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Gay Marriage in Massachusetts Louis Rizoli, Massachusetts

Marriage Historically

The rules regulating both the requirements and ability to marry in Massachusetts have changed many times since Massachusetts was a colony. In 1646, the colonists of Massachusetts were little more than one generation removed from the religious persecution they had suffered in England. As a result, when the residents of Massachusetts created their first ordinance governing marriage, they did not allow members of clergy to solemnize any marriages within the Colony. *Inhabitants of Town of Milford v. Inhabitants of Town of Worcester*, 7. Mass 48 (1810) at 53.

When the first charter was replaced by provincial statute, the marriage laws of Massachusetts were changed in two critical ways. First, the colonists having recognized the important role that religion played in most of their lives amended the marriage statute in order to give ministers the right to solemnize marriages. Secondly, even though the statute governing marriage allowed for solemnization, it nevertheless restricted who had access to the institution of marriage. As a result, the law required the local government's consent before it could take place. A couple that wished to marry needed to show that each of their parents knew of and consented to the marriage. In 1785, the residents of Massachusetts for the first time decided to regulate, not just its requirements, but the relationship of marriage. Marriages of consanguinity were declared void and prohibited. Also, any person with a former spouse still living was prevented from getting remarried. In 1786, a marriage between a white person and a "negro, Indian, or mulatto" was declared void and prohibited. *Id.*

In the 127 years between 1786 and 1913, all of the statutes above with the exception of the limitations on marriages of consanguinity had been repealed. In 1913, several states still forbade interracial marriages. This led

many to believe that couples from all over the country were going to come to Massachusetts in order to get married. The Massachusetts legislature responded to this potential problem by adopting M.G.L.C. 207 section 12, which makes it illegal for residents of other states to marry in Massachusetts if their marriage would be illegal in their state of residency.

Gay Issues in Massachusetts

In 1989, a 14-year battle between gay activists and the Massachusetts legislature culminated with the passage of the Gay Rights Act, which made it illegal to discriminate on the basis of sexual orientation in areas such as housing and employment. Inspired by the adoption of the Act, activists next tried to get the legislature to provide some recognition of their relationships. Over the next 14 years several bills were introduced that would have created domestic partnership benefits for partners of state employees. None of the bills became law.

In 1993, the Supreme Judicial Court of Massachusetts (SJC) issued its landmark decision in *Adoption of Tammy*, 416 Mass. 205, (1993); the SJC ruled that the state's adoption statute M.G.L.C. 210 does not bar same-sex couples from adopting children. The court reasoned that "the judge is directed to consider all factors relevant to the physical, mental, and moral health of the child." *Id.* at 214 The court elaborated by saying, "a decree of adoption may be entered only after the judge has determined that the adopting parties are of sufficient ability to bring up the child and provide suitable support and education for it and that the child should be adopted." *Id.*

On December 20, 1999 in *Baker v. Vermont*, 170 Vt. 194, 744, the Vermont Supreme Court ruled that the Common Benefits Clause of Vermont Constitution requires that same-

sex couples receive the same benefits and protections as do married couples under state law. Massachusetts residents who were opposed to gay marriage were moved to action by the decision in *Baker*. In 2001, many Massachusetts citizens mobilized and collected the requisite number of signatures to submit a proposed initiative amendment under Article XLVIII to the joint session of both houses. The proposed amendment would have defined marriage as a union between a man and a woman. According to Article XLVIII, the Senate president must call a joint session of the legislature. When the legislature meets in a joint session, 200 members of the House and Senate convene. A minimum of one quarter or 50 legislators meeting in a joint session must approve the proposed initiative

amendment for it to be referred to the next General Court. If the proposed initiative amendment is once again approved by a minimum of 50 legislators it then appears on the ballot; which if approved by a majority of the voters then becomes part of the Massachusetts Constitution. The proposed initiative amendment would have defined marriage as the union between one man and one woman.

On July 17, 2002, Senate President Thomas Birmingham, called the joint session to order. Many members rose to be recognized. The Senate president recognized Senate Minority Leader, Brian Lees, for the sole purpose of allowing Senator Lees to move that the joint session be adjourned. Senator Lees, after being recognized did so move, and the vote to ad-

journal prevailed by a vote of 137 to 53. Thus, the proposed initiative petition was prevented from being voted upon; which would have had the necessary 50 votes to be referred to the next session.

Gay Unions and Marriage in Massachusetts

In 2001, seven same-sex couples who had been denied marriage licenses sued the Department of Public Health, which is in charge of granting marriage licenses in Massachusetts. On November 18, 2003, in *Goodridge v. Department of Public Health* 440 Mass. 309, the SJC held that limitation of protection, benefits and obligations of civil marriage to individuals of

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2004 Fall Forum and Special Meetings December 7-10, 2004 in Savannah, Georgia

Plenary Sessions:

Larry Sabato, As the Dust Settles: An Analysis of the 2004 National and State Elections

Larry Sabato, a national election analyst and Director of the Center for Politics, will analyze election results and how they will affect state legislatures.

The Politics of Health Care Reform

How to reform the nation's health care system has been a prominent and divisive element of this year's presidential campaign. The election's results will clearly shape the debate over health care in the 109th Congress. This program will look at what the nation can expect on the health reform front once the election is over.

Special Briefings

Shrinking State Authority

Federal proposals preempt states' authority and restrict their ability to experiment and innovate. It's happening in education, insurance, environment, telecommunications and health care. What are the causes—and the consequences? What can you do about it?

Funding Homeland Security

Earlier this year, Homeland Security Secretary Tom Ridge created a task force that developed a set of practical recommendations designed to alleviate concerns that homeland security funds have been slow to be spent. This session will review the recommendations and examine congressional proposals that would change the current funding arrangements.

Quality Health Care: An Impossible Task Without a Team

Our nation faces shortages of physicians and nurses and a broad range of other health professionals. This session will look at innovative approaches to preserving adequate levels of health care workers.

For more information see <http://www.ncsl.org/forum/GAagenda.htm>

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- √ Budget and Revenue Outlook
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- √ State Impacts of Trade Agreements
- √ Streamlined Sales Tax
- √ The Next Wave of Election Reform
- √ Buying Insurance After a Hurricane
- √ Bank Mergers and Acquisitions
- √ Tort Reform
- √ Gun Control
- √ Offshore Outsourcing
- √ State Effects of Medicare Reform
- √ Student Achievement
- √ Financing and Flexibility in Child Welfare
- √ The New Farm Bill

Special Meetings

Traffic Safety and Public Health Seminar - December 7

Join traffic safety, public health and injury prevention experts to explore one of the leading causes of death in the United States—motor vehicle crashes. Hear from crash investigators, discuss the costs associated with car wrecks and meet with policy experts to explore programs that reduce traffic-related injuries and fatalities.

Fiscal Leaders Seminar - December 8-9

Discuss recent budgeting strategies, state tax reform efforts, the economic outlook and solutions to state fiscal problems.

National Health Conference - December 8-10

Examine pressing health issues including rising health costs, Medicaid and chronic diseases and address timely public health issues.

opposite sexes lacked a rational basis and violated state constitutional equal protection principles. The court reasoned that "the Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens." *Id.* at 313. Additionally, the court said that the commonwealth "failed to identify any constitutionally adequate reason for denying civil marriage to same-sex couples." *Id.*

On December 11, 2003, the Massachusetts Senate, acting pursuant to Massachusetts Constitutional Amendment Article LXXXV, adopted an order asking the SJC if a statute creating civil unions would satisfy constitutional requirements. Senate No. 2175 (2003) On February 4, 2004, the SJC responded in re *Opinions of the Justices to the Senate* 440 Mass. 1201, the court announced that the proposed civil union bill violated the equal protection and due process clauses of the Massachusetts Constitution. The court, quoting Goodridge, concluded that "the very nature and purpose of civil marriages renders any attempt to ban all same-sex couples, as same-sex couples from entering into civil marriage." *Id.* at 1206

Representative Philip Travis, a Democrat from Rehoboth, Massachusetts filed a legislative amendment for consideration in the 2003-2004 session that defined marriage as between one man and one woman. Similar to an initiative petition, Article XLVIII gives legislators the ability to propose constitutional amendments to the people for ratification. If a legislator proposes an amendment to the state Constitution, it must be approved by the legislature in exactly the same form in consecutive constitutional conventions in order to be submitted to the people. Unlike the proposed initiative petition

that was proposed in 2002 which required only 50 affirmative votes the legislative amendments require the support of a majority of the 200 members or 101.

On February 11, 2004 the joint session was called to order by Senate President, Robert Travaglini. He stated that Speaker Thomas Finneran had requested that he be allowed to make the opening remarks. Speaker Finneran made his opening remarks and then to the surprise of some offered an amendment which would have defined marriage as a union between a man and a woman and would have allowed but not mandated that the General Court enact laws establishing civil unions. Speaker Finneran's amendment was narrowly defeated by a vote of 100-98. Afterward, a bipartisan compromise amendment offered by Senate President Travaglini and Senate Minority Leader Brian Lees was brought to the floor. The Travaglini-Lees amendment would have banned gay marriage, created civil unions, and reclassified as civil unions any gay marriages that took place between May 2004 and 2006. This amendment was defeated by a vote of 104-94. The following day, the original legislative amendment offered by Representative Travis was amended to include language that neither required nor approved civil unions. This amendment was defeated by a margin of 103-94. As the session of February 12 drew to a close, there was a brief filibuster with some legislators chanting, "We want to vote!" After two days of fiercely intense debate, the Massachusetts legislature was no closer to resolving the gay marriage issue. The Senate president recessed the constitutional convention until March 11, 2004.

On March 11, 2004 the joint session at the two houses was re-convened. Early in

the day's proceedings another compromise amendment, this one authored by Senate President Travaglini, Senate Minority Leader Lees, and Speaker Finneran, was introduced. This proposal would restrict marriage to the union of one man and one woman while providing for civil unions for same-sex couples which would contain all the rights and responsibilities of marriage. Procedurally it took three votes to send this measure to third reading. The measure passed each hurdle because of changing alliances of those voting in the affirmative. On the first two votes the amendment was passed by votes of 129-69 and 136-62, with those opposed to any amendment supporting it with the intention of defeating it on the third vote, where no further amendments could be offered. However, on the third ballot, many legislators who opposed civil unions as well as gay marriage joined with the leadership of the legislature in order to pass the amendment onto third reading. The vote to send the bill to third reading was 121-77.

On March 29, 2004, the legislature adopted the compromise amendment and sent it to the next session of the joint session of the two houses. If the proposed amendment is adopted by the next constitutional convention in exactly the same form it will be placed before the voters in November, 2006. It should be noted, however, that on September 29, 2004, a new speaker was elected to the Massachusetts House of Representatives, Representative Salvatore DiMasi. Speaker DiMasi consistently voted against any attempts to amend the Constitution that would have restricted marriage to the union of one man and one woman..

Louis Rizoli is House Counsel for the Massachusetts House of Representatives.

Stephen R. Miller, Chief of Wisconsin's Legislative Reference Bureau, receives the 2004 Legislative Staff Achievement Award!

Steve Miller's distinguished career in public service not only spanned decades but crossed the Mason-Dixon Line. Legislatures in Mississippi and Wisconsin have reaped the benefits of his talent and dedication. As a member of NCSL's Legal Services Staff Section, Steve was instrumental in developing and implementing the two-track program that is the mainstay of the section's professional development seminar. Steve was also the main architect of the Editors Conference held in Madison, Wisconsin, October 10-12. This year, Steve is serving as chair of the staff section's Fundraising Task Force. In addition to staff section duties, Steve served on the NCSL Executive Committee from 1996 to 1998 and from 1999 to 2002. He served as staff vice chair of the standing committees, staff chair of the Redistricting Task Force, and staff chair of the Reapportionment Task Force. And, in 2003, Steve received the Legislative Staff Achievement Award from the Staff Chair of the NCSL Standing Committees.

Steve's contributions have made NCSL a more dynamic and diverse organization.

The Place of State Legislatures Under State Constitutions

Professor G. Alan Tarr,
Director of the Center of State Constitutional Studies

The place of state legislatures under American state constitutions is a topic that has been too little studied. When looking at state constitutions, scholars have tended to gravitate to state declarations of rights. This scholarly predilection is understandable — civil liberties are a sexier topic than state legislatures. But it is unfortunate because the place of state legislatures under state constitutions is a crucial concern, perhaps the crucial concern, in understanding state government and state constitutions.

Why is this so? For one thing, state legislatures are the central institutions of state government. State legislatures play a predominant role in crafting public policy. Moreover, it is only state legislatures, as multi-member institutions, that can fully represent the demographic, geographic, and political diversity of their states. In addition, the position of state legislatures under the state constitutions is important because it is distinctive. It differs in fundamental respects from that of Congress under the federal Constitution or from that of the other branches of state government under the state constitution. As we shall see, this distinctive position has important implications for the exercise of legislative power and for the interpretation of state constitutions more generally.

The place of state legislatures under state constitutions is also important because it has been a matter of controversy for more than 200 years. State constitution-makers have struggled mightily to strike a proper balance, providing state legislatures with the power to deal effectively with problems while protecting against the abuse of that power. This struggle has played itself out not only in the legislative articles of state constitutions, but also in the finance and education articles, and in the other policy provisions that distinguish state constitutions from their federal counterpart. The noted legal historian Lawrence Friedman once remarked that "an observer with nothing in front of him but the texts of [state] constitutions could learn a great deal about state politics, state laws, and social life in America." I would amend Friedman slightly. One could learn a lot about those matters merely by looking at how state constitutions have dealt with state legislatures.

State Legislatures and State Constitutional Design

I begin, then, with how state legislatures fit into the state constitutional design. Like its federal counterpart, the state legislative article creates a legislature, which except in Nebraska is bicameral, and it prescribes the qualifications, terms, and mode of selection for legislators. Article I of the federal Constitution enumerates a set of powers granted to Congress and thereby implicitly withholds those not granted, confining Congress to "all legislative powers herein granted." In contrast, state constitutions do not delineate state powers. They do not need to enumerate powers because the state legislative power is plenary, limited only by the cession of powers to the federal government and by those restrictions found in the federal or state constitutions. The Kansas Supreme Court drew the inevitable conclusion from this:

"Where the constitutionality of a [state] statute is involved, the question presented is not whether the act is authorized by the constitution, but whether it is prohibited thereby." *See Hunt v. Eddy*, 150 Kan. 1, 4 (Kan., 1939)

Unlike Congress, state legislatures are not restricted in the purposes for which they can exercise power. They can legislate comprehensively to protect the public welfare. State legislatures need not point to grants of power to justify their actions. They exceed their constitutional authority only when they violate restrictions placed in the state or federal constitution. This helps explain why state constitutions are so long. A state constitution must specify all the restrictions that they wish to impose on state legislatures.

The plenary character of state legislative power has important implications for the intrastate distribution of powers. Although a state constitution does not define the state legislative power, it typically does define the powers of the state executive and judicial branches: Their powers are not plenary. As a result, all powers not granted to those branches are reserved to the state legislature. Put differently, under state constitutions, implied powers reside in the legislature rather than with the governor or the courts. In addition, in contrast with federal constitutional interpretation, which historically focused on the implied powers of Congress, a fundamental interpretive issue under state constitutions becomes the following: What are the implied limitations on the state legislature?

How might such limitations arise? One possible source of limitations might be separation-of-powers provisions. In contrast to the federal Constitution, most state constitutions expressly mandate a separation of powers. Article III of the Indiana Constitution illustrates these provisions: "The powers of the Government are divided into three separate departments: the Legislative, the Executive including the Administrative, and Judicial; and no person, charged with official duties under one of those departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

This text suggests that for each branch of government there is a corresponding identifiable function. Powers are not quasi-legislative or quasi-judicial, but legislative, executive, or judicial. This encourages an interpreter to employ what is usually referred to as the formalist approach to the separation of powers, identifying whether a particular power is legislative or executive or judicial, and ensuring that it is exercised by the appropriate branch. Thus, if a state legislature exercised a power that was executive or judicial in character, it would violate the state constitution.

I should note that in interpreting state constitutions, one should not assume that the definition of what is "legislative" or "executive" is the same at the state level as at the national level, or even the same from state to state. One can get a sense of this

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by focusing on powers that were once understood as legislative but are no longer seen as legislative or at least as exclusively legislative. The first of these powers is the divorce power, the power to dissolve marriages. Historically, this was a legislative power, exercised through the passage of private bills. It paid to know your legislator. But now it is viewed as a judicial power, and indeed, several state constitutions expressly prohibit their legislatures from granting divorces. Another is the spending power. Historically, this too was understood as exclusively a legislative power. The executive had the "sword" and the legislature had "the purse." However, during the twentieth century most states introduced significant changes. The vast majority of states instituted a budget line-item veto, and several also authorized governors to reduce the amounts of items as well as flatly vetoing them. In addition, several state constitutions mandate that the governor submit a draft budget to the legislature and that this form the basis for legislative deliberations. Thus, over time what was once exclusively a legislative power and remains a legislative power under the federal Constitution — become a shared power under state constitutions.

If separation-of-powers provisions provide one limit on the plenary state legislative power, unenumerated rights provisions provide another a more perplexing limit. Many state constitutions contain provisions like Article I, section 30 of the Washington Constitution: "The enumeration in this constitution of certain rights shall not be construed to deny others retained by the people." The inspiration for such guarantees in state constitutions was likely the Ninth Amendment of the fed-

eral Constitution, which holds that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Some scholars have asserted that the idea of unenumerated rights conflicts with the idea of a plenary legislative power. Whatever the validity of this contention, there is no denying the difficulty of the task of determining what the unenumerated rights are that are retained by the people and that serve as limitations on state legislation.

A third implicit limitation on state legislatures ought to be noted. If state legislatures have plenary legislative power, then provisions that look like grants of power to state legislatures may in fact operate as limitations. I emphasize here the word "may." Take, for example, a provision that authorizes the Legislature to grant tax exemptions to charities. One could read that as a straightforward grant of power. But one could also read that as a limitation. If the Constitution authorizes the Legislature to grant exemptions to charities, it by implication withholds the authority to grant exemptions to entities that do not fall within the definition. In this example, it cannot exempt entities that are not charities. The decision in any particular case would properly depend on such contextual factors.

State Legislatures and State Constitutional Development

Let me at this point to shift from constitutional theory to historical practice and to sketch the evolving treatment of state legislatures by state constitutions. Eighteenth-century state constitutions created governments dominated by the state leg-

islature. Executive powers, such as the power of appointment, were transferred wholesale to state legislatures. In fact, state legislatures appointed not only executive officers but many local officials as well. Other executive powers, such as the pardoning power, were also subjected to regulation and control by the legislature. Governors typically lacked the power to check the legislature. Most constitutions either eliminated the veto or allowed legislative override by a simple majority vote. Moreover, even if governors had the power, they rarely had the inclination, since they lacked an independent political base. The earliest state constitutions provided for gubernatorial selection by the legislature for a one-year term. Although later eighteenth-century constitutions moved toward popular election of the governor, they typically prescribed a short term of office and prohibited reelection. This undermined the political power of the office. State judiciaries were similarly hamstrung. Many states provided for appointment by the legislature, and several permitted removal of judges by "address," which is by vote of the legislature. Usually requiring a 2/3 majority. Legislatures were quite willing to intervene to overturn judicial rulings with which they disagreed, and judicial review of legislation was slowly developing at best. Finally, state constitutions imposed few limitations on state legislatures other than those found in their declarations of rights.

What kept these legislatures from abusing power? For 18th century state constitutional drafters, abuse was most likely to take the form of a failure by legislators to adhere to the views of their constituents.

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Legal Services Staff Section Executive Committee

Nancy Cyr, Legal Counsel, Nebraska Legislative Research Division, officially took the reins of the Legal Services Staff Section at the staff section's annual business meeting, July 22, 2004, in Salt Lake City, as attendees approved the slate of executive committee members for the 2004-2005 legislative year.

Cyr has worked for the Nebraska Legislature for 23 years, serving as a bill drafter in the Reviser of Statutes office from 1981 to 1992 before joining the Legislative Research Division. Michael Chernick, Research Counsel for the Legislative Council in Vermont was selected staff section vice chair. The staff section bylaws provide that the vice chair automatically assumes the role of chair the following year.

In addition to the staff section officers, Bridgette Frazier, House Counsel for the Arkansas House of Representatives begins her first term on the executive committee, while Bob Nelson, Legislative Attorney for Wisconsin's Legislative Reference Bureau, and Larry Shapiro, Chief Legislative Attorney for Connecticut's Legislative Commissioners' Office, were each reappointed for a second two-year term.

Other executive committee members include Rich Merkel, Judiciary Division Chief for Wisconsin's Legislative Reference Bureau; Diane Boyer-Vine, Legislative Counsel of California; David Savelle, Chief Analyst, Bill Drafting Services, for the Florida House of Representatives; Bob Rothberg, Legal Counsel for the New Jersey Office of Legislative Services; Jery Payne, Staff Attorney for Colorado's Office of Legislative Legal Services; and Pam Ray, Staff Attorney, Legislative Council Service in New Mexico.

The main approach for preventing abuse of power was to strengthen the mechanisms of popular control. Therefore, members of the lower house were elected annually, and in many states, that was true senators as well. The axiom of the times was "when annual elections end, tyranny begins." Imagine how popular that would be today! Several state constitutions supplemented this by granting the right of constituents to instruct their representatives. Constituents had the right to direct how the representatives should vote on particular measures. Even in states where instruction of representatives was not an express right, it was widely assumed.

Pennsylvania in its 1776 constitution probably went the furthest in institutionalizing mechanisms of popular control. The Pennsylvania Constitution of 1776 vested broad power in an annually elected unicameral legislature. The Constitution mandated rotation in office to avoid "the danger of establishing an inconvenient aristocracy." The legislature was large, with small electoral districts that not only facilitated close contacts between legislators and constituents but also made it more likely that representatives would mirror demographically the people they represented. The Constitution apportioned the legislature on the basis of number of taxable inhabitants. According to Article 17, this is "the only principle which can make the voice of a majority of the people the law of the land." Not content with all that, the Constitution introduced various plebiscitary elements. Popular control over lawmaking was enforced by imposing a waiting period for popular consideration of proposed legislation. Except "on occasions of sudden necessity," enactments did not take effect prior to the election of a new assembly, creating an opportunity for voters to install legislators pledged to repeal unpopular measures. This, together with the right to instruct representatives, operationalized the principle enshrined in the Declaration of Rights that "the People in the state have the sole, exclusive, and inherent right of governing" and that "all officers of government ... are their trustees and servants."

The states soon soured on their experiment with relatively unrestricted state legislatures. Pennsylvania abandoned its

1776 constitution in 1790. Still, the major changes came in the nineteenth century. Beginning in the 1830s and continuing throughout the century, many states sought to enhance the autonomy and authority of the executive and judiciary, viewing this as a vital step in promoting a system of checks and balances. They secured the independence of these two branches by replacing legislative appointment of governors and other executive branch officials with popular election. After 1846 they extended popular election to judges as well. The introduction of checks and balances might suggest a movement toward emulation of the federal Constitution, but despite some surface similarities to the federal model, the state reforms were primarily concerned with preventing faithless legislators from frustrating the popular will, not with checking majority tyranny through the legislature. The fact that executive officials and judges were directly elected was crucial. Popular election did more than ensure accountability; it also allowed executives and judges to claim that they had just as strong a connection to the people, the source of all political authority, as legislators did.

Loss of faith in the judgment and probity of legislators also led state constitution drafters to impose increasingly stringent procedural limitations on state legislatures. Some state constitutions required extraordinary majorities to adopt certain types of legislation, under the assumption that it would be more difficult to marshal such majorities for dubious enterprises. Others imposed procedural restrictions designed to prevent duplicity and increase transparency in the legislative process. Thus, state constitutions mandated that all bills be referred to committee, that they be read three times prior to enactment, that their titles accurately describe their contents, that they embrace a single subject, and so on. Perhaps most importantly, most required that no special laws be enacted where a general law was possible.

Equally important were substantive restrictions imposed on state legislatures, which seemed to reflect — in the words of a late-nineteenth-century observer, Charles C. Binney — a "belief that legislatures are by nature utterly careless of the public welfare, if not hopelessly

corrupt." Constitutional prohibitions on loaning the credit of the state to private entities and bans on special corporation acts exemplify the concern for legislative partiality. So too does the imposition of the constitutional requirement of equal and uniform taxation, replacing the unfettered legislative discretion that had previously prevailed. In the wake of the Civil War, constitutional prohibitions on legislative action proliferated. The Illinois Constitution of 1870 prohibited the state legislature from addressing 20 fields of local or private concern, the Pennsylvania Constitution of 1873, 40, and the California Constitution of 1879, 33.

Finally, nineteenth-century state constitutions limited the frequency and length of legislative sessions. By 1900, 33 state constitutions restricted the length of legislative sessions, and only 6 state legislatures met annually. Indeed, a delegate at the California convention of 1879 proposed that "there shall be no legislature convened from and after the adoption of this Constitution, and any person who shall be guilty of suggesting that a Legislature shall be held, shall be punished as a felon without benefit of clergy."

The first half of the twentieth century saw a reaction against such limitations. State constitutional reformers argued that the myriad constitutional restrictions on state legislatures were counterproductive, that they prevented legislators from responding effectively to changing circumstances and acting vigorously on the problems confronting the states. In order to promote effective legislative action, the Model State Constitution proposed abolishing virtually all procedural and substantive limits on legislative action other than those found in state bills of rights. Those limits, the Model State Constitution asserted, were "designed for an age when less was demanded of government than is the case today" and were, in addition, "difficult to reconcile with a real belief in democracy." What was needed was a highly professionalized, full-time legislature that would have the time and information needed to deliberate thoughtfully on the policy issues confronting the state. Insofar as abuse of power remained a problem, early twentieth-century reformers assumed that periodic elections would serve as a sufficient check on such abuses.

Although no state fully embraced the recommendations of the Model State Constitution, the reform of state constitutions and state governments during the first seventy years of the twentieth century reflects this reform perspective. If one compares the current Alaska, Hawaii, and New Jersey constitutions with late nineteenth century constitutions, one notes dramatic differences in the treatment of the legislature. Many restrictions, both procedural and substantive, have been eliminated. This same understanding of state constitutionalism has undergirded many of the piecemeal changes introduced in many states that did not replace their constitutions during the twentieth century, and it continues to shape the reform agenda for many states today. Nevertheless, a competing model of state constitutional reform, what I would call the new constitutional populism, gained considerable support in the last third of the twentieth century.

Advocates of constitutional populism do not share the Model State Constitution's faith in vigorous state action or in the effectiveness of elections for ensuring responsiveness in state legislators. Rather, the key concerns of constitutional populism have been to curtail what were seen as overly expensive and powerful state governments and to regain control over state governments that were viewed as insulated from popular concerns and popular control. Of course, distrust of state governments in general and of state legislatures in particular is nothing new. Such distrust has been a staple of reform efforts throughout American history. But the context in which past reform efforts operated was quite different. Prior reformers usually sought to make government more responsive by expanding the electorate, by changing the intrastate distribution of political power, or by restructuring the government. But by the 1970s, with the extension of the franchise, the reapportionment of state legislatures, and the modernization of state executive branches, those possibilities had been exhausted. Yet constitutional populists believed that these reforms had not produced responsive state government. Proponents of constitutional populism thus concluded that having a system of representative government was not sufficient to solve the state problems that they per-

ceived. The solution required lodging policymaking authority directly in the people, giving voters the power to reverse policies enacted by state legislatures, and limiting the power and tenure of state legislators.

The primary mechanism for accomplishing these changes has been the constitutional initiative. If, as the constitutional populists believed, state legislators were unaccountable and beholden to special interests, then it was necessary to limit their power by constitutionalizing policy choices and by circumscribing their freedom of action. Since the adoption of Proposition 13 in California in 1978, several states have adopted various tax or expenditure limits. Examples of such limits are a supermajority requirement for the legislature to enact a tax increase, tying increases in spending to the rate of inflation and population increases, or requiring voter approval for new taxes. Constitutional populists have also circumvented state legislatures by enacting legislation as constitutional amendments. My person favorite is Article XI-M of the Oregon Constitution, "Seismic Rehabilitation of Public Education Buildings." Finally, from 1990-1994, 21 states imposed term limits on state legislators. California complemented the attack on legislative incumbency with the adoption of Proposition 140, which prohibited legislators from earning state retirement benefits and required major reductions in legislative agencies and staff, and Texas and Oklahoma in 1990 constitutionalized ethics commissions that would investigate official misconduct.

Taken together, these measures reflect skepticism about the benefits of the proactive, professionalized state legislatures championed by the Model State Constitution. The perspective of the constitutional populists is much more akin to that of nineteenth-century constitutional reformers, who did not trust state legislatures to represent the interests of the people. The availability of the constitutional initiative, particularly in states west of the Mississippi, encouraged citizens to circumvent rather than rely on state legislatures and to take direct democracy seriously as an alternative to representative government.

Personally, I find this history utterly fas-

cinating. I would probably even concur with an early twentieth-century commentator, who claimed that "the romance, the poetry, and even the drama of American politics are deeply embedded in American state constitutions." But I suspect that some may be less entranced by state constitutional history than I am. Perhaps it is an acquired taste. So the question arises: for an audience involved in the intensely practical work of state legislatures, of what use is this historical excursion?

Implications

Let me suggest some ways in which what I have said might connect with the work of a legislative lawyer. The first thing to note is that most of you are operating under nineteenth century state constitutions. During the nineteenth century, most states replaced their eighteenth-century constitutions. Only Massachusetts, New Hampshire, and Vermont have constitutions drafted before 1800. But no similar replacement of nineteenth-century constitutions has occurred. During the twentieth century, only 12 states revised their constitutions, while another 5 adopted their first and only constitutions. Thirty state constitutions were adopted during the nineteenth century, and therefore, knowledge of the perspectives underlying those constitutions is important. For the political perspectives regnant at that time continue to influence the provisions that affect the operation of state legislatures.

Yet the situation is considerably more complicated. During the twentieth century, most states heavily amended their constitutions although relatively few adopted new constitutions. Indeed, in most states, the constitution averaged more than one amendment per year that they have been in existence. Think about what this means to interpreting those constitutions. In most states, there is no single set of founders or even a founding epoch. Instead of viewing a state constitution as an organic whole, it seems better to view it as reflecting a variety of distinct, perhaps even conflicting, perspectives. The state constitution reflects the political conceptions of its initial drafters and ratifiers, plus those of subsequent political movements that have added con-

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Editor's Corner: The Uses of a Constitution

Jery Payne

Student: I cannot find the French constitution.
 Librarian: Did you look under periodicals?
 — Old Political Science Joke

Lawyers, commentators, and politicians have decried the use of state constitutions to legislate. Many believe that constitutions ought to be reserved for more important issues. The governor of Florida recently said, "The bottom line is that pregnant pigs don't belong in our state constitution." This issue has been exacerbated by direct democracy in the form of state initiatives.

Initiatives, typically, require a lot of resources to pass, but an initiated statute may be repealed or amended by the legislature next year. This creates an asymmetry between risk and reward. A constitutional amendment, however, cannot be changed by a mere majority vote of the legislature. Frequently, an initiated constitutional amendment requires little or no more effort than passing a statute. An initiated constitutional amendment is frequently no harder to pass than a statute and it is a lot more difficult to repeal or change. Therefore, while an initiated statute is high-risk after it passes, an initiated constitutional amendment is low-risk after it passes. This makes an initiated constitutional amendment a strategically better choice for strong proponents of a policy. Is it any wonder people choose the constitutional amendment?

Initiatives, however, are not the only constitutional amendments that have been regretted. The 18th amendment to the United States Constitution, which was prohibition, is a good example. Thirteen years after it passed, it was repealed by the 21st amend-

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state constitutional provisions by amendment. Since the amendment process often involves neither deletion nor replacement but rather the addition of provisions, over time what develops is a sort of layering effect. Thus, one should approach a state constitution like an archeological site, looking at the contributions of various civilizations to the site layers. The metaphor is accurate, except for one crucial practical difference. Whereas the archeologist studies civilizations that no longer exist, the layers in state constitutions continue to be operative law, so the layers must be reconciled.

Even states that adopted constitutions during the twentieth century do not escape the problems posed by this layering within

Constitution: "The fundamental and organic law of a nation or state, establishing the construction, character, and organization of its government, as well as prescribing the extent of its sovereign power and the manner of its exercise."
Black's Law Dictionary, 7th edition 1999)

Black's Law Dictionary, 7th edition 1999)

ment. President Hoover established the Wickersham commission to study the 18th amendment. The Wickersham commission advised President Hoover that Prohibition was not working, but concluded that it should be continued anyway. In response, Humorist Franklin P. Adams penned this poem:

Prohibition is an awful flop.
 We like it.
 It can't stop what it's meant to stop.
 We like it.
 It's left a tail of graft and slime,
 It didn't prohibit worth a dime,
 It's filled our land with vice and crime,
 Nevertheless, we're for it.

As noted, a recently proposed Florida constitutional amendment addressed the needs of pregnant pigs. Proposed amendments in Texas deal with reverse mortgage loans and donations of equipment to the Texas Forest Service. In Colorado, constitutional amendments deal with topics ranging from the issuance of corporate stock to nuclear detonations. The Oregon constitution address seismic rehabilitation of public education buildings, whatever that means. Arguably these are not fundamental issues. How many constitutions prohibit murder? This issue is left up to the sound discretion of the legislatures. Is issuing stock or protecting pregnant pigs more fundamental than the question of whether and when people should be allowed to kill other people?

Of course, "fundamental" does not mean "important." According to my dictionary, "Fundamental" means "forming or serving as an essential component of a system or structure." Are not the laws against murder, rape, and theft considered an essential part of our legal system? If so, then how do we distinguish between those issues and the legitimate issues contained within the typical

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state constitutions. Because dissatisfaction with certain key features of a state's constitution usually provides the impetus for revision, constitutional drafters focus on those features, often leaving untouched other provisions that did not excite controversy. This makes good political sense. Attempting to change too much risks alienating diverse constituencies that may coalesce in opposition to a proposed constitution. As a result, constitutions that have been revised typically retain layers of provisions.

Something else follows from this layering as well. If some constitutional provisions reflect political perspectives that are no longer dominant in a state, then current political majorities may find themselves

seeking to circumvent those provisions. This is particularly likely when the provisions restrict legislative discretion. Restrictions on state support of internal improvements and on borrowing are prime examples. In fact, a branch of the legal profession specializes in enabling states to borrow without committing the full faith and credit of the state, thereby avoiding constitutional strictures.

Alan Tarr is a Professor of political science at Rutgers University



state or national constitution? Even the accepted and important constitutional amendments sometimes deal with things that are less important than murder. For example, original federal constitutional provisions deal with issues like the quartering of troops, titles of nobility, post offices, and excessive fines. Is prohibiting titles of nobility more essential to the United States than prohibiting murder? As Abraham Lincoln once said, "I hope to have God on my side, but I must have Kentucky!" Are such things merely a matter of judgment?

I believe the crux of the conundrum lies in a confusion between a description of a constitution and the reason for a constitution. As Chief Justice John Marshall explained in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. *Marbury v. Madison*, 5 U.S. 137, 176 (U.S., 1803)

Thus a constitution is fundamental because it embodies the delegation of authority from the people to the state. Justice Marshall continues, "This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments." The purpose of a constitutional provision is to direct the state. In the Declaration of Independence, Thomas Jefferson wrote:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, ...

Thus, a constitution is a contract between the people and the state. The terms are that the government is delegated sovereign authority to make and enforce laws in return for a promise to act consistently with the prescriptions and proscriptions required in a Constitution. The upshot of this is that the purpose of a statute is to govern the conduct of the citizen, but the purpose of a constitution is to govern the conduct and authority of the state.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

Marbury v. Madison, 5 U.S. 137, 177 (U.S., 1803)

I think this illuminates the mentioned conundrums. Murder, prohibition, and the proper treatment of pregnant pigs are rules that apply to persons or citizens. It is not that prohibiting murder is less essential than prohibiting titles of nobility, it is that the state is prohibited from bestowing titles of nobility and people are prohibited from murdering. Actually, the U.S. Constitution does address killing people: The Fifth amendment prohibits the state from killing a person without due process of law. The state creates rules that govern when a person may kill and the people create rules that govern when the state may kill. Another example is Section 3 of Article 3 of the U.S. constitution, "Treason against the United States shall consist only on levying war against them, or adhering to their enemies; giving aid and comfort. ..." This section severely limits the state's ability to define treason. Therefore, the proper subject of a constitution is the state.

As an aside, this is suggestive concerning one of the current judicial and political controversies of our time, judicial activism. Most are either for or against judicial activism, but maybe judicial activism is sometimes appropriate and sometimes not. For example, a court should probably take a broader view of constitutional proscriptions and prescriptions than grants of authority.

Common sense and reason holds that "no man can be judge in his own cause," as Thomas Hobbes explained in *Leviathan*. In the Federalist Paper No. 80, Alexander Hamilton declares that "No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias." Yet that is exactly what happens in the state. The state is required by the contract to interpret the terms of the contract to which it is a party. I believe this is why many people distrust judicial activism, but it also suggests that, when in doubt, a court ought to interpret a constitution against the state's interests. Sometimes, this is the essence of judicial activism.

If a constitution consists of the rules that the people place upon the state, then is it so wrong for the people to tell the state to prohibit certain conduct? For example, Section 1 of Article 13 of the U.S. Constitution provides that "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." This type of clause seems reasonable as a method of settling a divisive or difficult issue. If the people's delegation of authority includes proscriptions, why can it not include prescriptions? Nevertheless, such bootstrapping should only apply to essential issues of importance that the state is not effectively able to address and should stick to first principles. After all, Section 2 of Article 13 of the U.S. constitution provides, "Congress shall have power to enforce this article by appropriate legislation." The question is whether the purpose for amending the constitution is to create a proscription on the state or a prescription on the people. The first is reasonable, the second reneges on the delegation. Contracts create obligations on both sides. This is, after all, a system where the people delegate governing authority to the state. Unless every man is to be sovereign unto himself, it seems to me that the distinction ought to be maintained.

Jery Payne is an attorney for the Colorado General Assembly.

STATE NEWS



ALASKA

PAM FINLEY

The Twenty-Third Alaska Legislature, completing its second regular and first special sessions, passed legislation dealing with the following:

Resource/Economic Development: The legislature approved measures to authorize the state-owned Alaska Railroad to delineate a transportation and utility corridor from the interior of the state to the Canadian border and to investigate extending the railroad to connect with the North American rail system, and to allow the Railroad Corporation to issue up to \$500 million in revenue bonds to pay for extending a rail line to Delta Junction and Fort Greely; to amend the state's fisheries business tax rate for fishermen who sell their own catch in order to encourage small-business Alaskan fishermen to process and sell their own fish; and to modify laws applicable to leasing and development the relatively untapped resource of coalbed methane.

Victim's rights: The legislature approved bills to create a Domestic Violence Fatality Review Teams in municipalities throughout Alaska, designed to analyze and review the facts surrounding domestic abuse fatalities; to require judges to order that restitution be paid to victims who have suffered a financial loss; and to require police and prosecutors to notify crime victims of the Alaska Office of Victim's Rights.

Criminal law: Legislative initiatives included bills to allow prosecutors to use prior suppressed statements and evidence to cross-examine defendants who have changed their story, and to modify current law that requires that defense attorneys or defense investigators obtain consent from the parents of minors that they want to question, whether the interview is tape recorded or not.

Administrative law: The legislature established an independent office of admin-

istrative hearings under the direction of a chief administrative law judge; directed legislative agency review of proposed regulations; and authorized judicial relief in certain administrative matters where there is evidence of unreasonable agency delay.

Finally, in anticipation of issuance in 2008 of an Alaska quarter under the 50 States Commemorative Coin Program, the legislature made provision for a commission to receive and recommend designs for the coin for the governor's approval, and in consideration of the 50th anniversary of Statehood in early 2009, authorized establishment of a Statehood Celebration Commission.

COLORADO

DEBBIE HASKINS

When we last updated you on news from Colorado, it was still up in the air whether we would have a special session to address conflicting budget provisions in the state constitution or whether there would be measures on the ballot to ask the voters to make changes. There was no special session and the proponents of initiatives to make changes in the constitution withdrew their proposals. We go into the 2005 session with nothing resolved and knowing that more budget cuts will need to be made. A new computer system to streamline benefits applications was rolled out by the state over the objection of all 65 counties who run the state administered social services system in Colorado. It proved to be the disaster that the counties predicted. Technicians could not get people signed up, benefits checks were sent to kids instead of to grandparent caretakers, and huge backlogs were created. Since the old system is over 30 years old and built with computer technology that is no longer being taught and would take more time to restore, no one really wanted to go back to the old system either. The contractor brought in more staff and the community started food drives to help the people who were not able to get food stamps at the

offices because of the backlog caused by the new system.

Our interim has been busy with on-going litigation involving the Colorado General Assembly. The General Assembly sued the Governor 2 years ago over his vetoes of headnotes on line-item appropriations in our budget bill and over a veto not of the bill but of the appropriation clause in a substantive bill. A three-day trial was held in Denver District Court in August. The decision was recently announced. The General Assembly lost on the headnote issue, but the Court held that the governor can not veto the funding part of a substantive bill. The governor must veto either the entire bill or nothing. We expect this case to be appealed. Another lawsuit occurred when a member of the State Senate sued the staff director of the nonpartisan research office of the General Assembly. The nonpartisan research staff prepares a voter's guide, known as the Bluebook, that explains the different proposals on the ballot and gives the pros and cons based on information supplied by the proponents and opponents. Pursuant to statute, the staff draft is reviewed by a legislative committee and the committee has traditionally amended and revised the staff version prior to its being published and mailed to the registered voters in the state. This year, some of the amendments caused controversy. Critics claim that the amendments are biased, and therefore, the Bluebook is no longer be fair and impartial. The plaintiff senator voted against the amendments. He sought an injunction against the distribution of the amended version approved by the legislative committee. The matter was heard in Denver District Court and the court dismissed the action on the grounds that the judicial branch should not interfere in a legislative determination. The decision was based on separation of powers and legislative immunity, which was extended to the staff director. The senator appealed, but the amended were mailed to the voters.

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DELAWARE

RICH DILLARD

Although the 2nd half of the 142nd General Assembly ended on June 30, legislation continued to be signed into law well into August as usual. This occurred despite a constitutional requirement that Bills which are not signed or vetoed within 10 days become law without signature. The reason is that the clock doesn't start running until the Bill is physically in the possession of the Governor's Office. Since most Bills are passed by the 2nd chamber in June, the House of origin holds most of the passed Bills and doles them out through the summer.

The Bills signed into law this summer included 3 of 4 mentioned as pending in the last report: .08 BAC, whistleblower protection for private sector employees and allowing professional and occupational licenses for felons whose crime was not substantially related to the profession or occupation. Also signed into law was a Bill making Delaware the final State to allow foreign nationals to be sent back to their country of origin to serve the rest of their sentences.

Lastly, proving that the Delaware General Assembly does not speak with a forked

tongue, the practice of "tongue splitting" was criminalized except when performed by a doctor or dentist on a sober adult.

FLORIDA

EDITH ELIZABETH POLLITZ

After regular session last year, we had several special sessions. This year, we have had several hurricanes but no special sessions yet. There have been rumors floating around about a special session in December to deal with some of the issues that have come out of the storms. One such issue is that each hurricane is a different "event" for insurance purposes. With elections coming up and the organizational session following in November, it remains to be seen as of this writing if a special session will be called in conjunction with the organizational session or otherwise.

INDIANA

GEORGE ANGELONE

On September 29, the Indiana Supreme Court declined to take jurisdiction in *Aztar Gaming Corporation v. Indiana Department of State Revenue*. The Indiana Tax Court ruled in April that Aztar Corp., which operates Evansville's Riverboat, was not entitled to deduct wagering taxes

from its state income tax bill. The Indiana Department of Revenue is auditing the casinos' past tax data to determine how much each company owes. It is estimated that the 10 riverboat casinos in Indiana may owe up to \$200 in back taxes and \$50 million more in each future year as a result of the decision.

In October, the Legislative Services Agency is hosting four South Africans for the next several weeks. They are part of an exchange program sponsored by Indiana University designed to teach drafting principles to members of the national and regional legislative staff in South Africa.

The Indiana General Assembly is a part-time legislature. The next session is scheduled to begin November 16, 2004 and adjourn April 29, 2005, with a long recess extending from November 17 through January 9. The General Assembly will attempt to pass a biennial budget. The mayor of Indianapolis proposed consolidating certain city, county, and township offices in his county. The mayor also proposed state and local shared funding of capital improvements needed to expand the convention center and the Colts football stadium. In addition, both candidates running for governor have

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LEGAL SERVICES STAFF SECTION 2004 FALL DEVELOPMENT SEMINAR IN VERMONT

MICHAEL CHERNICK, VERMONT

The Legal Services Staff Section's 2004 Fall Development Seminar was held along the shores of Lake Champlain in Burlington, Vermont, and at the Vermont State House in Montpelier. In an unusual combination of staff sections, LSSS met concurrently, and shared selected sessions, with the technology specialists of NALIT. Approximately 55 LSSS members attended, and they were treated to a rich menu of programs. Among the offerings was a presentation on statutory interpretation, seminars addressing both the constitutional and technical aspects of drafting, topical programs relating to farming rights in and nuisance law, Vermont's civil unions law, and an important examination of multinational treaties' impact on state legislative drafting. This last topic drew considerable attention and is one the section will continue to follow through future seminars. Two joint sessions, one on XML as a computerized drafting system, and a second exploring the legal and technical issues pertaining to e-mail as a public document, were well received. The e-mail session was lively and informative, and it featured an excellent cross pollination of speakers representing the archival, IT, and legal perspectives.

For those interested in an historical examination of the legislative world, Vermont State Archivist, Greg Sanford, lectured in the Vermont House chamber on the Council of Censors. This was Vermont's popularly elected body that met every seven years to review the constitutionality of legislative enactments and recommend constitutional changes. While its role was exclusively advisory, it did have a measurable impact on the statutory and constitutional decisions in 18th and 19th century Vermont.

It was abolished on account of the council's own 1869 recommendation. The two luncheon speakers were University of Vermont political scientists. The first, Garrison Nelson, spoke on the 2004 presidential election. And the second, Frank Bryan, spoke about his new book, *Real Democracy: The New England Town Meeting and How It Works*. Each proved to be humorous, great raconteurs, and informative.

Vermont Supreme Court Justice Marilyn Skogland's provocative lecture, "Shall We Talk," addressed the dynamics of the relationship between the judicial and legislative branches. Her informality and colloquy impressed all of us. Many of our colleagues were surprised to learn that Justice Skogland read the law and did not attend law school. She may be unique in that respect among the current justices on the states' highest courts. The conference closed with Professor Alan Tarr of Rutgers University whose lecture has been transformed into an article on page 4.

After the conference's opening day brush with the edge of Hurricane Frances, Saturday proved to be a beautiful day. Many of the attendees followed the advise of Vermont's Chief Legislative Counsel Bill Russell and I offered to explore the Green Mountain State beyond Burlington's city limits. All of the logistics were flawless including the bus trip to Montpelier. All in all, the event was a rousing intellectual, institutional, and social success! Now we start to plan for Chicago in September, 2005!

proposed extensive changes to the structure of state government. The session is likely to be very busy.

IOWA

RICHARD JOHNSON

The Iowa General Assembly and its Code Editor have been sued by a workers' compensation claimant. The suit alleges that House File 2581, the non-appropriation bill passed at the special legislative session on September 7, 2004, violates Article III, section 29, of the Constitution of the State of Iowa. The allegation states that the title of House File 2581 expresses and embraces more than one subject in violation of the constitutional provision. The suit requests the court to declare House File 2581, in whole or in part, invalid, and to enjoin the Code Editor from codifying House File 2581. The Legislative Council will decide whether the Attorney General or outside legal counsel will represent the legal interests of the General Assembly and the Code Editor in the case. The title of the bill in question reads as follows: "An Act concerning regulatory, taxation, and statutory requirements affecting individuals and business relating to economic development, workers' compensation, financial services, unemployment compensation employer surcharges, income taxation bonus depreciation and expensing allowances, and civil action appeal bonds, and including effective date, applicability, and retroactive applicability provisions."

KENTUCKY

ANN ZIMMER

The 2004 regular session of the General Assembly was adjourned in April of 2004, without passing an executive budget for the 2004 -2006 fiscal years, although budgets were passed for the judicial and legislative branches of government. Since the beginning of the 2004-2005 fiscal year, the state has been operating under a spending plan implemented by the governor under an executive order. This spending plan is currently the subject of litigation as to its constitutionality.

The Kentucky General Assembly was called into extraordinary session by the governor on October 5, 2004, "for the sole purpose of considering the compen-

sation, health insurance benefits and retirement benefits of active and retired public employees and making an appropriation therefor." The special session was called following the governor's announcement, early in September, of the details of his proposed health care plan for teachers and other state workers. The governor said that these and other changes were necessary to save the state from significant increases in health care costs and move toward a wellness model of health care. Many teachers, state employees, and others objected to the governor's proposed plan. Although teachers' strikes are illegal in Kentucky, the Kentucky Education Association voted to begin a strike on October 27 unless changes are made to the health plan.

MARYLAND

SHERRY LITTLE

Over the last several years, what some are calling a medical malpractice insurance crisis has drawn national attention particularly for certain high-risk specialties such as obstetrics, neurosurgery, and orthopedic surgery. A number of states are considering a variety of measures to respond. Initiatives include tort reform measures such as caps on noneconomic and punitive damages, limits on health care provider liability, changes to statutes of limitations and collateral source rules, and abolition of joint and several liability. Other measures include changes to physician discipline statutes and increased regulation of insurers.

Until recently, Maryland's medical malpractice insurance industry had not experienced the steep rate increases that had occurred in other states. However, effective this past January, the Medical Mutual Liability Insurance Society of Maryland, the insurance provider to approximately 80% of the 7,000 of the State's private practice physicians, received a 28% rate increase in medical malpractice insurance premiums. Medical Mutual subsequently requested a 41% increase for the coming year and Maryland's Insurance Commission approved a 33% rise. The latest increase is estimated to push the cost of insurance to more than \$150,000 for obstetricians, the highest risk specialty. Further, Med Mutual released a survey of physicians that indicates that nearly 40% of the respondents are thinking of quit-

ting, cutting their hours, or moving out-of-state.

Other physicians who are associated with or employed by hospitals or professional practice groups receive partial or full malpractice insurance subsidies from the hospitals or practice groups. According to the Maryland Hospital Association (MHA), Maryland hospitals are now paying 34% more for liability insurance. Specifically, the State's 47 hospitals are paying \$144 million in liability premiums up from \$104 million last year and double the \$67 million paid in 2001. According to a recent MHA survey of hospitals, 44% report that some doctors planning to retire early, 40% responded that they have doctors who are cutting back on certain procedures, 25% have doctors who have stopped working in the emergency room, and 21% may have to limit services.

In response to these concerns, the General Assembly considered a number of proposals during the 2004 session, but none were successful. House legislation (**HB1299**), the product of a House of Delegates workgroup consisting of members of the Economic Matters Committee, the Health and Government Operations Committee, and the Judiciary Committee, would have established a Task Force on Medical Malpractice; required that, in situations where arbitration of a malpractice claim had been waived, the claim be subject to mediation; expanded the definition of "health care provider" under the health claims arbitration statute to include a medical day care center, hospice care program, assisted living program, and freestanding ambulatory care facility; modified the collateral source rule; and required the filing of a supplemental certificate of a qualified expert after the completion of mediation and discover. Other provisions would have required that actions to recover damages against a health care provider's insurer for failure to settle a claim be brought in the same county in which a health care malpractice action was brought against the health care provider; required an arbitration panel or circuit court to itemize by specified categories any damages awarded; and required each insurer providing professional liability insurance to a health care provider in the State to report certain in-

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formation to the Maryland Insurance Commissioner, and the Commissioner to compile and report this information to the General Assembly by September 1 of each year.

Other legislation in the 2004 session (SB193/HB287), proposed by the Governor, also failed. These bills would have reduced the cap on noneconomic damages from \$635,000 (with a \$15,000 increase on October 1 of each year) to \$500,000 for medical injuries; revised procedures for determining medical expenses; required the use of annuities for future economic and noneconomic damages in excess of \$250,000; and established procedures under which a defendant could make an offer of judgment to an adverse party and recover attorney's fees and costs if the judgment entered is not more favorable than the offer.

Following the session, the Senate of Maryland formed the Senate Special Commission on Medical Malpractice Liability Insurance. That group held numerous meetings throughout the interim with expected findings due in December. The Governor also established a Task Force on Medical Malpractice and Health Care Access that has been meeting during the interim. Most recently, that task force heard five hours of testimony from physicians and other stakeholders.

To date there is no agreement on what combination of reforms will work. One proposal would set up a State fund that would allow Medical Mutual to freeze rates, while other proposals support tying the short-term fund to a package of long-term measures including changes in the court liability system, new patient safety rules, and new insurance regulations. If a consensus is reached, the legislature may meet in a special session before the end of this year to resolve the crisis – at least on a short term basis. The regular 2005 session will convene January 12.

MINNESOTA

KAREN LENERTZ

The Office of the Revisor of Statutes in Minnesota began a major computer development project. Our current bill drafting system is comprehensive and integrated, but it operates on a thirty-year-old mainframe computer. After a pilot project to explore options, we determined to utilize a standards-based approach using

XML technology. Specifically, we purchased Arbortext's Epic XML editor, and will operate it on Windows servers. We also purchased Oracle database software, and will operate it on a Linux platform.

The process to customize the off-the-shelf software to meet the needs of the Minnesota Legislature began in the fall of 2002. In January of 2005, we plan to implement the first portion of the project, which includes the migration of the bill status system to the new database and a new web server. We anticipate the implementation of the new bill drafting system in July of 2005, for the 2006 session of the Minnesota Legislature.

In *Unity Church of St. Paul v. State of Minnesota* (C9-03-9570), a Second District Court in St. Paul declared unconstitutional the conceal and carry law that was signed by the governor into law after it passed the Minnesota Legislature during the 2003 legislative session.

The law passed the legislature as an amendment to a natural resources bill. The court said that the conceal and carry weapons amendment to the natural resources bill violated the single subject provision of Article 4, Section 17, of the Minnesota Constitution. The court "permanently enjoined and prohibited" the enforcement of the conceal and carry amendment and severed it from the other provisions in the natural resources bill. The court's decision has been appealed to the Minnesota Court of Appeals.

MISSISSIPPI

Ted Booth

The Mississippi Legislature's Joint Budget Committee completed its hearings on agency budgets for FY2006 at the close of September. The Committee will return in November to adopt an estimate of general fund revenue growth and make recommendation on agency budgets to be used by the Appropriations committees when the legislature convenes in January. Concerns exist that revenues may not meet expectations and that reductions in budgets may be necessary to produce a balanced budget.

Recently a United States District Court in Jackson barred the Division of Medicaid's implementation of controversial legislation adopted in the 2004 session that would have taken approximately 65,000

recipients off of Mississippi's Medicaid program. Defects in notice given to the recipients served as the basis for the consent decree adopted during the week of October 11, 2004. According to the consent decree, the division may not consider implementation until; the end of January 2005 thereby giving the Legislature an opportunity to consider whether it wishes to amend the legislation it adopted last year.

NEBRASKA

Scott Harrison

The bill drafting office is working with Arbortext of Ann Arbor to develop a XML-based bill drafting system. The drafters will use Arbortext's Epic Editor to create and process bill requests, bills, amendments, and other legislative documents. DtSearch was selected as the search engine for the statutes, bills, and other legislative documents. Development has been on the fast track over the interim with hopes for at least partial implementation for the 2005 session. During the 2005 interim the office will expand the system to cover the statute publishing duties of the office. Future additions include a content management system which could not be developed for 2005 implementation.

NORTH CAROLINA

Bill Gilkeson

Probably the largest event in North Carolina this fall is the historic tobacco quota buyout, which gave the 76,000 NC farmers who held federal quota allotments about \$3.8 billion. That ended the New Deal-generated tobacco price support program that many felt had been made obsolete by globalization. The buyout frees tobacco farmers to grow as much tobacco as they can sell and to sell it at the market price. But the tobacco buyout is essentially a federal story, rather than one affecting the legislature or State law. Two other big stories are more state-house-related:

First, the NC Supreme Court upheld a lower court decision that says the State is violating a constitutional provision requiring it to provide a "sound basic education" to all students. The lawsuit had been brought by several local school boards in rural, poor parts of North Caro-

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lina. They alleged that they could not afford, without additional State assistance, to meet the constitutionally required minimal education standards for all their students. (In North Carolina, schools are funded out of property taxes at the local level, but the funding is supplemented by the State.) The Supreme Court, in an early decision in the case's 10-year history, fleshed out the constitutional standard for a sound basic education to have four parts: "(1) sufficient ability to read, write, and speak the English language and a sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in further formal education or gainful employment in contemporary society." On remand to examine NC's school funding system, the trial judge ruled that the State had failed in its duty to provide a sound basic education to the plaintiffs, and specifically had a duty to provide pre-kindergarten programs to "at-risk" children, if that's what they needed to be educable in their later years. In a second opinion in the case this summer, the Supreme Court upheld the trial court's finding that the State had failed in its duty, but reversed his specific order to provide pre-kindergarten programs, saying that degree of specificity at this stage should be left to the General Assembly. Nonetheless, the Supreme Court gave the trial court, Judge Howard Manning, continuing authority over the compliance process. Manning set a hearing in October on the legislature's decision to adjourn in July without approving the State Board of Education's request for \$22 million for low wealth schools. The Governor used his extraordinary budgetary powers to make up the difference. But Judge Manning at the hearing said the legislature would have to be more of a participant in the future.

Second, for the first time, members of the State Supreme Court and the State Court of Appeals are being elected in a nonpartisan election, with public financing available if they accept restrictions on contributions and spending. All NC judges are elected, and until the 1990s all elections were on the same partisan ballot as Governor and General Assembly. But step-by-step over the past decade judicial elections were made nonpartisan. The final step toward nonpartisan elections affected the highest appellate courts. For appellate races, the General Assembly established a public campaign financing program, funded mostly from a \$3 check-off on the State income tax form. Unexpected resignations from the court created two additional vacancies, taxing the public financing fund more than expected. Normally, the nonpartisan election for a judgeship involves a nonpartisan primary to narrow the field to two candidates. But the unexpected resignations triggered a provision for a plurality election. In all, 16 candidates were on the November ballot for the five appellate judgeships, including eight candidates for the one Supreme Court vacancy election. Twelve of the 16 candidates qualified for public funding. Two candidates did not seek the funding, and two sought the funding but did not raise the threshold in qualifying contributions. Of the roughly \$1.5 million dollars available for candidates, the two candidates for a full-term Supreme Court seat received \$201,775 each, the eight candidates for the Supreme Court vacancy seat got \$80,710 each, and five candidates for Court of Appeals got \$138,125 each. As part of the program, the State is also spending just under \$1 million to send a Judicial Voter Guide to 3.9 million households. In the Guide, candidates for appellate judgeships are given 150 to pitch their candidacies. One legislative leader, seeing the increased demand on the public financing fund, sought in the 2004 session to raise attorneys' annual dues by \$50 to support it, but his effort failed.

PENNSYLVANIA

Stacey Connors Mosca

In July, Pennsylvania passed legislation which expands gambling in Pennsylvania by allowing for the placement of slot machines at each of Pennsylvania's race-

tracks as well as other locations. The legislation authorizes up to 14 slot licenses, including eight at the Commonwealth's horse racing tracks. The slot venues are expected to generate \$1 billion in state tax revenue annually, which will be used primarily to fund property tax cuts for Pennsylvania homeowners. Slots revenue will also initially provide approximately \$1.5 million to fund a program to deal with compulsive gambling, and provide \$25 million annually for the Volunteer Fire Grant Program. License fees for slot operators will provide an additional one-time revenue boost of more than \$600 million.

The placement of slot machines at tracks is expected to create approximately 18,000 new jobs and protect 35,000 existing jobs in the horse racing industry. A newly created Gaming Control Board will regulate all aspects of lot machine gaming at racetracks and other sites, including subpoena powers, the ability to suspend licenses, and the authority to hire enforcement officers.

In October, the Pennsylvania Senate revisited the slots issue by passing legislation to make changes to the slot machine law that was passed in July. The July measure had included a provision which allowed public officials to have a 1% ownership interest in gambling facilities. The legislation approved by the Senate in October would eliminate the one-percent ownership threshold in the original legislation, and expand the Attorney General's power to prosecute crimes associated with gaming.

TENNESSEE

Joseph Barnes

The 104th Tennessee General Assembly will convene an organizational session on January 11, 2005.

Among the studies to be performed during this session are the following: HR 442 - the impact of higher education costs, student loans and other indebtedness upon bankruptcy among young adults; HJR 773 - pre-trial release programs; HJR 890 - disproportionate minority confinement within the juvenile justice system; PC 840 - implementation and administration of lottery scholar-

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ships; PC 831 - cost and adequacy of allied health programs; PC 868 - mold abatement; PC 746 - predatory lending practices; PC 850 - obesity and its consequences; and PC 822 - wage disparity adversely impacting women and minorities.

By executive order, the Governor established an interdisciplinary task force to study societal and law enforcement issues related to methamphetamine manufacture and use. It is anticipated that this task force will recommend legislation to address a multitude of problems and issues.

WASHINGTON

Jeffrey Mitchell

The popularity of bypassing the legislature through the initiative and referendum process does not appear to be waning in the state of Washington. Voters will vote on a wide array of issues ranging from property tax relief, gambling, and school funding to charter schools, primary elections, and hazardous waste cleanup. The following is a description of these measures.

Initiative 297 would establish additional requirements regulating radioactive and nonradioactive hazardous substance sites such as the Hanford Nuclear Reservation in southeast Washington. The initiative would prevent the importation of additional contaminated waste until existing facilities conform to all federal and state environmental laws. The measure would also provide new laws regulating site cleanup, permitting, and design and require broader public participation for advisory purposes.

Initiative 872 would provide a new system for conducting partisan primary elections. This initiative is the latest twist in a back-and-forth saga that has Washington voters battling the political parties. In February of this year, the U.S. Supreme Court refused to consider the Ninth Circuit of Appeal's ruling that invalidated Washington's popular blanket primary which allowed voters to vote for candidates regardless of party affiliation. The blanket primary was invalidated on the grounds that it interfered with the party's right to free association. During the 2004 session, the legislature enacted a "top 2" primary, ESB 6453, that allowed voters

to continue voting for candidates regardless of party affiliation and without party registration. Under this system, the two candidates for each position receiving the most votes advance to the November election. As a precaution, however, the legislature included a back-up "Montana" primary that required voters to pick a party and only vote for candidates within that party. Governor Locke vetoed the top 2 primary thereby implementing the "Montana" system. Initiative 872 would essentially restore the top 2 system. If Initiative 872 is approved, legal challenges are sure to follow.

Initiative 884 would provide additional school funding by increasing the state sales tax from 6.5 to 7.5 percent. About 70 percent of the new revenue would increase per student allocations, with an additional per student increase for at-risk students. The remaining 30 percent would be used for salary increases, bonuses, and conditional scholarships.

Initiative 892 would authorize additional electronic scratch ticket machines at non-tribal gambling establishments. Currently, only tribal gambling establishments offer electronic scratch ticket games. The measure authorizes certain nontribal establishments to operate the same type and number of machines as the tribal governments. A 35 percent state tax would be imposed on the net win. Receipts from the state tax would be used to reduce state property taxes.

Referendum 55 would authorize charter public schools. After debating this issue for almost a decade, the legislature passed E2SHB 2295 during the 2004 session which authorized the creation of 45 charter schools. The legislation was set to take effect June 10, 2004. However, opponents of the legislation submitted the 98,867 valid signatures required to place the bill on the November ballot for a referendum vote.

WEST VIRGINIA

Mark McOwen

The 76th Legislature convened briefly in Extraordinary Session on June 15, 2004 to address fiscal matters. Several Supplementary Appropriations bills were passed that provided funding for various purposes, including additional money for flood recovery costs made necessary by

extensive flooding (again) in the Mountain State.

During the interim period between regular sessions, the Legislature meets monthly to study various topics. Among the numerous topics this year are the study of mechanisms to encourage the film industry to conduct business in West Virginia; public school dress codes; sources of revenue to pay for cost of clean-up of sites insured by Underground Storage Tank Insurance Fund; property tax laws; limitations on nurse overtime policies in hospitals operated by state agencies; mechanisms to provide all citizens with comprehensive, quality and affordable health care; the State's water quality standards; and homeowner's, commercial property and casualty insurance. Health issues being monitored include the implementation of the Regular Session's "Pharmaceutical Availability and Affordability Act" (HB 4084) that is ultimately intended to reduce and control the cost of prescription drugs in this State. Current discussions center on proposals to mandate negotiated discounts for all state-managed health plans, using the discounted Federal Supply Schedule as the benchmark.

WISCONSIN

Steve Miller

Legislative leaders have identified a "100-day plan" of legislation for the upcoming session. A key provision is a statutory property-tax freeze, pending adoption of a constitutional freeze. Assembly Democrats countered with a proposal to reduce property taxes by a reallocation of other tax credits. Wisconsin's constitution can only be amended after two successive legislatures propose an amendment, so the earliest that a constitutional tax freeze can be added is 2007. In primary elections, the Senate Majority Leader, a Republican, was defeated by a more conservative member of the Assembly.



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