examined in light of their restrictive power on the legislature to meet not only today's problems but tomorrow's as well, and should be drafted with a clarity that will make it unnecessary to resort repeatedly to the process of litigation in order to determine their meaning.

The Importance of Popular Understanding

Finally, regarding the general question whether the constitution should be a relatively compact instrument limited to constitutional fundamentals or an elaborate and detailed document, it is worth mentioning that a significant element of value in a written constitution is that it is a document which citizens should be acquainted with, which they are ready and willing to read, and which they can understand. The briefer and more compact the document, the more likely it is to be read, studied and understood. Conversely, a long document replete with details does not invite the attention of the average, citizen or reward his efforts.¹⁵

With due regard then to the conception of a state constitution as establishing the basic order of government and concerned only with the fundamentals, what are the general areas that must be considered and should be the focal point for debate and consideration in a constitutional convention? The writer at this

point has no intention of stating in detail the provisions he would regard as essential to a model constitution. Others have attempted this task.¹⁶ Attention here will be focused on the frame of government, the declaration of rights, and the amending process.

The Frame of Government

The first fundamental objective is to establish the organs of governmental power, to define and distribute authority among them, and to state limitations on these powers. Although attention is usually directed at the outset to the three departments of government—the legislative, the executive and the judicial—it may be suggested that the electors of the state are the primary organ of power, both because they in the end establish the constitution and because they elect the legislative representatives and other officers who operate the government. Turning then to the electors, a necessary function of the constitution is to define voting qualifications. Secondly, the questions of direct participation by the electors in the legislative process by means of the referendum and initiative and the mechanics of these processes require attention. Finally, it may be suggested that since political parties are vital to the voting process and the operation of representative government, attention may well be given in the constitution to their status, organization and responsibilities.

Apart from the electorate and the three departments of government, the other organs or bodies that may be vested with constitutional status are public corporations. These may be divided into two categories: (1) municipal corporations and other local governmental units including counties, townships, and metropolitan districts and (2) public corporations organized for specific purposes such as the state universities. With respect to both classes, the questions respecting constitutional position and authority—including in the case of those in the first class the important questions of home rule status—are matters of basic concern.

The larger part of the constitution necessarily centers on the three departments.

The Legislature

Here the important organization and procedural questions are whether the legislative body shall be bicameral or unicameral; the scheme of legislative apportionment; the qualifications of legislators; the time and method of their elec-

tion; their term of office; method of determining compensation; and the mechanics of the legislative process. These are all vital organic matters and a number of them necessarily require treatment in some detail.

Questions respecting the substance of the legislative power, its reach and the limitations upon it have received attention earlier in this monograph and it is unnecessary to repeat here what was said earlier about the necessity or desirability of spelling out legislative power. The question of express limitations on legislative powers has also been discussed in connection with the proposition that the constitution should be limited to the fundamentals and that the whole problem of stating limitations on legislative powers should be carefully examined lest the legislature be curbed too severely in the exercise of its power and responsibility to meet tomorrow's as well as today's problems.

The search here should be for limitations that are flexible and that admit of departure without the necessity either of piecemeal constitutional amendments that add bulk and complexity to the constitution or of forced judicial interpretations that undermine the limitation and weaken the dignity of the document and the respect that should be entertained for it. A more flexible type of limitation, for instance, is one which fixes a borrowing limit on a formula basis that takes account of assessed property values or other variable factors and in turn permits borrowing in excess of this limit either by a special majority vote of the legislature or on approval of the electorate. The same type of limitation can be made applicable to the taxing power. The principle of permitting the raising of debt limits and tax limits by special vote of the electorate is already recognized in Michigan in respect to local units of government.

The Executive

The office of the governor; his qualifications; time and manner of election; term of office; fixing the method of determining compensation; and his general powers and duties are the central items of interest here.. Probably the most critical questions in respect to the executive department are whether the constitution should spell out in some detail the other branches of the executive department, as well as state administrative agencies, and whether the other important executive officers should be elected or appointed. Much current thinking supports the idea that the number of elected state officers should be reduced; that in the interests of unified responsibility the governor should have the power to appoint heads of the principal executive departments; that details in regard to the organization and duties of departments should be avoided; and that either

the legislature should be authorized to detail the organization of the executive department, as well as create state administrative commissions and agencies as needed, or that the governor be vested with power in these matters subject to legislative veto.

The Judiciary

Here the important questions relate to the organization of the judicial department; the structure of the court system; whether judges shall be elected or appointed; the method of election or appointment; the term of office; the fixing of compensation; and the general authority of the Michigan Supreme Court in respect to such matters as rule making and the supervision of the lower courts. A primary consideration that affects a number of these questions is to assure as far as practicable by constitutional means the independence of the judiciary. An important problem requiring attention is whether the judicial system (the types of courts and their respective jurisdictions) shall be spelled out or whether the constitution shall outline the general structure and vest power in the legislature to fill in the details.

The Declaration of Rights

Article II of the Michigan constitution, entitled "Declaration of Rights," enumerates in some detail the constitutional rights that serve as limitations on the exercise of governmental power. These are rights that are "declared" and reserved by the people, not rights created by the constitution. Of the declaration of rights it may be said, to use the eloquent words found in an opinion of the Michigan supreme court:

Here the people have erected their safeguards, not only against tyranny and brutality, but against the oppression of temporary majorities and the rapacious demands of government itself. Here are found words that are beyond words, principles for which men have died and reckoned not the cost. It is a charter heavy with history, pregnant with the pride of a free people.¹⁷

The inclusion of a declaration of rights conforms to the principle deeply rooted in American constitutional history and experience that the basic rights of the citizen are of such importance as to require recognition in the fundamental law

and thereby receive the added protection furnished by the process of judicial review. Indeed, the earliest of English and American constitutional documents were concerned primarily with asserting the rights of persons as against the arbitrary and despotic acts of those clothed with the powers of government.

Protection of Rights in the Federal System

Reverting again to the federal nature of our system, the question may be raised whether, since basic rights of the person are already protected against impairment by the states under the constitution of the United States, notably under the due process and equal protection clauses of the fourteenth amendment, further recognition and protection of rights under a state constitution is really necessary. This question admits of a ready answer. It is true that a citizen can claim against his own state the protection secured to him under the constitution of the United States of his so-called fundamental rights and that he is similarly protected against arbitrary discrimination at the hands of his own state government. But these fundamental rights, both of a procedural and substantive character, do not embrace all the rights presently enumerated in the Michigan constitution. Thus the United States supreme court has said that the right to jury trial, the privilege against self-incrimination and freedom from double-jeopardy, in the sense in which these rights are protected against the federal government, are not essential to due process of law and are not included among the fundamental rights. But these are all recognized under the Michigan constitution and surely no one will be heard to contend that they should be eliminated. Moreover, some of the fundamental rights protected under the constitution of the United States do not have the same scope as corresponding rights enumerated in the state constitution.

It must be remembered that a state supreme court is free to give such freedoms as freedom of speech or of the press or the freedom from unreasonable search and seizure, when recognized in the state constitution, a reach that transcends interpretations given the fundamental rights by the United States supreme court. The general theory of the supreme court's interpretation of the due process clause, seen as a federal limitation on state action, is that this assures minimum standards of protection. A state should, therefore, feel free to develop its own higher standards. The supreme court has held that consistent with the constitution of the United States a state may authorize advance censorship of movies. But a state by its own constitution may see fit to prohibit all forms of censorship.

State Protection of Rights

The proposition that each state should by its own constitution declare and protect basic rights, even though minimum protection is already afforded by the constitution of the United States, is reinforced by another important consideration. Mention was made earlier of the trend toward further centralization of power at the hands of the federal government, including broadened review by the United States supreme court of the actions of state legislatures, administrative agencies, and courts for the purpose of protecting fundamental rights and freedom from discrimination based on race or color.

A study of the cases coming before the court illustrates that the failure of the states in many instances to respect minimum standards of justice—and this has particular relevancy in respect to the administration of criminal justice—accounts for increased federal intervention in matters over which the states have primary authority and responsibility. Recognition by each state in its own constitution of the basic rights of the individual—and this not limited to the minimum standards derived from the constitution of the United States—and a policy and program of effective protection of these rights by all state agencies including preeminently the state judiciary, offer the surest Guarantee of maximum state responsibility and autonomy in this area and a corresponding minimum of federal intervention.

In any revision of a state constitution, the existing declaration of rights should be examined to determine whether some provisions are no longer necessary, whether some should be clarified or expanded, and whether new basic rights should be recognized. It may be suggested, for instance, that the provision of the Michigan constitution (Article II, Section 7) prohibiting peacetime quartering of troops in any home without the consent of the owner is no longer relevant.

A right of vital current significance is the right to equal protection of the laws, and, more particularly, the right to be free from governmental action which discriminates on the basis of race, color, religion or national ancestry. This right is protected at the national level by the equal protection clause of the fourteenth amendment. Any right to the equal protection of the laws under the Michigan constitution derives from the provision (Article II, Section 1) which states that all political power is inherent in the people and that government is instituted for their equal benefit, security and protection, The question may be raised whether on revision an explicit equal protection clause should be adopted

and along with it a specific provision prohibiting the deprivation or denial of right on the basis of race, color, religion, or national ancestry.

The Bill of Rights as a Limitation on Governmental Power

The classic concept of basic rights in the American constitutional tradition is that these rights are retained by the people as against limitations and infringements by actions of the government. The rights a person has against third persons are defined by common law and statute. These are not ordinarily regarded as constitutional matters. The principle that a state shall not deprive a person of his life without due process of law is a constitutional matter, but constitutions do not make it a crime for an individual to take another's life. This is governed by the criminal laws.

If all civil rights, in the sense of rights which a person may assert against his fellow citizens, were to be incorporated in the constitution, the distinction between the constitution as fundamental law-defining the frame of government and the relation of the government to the citizen—and the general laws of the state—defining rights and obligations arising out of private relationship—would be lost. Adherence to the basic purpose of a constitution suggests, for instance, that laws dealing with employer-employee relations, such as laws declaring a right of collective bargaining or declaring a right to work regardless of closed shop agreements, and laws prohibiting discrimination by private persons in such fields as employment or housing, etc., are properly reserved for legislation and should not be made constitutional matters.

Declaration of any such rights against private persons would necessarily have to be accompanied by details limiting and controlling the right, all matters best left to the legislative process. Once the door is opened for enumerating and defining rights in the field of private relations, it may be expected that a number of special interest groups will be pushing for recognition of their own particular interests.

Social and Economic Rights

Somewhat related is the question whether the conception of basic rights should be expanded so as to include not only the traditional types of rights that operate as a restraint on governmental power but also social and economic rights premised on claims of a duty owed by the state to assure certain benefits to its citizens. Mention may be made of welfare relief, old age assistance, health benefits, public housing, education and recreation. A state is free to declare such rights in its constitution, or, putting the matter conversely, to impose a duty on the legislature to provide benefits of this kind.

Michigan has long recognized for reasons peculiar to the importance of schools in a self-governing society that the legislature is under a duty to maintain a system of tuition-free primary schools.¹⁸ But whether in deference to present trends favoring, increased public services and benefits, new economic and social rights should receive constitutional sanction is another question. Rights of this kind, stated in a constitution, are “programmatically” in character. They are not judicially enforceable and require legislative acts for their implementation. To define the limit and scope of these rights is necessarily reserved for legislation.

Discussion of rights of this character at a constitutional convention and of the kinds of rights to be enumerated will necessarily excite extended debate on such broad subjects as free enterprise, socialism and the welfare state. A constitutional convention must ask itself the question whether consideration and discussion of these matters is not more appropriately reserved for the legislative forum. The people through their elected representatives in the legislature are free to fashion their own destiny in this respect and to adopt the controls and provide the public services needed in response to the temper and spirit of the times. What is relevant and important, constitutional-wise, is that the legislature be recognized to have the power to adopt legislation and programs to promote the general welfare and to have the choice of means suitable to this end, subject only to such restrictions as the people have seen fit to impose by express limitations and by the rights they have reserved.¹⁹

The Process of Constitutional Revision or Amendment

Just as the establishment of a state constitution rests in the first instance on the authority and will of the people, so also must opportunity be allowed for future amendment or revision and approval of the same by the electors. A constitution should state the means and processes for such amendment or revision.

State constitutions commonly authorize amendment by means of popular vote on propositions submitted by the legislature or initiated by citizens' petition in accordance with procedures defined by the constitution. They may also require that the question whether a convention of popularly elected delegates be called to consider constitutional revision be submitted to the electors at regularly stated intervals.

The relative ease with which state constitutions are amended, with the result that state constitutions have grown bulky and the constitutional amendment process often resorted to as a substitute for the law-making process—a point stressed in an earlier section—suggests the question whether restrictions should be placed on the amending process in the interest of assuring the status of the constitution as the fundamental and more enduring law. This is a matter requiring careful study and attention.

The amendment process should be neither too difficult nor too easy. To suggest limitations on the amending process is to enter upon a sensitive area, since it is one of our traditions that a constitution resting on the will of the people should always be freely subject to amendment by expression of the same popular will.

Thought may be given, however, to the possibility of limiting the amendment process in respect to certain parts of the constitution. One suggestion, for instance, is that all amendments relating to certain specified legislative powers, such as the vital fiscal powers, either originate with the legislature or, if originated by citizens' petition, be subject to disaffirmance or modification by a two-thirds majority of the legislature upon declaration of an emergency by the governor.

The important point is that a constitutional convention give serious thought to the problem of whether the process of constitutional amendment can be limited in such a way as to preserve the constitution's character as the state's basic

fundamental and enduring law, while at the same time keeping open necessary and adequate channels for changes in response to the popular will and consistent with the theory of the people's sovereignty on which the constitution rests. Unless this is done and no matter how admirable and compact a document the convention produces, it is fair to predict that within a fairly short time the familiar story of frequent amendments and use of the constitutional amendment process as a substitute for legislation will be repeated.

Conclusion

Extraordinary changes have taken place since Michigan's constitution was last revised by the convention which met in 1907. The state's population has tripled, the state has become highly urbanized and industrialized, means of transportation and communication have undergone radical changes, governmental regulation and public services have expanded and proliferated in ways not dreamed of in 1907, and the social, economic and political problems the state faces are vastly different and far more complex. Patterns of government adequate to meet the relatively simple needs of 1907 are no longer responsive to today's conditions.

The organs of government must be vested with powers adequate to their tasks and responsibilities in fashioning and administering policies that are directed to the end of promoting the general welfare as determined by a preponderant public opinion in the context of new and changing circumstances. And, on the other hand, the vast expansion of governmental authority, the broadened areas of public service, and the increased demands placed upon citizens by regulatory and tax laws, make it equally imperative that the safeguards of representative government in its various institutional aspects, of the rule of law, of the reserved rights of the people, and of the restraints designed to prevent the arbitrary and irresponsible exercise of power be preserved and strengthened.

The constitutional convention of 1961 will not be starting from scratch. The state of Michigan has an extended constitutional history and tradition that began with the adoption of the first constitution in 1835. Any revised constitution must keep faith with the past and with what has been determined by experience to be the enduring values of a government resting on the consent of the people. To fashion a fundamental order of government that preserves the continuity of our constitutional tradition by holding fast to that which is good, but which will be adequate to meet not only today's but also tomorrow's needs—this is the large, challenging and difficult task that faces the constitutional convention of 1961.

Various interests and points of view will be represented at the convention. Differences of opinion will emerge on many vital questions. Compromises will be made. Whatever the ultimate solutions to concrete problems, however, it is important and imperative that the delegates approach the task with open-mindedness, with an awareness that they will be framing a document designed

to serve the best interests of all the people, and with the understanding that a constitution is a basic document centered on the fundamental order of government and, therefore, a document which should be designed with an eye to relative permanence and stability.

In the end, the convention must submit the results of its deliberations to the state's electors for approval. To merit this approval, a proposed revision of the constitution must be a document that can be read and understood by citizens and which in meritorious features commends itself to the people as a worthy instrument for the furtherance of effective and responsible government directed to the end of serving and promoting the common good.

Footnotes

- 1 For helpful discussion, see Munro, "An Ideal State Constitution," 181 Annals 1 (1935); Dodd, "The Function of a State Constitution," 30 Pol. Science Q. 201 (1915); Fellman, "What Should a State Constitution Contain?" Chap. VIII in Graves (ed.) State Constitutional Revision (Public Administration Service, Chicago, 1960); Walker, "Myth and Reality in State Constitutional Development," Chap. 1 in Graves, op. cit.; Dishman, State Constitutions: The Shape of the Document (National Municipal League, New York, 1960).
- 2 For a collection of these documents as well as others referred to below, see Perry (ed.), Source of Our Liberties (American Bar Foundation, Chicago, 1959).
- 3 I The American Commonwealth, 429 n. (3d ed. rev., New York, 1895).
- 4 Perry, op. cit., Foreward, p. xviii.
- 5 Connecticut and Rhode Island continued to govern themselves under their old charters which had been liberally framed.
- 6 Chase, C.J. in Texas v. White, 7 Wall. 700, 725 (1868).
- 7 "The proposed Constitution, so far from implying an abolition of the state governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government." Alexander Hamilton in The Federalist, No. 9, p. 40 (Everyman's Library ed.).
- 8 See the discussion in Dodd, op. cit. pp. 201-212.
- 9 See Dishman, op. cit. pp. 9-12.
- 10 "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and com-

plete power as it rests in, and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." Cooley, 1 Constitutional Limitations 175 (8th ed. Carrington, Little, Brown & Co., Boston, 1927).

11 4 Wheaton 316, 407-408 (1819).

12 The Nature of the Judicial Process, 24 (Yale University Press, New Haven, 1921).

13 See Fellman, op. cit., pp. 139-146. The Michigan Constitution of 1903 was a document of moderate length and despite frequent amendments that added a substantial amount of detail, it does not suffer from the bulk and wordiness found in some state constitutions.

14 See Dodd, op. cit. pp. 212-216.

15 Fortunately the current trend reveals a return to brevity and compactness in the making and revision of state constitutions. The three newest constitutions—those of New Jersey, Alaska and Hawaii, are among the shortest of the state constitutions.

16 See Model State Constitution prepared and published by the National Municipal League (5th ad., 1948).

17 Smith, J. in *Lockwood v. Commissioner of Revenue*, 357 Mich. 517, 557 (1959).

18 See Michigan Constitution, Article XI, Section 9.

19 Attention may be called at this point to the provisions of Article X of the Model State Constitution prepared by the National Municipal League. The legislature is placed under a duty to provide for a system of public education and to protect and promote the health of the inhabitants of the state. In respect to public relief, public housing, and conservation, the legislature is authorized to enact appropriate legislation.

