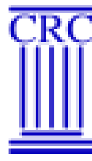

From: **The State Constitution: Its Nature and Purpose**, originally published by the Citizens Research Council of Michigan in October 1961.

In late 1961, the Citizens Research Council of Michigan prepared a series of papers concerning the decisions confronting the Constitutional Convention of 1961-62. The second in the series was *The State Constitution: Its Nature and Purpose* (October 1961), by Paul G. Kauper, University of Michigan School of Law. Among the issues addressed was the level of detail appropriate to a state constitution.

Professor Kauper argues that detailed constitutional provisions are inimical to the role of a constitution as an enduring, understandable basic governing document.

Several proposed amendments to the 1963 Michigan Constitution submitted to voters either by the Legislature or by initiative petition in recent years have contained enough detail to raise the question of whether the Constitution is the appropriate place for such detailed and often complex provisions, regardless of their merits as public policy.

In the interest of stimulating consideration of this question, CRC is reissuing a portion of *The State Constitution: Its Nature and Purpose*.

The Constitution as a Fundamental and Enduring Instrument of Government

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

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

Justice Cardozo stated the matter more succinctly:

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

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

The Trend Toward Detail

Despite the admirable pattern established by the earlier documents, the general trend throughout the nineteenth century was to make state constitutions, by the process either of revision or amendment, much more detailed and elaborate and in many cases prolix documents which incorporated matters that could well have been left for the ordi-

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nary law-making processes. The distinctive character of a constitution as the fundamental or basic law, superior to ordinary laws, underwent a change. A number of factors contributed to this result. Undoubtedly the acceptance of the theory of popular participation in the law-making process played a major part.

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

In some situations a relatively simple amendment process offers and easier method for securing legislation than the usual legislative process. Moreover, the tendency toward inclusion of greater detail in state constitutions, and particularly the inclusion of restrictions on the legislative power, notably the taxing, borrowing and spending powers, reflected a distrust of the legislature and an unwillingness to vest it with broad general powers in these areas.

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

The Need for Restraint

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

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

Placing curbs on governmental power is understandable. This is one of the essential purposes of a constitution and this is a reason for including a declaration of rights. But it is another matter to cripple the legislature in the exercise of essentially legislative powers where judgment and discretion in meeting current problems are required. A state constitution designed to meet modern needs moves in a negative direction if premised on an unwillingness to entrust the people's representatives with powers adequate to their tasks. Improving the legislative process, attracting able individuals to the legislature and equipping them with the means and facilities conductive to well-informed and responsible discharge of their tasks is a

more constructive approach to the problem of responsible government than the process of popular law-making by means of constitutional revision or amendment or the placing of rigid constitutional limitations on the exercise of legislative powers. This is not to suggest that some limitations on generally stated legislative power are not desirable. But any limitations adopted should not be narrowly conceived, should admit of flexibility, should be carefully examined in light of their restrictive power on the legislature to meet not only today's problems but tomorrow's as well, and should be drafted with a clarity that will make it unnecessary to resort repeatedly to the process of litigation in order to determine their meaning.

The Importance of Popular Understanding

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

Initiating Law in Michigan

Two forms of initiated law are available to Michigan citizens under the Constitution adopted in 1963:

1. *Constitutional initiative*. In order to qualify for the ballot, a proposed amendment to the Michigan Constitution must be supported by petitions containing a number of signatures equal to at least 10 percent of the number of votes cast for governor in the last preceding election.

The first initiated amendment to the 1963 Constitution was the so-called "Parochiaid" amendment (Proposal C of 1970). In total, 19 constitutional initiatives have made it to the ballot since 1963. Five were adopted; 14 defeated.

2. *Statutory initiative*. In order to initiate a statute, a proposed law must be supported by petitions containing a number of signatures equal to at least 8 percent of the number of votes cast for governor in the last preceding election.

An initiated statute cannot be vetoed by the governor and may be amended or repealed only by a vote of the people or a ¾ vote of each house of the legislature.

The first initiated statute under the 1963 Constitution was adopted by the voters in 1972. In total, 11 statutes have been proposed under the initiative process since the adoption of the 1963 Constitution. Six were adopted[1]; 5 were rejected.

[1] One of the adopted initiated statutes was superseded by a statute referred by the legislature to the electorate that received more votes.