

## *Introduction*

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The state constitution is the fundamental law of the state. As such, it should embody the aims and aspirations of the citizens of the state and serve as the foundation for the state's political life. It also should facilitate—rather than retard—political, social, and economic progress in the state.

Despite their diversity, American state constitutions share certain common features. A state constitution establishes the institutions of state government and prescribes how those institutions shall operate. Through its rights guarantees and its prohibitions on governmental action, a state constitution largely determines the scope of state powers, and it distributes those powers among the branches of state government and between state and locality.<sup>1</sup> A state constitution also establishes qualifications for state office and prescribes how state officials are to be chosen. Thus it channels political conflict in the state and provides mechanisms for its resolution. In addition, many state constitutions, not content to structure state government, enshrine fundamental policy choices, sometimes providing broad direction for public policy and sometimes prescribing its content in considerable detail. It is therefore no exaggeration to suggest that the effectiveness and responsiveness of state government, the policies that it pursues and the values that it advances, all depend fundamentally on the state constitution.<sup>2</sup>

As a glance back through history reveals, state constitutions have played a crucial role in the development of American governmental institutions. In part this has occurred through individual states pioneering constitutional reforms that were subsequently adopted by other states throughout the nation. Examples of the operation of this horizontal federalism include the movement to white manhood suffrage that occurred in emulation of the Alabama Constitution of 1819, the adoption of partisan election of state judges that followed the example of the influential Iowa and New York Constitutions of the mid-nineteenth century, and

the spread of the initiative that followed its adoption by Oregon in 1902.<sup>3</sup> State constitutions have also had an impact on national politics. In some instances state experiments, such as the enfranchisement of women and the direct election of the upper house of the legislature, have been incorporated into the federal Constitution. Even when state initiatives have not been adopted nationally, they have often furnished the agenda for those seeking to improve the operation of the federal government. Recent examples of this vertical federalism include the campaigns for a presidential item veto and for a balanced-budget requirement.

Finally, state constitutions in a sense “complete” the federal Constitution by including elements not found in that constitution that are essential to American government.<sup>4</sup> For example, the original federal Constitution did not need to define voting qualifications because state constitutions had already done so. Even today, the federal Constitution need not address education and local government, to take but two examples, because state constitutions deal comprehensively with those matters. Thus many matters that are dealt with in the national constitutions of other countries are in the United States addressed in state constitutions.

This is not to say that state constitutions always succeed in achieving the objectives sought by their drafters. Indeed, the history of state constitutions is largely a history of constitutional change, fostered by the conviction that constitutional reforms would improve the performance of state government. Only nineteen states retain their original constitutions, and most states have adopted three or more constitutions. Even when states have not jettisoned their constitutions, they have continued to tinker with them. The states’ current constitutions contain more than 6,000 amendments, with most state constitutions averaging more than one amendment for every year they have been in operation.<sup>5</sup> The frequency of state constitutional change through revision and amendment suggests both an acknowledgment of the problems plaguing current state constitutions and an optimism that their defects can be corrected.

The problems that provide the impetus for state constitutional change take various forms. Specific defects in a state constitution may prompt piecemeal reforms designed to address those defects. Many state constitutional amendments serve this purpose. In addition, a state constitution may over time cease to serve the broad social, political, or economic ends for which it was created, in which case fundamental changes may be introduced to achieve those ends more effectively. For instance, the perception at the outset of the twentieth century that state constitutions no longer sufficiently ensured the accountability of government officials prompted constitutional reformers to introduce elements of direct democracy—the initiative, referendum, and recall—into state constitutions. A state constitution may also be changed because the citizenry wishes to make specific substantive choices different from those in the former constitution and wants to devise new institutions or procedures for implementing those choices.<sup>6</sup> Examples include the constitutions adopted in the South after Reconstruction

that were meant to reassert white political control, as well as Illinois' "Granger" Constitution of 1870 and Montana's "environmental" Constitution of 1972. Alternatively, a state constitution may be changed to renew original constitutional commitments when political practice departs too much from the original constitutional design. When constitutional reformers do this, they are heeding the admonition of the Virginia Declaration of Rights that "no free government, nor the blessings of liberty, can be preserved to any people but by . . . frequent recurrence to fundamental principles."<sup>7</sup> Finally, a state may adopt a new constitution or substantially alter its old one to respond to new problems or new conditions. In doing so, the states are following the advice of Thomas Jefferson, who claimed that constitution making is a progressive enterprise, that each generation can draw on a broader range of political insight and experience in addressing the changing constitutional challenges confronting it, and that frequent constitutional change is thus desirable.<sup>8</sup> The adoption of the New Jersey Constitution of 1947, the Connecticut Constitution of 1965, and the Florida Constitution of 1968 illustrates this phenomenon.

Although only a few states followed the lead of New Jersey, Connecticut, and Florida in revising their constitutions during the mid-twentieth century, the political, social, and economic changes that promoted constitutional reform were hardly unique to those states. This is true more generally. Many of the problems and concerns that encouraged state constitutional change in the past were common to all the states, rather than idiosyncratic. And this is the case at the beginning of the twenty-first century as well. All the American states are assuming new responsibilities for policy development and implementation as power is devolved from the federal government and as new tasks arise for government at all levels. All the states likewise are seeking to address endemic problems in areas of traditional state responsibility, such as education, economic development, and the environment. All face budget difficulties to a greater or lesser extent. Moreover, all are confronting their responsibilities, new and old, amid rapidly changing political, economic, and social conditions. How effectively individual states respond to the challenges facing them will depend to a significant extent on the quality of their state constitutions, because these constitutions structure and guide the operation of state government.<sup>9</sup>

This, however, is a cause for concern. More than two-thirds of the states now operate under constitutions that are more than a century old, that were designed to meet the problems of another era, and that are riddled with piecemeal amendments that have compromised their coherence as plans of government. In addition, the public disdain for government at all levels, together with the increasing reliance on direct democracy for policy making in the states, suggests a need for constitutional reforms designed to increase the responsiveness of state institutions and to promote popular involvement that does not preclude serious deliberation about policy options. Many state constitutions would benefit from

substantial changes designed to make state governments more effective, equitable, and responsive, and to equip them to deal with the challenges of the twenty-first century.

Previous volumes of *State Constitutions for the Twenty-first Century* have focused on overcoming the political obstacles to state constitutional reform and on drafting state constitutional provisions. The present volume, in contrast, is aimed at the substantive direction of constitutional reform. It is designed to assist scholars, public officials, and members of the general public in identifying the constitutional problems confronting their states, in recognizing the range of alternative responses to those problems, and in choosing among those alternatives. To serve these purposes, the book describes the variety of state constitutions, analyzing their strengths and weaknesses, thus providing an overview of the current state of state constitutions. By identifying those strengths and weaknesses, it encourages officials and citizens to examine whether their particular state constitutions will enable their state governments to meet the challenges that will confront them in the early decades of the twenty-first century. Finally, by identifying alternative approaches devised by the states to deal with common constitutional problems and by assessing the advantages and disadvantages of those approaches, this volume provides guidance for those undertaking the task of constitutional reform.

The volume is organized topically, with chapters focusing on each of the major features common to contemporary state constitutions. The chapter “Rights” by Robert F. Williams considers the protection of rights under state constitutions. Four chapters—“The Legislative Branch” by Michael E. Libonati, “The Executive Branch” by Thad Beyle, “The Judicial Branch” by G. Alan Tarr, and “Local Government” by Michael E. Libonati—examine state constitutional provisions dealing with governmental institutions and their operation. Two chapters—“Voting and Elections” by James A. Gardner and “Constitutional Amendment and Revision” by Gerald Benjamin—look at constitutional provisions dealing with the expression of the popular will. Finally, three chapters—“Education” by Paul Tractenberg, “Environment and Natural Resources” by Barton H. Thompson, Jr., and “Taxing, Spending, and Borrowing” by Richard Briffault—consider constitutional provisions pertaining to fundamental areas of state public policy. In dealing with these topics, the chapters share a common approach. They identify the values that should guide constitution makers and constitutional reformers in dealing with these topics, survey the major issues pertaining to each topic, assess how various state constitutions have dealt with each of those issues, and thus clarify potential approaches to constitutional reform.

The use of the plural “approaches” is intentional and important. State constitutions necessarily reflect diverse state constitutional traditions, historical developments within individual states, and the particular political complexion of each state. As a consequence, no single model is appropriate for all states, and this volume eschews the creation of a “model state constitution.”<sup>10</sup>

Having said that, one must also emphasize that the constitutional experience of other states is vitally important for state constitutional reformers. State constitutions share a more or less uniform structure, and they deal with a common set of issues (as well as some issues that are distinctive to particular states or groups of states).<sup>11</sup> State constitution makers can therefore learn from the constitutional experience of other states and can draw on their constitutions. In fact, state constitution makers have regularly done so. The history of state constitution making is a history of constitutional borrowing, of drafters looking beyond their borders for how other states have dealt with the problems they share.<sup>12</sup> Judicious consideration of the experience of other states can yield both positive and negative models, as well as helping to identify the range of alternative approaches for addressing common problems. The contributions to this volume have undertaken to facilitate this task of constitutional comparison and borrowing.

The three volumes of *State Constitutions for the Twenty-first Century* represent the culmination of several years of work by a group of scholars and officials dedicated to improving political life in their states. Some of these dedicated individuals have contributed chapters to these volumes. Others too numerous to mention have provided information, encouragement, and critical commentary, and their contributions are likewise reflected in the pages of these volumes. I personally have profited immensely from their efforts and their expertise and want to recognize their importance.

This project would never have gotten off the ground without the generous backing of the Ford Foundation. I would particularly single out the support of Julius Ihonvbere, my grant officer at Ford, whose enthusiasm for the project never flagged. Finally, I would like to thank all those at Rutgers University-Camden who played a crucial role in the completion of the project. Provost Roger Dennis encouraged the formation of the Center for State Constitutional Studies, and he and Dean Margaret Marsh have strongly backed its activities ever since. Robert Williams, my colleague at Rutgers-Camden and Associate Director of the Center for State Constitutional Studies, has made enormous contributions to the project. His breadth of knowledge and his ability to negotiate difficulties have been crucial to the success of the project. Sylvia Somers, the administrative assistant at the Center, has helped keep the project on course with her hard work, her sharp eye for detail, and her eminent good sense.

## NOTES

1. State governments have historically been understood as possessing plenary legislative powers—that is, all residual powers not ceded to the federal government or prohibited to them by the federal Constitution. This is somewhat oversimplified but largely correct. State constitutions thus operate primarily as documents of limitation

rather than as documents of empowerment. With some notable exceptions, they do not grant powers to the state government but rather impose limits on the exercise of state power, and in the absence of such a constitutional limitation, it is generally assumed that the state government can act. For indications that the situation is somewhat more complicated than the traditional understanding suggests, see Robert F. Williams, *State Constitutional Law Processes*, 24 *Wm. & Mary L. Rev.* 178–79 (1983).

2. For further elaboration of the character of state constitutions and their development, see G. Alan Tarr, *Understanding State Constitutions* (1998).

3. Horizontal federalism refers to interstate relations, the transmission of ideas and policies from one state to another, in contrast with vertical federalism, which involves the relation between the federal government and state governments. See “Editors’ Introduction,” in *State Supreme Courts in State and Nation* (Mary Cornelia Porter and G. Alan Tarr, eds., 1982), xix–xxii.

4. Donald S. Lutz, “The United States Constitution as an Incomplete Text,” 496 *Annals Academy Pol. & Soc. Sciences* 23 (1988).

5. Data on state constitutions and state constitutional amendments are contained in thirty-five *Book of the States* 10, tbl. 1.1 (2003).

6. See Mark E. Brandon, “Constitutionalism and Constitutional Failure,” in *Constitutional Politics: Essays on Constitution Making, Maintenance, and Change* (eds. Sotirios A. Barber and Robert P. George, 2001).

7. Virginia Declaration of Rights, sec. 15.

8. Letter to Samuel Kercheval, July 12, 1818, reprinted in *The Portable Thomas Jefferson* (ed. Merrill D. Peterson, 1975).

9. These themes are elaborated in G. Alan Tarr, “The State of State Constitutions,” 62 *La. L. Rev.* 3 (2001).

10. The National Municipal League created a “model state constitution” in the early 1920s and periodically revised it over four decades. See *A Model State Constitution*, 6th rev. ed. (1967). For discussion of the political perspective underlying this model and the model’s effects on constitutional reform, see Tarr, *supra* note 2, at pp. 150–57.

11. State constitutions do differ in the level of detail in their treatment of those issues and in the range of other issues they address. Moreover, some problems are so state-specific that no other state’s experience is helpful in solving them.

12. For documentation of borrowing during the nineteenth century, see Christian G. Fritz, “The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution Making in the Nineteenth-Century West,” 25 *Rutgers L.J.* 945 (1995). More generally, see Tarr, *supra* note 2, chapters 4–5.