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NEW JERSEY CONSTITUTIONAL CONVENTION

WHAT SHOULD A CONSTITUTION CONTAIN?

by

W. Brooke Graves

Chief, State Law Section,

Legislative Reference Service, Library of Congress

Chairman, Committee on State Government, National Municipal League

State of New Jersey  
Alfred E. Driscoll, Governor  
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## WHAT SHOULD A CONSTITUTION CONTAIN?

A constitution is a body of fundamental law. It is established for the purpose of providing a set of governmental machinery, on the one hand, and of protecting the citizen from an unfair or improper use of governmental authority, on the other. When we say that the provisions of a constitution are fundamental, we imply that they are relatively more permanent, more stable, and less subject to the need for frequent change, than are the provisions of statutory law. Statutory law, on the other hand, is regarded as being more or less transitory in character, as being more concerned with current policies and practices, and less with those "eternal verities" of government which have been handed down, generation after generation, from the past. A constitution is supposed to represent an attempt at stating the accumulated wisdom of the ages, on the subject of government, while statutes are a contemporary effort to deal with problems of a current nature.

While this distinction is time-honored, and firmly imbedded in the thought of this country on the subject of government, we have often failed to keep it clearly in mind. The result has been the incorporation in numerous state constitutions of provisions that are definitely statutory in character. This has been due in part to a distrust of the legislature, and in part to a somewhat naive idea on the part of various interest and pressure groups, that if they could only get into the constitution a statement of some principle or idea dear to them, it would be safely and securely fixed. Thus the Commissioner of Highways in a mid-western state in 1921, appealed to the people to write into their fundamental law, in the form of amendment, a detailed description of the various routes in the highways system of the state. It is thus possible to change these routes, no matter how much the changes may be needed, only by amending the constitution. It is doubtful whether this was a good thing for the roads, and it is certain that it was

a bad thing for the constitution - the length of which is increased by several pages of fine print. While this is an extreme case, the underlying philosophy is typical of that in many others.

Other things being equal, the shorter the constitution is, the better it is. The Federal Constitution has endured as long as it has, and it has continued to be a satisfactory instrument of government, because it was well drafted. Quite in contrast to the constitutions of many of our states, its provisions were confined to matters that were and are, essential; emphasis upon this point recurs frequently in the paragraphs which follow. There are in all of American state constitutions - old and new alike - certain essential features which must be included if the constitution is to meet in a satisfactory manner the needs which led to its adoption. These fundamentals may be grouped, for purposes of discussion, under four headings: the bill of rights, the framework of government, its powers, and provisions for piecemeal amendment.

#### Bill of Rights.

In all democratic countries, important personal and civil rights of citizens are recognized. The sphere thus established may not be invaded or violated by the public authority. In England, where the constitution is in the main unwritten, these rights have become a part of the "law of the land"; in the United States, on the other hand, where written constitutions are everywhere in use, the protection of these rights is guaranteed by a written statement known as a bill of rights. This practice has been general in the states since the Virginia bill of rights was adopted in 1776. While there is a good deal of similarity in the provisions of the statements found in the various state constitutions, the particular expression of these ideas found in the constitution of any given state is likely to be vigorously

defended by its citizens. It has the strength which comes from long usage; the clarity which comes from its having been judicially interpreted, and the veneration and respect which people give to institutions tried and proved.

The provisions of a bill of rights may be variously classified. From one point of view, they protect the rights of persons on the one hand, and the rights of property on the other. The rights of persons include those of a civil character, and those that relate to persons accused of crime. The civil rights include the right to freedom of speech and of assembly, freedom of the press, and freedom of conscience, the inviolability of the home from searches and seizures without warrant and the quartering of troops in time of peace. The rights of persons accused of crime include guarantees of freedom from false arrest, guarantees of indictment by grand jury and trial by jury, freedom of the necessity of giving testimony which might be self-incriminating in character, and guarantee of a fair trial, under due process of law. It includes, for those under indictment, freedom from the enforcement of ex post facto laws; and for those who have been convicted, freedom from cruel and unusual punishments. These lists might be extended, but the items mentioned are sufficient to indicate the character of the provisions in question. The right to the enjoyment of the privileges associated with the ownership and control of property are protected by provisions governing the taking of private property for public use under eminent domain, freedom from the enforcement of confiscatory taxes, from arbitrary and discriminatory legislation - these latter under due process and equal protection clauses of state constitutions which antedate by many years the similar provisions of the Fourteenth Amendment, inserted in the Federal Constitution in 1868. Both, of course, are applicable.

In nearly every state, some of the provisions of the existing bills of

rights have long since passed the stage at which they have any relation to present-day conditions. While practical minded people might wish to eliminate these provisions, more conservatively minded persons, particularly members of the bar, are likely to resist any effort to eliminate or modify these provisions. Since they do no great harm, perhaps the energy expended in the effort to remove them might better be applied to more vital matters. Even though the wording may be stilted and archaic, lawyers will often contend for its preservation, since the meaning of the existing provision has been adjudicated and established. This does not mean, however, that new material may not be added to the bill of rights. Even though the older provisions are permitted to remain unchanged, provision should be made for the protection of the newer rights, more recently acquired, and most likely to be called into question. Bills of rights have grown through the years in exactly this way; men have sought to preserve the rights that they have already won, and to secure guarantees in their fundamental law of those rights which, at the time, seem vital, but which have not, heretofore, been so generally recognized or so commonly observed.

#### The Framework of the Government

In our American constitutions, we have uniformly professed the idea of the separation of powers, as a result of which we have three separate and distinct branches of government - the executive, legislative, and judicial - each of which has its peculiar function to perform, and no one of which is supposed to invade the prerogative of either of the other two. While this principle of organization is not always applied consistently, and does not conform to that existing in other democratic countries, or for that matter, to that used in the conduct of private business in this country, it is so well established by long usage that any effort to abandon it would likely meet with overwhelming opposition.

Whatever the form of organization agreed upon, the basis for its establishment must be provided for in the constitution. There must be provision for the executive, his qualifications, the manner of his election, his term, etc. The legislature must be established, in one house, or in two, as has heretofore been the practice. The election, qualifications, and term of legislators must be provided for, and there must be provision for a system of courts. If the constitution is to endure, and remain satisfactory over a long period of time, these provisions should be brief. If they are brief, they will be flexible and elastic, susceptible of adaptation to the changing needs of the people in a rapidly changing society; if they are too long, and cluttered up with great masses of detail, they will be inflexible and inelastic, and will cause it to be difficult, if not impossible, to make desired changes.

To be specific, it is a mistake to put into the constitution the amount of the governor's salary. The purchasing power of the dollar has changed considerably over the years; a salary that was once ample may, under different conditions, be wholly inadequate, quite out of keeping with the importance of the position and the calibre of individual desired to fill it. The constitution should provide for adequate compensation, and should prohibit changes in the amount of compensation during the incumbent's term of office, but the amount should be left to legislative determination. Once the exact amount is specified in the constitution, it becomes difficult to change, and can be changed only by amending the constitution. If the amending process is a difficult one, the increasing of the salary becomes an even more formidable undertaking.

Again, many of the state constitutions go into great detail regarding the organization of the courts, providing the number and names of all judicial tribunals from the magistrates to the supreme court. This, too, is a great mistake. As the population grows, or population density shifts

from one part of the state to another, as new types of business or industry develop, the character and the quantity of judicial business changes. The judicial set-up that is suitable in one situation may be quite ill adapted to another. The legislature ought to be free to make such changes as the exigencies of the situation require, in order to secure the prompt and efficient handling of the judicial business. If such a suggestion seems to anyone to be a shocking departure from established practice, let it be remembered that the judicial clause of the Federal Constitution is very simple and direct:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

#### The Powers of Government

The constitution must either enumerate the powers which may be exercised by the various branches of the government, or else establish some rule upon the basis of which these powers may be determined. The possible scope of state power is indicated in a general way by the provisions of the Tenth Amendment to the Federal Constitution, which says that all powers not delegated by it to the Federal Government, nor denied by it to the states, are reserved to the states respectively or to the people. Within the limits of this framework, it is not only within the province of the state constitution, but it is its special function to establish, in language as clear as possible - language that has a general rather than a too specific application - the limits of the authority to be exercised by the executive, legislative and judicial branches of the government. And if the separation of powers system is to work satisfactorily, each department must be assured powers adequate to its peculiar responsibilities.

Students of government are practically unanimous in recommending broad grants of power, with a minimum of provisions of a limiting or restrictive character. In the early days of the Republic, there was a widespread distrust of the executive power; while this was natural at that time, it has now largely disappeared. The governor is, in fact, commonly regarded as a popular leader, but we have rarely changed our law to conform to our changed attitude toward the executive. The governor is a responsible elected official; if we expect him to control his administration, and secure definite results, we must not withhold from him the powers that are essential to the discharge of his responsibility. To do so is not only unfair to the man we have entrusted with the direction of the state government, but it imposes a handicap upon his success that is well nigh insuperable.

Similarly, with the legislature, we have imposed every kind of restrictive provision, so that our lawmaking bodies find themselves frequently lacking the power to deal effectively with pressing situations that confront them. Most of these restrictions originated in the reconstruction period, following the Civil War, and have no conceivable relation to present-day legislatures, or legislators. While every legislature has its quota of incompetents, there are regularly considerable numbers of men of ability and integrity, who give of their time and effort without reservation, in their anxiety to do a good job. With the techni-services that are now available for their assistance, in the form of legislative councils, reference bureaus, and bill drafting facilities, they should be freed from hampering restrictions, and given the opportunity to perform the task for which they were elected.

Provision for Amendment

The provisions for amendment and revision are among the most important to be found in any constitution. No group of men in a convention, no matter how wise or how devoted to the public interest, can foresee the problems which changed conditions may bring about in the future. They should not seek to impose their will and their judgment, based upon existing conditions, upon generations yet to come - generations which may find themselves living under conditions that are wholly different. These generations will of right demand the same privilege of changing their fundamental law that their forefathers exercised, and in all probability, they will be quite as competent to handle the problems confronting them.

It has - as has already been noted - been well established in the United States that a distinction should be made between fundamental or constitutional law on the one hand, and ordinary statutory law on the other. We have consistently regarded our constitutions as a kind of "higher law," and have consequently sought to make it more difficult to modify them than to change a statute. This attitude, which has much justification, should not be permitted to extend to the extreme position that constitutions are sacred, and that they ought not to be changed at all. In a dynamic society, they must be changed from time to time, and they will be changed. The Federal Constitution has been amended 21 times, and literally hundreds of amendments to it have been proposed. The temper of the American people is such that they prefer to make needed changes by orderly processes, but if no procedure were offered by which they could be made by orderly means, they might be obliged to resort to the methods used by the founders of the Republic.

The provisions for amendment and revision should be as liberal as is consistent with the American doctrine of constitutional supremacy. The provision for a popular referendum every 20 years, on the question of a convention for general revision, as in Missouri and New York, is a good one and should be included; but the provision for "piecemeal amendment" should also be liberal enough to permit the people to adopt from time to time such changes in their fundamental law as they may desire, without too many difficulties and obstructions. This is not the place to present the specifications of such a procedure; it is the purpose merely to present clearly the tests by which any procedure which might be contemplated, should be measured.

#### General Comment

We have tried to define a constitution, and to indicate the nature of that distinction, so deeply imbedded in American law, between a constitution and a statute; we have noted the different types of material, the inclusion of which is essential to the drawing up of a complete constitution. It now remains simply to observe that a constitution, like the government that operates under it, is a very human thing. There is no such thing as an ideal constitution, or a perfect constitution. A given constitution is good or bad, according to whether it encourages or impedes the body politic in its efforts to make those adjustments to changing social, economic, and political conditions, which are indicated by the application of reason and intelligence to the problems of modern society. A constitution should, as Mr. Justice Cardozo said on one occasion, attempt to state principles of government for an expanding future.