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TRENDS IN STATE CONSTITUTIONS

CHARLES R. ADRIAN*

A constitution is a set of rules about rule making and, consequently, is preeminently a political document. In the American states, the constitutions have never been accorded the reverence which has been associated with the United States Constitution almost from the beginning. The state constitutions have been amended quite freely in most states and some states have followed the practice of adopting a new constitution every generation or two. A few of them, like those of Illinois and Tennessee, are extremely difficult to amend, while at the other extreme some, such as those of California and Louisiana, are amended so easily and frequently as to suggest that many so-called amendments are in fact little more than statutes adopted by initiative or referendum.

In many of the states, a considerable tradition has grown up about the state constitutions, and as we would expect, even when they are amended drastically or new constitutions are drafted, the established institutions of the state and the prevailing life styles tend to be preserved. In the East, in particular, constitutions and other state institutions tend to be regarded as part of the heritage from colonial or revolutionary times. Thus, the Massachusetts constitution of 1919 is, in the folklore of the commonwealth, the constitution of 1780. The Vermont constitution of 1913 is commonly regarded as the constitution of 1793. The Maine constitution of 1876 is treated as if it were the original constitution of 1820. But in most states, the constitution is viewed pragmatically as an instrument for the assignment of powers and as the balance of political groupings changes in the state, so does the constitution.

I. THE EARLY STATE CONSTITUTIONS

The early state constitutions were very similar one to another. They were brief documents and the original thirteen constitutions shared these characteristics:

1. They were all based on the idea that governmental powers were

*Professor of Political Science, University of California, Riverside; B.A., Cornell University, 1947; M.A., University of Minnesota, 1948; Ph.D., University of Minnesota, 1950.

TABLE 1. AGE OF EXISTING STATE CONSTITUTIONS BY YEAR ADOPTED

Alabama	1901	Montana	1889
Alaska	1956	Nebraska	1875
Arizona	1912	Nevada	1864
Arkansas	1874	New Hampshire	1784
California	1879	New Jersey	1948
Colorado	1876	New Mexico	1912
Connecticut	1965	New York	1938
Delaware	1897	North Carolina	1876
Florida	1887	North Dakota	1889
Georgia	1945	Ohio	1851
Hawaii	1959	Oklahoma	1907
Idaho	1890	Oregon	1859
Illinois	1870	Pennsylvania	1874
Indiana	1851	Rhode Island	1843
Iowa	1857	South Carolina	1895
Kansas	1861	South Dakota	1889
Kentucky	1891	Tennessee	1870
Louisiana	1921	Texas	1876
Maine	1876	Utah	1895
Maryland	1867	Vermont	1913
Massachusetts	1919	Virginia	1929
Michigan	1962	Washington	1889
Minnesota	1857	West Virginia	1872
Mississippi	1890	Wisconsin	1848
Missouri	1944	Wyoming	1889

Source: To 1938, NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE, CONSTITUTIONS OF THE STATES AND UNITED STATES (R. Mott ed. 1938); 1939-1949, W. GRAVES, AMERICAN STATE GOVERNMENT 70 (4th ed. 1953); since 1949, NATIONAL CIVIC REVIEW, various issues. Note: The Alaska constitution was adopted in 1956 but did not go into effect until 1959.

derived from the people. This was a new idea at the time and most of them had a specific statement concerning this idea.

2. They generally recognized that a constitution not only allocates power within the governmental system, but also reserves some share of the political power to the people themselves. Eight of the thirteen contained bills of rights.

3. All the states used the concept of separation of powers and provided for three branches of government. The writers of these constitutions were still smarting under the belief that the problems of Revolutionary times had stemmed largely from excesses in the use of power by the executives and they associated government by the people with domination by the legislative branch of government.

4. The two-house legislature was generally assumed to be desirable. Only Georgia, Pennsylvania, and Vermont began with unicameral

legislatures. The upper house was often seen as being an advisory group to the governor, called the executive council. Quite commonly it was also devised as a body to protect vested property rights and property ownership requirements for election to the senate were common. Members of the lower house were generally elected for one year while for the upper house the term was usually three or five years.

Only in Massachusetts, New Hampshire, and New York were the governors elected by the voters. In all other states, the legislature made the selection. The powers of the governors were carefully circumscribed. Only in Massachusetts did he have a veto. In New England, there was not even a single *chief* executive. The governor shared many powers with the executive council. Together, they constituted a plural executive.

The original constitutions left to the legislatures many provisions regarding the judiciary. This branch of government was generally modeled upon colonial practices, but there was one major difference in that the judicial branch was considered a full third partner in government, enjoying parity with the legislative and executive branches. Only Georgia provided for the direct election of judges. In other states, they were appointed by the governor, subject to approval by the senate or executive council and they usually served during "good behavior." Some control was retained over the judges by the legislature in that the latter determined judicial salaries, thus preserving to themselves a potent weapon which was occasionally used.

It was on the basis of these general provisions, many of them now quite strange to most Americans, that the states first began operating. As the nation changed in population, dominant ideology, life styles, and ways of earning a living, the constitutions also changed.[1]

II. The Waves of Constitution Writing

State constitution writing and rewriting has occurred in waves, each peak being followed by a period of relative inaction while the problems, vogues, issues, and panaceas of one period were on the decline and before a new set had developed.[2] During the high periods of constitutional activity, documents that were not replaced were often widely amended.

1. *See* W. Graves, American State Government ch. 2 (4th ed. 1953).
2. *Cf.* Goldings, *Massachusetts Amends: A Decade of Consitutional Revision*, 5 Harv. J. Legis. 373, 382 (1968).

Jacksonian democracy brought with it two great waves of constitution writing, first in the 1830's and then later in the 1850's. The first represented the pioneer efforts at achieving a government based upon the cult of the common man,[3] and the second after this ideology had matured and had received virtually nationwide acceptance. During this period, the office of governor was strengthened somewhat with the general acceptance of the gubernatorial veto, but the concept of separation of powers was also more firmly adopted, together with the notion of checks and balances among the three branches. This was the era when the long ballot became standard in America. Short terms were retained while governors, judges, and gradually all of the important state-wide administrative officers (such as secretary of state, attorney general, auditor, and treasurer) were generally made elective. Bicameralism became universal and both houses tended to be elected on a direct population basis. Of the original constitutions of the fifty states, thirty-two of the senates and twenty-six of the lower houses were based on something like a straight population basis.[4] Reapportionment provisions were still often absent or in an embryonic state. Apparently theories of representation still had not advanced very far and it was generally assumed that each generation would solve the problem for itself. Most property requirements for voting and office holding were eliminated or greatly reduced during this period and bills of rights were strengthened. Toward the end of the period, the older notion of a plural executive reappeared in the form of boards and commissions which were assigned responsibilities for administering various functions.

The next wave of constitution writing came after the Civil War, lasting through the 1870's and into the 1880's. These constitutions were essentially Jacksonian in character, but they strongly reflected the particular concerns of the Civil War: that is, with the rights of the freed slaves and with matters of the rearranged relationships between whites and Negroes. In the South, quite a few states adopted a Reconstruction-era constitution during the period when Federal troops occupied the states of the old Confederacy, a period during which Negroes were encouraged to vote and hold office while whites who had participated in the affairs of the Confederacy or of its army

3. The term is from C. KLUCKHOHN, MIRROR FOR MAN (1949).

4. Dixon, *Reapportionment in the Supreme Court and Congress*, 63 MICH L. REV. 209. (1965).

were generally excluded from the political process. This was followed by a post-Reconstruction period, during which Southern whites, after the withdrawal of Federal troops by President Hayes, reestablished the conditions of white hegemony. Just as the Indiana constitution of 1851 and the Oregon constitution of 1859 reflected the pre-Civil War Jacksonianism, the Florida constitution of 1887 and that of Georgia (1877) represented Jacksonianism plus reactions to the Civil War and subsequent carpet-bagger government. Outside the deep South, the Illinois constitution of 1870 nicely reflected the values of the early years of an industrial society, one that was already beginning to emerge.

Technological changes after the Civil War had enormous effects upon life styles, rural-urban ecological balances, and the character of social issues. The coming of the big-time entrepreneur, the railroads, the factory, and a new class of both the wealthy and the urban poor was sharply felt as an influence upon state constitutions and politics during the Populist movement which centered in the 1880's and 1890's. This was the period of general distrust of legislatures in particular and of governments in general. Judges, legislators, and governors were all considered potentially to be in the vest pocket of the great, rich and powerful owners of industry and the railroads. The declining trust in the executive was indicated by the increasing popularity of administrative boards and commissions, many of them (and especially those dealing with railroads and education) having elective memberships. Decline in trust of the legislature was reflected in the rise of the use of the initiative and referendum. The review of the mandate of judges was made more possible through the drastic shortening of terms of office. While the original constitutions had generally provided for what amounted in most cases to lifetime terms, judicial terms were now reduced to eight years or less, and in some cases, to a mere two years. Distrust of executive and judicial officers was also reflected in the widespread adoption of the recall method of removal from office. The ballot was made still longer and the short term was retained during this period.

The Populist movement had reflected principally the concerns of farmers and small-town dwellers, with some support from urban working classes and urban middle-class reformers. Populist values were to be found especially in such constitutions as those of North Dakota (1889), Washington (1889), and Mississippi (1890).

During the Populist heyday, middle-class (and especially upper-middle-class) reformers in urban areas were developing the principles of a new political ideology — the Efficiency and Economy Movement. This movement had its early efforts directed principally against municipal charters and governments, but during the first two decades of the twentieth century, it also sharply influenced state constitutions and government. Constitutions written during this period strongly emphasized executive leadership and professional administration. They represented a reaction to Jacksonianism and, in particular, to Populism. The movement was Hamiltonian in ideology, suspicious of government by the common man, and highly desirous of applying the emerging methods of corporate management to government at all levels. In general, leaders of the movement were suspicious of all professional politicians, sought to minimize the impact of popular opinion upon politics, and to turn over decisions, wherever possible, to professionals in the field of each particular function. They sought, in effect, to "take the politics out of politics."

In seeking to strengthen the executive branch, the Efficiency and Economy reformers advocated the item veto, the executive budget, longer terms and better pay for legislators, the professionalization of the courts (by restricting judgeships to attorneys and adding an appellate layer between the trial courts and the state supreme court), the professionalization of the bureaucracy, municipal home rule (to reduce legislative domination over local policy decisions), nonpartisan elections (to weaken the power of the political parties), and a unicameral legislature. Some of the reformers also urged the greater use of special districts for the administration of specific functions at the community and regional levels, with the goal of turning over additional functions to the control of professional technicians and administrators and to reduce legislative influence over policy in these areas. The constitutions of Michigan (1909) and of Massachusetts (1919) closely reflect the values of this period.

World War I brought most reform efforts to an end, although some Efficiency and Economy efforts continued (see Table 2). The war also signalled a moratorium, lasting for a period of more than forty years, on state constitution writing. The 1920's were noted for non-innovation for the most part and the next decade was an era when concentration was on improving the performance of the national government, with relatively little attention paid to the problems of the

states. Most of the 1940's was devoted to World War II and the transitions that had to be made immediately thereafter. Probably the most important reason for the decline in constitution writing during this two-generation period, however, resulted from the reluctance of farmers and small-town dwellers to permit constitutional conventions to meet.

TABLE 2. CONSTITUTIONAL AMENDMENTS SUBMITTED, NEW YORK, 1927.

No.	Subject of Proposal
1.	Establishing a state executive budget system
2.	Authorizing New York City to borrow $300,000,000 outside its existing debt limit for rapid transit construction and equipment purposes; also expanding the debt-incurring power of certain other cities
3.	Making counties, instead of towns and villages, the local units in the apportionment of costs in grade crossing eliminations
4.	Fixing the salary of the governor at $25,000, that of the lieutenant governor at $10,000, and that of the members of the legislature at $2,500
5.	Designating the governor as the head of the executive department of the state
6.	Providing four-year terms for elective state officers and state senators and a two-year term for assemblymen, the first election thereunder to be held in 1928
7.	Authorizing the construction of a state highway in Essex County, from Wilmington to the top of Whiteface Mountain
8.	Authorizing the legislature to confer upon counties powers of excess condemnation in connection with public improvements
9.	Providing that no territory shall be annexed to a city without the consent of a majority in the territory obtained by a referendum vote

Source: W. GRAVES, AMERICAN STATE GOVERNMENT 62 (4th ed. 1953) (© D. C. Heath, Boston).

All modern wars have produced an acceleration in the rate of urbanization. The census of 1920, for the first time, indicated that more Americans lived in cities than in rural areas. Legislative leaders, who overwhelmingly came from rural and small-town areas, and other political leaders with similar backgrounds resisted major constitutional reform and particularly the calling of constitutional conventions because any basic changes seemed certain to involve a reduction in the political power of rural and small-town areas and, in many states, a transfer of political domination to urban areas. In most states, the question of calling a constitutional convention had to be decided by the legislative branch, an institution that was most reluctant to see

its incumbent members disadvantaged through reapportionment. During this period, the constitutional *commission* received increasing attention as a device to weaken legislative resistance. Such commissions are usually much smaller than conventions, often in the neighborhood of twenty members, appointed by the governor, or perhaps with some appointments by the governor and others by each house of the legislature. Typically, commissions can only make recommendations which then have to be put onto the ballot either by legislative action or by popular initiative in those states where this is possible. Either route is difficult and major changes are seldom made through use of this device.

In the 1920's, only Louisiana (1921) and Virginia (1929) adopted new constitutions. Major change in the 1930's was even more exceptional. Only the New York constitution of 1938 represented a successful effort to bring a state abreast of the particular problems and wants of the depression era.

The 1940's, strongly influenced by war-time conditions, and by the resistance of rural groups to constitutional reform, saw only three new state constitutions. These were adopted in Missouri (1944), Georgia (1945), and New Jersey (1948). The Georgia constitution did not result in fundamental changes in an approach to state government, but made only relatively minor changes from the 1877 document. The Missouri and New Jersey constitutions both reflected the old values of the Efficiency and Economy Movement. The principal contribution in Missouri was in the plan for the selection of judges.[5] This in effect took judicial selection "out of politics" and transferred dominant influence to the state bar association. It called for the naming of judges by the governor, but restricted his selection to names on a panel presented to him by representatives of the bar association. This approach nicely reflected the goal of professionalization of the courts which was part of the Efficiency and Economy Movement. It was widely urged for other states in the years that followed.

In New Jersey, a constitutional convention was made possible only because the leaders of both political parties agreed that reapportionment would not be considered at the convention, thus removing the greatest single threat to such a meeting. This convention concentrated some additional power in the governor and provided for an integrated administrative system for the courts, in both cases reflecting Efficiency

5. J. PELTASON, THE MISSOURI PLAN FOR SELECTION OF JUDGES (1945).

and Economy goals. This constitution, however, was the last in a series of middle-class reform efforts going back almost half a century. In the 1950's, except for the special cases of Alaska and Hawaii, no new constitutions were adopted. Urban-rural tensions increased.

The most recent round of constitution writing seems to have been inspired by the problems associated with the coming of a metropolitan-industrial society. In general, this new wave stems from the 1964 *Reynolds* case,[6] although it can be more specifically traced back to the Michigan constitutional convention of 1961-1962. The Michigan convention was the first to produce a new constitution since that of New Jersey in 1948, setting aside the new states of Alaska and Hawaii. It was adopted before the Supreme Court's decision endorsing the doctrine of "one man-one vote," and was probably made possible by a critical need to solve a problem in state taxation that could no longer be postponed. Although no public opinion survey was taken to test the matter, it seems likely that the marginal factor making possible a convention in Michigan in the early 1960's was the belief that something had to be done concerning state expenditures and tax shortages. Many voters appear to have been hopeful that a convention could find a way to avoid a state income tax.

The Supreme Court decision requiring both houses of state legislatures to be apportioned on the basis of population eliminated the single most important reason for the avoidance of constitutional conventions. It now became a matter of strategic advantage for state legislative leaders to accept or even advocate the calling of constitutional conventions. In 1965, Connecticut called a convention, under pressure from the United States District Court.[7] It was primarily for the purpose of working out a new and judicially acceptable reapportionment formula. In 1966, Kentucky and Rhode Island held constitutional conventions and, in 1967, so did Maryland and New York. That same year, Pennsylvania voters approved a proposal for a constitutional convention and in 1968, the Illinois legislature submitted to the voters for their decision in November, 1968, the question of calling a convention. After 1965, governors in many states urged the calling of constitutional conventions in the period. At the close of 1967,

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6. Reynolds v. Sims, 377 U.S. 533 (1964).
7. *See* Butterworth v. Dempsey, 237 F. Supp. 302 (D. Conn. 1965).

twenty-two states were engaged in "either overall or limited constitutional revision activity."[8]

In this most recent period of constitutional revision, the emphasis has still tended to be upon many of the Efficiency and Economy reform proposals, particularly those of executive leadership, and of judicial and bureaucratic professionalization (see Table 3). In addition, equal apportionment of legislative districts on the basis of population was necessarily a matter of concern. Much attention has also been paid to the threat to continuity in government raised by the possibility of thermonuclear war, and a lesser amount to the particular needs of services in metropolitan areas, a problem that had not much concerned state governments before World War II. In 1968, however, state governments still appeared to be lagging behind the national government in its concerns for social reform, problems of large-city governments, and of urban problems generally. In particular, the states had not yet shown much awareness of the problems resulting from slums, ghettos, and poverty.

TABLE 3. CONSTITUTIONAL AMENDMENTS SUBMITTED, NEW YORK, 1966.

No.	Subject of Proposal
1.	Increasing the state debt limit for industrial loan purposes
2.	Authorizing industrial loans in non-critical unemployment areas
3.	Authorizing support for the mentally ill and retarded from state funds
4.	Increasing teachers' pensions
5.	Reducing voting residence requirement to three months
6.	Eliminating personal registration to vote by persons whose jobs take them out of the county
7.	Authorizing continued service by retired supreme court justices
8.	Authorizing a state lottery to support the education fund
9.	Changing method of determining municipal debt limit for slum clearance and low-rent housing (failed)
10.	Authorizing continued service by retired court of appeals judges (failed)

Source: 56 NATIONAL CIVIC REVIEW 20-21 (1967).

8. 9 U.S. ADVISORY COMM'N ON INTERGOV'TAL RELATIONS ANN. REP. 8 (1968).

III. Conventions in Action

Conventions in the 1960's used procedures that were very similar to the conventions earlier in the century and, indeed, of most state conventions throughout our history. Hawaii and Alaska, writing their constitutions, had no problem in finding previous conventions to imitate as to structure and procedure, and convention procedures in the 1960's were commonly based upon the records left by earlier conventions. Some conventions were preceded by preparatory commissions which studied the procedures used by previous conventions, prepared proposed rules, and adjusted problems left incomplete by legislative provisions, the constitution, or the proposal to call the convention. They also took care of housekeeping duties, arranging for a convention site, and in general carrying out the instructions of the legislature or the governor. The convention itself might be activated by a federal judge issuing instructions to find some way to reapportion the state in accordance with Supreme Court orders, as in Connecticut, or the question of calling a convention might come up automatically for a vote of the people, as provided in the existing constitution, as in New York.[9] It might be called by a vote of the people after submission by the legislature, as in Maryland, or by a vote of the people after being placed on the ballot through initiative petition, as in Michigan.

In general, the conventions operate through committees which usually parallel the articles of the constitution. Delegates, aware of the need for support of newspaper editors in the state and of the voting public in general, usually require that all committee sessions be open to reporters and visitors. This was specifically provided for by acts of the Connecticut and Michigan conventions, for example. The legislature usually insists that the delegates be elected on a partisan ballot. (The Maryland convention was an exception to this.) Legislators may themselves become candidates for convention delegate and permit other public officers to serve in the convention simultaneously with their public jobs, as was the case in Connecticut, or they may exclude state legislators and office holders, as in Michigan. (In Michigan, however, county and municipal office holders and employees were permitted to become delegates, and many did so.)

The conventions tend to become partisan in character, seeking to give advantage to the majority party in the convention. This was the

9. N.Y. Const. art. 19, § 2.

case in Michigan, for example, where it early became clear that the issue of apportionment (this was before *Reynolds*) would force the delegates into partisan postures. When the convention first met, efforts were made to operate on a largely non-party basis. Delegates, for example, were seated alphabetically rather than by party or by district. Some of the groups originally supporting the call for a constitutional convention had strongly favored nonpartisan delegates. This was particularly true of the League of Women Voters. But the legislature had rejected this approach. An effort by George Romney to be elected president of the convention introduced a highly partisan note almost as soon as the delegates arrived at the convention site. In contrast, the Connecticut convention made a deliberate attempt to avoid partisanship by requiring a two-thirds vote for the adoption of any portion of the proposed constitution. This automatically required bipartisan support for any successful proposal, since the Republican and Democratic delegations were of equal strength. The Maryland convention sought to minimize partisanship by having non-partisan delegations.

Most of the recent conventions have operated on a tight timetable established either by the legislature specifically, or by considerations of the statutes concerning the amount of time that must elapse between the submission of a new constitution or constitutional amendments and the election at which they are to be voted upon. The Rhode Island convention was an exception to this pattern; it met off and on over a thirty-three month period.

Some of the conventions have been given an option as to whether they are to write a new constitution or merely to propose a number of amendments to the existing document. Where this option has existed, the convention tends to prefer to write a new constitution. In practice, the conventions are ordinarily conservative in their approach and usually accept a large percentage of the material in the existing document. Generally, however, they have a desire to become a part of history by becoming participants in the writing of a "new" constitution.

Another problem the delegates must often face is whether or not to submit the proposed new constitution as a single document, allowing voters only to accept the entire proposal or to reject it, or to submit their proposals as a number of alternatives, in effect, as major amendments to existing articles in the constitution. Because the delegates tend to want to be able to claim that they have written a new con-

stitution, they also tend to propose that the entire document be submitted on a take-it-or-leave-it basis. This decision often seems to be taken more on the basis of the vanity of individual delegates than for reasons of sound political judgment. The Michigan constitution was adopted by the voters by a narrow margin, with only 50.2 percent of the voters in favor, and the proposed new constitution for New York was defeated in 1967 by a wide margin largely because of an insistence on the part of the delegates to present a single package including the most controversial provisions, among them a proposal to repeal the provision that prohibits state aid to parochial schools in New York.

Finally, the delegates generally try to shorten the constitution. Advocates of Efficiency and Economy urged that constitutions be shortened by eliminating provisions that are essentially statutory rather than fundamental in character and by making broad provisions for the granting or withholding of powers. The shortening of constitutions has, for the most part, however, not come about for these reasons. Rather, reduction in size is more often a result of eliminating obsolete provisions and of abandoning the more flowery and traditional language of constitutions in favor of a more contemporary mode of expression.

The Michigan constitution was reduced in length from 21,790 words to 19,203 words. This was a reduction of about twelve percent, but left the document about half again as long as the relatively new constitutions of Alaska and Hawaii or the 1947 New Jersey constitution.[10] The rejected New York constitution of 1967 would have been less than one-half the length of the current constitution. The Maryland constitution, which is to be voted on May 14, 1968, makes an even greater reduction, from 40,000 to 14,000 words. It might be added, however, that while Efficiency and Economy Movement reformers generally equated brevity with excellence in state constitutions, there is no evidence to support the argument that an inverse correlation in fact exists between quality of state government and length of constitution.

IV. Conventions and Commissions

If we set aside the constitutional conventions of the 1940's and

10. A. Sturm, Constitution-Making in Michigan 281-82 (1963).

those of Alaska and Hawaii, which had to meet as part of the procedures admission to the union, we could say that the first constitutional convention designed to meet with the particular problems of contemporary America was that held in Michigan in 1961 and 1962. This convention stemmed from the serious financial crisis that the state found itself in beginning in 1959. In the post-war years, Michigan had been the scene of sharp inter-party conflict between Republicans and Democrats. The state had constantly raised the standards of performance in expensive state programs of health, higher education, primary and secondary education, public welfare, and highways. The result was that by the mid-1950's it was clear that additional taxes would soon have to be levied. A deep and, as it proved, irreconcilable conflict arose between the Republican-controlled legislature and Democratic Governor G. Mennen Williams. During this period, the state's economy was also undergoing a change, largely as a result of the decentralizing pattern of the automobile industry. This movement had little relationship to Michigan's tax burden, but it was claimed by the Republicans that the Democrats were "driving business out of Michigan." (Actually, Republican legislatures had enacted all of the existing state tax laws.) Various efforts were made to break the impasse that developed and the calling of a constitutional convention was one of these.

In 1948 and again in 1958, Michigan voters had supported the calling of a constitutional convention by a majority vote, but not by a majority of those voting in the election, as was required by the constitution. Taking these earlier actions as indications of a desire for a modernization of the constitution and in consideration of the financial crisis, the Michigan Junior Chamber of Commerce and the Michigan League of Women Voters proposed to secure by initiative a constitutional amendment that would make it easier to call a convention. The proposed amendment would make it possible to call a convention by a simple majority of those voting on the issue. The proposed amendment would also help to overcome the opposition of the Democrats to the calling of a convention by modifying the basis for selecting delegates. The constitution of 1908 had provided that three delegates should be elected from each senatorial district.[11] Because the senate had undergone only minor changes in the drawing of its districts since the adoption of that constitution, the upper house was

11. MICH. CONST. art. XVII § 4 (1908).

seriously gerrymandered against the interests of the Democrats. The proposed change would provide for one delegate from each senatorial and one from each representative district. This arrangement, plus the probable low turnout in voting for delegates, made it virtually certain that the Republicans would control the convention. As a result, most Democratic and liberal leaders were opposed to the calling of a convention under the proposed conditions. Sufficient signatures were secured on initiative petitions, however, and the amendment was approved by the voters in November, 1960. Only about two-thirds as many voters marked their choice on this proposed amendment as voted for governor that year, however.

The formal question of calling a convention was then placed before the voters in April, 1961, with Democratic and liberal groups still largely opposed. The proposal passed narrowly, receiving only about fifty-one prcent of the vote. After the holding of a constitutional convention became a certainty, Democratic, labor, and liberal leaders belatedly sought to field a full slate of delegates and to generate support for delegates to a convention that they had not wanted to have meet. The result was that in a state in which about fifty-three percent of the voters lean toward the Democratic party, the Republicans controlled two-thirds of the seats in the convention.

The convention met in October, 1961, and completed its work on August 1, 1962. In November of that year, by a margin of only 50.2 percent, the voters approved the new constitution.[12]

The Michigan convention met and carried out its work in an atmosphere of severe political tension. Before the convention met, the Democrats had been maneuvered into a position in which they were largely being blamed for the state's financial crisis, the Republicans were in virtually complete control of the convention, and politically knowledgeable people recognized that George Romney intended to run for governor in the fall of 1962, with his chances of unseating the incumbent Democrat excellent. Even so, the Democratic position was not a hopeless one. The Republicans were badly divided. Indeed, the outcome of the convention would depend upon coalition building, because the delegates consisted almost of equal parts of urban Democrats, suburban-moderate Republicans, and small-

12. A. STURM, *supra* note 10. For an article in defense of the work of the convention, by a delegate who is a political scientist, see Pollock, *Opportunity in Michigan*, 52 NAT'L CIVIC REV. 139-45 (1963).

town, conservative Republicans. The Democrats were led by an international representative of the United Automobile Workers and an attorney for that union. The moderate Republicans were led by George Romney, and the conservative Republicans by the man who may have been the most skillful politician in the convention, former state treasurer, D. Hale Brake.

For a while, it appeared that a conservative Republican-Democratic coalition might take control of the convention. The small-town Republicans were essentially Jeffersonians in outlook, while the Democrats endorsed many Jacksonian views. In particular, the Democrats, having demonstrated that they were a majority party on statewide elections, favored retaining the long ballot. The Republicans from the rural counties and the Democrats also shared an interest in maintaining the existing local government structure, since they seldom came into direct conflict with one another. Nearly all counties in Michigan are non-competitive in that they are overwhelmingly committed to either one party or the other. Finally, however, Romney and Brake were able to work out a compromise in which Romney secured some of his goals for strengthening the executive branch and making an income tax possible, while Brake secured a preservation of the local government system, a conservative article on finance, and a provision prohibiting a graduated income tax.

The proposed new constitution was approved by the delegates by a vote of 98 to 43. Only five reform Democrats among the forty-five Democratic delegates voted for the new document. In contrast, ninety-three of the ninety-six Republicans supported it. Only three very conservative, small-town Republicans voted against it. Clearly, the proposed constitution was conceived of as a partisan document, and this was so largely because of the apportionment provisions which provided for equal representation in the House of Representatives, and for a Senate formula which would determine districts on a basis which would, on the average, give eighty percent consideration to population and twenty percent to area. This formula went a long distance toward an equal population formula, but because of the concentration of Democratic voters in a relatively few urban counties, had the effect of guaranteeing Republican control of the upper house. If the convention provision had been held after the *Reynolds* case of 1964, the outcome of convention provisions might have been quite different.

(The Republican leaders were concerned about the *Baker*[13] decision, which was announced on March 26, 1962, but they argued their plan would be upheld in the courts. It was not.[14]) In general, while the Republicans expected to win the governorship in 1962, they also wrote the constitution on the assumption that the Democratic party would normally control that office. But they also considered it probable that the Republicans would have almost an equal chance each time of controlling the lower house while always controlling the Senate. The assumption concerning the governorship may have been valid, but that concerning the legislature would certainly not have applied had the convention been held a few years later.[15]

V. Recent Conventions

In 1964, New Hampshire held its fifteenth convention under the constitution of 1784. This state probably has the oldest existing written constitution, although Massachusetts claims that honor by use of folklore which claims that the present relatively new constitution is actually only a modification of the constitution of 1780. The New Hampshire constitution has also been modified quite frequently, but the many conventions have never proposed sweeping changes that would lead one to interpret them as resulting in a new constitution.

In the 1964 convention, seventy-five changes were proposed by various delegates. The convention met for thirteen days in May and June of 1964 and finally submitted only seven proposed amendments. All of these were adopted. The principal ones provided for apportionment of the legislature on the basis of population, an increase in legislative pay, and the legalization of graduated taxes.[16]

In 1962, a Rhode Island Commission on the Revision of the State Constitution made numerous recommendations to the legislature, in effect proposing a new constitution to replace that of 1842. Although the recommendations of this commission were not directly accepted,

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13. Baker v. Carr, 369 U.S. 186 (1962).

14. Marshall v. Hare, 227 F. Supp. 989 (E.D. Mich.), *rev'd*, 378 U.S. 561 (1964).

15. Some conclusions in this section were drawn by the author while he served as a research consultant to the Michigan constitutional convention.

16. *See* W. Graves, *State Constitutions and Constitutional Revision* in 16 Council of State Governments, Book of the States 3-9 (1966). Much information for this article was drawn from various issues of the *New York Times* and the National Civic Review.

they became the basis for the calling of a convention which met in 1964.

In February, 1963, a Constitutional Revision Commission in Oregon submitted to the legislature a proposed new constitution to replace that of 1859. The commission, by a vote of fifteen to two, submitted a proposed constitution that would be one-half the length of the existing 26,000 word document. This proposal was heavily influenced by both the Efficiency and Economy Movement and the concern with civil rights that was characteristic of the 1960's. It proposed that the governor should be the only elected state executive, that there should be a classified civil service, that the number of executive departments be limited to twenty, that there be a unified court system, headed by the supreme court with judges selected according to the Missouri plan and that the judges be attorneys. Annual legislative sessions were called for. The bill of rights was to be strengthened by making more specific guarantees of the right of the writ of habeas corpus, protection against double jeopardy, and the right to counsel. This proposed new constitution was killed in the state senate by a vote of seventeen to thirteen, with a favorable vote of two-thirds (twenty) being required.

In 1963, a Commission on the Revision of the Kansas Constitution recommended that five of the state constitution's articles be amended. In that same year, Governor William Scranton of Pennsylvania urged, in a message to the legislature, that the state's eighty-nine-year-old constitution be revised. However, in November, by a close vote, the proposal for a constitutional convention was defeated. It lost by 40,000 votes out of 2,200,000 cast. Governor John H. Chafee of Rhode Island had better luck, however. His recommendation for an unlimited constitutional convention was approved by the legislature and the people. At least five governors that year recommended that conventions be held. A vote on a proposal for one in Nebraska, though, was lost in the state legislature.

A Constitutional Revision Assembly was held in Kentucky in 1964. It consisted of fifty delegates appointed by the governor, lieutenant governor, speaker, and chief justice of the Court of Appeals. Its task was to consider amendments to or a replacement for the constitution of 1891. Voters had rejected proposals for constitutional conventions made in 1931, 1946, and 1960. The assembly — an enlarged version of the constitutional commission — recommended a new constitution,

but the voters once again showed their conservative tendencies when they rejected it in November, 1966.[17] They acted in this manner even though the proposed new constitution retained seventy percent of the provisions of the old one. The proposal included changes to strengthen the judiciary by giving the state high court "general control over all other courts," and by strengthening the legislature through annual sessions, longer terms of office, and legislative salaries to replace per diem allowances.[18]

A Constitutional Revision Commission met in California in 1963 and 1964. It consisted of sixty-three delegates, twenty of whom were members of the legislature. The group was asked to advise the legislature concerning revisions of the constitution of 1879. This constitution is the second longest in the nation and has the second largest number of amendments. It is exceeded in these respects only by the constitution of Louisiana. Between the time of its adoption and the meeting of the revision commission, it was amended about 350 times and grew in length from about 16,000 words to more than 100,000.

The commission made extensive recommendations to the legislature for revision, most of which were accepted and subsequently approved by popular referendum in November, 1966. These far-reaching amendments provided for a general revision of the legislative, executive, and judicial articles, strengthening the power of the governor, and moving further toward a professional judiciary, bureaucracy, and even a professional legislature. In addition, some changes were made relative to taxation, most importantly to permit the state to base its income tax upon federal income tax returns.

A Rhode Island constitutional convention met on December 8, 1964, and did not finish its work until late 1967. This was the state's first unlimited constitutional convention in 122 years. It was concerned mainly with reapportionment, but also considered problems of legislative pay, the length of the gubernatorial term, and the possibility of establishing a state lottery to help produce state revenue. An early proposal was for four-year terms for state executive officers and legislators, but this was strongly opposed and the proposals were finally

17. The 1966 draft was prepared without adherence to the state constitutional provision for a convention, but the Kentucky courts held that the method adopted was valid because of the submission to the electorate. *See* Gatewood v. Matthews, 403 S.W.2d 716 (Ky. 1966), *noted in* 81 HARV. L. REV. 693 (1968).

18. Booth & Reeves, *Kentucky Unorthodoxy*, 55 NAT'L CIVIC REV. 310-16 (1966); 56 NAT'L CIVIC REV. 19 (1967).

withdrawn in favor of permitting the continuance of the existing two-year terms.[19] The convention consisted of one hundred delegates, seventy-four of whom had had education beyond high school. Among the total, forty-three were attorneys, nineteen legislators, and nine women. The proposed new constitution was to be submitted to the people as a single proposition and was to be voted on on April 16, 1968.

In 1965, eleven governors argued in their messages to the legislature for constitutional revision.[20] In addition to the limited Connecticut convention of that year, another limited convention was held in Tennessee. It first met on July 26, 1965, and finished its work in December. It recommended a proposal on apportionment and also that the office of lieutenant governor be abolished and that legislators receive a salary rather than a per diem allowance.

Maryland held a constitutional convention which first met on September 12, 1967, and completed its work on January 10, 1968. It submitted to the voters a proposed new document to replace the constitution of 1867. The draft is to be voted on on May 14, 1968. The new constitution would be a greatly shortened document. It would reduce the size of the legislature, allow the governor to reorganize the executive departments subject to legislative disapproval, establish the Missouri plan for the selection of judges, allow the legislature to set all state government salaries including its own, lower the voting age to nineteen, and prohibit racial discrimination.

A constitutional convention met in New York in 1967.[21] It was dominated by the Democrats, with the Speaker of the House serving as the presiding officer of the convention. The partisan character of the convention together with a decision to submit to the voters all but one item of the constitution as a single proposal produced even more opposition than did a similar situation in Michigan five years earlier.

The delegates sought to replace the 1938 constitution with a document that would contain a large number of basic changes. It was proposed to turn over the problem of apportionment to a five-man commission, to give the governor great flexibility in reorganizing the state administrative structure, and to eliminate the pocket veto. The

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19. 54 NAT'L CIVIC REV. 22 (1965).
20. W. Graves, *supra* note 16, at 6.
21. *See generally* Kaden, *The People: No!—Some Observations on the 1967 New York Constitutional Convention*, 5 HARV. J. LEGIS. 343 (1968).

most controversial proposal was one to repeal the so-called Blaine amendment, which prohibits state aid to parochial schools. The proposal was opposed by, among others, *The New York Times, The New York Post, The New York Daily News,* The League of Women Voters, The Citizens Union, and many Republican and Protestant leaders. The document did receive support from a number of important sources, led by Governor Nelson Rockefeller. It had the endorsement of the New York AFL-CIO and an ad hoc religious group, but it lost by a margin of three to one on November 7, 1967.

Although quite a number of constitutional conventions were held in the 1960's, they by no means represented the only basis for change in state constitutions. Large numbers of constitutional amendments were being voted on at nearly every general election. Thus in November, 1966, 381 state constitutional amendments were before the voters, of which 219 were non-local in character. Amendments were considered in thirty-nine of the fifty states.[22] (See Table 4.)

Recent state constitutional changes have centered upon legislative apportionment, of course. Following the *Reynolds* case, nearly all of the states were forced to consider the problem of legislative apportionment and in a great many this also required consideration of constitutional change. Developments relative to apportionment have received a great deal of attention, the literature is substantial, and it will not be reviewed here.[23] Commonly accompanying plans for immediate reapportionment were provisions for the future automatic reapportionment of legislatures or for the handling of the task outside the legislatures themselves. Provisions along these lines were made, for example, in the Michigan constitution of 1962,[24] the Connecticut constitution of 1965,[25] and the rejected New York constitution of 1967.[26] Quite commonly, the legislature is given first opportunity to reapportion according to acceptable formulas. If it fails to act, a variety of ar-

22. 56 NAT'L CIVIC REV. 18-22 (1967).

23. The following are among the best basic sources: G. BAKER, THE REAPPORTIONMENT REVOLUTION (1966); Dixon, *Reapportionment in the Supreme Court and Congress,* 63 MICH. L. REV. 209 (1965); LEGISLATIVE APPORTIONMENT (H. Hamilton ed. 1964); THE POLITICS OF REAPPORTIONMENT (M. Jewell ed. 1962); K. LAMB, APPORTIONMENT AND REPRESENTATIVE INSTITUTIONS (1963); Lewis, *Legislative Apportionment,* 71 HARV. L. REV. 1057 (1958); Lucas, *Of Ducks and Drakes: Judicial Relief in Reapportionment Cases,* 38 NOTRE DAME LAW. 413 (1963); REAPPORTIONMENT (G. Schubert ed. 1965).

24. MICH. CONST. art. IV, § 6.

25. CONN. CONST. art. 3, § 6.

26. N.Y. CONSTITUTIONAL CONVENTION, PROPOSED CONSTITUTION art. III, § 2 (1967).

TABLE 4. STATE CONSTITUTIONAL AMENDMENTS VOTED ON DURING NOVEMBER, 1966.

State	General		Local
	Voted on	Approved	Voted on
Alabama	1	1	5
Arizona	1	1	0
California	15	10	0
Colorado	5	4	0
Florida	11	11	2
Georgia	20	18	93
Idaho	6	4	0
Illinois	2	0	0
Indiana	1	2	0
Iowa	1	1	0
Kansas	3	3	0
Kentucky*	1	0	0
Louisiana	25	19	20
Maine	1	1	0
Maryland	11	9	5
Massachusetts	4	4	0
Michigan	1	0	0
Minnesota	1	0	0
Mississippi	2	2	0
Missouri	0	0	1
Montana	2	2	0
Nebraska	15	10	0
Nevada	1	1	0
New Hampshire	8	7	0
New Jersey	1	1	0
New Mexico	1	1	0
New York	10	8	1
North Dakota	3	1	0
Oregon	2	1	0
Pennsylvania	2	2	0
South Carolina	6	5	35
South Dakota	3	3	0
Tennessee	10	9	0
Texas	16	15	0
Utah	7	0	0
Virginia	1	1	0
Washington	7	7	0
West Virginia	5	0	0
Wyoming	6	5	0

*A proposed new constitution was rejected.
Source: 56 NATIONAL CIVIC REVIEW 18-21, 152 (1967).

rangements are provided, often including an apportionment commission. If administrative procedures fail, the final question is often left to the state high court. The courts in general, whether specifically authorized by state constitution or not, continue to retain jurisdiction over the question of fair apportionment.

Other tendencies that affect the legislative branch include a leaning toward annual sessions. This tendency became evident immediately after World War II when the population of most states increased and the workload on legislatures did so, too. Many states went to the annual session beginning in the late 1940's, often with the election-year session being considered a short session for budgetary purposes only. The tendency has been for the short session to become a regular session, however. In recent years, Kansas, New Mexico, and Oklahoma have moved to annual sessions. Such provisions were also called for in the rejected Oregon constitution of 1963 and the Kentucky constitution of 1966. Amendments toward the same end were rejected in 1966 in West Virginia and Utah, but it may be supposed that these will be proposed again, given the nature of the trends in volume of legislation and continually expanding demands upon government.

Another tendency has been toward allowing legislators to receive salaries rather than per diem allowances and for the legislators to set their own salaries. Such provisions were made, for example, in the Michigan constitution of 1962 and that of Maryland in 1948 (which permitted the legislature to determine salaries for all state employees and officials). Proposals to permit the legislatures to set their own salaries were rejected in Kansas in 1963, in Maryland in 1966, and in Kentucky in 1966. But the trend clearly was away from per diem allowances or constitutionally determined salaries.

Despite arguments that the requirement of equal representation on the basis of population in both houses of state legislatures make one house superfluous, there has been no trend toward unicameral legislatures. Proposals in that direction were given brief consideration in the Michigan and Connecticut constitutional conventions, but were rejected. Unicameralism received somewhat more serious consideration in Rhode Island, where it was supported by both Governor John H. Chafee and former governor Dennis J. Roberts. The delegates rejected the approach, however.

Terms of office of legislators as well as of executive officers have

been increasing in recent years. The usual argument in favor of longer terms has been that public servants cannot tend to their increasingly complex jobs if they must be almost continuously on the hustings. Thus we find that the Michigan constitution increased the terms of constitutional executive officers and members of the senate to four years. North Dakota extended the term of executive officers to four years in 1964 and Idaho did the same that year for county sheriffs. Tennessee increased the term of office of senators in 1966 and Arizona increased county officers' terms in 1964. Wisconsin, Massachusetts, and Nebraska all have also recently made increases in terms of offices. The rejected Kentucky constitution of 1966 made similar provisions, but the Rhode Island constitutional convention, in 1967, rejected a proposal to change the term of office of state officers and legislators.

There has been some tendency toward repealing or at least liberalizing the limitation upon the number of consecutive terms a public officer can serve. In 1966, Louisiana modified its constitution so as to permit the governor to serve two consecutive terms. That same year, Oklahoma made the same change. West Virginia voters, however, defeated a proposal to allow the governor to succeed himself.

Legislative-executive relations have tended to be modified somewhat in the 1960's, particularly by a tendency to eliminate the pocket veto and to provide for or strengthen the item veto. The pocket veto was eliminated in Connecticut in 1965 and California in 1966 by providing for a recess at the end of the legislative session, with the legislators returning for a day or two subsequently in order to consider any gubernatorial vetoes. A similar provision was included in the rejected New York constitution of 1967. Connecticut, in 1965, raised the percentage of votes needed to overcome a gubernatorial veto from sixty to sixty-seven percent, while Kansas in 1963 amended its constitution in order to give the governor more time in which to veto items and thus to recognize the increasing volume of legislative business. California, in 1966, increased the power of the governor and, indeed, handed conservative governors a particularly powerful weapon, by providing that governors not only may veto items in appropriations bills, but may also reduce them. In light of the fact that gubernatorial vetoes in two-party states are rarely over-ridden, this may represent a very important change in the balance of political power. Another change in executive-legislative relationships took place in Massachusetts, in 1964, when the requirement that the executive council ap-

prove gubernatorial appointments was removed so far as most offices are concerned.

Changes in the executive branch have centered upon shortening the ballot by eliminating some of the elective state-wide officers, as was done in Michigan in 1962, Kansas in 1963, and as was proposed in the rejected Oregon constitution of 1963. Another tendency has been toward providing the governor with powers to reorganize the state administrative structure. The currently popular pattern is to provide that the governor may consolidate, divide, or modify agencies through transfers of functions, subject only to disapproval of a proposed reorganization through action by both houses of the legislature. Such authorization was provided for in the Michigan constitution of 1962, although it had existed in statute earlier, and in the Maryland constitution of 1968. The 1967 New York constitution also contained this feature. That constitution was defeated, but this provision was not controversial. In Connecticut, however, convention delegates in 1965 specifically rejected this approach to administrative reorganization.

The Massachusetts constitution of 1919 and an amendment to the Illinois constitution that same year restricted the number of administrative agencies that could exist in a single state. Twenty became the magic maximum. The idea was that no governor could oversee any more department heads and still keep reasonably well informed as to their activities. This belief reflected one of the maxims of public administration theory then in vogue, which held that the "span of control" of an administrator was limited and that if the number of separate agencies reporting to him were too many, he would not be able to supervise them effectively. This approach to supposed efficiency was endorsed by the Michigan constitution of 1962 and was placed in the Colorado constitution by a 1966 amendment. In addition, such a limitation was written into the proposed Oregon constitution of 1963, one that was rejected by the state senate.

Another trend in the executive branch has been toward requiring the governor and the lieutenant governor to run as a team, as do the President and Vice-President of the United States.[27] The argument in support is that this provides an arrangement whereby the person who succeeds to the governorship in the event of death, disability, or resignation would be more likely to share or approximate the ideology of his predecessor than would be the case if the lieutenant governor

27. *See* U.S. CONST. amend. XII.

were separately elected. A supplemental benefit was seen to exist in the fact that this approach also helps to shorten the ballot. Provision for such a "team" approach has been made in Michigan (1962), Kansas (1963), Hawaii (1964), Massachusetts (1966), and Wisconsin (1967).

The possibility of nuclear attack in the event of war has been a matter of concern for a large number of states in the 1960's. In an earlier age, it was necessary to provide for only one or two successors to the governor, but the possibility of a state capital being obliterated by a thermonuclear bomb has caused many states to modify their constitutions so as to establish a lengthy order of succession to the governorship, or to authorize the legislature to prepare such a list. In addition, these "continuity of government" provisions may authorize the government of the state to move, if necessary, to a location other than the state capital and to make other provisions for maintaining the government of the state. Such constitutional provisions have been adopted in Florida (1964), Georgia (1964), Massachusetts (1964), Montana (1966), New York (1963), and Pennsylvania (1963).

The judiciary has been moving toward more professionalization. The emphasis has been upon requiring all judges to be attorneys, the establishment of an intermediate level of courts between the trial courts and the high court of the state, and the adoption of some variation of the Missouri plan, so as to transfer control over the choice of judges from capricious, uninformed voters to the state bar associations. In state constitutional conventions, attorneys have been particularly numerous and they have been anxious to serve on committees on the judiciary. (In the Michigan constitutional convention, all but one member of the committee on the judiciary was an attorney.) They have generally favored both the abolition of the office of justice of the peace and the requirement that all judges be attorneys.

In the post-war years, the states have been plagued with tax problems. The solution to these has, however, been left largely to the legislatures. Relatively little new constitutional material relative to taxation has been added. A number of states have provided for modifications in the approach to the property tax and to methods of assessment and taxation. These have not, however, been of major influence upon state tax systems, although they have been important in the tax burden imposed upon specific individuals and firms. A few

states have tried to raise constitutional limits on the property millage rate. Kansas succeeded in doing so in 1963, but Wyoming rejected proposed amendments in both 1964 and 1966.

A number of states have adopted income taxes in the post-war period. Some of these have been based upon the provisions of the Federal income tax, so that when that tax changes in terms of such things as exemptions and deductions, so does the state tax. In some states, provision for this has been made by ordinary statute, but in others constitutional authority has been required. The voters of both California and Nebraska granted such authority in 1966. In searching for substitutes for taxes, some states have considered state lotteries, and a few have provided for them, as did New York by constitutional amendment in 1966.

With the increasing importance of metropolitan area government, one might expect that appropriate constitutional changes would recently have been made, but that is not the case. Michigan, in 1962, and Kansas in the following year, both made some provision for the general authorization of metropolitan area governments and the facilitation of intergovernmental cooperation. New Mexico, in 1964, granted local governments greater powers, and Michigan, in 1962, made a very weak provision for constitutional county home rule. And, in general, the enactment of local legislation by means of constitutional amendment has continued to decline outside the South and the Border States.

Considering the salience of the issues in the 1960's, one might expect that many constitutional changes would center on matters of civil rights and liberties. In fact, such provisions have been few. The Michigan constitution of 1962 provided for the establishment of a civil rights commission. Actually, however, the state and its municipalities already had authority to establish such commissions under the old constitution and there was nothing in the new constitution to prevent them from continuing. The provision was defended on the grounds that the issue was extremely important and hence should be included in the constitution, an argument that had been used often in the past to justify the placing of statutory law in the constitution. Michigan Republicans and Democrats vied with one another to make the strongest defense for this provision. Some of the delegates who had been strongest in their support of the proposition that the constitution should not contain statutory law supported this proposal. The

simple fact was that it was good politics in Michigan for each party to support civil rights provisions.

The Michigan constitution contained one other article on civil rights. This was one to broaden the controversial "stop and frisk" provision of the old constitution. Considerable doubt concerning the constitutionality of such a provision was raised as a result of the decision in the *Mapp* case,[28] which was announced by the United States Supreme Court while the convention was still in session. It was finally decided to leave the controversial section in the new constitution and let the question of its conformity to the United States Constitution be decided by the courts at a later time.[29]

The proposed Oregon constitution of 1963 contained several provisions to strengthen the state's bill of rights and the 1968 Maryland constitution added a specific section prohibiting discrimination on the basis of race. But few other provisions were new in the 1960's. The paucity of civil rights matters in state constitutions probably stems from the widespread assumption that matters of civil rights and liberties have now become essentially questions involving interpretation of the United States Constitution and that the basic questions and policies are beyond state control. State constitutional provisions in conflict with United States Supreme Court decisions, it is assumed, will be pronounced null and void and new trends will be set by the federal courts and Congress, rather than by the states.

The states have, however, adopted a number of constitutional changes relative to citizenship. The Maryland constitution of 1968 proposed to lower the voting age to nineteen. In 1963, Maine had lowered its to twenty. In contrast, the Michigan constitutional convention rejected proposals to lower the voting age and a proposed amendment to accomplish the same thing was rejected by the voters in 1966.

One of the most popular new constitutional provisions in the 1960's was one designed to recognize the high mobility rates of the American population by making special provisions for recent migrants to vote for President and Vice President. Most of these provisions greatly reduced the residence requirements for voting as they apply to persons moving from one state to another. In some cases, residence requirements were eliminated completely. Florida, Georgia, Michigan, New Jersey, New York, Oklahoma, Texas, and Washington all adopted

28. Mapp v. Ohio, 367 U.S. 643 (1961).

constitutional provisions on this subject. Connecticut (1964) and New York (1966) also reduced the residence requirement for voting for other offices. South Carolina, in 1966, finally got around to giving women full citizenship by permitting them to serve on juries.

Finally, the competition among states to secure additional industries has had some effect upon provisions in state constitutions. In a few cases, the rules concerning property taxes have been modified in order to try to make a state more attractive to industry. A few states have also recently provided for or liberalized existing provisions for industrial loans. Such changes were made in New York in 1966 and Ohio in 1965. Georgia, on the other hand, rejected a proposed amendment on this subject in 1966.

VI. Delegates and the Political-Career Ladder

The revival of constitutional conventions opened up a new route for career advancement in politics (one that may well have existed in earlier constitution-writing days). In Michigan, most legislators were opposed to the calling of a convention. Their primary objection probably stemmed from the threat reapportionment posed to them as incumbent office-holders, but many members showed no hesitation in admitting to the voter and to newsmen that the feared "con con" would provide free and favorable publicity to potential political rivals. Subsequent developments show that their worst fears were confirmed.

Of the 99 Republicans and 45 Democrats originally elected as delegates to the Michigan convention, 20 percent of the Republicans and 24 percent of the Democrats went on to other public offices between 1962 and 1964 (see Table 5). In addition, 9 Republicans (9 percent) and 1 Democrat (2 percent) tried one or more times for some elective office and failed. Still others — 8 Republicans (8 percent) and three Democrats (7 percent) — made unsuccessful primary election tries. In all, 29 percent of the Republican delegates and 31 percent of the Democrats sought elective office. Twelve of 29 Republicans and 10 of 14 Democrats succeeded. (The greater success of the Democrats is probably attributable to the fact that almost all delegates of that party were from safe districts, while many Republicans were from marginal districts.)

The pattern of results in this first state convention of the 1960's indicates that these sessions are functional for political purposes quite

apart from their powers to propose changes in the rules of the political game. Persons with political ambitions but no public office may be expected to join with reformers and the discontented in working for the calling of future state constitutional conventions.

TABLE 5. MICHIGAN CONSTITUTIONAL CONVENTION DELEGATES NAMED TO OTHER PUBLIC OFFICES, 1962-1964.

Kind of Office	By Election		By Appointment	
	Rep.	Dem.	Rep.	Dem.
U. S. Congress	1	1		
State				
Legislature	7	7		
Other	3		8	1
County	1	1		
Municipal		1		
	12	10	8	1

Source: MICHIGAN MANUAL (1963-64, 1965-66).

VII. SUMMARY

Developments in state constitutions during the last decade have been characterized by the following:

1) A new round of constitution writing has begun and is still underway. This search for new constitutions to fit new conditions is part of an old American tradition. It was brought about partly because of continuing trends toward a metropolitan, industrial (some argue, post-industrial) society, but probably for the most part because of court-ordered reapportionment, which went far toward removing the cause of the virtual moratorium on constitution writing after 1920, a moratorium imposed by rural and small-town legislators who feared loss of power through convention-imposed reapportionment.

2) Many states that have not held constitutional conventions or had a commission report since the *Reynolds* decision are considering doing so. More major revisions will be attempted in the next decade, given current trends.

3) Large numbers of amendments were voted on in the 1960's and considerable constitutional change has taken place even in states where conventions or commissions have not been active. The amend-

ments have followed the general trends indicated by states in which major revisions have been proposed.

4) Changes in state constitutions still are largely directed toward the goals of the Efficiency and Economy movement of two generations ago, concentrating upon professionalization of all branches of government rather than upon improving the responsiveness of state government to widespread popular demands and the major contemporary issues in society.

5) In general, recent amendments indicate that state government leaders are becoming increasingly aware of the need to participate in programs which are related to some of the problems of metropolitan, industrial America, but to the extent that state governments address themselves to contemporary social problems, they do so almost exclusively in joint efforts with local governments or, more likely the national government, or both. Few amendments or provisions of new constitutions of the last decade hint at the kinds of social turmoil that have been confronting our contemporary society.

Constitutional changes in the 1960's, it would appear, have concentrated upon making state legislatures more representative in terms of population, strengthening the leadership potential of the chief executive, professionalizing the bureaucracy, the judiciary, and to a lesser extent the legislature, and reducing the obstacles to electoral participation. The changes have not, however, reflected what appear to be the major concerns of the decade. That is, they show little recognition of the problems of civil rights and liberties or of the slums, the ghettos, and the nation's poor.

THE PEOPLE: NO! SOME OBSERVATIONS ON THE 1967 NEW YORK CONSTITUTIONAL CONVENTION

LEWIS B. KADEN*

INTRODUCTION

The chimera of simplicity and the spirits of 1787 haunt those who would revise a state constitution. The product of constitutional reform is expected to match the enduring ambivalence of the Federal Constitution, or at least to merit the praise afforded Thomas Jefferson by James Madison when he called the Virginia law revision a "model of technical precision and perspicuous brevity."[1]

It is a vision pursued only at the risk of disappointment. The New York state constitution, as the few who have traversed its 45,000 words can attest, fairly overflows with superfluous phrases, antique policies and duplicitous provisions that invite abuse.[2] From time to time critics demand a "simpler fundamental law" shorn of what they regard as statutory detail,[3] but the recited formula does not offer a program for reform.

The charter proposed by the ninth constitutional convention in New York was rejected by the voters on November 7, 1967,[4] follow-

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*A.B., Harvard College, 1963; LL.B., Harvard Law School, 1967.

1. 1 WRITINGS OF JAMES MADISON 288 (G. Hunt ed. 1910), *quoted in* Everson v. Board of Education, 330 U.S. 1, 31 (1947) (Rutledge, J. dissenting).

2. In 1959 the Temporary Commission on the Revision and Simplification of the Constitution (the "Peck Commission") put it this way in its first report:

> The New York State Constitution has literally gotten out of hand. It is no longer a clean-cut pattern for the structure of government, the control of official power, and the embodiment of public policies expressing the enduring purposes of the State.

FIRST STEPS TOWARD A MODERN CONSTITUTION, N.Y. LEGIS. DOC. No. 58, 2 (1959).

3. *See, e.g.*, N.Y. Times, April 5, 1967, at 32, cols. 1-8; April 11, at 34, col. 1; Sept. 27, at 46, col. 1; Sept. 28, at 46, col. 1.

4. The final vote, as reported in the *New York Times*, was 3,364,630 against and 1,309,197 in favor. Nov. 8, at 1, col. 8.

ing the pattern set by all but three of its predecessors since 1777.[5] It is perhaps not surprising that the process and those who participated in it have been severely criticized. What is more surprising is that amidst the criticism of this past convention and amidst the cries for a more pristine and slender charter there is so little discussion of the proper role of a state constitution, and the appropriate processes of state constitutional reform.

The recent experience in New York provokes some reflection on these matters. The purpose of this article is not to essay a detailed evaluation of the New York convention or the constitution it proposed. My intention is rather to offer in the light of that experience some observations on the place of a state constitution in our politics and the role of a constitutional convention in the process of reform. Now that some months have passed since the election day trouncing, it might not be untoward to request ever so softly that the unrelieved abuse apparently provoked by the vote in November not be the final judgment for the work of the convention. The proposals made by the convention might rather be the impetus for needed and vigorous exercise of the technique of popular lawmaking we call constitutional reform.

I. The Political Place of the State Constitution

> *Democracy is a charming form of government, full of variety and disorder.*
> Plato

The notion of a constitution made positive law by writing it down is, of course, an American contribution to political science.[6] It is a concept rooted in the colonial consensus that popular sovereignty was

5. The constitutions proposed by the Conventions of 1821, 1846 and 1894 were enacted by the people. In 1938 the convention submitted its work to the people in nine separate propositions, of which six were adopted. But, as indicated later in this article, the more substantial changes were rejected in the referendum. However, as Judge Weinfeld has recently pointed out, it is not entirely accurate to call the record of twentieth century conventions in New York a "heritage of failure." Letter to the Editor, N.Y. Times, Mar. 4, 1968, at 36, cols. 7-8, commenting on William J. vanden Heuvel's article, *Picking up the State Constitutional Pieces,* N.Y. Times, Feb. 24, 1968, at 28, cols. 5-8. I suggest in the course of this article that the value of the constitutional convention cannot be fairly determined by the referendum ballot, but that final judgment must await the official and public response in the years following the convention. Rather than being the final act of constitutional reform, the convention and the ratification ballot may well be the initial stage in a more extended process.

6. *See* C. Swisher, American Constitutional Development 9-20 (2d ed. 1954).

essential to public security, and that a tangible fundamental law was the best protection of the general welfare. In large part the revolutionary spirit was aroused by a shared resentment against parliamentary action encroaching on rights guaranteed by the colonial charters. Thus, the idea of a supreme law secure against legislative interference took hold, and it took on enduring form first in the state constitutions.

The early state constitutions were simply proclaimed by constituent assemblies convened in each colony at the suggestion of the Continental Congress to establish a form of government that would best "produce the happiness of the people, and most effectively secure peace and good order in the province, during the continuance of the present dispute between Great Britain and the colonies."[7] The first New York constitution was proclaimed by the delegates in Kingston on April 20, 1777.[8] Two states, Rhode Island and Connecticut, simply carried over their colonial charters as constitutions.[9] As these developments indicate, the distinction between constitution and legislative action was imperfectly understood until 1780 when the people of Massachusetts ratified by public ballot a charter proposed by the state constitutional convention.[10] For the first time the role of a constitution as the province of the popular will acting to structure and limit the forms of representative government was made clear. This novel development was underscored in Massachusetts by the fact that the normal property requirements for suffrage were set aside in the selection of delegates and the final ratification, and the ballot was entrusted to all free males in the state.[11]

In this experience the pattern for future constitutional development was set. A constitution was to be the work of the people, establishing

7. *Quoted in* D. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 408 (1965).

8. N.Y. CONSTITUTIONAL CONVENTION, CONSTITUTION OF THE STATE OF NEW-YORK (1777).

9. *See* 1776-77 RHODE ISLAND LAWS 22-26 (An Act repealing an Act entitled, "An Act for the more effectually securing to his Majesty the Allegiance of his Subjects, in this his Colony and Dominion of Rhode-Island and Providence Plantations" . . . .) (1776); 1 F. HOUGH, AMERICAN CONSTITUTIONS 153-54 (1872).

10. *See* Goldings, *Massachusetts Amends: A Decade of State Constitutional Revision*, 5 HARV. J. LEGIS. 373 (1968).

11. On the Massachusetts Convention of 1780 see D. BOORSTIN, *supra* note 7, at 409-412; R. BROWN, MIDDLE CLASS DEMOCRACY AND THE REVOLUTION IN MASSACHUSETTS, 1780-1791 (1955); S. Morison, *The Vote of Massachusetts on Summoning a Constitutional Convention, 1776-1916*, MASS. HIST. SOC. PROC. L. (April, 1917) 241-249 and *The Struggle over the Adoption of the Constitution of Massachusetts, 1780*, MASS. HIST. SOC. PROC. L. (May, 1917) 353-411.

the framework of their government. And so it has continued. Because constitutional reform and revision is popular lawmaking its frequent exercise at the state level is not necessarily proof that the charter provisions are defective. Instead, vigorous reform may be an indication of a concerned and vital electorate.

This is the background for inquiring into the role of a state constitution. It is essentially the people's charter; and the people play a more significant part in the procedures by which it is altered than they do in more commonplace legislative proceedings. The guiding principle in reform is that the constitution measure the limits of public distrust, for in the basic charter of state government the people will make those political decisions they choose to withhold from the legislators. By placing a provision in the fundamental law, the people put it as far beyond alteration as they can within the political system; the subject matter they choose for constitutional status is effectively removed from the ordinary struggles of faction and party in the legislature. Thus, it is fair to say that the written constitution and particularly the process of constitutional revision are the most democratic of our political institutions. The constitution and the constitutional convention were created in the early days of the nation out of a felt need to establish the popular sovereignty and limit the popular representatives. Without attempting a thoroughgoing evaluation of how this original understanding has been altered in nearly two centuries of constitutional reform, I think it is possible to review in cursory fashion the proposals of the 1967 New York convention and suggest some purposes served by popular lawmaking through constitutional revision today.

A. The Structure of Government

For forms of government let fools contest;
Whate'er is best administer'd is best.
Alexander Pope

The first function of a state constitution is to establish the institutions of government for the state, and to set the framework for the exercise of executive, legislative and judicial power. Commonly, the qualifications and terms of service for public officials as well as the general description of their responsibility are set forth in the constitution. In New York and throughout the country, one principle has been regarded as fundamental since the 1770's — that any constitution in-

clude restraints on the intermingling of responsibilty to make, enforce and interpret the laws — out of a recognition based on experience of the tendency to abuse inherent in an overconcentration of political power. But with each succeeding convention new demands of changing political conditions raise new questions concerning the organization of government.

The 1967 convention in New York devoted considerable attention to proposals in this category. Questions of the apportionment of voters into electoral districts arise in nearly every state constitutional convention. The 1967 convention was called partly in response to the decision of the Supreme Court in *Reynolds v. Sims*[12] where the rule of apportionment solely on the basis of population was held applicable to both houses of a state legislature. As a result of this and other decisions New York was obliged to draw new, compact and equally apportioned districts for congressional as well as state legislative elections. The proposed charter would have applied the same population standard to local and county governmental bodies,[13] a revision that not surprisingly provoked considerable political opposition. Another proposal would have established a special commission to reapportion the state's congressional districts to meet the "one man-one vote" standard.

In another significant proposal the convention would have authorized the state court of appeals to create new lower court judges by certification to the legislature, and provided that the measures certified would become operative unless the legislature took affirmative action to modify the proposal within a specified time. Proponents of this measure saw it as facilitating a much needed expansion of the state's judicial system. More sweeping reforms of the judiciary article, including efforts stimulated by Governor Rockefeller and several bar committees to replace the elective process of selecting judges with some appointment procedure, were unavailing. Also, suggestions to authorize a major reorganization of the executive department of the state, and to increase the term for state senators from two to four years were urged on the convention delegates without success.

These are but a sample of the variety of provisions establishing the

12. 377 U.S. 533 (1964). In Wesberry v. Sanders, 376 U.S. 1 (1964), decided four months before *Reynolds*, the Court had found a justiciable challenge to congressional districts.

13. *Cf.* Avery v. Midland County, Texas, 406 S.W.2d 422 (Tex. Sup. Ct. 1966), *vacated and remanded*, 36 U.S.L.W. 4257 (U.S. April 1, 1968).

basic structure of government that may warrant inclusion in the constitution if accepted by the general community.

B. The Security of Personal Rights against Official Power

> *No man's life, liberty or property are safe while the legislature is in session.*
>
> Gideon J. Tucker
> Surrogate of New York Co.
> (1868)

As the forum of popular politics, a constitution commonly includes limitations on public action that are imposed to secure personal interests. In the federal experience it was quickly seen during the ratification process that the failure to provide protection for the individual against public assault and infringement of his rights was the most basic defect in the Constitution, and accordingly the Bill of Rights was added to the charter by the first Congress. It may be suggested that the application of the guarantees of the Bill of Rights to the states in recent years has left comparable provisions in state charters superfluous. But this argument ignores the capacity for innovation that is so important to the proper workings of a federal system. Although he spoke of concerns in a different area, Justice Brandeis' comment is no less pertinent in a time of great concern with personal liberty. Dissenting in a case where the majority struck down a state regulation of ice manufacturing under the due process clause of the fourteenth amendment, Justice Brandeis noted that "one of the happy incidents of a federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[14] The guarantees of equality and liberty in that amendment define the minimal protection for personal interests required of the states; but there should be no limit to the respect for individual liberty one state finds tolerable to demand of its officials.

One state may more readily than the whole nation extend its constitutional requirements to afford all the freedom for the individual that is compatible with social ordering. As the government becomes involved in a broad array of activities, it becomes ever more important that the state's fundamental law manifest the highest regard for per-

14. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (dissenting opinion).

sonal liberty. A particular contribution can be made through state constitutional reform in extending protection to the individual's interest in solitude against what Professor Fried has called "the purely fortuitous intrusions inherent in a compact and interrelated society."[15] Scientists have in recent years refined an immense variety of devices that are capable of tracking a person's movements and conduct, or even of monitoring his body functions.[16] In the same period an expanding group of public and private agencies have created a substantial industry based on accumulating information on the details of personal life. The new technology, expanded government action, crowded cities and public frustration that attends these developments make necessary the articulation of basic safeguards of individual integrity against infringement by the general community. In the popular lawmaking of constitutional reform the people have the opportunity to establish this protection and put it in the most enduring political form.

The 1967 convention made some efforts in this direction. In addition to proposing an expansion of the right to jury trial in criminal cases to include misdemeanors,[17] the convention also tightened controls on electronic surveillance by adding eavesdropping to the present prohibition of wiretapping except under court order.[18] The delegates rejected a recommendation of the special committee on constitutional reform established by the Association of the Bar of the City of New York to change existing state case law by providing that evidence obtained in violation of the state constitution be excluded from use as evidence at trial.[19]

Perhaps most interesting was the proposed inclusion in the revised Bill of Rights of this section:

> Any citizen of this state shall have the right to maintain a judicial action or proceeding against any officer, employee, or instrumentality of the state or a political subdivision

15. Fried, *Privacy*, 77 YALE L. J. 475 (1968). Professor Fried has written an interesting and useful discussion of the political and social underpinning for the legal concern with the right to be left alone.

16. *See* Note, *Anthropotelemetry: Dr. Schwitzgebel's Machine*, 80 HARV. L. REV. 403 (1966).

17. *Cf.* Duncan v. Louisiana, 250 La. 253, 195 So.2d 142, *prob. juris. noted*, 389 U.S. 809 (1967).

18. N.Y. CONSTITUTIONAL CONVENTION, PROPOSED CONSTITUTION art. I, § 4(b) (1967).

19. ASSOC. OF THE BAR OF THE CITY OF N.Y., REPORT OF THE SPECIAL COMMITTEE ON THE CONSTITUTIONAL CONVENTION, *Bill of Rights* 5 (April, 1967).

> thereof, to restrain a violation of the provisions of this constitution or the constitution of the United States, including unconstitutional expenditures. . . .[20]

With the expanding activity of government, the problem of affording all persons adequate access to court for the purpose of challenging official conduct becomes of paramount concern. Recognition of the importance of securing easy avenues of challenge to government action has appeared recently in several forms. It is a factor present in cases applying the equal protection clause of the fourteenth amendment to assure that important privileges are not denied on the basis of economic condition.[21] And the question has arisen with new vitality in cases challenging standing limitations that bar access on the ground of insufficient or remote interest.[22] The proposed amendment would make clear that where the official action raises a substantial question under the constitution, citizenship itself gives sufficient interest to afford a right of challenge. Behind this recognition lies a sense that more ready access to challenge official activity will improve the process of government as well as more effectively secure individual interests. The proposal indicates the type of innovation to extend individual freedom that can be achieved through state constitutional reform.

C. The Coordination of Responsibility among State and Municipal Governments

> *Hell is a city . . .*
> *A populous and smoky city.*
> P. B. Shelley

A third purpose served by the state constitution is to allocate power and responsibility between the state governments and subdivisions of the state. This is perhaps the most critical challenge to the invention and imagination of constitutional reformers today. No issue is more crucial and no problem more imposing than that presented by the conditions, physical and social, of urban centers, and the mere size and compactness of New York City tends to magnify the scope of that range of urban ills in New York State.

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20. N.Y. CONSTITUTIONAL CONVENTION, PROPOSED CONSTITUTION art. I, § 2 (1967).
21. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia State Board of Elections, 383 U.S. 665 (1966).
22. *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923); Flast v. Gardner, 271 F. Supp. 1 (S.D.N.Y.) (three-judge court), *prob. juris. noted*, 389 U.S. 895 (1967).

The capacity to deal effectively with urban problems requires proper utilization of the resources and energies of all units of government. If state and local powers are to be coordinated with the federal assistance programs it is essential that the framework of responsibility within the state be established in advance and that the principles by which power is allocated — what sociologists call the explicit value premises of divided responsibility — be made more enduring than would be the situation if left to legislative action.

The allocation of power is not achieved by simple repetition of slogans like 'home rule'. Whether the problem involves the control of crime, the provision of better housing, plans for physical redevelopment of the community, air pollution, attracting industry, job training or public assistance, the immense difficulties cannot be overcome without the concern and participation of all levels of government. The most fundamental issues of taxing power, primary responsibility for program development and administration, and facilitation of cooperation among governmental units should be the subject of constitutional provisions. It is of course essential that the governmental units organized under the constitution have sufficient flexibility to adapt their form to meet new problems. To deal with transportation or pollution, some type of metropolitan or regional administrative unit might be appropriate; for education the proper focus might have to be on the neighborhood community; and efforts to rebuild slums or develop sound family policies require the coordinated resources of city, state and federal governments. It should be apparent that the challenge to constitutional lawmakers in this area is of the greatest complexity and importance. But there are some basic questions that can guide constitutional development in the area of local government. How can the initiative of local governments be stimulated to develop new techniques and meet new responsibilities? How can state activity be directed to matters of significance to the entire state, and not diverted to problems of basically local concern? To what extent should the state be given power to override local action? How can cooperation among various subdivisions of the state be facilitated so solutions to each problem can be developed and administered by the most appropriate political unit.

The traditional approach to these problems has been to assume that local governments have only that measure of power delegated

them by the state.[23] Although the New York Constitution has gradually expanded the range of subjects open to local initiative, the prevailing assumption has inspired a strict judicial construction of the delegation. At the same time, the courts have given a broad berth to action by the state legislature superseding local laws.[24]

Several commentators and committees have suggested inverting the assumption through adoption of a simple local government article in which local governments are granted full legislative power subject only to specific withdrawal by the state legislature.[25]

The 1967 convention essentially retained the present article of local government which has been seriously criticized since its adoption in 1963.[26] The present Article IX guarantees to the local unit power to "adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."[27] The constitution also delegates power to local governments to act in ten specific areas including "the government protection, order, conduct, safety, health and well being of persons

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23. *See generally* Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311 (1954), 55 COLUM. L. REV. 598 (1955); Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145 (1966); and a series of thoughtful articles in 30 LAW & CONTEMP. PROB. 1-229 (1965).

24. *See generally* Adler v. Deegan, 251 N.Y. 467, 167 N.E. 705 (1929); Browne v. City of New York, 241 N.Y. 96, 146 N.E. 211 (1925); County Securities, Inc. v. Seacord, 278 N.Y. 34, 15 N.E.2d 179 (1938). 1 J. DILLON, MUNICIPAL CORPORATIONS § 98 (5th ed. 1911).

25. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION § 8.02 (6th ed. 1963):

> A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied to counties or cities generally, or to counties or cities of its class, and is within such limitations as the legislature may establish by general law. This grant of home rule powers shall not include the power to enact private civil law governing civil relationships except as incident to an exercise of an independent county or city power, nor shall it include power to define and provide for the punishment of a felony

26. *See* Grad, *The New York Home Rule Amendment—A Bill of Rights for Local Government?*, 14 LOCAL GOV'T LAW SERVICE LETTER, June 1964, at 6; Lazarus, *Constitutional Amendment and Home Rule in New York State*, 152 N.Y.L.J., Oct. 13, 1964, at 1; Hyman, *Home Rule in New York 1941-1965: Retrospect and Prospect*, 15 BUFFALO L. REV. 335 (1966).

27. N.Y. CONST. art IX, § 2(c). The cases since 1963 have not clearly defined the standard of consistency. *Compare* Wholesale Laundry Board of Trade, Inc. v. City of New York, 43 Misc.2d 816, 252 N.Y.S.2d 502 (Sup. Ct. 1964) (state wide minimum wage law precludes New York City from establishing higher minimum wage) *with* McMillen v. Browne, 40 Misc.2d 348, 243 N.Y.S.2d 293 (Sup. Ct. 1963) (state public works laws did not preclude a city from setting minimum wage requirements in its regulations governing bidders for city contracts).

or property."[28] Within the jurisdiction, but in the Statute of Local Governments enacted pursuant to Article IX in 1964, the state seems to have withdrawn all power outside the traditional limits of property, affairs and government.[29] In any case the experience since 1963 leaves the status of local initiative unclear in New York, and the 1967 convention did little to clarify this most critical area. Immediate study of the various proposals is required so that the local government article can be effectively revised. It should be apparent that in every area of urban affairs neither the state nor the local community has a sole claim to concern. The recent proposals of Governor Rockefeller for a state program to rebuild the slums and state assistance in combatting narcotics addiction crimes make clear the joint interest while Mayor Lindsay's objections indicate the need for constitutional clarity in allocating responsibility and facilitating proper coordination of governmental effort.[30] Some principles are generally accepted. It would not seem practical or wise to attempt a specific delineation of jurisdiction. On the one hand there is scant justification for any inhibition on the exercise of local initiative to develop new programs, provide additional services, or experiment with new methods of raising revenue to meet the local share of the costs of programs to combat deteriorating conditions in the cities. It is equally clear, however, that the state must be permitted to act if the local government requests assistance or if the local officials are unable to deal effectively with a particular situation. Although state authority may be confined, the state power of supersession cannot practicably be eliminated. And intergovernmental cooperation must be facilitated — where a specific problem adapts to regional or metropolitan solution there should be no constitutional barriers to realignment of legislative power.

The most pressing assignment for constitutional reform in New York is to meet this basic problem, and to create a local government

28. N.Y. CONST. art. IX, § 2 (c) (10).

29. N.Y. STAT. OF LOCAL GOVERNMENTS § 11 (4) (McKinney 1966), enacted pursuant to the revised Article IX, provides:

> The legislature hereby excludes from the scope of the grants of powers to local governments in this statute and reserves to itself the right to enact any law described in this section notwithstanding the fact that it repeals, diminishes, impairs or suspends a power granted to one or more local governments in this statute:
>
> * * *
>
> 4. Any law relating to a matter other than the property, affairs or government of a local government.

30. *See* N.Y. Times, March 7, 1968, at 1, col. 8; *id.*, March 8, 1968, at 1, col. 2.

article that will provide the structural requirements government must have to deal with the urban crisis.

D. Fundamental Principles and Policies

Confound their politics, Frustrate
their knavish tricks.
God Save the Queen

A state constitution can include provision for the principles and policies of government that are most fundamental to the people. In this respect the function of state constitutionalism is sharply different from the federal charter. The Federal Constitution articulates the full extent of limited power available to the federal government. Its enduring vitality has rested on the very ambiguity of those grants. No one in 1787 could have described the range of authority encompassed in the grant of power to pass those laws deemed "necessary and proper", nor could any of the delegates in Philadelphia have imagined the scope of power included in the authority to regulate "commerce" among the several states, and no one today would venture to predict the limits of due process or equal protection as they might develop in the next decade.

The provisions of the Federal Constitution were essentially the states' protection against the uncertain national power. At the time no one could say with assurance whether what had been formed in the process was a national union or a league of states. Some principles such as the separation of powers among branches of the government were firmly resolved at Philadelphia. Other questions, including the choice between equal state representation in the national legislature and representation by population, were compromised. But many areas of potential division and sharp disagreement were prudently sidestepped. Most important the document produced by the convention did not clearly answer the basic question of the division of power between national and state government. If it had done so without equivocation the likelihood of ratification by states as diverse as Georgia and New York, and of approval by both John Adams and Thomas Jefferson would have been seriously diminished. The Federalists sought to secure enough national power to protect against a subsequent political victory by the Jeffersonians, but their document

had to be of sufficient ambiguity to ease the course of ratification.[31]

The state experience is quite different. Here, the charter offers more explicit protection of the people's interest against the action of their representatives. The revision process is less arduous; indeed, the frequency of amendments has been cited as an indictment of the state constitution for inadequate durability. But each amendment presents an opportunity for direct public involvement in the political life of the state. This does not mean the people easily make fundamental changes, or that they readily swerve from one form of government to another. But continuing constitutional reform gives the public a forum for political expression more directly than is available through the legislative process. In particular by revising the constitution the people have the chance to indicate public acceptance of novel measures at a time when legislative passage can not realistically be expected. In some situations public impetus for action will be inadequately transmitted to the legislature either because the public pressure is diffused as is the case with programs to expand assistance to the poor, or because it is opposed by a particularly effective interest group, a problem that arises, for example, in proposals for stricter regulation of public utilities.

There must, of course, be a fair balance drawn between the trust implied by a spare constitution and the distrust of legislative action that inspires the "statutory detail" in a constitution. But the problem of state constitutionalism is not resolved by demands for a constitution of absolute trust or "enduring principles." It should be clear that the people act imprudently if their constitutional "laws" shackle the legislature in its efforts to further desirable social purposes or implement acknowledged fundamental values of equality, liberty or opportunity; and that the public cannot be encouraged in any design to impose the majority's fears or feelings on a minority. This risk is as serious in government by referendum as in any representative scheme. We know from last Term in the Supreme Court that at some point public action by constitutional lawmaking to remove an area from legislative power raises a question of propriety under the fourteenth amendment. This was the issue presented when the California electorate placed a constitutional obstacle before efforts to gain legislative support for un-

31. Professor McCloskey makes this point in THE AMERICAN SUPREME COURT 5 (1960): "this congenial result [approval of the Constitution by both Adams and Jefferson] had been achieved not only by compromise but by forbearance."

biased access to housing. In *Reitman* v. *Mulkey*[32] the Court held that this public barrier to political action so involved the state in private discriminatory acts as to subject private persons to the constraints of the fourteenth amendment. Behind this ruling lay a recognition that access to housing is too significant for the Negro to place any extraordinary political roadblock in the path of his efforts to get legislation facilitating his search for a place to live. The result is that the Federal Constitution prohibits the people of the state from altering the state political process if the result of the alteration is to make political action more difficult in some area where the individual interest is protected against state infringement. Thus, Proposition 14 could be struck down without holding that the state had an obligation to guarantee access to housing without regard to race — the very permanence of constitutional reform was the source of the defect under the Federal Constitution.

The converse of this point is that some programs are so fundamental or so easily jeopardized that they merit inclusion in the state's most enduring law whenever public support for reform can be mobilized. Other policies or programs, though they take the form of principles of government, should not be put outside the legislative process. The present balance in the state constitutions, and particularly in New York, is subject to question. Through the nineteenth century public fears of official mismanagement with public funds led to inclusion in the state constitution of complex restraints on the state and local power to tax and incur debts. But as the range of government activities has expanded in the last thirty years these limitations have been a constant obstacle to the flexibility in fiscal matters necessary to meet governmental responsibility.

Today the most hopeful avenue of constitutional reform lies in the opportunity presented for the people to require more expeditious and extensive development of social services than is reasonable or prudent to expect from the leisurely processes of constitutional adjudication in the federal courts.[33] The battles of the 1938 New York convention

32. Reitman v. Mulkey, 387 U.S. 369 (1967); *see* Black, *Foreword: "State Action", Equal Protection and California's Proposition 14*, 81 HARV. L. REV. 69, 76 (1967).

33. The potential for Congressional action under section 5 of the fourteenth amendment to secure equality and expand the protection afforded individual liberty has been emphasized by the Court and in comment recently. *See* United States v. Guest, 383 U.S. 745, 762, 782 (1966) (separate opinions of Clark, J. and Brennan, J.); Cox, *Foreword: Constitutional Adjudication and the Promotion of*

were fought to determine the appropriate line between public and private responsibility, and the amendments adopted by the people included new authorization of public expenditures in areas of previously private concern. As the range of government activity had increased in the 1930's the people had come to accept that the government can and should be involved in a variety of programs of social benefit, and the constitution was amended to authorize public contributions to health insurance, school transportation, public operation of mass transit facilities in New York City and similar measures. Now in the last third of this century there is a new awareness that the piecemeal and voluntary assistance offered the poor through New Deal programs is insufficient to deal effectively with social problems of contemporary magnitude, and that there is a much greater public responsibility to assure equality by a genuine attack on social ills including family instability, joblessness, poor housing, and deficient education. No one any longer doubts the legislative *power* to develop a more effective range of social programs. But legislative power is quite distinct from legislative initiative. In the process of state constitutional reform lies the opportunity for transforming public acceptance of this responsibility into a mandate to the legislature. And as what Gunnar Myrdal calls the "American underclass" grows in numbers, the expectation grows that public impetus for these programs will be aroused before the legislature is moved to action. Further, confined within one state, adventurous experiments in social engineering can serve as models for an eventual national commitment. Of course, no substantial progress within the state is possible without financial assistance from the federal government, but there remains much that can be done within even the narrow limits of present financial limitations. The people's function as popular lawmakers offers the avenue of effective innovation for the public good.

The process of constitutional reform also provides a forum for public debate on state policy. By declaring legislative authority in an area where it might be doubted, or even by merely proclaiming the public interest in certain programs, the people use their political institution, the constitution, to influence their political representatives. The 1967 convention proposed a clear authorization of public loans

Human Rights, 80 HARV. L. REV. 91 (1966). Just as more vigorous legislative action in this area would be a healthy development, so a more active exercise of state power to extend the definition of liberty and equality would comport well with the continuing aims of federalism.

to private enterprise to assist in rebuilding slum areas. To the purist this is statutory detail or, worse, mere precatory surplusage, but it might serve to prod the legislature, and in effect to encourage such programs. By another proposal, the article on education would have directed the state to establish a system of higher education encompassing both public and non-public institutions by developing programs including free tuition, grants and scholarships.

In some areas principle and program are intertwined in one proposal. The recent convention proposed a change in the formula for distribution of state aid to elementary and secondary schools. In the present constitution the amount of financial assistance is basically a factor of pupil attendance; the convention proposed changing the index to pupil registration. Behind this apparently minor revision lay a bitter division between suburban and urban groups. The relatively higher income suburban communities benefit from the present formula, while the central city schools suffering from high registration and substantial truancy stood to gain a considerable increase in state aid had the proposal been adopted.

Another important proposal made by the convention also involved a mixture of principle and program and this issue dominated the attention of delegates and the public across the state. On August 16, 1967 the constitutional convention proposed repeal of section 3 of Article XI forbidding financial grants "directly or indirectly in aid or maintenance of any school under the control or direction of any religious denomination, or in which any denominational tenet is taught." This provision was placed in the constitution in 1894 at a time when the rapid growth of religious schools had created substantial pressure to prohibit all public expenditures for parochial education. The provision was popularly referred to as the Blaine Amendment although at the time of its incorporation in the constitution, James G. Blaine was neither alive nor a New Yorker. While a Senator from Maine, Blaine had proposed in 1876 an amendment to the Federal Constitution which would have prohibited a state establishment of religion and protected free exercise against state action, but this original Blaine Amendment had failed in the Senate after passing the House of Representatives.[34]

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34. With Everson v. Board of Education, 330 U.S. 1 (1947) the nonestablishment clause of the first amendment was applied to the states. Professor Freund has suggested that this bit of absorption need not have followed so automatically

In the New York Constitution the Blaine Amendment had been thought to protect the "wall of separation" between church and state against any erosion. In 1938 when the Court of Appeals struck down a law providing state supported bus transportation to parochial school children as an indirect aid to denominational schools in violation of Article XI, section 3,[35] a special exemption for transportation aid from the Blaine prescription was added to the constitution.

In 1967 the proposed repeal of Blaine initiated three months of religious dissension throughout the state; the battle was fierce and unseemly, and the wounds will not quickly heal. We were reminded, sadly, of Justice Frankfurter's explanation of the nonestablishment principle: "The Constitution prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflict of which the history of this country records some dark pages."[36] This is not the place to recount the campaign or assess the arguments on either side. It should only be noted that the inevitable polarization of views bore little relevance to the complex issues involved. The principle asserted by advocates of retention of Blaine was that the amendment served to bolster that "wall of separation." But although none can deny the critical importance of Jefferson's metaphor or the principle of religious freedom in our history,[37] the development of constitutional rules is seldom facilitated by oft-intoned

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the progressive inclusion of freedom of speech and free exercise of religion in the "liberty" secured by the fourteenth amendment. P. FREUND & R. ULICH, RELIGION AND THE PUBLIC SCHOOLS 8-9 (1965). *See* Cantwell v. Connecticut, 310 U.S. 296 (1939)

35. Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576 (1938); *see also* Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715 (3d Dept. 1922).

36. McCollum v. Board of Education, 333 U.S. 203, 228 (1948) (concurring opinion).

37. Jefferson wrote to the Baptists of Danbury, Connecticut:

> I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State.

16 WRITINGS OF THOMAS JEFFERSON 281-282 (1903). Professor Howe has suggested that the metaphor used by Jefferson to express an essentially political principle was in its origins designed to capture a principle basically theological, that the church required protection against worldly incursions into its domain. This was the notion behind Roger Williams' writing: "when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day." P. MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 89 (1953). *See* Professor Howe's interesting discussion in THE GARDEN AND THE WILDERNESS 5-11 (1965).

figures of speech.[38] The idea of nonestablishment is firmly rooted, as is the principle of free exercise. But the two principles of religious freedom may at times seem in conflict and in some circumstances the two branches of the religion clause may raise considerations pertinent also under the equal protection clause of the fourteenth amendment. Does the nonestablishment principle forbid transportation of parochial school children on state buses, or is that aid (however indirect the benefit, state payment surely aids the school) compelled by the free exercise or equal protection clauses?[39] Is the state compelled to grant pupils time from school to attend classes for religious instruction, or are such released time programs forbidden by the Constitution? Is it possible to include prayer reading in a public school program if attendance is voluntary and the prayer carefully drafted, or must the line be clearly drawn between devotional and objective exercises? How does the teacher determine when an "objective" study of humanism or a dramatic reading of a play takes on such devotional aspect that it is forbidden as an establishment of religion?[40] These and other problems have faced the Supreme Court, and the course of resolution is not eased by a locution.[41] In New York, after the constitutional convention had begun deliberations, the Court of Appeals in a 4-3 decision upheld a statute permitting school authorities to loan books to school children regardless of the school in which the child was

38. *See* Justice Reed's warning in McCollum v. Board of Education, 333 U.S., at 247 (1948).

39. *See* M. Howe, *supra* note 37, at 137-143.

40. These and similar questions are raised by Freund and Ulich, *supra* note 34, at 10-13.

41. *See* Cochran v. Board of Education, 281 U.S. 370 (1930) (financial aid in purchase of textbooks upheld against challenge considered under republican form of government clause; Court mention of child benefit theory); Everson v. Board of Education, 330 U.S. 1 (1947) (challenge based on nonestablishment clause to bus transportation aid rejected 5-4); McCollum v. Board of Education, 333 U.S. 203 (1948) (released-time program struck down because school facilities used for religious instruction); Zorach v. Clauson, 343 U.S. 306 (1952) (New York released-time program upheld because instruction took place outside school building); Engel v. Vitale, 370 U.S. 421 (1961) (school prayer reading with attendance voluntary impermissible under the nonestablishment clause); Abington School District v. Schempp, 374 U.S. 203 (1963) (no devotional exercises permitted in school). In *Engel* Justice Douglas who had voted with the majority in *Everson* questioned the vitality of that decision: "The Everson case seems out of line with the First Amendment." 370 U.S., at 443. *See* Snyder v. Town of Newton, 365 U.S. 299 (1961) (appeal dismissed) (bus transportation assistance does not violate the first amendment). *See also* P. KURLAND, RELIGION AND THE LAW (1962); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development I, II,* 80 HARV. L. REV. 1381 (1967); 81 HARV. L. REV. 513 (1968).

enrolled. In the majority opinion Judge Scileppi seemed to go beyond the child-benefit theory suggested to support state aid to transportation and school lunches, and put forth a standard that would prohibit aid only where the legislature acted with the specific purpose of assisting parochial schools.[42]

If the convention had proposed retention of Blaine without modification, it would have adopted this uncertain standard for testing collateral benefits. In addition to the principle of separation, serious programmatic considerations should have informed the choice. It is estimated that the existence of non-public schools with 450,000 students save New York City 500 million dollars in education costs each year.[43] At the same time, the diversion of state funds to parochial school children removes that much aid from the public educational system. Yet the question of collateral benefits was discussed during and after the convention in terms reminiscent of the anti-popery campaigns of the nineteenth century. Collateral aid to parochial school students may be politically and educationally wise or foolish, but it can be suggested that the point is not resolved by invoking old specters and familiar if latent anxieties.

I am suggesting only that the Blaine debate involved a range of issues of the greatest complexity, in terms of education policy as well as constitutional philosophy. But the public discussion on all sides was divisive and impassioned, designed not to expose to scrutiny the many facets of the problem, so much as to obscure them behind intense feelings and polar positions. There may be justification from time to time for such a debate, but it is vain to expect that other proposals will receive sufficient public attention along with ones in this sensitive area.

Finally, in the important area of state and local finance the 1967 convention proposed revisions that would have reduced restraints on the legislature, an example of popular law making contracting the the range of controls exerted by the public over the legislature. First, the draft constitution gave the legislature more flexibility by providing

42. Board of Education of Central School District No. 1 v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967).

43. Statement of Charles Silver, former president of the New York City Board of Education, Religious News Service, Aug. 4, 1967, at 14. *See also* N.Y. Times, Aug. 20, 1967, § 1, at 72, col. 3. In 1961 Senator Wayne Morse estimated that private schools reduce costs of public education by more than one billion dollars each year. 107 CONG. REC. 5208 (1961). These statistics are quoted in Giannella, *supra* note 41, at 573.

that bond issues could be authorized by action of two successive legislatures without the necessity of voter approval. Also, the ceiling on debt service costs was increased to 12% of state revenues, and the legislature was granted authority to raise this limit to 15% by referendum. As the difficulties of financing a broad range of services increase, the notion of vigorous restrictions on the power of state and local governments to raise funds and incur debt must be reevaluated in the continuing processes of constitutional legislation.

Thus, the state constitution serves four basic purposes: first, it establishes the form of government; second, it secures individual interest against official action, with the opportunity for innovation in protection for individual liberty more extensive than that afforded by the Federal Constitution; third, it sets the outline of responsibility allocated between state and local governments; fourth, the people have the opportunity to determine what principles and what programs are sufficiently important that they should be placed beyond modification by the legislators. In all these functions the state constitution offers a forum for popular participation in government that can be of considerable social benefit for the society.

II. The Procedures of Constitutional Reform: The State Constitutional Convention

> *Let me now . . . warn you in the most solemn manner against the baneful effects of the spirit of party.*
> George Washington

Under the New York Constitution there are two methods by which the state charter can be revised.[44] First, an amendment may originate in the legislature, and if passed by two successive legislatures, it will be submitted to the voters for approval. From 1938 to 1967 one hundred forty-nine amendments were placed on the ballot, and one hundred two of these were ratified. The alternative method of reform is the convention. The constitution provides that a question whether there shall be a constitutional convention must be submitted to the people every twentieth year. If the convention call is approved, the delegates are selected at the next general election, and the convention meets on the first Tuesday of the following April. There is no specified length to the assembly, but the convention is directed to submit

44. N.Y. Const. art. XIX.

any proposals to the voters at least six weeks before the date set for the referendum on ratification.

The role of the convention in constitutional reform in New York can only be appreciated if we look briefly at past experience. The first state constitution was proclaimed by the convention delegates on April 20, 1777, and the proposed charter thereby became the fundamental law of the state without any direct public action. The difference between general and constitutional law was not yet fully understood, but perhaps the more accurate explanation of the failure to submit the proposals to the people was that a referendum could not feasibly be conducted in the midst of battle. The one hundred four delegates to that first assembly were preoccupied with the fight against the British, and a majority of them was never in attendance at a convention session. Meetings were held intermittently for more than a year as the colonial leaders moved the convention site from New York to White Plains to King's Bridge, and on to Fishkill, Poughkeepsie and Kingston with the British in close pursuit. The final vote for adoption was 32-1 with Peter R. Livingston casting the dissent without explanation. The new charter was drafted essentially by three delegates, John Jay, Gouverneur Morris and Robert Livingston. Although the present constitution is more than fifteen times the length of their document, the framework of government established by them remains in force today. The second convention set an unsurpassed standard for inactivity — with Aaron Burr presiding, the convention met in 1801 for two weeks and adjourned after adopting five minor changes. Burr wrote to a friend that the work of the convention could as easily have been finished in six hours.[45]

The first convention to submit its proposals to the electorate was called in 1821, and the Vice-President of the United States, Daniel D. Tomkins presided over the assembly called because of public dissatisfaction with the Councils of Revision and Appointment that administered the civil service within the state. After seventy-four days the delegates proposed a new charter that abolished the unpopular councils and included a state bill of rights in the constitution for the first time.

In 1846 public finance and fiscal mismanagement generated the reform spirit for the first time in New York. Aroused by the insolvency and profligacy of several administrations, and in particular by the use

45. *See generally* S. SPALDING, NEW YORK IN THE CRITICAL PERIOD (1932).

of state credit to finance railroad and canal systems in New York, the people voted 6 to 1 to call a convention. With former Lieutenant Governor John Tracy in the chair, the delegates added 6,000 words to the constitution, for the most part in provisions designed to restrain fiscal policy and prohibit the gift or loan of state funds to private persons or corporations. In another proposal of continuing significance the convention revised the judiciary article to provide for the election of judges at all levels within the state court system.

The 1867 convention continued in session for more than nine months and its proposals were initially defeated by a substantial margin at the polls.[46] The defeat of the 1867 charter had been assured when the Democratic leaders issued a statement declaring that "the amended Constitution does not commend itself to the Democrats of the state, either by the motives in which it was conceived or the manner in which it was presented or by its intrinsic worth."[47] (One hundred years later the Republicans were to voice their objection to the work of the ninth convention in nearly identical terms.) In the 1870's after the passions aroused by the convention had subsided, citizen activity throughout the state initiated a period of substantial reform. These efforts were encouraged and provided direction in 1872 by Governor Hoffman's appointment of a distinguished committee to consider and coordinate the various proposals. Their recommendations were approved first by the legislature and then by the people in a referendum held in 1874.

The most recent convention to receive immediate public favor was held in 1894. Joseph H. Choate, who had recently returned from his post as Ambassador to the Court of St. James, presided over an assembly called to correct abuses of the use of patronage in public employment and to protect certain forest areas from destruction. The delegates responded by developing a classified civil service system covering most categories of public employment, and by proclaiming those forest preserves "forever wild." In addition, a provision declaring the state commitment to public and universal education was included in the constitution.

The 1915 convention foundered on partisan differences when the state's leading Democrats, Alfred E. Smith and Robert Wagner, Sr. urged the people to reject the proposed charter. Their opposition,

46. Amendments to the judiciary article were adopted by the voters in 1869.
47. *Quoted in* N.Y. Times, April 3, 1967, at 29, col. 6.

again duplicated among Republican leaders in 1967, was provoked by the reapportionment provision adopted by the convention.

In 1938 the state's leading political officeholders did not participate in the constitutional convention. The amendments proposed by the delegates were, however, attacked in one journal as a "hodgepodge of special legislation, crafty victories for reaction and a few grudging concessions to liberalism."[48] Nine proposals were submitted to the people and six were adopted, which for the most part as indicated above granted new authority for public expenditures or revised controls over the state's ability to incur debt. The three proposals that were rejected all involved structural changes in the government. Thus, a reapportionment proposal, an amendment to forbid proportional representation, and changes in the judiciary article were rejected. The latter included the most controversial matter before the convention. With the development in the 1930's of an expanded executive department and the creation of administrative agencies under executive supervision to administer new programs of social service, there arose demands from some quarters to control these agency determinations by providing for judicial review of administrative fact-finding as well as questions of law. A measure instituting judicial review was proposed by the delegates and decisively rejected by the voters. Professor Sutherland, writing shortly after the election, suggested that this campaign and the result indicated a public awareness and acceptance of the extension of executive authority to implement programs providing social services.[49] The voters also adopted an omnibus proposition including more than one hundred alterations in the constitution thereby engaging in an exercise praised by Sutherland as "constitutional legislation of considerable diversity."[50]

This comment is surely accurate, for popular lawmaking is the essential function of the process of constitutional elections reform. Because it would be cumbersome to give the people the initiative in proposing amendments,[51] a convention is called from time to time to coordinate public functions, and its work is submitted to the people.

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48. *Quoted in* vanden Heuvel, *Charter Convention, The Lessons Learned*, N.Y.L.J., Jan. 23, 1968, at S6.

49. *See* N.Y. CONSTITUTIONAL CONVENTION, RECORD 3134-3139 (1938).

50. Sutherland, *Lawmaking by Popular Vote*, 24 CORN. L.Q. 1, 5 (1938).

51. The California Constitution provides that an amendment to the Constitution may be initiated directly by petition signed by eight per cent of the voters in the previous gubernatorial election. CAL. CONST. art. 4, § 1.

It is tempting to emphasize the failure of the 1967 constitutional convention, to point to the partisan bickering or the inadequate leadership, the disorderly and interminable debates, the dissension caused by the public attention to the Blaine debate, and the ultimate repudiation of the convention work by 75% of the voters. But it is useful at the same time to recognize that a constitutional convention is a political meeting, and few political meetings evidence perfect order; that the convention did arouse great public attention to the public responsibility as charter lawmakers; that the constructive work of the convention need not be lost merely because the package charter was rejected.

In addressing the 185 delegates convened in the Assembly Chambers on April 4, 1967, the first day of the convention, Senator Robert F. Kennedy asked them to put aside partisan interests: "There is an honorable place for the class of party and interest, but that place is not here."[52] The advice, however sound, was offered too late for the process for the selection of delegates had ensured that the convention would be very much a place for the clash of party.

The constitution provides that three delegates be elected from each state senatorial district with fifteen delegates chosen at-large in a state-wide ballot. In the district elections, 88 Democrat-Liberals and 82 Republicans were sent to Albany for the constitutional convention. The balance of power was held by the fifteen at-large delegates. When thirteen Democrats were elected in the state-wide ballot the Democratic control of the convention was assured. It may be too much to expect that a convention called to reapportion the state could set aside party interests, but in the two years before the convention, efforts to assure a less partisan cast were made without success. In early 1966 a citizens committee proposed that one-third of the delegates be chosen without regard to public affiliation, but Governor Rockefeller rejected the suggestion.[53] Later Senator Kennedy suggested that the fifteen at-large delgates be given non-partisan designation with each party naming five of its outstanding citizens and agreeing on the final five. Again, the Governor, facing a difficult election campaign himself, rejected the proposal.[54] The result was to assure that the full convention representation would consist of per-

52. N.Y. Times, April 5, 1967, at 32, col. 7.
53. N.Y. Times, Jan. 21, 1966, at 18, col. 3.
54. N.Y. Times, May 6, 1966, at 50, col. 1.

sons with established ties to one party. The Governor was able to persuade Senator Javits and Judge Kenneth Keating to lead the Republican slate of at-large delegates; the Democratic list was led by former Mayor Robert Wagner. The defeat of the Republicans in November 1966 had the effect of ensuring that none of the major officeholders in the state would be present at the convention. The Governor, the one official with the knowledge and power to give direction to the convention is given no role, and in the 1967 convention his influence was seldom exercised.[55] Neither Senator Kennedy nor Senator Javits nor Mayor Lindsay participated in the convention proceedings. Other activities and a caution bred of historical and political sense motivated a passive role. The result was a partisan convention without the presence of those able to use the implements of political power most effectively.

This is not to suggest that a constitutional convention is a nonpolitical proceeding. To do so would be delusory. Popular lawmaking is no less political than the ordinary legislative process. But if the two are to be distinct it is essential that the ordinary partisan divisions be deemphasized in the procedures of constitutional reform, and that an effort be made to involve in the process distinguished members of the community who are not identified with one political faction. William vanden Heuvel, the Vice-President of the convention, has suggested that a simple change of seating the delegates without regard to party would have a beneficial if limited effect.[56] Federal District Judge Jack B. Weinstein has offered a more comprehensive proposal for ensuring that the public forum of a convention feel the influence

55. William J. vanden Heuvel, a Vice-President of the convention, has written that "the plain truth is that the present convention system does not give the governor a direct role and politically he would be ill-advised to seek the responsibility. The result is that the one official who has both the knowledge and the power to give the convention direction is left aside as an observer. No constitutional amendment in this century has passed to which the governor was opposed. And no constitution can ever pass with only his acquiescence because he, practically alone among state officials, has the levers in his control that can establish the popular support so vital to public approval. The full, active support of a governor does not assure passage of every constitutional reform; but without it, every chance is lost." N.Y.L.J., Jan. 23, 1968, at S6, col. 3.

56. Vanden Heuvel, who has assumed something of a role as a critical biographer to the convention, has suggested that a simple change in the seating at the convention, so that delegates were placed without regard to party designation, "might have permitted a communication that did not otherwise occur." *Id. See also* N.Y. Times, Feb. 24, 1968, at 28, col. 5.

of non-partisan spirits. In his model draft constitution[57] Judge Weinstein proposes that candidates for delegate be required to run without party designation, and that campaign advertisements not include mention of any party. In many cases the convention delegates elected might be the same as under the present system but it is Judge Weinstein's suggestion that partisan classification has no place in the process of constitutional reform. He suggests, too, that the election of delegates take place in a special election so that the public choice of these special representatives may be considered apart from the confusion of general campaigns for public office. These and similar suggestions deserve serious consideration. A constitutional convention is, and should be, a political forum in the sense that different interests and rival groups from the community are represented — it is inconceivable that useful reform could be achieved without fair representation from urban and suburban groups, from labor and management, from all economic groups. Representation of competing interests is part of any political process, particularly the political institution most responsive to public will. But party divisions are ill-designed to give the whole community a role in reform. The partisan bickering of the 1967 delegates can serve as the death rattle of party alignments in constitutional conventions.

Some reflections on the organization of a convention may also be offered based on recent experience. The President of the constitutional convention, Anthony J. Travia, did much to avoid the organizational infirmities of the 1938 convention. Thirty years ago the delegates groped their way in thirty-five committees, and an extraordinary amount of time was expended filling patronage positions on the staff. The 1967 convention established 12 committees on substance and three on style and arrangement. Each delegate had two committee assignments. Vanden Heuvel has suggested that future conventions should give each delegate but one area of primary concern. The substance of the work at constitutional conventions, as in the legislature, is done in committee. It may be that plenary sessions of the convention can be reduced in number, relieving the delegates and the public from the winded debates that have marked each convention. The verbosity of convention delegates is familiar from the press reports;[58] it

57. J. WEINSTEIN, A NEW YORK CONSTITUTION MEETING TODAY'S NEEDS AND TOMORROW'S CHALLENGES 162-165 (1967).

58. On at least one occasion the delegates' verbosity (in this case in debate on the proposed Bill of Rights) inspired some diversion. Marietta Tree, the former

leads inevitably to the strain and disruption of emotional outburst which the public has come to expect from constitutional conventions — at one point in the debate on the bill of rights, President Travia's gavel cracked the special walnut block attached to his podium, evoking memories of 1938 when Judge Crane threatened to adjourn the convention if other members of the bench insisted on conducting their personal feuds on the convention floor. It should not be forgotten that the proceedings of the 1787 meeting at Philadelphia were less than serene and that the frustration and disillusionment of last summer were not unique to constitutional lawmaking.[59]

It may also be likely that effective drafting of constitutional revision is possible only if the job is entrusted to a small group of delegates with instructions to transform the committee recommendations into appropriate language and consolidate the changes with other parts of the charter. The experience in New York as well as in the federal convention indicates that a large assembly is not equipped to produce a document of requisite precision and refinement.

Finally each convention faces the critical issue whether their work should be submitted to the people in one package or several propositions. Experience might counsel against the single submission. The likelihood of drafting a wholly new charter without provoking public dissension on any number of issues is not great. The decisive vote against the constitution proposed by the 1967 convention was not surprising. The failure to meet Mayor Lindsay's demands for new municipal taxing powers assured the opposition of many; the applica-

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member of the United States commission to the United Nations and a delegate-at-large, composed this verse for the benefit of her colleagues:

What would fill the breach
Is Freedom from Speech
Then we would not preach
Across the aisles but reach
For olive branches or a peach
And go to the beach
Arm in arm.

N.Y. Times, Sept. 22, 1967, at 49, col. 3.

59. *See generally* THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (M. Farrand ed. 1937). In 1787 George Washington wrote the following to an absent delegate, Alexander Hamilton: "I am sorry you went away. I wish you were back. The crisis is equally important and alarming. Our councils are now, if possible, in a worse train than ever; you will find but litle ground on which the hope of a good establishment can be formed. In a word, I almost despair of seeing a favorable issue to the proceedings of the Convention, and do therefore repent having had any agency in the business." *Quoted in* vanden Heuvel, *supra* note 55, at S1, col. 1.

tion of the population standard for reapportionment to local government was strenuously opposed by many Republicans; repeal of the Blaine Amendment split the state along ethnic and religious lines; and many other proposals added still more votes against the charter. In addition there is an inevitable public tendency to express their momentary resentments in votes against propositions placed on the ballot. It is sometimes said that 20% of the voters will vote against any proposal. If the objective of participatory democracy that lies behind constitutional reform in the states is to be achieved, the people should be given the opportunity to debate and consider each important provision on its own terms. It may be that the convention best serves its purpose by focusing attention on the constitution, making recommendations which then become the subject of public discussion in the years after the convention. Perhaps revised articles should be submitted to the voters after the convention recommendations are refined by citizen committees across the state. Vanden Heuvel has urged that there be a continuing committee of constitutional reform to provide a channel for public concern about their own lawmaking function.[60] The charter proposed by the 1867-1868 convention was rejected as decisively as the recent constitution, but the ballot was followed by the most productive period of constitutional reform when Governor Hoffman designated a committee to review the proposals of the convention. The same opportunity is presented now. As I have tried to suggest, some of the work of the 1967 convention was useful and productive. The public rejection of the revised charter need not require burial of all its proposals. In local government, finance and the judiciary the State of New York is much in need of constitutional reform. If the experience of this last convention gives rise to renewed activity and revitalized public attention to constitutional revision, its purpose will be well served.

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60. *Picking up the State Constitutional Pieces,* N.Y. Times, Feb. 24, 1968, at 28, col. 8:

> New York should have a permanent Constitutional Revision Commission, nonpartisan in nature, and grounded in the public's confidence by the statute and prestige of its individual appointments. Its mandate would be a continuing review and recommendation of constitutional changes and reforms. Its proposals should be presented directly to the people unless the Legislature disapproves by a two-thirds vote of its members.

Although vanden Heuvel's suggestion was that this commission might make it unnecessary to call another convention, it is possible, as I have suggested, that the two institutions of reform might complement each other.

Conclusion

We do well to remember in this context Walt Whitman's observation that "political democracy as it exists and practically works in America, with all its threatening evils supplies a training-school for first-class men. It is life's gymnasium not of good only, but of all."[61] In the periodic constitutional conventions we have an opportunity for developing the men and the institutions able to adapt the government to the changing demands of society. To make that process work requires not perfect decorum or high percentage of public approval. It demands only that public attention be aroused by the activity, that the clash be of legitimate interests and not established parties, and that the people be given ready access to the political institution that is most fully their own.

61. Democratic Vistas (1871) in 2 Complete Prose Works of Walt Whitman, at 85 (1902).

MASSACHUSETTS AMENDS: A DECADE OF STATE CONSTITUTIONAL REVISION

MORRIS M. GOLDINGS*

I. INTRODUCTION — THE STUDY OF STATE CONSTITUTIONS

In 1959 the Legislative Drafting Research Fund of Columbia University completed a two year study and published what was described as the second edition of the Index Digest of State Constitutions.[1] A significant fact concerning this publication is that the first edition of the work appeared no less than forty-four years earlier. To those practitioners of law and public administration for whom annual, monthly and weekly updating services have become a commonplace necessity, the apparent ability of state constitutional scholars to do without a revision of a major reference work for nearly half a century must seem almost incomprehensible.

The explanation for the comparatively small amount of intensive professional and scholarly interest in at least the basic study of comparative state constitutional provisions lies to a great extent in the nature of the state constitutional documents themselves. This can be proved, for anyone with the necessary time and patience, by reading the companion volumes published as part of the Columbia University project, a two volume verbatim compilation of the fifty state constitutions.[2] With some exceptions, the state constitutions are not notable as masterpieces of legal draftsmanship or literary style. Most are reflections of the periods in which the respective states formed or were admitted to the Union or, when an occasional state has undertaken a major revision of its document, the end product of scarcely remembered state historical, social and political events. Although generalizations are as dangerous in this area as any, it is surely defensible to suggest that the state constitutions as legal and governmen-

* Member of the Boston bar; A.B., Harvard College, 1957; LL.B., Harvard Law School, 1960.

1. LEGISLATIVE DRAFTING RESEARCH FUND, COLUMBIA UNIVERSITY, INDEX DIGEST OF STATE CONSTITUTIONS (2d ed. 1959).

2. LEGISLATIVE DRAFTING RESEARCH FUND, COLUMBIA UNIVERSITY, CONSTITUTIONS OF THE UNITED STATES (1962).

tal documents rarely, if ever, resemble "the ark of the covenant, too sacred to be touched."[3]

The significance of the state constitutional documents as symbols and part of the American political system is quite different. It is a commentary on the significance of the unique American contribution to the science of government — the written constitution and its necessary twin concept, judicial review — that each of the fifty state governments chose to establish a basic law in the form of a single document called a "constitution." No doubt the power of precedent and the requirements relating to the admission of new states dictated this course for the states following the original thirteen. Historians have for a long time explained the importance of the written document by the colonial charter background of the first states.[4] Notwithstanding all of these persuasive explanations for the consistency of written state constitutions, it is interesting to speculate on the possibility that a state might have followed the British example of establishing as its "constitution" not one document but a group of basic legal and governmental enactments, doctrines and traditions. Hamilton, it may be recalled, seemed to prefer that the bill of rights amendments remain unwritten.[5] Because of the product contained in the Columbia University studies, of course, this exercise must remain speculation. It is sufficient to suggest, however, that the development in America of the traditions of the common law and judicial review have made the differences between written and unwritten constitutions less significant than might have been anticipated.

This article does not mean to suggest that the area of state constitutions, either in the past fifty years or before, have lacked authoritative and important students and scholars. There are classics which must be known to all who would attempt to enter upon the field — Cooley, Jameson, Hoar and Dodd, in the nineteenth and early twenti-

3. Thomas Jefferson's classic exposition of the justification for constitutional change, his letter to Samuel Kercheval, of July 12, 1816, includes the famous sentence: "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched." The entire letter is a major American political document, and deserves great attention. *See* 12 WORKS OF THOMAS JEFFERSON 3 (P. Ford ed. 1905).

4. For Massachusetts the traditional wisdom begins and virtually ends with Samuel Eliot Morison's HISTORY OF THE CONSTITUTION OF MASSACHUSETTS, originally appearing in MANUAL FOR THE CONSTITUTIONAL CONVENTION (1917) and reprinted as an appendix to MASS. SPECIAL COMM'N ON REVISION OF THE CONSTITUTION, INITIAL REPORT (1963).

5. *See* THE FEDERALIST No. 84, at 535 (B. Wright ed. 1961) (Hamilton).

eth century, and more recently the works of W. Brooke Graves, Albert L. Sturm, and the National Municipal League, to name a few.[6]

The purpose of this article, however, will not be an attempt to review or survey the area of comparative state constitutions but an exploration of recent constitutional history in the Commonwealth of Massachusetts, a state whose document contains at once some of the most copied state constitutional texts and some of the most unique and unduplicated. Those who are more familiar than the author with developments in other states can, from reviewing the Massachusetts experiences, make their own comparisons. From these introductory remarks, it may be fairly assumed that the prejudices of the author are in favor of those who place less weight on comparison among state constitutional documents and more on the understanding of the significance of a particular state's draft in its historical, governmental and political contexts. While it is true to say that the fifty states provide "laboratories" for experimentation in government, each state must on its own strive to perfect its domestic equipment before prescribing it authoritatively to its sisters.

II. A Brief History of the Constitutional Amendment Procedure in Massachusetts[7]

The history of constitutional amendment procedures in Massachusetts is, in a very accurate sense, a history of the constitution itself. This history began in the 1770's with an unsuccessful attempt to draft a constitution undertaken by the General Court which had "resolved itself" into convention in 1777. The effort was unsuccessful because the people, to whom the draft constitution was referred in town meetings throughout the Commonwealth, rejected it. While

6. No attempt is made in this article to present a bibliography on state constitutional revision. *See* National Municipal League, A Selective Bibliography on State Constitutional Revision (1963). The references made in the text are to the following classics: T. Cooley, Constitutional Limitations (8th ed. 1927); J. Jameson, A Treatise on Constitutional Conventions (4th ed. 1887); R. Hoar, Constitutional Conventions (1917); W. Dodd, The Revision and Amendment of State Constitutions (1910); W. Graves, American State Government (4th ed. 1953); A. Sturm, Methods of State Constitutional Reform (1954); National Municipal League, State Constitutional Studies Project (1961-63). *See also* Adrian, *Trends in State Constitutions,* 5 Harv. J. Legis. 311 (1968).

7. This portion of the article follows Part I of Mass. Special Comm'n on Revision of the Constitution, Final Report, Mass. S. Doc. No. 1245 (1967), prepared by the author as General Counsel to the Commission.

there have been various interpretations of the reasons for this rejection, one reason explicitly stated in the return of the Town of Beverly was the omission in the draft constitution of any method by which the constitution could be amended. The specific objection merits quotation in the light of later history and recent proposals:

> We cannot dismiss it without observing the want of an article which we think any constitution that is confirmed and ratified by the people ought to contain. We mean one, by which it shall be provided, that on a certain day in the year 1798 or such time as may be judged best, a Convention chosen by the people at large, distinct from the General Court, shall be held, to determine on such amendment, alteration, addition, erasement as should be found just; such innovations to have the sanction of the people; and that after other twenty years, the constitution shall again be taken up in the same manner, and so on successively. This, if any known method can, might in time perfect a constitution and secure it inviolate —[8]

The objection of the Town of Beverly must have had widespread support. This can at least be inferred from the fact that the next effort at constitution making in Massachusetts, the Convention of 1779 and 1780, proposed as Part the Second, Chapter VI, Article 10 of the constitution which became the constitution of the Commonwealth, the following provision:

> In order the more effectually to adhere to the principles of the constitution, and to correct those violations which by any means may be made therein, as well as to form such alterations as from experience shall be found necessary — the general court which shall be in the year of our Lord one thousand seven hundred and ninety-five, shall issue precepts to the selectmen of the several towns, and to the assessors of the unincorporated plantations, directing them to convene the qualified voters of their respective towns and plantations, for the purpose of collecting their sentiments on the necessity or expediency of revising the constitution, in order to consider amendments.
>
> And if it shall appear by the returns made, that two thirds of the qualified voters throughout the state, who shall assemble and vote in consequence of the said precepts, are in favor of such revision or amendment, the general court shall issue precepts, or direct them to be issued from the secretary's

8. 156 MASS. STATE ARCHIVES, *Return of the Town of Beverly, June 1, 1778*, 424, 429-32, *reproduced in* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, 292, 295 (O. & M. Handlin eds. 1966).

> office to the several towns to elect delegates to meet in convention for the purpose aforesaid.
>
> The said delegates to be chosen in the same manner and proportion as their representatives in the second branch of the legislature are by this constitution to be chosen.[9]

The largely unfair story, to the effect that the Massachusetts constitution lacked provision for amendment because John Adams, its principal draftsman, could not believe that anything he wrote would ever need revision, is doubtful history. James Bowdoin, who was the president of the Constitutional Convention of 1779-1780, said in his address at the close of the deliberations:

> It is here to be remembered, that on the expiration of fifteen years, a new Convention may be held, in order that such amendment may be made in the plan you may now agree to, as Experience, that best instructor, shall then point out to be expedient or necessary.[10]

Pursuant to the provision quoted above, the General Court in 1795 passed a resolve calling for the taking of the census of the people on the revision of the constitution.[11] The vote showed that a majority of the people were in favor of a convention, but the requirement of a two-thirds vote proved to have been an important one and no convention was authorized. The "1795 provision" therefore became obsolete and with it passed what, from a literal reading of the document, was the only opportunity to amend the constitution.

Massachusetts was not the only state whose constitution, dating from the formative period of the 1770's and 1780's, had no specific provision for constitutional amendment. Six of the fifteen constitutions written before 1787 lacked such a provision.[12]

The constitution of the Commonwealth did contain in its preamble and in article VI of its Declaration of Rights statements granting to the people generally a "right to alter the government, and to take measures necessary for their safety, prosperity and happiness" and "an incontestable, unalienable and indefeasible right to institute government; and to reform, alter or totally change the same, when the protection, safety, prosperity and happiness require it." The convention

9. MASS. CONST. art. X (1780). Amendments are now governed by MASS. CONST. amend. art. XLVIII, div. IV.

10. 1779-1780 MASS. CONSTITUTIONAL CONVENTION, JOURNAL 217 (1832).

11. Resolve of Feb. 14, 1795, ch. 62, [1794-95] Mass. Acts & Resolves 264.

12. *See* 2 MASS. COMM'N TO COMPILE INFORMATION FOR THE USE OF THE CONSTITUTIONAL CONVENTION, THE AMENDMENT AND REVISION OF STATE CONSTITUTIONS (Bulletin No. 35, 1918-19).

methods were so instinctive to the constitutional fathers of Massachusetts and of the United States that the omission of a specific provision for conventions other than the 1795 "second look" is not so significant as literal readers of legal documents might have claimed.

Provision for a specific amendment procedure to the constitution dates, therefore, not from the original document but from an amendment placed in it by the first revisionary constitutional convention held in 1820. A considerable amount of debate occurred over the proposal which eventually became the ninth amendment to the constitution of the Commonwealth. At the urging of one of the delegates, Daniel Webster, the first specific amendment procedure for Massachusetts required that a proposal for amendment be made in the General Court and agreed to by a majority of the senators and two-thirds of the members of the House present and voting thereon with the votes taken by the yeas and nays and then published. The proposal was then required to pass by the same voting procedure "in the General Court next chosen." If it passed the second General Court, it would be submitted to the people and would be approved if ratified by a majority of the qualified voters voting thereon at meetings called for that purpose. Webster stated that his purpose in requiring the several provisions, particularly the two-thirds vote in the House, was to insure "the permanency of the Constitution," the "great articles" of which "were so established as to need no alteration." Webster stated that a provision for a general revision of the constitution was unnecessary and that the only change in the constitution would be "plain, sensible and useful alterations" which public opinion would force on the two General Courts as needed. He stated that he would rather there be no amending provision at all than one through which the whole constitution might "be constantly under amendment (with) every change of party." He did agree to a bare majority provision for the Senate, much to the dislike of some colleagues who did not share his views of the comparative "Safety" of that body.[13] Those who wished a less arduous amendment procedure opposed the two-thirds requirement for the House on the grounds that it violated the Declaration of Rights and was inconsistent with the premises of majoritarian popular government.[14]

The ninth amendment provided the mechanism by which every

13. 1820-1821 MASS. CONSTITUTIONAL CONVENTION, DEBATES 188, 404 (1853).
14. *See generally id.* at 402-07.

change in the constitution of the Commonwealth for a century was brought about — thirty-five amendments, the tenth through the forty-fourth. It should be pointed out, however, that the requirement of passage by successive general courts existed at a time when the General Court was elected annually, as were all constitutional offices. The maximum time which could elapse, therefore, between the submitting of a proposal in the assembling of a General Court in January and its presentation to the people in elections held for ratification would not exceed two years. In fact, the period of time elapsed was usually much less because of the fact that the elections held for constitutional amendments were commonly those held in the spring of each year, in the month of May. Thus the elapsed time between January of one year and May of the next year was less than eighteen months until 1877 when it became traditional to hold the election as part of the November elections. Even after 1877, the maximum elapsed time was never more than 20 months.

The amendment procedure next became central in Massachusetts constitutional history with the efforts to call a constitutional convention in 1833 and the successful calling of a convention in 1853. At both times, the mere existence of the ninth amendment was cited by opponents of the convention bills as legal grounds upon which to consider the holding of a convention as an unconstitutional act.[15] This debate, which is beyond the scope of this article, was resolved in a practical manner by the holding of a convention in 1853. While it is true that the 1853 convention was a failure in the sense that its proposals placed upon the ballot were all defeated, the procedural mechanism by which the 1853 convention was called and the argument in favor of its constitutionality made by the majority of a joint committee report[16] constituted valuable historical precedents for the more successful Convention of 1917-1919.

The amendment procedure was again the subject of great debate in preparation for the 1917 Convention. One of the great issues of the day was the cause of "more democracy." Among the specific proposals of those campaigning for direct democracy was the popular initiative, the popular referendum, and the popular recall. While these proposals had almost as many variations, at times, as they had

15. *See* Opinion of the Justices, 60 Mass. (6 Cush.) 573 (1833, *reported in* 1850); MASS. S. Doc. No. 36 (1852).

16. MASS. S. Doc. No. 36 (1852).

advocates, in Massachusetts the debate centered over the proposals for incorporating into the constitution a procedure for the popular initiative of legislation and of constitutional amendments and the popular referendum on legislation enacted by the General Court.[17] A substantial portion of the time of the convention was devoted to what became the most complicated provision in the Massachusetts constitution, and considered by many to be the most complicated provision in any state constitution, article forty-eight. It is the present method of specific amendment to the Constitution and has resulted in the adoption of twenty-three specific amendments, the sixty-seventh through the eighty-ninth. The forty-eighth amendment necessarily annulled the ninth amendment which had been in effect for nearly a century.

It is clear from the specific provisions of the forty-eighth amendment that the form of constitutional amendment procedure adopted in the 1820 convention had a considerable hold upon the delegates in 1917-1919. Thus, there is the requirement that the amendment be considered in two successive General Courts. The procedure within each General Court was changed from the Webster proposal to the requirement that action be taken in a joint session of the House and Senate by majority of all members elected, with respect to a legislative amendment. With respect to the initiative amendment, the requirement of presentation to two successive General Courts is also retained, with two significant changes: in order for a proposed initiative amendment to be considered further, it must receive the vote of only twenty-five percent of all members elected in each General Court. In order to be considered adopted, however, the initiative amendment must receive the approval of the voters in number equal at least to thirty percent of the total number ballots cast at the state election as well as by a majority of the voters voting on the amendment.

From these detailed provisions, it is apparent that the mechanics of constitutional amendment procedure were thoroughly debated and decisions were made in the normal method of compromise which could be expected at a popular convention. It is, however, a fact that the debates show a remarkable absence of recognition that the same convention which was debating these procedures also had under consideration the question of abandoning the annual election of state officers in favor of the biennial election. Thus, the forty-eighth amend-

17. *See generally* 2 1917-1918 MASS. CONSTITUTIONAL CONVENTION, DEBATES (1918).

ment was approved by the delegates of the convention on November 28, 1917, and the sixty-fourth amendment, calling for the biennial election of state officers, was finally approved on August 20, 1918. Both amendments were placed upon the same ballot at the same popular election and were approved November 5, 1918. By this action, the requirement of successive "General Courts" inevitably resulted in a considerable extension of the minimum elapsed time which would occur between the filing of a proposal for a constitutional amendment and its eventual approval on the ballot. Instead of the procedure which had existed for one hundred years under which the elapsed time would in no event be greater than one year ten months and usually was less than seventeen months, the minimum elapsed time, because of the biennial state election, was increased to two years ten months and the maximum possible elapsed time, which has frequently been required, was increased to three years ten months.

In the forty years following the 1917-1919 Constitutional Convention, fifteen specific amendments were added to the Massachusetts constitution. The majority of these made only minor technical changes in the provisions of the constitution relating to the structure of government. There were minor alterations to the initiative and referendum provisions themselves.[18] Other subjects contained in these amendments included women's suffrage,[19] restrictions on the use of motor vehicle tax receipts[20] and authorization for limited town meetings.[21] None of the amendments during the forty year period were in any way as significant as some of the amendments which the 1917-1919 Constitutional Convention approved or as important as what was to follow in the decade of the 1960's.

III. The 1960's — An Era of Constitutional Revision

The 1960's in Massachusetts are certain to be known as years of the most intensive state constitutional and governmental reform since the Constitutional Convention of 1917-1919. That earlier period and the years following the First World War saw the adoption of new budgetary and administrative procedures which are still the basis of

18. Mass. Const. amend. arts. LXVII, LXXIV, LXXXI.
19. Mass. Const. amend. art. LXVIII.
20. Mass. Const. amend. art. LXXVIII.
21. Mass. Const. amend. art. LXX (1926), *annulled by* Mass. Const. amend. art. LXXXIX.

much of the present-day governmental machinery in the commonwealth. The present decade is likely to surpass it in the variety and intensity of state governmental reform.

Why the interest in state governmental revision and reform should thus appear to come in cycles is an intriguing question,[22] but it is better left to the students of political psychology if not astrology. Viewed from a Massachusetts historical perspective at least, Jefferson's notion of a "revolution" every twenty years[23] finds much justification. Massachusetts government is in the midst of such activity at the present time, and it should serve a useful purpose to examine the extent and significance of some of the most important phases of the present revision movement as it relates to constitutional changes.

Inevitably and significantly, of course, the interest engendered by the more glamorous activity of amending the constitution affects the equally important work of the annual sessions of the legislature. This phenomenon occurs first because much in the area of constitutional amendment takes the form of enabling the General Court to pass operative legislation rather than of specifying details in the constitutional document. It also occurs because the proposals for constitutional amendments which are, in any period of intensive activity, strongly urged upon the legislature are often met by political resistance. Political resistance, however, cannot always mean absolute refusal to adopt proposed changes. The result frequently is that legislation, as distinguished from a constitutional amendment, is substituted and sometimes adopted as a partial solution to a problem originally seen as a "constitutional issue."[24]

The distinction between constitutional provisions and statutory enactments has not been lost in the midst of the sometimes feverish activity accompanying a campaign for governmental reform. "In all proposals for a revision of the constitution, the ideal should remain to restrict the area of constitutional amendments to those which are deemed so basic — and so potentially tempting in moments of political stress — that they should be difficult to change."[25]

22. *Cf.* Sutherland, Book Review, 5 HARV. J. LEGIS. 305 (1968).

23. *See* 12 WORKS OF THOMAS JEFFERSON 3, 13 (P. Ford ed. 1905).

24. It is clear, for example, that the many proposals for the abolition of the Executive Council by constitutional amendment were the main force behind the repeal of the statutory powers of the Council by ch. 740, [1965] Mass. Acts & Resolves.

25. MASS. SPECIAL COMM'N ON REVISION OF THE CONSTITUTION, INITIAL REPORT 13-14 (1963).

Even after the distinction is made, however, between the constitution as a basic and "hard-to-change" document, on the one hand, and statutes as the annual and more easily amended work of the legislature, on the other, the facts in Massachusetts show that there are several matters which have already, wisely or not, been included in the constitution and which consequently must be dealt with by further constitutional amendment if change is needed.

In contrast to the four decades of relative calm from 1920 to 1960, the present period shows interest at every level of government. The apparent suddenness of this intensive interest is best seen in perspective by considering the proposals for constitutional amendments filed in the twenty years from 1945 to 1964. The subject matter considered in the proposals made during this period can be described as follows:

1) The structure of government
   a) the executive branch
   b) the legislative branch
   c) local government
2) Fiscal affairs
3) Electoral matters
4) The Declaration of Rights
5) The amendment procedure
6) Technical legal matters.[26]

By far the most active area during the period considered has been the structure of government. In seventeen of the twenty years studied, at least one, and often several, proposals for the four-year term for governor and other constitutional officers were presented to the General Court. Some proposals included the Senate and House of Representatives in the four-year term; most proposals restricted this change to executive constitutional officers. Still other drafts would eliminate the election of all or some of the so-called minor executive constitutional officers and make them appointed officers of the governor. After years of rejection in the General Court, the 1961 joint session of the House and Senate approved a proposal providing for the four-year term for the Governor, the Lieutenant Governor, the Secretary, the Treasurer and Receiver-General, the Attorney General, and the Auditor. The General Court, in 1963, again approved this proposal as

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26. This analysis was originally undertaken by the author in the INITIAL REPORT, *supra* note 25.

required by the constitutional amendment process.[27] It appeared on the state election ballot for action by the people in 1964 and was approved, effective with the 1966 election.[28]

While the four-year term reform was under consideration, a related proposal was actively supported. It would require the Governor and Lieutenant Governor to run as one ticket. A version of this proposal received the approval of the General Court in 1963 and 1965[29] and was approved by the voters in the 1966 election and will be effective in 1970.[30]

The abolition of the Executive Council as an institution sharing appointive and other powers with the Governor has been proposed as a legislative amendment in ten of the twenty years studied. It was also proposed by an initiative petition in 1962. It has never achieved the required approval of the joint session of the General Court. In keeping with the phenomenon of constitutional reform being channelled into legislative proposals, however, an initiative petition for a statute repealing all powers of the Council which were created by statute (except those relating to the approval of certain long-term or supposedly quasi-judicial officers) received strong interest from certain civic organizations and appeared on the ballot for enactment as a law in November of 1964. It was overwhelmingly approved by the voters.

At least three times since 1945 proposals have been filed for constitutional amendments to change the "twenty department" restriction in the constitution, which has itself been rendered virtually inoperative by legislation. On occasion, a proposal has been made to regulate constitutionally the terms of office for appointees of the Governor and prohibit "freeze-ins" for state employees. Constitutional authorization for executive reorganization plans, patterned after the successful federal experience under various reorganization acts, was proposed by an initiative petition in 1962 and by a legislative amendment proposal in 1963. This proposal received favorable action from the General Court in 1963 and 1965,[31] and was also approved at the 1966 election.[32]

27. [1963] Mass. Acts & Resolves 893.
28. MASS. CONST. amend. art. LXXXII.
29. [1965] Mass. Acts & Resolves 811.
30. MASS. CONST. amend. art. LXXXVI.
31. [1965] Mass. Acts & Resolves 812.
32. MASS. CONST. amend. art. LXXXVII.

The 1962 and 1963 General Courts also passed a gloomy proposal which has received considerable attention since the Second World War, authorizing the General Court to provide for the continuity of government after disasters caused by enemy attack.[33] The amendment was approved by the voters at the 1964 election. An amendment on gubernatorial disability has passed one general court and is awaiting further action. A third matter on the 1964 ballot, in addition to the continuity of government and four-year term proposals, authorized either the Governor or the Executive Council to request opinions of the Justices of the Supreme Judicial Court on important matters.[34] This amendment was prompted by the growing campaign to limit the extent to which the Executive Council can review decisions by the Governor and was approved by the people,[35] eliminating the requirement that the Council concur in requesting such advisory opinions. (It also, perhaps unintentionally, authorized the Council to seek advisory opinions without concurrence by the Governor.)

The structure of government as it relates to the legislative branch has often been the subject of proposals for constitutional amendments. These proposals have not met with legislative success, except for the reorganization plan proposal described above. A reduction in the size of one or both branches of the General Court has been advocated by drafts submitted in twelve of the twenty years analyzed. Proposals for a unicameral legislature appeared in the mid-1960's. Various proposals limiting the length of General Court sessions in even-numbered years have also been before the legislature in eleven years since 1945. One such proposal for a six-month session received favorable action in 1961, but was rejected in the subsequent General Court.

The levels of government below the state have received additional attention. Various forms of amendments relating to the power of the General Court to legislate concerning cities and towns, so-called "home rule" amendments, have been presented in thirteen of the nineteen years between 1945 and 1963. In 1963 and 1965[36] a complex proposal in this area received the approval of the General Court and was approved by the electorate in 1966.[37] A change in the system of

33. MASS. CONST. amend. art. LXXXIII.
34. [1963] Mass. Acts & Resolves 895.
35. MASS. CONST. amend. art. LXXXV.
36. [1965] Mass. Acts & Resolves 807.
37. MASS. CONST. amend. art. LXXXIX.

county government has been the subject of proposals in at least four years, but has never been approved.

The area second to the structure of government in the number of proposals submitted has been that of fiscal affairs. The question of a graduated income tax was presented each year from 1946 through 1959, when one such proposal was acted upon favorably. This proposal received the approval of the second General Court in 1961,[38] appeared on the ballot in 1962, and was rejected by the people.[39] It has been again approved by two general courts since that rejection and will appear on the ballot once more in 1968. Modification or abolition of the constitutional amendment restricting the application of motor vehicle taxes has been proposed annually since 1960. Proposals to amend the constitutional provisions relating to the classification of property for taxing purposes have appeared each year since 1961. Additional restrictions on the pledging of the state's credit have been proposed, and one, a technical provision expanding the requirement of the two-thirds votes in each house to include the state guarantee of bonds, received the approval of the voters in 1964.[40]

Electoral matters, which in years long past had been the subject of movements for constitutional reform, have been of lesser importance in recent years than the structure of government and fiscal matters. It is, however, notable that proposals for the reduction of the voting age to 18 were made in nineteen of the twenty years studied, and one proposal for a 19 year old vote has passed one general court and awaits further action. The subject of congressional redistricting was of recent concern first in 1961 and 1962, and the well-known decisions of the United States Supreme Court concerning legislative reapportionment[41] have resulted in more proposals.

It is significant that an important and historic part of the Massachusetts constitution, the Declaration of Rights, has received very little attention in recent proposals for amendment. Interest in the constitution does, however, reflect the general concern over the level of public morality. A proposal in 1962, which was defeated by the General Court, would have attempted to limit availability of the privilege against self-incrimination for public employees. Constitutional abolition of capital punishment was similarly proposed and defeated in

38. [1961] Mass. Acts & Resolves 50.
39. [1963] Mass. Acts & Resolves 902.
40. MASS. CONST. amend. art. LXXXIV.
41. Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

1961. Modification of the prohibition on the aid to religious institutions was a subject of a proposal in the 1963 issue, but was not passed.

From this simple enumeration of the frequency and variety of proposals in the 1960's, the thesis that Massachusetts is undergoing much constitutional revision activity is well supported. To be sure, a subject so complex and, except to a very few, so inherently dull as constitutional law, will never rival sin and corruption for journalistic attention. It did not in fact approach the attention given the many indictments (and fewer convictions) of the Massachusetts Crime Commission which operated during many of the same years. Nevertheless, for the first time in several years, four proposed amendments were approved on the 1964 ballot and four others in 1966.[42] When combined with the initiative petition for statutory repeal of most of the powers of the Executive Council, these matters demonstrate that a basic review of governmental structure did finally spread from the academies and institutes and reach people at large.

The constitution of the Commonwealth stood, therefore, at the beginning of the 1960's, in the form of an historic document, containing a much admired and often-copied bill of rights; a long list of provisions relating to the structure of government; and eighty-one amendments, none adopted since 1950, and many of no current operative importance. Within just a few years dramatic changes were made in the substance of this constitution: a two-year term for executive officers became four years; the office of the Governor had its political and administrative power increased by providing for a governor-lieutenant governor "ticket" and adding the authority to submit reorganization plans subject only to affirmative legislative rejection within a prescribed period of time; the relationship of the cities and towns to the traditional paternalistic commonwealth underwent a significant change by popular approval of home-rule. A careful reading of the various constitutional amendments is necessary in order to assess their anticipated full impact, but it is fair to say that the changes which these proposals will make are as significant as any ever made in the Commonwealth at previous constitutional conventions. They are far more significant than ninety per cent of the prior amendments to the document since 1780.

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42. MASS. CONST. amend. arts. LXXXII-LXXXIX.

IV. The Future Course of Constitutional Amendment — Completing the Decade of Reform

The detailed analysis of recent amendments described above raises an important question as to the best manner of achieving future constitutional revisions. Throughout the history of Massachusetts, as was suggested in the second part of this article, there has existed a tension between those who have favored limited changes of the constitution on a single amendment basis and those who have advocated wholesale revision of the entire document by popular convention from time to time. The success of the 1960's might at first suggest that the specific amendment procedure has emerged victorious. Much of the emphasis for the group of specific reforms in the 1960's resulted, however, as a reaction to the pressure of many groups and individuals, including governors and candidates for the governorship, for another popular constitutional convention to review the basic document.

Such a proposal for a popular constitutional convention was first made for the present political generation by Governor Foster Furcolo in 1957 and was repeated by others both in and out of office. It was not favored by the General Court. Opposition to the popular convention method of constitutional amendment has traditionally come from the legislative branch for several reasons. The legislature accurately detects that the trend of most specific proposals in amendments is to increase the power of the Governor, often to the comparative disadvantage of the General Court. In addition the power of a popular constitutional convention which is called without limitation as to the subjects it will consider is likely to include the subject of the size of the legislature itself. Political nature, not to mention human nature, does not favor fratricide and surely not suicide. It should not be assumed, however, that self-interest has been the only source of opposition to the popular constitutional convention in recent years. Many persons have seriously contended that the quality of constitutional amendments drafted in a popular convention is inferior to that of proposals which must pass the General Court.[43] Others have felt that the holding of a constitutional convention, even if needed constitutional amendments would be favorably acted upon, would open up other areas of the constitution for unnecessary revision. The Declaration

43. *See, e.g.*, Grinnell, *Does the I and R Amendment Authorize an "Initiative" Petition for Another Constitutional Convention?*, 9 Mass. L.Q. 35, 37-39 (1924).

of Rights and provisions relating to the judiciary are commonly cited as sections which ought not to be changed.

In 1962 a bold and resourceful use of the initiative petition procedure was employed on behalf of a non-partisan group of citizens led by Endicott Peabody, who was also at the time a candidate for Governor. It is interesting to note that, although the unwieldy nature of the petition process resulted in an abandonment of the petitions for that year, three of the five proposals received the approval of the General Court when re-submitted with the support of Governor Peabody in 1963 (the joint election of the Governor and Lieutenant Governor, the reorganization plan procedure, and the provision for home rule)[44] and the rejection of a fourth (the abolition of the Governor's Council) was the trigger for an all-out drive to limit the statutory powers of the Executive Council.

If the initiative petition procedure itself were fully effective to require the submission to the electorate of all needed reforms regardless of their finding favor in the legislature, the opponents of the popular constitutional convention would seem to have the better argument. There exist, however, both legal and practical drawbacks to the initiative petition procedure. The constitution limits the subject matter of petitions in such a way that the abolition of the Council, for example, may not legally qualify, in the opinion of some authorities.[45] The mechanics of circulating petitions, with the required number being a percentage of the ever-increasing popular vote for governor, makes essential the existence of a large and financially endowed organization. In addition, as a matter of law, a proposal will die, even if popularly initiated, if it cannot receive the approval of twenty-five percent of the joint session of the legislature to which it is submitted.[46] These and other hazards make the role of the initiative petition for constitutional amendments one of publicizing reform issues. Such was the needed effect of the "Peabody Petitions." Immediate success in achieving adoption of many constitutional amendments by this method is doubtful. One notable effort, a proposal sponsored by the League of Women Voters of Masachusetts to reduce the size of the House of Representatives, is pending before the 1968 General Court. If it does not receive the affirmative vote of twenty-five percent of the joint

44. [1963] Mass. Acts & Resolves 807-13.
45. *See, e.g.*, 1962-1963 MASS. ATT'Y GEN. REP. 128.
46. *See* MASS. CONST. amend. art. XLVIII, div. IV, § 4.

session of the House and Senate, it will not proceed any further. This proposal is also, unfortunately, probably subject to court attack on the constitutionality of its own apportionment provisions and would in any event not take effect until the mid-1970's.

In 1967, the Special Commission on Revision of the Constitution filed its Final Report and addressed itself exclusively to certain of the difficulties in the amendment procedure.[47] It proposed, for example, that the requirement of passage of a legislative amendment by two "General Courts" (an election intervening) be changed to two "sessions" of the General Court. It also recommended that a proposal of a constitutional amendment which received a two-thirds vote in a joint session, confirmed by a second two-thirds vote within a stipulated time at the same session, be placed on the next state election ballot without presentation to the next session of the General Court. In other proposals, the mechanics for circulating initiative petitions would be slightly modified to allow a longer period for the collection of signatures. The most significant proposal was for the specific authorization for a vote on the question of holding a popular constitutional convention automatically every twenty years starting in 1974 and, upon vote of the General Court or by initiative petition, at any other time.

In the General Court, for any of several reasons, refuses to approve proposals which are needed to carry forward and complete the present drive for constitutional reform in Massachusetts and if the initiative petition method has both legal and practical drawbacks, the advocates of a popular constitutional convention remain the only persons with a plan for complete success. Because of the objections to the popular convention unlimited as to subject matter, and because many of the proposals which in the late 1950's seemed so far from successful adoption have received approval from the General Court, a variation on the popular constitutional convention seems to be the most likely next and perhaps final step in the current drive for constitutional amendments. This would be the *limited* constitutional convention. A constitutional convention may be called in the Commonwealth with its agenda limited to subjects which are specified in the vote of the people

47. FINAL REPORT, *supra* note 7.

calling the convention, and this call would restrict the convention from considering other matters.[48]

The appeal of such a procedure is obvious: The Declaration of Rights and judiciary could be excluded from consideration; matters recently approved as needed reforms could also be excluded; matters requiring attention but not receiving favorable action by the General Court could be specifically authorized; the open-ended nature of the expense, which some have used as an argument against a popular convention, would be limited. The advantages of a popular convention, such as the availability of persons with experience other than legislative and the existence of a forum for careful debating and final drafting of proposals, would be retained. The limited convention has been discussed and utilized in other states[49] and seems readily adaptable to the Commonwealth which in a sense, invented the idea of a working constitutional convention.

A limited constitutional convention could be convened, if the legislature were willing, by the enactment of a statute authorizing the placing on the ballot of the question of whether to hold such a convention and listing the subjects to be included or excluded. It is clear, however, that a circularity exists if one is to anticipate this set of events: a legislature unsympathetic to specific amendments which caused the need for a convention in the first place can hardly be expected to support a statute authorizing the convention which may adopt these very proposals. It is for this reason that a final sophistication in an otherwise complex drive for constitutional reform must be introduced. This additional step is to employ the popular initiative procedure for the enactment of a law in order to achieve the passage of the statute authorizing the limited convention question. In 1963 this procedure received the approval of the Attorney General as to its legal form, although the Attorney General noted the existence of serious constitutional questions still unresolved by the courts.[50] A distinguished

48. Occasionally critics contend that a convention cannot be limited as to subject matter. The author considers this incorrect as a matter of law, and feels confident that the Supreme Judicial Court, if ever presented the question, would follow the views expressed in an early Opinion of the Justices, 60 Mass. (6 Cush.) 573 (1833, *reported in* 1850). The Justices there indicated that the powers of a constitutional convention were to be determined by the specific nature of the vote authorizing it. *See also* Loring v. Young, 239 Mass. 349, 132 N.E. 65 (1921).

49. *See, e.g.*, Chenault v. Carter, 332 S.W.2d 623 (Ky. 1960); *see generally* Annot., 158 A.L.R. 514 (1945).

50. 1963-1964 MASS. ATT'Y GEN. REP. 105.

group of citizens, of both political parties, pressed forward with the limited convention initiative petition.[51]

While the search for the necessary signatures for this petition was carried on during the summer of 1963, the legislature was — by coincidence or not — acting more favorably upon the specific proposals which would comprise the bulk of the subject for the limited convention than ever before in its history. The number of signatures required in the initiative petition was not achieved that year. It did succeed in 1967 and a popular initiative petition for a limited convention is pending before the 1968 General Court. The limitations are such that the convention would be authorized to deal only with the structure of the executive branch, the General Court, the Executive Council and municipal government and also with the amendment procedure itself and the troublesome question of simplification of the constitutional document.

V. Conclusion

This review of the past and present history of constitutional revision in Massachusetts is necessarily incomplete. The advocates of further reforms — reduction in the size of the General Court, total abolition of the Council, the short ballot, and many others — must decide by their own counsel and by the practical necessity of the availability of manpower and resources whether future popular initiative proceedings are necessary to finish the task for this political generation.

Some will argue with great persuasiveness that a popular convention, limited or even unlimited, must still be held in order to make available that grand review of the entire text of the constitution, as it relates to the structure of government, which the prior conventions in Massachusetts have accomplished. It should not be overlooked that many improvements and reforms in the area of state government, sometimes unimagined a few years ago, are constantly being proposed, both by those in office and by outside scholars. Notwithstanding the caveat set forth at the outset, the experience of other states must be considered. For these reasons one should never assume that the well-

51. The interesting legal questions raised by this procedure are treated in Grinnell, *Does the I and R Amendment Authorize an "Initiative" Petition for Another Constitutional Convention?*, 9 Mass. L.Q. 35 (1924), and Goldings, *The Use of the Popular Initiative Petition for a Constitutional Convention Act*, 47 Mass. L.Q. 367 (1962).

known issues are the only ones which deserve attention at a convention. An essential purpose of a convention is to explore the several, often interrelated avenues of reform. The advantage of the convention system is that it is not bound by a specific draft proposal as is the General Court meeting under the legislative or initiative method of amendment.

Massachusetts cannot, in the twentieth century, afford the luxury of Adams' eighteenth century which seemingly anticipated only one second look at the Constitution, with the assumption that the document was fixed forever after that. Indeed, John Adams and his fellow draftsmen never really assumed that the amendment process could come to an end. What he expected, as history has shown with respect to all of the early written constitutions of the American states, was that future generations will have the same zeal for calling conventions to make the needed changes as the group of constitution makers in the 1770's and 1780's displayed.[52]

This assumption may now be doubted because of the complexity of the constitutions and of the interests surviving under them. The recent history of Massachusetts has, however, demonstrated that the zeal for reform and revision can find expression through many available procedures. While most of these procedures are slow, often disappointingly so, they *are* available. Were they not, the provision in the state constitution recognizing the right of revolution[53] might well take on more than historic importance. The question for the next few years is whether the slowness of the procedures and the immobility of the vested interests are such that a popular convention, general or limited, will be required as the final chapter for this period. One matter is certain: a delicate blend of history, politics, law and public administration will continue to guide the draftsman on his uniquely American course of constitution-writing.

52. *See* THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780, 50-51 (O. & M. Handlin eds. 1966).
53. MASS. CONST. art. VII.

A MODEL MOVIE CENSORSHIP ORDINANCE

I. INTRODUCTION

Perhaps one of the most difficult and controversial problems facing the American legal system today is the nature and extent of allowable governmental restrictions on communication. One aspect of this problem is commonly referred to as censorship. On the one hand, the First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Under the Fourteenth Amendment, this has been applied to all other government bodies on the state and local level. The policies which lie behind this structure are among the strongest in American jurisprudence, and need not be detailed here. But they are of such weight as to lead the courts, in their interpretation of the First Amendment, to bend over backwards in assuring that the guaranteed freedoms are not abridged. At the same time, it has long been recognized that not all speech is of such a nature as to deserve protection. Although there are difficult borderline cases, it is generally agreed that one may not yell "fire" in a crowded theater.[1] One may not incite to riot.[2] One may not publish obscene speech.[3] If the principles inherent in the First Amendment represent a judgment deeply ingrained in American society, the judgment that these principles have *some* limit is also deeply ingrained. The problem, of course, is to draw the line: When does speech lose its constitutional protection; and by what procedure is this judgment to be made.

The statute presented here is aimed at one narrow segment of "speech" — the motion picture. That motion pictures do come within the First and Fourteenth Amendment guarantees was settled by the Supreme Court in *Joseph Burstyn, Inc. v. Wilson*.[4] This recogcult process of "line-drawing." The process is continual, and is by no means complete, as the latest Supreme Court decisions show. As previously indicated, the problems may be generally classified within two broad categories: first, the development of an adequate and fair

1. Schenck v. United States, 249 U.S. 47, 52 (1919) (Holmes, J.).
2. De Jonge v. Oregon, 299 U.S. 353 (1937).
3. Beauharnais v. Illinois, 343 U.S. 250 (1952).
4. 343 U.S. 495 (1952).

procedural framework within which censorship decisions can be made; and second, the substantive definition of the types of speech which may be restricted.

II. The Procedural Framework

The historical procedure for movie censorship has generally involved approval by a licensing or other regulatory authority before the movie is shown to the public. Such a procedure runs directly into the free speech doctrine prohibiting prior restraint, a rather formidable doctrine, as was noted by Justice Clark in the *Burstyn* case.

> "The protection as to prior restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." In the light of the First Amendment's history . . . the state has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case.[5]

That prior restraint is feasible with regard to motion pictures was again upheld in *Times Film Corp. v. City of Chicago*.[6] The sole question there was ". . . whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture."[7]

The Court answered its own question in the negative. It was not until 1965, however, that the Supreme Court went on to define a procedural framework to fit within the constitutional requirements. The case was *Freedman v. Maryland*.[8] The Court held that

> a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.[9]

The Court set down three requirements. First, the censor must have the burden of instituting judicial proceedings. Second, any restraint prior to judicial restraint must be brief, and compatible with the time required for judicial determination. Finally, there must be statutory assurance of a prompt, final judicial decision so that the restraint due to an interim denial of a license will be minimized.[9a]

5. *Id.* at 503, 504 (quoting Near v. Minnesota, 283 U.S. 697, 716 (1931)).
6. 365 U.S. 43 (1961).
7. *Id.* at 46.
8. 380 U.S. 51 (1965).
9. *Id.* at 58.
9a. Teitel Film Corp. v. Cusack, 88 S.Ct. 754 (1968).

The model statute presented gives full recognition to all three requirements.

III. The Substantive Definition

What is censorable has long been a thorny problem. The answer is not as simple as saying that anything repellant to the community can be restricted. The concept of freedom of speech only arises when people wish to say that which others find repulsive. In another film case, involving the movie "Lady Chatterly's Lover," the Supreme Court made it quite clear that the censorship of ideas is incompatible with the First Amendment.

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea — that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty. . . .
>
> Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, "a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on." *Whitney v. California,* 274 U.S. 357, at 376.[10]

Permissible censorship seems to fall upon two general categories of speech: that which is likely to immediately incite its hearers to conduct proscribed by law, and obscenity. It is on this latter category that the Court has focused its recent attentions, and it is here that the problem is one of definition rather than recognition. The statute, in its definition of obscenity, attempts to follow along the lines developed by the courts since the landmark case of *Roth v. United States.*[11]

Two very recent cases deserve special mention, since the statute relies heavily on their reasoning. In *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General,*[12] the *Roth* definition of obscenity was summarized and reaffirmed:

> three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole

10. Kingsley International Pictures Corp. v. Regents of New York, 360 U.S. 684, 688, 689 (1959).
11. 354 U.S. 476 (1957).
12. 383 U.S. 413 (1966).

> appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[13]

Although this case dealt with a book, not a motion picture, it is unlikely that "obscenity" can have different meanings with respect to different methods of speech. Thus, this test has been adopted in the model statute.

The other recent case, *Ginzburg v. United States*,[14] presented a very different aspect of obscenity. The Court held that where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity. Again, the fact that it was the written word rather than a motion picture that was under consideration should not be grounds for a distinction. The Court's recognition that the emphasis of the advertising on the purely sexual aspects of the "speech" can be conclusive evidence of its lack of social worth is incorporated into the statutory scheme presented here. While this line of attack was new with the Ginsbusg case, its applicability to motion pictures is possibly even greater than to literature, and in applying the statutory test, the various review boards and the Court will hopefully have the benefit of further elucidation of this concept by the Supreme Court.

IV. Conclusion

In general, it is the hope of the draftsmen that the statute will always be applied in light of subsequent Supreme Court decisions. It is highly unlikely that the definition of obscenity is settled. All that can be done now is to comply with the present law. Under the severability clause of section 501, should any of the substantive definitions included in the statute become unacceptable, the entire statute will not fall. And short of a radical change in the attitude of the Supreme Court, changes in substantive definitions should not occur at all. The statute provides a safe procedural framework within which very strict substantive definitions must be applied. It must be recognized, however, that no matter what the standards, the difficulty of application will always exist. The lines must be drawn with care

13. *Id.* at 418.
14. 383 U.S. 463 (1966).

both in the definition and in the application. Such a situation is inherent in the very concept of censorship.

AN ORDINANCE

To provide a comprehensive scheme to determine the suitability for adults and children of films for public exhibition, to regulate such administrative determinations, and to provide standards therefor.

PART I — TITLE

SECTION 101. *Title*

This act shall be known and cited as the "[city or municipality] Motion Picture Regulation Ordinance."

COMMENT: The regulation of motion pictures comprises examination of their contents in order to classify them as suitable or unsuitable for children and to grant a permit for their exhibition or distribution, or in order to deny a permit.

PART II — OFFENSE

SECTION 201. *Exhibition and Distribution*

(a) A permit and a classification shall be obtained for each and every motion picture publicly exhibited within the city or distributed for public exhibition within the city, notwithstanding any license or regulation otherwise imposed by law. The classification shall be either "suitable for young persons" or "unsuitable for young persons." For the purposes of this ordinance "young persons" shall be those persons who have not yet attained eighteen years of age. Every exhibitor holding a [general motion picture license to exhibit films] shall be entitled to issuance of a [special motion picture license to exhibit films classified "not suitable for young persons"].

(b) It shall be unlawful for:

(1) any person to publicly show or exhibit within the city any motion picture, or any such picture or pictures as are commonly shown or exhibited in so-called penny arcades or in any other automatic or motion picture devices, without first having secured a permit therefor and a classification from the [director of welfare];

(2) any person to lease, license, sell or otherwise distribute or transfer any motion picture, plate, slide, film, or negative to any person for the purpose of public exhibition within the city, without

first having secured a permit therefor and a classification thereof from the [director of welfare];

(3) any person to exhibit within the city any film classified "not suitable for young persons" unless advertising and display media state that the picture is so classified;

(4) any person knowingly to sell or give to a young person a ticket to a film classified "unsuitable for young persons," or knowingly to permit a young person to view such a film.

It shall be a valid defense to any proceeding under subsection (4) that the young person was accompanied by his parent, legal guardian, or spouse.

COMMENT: The public exhibition or distribution for public exhibition of any motion picture is subject to the requirements of subsection (a) and to the prohibitions of subsection (b). Public exhibitions, to which the ordinance applies, are clearly meant to be distinguished from private exhibitions, yet the ordinance attempts no definition of the term "public." It was thought by the draftsmen that to do so was to invite evasion. The ordinance is intended to reach all that is constitutionally within the scope of the police power, and an inflexible definition might result in an ordinance more narrow than would be constitutionally necessary. In short, the proper line between public and private exhibition must be drawn by the courts in accord with the constitutionality of a given application of the police power to ostensibly private activity.

Inherent in the scheme of regulation is recognition of the freedom of adults and parents to expose themselves and their children to all motion pictures which are not proscribed, as well as the duty of the local government to act *in loco parentis* by forbidding children to expose themselves to motion pictures which fall below the standards established especially for young persons. Analogous, though constitutionally distinct, is the treatment of sales of alcoholic beverages to adults and minors. The scheme of regulation is adapted from Ordinance No. 11,284 of the city of Dallas, Texas.[15] It may be administered by any appropriate city official.

15. Ordinance No. 11,284, Nov. 22, 1965, *as amended by* Ordinance No. 11,298, Dec. 6, 1965. Interstate Circuit, Inc. v. City of Dallas, 249 F. Supp. 19 (N.D. Tex. 1965) *aff'd*, 366 F.2d 590 (5th Cir. 1966); Interstate Circuit, Inc. v. City of Dallas, 402 S.W.2d 770 (Tex. Civ. App. 1966); *cf.* Bookcase, Inc. v. Broderick, 18 N.Y.2d 71, 218 N.E.2d 947, 271 N.Y.S.2d 947 (1966). *See* note at pp. 411-12, *infra*, for action by the Supreme Court in a further stage of the *Interstate Circuit* litigation.

SECTION 202. *Penalty*

(a) Any person exhibiting or distributing any picture without a permit and a classification therefor shall be fined not less than . . . . . nor more than . . . . . dollars for each offense. Each day's exhibition of any picture without a permit and a classification shall constitute a separate offense.

(b) Every exhibitor of a motion picture classified "not suitable for young persons" shall exercise reasonable diligence to deny admission to all young persons. The presence of more than three (3) young persons who are unaccompanied by a parent, guardian or spouse at any exhibition of a film classified as "not suitable for young persons" shall be taken as presumptive evidence that the exhibitor did not exercise reasonable diligence. For each such separate exhibition the exhibitor may be fined not less than . . . . . nor more than . . . . . dollars.

COMMENT: The enacting government should establish the dollar value of fines with a view to several policies developed within this scheme of regulation. The fines should be small enough to overcome the compassionate reluctance of judge or jury to be harsh, but large enough to constitute a penalty and to prevent the likelihood of the fine being absorbed as a cost of doing business. They should be moderated to take account of the availability of the power of injunction and the penalties for contempt of court in case of violation of an injunction. The standard of reasonable diligence has been selected with the same policies of leniency, effectiveness, and flexibility in mind. Because of the constitutional protection of communications, a conclusive presumption of violation would not be appropriate. Nevertheless, the exhibitor should bear the burden of proving not only that he required proof of age, but also that he had not been placed on notice that the young persons were indeed under age eighteen. Repeated violations and convictions may warrant resort to an injunction or other appropriate remedy.

SECTION 203. *Injunctive Relief*

The [director of welfare] may petition a court of competent jurisdiction to enjoin any violation of this part.

COMMENT: The power to seek an injunction should be used not only as an ultimate penalty for repeated violations but also as a creative

tool for enforcement of the advertising provisions of section 201(a)(3) and of any other provision when a fine would not be effective.

SECTION 204. *Fee*

The fee for the original permit and classification in each case shall be [$1.00] for each [1000] lineal feet of film or fraction thereof. The fee shall be paid to the [city treasurer] before any permit and classification are issued.

COMMENT: The fee should cover as many of the routine expenses as possible without being so prohibitively expensive as to raise constitutional problems. It should be set within these two limitations.

PART III — PROCEDURE FOR OBTAINING A PERMIT AND A CLASSIFICATION

SECTION 301. *Application*

At least thirty (30) days, including Saturdays, Sundays and holidays, before the first scheduled public showing of a motion picture, the applicant shall apply to the [director of welfare] for a permit and a classification. The application shall include the motion picture's title, a description of its plot, a statement of its contents and such other information as the [director of welfare] may require by regulation. In the statement the applicant shall advise the [director of welfare] whether the motion picture contains scenes (a) tending to produce a breach of the peace or other unlawful conduct or (b) depicting nudity, depravity, sexual conduct or deviant sexual behavior which might be obscene. The presence of one or more of these elements in the statement shall not be considered proof that the motion picture is obscene, nor shall their absence be considered proof that the motion picture is not obscene.

COMMENT: According to the regulatory scheme a total of fifteen days plus the length of a judicial hearing would be required to process an exceptionally troublesome film after an application had been received under this section, assuming that Saturdays and Sundays and holidays are not included. Thus the requirement that the applicant file his application thirty days in advance of the first scheduled public showing guarantees that he will receive a permit and a classification or, in an exceptional case, a judicial determination of the denial of a permit or of the desired classification prior to the date of the first

scheduled public showing.[15a] The ordinance incorporates no criminal penalty for advertising a film as suitable for young persons when the film is classified as unsuitable for young persons. The absence of a penalty is designed to accommodate the possibility of delay in reaching a final determination of the film's classification with the applicant's need to advertise the film in advance of the first scheduled public showing. Under the assumption that the movie industry makes films available to applicants approximately five weeks prior to their intended public showing, the thirty day period gives the applicant about one week to prepare his application. The administering official should have broad discretion to expedite multiple applications, whether simultaneous or consecutive, for the same film.

The standards set forth to guide the applicant in the preparation of his statement about the film are fairly objective; they may be interpreted by the applicant in light of the grounds for denial of a permit and for classification of a film set forth in sections 401 and 402. Combined with a description of the plot, the statement about the film should bring most questionable films to the attention of the official administering the ordinance. It is assumed that other statutes or ordinances would provide protection from fraud in the submission of the application. In case of error or change in circumstances, section 403 provides adequate safeguards.

SECTION 302. *Review by Director of Welfare and Film Review Panel*

(a) Except as provided in subsection (b), on the basis of the information contained in the application, or upon the basis of information otherwise obtained, the [director of welfare] must, within three days, not including Saturday, Sunday or a holiday, issue the permit and the classification of "suitable for young persons," or refuse either.

(b) If the [director of welfare] deems it necessary, the motion picture shall be reviewed by the Film Review Panel prior to the granting of the permit and classification. The Film Review Panel shall be appointed by the [director of welfare], and shall consist of the [director of welfare] and one representative each from the [city counselor's office], the [police department], and the [city auditor's office]. The Film Review Panel shall review the film at a specified time at the place where the film is intended to be shown or at any

15a. Teitel Film Corp. v. Cusack, 88 S.Ct. 754 (1968).

place which is convenient. The Film Review Panel shall decide whether to issue a permit and a classification of "suitable for young persons" within three days, not including Saturday, Sunday or holidays, of the receipt of the application for a permit as provided under section 301.

COMMENT: This section provides for two alternative review procedures: first, the director of welfare or other designated official may issue a permit and make a classification or deny a permit on the basis of the written application; second, he can call the Film Review Panel in cases in which he has questions so that they can issue a permit and classification or deny a permit. The members of the Film Review Panel should be appointed by the official administering the ordinance, from among the available members of municipal departments or offices, although not necessarily from those offices designated in this draft. Civil servants, rather than members of the public, are preferable because they are being paid for their time and because they would be available to act as quickly and as frequently as necessary. Regardless of which of the two procedures is used, this stage of review calls for an administrative determination. Use of the Film Review Panel should provide a more refined administrative judgment in the more difficult cases.

The maximum time in which a decision must be made is three days, whether the Film Review Panel is called to act or not. Without this time limit and others, an applicant's permit and classification could be delayed indefinitely so that his film would be effectively censored. In arriving at a minimum workable time period, however, attention must be paid to the fact that if the period becomes too short there will be an impulse on the part of those making a decision in a hard case initially to deny the application, confident that the decision can be regarded in a more leisurely fashion during the later stages of review. Despite the rapidity with which a decision is required, it should be made carefully so that there will seldom be a need to call the uncompensated civilian members of the Motion Picture Appeals Board.

SECTION 303. *Motion Picture Appeals Board*

(a) There is hereby created a Motion Picture Appeals Board for the purpose of reviewing all motion pictures for which a permit or a classification of "suitable for young persons" has been denied by the

[director of welfare] or the Film Review Panel. The Board shall consist of at least five members to be appointed from the residents of the city by the [mayor] for a term of one year.

(b) Upon the denial of a permit or of a classification of "suitable for young persons" by the [director of welfare] or the Film Review Panel, the motion picture shall be made available for examination at a place designated by the Board in writing. The Board shall review the motion picture in its entirety. After the Board reviews the motion picture and before its determination is made, the applicant shall be given an opportunity to present oral or written testimony and arguments. The Board shall issue a ruling within four days, not including Saturday, Sunday or a holiday, of the denial of a permit by the Film Review Panel. The decision shall include the reasons of the members, and shall be signed by at least a majority of the Board.

COMMENT: The Motion Picture Appeals Board is designed to serve two important functions. First, it provides an additional stage of administrative review in order to decrease the number of cases which reach an overburdened court, or at least to delineate the issues in the cases which will require a judicial hearing. Second, an affirmation of the decision of the director of welfare or the Film Review Panel provides evidence of contemporary community standards for the judiciary since the members of the Board, chosen from the citizenry, should be representative of those standards. Moreover, the Board must act within four days of the prior decision in order to avoid censorship by delay. As is pointed out above, reduction of the period for decisions may result in their being taken more quickly than carefully. It is increasingly important to avoid this phenomenon at each successive stage of review.

SECTION 304. *Judicial Hearing*

If the Motion Picture Appeals Board decides to refuse a permit for a motion picture or to classify it as "unsuitable for young persons," and the applicant does not consent to the decision in writing, the Motion Picture Appeals Board shall immediately request the [court] to hold a hearing to consider whether to issue a permit for the motion picture, to classify it as "suitable for young persons," or both. A written notice containing the decision of the Motion Picture Appeals Board, and specifying the date and place of the hearing, shall be served upon the applicant in person or by registered mail. The hear-

ing shall take place not later than five days, not including Saturday, Sunday or a holiday, after the date of the decision of the Motion Picture Appeals Board, unless the applicant requests a postponement. The decision of the [court] shall be rendered not later than three days, not including Saturday, Sunday or a holiday, following the conclusion of the hearing.

COMMENT: The city, or more specifically the Motion Picture Appeals Board, must carry the burden of instituting legal proceedings to enjoin the exhibition of the film if a permit is denied or to require its exhibition under a classification of unsuitable for young persons if it is so classified. If the applicant consents to the denial of his permit or to the classification of his film as unsuitable for young persons, however, appropriate administrative and judicial procedures can be used to obviate the need for a judicial hearing. If he does not consent, he is provided his constitutional right to a judicial hearing within five days after the adverse decision of the Board and he is guaranteed a decision within three days after the end of the hearing.[15b] Thus the applicant is protected from censorship by administrative and judicial delay. After a court has issued a decision, he is free to appeal or pursue whatever remedies may be available to him. His right to free speech does not include the expediting of these additional remedies.[16]

SECTION 305. *Automatic Issuance*

If any of the reviewing bodies fails to act within the time limit prescribed by this part, a permit shall automatically be issued to the applicant and, unless the applicant makes a contrary request, a classification as "suitable for young persons" shall be made by the [director of welfare].

COMMENT: The automatic issuance of a permit and a desirable classification should provide adequate protection for the applicant from any illegal delays which would effectively censor his film. Nevertheless, the provision for automatic issuance does not leave the public at the mercy of an inefficient bureaucracy or judiciary, for section 403 provides for subsequent scrutiny of the film and appropriate action.

15b. *Id.*

16. Freedman v. Maryland, 380 U.S. 51 (1965).

PART IV — STANDARDS FOR DENIAL OF PERMIT AND FOR CLASSIFICATION

SECTION 401. *Grounds for Denial of Permit and Standards for Classification*

(a) The [director of welfare], the Film Review Panel, the Motion Picture Appeals Board or the [court] may refuse to grant a permit to an applicant only if it is determined that one of the following conditions exists:

(1) the motion picture incites the public to conduct proscribed by law, and the advocacy of such conduct would, under the circumstances prevailing in the community, be immediately acted upon; or

(2) the motion picture is obscene.

(b) The [director of welfare], the Film Review Panel, the Motion Picture Appeals Board or the [court] may classify a film as "unsuitable for young persons" only if it is obscene when viewed by young persons.

COMMENT: If the hallmark of the procedural sections in Part III is the speed with which decisions must be made, the dominant theme of Part IV is caution. The substantive provisions are hedged with restrictions aimed at preserving First Amendment liberties. They are divided into two types of prohibitions: first, films which would disturb law and order, and second, films which are obscene. In recognition of the public's responsibility to protect children and the damaging effects which obscene films may have upon their spiritual and moral development, the standards for the second prohibition are divided into separate categories so that a film which would not be obscene for adults, but which would be obscene when viewed by young persons, may still be classified as unsuitable for children who are not accompanied by a responsible adult.

Subsection (a) (1) uses the standard articulated by Justice Brandeis in *Whitney v. California*,[17] in order to insure that only the most unusual circumstances in the community presently coinciding with only the most provocative incitements to immediate unlawful conduct could be grounds for an inference that there is a strong likelihood that the incitements would be acted upon. Only the strong likelihood

17. 274 U.S. 357 (1927).

of immediate unlawful conduct would justify denial or revocation of a permit on this ground.

SECTION 402. *Obscenity Defined*

(a) In order to refuse a permit on grounds of obscenity the [director of welfare], the Film Review Panel, the Motion Picture Appeals Board or the [court] must determine that

(1) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; and

(2) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and

(3) the material is utterly without redeeming social value.

(b) The requirement of subsection (a) (1) is satisfied if the [director of welfare], the Film Review Panel, the Motion Picture Appeals Board or the [court] determines that the motion picture is designed for and primarily disseminated to a clearly defined deviant sexual group rather than the public at large, and that the dominant theme of the motion picture taken as a whole appeals to the clearly defined deviant sexual interests of the members of that group. Under no circumstances shall a deviant sexual group be construed to consist of adolescents as a group or those members of the community under eighteen years of age. In judging the criteria set down in this section, the [director of welfare], the Film Review Panel, the Motion Picture Appeals Board or the [court] must consider the motion picture in its entirety.

(c) The [director of welfare], the Film Review Panel, the Motion Picture Appeals Board or the [court] may consider the circumstances of production, sale and publicity relevant in determining whether the motion picture is utterly without redeeming social value pursuant to subsection (a) (3). Evidence that the motion picture is being commercially exploited for the sake of prurient appeal, to the exclusion of all other values, may justify the conclusion that the motion picture is utterly without redeeming social value.

(d) In order to classify a motion picture as "unsuitable for young persons" the [director of welfare], the Film Review Panel, the Motion Picture Appeals Board or the [court] must determine that

(1) the dominant theme of the material taken as a whole appeals to a prurient interest of young persons in sex; and

(2) the material is patently offensive because it affronts contemporary standards relating to the description or representation of sexual matters to young persons; and

(3) the material as it relates to young persons is utterly without redeeming social value.

COMMENT: Subsections (a) and (d) are analogous in setting forth the three necessary findings for a judgment that a film is obscene; the distinction between them is that subsection (d) is to be interpreted with an overriding purpose to protect children, whereas subsection (a) is to be interpreted with a view to the ability of an adult audience to choose its entertainment carefully and to look out for itself. The acceptability of a distinction between movies suitable and unsuitable for children was recognized in *Jacobellis v. Ohio*.[18] Emphasis is needed to point out that the special standard for children applies only to films which might be obscene. The standards for obscenity are taken from *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*.[19] Each of the three findings must be supported by separate considerations; each represents a distinct criterion. All three must be found to warrant either a denial of a permit under subsection (a) or a classification of unsuitable for children under subsection (d).

Subsection (c) sets out standards to determine which films are utterly without redeeming social value for all persons. Structurally the subsection is thus a substitute for the third criterion of subsection (a), and therefore cannot support a denial of a permit unless the film is also found lacking under the first two criteria of subsection (a). Procedurally this criterion may be sufficient to tip the scales against a film either before or after it is exhibited publicly, but more local evidence is likely to be available when the advertising campaign is underway than before. The criterion is derived from *Ginzburg v. United States*.[20] It emphasizes the manner in which a film is called to the public's attention. It is not likely to apply to the products of major film companies, but rather to objectionable theater operations in areas which offer more than films to appeal to a prurient interest in sex. The advertising and promotion may be so lurid that all three

18. 378 U.S. 184 (1964).
19. 383 U.S. 413 (1966).
20. 383 U.S. 463 (1966).

criteria of obscenity will be satisfied, without recourse to the contents of the film.

Subsection (b) is derived from *Mishkin v. New York*,[21] and is aimed at highly questionable cinematic material which is directed at specific groups which are considered deviant by society. Even if a film is directed at a clearly defined sexually deviant group, it must be given a permit unless it represents sexual matters in a clearly offensive manner as judged by contemporary community standards and unless it is utterly without redeeming social value. This subsection is designed only to permit the appeal of the film to be assessed in terms of the sexual interests of the particular deviant group for which it was intended; it should not be used to censor any film merely because it is intended for a deviant sexual group. *A fortiori* it should not be used to censor a film merely because it is directed toward adolescents or minors.

SECTION 403. *Appeal to Court by the Board Subsequent to Grant of a Permit*

After a permit for a motion picture has been granted or its classification as "suitable for young persons" has been made, the Motion Picture Appeals Board may recommend to the [court] that the permit be revoked or suspended because,

(a) under the circumstances prevailing in the community, the motion picture incites the public immediately to undertake a course of conduct proscribed by law, or

(b) the applicant's or any advertiser's sole emphasis is on the sexually provocative aspects of the motion picture and such sole emphasis would have been considered decisive in determining whether a permit should have been denied in accordance with section 402 (c). While the [court] is considering the recommendation of the Motion Picture Appeals Board, an applicant who has a permit and a classification for a motion picture may continue to display it with that classification.

COMMENT: This section is designed for two dissimilar situations. The first is an unpredictable change in circumstances within the community which make an immediate outbreak of disorder and violence a highly probable result of incendiary provocations in the film. The second is an advertising campaign which follows a decision to grant

21. 383 U.S. 502 (1966).

a permit or to make a classification as suitable for children, but which would have been influential under section 402 (c) in leading to a different decision. In addition, section 403 gives the Board limited power to correct a favorable decision of the administering official by appealing to the appropriate court. Censorship by harassment is not permitted, because the movie may continue to be exhibited pending a final official determination. The burden of recommending a change in classification or a revocation or suspension of the permit rests on the Motion Picture Appeals Board.

SECTION 404. *Effect of Prior Grant or Denial on Subsequent Application*

(a) Except as provided in subsection (b) the granting of a permit for a motion picture under one classification to an applicant shall require the granting of a permit for the same motion picture under the same classification to another applicant.

(b) A decision to refuse a permit to an applicant on the grounds of obscenity where a permit has already been issued to another applicant for the same motion picture shall be based only on section 402 (c).

COMMENT: The only situation in which a policy of evenhandedness is not operative in the application of this statute is the situation in which the same film is presented, promoted, and advertised in manners so different as to justify application of section 402 (c) to one exhibitor, but not to another.

PART V — SEVERABILITY AND EFFECTIVE DATE

SECTION 501. *Severability*

If any part, section, sentence, or clause of this ordinance shall be adjudged void and of no effect, such decision shall not affect the validity of the remaining portions of this ordinance. For the purposes of this section, subsections 401(a)(1), 401(a)(2), 401(b), 402(a)(1), 402(a)(2), 402(a)(3), 402(b), 402(c), 402(d)(1), 402(d)(2) and 402(d)(3) are expressly considered to be separable.

SECTION 502. *Effective Date*

This ordinance shall take effect . . . . . days after passage.

N.B. In a further stage of the Dallas litigation cited at page 400 n. 15

supra, the Supreme Court held invalid on grounds of vagueness the city's motion picture ordinance. *Interstate Circuit, Inc. v. Dallas* (U.S. April 22, 1968) at 1, col. 1, and at 34, col. 2 (city ed.)

NOTE: THE NEW DELAWARE CORPORATION LAW

I. INTRODUCTION

The new Delaware General Corporation Law,[1] effective July 3, 1967, has substantially transformed the prior Delaware Corporation statute.[2] The Delaware legislature, while originating a significant number of provisions, has also borrowed from other sources, such as the American Law Institute's Model Business Corporation Act[3] and the New York Business Corporation Act.[4] Not only are there numerous substantive changes, but few provisions have escaped modification in language either simplifying the wording or clarifying the meaning.[5]

In addition to the substantive and language changes,[6] the law has been modified to provide less involved procedures and has been updated to conform to new business conditions and to other law. Examples of procedural reform include a uniform method for filing documents with the state;[7] a simplified voting procedure for amendment of the certificate of incorporation;[8] and the elimination of the requirement that a chancery judge supervise a vote for dissolution.[9] The updating of the corporation law to conform to modern business conditions is exemplified by a provision permitting records to be kept by utilizing modern data processing techniques so long as the records can be readily converted into legible form.[10] A further illustration is the provision substituting the terms "registered agent" and "registered

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1. DEL. GEN. CORP. LAW tit. 8, §§ 101-398 (PRENTICE-HALL Corporations, 1967). [Hereinafter cited by section only].

2. DEL. CODE ANN. tit. 8, §§ 101-368 (1953) repealed July 3, 1967. [Hereinafter cited as 1953 Law].

3. ABA-ALI MODEL BUS. CORP. ACT, §§ 8, 11, 16, 39, 117 (1962) [Hereinafter referred to as Model Act].

4. N.Y. BUS. CORP. LAW § 713 (McKinney 1963).

5. For example, the wording of §§ 121, 123, and 261 has been changed significantly while the substance of the provisions has not been changed.

6. The more significant substantive changes are discussed *infra* pp. 414-27.

7. § 103. Formerly provisions for filing documents were specified for each document to be filed. To illustrate the significance of the change, the following provisions are among those adopting the procedure of § 103: §§ 133, 135, 151, 241, 245, 246, 251, 255, 275, 303, 311 and 312.

8. § 242(d).

9. § 275.

10. § 224.

office" for "resident agent" and "principal office,"[11] reflecting the fact that very often the agent for a corporation is agent for many corporations and is maintained solely to meet statutory requirements while all significant corporate operations are conducted outside of the state.[12] The updating of the law to conform to other statutes is exemplified by a provision[13] incorporating the Uniform Commercial Code — Investment Securities Article[14] and a provision[15] permitting restrictions on transfer of securities in conformance with Subchapter S of the Internal Revenue Code.[16]

II. Substantive Changes

Discussion of each of the many substantive changes embodied in the new corporation law is beyond the scope of this comment.[17] Items were chosen for discussion either because they represent significant modification of prior law (close corporations), clarification of prior law (ultra vires; interested directors; mortgage of all of the assets), or innovation in the law (director liability for unlawful stock redemption; merger and consolidation; waiver of notice of meetings).

A. Close Corporations

The 1953 statute treated close corporations no differently than publicly held corporations. New Subchapter XIV sets forth special provisions for close corporations which provide considerable flexibility in their management.

A corporation may qualify as a close corporation by providing in its

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11. §§ 131, 132.
12. The change in terms is in consonance with Model Act § 11.
13. § 201.
14. Del. Code Ann. tit. 5a, ch. 8 (Supp. 1967).
15. § 202(d).
16. Int. Rev. Code of 1954, §§ 1371-78.
17. Some of the changes that are not discussed include: Par stock is assessible up to the amount of the issue price rather than only up to the par value. § 162. Written stock subscriptions are irrevocable for six months unless otherwise agreed. §§ 165, 166. Stockholders are given greater latitude as to when they have the right to examine the stock ledger, but such examination is conditioned on a proper purpose. §§ 219, 220. The rights of bondholders to vote need not be conditioned on default of payment. § 221. Stockholders dissenting from a merger do not have appraisal rights if the stock of the corporation is registered on a national securities exchange or is held by not less than 2,000 stockholders. § 262(k).

certificate of incorporation[18] (1) that issued stock may not be held by more than a specified number of persons not exceeding thirty;[19] (2) that all stock must be subject to one or more of the restrictions on transfer permitted by § 202;[20] and (3) that no offering of its stock be made that would constitute a "public offering" within the meaning of the Securities Act of 1933.[21] A corporation may elect to become a close corporation by amending its certificate of incorporation by a 2/3 vote.[22]

Under the close corporation provisions, written agreements made by holders of a majority of the shares of a close corporation will not be invalid on the grounds that the agreements limit the discretion of the board of directors.[23] Were it not for this new subchapter, the enforcibility of such agreements would be in doubt in light of § 141(a) which requires that except as otherwise provided in the Corporation Law or in the certificate the board of directors shall manage the business of the corporation.[24]

Under the new law, these agreements limiting the discretion of the directors may be made with non-stockholders.[25] This provision is to some extent in conflict with the policy behind the requirement that the stock of the close corporation be subject to restrictions on transfer.[26] This policy would appear to be to permit the original stockholders

18. This inclusion in the certificate is in addition to the provisions required of all corporations by § 102.

19. In Bradley, *Toward a More Perfect Close Corporation — The Need for More and Improved Legislation,* 54 GEO. L.J. 1145, 1189-90 (1966) [hereinafter cited as Bradley], the suggestion is made that the number of stockholders be restricted to ten, since that is the maximum number of stockholders permitted for a corporation to be eligible for small business corporation status under the Internal Revenue Code. INT. REV. CODE of 1954, § 1371.

20. For example, the following restrictions are valid under § 202: restrictions on the sale of stock without first offering the corporation the opportunity to purchase the stock, restrictions on the transfer of stock without the consent of the corporation, restrictions to maintain status as small business corporation under Subchapter S, INT. REV. CODE of 1954, §§ 1371-78.

21. § 342. Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1933).

22. § 344.

23. § 350.

24. Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893 (1956); McQuade v. Stoneham, 263 N.Y. 323, 189 N.E. 234 (1934). *See generally* Delaney, *The Corporate Director: Can His Hands Be Tied In Advance,* 50 COLUM. L. REV. 52 (1950). Even under this new provision there is a question as to how the agreement will be enforced; *e.g.* whether the provision will be specifically enforced. *See* Ringling Bros. — Barnum & Bailey Combined Shows v. Ringling, 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947).

25. § 350.

26. § 342.

to have some control as to who would participate in the corporation and a fortiori who would manage the corporation.[27] As a result of the power of the majority to make agreements limiting the discretion of the board of directors, the minority stockholder may find that the power to manage the corporation not only is no longer in the hands of his fellow incorporators, but is held by a party who as a creditor has interests contrary to those of the minority stockholder.

Some protection is afforded to minority stockholders in that these agreements are binding only on the parties to the agreement.[28] However, in the case where the majority stockholders are also directors, the agreements, in effect, can bind the corporation. On the other hand, permitting agreements with non-stockholders which limit the discretion of the directors does add flexibility to close corporations in their dealings with creditors and non-stockholding managers. This flexibility is especially desirable in close corporations which often have limited access to risk capital and expert management and cannot demand either on the corporations' own terms.

The certificate may provide that the business of a close corporation shall be managed by the stockholders rather than the board of directors.[29] This option to permit shareholders to manage the business is a significant departure from the *modus operandi* typically associated with corporations: management by the board.[30] Apparently recognizing the extent of this departure, and to protect minority shareholders, the Delaware legislature required that the exercise of the option be embodied in the certificate, that such a provision may be inserted by amendment to the certificate only if there is a unanimous vote of all of the stockholders, and that the provision may be amended out of the certificate by only a majority vote.[31] These safeguards are substantial in comparison to the requirement that agreements limiting the discretion of the board can be made by shareholders holding only a majority

27. A transfer of stock inconsistent with the terms of the certificate may result in the termination of close corporation status. § 348.

28. § 350.

29. § 351. Florida's corporation has a similar provision. FLA. STATS. ANN. § 608. 0102 (1966 Supp.).

30. *See* Kessler, *The Statutory Requirement of a Board of Directors: A Corporate Anachronism,* 27 U. CHI. L. REV. 696 (1960) [Hereinafter referred to as Kessler]; *See also* Long Park, Inc. v. Trenton-New Brunswick Theatres, 297 N.Y. 174, 77 N.E.2d 633 (1948) which held illegal an agreement by all of the stockholders that the class A stockholders should have the exclusive power to manage the corporate business.

31. § 351.

of the shares.[32] Since the difference between management by a board of directors subject to an agreement limiting its discretion and management by the stockholders is only a matter of degree, the disparity in the protection offered to the minority stockholders seems unwarranted[33] and could be partially rectified if the courts required some minimum protection of the rights of the minority stockholders; *e.g.*, notice of the agreement.

The invalidity in Delaware of a provision in the certificate of incorporation of a publicly held corporation conferring the management of the corporation on the stockholders is not clear from the statutory language alone. Section 141(a) reserves the power of management of the business to the board of directors "except as may be otherwise provided in . . . the certificate." Section 141(a) would not invalidate a provision in the certificate which places the management of the corporation in the hands of the stockholders unless the provision is not properly includible in the certificate. To be properly includible in the certificate, such a provision must not be contrary to the laws of the state.[34] The statute does not expressly declare unlawful a provision vesting management of a publicly held corporation in its stockholders. There is a general judicial tendency to require that a corporation be governed by a board of directors.[35] However, the Delaware Court in *Mayer* v. *Adams*,[36] decided in 1957, implies in dictum that a corporation may exist without a board of directors if the certificate so provides.

If a close corporation is managed by stockholders and there is a deadlock impairing the business of the corporation, a custodian may be appointed by the court of chancery.[37] This procedure supplements another new procedure whereby a custodian may be appointed by the court of chancery if the board of directors is deadlocked.[38] As an alternative procedure, a provisional director may be appointed by the court of chancery to break a deadlock in the board of directors of a

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32. § 350.
33. Bradley, *supra* note 19, at 1187, argues that such agreements should be required to be signed by *all* shareholders.
34. § 102(b)(1).
35. *Seen generally* Bradley, *supra* note 19; Kessler, *supra* note 30.
36. 36 Del. Ch. 466, 133 A.2d 138 (1957).
37. § 352.
38. § 226. This section applies equally to close and publicly held corporations.

close corporation.[39] A provisional director differs from a custodian in that the former is only an additional director and control is left in the board, while the latter takes over the management of the corporation. This distinction is of importance with respect to issues as to which the board is not deadlocked, in that a custodian could enforce a position contrary to that of a majority of the board while a provisional director could not. It is also important as to issues with respect to which more than two positions may be taken. A custodian can enforce a position other than one of the two espoused by the respective sides of a deadlocked board, while a provisional director would not be able to do so except through compromise.

Under another new section no written agreement or provision in the certificate or by-laws is invalid on the ground that it is an attempt to treat a close corporation as a partnership.[40] In the past, courts have not looked favorably on agreements purporting to treat corporations as partnerships.[41] There has been a general judicial tendency to treat "incorporated partnerships" as partnerships: to require as a price for limited liability the maintenance of corporate form.[42] As long as creditors are put on notice of the limited liability of a close corporation such a judicial practice seems totally unwarranted. This new provision eliminates any doubt as to the validity of a multitude of arrangements[43] and permits close corporations to arrange their management, dividend, and arbitration agreements to conform to intended practice.

The certificate of a close corporation may now grant any shareholder or the holders of a specified number or percentage of shares the option to have the corporation dissolved at will or upon the occurrence

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39. § 353. *Cf.* Lehrman v. Cohen, 222 A.2d 800 (Del. 1966), decided before enactment of the new law, upholding a unanimously adopted amendment to the certificate which was designed to create a deadlock-breaking device by creating a new class of nonparticipating voting stock consisting of one share which was issued to a new director.

40. § 354. The Florida and North Carolina corporation laws also permit agreements to treat corporations as partnerships. N.C. GEN. STAT. § 55-73b (1965); FLA. STATS. ANN. § 608.0105 (1966 Supp.).

41. *See generally* Bradley, *supra* note 19, at 1148-50.

42. *Id.*

43. Such arrangements include, for example, giving each stockholder a single vote regardless of the number of shares, dividing "profits" so that salaries and dividends are allocated according to certain formulas, and establishing beforehand who will be elected to the board of directors. For a provision permitting voting pool agreements for both close and publicly held corporations *see* § 218(c).

of any specified event.[44] The dissolution after the exercise of the option, notice thereof, and a thirty day waiting period then proceeds as would any other dissolution.[45] This provision eliminates the necessity of a 2/3 vote for dissolution and the necessity of the board of directors initiating the dissolution.[46] Although a similar result could be achieved by creating a voting trust under § 218, this new close corporation provision avoids problems inherent in the use of the voting trust. These problems include possible difficulties in obtaining specific enforcement; a ten year limit on the term of the trust; and the possible inability of a voting trust to compel the board of directors to initiate a dissolution. Apparently the new provision does not affect the general requirements of the dissolution plan; *e.g.*, the fairness of the dissolution plan to minority shareholders.[47]

Taken as a whole the new subchapter[48] provides much needed flexibility[49] in the management of close corporations. Delaware has correctly recognized that close corporations do not operate in the mold of the public corporation[50] and that so long as the rights of minority shareholders are preserved and so long as outsiders are put on notice of major variations, little is to be achieved by attempting to force them into that mold.

B. Ultra Vires

Section 124 of the new corporation law partially codifies and partially modifies the common law doctrine of ultra vires.[51] In general, no completed act or transfer of property can be invalidated because the corporation was without power or capacity to effect the transaction

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44. § 355.
45. *Id.*
46. § 275.
47. *See* Shrage v. Bridgeport Oil Co., 31 Del. Ch. 203, 209, 68 A.2d 317, 320 (1949).
48. For related provisions not contained in Subchapter XIV, see § 101 which permits a single incorporator, and § 141 (b) which permits one or two directors where there is only one or two stockholders.
49. Bradley, *supra* note 19, at 1195; Kessler, *supra* note 30.
50. Kessler, *supra* note 30, at 717-718. As to close corporations, "neglect of . . . formalities is the rule rather than the exception, as has so often been pointed out. Yet such neglect may give rise to unfortunate consequences. . . ."
51. § 124 is almost identical to Model Act §6 derived from ILL. ANN. STATS. ch. 32, § 157.8 (1954).

or transfer.[52] An unauthorized act or transfer may be enjoined in the court of chancery in a proceeding by a stockholder.[53] The court of chancery may enjoin the performance of a wholly executory contract or set aside the performance of a partially performed contract if all of the parties to the contract are parties to the proceeding. The court also may award compensation for loss or damage sustained by any of the parties resulting from the enjoining or the setting aside of the performance of the executory contract, although such an award may not include anticipated profits.[54] The corporation (including trustees or stockholders in a representative suit) may assert the corporation's lack of capacity or power in a proceeding against an officer or director for loss or damage due to his unauthorized acts.[55] The Attorney General may have the corporation enjoined from carrying out an ultra vires act.[56] This section makes it clear that ultra vires may not be invoked by a third party, such as one who contracts with a corporation, since the use of the doctrine of ultra vires is limited to the stockholders, the corporation and the Attorney General.[57]

The opportunity for use of ultra vires may be significantly diminished if the corporation elects under new § 102(a)(2) to include in its certificate of incorporation a provision that the "purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law." Inclusion of such a provision obviates the necessity of listing in the certificate all activities that may be engaged in at some time in the

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52. *See* Delmarva Poultry Corp. v. Showell Poultry Corp., 54 Del. 472, 478, 179 A.2d 796, 799 (1962), holding that completed transactions may not be overturned. *See also* Healy v. Geilfuss, 37 Del. Ch. 502, 510, 146 A.2d 5, 10 (1958).

53. A stockholder may not complain of corporate action in which, with full knowledge of the facts, he has concurred. Elster v. American Airlines, 34 Del. Ch. 94, 96, 100 A.2d 219, 226 (1953).

54. § 124(1).

55. § 124(2). An unauthorized act by an officer or a director is to be distinguished from an ultra vires act by the corporation. For example, a declaration of dividends might be clearly within the power of the corporation; however, the payment of a dividend by an officer without prior approval by the board of directors would be an unauthorized act. Section 124(2) does not refer to this situation. Rather, § 124(2) refers to the directors' or officers' action being unauthorized because the corporation was without power to act.

56. § 124(3).

57. § 124. *See* Graham v. Young, 35 Del. 484, 489, 167 A. 906, 908 (1933), where it was held that only one who can show violation of some duty owing to himself can invoke ultra vires; Philadelphia, W. & B. R.R. v. Wilmington City Ry., 8 Del. Ch. 134, 144, 38 A. 1067, 1070 (1897).

future and the necessity of amending the certificate if a particular activity was not initially included.[58] Its inclusion eliminates the possibility of ultra vires acts occurring as a result of oversight in amending the certificate or because of mistaken judgment as to the extent of the corporation's powers as specified in the certificate.

Consonant with these new statutory provisions are the new statutory powers granted by § 122(10)-(16), some of which previously might have raised ultra vires problems. These powers include the right to be an incorporator,[59] to participate with others in any partnership or association,[60] to do any lawful business in aid of a national emergency,[61] to make contracts of guaranty,[62] to create pension, profit sharing, and stock option plans,[63] and to insure the lives of employees.[64] The prohibition against a religious corporation being a recipient of bequests has been deleted in the new law.[65] These changes would appear to be salutary. They seem to recognize the changing character of the modern business corporation in that businesses are often formed for the purpose of conducting multiple operations,[66] that modern compensation plans typically include pension, profit sharing and stock option plans, and that a significant financial loss to a corporation can result from the death of a key employee.

Analagous to the provisions concerning ultra vires are the provisions concerning foreign corporations unauthorized to do business in Delaware.[67] A foreign corporation doing business within Delaware and not complying with registration provisions may not maintain any judicial action or special proceeding in the state unless it becomes authorized to do business.[68] However, the validity of any contract or act of the foreign corporation shall not be impaired and the corporation may defend any suit.[69] The court of chancery may enjoin any unau-

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58. Such a provision would be of special value to conglomerate corporations.
59. §§ 122(10), 101.
60. § 122(11).
61. § 122(12).
62. § 122(13).
63. § 122(15).
64. § 122(16).
65. 1953 Law § 121(4).
66. *E.g.*, conglomerate corporations.
67. §§ 383-4. This provision is substantially the same as Model Act § 117.
68. § 383.
69. *Id.*

thorized foreign corporation from doing business in the state.[70]

A policy common to the provisions concerning both unauthorized foreign corporations and ultra vires is the avoidance of disruption of completed transactions, thus protecting third parties from harm. This policy decision seems clearly sound. Where an executory contract is enjoined as ultra vires, the third party is protected by the fact that he can obtain damages for any loss sustained as a result of his reliance on the contract.[71] Where the third party contracts with a foreign corporation unauthorized to do business in Delaware, the validity of the contract is not impaired.[72]

C. Interested Directors

Prior to the enactment of the 1967 law there was no statutory provision concerning the position of a director who deals either directly or indirectly with the corporation. New § 144(a)[73] provides that such contracts or transactions are valid if the director's interests are disclosed and the board has in good faith authorized the transaction by a sufficient vote, not counting that of the interested director;[74] if there is a stockholder's vote in good faith specifically authorizing the transaction after disclosure of the material facts of the interests and the transactions;[75] or if the contract was fair to the corporation at the time it was authorized.[76]

Insofar as this provision permits the stockholders to ratify a transaction which was unfair to the corporation at the time of the transaction,[77] there is a departure from the prior case law.[78] This departure does not seem justified, since apparently only a majority vote is required to ratify the transaction. Thus, the value of the interests of the minority stockholders may be adversely affected without their con-

70. § 384. *See also* § 378, a reenactment of 1953 Law § 349, which provides for fines for doing business within the state without first complying with relevant registration provisions.
71. § 124(1).
72. § 383.
73. For a similar provision, *see* N.Y. BUS. CORP. LAW § 713 (McKinney 1963).
74. § 144(a) (1).
75. § 144(a) (2).
76. § 144(a) (3).
77. § 144(a) (2).
78. Gottlieb v. Heydon Chemical Corp., 33 Del. Ch. 82, 91, 90 A.2d 660 (Sup. Ct. 1952). An unconscionable deal cannot be validated by a vote of the stockholders.

sent. Some protection would be afforded the minority by the requirement that the ratification be in good faith. Other than this departure § 144(a) appears to codify the case law.[79]

Section 144(b), which provides that interested directors are counted in the quorum at the meetings of the board of directors at which the authorization was made, is a direct reversal of the position which had been taken by the Delaware courts.[80] This reversal does not appear to be justified insofar as it reduces the number of disinterested directors required to be present for such a vote and thus increases the likelihood of authorization of action not in the interests of the corporation. Furthermore, the position taken by the courts could have made impossible obtaining a quorum even with all of the directors present. In such a situation, *i.e.*, whenever the number of disinterested directors did not equal a quorum, stockholder approval would have been required to validate the transaction. Such a result would appear to have considerable merit in that case, in that one of the major purposes in establishing quorum requirements is to insure that decisions be in the best interests of the corporation. Where the decisions to be made involve personal interests of members of the board of directors, the need to protect the best interests of the corporation is most acute.

D. Unlawful Redemption

The liability of directors formerly resulting from the declaration of unlawful dividends has been extended to the willful illegal redemption of stock.[81] A redemption of stock is unlawful when it occurs while the capital of the corporation is impaired or when it would impair capital;[82] a redemption of preferred stock is also unlawful when the redemption price exceeds the price at which preferred stock may be redeemed.[83] A director is protected against liability if he in good faith relies on the books of account of the corporation.[84]

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79. *See, e.g.*, Kerbs v. California Eastern Airways, 32 Del. Ch. 219, 225 ,226, 90 A.2d 652 (1952).
80. *Id.*; Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 580, 64 A.2d 581, 602 (Sup. Ct. 1948).
81. § 174.
82. § 160.
83. § 243. New § 243 (1) settles an unrelated problem by establishing that stock called for redemption is not outstanding for voting purposes.
84. § 172.

Although director's liability has been extended to unlawful stock redemption, the onus of the liability for unlawful dividends and stock redemption has been partially alleviated through new provisions for contribution from other directors voting or consenting to the unlawful dividend or redemption,[85] and for subrogation to the rights of the corporation against stockholders who had knowledge of facts indicating that the dividend or redemption was unlawful and who received payment.[86]

The broadening of the statutory liability of directors to include unlawful redemption is in accord with the purpose behind liability for unlawful dividends, which is to protect creditors from dilution of corporate capital.[87] Although the creditor is not protected completely in that the corporation may become insolvent without declaring dividends or redeeming stock, this new provision does afford the creditor added protection.

E. Mortgage of All the Assets

The new Delaware corporation law provides that stockholder consent for mortgage or pledge of corporate property is not necessary except to the extent provided in the certificate.[88] In so providing, the new law has resolved an ambiguity which arose under the prior law as to whether a mortgage of all of the corporate assets required stockholder approval.

Section 271 of the 1953 law required stockholder assent to the sale, lease, or exchange of all of the assets of a corporation. Whether the sale of all of the assets included the mortgage of all of the assets was left unanswered by the statutory language. In *Greene v. R.F.C.*[89] a federal court construing Delaware law[90] stated in dictum that the mortgage of all of the assets was a sale and therefore required stockholder approval. The court relied on a master's report which in return relied on two Massachusetts cases construing a Massachusetts provision similar to that of Delaware. One of the cases was *Commerce Trust Co. v. Chandler,*[91] which held that the policy behind the statute

85. § 174(b).
86. § 174 (c).
87. *See* Stratton v. Berles, 238 App. Div. 87, 263 N.Y.S. 466 (1933).
88. § 272.
89. 24 F. Supp. 181 (D. Mass. 1938).
90. DEL. CODE REV. (1935) ch. 65, *replaced by* § 271.
91. 284 F. 734 (1st Cir. 1922).

applied to the case where a mortgage of all of the assets secured a demand note. *Greene* attempted to extend this to a mortgage securing a time note without explaining why the policy of the statute so required. The *Greene* case, therefore, was probably of little value as precedent and it is fair to say that the question remained open.

The manner in which the new statute has resolved the issue — by providing that stockholder consent for a mortgage is not necessary except to the extent provided in the certificate[92] — seems to be the most desirable one. In general, the only disadvantages to a corporation which arise out of securing a note by mortgage are the restraint on the alienation of the corporate property and an undermining of the power to obtain other loans. In fact, though, it is often possible to make provision in the mortgage agreement allowing the alienation of specified property if other property is substituted. In addition, if the company is in a situation where it is necessary to mortgage all of the assets, it probably is in no position to obtain other loans. A mortgage does not change the rights of the stockholders[93] upon dissolution. Since upon dissolution all creditors are paid before stockholders, it is immaterial to the stockholders whether debts are secured by mortgage of corporate property or other form of indebtedness. The mortgage only relates to the position of the mortgagee vis-à-vis other creditors. The real issue is not the power to mortgage, but the power to borrow substantial sums without stockholder approval.

F. Merger and Consolidation

The new law gives Delaware corporations new powers with respect to consolidation and merger. When a corporation acquires another corporation and the treasury shares and unissued stock to be exchanged by the acquiring corporation do not exceed 15% of its outstanding stock immediately prior to the merger, no approval by the acquiring corporation's stockholders is needed so long as its certificate of incorporation does not have to be amended.[94] Delaware corporations may merge with non-U.S. corporations if certain requirements are met; *e.g.*, the resulting corporation is a Delaware corporation.[95] Added

92. § 272.

93. A stockholder-creditor can protect himself by having the certificate of incorporation amended to limit the power of the board to mortgage the assets. § 272.

94. § 251 (f).

95. §§ 256, 253 (e), 252 (a). This accords with Model Act § 2 defining foreign corporations to include non-U.S. corporations.

flexibility is given to the board of directors in that even after stockholder approval of a merger, the board can abandon merger plans without having to wait for a further stockholder vote.[96]

Two of these new provisions, the elimination of the requirement of stockholder approval for acquisition of small corporations[97] and the granting of power to the board to abandon merger plans,[98] have the effect of reducing the participation of stockholders in organic changes in the corporate structure.[99] The new provisions seem to be justified, though since the first does not result in a significant change[100] and the second provides desirable flexibility to counter such possibilities as adverse tax consequences and changing business conditions.

G. Waiver of Notice

Under the 1953 law wherever notice of a meeting is required, a written waiver of notice is deemed equivalent to notice.[101] The new law extends waiver of notice to include *attendance* at a stockholder meeting.[102] There is no waiver, however, if attendance is "for the express purpose[103] of objecting, at the beginning of the meeting, to the transaction of any business because the meeting is not lawfully called or convened."[104] This right to object is analogous to the judicial provision for special appearance to object to jurisdiction of the court without thereby submitting oneself to the court's jurisdiction.[105] Whether the analogy is so complete that the person making the appearance to object to the meeting can also participate in the meeting without waiving notice is an open question. Since the Delaware courts have held that a stockholder who objected to the propriety of a particular corporate vote and then participated in the vote did not lose

96. § 251 (d).
97. § 251 (f).
98. § 251 (d).
99. This is unlike §272 giving the corporation the right to mortgage, in that § 272 does not entail an organic change in either the formal or practical sense. *See* discussion *supra* at 424-25.
100. No more change is involved than the issue of an equivalent amount of unissued shares and the use of the proceeds to purchase the assets of another corporation.
101. 1953 Law § 229.
102. § 229.
103. Presumably, this purpose must be evidenced by some objective evidence such as actually objecting or attempting to object.
104. § 229.
105. *See, e.g.*, Harkness v. Hyde, 98 U.S. 476 (1878).

his right to object to the vote,[106] it is likely that participation in the business of a meeting would not be construed as a waiver when the participant first objected to the transaction of the business. Such a construction makes sense in that, otherwise, the stockholder objecting to the meeting is deprived of his votes if he erroneously decides the meeting was invalid.

III. Unresolved Problems

Although the new law answers many questions heretofore unanswered, many problems are still unresolved.[107] This section deals with two of these questions. The first apparently was intentionally left unresolved by the Delaware legislature. The second involves an apparent conflict between two provisions.

A. Removal of Directors

Section 141(b) refers to the possibility of the removal of directors. However, nowhere in the General Corporation Law is there any mention of whether removal is to be only with cause,[108] whether there can be removal without cause (with or without provision for removal without cause in the by-laws or certificate),[109] or whether the by-laws or certificate may provide that directors cannot be removed. The leading Delaware case is *Campbell v. Loew's*[110] which holds that stockholders have an inherent and unalterable right to remove directors for cause. The legislature's failure to indicate whether a by-law or certificate provision permitting removal of directors without cause is valid raises other questions. If, for example, a court holds that such

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106. Ringling v. Ringling Bros.-Barnum & Bailey Combined Shows, 29 Del. Ch. 319, 325, 49 A.2d 603, 606 (1946), *modified on other grounds* 29 Del. Ch. 610, 53 A.2d 441 (Sup. Ct. 1947).

107. Examples of unresolved problems include the whole question of de facto merger, the enforceability of voting trust agreements, and the liability of directors for mismanagement.

108. New York, Pennsylvania, and California, for instance, have statutory provision for removal for cause. N.Y. Bus. Corp. Law § 706(a) (McKinney 1963); Penn. Stats. tit. 15, § 1405 (Supp. 1967); Cal. Bus. Code § 810 (West 1947).

109. New York permits removal without cause if provision is made in the certificate. N.Y. Bus. Corp. Law § 706(b) (McKinney 1963).

110. 36 Del. Ch. 563, 134 A.2d 852 (1957).

a provision is valid,[111] it may also have to decide how to protect cumulative voting rights.[112]

If there is a determination that directors can be removed only for cause or that special procedures must be utilized if there is to be removal without cause, the definition of what constitutes cause and the delineation of appropriate procedures for determining whether cause exists are crucial. However, the statute offers neither definition of cause,[113] nor delineation of appropriate procedures. A single set of procedures for determining whether cause exists might not be appropriate. The procedure suitable for a small corporation might well be different than the procedure suitable for a large corporation. On the other hand, general criteria could be established so that minimum protection of the interests of the director and the stockholders could be insured.[114] Apparently, the framers of the 1967 law were content to allow the judicial process to derive these criteria of fairness.

B. Management by the Board of Directors

Section 141(a) in the 1953 law provided that "the business of every corporation . . . shall be managed by a board of directors, except as *hereinafter* or in the certificate of incorporation otherwise provided" (emphasis added).[115] The new law reenacts this provision except that "in this chapter" is substituted for "hereinafter," thus subjecting § 141(a) to the provisions preceding § 141 as well as those following it. Section 109(b) contains a new provision that "by-laws may contain any provision, *not inconsistent with law* or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers, or employees" (emphasis added).[116]

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111. Under § 102(b) (1) "any provision . . . defining . . . the powers of . . . the directors" can be inserted in the certificate if it is not contrary to the laws of Delaware. No Delaware statute appears to be in direct conflict with removal of directors without cause.

112. N.Y. Bus. Corp. Law § 706 (McKinney 1963).

113. Campbell v. Loew's, *supra,* held that deliberate attempts to harass the management of the corporation constitutes cause, while the attempt to gain control of the management does not constitute cause.

114. *See, e.g.,* Model Act § 36A.

115. 1953 Law § 141(a).

116. § 109(b).

Unanswered is the degree to which these two sections are interrelated. A by-law relating to the powers of directors is valid under § 109(b) so long as it is "not inconsistent with law." Management by the board of directors cannot be restricted under § 141(a) unless otherwise so provided in the General Corporation Law. If the word "law" in § 109(b) is interpreted to refer to § 141(a) and if the words "otherwise provided" in § 141(a) are interpreted to include only those provisions directly restricting management by the board and not § 109(b), a by-law restricting the board's discretion would be invalid. If, on the other hand, the word "law" is interpreted to refer only to direct prohibitions against the specific action contemplated and not to refer to § 141(a) and if "otherwise provided" is interpreted to include § 109(b), such a provision would be valid.[117]

If by-laws restricting the power of the board to manage the business of the corporation are not valid under § 141(a), the range of by-laws "relating to the business of the corporation, the conduct of its affairs, and . . . the . . . powers . . . of its . . . directors"[118] would be very limited. The all-inclusiveness of § 109 would indicate that the words "not inconsistent with law" were not intended by the legislature to refer to § 141(a) and the words "otherwise provided in this chapter" were intended to include § 109(b).

IV. Conclusion

The Delaware General Corporation Law has undergone material modification. This modification ranges in importance from the significant innovation embodied by the close corporations provisions[119] to the almost inconsequential formal change embodied by the substitution of "registered" agent for "resident" agent.[120] The new statute not only enlarges the coverage of provisions in the prior statute, as exemplified

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117. Other combinations of interpretations would result either in the by-law being valid under § 109b, but invalid under § 141(a); or in the paradox of the validity of the by-law under § 109(b) depending on the validity of the by-law under § 141(a), and the validity of the by-law under § 141(a) depending on the validity of the by-law under § 109(b).

118. § 109.

119. §§ 341-356.

120. § 132.

by the changes affecting mergers[121] and waiver of notice to meetings,[122] but also covers areas previously covered only by the common law, as exemplified by the provisions concerning ultra vires[123] and interested directors.[124]

Although the Delaware legislature has resolved certain issues such as whether stockholder approval is necessary for the mortgage of all of the assets[125] and whether directors are liable for unlawful redemption of stock,[126] it has also left unresolved such issues as the scope of removal of directors[127] and the validity of a by-law restricting the discretion of directors of publicly held corporations.[128] Excluding these unresolved issues, the new Delaware General Corporation Law is a creditable attempt to meet the problems of modern corporations.

*Charles H. Nida**

121. §§ 251, 252, 253, 256.
122. § 229.
123. § 124.
124. § 144.
125. § 272.
126. § 174.
127. § 141 (b).
128. §§ 109 (b), 141 (a).

*Member of the Class of 1969 in the Harvard Law School.