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# The Legislative Features of State Constitutions

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T H E S I S.

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THE LEGISLATIVE FEATURES OF STATE CONSTITUTIONS.

-By-

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## AUTHORITIES.

American Academy of Political and  
Social Science. (Nov. 1891.)

American Law Review.

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bearing on the subject and cited in the text.

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## THE LEGISLATIVE FEATURES OF STATE CONSTITUTIONS.

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In the following pages I shall speak of the tendency to incorporate non-constitutional provisions into State constitutions, the legislative features of modern constitutions and constitutions as codes of private and administrative laws.

Constitutions, as we know them to-day, are of comparatively modern origin. In the earliest times, a constitution did little more than regulate the descent of the Crown. Later, it imposed a few restrictions upon the ruler. These restrictions, from which the bill of rights in our Federal and State constitutions were taken, are Magna Charta, the Petition of Rights addressed to James II, the Declaration of Rights made by Parliament at the time it reinstated Charles II, the Habeas Corpus Act, passed in the same reign, and the conditions imposed upon William and Mary in the Act of Settlement, 1689. No attempt has ever been made in England to restrain the powers of Parliament. There is no precedent in history

for our written constitutions. The nearest approach to them were the charters given to certain trading corporations, doing business in foreign countries, in the Middle Ages. These charters provided for a frame of government, governors and advisory boards, and in many respects were similar to our State constitutions ; but they were merely trading corporations, exercising no political powers. (Charter of Merchants doing business in Flanders, 1463 ; East India Company, 1599 ; Colony of Massachusetts Bay, 1628.)

The first mention of a truly political written constitution to be found in English history, is the one proposed by Sir Henry Vane in his letters to Cromwell during the Protectorate. After describing the advantages to be derived from a written constitution, he recommends that a convention be called, "Which convention is not properly to exercise the legislative power, but only to \* \* \* \* \* agree upon the particulars that by way of fundamental constitutions shall be laid and inviolably observed as the conditions upon which the whole body so represented doth consent to cast itself into a civil and political incorporation." (Vane's Letters -- "The Healing Question" -- The Nation, Vol. 45, p. 166.)

The constitution adopted by the United States, and the

earlier ones adopted by the States, contain merely a frame of government, and a few safeguards for civil and political rights. In these early instruments we find nothing but the fundamental principles of organic law and the distribution of the powers of government. There are no restrictions upon the legislature. The executive powers were meagre. The governor could not veto bills. The people, as sovereign, reserved no powers to themselves. The legislatures, as their direct representatives, were practically unlimited. They elected the governors, appointed the judges and made all changes in the constitution, without referring them to the people for their ratification. Of the thirteen original States, only Massachusetts submitted her constitution to the people for their approval or rejection. Allowing the people to take a direct part in the making of the laws, through the medium of the constitution, is of gradual growth. The first change came about in 1821, when the right to pass upon a new constitution was first acknowledged in New York. Property qualification for the right of franchise was next abolished in different States. The legislatures were soon deprived of the right to elect the governors. The voters asserted their right to elect the judges. The will of the people began to

be consulted upon all matters of importance. Of the one hundred and twelve constitutions adopted since 1789, only twenty have taken effect without first having been submitted to the people. Nineteen of the twenty were adopted either prior to 1820, or during the late civil war ; the remaining one being that of Mississippi, adopted in 1891.

To fully appreciate the part taken by the people in the enactment of their laws, in their vote upon the adoption of a constitution, it must be remembered that the measure to be voted upon curtails the power of the legislature, and limits its existence ; that the instrument contains not only the outline of a frame of government, but is a code of laws within itself, legislating, often in detail, upon almost all important subjects ; and that its adoption is usually made a party issue, and is exhaustively discussed by the press and public speakers before the election.

As the people seized upon this method of taking part in the enactment of their laws, ordinary private and administrative laws began to be incorporated in the constitutions, necessitating frequent changes and amendments. Louisiana and Georgia have each had seven constitutions ; South Carolina, Arkansas and Virginia have each had five new constitutions,

besides numerous amendments. Besides this, the increase in length of these instruments, in the last half century, has been almost fourfold. Constitution making has become nothing more than a cumbrous mode of legislation, changing as often as important statutes. Or, as Mr. Woodrow Wilson expresses it, "The non-constitutional provisions which are becoming so common in our State constitutions are virtually only ordinary laws submitted to popular sanction and so placed along with the rest of the instrument of which they form an incongruous part, beyond the liability of being changed otherwise than through the same ultimate authority." (The State, Sec. 896.)

As the tendency to burden constitutions with ordinary laws increases, there have been corresponding restrictions placed upon the legislature. Within the last half century the constitutions of many States have changed the time of holding legislatures from annually to bi-annually. In others, the time has been limited from 90 to 40 days. They have tied the hands of the legislature with regard to special legislation upon almost all subjects. The legislature is almost universally forbidden, by special legislation, to open or vacate highways ; to give effect to informal deeds or wills ;



to drain swamp lands ; to change the laws of descent ; to create or impair wills ; to regulate interest on money ; to declare minors of age ; to grant divorces ; and to grant to corporations exclusive privileges. Special legislation for making internal improvements is forbidden in most of the Western States. The legislature may not change or locate a county seat, provide for the bonding of cities and towns, or in any way regulate the affairs of municipalities. Neither can the legislature grant compensation to officers or contractors after service is rendered ; not refund money paid into the State treasury ; nor release persons from debt to state or city ; nor restore citizenship to one convicted of crime, or change the name of any one ; nor create corporations by special act. This last provision is absolute in many of the States, while in others it is limited to cases where the corporation might be created under a general law. An examination of the different State constitutions will show that there are nearly seventy-five subjects upon which special legislation is forbidden. None of the constitutions contain them all. That of Missouri (1875) contains thirty-three inhibitions upon legislation. Kentucky's new constitution (1890) has twenty-nine. So many prohibitions argue a want of con-

fidence in the representatives on the part of the people.

In regard to corporations, State constitutions are very full and explicit. Their rapid increase in numbers, their wealth, power and influence has had much to do with this. The people cannot trust their general assemblies to grapple alone and unassisted with a being having "perpetual succession and without a soul." (Coke on Lit. 250.) Especially is this so since the decision in the Dartmouth College case (4 Wheaton, 518), holding that the charter of a corporation is a contract between the State and the corporation <sup>revised without</sup> and cannot be reservation of such right in the constitution. <sup>2?</sup> Though not a fundamental principle of organic law, and <sup>4</sup> could as effectually be embraced in a statute, yet the constitution of almost every State in the Union declares that the term "corporation" shall include joint stock companies, whenever they have any privileges not possessed by individuals ; that they shall be limited to the business for which they were created ; and that foreign corporations must have an authorized office and an agent in the State, upon whom process may be served. (Pa., Ark., Col., Ala., La., &c., &c.) In Alabama and Colorado the constitution provides that suit may be brought against a corporation in any county in which it does business. In Ohio

and Kansas the constitution makes each stockholder liable to a further sum equal to the amount of his stock. The constitution of Michigan makes each stockholder individually liable for all labor performed for corporations. By the constitutions of New York, Indiana, Illinois, &c., the stockholders in banking corporations are individually liable to the amount of their stock. But the constitutions of five States declare that stockholders shall in no case be liable otherwise than for unpaid stock. The constitutions of Nebraska, West Virginia, Oregon, Alabama, Connecticut and California make directors liable for all moneys embezzled by any officer of a corporation. The constitutions of Pennsylvania, Missouri, Arkansas, Texas, Colorado, Alabama and Louisiana forbid corporations to issue watered stock. And if they do issue stock other than for property, labor performed, or money actually paid, such stock is void ; and in Louisiana the company forfeits its charter. By the constitutions of Michigan and Delaware it is provided that charters shall not be granted to corporations other than municipal, and canal and railroad companies, for a longer period than thirty years.

Many of the State constitutions prohibit competing or parallel railroad and telegraph companies from consolidating,

or the one company owning stock in the other. (Pa., Ark., Texas, Ala., Ill., Mich. and others.) The rolling stock of railroad companies is declared personal property, and the general assembly can pass no laws exempting it from execution. (Ill., Neb., W. Va., Ark., Mo. and Texas.) As a guard against undue influence of railroad companies on representatives, they are forbidden to accept passes, by the constitutions of many of the Western States. The constitution of West Virginia compels all railroads to build depots at towns within half a mile of the road. In Illinois, a majority of the directors of a domestic corporation must reside in the State. The legislature is not allowed to limit the amount that may be recovered for wrongful death, in Pennsylvania and other States. In two States the constitution makes it a crime for an officer of a bank to receive deposits, or create debts for the bank, after knowledge of its insolvency or its being in a failing condition, and such officer is made personally liable for the amount of the debt or deposit. (Mo. and La.) In South Carolina the constitution makes it a penal offense for a bank officer to borrow money from the bank.

The people, through their constitutions, have in sixteen States provided for homesteads exempt from execution. In

nineteen they have provided the method of claiming, and the amount of personal property that shall be exempt from execution. Though it is certainly not a principal of fundamental law that a married woman's property should be free from the control and not liable for the debts of her husband, yet this subject has been taken from the hands of the legislature and placed in the constitutions of fourteen States. Jealous of long tenures, the people of Michigan and Delaware have, by their constitutions, declared leases with rent reserved for a longer time than twelve years void. In the new Western States, where public lands are plentiful, not satisfied to leave to the wisdom of the legislature the protection of the public domain, and to preserve it from land sharks, provision is made in the constitution that such lands can be sold only to actual settlers, prescribing the amount of land that may be granted, and the length of time the settler must hold before he can perfect his title. In others, mining lands are regulated and forests are protected. To avoid competition between honest and prison labor, the people have had placed in the constitution laws prohibiting mechanical trades being taught to convicts, except for the manufacture of articles not produced in the State. (Constitution of Mich.) The func-

tions of the constitution are extended to embrace usury laws, and prescribe the legal rate of interest, in five States. The constitution of Arkansas abolishes all private seals except corporate seals.

For the better protection of the cestui que trusts, provisions have been inserted in modern constitutions prescribing the methods and securities in which trust funds shall be invested. Lotteries are almost universally forbidden. Marriage and divorce are regulated by the constitutions. The constitutions of Virginia and Massachusetts legitimize certain classes of children. The constitution of Illinois declares what shall be a public workhouse, and that common carriers must weigh or measure grain at the place where it is received, and are made responsible for the delivery of the full amount. The constitutions of Texas and Louisiana make provisions for the licensing of medical practitioners, and for the punishment of malpractice. In three States constitutional provision is made for mechanics' and laborers' liens. (N. C., Texas and Col.) Poor-houses, insane asylums and schools for the blind are subjects of constitutional legislation in several States. In four States the constitution provides for the "code of procedure." (N. C., Ohio, Neb. and

S. C.) In Michigan the constitution abolishes the distinctions between proceedings at law and in equity. In New York and Wisconsin, it is provided that testimony in equity cases shall be taken in the same manner as at law. The constitution of North Carolina abolishes feigned issues. In four States, judges are not allowed to charge juries as to matters of fact. (Ark., Texas, Col. and S. C.) The constitution of Kansas makes provision for the custody of children after the divorce of their parents. Intermarriages between the whites and negroes are forbidden in North Carolina and Tennessee. In Oregon the people have declared, through their constitution, that the Chinese shall neither own real estate nor work mining claims. They are not allowed to vote either in California or Oregon. Under the constitutions of four States women may hold offices pertaining to public schools. (Pa., Minn., La. and Col.) By the constitution of Illinois each elector may cast as many votes for any one candidate as there are officers to be elected. The same constitution allows shareholders at corporate elections to cast all votes for any one candidate or distribute them as he pleases. Like provisions have since been adopted in Missouri, Pennsylvania, West Virginia, Nebraska and California.

The legislative features of constitutions so far spoken of are those where the law itself has been directly incorporated into and forms a part of the constitution. But many of the recent State constitutions contain provisions similar to the Swiss referendum, reserving to the people the right to pass upon and ratify all proposed laws upon certain subjects. Before noticing their provisions in detail, it may not be out of place to speak briefly of the referendum as adopted in other countries.

It has long been the custom in certain cantons of Switzerland for the representatives to formulate and propose legislation, which only becomes the law of the land after having been referred to the people and ratified by them. In some cantons this was compulsory ; in others, the people had a right to demand that all laws should receive their sanction before becoming obligatory. In the smaller provinces, the people met en masse for expressing themselves upon their laws ; in the larger provinces, the vote was taken by ballot. Previous to 1874 the referendum was local or confined to certain cantons. By the constitution adopted in that year, it became a part of the national system. At present a popular vote may be demanded upon all federal as well as local laws,



not of immediate necessity. The national constitution contains the following guaranty : "Federal laws as well as federal decrees, if not of an urgent nature, must be submitted to popular vote, upon demand of 30,000 qualified voters, or eight cantons." (Constitution of Switzerland, Ch. II. Art. 89.) During the first twelve years after the adoption of the constitution, the referendum was demanded upon nineteen laws, only six of which were ratified by the voters. (Morse's "Federal Government of Switzerland", p. 119.) They have demanded this right twenty-four times in the sixteen years since the privilege was extended to them. (American Academy of Political and Social Science (Nov. 1891), p. 36.)

The constitution of France, framed by the extreme democratic convention after the revolution of 1789, contained a like provision --- "Any law proposed by the legislative body shall be published and sent to all the communes of the republic, to be voted upon, provided objection has been made to such proposed law." In England, of recent years, the same influence has made itself strongly felt. An illustration, is the custom of referring laws that affect only local interests to the direct vote of the citizens of that district ; as, local option laws, laws to raise funds for free libra-

ries, hospitals, &c. Another more important illustration : It is now maintained as a constitutional doctrine that when any important measure changing established customs or the constitution is passed by the House of Commons, the House of Lords have a right to reject it, for the purpose of compelling a dissolution of Parliament, that an appeal may be taken to the voters. (Brice's "American Commonwealth", Vol. I. p. 449.) The author speaks of this as the phenomena of recent years. Belgium is at present looking to the referendum as a means of political reform. (American Academy of Political and Social Science (Nov. 1891), p. 55.)

It has long been the custom in this country for State constitutions to require legislation upon certain subjects to be submitted to the voters and approved by them before it becomes law. The first instance of this American referendum appeared in an amendment to the constitution of Michigan, ratified in 1843, which declared that all legislation ~~on~~ contracting State debts, except certain debts specified in the constitution, should be submitted to popular vote. Similar provisions have been incorporated in nearly all constitutions since adopted. Kentucky's constitution, adopted in 1891, has the following clause : "No act of the general assembly shall au-

thorize any debt to be contracted on behalf of the Commonwealth, except for the purposes mentioned in Section 49 \* \* \* \* nor shall such act take effect until it shall have been submitted to the people at a general election and shall have received a majority of the votes cast for and against it." (Sec. 50.)

To protect themselves against loss from the insolvency of banks, the people in many of the Western States have reserved to themselves the right of passing upon all acts creating banks. The constitution of Missouri contains the following clause : "No act of the general assembly creating corporations with banking powers shall go into effect or in any manner be enforced, unless the same shall be submitted to a vote of the qualified voters of the State and be approved by a majority of the votes cast at such election." (Art. XIV. Sec. 26.) There are like provisions in the constitutions of six other States. The constitution of Montana contains another instance of law making direct by the people ; it provides that the rate of taxation for State purposes shall never be greater than three mills on each dollar, and when the taxable property in the State shall exceed \$300,000,000, the rate shall not exceed one and one-half mills on each dollar of valuation. But the above rates may at any time be increased by

an act passed by the legislature for that purpose, provided the same is ratified by a majority of the votes at the next general election. (Art. XII. Sec. 9.) The constitutions of Colorado and Idaho contain similar provisions.

There are many other referendums found in the different State constitutions, such as prohibiting the legislature from changing the seat of government without the consent of the voters (found in sixteen States) ; and prohibiting the sale of canals, school lands and other public property, unless such sale is ratified by the people. (Constitution of Ill. Art. X ; Constitution of Kan. Art. VI.) The voters of Montana were required to determine whether the right of suffrage should be extended to women. The constitution declares that the legislature shall draft a law extending to women the right of suffrage, and submit it to the voters for their ratification or rejection. (Art. VII. Sect. 2.) Like provisions are contained in the constitutions of Colorado and Wisconsin. The location of State colleges, universities, asylums, prisons and all other State institutions must be submitted to popular vote, in Wyoming. (Constitution of Wy., Art. VI. Sec. 50.) Local option, or the right of the inhabitants of certain limits of territory to determine whether intoxicating liquors shall

be sold in such territory, is a right given by many State constitutions.

By an amendment to the constitution of California, adopted in 1887, city charters and all amendments thereto must be submitted to the people for their ratification. The same amendment provides that city and county governments may be consolidated and merged into one. As there is nothing in the State constitution preventing the incorporation of ordinary municipal ordinances into city charters, this may be said to be the nearest approach to a republican form of municipal government ever attempted in this country. The constitution of Washington has a like provision, except that it gives the legislature no power to reject city charters. (American Academy of Political and Social Science (Nov. 1891), p. 53.) The general assemblies of several of the States, in order to evade responsibility, have at different times submitted proposed legislation to popular vote, without express constitutional authority. Such legislation has usually been held unconstitutional. (Rice v. Foster, 4 Har. (Del.), 479 ; Jameson on Constitutional Conventions, 418.) Though in Illinois it has been held valid.

The courts of this country cannot declare a statute void

because it is unjust, contrary to natural justice or violates the principles of republican liberty, unless such legislative encroachment is forbidden by a provision of the constitution. This seems to be one of the reasons for placing so many limitations and restrictions upon the powers of the legislature. (Commonwealth v. McCloskey, 2 Rawle (Pa.), 374 ; 6 Ind. 515 ; Pennsylvania R. R. Co. v. Riblet, 66 Penn. 164 ; 13 Grat. (Va.), 98 ; Cooley's "Constitutional Law", p. 154. Contra, Gardner v. Village of Newbury, 3 Johns. Ch. 162.) Some method of avoiding conflicts between the constitutions and statutes was deemed necessary very early in the history of this country. The first constitution of Massachusetts (1780) contained a clause giving the governor and general assembly the right to require the written opinion of the judges upon the constitutionality of proposed legislation. (Part II. Chap. III. Sec. 3.) The constitutions of several other States contain similar provisions. (Me., N. H., R. I., Fla. ; and that of Mo., 1864, but not in the present.) The courts have been naturally very reluctant to pass upon matters thus submitted to them, and their opinions under such circumstances have not been considered authoritative or binding upon the courts. The constitutionality of a measure under consider-

ation by the senate of New Hampshire, in 1852, was submitted to the court. The court said, "Whatever opinion we may express upon this bill must be regarded as an impression, by which we shall not feel ourselves bound if the measure shall become a law and the rights of citizens shall depend upon its construction." (25 N. H. 537.) The same view has been taken in all other States having a like provision, with the exception of Maine. (126 Mass. 546 ; 5 Metcalf, 597 ; 126 Mass. 566 ; 58 N. H. 622 ; 60 N. H. 585 ; 70 Me. 583 ; 55 Mo. 295 ; 58 Mo. 369.) In 1793, President Washington requested the opinions of the judges of the Supreme Court upon questions not being litigated, arising under the laws and treaties of the United States. The court refused to express an opinion. (Sparks's "Life of Washington", Chap. X.)

The want of some satisfactory means of preventing antagonism between constitutions and State laws is another reason for encumbering State constitutions with so many legislative features. While the advantages to be derived from this method of legislation are not inconsiderable, the evils resulting from the change of constitutions to codes of law are apparent. Some of the advantages are these : ~~A few selected representatives can legislate more intelligently than the masses. Cons-~~

titutional conventions are usually composed of more intelligent and representative men than legislatures. It has always been considered an honor to be a member of such a convention, and the position has usually been sought and filled by the best men. As a result, their work has been more satisfactory. There is a lack of haste and looseness of draft, characteristic of modern legislation. The effects of constitutional provisions are more thoroughly considered by their authors, than ordinary laws originating with the legislature. Thus, it secures stability in laws, causes the citizens to take more interest in the affairs of the government, educates the masses to a certain extent, keeps them in closer touch with the government, makes them better citizens and makes them better qualified to take part in the government.

But the evils far outweigh the good. The practice of encumbering constitutions with laws and special restrictions has fettered and degraded the legislature, weakened their authority and hampered them on all sides. It often prevents them from correcting abuses and carrying into effect needed reforms. Questions legitimately belonging to the legislature, needing much thought, consideration and discussion, are taken from it and placed in an instrument whose adoption or



rejection is to be determined by men who have not the means of thoroughly considering the matter, and too often depend upon the whim of public opinion or the arts of demagogues. Not only is the responsibility of the legislature lessened, but it is embarrassed in its workings by being met at every turn by questions of its competency to legislate. As a result, its work is often loosely done, unsatisfactory, and the courts are crowded with suits for the construction of statutes and to pass upon their constitutionality. Another objection to placing ordinary laws in constitutions is that it makes them permanent and difficult of change. In this way objectionable and injurious laws may become a part of the jurisprudence of a State. Progress is change. Sir Henry Maine says, "Social necessities and social opinions are always more or less in advance of law. Law is stable, and society is progressive ; there is always a gap between them. The greater or less happiness of a people depends upon the degree of promptitude with which this gulf is narrowed." (Hitchcock's "American State Constitutions", p. 7.) This gulf cannot be rapidly closed when laws are placed in constitutions.

The courts of last resort, of the different States, have often pointed out the inexpediency of the people's passing di-

rectly upon the laws. In the case of Rice v. Foster (4 Har., Del., 479), the legislature of Delaware attempted to pass a law and refer it to the people for their ratification or rejection, without constitutional authority. The court said : "Neither the legislative, executive nor judicial departments x x x x x can devolve on the people the exercise of any of the sovrein powers with which each is invested. The powers of the government are trusts of the highest importance, on the faithful and proper exercise of which depend the happiness and welfare of society, and in no case whatever can it be delegated or transferred to any other persons, or to the whole people of the State. If the legislative functions can be delegated to the people, so can judicial and executive powers. The absurd spectacle of a governor referring it to a popular vote whether a criminal convicted of a capital offense should be pardoned or executed, would be the subject of universal ridicule. And were a court of justice, instead of deciding a case themselves, to direct the clerk to enter judgment for the plaintiff or defendant, according to the popular vote of the county, the country would be disgusted with the folly, injustice and iniquity of the proceedings. / All will admit that in such cases the people are totally incompetent to decide

correctly. Equally incompetent are they to exercise with discernment and discretion, collectively or by the ballot box, the power of legislation. Because, under such circumstances, passion and prejudice incapacitate them for deliberation.

(Jameson's "Constitutional Conventions", p. 421.)

Again, in the case of Thorn v. Charmer <sup>et al</sup> ~~and others~~ (15 Barbour, 102), the validity of an act establishing free schools throughout the State of New York was in question. The litigation arose over a section declaring that the "electors shall determine by ballot, at the annual election to be next held, whether this act shall or not become a law." Though the proposed law received the sanction of more than a majority of the votes, the court held it void, among other things saying : "The doctrine that no harm can result from allowing the people to exercise directly the law making power, is more plausible than sound. We think it might be easily shown that some of the very worst evils must necessarily flow from such a violation of fundamental law. The law making power has been wisely deposited in the hands of a limited number of chosen men. The voters may have discretion enough to select suitable men for the offices ; but if they were put directly to the business of law making themselves, they would be quite out of

their element. If the two Houses can divest themselves of their office of law making and devolve it upon the people, what security have we against the passage of laws, perhaps well meant, but liable to be glaringly wrong because inconsiderately adopted ? If the practice be sanctioned \* \* \* \* every case of doubtful propriety will be referred to the result of a ballot, and acts of the assembly, subject to the popular vote, will be yielded to the claims or partisan importunities by faithless legislators anxious to escape the responsibility of their position." (Boadley v. Baker, 15 Barb. 122 ; People v. Collins, 3 Mich. 343 ; 5 W. & S. (Penn.) 281 ; 4 Selden (N. Y.), 483. Contra, Smith v. Bryan, 5 Gilm. (Ill.), 1.)

The argument of the above cases applies as well to instances where the people are allowed to make their laws by inserting them in their constitutions, as where they are allowed to pass upon them without constitutional authority. Where the constitution empowers the legislature to divest itself of responsibility, or to refer its labors to the people, or where the laws are embodied in the constitution itself, of course, there can be no question as to their validity ; but it makes it none the more advisable. The stamp of legality

does not add to the wisdom of this method of legislation. The convention of November, 1890, that framed the present constitution of Mississippi passed an ordinance at the same time regulating the times and method of holding elections, adopted the Australian ballot system, and prescribed in detail the means by which the same should be carried into effect. The legislature is forbidden to repeal or in any way change this ordinance prior to 1896. This ordinance is nothing but an ordinary law, enacted without the consent of either branch of the legislature, and not subject to the veto power of the governor, and curtails the powers of future legislatures. The convention that framed the constitution of Arkansas of 1861, passed an ordinance, in connection with the constitution, to provide revenue for the State. The validity of certain bonds issued under this ordinance was questioned in the case of Bragg v. Tuffs (49 Ark. 561), in 1887. The court held them void, among other things saying : "A convention called to frame a new constitution has no inherent right to legislate about matters of detail. All the powers that it possesses are such as have been delegated to it by express grant or by necessary implication. The passage of an ordinance to raise revenue was an assumption of power by the con-

vention, and has never been ratified by the people."

The practice of filling constitutions with ordinary laws and limitations upon the legislature was at first resorted to by the people as a means of retaining as much power to themselves as possible, as the instrument was referred directly to them for their ratification ; but there is danger of this becoming means of oppression rather than of relief. The constitution of Mississippi, adopted in 1890, not only contains many provisions that should have been left to the legislature, but it also disfranchises a large per cent. of its citizens, and does this without their consent, and without its being referred to the voters for their sanction. The legislature of Kentucky, in 1891, passed an act calling a constitutional convention, and provided that before the constitution should become operative it should be referred to a popular vote and be ratified by a majority of those voting. After framing the constitution, the convention referred it to the people, and it was ratified ; subsequently, the convention reassembled and made numerous alterations of the constitutions, several material, and promulgated the instrument as changed as the constitution of Kentucky. The validity of this proceeding was contested, and the matter carried to the Court of Appeals

(Miller v. Johnson, S. W. Rep.), where it was sustained, on the ground that it was a political rather than a judicial question.

There seems to be no adequate relief against irregularities in constitution making. (Wells v. Bain, 75 Penn. 46 ; Miller v. Johnson, S. W. Rep. 15; Constitution of Miss., 1865 ; Ark., 1874 ; La., 1852 ; Mo., 1865.) Therefore, a short, concise, written constitution, containing merely the fundamental law of the State, regulating the exercise of sovereign powers, directing to whom these powers shall be confided and the manner of their exercise, seems to be the best suited to our conditions ; or, as Judge Cooley expresses it (23 American Law Review <sup>228</sup>), "Of all the constitutions which a people makes for itself, the best is that which is written with a close hold on the past, but which with foreseeing eye prepares the way for appropriating the lessons of a progressive future. Only such a constitution can embody the essential excellences, and can so far harmonize the conservative and the progressive principles, that the one will become the complement of the other in steadily, but cautiously and safely, moulding the instrument to greater perfection."

*Henry Lay Fitzhugh.*