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ALASKA STATEHOOD COMMITTEE

FOR THE

ALASKA CONSTITUTIONAL CONVENTION

Volume 1 of 3.

PUBLIC ADMINISTRATION SERVICE

CONSTITUTIONAL CONVENTION
Administrative Service - Constitutional Studies, Vol. 1

Service - Constitutional Studies, Vol. 1

C O N S T I T U T I O N A L S T U D I E S

Prepared on behalf of the
ALASKA STATEHOOD COMMITTEE
for the
ALASKA
CONSTITUTIONAL CONVENTION

Convened
November 8, 1955

P U B L I C A D M I N I S T R A T I O N S E R V I C E

Volume 1 of 3



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November 8, 1955

Honorable Delegates
Alaska Constitutional Convention
College, Alaska

Ladies and Gentlemen:

The Act of the Alaska Territorial Legislature creating the Alaska Statehood Committee (Chapter 108, Session Laws of 1949) authorized and directed the Committee, among other things, to:

"Have ready, in preparation for the Constitutional Convention, fully detailed information and analyses for use by the Convention in preparing the required draft of a constitution for Alaska, to the end that the people may have the opportunity of passing upon an entirely sound and thoroughly prepared document."

On June 1, 1955, the Statehood Committee entered into a contract with Public Administration Service, a non-profit organization devoted to providing research and consulting services for governmental jurisdictions and agencies, to make the necessary research and to provide reports for use by the Convention Delegates in their deliberations. The Statehood Committee takes pleasure in presenting to the Delegates, in three volumes, the materials prepared by Public Administration Service.

For the information of the Delegates we are listing the names of the representatives of Public Administration Service who participated in the preparation of these studies:

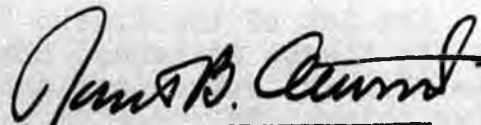
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Service Constitutional Studies, Vol. 1

In addition, Dr. Ernest R. Bartley of the faculty of the University of Florida and Laurin L. Henry of the staff of Public Administration Clearing House participated in the studies.

The Alaska Statehood Committee has also undertaken to make available for the use of the Delegates a small library of standard reference materials. We sincerely hope that these efforts of the Committee will prove useful to the Delegates in developing a constitution which will serve the needs of the people of Alaska for many years to come.

Respectfully submitted,



Robert B. Atwood,
Chairman

TABLE OF CONTENTS

VOLUME 1

- I. The State Constitution within the American Political System
- II. Civil Rights and Liberties
- III. The Alaskan Constitution and the State Patrimony
- IV. Suffrage and Elections

VOLUME 2

- V. The Legislative Department
- VI. The Executive Department
- VII. The Judicial Department

VOLUME 3

- VIII. The Constitution and Local Government
- IX. State Finance
- X. Legislative Structure and Apportionment
- XI. Constitutional Amendment and Revision
- XII. Initiative, Referendum, and Recall

Constitutional Studies, Vol. 1

I

THE STATE CONSTITUTION WITHIN THE
AMERICAN POLITICAL SYSTEM

A staff paper prepared by the Public Administration
Service for the Delegates to the Alaska
Constitutional Convention

November, 1955

Alaska - Constitutional Studies, Vol 1

Constitutional Studies, Vol. 1

A constitution, to contain an accurate detail of all subdivisions of which its great powers will admit, and all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It probably would 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 composed those objects be deduced from the nature of the objects themselves.

Chief Justice John Marshall
speaking in McCulloch
v. Maryland, 1819.

Vol. 1
Constitutional Studies

TABLE OF CONTENTS

The State Constitution within the American Political System	1
Place of the States in the Federal Union	2
The Distribution of Governmental Powers	3
Relationship of State to Federal Government	6
The Internal Responsibilities of States	9
Responsibilities of States to each other	9
The Electoral Functions of the States	12
The Constituent Functions of the States	12
Admission of States to the Union	13
Procedure	13
Congressional Limitations as Conditions for Admission	14
Congressional Restrictions and the Alaska Constitutional Convention	17
Principles of Constitutional Government	21
The Principle of Popular Sovereignty	22
The Principle of Limited Government	24
The Principle of the Separation of Powers	25
The Principle of Checks and Balances	27
Summary	28
Characteristics of Present State Constitutions	29
Length	30
Contents of State Constitutions	31
Bills of Rights	31
Suffrage and Elections	32
Separation of Powers	33
Legislature, Executive, and Judiciary	33
Amendment and Revision	34
Other Provisions	34
Summary	35
The Criteria of Constitutional Drafting	36
(1) Constitutional language is significant and its drafting of the highest importance	36
(2) Experience demonstrates the importance of confining the language of the Constitution to fundamentals	40

(3) The civil rights and liberties set out in the Bill of Rights should be stated concisely	42
(4) Authorities agree that the Constitution should set out only the essential framework of the machinery of government	43
(5) A well-drafted Constitution will be so organized that the scope of executive and legislative powers and functions are clearly defined in order that responsibility for governmental action can be readily determined	45
(6) The independence of the judiciary is an end to be desired in constitutional drafting	46
(7) The Constitution should provide for amendment	46
Summary	47
The Role of a State Constitution Today	48

THE STATE CONSTITUTION WITHIN THE
AMERICAN POLITICAL SYSTEM

Fifty-five citizens of Alaska will gather at College on 8 November 1955 for the purpose of writing a Constitution, a charter which will represent one additional link in a chain leading to ultimate statehood. Almost 170 years ago, fifty-five men sat through sweltering summer heat in Philadelphia and produced a document which is the oldest written constitution in the world today--the Constitution of the United States. The difference in miles, years, and climate covers an unbroken span of geographic, economic, social, and political growth without parallel in modern history. The Alaska Constitutional Convention is in keeping with that great governmental tradition.

The writing of constitutions has always and in every circumstance been a serious matter, for a constitution is the fundamental law of a nation, embodying those principles which underlie the government. In more common language, it is the body of rules that govern the playing of the governmental game. The rules may be complex or simple, though the latter is to be

preferred but rules they are, and the authority of government is circumscribed by and subservient to them.

American tradition requires that the constitution shall be a written one. It is, in American theory, the contract by which the people, from whom all political power flows, agree to establish a government and to surrender to it the authority which they wish it to exercise. It is designed to establish the principles upon which the political system rests, to lay out the broad plan of governmental structure, and to prescribe the limits of governmental power over the individual. It is a contract among free people subject to change only with the people's consent.

To paraphrase Justice Cardozo, the Alaska Constitutional Convention will be charged with stating "principles of government for an expanding future." Such is the import of a constitution and great is the responsibility of those who undertake to be the authors of such a document.¹

Place of the States in the Federal Union

When Alaska becomes a state, she will assume the obligations and receive the privileges of a member of the American federal union. Certain defined relationships between Alaska and other states and between Alaska and the national government will be

¹ There have been one national constitutional convention and some 200 state constitutional conventions during the course of our national history.

Service - Constitutional Studies, Vol. 1

brought into being. Alaska will become, in the words of Chief Justice Chase, a member of that "indestructible union of indestructible states."²

The Distribution of Governmental Powers.

As developed in the federal Constitution and by years of practice, American federalism has distributed the powers of government between the central government on the one hand and the state governments on the other, with this distribution of power formalized in the Constitution so that changes in that distribution can be accomplished only with the consent of both nation and states. This distribution of power between nation and states in a written document has been one of the most important circumstances of American constitutional existence.

The theory of this distribution of power in the American federal system is not a difficult one to understand. The distribution has its rationalization in the idea that national problems should be met by the national government and that state and local problems should be handled by state and local authorities. The federal government has been granted what are known as "delegated" or "enumerated" powers. Thus in Article I, section 8, there are listed almost a score of powers which the central authority may exercise--the power to coin money,

² Texas v. White, 7 Wall. 700 (1868).

Constitutional Studies, Vol. 1

4

establish post offices and post roads, lay and collect taxes, and regulate foreign and interstate commerce, for example.

Some other possible areas of governmental activity are denied by the Constitution (1) to the central government, (2) to the states, and (3) to both. The federal government may not, for example, try a person for a crime against the United States unless that individual has been duly indicted by a grand jury;³ states may, and some do, indict by information for crimes committed against state law.⁴ In the second category, one may note that the states may not enter into treaties or alliances with foreign nations, coin money, or grant letters of marque.⁵ Both the states and federal government are specifically prohibited from passing ex post facto laws or bills of attainder,⁶ nor may either authority levy taxes on exports.⁷

Those powers remaining after the grant of delegated or enumerated powers to the national government has been made, and after certain prohibited areas have been set up, are said

³ Fifth Amendment.

⁴ An "information" is an "indictment" drawn by the prosecuting attorney, in contrast to a grand jury, which is a specially chosen body of citizens created for the purpose of deciding whether the evidence is sufficient to return an indictment and cause the person to stand trial.

⁵ Article I, section 10, clause 1.

⁶ Article I, section 9, clause 3; Article I, section 10, clause 1.

⁷ Article I, section 9, clause 5; Article I, section 10, clause 2.

Volume - Constitutional Studies, Vol. 1

to be "reserved" to the states.⁸ The states are governments of residual powers; so far as the national Constitution is concerned, no listing of their powers can be found. Yet the powers reserved to the states are numerous and substantial: exercise of the police power,⁹ education, setting of voting qualifications, and many others may be mentioned. The powers of the states of the United States are not "paper" powers.

Within the framework of its delegated powers, the federal Congress may enact laws deemed "necessary and proper" to carry out the delegations granted to it. These so-called "implied powers" are necessary and proper concomitants of the specific enumerations of Article I, section 8. Through the device of the doctrine of implied powers the federal government has, of course, greatly extended its authority down through the years.¹⁰ By utilizing its power to regulate interstate commerce, for example, the federal government regulates methods of transportation and communication never envisaged in their wildest flights of imagination by the Framers of the Constitution.

⁸ "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Tenth Amendment.

⁹ Defined generally as the power which the state has to protect the health, morals, and welfare of its citizenry.

¹⁰ So-called "inherent" and "resultant" powers are not discussed in this paper. They are definitely a source of federal power, particularly in the field of foreign relations, but an understanding of them is not necessary to this discussion.

When operating in an area of authority properly within its province, the federal authority is paramount to any conflicting state legislation or action. Constitutional phraseology on the point is clear.

This Constitution, and the Laws of the United States which shall be made in pursuance thereof: and all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land: and the judges in every State shall be bound thereby, anything in the Constitution, or Laws of any State to the contrary notwithstanding.¹¹

The interpretations of the United States Supreme Court, from the days of John Marshall,¹² have clearly established that state laws or activities must yield when in conflict with a constitutional exercise of federal power.

Relationship of States to Federal Government.

The men of 1789 were well aware that in thus distributing the powers of government they were providing for a dual system of authority. They were, however, unwilling to give powers to the central government without some guarantees, constitutionally manifested, that the central government would not take over the states and make of them mere administrative units. To that end

¹¹ Article VI, clause 2.

¹² In declaring in one of his most famous opinions that a state could not tax a national bank chartered by Congress, he stated that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared." McCulloch v. Maryland, 4 Wheat. 316, 436 (1819).

Service - Constitutional Studies, Vol. 1

they provided that the national government was to afford protection against invasion by foreign powers and was to give aid upon request of the state in case of domestic violence or catastrophe of such serious character that the state could not cope with it. The Framers of the national Constitution specified a guarantee of territorial integrity: no state was to be divided into two or more states without the consent of the state legislature and the Congress, nor were two or more states to be combined into one without the consent of the state legislatures concerned and the Congress.¹³

The Framers specified, too, that it should be the duty of the United States to guarantee to every state a "republican form of government."¹⁴ The federal courts have refused to give meaning to this clause, declaring the question to be a "political" one not susceptible of judicial interpretation. The Supreme Court has said that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character."¹⁵ Thus if Congress seats the congressional delegation from a given state, that state may be said to have a "republican" form of government.

There is a further meaning of the clause, however, as applied to the Alaskan situation. The many bills introduced

¹³ Article IV, section 4.
¹⁴ Ibid.
¹⁵ Luther v. Borden, 7 How. 1, 42 (1849).

in recent sessions of Congress calling for the admission of Alaska and Hawaii as states have specified that their constitutions "shall be republican in form."¹⁶ Practically speaking, this phraseology makes Congress the arbiter of the point and means that a constitution which it accepts will be deemed automatically "republican in form." The phrase as used in the various pieces of proposed enabling legislation, then, might conceivably be employed as a political handle by some opponents of statehood when the question of Congressional approval of the Alaskan and Hawaiian constitutions arises.

In addition to the three constitutionally specified obligations of the national government to the states, there are many other obligations which the national government has assumed by statute down through the years. The variety and number of these statutorily defined relationships need not be of concern here except for the realization that they do exist in considerable number and that they are in many cases of far greater importance to the economic well-being of the states than the constitutionally specified obligations. One may note, for example, that the numerous federal grant-in-aid programs are typical examples of federal obligations contingent upon a state meeting eligibility requirements for a particular type of grant.

¹⁶ See, e.g., H. R. 2535 (84th Congress, 1st Session), section 102, paragraph 2; section 203, paragraph 2; and S. 49 (84th Congress, 1st Session), section 102, paragraph 2; section 203, paragraph 2.

The Internal Responsibilities of States.

Of particular pertinence in the case of Alaska is the generally recognized concept of American government that a state of the federal union should be capable of maintaining internal peace and order within its borders. The phrase "capable of self government" is a bit trite but nevertheless expressive of this idea. The holding of the Alaska Constitutional Convention is a demonstration that the citizens of the Territory consider themselves capable of meeting their responsibilities to the federal union in this important respect.

Responsibilities of States to Each Other.

There is yet another aspect of responsibility which a member state of the American Union assumes upon admission. In order for such a union to operate satisfactorily, working relationships must be established among the various states. Though an individual state's jurisdiction is generally confined to the area within its borders, there must be at least a minimum recognition by the other states of an individual state's powers in specifically designated fields.

The Constitution of the United States specifies, therefore, that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other state."¹⁷ Interpretations of this clause are not entirely

¹⁷ Article IV, section 1.

without dispute, but the general statement may be made that the import of the section is to require each state to recognize the legal processes and acts of every other state. The section is, in many ways, the kingpin of a federal system; only by such a mutual recognition can such a system operate at all. Without enforcement by other states, wills, deeds, contracts, and similar instruments would be empty vehicles in many situations; men might move from state to state, evading judgments against them and making state law an object of ridicule. The points of greatest strain on the full faith and credit clause today involve divorce, non-support, and alimony cases.

A second constitutional obligation which the states owe is that of a recognition of the interstate privileges of citizens.¹⁸ Citizens of the United States may travel freely from state to state without undue interference. They may change their state of residence and engage in the common occupations without discrimination.¹⁹ Generally speaking, the section

¹⁸ Article IV, section 2, clause 1.

¹⁹ Individuals seeking to engage in most of the professions must procure a license in the new state. usually an examination is required. Such provisions are justified on the grounds that the state has the power to protect its citizens' health and welfare under the police power. State universities may charge out-of-state students a higher fee than residents, on the ground that ordinary tuition and fee charges do not cover the total cost of students' education. Similarly, higher fishing and hunting license fees may be charged out-of-state persons on the ground that the state has a proprietary interest in its fish and game resources.

binds the states to accord to citizens of other states the same rights as they give their own in protection by the government of ordinary property and business affairs and individual rights, and in access to the state courts.

A third obligation constitutionally imposed is that of interstate rendition or extradition. Though the constitutional phraseology requires that a fugitive from justice crossing state lines "shall be delivered up" upon the demand of the executive branch of government of the state from which he fled, the courts have held that the language is not mandatory.²⁰ Thus governors have on occasion refused to allow the extradition of persons where there was reason to believe extradition might result in a miscarriage of justice.

Aside from these constitutionally imposed obligations, the states have recognized that cooperation on a voluntary basis has been necessary for the solution of common problems. The states have agreed to obligate themselves in many different types of circumstances. Perhaps the best known of these devices is the interstate compact, an agreement between two or more states which is approved by Congress. The interstate compact has most commonly been used in the settlement of boundary disputes, though it has been the device for settling other problems, such as control of mutual river and marine resources,

²⁰ Kentucky v. Dennison, 24 How. 66 (1861).

as well.²¹ On a wider basis, simple cooperation between state officials has solved many difficulties without the necessity of resort to formal instruments of agreement. National organizations of state officials, such as the National Association of Attorneys General, have served as clearing agencies for information. The device of uniform state laws has been proved workable in a limited number of fields.²² All of these various methods smooth out interstate relationships, and help to insure the workability of the federal system.

The Electoral Functions of the States.

States perform important functions in the national electoral process. As members of the Union, they cast votes in the electoral college for the President and Vice-President of the United States. The number of such votes in each case equals the total number of members of each state's Congressional delegation. The states elect two United States Senators each and a number of representatives determined on the basis of the state's population.

The Constituent Functions of the States.

Each state of the American Union has important responsibilities

²¹ There are, for example, fisheries compacts among the Atlantic, Gulf Coast, and Pacific Coast states.

²² Approximately 55 of these laws have been promulgated by the parent body, the National Conference of Commissioners on Uniform State Laws. The Conference merely recommends, leaving decision on passage to the individual states. Two, the negotiable instruments act and the warehouse receipts act, have been adopted by all 48 states and the territories, including Alaska. Others, like the statute of limitations act, have been adopted by no states at all.

in the process of amending the national Constitution.²³ All amendments to the Constitution have thus far been initiated by a two-thirds vote of both houses of the Congress. Ratification is by three-fourths of the state legislatures or three-fourths of state conventions called for the purpose of passing on the initiated amendment. Congress sets the method of ratification. All amendments save the Eighteenth have been ratified by state legislatures; the Eighteenth by state conventions.

It is possible that the states may play a part in the process of initiation, though the exact legal details are in some dispute among students of the subject. The Constitution provides in somewhat ambiguous language that two-thirds of the state legislatures may request the national Congress to call a national convention for the purpose of proposing amendments to the Constitution. Recently an unsuccessful attempt was made to utilize this method to initiate an amendment to the Constitution providing for limitation on the percentage rate of national income taxation.

Admission of States to the Union

Procedure.

Under Article IV, section 3, of the national Constitution the sole power to admit new states lies with the Congress. Normally there have been five steps involved in the process:

²³ Article V.

(1) establishment of a territorial government; (2) request by the Territory to the Congress for admission; (3) passage by Congress of an "enabling act" which sets out the procedure for framing a state constitution; (4) framing of the state constitution; and (5) passage by Congress of a resolution of admission.

Yet there have been many exceptions to this procedure. Texas and California did not pass through territorial status. Fifteen states have entered the Union without enabling acts,²⁴ and of these four have gained statehood after Congressional approval of state constitutions drafted in the absence of enabling acts.²⁵ The ultimate step of passage by Congress of a resolution of admission, which in effect approves the proposed constitution, is the important and vital one in the entire process. Admission under such circumstances is as effective as though Congress had specifically authorized the proceedings in the first place.

Congressional Limitations as Conditions for Admission.

The present-day doctrine that "equality of constitutional right and power is the condition of all the states of the Union, old and new,"²⁶ did not find favor at the Constitutional Convention

²⁴ Arkansas, California, Florida, Idaho, Iowa, Kansas, Kentucky, Maine, Michigan, Oregon, Tennessee, Texas, Vermont, West Virginia, Wyoming.

²⁵ Kentucky, Idaho, Vermont, Wyoming.

²⁶ Escanaba and L. M. Transp. Co. v. Chicago, 107 U. S. 678, 689 (1883).

in 1789. The Convention voted nine to two to delete from a draft of Article IV a clause which would have written the idea of equality (previously expressed in the Northwest Ordinance of 1787 passed by the Congress under the Articles of Confederation) into the Constitution. It was very definitely contemplated that states would be admitted on an unequal basis.²⁷ History and tradition wrote a different answer, however, and the general rule operative down through the years has been that new states are admitted to the Union on the same plane of political and legal equality as the older ones.²⁸ Louisiana, in 1812, was the first state to be admitted with the specific proviso that the new state was admitted "on an equal footing with the original states."²⁹ The language has been followed in all subsequent acts of admission, saving only that of Texas. And in the latter case, the Supreme Court has ruled, in effect, that the omission was not significant.³⁰

The fact that states are admitted on an equal footing does not, however, prevent Congress from specifying conditions of admission. Statehood may be withheld if these conditions are not met. Once the state has actually become a member of the Union, however, conditions which are strictly internal in

²⁷ 2 Madison's Journal of the Debates in the Convention (Hunt's ed., 1908), 89, 274, 275.

²⁸ Coyle v. Smith, 221 U. S. 559 (1911).

²⁹ 2 U. S. Stat. 701, 703.

³⁰ United States v. Texas, 339 U. S. 707, 716 (1950).

character cannot be enforced against the state. Thus the Congressional act admitting Oklahoma in 1907 specified that the state capital should not be moved from Guthrie before 1913. In 1910, the capital was moved to Oklahoma City. The United States Supreme Court held invalid the restriction which Congress had attempted to impose on the location of the capital, on the ground that this was a matter for the state's internal decision.³¹ President Taft vetoed in 1911 the act admitting Arizona, stating his objection to a state constitutional provision allowing the recall of judges. The disputed provisions were removed from the constitution, the state was admitted, and the provisions promptly restored to the constitution by the people of Arizona. No legal grounds for objection were possible.

If on the other hand the limitation which Congress specifies is clearly one within the regulatory power of Congress, the condition is then enforceable as against the state. Thus the authority which Congress has to regulate commerce with the Indian tribes is not inconsistent with the doctrine of the equality of states,³² and conditions in the New Mexico enabling act which prohibited the introduction of liquor into Indian territory were held valid.³³

³¹ Covle v. Smith, 221 U. S. 559 (1911).

³² Dick v. United States, 208 U. S. 340 (1908); Ex parte Webb, 225 U. S. 663, (1912).

³³ United States v. Sandoval, 231 U. S. 28 (1914).

Again Congress has the power to make disposition of the public lands of the United States. In the New Mexico enabling act certain lands were granted to the new state with the provision that they be held in trust for enumerated purposes; the United States Attorney General was charged to enforce the trusts in appropriate proceedings. After admission, New Mexico attempted to use 3% of the proceeds of the trust property for advertising the state's resources. The Supreme Court, which apparently saw little need for extended discussion, held that the state's action could be enjoined and that the provision in the enabling act was a valid one.³⁴

A promise extracted from Minnesota at the time of admission was interpreted to prevent the state from taxing lands that had been tax exempt at the time of admission. The Court ruled that an agreement in reference to property was a contractual matter between the Congress and the prospective state and involves no question of state status.³⁵

Congressional Restrictions and the Alaska Constitutional Convention.

Questions of the power of Congress to place limitations on Alaska as she seeks admission to the Union are of considerable importance to the Convention at College. Reference to the various pieces of enabling legislation which have been introduced

³⁴ Ervien v. United States, 251 U. S. 41 (1919).

³⁵ Stearns v. Minnesota, 179 U. S. 223, 245 (1900).

Service - Constitutional Studies, Vol. 1

in Congress to start Alaska on the highroad to statehood show a great number and variety of proposed restrictions, some of a serious nature and others matters of small moment. The Convention will want to consider these proposed requirements with a view to deciding which appear to be of a fundamental nature insofar as future decision by Congress on the acceptability of the Alaskan Constitution is concerned. It must be remembered that the national House of Representatives and the Senate have each passed an Alaskan statehood measure in recent years. The Convention will probably desire to design some constitutional language, or perhaps enact a Convention ordinance, in the case of those restrictions which generally appear in one form or another in all, or most, of the bills.

Some of these provisions are non-controversial or deal with questions the answers to which are practically foreclosed. Declarations that (1) the Delegates shall declare that the proposed State of Alaska shall adopt the Constitution of the United States, (2) the Alaskan Constitution shall be republican in form, (3) the document shall make no distinction in civil or political rights on account of race or color, (4) the constitution shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence, and (5) that the constitution shall provide that no person who aids or belongs to any party who advocates the

Service - Constitutional Studies, Vol. 1

overthrow of the government by force and violence may hold public office, may be followed with little argument.³⁶ Similarly the general pronouncement in S. 49, section 203, H. R. 2535, section 203, and in the other statehood bills that the constitution "shall provide" that "no law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for the redress of grievances" merely repeats the time honored formula of the First Amendment to the Constitution of the United States.

Some of the requirements set out in recent Alaska and Hawaiian statehood acts are, however, of more far-reaching consequence. The fourth paragraph of section 203 of H. R. 2535 and S. 49, for example, calls for the people of Alaska constitutionally to "forever disclaim" right or title to lands and properties which may be held by natives or which is held in trust by the United States for natives. The highly controversial issue of aboriginal rights cannot be discussed in detail at this point, but the mere mention of it demonstrates adequately the importance of possible Congressional restrictions on the admission of Alaska to the Union.

³⁶ H. R. 2535 (84th Congress, 1st session), section 203, paragraphs 1 and 2; S. 49 (84th Congress, 1st session, section 203, paragraphs 1 and 2. The provisions are common to all the recent statehood bills.

One may note, again, that section 205 (j) of H. R. 2535³⁷ sets out that grants of mineral lands to the new State of Alaska are made upon the express condition that the lands so granted shall contain a reservation to the State of all minerals. The mineral deposits are subject to lease only, and the United States Attorney General is directed to institute appropriate proceedings for reversion of the lands to the United States if the terms of this trust are abrogated.³⁸

Other examples of these controversial requirements might be cited. In calling them to attention at this point, it is not the purpose to suggest that a complete catalog of such requirements should be made and the resulting list written into the proposed Alaskan Constitution by the Delegates at College. Some requirements may be safely ignored and others handled by Convention ordinance. Prediction of all the exact restrictions which Congress might set out is impossible, though it is, of course, safe to conjecture that presence or absence of some specific requirements might serve to facilitate or block Alaska's admission. These requirements will be noted, where applicable, in other staff papers. The fact that a

³⁷ As reported by the House Committee on Interior and Insular Affairs.

³⁸ It is the writer's opinion that the provision, paralleling as it does certain language found in other acts of admission and enabling acts, is constitutional. See especially Ervien v. United States, 251 U. S. 41 (1919).

This limitation on mineral lands is discussed in detail in PAS Staff Paper No. III, The Alaskan Constitution and the State Patrimony.

Constitutional Studies, Vol. I

Constitution for Alaska has been written will serve, too, it can be hoped, to place Congress in such a mood that further limitations will not be exacted from the prospective state.

Principles of Constitutional Government

If the Delegates at College perform well their function of writing a Constitution for Alaska, they will establish fundamental law under which the activities of the state government will be conducted and limited. In the words of J. A. Corry, noted Canadian student of government,

A constitution is no more than the skeleton or essential frame of orderly government. The constitution defines and provides for the establishment of the chief organs of government. It outlines the relation between these organs and the citizen, between the state and the individual.³⁹

The constitution represents the skeleton of government; the flesh, muscles, nerves, and body are added in the process of operation and growth under the constitution.

Persons who have grown up in the American tradition are accustomed to speak of "the constitution," by which they have come to mean a single written document which has been adopted by action of the people at a specific date. The Constitution of the United States is such a document, and the Alaskan Constitution will be another. Yet it must be recognized that practice through the years establishes customs and traditions

³⁹ Elements of Democratic Government (New York; Oxford University Press, 1947), 19.

which, though unwritten, are really a part of the "constitution" in the broad sense. Constitutional practice does not always follow the ideas which the formulators had in mind. One of the best known examples, on the national level, is found in the practice by which presidential electors have been mere rubber stamps; only on two occasions since the election of John Adams have presidential electors exercised their constitutional right to use their independent judgment in casting a ballot for the President of the United States.⁴⁰ Delegates to the Alaskan Constitutional Convention will recognize that their handiwork may not receive the precise interpretations in subsequent years that they had intended when writing the document at College.

Certainly, however, the Delegates at College will write into the Alaskan Constitution the great principles of government which have become so much a part of the genius and tradition of the American people and, in some cases, of democratic countries throughout the world. The machinery for implementing these principles may be the subject of argument but universal agreement on the principles themselves may be assumed.

The Principle of Popular Sovereignty.

Basic to the conception of democratic government wherever found is the idea that the people govern. Government is not

⁴⁰ One elector did so at the time of the election of Munroe. One Tennessee elector cast his ballot for J. Strom Thurmond in 1948, even though Tennessee had been carried by Mr. Truman.

something imposed on the people; it is an institution which comes from the people and over which they have control. A legal statement of the principle is found in the preamble to the national Constitution:

We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

With less verbiage the Declaration of Rights of the North Carolina Constitution of 1776 stated simply: "All political power is vested in and derived from the people only." The principle found expression in the bloody years of the Civil War when Lincoln coined his immortal "Government of the people, by the people, and for the people."

The principle of popular sovereignty is not a platitude. "We the people" govern. We elect our lawmakers, and having elected them, we may also choose new ones more responsive to our will. We may err in our choice, and we may elect rascals instead of statesmen, but the choice is ours--freely made and freely revocable at fixed periods. And government officials, of high and low estate, are always the servants and not the masters of the people. On no other principle can democratic government function and be maintained.

The Principle of Limited Government.

Closely akin to the doctrine of popular sovereignty is the principle of limited government. This principle, too, is absolutely essential to democratic government, whatever be the forms of that government. This doctrine is based on the idea that certain areas of authority are denied to government, that there are certain things that government--and government officials--may not do, no matter how expedient it might be at the moment.

The officials of government are limited by law. On the national level they are limited in many respects by the Constitution; the Bill of Rights of the national Constitution is an expression of this idea. But of importance, too, are the many restrictions imposed by statutory, as distinguished from constitutional, law. Administrators frequently find that activities they might wish to undertake are denied to them. They find that funds they have requested are not appropriated, or if appropriated are not appropriated for the purposes sought. They find that the courts stand ready to enforce not only the constitutional but the statutory prohibitions.

This concept is basic. The people limit the government in its activities by constitutional phraseology. And they may choose, through the actions of their elected representatives,

to limit the officials of government still more. The concept of limitation on the exercise of governmental authority cannot be removed from the democratic tradition without the complete destruction of that tradition.

The Principle of the Separation of Powers.

Constitutionally, there are various ways in which the principle of limited government may be implemented. One is through the device of Bills of Rights, which are found in all state constitutions and in the national Constitution. The United States has chosen to utilize the doctrine of the separation of powers as a further aid.

The idea had its classic expression in Montesquieu, an 18th Century French student of government and public affairs. Since the days of antiquity, governmental power had been classified into legislative, executive, and judicial. The legislative power made the laws; the executive power executed and administered the laws; and the judicial power interpreted the laws in case of dispute. Montesquieu took this ancient classification and argued that the key to the maintenance of individual civil liberty lay in so separating these powers that no one man or group of men could ever hold all of them. The whole power of one branch should not be exercised by those who possessed the whole power of another branch of government.

Montesquieu's conception did not envisage a totally distinct separation of the powers of the three branches of government. He was well aware that some overlapping was vitally necessary to the proper functioning of government. His contribution lies in the fact that he posited the idea that all power should not be in the hands of one man or group of men.

Not all democratic countries use the principle of the separation of powers. In Great Britain, for example, government operates on the principle of fusion of powers. Supreme authority is lodged in the Parliament, from which the ministers, the executive branch of government, are chosen. The ministers retain their offices so long as they continue to maintain the confidence of the House of Commons. The doctrine of the separation of powers, then, is not essential to democratic government, yet its influence has been apparent in the American scheme since 1789.

The Framers of the national Constitution did not, in so many words, adopt the principle. Rather they placed it in the Constitution by implication: Article I deals with the legislative branch of government; Article II with the executive; and Article III with the judiciary. State constitutions have frequently been more explicit and have used verbiage which fundamentally is nothing but excess constitutional baggage. The language of the Massachusetts Constitution of 1780, which has been a frequent model, is an example:

In the government of this Commonwealth, the Legislative Department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end that it may be a government of laws and not of men.⁴¹

It should be noted that neither in Massachusetts, nor in the other states which have incorporated this or similar categorical language into their fundamental law, has the actual practice been as explicit as the phraseology would indicate. There has been an appreciation of the point previously made that the doctrine of the separation of powers does not preclude some exercise by one branch of the government of the powers of the other. The governor's veto power, certainly a legislative power in its nature, is a typical example.

The Principle of Checks and Balances.

A discussion of the doctrine of the separation of powers leads logically to a consideration of the American constitutional principle of checks and balances. The three departments of government do not, and cannot, operate in vacuums, each removed from contact with the other. Further, the principle of limited government would demand that each branch have some check over the activities of the other. The national and state constitutions therefore, without exception, have created systems of

⁴¹ Article XXX of the Declaration of Rights.

checks and balances. As a general example, the legislature may pass an act, but the governor or President may veto it, but the legislature may in most circumstances override his veto by the vote of an unusual majority, but the courts may find the law to be in conflict with the constitution or may interpret it in disputes brought before the courts. Thus we have one demonstration of a series of checks and balances in the delicate mechanism of government.

Judicial review, the power peculiar to American courts to declare acts of the legislature and executive unconstitutional or invalid in cases brought before the courts, is one of these checks and balances. It is not customary for provision granting this power to the courts to be made in state constitutions, nor is any such provision found in the national Constitution. The power of judicial review represents a growth of American constitutionalism by custom and usage; it is now a tradition so powerful that, regardless of whether or not the courts usurped their function in exercising it in the first instances in the early days of our national and state governments, it is now firmly a part of our governmental system.

Summary.

These, then, are the principles which will undergird the Alaskan Constitution: popular sovereignty, limited government, separation of powers, and checks and balances. Just what

machinery will be deemed necessary to implement them is a question which the delegates must decide at College.

Characteristics of Present State Constitutions

The 48 present state constitutions present a considerable study in contrast. They vary widely in age, length, arrangement, and content. They establish a tremendous array of varying executive, legislative, and judicial machinery. Some provide an excellent framework within which state governmental machinery keeps pace with changing economic and social circumstances; some are straitjackets, deterrents to state growth, prosperity, and welfare.

Age.

About three-fourths of the state constitutions in effect today are over 75 years old. Twelve of the present state constitutions date before 1870, twenty-three fall in the period 1870 to 1899, and the remaining thirteen are dated 1900 or later.⁴² Georgia and Missouri accomplished extensive revision in 1944 and 1945 and New Jersey rewrote its fundamental law in 1948. The number of constitutions which individual states

⁴² W. Brooke Graves, American State Government (Boston: Heath, 4th ed., 1953), 70. The following state constitutions are considered as rearrangements of earlier documents:
 Maine, 1876 rearrangement of 1820 constitution
 Massachusetts, 1919 rearrangement of 1780 constitution
 New York, 1938 rearrangement of 1894 constitution
 Vermont, 1913 rearrangement of 1793 constitution
 Virginia, 1929 rearrangement of 1902 constitution
 A rearrangement is not to be considered as a new constitution nor as a revision of the older one.

have had varies from one (about one-third of the states are in this category) to Louisiana which has had nine in its 143 year history.

Length.

The variation in length is as great as the variation in age. The range is from some 6,000 words to well over 60,000. The Vermont and Rhode Island documents contain slightly less than 6,000 words; the California and Louisiana "examples" are well over the 60,000 mark. The Constitution of the United States, with its 22 Amendments, manages to stay within 8,000 words. On the other hand, the New Jersey Constitution of the Revolutionary period contained scarcely 2,500 words.

It may be of interest to note that the original lengthy California constitution of 1879 had been amended 306 times by 1950; one famous amendment, written into fundamental law, even specified the name of a person who was to administer a particular piece of welfare legislation: the provision did not work well and was repealed a year later. Other ridiculous examples abound. An amendment to the Minnesota Constitution set forth the complete town by town description of the highway system of the state--in roughly 6,250 ill-chosen words!⁴³

⁴³ Article XVI, Minnesota Constitution. The amendment was adopted in 1920 and represented an effort to take the highway system "out of politics."

Contents of State Constitutions.

Certain subjects are treated in all of the 48 state constitutions, though the method and manner of treatment are subject to wide variation. Other topics are found in a greater or lesser number of the constitutions, again with the treatment of such topics varying greatly. No attempt will be made at this point to discuss in detail the topics listed. Many are properly the subjects of separate staff papers.

Bills of Rights. Each of the constitutions contains a Bill of Rights, a manifestation of the fact that the people have chosen to limit the exercise of governmental power. The history of man's struggle for individual freedom is a lengthy one; the American tradition has its roots deep in English practice in the Magna Carta (1215), the Petition of Rights (1632), and the English Bill of Rights (1689). The Bill of Rights of the national Constitution was an outgrowth of English practice and American revolutionary experience. The rights deemed "fundamental" were thus incorporated into the national Constitution and the early state constitutions.

The rights to freedom of speech, religion, press, and assembly are found in all state constitutions. Protection against unwarranted searches and seizures and a guarantee of due process and equal protection of the laws in criminal and

civil proceedings are part of each state's organic law. Other traditional rights have also found general acceptance.

Later states have incorporated into their Bills of Rights, or Declarations of Rights as they are sometimes called, other ideas besides those contained in the Bill of Rights to the national Constitution. Times change. Iowa and Mississippi saw fit to prohibit dueling.⁴⁴ Minnesota, at a later date, incorporated as a "right" provisions relating to the sale of agricultural commodities.⁴⁵

The Delegates at College will be faced with the issue of how many, if any, of the newer, "positive" rights they wish to include in the Alaskan organic law. Such "rights" are usually highly controversial and many involve the expenditure of public funds for their accomplishment. This is particularly true where certain social welfare and pension programs are considered "rights."⁴⁶

Suffrage and Elections. Each state makes provision for setting out voting qualifications and the methods and manner of handling elections.⁴⁷ It is important to note, however,

⁴⁴ Iowa Constitution, Article I, section 5; Mississippi Constitution, Article III, section 19.

⁴⁵ Minnesota Constitution, Article I, section 18.

⁴⁶ The entire subject of civil rights is considered in detail in Staff Paper No. II, Civil Rights and Liberties.

⁴⁷ Discussed in detail in Staff Paper No. IV, Suffrage and Elections.

Constitutional Studies, Vol. I

that not all the states choose to do so in detail in their constitutions; many have found it the wiser policy to set down only the general outline in the constitution, leaving to statute law the necessary details of election administration.

Separation of Powers. As has already been noted, provisions for distributing the powers of government among the legislature, executive, and judiciary are common to all states. Some constitutions, such as that of Massachusetts, set out specifically such a requirement; others follow the pattern of the national Constitution (thereby decreasing constitutional verbiage), handling each branch of government in a separate article and allowing the separation of powers doctrine to follow by necessary implication.

Legislature, Executive, and Judiciary. All constitutions provide for the basic machinery of state government. In each case, a legislature,⁴⁸ an executive,⁴⁹ and a judicial system⁵⁰ are established. Some constitutions set out at great length the details of organization, procedure and powers of these branches. A few states follow the practice of the national Constitution and outline only basic organization and powers.

⁴⁸ Discussed in detail in Staff Papers No. V, The Legislative Department, and No. X, Legislative Apportionment.

⁴⁹ Discussed in detail in Staff Paper No. VI, The Executive Department.

⁵⁰ Discussed in detail in Staff Paper No. VII, The Judicial Department.

The national Constitution, for example, established in Article III the judiciary of the United States. It is a notably short article, less than a page of normal-sized type. A great court system enjoying the highest reputation has been created under this flexible article. On the other hand, the Maryland Constitution, not the worst nor yet the best of the state constitutions in this regard, takes 21 pages to establish the details of a system now badly antiquated and much in need of repairs after 85 years.

Amendment and Revision. All state constitutions make some provision for amendment and most provide directly or indirectly for constitutional revision.⁵¹ The mechanisms provided may be so complex and difficult that amendment is virtually impossible, as in Illinois, or they may be so easy that great numbers of amendments are possible, as in California and Louisiana.

Other Provisions. From this point on the variation in subject matter, as well as the variations in treatment, becomes even more diverse. As noted, all state constitutions contain some measures relative to Bills of Rights; suffrage and elections; the powers, organization, and procedures of the three branches of the government; and amendment and revision of the constitution. One can only list at this point a series of

⁵¹ Discussed in detail in Staff Paper No. XI, Amendment and Revision, Initiative and Referendum.

remaining topics treated in many, but not necessarily all, state constitutions:⁵²

Finance
 Local government
 Education
 Highways
 Corporations generally
 Banks, railroads, public utilities, monopolies, and trusts
 Agriculture
 Public welfare
 Militia

Summary.

If one were to attempt characterization of the present state constitutions, if characterization of so diverse a set of documents were possible, he would be forced to the conclusion that most of them are not nearly so old as the national Constitution, exceed that document greatly in length, and treat a wide assortment of topics. Whatever may have been the reasons for the length, detail, and topics chosen for consideration,⁵³

⁵² Pertinent topics are treated in detail in various Staff Papers.

⁵³ Students assign many reasons for the length and detail of state constitutions. Some argue that length has resulted from a distrust of legislative bodies by the people; others argue that distrust of the executive branch has been responsible for increased length. Certainly another factor has been the growing complexity of the economic and social order which has resulted in efforts to solve individual state problems through the device of adding amendments on given subjects to the constitution, or even in revising or rewriting the document in an effort to meet particular needs. The advent of Jacksonian democracy in the 1820s, with its belief that the spoils of government should be shared by the dominant political party and that government was such a simple operation that any person could handle any phase of it, probably caused provisions to be added to state constitutions calling for the wide-spread election of great numbers of purely administrative officials. Yet another factor has been the lack of adequate preparation and staff work immediately prior to the holding of the convention. The delegates have been forced to meet without having adequate materials available on which to base reasoned judgments.

the result has been a variation in treatment as wide as the variations among the states in economics, social order, size, and politics.

The Criteria of Constitution Drafting

Government is far more an art than a science. There are therefore, no precise formulas which, if carefully followed, will result automatically in a high-grade constitution. There are, however, certain criteria which may be utilized by the Delegates to the Alaska Convention as general guideposts in drafting the Alaska Constitution. In no sense are these criteria to be considered as absolutes. While no criteria can be devised which will eliminate the need for reasoned and careful judgment by the Delegates, those which follow may be of aid.

(1) Constitutional language is significant and its drafting of highest importance.

Constitutional purposes are expressed in the American tradition through the medium of the written word. The words, phrases, sentences, and paragraphs which are used must be so composed that the result is a cohesive and comprehensible whole, an expression so far as human capabilities will permit of the meaning and intent of the constitution framers. The first and surest evidence of faulty and ineffective constitutional drafting is found in the incorrect use of language--violation of accepted rules of grammar, inaccurate punctuation, verboseness, and, most important, failure to use words in their exact legal context.

The Framers of the national Constitution were acutely aware of the great importance of language and style. The Convention met at Philadelphia in May 1787. By early September the members had a draft of the Constitution, but they were wise enough not to let matters rest at that point. On September 8, 1787, a Committee on Style and Arrangements was appointed, consisting of Gouverneur Morris, James Madison, Alexander Hamilton, Doctor William Johnson, and Rufus King. It was this committee, and more particularly the literary and articulate Gouverneur Morris, which had the responsibility of eliminating errors, inconsistencies, and excess verbiage and of giving final polish to the language.

The responsibilities placed on the Committee on Style were heavy ones. They extended far beyond the questions of mere literary technique and good usage. The people of the Thirteen States would read the document and would make the critical decision on whether or not to ratify it. Did the written words express clearly the principles and ideas intended and desired by the men of the Convention? The responsibility in large measure lay with the Committee on Style. And if the document were ratified and became the basis for a new national order, interpretation by the courts, legislature, and executive--yes, and the people also--would be inevitable and necessary. Would the language meet these acid tests? Again the Committee on

Style would have to bear the onus for any inaccurate and incomplete phraseology.

The Committee on Style and Arrangements of the national Constitutional Convention did their work well. The Constitution of the United States, although not perfect in all stylistic and linguistic matters, remains today a model of constitutional draftmanship.

The prudent man does not hunt the grizzly with a .22 rifle, nor does the wise man use a .45 on a rabbit. Experienced hunters handle their weapons with the greatest care, for injury to self or to others may easily occur.

Words, too, are weapons and tools as well. It would be difficult to place too much emphasis on the importance of care and judgment in drafting constitutional language. The latently explosive results of poor draftmanship on the future economic development of Alaska, the welfare of its people, or the structure of its society are possible in almost every subject which the Convention at College will consider. Each clause or phrase must provide adequate coverage of the subject--and no more.

Almost every clause or phrase will be subjected at some future date to the closest judicial scrutiny and interpretation. Each clause and phrase will have to stand in relation to the other applicable language of the document. Legislature, executive, administrators and citizens will give their interpretations

to the written words.

Everyone has experienced the shock of having his own spoken or written words misunderstood, words which he was convinced were unmistakably clear at the time. Most persons will admit that they have, on occasion, failed to interpret properly the communications of others. The possibility of misunderstanding of the language of the Alaskan Constitution is infinitely greater, and the consequences far more serious, than the casual misunderstandings which occur daily in ordinary social and business contacts.

The language of a constitution is not the language of the streets--colloquialisms and slang. Nor can it be the language of everyday discourse and writing. Words and phrases used in constitutions have judicially construable and enforceable meanings. Those unfamiliar with the use and interpretation of constitutional phraseology may be critical of an emphasis on language. Americans generally are impatient in such matters, for precision requires time and we are disturbed by delay. Everyday language may, with the very best of intentions, be written into a constitution, but the judicial interpretations of such language may prove to be strikingly at variance with the original intent. Furthermore, the best legal draftsmen frequently make errors: infallibility is a quality unknown among those who draft constitutions, who write statutes and

Service - Constitutional Studies, Vol. I

codes, who establish administrative regulations, or who are charged with the interpretation of law. Extreme care in the use of language will not eliminate error and possible misinterpretation: the goal is to keep such possibilities to a minimum.

(2) Experience demonstrates the importance of confining the language of the Constitution to fundamentals.

Basic to all the other criteria of sound constitutional drafting is that which requires that a constitution should be a body of fundamental law. Transitory provisions, provisions designed to deal with changing affairs and matters of passing importance, have no proper place in a constitution. Such matters are the proper province of statutory, as distinguished from constitutional, law. The differentiation, though frequently a matter of judgment and difficult to make, must be kept firmly in mind. Fundamental law, constitutional law, may be defined for our purpose here as that law which is more or less permanent in character, which is not subject to the need for frequent change, which represents a fair degree of ultimate unanimity of thought among the citizens, and which is concerned primarily with principles, not with the mechanical means for implementing the principles. Statutory law deals with transitory matters; it is subject to frequent change to meet the exigencies of the moment, lacks permanency in the constitutional law sense, frequently must be highly detailed in order to accomplish its

purpose, and represents a scope of activity properly accorded to the political branches of the government. The constitution of a state is no proper place for statutory law, for legislative minutiae.

Certain consequences flow from strict adherence to the doctrine of writing only fundamentals into the constitution. First, and most important, is the fact that a constitution containing fundamentals is a flexible document, for its phraseology is necessarily general. General language is capable of the breadth of interpretation necessary to meet changing economic and social conditions. The great strength of the national Constitution has been in its general language, language which has made possible the required freedom of action for the activities of the legislative, executive, and judicial branches of government. This necessary freedom of action to meet rapidly changing demands of the social order is practicable only with a constitution which is devoted in the main to fundamentals. A good constitution grows with the society it orders; it does not straitjacket that society.

A second consequence of a constitution confined to fundamentals is that such a charter will be less in need of amendment. The national Constitution has been amended but twenty-two times, and even some of these amendments, viewed in retrospect, were scarcely of major importance. A constitution based on fundamentals will not need the constant therapy of additional

amendments to keep it in running order.

In an age when citizens are sometimes prone to pay too little attention to their civic responsibilities, it is important that the organic law of the state be in such form that people will be encouraged to give attention to, and not avoid, them. If the constitution is lengthy and detailed, it will require frequent amendment in order to keep it abreast of the times. If at each election, the citizen is faced with the necessity of passing on numbers of amendments, he will rapidly lose his ability and his interest in making reasoned judgments as to what is constitutional and what is properly statutory law. Constant amending of the constitution cannot but result in a loss of citizen respect for and appreciation of the document.

(3) The civil rights and liberties set out in the Bill of Rights should be stated concisely.

The other criteria of good constitutional drafting devolve logically from the first and great one of fundamentality. The idea of a Bill of Rights as a part of a written constitution is an American idea. Once given constitutional sanction, the right becomes fundamental and cannot be infringed by legislative or executive action, except within specifically provided constitutional terms. Such guarantees are, therefore, matters for most serious thought and careful consideration. The distinction between constitutional and statutory law is of the greatest importance. A guarantee of the right to assemble

Service - Constitutional Studies, Vol. 1

peaceably and to petition the government for redress of grievances is properly a part of any constitutional Bill of Rights; it may seriously be argued, however, whether there is a proper place in a constitutional instrument for declaring as "rights" either collective bargaining as between labor and capital or the so-called "right to work" concept.

A bill of Rights of minimum length and centered for the most part on the traditional precepts which have been so long held prevents the cluttering of the constitution with newly declared "rights," many of which are highly controversial and difficult of enforcement. It is important, too, for the layman to remember that the courts over a period of years have developed rather precise meanings for the traditional language. Extensive and radical changes in terminology would in many instances mean the loss of the benefits derived from this judicial interpretation; the courts would, moreover, be faced with the lengthy and difficult problem of giving judicial effect to the new language.

(4) Authorities agree that the constitution should set out only the essential framework of the machinery of government.

The Alaskan Constitution will of necessity make provision for three branches of government: the legislature, the executive, and the judiciary. Only the essentials of the method of selection of the personnel of each of the three branches, their general organization, and their powers should receive

constitutional attention. The language should be simple; the potential for growth and adjustment great. The judgment of future generations on how well the Convention at College performed its function in establishing the machinery of government may well be written in terms of ability of these mechanisms to adjust to changing future conditions. Complex provisions in this essential area will mean only the necessity for frequent and drastic amendment as unforeseen contingencies arise in the future.

It is well to remember that the portions of the national Constitution which have worked in least satisfactory fashion were those by which the Framers wrote mechanistic detail into the document. The example of the system of presidential election comes immediately to mind. Almost 50% of Article III was devoted to the mechanism for electing the President and Vice-President; it was complicated and it was naive. It worked perfectly so long as Washington was available. But after serving the first two terms, the election machinery creaked and groaned in choosing John Adams and it broke down completely in 1800 when Jefferson was finally chosen President after the election had been thrown into the House of Representatives. It became necessary to change the methods used, and the Twelfth Amendment was added to the Constitution, in an only partially successful effort at correction. The Framers of the Constitution had been

unable to foresee that the advent of political parties would make section 3 of Article III a piece of impossible election machinery.

Adherence to the criteria that the constitution should establish only the broad general framework of government will prevent the "loading" of the document with lengthy and detailed pronouncements on legislative organization and procedure and on judicial organization and powers. Numerous administrative agencies, boards, and commissions, necessary parts of 20th Century governmental activity, will not be created by the constitution. Creation of such agencies, and the details of the legislative and judicial machinery and powers, will be left, as they are in the national Constitution, to the political and judicial instruments of government.

(5) A well-drafted constitution will be so organized that the scope of executive and legislative powers and functions are clearly defined in order that responsibility for governmental action can be readily determined.

Sound constitutional drafting will produce a document so organized that the duties and responsibilities of governmental officials can be ascertained by the electorate. Those matters pertaining to the executive branch of government should be clearly set out in that specific portion of the constitution dealing with the executive and should not be scattered in haphazard fashion throughout the document. The same statement applies with equal force to matters of legislative powers and

functions. The voter should not be forced to search the entire constitution in order to find all of the various provisions which deal with either the executive or legislative branches.

(6) The independence of the judiciary end to be desired in constitutional drafting.

The American and English tradition of the independent judiciary is one worthy of preservation in a state constitution. The mechanisms for achieving this aim are varied and do not require discussion here. Certainly, however, a judge must not be in a position where his decisions can be dictated by either the executive or legislative branches. Nor should he be placed in a position where he will be subject to popular emotions of the moment in a matter before his bench. The vital importance of an independent judge is readily apparent, and constitutional provisions should assure that independence.

(7) The Constitution should provide for Amendment.

A sound constitution will contain provisions for its future amendment and revision. No group of persons are so wise as to foretell accurately what the future may hold. A manifestation of their wisdom may, indeed, prove to be in how well they discharge their responsibility in drafting the provisions for amendment and revision. For if the process be too difficult, they may have created a constitutional straitjacket instead of a dynamic organic law; and if the process be too easy, they will have opened the floodgates to the writing of statutory minutiae into fundamental law.

Nor are there satisfactory guideposts available to aid them in reaching decisions on this point. Similar or even identical procedures, adopted in different states, have proved in retrospect too difficult in the one and too easy in the other. The only general criterion available is the rule of thumb that a long and detailed constitution will most likely require an easy process of amendment; a short constitution a more difficult one.

Summary. The criteria of good constitution drafting may be stated, then, as follows:

1. Constitutional language is significant and its drafting of highest importance;
2. The language of the constitution should be confined to fundamental or constitutional law as opposed to statutory law;
3. The Bill of Rights should be held to minimum length;
4. The constitution should set out only the essential outline of the machinery of government;
5. The constitution should be so organized that the scope of legislative and executive powers and functions are clearly defined;
6. The constitution should guarantee the independence of the judiciary;
7. The constitution should make such provision for future amendment that the process will be relatively easy if the document is long and detailed and somewhat more difficult if the document is short and general.

The Role of a State Constitution Today

A striking characteristic of modern society is the trend toward increased governmental activity at all levels and the consequent ever-greater importance of government in everyday life. As a political issue, the wisdom of this trend may be controversial; but as a fact of 20th Century life, it is not. State governments today must provide a wide variety of services for their citizens. Legislative activity and responsibility is increased as the demands of the people for additional services multiply. The provision of such services requires complex administrative machinery, machinery which can be adapted to rapidly changing social and economic situations.

Under the Constitution which the Delegates will write at College, the state government of Alaska must provide not only the present territorial services but must assume additional functions presently administered by the federal government. The task of writing a constitution sufficient to handle these operations alone would be a great one.

But the Constitution must be more than a document applicable to the "here and now." It must be an instrument capable of providing a framework for an economy and society but dimly envisaged by the Delegates. Few states have entered the union with the tremendous potential for growth that Alaska has. Above all else the Constitution written at College must reflect that potential.

Service - Constitutional Studies, Vol. 1

The Delegates at College will be writing what will very possibly be the last of the constitutions for a new member of the American Union. They may draw on over 150 years of accumulated knowledge and practice of American government. Theirs is the weighty responsibility of making reasoned judgments in choosing those portions of that knowledge and practice which will be incorporated into Alaskan organic law.

Politics has been described as "the art of the possible." No document written at College will be perfect. Many of the problems which will face the Delegates will be incapable of any complete solution, for the problems of government frequently do not have a "best" solution but only a "more desirable" or "less desirable" solution. Compromise is the essence of democratic government; the Delegates will find on many occasions that compromise solutions to pressing issues will not be really satisfactory to many of the convention members. The national Constitution, for example, has been aptly described as a "bundle of compromises." Yet the compromises will be made at College and the result will be a Constitution for Alaska.

The Territory of Alaska stands on the threshold of becoming the State of Alaska. If the Delegates do their job well, they will provide a constitution which will enable the prospective state to grow socially, economically, and politically.

Constitutional Studies, Vol. 1

II

CIVIL RIGHTS

AND

LIBERTIES

A staff paper prepared by Public Administration
Service for the Delegates to the Alaska
Constitutional Convention

November, 1955

TABLE OF CONTENTS

Civil Rights and Liberties	1
The Purpose of a Bill of Rights	3
Relationship Between the Federal Bill of Rights and State Bills of Rights	5
Provisions on Popular Sovereignty and Safeguards to Popular Government	8
Provisions on Popular Sovereignty	8
Provisions on Safeguards to Popular Government	9
Provisions on the Civil Rights of Persons	10
Freedom of the Person	10
Freedom of Dissent	11
Freedom of Religion	13
Provisions on the Bearing of Arms	16
Provisions on the Rights of Persons Accused of Crime	16
Guarantees Against Usurpation of the Judicial Function	18
Provisions Requiring Fair Trial	20
Guarantees Against Imprisonment for Debt	23
Provisions on Excessive Bail and Cruel and Unusual Punishment	24
Provisions on Treason	25
Provisions on Property Rights	26
Provisions on Economic and Social Rights	28
Summary	33

Constitutional Studies, Vol. 1
Carver

CIVIL RIGHTS AND LIBERTIES

Free men have well learned that their liberties evaporate rapidly in the presence of unchecked governmental power, for freedom has always and in every circumstance been a "hard bought thing." Its maintenance after the blood price of original purchase requires further and continuous expenditures of human effort and sacrifice. The Framers of the national Constitution were well aware that governmental forms and legal phraseology were not in themselves adequate barriers against those who would seek to destroy freedom. But they were wise enough to perceive that forms and words could lend support and make easier the task of a people whose spirit was bent on the retention of freedom.

The Constitution of the United States abounds with examples of the efforts of the Framers to insure that governmental power and authority should be limited in its scope, circumscribed by limitations which could be truly effective only with the support of a united people. The principles of separation of powers and checks and balances are manifestations of the desire to limit governmental authority. The principle of limited government, or constitutional government as it is frequently called, which

is so basic to democratic systems finds expression in the original Constitution and in the Bill of Rights which was so soon appended to the fundamental law after its adoption.¹

The state governments which were organized during and after the Revolutionary War were the products of antipathy to governmental authority. These governments, like the national authority established in 1787, were sharply limited in their powers. The limitation was particularly noticeable insofar as the executive authority was concerned. The constitutions of these state governments contained Bills of Rights in most cases.

The founders of the American state and national governments did not rely solely on their own experience and intelligence in drafting the Bills of Rights which they appended to their fundamental laws. Behind the pronouncements which were made in the constitutions were centuries of theory and practice--and struggle. Magna Carta (1215), the Petition of Rights (1632), and the English Bill of Rights (1689) were part of a great tradition. English history was a part of the American heritage and

¹ Hamilton, and others, felt that a Bill of Rights was an unnecessary and even dangerous appendage for the Constitution which had been written. He argued that the new government was one of delegated powers only; therefore it would not have the power to encroach or trespass in the areas that might be encompassed by a Bill of Rights. He argued, too, that bills of rights are necessary only for people who must force a grant of rights from a despot or tyrant; under the new government the people themselves were the rulers. The Federalist, Modern Library Edition, 558-61.

the men of the Revolutionary Era benefited from that heritage. They did not copy English history; they utilized it for the lesson which it could teach a young and struggling New World democracy.

Traditionally it is government and not the individual citizen which is limited by the Bills of Rights of the national and state constitutions. The protections afforded by the constitutions are protections against encroachment by government on spheres of citizen activity which are constitutionally declared to be "civil rights and liberties" and therefore beyond the purview of government.

Traditionally, too, bills of rights are negative and restrictive in character rather than positive. The citizens are not compelled to take certain courses of action by the Bills of Rights of constitutions. Obligations may be enjoined on the citizenry by the pressure of public opinion or even by legislative enactment, but seldom, if ever, is there a constitutional compulsion.

The Purpose of a Bill of Rights

Today, on the demand of the people expressed through their duly elected representatives, government on all levels has assumed a greater and greater variety of service functions and activities. Hence, bills of rights have assumed ever greater importance. At the same time, a number of the traditional rights protected under the original federal and state bills of

Constitutional Studies, Vol. 1

rights have become so deeply ingrained in the American governmental system and in American tradition that few citizens are conscious of the initial grievances that called them into being.

A bill of rights is, in a very real sense, an expression of political faith and ideals--it sets the bounds of political authority and reserves to the individual certain freedoms believed essential to human happiness. It guarantees protection for those areas of individual difference necessary for the operation of popular government and political democracy.

Few areas of public law form the basis for as many legal actions as do federal and state bills of rights. The very growth of governmental authority and activity has involved over the years an ever greater encroachment on the privileges and liberties enjoyed by individuals and their privately organized enterprises and institutions. Liberty is relative in that it cannot be so utilized that its exercise by one individual deprives another of his just freedoms. The courts of our land are ever called upon to delimit the boundaries of individual freedom as individual well-being comes into conflict with the well-being of society. Likewise they must decide in case after case at what point the long-run cause of free institutions assumes greater significance than an immediate and apparent social advantage or benefit. To a degree greater than in any other country, judges in the United States have the duty of

assuring that statutes and administrative action accord with the principles expressed in state and federal bills of rights.

There can be little question that the Alaskan Constitution must have a bill of rights. Protection of individual freedoms, tradition, and the expressed policies of the United States Congress in proposed enabling legislation all demand its inclusion. The basic question, therefore, is what should and should not be included in a bill of rights for the Alaskan Constitution.

Relationship Between the Federal Bill of Rights
And State Bills of Rights

It is to be noted that from a legal standpoint the existence of the federal Bill of Rights has obviated to some extent the need to include certain specific provisions in state bills of rights. The federal Bill of Rights was for many years a limitation on the action of the federal government and was held to impose no limitations on the scope of state action.² However, after adoption of the Fourteenth Amendment to the federal constitution, a new relationship gradually emerged whereby a number of the prohibitions of the federal Bill of Rights were held to limit state authority as well as that of the national government.³ The major change in judicial interpretation came

² Barron v. Baltimore, 7 Pet. 243 (1833).

³ The new doctrine was slow to emerge. As late as 1922 the Supreme Court held that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restrictions about freedom of speech. (Prudential Insurance Co. v. Cheek, 259 U. S. 530).

in 1925 when the United States Supreme Court was considering the legality of a New York law designed to suppress seditious utterances. The court held that "For present purposes we may and do assume that freedom of speech and press--which are protected by the First Amendment from abridgement by Congress--are among the 'fundamental personal rights and liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."⁴ The dual character of the civil rights structure in the United States has now been partially bridged by judicial interpretation.

What rights and "liberties" of the first ten amendments to the federal constitution are included in the Fourteenth Amendment and therefore protected by the national constitution against state action? The fact of the matter is that the Supreme Court has not blanketed in all of the first ten amendments but only those that it has deemed "basic and fundamental" to a "scheme of ordered liberty." Consequently, even though a state Bill of Rights may contain many expressions of principle which, because of the bridging action of the Fourteenth Amendment, duplicate statements in the federal Bill of Rights, both literally and in legal force, a state cannot assume that all rights of its citizens are adequately and fully protected by the federal document. A state Bill of Rights covering the fundamental features of the federal Bill is generally regarded as desirable and necessary.

⁴ Gitlow v. New York, 268 U. S. 652.

Series - Constitutional Studies, Vol. 1

Many states have gone far beyond the fundamental freedoms protected in the federal Bill of Rights and have added others reflecting particular attitudes and problems of the citizens of the state community. Viewed in retrospect, however, many of the "rights" included in some of the state Bills of Rights seem neither fundamental nor proper in a constitutional document. For instance, the agricultural state of Minnesota declared constitutionally that "any person may sell or peddle the products of the farm or garden occupied or cultivated by him without obtaining a license."⁵ California and Rhode Island, where fishing is important, have guaranteed in their Bills of Rights that their citizens shall "enjoy and freely exercise all the rights of fishing."⁶ Many other examples of a similar nature might be cited. Over the years it has become increasingly clear as our society has become more complex and the area of government action has been extended so that limitations on government authority related to particular local circumstances and times eventually become handicaps rather than benefits. If a so-called "right" is not so fundamental as to have almost universal applicability in times of normal political life, its inclusion in a Bill of Rights is of dubious merit.

⁵ Constitution of Minnesota, Article I, Section 18. When this provision was included, it is doubtful if anyone foresaw a federal agricultural policy involving production and marketing quotas and related measures.

⁶ Constitution of California, Article I, Section 25; Constitution of Rhode Island, Article I, Section 17.

The materials which follow survey the contents of the Bills of Rights of the various state constitutions, with some applicable comment on the reasons for their inclusion. The widely varying nature of the provisions makes classification difficult, and the major categories for discussion are therefore somewhat arbitrary. It should be recognized that the various rights discussed are at some points interrelated and often do not stand by themselves as the organization of the material might appear to indicate.

The provisions are classified generally under five headings: (1) provisions on popular sovereignty and safeguards to popular government; (2) provisions on the civil rights of persons; (3) provisions on the rights of persons accused of crime; (4) provisions on property rights; and (5) provisions on economic and social rights.

Provisions on Popular Sovereignty and Safeguards to Popular Government

Many states have incorporated into their constitutions verbal expressions of the principle of popular sovereignty, the concept that the people grant and control the exercise of governmental power. Government is not something imposed on the people but something which comes from the people.

Provisions on Popular Sovereignty

Only the State of New York has failed to include in its constitution a declaration of popular sovereignty. In the

Review - Constitutional Studies, Vol. I

Bills of Rights of the other 47 states, or Declarations of Rights as they are sometimes known, there are statements which express Abraham Lincoln's immortal "Government of the people, by the people, and for the people." Some of the statements are lengthy; some are short. The North Carolina Constitution, after speaking of the "great, general, and essential principles of liberty and free government" declares that

all political power is vested in, and derived from, the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.⁷

The California provision is equally simple:

All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it.⁸

The California provision just quoted carries with it, in the last phrase, the concept that the people retain the right to change their form of government. This idea, whether expressed or unexpressed, is nevertheless an integral part of the idea of popular sovereignty.

Provisions on Safeguards to Popular Government

Provisions guaranteeing free and open elections are found in the constitutions of all states, but 24 of the states have seen fit to make such guarantees a part of their Bills of Rights.

⁷ Art. I, sec. 2.

⁸ Const., Art. I, sec. 2.

Nebraska specifies, for example, that

All elections shall be free; and there shall be no hindrance or impediment to the right of a qualified voter to exercise the elective franchise.⁹

One might list as other safeguards to popular government the now somewhat archaic provisions which frequently appear in state constitutions dealing with such matters as prohibition of hereditary titles,¹⁰ and subordination of the military to civil power.¹¹ These were important items many years ago but the customs of the people have now firmly engrafted these prohibitions on our system of government and they have become so much a part of it that inclusion in a Bill of Rights is now merely form.

Provisions on the Civil Rights of Persons

Freedom of the Person

The 13th Amendment to the national Constitution, adopted as a direct result of the Civil War, prohibits any person or state from holding individuals in a condition of slavery or involuntary servitude. The prohibition is clear and no further statement is needed in any state Bill of Rights. Nevertheless, the southern states formerly in rebellion were required

⁹ Const., Art. I, sec. 22.

¹⁰ E. g., Maine Const., Art. I, sec. 23: "No title of nobility or hereditary distinction, privilege, honor or emolument, shall ever be granted or confirmed, nor shall any office be created, the appointment to which shall be for a longer time than during good behavior."

¹¹ E. G., Mississippi Const., Art. III, sec. 9: "The military shall be in strict subordination to the civil power."

Sumner - Constitutional Studies, Vol. 1

to make it a part of their constitutions which were drafted after the Civil War.¹² Many of the other states admitted subsequent to the Civil War also made it a part of their fundamental law.¹³ As such, the provision merely reiterates the federal Bill of Rights.

Freedom of Dissent

No right is more fundamental to free and democratic government than that of freedom to dissent from the established order of things. The point is of importance in an age which places emphasis on uniformity of thought and speech in matters political, social, and economic. The expression of unorthodox opinions through speech and printed matter is one of the hallowed traditions upon which this nation was founded. It is not surprising, therefore, that even though the 14th Amendment has carried over the federal guarantees on speech to the protection of the individual against action by a state, expressions on freedom of speech and press are found in every state constitution. It is of some significance that even those constitutions which have been revised since the decisions of the Supreme Court have continued to carry the speech provisions.

¹² E. g., Mississippi Const., Art. III, sec. 15: "There shall be neither slavery nor involuntary servitude in this State, otherwise than in the punishment of crime, whereof the party shall have been duly convicted."

¹³ E. g., Nebraska Const., Art. I, sec. 2. The wording is identical to that of Mississippi.

The New Jersey Constitution of 1947 contains a typical provision:

Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.¹⁴

A number of states, such as Maine,¹⁵ also utilize this longer form. Some, however, express merely the basic policy, without such extended consideration of the question of libel. Idaho is an example:

Every person may freely speak, write or publish on all subjects, being responsible for the abuse of that liberty.¹⁶

Dissent to established policies can be expressed in ways other than individual speech or print; the right of assembly and the right to petition the government for the redress of grievances are part and parcel of freedom. Dictators call them mobs; democracy recognizes the group as an instrument of necessary protest. The common expression of the principle is similar to that of the Arizona Constitution which states simply:

¹⁴ Art. I, sec. 6.

¹⁵ Const., Art. I, sec. 4.

¹⁶ Const., Art. I, sec. 9.

13

The right of petition, and of the people peaceably to assemble for the common good, shall never be abridged.¹⁷

The Oregon version is a bit longer but expresses much the same concept:

No law shall be passed restraining any of the inhabitants of the state from assembling together in a peaceable manner to consult for their common good; nor from instructing their representatives; nor from applying to the legislature for redress of grievances.¹⁸

In these modern days, the right to petition for the redress of grievances in effect guarantees the right to lobby for or against particular pieces of legislation. "Lobbying" has become a word with an unpleasant connotation, but the right to do so, subject to reasonable regulation, is constitutionally protected not only in the national Constitution but in the state constitutions as well.¹⁹

Freedom of Religion

There is, for the most part, little quarrel today with the basic right of religious freedom--the right of man to worship or not to worship, to believe or not to believe, as his conscience dictates. The Bill of Rights of the federal Constitution was written in a period when American experience was antagonistic to the idea of the amalgamation of church and state, because Americans had had experience with such amalgamation in England. The 1st Amendment to the national Constitution

¹⁷ Art. I, sec. 5.

¹⁸ Const., Art. I, sec. 26.

¹⁹ The Georgia Constitution declares lobbying to be a crime, the only state which does so. Art. I, sec. 2, par. 5. Needless to say the provision has not reduced lobbying activity.

Constitutional Studies, Vol. 1

provides, therefore, that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The state Bills of Rights have taken this idea and expanded upon it. The sections have usually been rather lengthy. Problems in the hotly disputed argument over the separation of church and state have, moreover, forced the amendment of this particular section in some instances. The present lengthy provisions in the Washington Constitution²⁰ reads as follows:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or the support of any religious establishment.

To this point the section is the same today as it was in the original Constitution of 1889. The last sentence, however, raised difficulties and controversies. The following additional sentence was therefore inserted in 1904 at this point in the section:

Provided, however, That this article shall not be so construed as to prevent the employment by the state of a chaplain for the state penitentiary, and for such of the state reformatories as in the discretion of the legislature may seem justified.

²⁰ Art. I, sec. 11, as amended.

The remainder of the sections reads today as it did in 1889:

No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

The Connecticut Constitution contains a much shorter statement on religion in its Bill of Rights.

The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in this State; provided that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the State.

No preference shall be given by law to any Christian sect or mode of worship.²¹

The importance of religious thought in Connecticut is manifested, however, by the fact that the constitution's Article VII, a lengthy one, is devoted in entirety to religion!

Religious controversy has found its way to the United States Supreme Court in recent years. The use of public school facilities for religious instruction has been held to violate the 1st and 14th Amendments of the national Constitution;²² but "released time" programs, where students are given time from school to attend religious instruction held in churches

²¹ Art. I, secs. 3 and 4.

²² McCollum v. Board of Education, 333 U. S. 203 (1948).

and synagogues, have been held constitutional.²³ The use of public school buses for transportation of children to parochial schools has been held not to violate the 1st and 14th Amendments.²⁴

Provisions on the Bearing of Arms

The federal and 33 of the state constitutions declare that the right to keep and bear arms shall not be infringed.²⁵ In practical effect, the demands of modern day society have limited the sweeping language. Some state constitutions have stated, along with the general principle, that the carrying of concealed weapons may be punished or prohibited.²⁶ Many states have by statute provided for the registration of pistols, revolvers, and automatic weapons.

Provisions on the Rights of Persons Accused of Crime

We have become accustomed in recent years to an emphasis on civil rights--speech, press, assembly, religion, and petition. We tend to forget that the first freedoms which Englishmen asserted and won for themselves were in the field of criminal law. The barons at Runnymede wrung from King John in the Magna Carta a guarantee that "no free man shall be taken, or imprisoned, or disses'd or outlaw'd, or banished or any ways destroyed; nor . . . pass upon him, or commit him to prison, unless by the

²³ Zorach v. Clauson, 343 U. S. 306 (1952).

²⁴ Everson v. Board of Education, 330 U. S. 1 (1947).

²⁵ E. g., Alabama Const., Art. I, sec. 26; Wyoming Const., Art. I, sec. 24.

²⁶ E. g., Louisiana Const., Art. I, sec. 8; Colorado Const., Art. II, sec. 13.

Constitutional Studies, Vol. I

"legal judgment of his peers, or by the law of the land." The phrase "law of the land" is the progenitor of the famous "due process of law" concept. And due process of law meant, down until the latter part of the 19th Century, due process of criminal law--fairness of procedure in the process of conviction for an illegal action.

In the English and American traditions, a man is innocent until he has been proved guilty. A presumption of innocence follows him throughout the course of his arraignment and trial. Of considerable concern today are the non-legal but nevertheless real presumptions of guilt that have to be associated with accusations and interrogations made in the course of executive and legislative investigations concerning matters of subversive activity. Persons accused in such circumstances are generally not on trial, although if suspicion comes to rest upon them they may be deprived of employment in government or in certain industries. They may be subjected to social ostracism. Since they are not on trial, however, persons called as witnesses or accused of subversive associations frequently are denied many of the protections afforded common criminals, such as the right to face one's accuser and to cross-examine witnesses against him. The problem involved has become a subject of great controversy, and as yet no really satisfactory solution has been offered. There are cogent arguments why in matters of subversion witnesses should be kept secret and why more formal court procedures would in many cases defeat the efforts of

investigative agencies to identify and render harmless those whose loyalty to the United States is open to question. It is not here suggested that Alaskans in their constitutional deliberations attempt to resolve the problems involved in this issue. The problem is mentioned only to call attention to a fundamental matter related to the legal and investigative processes and long-standing presumptions of innocence in the face of the unusual pressures of modern political life.

Guarantees Against Usurpation of the Judicial Function

The writ of habeas corpus has been called the "most important single safeguard of the American judicial system." Blackstone extolled it as the "bulwark of the British constitution." The writ is an order issued by a court directed to any person detaining another and requiring him to bring the "body" of the prisoner before the court. The judge then determines whether legal cause exists to hold the prisoner further. Thus detention without speedy hearing is barred. Forty-one state constitutions, as well as the national Constitution, have incorporated this guarantee.

On the national level, the operation of the writ can be suspended only by Act of Congress, or at least under authority directly granted by Congress.²⁷ Some states allow the suspension

²⁷ Ex parte Milligan, 4 Wallace 2 (1866); Duncan v. Kahanamoku, 327 U. S. 304 (1946).

Constitutional Studies, Vol. 1

of the writ in cases of "rebellion or invasion,"²⁸ and some prohibit the suspension of the writ on any account.²⁹ The usurpation of the judicial function is secured in this manner against action by the executive branch of the government.

There is always the possibility that usurpation of the judicial function may be attempted by the legislature, especially in moments of popular passion. There are two especially obnoxious ways in which legislatures have acted in times past to prevent a fair trial: directly, through a bill of attainder;³⁰ or indirectly, through an ex post facto law.³¹ Both devices had been frequently used in English practice and even in early American colonial legislatures. The fathers of early American state

²⁸ E. g., Louisiana Const., Art. I, sec. 13: "The privilege of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion, or invasion, the public safety may require it."

²⁹ E. g., Oklahoma Const., Art. II, sec. 10: "The privilege of the writ of habeas corpus shall never be suspended by the authorities of this State."

³⁰ A bill of attainder is a direct legislative condemnation, a law that finds a specified person guilty of a crime without a court trial. Sometimes the attainder extends only to the accused, sometimes it works an attainder of blood, or extends to the heirs.

³¹ An ex post facto law is a criminal statute that applies to an act committed before the passage of the law and operates to the disadvantage of the accused. An action cannot be changed to a crime if it was not so at the time the act was performed, nor can the penalty be increased retroactively, nor can the rules of evidence be changed to make conviction easier.

constitutions and the national Constitution took special pains to forbid the practice.

An express prohibition of these practices by the states is made in the federal Constitution.³² Because of the specific terminology, state provisions on the topic are not really necessary. Nevertheless, most state constitutions have added the declaration to their Bills of Rights.³³

Provisions Requiring Fair Trial

General Provisions. Even though the details of what constitutes a fair trial vary among the states and between the states and the federal government, the fundamentals of a fair trial are fairly easily established. All of the fundamentals are based on the idea of the presumption of innocence and together they add up to the Anglo-Saxon concept of "fair play." An individual accused of crime generally has a right: (1) to be informed of the nature and cause of the accusation made against him;³⁴ (2) to defend himself or, in capital cases and in many states other cases as well, to have the assistance of counsel in the preparation and the conduct of the defense; (3) to have the

³² Art. I, sec. 10.

³³ E. g., Oklahoma Const., Art. II, sec. 15: "No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts shall ever be passed. No conviction shall work a corruption of blood or forfeiture of estate: Provided, that this provision shall not prevent the imposition of pecuniary penalties."

³⁴ Indictment may be had either by grand jury or by information. Both methods meet the requirements of due process of law as laid down in the 14th Amendment. The general tendency in recent years has been to use the grand jury as a general investigative mechanism or for indictment in capital cases. The use of the information so far as less serious crimes is concerned is now well nigh universal on the state level. Prosecution for federal crimes, on the other hand, may be had only after indictment by grand jury.

assistance of court process in compelling witnesses on his behalf, and to confront his accusers in open court; (4) to have a speedy and public trial before an impartial judge; and (5) to have a trial before an unbiased and impartial jury.

These fundamentals are customarily contained in one omnibus section of the typical state Bill of Rights. All of the state constitutions contain provisions generally designed along the lines of the following example:

In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of his indictment against him.³⁵

To further buttress the protections of such a section, all but three of the states³⁶ have as a part of their Bills of Rights the famous due process clause: "No person shall be deprived of life, liberty, or property without due process of law." This clause "fills in the chinks" in the protective armor which has been erected around those accused of crime. When the Due Process clause of the 14th Amendment is added to these protections, the guarantees of fair trial are seen to be very substantial indeed.

Specific Provisions. In addition to the generally agreed upon fundamentals, there are at least two other elements of a

³⁵ Florida Const., Declaration of Rights, sec. 11.

³⁶ Florida, Kansas, and Kentucky.

fair trial which are somewhat more specific in nature. A trial would hardly be "fair" in the ordinarily accepted sense of the term, if the accused were compelled to give testimony against himself. Such has been the accepted tradition, though an occasional state is found which does allow a prosecuting attorney to comment unfavorably upon the defendant's past criminal record and to call attention to a refusal to testify.

The Louisiana Constitution may be used as an example on this point. The pertinent section reads:

No person shall be compelled to give evidence against himself in a criminal case or in any proceeding that may subject him to criminal prosecution, except as otherwise provided in this Constitution. No person under arrest shall be subjected to any treatment assigned by effect on body or mind to compell confession of crime, nor shall any confession be used against any person accused of crime unless freely or voluntarily made.³⁷

The last sentence is worthy of note, since by its terms "third-degree" methods are constitutionally prohibited. Again the basic importance of such a prohibition in terms of a genuinely fair trial is obvious.

Fairness of trial demands, also, that a person not be put twice in jeopardy for the same offense. A second trial, conducted after the accused has been freed at the first, could scarcely be said to be "fair." Most of the states, with the exception of Connecticut, have a double jeopardy clause in their constitution.

³⁷ Art. I, sec. 11. The Rhode Island Constitution states the principle more simply in its Art. I, sec. 13: "No man in a court of common law shall be compelled to give evidence against himself."

The omission in the case of Connecticut has proved important, for this is one of the instances where the United States Supreme Court suggests that double jeopardy may not be one of the rights of the first ten amendments which are protected by the due process of law clause.³⁸ States wishing to spell out this right more clearly have included it as a part of their Bill of Rights.

Guarantees Against Imprisonment for Debt

Imprisonment for debt is outlawed in roughly three-fourths of the states. New Hampshire is one of the states which has no such prohibition and as recently as 1953, a celebrated case of imprisonment for debt received wide newspaper coverage. The Missouri provision is a simple example which declares:

. . . no person shall be imprisoned for debt, except for nonpayment of fines and penalties imposed by law.³⁹

Other states add other limitations. Five states prohibit imprisonment for a militia fine in times of peace.⁴⁰ Seven states require the debtor to deliver up his estate before he can claim the protection.⁴¹ South Carolina and Wisconsin limit the protection to debts arising out of contract. Absconding debtors have no protection under the Oregon and Washington provisions.

³⁸ See Palko v. Connecticut, 302 U. S. 319 (1937).

³⁹ Const., Art. I, sec. 11.

⁴⁰ California, Iowa, Michigan, Nevada, and New Jersey.

⁴¹ Colorado, Illinois, Kentucky, Montana, North Dakota, Pennsylvania, and Rhode Island. Illinois also limits the protection where there is a presumption of fraud. Const., Art. II, sec. 12.

Provisions on Excessive Bail and Cruel and Unusual Punishment

Our imaginative ancestors devised some rather fiendish, as measured by present day standards, methods of inflicting punishment on those who had been adjudged guilty of crime. Burning at the stake, drawing and quartering, branding, and mutilation were accepted forms of punishment in English law. Use of the pillory and stocks were good Puritan customs. The traditional phrase barring such types of activity is a simple one and adds up to the fact that no person shall be subjected to "cruel or unusual punishment."⁴² Over three-fourths of the state constitutions contain such a provision, in addition to that found in the federal Constitution which has never been interpreted by the United States Supreme Court as being directly applicable against the states.⁴³

Prohibitions, too, against excessive bail and fines are also found in most state constitutions. Fairness requires that a man not be apprehended on some pretext for a minor crime and then held in custody under such high bail figures that he is unable to procure his release. Fairness, too, requires that the fine imposed for a minor crime bear some real relationship to the nature of

⁴² See e. g., Louisiana Const., Art. I, sec. 12.

⁴³ It is the writer's opinion that in a four-square case involving cruel and unusual punishment, the 14th Amendment would provide the necessary bridge and that this federal protection would be applicable.

the offense. A man should not be wiped out financially for some petty offense. Such procedures were favorite devices of English kings and have been used on occasion by petty local tyrants in the United States. The prohibition against excessive bail is usually coupled with that against cruel and unusual punishments and follows the wording of the 7th Amendment to the Constitution of the United States:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.⁴⁴

Provisions on Treason

Thirty states carefully define treason in their Bills of Rights and in doing so adhere to the language of the federal Constitution almost verbatim:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the testimony of two Witnesses to the same overt Act, or on Confession in open Court. The Congress shall have Power to declare the Punishment of treason, but no Attainder of Treason shall work Corruption of Blood, or forfeiture except during the Life of the Person attainted.⁴⁵

A number of the remaining states define treason elsewhere in their constitutions. Such provisions are found in southern state constitutions promulgated after the Civil War.

⁴⁴ Bail need not be granted a person indicted for a capital offense. Persons indicted for crimes, where there is strong evidence of an intent to flee the jurisdiction to escape having to stand trial, need not be admitted to bail.

⁴⁵ Art. III, sec. 3.

Provisions on Property Rights

"No person," so the ancient formula runs, "shall be deprived of life, liberty, or property without due process of law." The emphasis in the preceding section of this Staff Paper has been on the use of the formula in its relationship to personal rights and rights of persons accused of crime, but it has an applicability for property rights as well. Property rights in this complex day and age are not the same as they were many centuries ago when the formula was first devised, primarily as a procedural yardstick in criminal cases. But the judicial interpretations of the second decade of the 19th Century gave vitality to due process as it related to rights of property. This use of due process is important today, even though changing conceptions of government have somewhat modified the categorical character of property rights.

The older guarantees relating to property, some found in Bills of Rights as well as in other parts of the state and federal constitutions, are well known. Private property, for example, cannot be taken without the payment of just compensation.⁴⁶ It

⁴⁶ "The property of no person shall be taken or damaged for public use without just compensation therefor." Nebraska Const., Art. I, sec. 21.

The usual procedure, where a purchase price cannot be agreed upon, is for the public body to institute condemnation proceedings; the amount of payment is then determined through judicial processes. A few states have written this latter provision into their Bills of Rights. Thus the Missouri Constitution provides: ". . . private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of the land taken for railroad purposes without the consent of the owner thereof shall remain in such owner subject to the use for which it is taken." Art. I, sec. 26. The West Virginia Constitution, Art. III, sec. 9, has a somewhat similar provision. See also the federal Constitution, 5th Amendment.

would be difficult to imagine a more basic guarantee against government confiscation. All but nine states have included, as a part of their Bills of Rights, a provision that legislatures shall make no laws impairing the obligations of contracts.⁴⁷ Traditionally, too, provision has been made, usually as a part of Bills of Rights, that persons and property are protected against the arbitrary and unreasonable searches and seizures;⁴⁸ the prohibition arose out of the practice followed by the British, in the period prior to the Revolution, of searching the homes of American colonists on any or no pretext. From Revolutionary memories, too, comes the frequently included provision against the quartering of soldiers in private homes.⁴⁹

⁴⁷ E. g., Missouri Const., Art. I, sec. 13; Nebraska Const., Art. I, sec. 16; Federal Constitution, Art. I, sec. 10.

⁴⁸ The language on the point generally tends to follow that of the federal Constitution. The Louisiana Constitution declares: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no such search or seizure shall be made except upon warrant therefor issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and persons and things to be seized." Art. I, sec. 7. The New York Constitution, reflecting the communications consciousness of the 20th Century society, prohibits wire-tapping except under generally defined situations. Art. I, sec. 12.

Judicial interpretation of the language, as between federal and state courts, has varied somewhat on the point of whether evidence illegally obtained may be introduced on a trial of the accused. The federal rule is quite clear that such evidence may not be used. Wiretap evidence could not, for example, be used to obtain the conviction of Judith Coplon. On the state level, however, the rule has been different in some states. See Wolff v. Colorado, 338 U. S. 25 (1949).

⁴⁹ Thirty states have such a provision usually worded somewhat along these lines: ". . . no soldier shall be quartered in any house without the consent of the owner in time of peace, nor in time of war, except as prescribed by law." Missouri Const., Art. I, sec. 24.

The prohibition is sometimes coupled with a phrase which places the military power in strict subordination to the civil power. Such is the case in the Missouri Constitution. Of the 18 states which do not include prohibitions against the quartering of soldiers in private homes, 12 have "military subordination" clauses.

Some of the later pronouncements on property rights in state Bills of Rights have tended to place limitations on property. It should be noted in this connection, too, that many such limitations on the free exercise of the rights of property are found in other portions of state constitutions, where they do, perhaps, fall more logically. Irrevocable grants of special privileges, perpetuities, immunities, or monopolies are prohibited in the Bills of Rights of 16 states;⁵⁰ Louisiana and some other states have such a provision but it is found elsewhere in the constitution.⁵¹ Many of these provisions grew out of the ferment of the Populist period and the excesses of Reconstruction days. They represent a late 19th and early 20th Century contribution to the thinking of the citizenry on the place of property in the scheme of society.

Provisions on Economic and Social Rights

The rights so far discussed in this paper relate essentially to the matters covered in the federal Bill of Rights, although they have been treated as they appear in state constitutions rather than in the federal document. The states have added to or reworded many of the federal guarantees, but it would be difficult to demonstrate that they have improved upon them appreciably.

⁵⁰ Arizona, Arkansas, California, Indiana, Kentucky, Maryland, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Washington, and Wyoming.

Some states, for example Nebraska, prohibit only some of these things and thus are not listed among the 16.

⁵¹ Art. IV, sec. 4; Art. XIII, secs. 5 and 7.

The great majority of rights which appear in various state Bills of Rights and in the federal Bill of Rights are directed primarily against the arbitrary actions of government and government officials. They are tangible and justiciable. When violated, action may be taken in a court of law. The extension of governmental activity has narrowed the meaning of some of these rights and guarantees, but they still stand as the bulwark protecting the freedom of the American people.

As government has assumed an ever greater role in the social and economic order, many people have favored the recognition of a new category of "rights." This category would not prohibit or restrict government action. Rather, it would guarantee active government protection or intervention on behalf of particular interests or individuals. In other cases it would guarantee to every individual certain material or social benefits.

Many states have launched forth into this new area of positive "rights." Where one group, such as organized labor, is favored by a so-called right, opposing groups seek embodiment in the constitution of a counter right. Thus guarantees of collective bargaining are answered in other states by guarantees of a right to work irrespective of membership in a labor organization. The New York Constitution is quite specific and detailed on the subject of labor:

Labor of human beings is not a commodity nor an article of commerce and shall never be so considered or construed. No laborer, workman or mechanic, in the employ of a contractor or subcontractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days

in any week, except in cases of extraordinary emergency; nor shall he be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.

Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.

Nothing contained in this constitution shall be construed to limit the power of the legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, either directly or through a state or other system of insurance or otherwise, of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, except where the injury is occasioned by the wilful intention of the injured employee to bring about the injury or death of himself or of another, or where the injury results solely from the intoxication of the injured employee while on duty; or for the adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; or to provide that the right of such compensation, and the remedy therefor shall be exclusive of all other rights and remedies for injuries to employees or for death resulting from such injuries; or to provide that the amount of such compensation for death shall not exceed a fixed and determinable sum; provided that all monies paid by an employer to his employee or their legal representatives, by reason of the enactment of any of the laws herein authorized, shall be held to be a proper charge in the cost of operating the business of the employer.⁵²

The substance of the first paragraph, aside from the opening sentence which is fundamentally a statement of allegiance to a particular economic doctrine, is to set up standards to which private contractors performing state work must conform. The second paragraph is of general applicability, and is of considerable importance to organized labor generally. The third complicated paragraph falls only a little short of being an entire workmen's compensation act placed in a constitution.

⁵² Article I, Secs. 17 and 18. The second paragraph of the lengthy article has its counterpart elsewhere. Thus the Missouri Constitution makes the same provision in its Article I, Sec. 29.

Vol. 1
Constitutional Studies

A provision of the New Jersey Constitution reads:

Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.⁵³

Organized labor has, of course, favored writing into the various state constitutions guarantees of collective bargaining. Unions have just as vigorously opposed so-called "right to work" provisions which have found their way into public controversy in recent years. An amendment to the Florida Constitution, adopted in 1944, is typical of the "right to work" provisions.

The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.⁵⁴

It is to be noted that declarations of this sort involve highly controversial matters. It cannot be said that they reflect a basic consensus about which there is general and universal agreement. Traditionally, Bills of Rights have protected individuals in their person and in their property. Newer provisions on industrial relations mark an effort to establish the preferred positions of one or another economic or social group in a constitutional document.

⁵³ Article I, Sec. 19.

⁵⁴ Declaration of Rights, Sec. 12. Nebraska adopted a similar amendment in 1946.

Some constitutions have recognized certain so-called "human rights." Thus the Puerto Rican Constitution originally provided in its Bill of Rights for recognition of the existence of:

The right of every person to receive free elementary and secondary education.

The right of every person to obtain work.

The right of every person to a standard of living adequate for the health and well-being of himself and of his family, and especially to food, clothing, housing and medical care and necessary social services.

The right of every person to social protection in the event of unemployment, sickness, old age or disability.

The right of motherhood and childhood to special care and assistance.⁵⁵

This provision, admittedly visionary and beyond realization in the present state of Puerto Rican economic development, produced strong objection in the United States Congress. The article had to be removed as a condition of congressional approval.

It is perhaps pertinent to note that the federal Constitution and the constitutions of most states have been effective and vigorous charters because they have been realistic documents consolidating fundamental ideas and principles concerning which there was general agreement and on the basis of which people could act and depend upon the courts to uphold them in their rights. Constitutions which outreach the fundamental freedoms and rights of the people framing them have become objects of little effect and frequently of ridicule. The Constitutions of France, Italy, and of many of the Latin American republics suffer from such defects.

⁵⁵ Article II, Sec. 20.

A bill of rights section of a constitution should be restricted to a statement of the inalienable and unassailable rights and freedoms which characterize democratic people. These rights and freedoms should be those symbolic truths which are not only universally accepted by school children as well as adults and by all social and economic groups, but which they are willing to defend at all costs.

To venture beyond the fundamental and universal rights in a bill of rights section of a constitution by including controversial assertions of economic privilege accomplishes little more than a derogation of democracy's self-evident truths.

Summary

The Constitutional Convention at College will of necessity include a Bill of Rights in the Constitution for the State of Alaska. This Bill of Rights will include, probably, statements of the basic and fundamental freedoms so much a part of the American heritage. The fact that "legally," statements on some of the subjects which will be included do not really need to be made (because they are protected under the 14th Amendment to the national Constitution) simply will be an additional manifestation of the importance of these principles to the Delegates.

The issues which will arise out of attempts to write in some of the newer "rights" will cause considerable difficulty. No satisfactory yardstick which will be determinative in each case on the point of whether or not a specific proposal should be included can be devised. In Staff Paper No. I, certain criteria

for constitutional drafting were set out. The third of these criteria dealt with the subject of civil rights and liberties and was thus stated: "The civil rights and liberties set out in the Bill of Rights should be stated concisely." Certainly the example of the New York Constitution, as it dealt with the subject of workmen's compensation, could hardly be said to meet this requirement. There is some possibility that many of the newer "rights" would require extensive statements, if incorporated into constitutional law, which might better be left to the legislature and future statutory action.

The Delegates may wish to consider, also, the idea that a Bill of Rights should be a relatively non-controversial standard to which the great majority of Alaskan citizens can repair. Perhaps the more controversial elements, particularly in the welfare field might be better left to legislative judgment or, if incorporated into fundamental law, should be placed in a portion of the Constitution other than the Bill of Rights. In this fashion the idea of the Bill of Rights as a basic statement of principles on which there is a substantial consensus of opinion can be preserved.

III

THE ALASKAN CONSTITUTION AND THE STATE PATRIMONY

The Constitution and Natural Resources

A staff paper prepared by Public Administration
Service for the Delegates to the
Alaska Constitutional Convention

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Service - Constitutional Studies, Vol. I

TABLE OF CONTENTS

The Alaskan Constitution and the State Patrimony	1
The Nature and Extent of Alaska's Patrimony	2
Land Grants	3
Tide and Submerged Lands under Inland Navigable Waters	8
Submerged Lands in the Three Mile Zone	9
Resource Potential	10
Land Resources	11
Surface Resources--Agriculture	11
Surface Resources--Forests	11
Surface Resources--Wildlife	12
Surface Resources--Conservation Areas	13
Subsurface Resources	14
Water Resources	17
Marine Resources Proper	17
Submerged Soils--Inland Waters and Three Mile Zone	20
The Tidelands Proper	21
Hydro-Electric Resources	22
Water Resources and Transportation	24
Summary	24
Land and Resources Policy and Activity in the U. S.	25
State Constitutional Provisions on Lands and Resources	31
Waters and Water Resources	34
Basic Provisions	34
Hydro-Electric Use of Water	36
Tidelands	37
Free Navigability of Waters	39
Marine Resources	40
Mines and Minerals	41
Land Limitation	46
School Lands	47
Agriculture	50
Miscellaneous Constitutional Provisions	51
Summary	52
Resources Policy and the Alaska Constitution	53
Psychology of the Citizen and Resources Exploitation and Fraud	54
Suggested Lands and Resources Article	57
General Section	58
Lands and Mineral Rights	59
Waters and Water Resources	70
Forests	73
Concluding Section	74
Constitutional Provisions on Boundaries	74

Service - Constitutional Studies, Vol. 1

THE ALASKAN CONSTITUTION AND THE STATE PATRIMONY

Of the many problems and issues facing the Delegates at College, none has so great a long-range importance as that involving Alaska's lands and resources. The lands and resources problem may be stated thus: What should be the nature, scope, and possible verbiage of constitutional provisions, if any, that may be necessary to assure that the lands and natural resources of the new State of Alaska will be developed (1) to their highest potential and (2) for the benefit of all the people of Alaska? The two aims of development are not incompatible and both are of equal importance.

Emphasis must be placed at the outset upon two points. The term Alaskan "lands and natural resources" is a broad concept as it is used in this paper. It comprehends not only the agricultural and grazing uses of land so traditional in the mid-western and some of the western states but subsurface mineral wealth, forests, wildlife, and the resources of the navigable waters and the sea, including the subsoil of submerged lands and tidelands. The facts of Alaskan geography and economic existence require the use of this somewhat broadened conception of the term "lands and natural resources."

In the second place, the problem of lands and resources development and management has three phases: (1) the establishment of constitutional policy; (2) the creation of a resources code by the legislature or the passage of necessary legislation in the land and resources field; and (3) the implementation of the constitutional and statutory provisions by administrative agencies of the state government. The second and third phases of resources development and management are not properly subjects for inclusion in the State constitution. It is of vital importance that the administrative machinery should not be made a part of constitutional provisions. Nor should a "resources code" be incorporated into the document, for the writing of such a code is the proper province of the legislature. The establishment of a resources code, or the passage of legislation, and the creation of an administrative agency or agencies to administer the lands and resources development of the new State should not be undertaken until an extensive and relatively complete study of Alaska's resources, as defined in this paper, has been undertaken. Such a study would necessarily be a lengthy one and would entail considerable expenditure.

This staff paper is confined to the constitutional phase of resources development and management.

The Nature and Extent of Alaska's Patrimony

There are many elements that in their totality comprise the patrimony of the future State of Alaska. Land is, of course, the element of most common consideration.

Land Grants

The new State of Alaska will receive substantial land grants at the time of its admission to the federal Union. The exact amount and type cannot be forecast with complete accuracy, but there is a sound reason for belief, based on enabling legislation which has been previously introduced in the Congress, that the total amount may equal something over 103 million acres. This acreage is approximately equal to that of the total land acreage of the State of California.

The transfer of this vast acreage from the public domain of the United States into the hands of the State of Alaska represents in effect the transfer of an Empire. Even though Alaska's choice, to be exercised over a twenty-five year period if provisions of recent enabling legislation are followed, will be considerably limited by United States withdrawal and reservation policy, no other state has ever received, either dollar-wise or acreage-wise, so great a patrimony.¹

The provisions of Senate 49, 84th Congress, one of the recently proposed enabling acts, are typical of most recent proposed land grants to Alaska. Section 205, in summary, provided for the following acreages to be granted for the purposes

¹ Texas had a greater state public land acreage than that which Alaska will receive. Texas entered the Union, however, from independent republic status. The agreement at the time of her admission required the new State to assume the payment of the debts of the Republic of Texas; in return the State was allowed to retain its public lands.

noted:²

	<u>Acres</u>
From national forests for community development---	400,000
From public lands for community development-----	400,000
From public lands for State-----	100,000,000
From public land for:	
Government buildings-----	500,000
Institutions for mentally ill-----	200,000
Schools and asylums for deaf, dumb, and blind-----	200,000
Normal schools-----	500,000
State charitable, penal, and reformatory institutions-----	200,000
Needy pioneers-----	250,000
University of Alaska-----	500,000
Penitentiaries-----	<u>200,000</u>

Total proposed grants to Alaska-----103,350,000

H. R. 331, introduced by Delegate E. L. Bartlett in 1949, had followed the traditional pattern in providing for land grants in his proposed Alaskan enabling legislation; sections 2, 16, 32, and 36 of each township, plus certain special grants, were to be given to the new state for the support of its common schools.³ As amended by the Senate Committee on Interior and Insular Affairs and reported in 1950, the section provided for a round figure grant of 20 million acres, rather than a grant based on specifically numbered sections. The change was made because such a minor fraction of Alaska has been surveyed; grants of specific sections would have made very little land immediately available to the State. The 20 million acres so granted was to

² Section 205 also included small specific property grants, e.g., Block 32 in the City of Juneau. The provisions of H. R. 2535, 84th Congress, as reported, were identical.

³ Section 5 of the measure as introduced.

Service - Constitutional Studies, Vol. 1

be held in trust for the support of public schools and public educational institutions, and restrictions were placed on the state as to the size of tracts which might be sold and with reservation of royalty rights in minerals.⁴

The Bartlett Bill had followed tradition. Utah, Arizona, and New Mexico had been admitted to the Union with such grants of specific sections for school purposes.⁵ Discussion of statehood measures by Congress through the years, however, caused many members to reach the conclusion that the traditional formula would not give Alaska a broad enough economic base on which to found a fiscally sound state government. S. 50, as introduced in the 93d Congress, for example, called for a grant of 20 million acres plus other special grants; as reported, with a substitute, by the Senate Committee on Interior and Insular Affairs, however, the land grant provisions called for 100 million acres plus special grants. All enabling legislation introduced in the 84th Congress calling for Alaskan statehood, save one, contained the 100 million acre provision. The hope, expressed in committee hearings and congressional debate, was that the greater acreage would enable the new state to get off

⁴ "Such lands may be granted or sold by the State in tracts of not more than 640 acres for any purpose, but with a reservation to the State of a royalty of not more than 12½ per centum on all minerals produced therefrom." Section 5(b), as reported by the Senate Interior and Insular Affairs Committee.

⁵ Oklahoma, which entered the Union after Utah, but before Arizona and New Mexico, received sections 16 and 36 only. Wyoming, Idaho, Washington, Montana, and North and South Dakota, the six states admitted before Utah, received sections 16 and 36.

to a flying start. There was full appreciation on the part of members of Congress that the historical grant formula was being abandoned; some few members of Congress opposed the greater acreage grants. Because of the tremendous acreage involved, the basic 100 million acre grant was not limited to direct support of public education. Such a limitation would have been unrealistic, for the new State would need financial support for many other necessary activities besides education.

But of one fact, there can be little doubt. Whether the acreage is 20, 40, or 100 million, Alaska will receive, upon the assumption of statehood, a tremendous amount of public land. The State will make its choices within some set period of years, probably 25, and from those lands in the United States public domain which are "vacant, unappropriated, and unreserved" at the time of selection.⁶ The national policy of withdrawal⁷ and reservation very definitely will restrict the State's freedom of choice, as the following chart demonstrates:

⁶ Most enabling legislation which has been introduced would have allowed selections of specific acreage from national forest lands which were "vacant and unappropriated" for the purpose of developing and expanding Alaskan communities. The highest figure in any legislation on this type of acreage has been 400,000 acres.

⁷ Withdrawn land is land removed from the status of vacant public domain by the federal government. It is not open to settlement and is generally not available for selection by the future state.

Public land withdrawals in Alaska as of June 30, 1954⁸

<u>Type of withdrawal</u>	<u>Gross acreage</u>
Oil and gas reservation north of Brooks Range, including naval petroleum reserve-----	48,800,000
National forests-----	20,700,000
Wildlife refuges-----	8,000,000
National parks and monuments-----	6,900,000
Military and naval reserves-----	3,100,000
Native reservations-----	3,500,000
Classification and in aid of legislation-----	1,100,000
Powersite classifications and reserves-----	200,000
Other (including air navigation sites, 90,000; protection of water supply, 70,000; railroad reserves and town-sites, 70,000; lighthouses, 50,000; coal reserves, 30,000, and miscellaneous)	<u>400,000</u>
Total-----	92,700,000

The total area withdrawn is something less than the total of the individual withdrawals since some of them overlap each other.

A great deal of the choice land will not, therefore, be available to the new State for selection. There is a possibility that the State of Alaska may never choose to exercise its full option under these circumstances because the cost of administration of some lands might exceed the value to be derived therefrom.

⁸ Committee on Interior and Insular Affairs, House of Representatives, 84th Congress, 1st session, Hearings on H. R. 2535 and H. R. 2536 and Related Bills, 245. These Hearings were held in January and February 1955. Cited hereafter as Hearings on H. R. 2535.

Tide and Submerged Lands under Inland Navigable Waters

Under the decision and rule of law established by the United States Supreme Court in the case of Pollard's Lessee v. Hagan⁹ and numerous subsequent cases, the beds of navigable waters--lakes,¹⁰ rivers,¹¹ inland bays,¹² and tidelands proper down to mean low water mark,¹³ where such lands are not part of reservations or withdrawals made by the United States while the area is in territorial status--are held by the national government in trust for the future state. The exact extent of such submerged lands in Alaska is difficult of determination, but their area is certainly considerable. Such lands and waters, accruing to the state upon its admission to the area, are held subject to the overriding rights of the United States in the exercise of its constitutional powers over navigation, commerce, military necessity, etc. These submerged soils and waters

⁹ 3 How. 212 (1845).

¹⁰ Louisiana v. Mississippi, 202 U. S. 1 (1906); Massachusetts v. New York, 271 U. S. 65 (1926); Illinois Central R. Co. v. Illinois, 146 U. S. 387 (1892).

¹¹ United States v. Utah, 283 U. S. 64 (1931); Barney v. Keokuk, 94 U. S. 324 (1876); United States v. Chandler-Dunbar Water Co., 209 U. S. 447 (1908).

¹² McCready v. Virginia, 94 U. S. 391 (1876); Smith v. Maryland, 18 How. 71 (1855).

¹³ Shively v. Bowlby, 152 U. S. 1 (1894); Borax Consolidated v. Los Angeles, 296 U. S. 10 (1935).

Only representative cases have been listed on the question of submerged lands under the navigable waters of lakes, rivers, inland bays, and tidelands proper. No state or lower federal court decisions are cited. Many such opinions are available.

constitute an asset of considerable value to the new state.

Submerged Lands in the Three Mile Zone

The Submerged Lands Act of 1953¹⁴ allowed those littoral states on the Atlantic and Pacific Oceans which had not already done so to extend their boundaries out to the three nautical mile, one marine league, limit of United States territorial waters. Control over such lands and waters is, again, subject to the overriding rights of the United States in the exercise of the powers of war, commerce, and navigation.

Doubt was expressed after the passage of the Submerged Lands Act of 1953 as to whether or not it would extend automatically to states admitted after its passage, i.e., Hawaii and Alaska. Lest questions should arise and litigation result, recent proposed enabling legislation to admit Alaska and Hawaii has specifically made the provisions of the Submerged Lands Act of 1953 applicable to the Hawaiian and Alaskan situation.¹⁵ A carefully drafted boundary provision in the Alaskan Constitution will insure that the new State will be able to take advantage of the opportunity afforded by the Submerged Lands Act of 1953 and probable implementing Congressional legislation.

¹⁴ Public Law 31, 83d Congress, 1st session; 67 U. S. Stat. 29. The Outer Continental Shelf Act, Public Law 212, 83d Congress, 1st session; 67 U. S. Stat. 462, retains for the United States powers in the area outside state boundaries. Since the question of submerged soils in the Gulf of Mexico, as raised by the Submerged Lands Act of 1953, is not pertinent to the Alaskan situation, no mention is made of that issue in this Staff Paper.

¹⁵ See, e.g., H. R. 2535, 84th Congress, sections 103 (e) and 205 (o) as reported by the House Interior Committee.

Service - Constitutional Studies, Vol. 1

Because of the difficulty of knowing at the present time exactly which waters are inland waters, and therefore under the rule of Pollard's Lessee v. Hagan, the exact extent of the offshore area coming under the control of Alaska under the Submerged Lands Act of 1953 cannot be accurately determined. The variegated nature of the coastline will make the drawing of a baseline from which to measure the three mile zone exceedingly difficult. It can be stated, however, that there is a considerable and potentially valuable area coming to the State under the provisions of the Submerged Lands Act and the probable act of admission.

Resource Potential

A sound Alaskan land and resources policy must not be based on acreage alone. While no attempt is made in the descriptive material which follows to outline in detailed fashion the known and potential possibilities of lands and resources in Alaska, reasoned judgment on final constitutional policy cannot be made without a general comprehension of the Alaskan resources picture. The classification which follows, with the major division of land resources on the one hand and water resources on the other, is not a perfect one; there is obvious duplication, for example, in the mineral area, for mineral wealth may be found in the subsurface of land resources and the subsoil of the marginal sea as well. Nevertheless, the classification has utility in focusing attention on actual resources rather than mere acreage.

Service - Constitutional Studies, Vol. 1

Land Resources. The land resources of Alaska fall logically into two sub-classifications: those involving the surface and those involving the subsurface.

Surface Resources--Agriculture. The most important producing agricultural area of Alaska at the present time is in the Matanuska Valley with smaller developments in the Tanana Valley and, to a lesser extent, in the Homer area on the west side of the Kenai Peninsula. Isolated agricultural pursuits are carried on in other parts of the Territory.

Only a minor fraction of the land area in Alaska is suited for agricultural pursuits, at least in the present state of agricultural knowledge. Agricultural experimentation will undoubtedly produce varieties of farm products especially suited to Alaskan climate. Newer farming methods may well serve to increase agricultural production. But while the number of acres under cultivation will undoubtedly continue to increase in the future, there appears to be little likelihood that agriculture will ever be able to assume a role in Alaska similar to that it has traditionally had in the midwestern and most western states. Agriculture, while important, cannot be listed at the present time, nor is it likely that it can be listed in the future, as a producer of major income in Alaska.

Surface Resources--Forests. A high proportion of Alaska's surface wealth is found in her forests. True, much of this wealth today is located in the Tongass and Chugach National Forests; these areas would not be available in the form of land grants

to the new State, except for very limited acreage immediately surrounding present communities located in the national forests.¹⁶

However, Governor Heintzleman indicated in 1954 that, in his opinion, there were some 40 million acres of timber of commercial quality in the open public domain. He estimated, in addition, that some 10 million acres, which does not carry commercial timber at the present time because of destruction by fire, has the necessary potentiality for forest production.¹⁷ Such lands would, of course, be subject to appropriation by the State of Alaska. These forest areas, eliminating the national forests from consideration for the moment, constitute the major portion of the known surface wealth of Alaska. Administered on a sustained yield basis they would provide the basis for a considerable addition to the present and contemplated pulp operations in Southeastern Alaska.

Surface Resources--Wildlife. Upon the assumption of statehood, Alaska would take over the operation and management of game resources, except in those areas where the national government, by reservation, withdrawal, or international treaty has retained specific control of particular game animals. Legally, as a State,

¹⁶ Sections 205 (g)(1) of H. R. 2535 and S. 49, as introduced in the 84th Congress, provided that Alaska should receive, upon statehood, an additional 12½% of the income derived by the United States from the national forests in Alaska. The normal payment to a state is 25%. Alaska would thus receive 37½%. The provision was stricken by the House Interior and Insular Affairs Committee in 1955.

¹⁷ Committee on Interior and Insular Affairs, United States Senate, 83d Congress, 2d session, Hearings on S. 50, pp. 141-2. These Hearings were held in January and February 1954. Cited hereafter as Hearings on S. 50.

Service - Constitutional Studies, Vol. I

Alaska may manage its game resources--define hunting areas, set bag limits, require licenses, etc.--because it is said to have a "proprietary" interest in preserving the game for the use of its citizens.¹⁸

From the commercial point of view, the value of fur and fur products is an important element of the Alaskan economy. A substantial percentage of persons in the Second Division and a lesser percentage in the Fourth, are dependent upon wildlife for food, clothing, and cash income. The new State will certainly have the responsibility of working out adequate hunting and trapping requirements on State lands, though these regulations should hardly be accorded constitutional status.

From the point of view of those interested in building the sports side of the wildlife operation, the potential is also great. It is possible to hunt animals in Alaska which are found almost nowhere else under the American flag. Conservation and maximum utilization of wildlife for commercial, personal, and sports use will be necessary.

Surface Resources--Conservation Areas. While provisions dealing with State parks and recreation areas may have no proper place in the State Constitution, the probable future emphasis on sports, hunting and fishing and increased tourism will require eventually a system of such parks and recreational areas. A small but substantial portion of State revenue and a considerable income for the State's citizens might be derived from

¹⁸ Geer v. Connecticut, 161 U. S. 519 (1896). See also Silz v. Hesterberg, 211 U. S. 31 (1908).

this source. In listing, therefore, the surface resources of State lands, the element of parks and recreation areas must be included.

Subsurface Resources. Few will quarrel with the statement that Alaska's greatest single source of potential wealth lies below the surface of the land. Since the purchase of Alaska in 1867 over a billion dollars in mineral wealth has been removed. Gold has accounted for two-thirds of this amount, and copper, in the period from 1911 to 1938, was recovered in the amount of almost a quarter of a billion dollars. Pegging of the price of gold by the United States has caused the complete shutdown of gold lode mining operations, but gold recovered through sub-aqueous dredge operations for the most part, remains today an important source of mineral production, returning about \$8½ million in 1954. In 1953, coal in the amount of almost \$8½ million was produced; the value of coal in 1952 was about \$5 3/4 million.

Good general indications exist today in Alaska of the kinds and, in some cases, the amounts of minerals which are available. Most geologists remain convinced that many new discoveries, some of which will be commercially feasible production-wise, are likely in the near future as mineralogical exploration continues. As known reserves of minerals are exploited within the continental limits of the United States, Alaska becomes a logical point of search for new sources.

Petroleum exploration provides an excellent example of this point. Before the small refinery was destroyed in 1933, the Katalla Field had yielded about 150,000 barrels of oil. There was no widespread excitement about Alaskan oil possibilities. But interest increased manifold after World War II. The post-World War II activities of the United States Navy in Petroleum Reserve 4, north of the Arctic Circle, are known today throughout Alaska; oil, in commercial quantities under less stringent climatic and geographic conditions, has been discovered. Though the exact extent and size of the Gubik gas field, found partly in Petroleum Reserve 4 and partly on lands withdrawn by the Department of the Interior under Public Land Order 82, is not known, there is every indication that the discovery is a valuable one. Major oil companies have greatly stepped up their exploration activities in Alaska. Activity in the Yakataga-Katalla district, at Wide Bay, in the Nelchina area, and exploration by major companies on the Kenai Peninsula--these and other operations have been induced in no small part by the increasing demand for petroleum products and the vital necessity for finding new sources of supply to meet that demand.¹⁹

¹⁹ Under the federal Mineral Leasing Act of 1920, and amended in 1947, the Territory presently receives 37½% of fees, rentals, and royalties collected by the Bureau of Land Management. Even in the exploratory state of petroleum development, important monetary returns have accrued to the Territory. From 1951 to March, 1954, the Territory received \$178,709.12 as its share of oil and gas rentals. From March 1954 through fiscal 1956, the amount was \$243,363.15. Approximately 4 million acres are under petroleum lease. Biennial Report of the Alaska Development Board (1953-1955), 25-26.

The State of Alaska will be somewhat limited in the choice of possible petroleum lands which it can make. Navy Petroleum Reserve 4, for example, will not be subject to appropriation by the new State, nor will the P. L. O. 82 lands unless the Interior Department releases them. Yet there are areas in the public domain from which Alaska will be able to select lands with high petroleum potential.

Viewed over all, the mineral industry in Alaska at the present time is not in the healthiest possible situation. The closing of all gold lode mining operations in the Territory, and the reduction of placer activities have not yet been offset by oil, uranium, and other mineral production. Mining activities of the less precious metals, like tin, have been especially hit by lack of adequate available transportation. Development of such areas as the Klukwan iron deposits wait on the result of international negotiations, among many other factors. Not infrequently state-side interests have deliberately prevented the development of a given mineral because of competition with state-side activities.

But the fact remains that the subsurface of much of the land that the new State might appropriate will be of potentially high mineral character and that it is this mineral wealth which will constitute the State's greatest single long-range asset. The petroleum geologists are hard at work. The search continues for other mineral substances. The uranium fever has hit a high

Service - Constitutional Studies, Vol. I

pitch and Geiger counters and scintillators are fastmoving sales items.²⁰ Wise utilization of the State's potential mineral wealth will result not only in fullest development but in an orderly development calculated to return the greatest possible benefit to the people of the new State who are the real proprietors of these assets.

Water Resources. The water resources of Alaska have been classified for the purpose of this Staff Paper into three categories: marine resources proper, submerged soils resources, and the resources of the tidelands proper.

Marine Resources Proper. Alaska's greatest dollar volume of business for many years has been in its salmon fisheries. Subject to great decline in volume of catch, the 1955 pack was the smallest in the last half-century, the higher prices obtained have maintained the industry in its position as number one in the list of Alaskan dollar producers, although defense construction work has had a bigger payroll and more employees in recent years. Since 1867, Alaska has yielded a total value in fisheries products of almost \$2½ billion. The power of the industry in the control of Alaskan affairs is well-known to all citizens of the Territory. Few topics arouse more acrimony in social discussion than the issue of "big" against "little" salmon interests and the reasons for the decline in the catch down through the years.

²⁰ The relationship of state resources policy and the grant of federal public lands to the Atomic Energy Act of 1946 is not entirely clear. See opinion stated in Appendix II.

Yet for all the admitted importance of the salmon--king, sockeye, dog, humpback, or coho--it is not the only marine resource found in Alaskan waters. Halibut, sablefish (black cod), and herring are available commercially. The King and Dungeness Crab operation has become a big dollar producer. Clams and shrimp may be handled in small commercial operations. Sports fishing for the numerous varieties of trout, as well as salmon, promises great potential for the future. Marine biologists have been giving more and more attention to Alaskan waters in recent years, not only in an effort to determine the reasons for the decline in "King" salmon but to aid in fuller utilization of marine life generally.

Recent legislation proposing to admit Alaska as a state has uniformly provided that the "State of Alaska shall possess and exercise the same jurisdiction and control over the fisheries and wildlife of Alaska as are possessed and exercised by the several States within their territorial limits, including adjacent waters."²¹ The purpose of this provision is clear and constitutes, admittedly, a major reason for the opposition of the salmon industry to statehood. Alaska's control over the commercial and sports fishing would derive not only from the specific provision admitting the state to the Union but from the inherent right of the state to control these resources under the concept that the fish, "insofar as they are capable of ownership" are

²¹ H. R. 2535, section 205 (f), clause 2. As reported by the House Interior Committee.

under the proprietary protection of the state.²²

Control over the fisheries would extend not only to the inland waters, but to the area of marginal sea out to the three mile limit as well. Under pertinent rulings of the Supreme Court of the United States, commercial fishing in the marginal sea is within the purview of the privileges and immunities clause of Article IV, section 2, of the national Constitution, and discriminatory legislation directed against non-residents has been held void as applied to this area.²³ In addition to this particular limitation of state power against discrimination directed to non-residents, the federal government may be constitutionally utilized on occasion under its treaty power to allow federal authority to supersede state authority in some particular regard in the area of fisheries regulation. Fisheries compacts, international treaties, and conventions are examples. Yet even with these limitations, especially important as they are to the Alaskan situation, there is still tremendous potential control authority

²² Corfield v. Coryell, 6 Fed. Cases 3230, 546, 552 (1823); Bayside Fish Flour Company v. Gentry, 297 U. S. 422, 426 (1936); Manchester v. Massachusetts, 139 U. S. 240 (1891); Miller v. McLaughlin, 281 U. S. 261, 264 (1930). Other citations on the point and general information on power and limitations of states over their fisheries are found in Ernest R. Bartley, The Tidelands Oil Controversy (University of Texas Press: Austin, 1953), 37, 75-77, 90, 265-70.

²³ Toomer v. Witsell, 334 U. S. 385, 403 (1948). Mullaney v. Anderson, 342 U. S. 415 (1952) held void an Alaskan statute providing for the licensing of commercial fishermen in Territorial waters and levying a license fee of \$50 on non-resident and only \$5 on resident fishermen. The decision was based on Toomer v. Witsell.

in the prospective State of Alaska. Because of the great value of marine life in Alaskan waters, the question of fisheries policy is of high importance.

Submerged Soils--Inland Waters and Three Mile Zone. Much of what has been said in the section dealing with the mineral wealth of the subsurface of land areas applies with equal force when discussing the resources of the beds of navigable inland waters--lakes, rivers, harbors, bays--and the bed of the three mile belt of marginal sea. At the present time most of the interest in potential mineral wealth in these types of lands is centered in petroleum possibilities: Cook Inlet, the Kenai Peninsula, and elsewhere. Modern drilling techniques have made possible the exploration for and production of petroleum from the subsoil of water areas.

But there are mineral possibilities other than oil in the submerged soils of Alaska. The various types of placer operations, some of which remove gold from the beds of streams, are well known. Other placer activities remove the overlay and utilize dredges in subaqueous operations to separate the gold from the gravel. The story of the gold strike on the beaches at Nome is a permanent part of the Alaska story. Other minerals besides gold and oil are most certainly present in the submerged soils of Alaska. There are techniques available which can recover such minerals, though the processes are much too costly for present developments. Nevertheless, the issues of public

policy on mineral production from submerged lands, over and above petroleum and gold, should not be forgotten.

The Tidelands Proper. Tidelands, technically defined, consist of those lands between mean high and low tides--the land which is alternately covered and uncovered by the ebb and flow of the tide. Alaska, because of the tremendous rise and fall of the tidal waters, has extensive and important tidelands resources. Again, as in the previous paragraphs, some of these resources are subsurface and mineral in character. Statements on these points need not be repeated.

But of possible greater importance so far as the tidelands are concerned is the resource which arises out of their strategic location. For docks, wharves, jetties, and groins must be built, at least partially, on tidelands. Filled land, of which there is and will be a great deal in Southeastern Alaska especially, must be based on tidelands. Alaskans are only too well aware of the importance of this fact, having seen the repeal of the Shore Space Reservation Act²⁴ accomplished finally in 1955.²⁵ The tidelands proper will be the property of the new State and subject to disposition by it,²⁶ except where the United States has made withdrawals, reservations, or has previously granted such lands to individuals or to corporations. The general policy

²⁴ 30 U. S. Stat. 413.

²⁵ H. R. 605, introduced by Delegate E. L. Bartlett. Passed House 5 July 1955; passed Senate 22 July 1955.

²⁶ Borax Consolidated v. Los Angeles, 296 U. S. 10 (1935).

established for the utilization of the tidelands can be of tremendous importance to the economic development of the State of Alaska, dependent as it will be for some time to come on water transportation for heavy hauling.

Hydro-Electric Resources. A fairly complete, though somewhat dated, study was made in 1952 of potential water and hydro-electric development in Alaska.²⁷ The mountainous character of much of Alaska, together with tremendous snow cap and precipitation in some portions contributes to a great hydro-electric potential. Some of the proposed developments, particularly those in the Copper River area and Southeastern Alaska would conflict with the fisheries resources in that present techniques are not sufficiently developed to raise the fish over the high dams and get the new crop back down safely again for their return to the sea. Technical difficulties would mean great cost in the building and operation of some of the projects.

In spite of the great cost of the projects, there can be little doubt that hydro-electric development would do much to aid the development of the mining industry and encourage the

²⁷ Our Rivers: Total Use for Greater Wealth. Reconnaissance Report on the Potential Development of Water Resources in the Territory of Alaska, House Document 197, 82d Congress, 1st Session. The study was prepared by the United States Department of the Interior under the general supervision of the Bureau of Reclamation.

The study contains a great deal of valuable information on the general resource picture in Alaska, even though its major emphasis is on water development.

Cited hereafter as Alaska Water Resources Report (1952).

Constitutional Studies, Vol 1

Service - Constitutional Studies, Vol. 1

development of the mining industry and encourage the location in Alaska of other industries, like aluminum, whose location depends upon the availability of large amounts of electric power. The proposed Taiya project,²⁸ at the moment of writing in a state of suspense because of its international ramifications, is an excellent example of the potentialities of cheap hydro-electric power. The possibilities of electrolytic reduction of various types of ores, such as iron and copper, are tremendous. Thus the development of the subsurface resources of Alaska may, in a number of instances, be closely tied in with the development of the water, and more particularly the hydro-electric, resources of the area.

The State of Alaska must be aware, however, that the development of these hydro-electric resources is not in its hands alone. Licenses to dam navigable streams are matters for federal agencies and federal control, even where those streams are entirely within the boundaries of a state; the achievement of statehood will not thereby assure the new State of Alaska complete legal control in such matters. Economically, these projects might require the expenditure of sums so great that neither private capital nor state financing would be sufficient to handle the cost. The recent Eklutna project, dedicated in 1955 near Anchorage, for example, is not large as hydro-electric projects are measured today, yet its financing was possible only

²⁸ For aluminum development on the Alaska-Canadian frontier.

by the federal government. The Tuya project, requiring utilization of Canadian water resources, would necessarily involve the federal government, even though Alaska were a state, because of the international aspects of the situation.

Water Resources and Transportation. For a considerable period of years to come, Alaska will necessarily be forced to depend upon its waterways for much of the hauling of heavy commodities. As in the case of hydro-electric development, federal agencies will still exercise considerable control, even after Alaska becomes a state.

Nevertheless, the State of Alaska will be able to exercise some small degree of control over water transportation which is entirely within the boundaries of the State.²⁹ Certainly the problem of water transportation is one in which the state is vitally interested.

Summary. Alaska will acquire a tremendous acreage of land upon becoming a State. Over a period of years she will be able to choose great amounts of additional lands. The lands will derive from three main sources: (1) land grants from the public

²⁹ The amount of state control over transportation which is entirely within state boundaries is considerably limited by judicial decisions which have, in effect, given the federal government the power to establish rates within states where those rates affect rates of charge for interstate hauls. While these decisions have been concerned primarily with railroad transportation, their applicability in the field of water transportation cannot be doubted.

The entire picture would be complicated, so far as Alaska is concerned, by the fact that water transport within Alaska is relatively small as compared to water transport from the States to Alaska.

Service - Constitutional Studies, Vol. 1

domain of the United States, (2) navigable waters and submerged soils under such waters which have been held in trust during territorial status for the future State, and (3) waters and submerged soils under the three nautical mile belt of marginal sea off the sea coasts of Alaska.

The resources potentials of these lands, even when limited by national reservation and withdrawal policy is so great as to defy exact definition. The land resources include (1) the surface resources of agriculture, forests, wildlife, and recreation areas; and (2) the subsurface mineral resources of diverse quantity and amount. The water resources include (1) the marine resources proper, (2) the resources of the submerged soils of the inland waters and three mile zone, (3) the resources of the tidelands proper, (4) hydro-electric resources, and (5) the waterways resources for transportation purposes.

Land and Resources Policy and Activity in the United States

The existence of large areas of uninhabited and undeveloped land has been a problem from the earliest days of the federal Union. One of the sore points of contention among the Thirteen States during and immediately after the Revolutionary War involved the many disputes over conflicting land claims by the various states in the area west of the Appalachians.

During the period of government under the Articles of Confederation, seven of the original states were persuaded to cede their western land claims to the United States. On 20 May 1785, the Congress under the Articles of Confederation passed

the Ordinance of 1785, the basic land ordinance which provided for rectangular surveys setting out townships, with each township divided into 36 sections of 640 acres each.³⁰ The Ordinance of 1785 was "accepted" by the Congress, which met later under the Constitution. While it was never legally recognized as binding, the system of surveys contemplated by it became national policy. On 13 July 1787 the famous Northwest Ordinance was passed by the Congress under the Articles, which provided for the government of the territory north of the Ohio River and made provision for the establishment therein of new states which were to enter the Union on an "equal footing" with the original states.

There were no national public domain lands in the original 13 states and Texas, though the United States did later acquire tracts of lands for specific purposes, such as military and naval installations. Maine had originally been a part of Massachusetts and therefore the United States never held domain lands within its borders.³¹

Today there are no longer any identifiable public domain

³⁰ Sections 8, 11, 26 and 29 in each township, plus 1/3 of the precious metals discovered therein, were to be reserved, with the 16th section set aside for the purpose of providing common schools.

³¹ The claim is also made, with some substantiation, that there were no original public domain lands in either Kentucky or Tennessee. The point is a technical one, of no immediate concern to the Alaskan problem.

lands in Illinois, Indiana, Iowa, Missouri, and Ohio. There are small amounts of such land in Alabama, Kansas, Louisiana, Michigan, Mississippi, Oklahoma, and Wisconsin. Even these small tracts are not all located.³²

National land policy in the early days of the Republic was strongly conservative. State-owned lands were selling at much lower prices and on far more liberal credit terms than national lands. The eastern states were thus able to outbid the national government for settlers. The effort in the early part of the 19th Century was on utilizing the proceeds of the sales of public domain lands to pay off the national debt, a policy which proved highly successful.

Ohio was the first public land state to be admitted to the Union. The federal government adopted at that time a policy of retaining title to all ungranted tracts within state boundaries, except one section, the 16th, in each township which was specifically set aside for educational purposes. This latter provision was increased to two sections, the 16th and 36th, in the case of states admitted later in the 19th Century, and to four sections, the 2d, 16th, 32d, and 36th, in the case of Utah, Arizona, and New Mexico. The states were not allowed to take these sections if the lands were known or presumed to be mineral

³² Legislative Reference Service, American Law Section, Library of Congress, Memorandum, "The Public Domain Within Newly Admitted States," 26 February 1953.

in character; they were instead allowed to choose other land "in lieu" of the original sections. The lands could pass, of course, only after surveys had determined the precise location of the various sections in the townships.

Unhappily the disposition of lands by the federal government and of state lands by state governments has been marked by frequent fraud and scandal and lack of attention to development in the long-range public interest. Such frauds have occurred in almost every decade from the founding of the nation down to the present day.

Speculation and speculation in western lands began almost before the Revolutionary War was finished. Many soldiers were given grants, which they sold for a fraction of true value to persons operating speculative ventures. The nation was scarcely ten years old when one of the largest land frauds in American history was perpetrated in Georgia. The so-called Yazoo Fraud was made possible by a grant of land by the Georgia legislature in 1795 of some $15\frac{1}{2}$ million acres to four companies, which numbered among their stockholders members of the legislature voting the grant. The purchase price was $1\frac{1}{2}$ ¢ per acre. The legislative action caused a great outpouring of popular indignation when its terms became known; it was repealed the following year by a legislature elected almost solely on that one issue.

Chief Justice John Marshall maintained, in a case brought to test the validity of the rescinding act, that the judiciary could not inquire into the motives of the legislators and

construed the grant as a contract within the meaning of the national Constitution. The rescinding act he held void as impairing the obligation of contract.³³ Georgia ceded her western land claims in 1802 and thus the federal government fell heir to the sorry mess. Finally in 1814 a settlement was made. But the country had been treated to its first large-scale land fraud.

The development of the west in the 19th Century was greatly stimulated by grants of federal and state lands to railroads for construction purposes. Estimates of total federal grants run around 155½ million acres, though because of non-completion, the final total was 131,350,534 acres. Western states granted the railroads an additional 49 million acres. Unfortunately, not all of these grants were free of fraud; the Credit Mobilier affair was one nation-wide scandal which was tied into railroad grants. At a later date, the Tea Pot Dome affair of the Harding administration involved illegal activities on the part of government officials and oil companies in the handling of federal naval petroleum reserves.

States, too, have trouble with the disposal of public lands. In the case of midwestern and western states, most such grants from the federal public domain have been for the purpose of aiding state systems of education. Again, many states have experienced fraud in the disposal of these lands. Texas, which

³³ Fletcher v. Peck, 6 Cr. 87 (1810).

of course retained its public lands upon admission to the Union, found that its school lands had been fairly well exhausted by manipulation by the latter part of the 19th Century. A settlement of a small sum of cash for the "worthless" tide and submerged land was made at that time by the legislature to the school fund. Fortunately for the Texas school fund, the "worthless" tide and submerged lands turned out to have considerable value in the 20th Century.

The level of political morality has been high in Alaska. The Territory has not been troubled with many cases of outright corruption as have some of the states. The resources of the Territory have, however, been somewhat more susceptible to exploitation, without appreciable benefit to the Territory, than have the resources of many of the states. The memory of the Kennecott copper operation in the Chitina District is still fresh in the minds of many Alaskans. Copper in the value of over \$200 million was removed in this operation; the area was "high graded" with ores of lesser value disregarded. The Kennecott operation was shut down in 1938. The railroad, installed originally at a cost of some \$20 million was removed. Great wealth had been removed from the Territory. The entire operation, with its tremendous production and investment left absolutely nothing of enduring value for the Territory and its citizens except a small ghost town which has become a minor tourist attraction.

The lesson of Kennecott is equally or more important than that of the land frauds and scandals which have plagued American land and resources policy since the early days of the Union. The example of Kennecott unfortunately is not an isolated one in Alaskan history. Alaskans will not confuse "exploitation" with "development."

State Constitutional Provisions on Lands and Resources

Approximately three-fourths of the states have provisions in their constitutions relating to one phase or another of the land and resources problem. Most of these provisions, as will be presently shown, are confined to one specific resource or land problem of peculiar importance to that particular state. The variety and character of these provisions makes well-ordered and meaningful classification difficult.

It is perhaps well to bear in mind that most of the state constitutions were written considerably before the growth of public awareness of the importance of lands and resources policy; in no small measure this accounts for the fact that one cannot find in any state constitution an overall statement of policy on all of the lands and resources problems which faced the state on its entrance into the Union. Many of the provisions which do appear reflect concern only with a dominant and overwhelming problem, such as the provisions on water rights which appear in a number of midwestern and western state constitutions. The Texas Constitution, for example, speaks blandly of conservation

and development of "all the natural resources" of the state, but then proceeds in the remaining lines of the section to discuss only water resources and the elements, like navigation, so much a part of the general problem of water resources.³⁴

The proposed Hawaiian Constitution contains a provision much broader in scope than those generally found:

The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, ³⁵forest, water, land, game and other natural resources.

The Constitution of the Commonwealth of Puerto Rico declares that it "shall be the public policy" to "conserve, develop, and use" the natural resources "in the most effective manner possible for the general welfare of the community."³⁶ In both instances, the provisions are broad enough to cover the subject, but it is doubtful whether they constitute much more than pious obiesances in the direction of the body politic. Certainly there is little in them besides an open declaration that "resources should be developed and conserved for the benefit of the people." Such statements only labor the obvious, if American democracy has any real meaning.

Therefore in considering possible constitutional provisions on lands and resources, Alaska has the opportunity of breaking

³⁴ Art. XVI, sec. 59. Italics supplied.

³⁵ Art. X.

³⁶ Art. VI, sec. 19.

new ground as well as utilizing the accumulated experience of other states on specific resource matters. In the discussion of representative state constitutional provisions on lands and resources which follows, the emphasis is on discovering which of those provisions, conceived as they were in most cases to serve a single and narrow purpose, might be adaptable in part to a land and resources situation of a size and scale never before confronting a single state. In discussing, for example, the details of the constitutional provisions on school lands, the analysis in this Staff Paper is one based on general lands and resources policy for Alaska, not educational policy. The intention is to discover what, if any, use the school land provisions may have in the far more general situation facing Alaska. However sound the policy of Congressional earmarking of school land grants may have been when only the traditional two or four sections were given the states, the limiting of all or any portion of Alaska's 100 million acre grant solely for educational or any other special purposes would place the new State's financial structure in a condition of imbalance and might conceivably adversely affect its financial solvency.

A second caution is also necessary. The economic base of Alaska is not now agricultural, nor does it appear that it ever will be. The vast majority of state constitutional provisions dealing with lands and resources are based on a concept of the primacy of agriculture. Considerable care must be exercised, therefore, in assessing state provisions in the light of a

greatly different Alaskan situation.

State Constitutional Provisions on Waters and Water Resources

Basic Provisions. State constitutional provisions on waters and water resources reflect the needs of the economy of the individual states; the most fundamental provisions appear in the constitutions of states that have large percentages of arid or semi-arid land. The constitutional provisions of California, Colorado, Idaho, Nebraska, New Mexico, Utah, and Wyoming are pertinent. It is not surprising that some of these states have declared that the use of water is a public use,³⁷ or as in the case of Wyoming, that the waters of streams, springs, and lakes, are the "public property of the State."³⁸ The Texas Constitution, Article XVI, recognizes that the conservation and development of water resources are "public rights and duties."

The doctrine of prior appropriation of water for beneficial use³⁹ is constitutionally recognized by Colorado,⁴⁰ Idaho,⁴¹

³⁷ California Const., Art. XIV, sec. 1; Idaho Const., Art. XV, sec. 1; Nebraska Const., Art. XV, secs. 4 and 5.

³⁸ Const., Art. VIII, sec. 1. Colorado declares that all water, not appropriated at the time the constitution was drafted is the "property of the public" and dedicates such waters to the "use of the people of the state." Const., Art. XVI, sec. 5.

³⁹ The doctrine generally holds that an appropriation of water flowing on the public domain consists in the capture, impounding, or diversion of it from its natural course or channel and its actual application to some beneficial use, private or personal to the appropriator, to the entire exclusion, or exclusion to the extent of the water appropriated, of all other persons. To constitute a valid appropriation, there must be an intent to apply the water to some beneficial use existing at the time or contemplated in the future, a diversion from the natural channel by means of a ditch, canal, or some physical act of taking possession of the water, and an actual application of it within a reasonable time to some useful or beneficial purpose. Black's Law Dictionary.

Nebraska,⁴² New Mexico,⁴³ and Wyoming.⁴⁴ The doctrine of riparian rights⁴⁵ in the California Constitution is severely curtailed as that doctrine would normally be understood and applied.⁴⁶

⁴⁰ Const., Art. XVI, sec. 6. The provision of the Colorado fundamental law is fairly typical of the other states as well: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Note the emphasis on agriculture, which is common to most such provisions. The Colorado Constitution, Art. XVI, sec. 7, guarantees access and rights of way, upon payment of just compensation, across private and corporate lands for the construction of ditches, flumes, etc., for beneficial water use.

⁴¹ Const., Art. XV, secs. 3, 4, and 5. Idaho, in sec. 4, guarantees the continuing rights to water and in sec. 5 allows the reasonable limitation of prior appropriations where water supplies are limited.

⁴² Const., Art. XV, sec. 6. Nebraska provides that no superior user can acquire an inferior right without "just compensation" to the inferior user.

⁴³ Const., Art. XVI, sec. 2.

⁴⁴ Const., Art. VIII, sec. 3. The doctrine may be denied in Wyoming when such denial is "demanded by the public interest."

⁴⁵ The doctrine of riparian rights descends from the English common law. Riparian rights are the rights held by the owners of lands on the banks of water courses and relate to the water, its use, ownership of soil under the stream, accretions, and other elements. A riparian owner is said to have a qualified property right in the soil to the thread of the stream and he derives therefrom certain legal privileges. Black's Law Dictionary

⁴⁶ Const., Art. XIV, sec. 3. The law of waters and water-courses in California is extremely technical and much disputed. No extensive understanding of it is required so far as the possible drafting of Alaskan constitutional provisions on waters might be concerned.

Service - Constitutional Studies, Vol. 1

The Utah Constitution, in a short section, recognizes rights existing at the time of the adoption of the document for the beneficial use of water.⁴⁷

Provisions Touching on Hydro-Electric Use of Water. The State of Oregon provides an interesting example, and the only one, of a state's attempt to declare in broad constitutional terms its policy toward the development of hydro-electric resources. In 1932 an amendment, proposed by use of the initiative, was added to the Constitution which declared that "rights, title and interest" in the use of water for water power and water power sites should be held by the state in "perpetuity."⁴⁸ The State was empowered:

1. To control and/or develop the water power within the State;

2. To lease water and water power sites for the development of water power;

3. To control, use, transmit, distribute, sell and/or dispose of electric energy;

4. To develop, separately or in conjunction with the United States, or in conjunction with the political subdivisions of this State, any water power within the State, and to acquire, construct, maintain and/or operate hydro-electric power plants, transmission and distribution lines;

⁴⁷ Art. XVII, sec. 1.

⁴⁸ Art. XI-d. The Nebraska Constitution provides that the "use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as by law prescribed." Art. XV, sec. 7.

The Idaho Constitution qualifies the right to appropriate the waters of the state by allowing the state to "regulate and limit" the doctrine for power purposes.

5. To develop, separately or in conjunction with the United States, with any State or States, or political subdivisions thereof, or with any political subdivision of this State, any water power in any interstate stream and to acquire, construct, maintain and/or operate hydro-electric power plants, transmission and distribution lines;

6. To contract with the United States, with any State or States, or political subdivisions thereof, or with any political subdivision of this State, for the purchase or acquisition of water, water power and/or electric energy for use, transmission, distribution, sale and/or disposal thereof;

7. To fix rates and charges for the use of water in the development of water power and for the sale and/or disposal of water power and/or electric energy;

8. To loan the credit of the State, and to incur indebtedness to an amount not exceeding 6 per cent of the assessed valuation of all the property in the State, for the purpose of providing funds with which to carry out the provisions of this article, notwithstanding any limitations elsewhere contained in this Constitution;

9. To do any and all things necessary or convenient to carry out the provisions of this article.

The provision was never effectively implemented. Its length and detail leaves something to be desired. There are practical limitations imposed in terms of the tremendous cost of hydro-electric projects. There are legal limitations because of federal authority, through the commerce power, to license hydro-electric operations on navigable streams. Yet there may be elements, broader than the use of waters for hydro-electric projects alone, which are applicable and practicable for the Alaskan situation.

Provisions on Tidelands. The problem of tidelands, as noted previously in this Staff Paper, is of considerable

importance to the Alaskan resources picture. The strategic location and extent of this land which is uncovered by the ebb and flow of the tide is of public concern. Two states, both with considerable tidelands problems, have seen fit to incorporate provisions dealing with them into their fundamental law.

The State of Washington has asserted its "ownership" to the beds and shores of all navigable waters in the state up to the line of ordinary high tide, including the tidelands proper.⁴⁹ There is no constitutional barrier to sale or lease by the state. As such, the provision, standing alone, does no more than declare an established fact under the rule of Pollard's Lessee v. Hagan and other cases. But Washington has seen fit to add another provision. A Harbor Line Commission was constitutionally established to locate harbor lines and to relocate them if necessary. The State is forbidden to "give, sell or lease" waters beyond such harbor lines. The area "lying between any harbor line and the line of ordinary high water, and within not less than fifty feet nor more than two thousand feet of such harbor line" may never be "sold or granted," nor the "rights to control the same relinquished." This latter area is "forever reserved" for landings, wharves, streets, etc., which aid navigation and commerce.⁵⁰

⁴⁹ Const., Art. XVII, sec. 1.

⁵⁰ Const., Art. XV, sec. 1.

The California Constitution withholds from "grant or sale to private persons, partnerships, or corporations" all tidelands within two miles of any incorporated city or town and fronting on any "harbor, estuary, bay, or inlet" used for navigational purposes.⁵¹ Tidelands have, by statute, been granted to the various municipal corporations. Access to the water across tidelands for public purposes is constitutionally guaranteed.⁵²

Provisions of Free Navigability of Waters. Where water transportation is of importance, as in Alaska, constitutional provisions on navigability of waters may be appropriate. The South Carolina Constitution, for example, declares that

All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed; and no tax, poll, impost or wharfage shall be imposed, demanded or received from the owners of any merchandise or commodity for the use of the shores or any wharf erected on the shores or in or over the waters of any navigable stream unless the same be authorized by the General Assembly.⁵³

The California Constitution declares that the freedom of navigable waters shall not be destroyed or obstructed and that access to the navigable waters "shall always be attainable for the people."⁵⁴

⁵¹ Art. XV, sec. 3.

⁵² Ibid., sec. 2.

⁵³ Art. I, sec. 28.

⁵⁴ Art. XV, sec. 2. The Tennessee Constitution declares that the navigability of the Mississippi is an "inherent right" of Tennessee citizens. Art. I. The clause has its origins in the historic controversy over navigation on the Father of Waters.

Freedom of navigation clauses, coupled with provisions guaranteeing access to navigable waters for a state's citizens, might run afoul hydro-electric provisions. Care would be required to fit both types of matters into a constitution.

Provisions on Marine Resources. No state constitution contains a broad provision on fisheries and marine resources. The proposed Hawaiian Constitution places on the legislature the responsibility for conservation, development, and utilization of fish and other resources generally. It also specifies, in a separate section, that the fisheries in the sea not included in a "fish pond or artificial enclosure" shall be "free to the public," subject to previously vested rights and the right of the State to regulate the fisheries.⁵⁵ The states of California and Rhode Island are widely separated geographically, but both have had fisheries difficulties. Each included in its Bill of Rights a provision declaring the right of the people to fish in state waters. California included a provision making illegal a sale or transfer of state waters which did not reserve the right to fish.⁵⁶ Reasonable regulations in aid of conservation are, of course, permitted.

The State of Florida, following a bitter political struggle between sports and commercial fishermen, established by constitutional amendment the Florida Game and Fresh Water Fish Commission.⁵⁷

⁵⁵ Art. X, secs. 1 and 3.

⁵⁶ California Constitution, Art. I, sec. 25; Rhode Island Constitution, Art. I, sec. 17.

⁵⁷ Art. IV, sec. 30 (1942).

Constitutional Studies, Vol. 1

This body has no control over the salt water fisheries, that area being left to the legislature. The Commission, from the standpoint of its legal power, is the only one of its kind in the nation. Its rules and regulations on substantive matters may override legislative enactment and legislative enactments in the area of Commission jurisdiction must conform to Commission rules! The agency has been, as can be imagined, very much a political football.

The Missouri Constitution contains provisions for a Conservation Commission. Its duties include the conservation and development of fisheries resources in the waters of the state.

Only the California and Rhode Island provisions appear to have even partial applicability for the Alaskan fisheries and marine resources situation.

State Constitutional Provisions on Mines and Minerals

Most of the constitutional provisions dealing with mines and minerals have been in the area of mine safety rather than in any substantive area of policy. The Arizona, Colorado, New Mexico, Oklahoma, and Wyoming Constitutions, for example, create an office variously known as Inspector or Commissioner of Mines.⁵⁸ The office is an elective one in Arizona and Oklahoma and appointive in the other states. The legislature is charged with

⁵⁸ Arizona Const., Art. XIX; Colorado Const., Art. XVI, sec. 1; New Mexico Const., Art. XVII, sec. 1; Oklahoma Const., Art. VI, sec. 25; Wyoming Const., Art. IX, sec. 1.

Constitutional Studies, Vol. 1

enacting laws to promote mine safety and protect the health of the miners.⁵⁹ In what are now outdated provisions, Colorado prohibits children under 12 and New Mexico children under 14 from working in the mines.⁶⁰ Today none of these provisions would be necessary for the legislature to have power to pass laws relating to mine safety, etc. In the late 19th and early 20th Centuries, however, court decisions invalidating laws of the type covered brought about the inclusion of such materials in the state constitutions.

Of greater interest and importance to the Alaskan situation are those few cases where states have included constitutional provisions which bear on substantive aspects of mineral policy. There are not many such instances and the few examples available sometimes deal with rather restricted segments of mineral policy. Nevertheless they do afford some insights which may be of worth to the Alaskan mineral scene.

Originally the State of Texas reserved all the mineral rights to the state. Large grants of lands for grazing and agricultural purposes complicated the picture, however. Antagonisms between surface owners and state mineral lessees arose; in some cases there were failures to bid for the minerals because of the known antipathy and opposition of surface owners. By statute, the

⁵⁹ Arizona Const., Art. XIX; Colorado Const., Art. XVI, secs. 2 and 3; New Mexico Const., Art. XVII, sec. 2; Wyoming Const., Art. IX, sec. 2.

⁶⁰ Colorado Const., Art. XVI, sec. 2; New Mexico Const., Art. XVII, sec. 2.

surface owners were released a half interest in all minerals under the surface, an act which was held partially invalid by the Texas Supreme Court. The surface owners were then commissioned to act as agents for the state and some of the cause of antagonism was removed. As a result of constitutional amendment, the surface owners now own the mineral rights.⁶¹

It would be well to bear in mind, in considering the Alaskan situation, that the Texas picture was complicated by the presence of large scale agricultural holdings, a situation not likely to develop in an area where major cattle and sheep operations are not possible. It was not so much the original basic policy that was faulty but the fact that mineral policy and agricultural policy collided, with mineral policy giving way to the then dominant agricultural demands.

The State of Nebraska declared constitutionally that the salt springs, coal, oil, minerals or other natural resources on or contained in the land belonging to the state shall never be alienated; but provisions may be made by law for the leasing or development of the same.⁶²

This clause has been enforced in Nebraska. The courts there have held, however, that the purpose of the limitation is not to prevent alienation where the mineral yield is of no commercial value.

⁶¹ Art. XIV, sec. 7. The minerals are constitutionally taxable as property. By statute, the state sells the surface of a public land block. It sells at the same time 15/16s of the minerals and keeps 1/2 of the usual 1/8 royalty. There are those, like U. S. Senator Price Daniel of Texas, who believe that the state should keep at least a straight 1/2 of the minerals on all present sales of Texas public lands.

⁶² Art. III, sec. 20. An Amendment concerning the taxation of reservations of mineral rights was defeated by Nebraska voters in 1948 by a margin of roughly 40,000 votes.

Conveyances under such circumstances must include a reservation that the minerals do belong to the state if they after conveyance become commercially valuable.⁶³

Since 1921, the Louisiana Constitution has contained the following provisions:

. . . Nor shall the Legislature alienate, or authorize the alienation of, the fee of the bed of any navigable stream, lake or other body of water, except for purposes of reclamation. In all cases the mineral rights on any and all property sold by the State shall be reserved, except where the owner or other person having the right to redeem may buy or redeem property sold or adjudicated to the State for taxes. This, however, shall not prevent the leasing of such lands and rights for mineral or other purposes.⁶⁴

This mineral reservation was held by the Attorney General of Louisiana to be applicable to 16th section school lands of the State.⁶⁵

North Dakota provided constitutionally in 1889 that the coal lands of the state should never be sold. The legislature was empowered in general terms to lease such lands.⁶⁶

Specified sections of land were granted to the states upon their entrance to the union, with the limitation that the proceeds should be used for education and with the further limitation that mineral lands could not be taken by the state. Instead, if the specified sections were mineral in character, the state was forced to take other lands "in lieu" of the mineral sections.

⁶³ State v. McMullen, 119 Neb. 739, 230 N. W. 677 (1930).

⁶⁴ Art. IV, sec. 2.

⁶⁵ Op. Att. Gen., 1940-42, p. 3226.

⁶⁶ Art. IX, sec. 155. This article does not appear in the original enrolled copy of the North Dakota Constitution. It is, however, carried as a bonafide article and has been so treated.

Sims - Constitutional Studies, Vol. I

In 1927, Congress changed this rule so that those states who had not yet, for one reason or another, taken their school sections could take them even if they were mineral in character. The Congressional statute specified, however, that the states could never alienate their title to these minerals. They could lease them, but sell the mineral lands in fee they could not.⁶⁷ No restrictions were placed on the states as to type of lease.

The New Mexico Constitution was amended in 1928 to take account of this policy. The amendment called for the legislature to set up regulations on appraisement, advertisement, and competitive bidding and applied the rentals and royalties to the school land fund.⁶⁸ Though the other states which had not yet taken all of the lands coming to them did not amend their constitutions, the Congressional restriction was, of course, binding on them.

These substantive provisions on mineral resources from the Texas, Nebraska, Louisiana, North Dakota, and New Mexico Constitutions are not in themselves definitive guideposts of possible Alaskan constitutional policy. The basic concept may, however, have applicability; the point will be discussed later in this Staff Paper. Certainly the idea of reserving mineral rights is not particularly startling today for private persons not infrequently sell the surface and reserve the minerals.

⁶⁷ 44 U. S. Stat. 1026, as amended.

⁶⁸ Art. XXIV.

State Constitutional Provisions on Land Limitation

The problem of land held for speculative purposes in an unimproved condition has always been a thorny one. California is the only state which has attempted a constitutional statement of policy on the point. Section 2 of Article XVII states:

The holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property.

The statement, of course, did not discourage the very activity against which it was directed. The section had no teeth and the legislature steered carefully away from attempts at implementation.⁶⁹

Limitations on the amount of acreage of state lands to be sold to any one person have met with somewhat greater, though still qualified, success. Most such limitations have been imposed by legislative enactment but a few states have incorporated limitation provisions into their constitutions. California, for example, provided that state lands suitable for cultivation should be granted only to "actual settlers," with a 320 acre maximum for each settler.⁷⁰ Idaho provided that not more than 320 acres of its school lands should be sold to any "one individual, company or corporation."⁷¹ The Texas Constitution declares that no land

⁶⁹ The Oklahoma Constitution contains a novel provision which forbids the creation or licensing of corporations for dealing in real estate other than real estate located in incorporated cities or towns. Art. XXII, sec. 2. The purpose of the provision is to prevent the operation of land companies.

⁷⁰ Const., Art. XVII, sec. 3.

⁷¹ Const., Art. IX, sec. 8.

Constitutional Studies, Vol. 1

certificate was to be sold except to "actual settlers" and then in lots not to exceed 160 acres.⁷² The State of Washington placed no limitation of amount of individual holding, but attempted to meet the problem with a provision that no land parcel offered for sale might exceed 160 acres.⁷³

Such acreage limitations might have value in terms of the possible agricultural uses of land in Alaska. It would appear doubtful that acreage limitations, for other than agricultural purposes, would prove any more effective in Alaska than they have in the States. Certainly Alaskan experience with federal acreage limitations on mineral leases is anything but favorable.

State Constitutional Provisions on School Lands

The vast bulk of lands passing directly from the federal domain to the states came from grants of designated sections for educational purposes--sections 16 and 36 for the states admitted earlier and sections 2, 16, 32, and 36 in the case of Utah, New Mexico, and Arizona. In addition to these grants which were made for educational purposes, grants of acreage in specified amounts have been under the Morrill Act for the establishment of land

⁷² Art. XIV, sec. 4. The Texas Constitution made provision for direct homestead grants to settlers. Art. XIV, sec. 6.

⁷³ Const., Art. XVI, sec. 4. Special provision was made for lands in and around incorporated cities where value was higher. Land worth more than \$100 per acre, after appraisal, was to be platted in blocks of not more than five acres to the block, with the single offering feature applying to the block.

grant colleges.⁷⁴

Practically all of the states west of the Mississippi River have provisions in their constitutions specifying in greater or lesser detail the policy dealing with the administration of school lands.⁷⁵ Customarily, the states having constitutional school land provisions create therein a school fund which is declared a trust and which is to be used solely for education. These provisions were made a part of the state constitutions partly because Congressional enabling acts required such earmarking and partly in an effort, not successful in all cases, to forestall fraud and exploitation in the disposition of the lands. Sale of non-mineral school land as a method is allowed in all cases. The North Dakota Constitution states specifically that the coal lands of the state may not be sold but only leased, and Nebraska and Louisiana reserve minerals in all state lands. A 1928 amendment to the New Mexico Constitution provides for the reservation of mineral rights in school lands.⁷⁶ In addition to sale, a number of states allow lease for specified purposes.⁷⁷

⁷⁴ The Act became law 2 July 1862. As originally enacted each loyal state was granted 30,000 acres for each Senator and Representative then in Congress. After the Civil War was over, the Act's operations were extended to include the formerly rebellious states. Later the Territories of Hawaii and Alaska were included. The Universities of Hawaii and Alaska are land grant colleges. Under the provisions of the Morrill Act, 69 land grant colleges have been established.

⁷⁵ These are the states which are of most interest to the Alaskan situation. Michigan, Wisconsin, and North Carolina have provisions which have pertinence, but they are similar to provisions found in one or more of the Western states.

⁷⁶ See the discussion on these points at pp. 44-47 of this Staff Paper.

⁷⁷ (See next page.)

Idaho restricted the amount that could be sold to one "individual, company or corporation" to 320 acres.⁸⁷ Appraisals to establish prices below which land could not be sold were constitutionally required in North Dakota,⁸⁸ South Dakota,⁸⁹ Washington,⁹⁰ and Wyoming,⁹¹ among others.

This short summary of major points of emphasis in the constitutional school lands provisions of the Western states does not afford an appreciation of the length and detail of many of those provisions. Many of the articles cover two to three pages of fine print. They are filled with administrative detail and create numbers of administrative agencies like Boards of Land Commissioners, appraisers, etc. The writer would emphasize, too, that these school land provisions are discussed for any pertinence they may have for general land and resources policy in Alaska, not for their relationship to educational policy.

State Constitutional Provisions on Agriculture

All of the states have created, by statute or constitutional provision, a state agency charged with encouragement or agricultural pursuits. Some have elective heads; some provide for

86

(Continued)

Kansas provided that sale of school lands could not be made until there had been a voter referendum on the subject, but lease was allowed. Const., Art. VI, sec. 5.

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Const., Art. IX, sec. 8.

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Const., Art. IX, sec. 157.

89

Const., Art. VIII, sec. 4.

90

Const., Art. XVI, sec. 2.

91

Const., Art. XVIII, sec. 1.

Review - Constitutional Studies, Vol. 1

appointive heads. The variety of administrative arrangements is great and varies with the importance of agriculture in the economy of any given state.

Constitution-wise, where such arrangements have appeared in the fundamental law of the states, they have usually been accompanied with general statements which empower the legislature to foster, or aid, or encourage agriculture. In many respects the constitutional provisions on land just discussed have far more real meaning for agriculture than do the sweeping generalities and sometimes pious recognition that agriculture should be "aided."

Miscellaneous State Constitutional Provisions on Resources

Provisions on forests which are found in state constitutions for the most part are of a character which empowers the state legislature to conserve the forest resources. The provision of the Utah Constitution is typical:

The Legislature shall enact laws to prevent the destruction of and to preserve the Forests on the lands of the State, and upon any part of the public domain, the control of which may be conferred by Congress upon the State.⁹²

New York provides that its forest preserve is to be "kept as wild forest lands" and that the preserve shall never be "leased, sold or exchanged . . . nor shall the timber thereon be sold, removed or destroyed."⁹³ Needless to say the New York declaration has no pertinence for Alaska!

⁹² Art. XVIII, sec. 1.

⁹³ Const., Art. XIV, sec. 1. In later sections of this article the legislature is charged with appropriating money to accomplish reforestation.

Some of the constitutional provisions on school lands have empowered the state legislature to establish policy on the lease or sale of timber land or the timber itself. The proceeds from such sale or lease accrue, of course, to the permanent school fund in these cases.

A few constitutions include game as a part of general statements on conservation. The game of the state is included, for example, in the area of control of the Conservation Commission established by the Missouri Constitution.⁹⁴ No state constitution has a specific article dealing with game and wildlife resources alone.

Summary

Except for provisions relating to the disposal of school lands acquired at the time of admission, many states do not have any basic constitutional provisions relating to lands and resources. In the case of resources other than school lands, provisions on water (found for the most part in semi-arid or arid western states) are most commonly mentioned. A few states make provision relative to mines but only Nebraska and Louisiana establish policy on minerals under all state-owned lands; the mining provisions deal primarily with safety measures. A few states have attempted to recoup earlier losses sustained through fraud or bad management and have added provisions relative to conservation, parks, fish and game, etc.

⁹⁴ Art. IV, sec. 40a.

Some of the constitutional articles on school lands make elaborate provision for appraisal and disposal of the lands. Most of the clauses allow sale of the land, though under federal limitation states acquiring sections of mineral land after 1927 are required to retain title to the mineral wealth.

Administrative officials of one kind or another, elective or appointive, are constitutionally established in many cases to handle mining, agriculture, conservation generally, manufacturing and industrial development, etc. Such attempts to write administrative detail into constitutions has been the result of efforts, in many cases, to take state resource administration "out of politics," a policy which has usually resulted in more, not less, politics as that term is commonly understood. The end product in most instances has been the complication of administration. Establishment of such agencies by constitutional provision has made more difficult the synchronization of resources programs with the other programs of state government.

Resources Policy and the Alaska Constitution

Considerably less than one per cent of the land of the Territory of Alaska is presently in private hands. Upon statehood Alaska will undoubtedly fall heir to something over 100 million acres of land. This is the land upon which a sound foundation for the operation of a state government for the benefit of the people must be erected. With the land comes an

Service - Constitutional Studies, Vol. 1

opportunity to draft a resources policy on a scale and with a purpose that no other state entering the Union has ever had.

The Psychology of the Alaska Citizen and Resources Exploitation and Fraud

The citizen of Alaska is only too well aware of the stifling effect of federal red tape upon the development of Alaskan land and resources. His own industry and initiative have frequently been curtailed by agencies over which he exercised no control and whose decisions he was powerless to appeal. He has seen, on more than one occasion, the policy of federal agencies serving as protection for interests which did not want to see Alaskan resources developed because of competition with those same outside interests or for other reasons.

Statehood gives the citizen of Alaska a considerable measure of control over his destiny. Statehood places him in the position of having to exercise to the fullest the political, social, and economic maturity which he claimed as his attribute in his struggle for statehood. At no point is the need for thoughtful judgment more necessary than in establishing the basic policy for the management and disposal of the tremendous resources which have been given him as his patrimony.

In the first flush of statehood, the average Alaskan will react, and very justifiably so, against the unnecessary restrictions which have bound him for so many years. He will not take kindly to the substitution of state red tape for federal red tape,

Vol. 1
Constitutional Studies, Service -

nor should he. But the Alaskan will, as he thinks over his situation, be aware that any state control over resources which his judgment tells him is necessary is his control, ordained by him through the political process and subject to control and change through the same media.

Psychologically, the emphasis in the first days of statehood, so far as land and resources policy is concerned, will be in the direction of disposing of the patrimony as rapidly as possible, to get it into private hands so that immediate, and long-delayed, development may commence at once. Yet precipitate action could easily result in a situation which the people would have cause to regret in a few years.

This will be the critical point in Alaskan development, not alone for resources policy but for the entire future of the State of Alaska. The stakes are huge, and they will attract persons and corporations interested in them. Some of the ventures will be legitimate, some speculative, and some insidious. If the drive is for slam-bang disposal, without discrimination in the choice of terms of sale or lease, the interests of all the people of Alaska will suffer. If disposition of the land and its resources is made at ridiculously low prices, the parable of Jacob, Esau, and the bowl of pottage will be repeated; Alaska's patrimony will have been dissipated for the small-benefit of exploitation, or the non-benefit of fraud.

Lord Acton in a rather indelicate but expressive and oft-quoted statement pointed out that "Where the body is, there will the vultures be gathered." The expression is aptly applied, in part, to the Alaskan resources picture. Fortunately, an alert and enlightened citizenry can serve as a counterbalance; fortunately, too, not all developmental interests operate solely on the exploitative level but sincerely seek to benefit permanently the society of which they are a part as well as to take the profits which are a basic and recognized part of the American system.

No constitutional provisions can be devised which will present a perfect and complete barrier to the determined commission of lands and resources fraud or to "giving away" of the resources of the people to interests for the purpose of exploitation rather than orderly development. But provisions can be devised which will make it easier for the public officials of the state to carry their burdens. If there are constitutional provisions to which they can point when some lobby urges them to take action which they know full well is not to the ultimate benefit of the people, the strain of maintaining moral as well as strictly legal honesty is less.

The fact that other states have not seen fit to incorporate an overall resources policy in their constitutions is not in itself a reason for the Alaskan Constitutional Convention failing to do so. The potentialities and amounts of land to be conferred

Service - Constitutional Studies, Vol. 1

on the State of Alaska are without parallel; the situation differs considerably from that of any other state previously admitted. A few of the somewhat specialized provisions of other state constitutions may provide ideas, but when all is said and done, the Convention at College will have the opportunity of breaking new ground in the field of lands and resources management. No other state has had this opportunity.

Suggested Lands and Resources Article

From the previous descriptive material on Alaskan resources⁹⁵ the possible major subjects for constitutional consideration would appear to be (1) the forests on the land surface; (2) the minerals in the subsurface; (3) the water resources; and (4) the submerged lands and tidelands. In addition, and as a preface to the consideration of the major subjects listed, the Delegates might wish to include as a part of a constitutional article on lands and resources a general statement of state purpose, inclusive of the major resources and resources not specifically a subject of constitutional reference.

In the materials which follow, suggestions have been made as to a possible draft of particular sections of a Land and Resources Article. These suggestions and the accompanying discussions are presented to emphasize the importance of the issue, to focus the discussion, and to provide a point of departure for the Delegates. There is no suitable precedent to which the

Delegates can turn, no language of other constitutions which can provide a broad-gauge point of reference. The suggested sections relate in each instance to the unique Alaskan situation. There would appear to be little doubt that some constitutional policy, other than that of bland generality, is needed.

The range of possibilities for a land and resources article is, of course, great. They range from the extreme of not mentioning lands and resources at all in the constitution to a comprehensive article of the size and detail of a resources code. Both extremes would, it appears, be equally bad as applied to the Alaskan resources scene. A land and resources article should not bind the hands of legislators and administrators in the problem of developing Alaska's resources. On the other hand, constitutional policy should be devised to reduce, insofar as possible, the possibility of large scale fraud and obvious exploitation which would be so detrimental to the interest of the people of Alaska.

The General Section

The introductory section of the suggested Article on Lands and Resources reads as follows:

Section 1. (General) The State of Alaska shall have the power to provide for the orderly development, maximum utilization, and conservation of all of the natural resources of the lands and waters of the State, to the end that such resources shall be developed, utilized, and conserved for the benefit of the whole people of the State.⁹⁶

⁹⁶ In the pages which follow each section of the Lands and Resources Article is quoted and discussed. The entire suggested Article on Lands and Resources is Appendix I to this Staff Paper.

Vol. 1
Constitutional Studies,
Service -

Generalizations may serve a very real purpose, and particularly so when coupled with constitutional specifics in the framework of fundamental law. The general article, as here stated, is relatively non-controversial. The power of the state to provide for development, utilization, and conservation extends to all of the State's land and water natural resources. The natural resources included in the general terminology of this article, as comprehended by the courts in various decisions dealing with the term "natural resources," encompass the lands (including agricultural development), minerals, forests, waters, game, fish, and, in conjunction with the police power, scenic resources.

Lands and Mineral Rights

Section 2 of the suggested Article is somewhat more lengthy:

Section 2. (Lands and Mineral Rights) The public lands of the State which are now or hereafter may be acquired may be sold, granted, deeded, patented, or leased under such general laws as may be established by the Legislature. Each sale, grant, deed, or patent shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the minerals. Mineral deposits shall be subject to lease by the State under such general laws as the Legislature may enact. Provided: that the Legislature may by general law alienate the State's right, title, and interest to minerals in the case of homesteads or areas of lesser acreage; and provided further, that no person, company, or corporation shall hold such alienated mineral rights in an amount greater than the acreage of one homestead.

No person, company, or corporation shall deny a mineral lessee of the State access to such minerals; but such access shall be taken only upon payment of just compensation to the surface owner, grantor, or lessee.

The basic concept here is the separation of the mineral rights from the rights in land, with the important exception that the Legislature may by general law⁹⁷ alienate the mineral rights in the case of homesteads and areas of lesser acreage. While the federal rule on homestead acreage is based fundamentally on a 160 acre standard, state law might set acreage at a higher, or lower, point; the state homestead law would thus rule in the determination of the amount of acreage. The exemption is, of course, designed to benefit the small land holder and the owners of industrial and business properties. If the suggested section is finally utilized, a basic acreage limitation in terms of specific figures might be deemed more desirable than the somewhat more flexible "homestead" yardstick.

The reservation to the State of mineral rights is not nearly so revolutionary a concept as it might at first appear. In Spanish law the minerals remained the property of the king and not the surface owner. The device of separation has often been used in the past score or more of years by private owners who have sold their land but retained the mineral rights. Few persons, selling a farm in the Williston Basin of North Dakota today, would part with their mineral rights.

⁹⁷ The "general law" phraseology is deliberately used in the suggested Article on Lands and Resources. A general law may be distinguished from one that is local or special. As legally defined a general law is restricted to no locality, and operates equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves. Black's Law Dictionary.

The principle is well known in Canada and has been utilized for many years. The British North American Act of 1867 placed in the hands of the legislature of each Province the power to manage and sell the public lands of the province.⁹⁸ Titles to dominion lands in the Northwest Territories and Yukon Territory reserve to the Crown the minerals that may be found in or under such lands, together with the right of operation. Some of the Provinces, like Ontario, allow the surface owner to hold the minerals, unless the minerals are expressly withheld. In New Brunswick, since 1805, all mines and minerals are regarded as property separate from the soil. In Manitoba, Saskatchewan, and Alberta, in the case of lands granted for agriculture or any purpose other than mining, the mining rights are reserved to the crown.⁹⁹

There is, moreover, good precedent in the laws of the United States for this reservation of mineral rights. Mention has previously been made of the Congressional Act of 1927¹⁰⁰ which allowed the states which had not already completed their selection of allotted sections of school lands to take their numbered sections even though those sections were mineral in character and even though under their enabling acts the taking of such sections was prohibited to them. The 1927 Act provided

⁹⁸ Art. 92, sec. 5.

⁹⁹ Summary from Canada, Department of Mines and Technical Surveys, The Mining Laws of Canada (4th ed., 1950, by Arthur Buisson), 1-4.

¹⁰⁰ 44 U. S. Stat. 1026, as amended.

that the states could, in effect, sell such lands but that the state had to retain the title to the minerals on pain of forfeiture and reversion to the United States. The state could lease such minerals. The Attorney General of the United States was charged to institute proceedings if the state disposed of the mineral rights. Considerable grants of lands to states for educational purposes were made under the 1927 Act. One state, New Mexico, incorporated leasing provisions into its Constitution to handle the new contingency;¹⁰¹ the other states affected did not, but the 1927 Act was binding where they took title to mineral lands. The North Dakota Constitution, as previously noted, retained title to coal lands in the document as originally drafted. The Nebraska and Louisiana Constitutions reserved to the state the minerals in all state lands.¹⁰²

The political aspects of the suggested section cannot be completely separated from the legal. At various Congressional hearings on Alaskan Statehood enabling acts, various members of Congress expressed the sentiment that there should be some statement of policy in a statehood bill, whether the statement was placed on a mandatory basis or not, which would require that the land should be managed in such a way as to bring about the "widest possible use" and "diverse ownership in order to prevent

101 Art. XXIV.

102 See pp. 43-45 this Staff Paper.

Vol. I
Constitutional Studies,
Service

"monopolization."¹⁰³ One member of Congress suggested that the new State should be given 100% of its public lands but wished to see the bill written with a restriction which would give the United States a general oversight to supervise so that there would be no exploitation of natural resources.¹⁰⁴ Between these two extremes there were many shadings of opinion.

These sentiments, expressed in 1954, crystallized in 1955 in the first session of the 84th Congress. S. 49, as introduced in the Senate by Senator Murray for himself and 25 other Senators, contained the following pertinent language:

All grants made or confirmed under this Act shall include mineral deposits. The grants of mineral lands to the State of Alaska under subsections (b) and (c) of this section [granting 100 million acres of vacant, unreserved, and unappropriated public lands and making certain special grants] are made upon the express condition that all sales, grants, deeds, or patents for any of the mineral lands so granted shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. Mineral deposits in such lands shall be subject to lease by the State as the State legislature may direct: Provided, that any lands or minerals hereafter disposed of contrary to the provisions of this section shall be forfeit to the United States by

¹⁰³ See, e.g., statement of Senator Jackson of Washington, Hearings on S. 50, pp. 13 ff. The Hearings were held in January and February of 1954. In this same Colloquy, Delegate Bartlett expressed an opinion that while some errors might be made in the transfer of state land to private ownership, it would be advantageous in the long run to get the lands into private hands as soon as possible.

Senator Smathers of Florida, foe of statehood for Alaska and advocate of Commonwealth, indicated his general agreement with Delegate Bartlett but felt that if a statehood bill were passed there should be some limitation which would aid the state in seeing that the land did not pass into the hands of "five or six" big companies or corporations.

¹⁰⁴ Ibid., pp. 32 ff.

appropriate proceedings instituted by the Attorney General for that purpose in the United States District Court for Alaska. For the purpose of this subsection the mineral character of lands granted to the State of Alaska shall be determined at the time patent issues and the patent shall be conclusive evidence thereof.¹⁰⁵

Congressman Engle introduced H. R. 2535 in the House of Representatives and the language just quoted was identical.¹⁰⁶ This language was disseminated in the Territory and Delegate Bartlett called special attention to it in his Newsletter.

As the House Bill came out of the Committee on Interior and Insular Affairs, however, the last sentence, above quoted, was stricken.¹⁰⁷ Thus the Committee version left unsatisfied the question of just what might constitute "mineral lands." The issue, viewed in the light of federal handling of school lands, has considerable significance for Alaska and the Lands and Resources Article herein suggested. Under the terms of various state enabling acts, states had not been permitted to take school sections where such lands were "mineral lands." Interpretations of the phrase reached the point where, in practice, the mere suspicion that a particular section might be mineral in character was all that was needed to require the state to take "in lieu"--and non-mineral--lands. The 1927 Act was, in part, an effort to ease this rigid interpretation, for in effect the states were finding it difficult to locate "in lieu"

¹⁰⁵ Section 205 (k).

¹⁰⁶ Section 205 (k).

¹⁰⁷ Section 205 (j).

lands that were non-mineral. Interestingly enough, the language of S. 49 and H. R. 2535 is taken almost directly from the 1927 School Lands Act, as amended. And the language of the 1927 Act and of the 1955 legislation definitely provided for the non-alienation of minerals.

If the interpretations of the phrase "mineral lands" made prior to 1927 were to obtain, it would be difficult for the State of Alaska to exercise its options in picking up 100 million acres of land. A sizable portion of the land that would be available for choice in Alaska is "mineral" in the pre-1927 sense. Under the terms of H. R. 2535 and S. 49, therefore, the lands could be sold, but the minerals would have to be reserved to the state and the mineral rights could only be leased. Such is the political side of the Alaskan lands and resources matter.

In effect the suggested Lands and Resources Article merely incorporates the Congressional language into the Alaskan Constitution and makes it applicable to all the lands which Alaska would receive. Since so much of the land is potentially mineral and would probably be granted to the state with a reservation limitation on mineral rights anyhow, the constitutional extension to all lands is not so significant as it might otherwise be. The ordinary rights of ownership, like the right to drill a well for water or to use the soil for fill purposes are not, of course, affected.

An attempt is made in the section to modify somewhat the stringent effects of the Congressional wording and it would be

hoped that Congress would accept the modification. The legislature could make exceptions for homesteads and areas of lesser acreage. Under the suggested article, the mineral rights of these holdings could be alienated. The reasonableness of this exception is apparent as is also the limitation on the total acreage of alienated mineral rights which might be held in fee. The small home owner, the industrial establishment, and the small businessman are thus protected, not only in the value of their mineral rights, such as they might be, but also, and probably more important, in their ability to refuse completely to allow their property to be used, damaged, or destroyed by mineral lessees of the state.

The access provisions of the second paragraph of section 2 of the suggested Article are primarily designed to prevent speculators from buying up large areas of land with relatively no surface value with a view toward "holding up" possible mineral lessees of the state. At the same time, the guarantee of just compensation to persons holding surface rights is secured.

The net effect of the suggested section is to bring the Alaska Lands and Resources Article fairly well into line with the major statehood bills of the 84th Congress. The suggested provision proposed an expansion of the reservation of mineral rights concept to all public lands rather than "mineral lands." The suggested provision offers a limitation on the reservation concept in that exceptions may be made to allow alienation of

Service - Constitutional Studies, Vol. 1

mineral rights for homesteads and lesser acreage. Politically the language of the suggested section therefore has much to recommend it. While the assumption cannot be categorically made that a future Congress would incorporate such language in an act of admission, there is sound reason for belief that the Congress would limit the grants. The whole history of the grants of school lands, including the 1927 Act with its forfeiture provision, coupled with the expressions of many Congressmen, would so suggest.

But there is a broader question of state policy as well to be considered. An article on any given subject in the Alaskan Constitution should not be drafted with the sole aim of possible effect in Washington, D. C. An Article on Lands and Resources must take account of the Alaska situation.

The minerals are the chief potential wealth of the new State. Alaskans will not want a repetition of Kennecott. They will want the mineral development of the new State to be such that some permanent return accrues to the State. The lease technique, with its rentals and royalties basis and its performance and development clauses, offers at least one solution of a partial nature.

The legislature can, of course, effectively nullify the suggested section by passing general laws which allow mineral leasing at ridiculously low rentals and royalties and omitting

performance clauses which would compel the lessee to develop his lease or return it to the state. The legislature could allow leases to run for long periods of years--so long that the "lease" would in effect be a practical grant of title.

Yet with the lease there is always the possibility, even with a poorly drawn instrument that may not be to the benefit of the people, that some day the mineral rights may return to the state for another and more successful try. Granting fee simple title to the land in the first instance destroys that ultimate eventuality.

Moreover a lease, whether from the national, state, or local government or from an individual or company, is an accepted instrument of mineral policy in the United States and Alaska today. No longer do major oil producers "own" the land which they explore and drill nor would they desire to do so. Major petroleum companies operate on a leasing basis. Naturally, these companies hope to secure as favorable lease terms as possible but without exception there are always preliminary rentals and perhaps bonuses to pay and, if production should occur, royalties. With the recent easing of Alaskan exploration and production acreages, plus the lower royalty in the first proved field (5% instead of 12½%), the oil industry has been able to throw tremendous resources into the Alaskan picture. Oil exploration in Alaska today is conducted on a lease basis. The Alaskan coal industry too operates on a lease basis, though the

acreage limitation on federal leases for coal production has imposed severe handicaps.

Alaskan gold came on the scene in large scale production at a much earlier period of development than coal and oil. The legal relationships of the gold companies and miners to the land which they then mined and operated and which some operate today is based on the patent system with its origins in concepts of fee ownership. The suggested section in no way disturbs the mineral rights in any previous grants, deeds, sales, or patents issued by the United States. Nor could the language disturb future patents issued by the United States on federal public domain lands.

In many respects the major objection which might be offered to the suggested section lies in the fact there would be created a duality of land systems. This is a real question which deserves serious consideration. The impact of such a duality is softened somewhat by the realization that only a minor fraction of the land in Alaska is presently so patented. Further, if the history of the western states is any indication, there is little reason to believe that the federal government would ever release a substantial enough portion of its remaining federal domain into private hands so that the lands and resources policy of the State of Alaska would be severely or even moderately affected.

The suggested section will not stop completely fraudulent dealings, nor will it prevent the passage of legislation which

will allow exploitation or non-development rather than development and utilization of Alaska's minerals potential. No constitutional provisions can be devised which can guarantee perfection.

It may be, however, that in the suggestion of reserving minerals to the State there is the germ of an idea which can be utilized to make easier the task of future legislators and administrators of the State of Alaska as they seek to develop the resources for the benefit of all the people.

Waters and Water Resources

The section of the suggested Article on Lands and Resources dealing with waters and water resources reads:

Section 3. (Waters and Water Resources) The use of waters of the State is hereby declared to be a public use, and subject to the regulation and control of the State in a manner to be prescribed by law.

The State may sell, grant, deed, patent, or lease the submerged and tidal soils under such general law as the Legislature may enact. The provisions on the non-alien ability of minerals of Section 2 of this Article shall apply to submerged and tidal soils.

No citizen of the State or of the United States shall be denied the free ingress and egress of the navigable waters of the State, except that the State may by general law regulate and limit this use for power development or other beneficial and public purposes.

The Legislature shall pass no law creating a several fishery in the navigable waters of the State.

The Territory of Alaska does not have any established water policy, except insofar as the doctrine of prior appropriation may be applicable to certain mining developments and small power producing setups. The intent of the first paragraph of this section is to secure to the State the power to determine general

Service - Constitutional Studies, Vol. 1

water policy, not only as it may be applicable to the inland navigable waters but in the case of the marginal sea as well, subject always to the overriding rights of the United States in commerce and navigation.

The second paragraph of the suggested section simply carries out to the tide and submerged soils the general principle of reserving mineral rights to the State. The legislature has full power insofar as the disposition of surface rights for the building of industrial establishments, docks, wharves, jetties, and the filling in of land is concerned; the legislature may sell the lands in these cases, should it desire to do so.

But mineral production is also of importance in considering the tide and submerged lands issue. There appears to be excellent geophysical evidence that major petroleum recovery can be made from tidelands and from lands under inland navigable waters. There is thus a considerable measure of protection afforded the State under the mineral reservation arrangement.

Some consideration was given to the California and Washington constitutional provisions on tidelands. The constitutional establishment of a harbor lines commission, as in Washington, certainly does not appear to be warranted. The prohibition against sale of tidelands within two miles of an incorporated town or city, as in California, might react unfavorably to the growth of Alaskan cities and industry because of the tremendous strategic importance of the tidelands in such growth.

The third paragraph of the suggested section states as constitutional principle the general common law rule that the navigable waters of the state are free for purposes of travel and no artificial restriction may be placed in these waters which obstructs that free ingress and egress. The paragraph recognizes, however, that a dam erected for the purpose of hydro-electric development obviously does obstruct navigation. Additionally, there may be other beneficial and public reasons why the navigability of waters might require limitation. The legislature is enabled under this provision to establish these limitations by general law.

The fourth paragraph places in the Constitution a common law concept which can be traced back to 13th Century England. The Magna Carta (1215) wrested by the barons of England from King John contained a provision which took from the King his power to grant a "several fishery." A grant of a several fishery, in law, gives an exclusive right of fishing derived, originally in common law, from the ownership of the submerged soil; today there is a diversity of opinion on whether the ownership of the soil under the water is essential to the concept.¹⁰⁸ But whether ownership of the soil is essential or not, the paragraph as here simply stated would guarantee that the waters of the State would be free to the citizens for purpose of fishery.

¹⁰⁸ See 36 Corpus Juris Secundum, "Fish," sec. 1.

Public Service - Constitutional Studies, Vol. 1

Forests

The forests are the major resource of the surface of Alaska soil. This will be true after statehood, even though much of the better timber will remain reserved in national forests. The suggested Article on Lands and Resources includes this section:

Section 4. (Forest Lands) Sales, grants, deeds or leases of forest lands of the State, where such lands are to be developed and utilized primarily for their forest resources, shall contain provisions binding the purchaser, grantee, or lessee to adhere to the principles of sustained yield management of the forest areas so sold, granted, deeded, or leased.

Sustained yield management has become well established, both as a principle of sound forest practice and as a legal concept. Legitimate timber operations are today conducted on this basis, even when the compulsion of law may be absent. The phrase is broad enough to cover stripping operations where the timber has become so badly rotted and fallen that there is no other way than stripping to recover the available timber and to start a sound sustained yield program through replanting.

The phrase "where such lands are to be developed and utilized primarily for their forest resources" is inserted in order to protect the small land owner who may have only a few acres of timber and who cannot and could not be expected to meet the principles of sustained yield management on such a limited area.

Concluding Section

The concluding section of the suggested Article on Lands and Resources reads:

Section 5. The specific provisions of Sections 2, 3, and 4 of this Article shall not be held to preclude or limit the power of the State over other natural resources.

This section is designed to handle a legal problem which has frequently arisen in connection with constitutional interpretation by the courts. Not infrequently, the courts have held that mention of specific authority precludes the exercise of a general authority over items logically connected with the subject but not specifically mentioned. A clause, such as that suggested, has been the answer to the legal problem.

Constitutional Provisions on Boundaries

A boundary article will be necessary for the Alaskan Constitution. Such an article should not spell out in detail the exact boundary limits of the State. The landward boundaries are well established and there is little argument over them. There is little possibility of major dispute so far as the landward boundaries are concerned.

The importance of the boundary article arises from the events of the past ten years which have become known as the "tidelands controversy."¹⁰⁹ In 1953 Congress, in an effort to

¹⁰⁹ The legal, and to a lesser extent the political and economic aspects of the controversy are discussed in Ernest R. Bartley, The Tidelands Oil Controversy (University of Texas Press: Austin, 1953).

settle partially the disquieting effects of the Supreme Court in the so-called tidelands cases,¹¹⁰ passed the Submerged Lands Act of 1953 which guaranteed to the littoral states on the Atlantic and Pacific Oceans control over a three mile belt of marginal sea off their coasts.¹¹¹ To gain this control requires, under the Act, affirmative indication that such control is taken.¹¹² In the case of most states, actions prior to the passage of the Act in 1953 are deemed sufficient to establish this control. Some states, like Florida, have had to take affirmative action since 1953.¹¹³

Considerable discussion was had in the hearings on the Alaskan statehood measures held in 1954 and 1955 as to whether Alaska and Hawaii benefited automatically from the provisions of the Submerged Lands Act of 1953. It was the opinion of Mr. Stewart French, Counsel for the Senate Interior and Insular Affairs Committee that any enabling legislation should make specific reference to the Submerged Lands Act and apply it to Alaska and Hawaii in order that the new States should have the same right under the Submerged Lands Act as the other 48

¹¹⁰ United States v. California, 332 U. S. 19 (1947); United States v. Louisiana, 339 U. S. 699 (1950); United States v. Texas, 339 U. S. 707 (1950).

¹¹¹ 67 U. S. Stat. 29.

¹¹² *Ibid.*

¹¹³ In 1955 Florida passed an act defining its Atlantic Coast boundary.

states.¹¹⁴

The statehood bills for Alaska and Hawaii in 1954 and 1955 included language designed to apply the Submerged Lands Act of 1953 to those two prospective states.¹¹⁵ The description of Alaskan boundaries set out in these acts¹¹⁶ is pertinent to the drafting of a boundary article for the Alaskan Constitution, for the assumption can be made with a fair degree of safety that similar language will be incorporated into any future Congressional Act of admission. The language was rather carefully worked out in 1954 and 1955 in the Committees of the House of Representatives and the Senate and can be considered as settled.

A boundary article for the Alaskan Constitution might read as follows:

The State of Alaska shall include all the territory, together with the territorial waters appurtenant thereto, heretofore constituting the Territory of Alaska.

This article, though not euphonious stylistically, is carefully taken from statehood measures in order to get conforming phraseology and, more important, to provide the necessary affirmative indication that Alaska assumes the control of the three mile belt of territorial waters to which, under the Submerged Lands Act, it would be entitled.

¹¹⁴ Letter dated 2 February 1954, Hearings on 5:50, p. 225.

¹¹⁵ H. R. 2535, 84th Congress, 1st Session, as reported, sec. 205 (o); S. 49, 84th Congress, 1st Session, sec. 205 (p); S. 50, 83d Congress, 2d session, as reported, sec. 5 (p).

¹¹⁶ H. R. 2535, sec. 201, par. 2; S. 49, sec. 201, par. 2; S. 50, sec. 1, par. 2.

Constitutional Studies, Vol. 1

It is the opinion of the writer that great caution should be exercised in changing the above terminology. A question of formula, non-controversial in nature, is involved. The above language appears to meet the demands of the situation.

The Department of State has steadfastly refused to recognize that many Alaska bays, with headlands greater than ten nautical miles apart, are "historic bays" and therefore inland waters under the rule of Pollard's Lessee v. Hagan. The Department does not view Bristol Bay and the Gulf of Alaska, for example, as historic bays. This means, in effect, that the Department holds that the State of Alaska could exercise jurisdiction, under the Submerged Lands Act, from mean low water mark out to the three mile limit only--not over the entirety of Bristol Bay or the Gulf of Alaska. Jurisdiction over inland waters is, of course, guaranteed to the new State anyhow.

No attempt whatsoever should be made in the Constitutional Convention at College to mark out constitutionally specific boundaries in such areas as Bristol Bay and the Gulf of Alaska. Because of the base line issue, the question of the point from which the three mile zone is to be measured, there is no way by which possible litigation under the Submerged Lands Act of 1953 could be forestalled. The State of Alaska would be no different than many other littoral states so far as this question is concerned.

A simple article, of the type noted, will meet the demands of formula and will provide the State of Alaska with the maximum possible seaward jurisdiction, whatever the baseline may prove at a later date to be.

Conclusion

The importance of resources policy has run like a thread throughout this Staff Paper. Few topics facing the Convention are of greater long-range importance. Practically all of the other states which have become members of the federal Union have had economic bases in agriculture. Alaska's future wealth is in large part in her waters and her minerals. The wise use and administration of these resources is vitally necessary for a sound and healthy Alaskan economy.

The suggestions and proposals made in this Staff Paper are not revolutionary, yet they do represent a departure from national resources policy, particularly in the mineral field. There are precedents which have been noted for the suggestions made. Yet the Delegates to the Alaskan Constitutional Convention will realize full well that much of their work in the field of resources policy must be accomplished without resort to precedent. They will be breaking new ground and proving, at the same time, their political right to become a full partner in the American Union.

Service - Constitutional Studies, Vol. 1

APPENDIX 1

Text of a Proposed Lands and Resources Article

Section 1. (General) The State of Alaska shall have the power to provide for the orderly development, maximum utilization, and conservation of all of the natural resources of the lands and waters of the State, to the end that such resources shall be developed, utilized, and conserved for the benefit of the whole people of the State.

Section 2. (Lands and Mineral Rights) The public lands of the State which are now or hereafter may be acquired may be sold, granted, deeded, patented, or leased under such general laws as may be established by the Legislature. Each sale, grant, deed, or patent shall be subject to and contain a reservation to the State of all of the minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the minerals. Mineral deposits shall be subject to lease by the State under such general laws as the Legislature may enact. Provided: that the Legislature may by general law alienate the State's right, title, and interest to minerals in the case of homesteads or areas of lesser acreage; and provided further, that no person, company, or corporation shall hold such alienated mineral rights in an amount greater than the acreage of one homestead.

No person, company, or corporation shall deny a mineral lessee of the State access to such minerals; but such access shall be taken only upon payment of just compensation to the surface owner, grantor, or lessee.

Section 3. (Waters and Water Resources) The use of waters of the State is hereby declared to be a public use, and subject to the regulation and control of the State in a manner to be prescribed by law.

The State may sell, grant, deed, patent, or lease the submerged and tidal soils under such general law as the Legislature may enact. The provisions on the non-alien ability of minerals of Section 2 of this Article shall apply to submerged and tidal soils.

No citizen of the State or of the United States shall be denied the free ingress and egress of the navigable waters of the State, except that the State may by general law regulate and limit this use for power development or other beneficial and public purposes.

The Legislature shall pass no law creating a several fishery in the navigable waters of the State.

Section 4. (Forest Lands) Sales, grants, deeds or leases of forest lands of the State, where such lands are to be developed and utilized primarily for their forest resources, shall contain provisions binding the purchaser, grantee, or lessee to adhere to the principles of sustained yield management of the forest areas so sold, granted, deeded, or leased.

Section 5. The specific provisions of Sections 2, 3, and 4 of this Article shall not be held to preclude or limit the power of the State over other natural resources.

APPENDIX 'IIAPPLICABILITY OF THE ATOMIC ENERGY ACTS OF 1946 AND
1954 TO THE ALASKAN SITUATION

Some question has been raised about the relationship of the Atomic Energy Act of 1954¹ to the Alaskan minerals situation upon assumption of statehood. Briefly stated, the issue is concerned with the status of those minerals from which materials for atomic fission may be derived. Will such minerals be included in the grants of public lands to the new State?

The major 1955 Alaskan statehood bills, S. 49 and H. R. 2535 as reported, provided that grants of land to the new State should include "mineral deposits." Further, the new State would be required, as noted a number of times in this Staff Paper, to reserve to the State "all of the minerals" in the land granted to it from the federal public domain.² The proposed enabling legislation makes no mention or exception of those minerals, like uranium and thorium, necessary for the production of fissionable materials.

The Atomic Energy Act of 1946 in effect nationalized the "production, ownership, and use of fissionable materials."³ The Atomic Energy Act of 1954 relaxed these restrictions somewhat and completely rewrote and supplanted the 1946 Act to

¹ 68 U. S. Stat. 921.

² S. 49, sec. 205 (k); H. R. 2535, sec. 205 (j). Italics added.

³ 60 U. S. Stat. 756.

Service - Constitutional Studies, Vol. 1

allow a broader play of private initiative and enterprise in the atomic energy field, subject always to the demands of national security.⁴

The 1946 Act by definition carefully separated "fissionable materials" from "source materials."⁵ It is the latter term which is of interest here and the 1946 Act defined it to include "uranium, thorium, or any other material which is determined by the Commission, with the approval of the President, to be peculiarly essential to the production of fissionable materials; but includes ores only if they contain one or more of the foregoing materials in such concentration as the Commission may by regulation determine from time to time."⁶ The basic definition was substantially unchanged in the 1954 Act, except that the method of adding materials to the defined list was far more carefully drafted and limited.⁷

The 1946 Act had provided that all source materials, in whatever concentrations, in United States public lands should be reserved to the United States. Patents, conveyances, leases, and other permits were to contain clauses to that effect, even

⁴ 68 U. S. Stat. 921 ff.; 42 U. S. C., secs. 2011-13.

⁵ 60 U. S. Stat. 760.

⁶ Ibid.

⁷ 68 U. S. Stat. 922; 42 U. S. C., secs. 2014(s) and 2091.

where source materials which might someday be found were in less than commercial quantity.⁸ This restriction would have posed a question, regarding source materials in public lands, as to the relationship of the Atomic Energy Act of 1946 to possible Alaska statehood legislation. Real issues as to possible state ownership of source material deposits in lands granted to the new State could easily have arisen.

The 1954 Atomic Energy Act, supplanting as it does the 1946 Act, appears to have removed at least some of the possible contradictions. Where patents, conveyances, leases, or permits were issued under the 1946 Act with source material reservation, the 1954 Act authorizes a supplemental patent, lease, conveyance, or authorization without such reservation. The supplemental action can be taken upon application of the original holder.⁹ The 1954 Act in effect allows mineral location for source material as though the location were one for locatable mineral deposits for other than source materials.¹⁰

It is therefore the opinion of the writer that grants of land to the proposed State of Alaska, such grants following substantially the terminology of S. 49 and H. R. 2535, would

⁸ 60 U. S. Stat. 762-3.

⁹ 68 U. S. Stat. 934; 42 U. S. C., sec. 2098(b). Rights of persons removing source materials under such reservation under the 1946 Act are protected by the 1954 section.

¹⁰ 68 U. S. Stat. 934; 42 U. S. C., sec. 2098(c).

not offer any questions on the transferability to the State of original rights in source materials. License requirements and the right of the Atomic Energy Commission to acquire title to such source materials upon discovery remain unaffected.¹¹ Such rights to license and acquire do not affect the power of the Alaskan Constitutional Convention to determine basic resources policy. No issues, in the opinion of the writer, are presented to which the Convention must give special attention. Nor are there issues which require special treatment in any future Act of Congress admitting Alaska as a member of the federal Union.

¹¹ 68 U. S. Stat. 932-33; 42 U. S. C., secs. 2092-96.

Service - Constitutional Studies, Vol. 1

IV

SUFFRAGE AND ELECTIONS

A staff paper prepared by Public Administration
Service for the Delegates to the Alaska
Constitutional Convention

November, 1955

Table of Contents

Suffrage and Elections	1
Federal Limitations	2
The Suffrage	4
Expansion of the Suffrage	4
Qualifications for Voting	4
Citizenship	5
Age	5
Property and Taxpaying Requirements	6
Literacy Tests	8
Residence Requirements	9
Disqualification from Voting	12
Crime	12
Unsound Mind	12
Definition and Enforcement Problems	13
Elections	13
Secrecy	14
Time of Elections	15
Administration of Elections	16
Registration	17
Absentees	19
Purity of Elections	19
Election Contests	20
Summary	20
Appendix: Sample Constitutional Articles on Suffrage and Elections	23
Hawaii	23
Missouri	23
New Jersey	25
Model State Constitution	26

Service - Constitutional Studies, Vol. 1

SUFFRAGE AND ELECTIONS

Introduction

In our form of government the people do not govern directly but through their elected representatives. Therefore, providing for elections and determining who may vote in them is an essential part of constitution-making. Open and fair elections, although a common feature of American life, can hardly be taken for granted. There are things that a constitution can say which will help insure that elections are conducted fairly and that their results will be observed. There are things that a constitution can say, principally in defining the suffrage, which may possibly affect the future distribution of political power in Alaska. Alaska also has some unusual characteristics of geography, population, and governmental history that must be considered. Some deliberate policy decisions about suffrage and elections will be required of the Convention. On the other hand, the drafting of the article (or articles) on suffrage and elections should not be unduly difficult unless the Convention attempts to put an unusual amount of detail into the Constitution. A thorough and effective article can be quite short, and most of the issues lend themselves to common-sense rather than technical discussion.

Federal Limitations.--In the American constitutional system it is basically left to the states to determine who shall vote and how elections shall be conducted, for federal as well as for state and local offices.¹ However, the Constitution puts certain limitations on the discretion of the states in this matter. Two limitations are of real importance. The first is the Fifteenth Amendment, which states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." While there may still be some evasion of the intent of the Fifteenth Amendment in certain parts of the country, the federal courts in recent years have been increasingly willing to declare unconstitutional any state constitutional provisions, statutes, or election regulations designed to keep racial minorities from voting.² The law is now settled and the practice is rapidly coming into line.³

¹ Constitution of the United States, Art. I, Sec. 2, and Amendment XVII.

² The following excerpt from the Supreme Court's majority opinion in the case of Lane v. Wilson, 307 U. S. 268, 275 (1939) suggests the present attitude of the Court: "The Amendment nullifies sophisticated as well as simple minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."

³ Although there was doubt on the point for many years, it is now clear that the protection of the Fifteenth Amendment extends to primary elections.

Service - Constitutional Studies, Vol. I

The second significant limitation on state discretion is the Nineteenth Amendment, which forbids denial or abridgement of the right to vote on account of sex. With these two exceptions, the Convention is free to define the suffrage in Alaska.⁴

Except for the federal anti-discrimination amendments, the states have practically complete freedom with respect to state and local elections. Responsibility for elections of U. S. Senators, Representatives, and Presidential Electors is also upon the states. Under the Constitution, Congress has certain reserve power to regulate the times, places, and manner of electing these officials, but it has exercised this power sparingly.⁵ For example, Congress has fixed a uniform election day for Congressmen and Presidential Electors, has regulated contributions and expenditures in campaigns for these offices, and has passed legislation to facilitate absentee voting by servicemen. These, however, are limited interventions. Each state has the basic responsibility of providing for and administering elections, and the fundamentals of the election system are obviously matters for constitutional determination.

⁴ The "equal protection of the laws" clause of the Fourteenth Amendment, which occasionally has been used to strike down indirect methods of keeping Negroes from voting, might conceivably be called upon if a state tried to exclude some group from voting on highly arbitrary or capricious grounds, but this is a rather abstract point.

⁵ Edward S. Corwin, The Constitution and What It Means Today (1954), pp. 12-15, 91-94.

The Suffrage

Expansion of the Suffrage.--The history of the United States shows a steady expansion of the suffrage, the privilege of voting. In the early state constitutions, which made no pretense of being democratic, voting was confined to men of substance, property, and, in some states, the appropriate religious faith. Since the early Nineteenth Century these restrictions have been swept away one after another. In legal theory voting remains not a right but a privilege which may be granted liberally or conservatively at the discretion of the states. However, the distinction is becoming more and more technical. Adult suffrage with moderate exceptions which exclude only a small percentage of the population is the normal expectation of the American people.

Qualifications for Voting

Although the privilege of voting is widely shared, it is not open to everyone, like a postage stamp window. There is general agreement that the states should set certain requirements which individuals must meet before they can vote. These requirements are intended partly to guard against election frauds and partly to insure a minimum of responsible citizenship on the part of the voters. Requirements of the sort illustrated below normally are specifically stated in the constitutions in states where they are in effect. Since voting is such an important privilege of citizenship, it is entirely appropriate that any requirements to be adopted be constitutionally prescribed.

Citizenship.--The first and most obvious qualification is U. S. citizenship. This is now constitutionally required in all states, although for a number of years there were some states that permitted aliens to vote after they had taken out their first naturalization papers. This could become an issue in Alaska only in the rather unlikely event of large-scale foreign immigration.

Age.--The traditional age for first voting in the U. S. and other English-speaking countries has been 21 years. However, in the past few years there has been considerable discussion of amending constitutions so as to lower the age requirement. The arguments are familiar. Advocates of the change say that in a country with widespread public education young people in their late 'teens are as well informed and capable of acting intelligently at the polls as their parents. Since World War II and the beginning of large-scale drafting of youths into the armed forces the slogan "Old enough to fight; old enough to vote" has been employed effectively. Opponents suggest the danger of youthful irresponsibility, point to an apparent disinterest in politics on the part of many young people, and say that there is no necessary connection between ability to fight and ability to cast a vote intelligently. Advocates come back with the argument that any signs of political apathy or irresponsibility are because young people have such a long waiting period between the usual school-leaving age and

reaching their 21st birthday; if they could look forward to voting shortly after leaving school their interest would be sharpened. In spite of many proposals to lower the voting age, either by federal amendment or by action in the individual states, there has been relatively little action. In 1943 Georgia lowered the age requirement to 18 years, and the Hawaiian constitution calls for voting at age 20; in all other states the 21-year requirement is in effect.

Convention Delegates may recall that an act lowering the voting age from 21 to 18 was passed by the Alaska Territorial Legislature in 1945 but failed to receive the necessary Congressional approval. The Constitutional Convention now has the opportunity to fix any voting age it considers appropriate. Because of the unusually high percentage of young people in the Alaskan population, lowering the voting age would have a considerable effect, numerically at least, on the Alaskan electorate. As of 1955, Alaska has about 70,000 eligible voters. Establishing the voting age at 18 would add approximately 5,000 or 7.01% to the number of potential voters.⁶ What effect, if any, such a change would have upon either the political balance of power in Alaska or the attitude of Congress toward Alaskan statehood is of course hard to predict.

Property and Taxpaying Requirements. In the early days of this country, the principal device used to keep the government in the hands of the supposedly responsible and stable citizens

⁶ Based on U. S. Census data of 1950 as projected by the Bureau of Vital Statistics, Alaska Department of Health.

was to restrict the suffrage to persons who paid taxes or owned property of specified value. Except for a poll tax requirement which is still effective in a few states, these restrictions have practically all been swept away. The principal reason has been a general feeling that they are undemocratic. Another very practical reason has been the appearance of wealth in many forms different from the traditional real property. It is increasingly difficult to maintain a satisfactory definition of "property-owners" or an effective system for administering property qualifications.

A few remnants of property requirements may be noted. The Virginia Constitution permits the General Assembly to set a property requirement of not over \$250 for voting in county and local elections, and South Carolina excuses owners of property assessed at \$300 or more from taking its literacy test for voting. There are still a half-dozen states where only property-owners may participate in local referenda on bond issues or special assessments. The only taxpaying requirements that are really at all effective and controversial are the constitutional requirements in five states that evidence of having paid the poll or head tax must be shown before voting.⁷ There is, of course, great controversy over the intent,

⁷ On this and several other points with respect to qualifications for voting in the several states the excellent table in Council of State Governments, Book of the States, 1954-55, pp. 80-81, has been relied on.

Service - Constitutional Studies, Vol. 1

desirability, and effectiveness of such restrictions. The spread of education and general improvement of economic conditions in the U. S. have made the poll tax a somewhat less formidable hurdle than it used to be, but this restriction still apparently keeps sizeable numbers of persons--of all colors--from voting in the states which retain it.

Literacy Tests.--There are now 17 states that have some form of literacy requirement for voting.⁸ The most common form is that voters be required to demonstrate ability to speak, read, and write the English language unless some physical disability prevents them from doing so. Unlike the property requirements, which are hangovers from colonial times, the literacy tests have been appearing gradually since the late 19th Century. They were originally considered desirable reforms, on the basis that a person unable to communicate fully in the language of the country would not be apt to make a responsible or informed choice at the polls. This is still a reasonable position to take, although one occasionally encounters skepticism that there is any necessary connection between literacy and political intelligence. The two most recent state constitutions to go into effect, Missouri and New Jersey, contain no literacy tests, and the Hawaiian Constitution has only a minimal requirement.

Assuming the desirability of some form of literacy test, the problem is to set a standard and establish a system of

⁸ Idem.

Constitutional Studies, Vol. 1

enforcement that can be administered effectively, fairly, and evenly throughout the state. Setting the standard is a constitutional matter. The administration is probably best left to legislation. Setting too high a standard is usually self-defeating. On the one hand it is not likely to be enforced by election officials at the polling places; on the other hand it may be used arbitrarily to disfranchise unpopular individuals or groups.⁹ The present Alaska requirement that voters must be able to read ten lines of the Constitution and write ten words dictated therefrom by election officials¹⁰ is probably more stringent than the average, although no information is available about the usual manner of its enforcement. Literacy tests are most satisfactory when they are tied into a system of voter registration; in this way at least part of the burden of enforcement is transferred from the amateur election officers at the precincts to regular officials who can be expected to provide more uniform administration. A special problem arises when there are large groups of permanent residents who are by tradition non-English-speaking. The Hawaiian Convention handled this by specifying ability to speak, read, and write either English or Hawaiian.¹¹ However,

⁹ Requirements that voters demonstrate ability to "interpret" or "construe" parts of the Constitution have been abused notoriously in some places.

¹⁰ Alaska Compiled Laws Annotated, 1949 (hereafter cited as ACLA), 38-1-2, 3, 4.

¹¹ Constitution of the State of Hawaii, 1950, Art. II, Sec. 1.

in New Mexico, where literacy tests at one time were the subject of considerable controversy, the Constitution forbids a literacy test in either English or Spanish and specifies an extraordinarily difficult amendment procedure for the suffrage article.¹²

Residence Requirements.--In order to insure that those who vote have some attachment to the community, and to guard against importation of persons for voting purposes only, all state constitutions establish some minimum residence requirement for voting.¹³ A year's residence in the state is required by 33 states. Eleven states permit voting after only six months residence, but four Southern states require two years. All state constitutions but one also prescribe local residence requirements, either in the county, or the precinct, or both. County residence requirements range from thirty days up to a full year. Precinct or local district requirements range from ten to sixty days. Ninety days in the county and thirty days in the precinct is about average. Alaska's present residence requirements--one year in the Territory and thirty days in the precinct¹⁴--are fairly liberal but not unusually so.

Residence requirements of the usual sort cause no great difficulty as long as people "stay put." On the other hand more and

¹² Constitution of the State of New Mexico, Art. VII, Sec. 2.

¹³ Book of the States, 1954-55, pp. 80-81.

¹⁴ ACLA 38-1-8.

more states are having to face the fact that there are substantial numbers of people who do not fit the common notion of what is a "resident." What is to be done about military personnel and their families, college students, inmates of institutions, construction workers, and members of other occupational groups who move about frequently yet may stay in one place long enough to qualify for voting under the usual requirements? Most states have been tempted to add provisos to the residence requirements which have the effect of excluding such people. However, a few states interested in building up their voting population have encouraged such people to vote, and Alaska may wish to adopt a similar policy. Even states that want to exclude "semi-permanent" residents from voting usually want to protect the voting privileges of their own natives whose occupations may take them away from home for extended periods. The best solution to this problem is probably a "neither gained nor lost" section similar to the ones contained in the constitutions of Missouri, Arizona, Hawaii, and several other states, and used in the Model State Constitution:

Residence. For the purpose of voting, no person shall be deemed to have gained or lost a residence simply by reason of his presence or absence while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student at any institution of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison.¹⁵

¹⁵ National Municipal League, Model State Constitution (1948), Art. II, Sec. 203.

Service - Constitutional Studies, Vol. 1

Such a provision would seem to give a state ample protection against the "floating vote" and at the same time enable those who were serious about establishing a permanent residence to do so. For example, a serviceman who brought his family and established a home off a military reservation would be a resident and not "simply . . . employed in the service of the United States."

Disqualification from Voting

Although the suffrage has been opened widely, there remain certain residual categories of persons who are usually excluded from voting on the ground that they are incapable of responsible citizenship.¹⁶

Crime.--Individuals who have been convicted of serious crime are permanently disqualified from voting in thirty-six states, although in some states the privilege may be restored by legislative or executive clemency. Constitutions usually refer only to "infamous crime" or "felony" and do not itemize the crimes which involve disfranchisement. Minor crime or confinement in a jail does not in itself cause disfranchisement.

Unsound Mind.--It is the usual constitutional practice to disqualify persons of unsound mind. The terms "non compos mentis," "insane," "idiots," and "lunatics" are also commonly used.

¹⁶ On the categories of disqualification see W. Brooke Graves, American State Government (1953) p. 108. Also, Territory of Hawaii, Manual on State Constitutional Provisions (1950) pp. 369-70.

Definition and Enforcement Problems.--Although there is ordinarily general agreement on the principle that criminals and the mentally ill should not vote, such exclusions are always hard to define precisely and not easy for election officials to enforce. A few constitutions have gone to considerable length to specify the categories of persons who are disqualified, but in this, as in so many other aspects of constitution-making, going into detail may create more problems than it solves. Probably the most satisfactory course is to keep exclusions to a minimum, to identify them in terms which have reasonably clear meanings both legally and in common usage, and to leave the rest to legislation.

Elections

In addition to determining who may and may not vote, the constitution will need to provide for the conduct of elections. This is obviously an important matter, and if there were any way in which a constitution could guarantee honest and fair elections forever it would certainly be incumbent on the Delegates to insert the appropriate provisions. Unfortunately, there are no magic words. Elections are complicated affairs, requiring detailed regulation by statute and constant adjustment to changing conditions and new problems. The most that a constitution can do is to set forth a few basic principles and leave the rest to legislation and the public conscience. This is especially true in the present case, where the main structure of government is yet to be

determined and the election system must take into account great variations in local conditions and rapid change in population distribution.

What should a constitution say about elections? Looking at the constitutions of other states, one comes to the conclusion that it is not necessary to say very much. Constitutional provisions are usually relatively brief and for the purpose of indicating the conditions under which elections are to be held rather than establishing either the organization for administering them or the details of procedure. A few states, to be sure, have long amendments obviously designed to plug loopholes or clear up disputed points, but these are hardly to be recommended for adoption in a state making a fresh constitutional start. Assuming, however, that the Convention will wish to lay down at least a few guidelines for the future, what are some of the main points concerning elections which are to be considered?

Secrecy.--Some declaration of the principle of secret voting is in virtually all state constitutions. Most of the older constitutions refer to "secret ballot." The newer constitutions tend to avoid or qualify the word "ballot" because courts have sometimes held that it precludes the use of voting machines. The Hawaiian constitution merely says "Secrecy of voting shall be preserved," which should be adequate. Other states specifically authorize the legislature to provide for mechanical devices for voting or counting votes.¹⁷

¹⁷ New York Constitution, Art. II, Sec. 4; Missouri Constitution, Art. VIII, Sec. 3; Model State Constitution, Art. II, Sec. 205.

Time of Elections.--Many state constitutions provide for general elections at regular intervals, most frequently the first Tuesday after the first Monday in November in even-numbered years, which is the customary time for election of Congressmen and presidential electors. Declaration of regular general elections is, of course, an affirmation of one of the basic principles of government by consent of the governed. It also represents neat constitutional draftsmanship. If the article on elections provides for and defines a "general election," it is unnecessary for each of the articles establishing the various offices to go into detail about their election, since it can be specified that they are to be chosen at general elections. Although most states do so, it is not necessary to have the state general election day on the same day as national elections. A state could have elections on some other day, or in the odd-numbered years. In fact, some reformers have advocated that national and state elections be separated in the hope that state and local campaigns can be kept focused on local issues instead of being swallowed up in the national campaigns. However, for reasons of tradition, economy, and perhaps to reduce the strain on the voter, most states use the Congressional election date. Some states whose governors serve four-year terms have the gubernatorial cycle set so that governors are elected in the even-numbered but non-Presidential years.

Administration of Elections.---As pointed out above, the details of election administration are seldom comprehensively treated in state constitutions, although there are occasional provisions on such points as the form of the ballot, the method of appointing election officials, and the procedure for counting votes or certifying results. Because of the enormity of the job (most state election codes run into hundreds of pages of statutes), a constitution can do no more than lay down some general outlines of a system.

The typical state election system is highly decentralized. The responsibility for preparing the ballots, setting up polling places, appointing precinct officials, and collecting results from the polling places is usually on city clerks, county clerks, or clerks of court in the various local jurisdictions. More populous counties or cities may have a regular election board or commissioner for this duty. The secretary of state may exercise some general supervision over elections, but his duties are usually confined to compiling returns and certifying results. Allowing for the peculiarities of territorial government, the present system in Alaska resembles most state systems. The key officials are the clerks of court in the four judicial divisions, who prepare the ballots, and the U. S. commissioners in the various recording districts who oversee the establishment of polling places and appoint precinct election officers. The Governor and the Secretary of Alaska canvass the returns from the judicial districts

and certify the winners, but they do not actually supervise the election procedure. One of the points to which the Convention might give some consideration is whether such a decentralized system should be continued or if some authority at the state level should be provided in the interest of uniform procedure and more effective supervision of local officers throughout the state.

The staffing of the election machinery is always difficult to handle completely satisfactorily. Except in the most populous areas, which have enough work for full-time year-round election officers, administration of elections is always an extra duty of an official with other basic responsibilities, who must rely on temporary employees to do most of the actual work. In areas under political machine control, this situation obviously invites manipulation and abuse of the principle of honest elections. Some states have tried to protect the purity of the electoral process by requiring election boards to be chosen on a bipartisan basis. The National Municipal League finds that bipartisanship is usually not a great deal of help and recommends that state constitutions provide for appointment of election officials on the basis of fitness and merit, by competitive examinations if possible.¹⁸

Registration.--Many state constitutions authorize or instruct the legislature to provide a system of registration of voters. These provisions are in part a reflection of the fact that voter

¹⁸ Model State Constitution, Art. II, Sec. 206.

registration has in some areas been a popular reform and its advocates have had a normal desire to get specific constitutional sanction for it. A more valid reason for having registration authorized in the constitution is that some courts have held that statutes establishing registration systems were, in effect, laying down a new requirement for voting which was not contemplated by the constitution. On that basis the statutes were declared invalid.

In essence, registration is a procedure in which the voter establishes, in advance of the election, his eligibility to vote. On election day only those persons on the registration list are normally permitted to vote, although a few states provide a special procedure by which non-registered persons may establish their eligibility on election day. The need for registration systems is greatest in urban areas where most of the voters are not known to election officers and there is danger of fraud by use of "floaters," "repeaters," and other ineligible voters. Many states, recognizing this, provide for registration only in the most populous areas. Almost all states, however, have at least partial registration systems.¹⁹ Alaska, with its population until recently mostly distributed among small communities, does not now have a general registration system. The need for one may soon be felt in several of the fast-growing cities, and the Convention may wish to express itself on the subject.

¹⁹ Council of State Governments, Book of the States, 1954-55, pp. 80-81.

Absentees.--Although several states have long-standing constitutional or statutory provisions designed to put a ballot in the hands of qualified voters who are unable to be physically present in their home precincts on election day, there has been some doubt of the constitutional validity of such arrangements in certain states. Since World War II, when there was special interest in making sure that servicemen could cast a vote back home, there has been a movement to get absentee voting implanted in state constitutions. All states but New Mexico now make some provision for absentee voting, although Maryland and South Carolina restrict this privilege to military personnel.²⁰ In the absence of constitutional language specifically forbidding absentee voting, statutes establishing such a system would probably be valid, but the Convention may wish to make the point clear by authorizing or instructing the legislature to take action.

Purity of Elections.--Many constitutions have general provisions authorizing or instructing the legislature to enact various sorts of legislation designed to protect the voting franchise and insure purity in elections. The Oregon constitution, for example, requires:

The legislative assembly shall enact laws to support the privilege of free suffrage, prescribing the manner of regulating and conducting elections, and prohibiting, under adequate penalties, all undue influence therein from power, bribery, tumult, and other improper conduct.²¹

²⁰ Ibid., pp. 88-91.

²¹ Constitution of Oregon, Art. II, Sec. 8.

Other constitutions are more specific about the evils to be guarded against and the penalties intended. Some authorize the legislature to regulate campaign expenditures or require publicity concerning them. Other constitutions provide for permanent disfranchisement and other penalties against persons convicted of bribery or fraud in connection with elections.

Election Contests.--One of the points of election procedure most frequently touched upon in state constitutions is the method of resolving contested elections. The houses of the legislature are normally authorized to judge the elections of their own members. Contested elections of state executive officials may be resolved either by one of the houses of the legislature or by the courts. The Missouri constitution has a comprehensive article providing for judicial resolution of election contests:

Contested elections for governor, lieutenant-governor and other executive state officers shall be had before the supreme court in the manner provided by law, and the court may appoint one or more commissioners to hear the testimony. The trial and determination of contested elections of all other public officers in the state shall be by courts of law, or by one or more of the judges thereof. The general assembly shall designate by general law the court or judge by whom the several classes of election contests shall be tried²²

Summary

This paper has touched briefly on the aspects of the electoral process most important for the Convention to consider. No effort has been made to suggest a detailed plan of elections administration and procedure. Developing such a plan will require

²² Constitution of Missouri, Art. VII, Sec. 5.

careful future study. As a practical matter it is probably beyond the reach of the Convention for reasons of time. The essential responsibilities of the Convention are (1) to provide for regular elections; (2) to specify the qualifications required for voting; (3) to specify any classes of persons to be disqualified; (4) to authorize someone (presumably the legislature) to regulate the elections process in detail; and (5) to prescribe any special conditions or characteristics of administration and procedure which the Convention may feel to be of particular importance in assuring an election system that will be open and fair and suitable for Alaska.

In order to illustrate some of the points in this paper, several brief but comprehensive state constitutional articles on suffrage and elections are attached as an appendix.

Vol. 1
Service - Constitutional Studies,

APPENDIX

Sample State Constitutional Articles on Suffrage and Elections

Constitution of Hawaii: Article II, Suffrage and Elections

Section 1. Every citizen of the United States, who shall have attained the age of twenty years, have been a resident of this State not less than one year next preceding the election and be a voter registered in accordance with law, shall be qualified to vote in any state or local election. No person shall be qualified to vote unless he is also able, except for physical disability, to speak, read and write the English or Hawaiian language.

Section 2. No person who is non compos mentis and no person convicted of felony, unless pardoned and restored to his civil rights, shall be qualified to vote.

Section 3. No person shall be deemed to have gained or lost residence simply because of his presence or absence while employed in the service of the United States, or while engaged in navigation or while a student at any institution of learning.

Section 4. The legislature shall provide for the registration of voters and for absentee voting; and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved.

Section 5. General elections shall be held on the first Tuesday after the first Monday in November in all even-numbered years. Special elections may be held in accordance with law. Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law.

Constitution of Missouri: Article VIII, Suffrage and Elections

Sec. 1. Time of General elections--The general election shall be held on the Tuesday next following the first Monday in November of each even year, unless a different day is fixed by law, two-thirds of all members of each house assenting.

Sec. 2. Qualifications of voters--disqualifications--All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of twenty-one who have resided in this state one year, and in the county, city or town sixty

days next preceding the election at which they offer to vote, and no other person, shall be entitled to vote at all elections by the people; provided, no idiot, no insane person and no person while kept in any poor house at public expense or while confined in any public prison shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting.

Sec. 3. Methods of voting--numbering and recording ballots
--secrecy of ballot--exceptions.--All elections by the people shall be by ballot or by any mechanical method prescribed by law. Every ballot voted shall be numbered in the order received and its number recorded by the election officers on the list of voters opposite the name of the voter. All election officers shall be sworn or affirmed not to disclose how any voter voted. Provided, that in cases of contested elections, grand jury investigations and in the trial of all civil or criminal cases in which the violation of any law relating to elections, including nominating elections, is under investigation or at issue, such officers may be required to testify and the ballots cast may be opened, examined, counted, compared with the list of voters and received as evidence.

Sec. 4. Privilege of voters from arrest--exceptions.--Voters shall be privileged from arrest while going to, attending and returning from elections, except in cases of treason, felony or breach of the peace.

Sec. 5. Registration of voters.--Registration of voters may be provided for by law.

Sec. 6. Retention of residence for voting purposes.--For the purpose of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence while engaged in the civil or military service of this state or of the United States, or in the navigation of the high seas or the waters of the state or of the United States, or while a student of any institution of learning, or kept in a poor house or other asylum at public expense, or confined in public prison.

Sec. 7. Absentee voting.--Qualified electors of the state who are absent, whether within or without the state, may be enabled by general law to vote at all elections by the people.

War Service - Constitutional Studies, Vol. 1

Constitution of New Jersey: Article II, Elections and Suffrage

1. General elections shall be held annually on the first Tuesday after the first Monday in November; but the time of holding such elections may be altered by law. The Governor and members of the Legislature shall be chosen at general elections. Local elective officers shall be chosen at general elections or at such other times as shall be provided by law.

2. All questions submitted to the people of the entire State shall be voted upon at general elections.

3. Every citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote for all officers that now are or hereafter may be elective by the people, and upon all questions which may be submitted to a vote of the people.

4. In time of war no elector in the military service of the State or in the armed forces of the United States shall be deprived of his vote by reason of absence from his election district. The Legislature may provide for absentee voting by members of the armed forces of the United States in time of peace. The Legislature may provide the manner in which and the time and place at which such absent electors may vote, and for the return and canvass of their votes in the election district in which they respectively reside.

5. No person in the military, naval or marine service of the United States shall be considered a resident of this State by being stationed in any garrison, barrack, or military or naval place or station within this State.

6. No idiot or insane person shall enjoy the right of suffrage.

7. The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned or otherwise restored by law to the right of suffrage, shall again enjoy that right.

Model State Constitution Article II, Suffrage and Elections

Section 200. Qualifications for Voting. Every duly registered citizen of the age of eighteen years who shall have been a citizen for ninety days, and an inhabitant of this state for one year next preceding an election, and for the last ninety days a resident of the county and for the last thirty days a resident of the election district in which he may offer his vote, shall have equal voting rights at all elections in the election district of which he shall at the time be a resident, and not elsewhere, except as hereinafter provided, but no person shall become entitled to vote unless he is also able, except for physical disability, to read and write English; and suitable laws shall be passed by the legislature to enforce this provision.

Section 201. Absent Voting. The legislature may, by general law, provide a manner in which qualified voters who may be absent from the state or county of their residence may register and vote, and for the return and canvass of their votes in the election district in which they reside.

Section 202. Disqualifications from Voting. No person who shall receive, accept, or offer to receive, or pay, offer or promise to pay, or withdraw or withhold or threaten to withdraw or withhold any money or other valuable consideration as a compensation or reward for the giving or withholding of a vote at an election shall vote at such election. No person under conviction of bribery or of any infamous crime shall exercise the privilege of the suffrage.

Section 203. Residence. For the purpose of voting, no person shall be deemed to have gained or lost a residence simply by reason of his presence or absence while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student at any institution of learning; nor while kept at any almshouse, or other asylum, or institution wholly or partly supported at public expense or by charity; nor while confined in any public prison.

Section 204. Registration of Voters. Laws shall be made for ascertaining, by proper proofs, the citizens who shall be entitled to the privilege of the suffrage and for the registration of all qualified voters. Registration shall be upon personal application in the case of the first registration of any voter and shall be completed at least ten days before each election. Such registration shall be effective so long as the voter shall remain qualified to vote from the same address or for such other period as the legislature may prescribe.

Section 205. Methods of Voting. Voting at all elections or on referenda shall be by such method as may be prescribed by law, provided that secrecy of voting be preserved. The legislature shall have power to provide for the use of mechanical devices for voting or counting the votes.

Section 206. Election Officers. All officers and employees charged with the direction or administration of the election system of the state and of its civil divisions shall be appointed in such manner as the legislature may by law direct, provided that appointment shall be made according to merit and fitness, to be determined, so far as practicable, by competitive examination.

Section 207. Regular elections shall be held annually on the first Tuesday after the first Monday in November; but the time of holding such elections may be altered by law.

Series - Constitutional Studies, Vol. I