

# Citizens Research Council of Michigan

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## Michigan Constitutional Issues

CITIZENS RESEARCH COUNCIL OF MICHIGAN IS A 501(C) 3) TAX EXEMPT ORGANIZATION

Report No. 313-01 First in a series on revising the Michigan Constitution

June 1994

### THE NATURE AND PURPOSE OF A STATE CONSTITUTION

#### THE ISSUE IN BRIEF

At the general election to be held on November 8, 1994, the people of Michigan will decide the question whether to call a Constitutional Convention to revise the present state Constitution Which was adopted April 11 1963. Section 3 of Article 12 of the State Constitution requires that “[a] the general election to be held in the year 1978, and in each sixteenth year thereafter and at such other times as may be provided by law, the question of a general revision of the constitution shall be submitted to the electors of the state...”

In resolving the question of whether to call a Michigan Constitutional Convention, it is essential that voters have an adequate understanding of the nature and purpose of a state constitution. This analysis examines the basic principles underlying American constitutional law, particularly as those principles concern the nature of state government. This analysis summarizes the issues examined in Research Council Memorandum No. 202, The State Constitution: Its Nature and Purpose, authored by Paul G. Kauper, October 1961, 29 pages.

#### Introduction

American constitutional law presupposes certain basic principles that find expression, either explicitly or implicitly, in state constitutions and the Constitution of the United States. Some of these principles are so fundamental and familiar, and their implications so plain, that it is sufficient simply to enumerate them: that political power resides ultimately in the people; that the popular will is reflected in the institutions of representative government which are created to serve the interests and welfare of the people; that those institutions of government are subject to the limitations imposed by the people and by the rights retained by them; that a constitution is the fundamental and supreme law; and that courts when exercising the power of judicial review have the responsibility and obligation to uphold this fundamental law and to remit enforcement of legislative and other acts of government which are repugnant to it. These are propositions which need no elaboration. The matters discussed below regarding the nature and purpose of a state constitution, both in relation to the structure of the federal system and to the internal purpose served by such a document, warrant a more extended treatment.

#### The Notion of a Written Constitution as Supreme Law

The United States Constitution and the state constitutions, some of which predate the federal charter, give expression to the concept that the basic framework and institutions of government and the liberties which the people reserve to themselves are to be reduced to writing In a document that is recognized as the supreme law. The contours of American government, that now are so accepted as to be taken for granted, and which in the main consist of a distribution of powers

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between a central government and constituent states in a federal system and a well-defined separation of powers within their respective spheres, could not be achieved on a constitutional basis except through a written document.

### **States as Part of the Federal Union**

In 1868, the United States Supreme Court observed In the case of **Texas v White** that the United States Constitution "looks to an indestructible Union composed of indestructible States." That Michigan Is one of the states comprising this union is of great importance in determining the nature and purpose of its Constitution. The states, while indestructible and possessed of a distinctive constitutional status and sphere of autonomy, are not totally sovereign in the usual sense of that word due to the authority ceded to the federal government.

Because of the express and implied delegation of certain powers to the federal government, the express and implied denial of other powers to the states, and because the federal Constitution recognizes certain individual liberties which can be enforced as a matter of federal law against the states in dealing with their own citizens, states are not sovereign in the full sense of the word.

Nevertheless, the states continue to occupy a place of great significance and responsibility in the federal Union. The states continue to have primary responsibility for a wide array of activities, including the bulk of the criminal laws, the system of private law and its administration, the role of local governments, elementary-secondary education, and public health and safety. In addition, the states exercise significant regulatory power in important areas of economic life, notwithstanding the increasing reach of the federal government into vital segments of the national economy. The nature of the federal-state relationship considered here is expressed in the Tenth Amendment to the United States Constitution which provides that "[t]he powers not delegated to the United States by this Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

### **State Constitutions as Documents of Limitation**

It is an accepted tenet of American constitutional law that the principal purpose of a state constitution is to serve as a limitation upon the governmental power of the state. Although a state constitution also defines the organs of government, allocates the powers of government among those organs and declares basic liberties, these considerations are secondary to that of limiting state governmental power. Because that power derives from the nature of sovereignty itself, it is plenary except in so far as it may be limited by a state constitution or by the Constitution of the United States.\*

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\* The fact that state constitutions are primarily documents of limitation upon an otherwise plenary, preexisting authority is one explanation for their considerable length. According to data compiled by the Council of State Governments as of January 1, 1994, the 50 state constitutions ranged in length from approximately 174,000 words (Alabama) to 6,600 words (Vermont). The average length was 28,591 words. By comparison, the Constitution of the United States is but approximately 4,400 words.

The sovereign power of a state is to be contrasted with the delegated power of the federal government. In theory at least, the domestic powers of the federal government are limited to those that either are explicitly granted by the Constitution of the United States or which arise by necessary implication. There is a notable exception to the federal government's delegated power: the power to conduct foreign relations, which is generally considered to be an inherent attribute of a sovereign nation. In essence, the Constitution of the United States delegates to the federal government powers which it would not otherwise possess, while the constitution of a state serves not as a grant of authority but as a limitation upon a preexisting authority, the precise outer limits of which are difficult to mark.

The significance of the fact that the powers of a state are plenary, except to the extent they are constitutionally limited, is not always understood. Thus, it not uncommonly occurs that when a state legislature enacts a law, those who may consider it to be objectionable in certain respects may inquire as to what provision of the state constitution authorizes the law. However, in order to vindicate the exercise of a given power, a state legislature need not point to a power granted to it in the constitution. The only relevant inquiry would be whether any provision in the state constitution (or federal Constitution) prohibited the legislative action. In theory, if a state constitution did no more than to establish a legislative body, despite an absence of any specific grant of authority, that body could enact general laws pursuant to the police power, levy taxes of various kinds, borrow and spend money, condemn property for public use, and perform all other acts embraced within the concept of the general powers of government.

### **The Separation of Powers**

Based upon Montesquieu's celebrated analysis, the powers of government may be classified into three categories: legislative, executive, and judicial. In the absence of a state constitutional provision to the contrary, and to the extent they are not delegated to the national government, these powers are exercised by the legislative branch of state government. One of the traditional methods by which citizens afford themselves protection from the abuses which naturally would flow from such a centralization of governmental power in one institution is by providing in their state constitutions for a separation of that power.

The doctrine of separation of powers is fundamental to American constitutional thinking and practice. According to this doctrine, the powers of government are dispersed among and within distinct branches of government. For example, Section 2 of Article 3 of the present Michigan Constitution states that "[t]he powers of government are divided into three branches of government; legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Hence, in Michigan as in other states, the Legislature has the power to enact laws, but not to enforce them; the executive is granted the power to enforce the laws, but not to enact them; and neither can construe the law with finality, for that power is committed to the province of the courts.

### **Other Considerations**

The organs of government as set forth in a state constitution should be vested with powers adequate to achieve the ends of good government. This means, among other things, that the government should be endowed with the capacity to fashion and administer policies which promote

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the general welfare as determined by a preponderant public opinion in light of new and changing circumstances. At the same times the vast expansion of governmental authority and the increased demands imposed upon citizens by regulatory and tax laws, make it equally imperative that the safeguards of representative government, such as the rule of law, the reserved rights of the people, and the restraints designed to prevent arbitrary and irresponsible exercise of power be preserved and strengthened.

The present Michigan Constitution was adopted by the people over 30 years ago. Any proposed revision of that Constitution would do well to observe those considerations which have been determined by experience to be the enduring values of a government resting on the consent of the people. To fashion a fundamental order of government, to preserve the continuity of constitutional tradition by holding fast to that which is good, while ensuring a government which would be adequate to meet not only present needs, but also those of tomorrow -- this is the challenge which would confront a state Constitutional Convention.