INTERPRETING STATE CONSTITUTIONS

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I. The premise of this program is that there are recurring questions that arise in the interpretation of state constitutions in any state and that approaches and techniques of interpretation apply generally across state lines. In other words, state constitutional interpretation can be approached generally rather than always on a state-specific basis. This was certainly the approach of Cooley's *Constitutional Limitations*.

The classic work on state constitutional interpretation was Thomas M. Cooley's *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the State of the American Union*, first published in 1868 and updated in numerous subsequent editions. Many courts relied on this work as authority, referring to it simply as "Cooley's Constitutional Limitations." *But see* Thomas Reed Powell, *Book Review*, 41 HARV. L. REV. 272 (1927) ("out of date"); William F. Swindler, *State Constitutional Law: Some Representative Decisions*, 9 WM. & MARY L. REV. 166 (1967) (describing Cooley's treatise as "now obsolete").

II. State Constitutions are unique legal instruments, real *constitutions*, but different from the federal constitution.

> To be sure, the State Constitution in the overall is a lengthy and high detailed document. While its largely non-self-executing rights are sometimes characterized as technicalities, they are, within a proper and reflective perspective, the embodiment of protections build on history and fair-minded principles that have withstood the test of time and experience. It is not too much to ask that the requirements be satisfied rather than evaded or eroded for the sake of situational expediency.

People v. Trueluck, 670 N.E. 2d 977, 979 (N.Y. 1996). *See also*, Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 408 (1987) ("But it *is* a constitution we are expounding, and its commands are therefore entitled to the particular deference that courts are obliged to accord matters of constitutional magnitude.") *But see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

A. There can be no single, unifying theory of state constitutional interpretation.

B. State constitutions are basically documents of limitation, by contrast to the federal constitution which enumerates powers.

The constitution is not a grant but a limitation upon the lawmaking power of the state

> legislature and it may enact any law not expressly or inferentially prohibited by state and federal constitutions.

State v. Hy Vee Food Stores, Inc., 533 N.W. 2d 147, 148 (S.D. 1995).

1. Limitations may be either express or implied. *Caddo-Shreveport Sales and Use Tax Commission v. Office of Motor Vehicles Through the Department of Public Safety and Corrections of the State of Louisiana* 710 So. 2d 776, 779-80 (La. 1998). ("...a constitutional limitation on legislative power may be either express or implied.")

Therefore, many of the difficult questions of judicial interpretation of state constitutions involve implied limitations on power. Walter Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L.J. 137, 160 (1919):

> The preceding discussion has suggested a real antithesis between constitutional construction as it relates to the national government on the one side and constitutional construction as it relates to the state government on the other. With respect to the United States, emphasis has been upon powers, and perhaps the most important single manifestation of judicial action has been the doctrine of implied powers. With respect to the states, emphasis has been upon limitations, and the most important single manifestation of judicial action has been the doctrine of implied limitations.

2. Executive and judicial branch powers may be viewed differently.

3. The problem of "negative implication."

When provisions mandate legislative action or grant authority to a legislature already vested with plenary power, courts can transform these provisions into limitations on legislative power. As Professor Frank Grad cautioned:

> It must be emphasized that very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation.
>
> ....
>
> In constitutional theory state government is a government of plenary powers, except as limited by the state and federal constitutions.... In order to give effect to such special authorizations, however, courts have often given them the full effect of negative implication, relying sometimes on the canon of construction *expressio unius est exclusio alterius* (the expression of one is the exclusion of another).

Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 964-65, 966 (1968). *See School Committee of Town of York v. Town of York,* 626 A.2d 935 (Me. 1993).

III. In many states, there are opinions, "teaching cases", that set forth a general approach to state constitutional interpretation, together with a number of specific rules. *Thompson v. Craney*, 546 N.W. 2d 123, 127 (Wis. 1996), *Boehn v. Town of St. John*, 675 N.E. 2d 318, 321 (Ind. 1996), *Hawaii State AFL-CIO v. Yoshina*, 935 P.2d 89 (Hawaii, 1997).

A. Some courts set forth a general interpretational approach.

> In interpreting a constitutional provision, the court turns to three sources in determining the provision's meaning: the plain meaning of the words in the context used; the constitutional debates and the practices in existence at the time of the writing of the constitution; and the earliest interpretation of the provision by the legislature as manifested in the first law passed following adoption.

Thompson v. Craney, 546 N.W. 2d 123, 127 (Wis. 1996).

B. Questions of state constitutional interpretation are treated as matters of law to be determined de novo by state high courts. *State v. Cook*, 530 N.W. 2d 728, 731 (Iowa 1995).

IV. The purpose, background, and function of the provision.

A. Purpose

> "When determining the purpose of a provision, we will consider the evil to be remedied and the good to be accomplished by that provision." *Brown v. Meyer*, 787 S.W. 2d 42, 45 (Tex. 1990). *See also Foster v. Jefferson Co. Quorum Court*, 901 S.W. 2d 809, 817 (Ark. 1995) ("mischief intended to be corrected").
>
> "And finally, in our examination of the constitution, we must look to the history of the times and examine the state of affairs as they existed when the constitution was framed and adopted." *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995).
>
> "The context of a constitutional provision includes other provisions in the constitution that were adopted at the same time." *Coultas v. City of Sutherlin*, 871 P.2d 465,468 (Or. 1994). See also *Johnson v. Wells County Water Resource Board*, 410 N.W.2d 525, 528 (N.D. 1987) ("the background context of what it displaced.")

B. Background

1. National Background - Revolutionary, Jeffersonian, Jacksonian, Civil War, Reconstruction, Populist, Progressive and Managerial influences on state constitutional development.

2. Regional

a. East - dating from 1776
b. Midwest -
   i. Northwest Ordinance of 1787
   ii. Congressional enabling acts
   iii. Congressional and Presidential influence on state constitutions during the process of admission
   iv. modeling on other state constitutions

c. West
   i. modeling on many more state constitutions
   ii. passage of time and changes in society, economy and government by the time of admission to statehood

3. State Specific

C. Function

"We conclude that the quick take provision was added to the constitution, not to grant power to the Board, but to remove the limitation imposed by judicial construction on the authority of the Legislature to enact quick take statutes if the legislature chose to do so." *Johnson v. Wells County Water Resource Board*, 410 N.W. 2d 525, 529 (N.D. 1987).

V. State constitutions, ratified by the electorate, are the "voice of the people."

A. Intent of the electorate

When construing a constitution, the Court's task is to "divine the 'common understanding' of the provision, that meaning 'which reasonable minds, the great mass of the people themselves, would give it.'"...Relevant considerations include the constitutional convention debates, the address to the people, the circumstances leading to the adoption of the provision, and the purpose sought to be accomplished.

People v. Mezy, 451 N.W. 2d 389, 393 (Mich. 1996); State ex rel. Sanstead v. Freed, 251 N.W. 2d 898, 905 (N.D. 1977).

B. Ordinary meaning

Our primary task is to "ascertain and give effect to the intent of those who adopted

> [the amendment]."... I the case of constitutional amendments adopted by popular vote, we must consider the intent of the voters in enacting the provision, and to that end, we must give the words of the amendment their natural and popular meaning.

Tivolino Teller House, Inc. v. Fagan, 926 P.2d 1208, 1211 (Colo. 1996).

> To determine intent courts first examine the language of the amendment and give words their plain and commonly understood meaning.... Courts should not engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the intent of the people.

Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996).

C. Plain meaning

> In the absence of ambiguity, the language in the constitution must be applied as it reads.

In re Janklow, 530 N.W. 2d 367, 370 (S.D. 1995).

McIntyre v. Wick, 558 N.W 2d 347 (S.D. 1996) (Search for plain meaning is primary task, but often plain meaning difficult to find.)

D. Evidence of peoples' intent

1. Ballot Pamphlet

> When, as here, the language of an initiative measure does not point to a definitive resolution of a question of interpretation," 'it is appropriate to consider indicia of the voters' intent other than the language of the provision itself.' ... Such indicia include the analysis and arguments contained in the official ballot pamphlet."

Hill v. National Collegiate Athletic Assoc., 865 P.2d 633, 642 (Cal. 1994).

2. Newspaper Coverage

Client Follow-up Co. v. Hynes, 390 N.E. 2d 847, 854 (Ill. 1979); *Lipscomb v. State*, 753 P.2d 939, 944-46 (Or. 1988); *State v. Trump Hotels & Casinos Resorts, Inc.,* 734 A.2d 1160, 1182-86 (N.J. 1999). *But see Kalodimos v. Village of Morton Grove*, 470 N.E. 2d 266, 272 (Ill. 1984) (newspaper coverage unreliable where only from one part of the state).

3. Address to the people

Neither in the debates in the Constitutional Convention...nor in the Address to the People...was it suggested...

Wood v. State Administrative Board, 238 N.W. 16, 17 (Mich. 1931).

E. How can constitutional convention materials shed light on the people's intent?

VI. Textual Analysis

> Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well: the text necessarily includes the words themselves, their grammatical relationship to one another, as well as their context.

Maylon v. Pierce County, 935 P.2d 1272, 1281-82 (Wash. 1997).

A. Close textual analysis

Finks v. Secretary of State, 647 A.2d 402 (Maine 1994). *Westerman v. Cary,* 892 P.2d 1067, 1073 (Wash. 1995).

B. State constitutions interpreted to give all words meaning.

> One of the fundamental rules of constitutional construction is that no word shall be assumed to be mere surplusage. It is an essential corollary that every word must be given a meaning if possible.

Hendricks v. State, 196 N.E. 2d 66, 70 (Ind. 1964).

C. Constitutional provisions relating to the same subject matter must be construed together and harmonized if conflicts appear.

Copeland v. State, 490 S.E. 2d 68, 71 (Ga. 1997).

> Sections 14, 54 and 241 have been interpreted to work in tandem and to establish a limitation upon the power of the General Assembly to limit common law rights to recover for personal injury or death. The fact that these provisions might not have been "conceived as some sort of package"... does not prevent them from being construed together to arrive at a separate principle.

Williams v. Wilson, 972 S.W. 2d 260, 267 (Ky. 1998).

But see G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 194 (1998) ("For state judges, the penetration of the state constitution by successive political movements makes the task of producing coherence even more difficult than it has been for federal judges.... In so far as a state constitution does not reflect a single perspective, an interpreter cannot always look to the whole to illuminate the

meaning of its various parts.").

VII Textual evolution—meaning may be derived from the changes to a state constitutional clause over time (layering).

A. Change in language indicates change in meaning.

> We assume that the people's decision to change the language of the constitutional provision was intended to also change the meaning.

Husebye v. Jaeger, 534 N.W. 2d 811, 814-15 (N.D. 1995). *Hunt v. Hubbert*, 588 So. 2d 848 (Ala. 1991), *Advisory Opinion to the Governor*, 626 So. 2d 684, 687-88 (Fla. 1993).

B. Change in language does not always indicate change in meaning.

Connally v. State, 458 S.E. 2d 336, 336-37 (Ga. 1995).

C. Reinactment of provision without change.

G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 203-04 (1998).

D. Effective date of state constitutional amendments

Republican Party of Florida v. Smith, 638 So. 2d 26, 28-29 (Fla. 1994); *People v. Dean*, 677 N.E. 947, 952-53 2d (Ill. 1997).

E. Repeal by implication through later inconsistent amendment.

Duggan v. Beerman, 515 N.W. 2d 788, 792 (Neb. 1994), *Copeland v. State*, 490 S.E. 2d 68, 71 (Ga. 1997).

F. Provisions copied from federal constitution

State of Hawaii v. Duk Won Lee, 925 P.2d 1091, 1094 n.4 (Haw. 1996).

G. Provisions copied from other states

Westerman v. Cary, 892 P.2d 1067, 1074 (Wash. 1995); *State v. Wicklund*, 589 N.W. 2d 793, 799 (Minn. 1999).

H.. Interpreting new provisions with reference to the intent of earlier, failed state constitutional changes.

> [t]hat proposed [failed] Constitution can effectively be used to interpret our present Constitution, that from the Convention of 1867, only in the case of an amendment to

the present Constitution adopting some of the language of the proposed Constitution, as has been done in certain instances.

In Re Special Investigation No. 244, 459 A.2d 1111, 1114-15 (Md. 1983). *See* Dan Friedman, *Magnificant Failure Revisited: Modern Maryland Constitutional Law From 1967 to 1998*, 58 MD. L. REV. 528 (1999).

I. Reliance on proposed amendment defeated by the electorate.

Even less by way of inference is required to ferret out public understanding of section 9(e) of article IV, since the voters themselves have addressed the question we now consider... This amendment was rejected by the voters in the 1974 referendum.

Continental Illinois National Bank & Trust Co. v. Zagel, 401 N.E. 2d 491, 496 (Ill. 1979).

VIII. State constitutional history—constitutional convention or legislative materials.

A. Cases where majority and dissent rely on same constitutional convention debate.

Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996)

B. Debates reflecting purpose of provision.

It is clear from the minutes of the Constitutional Convention that the second sentence of Section 16 was in response to our decision....

Trankel v. State Department of Military Affairs, 938 P.2d 614, 621 (Mont. 1997).

C. Meaning derived from the rejection of amendments during constitutional convention.

State v. Rivers, 921 P.2d 495, 513 (Wash. 1996), (rejected amendment indicates meaning), *Gryczan v. State*, 942 P.2d 112, 123 (Mont. 1997) (rejected amendment does not indicate meaning).

D. Convention debates linked to "voice of the people"

We have previously acknowledged that in construing the Constitution the true inquiry concerns the understanding of the meaning of its provision by the voters who adopted it. However, the practice of consulting the debates of the members of the convention which framed the constitution has long been indulged in by courts in determining the meaning of provisions which are thought to be doubtful.

People v. Tisler, 469 N.E.2d 147, 161 (Ill. 1984)

The insight provided by these comments is critical to our task of discerning

> the intent of the drafters. As this court has stated in the past, "[t]he meaning which the delegates to the convention attached to a provision in the Constitution * * * is relevant in resolving ambiguities which may remain after consulting the language of the provision [citations.] The reason is that it is only with the consent of the convention that such provisions are submitted to the voters in the first place."

Cincinnati Ins. Co. v. Chapman, 691 N.E.2d 374, 381 (Ill. 1998).

E. Reliability of constitutional convention debates

> The statements made by the delegates to the constitutional convention are not always significant in determining the meaning of a particular amendment. To be entitled to consideration, the delegates' statements must interpret the amendment's language in accordance with its plain and common meaning while being reflective of its known purpose or object.

N.H. Mun. Trust Wkr's Comp. Fund v. Flynn, 573 A.2d 439, 441 (N.H. 1990); *Straus v. Governor*, 592 N.W. 2d 53, 57 n. 2 (Mich.1999) (constitutional history relied on by both sides, but "too ambiguous and short-lived..."). *See also*, L. Harold Levinson, *Interpreting State Constitutions By Resort to the Record*, 6 FLA. ST. U. L. REV. 567 (1978).

F. Constitutional convention records indicate adoption of earlier case law.

Polk v. Edwards, 626 So. 2d 1128, 1137-38 (La. 1993).

G. Ambiguity as a prerequisite for examination of constitutional convention records.

SJL of Montana Assoc. v. City of Billings, 867 P.2d 1084, (Mont. 1993) (disagreement in majority and dissent over presence of ambiguity).

H. Unofficial Compilations of Newspaper Coverage of Constitutional Conventions

> Fortunately, the three Salt Lake City newspapers, the *Deseret Evening News* (owned by the Mormon church), the *Salt Lake City Tribune* (owned by non-Mormon Republicans) and the *Salt Lake Herald* (a Democratic party voice), covered each day's sessions in lengthy, sometimes gossip-mongering, detail. From these accounts, the real flavor of the convention emerges.

JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE 212-13 (1998); James C. Harrington, *Framing A Texas Bill of Rights Argument*, 24 ST. MARY'S L.J.399, 424-26 (1993).

Levine v. State of N.J. Dept. of Institutions and Agencies, 418 A.2d 229, 234 (N.J. 1980) ("*Trenton True American,* July 9— Nov. 18, 1873 (collected and bound).") *See also In re Application of Lamb*,

169 A.2d 822, 828 (N.J. App. 1961) ("Research of ... all available records of the 1875 constitutional amendment, the State Archives and even the newspapers of the day, does not bring to light any helpful interpretative information.").

OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Charles Henry Carrie, ed., 1926). This work is regularly relied upon by Oregon courts and scholars. See, e.g., *State v. Conger*, 878 P.2d 1089, 1094 (Or. 1994); *Billings v. Gates*, 916 P.2d 291, 298 (Or. 1996); *Vannatta v. Keisling*, 931 P.2d 770, 782 (Or. 1997).
MILO M. QUAIFE, THE CONVENTION OF 1846 (1919). The Wisconsin courts have relied on this source. *See, e.g Jacobs vs. Major*, 407 N.W. 2d 832, 853 (Wis. 1987).

Wesley W. Horton, *Annotated Debates of the 1818 Constitutional Convention*, 65 CONN. B.J. SI-1 (special issue 1991). Connecticut courts and scholars had relied on the newspaper reports even prior to Horton's compilation. *See, e.g., Cologne v. Westfarms Associates*, 469 A.2d 1201, 1209 n.9 (Conn. 1984).

PHILIP B. PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867 (1923). *See Hornbeck v. Somerset Co. Bd. Of Ed.*, 458 A.2d 758, 770 (Md. 1983).

Even in states where the newspaper reports of state constitutional conventions have not been compiled and indexed, lawyers, judges and scholars seek them out and rely on them.

See, e.g. Collins v. Day, 644 N.E. 2d 72, 77 (Ind. 1994); *Dye v. State*, 507 So. 2d 332, 340-41 (Miss. 1987); Virmani v. Presbyterian Health Services, Inc., 493 S.E. 2d 310, 316 (N.C. App. 1997).

I. Constitutional Commission materials

Because of the indirect route taken by constitutional changes proposed by commissions, debates and reports of such commissions arguably do not qualify as "constitutional history" in the direct sense that the debates in a constitutional convention, or in the legislature on proposed amendments, would be considered evidence of the "intent of the framers." Technically, and legally, of course, the appointed members of a constitutional commission are not the "framers" of ratified amendments that are based on their recommendations. But this is too narrow a view of constitutional history. The commission members operate under a direct delegation of power from either the legislature or the governor. Their recommendations form the origins of important state constitutional changes. Of course, neither the legislature nor a constitutional convention is bound to accept the commission's recommendations, nor even to limit their consideration only to those recommendations forwarded by the commission. The legislature or convention is neither limited *by*, nor *to*, such recommendations. Still, courts routinely rely on the materials prepared by state constitutional commissions.

See, e.g. Snow v. City of Memphis, 527 S.W. 2d 55, 61 (Tenn. 1975), *appeal dismissed* 423 U.S. 1083 (1976); *State v. Manley*, 441 So. 2d 864, 885 (Ala. 1983) (Beatty, J., dissenting); *Claudio v. State*, 585 A.2d 1278, 1297 (Del. 1991). The Florida Supreme Court relied on the records of the

1966 Constitutional Revision Commission, located in "a special file in the Supreme Court Library." *Hayek v. Lee County*, 231 So. 2d 214, 216 (Fla. 1970).

J. Conflict between plain meaning and constitutional history.

In the words of the Pennsylvania Supreme Court:

> Where, as here, we must decide between two interpretations of a constitutional provision, we must favor a natural reading which avoids contradictions and difficulties in implementation, which completely conforms to the intent of the framers and which reflects the views of the ratifying voter.

Commonwealth ex rel. Paulinski v. Isaac, 397 A.2d 760, 766, *cert. denied*, 422 U.S. 918 (1979). *See also matter of Kuhn v. Curran*, 61 N.E. 2d 513, 517-18 (N.Y.1945) ("in construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter").

Do these decisions mean that even clear constitutional history ("original intent") cannot overcome an apparent "plain meaning" that would have been the understanding of the voters?

IX. Strict or liberal construction based on nature of state constitutional provision

A. Strict construction

> Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly.

Bd. of Ed. of St. Louis v. City of St. Louis, 879 S.W. 2d 530, 533 (Mo. 1994).

Corporation of the Episcopal Church in Utah v. Utah State Tax Commission, 919 P.2d 556, 558 (Utah 1996) (tax exemptions are strictly construed).

B. Liberal Construction

Fabec v. Beck, 922 P.2d 330, 341 (Colo. 1996). (Constitutional provisions governing initiative process should be liberally construed to facilitate the right of the people).

X. Burden of constitutional challenge

A. Reasonable doubt standard

Robinson v. J.C. Stewart, 655 So.2d 866, 867 (Miss. 1995), *Wisconsin Retired Teachers Assoc. v. Employee Trust Funds Bd.*, 558 N.W. 2d 83, 90 (Wis. 1997), *Hlava v. Nelson*, 528 N.W. 2d 306, 308 (Neb. 1995).

Two experienced Connecticut state constitutional litigators have identified this as an improperly heavy burden - a barrier to state constitutional litigation.

> Creating more than a presumption of constitutionality for legislative or executive action places the reaches of those branches almost above the constitution and tends to render the constitution itself subsidiary.
>
> The adoption of this rigorous standard of persuasion obviously equates a statute with a defendant accused of a crime. This equation is faulty. Protection of an assumedly innocent defendant is of more concern than the protection of a statute of questionable constitutionality. The standard also is unsuitable because in constitutional cases the issue is one of law, not of fact.

Robert Satter and Shelley Geballe, *Litigation Under the Connecticut Constitution—Developing a Sound Jurisprudence*, 15 CONN. L. REV. 57, 70 (1982).

Failing to distinguish the arguments for deference to the elected, representative, legislature, on the one hand, and the executive, not always elected, and including administrators, police and prison officials may be a mistake. At least a few courts have made a distinction. An Oregon Supreme Court justice recently stated:

> The approach taken by the court in this case also recognizes the proper position of the courts in reviewing the actions of the police, which are part of the executive branch of government. The courts are part of the judicial branch. As such, the courts have no general authority to review the reasonableness of the executive action. Under the Oregon Constitution, the courts are empowered to scrutinize the "reasonableness" of a particular class of executive conduct, namely searches and seizures, to determine whether such conduct complies with Article I, section 9, of the Oregon Constitution.

State v. Nagel, 880 P.2d 451, 459 (Or. 1994) (Unis, J., concurring). *See also City of Cleveland v. Trzebuckowski*, 709 N.E. 2d 1148, 1153 n.2 (Ohio 1999).

Justice Michael Zimmerman of the Supreme Court of Utah recently discussed the inapplicability of the "beyond a reasonable doubt" standard, albeit in the context of a *city ordinance*:

> The City Council argues that we should uphold its practice unless the Separationists show that the practice is unconstitutional "beyond a reasonable doubt." We agree with the Council that the burden of showing the unconstitutionality of the practice is on the Separationists... However, we do not agree that the showing must be made "beyond a reasonable doubt" as that phrase has been interpreted in the criminal law context... We therefore restate the burden to be met by one who challenges an enactment on constitutional grounds: The act is presumed valid, and we resolve any reasonable doubts in favor of constitutionality.

Society of Separationists, Inc. v. Whitehead, 870 P.2d 916, 920 (Utah, 1993)

B. Presumption of constitutionality

California Housing Finance Agency v. Patitucci, 583 P.2d 729, 731 (Cal. 1978) ("strong" presumption.) *But see* Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1090-91 (1997) (presumption of constitutionality misplaced and unnecessary).

C. Presumption of constitutionality inapplicable to certain kinds of laws.

Washington v. Fireman's Fund Ins. Cos., 708 P.2d 129, 134 (Haw.1985), *cert. denied*, 476 U.S. 1169 (1986) (presumption inapplicable to laws which, on their face, classify on the basis of suspect categories). *See also Baehr v. Lewin*, 852 P.2d 44, 64 n.28 (Haw. 1993); *Tillis v. City of Branson*, 945 S.W. 2d 447, 448-49(Mo. 1997). ("The unconstitutionality of a special law is presumed.")

XI. Application of the rules of statutory construction to state constitutional interpretation.

A. Many state courts make the statement that the rules of statutory construction apply equally to state constitutional interpretation.

Baker v. Miller, 636 N.E. 2d 551, 554 (Ill. 1994). *Fish Market Nominee Corporation v. G.A.A., Inc.* 650 A.2d 705, 708 (Md. 1994); *State ex rel. Sanstead v. Freed*, 251 N.W. 2d 898, 908 (N.D. 1977).

B. Other courts recognize subtle or major differences between statutory and state constitutional interpretation.

> Though applied more broadly because of the permanent nature of constitutional provisions, rules of statutory construction apply to interpretation of the constitution.

Thompson v. Committee on Legis. Research, 932 S.W. 2d 392, 395 n.4 (Mo. 1996).

> We look to the State Constitution, not to determine what the legislature may do, but to determine what it may not do....
>
> There flows from this fundamental concept, as a matter of logic in its application, the inescapable conclusion that the rule of *expressio unis est exlusio alterius* has no application to the provisions of our State Constitution.

Eberle v. Nielson, 306 P.2d 1083, 1086 (Idaho 1957). *See also Imbrie v. Marsh*, 71 A.2d 352, 371 (N.J. 1950) (Oliphant, J., dissenting), *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1213 (Colo. 1994) (Erickson, J., dissenting).

Arnett v. Sullivan, 132 S.W. 2d 76, 78 (Ky. 1939) (mandatory/directory distinction inapplicable in state constitutional interpretation).

Professor Frank P. Grad noted, with respect to the question of whether state constitutional provisions are mandatory or directory:

> Following Cooley, a number of cases have maintained that constitutional language is *always* mandatory, unless *expressly* permissive, and have suggested that any other interpretation would allow violation of the constitution. Theses cases follow Cooley, too, in presuming "that the people in their constitution have expressed themselves in careful and measured terms..." and that the constitution truly contains only fundamental matter, each provision having been "solemnly weighed and considered." This presumption, unfortunately, is contrary to fact in all too many instances.

FRANK P. GRAD, THE DRAFTING OF STATE CONSTITUTIONS: WORKING PAPERS FOR A MANUAL (1967).

XII. Interpreting statutes to avoid state constitutional questions.

> ...when one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning.

State v. Kitzman, 920 P2d 134, 141 (Or. 1996). See also *V-1 Oil Company v. State*, 934 P.2d 740 (Wy. 1997).

XIII. Mandatory versus directory provisions

A. Mandatory

Missouri Health Care Assoc. v. Attorney General, 953 S.W. 2d 617, 622 (Mo. 1997).

B. Directory

State Ex Rel. Ohio AFL-Cio v. Voinovich, 631 N.E. 2d 852, 586 (Ohio 1994).

Should the use of "shall" rather than "may" be conclusive of the mandatory/directory issue? The famous *Scopes* case held that "shall" could be read as only directory. *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927). *Contra, State ex rel. Fatzer v. Board of Regents*, 167 Kan. 587, 202 P.2d 373 (1949).

XIV. Contemporaneous Construction

A. Judicial Construction

> the prevailing political climate at the time of adoption of the 1891 Constitution and the language used permits an inference that the

> Constitutional Convention desired to impose limitations upon legislative authority and cases decided contemporaneously or close in time would appear to be persuasive of Delegates' intent.
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> * * * *
>
> This Court has endorsed the principle of contemporaneous construction as providing special insight to the Delegates' intent: "The judges recognizing that tradition in their opinions wrote with a direct, firsthand knowledge of the mind set of the constitutional fathers, ..."... Accordingly, our decisions in *Louisville & Nashville R.R. v. Kelly's Adm'x, supra* and *Illinois Central R. Co. v. Stewart, supra*, are entitled to greater weight in our constitutional analysis.

Williams v. Wilson, 972 S.W 2d, 260, 267 (Ky. 1998)

B. Legislative construction

State ex rel. Sanstead v. Freed, 251 N.W. 2d 898, 905-06 (N.D. 1977).

State ex rel. Board of University and School Lands v. City of Sherwood, 489 N.W. 2d 584, 587 (N.D. 1992)

> A contemporaneous and long-standing legislative construction of a constitutional provision is entitled to significant weight when we interpret the provision.

State ex rel. Bd. of University and School Lands v. City of Sherwood, 489 N.W. 2d 584, 587 (N.D. 1992).

> In construing a constitutional provision, this court properly consults extrinsic sources, including the proceedings of constitutional conventions and any legislation related to the constitutional provision that was enacted at or near the time of the adoption of the constitutional amendment.

City of Pawtucket v. Sundlun, 662 A.2d 40, 45 (R.I. 1995).

C. Executive construction

As the Governor notes in his brief, the historical evidence in this case is overwhelming. Indeed, the Governor's exhaustive analysis of all available historical evidence compels the following conclusions:

Since the ratification of the 1895 Constitution, the uniform belief of South Carolina's governors has been that a bill they have declined to sign after sine die

adjournment does not have the force and effect of law until it is signed, and a bill vetoed in the interim lacks the force and effect of law without a veto override.

Williams v. Morris, 464 S.E. 2d 97, 101-02 (S.C. 1995).

State ex rel. Twitchell v. Hall, 171 N.W. 213, 216 (N.D. 1919).

XV. Practical construction

> And finally, as an elementary rule of construction, we note that which is drawn from contemporaneous and practical constructions, and "where there has been a practical construction which has been acquiesced in for a considerable period considerations in favor of adhering to this construction sometimes present themselves to the courts with a plausibility and force which is not easy to resist."
>
> A contemporaneous and long-standing legislative construction of a constitutional provision is entitled to significant weight when we interpret the provision.

State ex rel. Linde v. Robinson, 160 N.W. 514, 516 (N.D. 1916) (quoting Cooley, A Treatise on Constitutional Limitations (7th Ed. 1903)).

XVI. Are state constitutional provision self-executing?

> "A self-executing provision of a constitution is a provision requiring no supplementary legislation to make it effective and leaving nothing to be done by the legislature to put it [into] operation."

Most Worshipful Grand Lodge of Ancient Free and Accepted Masons of Kansas v. Board of County Commissioners of County of Shawnee, 912 P.2d 708, 712 (Kan. 1996).

> The record of the debate at the Convention is clear that this was the delegates' intent in amending the provision. The second sentence is mandatory, prohibitive, and self-executing and it prohibits depriving an employee of his full legal redress, recoverable under general tort law, against third parties.

Connery v. Liberty Northwest Ins. Corp., 960 P.2d 288, 290 (Mont. 1998).

> Further authority is found in art. 7, § 6 of the Idaho Constitution which permits a municipal corporation to assess and collect taxes for all purposes of the corporation. However, that taxing authority is not self-executing and is limited to that taxing power given to the municipality by the legislature.

Idaho Building Contractors Assoc. v. City of Coeur D'Alene, 890 P.2d 326, 328 (Idaho 1995). *See also Johnson v. Wells County Water Resource Bd.*, 410 N.W. 2d 525, 528 (N.D. 1997); Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-*

Execution: A Political Question? 17 HARV. ENVTL. L. REV. 333 (1993).

See, Chesney v. Byram, 101 P.2d 1106, 1108 (Cal. 1940) *quoting* T. COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 100 (6th ed. 1890):

> However, it does not follow from the determination that the above-mentioned constitutional provision is self-executing, that the legislature did not have the power to enact legislation providing reasonable regulation for the exercise of the right... "but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it."

XVII. Horizontal Federalism

A. Comparing and contrasting other states' constitutional provisions

> Our constitution requires "equal and uniform" taxation within each class of property. The Ohio Constitution provides that land "shall be taxed by uniform rule according to value." OHIO CONST. art. XII, § 2. The Constitution in Vermont provides that every member of society is bound to contribute his "proportion" towards the expense of protection of life, liberty, and property. VT. CONST. ch. I, art. 9. The Wisconsin Constitution provides, "[t]he rule of taxation shall be uniform." WIS. CONST. art. VIII, § 1. None of these constitutions demand equality.

Gray v. Wyoming State Bd. of Equalization, 896 P.2d 1347, 1351-52 (Wyo. 1995).

> Several states, including Pennsylvania, have adopted constitutional provisions called "ripper clauses," which prohibit their legislatures from stripping locally elected officials of the powers associated with their offices. These provisions were a nineteenth century response to excessive state interference with local government... *see also* Randy J. Holland, *State Constitutions: Purpose and Function*, 69 Temp. L. Rev. 989 (1996). The Delaware Constitution, however, has no limiting provision on the power of the General Assembly to control government.

New Castle County Council v. State, 688 A2d 888, 893 n. 6 (Del. 1997). *See also Specht v. City of Sioux Falls*, 526 N.W. 2d 727, 730 (S.D. 1995).

See Cardiff v. Bismarck Public School Dist. 263 N.W. 2d 105, 112-13 (N.D. 1978) (comparison of constitutions of three other states admitted to Union under same enabling act).

XVIII. Deference to legislative interpretation of state constitution

> The situation then, as it presents itself in connection with our constitutional provision, is at least that by the decision of the courts of Florida and other jurisdictions the word "lottery" may have either of several meanings, and that either

> is reasonable and possible. In such a situation, where a constitutional provision may well have either of several meanings, it is a fundamental rule of constitutional construction that, if the Legislature has by statute adopted one, its action in this respect is well-nigh if not completely, controlling.
>
> * * * *
>
> When the Legislature has once construed the Constitution, for the courts then to place a different construction upon it means that they must declare void the action of the Legislature. It is no small matter for one branch of the government to annul the formal exercise by another of power committed to the latter. The courts should not and must not annul, as contrary to the Constitution, a statute passed by the Legislature, unless it can be said of the statute that it positively and certainly is opposed to the Constitution. This is elementary.

Greater Loretta Improvement Ass'n v. Boone, 234 So. 2d 665, 669-70 (Fla. 1970). *See also State v. Bernier*, 717 A.2d 652, 656 (Conn. 1998) ("We have recognized that 'statutes may... help to define the contours of constitutional rights....'").

In *Junkins v. Branstad*, 421 N.W. 2d 130, 135 (Iowa 1988), the Iowa Supreme Court dealt with a legislative attempt to define in a statute the term "appropriation bill" as it was used in the constitutional item veto provision. The court stated:

> Whatever purposes the legislative definition of "appropriation bill" may serve, it does not settle the constitutional question. In this case, determination of the scope of the governor's authority granted by Article III, section 16, as amended, will require a decision whether the bill involved here was an "appropriation bill" as that term is used in our constitution. This determination, notwithstanding the legislative definition, is for the courts.

See also Hickel v. Cowper, 874 P.2d 922, 935-36 (Alaska 1994).

XIX. The doctrine of precedent in state constitutional interpretation

> The United States Supreme Court has stated on more than one occasion that *stare decisis* carries less weight with respect to the Court's constitutional adjudication than in cases of statutory construction. The most oft-cited justification for this view was first expressed by Justice Brandeis in his famous dissent in *Burnet v. Coronado Oil & Gas Co*.[58] In that case, Justice Brandeis argued that because the Constitution is the supreme law of the land and the Supreme Court its final arbiter, and, furthermore, because Congress is incapable of enacting statutes that overrule the Court's

[58]285 U.S. 393 (1932) (Brandeis, J., dissenting).

> constitutional decisions, the Court must not be constrained in acting to correct ill-conceived or obsolescent constitutional doctrine. It is important to note, however, that "notwithstanding the functional similarities between state constitutions and the federal Constitution," Justice Brandeis did not feel that relaxation of *stare decisis* was appropriate in the context of state constitutional adjudication. Because most state amendment procedures afford meaningful legislative, as well as popular, participation in the state constitutional lawmaking process, state high courts should proceed with circumspection when deciding whether to overrule a state constitutional precedent.[61]

Thad B. Zmistowski, *City of Portland v. DePaolo: Defining The Role of Stare Decisis in State Constitutional Decisionmaking*, 41 MAINE L. REV. 201, 211-13 (1989).

In footnote 5 of Justice Brandeis' dissent, quoted in footnote 61 below, Justice Brandeis went on to say "The action following the decision in *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, shows how promptly a state constitution may be amended to correct an important decision deemed wrong."

> Justice Brandeis's rationale is important for what it does not say as well as for what it says. His argument for a relaxation of *stare decisis* is not grounded in the nature of a constitution as a unique source of law, a source different in form than statutory or judge-made law. If the essence of a constitution as a source of law were what justified the relaxation of *stare decisis*, presumably a state's highest court should apply only a relaxed version of *stare decisis* to its own constitutional precedents, regardless of the state's amendment procedure. Yet Justice Brandeis distinguished the claims of state constitutional precedents notwithstanding the functional similarities between state constitutions and the federal Constitution, or the similarities of the oaths binding state judges and Supreme Court Justices to their respective charters. For Justice Brandeis, apparently, the argument for a relaxation of *stare decisis* is warranted only by the peculiar difficulty of political response to Supreme Court adjudication of federal constitutional issues.

James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 351-52 (1986). *See generally*, Martin B. Margulies, *Cologne v. West Farms Associates: A Blueprint for an Overruling*, 26 CONN. L. REV. 691 (1994).

[61] In his *Burnet* dissent, Justice Brandeis stated that "[t]he policy of *stare decisis* may be more appropriately applied to constitutional questions arising under the fundamental laws of those States whose constitutions may be easily amended." *Burnet v. Coronado Oil l& Gas Co.,* 285 U.S. at 409 n.5 (Brandeis, J., dissenting).

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