Our State Constitutions

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OUR STATE CONSTITUTIONS

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# CONTENTS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. GENERAL TENDENCIES IN STATE CONSTITUTIONS</td>
<td>1</td>
</tr>
<tr>
<td>II. THE MAKING OF CONSTITUTIONS</td>
<td>11</td>
</tr>
<tr>
<td>III. AMENDMENT, REVISION, AND BILLS OF RIGHTS</td>
<td>17</td>
</tr>
<tr>
<td>IV. SUFFRAGE AND ELECTIONS</td>
<td>24</td>
</tr>
<tr>
<td>V. THE EXECUTIVE DEPARTMENT</td>
<td>30</td>
</tr>
<tr>
<td>VI. THE JUDICIAL DEPARTMENT</td>
<td>36</td>
</tr>
<tr>
<td>VII. ORGANIZATION OF THE LEGISLATIVE DEPARTMENT AND ITS PROCEDURE</td>
<td>42</td>
</tr>
<tr>
<td>VIII. LIMITATIONS ON THE LEGISLATURE</td>
<td>50</td>
</tr>
<tr>
<td>IX. CONSTITUTIONAL REGULATION OF IMPORTANT INTERESTS</td>
<td>55</td>
</tr>
<tr>
<td>X. RELIGIOUS PROVISIONS OF THE STATE CONSTITUTIONS</td>
<td>62</td>
</tr>
<tr>
<td>XI. POPULAR REPRESENTATION IN STATE LEGISLATURES</td>
<td>70</td>
</tr>
<tr>
<td>XII. CONSTITUTIONS OF THE NEW ENGLAND STATES</td>
<td>83</td>
</tr>
</tbody>
</table>

INDEX | 91 |
OUR STATE CONSTITUTIONS.¹

CHAPTER I.

GENERAL TENDENCIES IN STATE CONSTITUTIONS.

Throughout classical and medieval philosophizing runs a theory of a paramount or fundamental law, permanent in kind, because fixed in nature. This theory in its modern form, after voicing itself for a time in the Cromwellian period, came to the front in the American Revolution, and found its proper expression in the written constitution. In our federal system, owing to the rigidity of the national constitution, the development of that document must be traced in the varying decisions of the supreme court of the United States. In the commonwealths a more flexible system of amendment prevails, and for that reason changes in what the states consider to be their fundamental law, may be traced more easily in the constitutions themselves, subject as they are to frequent revision and amendment.

In the revolutionary period these constitutions were few in number, small in size, and contained a mere framework of governmental organization. Since that time some two hundred state constitutions have been made or revised. The forty-five now in force average in length over fifteen thousand words, the longest, that of Louisiana, having about forty-five thousand. In place of fundamentals only, they are filled with details, so petty in many instances, as hardly worthy even to be dignified as statutory.

This tendency to enlargement is not without justification. The proper solution of problems arising from the complexity of modern interests, demands more wisdom and knowledge than is usually found in legislatures, which are often incompetent and sometimes venal. The democratic demand for legislation through convention, is really a demand for legislators of a high grade. To legislatures in consequence are left the mere details of legislation with a minimum of discretion in the formulation of statutes.

¹Read December 27, 1906, before the Third Annual Meeting of the American Political Science Association at Providence, R. I.
The Annals of the American Academy

Their ability in this sort of thing is well seen in the biennial output by the states of nearly twenty thousand statutes, three-fifths of which are local, private, or special in kind.

Our present state constitutions represent different stages of development and may be divided into four sets: (1) the six New England constitutions, (2) the ten made during the twenty-five years ending with 1865, (3) the fourteen made from that date up to 1886, and (4) the fifteen new and revised constitutions of the last twenty years. Three more will likely be added to this number within the next twelve months, and an average of one per year may be expected from that time on. The process of amendment, through which about twenty additions are made annually to our constitutions, tends to modernize all of these.

A comparison of these sets shows that the starting point for the study of state constitutions is the article on the lawmaking department. This powerful body in revolutionary days completely overshadowed the other two departments, and was practically the repository of the sovereign powers of the state. Though the theory of the separation of powers was held, all really important powers were in fact entrusted to the legislature. This is by no means the present condition. Not only have the other two departments been built up and strengthened at the expense of the assembly, but three other departments of government have developed into importance, and should be considered in any discussion of the division of sovereign powers. If the government is that organization through which all the sovereign powers of the state may be expressed, then surely in modern times we should speak not merely of the three historic departments of government, viz., the executive, the judicial, and the legislative, but also of the differentiations from these, the administration, the electorate, and that nameless agency, which in every state has the legal right to formulate the fundamental law, an agency which, for want of a better name, may be called the Legal Sovereign. These six departments unitedly may exercise every conceivable power included within the term sovereignty.

The general tendency in regard to these six departments of government, as shown by our existing constitutions, will be indicated in order, and then attention directed to the lengthy series of limita-

\footnote{Oklahoma, Michigan, and possibly Iowa.}
Our State Constitutions

...tions placed on the exercise of other powers not removed from legislative discretion.

I. Administration.—Historically administration is of course part of the executive function, but in our revolutionary period it was at first controlled and in part carried on by the legislatures. This was done through committees, temporary and then permanent. The work performed by these was gradually transferred to paid officials, who, as functions became specialized, were organized, for the purpose of carrying on the work of administration, into the numerous boards, commissions, and departments of government. Most of our states are still in this stage of development. Every new line of activity results in the formation of a special board or department, the organization and powers of which are frequently defined in the constitution. This also regularly provides for the election by popular vote of the heads of the chief administrative departments, such as the secretaries of state and of the treasury, the comptroller, or auditor, and the superintendent of education. As these numerous boards and departments really perform the larger part of governmental business, it is surely advisable that the several articles and provisions of the constitution be gathered together and placed under a separate heading entitled, departments of administration. Their functions also should be coordinated, unified, and thoroughly supervised. The absence of such centralization is perhaps the greatest weakness in local administration. Supervisory control over such bodies by legislative committees tends to become merely nominal, with the inevitable consequences of inefficiency and lack of economy. There is however a strong tendency to center such powers in the executive, making him the head of the administration as in the national system. This is done by bestowing on him large powers in appointment and removal, authority to demand reports, and to investigate the management of departments.

II. The Executive.—Aside from control over administration, the chief gain in power on the part of the executive is his veto over legislation. In 1788 two states only had placed the veto power in their constitutions, at this time but two states withhold it. Thirty-one states adopt the national fraction of two-thirds of both houses to override the veto, the other twelve prefer a majority or three-fifths. Thirty states now allow the governor to veto items of appropriation...
bills, and three of these also allow him to veto part or parts of any bill. If adjournment intervenes between the sending of a bill to the governor and its return approved or vetoed, ten states allow the governor a period of from three to thirty days to decide whether or not to approve such bills. Eighteen states allow him to file objections with the secretary of state, thereby defeating the bill. The veto power, especially when strengthened by the power to veto items and to approve or disapprove after adjournment, has aided greatly in the enlargement of the importance of the executive and in the conservation of public interests.

The governor's term of office is four years in twenty-one states, two years in the same number, three in New Jersey and one year in Massachusetts and Rhode Island. The office of lieutenant-governor is still retained in thirty-two of the states. He presides over the senate in thirty of these. In Massachusetts and in Rhode Island, he is a member of the council, or of the senate, \textit{ex-officio}, but presides only in the absence of the governor, who by constitution is presiding officer. The old-fashioned executive council is still retained by three of the New England states, and a modified form of it in North Carolina. Iowa by statute has an executive council made up of the governor and the heads of three departments.

III. The Judiciary Department.—The older constitutions disposed of this department in few words. Discretionary power was conferred on the legislature, and judges, appointed by governor or legislature, usually held a life tenure. The newer constitutions completely reverse this practice. The court, in the United States, does not simply decide cases, it interprets finally the constitution, and to that extent is a political factor. For this reason complex business conditions and the rise of corporate interests, necessitate much more attention to this department of government. The constitution of Louisiana, for instance, devotes about twelve thousand words to the courts of the state and of the city and parish of New Orleans. The newer constitutions regularly outline the grades of courts, define their powers, set the boundaries for judicial districts, and regulate the number and tenure of the judiciary. Three of the original states still retain a life tenure, but all others fix a term of years for judges of the supreme court; the term varies from two to twenty-one years. Twenty states favor the six-year term, eight and twelve years are the terms next favored,
three states have long terms, and Vermont a two-year tenure. Six states only retain appointment through the governor aided by council or senate. Four choose through the legislature, and one nominates through the governor and elects through the assembly. The other states all elect their judiciary and show no tendency in the other direction. Four of the New England states still allow the governor or assembly to ask the supreme court for opinions on questions of law.\(^8\) South Dakota and Florida allow the governor this privilege, but all the other states with greater wisdom reject this provision. There is a marked tendency in the constitutions to merge law and equity into a common procedure, to modify the jury, to define libel, and to safeguard the exercise of eminent domain by quasi-public corporations. All these tendencies unitedly show a strong determination to make the judicial system responsible directly to the electorate.

IV. The Constitutional Convention.—The modern theory of a fundamental law, and its embodiment in the written constitution, have necessitated the development of a governmental agency for the express purpose of formulating the fundamental law. Two forms of this agency are in use among the states, the legislature and the convention.

(1) The legislature in the performance of this office is not properly a legislature, but a convention. This is shown by the fact that its recommendations are not sent to the governor for his approval or veto, but to the electorate for final decision. The older method of amendment was through the action of two assemblies and large fractional votes by assembly and electorate. At the present time action by one assembly is sufficient in twenty-six states. Eighteen still require two assemblies, and the remaining state (New Hampshire) amends only in convention. All but Delaware use the referendum for final decision. Seventeen of the constitutions still require a two-thirds vote of both houses on amendments; seven, a three-fifths vote; in sixteen a majority is sufficient. Only two states require more than a majority for referenda, Rhode Island (three-fifths), and New Hampshire (two-thirds); the usual requirement, that of twenty-eight states, is "a majority of those voting thereon," but a few make amendment

\(^8\)Massachusetts, Maine, New Hampshire, Rhode Island.