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MISSOURI CONSTITUTIONS: HISTORY, THEORY AND PRACTICE
(In Two Installments)

WILLIAM F. SWINDLER*

I. STATE CONSTITUTIONAL LAW IN GENERAL

Among the many unwritten chapters in American legal history, the theory and practice of state constitutional law make up a large segment. That the state constitutions adopted since 1787 have been influenced both in form and substance by the Federal Constitution is generally accepted; and the degree of influence upon the federal instrument by pre-1787 state documents has also been the subject of some study.¹ But the precise nature of state constitutions, the local needs they were designed to satisfy as distinguished from the needs of a national government, the significance in their generally greater length and variegation, the similarities and divergences in development in different states—not to mention the practical need of the average attorney for a working knowledge of state, as distinguished from national, constitutional procedure—are all fundamental questions for which the answers await additional research to supplement what little has been done to date.² Mean-

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¹ See NEVINS, THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789, cc. 4, 5 (1927); DODD, REVISION AND AMENDMENT OF STATE CONSTITUTIONS c. 1 (1910); Morey, The First State Constitutions, 4 ANNALS 201 (1894); Webster, COMPARATIVE STUDY OF THE STATE CONSTITUTIONS OF THE AMERICAN REVOLUTION, 7 ANNALS 380 (1897); Hughes, THE GOVERNMENT OF VIRGINIA PRIOR TO THE FEDERAL CONSTITUTION, 6 CONST. REV. 206 (1922); MORISON, A HISTORY OF THE CONSTITUTION OF MASSACHUSETTS cc. 1, 2 (1917); SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776 passim (1936); Humphrey, Connecticut's First Constitution, 13 CONN. B.J. 44 (1939); Smith, The Early Georgia Constitutions, 16 Ga. B.J. 273 (1954).

² In addition to several of the citations in the preceding note, the following are representative: SWISHER, MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION, 1878–79 (1930); O'Rourke and Campbell, CONSTITUTION-MAKING IN A DEMOCRACY (1943); McDANIEL, THE VIRGINIA CONSTITUTIONAL CONVENTION OF 1901–02 (1928); KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA (1916); ANDERSON and LOBB, A HISTORY OF THE CONSTITUTION OF MINNESOTA (1921);
time, there remains a vacuum of historical knowledge in this area of American jurisprudence, occupied to a certain extent by folklore and idealized stereotypes.3

What Corwin some years ago described as the “higher law theory” of American constitutional law as a whole has doubtless accounted for a certain amount of the studied emulation of the federal document in the organic law of most of the states. On the other hand, the impassioned pronouncements of sovereignty and reserved powers that have dotted the preambles or bills of rights of most state constitutions attest to the elemental conviction of the people that there must be a clearly defined limit to national power, while recognizing that a congressional act within the scope of the constitutional grant “becomes the supreme law of the land, and operates by its own force on the subject matter” of the enactment, “in whatever State or territory it may happen to be.”4 Indeed, the insistence upon the inclusion of the ninth and tenth amendments in the federal bill of rights was itself a recognition of the high degree of sovereignty which was conceived to inure to the federal document from the moment of its ratification. To the extent that it had received power from the people, it had plenary power.5

By the same token, the font and origin of all power was the people, and their state constitutions, based presumably upon the greater proportion of the people’s sovereignty withheld from the national government, logically addressed themselves to a wider variety of subjects.6


3. “Over the years the constitutional convention was endowed by popular faith with legendary qualities contributing to the constitution worship that figured so much in our legal history,” observes a contemporary scholar. Hurst, The Growth of American Law—The Law Makers 217 (1950). This has led to an exaggerated concept of the integrity and competence of many state founding fathers of the past.


6. The New York constitution of 1777 declared that “no authority shall, on any pretense whatever, be exercised over the people or members of this state, but such as shall be derived from and granted by them.” N.Y. Const. § 1 (1777); see Barker v. People, 20 Johns. (N.Y.) 457 (1823). Some writers have felt that the Federal Constitution left the states “in the position of a residuary legatee under a will.” Dodd, The Decreasing Importance of State Lines, 27 A.B.A.J. 78, 79 (1941). But cf. Orfield, infra note 11.
"[All] power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety and happiness," and to "guard against transgressions of the high powers which we have delegated, we declare, that everything in this article is excepted out of the general powers of government, and shall remain forever inviolate," ran the bill of rights of the Kentucky constitution of 1798; while that of Ohio, the first state to be created out of the territory defined by the famous Northwest Ordinance, declared that "every free republican government, being . . . organized for the great purpose of protecting their rights," the people "have at all times a complete power to alter, reform, or abolish their government, whenever they may deem it necessary." To these familiar-sounding statements a Pennsylvania court in 1845 added: "The rule of interpretation for the state constitution differs totally from that which is applicable to the Constitution of the United States. The latter instrument must have a strict construction; the former, a liberal one. Congress can pass no laws, but those which the Constitution authorizes, either expressly or by clear implication; whilst the general assembly has jurisdiction of all subjects on which its legislation is not prohibited."

With such grandiloquent avowals of political belief, implemented by the increasing detail in which the state charters dealt with the problems and processes of local government, it might well have been supposed that the organic law of the several states, rather than that of the national state, would have become paramount by now. That the contrary has proved true is generally understood to have resulted from the fundamental shift in economic orientation which came about in the United States in the last third of the nineteenth century—setting in motion a trend

7. Ky. Const. art. XII, §§ 1, 28 (1798).
8. Ohio Const. art VIII, § 1 (1802). It has been held generally that with the adoption of state constitutions, the provisions of the Ordinance of 1787 ceased to operate. See, e.g., Escanaba Company v. Chicago, 167 U.S. 678 (1882); Permoli v. New Orleans, 44 U.S. (3 How.) 561 (1845).
10. On the relations between the federal power and that of the states, in general, see McCulloch v. Maryland, supra note 4; Legal Tender Cases, 12 Wall. 457 (1871); Kansas v. Colorado, 206 U.S. 46 (1907); United States v. California, 297 U.S. 175 (1936); Carter v. Carter Coal Co., 298 U.S. 238 (1936); Helvering v. Gerhardt, 304 U.S. 405 (1938). On the widely-discussed "conspiracy theory" of reorienting federal-state relations through the medium of the Civil War and Reconstruction Amendments, see Boudin, Truth and Fiction About the Fourteenth Amendment, 16 N.Y.U.L.Q. Rev. 19 (1938); Graham, The "Conspiracy Theory" of the Fourteenth Amendment, 47 Yale L.J. 371 (1938).
toward interstate corporate enterprise and increasingly complex industrial and social processes that inexorably called forth an interstate administrative system which only the federal authority could execute. As a result, the pendulum of legal theory swung in emphasis from one extreme—the primacy of the people and their local governments which was the political apologetic of the early nineteenth century—to the other, focussed almost exclusively upon the dramatic issues of centralized national power.¹¹

The progression of political theory away from the succinct statement of general principles in the early state constitutions, in the direction of increasingly detailed organic laws seeking to cope with the increasingly complex problems of local society as the industrial revolution advanced, is readily traceable in charters taken from different eras and areas. Thus the Massachusetts constitution of 1780 (still operative, though variously amended) contained a declaration of rights, a condensed outline of the several branches of government, a section on “the university at Cambridge,” and a miscellaneous article. And its preamble, true to the ideals of the Enlightenment, read:

The end of the institution, maintenance and administration of government is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquillity their natural rights, and the blessings of life; and whenever these great objects are not obtained, the people have a right to alter the government, and to take measures necessary for their safety, prosperity and happiness.

The body politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of

¹¹. On many issues, however, the ultimate control still rests within the states: "States possessing less than twenty per cent of the population can defeat any Act of Congress. States possessing less than ten per cent of the population can defeat a treaty in the Senate. Finally, states possessing less than five per cent of the total population can defeat an amendment to the Constitution." Orfield, What Should Be the Function of the States in Our System of Government? 23 Neb. L. Rev. 87, 91 (1944). This was the winning essay in the 1943 Ross Memorial Competition. For a critique of Orfield’s general thesis on state functions, see Strong, The Future of Federalism in the United States, 22 Texas L. Rev. 255 (1944).
making laws, as well as for an impartial interpretation, and a faithful execution of them, that every man may, at all times, find his security in them. . . .\textsuperscript{12}

Illinois in 1818 found little need for a charter much more detailed than that of the Bay State, and confined its provisions to a preamble and eight articles, including an article on the state militia necessary for a frontier region, and one prohibiting slavery. But thirty years later that state found itself obliged to write a new—and longer—instrument, including fifteen articles among which were such signs of the times as provisions on state revenues, the chartering and control of corporations, and a special 2-mill tax.\textsuperscript{13}

Farther west and a decade later, the constitution of Oregon was created with eighteen articles, including one on suffrage which was broken into eighteen sections, another defining the administrative function of government, and others on school lands, state financing, corporations and internal improvements.\textsuperscript{14} Thus by the middle of the nineteenth century a fairly discernible trend of state constitution making was laid out. Yet the practical objectives of the later charters were heavily glossed over with unreasoned imitations of the federal model—the unvarying practice of creating two-house legislatures, for example, was almost totally devoid of the logical justification of 1787. The pre-eminence of the Federal Constitution, enhanced by the writings of Tucker, Kent, Story, and a whole school of less well-remembered commentators\textsuperscript{16} tended to thwart any nascent attempt to express an independent rationale of state constitutionalism. The second half of the century witnessed a basic restatement of the federal-state relationship,\textsuperscript{16} a flurry of constitutional revisions, particularly in the seventies,\textsuperscript{17} and the appearance

\textsuperscript{12. 10 Mass. Ann. Laws 5. For a short historical note on the development of the Massachusetts constitution, see 10 Mass. Ann. Laws 153-54. The bill of rights of the Virginia constitution of 1776 declared: "That all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amenable to them." Va. Const. art. I, § 2 (1776).}


\textsuperscript{15. See Bauer, Commentaries on the Constitution, 1790-1860, esp. cc. 1, 2, 6-8 (1952).}

\textsuperscript{16. See note 10 supra.}

\textsuperscript{17. Between 1870 and 1925, not including new states admitted to the union, the following adopted new constitutions: Alabama (1875, 1901), Arkansas (1874), California (1879), Delaware (1897), Florida (1887), Georgia (1877), Illinois (1870),}
of the one major work on state constitutionalism which expressed its thesis largely in terms of the federal stereotype.

A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union was published by Thomas M. Cooley in 1868, and continued through eight editions to 1927.\textsuperscript{18} The work was literally overpowering in the breadth of coverage, practical appreciation of local government processes, and range of jurisprudential concepts it represented.\textsuperscript{19} But at the same time, the author found himself somewhat in the position of Sir Edward Coke writing his \textit{Institutes}, and Sir William Blackstone compiling his lectures on the common law: The pioneer inevitably encounters large uncharted areas where he must advance by judicious guesswork, dead reckoning and a number of a priori judgments. Coke and Blackstone dogmatized freely; Cooley sought to be more objective, but the fact remains that many "constitutional limitations" became largely what he said they were—and too little effort has been made since his day to refine and revise his propositions, which is the normal procedure in assessing any major scholarly contribution.\textsuperscript{20}

Kentucky (1891), Louisiana (1879, 1898, 1913), Michigan (1909), Mississippi (1890), Missouri (1875), New York (1894), North Carolina (1876), Pennsylvania (1874), South Carolina (1895), Tennessee (1870), Texas (1875), Virginia (1902), West Virginia (1872).

The best recent compendium of state constitutions is 3 Reports of the New York State Constitutional Convention Committee (1938); see especially the analytical index, 1741–1813.

Many of the revisions of the seventies in the Southern and border states, of course, were intended to get rid of obnoxious features of Reconstruction constitutions. A Louisiana court expressed Southern disdain for these instruments by stating: "[under the 1864 constitution] State government was provisional only and liable at any time to be altered, modified or abolished by the Congress of the United States. The enactments of a Legislature deriving its authority from so infirm a source necessarily partook of the same provisional character. . . . To the people of the state . . . paramount jurisdiction passed on the adoption of the Constitution of 1868, and its subsequent approval by Congress; and they were competent, speaking through that Constitution, to ratify or annul the legislation of the antecedent provisional State Government. . . ." Police Jury v. Burthe, 21 La. Ann. 325, 327 (1869). But cf. State v. Starling, 15 Rich. Law 120 (S.C. 1867); In re Hughes, 61 N.C. 57 (1867); In re Deckert, 7 Fed. Cas. 334, No. 3728 (C.C.E.D. Va. 1874).


19. Cooley brought to his treatise the background of a compiler of the Michigan statutes, a reporter for the state supreme court, a justice of that court, and a professor of law at the University of Michigan. No definitive study of him has been published. See sketch in 4 Dicr. Am. Bios. 392 (1930).

20. On the problem of legal difficulties deliberately placed in the way of amending or revising state constitutions, see Laughlin, \textit{A Study in Constitutional Rigidity}, 10 U. Cmr. L. Rev. 142 (1943); Sears and Laughlin, id., 11 U. Cmr. L. Rev. 374 (1944); White, \textit{Amendment and Revision of State Constitutions}, 100 U. Pa. L. Rev. 1132 (1952).
Thus Cooley declared that state constitutionalism originated in the
general sovereignty of the people, the colonial and revolutionary experi-
ence of local governments, the general principles of the common law, and
the general territorial policies of Congress in effecting the transition of
federal lands into statehood. The constitutions thus devised provided
the fundamental definition of the nature and functions of the several
branches of government, preserving the sacrosanct principle of the
separation of powers and reiterating the "unalienable rights" of the
people creating the government and placing themselves under it.

Constitutional construction he held to divide into two classes: "The first . . .
where, by the constitution, a particular question is plainly addressed to
one department or officer, so that the interference of any other depart-
ment or officer, with a view to the substitution of its own discretion or
judgment . . . would be impertinent and obtrusive"; and the second where
"the question of construction is equally addressed to two or more depart-
ments of government, and it then becomes important to know whether
the decision by one is binding upon the others, or whether each is to act
upon its own judgment."

That the judiciary may be required to determine, first, the constitu-
tional soundness of the construction thus to be had, and, second, the class
into which it falls, led Cooley to his fundamental principle as to the
nature of state organic law: "While . . . the Parliament of Britain
possesses completely the absolute and uncontrolled power of legislation,
the legislative bodies of the American States possess the same power,
except, first, as it may have been limited by the Constitution of the
United States; and, second, as it may have been limited by the constitu-
tion of the State. A legislative act cannot, therefore, be declared void,
unless its conflict with one of these two intruments can be pointed out." Here was the very epitome of the Jeffersonian ideal of local government;
it was, ironically, pronounced just prior to the progeny of decisions
spawned by the Supreme Court of the United States in the exploitation of
the fourteenth amendment.

21. COOLEY, CONSTITUTIONAL LIMITATIONS c. 3 (4th ed. 1878).
22. Id. at 36-38.
23. Id. at 51-52.
24. Id. at 209.
25. See, e.g., JACKSON, STRUGGLE FOR JUDICIAL SUPREMACY (1941); 2 BOUDIN, GOV-
ERNMENT BY JUDICIARY (1932).
Cooley's treatise appeared on the eve of a wave of constitutional revisions; it manifestly influenced the draftsmen in many instances—and handicapped them in others, primarily because its formal and relatively simple conceptualization of the state charter did not anticipate the array of new economic problems arising as the frontier period in national history drew toward its close, the railroads interlaced the various sections of the continent, the interstate corporation began to assume its ultimate proportions, industrialism gave a new character to American cities and vastly increased their size, and local government found a progressively more urgent need for new powers both to control and to serve the citizen. Indeed, the real shape of state constitutionalism after 1870 may be discerned in those provisions, either in the new constitutions or in the amendments added to them during the next several decades, which Cooley scarcely conceived of, even in subsequent editions.

Thus one charter after another wrote prohibitions of special legislation into the fundamental law, addressed themselves to such problems as municipalities' authority over street railways, suspension of specie payments by state banks, and rate abuses by carriers. Home rule for cities became a fundamental proposition of this period, at the same time that an increasing restraint upon state legislatures was emphasized. Conservation and reforestation were recognized as a state responsibility, while Delaware, on the other hand, found in the mushroom growth of the corporation an opportunity to attract a disproportionate degree of interstate business to itself in the form of liberal charters for combines.

In response to the threat of foreclosures on homesteads, more than one

26. Cooley was not the sole influence, of course. Story's commentaries on the federal instrument, and John A. Jameson's TREATISE ON CONSTITUTIONAL CONVENTIONS (4th ed. 1887), were important contemporaries. All of them, however, cast their arguments in terms of the national documents, and Jameson's work was based, as his preface candidly confesses, upon a preconceived notion that "the origin, functions, and powers of the [constitutional convention] had been widely misapprehended, and that, as conceived by the 'natural man,' without knowledge or experience, jumping to conclusions respecting it hastily, it had been and was a source of extreme danger to the republic." Id. at iii.

27. See, e.g., IL. CONST. art XI, §§ 4, 7, 9-15 (1870).
28. See MO. CONST. art. IX, § 20 (1875). The pioneering position of Missouri in constitutional home rule for municipal corporations is well known. See the discussion in part III, section D which will appear in the second installment to be published in the April issue.
29. See, e.g., CAL. CONST. art. IV, §§ 22, 25, 30 (1879).
30. See, e.g., N.Y. CONST. art. VII, § 7 (1894).
31. DEL. CONST. art. XI (1897). For the general Delaware corporation law, see 8 DEL. CODE c. 1.
state exempted a certain minimum estate from sale or execution, while the demand for a greater popular voice in the affairs of government led to the initiative and referendum movement. The requirements of the twentieth century are reflected in the succession of proposed amendments to the constitution of a single state—with the cultural lag which resulted in the defeat of most of the proposals and the ultimate cumulated need for a completely revised charter: eminent domain for utilities, authority for municipalities in condemnation proceedings, control of the sale of securities, workmen’s compensation, state department of commerce, and the like.

A twentieth-century approach to the matter of constitutional revision and the general nature of state constitutionalism was signaled in 1915 with the creation of the first New York State Constitutional Convention Committee. The agency thus created by the legislature in that state was charged with making a comprehensive study of the form and substance of state charters in general with, of course, particular reference to the felt needs of New York state. A number of specialists in law and social sciences made up the personnel of the committee, and the results of its labors took shape as a series of monographs relating to various problems and subjects to be considered in devising a charter adapted to current and prospective needs. The convention produced no new constitution for New York at that time, but it served as a model of practical approach to the subject when, more than twenty years later, New York returned to the issue and in due course adopted a new constitution. Although no other states have undertaken as voluminous a

32. See, e.g., Ala. Const. art. X (1901).
34. O’Rourke and Campbell, op. cit. supra note 2, cc. 1-3.
36. New York State Constitutional Convention Committee Reports (1915) were published in seventeen volumes, covering the following subjects: documents and working materials, journals and revised journals (the latter in four volumes), proposed amendments (two volumes), convention record (six volumes), New York City government, county government in New York, and index-digest of the other state constitutions.
37. Illinois also undertook a systematic inventory of needs preliminary to a constitutional convention. See Dodd, Preparation for the Constitutional Convention, 14 Ill. L. Rev. 266 (1919); Wigmore, The Draft Constitution: Fifty Years of Progress, 17 Ill. L. Rev. 298 (1922).
38. New York State Constitutional Convention Committee Reports (1938) were published in twelve volumes, covering the following subjects: annotated state constitution, survey of proposed amendments since 1895, text of the constitutions of
preliminary study, the example of painstaking and systematic advance preparation has been effectively followed in Missouri and in several other states in the ensuing years.40

Another agency seeking to modernize the point of view of the state constitutional revisionists has been the National Municipal League, which periodically publishes a new version of its so-called Model State Constitution. Dedicated to the proposition that the most efficient charter is one which is reduced to essentials—and dedicated also, of course, to the League's own program of widened authority for local governmental units—the model embraces less than a dozen subjects: a bill of rights, a legislative article (which firmly advocates the unicameral form), a provision for initiative and referendum, an executive article, and others on the budget, the judiciary, taxation and finance, local government, civil service, public welfare, and the amending process. The document is in sharp contrast to the staggering length of some extant state charters; but whether, in the final analysis, one form or the other—or a third—is the best approach—or whether there is any "best" approach in terms of a generalized concept—is a question still awaiting adequate study of the whole subject of state constitutional law, with all due credit to the league, Professor Cooley, the two New York State Constitutional Convention Committees, and various other experts who have grappled with the subject to date.

With this rather lengthy introduction—which seems warranted by the importance of the general subject as well as by the paucity of studies addressed to it—comes now the main portion of the present article: The general character of constitutional law in Missouri. Having already em-

the forty-eight states, state-national government relations, New York City government, bills of rights, legislative organization, executive organization, judicial administration, taxation and finance, home rule and local government, and general index.

On the 1938 constitutional convention generally, see O'ROURKE AND CAMPBELL, supra note 2, esp. cc. 7-9; Sutherland, Lawmaking by Popular Vote, 24 CORNELL L.Q. 1 (1938).


41. NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION (4th ed. 1956). It is interesting to compare the League's recommendations (id. at 23-57), with those prescribed by Cooley (CONSTITUTIONAL LIMITATIONS 43-47 (4th ed. 1887) ).

42. See, e.g., Louisiana constitution of 1921, containing twenty-five articles and covering 120 octavo pages.
phasized the need for thoroughgoing research in this area, the present
writer does not pretend that a single brief study such as this will sub-
stantially reduce the unexplored territory which confronts the legal
historian. But in the case of Missouri, while there has been as yet no
comprehensive, integrated constitutional history of the state, the
surveyor will find, upon each of the four adopted constitutions as well
as upon some of the interim developments, a number of significant pub-
lished materials, some of them valuable primary references. The
present article may be considered as a brief synthesis of these published
materials, at least in the section which immediately follows and is devoted
to a chronological exposition of the state's constitutional development.
The definitive history of constitutional law in Missouri remains to be
written.

Incorporating by reference, so to speak, the materials thus far pro-
duced on various phases of constitutional development in Missouri, the
present article undertakes to delineate certain main currents: the his-
torical progression of constitutional concepts over a century and a
half; the relative emphases in succeeding constitutions on differing
problems of organic law, as indicated by a comparative analysis of the
four adopted constitutions; and the formulation of judicial theory of state
constitutionalism in the process. It might be argued that all this were
better left to be written after the complete history; it is certain to be
subject to revision when and as that history is produced. There are two
answers: first, the availability of basic materials which already set forth,
in fairly definite terms, the major features of Missouri constitutional
development; and second, the continuing urgency of all manner of studies
on the broad subject so long neglected.

43. Cf. esp. study by Morison, op. cit. supra note 1, and those cited in note 2
supra.
44. The definitive works on the first Missouri constitution are Shoemaker, Mis-
souri's Struggle for Statehood (1916), and Shoemaker, The First Constitution of
Missouri, 6 Mo. Hist. Rev. 51 (1912). See also Journal of the Missouri State Con-
vention of 1820 (1820, facsim. repr. Washington, 1905). On Missouri constitutional
history generally, see the introductory material in Loeb, Constitutions and Con-
stitutional Conventions in Missouri, Journal of Missouri Constitutional Con-
vention of 1875, at 7 (1920) (also appearing in 16 Mo. Hist. Rev. 189 (1922)).

On other constitutional developments, see Journal of the Convention of the
State of Missouri—1845 (1845); Journal and Proceedings of the Missouri State
Convention (1861–63); Journal of the Missouri State Convention of 1865 (1865);
Barclay, The Liberal Republican Movement in Missouri, 20 Mo. Hist. Rev. 3 (1925);
Loeb and Shoemaker, Journal of the Missouri Constitutional Convention of 1875
(2 vol., 1920); Loeb and Shoemaker, Debates of the Missouri Constitutional Con-
II. Chronology of Missouri Constitutional Development

(A Chronological table, hereafter referred to as “Table I,” appears in an Appendix immediately following this part of this article.)

A. From Territory to Statehood

Another segment of unwritten American legal history has to do with the territorial and state-making policies of the United States. From the Northwest Ordinance of 1787 to the organization of the Oklahoma Territory in 1890, there were twenty-six major organic acts drawn by Congress.\footnote{The Louisiana Territory is covered in vols. 13-15. These, together with the debates in Congress and the Statutes at Large, will get any researcher off to a substantial start.} While the first set a pattern which was followed to a certain extent throughout the legislative history of the others, the divergences of each territorial statute reflected the adjustment of successive Congresses to changing national—and sectional—moods. Even the companion to the renowned Northwest Ordinance, which followed in 1790 and organized the territory south of the Ohio, revealed certain changes in policy which had developed in the three years between—effected in large measure, no doubt, by the change from Confederation to Constitution.\footnote{See Act of May 26, 1790, c. 14, 1 Stat. 123. Rep. Marion (N.C.) recommended in the course of the debates on the organic law of the Louisiana Territory that the provisions of the Northwest Ordinance of 1787 be applied. 3 Annals of Congress 146 (1849).} In any case, the 1804 act creating the Territory of Orleans was the fifth, and the 1805 act creating the Territory of Louisiana (Missouri) was the seventh, in order of development of national territorial policy; and that policy had at least crystallized into the devising of three grades of territorial organization:

(1) The first grade was that of a district, in which the inhabitants had no control of the governmental process: “a governor and judges, appointed by the Federal government, adopted laws from the codes of other states, and executed them.”\footnote{A valuable primary source for the study of American territorial policy has been made available by the publication between 1934 and 1952 of Territorial Papers of the United States (18 vol.); see especially the materials in the preliminary print of vol. 1. The Louisiana Territory is covered in vols. 13-15. These, together with the debates in Congress and the Statutes at Large, will get any researcher off to a substantial start.}

\begin{itemize}
  \item \footnote{46. See Act of May 26, 1790, c. 14, 1 Stat. 123. Rep. Marion (N.C.) recommended in the course of the debates on the organic law of the Louisiana Territory that the provisions of the Northwest Ordinance of 1787 be applied. 3 Annals of Congress 146 (1849).}
  \item \footnote{47. Explanatory note, probably by Senator Benton, in 3 Annals of Congress 146-47 (1849).}
\end{itemize}
(2) The second grade conferred limited territorial status, adding a legislative council appointed by the President from among the inhabitants themselves, to act with the judges in adopting laws.

(3) Full territorial status in the third grade was signified by the creation of a house of representatives elected by the people, to serve as a lower chamber of the territorial legislature and with "liberty to originate and enact laws . . . subject to the approbation of Congress." 48

The act of March 26, 180449 made the first grade of territory of the District of Upper Louisiana, attaching it to the Territory of Indiana centered in Vincennes. (See Table I.) Protest in the district was vigorously vocal,50 and the act of March 3, 180551 met some of the objections by redefining the area as a territory in name, although in organization it retained most of the characteristics of the first grade.52 Not until the state of Louisiana was proclaimed in 181253 did Congress take the opportunity, upon changing the name of the remaining territory to Missouri, to confer upon it the third and fullest grade of territorial status. With the act of June 4, 1812,54 the constitutional history of the state actually begins; in most respects the framework of self-government-subject-to-national followed the example of earlier territorial legislation, although in some cases there were important new concepts—particularly in the reorganization of 1816 which gave the Missourians the right to elect members of the legislative council.55 The governor, territorial secretary and the judges continued to be federal appointees; the chief executive was designated commander of the militia—a proposition of considerable signi-

48. Id. at 147.
49. c. 38, § 12, 2 Stat. 283.
50. See 13 Territorial Papers 7, 33, 41-46, 270-73 (note 45 supra); Shoemaker, Missouri's Struggle for Statehood c. 1 (1916). The threat of congressional interference with their slave properties, and the compromised position of many land titles in the Territory, were the major issues agitating the inhabitants. Act of March 26, 1804, c. 38 § 14, 2 Stat. 283, in fact, declared null and void all land titles granted by the Spanish government after the Treaty of San Ildefonso (October 1, 1800) retreating the territory to France. The complicated question of the Spanish grants constitutes still another unwritten chapter of legal history. See 2 Houck, Spanish Regime in Missouri passim (1909); Foster v. Neilson, 27 U.S. 108 (1829); Garcia v. Lee, 37 U.S. 826 (1838); Strother v. Lucas, 37 U.S. 763 (1838).
51. c. 31, § 1, 2 Stat. 331.
52. E.g., the statute provided for a resident governor and secretary for the territory, but vested legislative power in the governor and three judges, without mention of a legislative council. Act of March 3, 1805, c. 31, § 3, 2 Stat. 331.
53. Act of April 8, 1812, c. 50, 2 Stat. 701.
54. c. 95, 2 Stat. 743.
fiance both in the frontier era and in 1861—and had exclusive appointive authority over all civil and military officers in the territory, as well as the power of pardon with reference to offenses against local laws and of reprieve in respect of offenses against the United States. The governor, together with both houses of the legislature, exercised the legislative power; this included the right to originate local enactments, create certain inferior courts, and define the powers and duties of all civil officers. Suffrage and jury duty alike applied to all free white males of age twenty-one and over. The superior court consisted of three justices, with exclusive jurisdiction in all capital criminal cases, and both original and appellate jurisdiction in other criminal cases and in civil actions involving more than $100.00.

With the 1812 act there was also a bill of rights, thus for the first time guarantying to the inhabitants of the territory the privileges and immunities of American citizens which the United States had undertaken, in the treaty effecting the Louisiana Purchase, to extend to all persons in the new dominion as quickly as possible. The specific guaranties included the right of proportionate representation, common law judicial procedure, jury trial, the provision that all but capital criminal charges should be bailable, the prohibition of excessive fine and punishment, the due process provision of the fifth amendment to the Federal Constitution, compensation for property taken under eminent domain, prohibition of ex post facto laws and laws impairing obligations of contracts, religious freedom, and provisions for sale of public lands to aid in the establishment of public education.

Territorial organic laws were characteristically simple—sufficient for the primary needs of a frontier society and, in the case of the 1812 act, broad enough to permit the newly constituted government to enlarge

56. Act of March 3, 1805, c. 31, §§ 1, 2, 4, 8, 2 STAT. 331, 332; Act of June 4, 1812, c. 95, §§ 2, 3, 12, 2 STAT. 744, 746.
57. Cf. the Massachusetts constitution, part II, c. 1, which styles the lawmaking body the "general court."
58. Act of June 4, 1812, c. 95, §§ 2, 4-6, 10, 2 STAT. 744, 745, 746. Cf. Act of March 3, 1805, c. 31, § 3, 9, 2 STAT. 331, 332, under which the governor and judges had legislative power.
59. Act of June 4, 1812, c. 95, §§ 9, 11, 2 STAT. 745, 746.
60. Id. § 10.
61. Article III, Treaty of Paris, April 30, 1803, 8 STAT. 201. For litigation under this article, see Delassus v. United States, 34 U.S. 303 (1835); Soulard v. United States, 29 U.S. 169 (1830).
62. Act of June 4, 1812, c. 95, § 14, 2 STAT. 747.
upon the basic structure of local law erected by previous governments. Already the district officers attached to the Indiana Territory, distasteful as this association had been to the settlers of Upper Louisiana, had accommodated them with a system of courts, a recorder's office and a detailed slave code.\textsuperscript{63} The Louisiana Territory officials had added the office of attorney general and had devised an elementary fiscal program.\textsuperscript{64} The full-fledged territorial government had only to proceed from these beginnings, which it did by adding new courts, creating the offices of auditor and treasurer, extending the privileges of habeas corpus, and providing for the substitution of common law for civil law as the system of jurisprudence.\textsuperscript{65} The scheme of government seemed to work fairly well, and the territory thrived economically; those groups which found fault with the existing state of affairs provided the basis for nascent political organizations. The 1816 act enlarged upon the degree of control which the inhabitants could exert over their own concerns,\textsuperscript{66} and two years later they felt sufficiently matured as a political society to petition for the right to draw up a constitution and seek admission to statehood.

The details of the first and second Missouri Compromises have been covered to a certain degree by earlier investigators;\textsuperscript{67} it is sufficient to point out here that in pronouncing a prohibitory policy as to slavery in certain future states above the designated latitudinal line, Congress closed the phase of territorial history begun with the Northwest Ordinance, and opened another which was to continue until the Civil War (the passage of the Homestead Act marked the third and latest phase).\textsuperscript{68} For the Missouri Territory, it signaled the closing of the first period in constitutional history and, with the convention and constitution of 1820, the beginning of the second. The new instrument was completed in less than five weeks, and the convention delegates were sufficiently sure of their work to provide that it should take effect at once.\textsuperscript{69} That they in fact overreached

\begin{itemize}
\item \textsuperscript{63} LA. DIST. LAWS 88, 101, 107 (1804, facsim. repr., Statute Law Book Co., Washington, D. C. 1905).
\item \textsuperscript{64} LA. TERR. LAWS 31, 349 (1803); LA. TERR. LAWS 18 (1810).
\item \textsuperscript{65} MO. TERR. LAWS 52 (1813); MO. TERR. LAWS 62 (1814); MO. TERR. LAWS 59 (1815); MO. TERR. LAWS 32 (1816).
\item \textsuperscript{66} Act of April 29, 1816, c. 155, 3 STAT. 328.
\item \textsuperscript{67} See SHOEMAKER, MISSOURI'S STRUGGLE FOR STATEHOOD c. 2 (1916).
\item \textsuperscript{68} The original Missouri Compromise of 1820 (c. 22, 3 STAT. 545) was nullified for all practical purposes by the compromises of 1850 (9 STAT. 446-7, 453) and was specifically repealed in 1854 by the Kansas-Nebraska Act (c. 59, § 32, 10 STAT. 277); and it was pronounced unconstitutional in a dictum by the Supreme Court of the United States in Dred Scott v. Sanford, 61 U.S. (19 How.) 1 (1856).
\item \textsuperscript{69} See JOURNAL OF THE 1820 CONVENTION, supra note 44.
\end{itemize}
themselves is a matter of history; having provided (art. III, sec. 26) that the legislature should have no power of emancipation of slaves without the consent of their owners, and should not permit the introduction of a slave trade, the convention had instructed the legislature to “prevent free negroes and mulattoes from coming into and settling in this state, under any pretext whatsoever.” Not only was the proviso a blatant example of extraneous material in a constitution, but it precipitated a prolonged debate in Congress which only ended when the admission of the state was conditioned upon a “solemn public act” that the legislature would never carry out the proviso if it were to result in the denial of any constitutional rights of United States citizens.70

Because the 1812 act had devised a basic governmental structure including the now established characteristics of national and state organization, it is not surprising that the constitutional provisions should follow it with fair degrees of similarity; however, the constitutions of several states—notably those of neighboring Illinois and Kentucky—provided the immediate models.71 Symptomatic of the popular appetite for complete self-government was the primacy which the new instrument gave to the legislative function; not only were its powers broad, but it was given impeachment authority over a variety of most of the executive branch and all judges (art. III, sec. 29), while the state treasurer was to be biennially appointed by the assembly (art. III, sec. 31). Finally, the whole process of amendment of the constitution itself was reserved to the legislature (art. XII).72 With a popularly elected body in both houses—the house of representatives holding two-year terms and the senate four, with half of the upper house standing for reelection on alternate biennia—the amending process seemed to be democratic enough.73 Indeed, the whole tenor of the 1820 constitution—the relatively limited authority of the executive and judiciary in their respective spheres as compared with that

70. In 1847 the Missouri legislature did in fact implement the constitutional proviso. Mo. Laws 1846–47, at 103. The proviso, indeed, did not go as far as the amendment to the Illinois constitution of 1848 (art. XIV) or the amendment to the Oregon constitution of 1857 (art. I, § 35); but these were both adopted after statehood. On the right of a state to disregard the condition upon which it was admitted to the Union, see Withers v. Buckley, 61 U.S. (20 How.) 286 (1857); Ward v. Race Horse, 163 U.S. 504 (1895); Frantz v. Autry, 81 Pac. 193 (1907).

71. See SHOEMAKER, MISSOURI’S STRUGGLE FOR STATEHOOD c. 8 (1916).

72. This provision is rare among state constitutions. The Connecticut constitution of 1818 (art. XI) and the Georgia constitution of 1798 (art. XV) provided possible precedents. See also the Arkansas constitution of 1836 (art. IV following § 34).

73. But cf. text at notes 75–77 infra.
of the legislature, and the detail of the declaration of rights (twenty-two sections)—bespoke the Jeffersonian ideal of limited government and anticipated the Jacksonian proposition of a thoroughly democratized government.  

B. Politics and the Missouri Constitution

If democratization meant continuing adjustment of the constitution to the various cross-currents of political interest which rolled across the state in the next four decades, there was plenty of it. The first amendment came within the first twenty months of the operation of the new instrument, repealing the constitutional provision for courts of chancery (although reserving to the legislature the right to create them by statute) and removing the minimum limits on salaries of executive officers.  

The 1820 constitution had vested the amending power in the legislative branch—changes to be proposed at one session and ratified at the next (art. XII)—and this soon proved to be an apt vehicle for partisan maneuver: Thus the second amendment, in 1832-34, vacated the circuit judgeships of the state, repealed the provision (art. V, sec. 15) authorizing the judges to appoint clerks of court, and declared the clerkships vacant—a stratagem to be repeated several times as various factions made their bid for control of state politics. Whatever had been the basic reasons for devising the 1820 constitution in this manner—and it is to be noted that the instrument itself was not submitted to a popular vote—it had become apparent by this time that an amending process vested in the legislature meant essentially an upset of the plan for the separation of powers so ingenuously proclaimed in article II.

Although the next decade saw no further amendments adopted, there were numerous proposals for further change. Like other states experi-

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74. This article does not, it should be reiterated, attempt to analyze in detail the features of each of the constitutions of Missouri. A comparative analysis of some major features is given in part III and in Table II, both of which will appear in the second installment to be published in the April issue.

75. Mo. Rev. Stat. 65-67 (1825). But a statute of 1825 giving justice of the peace courts broader jurisdiction was held unconstitutional. State v. Stein, 2 Mo. 56 (1828).

76. Mo. Laws 1832-33, at 3, 4. On Missouri politics of the 1830’s and ’40’s, see SWITZLER, HISTORY OF MISSOURI cc. 19-22 (1879).

77. The supreme court observed that while plenary power of amending the constitution was in the legislature, the court yet had the prerogative of determining that the power itself had been exercised in conformity with the stipulations of the constitution itself. State v. McBride, 4 Mo. 303, 29 Am. Dec. 636 (1836). See also State v. Fry, 4 Mo. 120 (1835).

78. See Loeb, Constitutions and Constitutional Conventions in Missouri, JOURNAL OF MISSOURI CONSTITUTIONAL CONVENTION OF 1875, at 12-13 (1920) (also appearing in 16 Mo. Hist. Rev. 184-95 (1922)).
encing a rapid transition from a frontier to a settled economic society, Missouri found its original instrument unsuited in many respects to the needs created by the new relationships within the community. Interestingly enough, the reservation of power to the people in instances where the authority to the government had not been expressly granted—that epitome of democratic idealism of the Enlightenment—inhibited courts in many instances from finding a constitutional basis for coping with unanticipated developments; and thus the state constitutions experienced, a generation before they found more dramatic expression in the interpretation of the federal instrument, the fundamental difficulties of a calendar of specific and limited powers, strictly construed.\textsuperscript{79}

Accordingly, as the demand for a general modernization of the original constitution became articulate enough to attract legislative attention—and as the public grew restive over the political uses of the amending process in the hands of the lawmakers\textsuperscript{80)—a proposal for a constitutional convention was approved in due course by the legislature of 1843 and ratified by a substantial majority at the election of 1844.\textsuperscript{81} The convention met at Jefferson City in November 1845 and, after eight weeks of work, approved a complete new instrument.

In a letter of May 30, 1846 to his constituents advocating approval of the new constitution at the general election in August, R.W. Wells, president of the convention, listed half a dozen major changes which the convention had devised. His commentary on the needs for these changes not only indicates the general economic issues of the period but also the vested political interests affected. The chief revisions he cited as follows:

(1) A reapportionment of legislative representation. This was an inevitable requirement where the membership in the lower house had been fixed by article III at a maximum of one hundred and the trends of settlement had brought about more counties than could be adequately represented. Inevitably, too, a reapportionment was almost sure to redound to the advantage of the smaller populated areas and to the disadvantage of such a dominant political and economic center as St. Louis; so that Wells warned his correspondents that strong opposition to the representation article could be expected from “Bank men or men connected with Banks.”

\textsuperscript{79} See Peters v. St. Louis & Iron Mt. Ry., 23 Mo. 107 (1855); Louisiana & Frankford Plankroad Co. v. Pickett, 25 Mo. 535 (1857); State v. Cowan, 29 Mo. 330 (1860).
\textsuperscript{80} See \textsc{Switzer}, \textit{op. cit. supra} note 76, c. 18.
\textsuperscript{81} Mo. Laws 1842-43, at 26-28.
(2) Reorganization of the bank article. The hardships created by unstable banking procedures in the western states generally is a familiar chapter in the economic history of the nineteenth century, and the chronic outcry against the chronic difficulties of the small freeholders caught between a need for easy credit and currency and the inevitable bankruptcies arising from virtually unsecured loans and note issuances was reflected in the constitutional attempt to place stringent limits on the power to charter such institutions. 82

(3) A provision to limit the program of internal improvement through taxation authorized by article VII of the 1820 constitution. This provision represented another economic reaction against the rise of a creditor group and a corresponding debt-consciousness.

(4) Popular election of judges—those of the circuit courts for terms of six years and supreme court justices for twelve. This was an attempt to settle a political issue which agitated the state for another century.

(5) Limitation of legislative sessions to sixty days. In Wells' estimation this provision would reduce the problem of "too much legislation"; as things were, he wrote, "people could not become acquainted with the laws before they were repealed"—a significant commentary on the changes and chances of Jacksonian democracy.

(6) The amending process would be removed from the legislature to the people, but only with a vote to follow mature reflection: "Each amendment must be proposed, separately, by the general assembly, published in all the papers for many months, and then finally ratified by a direct vote of the majority at the polls at the next general election." 83

Despite the exhortations of Wells and others in favor of the new constitution, it was defeated the following August in a relatively close vote. 84 Whether the organized opposition of conservative interests—including "the Bank men" as Wells had described them—was the key factor is another unanswered question in legal history; but it is significant that the proposed new instrument did not address itself to as great a variety of new problems as might have been expected—which is to say that the cumulative effect of a variety of generally recognized

82. Cf. Dewey, Banking Theories Before the Civil War passim (1910).
83. Cf. Wells' address bound with the 1845 Convention Journal, supra note 44.
84. See Loeb, supra note 78, at 14, 16 Mo. Hist. Rev. at 196.
reforms had not become great enough to attract a majority vote. In any case, the 1845 constitution did not take up such matters as the control of railroad development, the clarification of revenue power in the state government, and similar issues which arose when a frontier society achieved a certain stage of economic maturity.

Having lost the proposition to rewrite the constitution in general, the legislature that fall returned to the amending process to effect at least some of the changes envisioned in the rejected document. Thus a third amendment reorganized the basis of representation in the lower house, a fourth abolished section 13 of article V and empowered the governor to appoint judges of the circuit and supreme courts "by and with the consent of the senate," and a fifth provided for the transfer of judges to various circuits.

The political struggle within the state intensified in the late forties and early fifties, and was reflected in the succeeding amendments which the next legislature adopted: the sixth amendment, repealing the fourth and providing for popular election of supreme court judges—and vacating the judgeships in anticipation of such election; the seventh, extending the election process to the circuit judgeships and similarly clearing out the incumbents by a decree of vacation; and the eighth, in which the legislature applied the principle of popular election to a number of executive departments—secretary of state, attorney general, auditor, and state treasurer. The legislature undertook to limit its own powers to a slight degree by denying to itself the power to grant bills of divorcement. The bank problem was attacked in 1854 with an amendment requiring such institutions thenceforth to be "based upon specie capital, and made liable to redeem . . . issues in gold or silver." Public debts were limited in 1858 to a total of $30,000,000.00, with the state forbidden to incur

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85. On the general apathy of voters in the matter of state constitutional revisions, see Hurst, op. cit. supra note 3, at 211-216.
88. See Switzler, op. cit. supra note 76, c. 23.
89. Mo. Laws 1848-49, at 6, 8; Mo. Laws 1850-51, at 45, 47, 48, 50. See also State v. Ewing, 17 Mo. 515 (1853).
91. Amend. XI, Mo. Laws, 1855-57, at 6. See Morgan v. Buffington, 21 Mo. 549 (1855). Other amendments, X and XIII, related to the creation of certain counties. The amendments after X were not numbered, for some reason.
further liability "except to repel invasion, or to suppress insurrection or civil war." 92

The overriding political issues of sectional conflict which were becoming manifest by the end of the decade were reflected in this last amendment—inspired obviously by the border warfare with Kansas and the increasingly ominous alarms from east and south. The constitutional history of the state was now entering the tragic penumbra of war and reconstruction, which was to witness some striking and ephemeral constitutional developments and was to postpone the execution of a modern instrument until the sectional question had been conclusively settled. The language of the 1858 amendment articulated the fundamental, though still nebulous, conviction of both sides on the secession issue. Thus Governor Jackson in 1861 was able to appeal to the authority "to repel invasion" in justification of his mobilizing the state militia to resist the advance of federal troops into the state, 93 while the Unionists centered in St. Louis cited the prohibition against insurrection and civil war to establish the constitutional validity of their course. In any case, the legal regime in Missouri from 1861 to 1865 was anomalous in the highest degree; with Jackson and most of the state officials in flight with guerilla or Confederate forces, the convention which had been called to consider the state's relations both with the Union and the incipient Confederacy found itself the only organized group in a position to forestall either military government or anarchy. Accordingly, from 1861 to 1863 the convention functioned as a de facto directory for the state. 94

As enmity intensified with prolonged conflict, the uses of the constitutional power were directed to complete disfranchisement of the disidents. During its tenure, the convention of 1861-63 enacted a number of ordinances, including one vacating the several state offices held by the Jackson adherents and providing for a new election on terms which would assure victory for pro-Unionists (ordinance of July 10, 1861);

92. Amend. XII, Mo. Laws 1858-59, at 3.
93. Missouri's status as a border state in the Civil War is still another subject awaiting adequate legal study. Governor Jackson's proclamation was anomalous; it did not assert secession from the Union, probably because of the imminence of the convention (see note 94 infra) called to deal with that very question. The general tenor of political opinion within the state is difficult to reconstruct because most of the state histories were written by Union sympathizers after the fact. On one aspect of popular opinion, see Swindler, The Southern Press in Missouri, 1861-1864, 35 Mo. Hist. Rev. 394 (1941).
94. See SWITZLER, op. cit. supra note 76, c. 27.
another which further narrowed the voting franchise (ordinance of June 13, 1862); and a third which proclaimed emancipation of slaves in advance of the national proclamation of President Lincoln (ordinance of July 1, 1863.)

Having assured itself of the installation of a safe government for the state, the convention thereafter adjourned; but the flood tide of pro-Union vengeance and vindictiveness had not yet been reached. The political phenomenon which was soon to crystallize as the Radical Republican movement was already in ferment, and was to bear its most bitter fruit in the constitution of 1865.

The convention which assembled to draft this document showed its temper at the outset by enacting a series of ordinances supplementary to those of the continuing convention of 1861-63. These decrees proclaimed the abolition of slavery (as distinguished from the emancipation of the slaves of insurrectionists), the protection of emancipated Negroes, and the vacating of various state offices—and particularly the judgeships—held by men feared as being too moderate to countenance the type of instrument the convention intended to draft. For the constitution of 1865 imposed upon the state of Missouri, through the agency of its own elected representatives, a proscribed system as drastic as any placed upon the seceded states by force of federal occupation. The strictures centered in article II on the rights of suffrage, which provided for a comprehensive disfranchisement of Southern sympathizers and devised a loyalty oath and an elaborate formula for its application.

The 1865 constitution was, in the nature of things, essentially a negative instrument; but it did establish two important progressive principles—the prohibition of state bank notes and the provision for conversion of state banks into national banks (art. VIII), and the provision for popular ratification of subsequent constitutional amendments and the specific authorization to the legislature to submit to the people the question of future constitutional conventions (art. XII). As the reaction to the extremes of state reconstruction set in, amendments were adopted modifying the harshness of the 1865 instrument. Universal manhood suffrage was established in an amendment in 1870, which also rescinded

95. For the text of these and other ordinances, see Mo. Laws 1864.
96. See Barclay, supra note 44.
97. Ibid. See also note 100 infra.
98. See SWITZER, op. cit. supra note 76, cc. 32, 33.
99. See Barclay, supra note 44.
most of the stringent clauses of art. II.\textsuperscript{100} Other amendments in 1872 (increasing the number of supreme court judges from three to five) and in 1874 (providing for voter registration in larger communities) were symptoms of a shift in emphasis to the requirements of a new and more complex economic society.

C. \textit{Towards a Modern Constitution}

A decade after the constitution of 1865, it had become clear that an instrument devised by a faction obsessed with vengeance was impractical for a state and a nation eagerly entering upon a challenging new era. Thirty years had now passed since the rejection of the 1845 constitution which had aimed at modernizing the organic law; piecemeal reforms had been effected by certain amendments of the forties and fifties, and for the most part these had been incorporated into the 1865 instrument. But for all practical purposes the general framework of Missouri constitutionalism was that devised for the pioneer days of 1820.\textsuperscript{101} The rapid growth of railroads and corporations in general, the increasingly complex problems of local government, the wave of corruption in government at all levels which was to engulf the society of the seventies and eighties and continue without significant reaction until the era of the muckrakers in the decade prior to the first World War\textsuperscript{102}—these were but a few of the problems demanding a modern constitutional structure to cope with them.\textsuperscript{103}

With the waning of the Radical Republican movement, recommendations for a new fundamental instrument came from a Liberal Republican governor (B. Grantz Brown) in 1871 and a Democratic governor (Silas Woodson) in 1873; in 1874 the legislature voted to submit the question to the people, and the vote for a convention carried by a slight majority.\textsuperscript{104} But once the new constitution was submitted, the majority in its favor grew to a substantial one.\textsuperscript{105} For the new document buried the past—the last strictures of the suffrage article were dropped completely—and

\begin{itemize}
  \item[\textsuperscript{100}] The Radical Republican effort to control the courts resulted in a series of opinions affirming the ousting ordinances of 1865. See Circuit Attorneys' Election, 38 Mo. 419 (1866); State \textit{ex rel.} Conrad v. Bernoudy, 40 Mo. 192 (1887), citing Thomas \textit{v.} Mead, 36 Mo. 232 (1865). The loyalty oath was also upheld. State \textit{v.} Garesche, 36 Mo. 256 (1865) (holding the provision not to be in conflict with the Federal Constitution); State \textit{ex inf.} Atty. Gen. v. McAdoo, 36 Mo. 452 (1865).
  \item[\textsuperscript{101}] See Loeb, \textit{supra} note 78, at 25.
  \item[\textsuperscript{102}] See PATRON, \textit{BATTLE FOR MUNICIPAL REFORM passim} (1940).
  \item[\textsuperscript{103}] Cf. text at notes 27-34 \textit{supra}.
  \item[\textsuperscript{104}] See Loeb, \textit{supra} note 78, at 25.
  \item[\textsuperscript{105}] Id. at 26.
\end{itemize}
demonstrated an awareness of modern economic needs in the form of elaborate new articles on local government and revenue measures, at the same time hedging in the legislative power with a lengthy catalog of prohibitions. The 1875 constitution was three times the length of that of 1820, and twice as long as the 1865 document; most of the additions were to be found in the two new articles and in the legislative restraints.\textsuperscript{106} Perhaps the best-known modernizing feature of the 1875 constitution was the pioneer provision for home rule (art. X, sec. 16) for cities above 100,000 population (St. Louis).\textsuperscript{107}

That the new instrument did not or could not anticipate all the accelerating exigencies of the emerging industrial age was demonstrated by the steady succession of amendments—primarily of an economic character—which punctuated its seventy-year history. Between 1876 and 1943, when the convention to devise a new constitution was opened, sixty amendments were ratified.\textsuperscript{108} Many of these were of secondary importance, intended to correct details of various provisions frozen into the constitutional mould which conceivably should have been left to legislative initiative.\textsuperscript{109} But approximately one-third of the amendments reflected the state's response to the demands of a maturing economic society. The first major change, in fact, was the creation in 1884 of an appellate court system to relieve the congestion caused by rapidly increasing commercial litigation. In 1890—or eighteen years after the supreme court had been increased in membership to five justices—an amendment further enlarged it to seven, as another step toward reducing the pressure of judicial business.\textsuperscript{110}

One of the first contemporary economic issues to elicit a specific amendment was the firemen's pension provision of 1892; and in the prolonged legislative struggle to devise an effective constitutional plan to

\begin{footnotes}
\item[106] Id. at 27.
\item[107] Missouri's home rule experience is discussed in part III which will appear in the second installment to be published in the April issue.
\item[108] Bradshaw, Missouri's Proposed New Constitution, 39 Am. Pol. Sci. Rev. 61, 63 (1945). Compare also this comment, "One trouble with many state constitutions is that they have been patched too often by people who neglected to consider the effect of amendments upon the system as a whole." Bebout, The Constitution as a Plan for Government, Model State Constitution, supra note 41, at 23.
\item[109] Cf. Graves' note in Model State Constitution, supra note 41, at 51.
\item[110] On the appellate court system, see Mo. Const. art. VI (1875); amendment of 1884, Mo. Laws 1883, at 215. On the supreme court enlargement, see Mo. Laws 1889, at 322; Mo. Laws 1891, at 4, 5, 7. See also Rourke v. Holmes St. Ry., 257 Mo. 555, 166 S.W. 272 (1914).
\end{footnotes}
cover the retirement needs of a growing variety of groups in the state over the next half century (see Table I) may be traced a number of familiar arguments in the social history of the twentieth century. "The courts should not be diligent in searching out plausible reasons and specious pretexts to evade and set aside constitutional prohibitions against the improper use of public funds, and thereby unnecessarily increase the burdens of taxation," the state supreme court declared in holding invalid a St. Louis police pension ordinance of 1895: "Upon the contrary, all such provisions in the fundamental law of the state should be enforced" against any attempts to "grant public money to or in aid of any individual."111 Pensions for the blind were incorporated into the article in 1916, and police pensions a decade later; old-age security provisions for persons reaching the age of seventy were added in 1932, and six years later this limit was lowered to an age of sixty-five.112

The widening concepts of state services and responsibilities—attended by obstacles of constitutional interpretation and the amendatory steps to surmount the obstacles—were reflected in the experience with the highway program. The general assembly in 1899 proposed an amendment which was duly ratified in the 1900 general election and provided, inter alia, that for purposes of levying a county road and bridge tax, mortgagees should be deemed to have an interest in the property affected by the tax, except for holders of mortgages of a "railroad and other quasi-public corporations, for which provision has already been made by law." The supreme court invalidated the road and bridge levy on the ground that this provision as to mortgage interests violated the equal protection clause of the fourteenth amendment to the Federal Constitution.113

The Croy decision was handed down in 1901, and six years later the legislature drew up a new amendment to finance county road and bridge construction, avoiding the specific objections of the Croy case and adding further that money raised by the special taxes was "to be used for road

111. Mo. Const. art. IV, § 47 (1875), amended with respect to firemen, Mo. Laws 1891, at 221, implemented, Mo. Laws 1893, at 112. The police pension opinion from which the quotation is taken is in State ex rel. Heaven v. Ziegenhein, 144 Mo. 283, 45 S.W. 1099 (1898).
112. Mo. Laws 1917, at 583; Mo. Laws 1927, at 525; Mo. Laws 1933, at 478; Mo. Laws 1939, at 932.
113. Russell v. Croy, 164 Mo. 69, 97-110, 63 S.W. 849, 853-57 (1901). The court in this opinion noted that an identical law in California had been described in a dictum by the Supreme Court of the United States as probably unconstitutional. Id. at 99, 63 S.W. at 853.
and bridge purposes, but for no other purpose whatever.” This amend-
ment, duly ratified, passed muster with the courts, but only upon the
reiteration that it be strictly construed.114 But the automobile age
demanded an attack upon the road problem at the state rather than at the
county level; and in 1920 another amendment authorized the issuance of
state bonds to the amount of $60,000,000.00 to finance a statewide pro-
gram. This amendment, itself amended in 1921 to permit interest on the
bonds to be paid from automobile license fees,115 began a construction
program which was enlarged in 1928 by another amendment increasing
the bond total to $135,000,000.00.116

Other amendments to enlarge upon the powers of local governments
in levying taxes and incurring bonded indebtedness for improvements
were required with the state growth of the twentieth century: At least
seven amendments were adopted between 1902 and 1938 relating to
various aspects of local revenue power.117 The initiative and referendum
appeared in the constitution in 1908,118 thus widening the degree of popu-
lar control (at least in theory) over government. But other proposals,
equally urgent, were frequently defeated.119 By the end of World War I,
it was becoming evident that the document of 1875 was already overlaid
with a patchwork of efforts to keep up with the increasing complexities
of modern industrialism. In the hope of remedying this situation, an
amendment was adopted in 1920120 providing for a general election every
twenty years, beginning in 1921, on the question of calling a constitutional
convention.

The vote in that year was favorable, and a convention met at Jeffers-
son City in May 1922 to devote almost eighteen months to the proposals
for constitutional revision. The delegates had plenty of materials with
which to work—329 proposals for change were submitted for their con-
Eventually, while retaining the basic document of 1875, the convention agreed upon twenty-one amendments to be submitted to the electorate. The voters in 1924 adopted only six of these, none of them affecting the fundamental needs of the post-war economy. Opposition came from the rural areas affected by the depression in farm products, and from vested interests in the larger communities: "Misleading statements regarding the taxation amendments were circulated and it was asserted that most of them had their origin in secret associations of large taxpayers," wrote one observer.\(^{122}\)

As it had done in 1846 after the defeat of a proposed constitutional overhaul, the state returned to the practice of piecemeal reform. The police pension was authorized in 1926,\(^ {123}\) the highway bond program enlarged in 1928,\(^ {124}\) old-age pensions added in 1932,\(^ {125}\) a state conservation commission created in 1936,\(^ {126}\) and the age limit on pensions reduced in 1938.\(^ {127}\) A major change in the judicial system was effected in 1940 with the adoption of the widely-discussed non-partisan election of judges.\(^ {128}\) By this date, the second deadline for the twenty-year referendum on the question of constitutional revision was approaching, as provided by article XV. The calling of a convention was approved at the general election in 1942, and in September of the following year the delegates assembled for the lengthy task of devising a twentieth-century instrument. Three hundred and seventy-seven proposals for change were submitted, and the convention committees undertook to evaluate them.\(^ {129}\)

The new constitution which emerged from this labor was essentially a simplification and a reclassification of the heterogeneous provisions incorporated into the 1875 constitution by the amending process over seventy years. Several of the changes were manifestly demanded by rudimentary principles of efficiency: The various administrative boards, commissions, bureaus and comparable agencies were grouped under appropriate functions of the executive branch; tax-collecting facilities were centralized under the Department of Revenue; county government

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121. See Loeb, supra note 78, at 43.
122. Ibid.
123. See note 112 supra.
124. See note 116 supra.
125. See note 112 supra.
127. See note 112 supra.
129. Bradshaw, supra note 108, at 63.
was simplified by the definition of four classes. The non-partisan court plan was retained, the state park system was modernized, a merit system for employees of state hospitals and penal institutions was set up, and a bipartisan board of education created. Two important new developments were the replacement of justice of the peace courts with a system of magistrate courts, and the extension of the home rule principle to counties having more than 85,000 population.\textsuperscript{130}

The new instrument was adopted in February 1945 by a vote of 312,032 to 185,658, and went into effect on March 30 of that year. It was not without its critics,\textsuperscript{131} and there have been a succession of amendments since its adoption. In 1948 the electorate overruled the convention in the limitation it had placed upon public employee pension plans (other than for fire and police departments); the 1945 constitution had confined this power to cities of more than 100,000 population, while the amendment lowered the population figure to 40,000.\textsuperscript{132} In 1950 an amendment liberalized the provision for increasing tax limits by popular vote, as this applied to school districts.\textsuperscript{133} Other changes in 1952, in legislative compensation and session limits\textsuperscript{134} and a detailed addition to the article on state indebtedness, state building and allocation of tax funds\textsuperscript{135} ratified in 1956, attest to the proposition which probably may be derived from all constitutional history, that no fundamental law can or should attempt to effect a static organization of the society it is designed to serve.

\textit{(To be continued in the April issue.)}

\begin{footnotesize}
\begin{itemize}
  \item 130. See the sketch by Bishop, \textit{Government of Missouri Under the Constitution of 1945}, 1 V.A.M.S. 1, 6-7 (1951).
  \item 131. See, generally, the symposium on the new constitution in 19 \textit{KAN. CITY L. Rev.} 282-86 (1951).
  \item 132. Mo. Laws 1949, at 639.
  \item 133. Mo. Laws 1951, at 886.
  \item 134. Mo. Laws 1953, at 755, 757.
  \item 135. 1 V.A.M.S. 40 (Supp. 1957).
\end{itemize}
\end{footnotesize}
**APPENDIX**

**TABLE I**

**Chronology of Constitutional Development in Missouri**

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1803</td>
<td>Acquisition of Louisiana Territory from France, Treaty of April 30, 1803 ratified by Act of October 31, 1803, c. 1, 2 Stat. 245 (8th Cong., 1st Sess.)</td>
</tr>
<tr>
<td>1804</td>
<td>Act providing for government of District of Upper Louisiana, March 26, 1804, c. 38, 2 Stat. 283 (8th Cong., 1st Sess.)</td>
</tr>
<tr>
<td>1805</td>
<td>Act reorganizing government of Territory of Louisiana, March 3, 1805, c. 31, 2 Stat. 331 (8th Cong., 2d Sess.)</td>
</tr>
<tr>
<td>1812</td>
<td>Act reorganizing government of Territory of Missouri, June 4, 1812, c. 92, 2 Stat. 743 (12th Cong., 1st Sess.)</td>
</tr>
<tr>
<td>1816</td>
<td>Act replacing civil law with common law in Territory of Missouri, January 19, 1816, 1 Terr. Laws 436 Act reorganizing government of Territory of Missouri, April 29, 1816, c. 155, 3 Stat. 328 (14th Cong., 1st Sess.)</td>
</tr>
<tr>
<td>1818</td>
<td>Petition to Congress requesting permission to form a constitution and a state government and to apply for admission to the Union thereunder as the State of Missouri, November 21, 1818, Am. State Papers, II Misc. 557 (1834)</td>
</tr>
<tr>
<td>1820</td>
<td>Act to authorize the people of Missouri Territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states, and to prohibit slavery in certain territories (&quot;Missouri Compromise&quot;), March 6, 1820, c. 22, 3 Stat. 545 (16th Cong., 1st Sess.) Constitutional convention and Constitution of 1820; Ordinance of Acceptance, June 19, 1820</td>
</tr>
<tr>
<td>1822-23</td>
<td>Amendment I*</td>
</tr>
<tr>
<td>1832-33</td>
<td>Amendment II*</td>
</tr>
<tr>
<td>1845</td>
<td>Constitutional convention and proposed Constitution of 1845; defeated in election of August 1846</td>
</tr>
<tr>
<td>1848-59</td>
<td>Amendments III-XIII* (amendments after X were not numbered)</td>
</tr>
<tr>
<td>1861-63</td>
<td>Constitutional convention of 1861, operating as provisional government after elected officials proclaim &quot;resistance&quot; to &quot;invasion&quot; by federal troops; ordinances of convention vacating state offices, devising loyalty oath, proclaiming emancipation, etc.</td>
</tr>
</tbody>
</table>
1865 Constitution of 1865
1870-75 Amendments*
1875 Constitutional convention and Constitution of 1875; Schedule of 1875
1884 Amendment establishing appellate court system†
1890 Amendment enlarging supreme court to seven justices
1892 Amendment authorizing legislation on firemen's pensions; further amended in 1916 and 1936
1900 Amendment prohibiting extension of the state's credit to private enterprises
Amendment providing for roads and bridges to be constructed and financed with revenues from certain special taxes; held invalid under the fourteenth amendment to the Federal Constitution; readopted in new form in 1908
1902 Amendment authorizing issuance of school bonds
Amendment redefining local powers of taxation
1908 Amendment providing for initiative and referendum
1916 Amendment authorizing pensions for blind; amended in 1920
1920 Amendment extending home rule to smaller municipalities
Amendment redefining powers of municipal corporations
Amendment authorizing issuance of $60,000,000.00 worth of bonds for state highway system; amended in 1921 and extended to $135,000,000.00 by amendment in 1928
Amendment providing for a periodic (twenty-year) referendum on constitutional amendment and revision
1921 Amendment on woman suffrage
1922 Amendment on motor vehicle tax
1922-23 Constitutional convention of 1922, no instrument being agreed upon for submission to people
1924 Amendments and Schedule of 1924‡
1926 Amendment authorizing legislation on police pensions
1932 Amendment authorizing old-age pensions; further amended in 1938
1936 Amendment creating conservation commission
1940 Amendment devising system for non-partisan election of judges
1943-44 Constitutional convention and Constitution of 1945
1948-56 Amendments**

Sources: Statutes cited in Table supra; Jones' historical sketch of August 1, 1845, reprinted in III RSMo 1949, at 244; and sources cited in notes 45-71 supra.

*Details of the amendments are given in the text. See text at notes 75-76, 87-92, 100 supra.

†Only major amendments, representing the response of the constitution to developing social and economic needs, are included in this Table. See text at notes 108, 109, supra.

‡See text at note 122 supra.

**See text at notes 132-135 supra.