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CONSTITUTIONAL STUDIES



PREPARED ON BEHALF OF THE
ALASKA STATEHOOD COMMITTEE
FOR THE
ALASKA CONSTITUTIONAL CONVENTION

Volume 3 of 3.

PUBLIC ADMINISTRATION SERVICE

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CONSTITUTIONAL STUDIES

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

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Volume 3 of 3

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THE CONSTITUTION

AND

LOCAL GOVERNMENT

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

November, 1955

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THE CONSTITUTION AND LOCAL GOVERNMENT

The system of local government in Alaska is only partially developed. It consists of twenty-nine incorporated cities, twenty-one of which also function as city school districts, eight independent school districts, and a number of public utility districts. The area, functions, and general nature of these units are discussed in Publication No. 21-6, Local Government in Alaska, issued by the Alaska Legislative Council. In addition, the territory is divided in various ways for purposes of administering certain territorial government functions and into four large divisions for judicial purposes. Only a very small portion of the territory is organized at all for the performance of any functions of local self-government. Present national and territorial statutes permit additional units to be formed; but such units under existing legislation are limited as to size, authority, and functions. There is no general county structure, nor is there a pattern of townships, towns, villages, or other officially recognized unit such as are common in most states of the United States. Indeed, under territorial arrangements, no county structure is permissible except by affirmative action of the United States Congress.

Although articles creating local government units were omitted from some of the earlier state constitutions, virtually all later charters make some provision for local government structure or instruct the legislature to so provide. Others acknowledge existing structure by reference in numerous provisions. The whole subject is generally recognized to be of constitutional significance, for it relates to a major field of legislative action, is often fundamental to the system of representation adopted for the legislature, has strong bearing on the manner of administering numerous state functions, and, of probably greatest importance, it provides the basis upon which the citizens of individual communities can regulate their local affairs and perform for themselves many necessary services.

Theorists have waxed eloquent on the fundamental role of local political institutions in a democratic society. Lord Durham, in reporting to the British government on the state of affairs in Canada in 1838 commented:

The utter want of Municipal institutions giving the people any control over their local affairs may indeed be considered as one of the main causes of the failure of representative government, and of the bad administration of the country.

Similarly, some forty-four years later Alexis de Tocqueville asserted that "a nation may establish a system of free government, but without municipal institutions, it cannot have the spirit of liberty." Nothing in subsequent years has served to dim the ardour

of those who see in strong local government institutions one of the fundamental ingredients of a democratic society. Indeed, the record is clear that the forces of democracy have found the going most difficult in those countries and regions where the citizens of local communities have developed no tradition of managing their own affairs. The more diverse the region and the more isolated the population centers, the more important becomes the provision of adequate authority for the exercise of local judgment and initiative in governmental matters. Few will question the need for suitable local government provisions in a modern state constitution.

The American Pattern of Local Government

In spite of general agreement that local government is of fundamental importance in the American democratic system, there is little uniformity of views as to what the local structure should be or with what powers the local units should be endowed. The pattern of local government that has come to prevail throughout most of the United States was created by a successive transplantation of eastern seaboard concepts as the population moved westward across the American continent. Well-known and understood units were established in new territory long before statehood came about in most western areas, and little thought was given to the possible impact of changing times and place upon older arrangements that had served well during the period of colonization and formation of the American nation. In the North, the

township structure was carried along with the county and the municipality from New England and the Middle-Atlantic states, but it died out west of the Mississippi. In the South, the county and the municipality were carried westward into Texas and beyond, much as they had existed in Georgia, the Carolinas, and other southeastern states.

Of no lesser significance than the carryover of established ideas was the influence of the surveyor and the engineer whose handiwork soon blanketed the western plains with neat checkerboards of little squares each with a specific number of acres and each ripe for designation as a county. The designation of local government areas became a problem in mathematics. In the Far West, topography emerged as a major factor in area designation, tempered somewhat in California by the influence of Spanish land grants and Mexican jurisdictional arrangements. In the end, however, every state in the Union adopted a pattern of local jurisdictions involving counties and municipalities. In the East, Rhode Island never organized its counties, and in numerous other states the township continued in existence as an additional layer of local government. In a few states, other units such as boroughs, towns, and villages exist as subdivisions of counties, sometimes for purposes of local government in rural areas, and sometimes as part of a system of municipal classification. In New England the town is the principal unit of local government, and the county is little more than a judicial district.

Uniformity in the American pattern of local government is more apparent than real in many respects, for although units may be called by the same names their organization, powers, and composition vary widely. Local government is a creature of the state. It derives its existence from the state constitution and state laws, and scarcely any two states have viewed the matter in identical light. Thus in some states, of which Wisconsin, Michigan and California are examples, municipal units are endowed with considerable autonomy and broad powers with respect to both internal organization and range of activities. In other states, such as Tennessee and Indiana, municipal governments must function within the framework of highly restrictive state legislation. Counties, with a few important exceptions, are essentially extensions of state government that provide few opportunities for residents to influence policies and programs by local action. Although residents elect county officers at the polls, the duties and functions of the officers are generally specified in great detail in state law and the legislative power of county boards is in some cases almost non-existent. In a few states, of which Virginia and California are examples, some counties have been authorized to draft their own charters, set up their own organization, and function virtually as enlarged municipal corporations. In Texas, the counties have been authorized to develop home-rule charters, but none has done so in spite of the fact that permissive legislation has been on the books for a number of years.

An essential feature of the American local government pattern is the great number of special districts, of which school districts are by far the most common, some independent of other units and some to a greater or lesser degree dependent on county, township, or municipal units. Some special districts or special authorities are creations of the state and as such are hardly to be classed as local government units even though they may provide local services in particular areas. Some special authorities, such as the Port of New York Authority, owe their existence to inter-state compacts.

Every state and the territories of Alaska and Hawaii and the Commonwealth of Puerto Rico have special districts for one purpose or another apart from operation of schools. The greatest number are to be found in Illinois and California where in each case they number well over a thousand. In many cases they are subject to creation by county boards of supervisors upon petition of electors and after hearing and referendum. They function as governmental units by reason of separate officialdom, independent taxing authority, specifically defined territorial jurisdiction, and similar attributes. They vary in purpose from the abatement of mosquitos and the provision of street lighting to fire and flood control, operation of parks, development of ports and harbors, and operation of public transportation facilities. California has sixteen special districts to provide

and maintain memorial halls, nine to provide police protection, and 206 to provide and operate cemeteries. Nebraska has a considerable number of noxious-weed eradication districts and Wyoming counties may organize predatory animal districts for the eradication of animals that prey upon livestock. Indeed, there is virtually no function of local government that is not in one place or another entrusted to some form of special district or authority apart from the basic structure of county, township, and municipality. It is to be noted, however, that there are no districts or authorities endowed with the powers of general local government. Virtually all units are restricted in the scope of their activities to one or several related functions, although in a few instances--notably those of a number of metropolitan area districts--such functions have been broadly conceived and construed.

Other Local Government Structures

Throughout the United States the structure of local government almost everywhere involves a high degree of jurisdictional overlapping. Almost all cities are in counties; school districts may be coterminous with either or overlap both; cities may be in organized townships as well as in counties; and special districts may overlap cities, counties, and each other geographically. This complexity of structure has given rise to much confusion and inter-jurisdictional conflict, to say nothing

of compounded assessments, tax levies, high administrative costs, and great citizen confusion. The United States is certainly not the only country that has this problem, but in few others is the situation quite so confused.

The Canadian Pattern

Local institutions of self-government in Canada developed much later than in the United States. Indeed, the stimulus for their development came largely from loyalist immigrants from the United States who moved into Upper Canada (Ontario) and the Maritime provinces during and after the American Revolution. Prior to the middle of the nineteenth century such local government as existed was almost everywhere in the hands of crown-appointed justices of the peace who met annually or semi-annually in each county in what had come to be known as "Quarter Sessions." Local freeholders formed what was known as a Grand Jury to appear before the Quarter Sessions to present a statement of expenses, to propose names for appointment to various administrative positions, and to petition the justices for the resolution of any local problems. All authority lay with the justices, however, and the grand jury of free holders had no functions other than to advise and suggest. The first inroads upon this system were made by the towns of Upper Canada (Ontario), some of which secured locally elected councils and control over a few functions of government.

After 1838, when a royal commission reported to the crown its findings with respect to government in the Canadian colonies,¹ there developed a marked change in policy. The development of local institutions of self-government was actively fostered from above, and a considerable period of experimentation followed. Eventually both Upper and Lower Canada (Ontario and Quebec) developed a system of counties whose councils were composed of the heads of the local town, village, and township councils. The township reflected the New England development, but was basically a unit of rural government rather than a jurisdiction involving both urban and rural area as had been the case in the early Massachusetts and Connecticut structure. The pattern is not greatly dissimilar to that prevailing today in Michigan.

The county as a unit of government exists in Canada only in the provinces of Ontario and Quebec.² Elsewhere, experimentation in local government structure has followed an essentially different pattern. After formation of the Confederation in 1867, new provinces were one by one carved from the western territory, and each in its turn undertook to provide itself with a system of local government jurisdictions. In the 1880's Manitoba attempted to organize a county structure similar to

¹ The Durham Report on Government in Canada.

² Cities, and in Quebec, the towns, are separate units distinct from their surrounding counties.

that of Ontario, but owing to sparse population and the difficulty of communication the arrangement was considered unworkable and abandoned. Cities, towns, and villages were retained, and a few years later the creation of a large number of rural municipalities was undertaken. Saskatchewan and Alberta, which were created as provinces a few years later, eventually adopted much the same structure as Manitoba had worked out; but again a considerable period of experimentation ensued before a reasonably satisfactory arrangement emerged.

The Canadian experience in attempting to achieve a satisfactory local government structure would seem to have relevance in Alaska for a number of reasons. First, much of Canada, particularly in the western provinces, is confronted with spacial, climatic, and communication problems very akin to those of Alaska. The same pattern of low population density prevails. Second, there has been more outright experimentation with new and previously untried forms of local government unit in Canada than in any state of the United States. Finally, recent Canadian experiments in metropolitan government structure, particularly in the Toronto area, have attracted considerable attention throughout the United States and have aroused American interest in the general pattern of Canadian local government arrangements.

Examination of Canadian practice today reveals that while certain difficulties of the United States local government

structure have been avoided, many of the same problems prevail in both countries. The absence of counties in western Canada and in the Maritime Provinces has made possible the avoidance of a two-level local structure. The device that has assisted materially in this development is the rural municipality, a jurisdictional unit varying considerably in size from one province to another but which does not include incorporated cities and towns. The rural municipality developed out of a somewhat expanded concept of the township as it had come to exist in Ontario, and in the great prairie provinces out of the checkerboard pattern of the surveyor which provided the early territorial demarcations. Experimentation with the device has involved a continuing search for optimum size, economic, and population bases. The search has resulted in a tendency toward consolidations into larger and larger units.

Jurisdictional overlap has not been completely avoided, however. As in many of the United States, a local pattern of school districts has come to overlay most of the municipal units, both urban and rural. In the western provinces, other types of districts have also been introduced, such as those to provide hospitals and a number of other services. Often neither the districts nor the municipal units are coterminous in any instance, and of course they have separate administrative boards and taxing authority. Thus, the old problem of jurisdictional confusion and duplicatory administrative costs appears once more as it has so often in the United States.

In spite of the use of rural municipalities, much of Canada has no organized local government at all. This is in marked contrast with the United States where almost every square foot of the national territory is within the jurisdiction of some local government unit.³ Over 99 per cent of British Columbia is unorganized territory, and some 25 per cent of the population of the province lives in this unorganized area.⁴ The northern portions of the western provinces generally are so thinly populated that local self-government is not considered feasible, and the police and related functions performed in the area by the Royal Canadian Mounted Police mitigate the need for other forms of governmental activity.

Another aspect of Canadian practice that deserves mention is the existence in the provincial government structure of departments of municipal affairs. These departments exercise varying degrees of control over local financial matters, set standards and conduct examinations for filling certain local offices, provide assistance to local units in matters of planning and zoning, and perform certain functions through so-called development of local improvement districts in unorganized territory. In Saskatchewan the department provides a uniform and

³ There are four unorganized counties in North Dakota, but these are attached to other counties for certain services.

⁴ K. Callard, "The Present System of Local Government in Canada: Some Problems of Status, Area, Population, and Resources," Canadian Journal of Economics and Political Science, May, 1951, p. 208.

centrally organized assessment system for the entire province.

There are some counterparts to the Canadian departments of municipal affairs in a few of the United States. More commonly, some of the functions with which they are concerned are not performed at all in the various states, others are distributed among a variety of state agencies, and still others are performed by certain county administrative and judicial officials.

Opinion varies as to the usefulness of Canada's experimentation in the local government field. One student of the subject has ably set forth a few basic criteria for the establishment of local government units.

. . . Such an organization requires a balance of area, population, resources, and functions. The boundaries of . . . units will depend upon local sentiment, communications, economic interest, and other factors. It would be of little use to create a unit based on local patriotism which would be faced continually with the dilemma of impotence or insolvency. Similarly, to create units satisfactory in themselves, whose situation led them to thwart the activities of neighboring units, would be unsatisfactory.⁵

At the same time, he decries the results of Canada's efforts in much the same terms that have been used by critics of the American local government structure.

In Canada provincial authority in local government has led not to intelligent experimentation and adaptation to local needs, but rather to an immense confusion of units and powers and functions and finances; this is so great that it is almost impossible to understand the entire ramifications of the system of any single province. Individual aspects impinge upon the public:

⁵ Ibid., p. 215.

the burden of taxes, the weakness of particular services, each in relation to the particular municipality; accordingly remedies when sought are ad hoc, concentrating often upon the symptom, not the cause. Organized criticism of the system is next to impossible for few can understand how it works.⁶

It should nevertheless be noted that Canadian effort to create an effective local government structure in rural and in sparsely populated areas is worthy of considerable study. The fact that entirely satisfactory arrangements have not been worked out in any of the Canadian provinces is testimony to the difficulty and complexity of the problems encountered.

Other Local Government Structures

Systems of rural municipalities resembling those of Canadian provinces have been developed in several of the European countries. Generally they function beside but do not overlap incorporated villages, towns, and cities of essentially urban population. It is essential to note, however, the whole concept of the rural municipality assumes a significant rural population engaged in agricultural pursuits, a population that requires the construction of roads, the maintenance of law and order, educational institutions, hospital and health facilities, and some welfare services. A well-developed agricultural economy can support financially a portion, if not all, of the services required. Alaska's problem, and to a considerable extent, that of Canadian provinces, lies precisely in the absence of significant rural population except in very small segments of the total

⁶ Ibid., p. 206.

territory.⁷ The need is not for the creation of a separate local government unit to serve a great number of people who do not live in urban centers, for in most areas such a unit could not support itself owing to the absence of many people.

Another form of local government unit common throughout large portions of the world, including all of Latin America and, under the American flag, Puerto Rico, involves a combination of both urban and rural areas in a single political unit. The arrangement is similar to the New England township in the concept of territory, but differs fundamentally as to size and governmental structure. Generally the municipalities so constituted contain at least one urban center and a large area of land surrounding it. Taken in their total pattern, they cover the entire territory of a state or country. They differ from the southern or western American county in that all local government functions are concentrated in the single unit as a corporate municipality governed by an elected council and a mayor.

The municipality thus conceived has historically never attained much status as a strong unit of local self-government. Reasons for this have their origin in factors not necessarily related to the concepts of territory and population distribution involved. They stem rather from the rigid restrictions

⁷ In Alberta, five municipal districts exceed one million acres in extent and contain fewer than 2,000 persons each.

on taxing authority and on the scope of functions which the municipality is permitted to perform, from the lack of a strong tradition of home rule, and from strict supervision and control by central government agencies that justify their constant intervention in local affairs by reference to the backwardness and lack of political education on the part of local citizens and officials. Such concepts, while common in many parts of the world, are alien to the American culture and are certainly inapplicable in the United States, Alaska, or Canada.

The southern and western American counties might well have developed into combined urban-rural municipal units had they been viewed as corporate entities and had their early organizational structure permitted development of the administrative unity made possible in a few states in recent years by the authorization of county home rule charters. The course of American local governmental development followed quite another pattern, however, but recent steps toward city-county consolidation in Atlanta and Fulton County, Georgia, and in Baton Rouge and East Baton Rouge Parish, Louisiana, involve a considerable advance in the direction of a larger unit of local government containing both urban and outlying non-urban areas.

A major problem of any combination of urban and non-urban areas in a single local governmental unit arises from the need to secure adequate representation of the respective areas and

interests and to distribute the tax burden in proportion to services received. This problem has not been resolved in Latin America, and there has been little attempt to resolve it. However, in the United States the Baton Rouge and East Baton Rouge Parish consolidation in 1947 involved a major step toward solution in that a form of guaranteed representation was provided for the non-urban area and a division of the total jurisdiction into service districts made possible the adjusting of the tax burden to the level and number of services received.

The possibility of a combined urban and non-urban municipal unit amply endowed with legislative power and with full corporate municipal status would seem to offer a number of advantageous possibilities. Provided that the problem of representation can be resolved and a sufficiently flexible service-area tax differential and service charge system can be instituted, it would be possible to avoid completely the need for more than one level of local government in the area while at the same time the territorial scope of the jurisdiction could be made sufficiently broad to achieve many of the objectives that local government reorganizers have striven to achieve by various consolidation measures all over the United States. For the most part, however, movement in this direction is apt to be slow owing to attachments to existing municipal units and the difficulty of tampering with time-honored county structures frequently rigidified in state constitutions that would be most difficult to amend.

Constitutional Studies, Vol. 3

Issues and Trends in Local Government

Problems arising in the local government field throughout the United States are inseparable from the context of the local government pattern as it has evolved in the various states. They will become problems and have meaning in Alaska only if the people of Alaska follow in the footsteps of other states and create a structure that automatically produces the problems. Stated another way, Alaska faces the possibility of buying a full-fledged set of local government difficulties, or, as an alternative, it may take the opportunity of designing a structure aimed at avoiding many of the problems that other jurisdictions are struggling to overcome. The opportunity exists because the basic structure of Alaskan local government is as yet unformed, and Alaskans are free to create what they will, profiting by the mistakes of others, without disturbing a host of deeply-entrenched interests and traditions in the local government field.

The discussion that follows may at points seem irrelevant to the Alaskan scene. The relevancy often lies in the potential of the future more than in the actuality of the present. Points of the discussion assume significance in the context of what it would be well to avoid as demonstrated by the experience of other areas and the trends observable in those areas that are gradually breaking with the past in an effort to arrive at a

more rational and more workable local government structure. Major issues of local government will be discussed one by one, but not necessarily in the order of their importance, for importance varies with the time and circumstances involved.

Jurisdictional Confusion

From the brief description of American local government structure in the preceding section, it should be apparent that the pattern of local government in virtually all states, as well as in Canada, gives great evidence of confusion. Virtually everyone living in an incorporated town or city comes in contact with and pays taxes to no less than three local government units: the city, the county, and a school district. In many areas he also deals with and supports township officials and any number of special districts and authorities. Even the man living on a farm in the country may seldom escape the tax levies of at least a county and a school district. Often he too must secure a number of services from a variety of special districts of one kind or another. Very few people can describe the structure of their home community, and when they go to the polls to vote they are faced with a ballot that comes in several parts or that can only be spread out on a four-by-four foot table. If a person were asked to indicate the duties of all the positions listed on the ballot, he would be at a total loss.

One of the strongest arguments in favor of local government is that it keeps the control of local affairs close to the

people. Yet it is nevertheless true that the great majority of citizens are far more familiar with the federal government and how it operates than they are with their city or their county government. Usually they know more about state government than local government. A consequence of this situation is that in almost every general election the largest number of votes is cast for those running for federal office and the next largest number for those seeking state office. The fewest votes are cast for candidates for local office. This situation would seem to be a direct reflection of the citizen's increasing confusion as he approaches the lower end of his ballot. It probably also reflects an increasing disinterest born of lack of understanding.

The Consolidation Movement

No one interested in effective and economical local government views the overlapping and confusion of local government structure as in any way desirable. Officials themselves are generally in favor of simplification, provided, of course, that someone else's unit is abolished or consolidated. Over the past decade and a half considerable progress has been made in reducing the total number of governmental units at the local level. Most of the reductions have come about as a consequence of school district consolidation; little has been achieved by the effort to bring together different levels of local government into single units. At each level of government there are

strong groups of officials who have a vested interest in opposing consolidation, lest their positions be abolished or their activities subordinated to executive supervision.⁸ Often consolidation can only be brought about through constitutional amendment, and the amending process is extremely difficult in many states. Partly because of the difficulty of establishing consolidated or more comprehensive governmental units necessary to the performance of some functions on a broader basis, the number of special districts other than school districts has been on the increase. Indeed, the number in existence in 1951 (approximately 12,000) represented a 43 per cent increase over a ten year period.⁹

The problem of local governmental overlapping and confusion has been most severe in urban or metropolitan areas, and in such areas it is by no means a new problem. Over a half century ago steps were taken to consolidate certain city governments with those of the counties in which the cities were located. Within a relatively brief span of years consolidations were effected in San Francisco, New York City, Philadelphia, Baltimore, St. Louis, New Orleans, and Denver. The consolidation arrangements varied considerably as to the degree of integration achieved, but in general the result was a single governing body where

⁸ County sheriffs, county assessors, and a number of other officials of an elective status have been among the most vigorous opponents of consolidation.

⁹ Bureau of the Census, Governments in the United States in 1951, State and Local Government Special Studies No. 29, March 1952.

before there had been two and a single set of administrative officials where before two sets had existed. It is not possible to measure the effects of consolidation on the level of governmental services, for too much time elapsed before serious efforts were made to analyze the differences. However, the impact on governmental costs was startling. As was the case with services, efforts to appraise the differences in governmental costs were made years after the consolidations took place, and results were consequently subject to a considerable degree of inaccuracy, even though specific data were available. Nevertheless, indications are that in Denver the costs of carrying on the same governmental services throughout the city-county after consolidation were reduced by approximately one-third.¹⁰ In San Francisco governmental costs dropped from over two and one-half million to less than \$500,000 in the first full year after consolidation.¹¹ In subsequent years, the combined tax rate for San Francisco, based on 100 per cent valuation, remained relatively lower than the combined rates in cities of comparable size when rates were computed on the same valuation basis.¹²

City-county consolidation seemed for a time to point the way to a far more satisfactory local government structure in many urban areas, but the movement lagged shortly after the

¹⁰ National Municipal Review, June, 1940, pp. 383-384.

¹¹ National Municipal Review, March, 1941, p. 154.

¹² Ibid., p. 156.

turn of the century and was not revived with success until after World War II when Baton Rouge and East Baton Rouge Parish, Louisiana, achieved a form of consolidation. More recently, a number of major functions have been consolidated in Atlanta and Fulton County, Georgia. In many other urban centers some form of consolidation has been proposed time and time again, and even specifically authorized in state constitutions,¹³ but it has proved extremely difficult to bring about the change.

One difficulty that has arisen since the first city-county consolidations took place is the gradual expansion of the urban area beyond the boundaries of the consolidated jurisdictions. Neither St. Louis nor San Francisco, for instance, include more than a fraction of the population of their respective metropolitan areas today. It has proved impossible to add additional counties and municipal units to the consolidated jurisdictions owing in large part to the resistance of residents of the outlying areas. Those who pushed through the first consolidations did not foresee how large the population concentrations might become. Increasingly, metropolitan areas have been overlaid with a variety of special service districts in an effort to base major services on a broader area-wide program. A major factor in the increasing confusion of governmental units at the local level is the traditional attachment of people to

¹³ See provision of Pennsylvania Constitution with respect to Pittsburgh and Allegheny County, Article XV, Sec. 4.

local community entities long after they have lost their identity for all but governmental purposes in the stream of urban growth. Often such emotional attachments have proved costly from the standpoint of taxes, inadequate municipal services, high fire insurance rates, and a host of daily inconveniences. They are real, nevertheless, and become more deeply rooted with the passage of time. Frequently they are watered by the antagonisms and animosities of inter-jurisdictional disagreement and competition for tax resources. As a consequence, consolidation and simplification of structure become almost impossible to achieve by local action. It is significant that two of the major consolidation arrangements of recent years, those of Atlanta and Toronto, were accomplished by fiat of the state or provincial legislatures and not by submission of the plan to the local electorates for approval. However, the Baton Rouge consolidation was approved by the voters.

Home Rule versus State Control

Certainly equal in importance to the problem of jurisdictional confusion is the issue of home rule for local units. The issue is applicable with respect to both cities and counties, but by far the greatest effort to achieve home rule has been at the municipal level.

Home rule is not and cannot be absolute. Local units are creatures of the state under any arrangements, and this is equally the case whether the nature of their status and the scope of

their authority is set forth in a state constitution or in acts of the state legislature. Home rule for municipalities may be said to exist if the state permits local units to draft and adopt charters establishing the jurisdiction, powers, and structure of their governments. Some advocates of such local autonomy insist that home rule is of tenuous status unless protected by constitutional provision, and, since 1875, at least seventeen states have made provision in their constitutions for some degree of municipal home rule.¹⁴ In spite of embodiment in the fundamental law of the state, however, home rule authority is necessarily limited by general state law and frequently by narrow judicial interpretation of the limits of local legislative power.¹⁵

Home Rule Provisions

Home rule provisions may be self-executing, or they may require some sort of state legislative action to establish the necessary procedures. In Oklahoma, home rule charters must be approved by the governor after they have been ratified by the local electorate. If the constitutional provision is self-executing, action to prepare and adopt a charter may be initiated by a city without prior state legislative action, and generally the charter becomes effective when ratified by the voters of the city.

¹⁴ Arizona, California, Colorado, Michigan, Minnesota, Missouri, Nebraska, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, Washington, West Virginia, and Wisconsin.

¹⁵ See for instance State ex rel City of Toledo vs. Cooper, 119 NE 253 (1917).

In a number of constitutions, detailed procedures for development and adoption of charters are specified.¹⁶ In others, only the general outline of the procedure is mentioned.¹⁷ A number of states place restrictions on what may be included in a home rule charter, particularly with respect to taxing authority and bonding power.¹⁸ All but seven of the home rule states restrict application of the provision granting municipal autonomy to cities above a certain population.¹⁹

There has not yet been developed a completely satisfactory home rule provision. That of the so-called Model State Constitution has never been adopted in toto, but it is safe to assume that it would be subject to some of the same difficulties that other provisions have encountered under judicial construction and interpretation. The National Municipal League model provision (Section 804) is founded on the experience gained after long years of testing of various state provisions in the courts, and it attempts to strike a happy balance between too broad a generalization in the grant of municipal autonomy and too detailed a listing of municipal powers. Such a balance is important.

¹⁶ Article XI of the Nebraska Constitution and Article XVIII, Section 3 of the Oklahoma Constitution.

¹⁷ Article XI, Section 5 of the Texas Constitution.

¹⁸ Ibid.

¹⁹ Restrictions extend to populations as low as 2,000 and up to 20,000 in provisions with general application.

A general provision simply authorizing municipal units to "exercise all powers of local self-government"²⁰ produced endless litigation in the Ohio courts because of the uncertainty as to what was included by the phrase. On the other hand, any effort to list all the powers intended to be bestowed upon the municipalities is certain to prove fruitless, and any power accidentally omitted is most likely to be construed as denied by implication.²¹ Consequently, it would seem that a middle course is likely to be most satisfactory, that is, a general grant of authority, a list of major powers, and a statement to the effect that the enumeration should not be deemed to restrict the general grant. The Model State Constitution provision meets this requirement, although the listing of powers would seem to be somewhat excessive in their detail and statement of purpose.

Many state constitutions limit the grant of home rule authority by requiring that both charters and ordinances enacted thereunder be consistent not only with the state constitution but also with general state law. Concomitantly, the state legislature is prohibited from enacting special legislation pertaining to individual municipalities or to a variety of matters considered to be of an essentially local character.²²

²⁰ Article XVIII, Sections 3 and 7 of the Ohio Constitution.

²¹ State ex rel Cherrington v. Huntsinpillar, 112 Ohio St. 468.

²² See, for instance, Article III, Section 18, Constitution of Nebraska, and Article V, Section 46, Constitution of Oklahoma.

Colorado has adopted quite a different approach to the grant of local autonomy. Article XX, Section 6, of that state's constitution, in referring to municipal charters, specifies that:

Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

If interpreted as both the letter and the context imply, this provision would result in nullification of state law at the municipal level. Judicial precedent, in Colorado and elsewhere, nevertheless runs strongly in the direction of upholding the authority of the state and its legislature in all matters of general state concern, of interpreting broadly what is of general state concern, and of viewing narrowly what is of purely local import. The key to the extent of home rule authority is held by the judiciary in any state. Much also depends on the general acceptance of the concept and a mutual understanding of its limits by both state and local officials. If there is general agreement as to the desirability of local government autonomy, and, as a consequence, a suitable exercise of restraint on the part of the state legislature in local matters, the system can work smoothly without a high degree of constitutional specificity, as has been the case generally in Wisconsin.

If, on the other hand, home rule becomes the issue of a struggle between the state legislature and the municipalities, there can be little doubt of the outcome. Home rule will become a concept with little meaning.

If home rule is to be adopted, it is desirable that the constitutional provision relating to it be made self-executing. Otherwise, the provision may lie dormant for years, as has been the case in Pennsylvania. In the constitution of that state the legislature is authorized to enact a home rule statute, but it has never done so.²³

Alternatives to Home Rule

The issue of home rule is basically not a question to be answered with a "yes" or a "no." There is local self-government in every state of the union, to say nothing of most of the rest of the world. The issue is rather a question of how much autonomy local units should have in (1) determining the form of their local government and (2) exercising legislative authority within the area of their jurisdictions. A secondary issue to which far too much attention has been devoted is whether or not the extent of the autonomy decided upon should be made the subject of a constitutional provision in order to guarantee its enforceability.

State Classifications and Standards. Virtually all states have some system of municipal classification, and Washington, at least, has an elaborate system of county classification. Such classifications have been developed to identify for legal purposes local government units, specify local government structure, and provide a basis for offering local units a

²³ Article XV, Section 1, Constitution of Pennsylvania.

range of governmental authority. Units with fewer people invariably have less freedom in determining structure and exercising authority than do units with larger populations. In a great many cases constitutional or statutory debt limitations are established for each class of municipality, and similarly property tax rate limits are often specified. In theory, at least, the state assumes a sort of guardianship over its municipal units, looks after them in considerable detail when they are small, and allows them greater freedom to solve their own problems and to get in and out of trouble as they grow larger.

Optional Charters. A good number of years ago, New York devised what has come to be known as the optional charter plan. By this plan, the state legislature drew up model charters for its municipalities, the charters differing as to the form of municipal governmental structure. The local units were then permitted to adopt by selection and referendum one or another of the approved charters. Other states have followed somewhat similar practice, not always by providing sets of complete charters, but by indicating what must and what may be included in charters at the various levels of the municipal classification plan. Such arrangements have never been entirely satisfactory, for it is difficult to devise any particular charter that will meet the needs of all municipalities of a particular size.²⁴ Even with options, some local units have found their

²⁴ A plan of completely uniform charters for all or for the various classes of municipalities is no longer in use in any state.

needs not satisfactorily met. In many states, including several that have constitutional home rule provisions, the smaller units are not permitted charters, but instead the form of government to go into effect upon incorporation is specified in general state law.

Legislative Charters. At one time the majority of states granted individual municipal charters by a special legislative act in each case. Some half dozen states still follow this plan, but it is generally considered to be highly unsatisfactory. It involves state legislatures in a great amount of detailed local legislation because charter amendments are forever being proposed. One difficulty has been that legislatures using this system have shown a proneness to enact local charters in excessive detail, thereby guaranteeing a constant need for revision. More basic is the fact that in practice decisions on local problems are removed from both the electorate concerned and from the state legislature as a whole. Individual legislators, more often representative of a hostile county constituency than of the cities involved, become the arbiters of municipal affairs. A recent description of Florida practice is pertinent.

Local bills still provided the usual method of creating new cities or amending existing city charters. The sheer number of such acts made it impossible for the Legislature as a whole to consider the bills. Consequently, the local bill calendar developed. Passage of local matters in each house was automatic if approved

by the district senator or local representative delegation, as the case might be. Debate ensued only if the House delegation from that county was divided as to the merits of a local bill.²⁵

An arrangement such as this, which is still the practice in Florida and a number of other states, can be considered neither self-government nor good government.

Local acts other than those establishing municipalities and granting or amending their charters are still permitted in some states, principally the few that still follow the practice of granting individual legislative charters. However, seven-eighths of the states have prohibited or greatly restricted the enactment by the legislature of local bills relating to municipal or local government matters. Such prohibitions and restrictions have not always been effective; and some states, of which Indiana is a notable example, have set up such complex systems of jurisdictional classification that acts of the legislature applying to one class of municipality or local unit frequently apply only to a single jurisdiction. This perversion of the classification process serves to retain for the state legislature the same city-by-city control that would exist were there no classification system and no restraints upon legislative enactment of local bills.

The Trend Toward Home Rule

There has been a clear trend in recent years in the direction of greater home rule authority for local government

²⁵ Manning J. Dauer and William C. Havard, The Florida Constitution of 1885--A Critique (Gainesville: Public Administration Clearing Service, University of Florida, 1955), p. 63.

units. The initial movement made greatest headway in the years just preceding and after the first world war. Then a number of years elapsed in which only two states, Utah (1932) and West Virginia (1936), took significant steps toward greater freedom for local units by constitutional provision. Within the past six years, however, Georgia, Illinois, and New Jersey have each so amended their constitutions as to permit some exercise of home rule authority. It is still true, however, that the majority of states do not have constitutional home rule provisions. Most states attempt to regulate local government affairs by general acts in accordance with which individual units exercise varying degrees of legislative authority and control over structure and internal organization.

Form of Local Government. Probably the most important single achievement of the home rule movement has been its success in obtaining for municipalities freedom to determine their own form of government. While such freedom may exist without constitutional protection, there can be little doubt that municipal reorganization and reform have been closely associated with the constitutional grant of self-government powers to local units. Likewise, while courts have whittled away at the legislative powers of local governments in spite of constitutional home rule provisions, they have strongly upheld the rights of municipalities to determine their own internal organizational structure.

Exercise of Legislative Authority. Experience has demonstrated that however broad the constitutional grant of legislative authority to local units, in case of conflict general state laws will prevail. If the state has not acted with respect to a particular subject, however, local ordinances will frequently stand on the basis of a constitutional grant. This is extremely important, particularly in a developing community where numerous matters will become of state-wide importance only after the passage of many years. Without home rule, and in the absence of specific legislative authorization, any new or unusual exercise of authority by municipal units is almost certain to be challenged in the courts and more likely than not held illegal. The grant of adequate home rule authority may therefore prevent the development of legal vacuums -- areas of governmental activity in which the local unit has no authority to enter and in which the state is not yet prepared to enter on a general basis. This consideration clearly supports the desirability of a home rule provision in state constitutions.

County Home Rule

Several states have made constitutional provision for county home rule, and a number of others permit counties to select their own form of government with some degree of freedom. Relatively few counties, however, have taken advantage of home rule provisions in any of the states. Although there are over 3,000 counties in the United States, the number operating under home rule charters is fewer than 100.

The application of home rule to counties involves a number of factors quite apart from the question of whether people in county units should be permitted to manage their own local governmental affairs. One of those factors is the fact that many of the so-called local affairs traditionally entrusted to county governments have been generally considered state functions. Another factor is that in most states county government is not a corporate entity with its own legal personality. It consists rather of a group of so-called "row officers" whose positions and duties have been created by the state constitution and state law, who act quite independently of each other, and who are county officials only in the sense that their jurisdiction or authority extends throughout an area known as a county and they were selected for office by the electorate of that area. In addition the usual county always possesses a quasi-legislative body or board composed of elected commissioners or supervisors, representatives of townships and cities, or, as in South Carolina, members of the state legislative delegation. Such boards possess some functions and powers similar to those of municipal councils, but they are not the governing bodies of integrated governmental units. Rather, they are responsible for the performance of certain functions assigned them by state laws, such as the construction of rural roads, the provision of relief, and the operation of certain types of homes and hospitals for the indigent and infirm. They do not possess general governmental powers, and usually they may not undertake new

functions unless specifically authorized by the state legislature to do so. They generally have no authority over the various independent, elected officials of the county.

Still a third factor of importance to the home rule issue is the presence in every county of one or more municipal units which may in themselves be endowed with broad home rule powers. The exercise of similar powers in the same area may obviously lead to considerable confusion.

The provision of county home rule automatically brings about basic changes in the nature of the county. It makes the county a corporate entity responsible not to the state government but to the citizens who reside in the area which it comprises. In one sense, it converts certain state functions into local government functions. Under home rule provisions, the county is usually required to perform the functions that have always been performed by county officials, but the reorganized unit is permitted to determine in its charter and by its legislative action how such functions will be performed and by whom. The county ceases to be a peculiarly constituted administrative district of the state government and becomes instead a municipal corporation to which the state delegates not only authority but specific responsibilities.

The Need for County Reorganization. Because of the increasing urbanization of the nation and because of the generally greater role that government has come to play in all phases of

social and economic activity, more and more functions have been entrusted to county boards and officials in recent years. County boards have been given many ministerial functions in the creation of special districts and in approving their tax levies. In many states they exercise control or at least supervision over the financial affairs of school districts, particularly with regard to capital outlay and issuance of bonds. Increasingly county boards have been authorized to provide a considerable variety of new services, ranging from basic utilities to library and recreation services, airport operation, and agricultural and economic development. In the performance of many of these newer functions, county boards exercise quasi-corporate powers and in so doing have subjected themselves to treatment as a municipal corporation in the eyes of the courts. Various governmental experts have pointed out that the county is in many areas an obsolescent governmental unit, but such an observation is not based on the belief that the county is of declining importance. It stems rather from the fact that county structure, both in administrative organization and area of jurisdiction, is ill-suited to effective performance of the many duties thrust upon it by state legislation.

In recognition of the growing obsolescence of the county in this sense, the home rule movement has provided one means of reorganizing the county and revitalizing it. Advocates

assert that if the county must perform the functions of an enlarged municipality, it should be organized to do so effectively and should be made responsible to the people it serves. Consequently, in those states where county charters have been permitted either by constitutional home rule provisions or legislative act, changes that have come about have generally included the creation of a chief executive for the county, whether elected or appointed by the board, and the assignment to him of responsibility for directing and supervising the administrative affairs of most county agencies.²⁶

Home Rule As An Expedient. There can be little doubt that the detailed specification of a group of virtually independent elective county offices in the state constitution has, over the years, provided an unsatisfactory basis for county government.²⁷ It has provided no assurance of competence in the

²⁶ Such arrangements are common in California's home rule counties, and they have come into use in Maryland, New York, North Carolina, South Carolina (Charleston), and Virginia. Fulton County, Georgia, has followed this plan. It involves the extension of the city manager plan to county government.

²⁷ A typical provision is that of Article XIV, Section 8, Constitution of Colorado, which reads in part.

There shall be elected in each county, at the same time at which members of the general assembly are elected, . . . one county clerk, who shall be ex officio recorder of deeds and clerk of the board of county commissioners; one sheriff; one coroner; one treasurer who shall be collector of taxes; one county superintendent of schools; one county surveyor; one county assessor; and one county attorney who may be elected, or appointed, as shall be provided by law

performance of the various functions, and it has provided no adequate basis for good local government organization. Similarly, the detailed constitutional specification of county boundaries has, where used, placed local jurisdictions in a rigid straitjacket that has served little useful purpose.²⁸ These difficulties have generally been recognized in the process of recent constitutional revision and in the drafting of new constitutions.²⁹ They have been recognized time and again in specific constitutional articles granting permission to change the traditional pattern in a great number of cases. Where the voters of a county are permitted to draft and adopt

²⁸ Article XVII, Section 8, of the Oklahoma Constitution devotes some 11,000 words to describing the boundary of every county in Oklahoma.

²⁹ Article VI of the Missouri Constitution of 1945, in addition to providing for county home rule for the more populous counties (85,000 or more inhabitants), avoided naming any administrative officers of county government. The Hawaiian Constitution makes no mention of county administrative officers, but authorizes all local units to frame and adopt charters in accordance with procedures prescribed by law. The New Jersey Constitution (Article VII, Section 2) mentions only a county clerk, a sheriff, and surrogate. Pertinent is a 1944 amendment to the Oregon Constitution, Article VI, Section 9a, which reads as follows:

Whenever the legislative assembly of the State of Oregon shall provide by law the means and method therefor, the legal voters of any county in this state by majority vote of such electors who shall vote thereon at any legally called election, hereby are authorized to adopt a county manager form of government, and thereupon any and all of the county offices, whether the same shall be provided for by the constitution or otherwise provided for by law, may be abolished and their powers and duties vested in an elective commission and a county manager elected or appointed in the manner provided by law.

their own charter for county government, the difficulties of previous arrangements have been and are being avoided.

County home rule, however, while making possible more effective administrative organization, does not in itself solve the problem of too many layers of government. It does not necessarily assist in reducing the number of competitive local jurisdictions and special districts in urban areas. These difficulties will persist unless the voters of the county through the exercise of home rule powers abandon some of their units and centralize local government authority in the larger area-wide government. Had county home rule been emphasized years ago rather than its municipal counterpart, many of the complexities of present-day local government organization might easily have been avoided, for a self-governing county could have undertaken many of the functions and provided many of the services that were available only through municipal incorporation. The county today, sandwiched in between an expanding state administrative organization and expanding municipal structures has seemed to many an anachronistic institution in spite of the increased demands upon it for services. Until such time as a more rational local government pattern emerges, however, there is good reason to endow the county with corporate unity and effective organization which will permit it to function efficiently as a true unit of local self-government.

Local Government Finance

Basic to all aspects of the local government problem is the issue of what financial resources should be made available to local units, whether they be cities, counties, districts, or a combination of all three. No governmental unit can function for long without funds.

The problems involved in local government finance include several major facets. These may be stated as questions:

1. What should be the tax base of local units?
2. What limitations should the state impose on local units with respect to level of taxation, debt, and bonding power?
3. To what extent should the state impose standards and procedures on local units with respect to financial matters?

All of these matters have been made the subject of constitutional provision in a good many states. They are an issue of provincial-local relations in Canada, and they claim the most attention of state or national officials concerned with local government in other parts of the world.

Tax Base

Within the framework of home rule provisions for local governments, such units would seem to enjoy considerable taxing freedom. This is not necessarily the case, however, for general state law can and frequently does restrict severely the taxing powers of local units. Where home rule is not in use, local units have only those taxing powers permitted them by state law or by such charters as they may be permitted to draft or

may receive from the state legislatures. It is no understatement to say that throughout the United States most counties and municipalities have long been scraping the bottom of the tax resource barrel. In the face of ever-increasing service demands and mounting construction and administrative costs, few cities are amply supplied with revenue. New sources are everywhere being sought.

A major difficulty for local governments in their search for adequate revenues is the virtual preemption of the most lucrative tax fields by the states and federal government. About all that many municipalities have left to them is the property tax, which has always been their principal source, and a few business license taxes and fees. Counties are in no better shape. As a consequence, legislatures have been increasingly bombarded with requests to liberalize local government taxing powers. At the same time, they are also asked to make available to local units some portion of the state's revenues through grants, shared taxes, and state assumption of various local government functions.

There can be little doubt that state support for many local government activities is essential under any conceivable breakdown of tax sources. This need arises from the desirability, long recognized, of achieving a balance between needs and resources throughout the state. Children must be educated, for instance, wherever they reside and whether or not the local government unit can with its own resources provide an adequate

educational program. In the same manner, many health and welfare functions are essentially shared functions in which both the state and the local community participate, not on the basis of equality but on the basis of need as determined by state-wide standards. Road construction provides another example.

With respect to functions which are not shared, however, the state has no obligation to provide support. Nevertheless, state governments are increasingly asked to provide funds to local units for general government purposes, and a number of states have worked out arrangements to divide some portions of state taxes with cities, counties, or townships.³⁰ Canadian provinces have developed an arrangement whereby local units receive a "block grant" for general purposes in addition to a variety of special purpose grants. A number of European countries make use of the "block grant" extensively.

State support of local general government services as well as support for shared services may become a standard arrangement in the years to come. There are definite disadvantages, however, not the least of which is that it encourages a degree of local irresponsibility in financial matters by fostering the fallacy that somebody else is paying for local services. Administrative arrangements involving complex distribution formulas frequently become necessary, and if state appropriations are not made far in advance--and they generally are not--local budgeting becomes difficult and uncertain.

³⁰ Florida divides a tobacco tax with local units, Wisconsin shares the state income tax and Michigan shares the state sales tax with townships. In all cases cited, the state collects the tax and redistributes the proceeds. This arrangement is to be distinguished from that in which both state and local units ~~levy~~ ~~quite~~ ~~independently~~ ~~against~~ ~~the~~ ~~same~~ ~~source~~.

The need for state support can be minimized by not restricting local units to one or two tax sources. Indeed, several states, notably Pennsylvania, California, and Ohio, have by legislative process reached the position where they allow municipalities to tax about what they please. As a consequence, in Pennsylvania and Ohio municipal income taxes have become common and highly productive. In California, as well as a number of other states, local units have been able to increase sharply their revenues by means of the sales tax.

It may well be pointed out that the authority to tax one's self is seldom a dangerous authority. It is likely that the legislature will have just as effective control and fewer troublesome local taxation problems to face if it allows local units to tax all that is not prohibited by law rather than restricting them to only those taxes specifically authorized by law.

Home rule provisions may not in themselves guarantee free taxing authority to local units. Much depends on judicial interpretation of any home rule clause in a constitution. There prevails in most states the doctrine of preemption. In essence, this doctrine provides that the state by levying a particular kind of tax preempts that revenue source, and local units may not use it unless specifically authorized to do so. Under home rule provisions with free taxing power, local units would be permitted to tax only in the fields which the state was not using. This difficulty may be avoided by legislation, and

there is little to justify dealing with the subject by constitutional provision.

Constitutional Limitations

The traditional tax base of local governments, both city and county, throughout the United States is the real and personal property tax. It is the tax base of school districts and many special purpose districts. In times long past it was a principal source of state revenue, but most states have largely abandoned it to the municipalities and other local units.

Property taxation involves two essential elements: an assessment of the value of the property, and a determination of the rate of the levy. The combination of these two elements, plus such exemptions as may be allowed, determines the tax yield.

The manner of assessment has received little or no attention in state constitutions, although it is in many respects the more important of the two basic elements. Constitutions frequently provide, however, for the election of a county assessor and thereby make almost certain that a highly technical function will be performed by an amateur who will in all likelihood be defeated for reelection if he performs his duties effectively and honestly.³¹

Rate Limitations. Almost half the state constitutions set tax rate limitation on municipal units and nearly as many place similar limitations on the counties. A few others specify that the legislature shall fix rate limits. The limits are usually

³¹ See comments of Austin F. Macdonald, American State Government and Administration (4th Ed.) (New York: Crowell, 1950), p. 408.

stated as a percentage of assessed valuation, and thereby is introduced a variable factor subject to considerable manipulation. Many a city has faced revenue starvation at the hands of an unsympathetic elected county assessor interested only in keeping the valuations down at the behest of his rural constituents.

A half dozen states specify in their constitutions that tax rates must be uniform, or that taxes in general must be uniform upon the same class of subjects. Such a provision serves little purpose inasmuch as the "due process" clause of state and federal constitutions (an almost universal Bill of Rights provision) provides ample protection against discriminatory taxation. Indeed, a uniformity provision might conceivably be construed to prevent a local jurisdiction setting up tax rate differentials for different service zones or areas, a device that may have considerable merit and should not be constitutionally precluded.

Exemptions. Many states have provided either constitutionally or by statute for various types of real property tax exemptions. The subject is discussed here because it constitutes one of the major problems of local government finance. In some states and cities the amount of real property covered by one or another type of exemption has reached fantastic proportions.³² In Florida, any head of a family owning and residing

³² Government exemptions and a few miscellaneous other exemptions in New York City in 1947-1948 are estimated to have totalled \$5.5 billion. W. Brooke Graves, American State Government (New York: Heath, 1953), p. 528.

on a piece of property used only as a single family residence may "homestead" the property and thereby receive a tax exemption on the first \$5,000 of assessed valuation.³³ In some states, homestead exemptions are complete and without limitation; in others they are limited as to specific amounts of valuation and/or acreage of land. Some states have no homestead exemptions at all.

Certain property other than homesteaded property is commonly exempted. Such property includes that owned by churches and charitable institutions and used for religious or charitable purposes, property used for educational purposes, and property owned by governmental units. All of these matters may be handled quite adequately by legislation, although interested groups are prone to seek the somewhat greater protection of constitutional provision.

There is almost unanimous agreement among government and taxation experts that property tax exemptions of any sort are a plague and an abomination. They create administrative problems, often undermine the validity and equity of assessments, and serve to pass a heavier tax burden to those who for one reason or another do not qualify for exemptions. Nevertheless, certain exemptions are inevitable. With very minor exceptions, governmental units do not tax each other, and the state and its political subdivisions cannot tax federal property should

³³ Article XII, Section 7, Constitution of Florida.

they wish to do so.³⁴ The various homestead exemptions are perhaps the most troublesome for local units, for in certain types of communities they may serve to undermine almost completely the property tax base and force resort to other less satisfactory tax levies. The issue is, of course, one of public policy and, as such, falls properly within the scope of legislative power. There is no justification, other than interest group pressure, for inclusion of a homestead exemption provision in a constitution.

Debt Limitations. Only eleven states prescribe no form of debt limitation on municipalities, and an even fewer number have avoided placing some sort of restriction on county and school district debts. The most common form of limitation is a provision that debt may not exceed some percentage of total assessed valuation. Some states break the limitation down on the basis of a certain percentage for each of a number of bonding purposes, such as street construction, water works, sewage, etc. Other possible limitations include specification of debt retirement periods, maximum interest that can be paid, prohibitions against bonding for various purposes, and, rather common, requirements of voter approval, sometimes by more than the usual majority.

There are two major considerations with respect to constitutionally restricting the bonding power of local governments. First, there is a considerable history of default by municipal and county units on bond issues. There are jurisdictions which

³⁴ McCulloch v. Maryland, 4 Wheat. 316 (1819); Clallam County v. United States, 263 U. S. 341 (1923).

are still in default on bonds issued prior to the great depression of the 1930's. Local governments, more commonly than states, have demonstrated a tendency to over-extend themselves for various types of local improvement, particularly in periods of high economic activity and prosperity. As units of local government, cities and counties, school districts, and other types of jurisdiction are state instrumentalities in a sense and states are assumed to have at least a moral and in some states a legal responsibility for their financial solvency. Consequently, there is justification for some exercise of state control over the incurring of local indebtedness.

Second, constitutional limitations on local indebtedness are a poor substitute for forms of control that are more flexible, that may be exercised in accordance with the circumstances of the particular community, and that are more difficult to evade. Even statutory percentage limitations on indebtedness are found to work hardships on local units with considerable frequency. At least in part because of constitutional and statutory limitations, resort has been had to various types of special service and improvement districts whose bonding power is not limited as is that of regular governmental units.

Local governments frequently need assistance of a technical nature in matters of indebtedness, in determining the size of bond issues, in scheduling bond retirement, and particularly in marketing the bonds. A state can provide such assistance and at the same time exercise a degree of supervision that is

flexible in its application and cooperative in its effect. This has been recognized by a number of states that have established state agencies to work with municipalities and perform the necessary functions of administrative supervision and control. In some states, supervision is vested in a state tax commission. New Jersey, North Carolina, Pennsylvania, and New York have established agencies, bureaus, or commissions to deal with local government problems in a manner suggestive of the functions of the departments of municipal affairs found in every Canadian province. Among the functions of some of these units is that of taking over and conducting the financial affairs of those local government units that find themselves in financial difficulties.

The arrangements just cited are suggestive of the fact that adequate state supervision of local government finances can be achieved quite satisfactorily by a combination of general legislation setting flexible standards and administrative application of the standards. By the use of such arrangements, the need for inflexible and arbitrary constitutional limitations can be avoided.

Standards and Procedures in Financial Matters

Apart from such standards as may be utilized for control over local government taxation and indebtedness, there arises the question of constitutionally requiring local units to prepare and adopt annual budgets, to render financial reports, and to submit to an examination of their accounts by qualified auditors.

These are minimum standards of good administration for any jurisdiction, are unlikely to be considered controversial, and are sufficiently basic to be required of all governmental units. Modern constitutions generally provide for budgeting and auditing functions at the state level and it is equally important that these elements apply to local government also. No attempt should be made in a constitution to indicate forms and procedures, however; such matters are properly left to the discretion of the legislature in order that differing needs and experience may be reflected in statutory requirements.

An Approach to the Problems of Local Government in Alaska

The foregoing pages recounting the patterns, trends, and problems of local government organization in the United States and elsewhere, as appropriate, suggest a variety of alternatives that the Alaska Constitutional Convention may wish to consider. It is appropriate at this point to summarize the many difficulties and problems that have been mentioned and the opinions and trends concerning possible solutions.

With respect to the structure of local government within the larger jurisdiction of the state, the following points are pertinent:

1. There is a great excess of jurisdictional units and layers of local government throughout the United States, and a similar problem prevails in Canada although to a lesser degree.
2. Many municipal units are too small to meet adequately the needs of modern local government, and as urban regions have expanded it has not been possible for municipal jurisdictions to expand their territory proportionately.

3. While municipal units or clusters of municipal units tend to comprise economic and social communities, many counties are quite artificial in this respect and do not constitute satisfactory jurisdictional entities.

4. In many regions there are too many counties in view of modern methods of communication and transportation, but while consolidation is frequently advocated, it has been most difficult to bring about.

5. Efforts to bring order out of the chaos of local government jurisdictional patterns have generally involved attempts to consolidate city and county government and to combine smaller units to make larger units. It has been difficult to bring about such changes, but where achieved it has improved services and reduced costs.

With respect to the powers of local units, the following points are significant:

1. There has been a long and persistent trend away from rigid and detailed control of municipal government by state legislatures. Most states constitutionally prohibit the passage of special acts relating to local government and permit a considerable measure of home rule either by constitutional guarantee or by legislative authorization within the framework of a municipal classification plan.

2. Home rule has provided considerable freedom for local units in the determination of the form of government as between such possibilities as mayor-council, councilmanic, and city-manager systems.

3. Home rule has provided considerably less freedom in the exercise of governmental powers than in the determination of governmental form. General state laws usually prevail when in conflict with local ordinances, and the home rule legislative power has been construed rather narrowly by the courts. Generally, however, home rule cities have somewhat more freedom than do those which function under general statute specifying their legislative authority.

4. County home rule has developed much more slowly than municipal home rule. Where in use, however, it has enabled counties to reorganize in bringing about governmental unity, to eliminate numbers of independent and uncoordinated offices, and to create an effective and unified county executive under a single head.

With respect to the financial relationships between state and local governments, the following points are significant:

1. Constitutionally imposed tax and debt limitations have proved to be unnecessarily rigid and inflexible means of supervising the financial affairs of local units, and have often proved a serious handicap in meeting the needs for local services. Nevertheless a number of states have assumed some degree of financial responsibility for their subordinate jurisdictions, and it is generally recognized that all the people of any state have an interest in the solvency of the state's subordinate units. In other words, the issue is one of general rather than purely local concern.
2. Local governments generally, both in the United States and elsewhere, face the difficult problem of rising costs and increased service demands on the one hand and shrinking tax bases on the other. The shrinking tax base has been due in many cases to preemption of more and more taxing fields by the state and federal governments.
3. To satisfy their needs for increased revenues, local units have increasingly sought broader taxing powers, including the authority to tax many of the same sources used by state and federal governments. At the same time, they have sought increasingly to obtain subsidies from state governments in the form of grants-in-aid, shared taxes, and assumption by the state of more local services.
4. There is a clearly discernible trend in many states to grant very broad taxing powers to local units as an alternative to larger state grants for local functions.
5. Assessment, as one element of determining the property tax base for local units, is a major problem in most states; and this is due in no small measure to lack of uniformity in assessment, inadequate assessment standards, and lack of trained or experienced personnel in local units. Constitutional designation of the position of elective county assessor has been a major contributing cause in all these difficulties.

Alaska's Opportunity

The approach to local government that considers only traditional structures, forms, and powers would seem to offer little hope of solving many of the problems that characterize this entire field of government. Two pertinent questions need to be raised and answered whenever the issues are considered, and these questions have a particular relevance in Alaska where a new state is being formed, local government is only developed to a limited extent, and where many functions of an essentially local nature have long been performed by agencies of the federal government which will no longer perform them once statehood is achieved. These questions are:

1. What functions should be regarded as state functions and what functions should be entrusted to local units?
2. How can local units be formed which will reflect recognition of natural geographic, economic, and social communities as distinct from chance, whim, and mathematical preciseness that bears no relation to other factors?

The Problem of Functions

Throughout the United States, certain functions of government are traditionally local, others are traditionally state, and a number are mixed or jointly performed. Thus, state governments generally administer and enforce fish and game laws, register corporations, conduct agricultural experimentation, administer unemployment compensation and employment services, perform agricultural inspections, operate the National Guard, inspect mines, and operate a number of types of institutions such as universities, teachers' colleges, mental institutions,

and prisons. Local units, on the other hand, pave city streets, put out fires, operate water and sewerage systems, collect garbage and refuse, put in sidewalks, enact and enforce zoning systems, and exercise a number of regulatory functions with respect to local business activity, traffic, transportation facilities, and other matters. Many of the major governmental activities fall in the category of shared services, that is, they are performed separately or jointly by both state and local government units. These activities include the operation of schools, construction of highways, enforcement of the law, provision of health and welfare services, conduct of elections, and administration of justice through a system of courts. In a number of state-local functions the federal government also participates, and in one function, at least, housing, the activity may be conducted jointly by federal and local governments without state intervention.

In general, the state performs those functions that require state-wide uniformity in their application, that involve great cost, or that have no particular relationship to any given locality. In theory, at least, those functions which are performed jointly by state and local units are those in which the state has a general interest but in which local units also have a sufficient interest to justify financial support and administrative modification to meet local needs and circumstances.

The county, conceived as an administrative unit of the state, is in many states the chief unit for performance of the so-called shared functions. Only as the county moves over into the proprietary field to perform functions on its own initiative and which are not required by the state does it become a true governmental unit in the local sense and takes on the aspects of a broader-jurisdiction municipality.³⁵ It is the dual capacity and status of the county that has rendered it such a peculiar institution and caused great confusion as to its proper role. The trend has long been in the direction of considering the county an autonomous unit of local self-government, however, and it is so considered for purposes of this discussion.

There are ample reasons why state governments should continue to perform some functions exclusively, why local units should do likewise, and why some functions should be shared. Any simplification of local government structure, however, necessarily involves a reexamination of the distribution of functions between the two major governmental levels. There is nothing inherently distinctive to permit separate designation of state and local government functions. All are state functions in the sense that authority for their performance

³⁵ The Supreme Court of Georgia once stated that the county was created by the state of its own volition "without the particular solicitation, assent, or concurrent action of the people who inhabit it; a local organization which, for the purpose of civil administration, is invested with certain functions of corporate existence." (Hammon v. Clark, 71 S.E. 497 [1911]).

derives from a state constitution. The constitution provides an allocation of authority as between two or more sets of constitutionally authorized governmental officers. However, the issues of distribution of functions will change from time to time and will necessarily be matters for legislative rather than constitutional consideration.

By constitutionally designating local government offices, as has been the practice for many years with respect to numerous county positions, constitution framers automatically make a distribution of functions which they may or may not intend. By designating a county sheriff, they assign state police functions to a particular level of government; by designating a county assessor, they determine that assessment shall be a state function locally performed; by designating a county judge, they imply a particular type of judicial organization. Experience has demonstrated that this indirect assignment of functions as between state and local levels of government is apt to become a problem in future years. The question arises as to whether these officials are state officials or local officials, whether the function is a state function or a local function. The courts have generally considered both functions and the officials so designated to perform them as belonging to the state, but constitutional county home rule amendments and revisions have altered the picture decidedly.³⁶

³⁶ See for instance home rule provisions of the California Constitution.

It is well to remember that the designation of judicial positions is of fundamental importance in relation to the judicial article of the constitution. It should be noted that property assessment has in a number of states come under closer and closer state supervision, that in Puerto Rico it is exclusively a Commonwealth function, that it is a provincial function in Saskatchewan, and that it comes very close to being an exclusively state function in Ohio. Similarly, in a number of states, the sheriff as a law enforcement officer is becoming less and less important as state police and municipal police have been developed to minimize the county as a law enforcement unit. In each of these cases, the trend has been due in no small part to modern-day recognition of the technical complexity of the work involved in these functions and the unavailability of the necessary skills and modern mechanical equipment in many local units, plus the need for uniformity in the maintenance of performance standards. Major considerations are those of ability to support a particular activity, availability of qualified personnel, lower administrative cost, and special problems of particular areas. The need for flexibility in this area is great, and the less said about the subject in a constitution, the less likely will be the need for later amendment to correct a provision that proved unworkable.

The Formation of Local Units

Determination of the general pattern of local government is an essential function of the state government. Authority to create local units or to provide a system for their creation is appropriately vested in the legislature, and it is so vested in every state of the American Union. In Canada, the authority resides in the provincial legislatures, although in some provinces a rather more liberal delegation of the authority to provincial administrative agencies has taken place than is common in the United States. Many state constitutions provide that the legislature shall by general law establish the procedures for municipal incorporation, and legislative incorporation of individual units at the municipal level is prohibited.

The question facing Alaska, however, is not how the formation of local units should take place in a procedural sense, but it is rather one of what kind or kinds of local units should be recognized. Most state constitutions give recognition to an already existing local structure, either by specific provision or by inference and reference. Alaska could conceivably go no further in its constitution than to acknowledge the existence of municipalities, thereby leaving all but a small portion of the territory of the state unorganized for local government purposes. Other districts, such as the recording districts and the so-called judicial divisions, are not units of local government but merely defined areas for administration of federal or territorial functions. One exception is the

public utility districts and another is the school districts, these being local government units for performance of certain functions. Like the municipalities, however, neither the public utility districts nor the school districts as now constituted provide a basic system of local government structure outside of but a small area. Relationships among these units in some areas have already given rise to interjurisdictional conflicts which suggest the inadequacy of present arrangements.

It is important to note that when statehood is achieved and federal administration of local affairs is terminated, a number of functions will be thrust upon the new state which are largely of a local nature. These functions include most of those now performed by the various United States commissioners. They may eventually include a number of those performed by the Indian Service. Unless the new state is to administer all such functions centrally for most of the area of Alaska, some arrangements must be made for their performance by local units.

Alaska's opportunity lies in boldly recognizing that units of local self-government can prove satisfactory in the long run only if such units are based on natural geographic, economic, and social communities large enough to meet the service needs of the natural regions, and endowed with sufficient resources to support adequately a minimum standard and level of necessary services. Similarly, by recognizing that all

local legislative authority and all local executive and administrative functions can and should be vested in one unified local government, Alaskans will be reaching at one stride a goal that local government reformers and specialists have been striving to attain in many states over a period of several generations.

The concept of a satisfactory local government unit here postulated necessarily involves an organization that would include geographically much more than a small or even a large urban community. It would include all territory, whether populated or not, within the confines of an ascertainable geographic and economic community, and would permit of no fragmentation into small independent municipal units each with its set of officials and each jealous of its prerogatives, jurisdiction, and tax base. A much broader concept is indicated. Naturally, within any large geographic and economic entity, considerable variation would exist as to services needed and services that may reasonably be provided. Obviously, such variations would have to be recognized through the device of service zones or districts, determined by the local legislative body, and reflected in differing levels of taxation or service charges in proportion to the kinds and level of services provided by the jurisdiction. Thus those in urban areas benefiting by the usual urban services would be expected to support

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such services with a higher tax levy or higher service charges. Those receiving only such minimum services as education, recording of records, and maintenance of order would be expected to contribute to the support of the local government, but to a much lesser degree.

With the creation of larger units of local self-government, many of which would contain several urban or semi-urban areas, the need for an adequate system of local representation on the local legislative body becomes apparent. This need could be met adequately with the use of a district basis for representation on the local legislative body. However, all administrative and executive functions should be grouped under a single responsible chief executive or manager. This is essential if the well-established evils of ward and commissioner administration are to be avoided.

With the existence of a competent and suitably organized local government unit, properly endowed with authority to draft and adopt its own charter, there would be no need for the expedients of a whole group of special districts or other governmental levels or entities commonly created to by-pass ineffective local units or to meet area-wide needs when no local unit has sufficient jurisdiction. Adequate jurisdiction would exist in the local government, and its charter-empowered legislative body would have whatever authority the citizens of the community saw fit to bestow upon it within the framework of a

state-determined division of functions between state and local governments. Thus the existence and high costs of multiple levels of local government would be avoided.

It is not reasonable to expect that a constitutional convention could properly undertake to identify and write into a constitution suitable units and boundaries of local self-government in Alaska. The creation of such units can only be left to the future state legislature after careful and expert study of Alaska's needs and problems in the establishment of geographically, socially, and economically homogeneous units. The constitution can and should authorize the legislature to create local government units, which when created would be vested with suitable home-rule powers. It should recognize the fact that as Alaska develops, new communities will arise and rearrangements will become necessary. Only the legislature can properly deal with such problems. The constitution should not create or recognize either counties or municipalities as such, for each carries connotations not in keeping with the type of jurisdiction here considered as a more suitable local government unit, whatever name may eventually be applied to it. It would be appropriate, however, for the constitution to specify that in creating units of local self-government, the legislature shall so act as to recognize natural geographic and economic relationships and establish units large enough to embrace the entire territory of the state in their totality.

Units with insignificant population need not be politically organized immediately, but they should nevertheless be identified for electoral purposes and for purposes of state administration of local functions until sufficient population would justify the political organization of the local units.

With such a general provision vesting authority in the state legislature and indicating basic standards to be followed in the exercise of that authority, the Alaskan Constitution would avoid fixing upon the new state patterns that elsewhere have proved less than satisfactory. At the same time, it would provide guidance for the legislature in embarking upon the solving of a problem that has proved universally troublesome wherever free men strive to meet the needs for local self-government.

IX

STATE FINANCE

A staff paper prepared by Public Administration
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STATE FINANCE

Early state constitutions made little mention of the financial powers of state government and they made virtually no provision for financial organization. A few states, Connecticut, Iowa, Rhode Island, and Vermont, do not by any particular provision authorize the state legislature to levy taxes. Most States, however, include the power of taxation as one of the powers granted the legislature, and many go much further by constitutionally providing for or prohibiting certain types of taxes and by specifying various features of the state organization for financial administration. Only five states, Connecticut, Vermont, Mississippi, New Hampshire, and Tennessee, fail to provide some sort of constitutional limitations on the borrowing power of the state.

It is unnecessary for a constitution to grant taxing powers to the state government; the legislatures, as wielders of the broad and unspecified powers reserved to the states in the federal constitution, have whatever taxing authority is not denied them by the federal and state constitutions. Thus, a state may not levy export duties or import duties or place any levy on tonnage,¹ it may not without the consent of Congress tax

¹ Article I, Section 8, Constitution of the United States.

instrumentalities of the federal government,² and it may not through the exercise of its taxing powers place an undue burden on interstate commerce or otherwise impinge upon the authority of the national government in the exercise of its constitutionally delegated taxing and regulatory powers.³ These things are prohibited to the states by the federal constitution specifically and by judicial construction.

The extent of federal constitutional limitations on the taxing power of the states has been subject to almost continuous judicial interpretation for many years. State legislators, in the exercise of the state's taxing power, must be aware of the many fine points of judicial construction if they entertain any hope of avoiding conflict in this area, but the entire matter has little to do with what the states deem suitable to include in their constitutions with respect to state taxing power.⁴ The power of the state to tax is a fundamental residual power that needs no constitutional elaboration.

The important constitutional aspect of state taxation is the question of limiting the legislature's power in this field.

² McCulloch v. Maryland, 4 Wheat. 316 (1819); Western v. Charleston, 2 Peters 449 (1829).

³ Philadelphia & R.R. Co. v. Pennsylvania, 15 Wall. 232 (1873).

⁴ Thus Article XIV, Section 9, of the proposed Hawaiian Constitution prohibiting state taxation of federal property without Congressional consent merely forbids something already beyond state power.

Similarly, the power of a state to contract debt is clear; the issue is one of limitations that conceivably should be placed upon that authority.

The Taxing Power

A common provision of state constitutions is that requiring that the purposes of a particular tax be stated in the law creating the tax. A related provision often requires that the proceeds of a tax must be used for a "public purpose."⁵ It is only a short step from such provisions to one that requires monies collected for one purpose to be used for that purpose only.⁶ Such provisions as these fall short of outright revenue dedication, for the legislature is left free to specify what the object or purpose of the tax may be. Thus the purpose may be the general operations of the state government.

Provisions of the type just mentioned usually involve one or both of two rather hazy concepts. One is the desire to prevent the state from using public taxing power for the benefit of private individuals, groups, or non-governmental purposes. This is more a limitation on the spending power of the state than on its taxing authority. The second concept involves an assumption that it is desirable and possible to identify particular public benefits with the taxes levied to establish and support them. A further step in this direction involves the attempt to force the beneficiaries of a particular service to bear directly the cost of the service in its entirety. This concept, suitably applied to various utility services, becomes

⁵ Article X, Section 3, Constitution of Missouri.

⁶ Article VII, Section 5, Constitution of Washington.

difficult to apply and breaks down altogether when applied to various services available to the general public.⁷

Many state constitutions have included a provision requiring that taxes be uniform, that they be uniform on the object to which they are applied, or that they be uniform within a particular class.⁸ A related provision commonly used requires that property taxation be in proportion to the value of the property.⁹ Provisions of this sort are intended primarily to prevent discriminatory taxation. For the same purpose, some states have constitutionally specified that the rate of assessment shall be equal and uniform.¹⁰

A provision that has come into increasing use in recent years is the clause stating that "the power of taxation shall never be surrendered, suspended, or contracted away."¹¹ This provision is the only provision dealing with taxation that is

⁷ Property owners generally pay a property tax for the support of schools even though they have no children in school. In many states, however, road users bear almost the entire support of highways through payment of gasoline taxes.

⁸ Article IX, Section 1, of the Constitution of Pennsylvania is typical.

⁹ Article XIII, Section 2, of the Constitution of Utah contains a typical phrase on this subject.

¹⁰ Article X, Section 1, of the Constitution of Indiana and Article VIII, Section 1, of the Constitution of Nebraska contain common provisions of this sort.

¹¹ States with this provision are: Arizona, California, Florida, Georgia, Kentucky, Maine, Minnesota, Missouri, New York, and Oklahoma.

included in the Model State Constitution of the National Municipal League. Its object is to prevent the state from exempting, particularly by contract, individuals and corporations from taxation. A considerable number of states have the provision but limit its application to corporations.¹²

Public Purpose Provisions

The question of what is a "public" purpose cannot be answered categorically. Government has entered many fields in the past fifty years that would hardly have been considered "public" a century ago. The question is essentially one for judicial determination, and when the issue is clearly in doubt the taxpayer has recourse to the courts whether or not there is a "public purpose" provision in the state constitution.¹³ The issue of taking private property without due process of law is involved, as may also be the question of constitutional guarantees of equal protection under the law.

The question of what is public purpose has been repeatedly adjudicated in the courts under the due process clauses of both state and federal constitutions, and the history of such litigation tends to demonstrate that the legislative determination of

¹² Arkansas, Louisiana, Idaho, Montana, North Dakota, Pennsylvania, Texas, Virginia, and Washington. South Dakota.

¹³ The basic case on this matter arose in Kansas and was decided against the municipality as an agent of the state. Kansas had no public purpose provision and the issue was joined on the basis of due process. (Citizens' Savings and Loan Association v. Topeka, 20 Wall. 655 (1875). See also Green v. Frazier, 255 U. S. 233 (1920).

public purpose will be given great weight.¹⁴ In reality, the addition of a public purpose provision to a state constitution adds little if anything to the protections afforded the taxpayer under federal and state bills of rights. The requirement must be met in any case.

Uniformity and Related Provisions

Uniformity provisions came into existence in an era when the real property tax was considered the basic source of state revenues. They were intended to prevent discriminatory taxation by requiring that the rate be uniformly applied within the jurisdiction of the taxing authority. In recognition of the fact that the other important element of the property tax is the assessment, some constitutions include also the requirement that the assessment be at a given percentage of fair, market, or true value, sometimes 100 per cent.

Uniformity provisions have generally not achieved their purpose. Application of the provisions has broken down as a consequence of poor assessment administration. With decentralized assessment, usually at the county level but with cities frequently having independent assessment authority, variations between local jurisdictions have been extreme in state after state. The amount of tax actually paid on property of equivalent market value varies greatly in such circumstances even though the rate is identical.

¹⁴ The courts have held a great variety of government expenditures to be public purpose, including those for: a city coal and fuel yard, a grain elevator, books for school children attending private as well as public schools, etc.

Even within the same assessment unit, the assessments have generally been quite unrealistic and inequitable as a consequence of amateurish methods used by officials lacking the technical qualifications for the work and often diverted from their duty by the pressures of local political and business interests.

As with public purpose provisions, the traditional remedy for discriminatory application of tax rates and assessments lies in the courts. The remedy has been an unsatisfactory one because of the universal inadequacy of assessment practice and because the courts can generally deal only with the individual case, not with the general practice.¹⁵ The individual has as much protection under his right to due process as any under any uniformity provision of a state constitution. The real remedy to the problem lies in the application of professional assessment practices on a state-wide basis rather than in the attempt to write fair taxation practice into a state constitution.

Uniformity provisions have occasionally had the unfortunate consequence of blocking or delaying the use of accepted techniques in the application of other forms of taxation. The difficulty has arisen primarily with respect to the constitutionality of graduated income tax rates. Laws providing for rate graduation and exemptions have run afoul of the uniformity provisions of some state constitutions.¹⁶ Where this has occurred, it became

¹⁵ See Hackensack Water Co. v. Orodell, 17 F. Supp. 39.

¹⁶ See William L. Mathews, Jr., "The Function of Constitutional Provisions Requiring Uniformity in Taxation," in four issues of Kentucky Law Journal, November, 1949, through May, 1950.

necessary either to amend the constitution or tax incomes at a single flat rate.

A potential difficulty that might arise from a uniformity provision is the prevention of a single taxing jurisdiction or governmental unit from applying different property tax rates on a service zone basis. Similarly, the levying of special assessments for improvements benefitting particular property may conceivably run afoul of a uniformity provision, and some state constitutions grant such taxing power to local jurisdictions as an exception to the uniformity provision.¹⁷

In summary, uniformity provisions have given little or no relief from inequitable property taxation, provide no greater guarantee against discrimination than those available to taxpayers under the due process clauses of state and federal constitutions, and in some cases they may serve to interfere with the application of appropriate graduations to other forms of taxation. W. Brooke Graves summarizes a discussion of these provisions by hoping "that in future constitutional revisions these clauses will be omitted."¹⁸

Tax Exemptions and Alienation of the Taxing Power

The power to tax is a public function and is universally so recognized today. Historically, there are many instances in which the power to tax was conferred upon or delegated to the

¹⁷ See Article VIII, Section 6, Constitution of Nebraska.

¹⁸ American State Government (Boston: D. C. Heath & Co., 4th ed., 1953), p. 524.

grantee of land in colonization undertakings and in similar circumstances. Few today would consider such practices at all consistent with the public interest and it would seem almost certain that any such grant of the power to tax would be found in violation of the due process and equal protection clauses of the federal constitution.

The issue today is not one of conferring taxing power as such, but rather it is a question of under what conditions and in what circumstances should the state limit itself in the use of its taxing power. There are various cases in which states have limited or surrendered taxing authority over particular individuals, institutions, corporations, or industries in an effort to favor some particular class of people, use of property, or to induce investment or construction of a particular type or in a specific jurisdiction or locality.¹⁹ A few state constitutions

¹⁹ The Constitution of Florida, Article IX, Section 12, provides as follows:

For a period of fifteen years from the beginning of operation, all industrial plants which shall be established in this State on or after July 1st, 1929, engaged primarily during said period in the manufacture of steel vessels, automobile tires, fabrics and textiles, wood pulp, paper, paper bags, fiber board, automobiles, automobile parts, aircraft, aircraft parts, glass and crockery manufacturers and the refining of sugar and oils, and including by-products or derivatives incident to the manufacture of any of the above products, shall be exempt from all taxation, except that no exemption which shall become effective by virtue of this amendment shall extend beyond the year 1948.

The exemption herein authorized shall not apply to real estate owned and used by such industrial plants except the real estate occupied as the location required to house such industrial plants and the buildings and property situated thereon, together with such lands as may be required for warehouses, storage, trackage and shipping facilities and being used for such purposes. (Continued on next page.)

are silent on the subject;²⁰ many provide exemptions from certain types of taxation or from all taxation for religious and charitable organizations. Others exempt from taxation property used for religious, charitable, welfare, and political purposes.²¹ Another type of exemption applies to homesteaded land, to land owned by veterans, or to land owned by widows with families.²² Some exemptions are granted in the constitution itself, others are specifically made permissive at the discretion of the legislature.

It is almost equally common to constitutionally prohibit exemptions except in particular circumstances or for certain classes of property use. Some seventeen states provide that the power of taxation shall not be delegated, surrendered,

(19 con't.) Amendment No. 12 to the Constitution of Arkansas, adopted October 5, 1926, provides as follows:

That all capital invested in a textile mill in this State for the manufacture of cotton and fiber goods in any manner shall be and is hereby declared to be exempt from taxation for a period of seven years from the date of the location of said textile mill.

²⁰ Those of Vermont and New Hampshire, for instance, make no mention of the subject. That of Idaho merely authorizes the legislature to deal with the subject.

²¹ Typical examples may be found in the constitutions of Indiana (Art. X, Sec. 1), Kansas (Art. XI, Sec. 1), Montana (Art. XII, Sec. 2).

²² See, for instance, the constitutions of Florida, Louisiana, Texas, and Utah.

suspended, or contracted away.²³ As will be noted in another place, such a provision does not prohibit tax exemptions; it serves another rather technical purpose in limiting the nature of exemptions granted by the legislature.

The question of whether or not exemptions of one kind or another should be included in a constitution is one of public policy. In the absence of constitutional provision dealing with the subject, the legislature is free to grant such exemptions as it wishes provided that in so doing it does not act in such a discriminatory manner as to deny equal protection of the laws to the citizens of the state.²⁴ It is to be noted that the entire pattern of exemptions has developed in connection with property taxation, and although other types of exemptions from other forms of taxation have come into being in recent years,²⁵ constitutional provisions on the subject still relate primarily to real and personal property taxes. Inasmuch as states have increasingly abandoned this field of taxation to local government units, exemptions serve primarily to undermine the tax base of municipalities, school districts, and counties.

Taxation specialists with few exceptions view exemptions

²³ This provision is endorsed by the National Municipal League in its Model State Constitution, Article VII, Section 700.

²⁴ Colgate v. Harvey, 296 U. S. 404 (1935); Southern Railway Co., v. Greene, 216 U. S. 400 (1910); Keeney v. New York, 222 U. S. 525 (1912).

²⁵ State income tax laws commonly have exemptions.

with disfavor, particularly as applied to the property tax base.²⁶ There is little to be gained by the state taxing its own property or that of municipal and other local political units and vice versa. Even in this area of exemptions there is room for debate with respect to property owned by the state and its political subdivisions and used for commercial purposes. Many federal government activities of recent years have involved extensive acquisitions of property and the use of the property for purposes that impose considerable burdens on local governments to provide services. It is not at all unusual for municipalities to find themselves faced with providing water, fire protection, electrical power, and similar services to federal government installations, particularly housing projects. Local school districts must educate children living on federal property. The major economic base of many communities is some sort of government installation. While Congress has recognized in a number of forms the burden that is sometimes placed on local governments by the presence of tax-exempt federal property, it has been generally unwilling to surrender federal tax immunity. Various types of in lieu payments have been authorized, direct grants-in-aid have been authorized to school districts under certain circumstances, and tax immunities have been waived in limited categories of cases, but Congress remains the arbiter of what and under which

²⁶ See Tax Exemptions (Tax Policy League, 1939), which labels industrial exemptions as a "violation of the first principles of a sound tax program."

circumstances federal property may give rise to a valid claim for tax support or payments in lieu thereof.

Federal policy in this area exhibits considerable uncertainty at the present time. It has demonstrated a gradual trend in the direction of greater liberality toward local taxing jurisdictions. In the circumstances it would seem unwise to constitutionally exempt from taxation all government owned property. The legislature should be left free to take advantage of whatever changes in federal policy emerge and to make practical adjustments with respect to the increasingly varied uses of state and local government owned property.

Problems with respect to taxation of property used for religious, scientific, and welfare purposes pose fewer areas of uncertainty. Practice is well established and generally accepted. General law may quite adequately provide suitable exemptions without resorting to constitutional provision. It is generally necessary to cover the finer points of when property ceases to be used exclusively for the purposes for which the exemption is granted and when the purpose becomes that of a business venture. The difficulties arise when a scientific or religious institution acquires income property to provide for the support of tax exempted activities. If the matter is left open for legislative determination, unnecessary detail can be avoided in the constitution and legislative dispositions cannot be repeatedly subjected to tests of constitutionality.

With respect to other types of exemptions, the case for constitutional status grows weaker. The issue becomes one of interest groups seeking to secure a preferential status by constitutional guarantee. Resistance to such pressures has broken down primarily with respect to holders of homesteads and property owned by veterans, disabled persons, and various types of service organizations. Framers of the new constitution of New Jersey in 1947 found themselves carried along on a wave of veterans' preference feeling and wrote an extensive tax exemption provision into the fundamental law of the state.²⁷ In other circumstances they might well have left the matter to the legislature which could just as effectively assess the justifications for special exemptions and provide for such matters in accordance with the needs at the time.

The cold facts of the matter are that local government jurisdictions throughout the United States have been faced with ever-greater inroads on their real property tax base. A state government which derives most of its revenues from other tax sources, as most of them do, can all too blandly dispose of the tax base of its municipal units without itself feeling the pinch. It was not without reason that the Missouri Constitution of 1945, after providing a rather generous list of exemptions, was written to include a clause to the effect that "All laws exempting from taxation property other than the property enumerated in this

²⁷ Article VIII, Section 3, Constitution of New Jersey.

"article, shall be void."²⁸

Tax exemption or abatement inducements have been used by many states, particularly in the South and Midwest, to encourage industrial and commercial development. Tax specialists frown darkly on such devices, but they have been used in state after state not only by the state government but by local jurisdictions as well. Whatever may be the merits of their use, business and industrial tax exemptions have occasionally given rise to a significant constitutional problem. By granting such inducements in legislation, states have been held on occasion to have contracted away the taxing power. It is a settled principle of public law that one legislature cannot bind another²⁹ and that the government of a state cannot contract away its police powers.³ The power to tax is not considered inalienable, however. In granting exemptions, one legislature may bind another and thereby lose for the state its power to tax. The exemption may, under certain conditions, result in a contract relationship that legislatures may not abrogate without violating the federal constitutional guarantee against state legislation impairing the obligatio

²⁸ Article X, Section 6.

²⁹ Broom's Legal Maxims, pp. 27-29.

³⁰ Stone v. Mississippi, 101 U. S. 814 (1880); Atlantic Coast Line Railroad Co. v. Goldsboro, 232 U. S. 548 (1914).

of contracts.³¹

To avoid such difficulties, a considerable number of states have constitutionally prohibited the surrendering or contracting away of the taxing power. It is deemed that with such a provision in the constitution, a state enactment intended to give contract status to a tax exemption would be void ab initio. Any general exemption act would be read as not capable of establishing a contracted exemption. A number of states have limited the application of the prohibition to arrangements involving corporations. Whether or not the Puerto Rican constitutional provision prohibiting the suspension of the taxing power might invalidate even the legislative grant of tax exemption to new industries for specific periods of time has not been tested.³²

The chief source of contract grants of tax immunity has been historically the corporate charter granted by a state legislature under special act. It is now common for constitutions to prohibit the granting of charters in this manner.³³

³¹ Piqua Branch of the State Bank v. Knoop, 16 Howard 369 (1854); Georgia Railway Co. v. Redwine, 342 U. S. 299 (1952). Exemptions are to be narrowly construed. They are more likely to be considered contracts if contained in a corporate charter, or if they arise from a special rather than a general law, or if they are acted upon and become a condition of establishment as distinct from a benefit conferred upon an already existing business or industry. See Edward S. Corwin, Constitution of the United States, Revised and Annotated (Washington: Government Printing Office, 1953), pp. 347-348.

³² Article VI, Section 2, Constitution of the Commonwealth of Puerto Rico.

³³ Article 12, Section 1, of the Constitution of Kansas is typical. "The legislature shall pass no special act conferring corporate powers. Corporations may be created under general laws; but all such laws may be amended or repealed."

The Importance of Legislative Classification

Efforts to control tax exemptions by writing specific exemptions and prohibitions into a state constitution have often failed to produce the results intended. While the exemptions usually hold up, the prohibitions intended to limit legislative action often do not. Legislatures are generally free to classify subjects, uses, and circumstances for taxation purposes. While uniformity provisions have sometimes been interpreted to forbid classifications in the property tax field, classifications are essential to many other forms of taxation.

The power of the State to classify for purposes of taxation is "of wide range and flexibility." The Constitution (federal) does not prevent it "from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State Legislature."³⁴

As long as the legislature is free to classify the subjects of taxation and apply different rates, including no rate, to the various classes, prohibitions against tax exemptions can be rendered almost if not entirely ineffective. It is not surprising, therefore, that framers of some state constitutions have

³⁴ Corwin, op. cit., p. 1147. Quotations are from Louisville Gas and Electric Co. v. Coleman, 277 U. S. 32, 37 (1928) and Bell's Gap Railroad Co. v. Pennsylvania, 134 U. S. 232, 237 (1890).

attempted to limit the power of the legislature to classify.

Article VII, Section 3, of the Constitution of Georgia provides:

. . . Classes of subjects for taxation of property shall consist of tangible property and one or more classes of intangible personal property including money. The general assembly shall have the power to classify property including money for taxation, and to adopt different rates and different methods for different classes of property.

The Missouri Constitution goes even further. It attempts to establish at least part of the classes:

. . . All taxable property shall be classified for tax purposes as follows: Class 1, real property; Class 2, tangible personal property; Class 3, intangible personal property. The general assembly, by general law, may provide for further classification within classes 2 and 3, based solely on the nature and characteristics of the property, and not on the nature, residence, or business of the owner, or the amount owned³⁵

The latter provision seems a clear attempt to write the essence of legislation into a constitutional document. Such efforts, if carried to the point of being effective in the great range of taxation power to which they may apply, cannot fail to seriously hamstring the legislature and produce unforeseen inequities that only constitutional amendment will correct.

Tax Limits

A number of states have placed rate limits in their constitutions with respect to various kinds of taxes. Most limits apply to property taxes and act to restrain local government units rather than the state legislature. A few states have fixed maximum rates on income and inheritance taxation.³⁶

³⁵ Article X, Section 4.

³⁶ Alabama, Louisiana, North Carolina, and Florida have limits with respect to either income or inheritance taxation or both.

Tax limits were in several cases adopted as amendments to constitutions during the depression years of the 1930's. Chief supporters of such limits have been local taxpayers associations, composed mainly of business people, and various real estate groups. As noted in another paper,³⁷ tax limits have worked hardships on local jurisdictions and serve mainly to distort the total taxation pattern rather than to hold taxes down. If governments are to undertake the functions the public demands that they perform, there is no way of avoiding taxation. If the tax burden is to be distributed equitably, the legislature must be left free to adopt a tax program that is broadly based and adjusted to the circumstances of the state and its local communities. Rate ceilings only serve to benefit certain classes of taxpayers at the expense of other classes. They have few advocates outside of those groups which traditionally complain of high taxes and at the same time demand that the city repave the street and provide better fire protection.

Summary

Alaska will be a state with great possibility for development and expansion of its population and its economy. The problems which will inevitably arise as the development takes place cannot be foreseen at this time. In order to cope with a rapidly changing situation, the legislature will need broad authority and wide freedom of action. Vast resources will become available for development and exploitation with the transfer to the state of great tracts of land now in the public domain. Problems of

³⁷ The staff paper on Local Government.

disposal and utilization can hardly fail to arise. The state may, for example, find it expedient to tax unused land held for speculative purposes in order to force it into production. Some areas might conceivably be held solely to prevent development of forest and mineral resources in competition with those of other states. The new state will need weapons to cope with any such possible difficulties, and broad taxation authority can be a most potent weapon. The classification of real property for taxation purposes could, under certain conditions, prove entirely desirable. Any constitutional limitations such as those requiring uniformity and prohibiting classification can only serve to inhibit the freedom of the legislature to meet directly the problems it will face. Constitutional guarantees under both federal and state charters can provide the basic protections for the individual against unequal treatment and discrimination.

It could, however, prove desirable to constitutionally protect the state from loss of the taxing power through the development of contract relationships arising out of tax exemptions.

Two specialists in the tax field have summed up a great deal of experience in two short statements:

. . . the history of classification does demonstrate that legislatures will act with reasonable wisdom when given broad constitutional powers relative to taxation. And, if property is to be taxed, the legislature should possess the right to classify property. The prudence of wide-open constitutional provisions concerning taxation has been repeatedly demonstrated.³⁸

³⁸ S. E. Leland, Property Taxes (Tax Policy League, 1940), p. 115.

. . . the taxation provisions and references in our state constitutions have become too numerous, too complicated and too rigid for the best results . . . the efforts of those concerned with sound and equitable taxation should be expended in the direction of simplifying, and even of eliminating altogether the existing constitutional verbiage on this subject. . . . the greater the detail with which a constitution outlines a tax system . . . the more imperative becomes the necessity of adopting further amendments in order to accomplish any departure from the established order I conclude that from the standpoint of sound taxation, that constitution is best which says least about taxation.³⁹

State Debt

Provisions limiting the debt of the state and its political subdivisions are common in state constitutions. They clearly reflect a fear that the state may borrow itself into insolvency. There have been times, historically, when some of the states did get themselves into serious difficulty as a consequence of heavy borrowing. A number of states were caught with high indebtedness in the Panic of 1837 and defaulted on bonds. Southern states defaulted generally on indebtedness incurred to fight the War Between the States. During the depression years of the 1930's many of the states borrowed heavily to finance relief for the unemployed, and while none defaulted, many were placed in a precarious financial position.

Five states, Connecticut, Mississippi, New Hampshire, Tennessee, and Vermont, make no constitutional provision limiting the authority of the legislature to contract debt. Some

³⁹ Harley L. Lutz, Proceedings of the Twenty-first Conference, National Tax Association, 1928, pp. 6-9.

twenty-five states deny to the legislature the authority to contract debt except to cover casual deficits (usually arising from the periodicity of tax collections), or for specific purposes, or with definite limits and conditions. Excepted in most states is debt incurred to repel invasion and defend the state. Four states, Arkansas, Florida, New York, and Virginia, constitutionally prohibit the legislature to incur any debt other than for the purpose of defending the state, or for certain other specific purposes. Additional debt may be incurred by constitutional amendment or by approval of the voters in a popular referendum. Some states have limited the amount of the debt to a specific figure, to a percentage of assessed property value, to anticipated tax revenues, to a percentage of the debt reduction in the previous biennium, or to a percentage of the general appropriation act. A few have required an unusual majority in the legislature to approve incurrence of a debt, and some states must submit the matter to the electorate before debt above a certain amount may be incurred.⁴⁰

The strange thing about the entire matter is that many of the states with highly restricted authority to incur debt are no better off financially than those states which may incur debt without constitutional restriction.

⁴⁰ Several of the states also limit the debt-creation which may be authorized by the electorate. In New Mexico, Virginia and Wyoming, for example, bond issues approved by popular referenda must not exceed 1% of the assessed value of taxable property.

The usefulness of a debt limitation today in most states is questionable. The era of heavy borrowing for economic development through railroad construction is long past, and this was a principal difficulty that a number of states got themselves into in the 1830's, and which provided at least some of the initial impetus for constitutional debt limitations.

Many states with constitutional debt limitations have in recent years resorted to revenue bonds which do not pledge the full faith and credit of the state and consequently are not subject to the constitutional debt limitation, and have also resorted to special purpose authorities in an effort to evade constitutional debt limitations on the state government itself. Such devices unnecessarily complicate the administrative structure of the state and limit future legislative control. Democratic faith in a legislature to protect the state's credit while at the same time providing for its needs, bolstered by a money market which carefully scrutinizes the jurisdiction's future solvency in connection with any proposed incurrence of debt, seem to make constitutional debt restrictions per se unnecessary. A constitutional provision requiring that any legislative appropriation must also specify the means of financing the appropriation would appear to be an adequate safeguard of the state's credit.

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Planning and Controlling State Expenditures

Having discussed the taxing and borrowing powers of the state government, we come to the question of planning and controlling the expenditure of state money and the determination of how these responsibilities are to be allocated between the legislative and executive departments.

Budgeting

Since the first constitutions were adopted, two significant developments have emerged in planning for the expenditure of state money: (1) the transition from the legislative to the executive budget; and (2) the state budget has tended to widen in scope from merely a schedule of expenditures to a comprehensive financial plan which makes possible general as well as fiscal controls. Both of these developments have paralleled the trend in the direction of integrating financial functions in a department of finance and making provision for the development of a budget unit either as a part of the department or attached to the governor's office.

At present, budget-making authority is assigned to the governor in 42 states.⁴¹ Only 14 states⁴² make provision in their constitutions for a budget system; the remainder fix

⁴¹ Book of the States 1954-55, pp. 166-169.

⁴² Alabama, California, Colorado, Georgia, Idaho, Illinois, Maryland, Massachusetts, Missouri, Montana, Nebraska, New York, Texas and West Virginia.

responsibility for budgeting by statute. In all states but one the governor is assigned responsibility for submitting a budget to the legislature; the exception is West Virginia which vests this authority in a board of which the governor is chairman. Among the remaining states which fix budget preparation by statute, Arkansas is the only state that has retained the purely legislative budget prepared by a joint budget committee with no representation of the executive branch.

There is no clear constitutional authority in any state for what might be termed a true executive budget. Reliance on legislative enactment regarding the details of budget preparation makes it possible to meet changing conditions in a manner which might not be possible if the mechanics of budget-making were constitutionally prescribed. However, the future trend may well be toward the inclusion of a provision such as is set forth in the Model State Constitution.⁴³ This provision seeks to assure not only an executive budget but the granting of clear authority

⁴³ Section 703. The Budget. Three months before the opening of the fiscal year, the governor shall submit to the legislature a budget setting forth a complete plan of proposed expenditures and anticipated income of all departments, offices, and agencies of the state for the next ensuing fiscal year. For the preparation of the budget the various departments, offices and agencies shall furnish the governor such information, in such form, as he may require. At the time of submitting the budget to the legislature, the governor shall introduce therein a general appropriation bill to authorize all the proposed expenditures set forth in the budget. At the same time he shall introduce into the legislature a bill or bills covering all recommendations in the budget for new or additional revenues or for borrowing by which the proposed expenditures are to be met.

to the governor to obtain information which is necessary for budget formulation from other elected officials as well as the legislature and judiciary. Similarly it attempts to assure the comprehensiveness of the budget and adequate time for its preparation and consideration in relation to the established fiscal year and the date when the governor and legislators take office.

Ordinarily a budget consists of three parts: (1) the budget message in which estimates and the state's financial condition are summarized and the proposed fiscal policy for the state is presented; (2) a balanced statement of proposed expenditures and estimated income--both in summarized form and with a series of supporting schedules and detailed estimates; and (3) drafts of appropriation and revenue bills necessary to put the budget into operation or recommendations about the exercise of the borrowing power if a deficit is to be met this way. Most states provide for budget form and content by statute; however, some states constitutionally specify the budget form or the procedure to be followed.⁴⁴ The essential features of a budget document are reasonably well established by modern practice so that detailed constitutional specification may be considered unnecessary. The important objective is that of comprehensiveness or

⁴⁴ There are eight states which include provisions for budget form and procedure in their constitutions: California, Georgia, Maryland, Massachusetts, Missouri, Nebraska, New York, and West Virginia. In addition there are six states in which the governor is charged with the duty of estimating at the beginning of each legislative session the amount of money required by taxation for all purposes of the state: Alabama, Colorado, Idaho, Illinois, Montana, and Texas.

scope of the budget so that the financial plan of the state is not considered piecemeal. The legislature should be able to see at one time what the total financial needs and tax burden of the state are to be.

The widening scope of the budget document raises the question of the inclusion of estimates of legislative and judicial expenditures with those of all executive agencies. The constitutions of New York, Maryland, and West Virginia include this requirement.⁴⁵

Earmarked Revenue. The most severe obstacle to the scope and flexibility of budgeting results from the earmarking or dedication of certain revenue for specified purposes or funds. To the extent that this device is permitted in any given state it bedevils both the legislature and the administrative fiscal officers alike, curtailing the exercise of proper controls of each branch of government over the finances of the state. The device of "dedicated" revenues became widespread after the general adoption of the state gasoline tax, originated by Oregon in 1919. The usual justification of earmarking tax receipts is that it guarantees that the yield of a tax will actually be used to benefit the groups subject to taxation, and so reduces taxpayer resistance. However, in many cases, there is no relationship between the incidence of the tax and the purpose to which

⁴⁵ The New York provision states: "Itemized estimates of the financial needs of the legislature, certified by the presiding officer of each house, and of the judiciary, certified by the comptroller, shall be transmitted to the governor not later than the first day of December in each year for inclusion in the budget without revision but with such recommendations as he may deem proper."

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its revenue is dedicated. The most common forms of dedication are revenues produced by gasoline and motor vehicle license taxes for road purposes and a variety of tax receipts for educational and welfare purposes.

It is reported that 37 states have one or more sources of revenue reserved for specified purposes; of these 23 states dedicate revenue by constitutional provision.⁴⁶ The extent of dedication has in many cases grown to seemingly uncontrolled extremes. In Colorado approximately 90 per cent of tax collections are earmarked for special funds.⁴⁷ In Texas, only 15 per cent of 1951 tax collections were unrestricted; constitutional provisions dedicated 45 per cent and the remaining 40 per cent of tax collections were earmarked by statute. Subsequent tax increases have served to increase the proportion of dedicated revenue. Kansas has over 140 dedicated funds which embrace over 80 per cent of the state's revenue.⁴⁸ Since 1930 South Dakota special funds ranged from 454 to 530. In Alaska dedication has already begun. The dedication of 1954-55 Territorial tax collections amounted to almost 27 per cent of total territorial revenue.⁴⁹

⁴⁶ Louisiana State Law Institute, Constitution Revision Project-No. 42. Revenue Finance and Taxation, 1947.

⁴⁷ Proceedings of the National Tax Association, 1944, p. 345.

⁴⁸ Your Government. Bureau of Government Research, University of Kansas, Vol. II, No. 8, 1947.

⁴⁹ Based on Staff Memorandum No. 4, Alaska Legislative Council, September, 1954.

Impetus to dedicated funds often comes from the constitutional requirements found in many states that no money arising from a tax levied for one purpose shall be used for another purpose or the provision that every law imposing a tax must clearly define the nature and purpose of the tax.

Attempts to reverse the trend toward dedication have encountered considerable resistance from the benefitting interests. Some progress has been made in Georgia, which adopted a single general fund in its new constitution of 1945.⁵⁰ After several attempts, New Jersey passed a statute creating a single state general fund in 1945. This provision was also incorporated in the new constitution of 1947.⁵¹ Governor Edge of New Jersey in trying to obtain fiscal reform and urging the establishment of a single state fund said in his Annual Budget message of 1945:

"The existence of a \$50,000,000 State Highway Fund side by side with the General State Fund has resulted in unbalanced services and administrative organization, complicated accounting procedures and a confused and incomplete picture of state finances. It has also made it necessary to engage in fiscal gymnastics to keep accounts orderly as between two funds

"Modern government has become too complex to allow the continuance of separate funds like the Highway Fund. This concept of such a separate fund connotes that the Highway Department is, in effect, a government unto itself, instead of being part of an integrated state administrative system As long as a separate fund of the size of the Highway Fund exists there must be a fractionalization of the fiscal program and policy of the state. . . .

⁵⁰ Georgia Constitution. Article VII, Sec. II and Sec. IX.

⁵¹ New Jersey Constitution. Article VIII, Sec. II, Par. 2.

"A single State Fund will make for better budgeting, a more unified and effective control of expenditures, simplified accounting procedure, and a clearer, more complete picture of state finances . . ."

The dedication of revenue leads a particular group of taxpayers to feel that revenues derived from certain licenses or fees belong to them as a group, hence they tend to consent more readily to the imposition of such taxes but will resist en masse any attempt at diversion, regardless of the worthiness of the purpose. As Governor Edge points out over-all planning of the fiscal program of the state is prevented; moreover the relationship between the dedicated revenue produced bears no consistent relationship to the needs to be met or services to be provided thereby, let alone the comparative needs of other agencies which must rely upon specific appropriations to carry on essential services. The legislature, whose responsibility it is not only to lay taxes but to spend the receipts in the best interests of the people, abdicates its authority and responsibility when it submits to the demands of a pressure group and resorts to the dedication device. As shown, many states have less than half of the money of the state available for the kind of budgeting aimed at carrying out an effective and responsive program of services. There is ample and eloquent testimony and considerable experience to the effect that constitutional earmarking of revenues should be avoided at all costs.

Legislative Budget Procedure. There are several important questions in the consideration of the budget by the legislature. In three states, Maryland, New York, and West Virginia, the power of the legislature has been limited to striking out or reducing, but not raising items.⁵² In all other states the power of the legislature to change the budget is unlimited. This power seems necessary if the three branches of the government are to coordinate.⁵³ Of course, the governor's power to veto items whether in whole or in part, materially affects this legislative power.⁵⁴ Similarly, appropriations are normally considered authorizations to spend rather than mandates to spend, and the governors of more than half the state are specifically authorized to reduce expenditures under appropriations whenever actual revenues fall below estimates. This arrangement has been found to give necessary flexibility in state expenditures, particularly during the depression.

⁵² Nebraska permits legislative increases in the governor's recommendations upon a three-fifths vote.

⁵³ At least one state goes to great length to preserve the budgetary independence of the three branches of government. L. D. White, in his Introduction to the Study of Public Administration, Revised Edition, 1939, reports, p. 220, a provision in the Maryland Constitution (Article III, Section 52) as follows: "The governor's estimates for the executive branch cannot be increased, but may be reduced . . . ; the estimates for the courts (prepared by the judges) cannot be reduced, but may be increased; and estimates for the legislative branch may be either increased or reduced."

⁵⁴ The veto power is discussed in Staff Paper No. VI, The Executive Department.

Administrative and Legislative Audit of Expenditures

Current practices indicate a widespread confusion in many states in the conduct of auditing functions. This condition stems largely from the failure or refusal to recognize a distinction between pre-audit or administrative audit and post-audit or the independent audit which checks on the administration's use of funds. As a result such anomalies occur as an elective auditor who conducts independent, often obstructive, administrative audits in executive and other agencies of the government, then certifies in a post-audit as to the correctness of his own pre-audit. Equally anomalous is an auditor appointed by the legislature or governor who performs both functions. Undoubtedly the least defensible practice is a constitutional provision or a statute providing for an independent elective auditor to exercise pre-audit and post-audit controls. Because of the influence and limitations such an officer can exercise in the administrative process, this arrangement has essentially resulted in a dual executive.

The two main types of audit may be briefly defined as follows:

1. The internal, administrative, or pre-audit refers to the checking of revenues and receipts at the time of collection and the examination and approval of claims before payment.
2. The external or post audit is made after the transactions have been completed and is a review of what has taken place.

The administrative or pre-audit is a managerial function and should be done by the financial agency of the administration. Its purpose is to control expenditures to ensure care and good business judgment, regularity and accuracy in the use of funds, and more broadly to enable the chief executive to bring his influence to bear upon work programs and administrative policy as reflected in expenditures.

The external or post audit is aimed at enforcing financial accountability upon the governor and his department heads and therefore should be completely independent of the administration. This requirement would preclude an appointee of the chief executive. Similarly an elective auditor would have no immediate accountability within the framework of the state government. Moreover, if he is of the opposite political party, there may be a lack of cooperation between his staff and executive agencies; if he is of the same political party, there is the possibility of too much cooperation. The provision that the legislature should appoint a post-auditor is increasingly looked upon as a desirable step.⁵⁵ Through this device and the power of investigation the legislature utilizes post-auditing to bring the governor to complete account for his acts. It is intended that such an auditor be required to conduct post-audits of all financial transactions and of all accounts kept by the executive agencies of the state government, and to report his findings and criticisms to the governor and to the legislature.

⁵⁵ See Model State Constitution, Section 708.

X

LEGISLATIVE STRUCTURE

AND

APPORTIONMENT

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

November, 1955

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LEGISLATIVE STRUCTURE AND APPORTIONMENT

It will be necessary for the Alaskan Constitutional Convention to discuss and record in the constitutional document its decisions on a number of important matters connected with the legislative function. In this series of staff papers for the assistance of the Delegates the problems concerning the legislature have been divided under two broad headings, with a paper devoted to each. The present paper concerns the structure of the legislature, the basis of representation, the method of apportioning the legislative seats, and other closely related matters. A separate paper (No. V) treats the powers of the legislature, its internal organization, and procedure.

Structure of the Legislature

The first question concerning the legislature that might be taken up by the Convention is that of basic structure. Specifically, should the legislature be unicameral (one house) or bicameral (two houses)?

Bicameralism

The two-house legislature is of course normal in the American states, only Nebraska having a unicameral body at the present time. Bicameral practice has its roots in American colonial government and became firmly established after Independence, when distrust of legislative assemblies led to belief in the desirability of setting one house against the other as insurance

against corruption and ill-considered action. All states except Georgia, Pennsylvania, and Vermont created bicameral legislatures after Independence. Division of the U. S. Congress into a House with representation based upon population and a Senate with equal representation for all states was a workable solution to one of the controversies in the Constitutional Convention between the large and small states, fitted well into the check-and-balance political theory popular at that time, and became a weighty (if not entirely relevant) precedent. As additional states were admitted to the Union they adopted the bicameral form. Georgia and Pennsylvania shifted to bicameralism before 1800, and Vermont changed in 1836. During the 101 years that elapsed before any other state adopted the one-house form, bicameralism established itself as the traditional form of American legislature, for state governments at least.¹ For some reason, bicameralism has never made much headway in city councils.

This brief history suggests both the weight of tradition and the main points upon which the case for bicameralism rests: (1) bicameralism is "normal" and a known quantity; (2) a bicameral body is less likely to take ill-advised action, either through haste or corruption; and (3) a bicameral legislature offers the possibility of representation on different bases in the two houses, e.g., population in one house and area or existing political units in the other.

¹ For a rather complete treatment of the history of state legislatures and a number of other points touched upon in this paper see W. Brooke Graves, American State Government (1953), especially Ch. 6, "State Legislative Organization."

Unicameralism.

The advocates of unicameralism can make, on paper at least, a very reasonable case. Most of the historical precedents for bicameralism can be in part refuted or shown to be not fully applicable. Vermont's fifty years of unicameralism seem in historical retrospect to have been quite satisfactory.² More to the point is Nebraska's successful experience with unicameralism since 1937. Those in favor of unicameralism insist: (1) bicameralism does not necessarily prevent either ill-considered action or legislative corruption, as shown by the behavior of some state legislatures; (2) unicameralism offers ample opportunity for careful consideration of bills since the legislative procedure is simpler; (3) unicameralism clarifies responsibility for leadership within the legislature and fixes responsibility in the eyes of the public; and (4) a unicameral body, being smaller, is more economical.³

Summary

There are no inherent reasons why either sort of legislature cannot work satisfactorily. The theoretical case for the unicameral body is good, yet only one state has adopted this form and no more are likely to in the near future, unless Alaska

² For a review of experience with bicameralism and unicameralism, highly favorable to the latter, see Charles W. Shull, American Experience with Unicameral Legislatures (1937).

³ The unicameralism-bicameralism argument is elaborated in Belle Zeller (Ed.), American State Legislatures (1954), Ch. 4. This is a report of the Committee on American Legislatures of the American Political Science Association. Like most scholarly treatments, it favors unicameralism.

chooses the unconventional but not unprecedented course. As Dr. Graves observes, "The opinions of the people who ought to know vary widely; in fact they are often diametrically opposed. A large majority of political scientists favor unicameralism, while an overwhelming majority of persons with actual legislative experience are opposed to it."⁴ Delegates to the Convention can weigh the arguments: on the one side tradition, experience, and the possibility of double-check; on the other side simplicity, economy, and clear responsibility. Alaska's relatively small population, and the economy and simplicity of the unicameral legislature, seem to argue in favor of the single house. On the other hand, the apparent satisfaction with the two-house system in the Territorial legislature makes any departure from tradition difficult.

Size of the Legislature

It will be necessary for the Convention to arrive at some decision about the size of the legislature. A constitution can either fix the size of the legislature permanently or it can fix it temporarily with provision for expansion as the state grows. The objective obviously is to create a body large enough to handle the necessary business and give satisfactory representation to the main interests of the state, yet not so large as to be unwieldy or unduly expensive to operate..

Precedents With Respect to Size

In considering the matter of size of the legislature, the Convention can take advantage of the bench marks that have been es-

⁴ Graves, op. cit., p. 193.

established in other states and of Alaska's own experience.

Legislatures in Other States

As might be expected, the smallest state legislature is Nebraska's one-house body of 43 members. The smallest bicameral legislature is Delaware's historic and unusual body of 52. Next smallest are Nevada (64) and New Jersey (81). Including Nebraska's, there are nine state legislatures with under 100 members. Other state legislatures vary greatly in size, the majority being between 100 and 200. There are eight with over 200 members, including New Hampshire's enormous 424. The larger legislatures in Eastern and Midwestern states are the result of constitutions that guarantee representation to each of a large number of counties and towns, or which provide for automatic expansion of the legislature as population increases. Increments of population which seemed to justify an additional legislator 100 years ago are now completely unrealistic. It is worth noting that 6 of the 8 states with legislatures of under 100 members are Western states of relatively large area and low population--perhaps the best presents for Alaska.

Alaska's Own Experience

Perhaps most useful to the Delegates will be some reflection on Alaska's own experience. The Territorial Legislature has a Senate of 16 and a House of 24. Has this been satisfactory? Has a body of 40 members been able to do the job and give adequate representation? Delegates may be able to form some impressions on the basis of the Constitutional Convention itself. Does a

group of 55 seem adequate to represent the diverse population and interests of Alaska? Is it of manageable size?

General Considerations

In looking at other state legislatures, it should be kept in mind that there are few, if any, defenders of large-sized legislatures as such. Many are large for historical and accidental reasons; once large, there is no convenient way to shrink them.

The size of the legislature needs to be related to other decisions the convention will have to make about the legislature. For example, if the number and length of legislative sessions are to be limited, the legislature might be somewhat larger. The size of the legislature also is related to the system of apportionment and districting to be adopted. These matters will be discussed later in this paper. The Delegates may wish to arrive at a preliminary agreement about the approximate size of legislature desired, and then move on to discussion of other aspects of the legislative structure before determining the precise size.

If a suggestion may be ventured, there seem to be no reasons why a legislative body of 40 to 75 members (assuming two houses) could not serve Alaska's needs adequately for the foreseeable future. In the present situation it might be appropriate to start with a legislature of relatively small size--not too different from the Territorial Legislature--and allow gradual expansion according to population increase as indicated by each decennial census. However, the steps of increase ought not to be too large, and the

legislative monstrosities that may be seen in some states are clear evidence of the need for a reasonable ceiling.

Legislative Apportionment

One of the most complicated subjects to be taken up by the Constitutional Convention is legislative apportionment. It is complicated but at the same time it is of the utmost significance, since the decisions of the Convention will largely determine whether the legislature in coming years is to be satisfactorily representative of the people of Alaska. Experience of other states demonstrates that unwise constitutional provisions for apportionment can saddle a state with a legislature that with the passing years grows less representative, less responsive to the needs of the majority of the people. Failure of state legislatures to respond to widespread needs and changing situations has weakened the states and encouraged--even made imperative in some cases--expanded activity by the federal government. In the present decade the problem of state legislative apportionment has become one of the main focal points for the research of political scientists and the energy of reformers.⁵

⁵ This problem is treated extensively in all the government textbooks and a large number of special studies. The implications of state legislative reapportionment for federal-state relations are spelled out in U.S. Commission on Intergovernmental Relations (Kestnbaum Commission) Report (1955). One of the best short treatments is Gordon E. Baker, Rural versus Urban Political Power (1955). Also comprehensive is "Legislative Reapportionment," a symposium occupying the entire issue of Law and Contemporary Problems, Spring, 1952. Two good studies of individual states are James E. Larson, Reapportionment in Alabama (1955), and Thomas Page, Legislative Apportionment in Kansas (1952). Two thorough recent studies by legislative councils are

(continued next page)

Before proceeding to the substantive discussion, it may be helpful to clarify some points of definition and terminology. Strictly speaking, there are three different problems involved, but they are so intertwined that it is very difficult to separate them in any discussion and they are usually lumped under the general heading of "apportionment." The first problem is the basis of representation. What is it that is being represented in the legislature? Does each legislator stand for a certain number of people, or a given area, or a certain political unit (like a county or city)? The second problem is districting--the drawing of a map to lay out the districts in which legislators are to be elected. The third matter is apportionment in a narrow sense--the process of dividing (or apportioning) the available legislative seats among the districts.

Basis of Representation

There are several possible bases on which representation can be granted.

Population. The most common basis of representation in state legislatures is population. Unless otherwise specified, it is normally assumed that "representation according to population" means "representation according to equal population."⁶

(5 con't.) State of Minnesota, Legislative Research Committee, Legislative Reapportionment (1954), and Washington State Legislative Council, Congressional and Legislative Reapportionment (Final Report of a Special Committee, 1954).

⁶ There are certain types of apportionment plans in which population supplies the basis of calculation but there is no pretense of equality of representation. These are considered hybrids which combine population and some other principle. They will be discussed later in this paper.

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Legislative districts are drawn, and seats are apportioned among them, in such a way that each legislator represents, as nearly as possible, the same number of people. The legislator represents not the district as such, but the people who happen to live there. This is also sometimes referred to as the principle of equal representation. The case for equal representation on a population basis has been stated as follows:

One of the basic assumptions of democratic rule is the doctrine of political equality. "One man, one vote" has been the most concise and effective phrase employed to illustrate the ideal that all citizens should have approximately the same political weight. This means that representative assemblies should reflect fairly accurately the character of the body politic. After all, of how much value is equal suffrage if all votes are not weighed equally? A concomitant feature of the right to vote is the right to have the vote counted--and counted as a full vote. Any considerable distortion in the representative picture means a dilution of some votes--in effect, a restriction on suffrage.⁷

As of 1953, eleven state constitutions called for apportionment of both houses of the legislature on population or a similar basis offering substantial equality of representation.⁸ Eighteen states provided for one house on a straight population basis with some modification of the population principle in the house. Nineteen states departed from the straight population principle to some extent in both houses. However, in most of the

⁷ Baker, op. cit., p. 5.

⁸ Variations on the population principle are representation according to the number of registered voters, of adult males, of votes cast in general election, etc. These may or may not cause a slightly different structure of representation from a straight population basis, depending on the circumstances.

latter group some modification of the population principle was used for at least one house.⁹

Area. The other basis of representation frequently used is area. This requires some additional definition. Although it has been done in the past, there is no present day use of area as such--acres of land--as a basis of representation. The area principle is now expressed by giving representation to specified units covering a given territory--counties, towns, or legislative districts--regardless of their population. Because the territorial units used in this system usually are political entities of some sort (counties, especially), this is sometimes described as representation to political units. Examples of this approach are the senates of Nevada and New Jersey, which are composed of one member from each county, and the house in Vermont, composed of one member from each town.

The theory underlying this approach to representation is that there are certain identifiable geographic areas of the state having interests with a legitimate right to representation, regardless of population. Area representation, or some variation thereof, is most often advanced by spokesmen for the relatively sparsely populated areas, who feel that in order to protect their interests from being neglected they need representation greater than that to which they would be entitled on a straight population basis. The analogy of the U. S. Congress, with representation in the Senate by states

⁹ See Book of the States, 1954-55, pp. 114-118, for a recapitulation of state constitutional provisions on legislative apportionment.

and in the House by population is often advanced in defense of the practice of having one state legislative house composed of county representatives. However, the so-called "federal analogy" is hardly relevant, since the U. S. Senate was organized to accommodate the interests of pre-existing political units which, even after union, retain certain inherent rights.

Counties, on the other hand, are not sovereign but are creatures of the states with no rights which are not granted, and could not at any time be taken away, by the states.

Population, Plus. Actually there are only a few state legislative houses constructed purely on an area basis. Most of these which are not strictly according to population start with a population base but modify it with exceptions and limitations that have the effect of introducing an area factor and in causing various degrees of distortion of equal representation. These limitations appear in various forms. A common provision is that representation shall be according to population, except that each county shall have at least one seat. This may cause relatively little distortion if the number of counties is small and the number of available seats relatively large, but in states which have almost as many counties as legislative seats it places a serious limitation on the seats available for distribution to the more populous counties. Other states achieve this same effect with provisions for representation calculated on the basis of population but according to formulas under which a district's representation increases at a slower rate

than its population. Some constitutions put ceilings on the number of representatives any county or district may have.

Districting

Under most schemes of representation it is necessary to define districts in which representatives are to be elected. In some circumstances the electoral district may be the state or territory as a whole. Governors and U. S. Senators are elected "at large" in this manner. Normally, however, the state is divided into smaller election districts. Depending upon the system of apportionment used, the districts may elect one member each or may elect two, three, or several members. The Constitutional Convention itself is an interesting example of districting, with some delegates elected from the Territory at large, some from multi-member districts based on the judicial divisions, and some from single-member districts.

Election districts normally follow the lines of existing counties, towns, census tracts, or other territorial units of known population that can serve as "building blocks." Thus the present election districts for the Territorial Legislature are created by simply adopting the four judicial divisions: single-member districts were created for purposes of the Constitutional Convention from combinations of the various recording districts. If there are no existing units suitable for use as electoral district building blocks, new lines can be drawn on the map for this

particular purpose. However, in cases when unconventional units are used there is sometimes difficulty in getting population data in suitable form.

As a part of the scheme of apportionment it chooses to adopt, it will be necessary for the Constitutional Convention to make some provision for election districts for the legislature. The constitution can fix the district boundaries permanently or it can fix them temporarily with provision for redrawing them in connection with future reapportionments. If representatives are to be elected from single-member districts it will be necessary to leave the district boundaries subject to adjustment with population changes. If representatives are to be elected from a relatively small number of multi-member districts it may be practical to have the districts permanently fixed and carry out reapportionments by simply adjusting the number of seats for each district. In considering the matter of permanent or temporary districting, Delegates might bear in mind the uncertain future structure of local government boundaries in Alaska. Both apportionment and election administration are facilitated when election districts coincide in some manner with local government units.

The process of legislative districting is subject to the type of manipulation called "gerrymandering." Gerrymandering is the process of drawing the legislative map so as to enable the group doing the districting to capture the maximum number of seats. Generally the technique is to lay out the districts in such a way as to scatter as much as possible of the opposition strength among

districts where the party doing the districting is fairly sure to win. Unrestrained gerrymandering of course produces legislative districts of freakish shapes. Many constitutions contain provisions designed to discourage gerrymandering, although it is almost impossible to eliminate completely. The usual requirement is that legislative districts be of "compact and contiguous area".

Apportionment and Reapportionment Techniques

When the Convention has determined the size of the legislature and its respective houses, determined the basis of apportionment in the respective houses, and drawn the electoral districts, the final step in the process will be apportioning seats among the districts. For convenience these steps are being described here in a sequence. Actually, of course, these processes are interlocked and must be considered as a whole. The first distribution of seats among districts will be a part of whatever overall apportionment scheme is adopted. Presumably the various factors--size of the legislature, number of districts, population, etc.--will be adjusted to each other so that the whole represents some sort of rational system. Rational or not, the Convention will have the power to establish a system and an apportionment to be in force for as long as the convention may determine.

The Convention will, however, undoubtedly want to provide for reapportionment at some future time. Population shifts, grows in some areas, remains stable in others, and declines in still others. New local government units may be organized, others may be consolidated or disappear. Except in Delaware (which apparently assumes

that nothing ever changes) all state constitutions make some provision for reapportionment of at least one house, either at stated intervals or at the discretion of the legislature.

The ease or difficulty of reapportionment depends upon the "rules of the game" and the various limiting factors permanently fixed in the constitution. Under some systems, reapportionment can be practically automatic, requiring only the application of a mathematical formula to a new set of figures. In other cases, reapportionment is a complicated political act, involving discretion, controversy, compromise, and the possibility of unfair manipulation. This is especially true if reapportionment requires redistricting at the same time. The problem for constitution-makers is to hit upon a system of apportionment specific enough that reapportionment can take place without undue controversy, yet flexible enough that it does not in future years produce a pattern of representation completely at odds with the original spirit of the constitution. Any good apportionment scheme is likely to be a bundle of compromises; specificity in some parts may have to be sacrificed to flexibility in others.

Reapportionment usually involves juggling legislative seats and districts--either or both of which may be fixed in number-- in response to changes in population. The number of situations that can arise is almost infinite, but for illustrative purpose it is worth noting several general types of systems and the advantages and drawbacks of each. First let us assume several situations in which the number and boundaries of the legislative districts are

permanently fixed in the constitution, as they are in the so-called "automatic" plans.

With District Boundaries Fixed. In such a situation the most completely automatic scheme would give each district a number of representatives based on its actual population. Original districts would be set up so that each contained for example, 5,000 people. At succeeding censuses any district with over 10,000 might get two seats; over 15,000 three seats; over 20,000, four, etc. This is simple and fair since the number of seats increases in proportion to the population and preserves approximate equality of representation. The problems however are fairly obvious. In the first place, there is no control on the size of the legislature, which might grow to a completely unexpected size if the population increased rapidly. The second problem would be how to elect representatives in the districts that became entitled to several representatives. Either they would have to be elected at large within the district, which might not be satisfactory if there were a large number of them, or some sort of subdistricting would have to be provided for. The third problem is inherent in any setup with fixed districts: what to do about districts that lose population? England had its famous "rotten boroughs" which had lost most of their inhabitants but still sent members to Parliament. Alaska, too, has had its ghost towns.

It is, of course, possible to place a check on the size of the legislature in a system like this by simply providing that

districts can increase their representation up to a certain number but no more. But to the extent that such checks become operative, they produce underrepresentation of the more populous areas. This is precisely what has happened in some states, where fast-growing urban districts have hit the ceiling and can send no more representatives, even though they may have almost half the population of the state.¹⁰ Equality of representation is flagrantly violated.

Fortunately, there are fairer ways of apportioning according to population in a situation where both the total number of seats and the district boundaries are fixed. If there is no limit on the number of seats any district can have, it is possible to distribute the available seats among districts, on the basis of their population, according to certain mathematical formulas, which insure equal representation as nearly as possible. This situation arises in the U. S. Congress, where after every decennial census it is necessary to re-shuffle the 435 seats in the House among the 48 states. This is done by the Census Bureau through application of a mathematical formula called the "method of equal proportions" which distributes the seats among the states. There are several mathematical methods of carrying out such distributions.

¹⁰ For example, Florida, where nine urban counties have 60% of the population but only 23% of the House seats because, although representation is supposed to be on the basis of population, no county may send more than three representatives. This is by no means unusual. See Table I in Baker, op. cit., pp. 16-17.

Although they might produce slightly different distributions in certain situations, they are all "fair" and maintain substantial equality of representation.¹¹ Formulas of this sort are most satisfactory when the number of seats to be distributed is quite large as compared with the number of districts, as in the House of Representatives. In tighter situations the formulas are still fair, in the sense that the rules of the game are predetermined and there is no opportunity for manipulation, but sometimes the mathematically-determined cut-off points give additional representatives to districts which have only a small margin of population over their nearest rivals. Systems of this sort also have the problem of how to elect representatives in districts that are entitled to more than one. Either they must be elected at large, or some one must divide the districts into sub-districts--which raises the districting and apportionment problem all over again.¹²

¹¹ For a technical explanation of these methods see Walter F. Willcox, "Last Words on the Apportionment Problem," Law and Contemporary Problems (Spring, 1952), pp. 290-301; and Laurence F. Schmeckerbier, "The Method of Equal Proportions," Ibid., pp. 302-13. The Hawaii Constitution adopts the method of equal proportions for reapportioning the 51 house seats among the four basic areas of Hawaii (Art. III, Sec. 4).

¹² In Arizona and Missouri, where seats are apportioned among counties (which serve as election districts) the duty of internal apportionment and districting is placed on the county boards, Arizona constitution, Art. IV, Part 2, Sec. 1; Missouri constitution, Art. III, Sec. 2.

With District Boundaries Changeable. When reapportionment may include total or partial redistricting, a different set of problems is raised. The job is to divide the state into as many districts as there are seats, with each district containing approximately the same number of people. Potentially, of course, this is a very fair system, with opportunity for substantial equality of representation¹³ and a chance with every reapportionment to clean out any "rotten boroughs." The other side of the coin is that this system allows whoever is doing the districting a wide area of discretion, which is not always exercised wisely because of political pressure. There is bound to be pressure for gerrymandering, for drawing lines in such a way that no incumbent legislator will be out of a seat, and other districting devices giving advantage to certain individuals or groups.¹⁴ However, if legislators are to be elected in single-member districts, and any pretense of equality of representation

¹³ Because it is most practical to draw district lines along recognized territorial boundaries of one kind or another, the districts can never be completely equal in population. A redistricting in which no district has over 10 or 15% variation from the average population is considered a reasonably good job. See Page, op. cit. pp. 21-22.

¹⁴ A reapportionment committee in California received a letter with the following advice: "Put the Political Science Professor which you have appointed into an office, put a 'Do Not Disturb' sign on the door and disconnect the phone. Equip him with the 1950 Census results, a map and a pencil. Have him start by dividing the State's population by 30. Then let him figure out Congressional Districts which are as nearly equal in population as it is humanly possible. Then fight for this fair plan and to Hell with local politicians!" Quoted by Ivan Hinderaker and Laughlin E. Waters, "A Case Study in Reapportionment--California, 1951," Law and Contemporary Problems, Spring, 1952, p. 444.

is made, there must be provision for redistricting from time to time.

There are, of course, ways of reducing the discretion of the apportioning authority when both reapportionment and redistricting are done simultaneously. Many state constitutions call for redistricting but provide that district boundaries must follow county lines, or that each county must have at least one representative, or that no county may be divided for districting purposes. It is usually impossible to comply with such limitations and still achieve equality of representation. Actually, the purpose of such limitations is usually to guarantee distortions of representation rather than to prevent abuses.

Execution of Reapportionment

The preceding discussion has emphasized the theory and technique of reapportionment and the relevant provisions of state constitutions. It is now appropriate to give some attention to the methods by which the states attempt--sometimes successfully and sometimes not--to get reapportionment actually carried out.

Frequency of Reapportionment--The Law

A few state constitutions provide for reapportionment at the discretion of the legislature, although most of them call for reapportionment at specified intervals. The most common and probably most satisfactory provision is for reapportionment every ten years, following the results of the U. S. Census. A few of the older constitutions call for reapportionment at

at more frequent intervals and imply that the state itself shall somehow provide census data, but this approach is hardly to be recommended. Of course if a state adopts some other basis of apportionment than straight population--for example the number of registered voters, or votes cast at the last election--it may be practical to reapportion at other and more frequent intervals.

Frequency of Reapportionment--The Practice

Regardless of the law, the facts of life are that in many states reapportionments are not made. In over half of the states, no apportionments whatever have been made in the 1950's, and many of those accomplished have been in one house only. Dr. Graves reports the results of a survey made in 1952:

The survey also showed that there had been no reapportionment of one or both houses in Connecticut since 1818, in Mississippi since 1890, in Delaware since 1897, in Oklahoma since 1908, in Tennessee since 1905, in Iowa since 1904, in Alabama and Illinois since 1901, in Minnesota since 1913, in Texas since 1920, in Indiana, Kansas, Louisiana, Maryland, Michigan, Montana, and Pennsylvania since 1921, in Arizona, Arkansas, Colorado, Nebraska, North Dakota, Oregon, South Carolina, Utah, Washington, West Virginia, Wisconsin, and Wyoming since the early thirties.¹⁵

The responsibility for failure to reapportion in almost all cases rests squarely upon the state legislatures. If there is any proven fact about state government, it is that legislatures face the task of reapportionment with extreme reluctance.

¹⁵ Graves, op. cit., p. 200. A few of the states mentioned have reapportioned since 1952, but the quotation is a good indication of the lag that exists. See also Lloyd M. Short, "States That Have Not Met Their Constitutional Requirements," Law and Contemporary Problems. Spring, 1952, pp. 377-385.

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Reapportionment always means uncertainty about the seats of incumbent members; districts may be abolished, or two members may be thrown into the same district and forced to campaign against each other. More important is the fact that in states where there has been failure to comply with constitutional requirements for long periods, carrying out reapportionment according to law would mean a drastic shift in the balance of power within the legislature. Such situations are most frequently found in states where there has been rapid growth of cities, and the rural interests that have traditionally dominated state politics refuse to "let go."

But is there no relief in the courts? The courts may be the guardians of some aspects of our state constitutions, but they offer little recourse on this point. Pleading the doctrine of separation of powers, courts ordinarily refuse to make any attempt to make the legislature--a co-equal branch of the government--perform a duty which the constitution puts upon it.¹⁶ The courts will occasionally review an apportionment act after it is passed to see if it complies broadly with constitutional standards, but even here the typical position is to allow the legislature rather wide discretion.¹⁷

¹⁶ Lashley G. Harvey, "Reapportionments of State Legislatures--Legal Requirements," Law and Contemporary Problems, Spring, 1952, pp. 364-376.

¹⁷ Short, op. cit., p. 379.

Constitutional Provisions Facilitating Reapportionment

Recent years have seen a search for constitutional provisions more effective in securing timely reapportionment than relying on the initiative of the legislature.¹⁸

Several states have had success with provisions for reapportionment by some other agency if the legislature fails to act. In California, Michigan, South Dakota, and Texas reapportionment is to be carried out by boards consisting of the governor and other executive officials if the legislature does not reapportion within specified periods. In Oregon the secretary of state is responsible in the event of legislative inaction, and in Florida the governor is authorized to call a special session of the legislature which may not adjourn until a reapportionment bill is passed. In Illinois, under a 1954 constitutional amendment, the governor is to appoint a commission from lists of nominees supplied by the two major parties. If this commission fails to produce a reapportionment, the entire legislature is to be elected "at large" until a reapportionment bill is passed. Experience shows that constitutional "teeth" of this sort produce action, since legislatures almost invariably will reapportion themselves rather than give some other agency a chance to do so.¹⁹

¹⁸ For a concise summary of state constitutional provisions for the reapportionment agency, see Minnesota Legislative Research Committee, op. cit., pp. 6-9. A more extended discussion is in Hugh A. Bone, "States Attempting to Comply with Reapportionment Requirements," Law and Contemporary Problems, Spring, 1952, pp. 387-416.

¹⁹ Larson, op. cit., p. 34.

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There is another school of thought which holds that since legislators, individually and collectively, always have vested interests in any existing apportionment scheme, it is unwise to expect a legislature to reapportion itself promptly or fairly. Therefore, reapportionment should be taken out of the control of the legislature altogether. This approach is illustrated by Ohio and Arkansas, which provide for reapportionment by boards consisting of the governor and other executive officials. In Missouri the senate is reapportioned by a bipartisan board appointed by the governor. Arrangements of this type have been effective.

There are still other possible types of reapportionment arrangements. Maine, for example, has "automatic" reapportionment by a complex formula written into the constitution; no legislative act is necessary, and there is no executive discretion. In four states there is the possibility of passing reapportionment bills by initiative of the people. This has actually been accomplished once in Washington and once in Colorado.

Proportional Representation

Something should be said at this point about proportional representation, a somewhat unconventional scheme of holding elections and apportioning seats that has a number of devoted supporters. Proportional representation (PR) would superficially seem to mitigate some of the apportionment problems referred to in the preceding pages, but it has very serious drawbacks of its own.

There are several varieties of PR systems some of them rather technical, and it is impossible to explain them in detail in this short paper.²⁰ The essentials of PR may be explained by contrasting it with the conventional type of election. In ordinary electoral systems, representatives are elected in single-member districts. The candidate with a majority (or even a plurality, if there are several candidates) gets the seat. If this same situation is repeated in most of the districts, it is possible for a party with only a slight edge in the popular vote to control all or most of the seats in a legislature.

Under the simplest type of PR, all representatives would be elected at large. The ballots would be set up and the votes counted in such a way that the main parties or groups would win a number of seats roughly in proportion to their total vote. A majority party would have a majority of the seats, but the minority would also be represented. A somewhat less drastic method than electing the whole house at large would be to divide the state into a small number of districts, each with several members according to its population. PR elections would then be held within each of these districts. Such a scheme would assure the minorities a substantial amount of representation while still identifying each representative with one major area of the state.

²⁰ All government textbooks devote some space to PR. See Graves, op. cit., pp. 156-169; C. O. Johnson, State and Local Government (1952), pp. 74-75; V. G. Key, Jr., Politics, Parties, and Pressure Groups (1947), pp. 694-698; Howard Penniman, Sait's American Parties and Elections (1948).

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There are no American state legislatures elected on a PR basis, although the system has been used in a few city councils.²¹

In theory, at least, PR would avoid some of the problems of apportionment and districting. If the whole legislature were elected at large, the legislature would, in effect, be apportioned by the election itself. Districting and gerrymandering controversies would be avoided. There would be equality of representation since any group which voted together would get representation roughly in proportion to its strength. Most of these advantages would be retained if elections were not in the state at large but in several multi-member districts. Such districts could probably be permanently fixed in the constitution, and apportionment of seats among them could be made automatically by mathematical formulas based population. It would be impossible for any party, special interest, or town within any district to capture all of its seats.

Convenient though it might be from the viewpoint of legislative apportionment, the desirability or undesirability of PR rests on a broader issue--namely, its effect on party government. To be sure, it seemingly makes legislatures more representative, in a sense, since each group gets its spokesmen in the legislature and there is protection against complete domination by the

²¹ The closest thing to PR in any state is a weighted voting system in Illinois, where each district elects three members of the House, and the voter can give three votes to one candidate or divide his three as he chooses. The Model State Constitution recommends a legislature elected by proportional representation in districts of 3 to 7 members each. Art. III, Sec. 302, and an explanatory article, pp. 26-27.

majority. The danger is that it represents artificial interference with the operations of democratic majorities and it may destroy the two-party system. Since any group, interest, or minority of any consequence can get at least some representation in the legislature, it encourages such groups to stick together and vote together. This produces minority or "splinter" parties, and reduces the chance that any party can get a clear majority. Without a majority party, who is there to represent the whole state, and where does the responsibility for government lie? Chaos of the sort chronic in the French Parliament and other European multi-party legislatures which rarely have a majority party, is certainly to be avoided. There is controversy among scholars whether PR causes a multi-party system, but under some circumstances it certainly encourages it.

The Politics of Apportionment

The preceding parts of this paper have considered legislative structure and apportionment largely from the technical and legal point of view. It is now appropriate to consider some of the political issues that are in practice inseparable from the technical points and should be kept in mind by Delegates.

Historical Roots of Present Systems

Political theorists since the ancient Greeks and Romans have been struggling with the question, "What constitutes adequate representation." For present purposes it is not necessary to go back that far, but only to note that argument, compromise, and

majority. The danger is that it represents artificial interference with the operations of democratic majorities and it may destroy the two-party system. Since any group, interest, or minority of any consequence can get at least some representation in the legislature, it encourages such groups to stick together and vote together. This produces minority or "splinter" parties, and reduces the chance that any party can get a clear majority. Without a majority party, who is there to represent the whole state, and where does the responsibility for government lie? Chaos of the sort chronic in the French Parliament and other European multi-party legislatures which rarely have a majority party, is certainly to be avoided. There is controversy among scholars whether PR causes a multi-party system, but under some circumstances it certainly encourages it.

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confusion about proper representation is older than the American states. From the time the colonies began to achieve some measure of self-government under the British, both "area" and "population", or similar concepts, were used as bases of representation.²² In most of the early state constitutions, population seems to have been the predominant factor considered, but with considerable recognition of the claims of counties or towns, as such, regardless of their population.²³ With the rise of democratic theory in the late 18th Century, population came to be considered as having a higher claim on theoretical or moral grounds. As early as the American Revolution, Jefferson was criticizing the constitution of Virginia:

Among those who share the representation, the shares are very unequal. Thus the county of Warwick, with one-hundred fighting men, has an equal representation with the county of Loudon, which has one thousand seven hundred and forty-six. So that every man in Warwick has as much influence in the government as seventeen in Loudon.²⁴

Professor Baker also notes Jefferson's criticism of the Maine constitution of 1819 because it guaranteed a seat in the legislature to every town regardless of size. Jefferson thought this a violation of the principle of equal representation, and a sacrifice of the rights of the people at large to a few.²⁵ Under the influence of this kind of thinking, population--an

²² Page, op. cit., Ch. 2.

²³ Graves, op. cit., p. 199.

²⁴ Jefferson, Notes on Virginia, quoted by Baker, op. cit., p. 7.

²⁵ Ibid., p. 4.

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equal number for each legislator--came to be the predominant basis of representation in state constitutions through the 19th century.

Yet the population principle was rarely recognized to the exclusion of all others. At almost every crisis there were those who could muster enough arguments, precedents, or political power to get some guarantee that their town, county, or area would be recognized as such. At one time it might be well-to-do land speculators who owned vast areas of the hinterland and naturally sought seats for areas they could control; at another it might be the back-country hunters and small farmers fearful of exploitation by the commercial interests in the towns along the seaboard; later it was the farmers and merchants in the villages and county seat towns suspicious of slick politicians in the state capital. Typical of the arrangements sought and frequently secured by such interests were to have one house of the legislature composed of county delegates, like the U.S. Senate, or to guarantee to every county or district at least one delegate and provide a limited number of seats for distribution among the more populous places. Against a historical background of neglect and underrepresentation for the frontier areas, such arrangements did not at the time appear particularly undemocratic.

These compromises did not pinch very hard on either rural or urban areas as long as states remained predominantly rural and the cities small, but by the latter part of the 19th century it was clear that a fundamental change in the population of the United States was taking place. Population was growing at an almost in-

credible rate, and the greatest growth was in the cities. In many states it was not hard to foresee the day when one or two towns might have as much population as the rest of the state put together. What then? Could such places be allowed the full representation to which their population otherwise entitled to them, with the possibility that they might be able to control state policy?

Present Deviation from Equal Representation

The situation described in the preceding pages has continued to the present day. The prevailing constitutional requirement and the most popular political theory call for equal representation on the basis of population. The fact is that there are gross distortions of equal representation. These distortions result from three factors: (1) constitutions which deviate from the principle of representation of population and make concessions to representation of areas; (2) rapid and uneven population growth, especially in urban areas; (3) failure to comply with constitutional requirements for reapportionment. Taken together, these factors have produced state legislatures that are not representative. A recent study reports:

These patterns for representation by considerations other than population were established before the great growth of urban population in this century. The relatively minor earlier misrepresentation has been magnified by the growth and movement of population. Strange results are not uncommon. Eight senators in one state represent about four-fifths of the state's population, while 13 represent the remaining one-fifth. Three representatives from one urban county in one state represent one-eighth of the state's population, while

202 represent the rest of the state. It was estimated in 1947 that urban centers in the United States with almost 60 per cent of the population elected only 25 per cent of the state legislators. Members sitting in the same legislative house, and with the same vote, not uncommonly have constituencies with one-fifth to one-tenth of the population of other members. Such conditions, making the votes of some citizens many times as powerful as other, strain the underlying assumptions of our system of government.²⁶

Startling deviations from equal representation are not confined to a few states. A study of rural and urban representation published in 1955 classified 8 states as having "especially severe" overrepresentation for rural areas, and corresponding underrepresentation for urban areas. In the same study, the distortion was classified as "severe" in 22 states, "substantial" in 9 states, and "moderate" in 7 states. Only two states had equal representation.²⁷

In many states failure to reapportion and constitutional provisions for representation on a basis other than population tend to reenforce each other and it is not easy to tell which is to blame. Either or both can cause serious distortions. In Minnesota the constitution calls for apportionment according to population (exclusive of Indians not taxed) and reapportionment at least every ten years. But through failure to reapportion since 1913 the following situation exists:

²⁶ Karl A. Bosworth, "Lawmaking in State Governments," The Forty-Eight States (Research report for the American Assembly, 1955), p. 94

²⁷ Baker, op. cit., pp. 15-17 and Table I.

Size of Senate	67	Size of House	131
Average pop. per Senator	44,515	Average pop. per representative	22,767
Largest Senatorial district	153,455	Largest representative district	107,246
Smallest Senatorial district	16,878	Smallest representative district	7,290

As might be expected, the districts presently most underrepresented are in the Minneapolis-St. Paul area. However, there are several underrepresented counties in the lake and woods area of northern Minnesota. They are still relatively sparsely populated, but because they were almost unsettled at the time of the last reapportionment they still get very little representation.²⁸ Rural as well as urban counties can lose out through failure to reapportion.

Of course some of the most drastic distortion of equal representation exists in legislative houses for which there is no constitutional provision for reapportionment. A few years ago in the Montana senate, composed permanently of one senator from each county, the senator from Silver Bow represented 53,207, while the senator from Petroleum represented only 1,083 persons. In Delaware, where the constitution itself does not mention reapportionment, for either house, Wilmington had 67 per cent of the population but only 42 per cent of the representation.²⁹

²⁸ Minnesota Legislative Research Committee, op. cit.

²⁹ Graves, op. cit., p. 203.

Consequences of Unequal Representation

What difference does all this make? Presumably in American society the principle of equality has special significance for its own sake. In the long run--and not too long at that--the people can have little confidence in an unrepresentative legislature. State governments constitutionally incapable of responding to change are not likely to stimulate respect for law and attitudes of responsibility on the part of either an entrenched minority or a frustrated majority. Several specific results of misrepresentative legislatures might be noted.

Urban-Rural Conflict ³⁰

The present bias in state legislatures tends to place control in rural groups which may have little sympathy for or knowledge about either the practical problems of government in cities or the general political outlook and aspirations of urban citizens. Since cities are legal creatures of states they must function within a framework of laws passed by state legislatures. Today many cities are caught in a squeeze between the needs of their citizens and state-imposed limitations, financial and otherwise, on their autonomy. There is constant struggle over taxation, finance, allocation of revenue, and other issues. Internal city housekeeping matters like building codes, traffic regulations, metropolitan transport, and slum clearance and re-

³⁰ On this subject see especially a work previously cited, Baker, Urban versus Rural Political Power (1955).

development, often fail to get over the hurdles at the state capital. Having less than their proper representation, the cities usually come out second best. Urban-rural controversy is not limited solely to questions of city administration. Rural-dominated legislatures traditionally show little interest in social legislation and state programs in the field of public welfare which are apt to be desired by city dwellers.

Once a pattern of misrepresentation has been established it has a poisonous effect on state politics generally. Issues are not resolved. They fester, and gradually every question before the state legislature becomes infected with the "upstate-downstate" controversy. Questions are not considered on their merits but with respect to their import for relative advantage in the perpetual conflict.

Rotten Boroughs and Legislative Behavior

When a legislator is elected by a very limited number of people, as compared with his colleagues, he is likely to have a limited area of interest and responsibility. The legislator with a large complex constituency must keep in touch with many fields, follow the main trends of thought, and make close calculations regarding the majority sentiment and the broader public interest. The legislator representing only a few can spend most of his time pushing the narrow interest of his immediate constituency and build his popularity on personal favors; he can afford to take extremist positions and be irresponsible about issues that seriously matter to many others.

Perhaps even worse than disinterest on the part of rotten borough representatives is the danger that since the constituency has only a narrow range of interests and is not concerned about how the representative votes on other issues, the representative is vulnerable to pressure and influence and can, if he chooses, bargain his vote to special interests. A student of the California legislature concluded:

Privately owned utilities, banks, insurance companies, and other concerns with crucial legislative programs have discovered some 'cow county' legislators more responsive to their demands and less committed to contrary points of view on key social and economic questions than are urban representatives. The urban legislator is more likely to be influenced by organized labor and by the many popular movements that ebb and flow through California politics.³¹

Rotten boroughs and irresponsible legislators are not an exclusive product of rural areas, by any means. In the Illinois legislature some of the most startling behavior comes from members from old districts close to the heart of Chicago where industry and commerce have gradually displaced most of the residents and left a political situation easy to manipulate. As Page points out, the struggle is not simply between rural and urban areas as such, but between interests that speak through legislators from those areas, which may be a different thing altogether.

³¹ Dean E. McHenry, "Urban v. Rural in California," National Municipal Review (July, 1946), pp. 350-54, quoted by Page, op. cit., pp. 14-15.

Legislative-Executive Relations

Even though minority interests are overrepresented in, and frequently control, state legislatures, governors are elected in the state at large and thus represent a majority. In a two-party state it is common to have a legislature (or at least one house) controlled by a party different from the governor. Surveying the twenty-eight governors who were elected in 1954, Bosworth notes:

The results are remarkable in the infrequency with which the party division in the legislature to be dealt with by the governor came even close to the party division of popular votes for governor. Ten of these governors found the opposite party in charge in at least one of the houses. Five of them who won with the respectable figure of 54 per cent of the votes found both houses in the hands of the opposition.³²

Such situations not only suggest the failure of the legislature to properly mirror popular sentiment, but invite legislative-executive conflict and stalemate. No one suggests that a chief executive has any inherent right to a legislature of his own political faith, but the frequency with which legislative-executive splits occur in some states and the consequences that often follow suggest the need for change. In addition to the danger of short-run stalemate, the long-range result of these situations is an increasing reliance of the people on the chief executive to take actions desired by the majority, with a consequent lowering of interest in and respect for the legislature.

³² Bosworth, op. cit., p. 96-97

Federal-State Relations

One more result of the failure of state legislatures to respond to the needs of the majority may be noted--the tendency for the federal government to fill the vacuum left by state inaction. A Presidential Commission recently appointed to examine federal-state relations (after much agitation about federal "encroachment" on states) concluded that much of the responsibility for federal expansion was due to the states themselves. The Commission found "a very real and pressing need for the States to improve their constitutions." One of the areas in which improvement was needed was "to maintain an equitable system of representation."³³ The Commission said:

One result of State neglect of the reapportionment problem is that urban governments have bypassed the States and made direct cooperative arrangements with the National Government in such fields as housing and urban development, airports, and defense community facilities. Although necessary in some cases, the multiplication of National-local relationships tends to weaken the State's proper control over its own policies and its authority over its own political subdivisions.

Further:

For these and other reasons, the Commission has come to the conclusion that the more the role of the States in our system is to be

³³ U. S. Commission on Intergovernmental Relations (Meyer Kestnbaum, Chairman), Report (1955), p. 38

emphasized, the more important it is that the State legislature be reasonably representative of all the people.³⁴

Summary

This discussion has shown how constitutional deviations from equal representation and lax provisions for reapportionment have produced many state legislatures that no longer represent a majority. Some of the consequences of this for state and national politics have been pointed out. These problems may seem a bit remote for present-day Alaskans. It is important to remember, however, that constitutions that have allowed these things to happen in other states were written at points in the history and development of those states that closely resemble Alaska's situation at the present time. Apportionment arrangements that seemed not unreasonable in 1850 and even in 1900 have produced gross distortions of representation in the 1950s. Alaska is young and it will grow; no one can foresee the eventual size of distribution of its population. It is to be hoped that Alaska will study the lessons of history and plan a legislature that will still be as representative in the year 2000 as on the day of Statehood.

Congressional Apportionment

One additional subject on which some constitutional decision should be considered is the division of Alaska into Con-

³⁴ Ibid., p. 40.

gressional districts when Alaska gains enough population to qualify for more than one member of the U.S. House of Representatives. This problem is not directly connected with state legislative structure but is treated here because of the similarity of the problem and the need for the same type of remedies.

After each decennial census Congress passes an act dividing the House among the 48 states according to their population, except that no state receives less than one Representative. Although apparently Congress would have the power, if it chose to exercise it, to divide each state into Congressional districts, it has always left that responsibility to the individual states.³⁵ At certain times in the past Congress has set standards for districting by the states (such as that the districts must be approximately equal in population, or that they must be composed of compact and contiguous territory) but no such standards are now on the statute books.

The Congressional reapportionment act passed after the 1950 census provided that in the states which received increased representation the additional representatives would be elected at large unless and until the state took action to redistrict. In states that lost representatives, the State's entire remaining Congressional delegation would be elected at large until the State redistricted. Apparently all states that either gained or

³⁵ The subject of congressional apportionment is well treated in James E. Todd "The Apportionment Problem Faced by the States," Law and Contemporary Problems, Spring, 1952, pp. 314-337.

lost Congressmen after the 1950 census did redistrict. However, since the federal law does not require the states to district themselves it is possible for a state to elect its delegation at large for an indefinite period. As a matter of fact, New Mexico and North Dakota, states which have two Congressmen each, have elected at large for a number of years. Such a pattern would seem to be adequate for Alaska for some years to come.

Summary: Problems and Alternatives

It is beyond the scope of this paper to suggest a complete plan of legislative structure and apportionment. Indeed, the alternatives and combinations of plans that might be used are so varied that it is impossible to trace them all. The course finally adopted by the Convention will need to be determined after serious deliberation and with the support of adequate technical staff work so that the implications of all the proposals made can be made clear. It is possible, however, to recapitulate some of the points that the Convention will need to consider and identify a few of the broadest issues.

Basic Factors in the Situation

First might be noted several of the factors that are "given":

1. The Territorial legislature provides a point of departure. It is desirably small. The prospects are good for a body of moderate size and provision for gradual growth according to some reasonable plan.

2. The Alaska population is an uncertain factor. At present it is relatively small and unevenly distributed. Neither the rate of increase nor the future distribution can be predicted with accuracy.

3. Apportionment in the Territorial Legislature is among four major divisions with legislators elected at large within each division. The results of this are that most of the legislators come from the one or two largest towns in each division. There is an appreciable amount of sentiment for some sort of apportionment that will give a wider geographic distribution.

4. Alaska is now divided into judicial divisions and recording districts, and population data are available primarily on the basis of these units, making it probable that for the immediate future these will have to be the building blocks for apportionment and districting.

5. The future structure and division of Alaska into local government units will depend upon constitutional provisions and future legislative action. Election and apportionment needs to be tied in as closely as possible to local government. On the other hand, the absence of counties or towns with special claims to representation as such, regardless of population, gives the Convention an opportunity to devise an apportionment with full equality of representation.

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Legislative Structure

First of all, is the legislature to be bicameral or unicameral? Some of the considerations on this point have been discussed in the early part of this paper.

Second, the Convention will have to fix the size of the legislature. Shall the size be fixed permanently, or should there be provision for expansion? If the latter, what limit may be placed on expansion? There seems to be no impelling reasons for making the legislature much larger than the Territorial Legislature for the time being, but a body of this size may not be adequate to provide the necessary variety of representation if Alaska should grow rapidly in population. It might be practical to start with a legislature of about 45, and allow for small expansion after any census in which substantial growth of population was verified. For example, if by the 1970 census Alaska has 400,000 civilian residents, the legislature might be increased by five members. A series of five-member increases not oftener than every ten years and conditional upon the population reaching specified amounts might be provided for. A ceiling might be placed at 100 legislators.

The third major point is the basis of representation. Will equal representation according to population be assured?

At this point it should be emphasized that there are ways of electing a legislature (especially a bicameral one) which will produce a substantial variety of representation without

sacrificing equality of representation. One way of doing this would be to vary the size of the electoral districts for the Senate and the House. Senators might represent districts of considerable size and complexity. Representatives could be elected in smaller districts and thus be more closely tied to the specific interests of their constituencies. A House of 25 to 30 members elected in single-member districts will produce a considerable geographic spread of representation.

Districting and Apportionment

The basic decision of the Constitutional Convention on the apportionment of legislative representation depends primarily on the decision of the Convention regarding the organization of local governmental units. This is because local governmental units provide the simplest and most efficient electoral districts, and because their identification as such contributes to their essential political strength. The arrangement of local governmental units logically will provide one of two patterns: (1) municipal jurisdictions which will encompass homogeneous economic and political areas including and surrounding existing urban areas, but leaving large areas as essentially "unorganized territories" in which local governmental services would be provided by the State; or (2) municipal jurisdictions which collectively would encompass all of Alaska.

Under alternative (2), legislative apportionment could be reasonably simple. The senate or upper house could be composed

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of one senator from each municipality regardless of its population. The lower house would be composed of one representative from each municipality, with additional representatives from those municipalities which exceeded a population minimum. This population minimum would depend upon the size, or maximum size, which the Constitution establishes for the lower house of the legislature.

Under alternative (1), providing for municipalities with comprehensive area jurisdiction but still leaving large areas as unorganized territory to be administered by the state, the apportionment pattern described above would have to be supplemented in order that the voters in the unorganized territories would not be disenfranchised. This could be done by allotting each unorganized territory to a contiguous municipality for electoral purposes, or by establishing separate electoral and apportionment districts for the unorganized areas. Since the legislature, rather than the constitution, should establish the municipal districts, it is probably desirable that the constitution, after establishing the basic pattern of apportionment and legislative representation, leave to the legislature the task of providing similarly for any unorganized districts.

Timely and Fair Reapportionment

The precise nature of a provision for reapportionment will depend upon how the Convention resolves some of the problems suggested in the immediately preceding section, but in any

event, the constitutional requirements for satisfactory reapportionment are reasonably clear.

Assuming apportionment on the basis of population, mandatory reapportionment every ten years, immediately following the U.S. census, is probably the most satisfactory.

It is clear that a legislature cannot be counted on to reapportion itself. Either special incentives and leverages must be provided to induce the legislature to act, or reapportionment must be taken away from the legislature altogether. Several possible courses of action have been suggested earlier in this paper. The threat of apportionment by a commission in the event of legislative inaction has always produced results so far in the states where it has been in force. Apportionment in the first instance by a commission of either executive officials or party nominees seems satisfactory. The threat of elections at large held over such a commission might also help produce results. If the constitution designates some officer other than the governor to appoint the apportionment commission he would probably be subject to writ of mandamus; the constitution might make it explicit. Constitutional language referring to reapportionment by executive branch officials should be coordinated with the constitutional article on the executive branch; it would not do to provide a duty in this part of the constitution for some officer whose existence is not elsewhere specifically provided for.

The traditional provision that legislative districts must be compact and of contiguous area seems to be about as specific a commandment against gerrymandering as can be drawn and still leave opportunity for realistic adjustment of district boundaries. Certainly the standard of equality of population ought to be required. Perfection in this can never be achieved, but the present tolerances are too loose. Constitutional language establishing a maximum deviation from the average population per district would be helpful in securing effective judicial review. Most students think a permissible deviation of 15 per cent a reasonable compromise between the principle of equality of representation and the need for flexibility.

Congressional Apportionment

This Convention may wish to consider some provision for apportioning Alaska's delegation in the U.S. House of Representatives. If so, the methods of securing prompt apportionment and the standards suggested just above should be equally applicable. However, it appears that for some time to come, election at large of the congressman allotted to Alaska would appear to be not only adequate but justifiable.

XI

CONSTITUTIONAL AMENDMENT

AND

REVISION

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

November, 1955

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CONSTITUTIONAL AMENDMENT AND REVISION

Some political thinkers have interpreted the written constitution in the American political system as a stabilizing element which operates to retard change or requires a more deliberate selection of what changes society deems desirable, hence acceptable. As a document embodying the fundamental political beliefs of the people and an accepted general arrangement of governmental powers, there is indeed good reason to examine searchingly any major changes proposed in the basic structure and philosophy. As Victor Hugo once said: "He is no wise man that will quit a certainty for an uncertainty." There can be little doubt that state constitutions have operated to retard rapid changes; but this stabilizing effect in some states has been so strong as to preclude continued consonance between the patterns and needs of the life of the people and the doctrines and arrangements set forth in the constitution. In other states, constitutional change is easy and frequent so that the stabilizing effect of the constitution is difficult to perceive because of the intermixture of constitutional and legislative matters. In the American

political tradition, constitutional amendment and revision is a basic and continuing problem of arriving at a desirable balance between stability and change.

A combination of the basic conservatism of the people against change and provisions for the amendment and revision of the constitutions of many states has proven so formidable that it has taken several generations to accomplish even piecemeal amendments. In Tennessee, for example, the constitution, adopted in 1870, was not amended for 83 years despite many efforts to do so. In Illinois, efforts to adopt a more workable amendment provision began in 1892 with intervening attempts in 1896, 1924, 1932, and 1946 and final ratification in modified form in 1950. This danger of constitutional stagnation and immutability is undoubtedly of the most pernicious type. The constitution becomes a positive obstacle - to even the most urgently needed changes and brings about either resignation to archaic forms and requirements or unhealthy evasion of constitutional provisions.

Another problem which directly affects the amendment and revision process is the length and detail of most state constitutions. The average state constitution is four times as long as the U. S. Constitution; and Louisiana's constitution, holding the record as the lengthiest, is 27 times as long as the federal one. The detail and length of constitutions and

liberalized amendment procedures have created the tendency (and need) for amendments to multiply. California, for example, with one of the longest constitutions, has amended it over 340 times since its adoption in 1879.

If the Delegates at College can resist the tendency of state constitutions to increase in detail and length, the amendment and revision process should be so designed as to be differentiated from ordinary legislative processes and perhaps somewhat more difficult; they should not, however, be unduly severe or complex as to preclude future changes. If the product produced by the Convention is more prolonged and detailed, the amendment procedure must be made more liberal. This, in turn, will require liberalized revision provisions to enable the periodic rationalization of accumulated piecemeal amendments which will forthcome.

Constitutional Amendment

The process of amending a state constitution normally consists of three phases: (1) proposing an amendment; (2) publication; and (3) ratification.

Proposing an Amendment

Proposals to amend a constitution can arise in the legislature, by popular initiative, or in a convention assembled to consider the whole document. The oldest and most common method of initiating amendments is by legislative proposal and at

present only one state fails to make provision for this method. Some states place inordinate limitations on this process, such as specifying the house of origination, the exemption of certain subject matter or prohibitions against the combination of subjects, and limitations on the frequency with which legislative amendments can be prepared. Typically, and more wisely, discretion is left to the legislature as to the methods it will use in considering amendments proposed before it.

State constitutions are well divided however on the question of the size of the legislative vote required to approve proposed amendments. One-sixth of the states require a three-fifths majority of the members elected to each house; the remaining states are about equally divided between those requiring a simple majority and those stipulating a two-thirds majority. A dozen states require the requisite majority at two consecutive sessions before submittal to the people.¹ In New Jersey, a second passage (by a simple majority of the membership) is required only if the legislature originally adopted the amendment by a majority less than two-thirds. The provisions which are made, if any, in the Alaska Constitution for the enactment of regular legislation could also be used as the basis of differentiating the treatment of proposed constitutional amendments by the legislature.

¹ In Delaware amendments become effective upon passage by two consecutive legislative sessions, with no requirement of a popular referendum.

Amendment Proposals by Popular Initiative. About one-fourth of the states provide that amendments to their constitutions may also be proposed by popular initiative. Normally, as a first step it is necessary to obtain signatures on a petition, the number usually being set by the constitution as a given minimum percentage of qualified voters (ranging from 8 to 15 per cent) or an absolute numerical minimum (20,000 and 25,000 voters in North Dakota and Massachusetts respectively). This device is subject, in most states in which it is used, to strict prohibitions as to the kinds of matters which can be considered; these normally include appropriations, the abolition or creation of courts or political divisions, and abridgement of civil rights. The limit on frequency with which proposals may be submitted to popular ratification is also employed in some states.

It seems rather fruitless to provide for a device of popular participation in constitutional amendment and then to circumscribe it strictly. Probably the only justification for this device is a rather limited but perhaps important one; namely the popular initiation of such amendments which the legislature, by virtue of its unrepresentative nature, refuses to initiate because of political embarrassment or because they would produce shifts of political power.

Amendment Proposals by Convention. Two-thirds of the state constitutions make provisions for conventions to propose constitutional amendments or revisions. In those states which are silent on this subject, it has been interpreted that the legislature has the right to call a constitutional convention. Eight states provide for automatic periodic referenda on the question of calling a convention, ranging from 7 to 20 year intervals.² Most states which specifically provide for the calling of conventions by the legislature require that this question also be submitted to popular vote.

The convention is more often a device used for more thoroughgoing revision of the constitutions rather than amendment. In some states the practice of a commission appointed by the governor or legislature has been followed to study and recommend amendments for the consideration of the legislature.

Publication of Proposed Amendments

The manner and time of publication of proposed amendments is generally left to the discretion of the legislature, whether the proposal originates by popular initiative or in the legislature itself. Some constitutions include instructions covering the time and duration, area, and media of publication as well as the distribution of arguments for and against the amendment.

² The people of New Hampshire, who have no other means provided for amendments than by conventions, vote on convening one every seven years.

Generally, failure to comply with publication requirements exposes an amendment to invalidation after its approval. Hence considerable caution should be exercised in prescribing publication requirements if they are to be written at all.

Ratification of Proposed Amendments

A popular vote is almost universally required to ratify an amendment to a state constitution, regardless of the method of initiation. Although a majority vote is normally the requirement for ratification, stricter majority requirements can be found, such as majorities of those voting at the election, a three-fifths majority, or a straight majority where prescribed minimum percentages of the voters at an election must have expressed themselves on the amendment. These extraneous popular ratification requirements have been the direct source of constitutional stagnation in many states, often in the face of a longstanding and clear popular desire for adoption.

About half of the state constitutions provide for amendment proposals to be submitted at regular elections. The others variously specify a special election, defer to legislative discretion, or are silent on the matter.

Constitutional Revision

When amendments are recognized to be piecemeal, the source of confusion, or generally inadequate, it becomes necessary to overhaul the entire document through revision. A few revision commissions have been used in which cases the legislature

may transform itself into a revision commission or it may create such a body alone or with the governor. A more usual practice however, is the device used in Alaska to draft its constitution, that is, by a convention provided for the purpose.

Authorizing and Assembling the Convention

Where a constitution is silent on the constitutional convention, it has been construed to mean that the legislature may provide for calling one. When specified, most states provide for constitutional conventions to be called by the legislature. In many cases a popular vote of approval is required so that the legislative action becomes merely a proposal to call a convention. Often a two-thirds vote in each house is necessary to pass the call for a convention.

Most constitutions leave the legislature free to decide when a convention should be called. Some, however, as indicated earlier, prescribe that the question of calling a convention should go on the ballot periodically. Implementing details for assembling the convention are usually left to legislative specification, though here too some constitutions contain this minutiae. The selection of delegates is normally by popular elections in established districts. At-large delegates are sometimes provided for, as was used in the formation of the Alaska Convention.

Adoption of Convention Proposals

It has become almost universal practice to submit the revised constitution to popular vote, although less than half of existing constitutions make this specific provision. The revised instrument can go to referendum as a unit, as separate amendments to be voted upon separately, or both. Like the ratification of amendments, variations exist as to the basis of the required majority vote and in the use of general or special elections.

General Comments

As discussed above, most of the desirable mechanics and powers for constitutional amendment and revision can be achieved by silence in the constitution. It is difficult to lay down firm guidelines for drafting amendment and revision provisions because of the dependence of their content on the nature of the constitutional document produced by the Convention. If the document is brief and confined essentially to fundamental considerations, there is perhaps justification for designing an amendment and revision process which differs from that for regular legislation and one requiring clear popular support. If, however, the constitution produced by the convention includes a considerable number of limitations and elaborations and becomes somewhat detailed in character, experience in other states has shown the need for relatively more liberal

amendment procedures to permit the modification of outgrown or archaic provisions. With liberal amendment provisions, it is equally desirable to pave the way for the periodic clarification and systematization of the constitution through the constitutional convention process.

XII

INITIATIVE, REFERENDUM AND RECALL

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

November, 1955

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INITIATIVE. REFERENDUM AND RECALL

When the Convention has finished its work the draft Constitution will be submitted to the voters of Alaska for their approval or rejection. This procedure, called a referendum, is one of the ways in which citizens can participate in the governmental process in addition to voting for specific officials. One of the subjects to be considered by the Convention is whether, or in what form, to provide for the referendum and its related procedures, the initiative and the recall.

Dr. Gosnell identifies eight varieties of direct popular participation:¹

1. A constitutional amendment originating in the legislature and requiring the approval of the electorate.
2. A constitutional amendment initiated by a petition signed by a specified proportion of the electorate and requiring popular approval.
3. A law initiated in a similar manner and requiring popular approval.
4. A law required by constitutional provision to be submitted to a popular vote.

¹ Harold F. Gosnell, Democracy--The Threshold of Freedom (1955), pp. 253-254.

5. A law referred by the legislature under a constitutional authorization to a popular vote.
6. A law referred to popular vote after a petition has been signed by a specified number of voters.
7. A public policy measure which is only advisory to and not mandatory upon the legislature.
8. A special election to determine whether an official should be superseded before his term is completed.

This summary identifies the principal varieties of initiative (2 and 3), referendum (1, 4, 5, 6, and 7), and recall (8). It is important to note Gosnell's distinction between the initiative and referendum as applied to constitutions and statutes. The constitutional referendum was the original form of direct participation and is still almost universal in the American states; only a few states provide for constitutional amendment through the initiative.² The main focus of the present paper is the initiative and referendum as applied to statute-making.³

The ideas of representative government on which most of the original state constitutions were based assumed that the opportunity to elect legislative and executive officials from

² For a summary of constitutional provisions for amendment by initiative and referendum, see Legislative Reference Bureau, U. of Hawaii, Manual on State Constitutional Provisions (Prepared for the Hawaii Constitutional Convention, 1950 and hereafter cited as the Hawaii Manual), pp. 315-340.

³ Use of the initiative and referendum in connection with revision of the constitution is discussed in Staff Paper XI, Amendment and Revision.

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time to time was the main check that the people would exercise on the government. However, about fifty years ago, at a time when the prestige of state legislatures and government in general had fallen to perhaps its lowest point in our history, there began to be agitation for opportunities for people to express themselves directly on policies and politicians. Under the slogan of "direct democracy", the statutory initiative and referendum became part of the program of the "progressive movement" and were installed in about half of the state governments, especially in the West prior to World War I. In recent years there has been a noticeable slackening of interest. Although no states have dropped the initiative and referendum, such a course has been seriously advocated in some places, and there has been a tendency to restrict the use of these devices. No new adoptions have been made in recent years.⁴

The Initiative

In his paper for the New Jersey constitutional convention, Dr. Ellis has an excellent, concise description of the initiative:⁵

⁴ Neither the New Jersey nor the Hawaii constitutions provide for the initiative and referendum except for the referendum on constitutional amendments. Missouri provides for them, but this is a carry-over from her old constitution.

⁵ L. Ethan Ellis, "The Legislative Initiative and Referendum," in State of New Jersey, Constitutional Convention of 1947, Proceedings, Vol. 2, pp. 1545-46.

Assuming that an active group desires a law which ordinary methods have not secured, its first step is to circulate initiative petitions. These must contain the proposed measure in full or in synopsis, and must be filed originally with the secretary of state. In some states the attorney-general must rule on the proposal's conformity with constitutional requirements as to scope and subject-matter. Having received approval, it is circulated by qualified voters for signature by qualified voters only; each copy of the petition must carry the text of the proposal. There is no uniformity as to the number of signatures required to put the initiative into operation. It is usually fixed in terms of a percentage of the total vote for a prominent state officer (governor, secretary of state, or justice of the supreme court) at the last general election. Frequently a law and a constitutional amendment may be initiated in precisely the same way. Where a distinction is made, a typical figure would probably be 8% for a law and 10% for an amendment.

After the secretary of state certifies that the completed petitions satisfy procedural regulations, the proposal is ready for submission to a popular referendum, in the case of the direct initiative, or the legislature under the indirect form. In the legislature an initiated proposal commonly takes precedence over everything except appropriation bills, and action is frequently required within 40 days. As indicated above, the legislature may amend or in some cases enact a competing substitute, in which instance both measures are referred to the voters. Legislative inaction automatically places the measure before the electorate. It is commonly required that the voters must have an opportunity to pass on the legislature's work within three or four months. In order to inform the electorate on the issues involved, several states circulate to all voters literature describing the measures to be referred.

Initiated measures may be submitted to special elections or added to the ballot on a general election. Practice varies as to the requirements for passage: sometimes a majority of the votes cast on the proposition is demanded; in other states a majority of all ballots cast in the election. Most states provide that

measures enacted by the initiative and referendum are exempted from the veto power of the governor, on the ground that the electorate is superior to its agent. There is no uniformity regarding the power of subsequent legislatures to amend or repeal measures enacted through the initiative and referendum. Several states expressly grant this power, occasionally restricting its operation in some manner. In the absence of express provisions, the power probably exists by implication. There remains in the courts the right to review unconstitutional enactments by direct legislation, and to resolve conflicts resulting from such action. A few states limit the areas of activity to which the initiative may apply, with the object of preserving religious freedom, the safety of the judiciary, and the sanctity of the taxing power. Some also limit the frequency with which the same proposition may recur.

State Constitutional Provisions for the Initiative

Altogether there are 19 state constitutions which provide for some form of statutory initiative. Eleven states have only the direct initiative, in which a proposition goes directly from the petition to the ballot. Six states have the indirect form, in which the legislature is given an opportunity to enact the proposed measure or a substitute before the question is carried to the people. Two states have both forms.⁶ Several state constitutions also guarantee the right of initiative in local government.

⁶ Hawaii Manual, p. 119. Direct initiative states are: Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Oregon, and Utah; indirect initiative: Maine, Massachusetts, Michigan, Nevada, Ohio, and South Dakota; both forms: California and Washington.

Constitutional provisions vary considerably with respect to the procedures prescribed and the detail in which the procedures are specified. About the briefest is the Idaho constitution which immediately after vesting the legislative power in the state legislature states:

The people reserve to themselves the power to propose laws, and to enact the same at the polls independent of the legislature. This power is known as the initiative, and legal voters may, under such conditions and in such manner as may be provided by acts of the legislature, initiate any desired legislation and cause the same to be submitted to the vote of the people at a general election for their approval or rejection provided that legislation thus submitted shall require the approval of a number of voters equal to a majority of the aggregate vote cast for the office of governor at such general election to be adopted.⁷

Contrasting with this brief statement, which should be adequate as a constitutional peg for legislative action, are lengthy articles in Massachusetts⁸ and Oregon. Because the initiative and referendum are at best complex procedures and often controversial, most constitutions contain more detail than is appreciated by careful constitutional draftsmen. Whether spelled out in the constitution or left to the legislature, the details are important because it is largely the procedural requirements which determine the real availability of the initiative. The

⁷ Art. III, Sec. 1. Utah also has a brief constitutional provision, Art. VI, Sec. 1 (2).

⁸ Articles 48, 74, and 81, which contain seven pages of constitutional provisions devoted to the initiative.

requirements are so difficult in some states that the possibility of legislation by initiative is more theoretical than real; other states have requirements so loosely drawn that almost any interest with an axe to grind can get its proposition on the ballot.

Among the points that are frequently constitutionally specified are the following:⁹

1. Number and Geographic Distribution of Petitioners. Eight per cent of the number of voters for governor in the preceding general election is the most common number of signatures required, although the number is as high as 25 per cent in four states and as low as 5 per cent in one or two others. A few states also specify an actual number of signatures instead of a percentage.¹⁰ In order to assure that there is more than merely local sentiment for an initiative, many states require a certain geographic distribution of the signatures among the counties.
2. Filing the Petition. Most constitutions specify the officer with whom petitions are to be filed (usually the secretary of state), and the minimum time prior to the election. Not less than four months prior to the election is the most common requirement.
3. Inaugurating and Circulating the Petition. Although most states have no special requirements to be met before the petition is circulated, California and Massachusetts require that the proposal first be submitted to the attorney-general, who ascertains that it is in proper legal form. In California, the attorney-general also prepares a title and summary of the proposal. These would seem reasonable methods of avoiding legal contests later. Other constitutions go into considerable detail about the form of the petition, who may sign it, who may circulate it, etc. In order to discourage "petition hawking" some constitutions forbid anyone to receive pay for circulating petitions.

⁹ See Book of the States, 1954-55, for summary of state provisions for the initiative and the referendum (p. 143). Also, Hawaii Manual, pp. 119-133.

¹⁰ W. Brooke Graves, American State Government (1953), p. 146.

4. Limitations on Subject Matter. In order to prevent interference with the routine operations of government by irresponsibly initiated measures, several constitutions forbid appropriations for current expenses or maintenance of state institutions through the initiative. Others forbid special or local legislation. Massachusetts removes most of the judicial functions of the state from the reach of the initiative. A common problem in states which provide for the initiative is that the same proposals keep turning up on the ballot year after year. The special interests pushing them are able to get enough signatures to put them on the ballot but never can push them through. Nebraska prevents such harrassment of the electorate by specifying a three-year waiting period after a proposal is rejected before it may be re-submitted. Oklahoma provides the same waiting period unless a 25 per cent petition (almost impossible to secure) is submitted.

5. Publicity. In order to furnish the public with information about the measures coming up, several states provide for the circulation of summaries and arguments for and against initiated measures at public expense. This material is usually in the form of pamphlets distributed to all registered voters; a few states provide for newspaper publicity.

6. Majority Required. The usual requirement to pass an initiated measure is a simple majority of those voting upon the question. A few states, however, make the initiative more difficult by requiring that the majority also constitute a certain percentage of those voting at the election. New Mexico requires that the majority be no less than 40 per cent of the votes cast at the election, Nebraska requires 35 per cent, and Massachusetts 30 per cent. These requirements can be quite restrictive on occasion, since there are usually a significant number of voters who fail to vote on initiative and referendum questions.

The Referendum

A referendum is simply a procedure in which the people vote whether to approve or reject a proposed measure. One form of the referendum has been introduced in the previous section which

described how measures resulting from popular initiative may be referred to the people for approval or rejection. There are also several ways in which measures originating in the legislature may be submitted to vote by the people. Some constitutions require that certain kinds of measures (especially constitutional amendments) be submitted to referendum; this is the so-called "compulsory referendum." There are also two different types of "optional referendum." In the first type, the option is in the legislature; if it chooses to do so it can order a law it has passed submitted to the people for approval or rejection. In the second type, the people themselves have the option. Laws (except for emergency legislation) do not take effect until a specified period of time has passed. During the waiting period there is an opportunity for circulation of petitions calling for a referendum on the law. If enough signatures are obtained the law is held in abeyance pending the results of the referendum.

State Constitutional Provisions for Referendum

The 19 states whose constitutions provide for the statutory initiative also have the referendum available upon petition. Maryland and New Mexico also have the referendum but without the initiative. Most of these constitutions and one or two others in addition specifically authorize the legislature to submit its acts to referendum if it chooses. In most of

these states a referendum may be had against either an entire act or any section or part thereof.

Many of the procedural details that apply to the initiative also apply to the referendum, but there are also important differences. One of the characteristic differences is that the number of signatures required to get a referendum is usually less than that required for the initiative. On the other hand, the subject matter of the laws to which referendum is applicable is more sharply circumscribed. Otherwise there would be danger of completely stopping the operations of government by referendum petitions against appropriation bills and other routine measures. There is considerable variation in the states, but most states exempt appropriation bills for the general functions of government, bills relating to schools, public health and safety, and the support of state institutions. It is also almost universal for constitutional provisions governing referendum to have an escape clause protecting emergency legislation from the referendum. The legislature itself is ordinarily the judge of emergency in the first instance, although this is often subject to judicial review. Some states protect the emergency clause by requiring an extraordinary majority in the legislature for emergency legislation. A few states permit filing of referendum petitions against such legislation but permit the legislation to go into effect immediately after passage and to remain in effect until the election result is determined.

The Recall

The recall is a form of popular participation directed not at laws but at men. It is a device wherein, upon petition, a special election is held to determine whether or not a given individual shall continue in office or be immediately removed. There are 12 states where the constitution makes some form of recall procedure available against state and local officials.¹¹

Officers Subject to Recall

The recall is most frequently available against elected executive officials, somewhat less frequently against legislators and judges. Two states provide for recall of certain appointed officials. A number of years ago, when the recall was fairly new, there was heated discussion on the question of applying the recall to the judiciary. In fact, President Taft vetoed the first resolution providing for the admission of Arizona to the Union because its proposed constitution provided for recall of judges, which he thought "pernicious," "destructive of independence in the judiciary," and "likely to subject the rights of the individual to the possible tyranny of a popular majority."¹² On the theory that judicial independence should be protected, four of the twelve states with recall

¹¹ Graves, op. cit., p. 152. The states are: Arizona, California, Colorado, Idaho, Kansas, Louisiana, Michigan, Nevada, North Dakota, Oregon, Washington, and Wisconsin. There are 16 additional states where recall is available against local but not state officials. In all cases but one, such recall is based upon statutory, not constitutional grounds.

¹² Idem. Arizona handled this problem by striking the offending article from its proposed constitution and reinserting it after gaining statehood.

of state officers have exempted the judiciary. Actually, the recall has seldom been exercised against judges. In fact recall proceedings against any officers at the state level are rare. Only one governor has ever been recalled. The principal use of the recall has been at the local government level.

Recall Procedures

The number of petitioners required to force a recall election is considerably greater than is required for an initiative or referendum. Twenty-five per cent is the most common, with some states as low as 15 per cent and others as high as 40 per cent.

There are three different types of recall elections found in the various states. In the first type, the question is simply whether the given officer should be removed or not. If he is, the vacancy will be filled by later special election or other method provided by law. In the second type, the voter expresses himself on the removal and also has an opportunity to name a successor in case the results turn out unfavorably for the incumbent. In the third type, the incumbent is a candidate to succeed himself along with any others who may be nominated; thus the question of recall is indirect.¹³

¹³ For detail on recall procedure, see Hawaii Manual, p. 126, 134.

Evaluation of Initiative, Referendum, and Recall

To understand the initiative, referendum, and recall, one must realize that these devices came into fashion in state government at times and places where there was disgust and disillusionment with state government in many states. Government seemed completely in the grip of "machines," and "politicians," who acted with little regard for what the ordinary people wanted. One party was held to be as bad as another. These special devices were advocated as methods of restoring the control of the people. They neither added nor subtracted from the powers of government as a whole. They simply short-cut the normal channels of responsibility and the regular election procedure, providing opportunities for direct intervention anytime enough people wanted to do so. As Woodrow Wilson said, they were to be like the gun that the old settlers kept behind the door, just in case. The threat of their use, as much as the actual results of their direct employment, was to help keep government responsive. And the opportunities for direct participation from time to time would help educate people to political issues and keep their interest alive.¹⁴ How has this worked out?

¹⁴ The campaign for the adoption of the initiative and referendum in Oregon (one of the states pioneering in its use), and the arguments used for its adoption are summarized in one of the few complete studies of any state's experience with these devices, Joseph G. LaPalombara, The Initiative and Referendum in Oregon, 1938-1948 (1950), ch. 1.

Extent of Use

The use of the statutory initiative and referendum has never spread in the United States the way its founders intended, as indicated by the statistics cited earlier in this paper. Except for referenda on constitutional amendments, the initiative and referendum is pretty much a Western--and especially West Coast--phenomenon. It has been used most extensively in California, Washington, and Oregon, and most of the detailed studies of its results have been made in those states.¹⁵ The experience of these states has been colored by the fact that their procedures blur the distinction between the constitutional and statutory initiative.

Even in many of the states where the initiative and referendum are available, they have not been used often nor resulted in passage of a great many laws. Graves summarizes several studies of the volume of direct legislation and constitutional amendments. In Colorado, from 1912 to 1938, only 121 measures were voted on by the people, of which 73 were constitutional amendments and 48 statutes. California has been more active.

¹⁵ See LaPalombara, op. cit.; Winston W. Crouch, The Initiative and Referendum in California (1950); Max Radin, "Popular Legislation in California, 1936-1946," California Law Review, June, 1947; Winston W. Crouch, "The Constitutional Initiative in Operation," American Political Science Review, Vol. 33, (Aug., 1939), pp. 634-45.

From 1912 to 1948, California adopted 51 initiated statutes and rejected 14; adopted 34 referred statutes and rejected 12; adopted 156 constitutional amendments proposed by the legislature and rejected 116; adopted 19 constitutional amendments proposed by initiative and rejected 50.¹⁶ The figures in most states where compilations have been made, and to some extent even in California, show declining use of the initiative and referendum with the passing years.¹⁷ And it should be noted that no states have adopted them recently. Apparently the results of normal politics and the gradual improvement of administrative standards in the United States are easing the need for such popular intervention.

Results

It has already been noted above that the reformers who pushed the movement for these devices almost fifty years ago thought that government would be reformed, if not revolutionized, by their use. There were others who thought that orderly government would be destroyed, the voter would be swamped under a

¹⁶ Graves, op. cit., p. 144-45.

¹⁷ As of 1950 Crouch reported that only 3 initiated laws had been adopted in California in the past 15 years and none of these were of great significance; no petition for referenda on statutes had qualified between 1941-49. However, there had been considerable more activity on Constitutional matters. Crouch, op. cit., pp. 24, 30.

mass of propositions he could never understand, special interests would manipulate public opinion for selfish advantage, and the laws and constitutions would become crazy-quilts of inconsistent provisions and "crank" proposals. The initiative, referendum, and recall have probably disappointed both their advocates and their opponents; neither bouyant hopes nor dire predictions have been fulfilled.

Surveying Oregon's experience, LaPalombara concluded that the initiative and referendum had a number of substantial accomplishments to their credit. Several desirable measures had been passed as a result of the initiative. Although the responsibility of the legislature had not been undermined, the possibility of the referendum was always present as a potential check and seemed at times to have had a desirable effect. The people of Oregon had neither been freed from nor delivered into the hands of lobbyists and special interests; it still took money and organization to wage political battle for both good and bad causes. The measures initiated, both as to their draftsmanship and general wisdom, were on the whole not much better or worse than the products of the legislature. The people of Oregon had been considerably burdened with decision on all manner of measures, some of them nuisance proposals that kept reappearing time after time. The people were not notably better educated politically than before. However, they had exercised their responsibility in a fairly conservative manner. They had

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been rather free to alter the structure of the government, had not been financially irresponsible, and had been rather conservative on policies in the general field of public welfare.¹⁸

In California, the initiative has apparently firmly established itself, partly as a result of rapid population growth, the presence of numerous discontented minorities, and the absence of strong party leadership. Crouch reports some of the variety of issues with which the electorate has had to struggle:

Retirement life payments, old age benefits, 'Ham and Eggs' and 'Thirty Dollars Every Thursday' pension plans, state liquor regulation, local option, legislative apportionment, 'hot cargo' labor issues, fair employment practices, and tidelands oil-drilling struggles have all served to make headlines about the initiative and referendum in California¹⁹

On the question of whether it would be difficult for the voter to conduct himself with any greater intelligence or responsibility than might be expected of a legislature, Crouch says:

It should be noted affirmatively, however, that the initiative has produced such less spectacular but nonetheless solid accomplishments as a state executive budget law, a state civil service system, and a successful method for selecting the state judiciary.²⁰

Because the California constitution was a lengthy document in the first place, and its amendment through the initiative

18 LaPalombara, op. cit., p. 83, and Ch. V.

19 See Crouch, op. cit., p. 1.

20 Idem.

may be accomplished relatively easily, there has been more activity with respect to constitutional amendments than statutes. While there have been in recent years only a small number of votes on initiated statutes and legislation upon which referenda were petitioned for, there has been a large number of initiated amendments and both amendments and statutes referred by the legislature. The constitution has continued to grow in length, and the distinction between statutory and constitutional law is for most practical purposes lost.

The general conclusion is that the initiative, referendum, and recall have failed as panaceas. They have not destroyed, neither have they notably improved representative government. Some wise and a considerable number of foolish measures have passed; the output is not strikingly different in quality from the normal legislative processes. Constitutions in some states have been riddled, but this is probably the fault of the poor structure of the constitution in the first place and of constitutional provisions that invite easy amendment, and not necessarily an indictment of the initiative itself. Probably the most effective criticism of "direct legislation" is that it asks the voter to make decisions--too many of them--for which he is not particularly well equipped.

At this point it is appropriate to distinguish between the effects of the initiative, referendum, and recall, which have

been discussed interchangeably in the past few pages. The form most open to criticism is the initiative, particularly the constitutional initiative. The experience with this in California, Oregon, and other states has not been reassuring. As for the referendum, the desirability of referenda on constitutional amendments proposed by the legislature is unquestioned. The referendum by petition, on legislation passed by the legislature, has been used conservatively in most cases; but the case for this form of direct participation as a check against the legislature is not a strong one. There has been no general survey of the results of the recall. At the state level it is a rare phenomenon and very difficult to carry through; it has occasionally been useful to clean up local scandals, but it has also been used irresponsibly as a partisan political weapon.

Considerations for the Convention

In summary, the Convention will have to consider whether it wants to write provisions for the initiative, referendum, and recall--any or all of them--into the constitution. They can be separated. In order of their desirability, they might rank as follows:

1. Referendum on constitutional amendments proposed by the legislature. This is the conventional form of ratifying amendments.
2. Referendum on statutes proposed and referred by the legislature. While this arrangement permits people to express themselves directly on measures referred by the legislature, it is mostly used as an evasion of legislative responsibility and in effect negates and violates the theory of representative government. The referendum by petition is surprisingly little used simply because it is

usually easier, through political party responsibility, to wage campaigns for new legislators if there is distrust of the ability of incumbents to legislate.

3. Recall of state and local officials, excluding the judiciary. The recall is another weapon to which there would be little objection as long as the requirements are sufficiently high that it is only likely to be invoked in a real emergency. However, under modern concepts that in the executive branch only a governor is elected, the need for the safety device of recall almost disappears; and application of similar concepts of executive organization at the local level makes recall equally unnecessary; in any event ample protection can be provided by statute.
4. Initiative on constitutional amendments. It is easy to see, on theoretical grounds, how the people ought to have some means for forcing a popular decision on amendment of the constitution if they found themselves in a situation where they did not trust their elected legislature. The initiative method of amendment, however, has been over-used in some states, both in frequency and in the detail of the amendments. The constitutional initiative is unnecessary if there is other and adequate provision for effecting constitutional amendment.
5. Initiative on statutes. This is difficult to justify on the basis of either theory or practice. If the people cannot get the laws they want from the legislature they have two alternatives: (1) change the composition of the legislature at the next election; (2) amend the constitution to improve the representativeness of the legislature. Elections are not, after all, so far apart in the United States, and it is assumed that the amendment power will be reasonably available. It has not been shown that the people, as a lawmaking body, are capable of acting any more intelligently than a legislature. No abandonment of democracy is implied in the statement that the electorate is not the body to which to address frequent, complex policy questions.