

**HAWAII
CONSTITUTIONAL
CONVENTION STUDIES
1978**

**Introduction
and
Article Summaries**

**LEGISLATIVE REFERENCE BUREAU
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INTRODUCTION

The Hawaii Constitutional Convention Studies 1978 were undertaken at the direction of the legislature and are an attempt to present in understandable form many of the possible issues and the arguments on both sides of such issues that the delegates to the Constitutional Convention of 1978 may wish to consider.

The Constitution itself is a document which sets forth the basic principles of the formal organization known as state government. It allocates the powers and functions of the government among its permanent branches, such as the executive, legislative, and judicial branches. It also establishes the structures and purposes of the organization and defines the method of selection, the terms, qualifications, and powers of public officers. The Constitution provides both the limits on the powers of the public officials elected under it and the necessary powers for governance of the State. Except as limited by the United States Constitution, United States Supreme Court opinions, Congressional statutes, and Hawaii Supreme Court opinions, the manner in which the Constitution empowers and limits government may be left unchanged or rewritten entirely.

There are presently two views in constitutional drafting--the conservative and the empirical. The conservatives advance the theory that long and complex constitutions are less effective than short, concise constitutions that concern themselves with fundamental law. In their view, constitutions replete with statutory materials needlessly complicate the constitutional structure, hamstringing the majority rule, and do not allow government to react with sufficient flexibility in times of crisis.

The empiricists, on the other hand, deny that there is an inverse relationship between a state's constitutional length and complexity and its effectiveness. Empiricists feel that constitutions, like all legal documents, can have but little permanent shape and effect beyond the good faith and ability of those called upon to put them into practice and the willingness of the governed to accept them as binding political instruments.

The Hawaii Constitution, which was originally drafted in 1950 in the hope that the constitution would improve the chances of attaining statehood and which was amended in 1968 by the Constitutional Convention of 1968 some ten years after statehood, has drawn nearly universal praise from political scientists and others interested in government. Although there are many sides to constitutional revision perhaps the delegates would best be guided by the following quote from one of the authorities in the field:

Constitutional revision is not a panacea but it may be a sign of political vigor in a state and it may also be the necessary prelude to more effective and responsible state and local government.

In preparing these 1978 Constitutional Convention Studies, the present members of the Bureau who have worked on this project acknowledge with a debt of gratitude and admiration the work performed by their predecessors in

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writing the 1968 Hawaii Constitutional Convention Studies. Their conceptualization of the format and content of these studies has made the preparation of the 1978 version much easier than it otherwise would have been. Although their names no longer appear as authors, their ideas appear throughout the revised volumes and we thank Herman Doi, Director of the Legislative Reference Bureau at that time, and Dr. Allan Saunders, Annette Y. Miyagi, Wayne K. Minami, Judy E. Stalling, Bertram Kanbara, Yukio Naito, Patricia Snyder, Marie E. Gillespie, Charles Mark, Patricia Putman, Jane H. Tsuchiyama, Newton N. S. Sue, Thomas W. Wong, Millicent Y. H. Kim, Harold S. Roberts, A. Sonia Faust, Mildred Lum, Harriette Joesting, and Richard J. Richardson.

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Richard F. Kahle, Jr.
Editor

Article I

BILL OF RIGHTS

THE BILL OF RIGHTS IN THE STATE AND FEDERAL CONSTITUTIONS

The bill of rights is one of the "core" areas found in all state constitutions, as well as the U.S. Constitution. Traditionally, the purpose of the bill of rights has been to protect individuals and minorities against the excesses of government, in other words, to act as a restraint upon government action. In the twentieth century, particularly since the 1930's, government has been increasingly viewed as a provider of services and economic security, and there has been a concomitant demand for new social and economic rights--to medical care, housing, education, and employment. However, the bill of rights, in Hawaii as elsewhere, has remained largely a source of negative claims against government interference rather than a source of positive claims upon the government.

Before the adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments after the Civil War, the guarantees of the federal bill of rights applied only to the federal government and did not bind the states. Any limitation on state action had to be found in a state's bill of rights. Beginning in the 1920's, the U.S. Supreme Court began to use the due process clause of the Fourteenth Amendment to safeguard against state action fundamental rights and liberties protected against federal action by the first 8 amendments. The Fourteenth Amendment was an appropriate vehicle because it was addressed directly to the states and was intended to act as a limitation upon them. In pertinent part, it reads as follows:

...No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

The U.S. Supreme Court has consistently rejected the idea that the entire bill of rights has been carried over intact or "incorporated" in toto into the due process clause. It has, however, through the doctrine of "selective incorporation", imposed nearly all the guarantees of the first 8 amendments on the states:

- (1) The right to compensation for property taken by the state;
- (2) The rights of speech, press, and religion covered by the First Amendment;
- (3) The Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence seized illegally;

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- (4) The right guaranteed by the Fifth Amendment to be free of compelled self-incrimination;
- (5) The Sixth Amendment rights to counsel, to trial by jury, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses;
- (6) The Eighth Amendment guarantee against cruel and unusual punishment.

Because of this nationalization of individual rights, and the establishment of a federal "floor" below which the states could not go, the state bill of rights lost its place as the primary source of protection against state action. In recent years, as the U.S. Supreme Court has become less solicitous of individual rights, state courts, including the Hawaii Supreme Court, have begun to revitalize the guarantees of fundamental rights as expressed in state constitutions. Twice the Hawaii Supreme Court has accorded a greater measure of protection to criminal defendants than the U.S. Supreme Court had done in similar cases. Since the Hawaii decisions rested on "independent" or "adequate" state constitutional grounds, the U.S. Supreme Court was precluded from review. Therefore, the Hawaii bill of rights has resumed a measure of importance, not only in cases where it provides greater relief or greater protection, but also in cases where the U.S. Supreme Court has deliberately left certain areas without precise definition, or where the guarantee is not expressly provided for in the federal bill of rights.

Aside from the process of "selective incorporation", the federal bill of rights has always had special significance for Hawaii. While Hawaii was still a territory, the federal bill of rights was applicable to it "as elsewhere in the United States" by virtue of section 5 of the Organic Act. When the Hawaii Constitution was formulated in 1950, as part of the effort to achieve statehood, many provisions of the federal bill of rights were taken over verbatim or with little change. It was the intent of the delegates that Hawaii would have the benefit of federal court decisions interpreting these provisions.

BASIC PRINCIPLES: POPULAR SOVEREIGNTY, INDIVIDUAL EQUALITY, AND SUPREMACY OF THE CIVIL POWER

It is standard practice to include in a state constitution provisions which reflect the democratic nature of government: popular sovereignty, the equality of man, and the subordination of the military to the civil power. Although these provisions are vague, open-ended, and rarely the basis for a judicial decision, they may be defended as a necessary statement of goals and aspirations.

Article I, section 1, of the Hawaii Constitution provides that:

...All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

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Every state constitution, with the exception of New York, declares in the Preamble or the Bill of Rights that the people grant and control the exercise of political power; many constitutions mention in addition the right of the people to alter, reform, or abolish the form of government. This principle, like the notion of inherent rights in sections 2 and 20, reflects the natural law philosophy which heavily influenced the framers of the U.S. Constitution.

The concept of natural rights which preceded the formation of government also finds expression in section 20 (which is derived from the Ninth Amendment to the federal constitution):

...The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.

Those rights which are enumerated are not fundamental because they have been written down; they are mentioned because they are fundamental. Furthermore, they are "but a nucleus or core of a much wider region of private rights, which, though not reduced to black and white, are as fully entitled to the protection of government as if defined in the minutest detail".

Article I, section 2, carries forward from section 1 the concept that the formation of government did not entail a complete loss of individual independence or the opportunity for self-amelioration. At the same time it emphasized that an individual's exercise of rights should not cause prejudice to those of others, and that the individual has a positive responsibility to preserve both his rights and the rights of others. Where section 2 speaks of equality, it appears that the 1950 Constitutional Convention understood it to mean primarily, if not exclusively, political (as opposed to social or economic) equality.

In practice, protection of individual equality by the Hawaii Supreme Court has usually been undertaken pursuant to the equal protection clauses of the Hawaii and U.S. Constitutions. Protection of life, liberty, and property has been implemented under the due process and just compensation clauses of the Hawaii and U.S. Constitutions.

Section 6 is yet another provision which overlaps with the due process guarantee of section 4:

No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

It was the understanding of the 1950 Constitutional Convention that "law of the land" meant the same as "due process of law". The only salient differences between the 2 provisions are that section 6 gives special emphasis to voting rights and more narrowly applies to "citizens", rather than "persons".

That the state is to act on the behalf of all, and not for the sake of a hereditary elite, is the purpose of section 19:

The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities.

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This section was not intended to prevent the grant of revocable privileges or immunities such as tax exemptions.

Several provisions in the Hawaii Constitution, and corresponding sections of the U.S. Constitution, are directed towards the subordination of the military to the civilian power. In addition to the general statement of policy in Article I, section 14, the supremacy of the civilian power is reinforced by section 13, which permits only the legislature to suspend the writ of habeas corpus, and then only under the most extreme circumstances; section 13 corresponds to Article I, section 9, of the U.S. Constitution. Section 16 prohibits the peacetime quartering of soldiers in civilian homes without the consent of the owner or occupant, or quartering in wartime except as provided by the legislature; this section corresponds to the Third Amendment of the U.S. Constitution. Section 15 guarantees the existence of a state militia and the right of individuals to keep and bear arms as members of the militia; it corresponds to the Second Amendment of the U.S. Constitution. Article IV, section 5, makes the governor the commander-in-chief of the armed forces of the state, and is based on Article II, section 2, of the U.S. Constitution.

The subordination of the military has been at issue in cases where civilians have been tried and punished by military tribunals. The general rule is that a military tribunal would not be empowered to act so long as the courts are open and functioning.

Of all the provisions concerning the civilian power, perhaps the most controversial is the one which deals with right to bear arms. The Second Amendment and comparable sections of state constitutions, such as section 15 of the Hawaii Constitution, are frequently pointed to as sources of an individual, personal right to own and use firearms, without interference by federal or state legislation. However, the history of the Second Amendment indicates that its purpose was to restrict the power of the federal government and its standing army, and to prevent the disarmament of state militias. Therefore, the right to keep and bear arms is one enjoyed collectively by members of a state militia as such.

Although the Second Amendment has not been "incorporated" into the due process clause of the Fourteenth Amendment and is not binding on the states, the fact that the Hawaii provision is a word-for-word adaptation makes the history and judicial interpretation of the Second Amendment highly relevant. The U.S. Supreme Court interpretation of the Second Amendment is scanty and ambiguous, but tends to support the collectivist view.

At the 1950 Constitutional Convention, it was the understanding of the delegates that section 15 would not prevent the legislature from imposing reasonable restrictions on the right to keep and bear arms (including absolute prohibitions on certain types of lethal weapons). On the other hand, the delegates appear to have viewed the right to bear arms as encompassing more than service in the militia, and extending to recreation and self-defense. The 1968 Constitutional Convention, to clear up any confusion left by its predecessor, stressed that section 15 referred only to the collective right to bear arms as a member of the state militia, but did not amend section 15.

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FIRST AMENDMENT FREEDOMS

The First Amendment freedoms refer to those of religion, speech, press, assembly, and petition found in the First Amendment of the United States Constitution. They have been adopted verbatim by Article I, section 3, of the Hawaii Constitution, which reads as follows:

No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

United States Supreme Court decisions interpreting the First Amendment are, therefore, important to Hawaii for 2 reasons: the Hawaii Constitution has borrowed the wording of the U.S. Constitution; and, the First Amendment guarantees are binding on all the states through the Fourteenth Amendment, establishing a constitutional minimum below which the states cannot fall. Only as the state constitution requires a more rigid separation of church and state, permits greater freedom in the exercise of religion, or offers greater protection for freedom of expression does it acquire independent force.

The basic thrust of the First Amendment--particularly as regards freedom of speech, press, assembly, and petition--is to facilitate the free exchange and circulation of ideas, particularly, but not exclusively, political ideas. Such a system of open communication fulfills a number of socially useful purposes. It is vital to the process of discovering truth, since the "ultimate good desired is better reached by free trade in ideas". It is necessary to the democratic political process: since government derives its legitimacy from the consent of the governed, the citizenry must be fully informed and able to communicate their wishes to the government. Because change can come through discussion and consensus, instead of violence, a system of free expression prevents society from developing a dangerous rigidity. Also, a system of free expression allows for personal self-fulfillment by allowing individuals to freely "develop their faculties".

It is worthwhile to note that the First Amendment only assumed its present significance within the last half century or so. Issues of individual liberty and the relationship of citizen to government became pressing, and were presented to the Supreme Court for resolution. The Court has had to strike a balance between the free dissemination and acquisition of ideas, and other competing interests such as public safety, social cohesion, and the individual's right to be left alone. At the same time, the Court's task of defining the terms of the First Amendment has been complicated by social and technological change. With the shift from theistic beliefs to those which emphasize human experience, it is no longer so easy to define what "religion" is and what "religious beliefs" merit the protection of the First Amendment. Innovations in the mass media such as television have similarly altered our conceptions of "speech" and "press". Despite social and technological change, however, the Court has been able to address a wide spectrum of issues through the original language of the First Amendment.

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Freedom of Religion

Article I, section 3, of the Hawaii Constitution provides in part that "[n]o law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof." Following U.S. Supreme Court interpretations of identical language in the U.S. Constitution, this phrase is intended to effect a complete separation of church and state, to make sure that the power and prestige of the government would not be used to encourage acceptance of any creed or religious practice.

The principal controversy surrounding this so-called Establishment Clause is what constitutes government aid to religion. Where government support was ideological and consisted of an official school prayer, the Supreme Court found an impermissible violation of the Establishment Clause, even though the prayer was nondenominational and pupils who wished to remain silent or be excused from the room could do so. Where the aid consists of material or financial support, the Supreme Court has not formulated any rationale which would lead to clearly predictable results.

The Hawaii Constitution creates an even more rigid separation between church and state than does the U.S. Constitution. This is due to the inclusion of the following 2 provisions:

No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 3 of Article I of this Constitution. (Art. VI, sec. 2)

...nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution. (Art. IX, sec. 1)

The Hawaii Supreme Court in Spears v. Honda relied on Article IX, section 1, in deciding that bus transportation subsidies to private and sectarian school students were unconstitutional. It pointed out that such subsidies did "support or benefit" nonpublic schools by inducing attendance at those schools and promoted the interests of the private or religious institutions which controlled them.

Article I, section 3, further provides that no law shall prohibit the "free exercise" of religion, that is, compel individuals to believe and act in a manner contrary to their individual conscience. The United States Supreme Court has associated the free exercise of religion with a general freedom from ideological conformity.

While it appears well-settled that religious belief is accorded absolute protection against government action, religious conduct is not treated with the same deference. The U.S. Supreme Court has, for example, upheld the conviction of a Mormon guilty of bigamy on the grounds that government was "free to reach actions which were in violation of social duties or subversive of good order".

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Speech, Press, Assembly, and Petition

Despite the absolute language of the First Amendment ("Congress shall make no law...") and of Article I, section 3, of the Hawaii Constitution ("no law shall be enacted..."), it has generally been recognized that government may reasonably regulate the content of expression as well as the conduct or mode of expression (i.e., its time, place, and manner). With respect to the content of expression, the United States Supreme Court has excluded from the protection of the First Amendment obscenity, defamation, fraudulent assertions, solicitation of crime, subversive advocacy, and "fighting words" which provoke the person addressed to acts of violence.

In the case of political speech the content of which enjoys clear constitutional protection, the government may nonetheless reasonably regulate its conduct. The rights of free speech and assembly do not permit a street meeting at rush hour in the middle of Times Square. In this situation, the importance of public order outweighs the interest of the speaker or speaker's audience in free expression. Discussion focuses on the following questions:

- (1) What kind of balance should be struck between the need for the media to keep the public informed and the need to protect the individual against falsehood which does damage to reputation?
- (2) How should the conflict between the need for the media to keep the public informed and the individual right of privacy be resolved?
- (3) What sort of accommodation should be reached between the public "right to know"--public access to government records--and the individual right to prevent disclosure of certain kinds of information? This subject is also discussed in The Right of Privacy.
- (4) Although the media has the right to publish, and the public has the right to receive, full reports of criminal proceedings, what measures should be taken to prevent a jury or potential jury from being improperly influenced by media reports? Further discussion may be found in The Administration of Criminal Justice.
- (5) Is free expression primarily a means of opening the political process to robust debate? If so, should there be a guaranteed right of access to the media for the purpose of increasing political dialogue?
- (6) To what extent does the First Amendment protect nonpolitical forms of expression such as commercial advertising?
- (7) To what extent does the First Amendment protect nonverbal forms of communication such as gesture or conduct?

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- (8) To what extent is freedom of expression valued per se as an incident of individual autonomy and self-fulfillment, thereby permitting the individual access to pornographic materials? Additional discussion appears in The Right of Privacy.

Possible Approaches

Since the courts have been able to cope with a wide variety of issues through the original language of the First Amendment, it appears that Article I, section 3, of the Hawaii Constitution may be left as it stands.

Insofar as the "right to know" is concerned, it might be desirable to reinforce the importance of Hawaii's open records-open meeting statute with a constitutional provision mandating a right of access to public records. This same provision might include a complementary right of disclosural privacy, or disclosural privacy could be left to a general privacy provision. A "right of participation" such as that found in the Montana Constitution is also possible.

A number of First Amendment issues, such as right of access to the media, obscenity, and newsman's privilege, await resolution by the legislative process, whether at the state or federal level.

DUE PROCESS, EQUAL PROTECTION, AND FREEDOM FROM DISCRIMINATION

Article I, section 4, of the Hawaii Constitution provides that:

No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

Since the Fourteenth Amendment of the U.S. Constitution imposes the guarantees of due process and equal protection upon the states, the Hawaii provision acts merely as a "reaffirmation" of those guarantees. However, it has added freedom from discrimination on the basis of 4 identifying characteristics, or so-called "suspect classifications": race, religion, sex, and ancestry.

Due Process

Due process is understood in 2 senses: procedural and substantive. Procedural due process requires that before the government takes action which will affect a person's "life", "liberty", or "property" interest, the person is entitled to prior notice and an opportunity to be heard before an impartial tribunal. Procedural due process has assumed particular importance in recent years in the areas of administrative law, criminal law, and creditor's remedies. The kind of procedures and type of hearing required are not invariable from

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one situation to another and depend both on the nature of the government function involved and the private interest affected.

Substantive due process refers to those constitutional rights which are either explicitly mentioned in the text of the constitution, e.g., freedom of speech, or are implied by the constitution as a whole, e.g., the right to interstate mobility (or right to travel), or may be derived from traditional and contemporary values, e.g., the right of privacy. These rights are not absolute and may be circumscribed when there is an overriding government interest such as national security. Certain government interference, however, is impermissible regardless of how procedurally fair it may be.

The First Amendment prohibits the government from censoring a newspaper for political content even if it censors all newspapers equally and even if it affords a full hearing to an editor who complains that the censor has erred.

With respect to both procedural and substantive due process, the U.S. Supreme Court has utilized the Due Process Clause of the Fourteenth Amendment to impose the standards of the federal Bill of Rights on the states.

The only provisions of the first 8 amendments to the U.S. Constitution which have not been made applicable to the states are the Second and Third Amendments, the Fifth Amendment requirement of a grand jury indictment, and the Seventh Amendment.

Equal Protection

The thrust of the Equal Protection Clause of the Fourteenth Amendment is to prevent the states from treating people in an arbitrarily different manner under their laws. The Equal Protection Clause does not require that everyone be treated in an equal manner, since all laws involve some degree of differential treatment (e.g., the requirement that one be a certain age before qualifying for a driver's license). The Equal Protection Clause does require, however, that classifications in a statute have a reasonable basis (e.g., persons under a certain age are presumed to have neither the physical coordination nor the psychological maturity to drive safely).

The threshold test of reasonableness under the Equal Protection Clause is as follows:

- (1) Did the legislature have a constitutionally permissible purpose in view when it passed the law in question?
- (2) Is the classification used reasonably related to the purpose of the law?

This is the test applied to most economic and social regulation, and the U.S. Supreme Court almost invariably finds the requisite reasonableness.

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But where the legislation distinguishes on the basis of a "suspect classification", such as race or alienage, or impinges on a "fundamental right", such as the right to vote, the Court relies on the "strict scrutiny" test (and nearly always invalidates the law):

- (1) Did the legislature have a purpose of overriding importance or "compelling interest" in passing the law?
- (2) Were the means chosen necessary to accomplish that purpose or was there a less drastic alternative?

Where the Equal Protection Clause of the U.S. Constitution has been judicially interpreted to apply to certain "suspect classifications", the Hawaii Constitution makes explicit which criteria are "suspect"--race, religion, sex, and ancestry.

The discussion which follows will address 2 classifications, neither of which are yet considered suspect under the U.S. Constitution: sex and age. The former of course has already been denominated suspect under the Hawaii Constitution.

Although the U.S. Supreme Court has found unconstitutional certain laws which discriminate against women, sex is not quite a suspect classification under the Fourteenth Amendment and hence the exacting "strict scrutiny" test does not always apply. The reluctance of the U.S. Supreme Court to treat it as suspect and to invalidate most sex-based legislation may be traced to:

- (1) The historical purpose of the Fourteenth Amendment to act as a shield against racial discrimination;
- (2) A desire not to pre-empt the state legislatures in their decision whether or not to ratify the Equal Rights Amendment (ERA).

Due to the reluctance of the U.S. Supreme Court to declare sex a suspect classification under the Fourteenth Amendment, it is thought that the elimination of sex as a permissible factor in determining the legal rights of men and women depends on the ratification of the national ERA and the addition of an ERA to state constitutions.

The national ERA, proposed as the Twenty-Seventh Amendment to the Constitution, reads as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This amendment shall take effect two years after the date of ratification.

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As of this writing, 35 states have ratified the national ERA; 16 states including Hawaii have an ERA provision in their constitutions. The Hawaii ERA has already had considerable impact upon legislative revision, in the areas of credit extension, employment, and survivorship benefits, among others.

Arguments advanced in support of the national ERA:

- (1) There is the need for a single coherent theory of sexual equality and consistent nationwide application;
- (2) Passage and ratification of ERA can be accomplished by a campaign of limited duration, and political energy need not be dissipated in piecemeal reforms of existing laws;
- (3) ERA will give a political and psychological boost to legislative reform;
- (4) There is need for a concerted attack on sex discrimination, the effect of which will be felt in all areas of the law. Through ERA women will achieve gains in the areas of property rights, marriage, and divorce, the right to engage in an occupation, and freedom from discrimination in employment and education;
- (5) The advantages of protective legislation can be extended to men. For example, with respect to child support and interspousal support in case of separation and divorce, both spouses can be made equally liable on the ability-to-pay principle.

Arguments raised in opposition to ERA:

- (1) Existing laws are adequate to the task of eliminating sex discrimination, and only need to be properly enforced;
- (2) Rather than add a vague provision to the Constitution, it would be better to amend existing laws ("specific pills for specific ills");
- (3) ERA is merely a symbol of equality and one of uncertain effect;
- (4) ERA will have a destructive effect on protective legislation, especially in the areas of labor and family law;
- (5) ERA will have a negative effect on the image of American motherhood.

Just as efforts to eliminate racial discrimination provided a useful analogy for the movement against sexual discrimination, sexual equality is supplying an analogy for the elimination of age-based discrimination, particularly as regards mandatory retirement. When the U.S. Supreme Court invalidated mandatory

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maternity leave and return-to-work rules, on the grounds that individualized determinations were necessary, it also threw into doubt mandatory retirement provisions. The U.S. Supreme Court, however, has declined to view age as a suspect classification or the right to public employment as fundamental, and has upheld compulsory retirement as meeting the reasonableness test.

The Hawaii Supreme Court has found a violation of equal protection where there was a provision permitting the continued employment of a post-65 university faculty member, and the faculty member demonstrated superior competence only to be terminated anyway. The Court nonetheless allowed that "the use of a certain age as cut-off point in employment may be justified when uniformly applied and when used without provision for individual evaluation".

Numerous arguments have been advanced in favor of mandatory retirement, including the comparative inefficiency of older workers, the greater tendency of older workers towards illness and absenteeism, the need to keep the lines of promotion open, and the administrative costs of individualized determinations. It is also maintained that many workers look forward to retirement at 65 or even earlier.

Against compulsory retirement are considerations of individual competence and ability to continue work, financial need, and the loss of self-esteem after forced separation from the work force.

The Hawaii legislature, in the context of employment, has already included age among those classifications considered inherently suspect. It is the stated policy of the legislature in establishing programs on aging to secure equal opportunity in employment for older persons. Also, employers may not refuse to hire, pay discriminatory wages to, or discharge an individual on the basis of age. However, to prohibit mandatory retirement it would appear necessary to add age to those suspect classifications in Article I, section 4, or to ban forced retirement by statute.

Possible Approaches

The general anti-discriminatory provisions of Article I, section 4, could be expanded to include political and military rights, or the qualifying adjective "civil" removed, empowering the courts to act against any form of discrimination.

Article I contains 3 references to sex discrimination: sections 4, 12, and 21. While these provisions are redundant and could be merged, it can be argued that all should be retained since together they give the principle of sexual equality an emphasis a single provision would not supply. It is not clear whether a prohibition against sex discrimination also encompasses discrimination on the basis of sexual preference or marital status. These might be added as suspect classifications to Article I, section 4.

Other classifications which might be denominated suspect under section 4 are age and physical or mental handicap.

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SEARCHES AND SEIZURES

The Hawaii constitutional provision on searches and seizures as set forth below is identical to the Fourth Amendment of the United States Constitution except for the underlined portions below which do not appear in the federal provision:

Section 5. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

The basic purpose of the provisions in the Fourth Amendment of the United States Constitution is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. Thus, reasonable searches are permitted, but unreasonable searches are not permitted. Generally, except for a few specific situations, warrantless searches are considered "per se unreasonable under the Fourth Amendment". The rationale is that a neutral and detached magistrate should make the decision to allow a search rather than the officer "engaged in the competitive enterprise of ferreting out crime" who may have to make a hurried decision, subject only to a review after the fact by hindsight judgment. This strong preference for search warrants has led the U.S. Supreme Court to note that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall".

In order for a search warrant to issue, there must be an affidavit or complaint that sets forth facts establishing probable cause to believe that the goods to be seized are in the place to be searched. The warrant must contain a particular description of both the items to be seized and the place to be searched which need not be of great exactitude, so long as they are clear enough that nothing is left to the discretion of the officer executing the search.

Despite the strong preference for warrants, some warrantless searches are permissible. Even though a warrant is not required, however, the search must still be conducted in a reasonable manner, although what is reasonable may vary according to the context and type of the search. For example, if there is a valid prior intrusion by the police--to make an arrest or respond to an emergency--the police may lawfully seize incriminating objects falling into their "plain view". Also, the police may make a warrantless entry of premises in hot pursuit of an offender. Similarly, where a valid consent is given, a warrantless search may be conducted, even though there is no probable cause for the search. These examples are not exhaustive of the important exceptions to the warrant requirement.

Evidence improperly seized, however, may be excluded at trial under the exclusionary rule. The basic principle of the exclusionary rule is that evidence seized in violation of the defendant's constitutional right is not admissible at trial. As applied to the Fourth Amendment, this would entail the exclusion of

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evidence seized without a warrant where a warrant was required, as well as any evidence which is subsequent "fruit" of that unlawful act.

The rule has been justified on 2 main grounds: to deter police misconduct by removing the incentive to engage in such action, and to preserve the integrity of the judicial process, by refusing to make the courts a party to the illegal actions of the police by not allowing the use of the evidence seized. At present, however, the deterrence rationale has become the overriding rationale for the rule, and the judicial integrity rationale has moved to a relatively insignificant position.

Because the exclusion of otherwise valid evidence often leads to the release of an apparently guilty individual, the courts have generally applied the rule only to those situations where the deterrence effect is greater than the social cost of excluding probative evidence. Accordingly, a number of exceptions to the rule have been developed to prevent the rule from extending beyond the point of diminishing returns.

For example, knowledge of facts obtained illegally may be used in court if such knowledge is also gained from an independent source. Furthermore, before a defendant can object to the use of illegally obtained evidence, it is well established that the defendant must have "standing" to challenge the constitutional violation. Standing to challenge a Fourth Amendment violation is granted only to those whose rights are violated by the search itself, i.e., in situations where the government unlawfully overheard one's conversation or where the conversation occurred on one's premises. A third party whose rights are not violated by the search itself has no standing to challenge a violation even though the evidence may be personally incriminating.

Opponents of the exclusionary rule have voiced the following criticisms:

- (1) Nothing for the innocent; freedom for the guilty. As noted before, the exclusion of otherwise valid evidence often acts to free the guilty, while nothing is done for the victims of illegal but fruitless searches.
- (2) The procedures to exclude evidence delay and confuse the principal issue at the trial--the guilt or innocence of the accused. It is not an appropriate forum for inquiring into the actions of a third person (the police officer).
- (3) The rule creates pressures on the police officer to give false testimony where an obviously guilty defendant is seeking to suppress clear physical evidence of guilt. For the same reason, it also creates pressure on the courts to weaken the rules governing probable cause to make an arrest, in order to validate the search that followed, and results in making it easier for the police to arrest in the future.

Those who favor the exclusionary rule but feel that exceptions have robbed it of its effectiveness also have expressed dissatisfaction. The standing requirement has been attacked on the ground that it permits the police to

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"ransack, coerce, and illegally seize evidence and information from all but the intended defendant". In addition, the independent source doctrine has been questioned because it allows the police to take illegal shortcuts. Instead of engaging in the standard procedures, the police could conduct an illegal search and then justify it by showing that they would have eventually found the evidence anyway through those procedures.

On the other hand, despite all its apparent shortcomings, the rule may be the only effective existing deterrent to police misconduct. Furthermore, it is argued by some that the rule may indeed be performing its function. They argue there is a greater sense of professionalism in the police departments and prosecutor offices, and because the Supreme Court carries much moral weight, as well as legal force, the police and prosecutors are more inclined to follow Supreme Court rulings even though there may be ways to circumvent them. Finally, it is argued that the police do eventually find out, through a slow filtering process, the kind of conduct that is permissible and the kind of conduct that is not.

Alternatives

As a federal remedy, the rule is still viable, and the convention may wish to leave the rule as it presently stands. However, the convention may also wish to consider, as a matter of state constitutional law, modifications or alternatives to the rule, in order to correct any deficiencies it may perceive. Alternatively, the convention may wish to modify the application of the exclusionary rule or the rules governing searches and seizures to provide more definitive guidance for the Hawaii Supreme Court in light of its tendency in this area to provide greater protection for the accused than that afforded by the U.S. Supreme Court in its interpretation of the U.S. Constitution. Modifications may include elimination of any one of the exceptions to the exclusionary rule (e.g., the standing requirement or the independent source doctrine) or strengthening the warrant requirements where warrantless searches are now permitted. Possible alternatives to the rule may include the creation of a cause of action for damages as a result of constitutional violations, or the creation of a review board or an ombudsman to review complaints and make recommendations or take disciplinary action against the offending officers.

ADMINISTRATION OF CRIMINAL JUSTICE

The investigatory and arrest procedures were discussed in Searches and Seizures. This subject is addressed to the prosecution of the arrestee who is guaranteed the following by Article I:

- (1) The right to be free from excessive bail, and the possibility of release without bail (on "own recognizance");
- (2) The right to a presentment or indictment by a grand jury in the case of all capital or otherwise infamous crimes;

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- (3) The right to a speedy and public trial by an impartial jury;
- (4) The right to be free from excessive fines and cruel or unusual punishment;
- (5) The right against double jeopardy; and
- (6) The privilege of the writ of habeas corpus.

Other rights of the accused, such as the privilege against self-incrimination and the right to counsel, are covered in Rights and Privileges of the Accused.

Protection from Excessive Bail and Bail as a Matter of Right

The Eighth Amendment of the U.S. Constitution and Article I, section 9, of the Hawaii Constitution provides in part: "Excessive bail shall not be required...." The purpose of bail is not to punish those "who have not yet had their day in court". The primary purposes of bail in a criminal case are to insure the defendant's appearance in court whenever the defendant's presence is required, to relieve the defendant of imprisonment, and to relieve the state of the burden of keeping a defendant pending the trial.

The U.S. Supreme Court has interpreted "excessive" bail to mean that which is "set at a figure higher than an amount reasonably calculated" to insure the presence of an accused. However, this is not to say that "every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount". At the very least, judges passing upon bail are obligated to deny such relief only for the strongest of reasons.

It is important to note that the U.S. Constitution expressly prohibits only excessive bail, and most commentators agree that the Eighth Amendment gives the right to bail to no one, whether juvenile or adult, despite the argument that a prohibition against excessive bail is meaningless without a guarantee of "some" bail. Also, the U.S. Supreme Court has not held the Eighth Amendment right to be free from excessive bail applicable to the states. Nonetheless, most state constitutions remedy these gaps: 40 state constitutions create an absolute right to bail in noncapital cases, and 49 state constitutions prohibit excessive bail.

The controversy concerning bail and other forms of pretrial release has to do with crime committed by defendants on pretrial release, and may be summarized by the following 4 questions:

- (1) How serious is the problem--how much crime is committed by defendants on pretrial release?
- (2) Is it possible to identify in advance those defendants who are dangerous and likely to commit crimes?
- (3) Is some form of preventive detention constitutionally permissible?

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- (4) Are there methods other than preventive detention which might be used to minimize the problem of crime on bail?

Data from the District of Columbia suggest that if the count is made on the basis of a relatively loose measure, such as rearrests, and is made with respect to the most serious defendants, as for example, those who have been indicted, the rate of recidivism tends to be very high. If, on the other hand, the count is made on the basis of a stringent measure, such as convictions or reindictments, and covers a wider group of defendants, such as all felony arrestees, the rate of recidivism tends to be much lower.

The problem of making sure that one detains all defendants who will commit crimes is sure to be solved if one is prepared to detain all defendants. Unless all defendants will commit crimes while on release, however, this method detains many persons who will not commit crimes. Unfortunately, predictive measures have been unimpressive. Some observers, noting the general lack of success in parole and probation prediction efforts, where much more extensive work has been carried out, have been much less hopeful.

Where state constitutions and statutes specifically guarantee to criminal defendants the right to bail except in capital cases, it has been held that the doctrine of preventive detention offends such provisions.

Although the Hawaii Constitution does not make bail a matter of right in noncapital cases, that right is given by statute. Significantly, Hawaii does not provide for preventive detention except in cases where illegal infliction of a wound or other injury may terminate in the death of the person injured.

Even staunch opponents of preventive detention do not deny that there is some amount of crime being committed by persons on pretrial release and some attention has been devoted to developing alternative solutions to the problem.

One approach is to increase the use of conditional and supervised pretrial release programs for "high risk" defendants, such as drug abuse counseling and job placement services. Another approach is to speed up the trial process and thereby reduce the amount of time that defendants spend on pretrial release. A third approach is release on recognizance, which is given explicit protection under Article I, section 9, of the Hawaii Constitution. Although it is not known how far own recognizance can be extended into the defendant population before the rate of nonappearance or the rate of pretrial crime becomes unacceptable, 15 years of nationwide experience with release on recognizance programs have demonstrated that, for a sizeable percentage of criminal defendants, monetary bail requirements are not necessary to ensure appearance in court. Indeed, it has been observed that cities with the highest rates of pretrial release and the highest rates of nonfinancial release did not have the highest nonappearance rates.

Yet another alternative is conditional release where the conditions may include assumption of responsibility for the defendant by a member of the community, limitations upon the defendant's travel, residence, and associations, and release under a program of supervision, which may require periodic reporting by the defendant. The danger in conditional release is that the

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judges may overuse conditions to the neglect of straight own recognizance. Owing to the need to supervise defendants on conditional release, this method of release is considerably more costly than straight own recognizance.

Possible Approaches

Although Hawaii's Constitution adopts the excessive bail provision of the U.S. Constitution, it does not explicitly provide for an absolute right to bail in noncapital cases. Article I, section 9, of the Hawaii Constitution in part reads:

Excessive bail shall not be required,.... The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment.

The second sentence of Article I, section 9, was added by the 1968 Hawaii Constitutional Convention. The reason for the amendment was to reflect the bail procedure under statutes implementing section 9. Moreover, the amendment "simply clarifies the scope with respect to the requirement of bail and would remove doubts, if any, as to the discretionary powers of the court in the matter of bail". Since the amendment permits bail to be dispensed with altogether, a right to bail in noncapital cases appears to have been assumed by the framers. Ambiguity remains, however, and could be cured by an explicit right to bail provision, along the lines of the one which follows:

All persons shall be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.

Since Hawaii does not allow capital punishment, the words "capital offenses" might be deleted from the provision above and inserted in lieu thereof, the words "offenses punishable by imprisonment for life not subject to parole".

Presentment or Indictment by Grand Jury

The Hawaii constitutional provision dealing with the grand jury provides:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces when in actual service in time of war or public danger....

The grand jury has been historically regarded as a bulwark of liberty because it acted as an independent body and was composed of members of the community which could interpose its judgment between the state and the individual. It stood as a shield for the individual from the excesses of an overly zealous or politically motivated prosecutor.

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The grand jury has 2 main functions:

- (1) Protective. The grand jury screens the government's case; and, if it finds probable cause to believe the suspect committed a felony, the suspect is indicted and brought to trial; if not, the case is dismissed.
- (2) Investigatory. The grand jury is also to independently conduct its own investigation. In this way, a grand jury may initiate investigations where the prosecutor is not zealous enough.

As a practical matter, there seems to be little difference between the 2 functions today because of the domination of the grand jury by the prosecutor. When the grand jury performs its protective function, it simply hears evidence that was prepared beforehand by the prosecutor. In its investigatory capacity, the prosecutor does not present evidence but uses the grand jury to uncover it. In both cases the grand jury hears the testimony of witnesses and sees the evidence the prosecutor chooses to present concerning the subjects the prosecutor chooses to pursue. The grand jury does not usually attempt to independently use its investigatory power.

To perform its functions, the grand jury is granted enormous power. Perhaps due to its image as an independent protector of individual rights, the judicial attitude toward it has been one of great deference. As a result, the grand jury is almost completely unfettered by the procedural rules that apply to other judicial or quasi-judicial bodies. The witness who is a potential defendant has no right to the presence of counsel nor generally of the benefits of open, adversarial procedures.

Because the grand jury carries an aura of impartiality, a grand jury indictment has a far more serious impact on the accused than the filing of an information (a formal charge issued by the prosecutor). The defendant may face a stronger inference of guilt in the minds of the trial jurors, as well as a stronger stigma of guilt in the community. Further, because the grand jury is regarded as an accusatory rather than judicial body, the defendant or potential defendant has few, if any, of the rights during grand jury proceedings that are accorded a defendant during trial. Thus, in addition to being deprived of the right to be represented by counsel, the defendant may not testify, present rebuttal evidence, cross examine witnesses, or even be notified of the proceedings themselves.

Witnesses and defendants are accorded some safeguards. A defendant has a right to an indictment from a fair and impartial grand jury, free from undue influence by the prosecutor. A witness may refuse to answer a question that infringes on a limited number of privileged communications, such as those that fall under the physician-patient privilege or the attorney-client privilege. The witness' right against self-incrimination is also protected, but this right may be circumvented by a grant of immunity from prosecution for matters to which the witness testifies. Once that immunity is given, the defendant may not assert the self-incrimination privilege and is obligated to testify or face punishment for contempt of court.

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Grand jury proceedings are conducted in secret. Except for grand jury deliberations and votes, disclosure of the proceedings may be made to the prosecutor for use in the performance of the prosecutor's duties. After indictment, the defendant has a right, upon request, to a transcript of that portion of the proceedings which relate to the offense charged in the indictment. But other information may be released only when so directed by the court in conjunction with a judicial proceeding or when permitted by the court at the request of the defendant who has shown that the grand jury proceedings may justify dismissal of the indictment.

Despite the belief held by many that the grand jury acts as a check on prosecutorial excesses and helps to eliminate weak cases (thereby saving time), critics have asserted that instead of standing between the prosecutor and the defendant, the grand jury simply "rubber stamps" prosecution requests for indictments. The grand jury may at one time have been an independent body, they claim, when it was composed of a body of neighbors familiar with the area under investigation and when, under early common law, the prosecutor was barred from the grand jury room and the grand jurors conducted the examination of witnesses themselves. Today, however, the grand jury is no longer a body of neighbors and the prosecutor is no longer barred from the room. Instead, the grand jury is now an impersonal body, growing increasingly dependent on the prosecutor.

Possible Approaches

In almost half of the states, there is no grand jury requirement. In many of these states, the prosecutor has the discretion to initiate a criminal proceeding by grand jury indictment or by filing an information, but where the prosecutor does not proceed by indictment, a preliminary hearing is sometimes required. Other state constitutions provide that the legislature may modify or abolish the grand jury system.

After an extensive study of the grand jury system in Hawaii, the National Center for State Courts recommended that Hawaii's grand jury provision be deleted from the Constitution. It does not propose that the grand jury system be abolished, but it recommends that the grand jury be convened only in extraordinary cases upon order of the circuit court following a showing of good cause by the prosecutor. The center recommends that in most cases probable cause be determined at a preliminary examination by the district court. The center argues that this will reduce delay, provide a more competent determination of probable cause, and eliminate many of the problems that stem from the dependency of the grand jury on the prosecutor, from the secrecy of the grand jury proceedings, and from the inability of the defendant to be accompanied by counsel, cross-examine witnesses, or present rebuttal evidence. Critics of this proposal, however, question the wisdom of tampering with State Bill of Rights guarantees and whether elimination or serious modification of the grand jury requirements will lead to a weakening of other rights.

The investigatory function of the grand jury could be eliminated. No state seems to have adopted such a measure in their constitutions. As noted

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above, this alternative would foreclose the potential for abuse as seen on the federal level, yet it might also severely restrict the prosecutor in the investigation of crime and official misconduct. The 1978 Constitutional Convention may also deem this to be an unnecessary measure, since the standard of conduct among Hawaii's prosecuting attorneys appears high, and consequently the instances of prosecutorial abuse are rare.

The grand jury could be retained in its present role, but more protection for defendants and witnesses could be provided. This alternative may include procedural safeguards at the grand jury proceedings, such as requiring that the witness be given the right to have counsel present, notice of the proceedings, adequate time to prepare for them, and the right to object to irrelevant and prying questions. Another possible amendment may include providing for more grand jury independence. The 1978 Constitutional Convention may wish to consider, however, whether these objectives are better accomplished through legislation or court rules.

Trial by Jury in Criminal Cases

Article I, section 11, provides in part that:

...[I]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused....

This provision is based almost exactly on the Sixth Amendment of the U.S. Constitution. Because the Sixth Amendment guarantees have been applied to the states through the due process clause of the Fourteenth Amendment, most, but not all, aspects of the jury trial are strictly governed by standards set forth in U.S. Supreme Court interpretations of the Sixth Amendment. Some issues, such as the size of the jury, have been left to the states, and to state supreme court interpretations of local constitutions.

The origins of the right to trial by jury date back to the early English common law. The trial jury became separate from the grand jury in the first half of the fourteenth century; the jury of 12 and the requirement of a unanimous verdict also emerged at this time. Although the jury has evolved over the centuries, the basic arguments in favor of the right to jury trial have not changed. In Duncan v. Louisiana, the U.S. Supreme Court gave the following justifications: (1) the right is "granted to criminal defendants in order to prevent oppression by the Government" and to give protection "against unfounded criminal charges"; (2) trial by jury is "an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge"; (3) the right reflects an "insistence upon community participation in the determination of guilt or innocence".

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In Duncan v. Louisiana, the U.S. Supreme Court bound the states to afford a defendant an opportunity for jury trial in all criminal cases where the defendant would have the opportunity in federal court. Despite the seemingly absolute language of "all criminal prosecutions", the court has limited the right of jury trial to "serious" offenses for which the defendant faces a possible penalty of 6 months or more imprisonment.

The right to trial includes requirement of a speedy trial which was applied to the states by the U.S. Supreme Court in Klopfer v. North Carolina. The rationale behind this guarantee is that it prevents prejudice to the defendant, whose normal routine has been disrupted by the imposition of criminal charges and whose ability to prepare an adequate defense would be undermined by delay. The right to a speedy trial only emerges when the defendant becomes an "accused", through formal indictment or information, or is restrained through arrest and detention.

The right to a speedy trial is relative, and delay a matter of degree. In federal courts, the Speedy Trial Act of 1974 provides guidelines for determining whether the right has been violated. In Hawaii state courts, guidelines are provided by Rule 48(b) of the Hawaii Rules of Penal Procedure.

The requirement of a public trial was imposed on the states by the U.S. Supreme Court in In re Oliver, and has been recognized by the Hawaii Supreme Court since 1906. "[A] public trial is a trial at which the public is free to attend," public attendance being an important safeguard of the integrity and impartiality of the courts. Judges, however, are not prevented from excluding persons "whose conduct or presence in the courtrooms is such that the orderly, fair and impartial functions of the courts are affected."

The right to an "impartial jury" is perhaps the most heavily interpreted aspect of the jury trial. United States and Hawaii Supreme Court decisions lead to the conclusion that an "impartial jury" is: (1) one which reflects a fair cross-section of the community; (2) one from which biased jurors have been removed; and (3) one which has been insulated from highly prejudicial publicity.

Since 1970, the U.S. Supreme Court has been promoting 2 important changes in the structure and functioning of the jury: (1) reducing the number of jurors, as a means of obtaining efficiency and economy; (2) allowing majority, instead of unanimous, verdicts, as a means of reducing the time and difficulty of deliberations. In a series of decisions, the Court has ruled that the traditions of juries of 12 and unanimous verdicts are not required by the Constitution. Juries of less than 12 have been approved in state criminal cases, and in federal civil cases. Less than unanimous verdicts have been allowed in state criminal cases (and by implication, in state civil cases) but disallowed for all federal cases. The Court has yet to decide whether a jury of less than 12 and a majority verdict together would pass constitutional muster.

The Court is of the view that a jury of less than 12 still fulfills the requirements of a jury: (1) "large enough to promote group deliberation"; (2) "free from outside attempts at intimidation"; (3) able to "provide a fair possibility for obtaining a representative cross-section of the community".

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However, there is some evidence that smaller juries are less representative, less reliable (the more jurors, the less random error), and more erratic in their verdicts. Roughly, the same arguments apply to the question of majority verdicts.

It is also questionable whether smaller juries save time and money, or at least whether the savings are significant enough to warrant the change.

A number of states have reduced the size of the jury in civil and misdemeanor cases, and 81 out of 94 federal districts have adopted 6-person juries in civil cases. But only 4 states have juries of less than 12 in major felony cases. The state supreme courts of Alabama, California, and Rhode Island have interpreted their state constitutions to require a jury of 12.

The debates at the 1950 Constitutional Convention indicate that the delegates understood the jury to be a jury of 12 and that a criminal defendant had a right to a unanimous verdict. Court rules, of course, might permit, with the consent of the defendant, waiver of a jury trial, stipulation to a jury of less than 12, or stipulation to less than a unanimous verdict in all but capital cases. Even though assumptions about jury size and unanimity are no longer as settled as they once were, it would appear that Article I, section 11, still presumes the right to a jury of 12 and a unanimous verdict.

Excessive Fines and Cruel or Unusual Punishment

Prohibitions against the imposition of excessive fines or the infliction of cruel or unusual punishment limit the power of the legislature and the courts to impose sentences on those convicted of crimes. Proper sentencing, whether in the imposition of imprisonment, fine, or a combination of these, seeks to accomplish the following, often inconsistent, goals: (1) retribution; (2) rehabilitation of the offender; (3) deterrence, both with respect to the convicted individual and others who might commit the same offense; (4) isolation of those who pose a danger to society.

Excessive Fines. Excessive fines are specifically prohibited by nearly all state constitutions. The Hawaii Supreme Court has yet to pass on the question of what constitutes "excessiveness". But it has relied on the equal protection clauses of the United States and Hawaii Constitutions to declare unconstitutional a statute providing for imprisonment where the person could not afford to pay the fine. The Hawaii Penal Code is in keeping with this decision, and does not permit imprisonment where there is an inability to pay.

Cruel and Unusual Punishment. The Hawaii and U.S. Constitutions have similar provisions prohibiting cruel and unusual punishment. The Hawaii provision reads in part:

Excessive bail shall not be required, nor excessive fines imposed,
nor cruel or unusual punishment inflicted.

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Although the Hawaii provision is disjunctive in form (cruel or unusual), and the Eighth Amendment is conjunctive (cruel and unusual), the scope of the 2 appears to be exactly the same. The Eighth Amendment protections against cruel and unusual punishment are also applicable to the states through the due process clause of the Fourteenth Amendment of the U.S. Constitution. When the phrase "cruel and unusual" punishment was included in the U.S. Constitution, it was intended primarily with proscribing torturous and barbaric methods of punishment such as pillorying, disemboweling, decapitation, drowning, and quartering. At the present time, however, the Eighth Amendment is not interpreted in so limited a fashion, but rather is understood to reflect contemporary standards of decency and proportionality between offense and punishment.

Addressing the issue of whether the death penalty violated the Eighth Amendment protection against cruel and unusual punishment, the U.S. Supreme Court recently upheld the death penalty for murder but struck down the imposition of that sentence for rape because the penalty was disproportionate to the crime.

In the 1976 landmark case of Gregg v. Georgia, the Court ruled that the death penalty "does not invariably violate the Constitution" nor can its infliction for the crime of murder be considered cruel and unusual. The Court justified its decision by pointing out that the framers of the U.S. Constitution were well aware of the use of the death penalty for murder when the provision was being drafted. Further, for 2 centuries, the Supreme Court has consistently acknowledged that the penalty of death for murder was not invalid per se.

More importantly, the Court believed that the use of the penalty did not run contrary to its previous holdings that criminal sanctions must meet contemporary standards of decency. As evidence, the Court pointed to the actions of the Congress and 35 states which reenacted capital punishment legislation during the 4 years preceding the Gregg decision due to an earlier court decision which caused these states to modify their statutes imposing the death penalty.

Explicit in the Gregg decision was the belief that the criminal sanctions must be proportioned to the crime. When the U.S. Supreme Court reviewed the use of the death penalty in 1977 for the crime of rape of an adult woman, in Coker v. Georgia, they declared that the infliction of the death penalty was unconstitutional stating that although "rape is without a doubt deserving of serious punishment...it does not compare with murder, which involves the unjustified taking of a life". Further, the Court implied that the death penalty for rape would not meet the "contemporary standards of decency test" as Georgia was the only state to permit the death penalty for rape.

As important as the constitutional validity of the death penalty are the procedures used by the states in determining whether the penalty should be imposed on a particular offender. The U.S. Supreme Court has required that the sentencing authority's discretion, whether judge or jury, be properly guided and limited in the matter of whether a human life should be taken or spared. This may be done "by a carefully drafted statute that ensures the sentencing authority is given adequate information and guidance".

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Generally, state statutes have been upheld if the law provides for the consideration of both mitigating and aggravating circumstances as part of the death penalty sentencing procedure.

The recent U.S. Supreme Court decisions interpreting the Eighth Amendment provide the basis for states to decide whether or not to enact death penalty legislation. For states with similar constitutional provisions or which rely on federal decisions to construe their own amendment, the infliction of the death penalty in some instances appears not to be a cruel and unusual punishment. State laws are subject to the U.S. Supreme Court's constitutional concerns regarding sentencing procedures. Currently, at least 35 states have enacted the death penalty legislation and in Hawaii, bills have been introduced reinstituting capital punishment in both the eighth and ninth legislatures.

The 1968 Hawaii Constitutional Convention specifically addressed the issue of capital punishment. A floor amendment was offered that would prohibit the death penalty. The amendment read:

Excessive bail shall not be required nor excessive fines imposed, nor cruel, unusual, or capital punishment inflicted. (Emphasis added)

Although the motion was defeated, it did not mean that delegates were in favor of capital punishment. Some of the opponents of the amendment believed that because state law already abolished the use of that penalty, it was unnecessary to address the matter.

The few states that mention the death penalty in their constitutions mention them in a context separate from their cruel and/or unusual punishment provisions. These either authorize the legislature to enact capital punishment laws or accord procedural protection to those accused of capital crimes, rather than making explicit provision for, or abolishment of, the death penalty.

Double Jeopardy

The Fifth Amendment of the U.S. Constitution, which was made binding on the states in 1969, provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb". Article I, section 8, of the Hawaii Constitution has an identical provision, except for the deletion of the phrase "life and limb" from the end of the passage.

The rationale for the double jeopardy provision is that the state, with its vastly greater resources, should not be allowed to subject an individual to the repeated embarrassment, expense, and ordeal of defending a charge for the same alleged offense. The individual should not be forced to live in a continual state of anxiety and insecurity, and the state should not be permitted to enhance the possibility of convicting an innocent person by repeated prosecutions.

Once jeopardy attaches, that is, once the defendant is put to trial, the defendant can raise a double jeopardy claim at a second trial even if the first

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trial ended without a final judgment (e.g. a mistrial was declared). However, the double jeopardy claim cannot be raised where the defendant wins a reversal upon appeal or in certain unusual situations where the public interest in a fair trial requires that a mistrial be declared and the defendant be subjected to a second trial. Where a jury convicts on a lesser charge, the defendant is deemed to have been acquitted of the higher charge. Accordingly, if the defendant appeals a conviction and wins a reversal, the second trial must be limited to the lower charge.

The doctrine of double jeopardy prohibits not only the relitigation of criminal offenses, but also includes the relitigation of specific issues already adjudicated at the first trial. Consequently, where a factual issue that is an essential element of a second charge was the basis for acquittal of the first charge, the defendant may not be tried on that second charge. For example, a defendant who was charged with robbing a victim and then acquitted on the ground that the defendant had not participated in the event could not be tried for the robbery of the victim's companion.

"Jeopardy of life or limb" generally refers to criminal prosecutions. It does not apply to proceedings that are remedial and not "essentially criminal" in nature. Although not usually applicable to civil trials, the doctrine may be invoked in civil proceedings where the stigma and loss of liberty are similar to a criminal trial.

One area of controversy in the area of double jeopardy is the so-called "dual sovereign" problem. Under our federal system of government, there are 2 independent sovereigns--the state and federal governments--each responsible for the enforcement of their own laws. Because there are 2 sets of laws, the same act may produce 2 offenses. Therefore, each sovereign can choose to prosecute separately, under its own laws for the same conduct, and the defendant cannot claim double jeopardy. As a practical matter, however, the dual sovereign doctrine may not have as serious consequences as some fear, for the federal government has voluntarily refrained from reprosecution after most state convictions, and many states including Hawaii bar state prosecution after conviction by the federal government for the same criminal act in many instances.

Habeas Corpus

Article I, section 9, clause 2, of the U.S. Constitution provides:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

The main purpose of a prisoner's petition for a writ of habeas corpus is to gain immediate relief from illegal confinement. The petition tests whether the prisoner has been deprived of liberty without due process. The clause is not a limitation upon the states, but only upon the federal government. The clause carefully lists circumstances which may justify suspension of the privilege of the

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writ. However, the primary issue historically has been who has the power to suspend. In England, suspension was by parliament. A well-noted suspension of the writ in America was by President Lincoln in 1861. One authority has said that the framers of the U.S. Constitution may have consciously omitted mentioning which branch of government is authorized to suspend the writ. The framers may have left the question open for subsequent resolution; or, familiar with the historical background of the writ, they may have understood the power of suspension to be a legislative one and therefore failed to indicate the repository of the power.

One commentator has set forth 3 possible constructions of the clause:

First, it can be read to give exclusive suspension power to Congress. The location of the habeas corpus clause in article I lends strong support to this position. However, Congress is often in recess or adjournment; if an emergency arises which might justify suspension of the writ, it may be cumbersome at the very least to summon legislators to Washington to decide if suspension is warranted. At worst, the emergency may have assumed disastrous proportions before legislative resolution of the suspension question would be possible. Manifestly, these factors militate in favor of a second construction granting exclusively to the executive branch the power to suspend the writ. The President can more conveniently and quickly make the factual determinations contemplated by the habeas corpus clause. Convenience and speed, however, can lead to arbitrariness and oppression if the power of suspension is lodged in the President alone; reposing the suspension power in Congress would provide the assurance of popular participation in such a grave and sensitive decision. A third construction is that the suspension power is "concurrent" as between the President and Congress, so that the President might act in the absence of congressional provision.

The United States Supreme Court never has been faced with the question of specifying who has the power to suspend the writ. History, however, has shown that in time of war even justices not otherwise prone to condoning severe restrictions on liberty have supported the executive.

Article I, section 13, of the Hawaii Constitution, drawn up by the 1950 Hawaii Constitutional Convention and unchanged since that time, reads:

The privilege of the writ of habeas corpus shall not be suspended, unless when in the cases of rebellion or invasion the public safety may require it.

The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe.

The first sentence is identical with the language of Article I, section 9, of the U.S. Constitution and thus carries with it federal judicial interpretations as

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to when a suspension may take place. The second sentence "makes it perfectly clear that that power [suspension of the writ] resides in the legislature, not in the executive".

There has been little controversy over, and not many proposals to change, this section of the Constitution. Perhaps, the most important question at present is the availability of habeas corpus relief in the federal courts, under the U.S. Constitution, to state prisoners. Stone v. Powell, a 1976 U.S. Supreme Court decision, has severely restricted the opportunities for state prisoners to seek redress of Fourth Amendment violations in federal court.

RIGHTS AND PRIVILEGES OF THE ACCUSED

Privilege Against Self-Incrimination

Article I, section 8, of the Hawaii Constitution provides in part:

...nor shall any person be compelled in any criminal case to be a witness against himself.

This provision is derived from the Fifth Amendment of the U.S. Constitution, and its adoption by the 1950 Constitutional Convention was intended to give to this state the benefit of federal decisions construing the same. It was not discussed at the 1968 Convention.

The privilege against self-incrimination is found in the constitutions of 48 states. The 2 exceptions are Iowa and New Jersey, both of which guarantee the privilege in statutes. Hawaii also provides for a statutory privilege against self-incrimination.

Although the Fifth Amendment privilege, or a similar provision, previously was a part of state law in most jurisdictions, the U.S. constitutional provision was held binding upon the states in the 1964 case, Malloy v. Hogan.

The clause "in any criminal case" of Article I, section 8, of the Hawaii Constitution would seem to suggest that compelling an individual to be a witness against the person's self is proscribed only at the individual's criminal trial. The U.S. Supreme Court, however, has held that in order to protect fully the rights of the accused at trial, the privilege must be extended to certain other proceedings. These include grand jury proceedings, police custodial interrogations, and even activities outside the criminal process, such as civil proceedings.

The self-incrimination provision advocated by the Model State Constitution is not limited to testimony in criminal cases. The privilege would extend to any kind of hearing where testimony is given and thus comports with recent federal decisions.

Until recently, a state grant of immunity from state prosecution barred assertion of the privilege against self-incrimination even though the testimony

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would incriminate the witness under federal law and vice-versa. In the 1964 case, Murphy v. Waterfront Commission, the U.S. Supreme Court held that the privilege may be asserted whenever the testimony would incriminate under either state or federal law. The Court also explained that under an exclusionary rule, testimony obtained in state proceedings under a grant of state immunity (and the fruits of that testimony) may not be used in federal prosecutions, and vice-versa.

There is an important distinction between "use" immunity, which guarantees only that the testimony and evidence obtained by use of the testimony will not be used, and "transactional" immunity, which serves as an absolute bar to prosecution of the offenses testified to. In a 1972 case, Kastigar v. United States, the United States Supreme Court upheld the constitutionality of a federal use immunity statute. Thus, a witness compelled to testify subsequently could be prosecuted although no direct or indirect use of the witness' compelled testimony could be made. The Court warned, however, that even though the witness can be prosecuted, incriminating evidence must be secured from a legitimate source, wholly independent of the compelled testimony.

Hawaii statutory law provides for the more broadly protective transactional immunity, however, no Hawaii case to date has addressed this issue.

As to the meaning of the phrase, "to be a witness", the U.S. Supreme Court has limited the privilege to evidence that is testimonial or communicative in nature. The privilege offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture.

Certain documents, such as business records, letters, or a diary, may be testimonial or communicative and can be as incriminating as the spoken word. The historic function of the privilege has been to protect a natural individual from compulsory incrimination through the individual's own testimony or personal records.

The suggestion that private papers were shielded from forced disclosure first was made in the 1886 case, Boyd v. United States. Since that time, the Court has held that the Fifth Amendment does not bar production of records not in defendant's possession.

While one decision appears to recognize the incriminatory effect of seized documents, it nevertheless draws a distinction between the methods used to discover evidence. The Court explains that the Fifth Amendment privilege covers production of evidence by subpoena but not procurement by seizure. The Court appears to reason that a lawful search does not involve "compulsion" because the witness is not forced to aid in the discovery, production, or authentication of incriminating evidence.

Different standards apply to a witness who is a criminal defendant and to a witness who is not; even the latter may be a "target" witness suspected of

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criminal activity. Where the witness is not a criminal defendant, the U.S. Supreme Court does not inquire so closely into the circumstances under which the witness waived, or relinquished, the privilege against self-incrimination.

In a 1976 case, Garner v. United States, which involved incriminating information on an income tax return, the Court held that where an ordinary witness, one not an accused, answers the questions of a government official, the witness' responses conclusively are deemed voluntary because there is no inquisitorial process directed against such witness. The Court further held, however, that a witness may lose the benefit of the privilege without making a knowing and intelligent waiver. Thus, a witness who is unaware that the witness can refuse to answer incriminating questions apparently cannot later argue for suppression of testimony on the ground that the witness did not knowingly and intelligently waive the privilege.

A person has the right to assert the privilege and remain silent without suffering any penalty for such silence. "Penalty" in this context means the imposition of any sanction which makes assertion of the privilege "costly" and is not restricted to a fine or imprisonment.

In economic penalty cases, the threat of being fired or losing government licenses or contracts for refusal to testify compels a person to self-incriminate. In a 1973 case, Lefkowitz v. Turley, the Court held that a witness cannot be forced to execute a waiver of immunity prior to testifying under the threat of loss of employment. In a 1968 case, however, Gardner v. Broderick, the Court held that a state employee can be fired for failure to answer questions relating to the performance of the employee's official duties.

This holding by the Court apparently stands in contrast to the view expressed in a 1967 case, Spevack v. Klein, where the Court held that a lawyer who refused to testify at a bar disciplinary proceeding could not be penalized by disbarment for invoking the privilege. The Court explained that "penalty" is not restricted to fine or imprisonment. It means the imposition of any sanction which exacts a price for the assertion of the Fifth Amendment.

At common law, a confession was required to be voluntary as a matter of evidence law, and in a 1936 case, Brown v. Mississippi, this became a requirement of due process of law. Initially, the decisions stressed the unreliability of an involuntary confession, but later cases argued that the due process prohibition against use of an involuntary confession rests upon more than a desire to assure reliability. This prohibition, much like the privilege against self-incrimination, rests upon the premise that coercing a person to give testimonial evidence later used to convict that person of a crime is inconsistent with the required respect for that person's dignity as a human being, whether or not the evidence is a reliable indicator of guilt.

In a 1961 case, Culombe v. Connecticut, the Court held that even in the absence of force or threats, a statement will be involuntary if, considering the totality of the circumstances, the defendant's will as to whether or not to confess was overborne. It is necessary to consider the pressures upon the defendant, whether intentionally applied or not, and the defendant's own subjective characteristics that affect defendant's ability to resist. This

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requires consideration of characteristics such as age, sex, physical health and strength, psychological condition, education, and prior experience with the law.

One aspect of the voluntariness test which might render a confession involuntary is the promise of some benefit by a person in authority. Another aspect of the voluntariness test, deceit during interrogation, however, might not render a confession involuntary.

In the landmark 1966 case, Miranda v. Arizona, the U.S. Supreme Court concluded that the traditional voluntariness test was inadequate to protect those accused from the subtle danger posed by custodial interrogation. It also was the first case to hold that the privilege against self-incrimination applied to police interrogation techniques.

It may be noted that the Miranda requirements are separate and distinct from the voluntariness rule, although the 2 may overlap, as where both a waiver of Miranda rights and the statement are challenged as involuntary.

Special problems in applying Miranda involve the concept of "custody" under Miranda, the right of the police to reapproach the defendant, and the prohibition against use of illegally obtained statements for impeachment purposes.

Under the Miranda formulation, "custody" consists of a deprivation of liberty. Questioning a suspect in a police station, however, need not necessarily be custodial when the suspect remains "free to leave". Moreover, the Court has held that no "custody" is involved where 2 "special agents" of the Internal Revenue Service interviewed an individual at the individual's home and failed to give the Miranda warnings, although their suspicions had focused upon that person as the suspect in a tax fraud case. The fact that suspicion focused on the individual is not controlling.

In a 1975 case, Michigan v. Mosley, the U.S. Supreme Court held that when police seek to question a suspect concerning one crime and the suspect indicates no desire for a lawyer but refuses to discuss that crime, the police later may "reapproach" the suspect and ask if the suspect would be willing to discuss another crime, as long as this is done in a noncoercive manner. The Court did not resolve the issue whether police may reapproach a defendant and ask that defendant to reconsider a refusal to talk until a lawyer is present.

Under the Miranda guidelines, if the police failed to give warnings and obtain a waiver, the prosecution would be barred from using any statements of the accused, whether inculpatory or exculpatory, either in its case-in-chief or on cross-examination. A later case, Harris v. New York, appeared to narrow the scope of the exclusionary rule by allowing illegally obtained statements to be admitted for impeachment purposes if the defendant chose to testify in defendant's own defense.

In a 1971 case, State v. Santiago, the Hawaii Supreme Court rejected the Harris v. New York holding and applied the earlier protections secured by Miranda. The Hawaii Court ruled that Article I, section 8, of the Hawaii Constitution made statements inadmissible under the Miranda rules inadmissible

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for any purpose, including impeachment. At least 3 state supreme courts have followed the Hawaii approach.

Apart from the Miranda guidelines, there is the McNabb-Mallory rule, which provides that any statement given by a defendant in custody made before defendant has been taken before a magistrate, as required by Rule 5(a) of the Federal Rules of Criminal Procedure, is inadmissible if, at the time of the statement, the delay had become "unreasonable". It is not a constitutional decision, and is not binding upon the states.

The McNabb-Mallory rule has been modified by a federal statute which directs that a confession made within 6 hours of arrest or detention be admitted if found to be voluntary, despite delay in presenting the suspect before a magistrate.

Hawaii has a prompt arraignment statute which imposes a 48-hour time limit within which a person arrested must be produced before a magistrate. The Hawaii Supreme Court, however, appears to have loosely interpreted the term "unlawful detention" under that statute.

Possible Approaches. The convention may wish to consider the following issues in the area of self-incrimination:

- (1) Whether fingerprinting and other such identificatory procedures should be explicitly excluded from the scope of the privilege against self-incrimination.
- (2) Whether certain documents, such as business records, letters, or a diary, should be explicitly included within the scope of the privilege, even though in the possession of a third party.
- (3) Whether the Miranda safeguards should be guaranteed to target witnesses as well as criminal defendants.
- (4) Whether penalties, such as loss of employment, should be specifically prohibited where a person exercises the privilege against self-incrimination.

The Right to Have Assistance of Counsel

Section 11 of Article I of the Hawaii Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for a defense. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days."

The first part of this provision was copied verbatim from the Sixth Amendment of the U.S. Constitution and is thus intended to give the state the benefit of federal decisions construing the same language. The last sentence

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was added by the 1968 Constitutional Convention to expand the rights granted under previous U.S. Supreme Court decisions (see below). The right of a defendant to retain privately the services of counsel in criminal trials has rarely been a subject of litigation, and the U.S. Supreme Court has characterized the right as "unqualified". A "necessary corollary" of that right is the right to be granted a reasonable opportunity to employ and consult with counsel.

Most cases dealing with the right to counsel provision have been centered around the duty of the state to appoint counsel, at its expense, to assist the indigent defendant. Expansion of the right to counsel in this area began primarily in 1932 when the U.S. Supreme Court in Powell v. Alabama held that the Due Process clause of the Fourteenth Amendment required the states to appoint counsel to indigent defendants in certain capital cases. In Gideon v. Wainwright, the Court held that the states must make appointed counsel available to indigent defendants in all criminal cases. Because this right was thought to apply only to felony prosecutions, the 1968 Constitutional Convention amended section II of the Hawaii Constitution to provide for all indigent defendants "charged with an offense punishable by imprisonment for more than sixty days".

In 1972, the U.S. Supreme Court in Argersinger v. Hamlin held that the right to appointed counsel applied to indigent defendants even in misdemeanor cases, where there is a possibility of imprisonment. A defendant not represented by counsel may not be imprisoned for any length of time. Whether this right presently extends or will be extended to civil cases that impose imprisonment or to criminal cases that do not impose imprisonment but impose, for example, a heavy fine, is not clear. The 1968 Convention did not extend the right to nonimprisonment cases, possibly out of a concern over the potential costs of providing counsel for so many indigent defendants.

In general, the Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against the defendant. It is this point that marks the commencement of the "criminal prosecution" to which the guarantees of the Sixth Amendment apply. Once the adversary judicial proceedings have been initiated, appointed counsel is necessary for all those "critical stages of the criminal proceedings" where substantial rights of a criminal accused may be affected" and therefore where the "guiding hand of counsel" is necessary to protect those rights. Besides at trial, the right to counsel has been held applicable to such "critical" stages as at post indictment lineups and arraignments.

These "critical stages", however, include only those "trial-like" confrontations where the defendant is faced with the "intricacies of the law" or the possibility of being overpowered by a skilled prosecutor. For example, the taking of fingerprint, hair, clothing, and blood samples from the defendant are not deemed "critical" where the procedures are standardized and the knowledge of the techniques is sufficiently available so that the government's case can be adequately challenged during cross-examination at trial and by the presentation of expert witnesses for the defense.

The Sixth Amendment is not the only constitutional provision that guarantees a right to appointed counsel. The right may be held necessary to

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protect other constitutional rights or to insure a fair hearing as required by the Due Process clause of the Fifth and Fourteenth Amendments of the U.S. Constitution. In addition, it is possible that the right to appointed counsel may be based, in some contexts, on the Equal Protection clause of the Fourteenth Amendment.

The right to the assistance of counsel may be waived by the defendant if it is voluntarily and knowingly made. The accused cannot be "threatened, tricked, or cajoled" into a waiver. Waiver will not be lightly presumed and a trial judge must "indulge in every reasonable presumption against waiver", regardless of whether it is made at trial or at some "critical" pretrial proceeding. Furthermore, the record must show that the accused was advised of the right to counsel (and at no cost if the accused was indigent) but clearly declined to exercise the right. Finally, the state has the burden of proving that the defendant voluntarily and intelligently waived counsel.

Although an accused was permitted to waive counsel at pretrial proceedings, it was not clear until 1975 whether a defendant had a constitutional right to dispense with counsel at trial and proceed pro se, that is, self-representation. For Hawaii and the other states in the federal Ninth Circuit, the right to represent oneself was long held to be constitutionally protected, but this had not been universally accepted.

In 1975, the U.S. Supreme Court in Faretta v. California held that the right of self-representation is guaranteed by the Sixth Amendment of the U.S. Constitution. The Court recognized that this decision seemed to be inconsistent with prior decisions that declared the assistance of counsel to be essential to insure a fair trial. For if counsel is necessary to a fair trial, how can a defendant who proceeds without one be justly convicted? The Court felt, however, that the founders of the Constitution placed a higher value on the right of free choice.

As in other contexts, when the pro se defendant waives counsel, the waiver must be "knowing and intelligent". Thus, the defendant should be made aware of the nature of the charges and the penalties involved, and basic rights should be discussed. The defendant need not have the skill and experience of a lawyer in order to make a valid waiver, but "he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open".

The right to the assistance of counsel carries with it the guarantee that such assistance be effective. The right to the effective assistance of counsel is protected not only by the U.S. Constitution, but by the Hawaii Constitution as well.

What constitutes a denial of the effective assistance of counsel is not entirely clear, since the U.S. Supreme Court has yet to squarely deal with the issue. Lower courts have asked whether the conduct of counsel was so inadequate as to render the trial a "farce" or a "mockery of justice", which generally meant that courts would find that a defendant was denied the effective assistance of counsel only in the most extreme cases. Although the federal

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Court of Appeals for the Ninth Circuit (which includes Hawaii) still abides by this permissive standard, the Supreme Court of Hawaii has followed the trend followed by most of the other federal Courts of Appeals and by many state courts to adopt a more stringent standard: to be "effective", counsel's assistance must be "within the range of competence demanded of attorneys in criminal cases". This involves a 2-step process. First, the conduct of the counsel must be examined to determine whether it appears to be unreasonable. Second, this conduct, if it seems to be unreasonable, will be examined further to determine "whether counsel's action was the result of informed judgment or constitutionally inadequate preparation". If counsel's action, viewed as a whole, appears to be reasonable, or if although appearing to be unreasonable is the result of an informed judgment, ineffective assistance of counsel will not be found.

A primary requirement of an effective counsel is that counsel "conduct careful factual and legal investigations and inquiries with a view to developing matters of defense in order that he may make informed decisions on his client's behalf, ... both at pretrial proceedings... and at trial". This necessarily means that the defendant's lawyer must be allowed adequate time to prepare for the trial, and under certain circumstances, the assistance of an investigator.

A lawyer may represent 2 or more defendants at the same time, as long as there is no conflict of interest between the defendants. Where there is a conflict of interest, the co-defendants are deemed to have been deprived of the effective assistance of counsel, regardless of whether the defendants can show prejudice to their cases.

Government or court action may also form the basis for a claim that the defendant was denied effective counsel. For example, gross surreptitious governmental infiltration ("spying") into the legal camp of the defense during or in preparation of a trial may violate this right. Court restrictions on the right of counsel to decide when the defendant would take the stand or which prohibit counsel from putting the defendant on the stand, or which prohibit counsel from making a closing summation may be held invalid. Further, a judge's unwarranted remarks which demean the defendant's counsel in the presence of the jury may also compromise the defendant's right to the effective assistance of counsel.

If a defendant's conviction can be challenged on the ground of the denial of the effective assistance of counsel, can a pro se defendant raise a similar claim? That is, where a conviction can be overturned because the performance of the defendant's counsel was of such a minimal quality as to deny the defendant the effective assistance of counsel, can a conviction be similarly overturned where the performance of a pro se defendant was so incompetent as to deny the defendant of a similar right? The U.S. Supreme Court has indicated that the pro se defendant does not have a right to effective representation, and so, unlike a defendant represented by counsel, a defendant who proceeds pro se cannot later complain of a violation of the Sixth Amendment right to counsel because of "bad tactics, errors of judgment, lack of skill, mistake, carelessness, incompetence, inexperience, or failure to prepare when the opportunity was available". The defendant must therefore choose between the assistance of counsel, who must meet a minimum competency standard, and proceeding pro se, which has no minimum standard at all.

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The appointment of standby counsel for those indigents who choose to represent themselves has been suggested as a possible solution to many of the problems posed by pro se representation. Standby counsel can aid the jailed indigent defendant by making the necessary preparations for a defense (e.g., legal research, witness interviews, etc.) that the defendant would be prevented from doing. Further, standby counsel can help meet the problem of assuring the pro se defendant of an adequate defense. Instead of a "sink or swim" approach, the pro se defendant would be able to conduct a more competent defense with the advice and guidance of the standby counsel. The use of standby counsel has been recommended by the American Bar Association, especially where the trial is long or complicated, or involves multiple defendants. No court seems to have accepted the view that there is a right to standby counsel. Many courts, however, commonly appoint such standby counsel, but only in their discretion.

Possible Approaches. In the area of the right to counsel, the convention may wish to consider the following issues:

- (1) Whether a pro se defendant should have the right to be able to adequately prepare for trial.
- (2) Whether a right to standby counsel for indigent pro se defendants should be guaranteed by the Hawaii Constitution.
- (3) Whether a pro se defendant is entitled to certain minimum standards of competency.
- (4) Whether the right to counsel should be expanded to other contexts that involve substantial detriment to the defendant (e.g., at civil trials where imprisonment is imposed or at criminal trials where heavy fines are imposed).

Nature and Cause of the Accusation

The Sixth Amendment to the U.S. Constitution and section II of Article I of the Hawaii Constitution both provide:

In all criminal prosecutions, the accused shall enjoy the right...to be informed of the nature and cause of the accusation;...

This provision was adopted by the 1950 Constitutional Convention but was not discussed at the 1968 Convention. The 1950 drafters state that Article I, section II, would "give to this State the benefit of the decisions of the Federal Courts construing the same language,..." The United States Supreme Court has not held that this Sixth Amendment right is applicable to the states.

The constitutional right to be informed of the nature and cause of the accusation is linked to the statutes fixing or declaring the crime. The Hawaii Supreme Court has held that the accusation must set forth the offense with clearness and reasonable certainty to apprise the accused of the crime of which the accused stands charged.

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When the accusation is certain, definite, and specific, the accused will be able to prepare intelligently the accused's defense and will be able to avoid the risk of double jeopardy.

The Hawaii Supreme Court also held that resort to common understanding and practice as the standard in a penal statute is not prohibited. Moreover, statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

Right of Confrontation

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him....

The above provision is found in the Sixth Amendment of the U.S. Constitution and in section 11 of Article I of the Hawaii Constitution. The Hawaii provision was promulgated by the 1950 Convention but was not discussed at the 1968 Convention.

The Sixth Amendment right of a defendant to be confronted with the witnesses against defendant was held binding on the states by the U.S. Supreme Court. The Model State Constitution provides for a right to confrontation, as do the constitutions of 47 states. The 3 states which do not have this provision are Idaho, Nevada, and North Dakota. Scholars seem to agree that the drafters of the U.S. Constitution intended it as a constitutional barrier against such flagrant abuses as trial by anonymous accusers.

Where an informant may be the source of information giving an officer probable cause to arrest defendant, the prosecution is not obligated to reveal the informant's identity, because the governmental interest in encouraging informers outweighs the likelihood that the information materially will aid the defendant. But if the informant's testimony is relevant to the issue of guilt and conviction, it appears that the government must reveal the informant's identity and address necessary to enable defendant to confront the witness.

A defendant who disrupts the courtroom has no absolute right to remain present and confront witnesses. The right of confrontation requires only that the trial judge use reasonable discretion in determining which means to use to deal with the disruptive defendant.

The general rule concerning out-of-court statements is that if 2 persons are tried together and one has given a confession that implicates the other, the confrontation clause bars use of that statement, even with instructions to the jury to consider it only as going to the guilt of the "confessing" defendant. Such a statement may be admitted only if the confessing co-defendant takes the stand and submits to cross-examination on the reliability of the confession.

The confrontation clause prohibits use of out-of-court statements of persons not testifying unless the prosecution has made a good-faith effort to

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secure the attendance of the witness at trial and failed, and the defendant has had an adequate opportunity to subject the witness to sufficient cross-examination to test the accuracy of the statement. Where out-of-court statements of persons who testify are introduced, such prior statements may be admitted if defendant had an adequate opportunity to test the reliability of such statements by cross-examination at trial, or if the statement was given under conditions providing reasonable assurances of accuracy, such as at a preliminary hearing.

The Supreme Court has recognized that due process requires that the record of the receipt of a guilty plea affirmatively shows that the plea was intelligent and voluntary. It also must demonstrate that defendant was aware of defendant's rights at trial and knowingly and intelligently waived them. These rights include the right to confront witnesses.

Compulsory Process for Obtaining Witnesses

Article I, section 11, of the Hawaii Constitution provides:

In all criminal prosecutions the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor....

Like the right of confrontation, this provision, derived from the Sixth Amendment of the U.S. Constitution, appears to have caused little controversy. Other than Nevada and New York, all states and the Model State Constitution have a compulsory process provision in their constitutions.

Hawaii's constitutional provision on compulsory process has been implemented by a statutory guarantee of compulsory process and a court rule providing substantially the same. The Hawaii Supreme Court has held that a witness violating an order excluding witnesses from the courtroom still should be allowed to testify to guarantee an accused's constitutional right to compulsory process for obtaining witnesses.

Companion and counterpart to the Sixth Amendment right of confrontation, the defendant's right of compulsory process differs in one significant respect. The confrontation clause is designed to restrain the prosecution by regulating the procedures by which it presents its case against the accused. Compulsory process, on the other hand, provides defendant with affirmative aid in presenting defendant's defense.

RIGHT OF PRIVACY

The development of a constitutional right of privacy by the U.S. Supreme Court began with the decision Griswold v. Connecticut. There the Supreme Court invalidated a state statute which prohibited the use of contraceptives by married couples. In subsequent decisions, a right of privacy, or "zone of privacy", has been gradually expanded to encompass 3 general types of interests:

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- (1) The right of an individual to be free in private affairs from governmental surveillance and intrusion.
- (2) The right of an individual to avoid disclosure of personal matters.
- (3) The right of an individual to be independent in making certain types of important decisions in matters relating to marriage, procreation, contraception, family relationships, and child-rearing and education.

The first interest associated with the right of privacy--protection from government intrusion--is the subject of the Fourth Amendment. The government may not invade one's home, office, automobile, person, or effects without a warrant or a determination of probable cause that criminal activity is afoot.

To a certain degree, privacy is a function of being at home, and certain activities are permissible in the home which would be impermissible elsewhere. For example, the possession and viewing of obscene materials in the home has been protected by the U.S. Supreme Court simply because the individual was at home. No penumbra of privacy, however, surrounds obscene materials outside the home, or the viewer when going to a local theater to watch a film with other consenting adults.

The idea of the home as a special locus of privacy immune to government intrusion is difficult to reconcile with other decisions of the Supreme Court which speak of privacy as inhering in people rather than places. In Katz v. United States, the criminal defendant complained that evidence against him had been obtained by the use of a "bugging" device attached to the outside of a public telephone booth. The Court upheld the contention that "reasonable expectation of privacy" had been violated.

The second interest associated with the right of privacy--the right of an individual to avoid disclosure of personal matters--grew out of a concern with the gossip-mongering of yellow journalism. The conflict between freedom of the press and an individual's desire to avoid the public eye is still present and is discussed in greater detail under First Amendment Freedoms.

But, in recent years, informational, or disclosural, privacy has taken on another dimension--maintaining control over the flow of personal information to the government. With the growth of government regulation and services, there is more occasion for the government to request information. With rapid advances in computer science, there is greater ease in acquisition, retention, and interagency transfer of information. If left unregulated, information-handling can lead to abuse: improper dissemination, for example, may result in the denial of employment or promotion if the information is given to someone who does not have a legitimate need for it, or if the information is released in incomplete or erroneous form.

Just as the protection of privacy has become increasingly important, the right of access to information held by the government has also become

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necessary. Both are a consequence of the fact that government operations are numerous, complex, and in many instances removed from public scrutiny. An inevitable conflict arises between the individual's right of disclosural privacy and the right of public and press to have access to governmental information.

On the whole, courts have found no constitutional infringement of privacy when personal information is gathered by the government for a valid purpose. The collection and retention of even highly sensitive health and medical records has been permitted where the state has demonstrated a strong need. However, courts are receptive to "privacy" arguments as to the assurance of confidentiality.

Courts have also been reluctant to find a right of disclosural privacy where an individual has been suspected of involvement in crime (or has been convicted), or in situations where the information is a matter of public record.

The third aspect of the right of privacy is personal autonomy in matters involving family life and procreation. After Griswold, the Supreme Court next had occasion to address this question in Eisenstadt v. Baird. In that case, the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons.

In Roe v. Wade, the Court continued to emphasize the individual's right to make important decisions concerning procreation, even outside the socially approved context of marriage. In Roe, the Court upheld the right of a pregnant woman, in consultation with her physician, to undergo an elective abortion during the first trimester of pregnancy. After the first trimester, however, the state's interest in maternal health would justify regulation of where and by whom an abortion could be performed. Also, after the point of viability (24-28 weeks after conception), the state's interest in the "potential life" of the fetus would permit prohibition of abortion except to save the life or health of the mother.

After Roe, the trend of Supreme Court decisions has been to invalidate laws or regulations which impede free choice in matters of procreation. On the other hand, the Court has not required the state to subsidize the fundamental right of choice in the bearing of children.

After the 1968 Constitutional Convention, Article I, section 5, was amended to include the underscored phrases:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

In the debates of the committee of the whole, "invasions of privacy" was discussed mainly in the context of wiretapping and electronic surveillance, along with "or the communications sought to be intercepted". However, Report No. 55 seemed to take a broader view of its applicability:

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The proposed amendment is intended to include protection against indiscriminate wiretapping as well as undue government inquiry into and regulation of those areas of a person's life which are defined as necessary to insure "man's individuality and human dignity".

In interpreting this provision, the Hawaii Supreme Court has yet to definitely commit itself to either the narrow or broad view. Part of the explanation may lie in the fact that the "privacy" cases which have come before the Hawaii Supreme Court have been both different and less varied than those handled by the United States Supreme Court. The vast majority of cases have involved either warrantless searches or possession of marijuana for personal use.

Although the Hawaii Supreme Court has asserted that "invasions of privacy" was added to the constitution specifically to protect against wiretapping and electronic surveillance, it has on other occasions acknowledged that the provision was not so limited in effect, merely by considering "privacy" claims in other situations. The Hawaii Supreme Court has suggested that it might adopt a more expansive interpretation of the right of privacy--encompassing the possession of marijuana--if Hawaii's constitutional provision were, like Alaska's, unitary and distinct.

As yet, individual autonomy in matters of family and procreation has not been enlarged into a general freedom to choose one's life-style, where life-style is the "capacity to craft one's intimate, personal existence in the manner one sees fit". Where the Supreme Court has sustained individual choice of life-style, it has been, on the whole, in the context of traditional, socially accepted modes of behavior.

For example, the freedom of related individuals to live communally, as an extended family, was upheld in Moore v. East Cleveland. A group of unrelated individuals does not have this right; according to Village of Belle Terre v. Boraas, a community may exclude such groups as detrimental to its peace and quiet.

In the area of consensual sexual conduct, the Supreme Court has sustained the constitutionality of sodomy statutes as applied to homosexuals. The issue has not been raised in Hawaii since all forms of consensual sexual behavior are left unregulated.

In the context of political protest, the Supreme Court has recognized choices in the area of dress as constituting "symbolic speech", deserving of First Amendment protection. But, outside of the political context, the Supreme Court has not acknowledged a fundamental freedom of choice with respect to personal appearance.

With respect to the possession and use of marijuana, the Supreme Court has yet to make a definite statement. It has hinted that it would defer to legislative judgment, and give a presumption of constitutionality to statutes restricting the use of marijuana. However, where a state constitution includes a right of privacy, a state supreme court could uphold the individual right to possess marijuana for personal use.

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The Supreme Court has also yet to rule on the so-called "right to die". The right of privacy, with its emphasis on independent decision-making and human dignity, has provided a rationale for the termination of medical treatment in cases involving progressive, debilitating illness or imminent death. This argument was accepted by the New Jersey Supreme Court in the celebrated case of In re Quinlan.

At present, 8 states in addition to Hawaii provide for a right of privacy. In 3 states, the right is, as in Hawaii, enumerated in the provision which covers searches and seizures. In one state, it is enumerated in the opening section on inalienable rights (comparable to Hawaii Constitution, Article I, section 2). In the remaining 4 states, the right of privacy is a separate provision.

Since the right of privacy has already been considerably defined by the judiciary, and is one of the major new concepts in constitutional law, it may be important to dignify the right by giving it separate treatment. The Alaska provision is particularly noteworthy in that it not only recognizes the right but also mandates the legislature to further develop it.

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

Arguments For and Against a Separate Right of Privacy in the Hawaii Constitution

Pro

- (1) An essential purpose of the Bill of Rights is to create sanctuaries of individual behavior free from unwarranted governmental interference. A separate right of privacy would be consonant with this purpose.
- (2) General constitutional protection of privacy would encourage the courts to interpret existing statutes and regulations that affect privacy with greater sensitivity to the individual's interest. Present statutes regulating information-handling for example show some but not enough consideration for privacy interests.
- (3) A constitutional provision would give the courts a broad mandate to develop the right through case law. Judicial definition of the contours of the right of privacy would be as comprehensive and effective as a right enacted by the legislature.

Con

- (1) A constitutional provision might generate the assumption that the government should exercise its power up to the limits of the individual's right to resist.

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- (2) A right of privacy tied to a constitutional provision is inherently inflexible and difficult to change.
- (3) The judicial development of a right of privacy would be limited by the individual litigation context, by the types of cases which happened to come before the court. [This is already apparent in Hawaii case law interpreting Article I, section 5.] A more comprehensive approach by the legislature is necessary.

THE INDIGENT AND THE RIGHT TO GOVERNMENT SERVICES

American rights have been historically rooted in negative claims against government restrictions or interference with respect to civil and political liberties. The Bill of Rights has limited the power of government to act arbitrarily or even to act at all through such guarantees as free speech, free press, and religious liberties. In recent years, the traditional conception of rights as encompassing only restraints upon governmental action has been challenged because of 2 significant developments: (1) the affirmative involvement of government in the provision of services that promote a person's economic security and well-being; and (2) the increased use of government regulation designed to inhibit access to these services.

Through a growing range of statutory enactments, states, aided by the federal government have increasingly become vested with the responsibility of providing needed services to the less fortunate. These services generally include basic necessities like income assistance, medical care, education, employment, and housing.

Acceptance of government's role as a provider of such services is due to the belief that these services are vital to the livelihood of economically deprived segments of our society. It is now widely recognized that the inability to independently obtain these necessities is often the result of social rather than individual circumstances.

It is the recognition of such factors that has generated public discussion about the possibilities of including positive statements concerning economic and social rights in a constitution. Unlike the traditional rights enumerated in a constitution, they are positive rights because they are a claim upon rather than against government.

Past discussions concerning the inclusion of positive rights were mainly concerned with the appropriateness of including a complex economic issue in the constitution. When attempts were made in the 1968 Constitutional Convention to provide a right to economic security, several delegates expressed the opinion that the task of creating such guarantees belong to the legislature. Annual legislative sessions made them better equipped to determine the level of aid that the state was capable of offering and the manner in which it should be provided. Those supporting an economic security right believed that its inclusion would demonstrate Hawaii's concern for the indigent, and prohibit the state from providing assistance that is below the minimum standard of living.

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The amendment was defeated primarily because there seemed to be no urgency for the inclusion of such economic rights in the Hawaii Constitution. It was pointed out that levels of payment were increasing, and at that time, the federal government had made a substantial commitment to the poor through the "War on Poverty". But since the 1968 Constitutional Convention, many states and local governments have become concerned with the perils brought by population growth and its corresponding effect on government-sponsored services. A number of laws have been implemented to control growth including limiting access to these services.

In Hawaii, where the state offers many of the services of municipal governments, overpopulation and its correlative burden on state services have been identified as one of the most important and pressing problems. Long-range plans are being developed to provide some control over the state's birth rate and for dispersing the population throughout the state. Another factor, in-migration, has received more immediate attention. It now contributes more to the overpopulation problem than resident births. One of the methods tried to help deter newcomers from settling is a one-year residency requirement enacted in Hawaii in 1977 as a condition for employment in the public sector.

Current efforts to safeguard the poor's access to services have been primarily accomplished under the Fourteenth Amendment of the U.S. Constitution. Under the Due Process clause, the emphasis has been to assure that the indigent received adequate and fair treatment in the receipt of services. For example, should a state find that an indigent is no longer eligible for welfare benefits, the indigent's right to due process is violated if benefits are terminated prior to holding an evidentiary hearing to determine if such action is warranted.

The equal protection standard has been used primarily when a fundamental right is violated or if a law or government practice creates a suspect classification. The fundamental right issue was involved in Harper v. Board of Elections where the right to vote was contingent upon the payment of a poll tax, a condition the Court said was unconstitutional. Laws which seek to exclude certain segments of the society from participating in welfare programs are an unconstitutional classification regarding that segment unless the state shows a compelling state interest. Thus, laws denying welfare benefits to aliens and illegitimate children have been declared unconstitutional in the absence of a compelling state interest.

The equal protection standard has more recently been intertwined with another fundamental right: the right to travel. The freedom to move and settle in a place of one's own choosing without interference has long been recognized and protected in the United States. Although the U.S. Constitution has no provision which explicitly deals with a person's right to interstate travel, Article 4 of the Articles of Confederation expressly provided that people of each state shall have free ingress and egress to and from any other state. Throughout the years, a number of U.S. constitutional provisions have been cited as a basis for the right.

The involvement of the right to travel with the equal protection clause is primarily due to the state's use of durational residency requirements for certain

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services. In the 1969 case of Shapiro v. Thompson, the Court held that the denial of welfare benefits to persons who had not met a one-year residency requirement was an unconstitutional penalty on a nonresident who had exercised the fundamental right to travel. The Court stated that the equal protection standard must be used because the law created 2 classes: those who reside in the state for more than a year and are eligible for benefits; and those who have resided for less than a year and do not qualify for such benefits. The Court mandated that the state must show that the continuance of the class is necessary to promote a compelling state interest, a burden that the Court felt that the state failed to sustain.

Unlike previous cases involving the right to travel, Shapiro signaled the U.S. Supreme Court's willingness to strike down laws which indirectly impinge that right. Along similar reasoning, durational residency requirements were struck down for voting and for the right of an indigent to receive free local government-sponsored medical care in Memorial Hospital v. Maricopa County.

The U.S. Supreme Court's holdings in these 3 cases do not appear to completely invalidate the use of durational residency requirements. In Shapiro, the Court stated that its holdings against durational residency requirements for welfare could not be used to imply the unconstitutionality of waiting periods or residency requirements for other services. In 1975, the Court upheld a state law requiring one-year residency as a condition for obtaining a divorce decree. Similarly, the Court upheld a state's interest in charging higher tuition rates for nonresidents in a state university system. The Court also noted a distinction between waiting periods and continuing residency laws and has upheld the latter. In McCarthy v. Philadelphia Civil Service Commission, a municipal regulation requiring city employees to be residents was held to be constitutional and not in violation of a person's right of interstate travel.

In Hawaii, there are 3 significant sources relating to the use of durational requirements. The Hawaii Supreme Court in 1972 declared constitutionally valid a statute which prohibited granting a divorce decree unless a person was domiciled or physically present within the state for one year before making an application.

In that same year, the Hawaii court also struck down a 3-year residency requirement for public employment because the law created an arbitrary classification without a rational relationship to a person's capabilities of performing the task and the law operated irrationally without reference to a legitimate state objective. Finally, an attorney general's opinion stated that a 90-day durational requirement for abortion in Hawaii was invalid.

In Maricopa County, the Court's decision to declare a durational requirement for free nonemergency medical care unconstitutional seemed to rely more on the fact that a fundamental service was involved rather than the right to travel. Legal commentators have suggested that this may have signaled the Court's recognition that basic necessities of life like medical care are fundamental rights protected by the Fourteenth Amendment.

The creation of a fundamental right to "basic" services, however, has consistently been repudiated by the U.S. Supreme Court. It refrained from

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finding a fundamental right to either housing or welfare in Lindsey v. Normet and in Dandridge v. Williams. In Dandridge, the U.S. Supreme Court upheld a Maryland law placing a limit on the amount of welfare payments available regardless of family size. The Court acknowledged the state's power in the area of economic and social regulation by approving the 2 legislative purposes for the law--encouragement of employment and avoidance of adverse income discrepancies between welfare families and families of the working poor.

Two other cases have also had a bearing on the relevance of an indigent's inability to afford or command needed services. In San Antonio Independent School District v. Rodriguez, the Court refused to find that the state's system of school financing based on property tax deprived students in districts with low tax rates of equal protection. In Maher v. Roe, the Court upheld state regulation limiting public subsidies to those abortions that are "medically necessary".

In these cases, the Court places the responsibility for such rights with the appropriate legislative bodies. The recognition that these rights are properly the concern of legislative authority rather than the judiciary receive some support in this statement about the prospect of the judiciary guaranteeing a right to welfare:

Courts simply have no reliable way to calculate whether welfare benefits ultimately encourage or diminish effort on the part of a recipient, or how much higher welfare levels and broader eligibility standards depress the incentives of other relatively disadvantaged persons to find jobs and seek training, or whether and when cumulative redistributive effects lessen the productivity of those in professional and business leadership upon whose drive and creativity the jobs and well-being of many others may depend,...

The addition of such rights to the state constitution may be appropriate only if the legislature has the authority to provide the manner in which the right can be asserted. While there are no state constitutions which provide such positive rights, the amendment for economic security presented in the 1968 Constitutional Convention may serve as a model:

The rights of the people to economic security, sufficient to live in dignity, shall not be violated. The legislature shall provide protection against the loss or inadequacy of income and otherwise implement this section.

MISCELLANEOUS PROVISIONS

Trial by Jury in Civil Cases

Article I, section 10, of the Hawaii Constitution provides that:

In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved.

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The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

This provision is derived from the Seventh Amendment of the U.S. Constitution, one of the few of the first 8 amendments which are not binding on the states. The right of trial by jury in civil cases is seen to be less important than the corresponding right in criminal cases, and consequently, the U.S. Supreme Court has not seen fit to impose minimal federal standards in the civil area. Nonetheless, in Hawaii, because the state constitution and rules of procedure are patterned closely after their federal counterparts, the Hawaii Supreme Court would find U.S. Supreme Court interpretations of the Seventh Amendment and the federal rules of procedure highly persuasive.

One difference between the Seventh Amendment and Article I, section 10, involves the amount in controversy. Where the former requires a minimum amount of \$20, the latter has raised the figure to \$100. At the 1950 Constitutional Convention this figure was decided upon because a one-day jury trial cost the state at least that much. Although the convention wished to reduce the availability of jury trial, it considered and rejected a minimum of \$500. As a matter of practice, it would appear that all or nearly all jury trials involve an amount well in excess of either figure.

The right of jury trial in civil cases is limited to suits "at common law", and does not extend to "equitable" proceedings such as divorce, adoption, guardianship, or probate. But in a case involving both legal and equitable issues, the right to a jury trial on the legal issues is preserved.

Where the right to trial by jury in a criminal case can only be waived (i.e. relinquished) by the defendant with the approval of the Court, a party in a civil suit may lose the right to trial by jury simply by failing to ask for one within the applicable time limit.

Another difference between the Seventh Amendment and Article I, section 10, is that the latter expressly permits the legislature to provide for less than unanimous verdicts. The legislature has implemented this provision by allowing a verdict to be returned when five-sixths of the jurors agree. This is in keeping with a trend observed by more than half the states, permitting majority verdicts in civil cases. Under the Hawaii Rules of Civil Procedure, the parties may stipulate to a majority of less than five-sixths.

The controversy surrounding juries of less than 12 has of course involved civil, as well as criminal, cases. A discussion of the arguments for and against smaller juries can be found in the Administration of Criminal Justice. The 6-person jury is now the rule rather than the exception in federal civil cases. Hawaii state court juries are usually juries of 12, even though both the criminal and civil rules of procedure permit stipulation to a number less than 12.

A study of the trial jury in Hawaii has recommended that the right to jury trial in civil cases not be changed, e.g., by eliminating the right in certain types of cases. Civil jury trials here are relatively infrequent; a relatively small saving would be achieved by limiting the right; there is a lack of interest in changing the right by judges and jurors. The study also recommends that

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the size of the jury in civil cases not be compulsorily reduced. If it is reduced, a jury of 8 could be tried on an experimental basis and the majority verdict by five-sixths retained.

Imprisonment for Debt

Article I, section 17, of the Hawaii Constitution, promulgated by the 1950 Hawaii Constitutional Convention and unchanged since that time, provides:

There shall be no imprisonment for debt.

The 1950 framers explicitly interpreted this provision as applying only to contract obligations and not to nonpayment of fines and penalties imposed for the violation of law.

Although the U.S. Constitution does not have any provision which prohibits imprisonment for debt, all but 13 state constitutions contain provisions which, although varying in terminology and application, prohibit imprisonment for debt. The United States Supreme Court has recognized the power of the state to abolish imprisonment for debt.

The Hawaii Supreme Court never has been faced with the question of what is a debt within the meaning of Article I, section 17, of the Hawaii Constitution. Judicial construction nationwide, however, appears to indicate that debt within such a constitutional provision arises exclusively out of the power to contract.

The consensus appears to be that constitutional guarantees against imprisonment for debt have as their purpose the prevention of the useless and often cruel punishment of persons who, having honestly become indebted to another, are unable to pay as they undertook and promised.

In 8 state constitutions besides Hawaii's, the power of the state to abolish imprisonment for debt altogether is absolute and contains within its terms no exceptions. California's Constitution expressly includes within its bar on imprisonment for debt tortious acts and peacetime militia fines, and thus appears to be broader in scope than Hawaii's.

Although the Hawaii Supreme Court has yet to decide the scope of the constitutional guarantee against imprisonment for debt, it did rule in an 1895 case that under constitutional guarantees of the Republic of Hawaii imprisonment for debt is barred where no fraud or crime is alleged. In 17 state constitutions the exception for cases of fraud as a ground of imprisonment is express. In Georgia and Tennessee, where the constitutional prohibition against imprisonment for debt is absolute, at least one state supreme court opinion in each state has excepted cases of fraud from the bar on imprisonment for debt. Five other state constitutions prohibit imprisonment for debt unless there is a "strong presumption" of fraud.

Some courts have construed constitutional provisions proscribing imprisonment for debt as excepting cases involving nonpayment of taxes. Upon

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the view that the penalty of imprisonment for nonpayment of taxes or license fees upon occupations, privileges, and similar activities is imposed, not for refusal or inability to pay the tax, but for violation of a duty imposed upon the taxpayer by law, the courts in some cases have held that statutes, ordinances, and other regulations imposing such taxes or license fees lawfully may authorize the imprisonment of those who fail to pay.

The 1950 Hawaii delegates resolved in floor debate that contempt proceedings to enforce alimony payments were not intended to be covered by Article I, section 17, of the Hawaii Constitution, and thus followed the lead of every state court except Missouri's at that time.

Possible Approaches. The constitutional convention may wish to review various constructions of the scope and application of the freedom from imprisonment for debt guarantee.

- (1) Article I, section 17, of the Hawaii Constitution prohibiting imprisonment for debt appears to apply to contract obligations and not to nonpayment of fines and penalties imposed for the violation of law. The constitutional convention may wish to make this restriction express, as Missouri and Oklahoma have done.
- (2) The constitutional convention also may wish to explore the question of contempt proceedings to enforce alimony payments as a possible express exception to Article I, section 17.
- (3) Constitutional revision in addition may focus on the question of broadening Article I, section 17, to include tortious conduct and peacetime militia fines within the proscription on imprisonment for debt. Article I, section 10, of the California Constitution explicitly includes these 2 areas within its bar on imprisonment for debt.
- (4) Constitutional revision may center too on the issue of excluding fraudulent conduct from the protections of the bar on imprisonment for debt. Seventeen states already have written that exception into their constitutions and 5 other state constitutions have made exception for a "strong presumption" of fraud.
- (5) Finally, the constitutional convention may wish to debate the question of whether the protection of Article I, section 17, excludes imprisonment for nonpayment of taxes. The generally held view appears to be that "debt" under constitutional provisions barring imprisonment for debt limits debts to those founded upon or arising out of contract, excluding taxes.

Eminent Domain

The Fifth Amendment provides in part:

...nor shall private property be taken for public use without just compensation.

The United States Supreme Court held in 1897 that the Fifth Amendment restraint on the power of eminent domain is deemed incorporated by the Fourteenth Amendment due process clause, and hence is a limitation on the states as well as the federal government. The typical provision, found in every state constitution except North Carolina's, provides that private property cannot be taken for public use without making just compensation.

In the usual case of the exercise of the power of eminent domain, the government institutes proceedings against the landowner for the purpose of paying the landowner just compensation for the taking of property. This procedure is known as condemnation. Typically, the only issue to be decided by the court in a condemnation proceeding is the amount of compensation required. Generally, just compensation is measured by the fair market value of the land taken as enhanced by the improvements and fixtures attached to the particular parcel.

Eminent domain, which involves the taking of property needed for public use, should be distinguished from an exercise of the police power, which involves the regulation of property to prevent an owner from using the property in a manner that is detrimental to the public interest.

In the mid-1800's it was recognized that exercise of the eminent domain power resulted in indirect or consequential losses not contemplated by the market value formula. A taking for a public use frequently produced noncompensable losses of goodwill, interruption of business, removal expenses, and injuries to adjoining property no part of which was sought to be acquired. Finally, in 1870, a constitutional amendment was adopted in Illinois providing that private property should be neither taken nor damaged for public use without compensation. Today, 26 state constitutions require just compensation when property is taken or damaged for a public use. However, the 26 states which have the damage clause in their constitutions vary on the standards employed to determine what specific types of injuries require compensation.

A few courts have defined "damaged" to include those injuries which would have been actionable at common law were the damaging act done by a private individual. This definition involves compensation for damage resulting from those negligent acts or nuisances attributable to a sovereign. This standard, however, is hard to apply. First of all, few public improvements which damage adjoining land have been the subject of litigation. Cases have not come up frequently enough to have settled the question whether such public acts would constitute an actionable injury at common law. Second, some of the injuries from public improvements which cause the greatest hardship to individuals would not be actionable at common law.

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Common law liability undoubtedly is an indication of damage. Lack of liability at common law, however, might not conclusively prove that there is no damage under the constitutional provision.

The broadest application of the constitutional "damage" clause has been under the depreciation in value standard. This standard provides that any public use of land which causes an actual ascertainable depreciation of the present market value of neighboring land constitutes damage. Although this rule has received approval in a few cases, in most jurisdictions such a definition of damage has been rejected as too broad, and compensation has been denied for injuries which had a depreciating effect upon the present market value.

Most jurisdictions which have adopted the damage clause have supported the rule that one is entitled to just compensation when one's land is damaged for a public use if there has been a physical injury to the property or the property rights of the owner. This rule does not allow compensation where the mere presence of the public use devalues the adjacent land. Compensation is required when there has been some physical disturbance of a right, and because of such disturbance, the occupier of land has sustained a special damage with respect to the property in excess of that sustained by the public generally.

Although the majority rule does not create an unwarranted distinction between those injured by private and by public improvements, as the actionable injury at common law standard appears to do, it has been criticized for arbitrarily distinguishing between an owner whose land in part is taken and one whose land is not taken at all. For example, if 2 persons own adjoining similar tracts and a railroad is constructed in such a way as to take a few inches off one tract and to pass just outside the other, the owner of the first tract by an accidental circumstance not affecting the merits of the owner's case recovers full compensation for the depreciation in value of the land. The owner of the second tract which receives almost precisely the same injury receives nothing. The depreciation in value rule, which does not require physical injury to property or to a property right, does not appear to entail such difficulty.

Article I, section 18, of the Hawaii Constitution reads:

Private property shall not be taken or damaged for public use without just compensation. [Emphasis added]

The 1950 Constitutional Convention adopted the eminent domain provision of the Fifth Amendment. Although the "or damaged" clause was considered for adoption at that convention, the convention rejected it, feeling that the term "damaged" was too vague and uncertain.

The 1968 Constitutional Convention adopted the "or damaged" clause first adopted by Illinois in 1870 and subsequently adopted in 24 other states. Convention Committee Report No. 15 cited with approval a case which promulgated the majority rule of special and peculiar damages, but expressly stated that that case and other findings at the convention are intended only to guide the courts, not to bind them.

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The Hawaii Supreme Court to date has not been confronted with an Article I, section 18, "damage" claim where no total or partial taking has occurred. In 4 cases, however, involving commercial lots where improvement and development expenditures and anticipated profits were sought as separate items of damage in condemnation proceedings involving taking of whole real properties, the court limited damages that could be received. In all 4 cases it provided that the loss of business profits and expenses incurred only could be considered as evidence in the process of determining the fair market value of the taken property.

Although it is clear that a class of damages, which formerly was noncompensable, now requires compensation, the vast majority of jurisdictions require some sort of physical injury to property or property right, thus limiting the measure of damages that may be awarded. The physical limitation to application of the damage clause, however, is a product of judicial interpretation and not the language contained in the constitutional provision.

While the eventual significance of Hawaii's damage clause must await future judicial determination, the constitutional convention may wish to provide guidance as to what "damage" is compensable and what standard of compensation should apply.

Construction

Article I, section 20, of the Hawaii Constitution provides a saving clause:

The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.

This section was promulgated by the 1950 Constitutional Convention but was not discussed at the 1968 Convention. Standing Committee Report No. 20 of the 1950 Convention explained that section 20:

[R]epresents a general statement reserving to the people those rights and privileges not specifically enumerated in the Bill of Rights and to prevent any interpretation by the courts that because certain rights and privileges were not specifically enumerated, it was intended to deny them to the people.

Thirty state constitutions have provisions very similar to Article I, section 20, of the Hawaii Constitution and the interpretations of those provisions uniformly appear to represent the view set forth by Standing Committee Report No. 20.

The language of Article I, section 20, is virtually identical to that of the Ninth Amendment of the U.S. Constitution which reads as follows:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

BILL OF RIGHTS

Although Hawaii's constitutional framers did not state that Article I, section 20, of the Hawaii Constitution was adopted from the Ninth Amendment, Justice Levinson of the Hawaii Supreme Court has explained that Hawaii's saving clause contains a similar rule of construction. The 30 state constitutions which have provisions similar to Hawaii's saving clause uniformly appear to recognize the applicability of the Ninth Amendment to those provisions.

Although authorities seem to disagree on the significance of the Ninth Amendment, there is little disagreement as to the purpose of including it in the U.S. Constitution. Historically, it was included to nullify the argument that the enumerated rights were intended to be the only rights protected.

As for its applicability to the states, although one commentator has suggested that the Ninth Amendment directly is applicable to the states, the arguments against direct application and in favor of incorporation through the Fourteenth Amendment seem far more persuasive. Neither the Ninth Amendment nor Article I, section 20, has been often cited in case law. In the U.S. Supreme Court and the Hawaii Supreme Court, reference to these provisions has been made in a few cases regarding "privacy" claims.

Article II

SUFFRAGE AND ELECTIONS

The right of suffrage (also called the right of franchise) is, simply stated, the right to vote. In a democratic society, a citizen's main check on government is through the voting process. The voting process is commonly termed an election. It is here that one may directly participate in the selection of those who exercise the power of government.

The United States Supreme Court, in Reynolds v. Sims, observed:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.

Thus, suffrage and elections are central to the United States' system of representative government.

State constitutions lay the basic framework for carrying out the electoral process. Major provisions deal with (1) suffrage, the question of who may vote; and (2) elections, the process of voting. Two other important topics are (1) nominating procedures, the extent to which such provisions should be included; and (2) initiative, referendum, and recall, 3 additional methods whereby the people may more actively participate in the democratic process.

SUFFRAGE

All state constitutions include some basic qualifications and disqualifications for voting. The qualifications most commonly mentioned are: (1) United States citizenship, (2) a minimum age, and (3) a minimum period of residency. The disqualifications most commonly mentioned include: (1) conviction of certain crimes, and (2) unsound mind. Additional provisions are set by statutory law in some states.

In commenting on the significance of the right of suffrage, Justice Matthews in Yick Wo v. Hopkins, said:

Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights.

Action at the federal level has resulted in almost universal suffrage in the United States.

SUFFRAGE AND ELECTIONS

Qualifications

- (1) United States citizenship is required by all 50 states as a voting qualification in their constitutions.
- (2) The voting age was lowered to 18 years in all 50 states, for all elections, by the ratification in 1971 of the Twenty-Sixth Amendment to the United States Constitution.
- (3) All literacy and other tests or devices were totally suspended by the Voting Rights Act Amendments of 1975.
- (4) Poll tax payments and property ownership requirements are no longer valid constitutional qualifications for voting in federal, state, or local elections, due to the passage of the Twenty-Fourth Amendment to the United States Constitution and several United States Supreme Court decisions.
- (5) Durational residency requirements for voting have been declared unconstitutional by the United States Supreme Court. However, a reasonable length of time for registration may be imposed by the states--a period of perhaps 30 to 50 days.

Disqualifications

Conviction of Crime. The conviction of certain crimes as a disqualification for voting is mentioned in the constitutions of all 50 states. The most commonly mentioned offenses include: (1) felonies--26 states, (2) election crimes--14 states, (3) treason--13 states, and (4) infamous crimes--12 states. In most states constitutional provisions are supplemented by statutory law. Such provisions are included because it is thought that convicted criminals, by their conduct, have demonstrated irresponsibility and opposition to basic social standards.

Typically, constitutional provisions may consist of one or both of the following: (1) naming of the crimes or conditions under which the right of suffrage is lost, and (2) provisions for reinstatement of the right to suffrage.

Unsound Mind. Unsound mind as a disqualification for voting is found in the constitutions of 40 states. Such provisions consist of one or more of the following parts: (1) the mental conditions under which the right of suffrage is lost, (2) how mental incompetency is determined, and (3) when the right of suffrage may be restored. Similar provisions are found statutorily in some states.

Some states have recently begun drives for voter registration for the mentally disabled as opposed to the mentally insane. A large voter registration drive at one institution in New York resulted in the registration of 250 out of 400 residents who were not severely retarded. The drive included: (1)

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educational programs, (2) campaigning, and (3) an evening question-and-answer session attended by 6 candidates.

ELECTIONS

The right of suffrage has been greatly extended in the twentieth century. The right of suffrage, however, is only one of the 2 halves of the American voting system: the other half being the electoral (elections) process. The electoral process can be an effective instrument of citizen control of government only if: (1) citizens are assured of the right of suffrage, and (2) election systems facilitate and encourage eligible voters to exercise their right of suffrage.

Most state constitutions contain a few basic statements on the electoral process, and order the legislature to provide for the details of the conduct and administration of elections. The most common concerns expressed in election provisions deal with administration, registration, and absentee voting.

Administration

State constitutions usually assign the responsibility of election administration to the legislature. This is the approach taken in the Hawaii Constitution. Two current issues in the field of election administration are the development of uniform procedures and the quality of election personnel.

Uniform procedures of election administration are important in obtaining equal suffrage throughout a state. In most states, however, each county and municipal government is given the responsibility of conducting elections. Without a central authority, the various jurisdictions "...are often left to their own devices to interpret laws that may be vague or outdated.... This results in a set of ambiguous and contradictory provisions for local use." In recent years, a few states have begun to shift the responsibility of election administration from the county to the state level. Since 1973, Florida, Georgia, Illinois, Indiana, Kansas, Rhode Island, Tennessee, Virginia, and Wyoming have acted to centralize state authority over the conduct of elections. Hawaii has had a centralized election process at the state level for many years.

Most authorities agree that in light of recent federal legislation and judicial decisions, there is an obvious need for extensive training programs to develop competent and responsible election personnel. The Illinois state board of elections has recently developed a 10-week training course for its state coordinators of elections: 6 weeks of classroom work and 4 weeks of field work.

SUFFRAGE AND ELECTIONS

Registration

Voter registration systems arose as a result of: (1) large increases in population, particularly through immigration, (2) the density of population in urban places, and (3) the mobility of the population. Election officials could no longer recognize each voter at the polls. In order to prevent fraudulent voting, voter registration systems developed.

There are 2 major types of registration systems: periodic and permanent. Periodic systems require all voter registration records to become invalid at stated intervals, thus requiring all voters to re-register. Proponents of a periodic system maintain that such a system's records are more accurate and current than that of a permanent system, thus diminishing the chances for fraudulent voting. Opponents of a periodic system contend that: (1) it is too costly, (2) it is inconvenient for the public, and (3) it is an undue burden on registration officials. Permanent systems require a voter to register only once; except for a change of residence or name, or failure to vote in a given number of elections. Proponents of a permanent system maintain that: (1) it is convenient for the voter and thus encourages voting; and (2) it facilitates recordkeeping because voter registers need only be updated, entering newly eligible voters and deleting ineligible voters, instead of completely redoing the register. Opponents of a permanent system contend that: (1) the chances of fraudulent voting are increased because the list is not always up to date. Voters who have died, moved away, or otherwise lost their eligibility remain on the list for possibly several years, and (2) the high mobility rate of today's society makes such provisions useless.

An adjunct to voter registration has recently been considered, that is, mail voter registration laws which have been passed in 14 states and the District of Columbia. They: (1) supplement rather than replace in-person voter registration, and (2) are administered by local officials with a state agency overseeing the local actions. Mail voter registration is a fairly new concept, thus data on its effectiveness are as yet initial and incomplete.

Absentee Voting

Most authorities agree that in view of the high mobility of American society, absentee voting privileges should be extended to all qualified electors who are unable to vote in person, because they are absent from the community or otherwise unable to go to the polls. Federal legislation has resulted in absentee voting rights for most Americans in presidential elections.

Other Important Provisions

Other important provisions include:

(1) The time of elections: A basic principle of government by the consent of the governed is that elections be held regularly. Twenty-five states

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constitutionally provide for annual or biennial general elections. Where the constitution does not specifically provide for general elections, the election date for certain officials may be stated in that section of the constitution creating the office. In Hawaii, all national, state, and local public officials are elected at the regular general election held in even-numbered years.

(2) Orderly succession to office: State constitutions seek to insure orderly succession to office after elections by 3 major types of provisions. First, many state constitutions provide that the candidate receiving the highest number of votes shall be declared elected. Second, some state constitutions specify the date at which the terms of public officials begin. Third, several states include provisions for the continuity of office: (A) in the event that a newly elected official is unable to take office at the specified date, or (B) in the event of absence or disability of an elected official.

(3) The act of voting: The concept of secrecy in voting was not fully established in the United States until the late nineteenth and early twentieth centuries. The "Australian", or secret ballot, was adopted in order to assure that a person could vote without outside pressure. Some state constitutions include provisions protecting voters from arbitrary arrests during the voting process.

(4) The ballot: The ballot is the medium on which people indicate their choices in an election. Issues about the ballot are centered around: (A) its form (party column or office block), (B) its length (long or short), and (C) the order of names on the ballot.

(5) The purity of elections: The integrity of the electoral process must be protected to retain public confidence in election results and to permit candidates and their supporters to accept defeat. Thirty-four states constitutionally safeguard the purity of elections. All 50 states statutorily (A) prohibit fraudulent registration and fraudulent voting, and (B) regulate campaign contributions and expenditures in certain elections.

(6) Contested elections: Provision for the efficient and prompt resolution of contested elections is an important safeguard of the purity of elections and the continuity of government. Only 8 state constitutions, including Hawaii's, contain a provision for the resolution of all contested elections. Where the constitution is silent, the legislature is assumed to have the power to provide a method for resolving contested elections under its broad power to control and regulate elections.

NOMINATING PROCEDURES

The nominating process determines which persons shall be placed on the ballot for election. It is thus a critical phase of the electoral process because it limits the range of choice open to voters in their selection of elected officials.

The nominating process is generally considered a legislative matter. Only 11 states have constitutional provisions referring to primary elections or the

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nominating process. Hawaii's Constitution does not provide for primary elections.

There are 2 basic methods of nomination: (1) the convention system, and (2) the direct primary system. Nomination by political party convention is provided for in 14 states. It is not the major nominating procedure in the states. Direct primary systems are the major nominating procedures; they were developed to return the nominating process to the people. In large measure, they transferred control of the nominating machinery from the party to the state, all parties choosing candidates on the same day under the supervision of public election officials, with secret, standardized ballots printed at public expense.

Candidates for nomination usually qualify for a place on the primary ballot by securing a required number of signatures of qualified voters on a petition. The 2 most commonly used primaries are the closed primary and the open primary.

In a closed primary election, only those voters who have registered as members of a given party, or who declare their party affiliation when casting their ballots, are entitled to receive that party's ballot. Thirty-nine states (including Hawaii) and the District of Columbia provide the closed primary for state officers.

In an open primary election, voters receive the ballots of all participating parties. Eleven states provide the open primary for state officers.

INITIATIVE, REFERENDUM, AND RECALL

Initiative, referendum, and recall comprise 3 methods whereby the people may more actively participate in the democratic process. Initiative and referendum are sometimes called "direct legislation", because they involve the people in the direct exercise of legislative powers. In recall, the people may remove an elected or appointed official from office through a special election called by petition.

Initiative is the process through which the electorate, by petition, may propose legislation or constitutional amendments and enact the same by direct vote of a majority of the people. This is done independently of the legislature, and thus is a direct, rather than representative, form of democracy.

The referendum is a process whereby the electorate may approve or reject at the polls an act or constitutional amendment passed by the legislature. Although it is not used at the federal level for nation-wide voting, it is used by every state for approving or rejecting state constitutional amendments and in some states for approving or rejecting statutes or amendments to statutes.

The recall is a procedure whereby the people may petition and vote to remove a public official from office. Like the initiative and referendum, the recall grew out of the Progressive Reform Movement.

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Initiative and Referendum Pro and Con Arguments

The following is a summary of arguments for and against the initiative and referendum.

Pro

- (1) The initiative and referendum help to guarantee that the will of the people and popular control shall be safeguarded.
- (2) The campaign itself will educate voters on issues of the day and stimulate public interest, thus being an educational and democratizing influence upon the electorate.
- (3) The provisions aid legislators by guiding them along the course of public opinion. If there is sufficient interest to put an issue on the ballot, legislators, as representatives of the people, must give consideration to the issue.
- (4) Legislative stalemate and the insensitivity of a malapportioned legislature may be circumvented by the use of the initiative and referendum.
- (5) Opponents argue that the side spending the most money in the campaign usually wins. However, this is also true of elections in general. They are still part of the democratic process and are not being abolished for such a reason.
- (6) Initiative and referendum measures on the ballot do not tire or confuse the voter; in fact, there is great voter response although such measures are usually found at the bottom of the ballot.

Con

- (1) The initiative and referendum tend to lessen the legislature's sense of responsibility and make it hesitant to act, thus weakening the legislature.
- (2) The initiative and referendum may be taken over by special interest groups.
 - (A) Since large amounts of money and manpower are required to launch and carry through a campaign, it works mainly for large and moneyed organizations--not the everyday person. It may be added that a minority legislates for the majority.
 - (B) It is a waste of public funds to hold an election that holds interest for only such special interest groups.

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- (3) The voter may be confused and burdened by the numerous and technical questions often asked.
- (4) The initiative and referendum do not afford the positive factors of legislative debate: clearing the issues, exchanging ideas, and compromising.
- (5) The frequency of elections guarantee that the popular control shall be sustained. The people have a right to vote for those who will be open and interested in issues of concern.
- (6) Cost considerations:
 - (A) The side spending the most money will probably win;
 - (B) Elections may be tilted in favor of campaigns funded by large contributions to advertising.

Recall Pro and Con Arguments

The following is a summary of arguments for and against the recall of public officials.

Pro

- (1) The public will not have to endure unethical, abusive, or incompetent officials until their terms are expired.
- (2) Knowing that the people have the power of recall will cause public officials to exercise continuous responsibility.
- (3) The public will be more receptive to longer terms for officials knowing they have the power to check them with recall.

Con

- (1) Recall elections are costly. They are generally not held at the same time as other elections.
- (2) As all states have provisions for removal of public officials guilty of improper conduct (by judicial, legislative, or gubernatorial action), the recall is unnecessary.
- (3) Elections for public officials are held often enough to allow voters a firm control over them.
- (4) Recall allows well-organized groups to legally harass and intimidate public officials because recall does not endeavor to prove charges against officials; it merely urges the people to remove them from office.

Article III

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LEGISLATIVE AUTHORITY

Typical Constitutional Restrictions

State legislative authority is residual; legislatures possess all powers not denied by the U.S. Constitution or the state constitutions. Most state constitutions contain numerous restrictions on legislative authority. Limitations are inserted not only in the legislative article but are also scattered throughout the constitution. This is not the case in Hawaii. The Hawaii Bill of Rights is largely confined to a listing of traditional inalienable rights. States which include constitutional provisions for statutory initiative and referendum limit the legislature's full responsibility for legislation by permitting direct citizen participation in the law-making process. The widespread practice of inserting statutory law in the constitution through these methods is virtually nonexistent in Hawaii. Finally, the doctrine of implied limitations which holds that a legislature is limited to powers specifically enumerated on the state constitution, is not applicable in Hawaii.

Local and Special Legislation Restrictions

One common limit on legislative power--prohibition of local and special legislation--developed as a result of the confusion and corruption which spread through state legislatures during the nineteenth century. In consequence, most of the states have now inserted in their constitutions restrictions upon the enactment of special laws. The Hawaii Constitution prohibits special legislation in 2 areas: (1) the passage of laws relating to political subdivisions; and (2) with the exception of transfers, power over the lands owned by or under the control of the State and its political subdivisions. Where such restrictions on special legislation have been imposed, the major problem has been in determining when a general law is applicable and who is to resolve, finally, whether or not such a general act is or can be applicable.

Constitutional Restrictions on Fiscal Authority

An effective legislature requires an effective legislative fiscal process. The range of legislative fiscal duties and performance is not uniform, but generally they include: (1) budget, (2) revenue review and enactments, (3) cost input of proposed legislation, (4) longer range financial planning, and (5) post enactment review for legal compliance, actual performance, and intent. Constitutional restrictions on legislative fiscal authority vary from minimal to extensive. The fiscal authority of the Hawaii legislature is largely free of the common constitutional restrictive provisions affecting other states, such as

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establishing maximum tax rates, specifying uniformity, earmarking revenue sources for special funds and requiring approval to borrow by popular referendum. Fiscal authority is restricted by the use of special funds because ordinarily the legislature may not allocate such funds for purposes other than those specifically designated in the creation of the special funds. Earmarking is a device which dedicates revenue from a specific tax to finance particular government functions. Earmarking, as a feature of state revenue systems, has been defended on the following grounds:

- (1) It requires those who receive the benefits of a governmental service to pay for it.
- (2) It assures a minimum level of expenditures for a desired governmental function.
- (3) It contributes stability to the state's financial system.
- (4) It assures continuity for specific projects.
- (5) It induces the public to support new or increased taxes.

The device has been criticized on the following grounds:

- (1) It hampers effective budgetary control.
- (2) It leads to a miscalculation of funds, giving excess revenues to some functions while others are undersupported.
- (3) It makes for inflexibility of the revenue structure, and reduces the legislature's ability to respond to changing conditions.
- (4) It tends to retain provisions after the need for which they were established has passed.
- (5) It infringes on the policy-making powers of the executive and legislative branches, because it removes a portion of government activities from periodic review and control.

Hawaii has no earmarking specified by the Constitution, but the legislature has dedicated certain taxes through statutory provisions.

LEGISLATIVE-EXECUTIVE RELATIONS

Impeachment

A method by which the legislature may remove executive or judicial officers is that of impeachment. Since the impeachment procedure is essentially judicial in nature, the power of impeachment is considered as a judicial power of the legislatures. The impeachment process provided in most states involves 2

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distinct steps: (1) the preferring of charges by the lower house of the legislature, and (2) the subsequent trial of those charges by the senate sitting as an impeachment court. Usually the grounds upon which impeachment charges may be based are prescribed by constitutional provision, though in a few states they are not so stipulated. The Hawaii Constitution specifically grants the senate power to try impeachments only in cases involving the governor and lieutenant governor; the procedure for trying other appointive officers shall be provided by law. Several authorities feel that the power of impeachment does not serve as an important means by which the legislature is able to oversee the executive because it is an extreme measure reserved for extraordinary situations rather than ordinary use. Others, however, consider impeachment a useful device to have available particularly for those instances where public officials may be so powerful as to effectively block court action against themselves.

Veto

Legislative authority is affected by the power of the governor's veto. Most students of government feel that the check and balance theory of government requires a strong veto power by the governor. Two steps in the veto procedure are of importance to legislative power--the legislative vote required to overturn a veto, and the ability of the legislature to reconvene after adjournment to reconsider measures vetoed at the end of the session. Legislative power is diminished when the governor's veto is absolute. This happens when the governor vetoes measures after the legislature is unable to reconvene to consider the vetoed measures. In addition to the proportion of legislators necessary to override the governor's veto, the ability of the legislature to meet for reconsideration of vetoed bills or items affects legislative authority. In those states where the legislature does not have the power to reconvene itself, the governor's veto after adjournment becomes absolute. Hawaii does not permit the governor a pocket veto, whereby a bill dies if the governor does not sign it within a given number of days.

Sessions

All state constitutions permit the governor to call the legislature into special session. Many persons contend that the legislature should also have this power. If the legislature cannot call itself into session and must rely solely upon the governor, it may be argued that the legislature is not equal to or independent of the other 2 branches of state government. A further limitation may occur if the legislature cannot determine what items to consider in the business transacted during a special session. It appears that in Hawaii the legislature and the executive share the authority to call the legislature into session and to determine what matters are in need of immediate legislative attention.

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Executive Oversight

Equally important to the legislature's role as policy-maker is its function of overseeing the implementation of its policy. The oversight function consists of a variety of activities such as requiring reports by administrative agencies, investigations, fiscal procedures, review of budgets and administrative rules, and approval of appointments and removals. Oversight activities can serve 3 purposes from the point of view of the legislative branch:

- (1) Oversight provides a mechanism by means of which the legislature can test and attempt to secure compliance with legislative policy.
- (2) Oversight affords an opportunity for the legislature to evaluate and assess legislative policy, indicating areas where there are differences between expected and actual performance.
- (3) Oversight activities permit the development of relationships between legislators and administrators so that there can be reciprocal and sustaining support for public policy.

Most legislatures do not effectively exercise oversight of the administration, largely because of constitutional restrictions on length and frequency of sessions, high legislator turnover, and poor staffing. An example of oversight is legislative review of administrative rules which occurs in about one-half of the states. Hawaii has no such review but checks on the rule-making powers of state agencies have been statutorily provided by (1) requiring gubernatorial approval of the adoption, amendment, or repeal of rules; and (2) establishing procedures for obtaining a judicial declaration as to the validity of an agency rule. Certain types of legislative review of administrative rules and regulations have been questioned in some jurisdictions as a violation of the separation of powers concept.

Separation of Powers

Legislative review of rules is part of the larger question of legislative control of the executive. To approach the constitutional question as purely one of separation of powers to be resolved by a precise demarcation of legitimate legislative and administrative spheres is fruitless. They can never be totally separate and distinct. Either extreme of keeping the legislature out entirely or involving it intimately with the administrative process violates the doctrine of checks and balances and does not appear to promote the public welfare. Effectiveness may be better achieved through increased legislative interest and adequate staff rather than upon adoption of formal powers.

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LEGISLATIVE STRUCTURE

Bicameral or Unicameral

A central issue concerning legislative structure is whether the legislature should be composed of one or 2 chambers. Many believe that the choice will greatly affect how the legislature performs its duties. The legislature should represent the people and enact the will of the majority with due regard for the state's minorities. In considering the arguments for and against bicameralism and unicameralism the question may be rephrased as "Which system will enable the legislature to best accomplish its work?"

Unicameralism and bicameralism have been considered before in Hawaii. In 1967, a Citizen's Committee to Advise the Senate on Legislative Process was appointed to determine how the legislative process in Hawaii could be improved. The committee recommended that bicameralism be retained in Hawaii's state legislature. Although the committee recommended that the bicameral legislative structure be retained, it also recommended certain modifications in view of prevailing criticisms. The committee believed that many of these recommendations for modification could be met by current legislative practices. The 1968 Hawaii Constitutional Convention also spent time deliberating the issue of a one- or two-house legislature and produced a listing of the claimed strengths and weaknesses of the 2 systems. The main strengths of unicameralism were seen by the convention as:

- (1) A simplistic legislative structure;
- (2) Decreased costs because of fewer legislators and support services;
- (3) Increased legislative visibility and accountability; and
- (4) A decrease in the power of political parties.

Bicameralist arguments centered on the two-house legislature providing:

- (1) Better representation;
- (2) Greater difficulty for interest groups or individuals to control 2 houses;
- (3) Greater opportunities for intense scrutiny of legislation prior to enactment; and
- (4) A much better record than Nebraska's 40 years of unicameralism since it has successfully operated in Hawaii for over 70 years.

Advocates of both systems agreed that the quality of legislation and the effectiveness of the state legislature is dependent upon the type of people the legislature is able to attract.

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With respect to the debate on bicameralism and unicameralism it appears that (1) to discuss unicameralism Nebraska must be used as the state operational example; and that (2) it may not be so much a question of unicameralism vs. bicameralism, but rather, a question of what is to be achieved through the legislative process and if it is legislative structure alone which best accomplish these ends.

In carrying out its deliberative function the legislature must identify the major issues of state affairs, sort out the conflicting claims presented by constituents, interest groups, and executive agencies, and arrive at a set of decisions for the state. The quality of the deliberative process is thought by many observers to be significantly influenced by utilizing either the bicameral or unicameral legislative structure. The many arguments raised for a one- or two-house legislature have focused mainly on (1) checks and balances in deliberative legislative functions; (2) effective representation; (3) visibility and access to legislative operations; and (4) cost and efficiency.

Legislation must be carefully conceived, technically sound, and insulated from the temporary pressures of popular passions and impulses. Traditionally, this goal has been sought by building a system of checks and balances into the legislative process. Proponents of unicameralism claim:

- (1) The Nebraska experience has demonstrated that procedural safeguards can be devised in the single-house structure to assure careful deliberation and ample time for debate before the vote is taken.
- (2) In the bicameral structure many bills passed in one house are received in the second house so late in the session that it is impossible to give them more than perfunctory consideration. Furthermore, bills are often passed without careful consideration in one house on the assumption that the second house will give more intensive review and this expectation is not always realized.

Bicameralists assert:

- (1) A two-house legislature with a duplicate committee system assure that careful deliberation will be given to legislation.
- (2) The problems presented by the end-of-session rush for adequate consideration may be exaggerated. In Hawaii, final dates for action on legislation have been established at least within 7 days after the opening of the legislative session. These dates require legislators to consider legislation before bill deadlines and reduces the number of bills which may be considered at the end-of-session.

The issues considered and the decisions reached in the deliberation process must be representative of the interests and desires of the people. Unicameralists argue that:

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- (1) The utility of the bicameral system as a device for representing geographical areas has been negated by the U.S. Supreme Court apportionment decisions. The Court said in Reynolds v. Sims, "the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies".
- (2) Since each chamber of the legislature must be apportioned on the basis of population a second chamber is no longer needed to assure adequate representation and would be superfluous for this purpose.

Bicameralists contend:

- (1) Although the Reynolds v. Sims case is often used as unicameralism's strongest argument, the same decision equally contains the strongest argument used for bicameral proponents where the U.S. Supreme Court explicitly rejected the suggestion that it was making bicameralism obsolete.
- (2) In any districting, geographical features are bound to cause some inequities in population among districts. Where there are 2 houses, an area that is somewhat underrepresented in one house may be given a compensating advantage in the other. Not only can bicameralism establish a more complete scheme of representation, it also permits a state to add a variety of dimensions to its representative system. In all states the lower house is larger than the upper, and by size and number, its members represent smaller constituencies.

Visibility and access to governmental operations are usually discussed in the same context as responsiveness and accountability and, in fact, are actually methods by which the larger goals of responsiveness and accountability are sought. Unicameralists claim:

- (1) A single house is more responsible to the voter because the legislative structure, being simpler, is more visible to the voter and more easily understood.
- (2) The unicameral structure facilitates the work of the press in keeping the voter informed.

Bicameralists argue:

- (1) Since the bicameral system has been the traditional legislative form, its operations are familiar to and understood by the people, thereby permitting the electorate to exercise greater control.

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- (2) Procedural rules rather than legislative structure are more important in making the legislative process visible and comprehensible to the people.

In view of the rising cost of government and recent fiscal problems confronting states and municipalities across the nation, the unicameralist's argument of cost and efficiency has gained attractiveness due to the following points:

- (1) The procedural delays and duplication of the dual committee system are eliminated and the rivalry between the 2 houses, often resulting in deadlocks, are removed.
- (2) With leadership concentrated in one house, legislative business is conducted in a more orderly fashion and effective working relations between the executive branch and the legislature can be achieved.

Bicameralists argue that efficiency is dependent upon factors other than structural form.

- (1) Such devices as a legislative council, bill drafting services, electronic equipment, committee systems, and other mechanisms of internal control can produce efficient legislative operations.
- (2) The expense and inefficiency of the committee system can be corrected by the establishment of joint committees with parallel functions in each house and a joint rules committee for coordinated management of the legislature.

OTHER STRUCTURAL CONSIDERATIONS

Size

Determination of what the proper size of the legislature should be has not been solved in a satisfactory manner. There seems to be no pattern in the size of legislative assemblies, except that the senate is smaller than the lower house. As a general guiding principle, it has been suggested that a legislature's membership should be large enough so that the major interest groups within the state may be represented, yet not so large as to be unwieldy in its action.

Sessions

The state legislature is the only branch of state government limited by the state constitution in the way it can schedule its business. But the trend moves toward fewer and fewer restrictions. There are several reasons for reducing restrictions on sessions:

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- (1) Social and economic problems at the state level demand faster legislative action.
- (2) Demands for action on social and economic problems show no signs of decreasing.
- (3) It is extraordinarily difficult in those states restricted to meeting only once every 2 years for the legislature to predict revenues and expenditures for a 2-year period.

There are 2 interrelated issues crucial to the discussion of legislative sessions: their frequency and their duration. The issue of frequency centers around the debate between advocates of annual and biennial sessions. The issue of duration revolves around the question of whether a constitution should place limits on the length of legislative sessions. Advocates of biennial sessions argue that:

- (1) Persons in favor of biennial sessions feel the quality of legislators may be better because some of the state's best citizens, who may be too busy to meet the time demands of legislative service each year, might be willing to give time every 2 years. The biennial system, it is said, allows legislators time to meet with the voting public.
- (2) In addition, the time between biennial sessions allows better performance of between-session studies and other interim work.

Advocates of annual sessions argue that:

- (1) Many believe that the balance of power of the governor and the legislature may be threatened, because the legislature is not a continuous body and it is more dependent on the executive branch of government. Annual sessions tend to overcome this imbalance.
- (2) Annual sessions allow the budgeting and legislative process to be more responsible to react to changes because of inflation, population shifts, the expansion of government functions, and unforeseen emergencies, which can occur every year.

Although the major issue in the frequency of legislative session is biennial versus annual sessions, several other alternatives have been tried, including unlimited biennial sessions, alternating budget sessions, and split sessions. Most states that have tried these other forms have rejected them in favor of annual sessions.

Proponents for removing constitutional limitations on the duration of the legislative session contend that:

- (1) Limitations encourage militant minorities to resort to delaying tactics to thwart the will of the majority.

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- (2) Hasty and inadequate consideration is given "must" bills that pile up at the end of the session.

Those who advocate the retention of constitutional limitations on session length argue:

- (1) Unlimited sessions would produce more legislation and extend government activities into new areas of daily life.
- (2) Unlimited sessions would invariably lead to increased salaries for the legislators.

Continuity

Many observers feel that the legislature's problem with lack of time is closely related to the lack of continuity from session to session. Much of the legislative progress made during a general session is lost in the intervening budget session or nonlegislative year in the biennial states, committee investigations are not complete, and with the high turnover of legislators, experience is lost. Methods for increasing continuity are (1) lengthening terms of office, (2) establishing legislative councils, (3) providing for interim committees, and (4) relying on technical assistance from research staffs.

LEGISLATIVE PROCEDURE

It is essential that the legislative process be governed by rules ensuring stability, order, and predictability. Bills must be considered in a public and orderly fashion; majority will must prevail, and safeguards must be imposed against arbitrary action. Although the need for rules is clearly recognized, the extent to which such rules should be fixed in the state constitution rather than being left for the legislature to establish and modify as the need arises continues to be a subject for debate by both legislators and students of government. Constitutional limitations on legislative procedure are found in 3 principal areas: (1) the form of enactments, (2) the general process of legislation, and (3) the functioning of committees.

The constitutions of 41 states, including Hawaii, provide that each bill must be confined to a single subject. While most authorities are in agreement with the purposes of the single-subject rule, they are of the opinion that legislation produced by this requirement and the obstacle presented against the codification of state laws makes the inclusion of this provision highly questionable. Other criticisms are that it provides greater opportunity for the exercise of the governor's veto and a fertile ground for litigation. The title-subject rule provides that only the subject expressed in the title can be contained in the act. The purpose of the rule is to enable legislators to rely on the titles of acts, inform the public of the general nature of the legislation concerned, and to correct other similar abuses. Although the purposes may be desirable, many authorities find that the dangers of invalidating sound legislation on such a technicality are sufficient to warrant constitutional exclusion.

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Hawaii ranks among the top 12 states in the number of bills introduced each session. The most effective and binding procedure for limiting the number of bills would be a constitutional amendment. Presently, Hawaii provides no limitation on the number of bills to be introduced. Arguments raised in support of limiting bill introduction:

- (1) Fiscal considerations; paperwork, and the printing and distribution of a large number of bills place a drain on the state's fiscal resources.
- (2) A reduction in the number of bills prepared for introduction would result in the increase of quality of those bills which are introduced because legislators and staff workers can then focus on fewer bills, and this in turn would lead to better laws.

Arguments in opposition:

- (1) Restrictions on bill introduction is a limitation on the legislative process and on the citizen's right of representation in the legislature.
- (2) Greater hardship may be imposed on the members of the minority party than on those of the majority party. The ideas of the minority party would be restricted pro rata to the number of members they have, rather than by the number of ideas they may advocate; and even though they may have as many ideas as the majority party, they can only put forward the amount as limited.

Although its importance varies from state to state, committee procedure is one of the overall significant steps in the legislative process. In Hawaii, committee procedures are established by rules of both houses of the legislature. Some experts believe that since committees form the hard core of legislative organization and are of paramount importance in the law-making process, there should be some provision for legislative committees in the state constitution. Of principal concern in many states has been a committee's ability to thwart the will of the majority by refusing to report out a bill; to inadequately prepare and publicize committee hearings; and the failure of the committee to record its proceedings and the votes cast by its members.

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Compensation

A major question concerning legislative compensation is whether the amount of compensation should be fixed by the constitution. Presently, in 9 states legislative compensation is so fixed, although in some of these states benefits and expenses may be raised. Another question is whether constitutional provisions against a legislature increasing its own salaries should

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also apply to expenses? Although Hawaii's Constitution explicitly covers salaries, there is no similar provision concerning expenses. Therefore, legislators can legally raise the amount they receive for expenses and make the change effective immediately. In 1968, the Hawaii Constitution was amended prohibiting a change in salary from applying to the legislature that enacted the change. Another constitutional issue is the method used in compensating legislators. The basic compensation of legislators is computed in one of 2 ways: per diem (a daily rate) or an annual (lump sum) salary. Hawaii's Constitution provides that unless the legislature enacts laws changing a member's salary, each legislator shall be paid \$12,000 each year. In general, it appears that the legislators on the daily plan are paid less than those on an annual salary. Furthermore, it appears that annual salary states provide higher compensation to their legislators.

Another issue is whether the legislature or a compensation commission should set legislative salaries. In the 1968 Hawaii Constitutional Convention, the Constitution was amended to provide for a commission on legislative salary to suggest salary changes. The purpose of the commission was to remove any burden of self-interest on the part of the legislature. Many people question the wisdom of allowing legislators to set their own salaries because of the possibility of abuse. In 1975, the Hawaii commission on legislative salary, recommended a salary of \$17,000 for each member of the legislature. Although bills were introduced regarding increases in compensation none was ever enacted into law.

Finally, the level of salary underlies all the issues mentioned and must be discussed. Traditionally, state legislators have been among the lowest paid public officials in government. Some authorities believe legislative salaries are inadequate to attract competent people and that they are too low for many people to afford to serve. Others believe that legislators deserve an executive salary since they are elected by the people of the state. Across the nation legislative salaries vary greatly. Lawmakers in New York are paid \$23,500 a year, in California \$21,000 a year, and in Illinois \$20,000 a year. By contrast, New Hampshire, North Dakota, and Rhode Island annually pay their legislators \$100, \$150, and \$300, respectively. Lawmakers' annual salaries exceed \$10,000 in only 12 states, and in 25, the pay is \$5,000 or less. In addition, the cost of living has risen during recent years almost as rapidly as compensation, and the amount of time legislators must devote to their elected duties has increased by more than one-third since 1964. Establishing compensation rates for legislators has become a complex and controversial matter. This problem is also compounded by the fact that most legislators must adjust their own salaries. As job responsibilities and time demands increase in addition to the increase in the cost of living, legislators feel that their compensation is not commensurate with the demands being placed on them. At the same time, taxpayers often are critical of pay increases for legislators. During times when the economy is not running at its best, legislators run the risk of voting themselves out of a job when they approve their own pay raises.

In addition to their annual salary, each legislator receives an allowance for personal expenses, travel expenses, and lodging when on official legislative business.

Conflict of Interest

Conflict of interest is the term applied to that area of governmental ethics where conflict between an official's independent public decisions and a private gain--a gain not shared by the general community--might occur. State legislators find themselves confronted with perhaps more potential conflicts between their public and private interest than any other public official. This is so because of the part-time nature of a legislator's job and the low salaries they receive, which forces them to find employment elsewhere in the private sector. Some of the major areas of conflict of interest are: (1) assistance to private parties; (2) self-dealings; (3) augmentation of income by private parties; and (4) post-employment restrictions.

Some states such as California, Florida, Louisiana, and Michigan specifically provide constitutional provisions requiring the enactment of legislation prohibiting conflict between public duty and private interest of members of the legislature. Hawaii's Constitution requires the enactment of conflict of interest legislation.

Lobby Regulation

There is probably no aspect of legislative life more difficult to deal with than the intricate relationship between legislators and the representatives of private interest groups or lobbyists. Thus, the principal aim of lobby regulation, whether by constitutional provision or statutory law, is to correct the abuses of pressure group influence while preserving the right of various social and economic interests to be represented. The primary reason given for including provisions in a constitution is that the legislature may be too influenced by lobbyists to legislate effectively for lobby controls. The argument against inclusion is that such provisions can act as heavy-handed restrictions, severely crippling a valuable element of democratic representation. Most of the constitutional or statutory provisions impose one or more of 3 types of provisions:

- (1) Requiring the lobbyist or employer, or both, to register with some state agency;
- (2) Requiring the lobbyist or employer, or both, to file at the close of each session verified accounts of their expenditures for legislative purposes; and
- (3) Prohibiting the employment of lobbyists under agreements which make their compensation contingent upon the success of their efforts.

Article III

REAPPORTIONMENT IN HAWAII

The problems involved in reapportionment are basic to the character of democratic government. The method of apportioning the number of elected officials and dividing political units into districts provides the framework for the selection of elected public bodies. In the last 15 years, no part of the representative process has undergone more rapid change than this aspect of selecting elected officials. Since 1962, the courts have required revolutionary changes in the standards used for apportioning elected public bodies.

Apportionment can be defined as "the division of a population into constituencies whose electors are to be charged with the selection of public officers". Generally, this involves 3 basic steps: (1) the definition of the basis of representation--people, governmental unit, special interest groups, etc.; (2) the delineation of the geographic area from which elected officials are to be selected; and (3) the allocation of available representative seats among the districts established. United States Supreme Court decisions since 1962 have held that, as a constitutional requirement, all states and local governments must use some type of population as the basis of representation, and that representatives must be allocated among districts of substantially equal numbers of people.

State and local government apportionment plans which grant representation to geographical areas or political subdivisions without regard to the equal population principle enunciated by the Court are now unconstitutional. In recent years, the courts have applied the equal population principle to almost all types of popularly elected public bodies, including the U.S. Congress, state legislatures, city and county councils, and school boards. Since the initial 1962 decision the preponderance of apportionment controversies has involved state legislatures. An appreciation of the constitutional principles established in those cases provides a background for understanding their application to other elected officials.

Judicial Background and Legal Considerations

In reviewing a state's legislative apportionment plan, courts "must of necessity consider the challenged scheme as a whole in determining whether the particular state's apportionment plan, in its entirety, meets federal constitutional requisites. It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also evaluating the actual scheme of representation employed with respect to the other house. Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the state's voters, in both houses of a bicameral state legislature."

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The U.S. Supreme Court has established the broad policy of reviewing apportionment as a total scheme of both houses of a legislative body. It also has addressed itself to the principles relative to a bicameral legislative system. Since the constitutional convention may consider legislative structures different from the present bicameral system, such as a unicameral legislature or a parliamentary form of government, it should be noted that the "one-man, one-vote" principle has been applied to unicameral bodies such as city and county councils and school boards.

There have been numerous bases for apportioning the elected representatives of legislative bodies. Geographical areas, political subdivisions, and other criteria have been used as alternative mechanisms for allocating the representational composition of governmental policy-making bodies. In addressing the malapportioned state legislature in Reynolds v. Sims, the United States Supreme Court established that apportionment must be based substantially on "population". The Court further held in a companion case, Lucas v. Colorado General Assembly, that a state's failure to utilize a population-based apportionment scheme cannot be justified or ratified by a vote of the state's electorate.

Whatever the measure of population used, the Court has not established rigid or uniform mathematical standards or formulas in evaluating the constitutional validity of a legislative apportionment scheme. Rather, the Court seeks "to ascertain whether, under the particular circumstances existing in the individual state whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination". In measuring the extent of representativeness, the Court generally looks to the percentage deviation from the ideal number of persons per representative.

In June 1973, the Court decided the case of White v. Regester. In that case, the U.S. Supreme Court held that a total deviation of 9.9 per cent is relatively minor (de minimis) and is constitutionally permissible, even without justification. It held that a mere showing that there is a total deviation of 9.9 per cent or that another plan could be conceived with lower deviations among districts is not enough to invalidate the plan, and that, to overturn an apportionment plan which has a 9.9 per cent total deviation, something more must be shown to prove that the plan is invalid under the Equal Protection Clause.

In the light of other cases, it might be argued that the Court has drawn a line somewhere around 10 per cent--deviations beyond that amount requiring justifications and deviations less than that amount requiring no justification.

Parallel to the issue of representativeness as determined by population per elected official is the question of representational structure. Where population per representative quantitatively insures voter equality, issues of representational structures look to ex ante qualitative assessments of a citizen's vote. Four types of representational structures that affect the quality of the voting right--multimember districts, floater districts, place systems, and fractional voting--have been presented to the Court.

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Among the issues of representational structure, the validity of multimember districts stands out as the question most frequently litigated. Unlike in single-member districts, the residents in multimember districts have 2 or more representatives elected from the district on an at-large basis. The general rule is that so long as substantial equality of population per representative is maintained, a districting plan including multimember districts is constitutionally permissible if it does not operate to dilute the voting strength of racial or political elements of the voting population.

A second mechanism for structuring citizen representation is the flotalial district. A flotalial district is "a legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned". The U.S. Supreme Court has indicated that flotalial districts are permissible tools for apportionment. However, concern has been expressed that if the constituent districts within a flotalial district are not substantially equal in population, the weight of individual votes in the respective districts may be so disproportionate that the plan could not survive judicial scrutiny.

Another variation among apportionment schemes is the post or slot system. It is used in multimember districts where candidates file and run for specific slots rather than compete against all others in the district. A post scheme coupled with a residency requirement is called the "place system". Each of the candidates in such a system must reside in a geographically established subdistrict or place within a multimember district. Only the residents of each place, although running at-large in the district, may qualify as candidates for the allocated seat. The Supreme Court, in reviewing a number of cases, has found that the slot and place systems are constitutionally permissible. They may be found to be a violation of equal protection, however, when the factual circumstances resulting indicate a dilution of voting strength.

Fractional and weighted voting is a fourth issue regarding representational structure that has been brought to the courts. In weighted voting, a legislator's vote is weighted in proportion to the number of people represented. It has been proposed to cure without redistricting an apportionment of legislators that is not proportionate to population. However, it could also be used to cure an isolated case of over or underrepresentation that might otherwise not be curable practically.

Although the United States Supreme Court has not passed upon the constitutionality of weighted or fractional voting, in the few cases where weighted or fractional voting has been sanctioned, it has been under extraordinary circumstances. However, in Hawaii, the fractional voting system established by the 1968 Constitutional Convention was struck down as constitutionally impermissible. There, the Court held that there were no extraordinary circumstances present in the Hawaii reapportionment scheme to permit a fractional voting provision.

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Legislative Apportionment

The changing degrees of court involvement with, and the evolution of, the constitutional standards shaping state legislative apportionment have greatly affected the constitutional apportionment provisions in Hawaii. The unique geographical and social factors characteristic of the State, however, have at the same time set the basic framework to which the dynamics of reapportionment have been applied.

The reapportionment problem was the genesis of the Hawaii Constitutional Convention of 1968 and its resolution was the motivating purpose of the convention. In addition to reapportioning the legislature, the 1968 Constitutional Convention inserted a constitutional provision establishing 1973 as a reapportionment year. The provision also calls for the creation of a 9-member reapportionment commission whose duty is to formulate a reapportionment plan which becomes law upon publication.

A commission so appointed met between March and July of 1973 to apportion the 25 seats in the senate and the 51 seats in the house of representatives among the basic island units of Hawaii, Maui, Kauai, and Oahu. The commission also determined the senate and house districts and their apportioned number of seats within each of those basic island units.

School Board Apportionment

The reach of the Fourteenth Amendment and the one-man, one-vote principle has been widely extended during the last 15 years. What began with the Court's initial recognition of justiciability over state legislative apportionment in 1962 has now been extended to almost all popularly elected bodies performing governmental functions. Hawaii's board of education, whose members are selected by popular election, has not escaped the reach of the one-man, one-vote principle.

In extending the applicability of the one-man, one-vote principle generally to all popularly elected public bodies performing governmental functions, the Supreme Court has concomitantly directed the guidelines contained in the line of cases regarding legislative apportionment and districting to elected public school district representatives. However, the Court's decisions regarding school district apportionment are only applicable to those districts where the state or local government has chosen to select members of the district's governing body by popular election.

The Hawaii State Constitution, in Article IX, section 2, establishes an elected board of education. The specific number of members and composition of the board were left for determination by the state legislature. By statute the legislature created an 11-member board of education which had been in existence for approximately 4 years before the U.S. Supreme Court applied the one-man, one-vote principle to the apportionment of school board membership.

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When asked by the State's chief election officer, the Hawaii attorney general concluded that the board of education was governed by the Court's ruling. Although the attorney general's opinion did not specifically address itself to the matter, it is important to distinguish whether the state constitutional provision or the state statute was unconstitutional. The constitutional provision only established a board whose members were to be elected and requires that it partially include representatives from geographic areas. The statute, on the other hand, determined the size of the board and the basis for apportionment and districting of its members. The board of education was not malapportioned because of the constitutional provision but rather because of the statutory requirements for membership selection.

An attempt to remedy the malapportionment was quick to follow in the 1970 legislature. A bill enacted by the legislature in April called for an amendment to the state constitution. It proposed to change the provision requiring selection of board of education members by popular election. The proposal instead left the method of board member selection for determination by legislative statute and allowed for membership by election or appointment. The Hawaii electorate, however, did not ratify the constitutional change. Between 1971 and 1974, the legislature attempted without success to reapportion the school board.

Because the legislature was unable to agree on a constitutionally acceptable board of education structure, the federal district court in an order dated June 19, 1974 reapportioned the state board of education. The membership of the board was changed from 11 to 9 elected from 2 multimember districts. The Court ordered that 7 of the 9 members be elected on an at-large basis from the city and county of Honolulu and that the other 2 members be elected on an at-large basis from the remaining counties of the State.

The Court's order superseded the Hawaii statute determining the composition and apportionment of the board of education. The court order will remain undisturbed and elections held under the 9-member plan until either the legislature adopts an alternative apportionment scheme, or the state constitution is amended.

Throughout the debate regarding the board's malapportionment, the alternative of an appointive rather than an elective system continued to reappear. It is clear that the method of selecting board members is a threshold issue to the apportionment question. If the present elective system is maintained, it is settled that the apportionment scheme for the board of education must comply with the Court's one-man, one-vote framework.

Congressional Apportionment

While the cause for the concern for fair representation in both the state legislatures and the U.S. House of Representatives is essentially the same, there is one essential difference in the problem of apportioning congressional seats from the problem of apportioning state legislative seats. State legislative apportionment is the sole responsibility of the states. Congressional

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apportionment, however, is the joint responsibility of both the states and the federal government.

The respective roles of the states and the federal government may be described by drawing a technical distinction between the act of "apportioning" and the act of "districting". "Apportionment" with respect to congressional/representation refers to the act of allocating the total number of representatives among the 50 states. "Districting" refers to the act of dividing a state into districts from which the representatives allocated to the state are to be elected.

Since 1967 the Congress has required that its representatives from the various states be elected from single-member districts. In Hawaii, a 1969 statute complying with the congressional act, created 2 representative districts each holding one of the 2 seats in the house of representatives apportioned to the State of Hawaii. However, concomitant to the statutory directives, the United States Supreme Court has decided a number of cases involving congressional apportionment and districting which established a number of parameters to the reapportionment process.

In reviewing the U.S. Supreme Court's decision, it appears that there is a clear line of cases now distinguishing the standards for congressional and state legislative districting. The "equal as nearly as is practicable" standard for congressional districting under Article I, section 2, of the Constitution permits only those population variances that are unavoidable despite a good-faith effort to achieve numerical equality. The Court has used strong language to indicate that almost complete numerical equality will be required. It also appears that the existence of an alternative plan with a lower population variation among its districts that honors state policies renders the higher deviation of an adopted scheme unconstitutional. Absent a showing of a good faith effort to achieve population equality among all districts in the state, each variance, no matter how small, must be justified. The U.S. Supreme Court has yet to definitively establish which justifications satisfy constitutional standards of population equality in such cases. It has acknowledged, however, that there may be valid state policies and preferences that should be observed in shaping those standards and determining the level of population variance from absolute equality to tolerable.

Although the U.S. Supreme Court had an opportunity to expressly establish what are acceptable population measures in redistricting through considerations of adjustments for population resulting in district variances, it has refrained from doing so. The language used by the Supreme Court in the cases reviewed suggests a preference for a total population basis for redistricting, but much more beyond that cannot be gleaned.

While no definitive authority on this question exists, a recent decision involving congressional districting sheds light on how the federal district court may resolve the issue regarding redistricting in Hawaii. In *Hirabara v. Doi*, a memorandum decision, the Court implied that registered voters is an acceptable basis for redistricting. Although the Court was not asked to and did not face the issue in its opinion, the footnoted reference may be significant. Describing the malapportionment between congressional districts measured by registered

voters, the Court noted that "Registered voters were determined to be a not invalid basis for reapportionment in Hawaii by Burns v. Richardson...." This statement may be overbroad because the Burns case cited dealt with legislative, not congressional, apportionment and districting. However, that the Court meant what it said may be supported because of the unique geographic and demographic factors characterizing Hawaii upon which the Supreme Court relied in Burns. While the federal district court may permit registered voter counts as a basis for redistricting in Hawaii, it remains to be seen whether such a conclusion is upheld by the Supreme Court.

The State's role in congressional apportionment and districting is limited to delineating the representational boundaries of Hawaii's 2 single-member districts. The U.S. Supreme Court has set rigorous standards for making the population of such districts as equal as is practicable. The basis for determining population, however, has yet to be definitively set by the Court. As a consequence, Hawaii's congressional districts presently are set to reflect the registered voters instead of the more customary census population of the State. Even based on such a population measure, current boundaries demark districts whose population deviations are only arguably within the constitutional standards set by the U.S. Supreme Court. Such a situation undermines the stability of the election process because of the potential for challenging its results. To the extent that the state legislature has evidenced its inability to remedy such situations, consideration of alternative districting mechanisms such as by reapportionment commission or constitutional amendment may be required in the future.

Selecting the Apportionment Base

Within the legal framework provided by the United States Supreme Court's decisions, there are many questions which must be resolved by individual states in devising permanent state constitutional provisions for reapportionment. Each state must determine the apportionment formula and the apportionment procedure best suited to its unique representational goals.

In devising an apportionment formula, a state must first determine the basis for allocating representation within and among the constituent parts of the political system. This raises the threshold question of what means for measuring population is desirable. In answering this question, a basic policy decision must be made regarding which people should be counted in the apportionment base.

In the United States, the traditional apportionment base for measuring population has been total population as reported by the Federal Census Bureau. The meaning of the term "population", however, is not restricted to total population figures. Except for the potential questions regarding congressional districting discussed earlier, the choice of the exact measure of population has been left up largely to the individual states. As a consequence, a number of states, including Hawaii, presently rely upon population measures for apportionment different from the total census population figures. Moreover, different population measures may be adopted for different purposes. The

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question regarding apportionment base arises whenever legislative, school board, and county reapportionment occurs. There are presently no constitutional, statutory, or judicial limitations on what population measure must be used for each type of elected body.

Five alternative measures of apportionment base--total population, state citizens, registered voters, actual voters, and eligible voters--can be compared for their advantages and disadvantages from the standpoint of both theory and practice. Selection of an apportionment base involves 6 considerations outlined below:

- (1) Detailed data breakdowns provide flexibility in drawing boundary lines for representational districts and allow closer conformity to equal population standards set by the Constitution.
- (2) Frequent data availability offers population information reflecting changes in demographic patterns and prevents distortions in representation through timely reapportionment potential.
- (3) Temporary residents are affected by the apportionment base because they may be included or excluded in the measure of population. Those in the armed forces or transient civilians excluded from the apportionment base are not represented by the public officials elected by their districts.
- (4) Aliens also may be affected by the apportionment base. The extent of the representational distribution that can result is indicated by the fact that 8 per cent of Hawaii's total population fell in this category in 1976.
- (5) Minors included or excluded by the apportionment bases also tend to "distort" the representational scheme. Some evidence indicates that minors are disproportionately distributed among the 4 major island groups.
- (6) Basic island units of the State--Hawaii, Maui, Oahu, and Kauai--are affected differently by the various apportionment bases. Because of the differential effect, a judgment regarding which base provides Hawaii with the type of representative system best suited to meet its peculiar needs is involved.

Registered voter totals are currently used in Hawaii as the apportionment base for the state legislature, school board, congressional districting, and local government purposes. It remains a viable measure of population for apportionment purposes. Total population also must be considered as a feasible mechanism for representational apportionment. Starting in 1980, federal census data will be available every 5 years and in detail sufficient for drawing district boundaries. While on the one hand, total population has the advantage of not discriminating against any group of residents, on the other hand, it tends to

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distort the representational process by equally weighting all persons, e.g., infants and adults are counted the same. Adoption of the total population apportionment base would change the present representational allocations among the basic island units.

Apportionment and Districting

The apportionment process raises still other issues beyond those concerning the principle of equal population, the range of variation in population permitted, or even which measure of population is selected. A remaining group of questions involves representative districting. This aspect of apportionment is important because districting and how it is undertaken affect the representation of individuals, political parties, and other interests within the State. Districting involves the drawing of boundary lines defining the geographic area from which a public official is elected.

The issues regarding representational districting can be grouped into 3 categories, namely, district structure, electoral systems, and criteria for how boundary lines are established. Questions involving district structure generally relate to the controversy over single and multiple member representative districts. Whether to create single or multiple member districts can be a subject of considerable controversy. Unfortunately, there is very little empirical evidence to support the arguments for or against either alternative although the following discussion attempts to present the evidence that does exist. For the most part, it is not known what the practical effects are of using one districting arrangement rather than the other.

Most of the effects commonly alleged to follow from use of single-member districts, in contrast to multimember districts, are actually due simply to the smaller or less heterogeneous nature of the single-member district, rather than to the fact that only one representative is apportioned to the district. When discussing single and multimember districts, it can generally be assumed that, in any state with an elected body of a limited size, multimember districts will be larger and encompass more diverse interests than will single-member districts. This close interrelationship of what are actually 3 separate district characteristics--size, degree of heterogeneity, and number of legislative representatives--should be kept in mind when evaluating the following claims regarding the effects of single and multimember districts.

In evaluating single and multiple member districts, a number of issues regarding the representational process are significant. Consideration must be given to whether (1) the number of persons elected structurally affect the relationship between the representative and constituency, (2) the structure of the representative district influences how public officials view the problems they face, (3) the district structure makes a difference in how effective pressure groups and political parties are with those elected, (4) the type of effects the structure may have on who gets elected, (5) minority group representation is affected by the district structure, and (6) the tendency to gerrymander is related to whether single or multiple member districts are adopted. A comparative summary of how single and multimember districts address these concerns is summarized in the following table:

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DISTRICT STRUCTURES AFFECT THE REPRESENTATIVE PROCESS

<u>Impact of District Structure</u>	<u>Single-Member Districts</u>	<u>Multimember Districts</u>
Representative/constituent relationship	<ul style="list-style-type: none"> - closer representative ties to constituents - representative more visible 	<ul style="list-style-type: none"> - increased representative independence - alternative access points to political process by constituents
Representative view of problem	<ul style="list-style-type: none"> - narrow concern for local issues 	<ul style="list-style-type: none"> - broader perspective of larger issues
Pressure group and political party influence	<ul style="list-style-type: none"> - representatives less dependent - organizations are weakened 	<ul style="list-style-type: none"> - greater representative reliance - stronger organizations
Effect on election characteristics	<ul style="list-style-type: none"> - greater emphasis on voter personality - simple ballot format 	<ul style="list-style-type: none"> - attracts better-qualified candidates - election emphasis on issues and parties - possible greater voting power
Minority group representation	<ul style="list-style-type: none"> - representation for minority areas - discourage minority parties 	<ul style="list-style-type: none"> - potential for party sweeps - allow multi-party system - dilutes minority strength
Opportunities for gerrymandering	<ul style="list-style-type: none"> - more susceptible to gerrymandering 	<ul style="list-style-type: none"> - less opportunities for gerrymandering

In addition to specifying the type of district and electoral system to be used for the apportionment and election of public officials, an apportionment formula may also include additional provisions designed to guarantee a fair and equitable districting process. Even acknowledging that the districting process inherently reflects political choices, it may still be desirable to place limitations upon how those preferences may be shaped. Districting standards guard against overt gerrymandering.

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Generally, there are 2 alternative constitutional strategies for representational districting. First, the constitution can fix representative district boundaries. That is, the details of each district's borders can be set out specifically through a constitutional provision. Secondly, the constitution can provide for general criteria as to the manner in which boundaries of representative districts are to be drawn. It is this second approach that was adopted by Hawaii's 1968 Constitutional Convention. It is generally cautioned that legislative districts not be permanently frozen in the constitution. The inequities fostered by inflexible districts which cannot be periodically redrawn to accommodate population shifts within a state are said to far outweigh the slight opportunities for gerrymandering under a constitutionally prescribed periodic redistricting system.

The major argument offered in favor of permanently fixing district lines in state constitutions is that this practice eliminates all opportunity for gerrymandering districts at the time of each decennial census. It must be noted, however, that arguments against constitutionally fixing boundaries for legislative districts may not apply with equal force where congressional or other elected bodies are concerned.

In Hawaii, the standards added to the state constitution after the 1968 Constitutional Convention can be broken down into 2 groups--absolute restrictions and decision-making considerations. The absolute restrictions on how the designated apportionment agency establishes representative districts are:

- (1) Legislators must be apportioned among the basic island units by the method of equal proportions.
- (2) No district shall extend beyond the boundaries of any basic island unit.
- (3) No district shall be so drawn as to unduly favor a person or political faction.
- (4) Except in the case of districts encompassing more than one island, districts shall be contiguous.
- (5) No more than 4 members shall be elected from any district.

Four other guidelines fall within the nonmandatory category. They are criteria that should be considered in any decision concerning districting and that the balance be struck among them is a matter for case by case determination. The 4 standards state:

- (1) Insofar as practicable, districts shall be compact.
- (2) Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and when practicable shall coincide with census tract boundaries.

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- (3) Where practicable, representative districts shall be wholly included within senatorial districts.
- (4) Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

Notwithstanding the existence of such guidelines, it is realistic to expect that it is impossible to completely eliminate all political considerations from the apportionment and districting process. This process is by its very nature political. The significant question is not whether there is politics in reapportionment. Rather, the question is how much politics in relation to the other factors influence the decisions. A well-thought out constitutional apportionment and districting formula can do much to limit the influence of narrow partisan interests and to ensure that Hawaii's districting system will serve the best interests of all the people of the State.

Machinery for Apportionment

Effective machinery is required to guarantee periodic reapportionment in accordance with a specified apportionment formula. In the past, state legislatures traditionally were vested with the responsibility for reapportionment. But the failure of those bodies to perform those functions and the absence of effective enforcement mechanisms together contributed to the reapportionment problems of the 1960's.

There are no judicial restrictions or standards as to what agencies can or cannot lawfully be assigned the apportionment function. Each state therefore is at liberty to choose among alternatives as to the agency best suited to the political needs of the state. Three mechanisms stand out as the mechanisms relied upon by the states. They are the state legislature, executive officials, and boards or commissions. A fourth alternative involves computer apportionment. The arguments regarding each mechanism can be summarized as follows:

NO APPORTIONMENT AGENCY IS COMPLETELY FREE OF POLITICAL INFLUENCES

<u>Agency</u>	<u>Arguments For</u>	<u>Arguments Against</u>
Legislature	- knowledge and experience regarding political representation	- failed to act in the past
	- comports to separation of powers doctrine	- self-interested and partisan; open to gerrymandering

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<u>Agency</u>	<u>Arguments For</u>	<u>Arguments Against</u>
		- not subject to court writs
Executive officials	- governor easily singled out for accountability - court review of actions	- open to partisan gerrymandering
Commission (nonpartisan)	- removed from legislature - objective in nature; independent - statewide orientation - automatic	- potential for gerrymandering - not accountable to political forces
Commission (bi-partisan)	- removed from legislature - protects interests of majority party - automatic	- potential for deadlock - potential for gerrymandering
Electronic computer	- automatic and objective	- programs reflect political values of programmers; benign gerrymandering

Regardless of who has the original responsibility for periodic state apportionment and districting, political questions will be involved, for the reapportionment process is by its very nature political. This is true in varying degrees depending upon whether the legislature, the governor, a commission, or an electronic computer performs the necessary reapportionment. The process of apportioning elected officials has political and partisan implications simply because these positions are representative and elective. Under such circumstances it is inevitable that there be political significance at all stages of the apportionment process.

Regardless of which apportionment agency is adopted, it may be vested with jurisdiction to apportion and district various types of representative districts. Present constitutional provisions for the reapportionment commission cover only the state legislature and it is debatable whether, absent express constitutional language, additional reapportionment functions affecting congressional and school board districts could be delegated to the commission. Notwithstanding issues of constitutional construction and interpretation, amendments to the constitution may expressly empower an apportionment agency to take on expanded types of functions. Such changes could specifically set out

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the types of districts the agency is empowered to restructure. In the alternative, constitutional provisions could vest the agency with open-ended jurisdictional authority that is defined by state laws.

Many states, however, have nonetheless realized that in order to ensure prompt and effective reapportionment, it is necessary to provide for an enforcement procedure in case the agency having the initial responsibility for reapportionment fails to act. An intermediate agency may be empowered to devise an apportionment plan or direct recourse to the courts may be constitutionally permitted.

Remedies state courts may be constitutionally empowered to use for enforcement include: (1) requiring election of legislators at large, (2) enjoining the holding of elections for filling legislative seats, (3) nullification of acts of an unconstitutionally apportioned legislature, and (4) issuance of writs of mandamus against a nonlegislative apportionment agency. The Hawaii Constitution presently provides for this latter remedy.

A final consideration in designing a total state apportionment procedure is the desired frequency of apportionment. This frequency should be specified in the constitution, and should be related to the availability of the official statistics required by the apportionment formula of the state. The availability of apportionment data, however, is a major constraint in formulating workable periods for reapportionment.

Alternative frequencies of reapportionment depend upon when apportionment base statistics become available. The 2 best possibilities for an apportionment base turn on federal census data or voter registration information. Thus, the breadth of reapportionment frequency possibilities can be set as either multiples of 5 years or 2 years. That is, voter-related figures offer periods of 2, 4, or 6 years. In contrast, 5 or 10-year intervals are possible if census-based apportionment data are used.

Independent of such limitations are the primary concerns regarding reapportionment frequency. Generally, setting a frequency for reapportionment involves a trade-off between representational stability and representational relevance. On the one hand, frequent reapportionments insure that the representational basis for public elections reflects demographic and mobility characteristics. For example, where a population is fast growing and highly dynamic, frequent reapportionment may be desirable to minimize the population imbalance among districts resulting from mobility over time. On the other hand, less frequent reapportionment enhances stability in legislative processes. Extremely frequent apportionment undermines the concept of legislative tenure and tends to confuse voters. Within such a context and taking into account the constraints of available data, workable alternative reapportionment periods worthy of consideration involve 5, 6, 8, and 10 years.

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From the early 1800's when Kamehameha I unified the Hawaiian Islands to the present, a tradition of a strong, centralized executive branch has been maintained in Hawaii. This tradition is reflected in Article IV and in the entire Hawaii Constitution. It is the purpose of this chapter to highlight key constitutional provisions involving the power, structure, and operations of the executive branch of Hawaii's government.

CONCENTRATION OF EXECUTIVE POWER

The deliberate concentration of executive power in the governor is based on the rationale that it fixes responsibility for the efficient conduct of government affairs. Although all 50 state constitutions vest the executive power in the governor and make the governor responsible for the faithful execution of the laws, it is only in a few states that other constitutional provisions enable the governor to be chief executive in fact as well as in name.

An important element affecting the conflicting considerations of optimum efficiency and maximum democracy in the executive branch is the manner in which executive offices are filled. A count of the number of independently elected executive officials and department heads is an obvious bench mark to rate effective gubernatorial power for the governor's power is clearly threatened if it is shared with elected officers whose spheres of authority and responsibility and whose political ambitions compete and conflict with the governor's. The "long ballot" record goes to Oklahoma with 13 elective offices. At the other end of the scale are the "short ballot" states--Alaska which elects only the governor and secretary of state; Hawaii which elects the governor, lieutenant governor, and the board of education; New Jersey and Maine which elect only the governor; Tennessee which elects the governor and the public service commission; New Hampshire which elects the governor and executive council; and Virginia which elects the governor, lieutenant governor, and attorney general.

Executive offices that are elective in a majority of the states, in addition to the governor, are the lieutenant governor, secretary of state, attorney general, treasurer, and auditor or comptroller. Below is a brief description of each of these offices and a summarization of the arguments for filling them by appointment or by election and of the arguments on other issues involving the offices.

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Lieutenant Governor

The office of the lieutenant governor is patterned largely after the vice presidency and serves 2 basic functions. Lieutenant governors in 30 states not including Hawaii are presiding officers of their state senates. As presiding officer of the senate, the lieutenant governor's responsibilities include the parliamentary tasks which control the order of senate business; referral of bills; in some cases, appointment of committees and designation of their chairmen; and, usually, authority to cast the deciding vote in the senate in case of a tie. Lieutenant governors are also "assistant governors" with executive responsibilities such as succeeding to the governorship in case of a vacancy in that office, acting in the place of the governor during his temporary incapacity or absence from the state, and serving on various boards and commissions. In a few states, including Hawaii, the lieutenant governor performs the functions generally belonging to the secretary of state.

In 1964, the Hawaii Constitution was amended to provide for the election of the governor and the lieutenant governor of the same political party. Arguments favoring the joint or team election feature include:

- (1) It would prevent a situation of chaos and confusion that would result from succession by a lieutenant governor of a political party different from the governor's.
- (2) It would follow the pattern for the election of President and Vice President of the United States.
- (3) It would allow people to vote for a political theory as much as for individual candidates.
- (4) It would prevent disputes and internal dissension in the executive branch, as evidenced in states where the governor and lieutenant governor represent different political parties.

Arguments opposing the joint or team election feature include:

- (1) It would detract from the conception of a popularly elected executive branch, particularly when few offices are elective.
- (2) It does not make any provision for nonpartisan candidates for governor or lieutenant governor.
- (3) It would encourage weak candidates for the lieutenant governorship.
- (4) Chaos would not occur in the case of succession by a lieutenant governor of a political party different from the governor's because administrative appointments must be approved by the senate.
- (5) The same problems of lack of harmony in the executive branch can exist between a governor and lieutenant governor

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who both represent the same party but different factions of the party.

Another issue pertaining to the office of lieutenant governor is whether the constitution should authorize the governor instead of the legislature to delegate the duties of the lieutenant governor. Arguments favoring gubernatorial delegation include:

- (1) By exercising functions that normally would not be delegated by the legislature, the lieutenant governor would be more effective.
- (2) It would add to the efficiency of the executive branch by authorizing the governor to delegate ministerial and routine duties to the lieutenant governor, such as when the governor is away from the seat of government.
- (3) Although it would not lessen the governor's ultimate responsibility, it would ease the administration of the executive branch.
- (4) It would enhance the concept of the governor and lieutenant governor as a working team under which imprudent delegation would be unlikely, particularly if it would increase the political stature of the lieutenant governor at the expense of the public image of the governor.

Arguments opposing gubernatorial delegation include:

- (1) It would create a two-headed executive.
- (2) It would relieve the governor of responsibilities and basic rights with respect to the execution of gubernatorial duties.
- (3) It would constitute a temptation to induce the governor to shirk duties by delegating "messy" jobs or "hot potato" emergencies or crises to the lieutenant governor.
- (4) The governor, as a matter of law, has ample authority to delegate purely ministerial duties.

Hawaii's lieutenant governor, as that office is now constituted, is elected on a joint ballot with the governor; is a purely executive branch office; is in direct line of succession to fill a vacancy in the governorship; and is responsible for all the functions and duties of a secretary of state. Supporters of the office, in general, argue:

- (1) Only one state, Maryland, has abolished the office in the past one hundred years, and in that state, the office was reconstituted in 1970.

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- (2) The Committee on Suggested State Legislation of the Council of State Governments includes the office of lieutenant governor in their model executive article.
- (3) People wish to retain elective positions.
- (4) The office, in most states, provides a permanent presiding officer for the senate without depriving the people of any senatorial district of their representative.
- (5) The lieutenant governorship has existed in all the larger and more influential states.
- (6) It provides a successor to the governorship elected by all the people.

Critics of the office argue:

- (1) The office seldom bears a significant share of administrative responsibilities.
- (2) The office tends to attract mediocre persons who are usually poorly compensated.
- (3) The lieutenant governor is an unnecessary "fifth wheel".
- (4) Regardless of party affiliation, there may be lack of comity between the governor and lieutenant governor.
- (5) The Model State Constitution and about one-fifth of the states make no provision for the office.

Secretary of State

The office is found in every state except Alaska and Hawaii which consolidate that office with the office of lieutenant governor. Secretaries of state are elected in 38 states; appointed by the governor in the 7 states of Delaware, Maryland, New Jersey, New York, Pennsylvania, Texas, and Virginia; and elected by the legislature in the 3 states of Maine, New Hampshire, and Tennessee. The traditional duties of the secretary of state include custodianship of records and archives, publication of public documents and laws, election administration, and service on numerous boards and commissions. Within the "long ballot" versus "short ballot" controversy, it is the office of secretary of state, of all executive offices, on which there is the widest consensus to make it appointive rather than elective. Arguments favoring an elective secretary of state include:

- (1) Election supports direct expression by the ballot of the popular will.

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- (2) There is danger in an overcentralized executive branch of government.
- (3) If there is party division between the governor and the secretary of state, the voters want an elective secretary of state as a watchdog over such operations as election administration or records.

Arguments favoring an appointive secretary of state include:

- (1) The position, being essentially ministerial and having so little discretion of a policy-making nature, there is little on which voters can acquaint themselves for purposes of casting an informed ballot.
- (2) Since the task of the office is to execute and implement state policy, the secretary of state should be directly responsible to the governor as head of state administration.

Attorney General

The office exists in each of the 50 states and is a constitutional office in all states except Alaska, Hawaii, Indiana, and Wyoming where it is established by statute. Attorneys general are popularly elected in 42 states; appointed by the governor in Alaska, Hawaii, New Hampshire, New Jersey, Pennsylvania, and Wyoming; elected by the legislature in Maine; and appointed by the Supreme Court in Tennessee. The functions of the attorney general fall into 3 categories: (1) legal adviser, with respect to the official powers and duties, of the governor, other administrative officers, and the state legislature; (2) representative of the state, or its officer or agency, in court in cases to which the state is a party or in which some state officer or agency sues or is sued in an official capacity; and (3) principal law enforcement officer of the state. Arguments favoring an elective attorney general include:

- (1) There is no pronounced trend to modify the position of the attorney general as an official largely independent of the governor and under no compulsion to see eye-to-eye with the governor in matters of administration policy.
- (2) Under an appointive office, gubernatorial control is apt to be influenced by political considerations.
- (3) The office is not solely a ministerial post but includes responsibilities that are quasi-judicial and quasi-representative as attorney for the people and for the state as well as for the governor and for the administration.
- (4) An important aspect of the attorney general's responsibility is the duty to check on the governor and the governor's administration to prevent violation of the law and to expose

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official wrongdoing in the state government wherever it is found--a watchdog function that an appointive attorney general subject to removal by the governor cannot discharge.

- (5) Only an elected attorney general is free to maintain true impartiality, detachment, and faithfulness to the law in the exercise of duties in contrast to an attorney general appointed, and subject to removal, by the governor who would tend to compromise impartiality and objectivity in straining to reach an opinion approved by the governor.
- (6) The separation of powers doctrine demands that the attorney general be independent of the executive.
- (7) Popular election gives the attorney general a mandate from the people which increases the respect and prestige of the office.
- (8) The office should be elective and serve as a training office for higher electoral responsibilities.

Arguments favoring an appointive attorney general include:

- (1) For purposes of administrative efficiency and public responsibility, the attorney general should be appointed by, removable by, and responsible to the governor, as the person responsible for the faithful execution of all state laws.
- (2) An appointed attorney general is freer to act on controversial issues than an elective attorney general who must consider the cost of action in office in terms of votes.
- (3) An elected attorney general may be in complete disagreement with the governor on important policy questions and may be an outspoken political rival to the governor resulting in the office of attorney general being used to obstruct the working of government.
- (4) The attorney general's function as a legal adviser to the governor and other state officers, and the duties to aid in the enforcement of state laws, are essentially part of the executive power and should be performed by one in agreement with the chief executive.
- (5) Since the attorney general is the legal adviser of the governor, the latter should have the privilege of selecting as legal adviser such a person as is in the governor's judgment the most competent, one whose views are similar to the governor, and one in whom complete confidence rests.
- (6) Gubernatorial selection of the attorney general brings into the public service attorneys of marked ability and high

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reputation who might not be available if forced to submit to an election to obtain the office.

- (7) Making the attorney general appointive by the governor, fully and directly responsible to the governor, and subject to removal by the governor is consistent with the basic theory of centralized administration and a strong, responsible governor.
- (8) The ultimate "watchdog" responsibility lies with the people, a responsibility much easier to discharge if only the governor is responsible for the operation of the state government.
- (9) The task of the administration of justice is a professional one, not a political one, and the attorney general should be interested first in the administration of justice as a professional function, not in personal political ambition.

Treasurer

The office exists in every state except Georgia and, as a distinct executive office, in every state except Alaska, Hawaii, and New York where the typical duties of a treasurer are carried on by the department of administration, the director of finance, and the controller, respectively. The treasurer's primary duties involve the actual receipt and custody of state funds and payment of warrants drawn on the state. The position is filled by popular election in 40 states; election by the legislature in Maine, Maryland, New Hampshire, and Tennessee; appointment by the governor in Alaska, Hawaii, Michigan, New Jersey, and Virginia.

The election of a designated treasurer as official custodian of state funds with duties that are largely formal and ministerial in nature, rather than discretionary, is still the rule in a majority of the states. However, the fact that both Alaska and Hawaii have entirely eliminated the elective position of treasurer and the fact that several reorganization proposals effected in states across the nation are indicative of some sort of state department of revenue becoming the accepted model. In addition to the need for a more rational and sophisticated organization for fiscal and budgetary operations, the rationale for shortening the ballot by omitting the position of treasurer also dictates that if the governor is to exercise a reasonable measure of control over state administration, the governor must certainly be the dominant figure in the field of state finance, for administrative control without some degree of financial control is a contradiction.

Auditor and Comptroller

The offices of auditor and comptroller, one or the other but not both, are commonly elective executive positions. Of the 48 states which provide for an

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office for post-auditing (auditor), 17 make it a constitutional, popularly elective office. Of the 35 states which provide for an office for pre-auditing (comptroller), 12 make it a constitutional, popularly elective office. None of the 33 states which provide for both an auditor and a comptroller fills both offices by the same method of selection.

Of 5 significant elements in state financial organization, Hawaii provides for the comptroller (head of the department of accounting and general services) to discharge the functions of determination of the nature of the accounting system, budgetary and related accounting controls; voucher approval and pre-audit, and warrant issuance; and for the legislative auditor to discharge the functions of post-audit. The distribution of these functions among officers and agencies in other states does not fit any readily discernible pattern. It is agreed that a distinction needs to be made between the pre-audit which is essentially an executive function and the post-audit which serves to assure the legislature that expenditures and investments have been made in accordance with law. It is also agreed that the greatest danger in this area is having the same officer charged with both pre-audit and post-audit and thus placed in the position, at the latter stage, of examining the officer's own accounts.

It can be concluded that, apart from reasons related to specific functions and traditions associated with a particular office in a given state, the underlying reason for making the lieutenant governor, secretary of state, attorney general, treasurer, auditor, or comptroller elective is the fear of an overpowerful single executive coupled with a desire for a representative bureaucracy achieved by direct election. The underlying reason for making the offices appointive is the fixing of responsibility in the chief executive by eliminating diffusion of command, division of authority, and frustration of executive power.

ORGANIZATION AND STRUCTURE OF THE EXECUTIVE BRANCH

The framework for the structure of the executive branch in Hawaii is aimed at the objectives of integration and consolidation of administrative operations, some of which are set forth below.

Allocation of Governmental Units

Legislative allocation of governmental units suggests a counter-proposal of gubernatorial allocation of governmental units, usually in the form of granting the governor constitutional power to initiate plans for administrative reorganization subject to rejection by the legislature. Alaska is an example of a state which has incorporated such a proposal in its constitution. Arguments favoring exclusive legislative powers of reorganization include:

- (1) Since the structure of government is properly a legislative responsibility, the legislature should have the principal role

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in framing departmental structure to assure that the policies of government are being executed.

- (2) Existing provisions have achieved the objective of preventing proliferation of governmental units.
- (3) Experience shows that the executive and legislative branches can work cooperatively to reorganize when the constitutional power is vested in the legislature.
- (4) Delegation of power to the governor does not allow the public to scrutinize the proposal as carefully as if the power is in the legislature.
- (5) Since the establishment of the structure of the executive branch is largely a matter of statutory law, its reorganization should also be a matter of statutory law.
- (6) Even the reorganization powers given to the President of the United States do not allow such major reorganizations as creating, abolishing, or altering executive, cabinet-level departments.

Arguments favoring gubernatorial reorganization powers subject to legislative veto include:

- (1) Since the governor is primarily accountable for and is better equipped than the legislature to oversee administration, the governor should have the authority, subject to legislative veto, to reorganize the administrative units under the direction of that office.
- (2) The legislature could retain effective power over reorganization since no reorganization would be made without its consent.
- (3) The power would assist the executive branch in carrying out efficiently the administrative functions assigned to it.
- (4) Requiring affirmative action on each plan submitted to the legislature could reduce chances for meaningful reorganization to take place at an acceptable pace.
- (5) Subject matter committees may jealously guard their jurisdictional assignments.
- (6) Similar reorganization powers have been given to the President of the United States since 1949.

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Twenty-Department Ceiling

A ceiling of 20 principal departments immediately suggests the questions of why 20 or why any constitutional limit by number. Arguments favoring a constitutional limitation include:

- (1) The provision insures that the legislature cannot create executive branch departments at will and thus protects the power of the governor to administer the state government.
- (2) The provision protects the legislature from undue pressure to create new departments.
- (3) The provision insures that the governor has a manageable span of control over departments and limits the number of departments and units reporting directly, thereby increasing government efficiency and accountability of officials.
- (4) A maximum of 20 departments is recommended by the Model State Constitution and the Model Executive Article and also appears to be the trend in other states in their attempt to prevent proliferation of departments of state government and bring sound management principles to the operation of government.

Arguments favoring removal of the constitutional limitation include:

- (1) The limit on the number of departments may result in an inefficient grouping of unrelated activities and interfere with efforts to achieve flexibility in administration.
- (2) The existence of a limit on departments has contributed to a proliferation of divisions, special agencies, boards, commissions, and offices.
- (3) The limitation to 20 departments is arbitrary.
- (4) A specific limit should not be in the constitution; the objectives could be achieved by statute which would have the advantage of greater flexibility.

Pressures Against Integrated Consolidated Administration

The following list consists of pressures against concentration of administrative and executive powers in the governor:

- (1) The "normal" drive for agency autonomy or an almost innate characteristic of administrative agencies to desire independence.

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- (2) A historical background of separate responsibility to the electorate which may have had its origin in a "reform" movement for a special function or as a popular repugnance against a scandal in an established service. The appeal of "direct responsibility to the people" is difficult to overcome.
- (3) The attitude of clientele and interest groups and the often closely related and mutually reinforcing factor of professionalism. Each interest group, identifying the public interest with its own, feels that its affairs are properly considered by keeping the agency and funds involved "independent"--meaning independent of everyone but the particular interest concerned. The politics of the ballot-box are substituted by the politics of special influence, often but not always with the highest motives. Professionalization, as a force for fragmentation of state services, is often closely linked to the pressures of special clientele groups.
- (4) Functional links to the national government, or the tendency of a lower level of government to adjust its organization to mirror the larger political unit. This tendency is probably most strongly felt at the state level as the result of federal grant-in-aid programs and requirements.
- (5) The desire to insulate special types of programs or the belief that certain kinds of programs should be in some measure removed from political policy and processes. Regulatory, experimental, and trade promotional agencies have often been provided with insulation or exemption from central controls and policies.
- (6) Political division between the governor and the legislature has frequently expressed itself in the establishment of administrative agencies which were placed under legislative control or, as a minimum, beyond any effective control of the governor.

Governor Sanford of North Carolina, in his work on revitalization of the states, makes 10 recommendations for achieving adequate and effective state government; most of the recommendations are pertinent to constitutional deliberations:

- (1) Make the chief executive of the state the chief executive in fact.
- (2) State constitutions, for so long the drag anchor of state progress, and permanent cloak for the protection of special interests and points of view, should be revised or rewritten into more concise statements of principle.
- (3) The 2-year term for governors should be replaced with a 4-year term, and a governor should be allowed to seek to

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succeed himself at least once. If succession is not favored in some states, perhaps a 6-year single term might be considered.

- (4) The governor should be given the dominant authority in the budget process, preferably as budget director.
- (5) The governor, as chief planner for the state, must conduct the administration to enable the state to look to the future beyond the governor's term of office.
- (6) Like the President of the United States, each governor should have the authority to reorganize and regroup executive agencies, subject to legislative veto within a specified period of time.
- (7) The executive committees, state councils, and separately elected executive officers and independent boards and commissions should be eliminated, in authority if not in fact.
- (8) Merit systems and civil service, a strength for government when properly structured, must be disentangled from an overzealous past, and liberated from an overprotective philosophy that smothers the best talent, prevents rapid promotions, and often penalizes assertive leadership.
- (9) The governor must have adequate staff to represent adequately the public interest.
- (10) The governor's office should be organized to be receptive to new ideas and should use the experience of other states in seeking fresh solutions to problems.

Critics of these recommendations and of the reorganization movement principles which would establish a clear administrative hierarchy headed by a popularly elected governor from whom all administrative authority flows focus on 3 points:

- (1) Overconcentration of authority in one individual.
- (2) Overemphasis of formalities at the expense of operating realities.
- (3) Disbelief that the "principles" will insure continuity of policy and reliable popular control.

EXECUTIVE-LEGISLATIVE RELATIONS

The governor's relationship with the legislature exemplifies the checks and balance system as a fundamental construct of American

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constitutional government. The governor's veto power is an obviously important element in the checks and balance system. Some constitutional specifications affecting that power are outlined below.

Time

The time available to the governor for reviewing measures that have passed the legislature affects the governor's ability to take informed action. In Hawaii, the governor has 10 days to consider bills presented 10 or more days before the adjournment of the legislature and 45 days for bills presented less than 10 days before adjournment or presented after adjournment. Bills which are neither signed nor returned by the governor within these periods automatically become law. Only 4 states, Alaska, California, Illinois, and Michigan, permit more time for in-session review and only Illinois grants more time after adjournment. It has been suggested that the period for gubernatorial consideration be increased, particularly because a bill not acted upon becomes law in Hawaii.

Pocket Veto

Twelve states provide for the pocket veto whereby a bill dies if the governor neither signs nor vetoes the measure. In Hawaii, the governor can exercise the pocket veto only when the legislature reconvenes in special session to consider a post-adjournment veto. At this time, if the legislature does not override the veto but instead alters the bill, the bill dies if the governor fails to sign it within the required time. The principal objection to the pocket veto practice is that it does not require the governor to state objections and therefore obscures gubernatorial responsibility in killing legislation.

Legislative Majorities to Override

If the number of votes required to override the governor's veto is a simple majority, the veto is, in effect, merely an advisory opinion and is not a true check on legislative action. The higher the extraordinary majority needed to override, the more the veto assumes its character of being a check on the legislature.

All states, except North Carolina, which does not provide for the veto, have constitutional provisions that specify the requirements for overriding the veto. Twenty-two states, including Hawaii, require a two-thirds vote of the membership of the legislature to override, and 14 states require two-thirds of the legislators present. In the remaining states, the veto may be overridden by a three-fifths or simple majority of the members or by three-fifths of the legislative quorum present. Arguments favoring relaxation of the required vote to override include:

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- (1) The small percentage of vetoed measures that are overridden indicates a need for a better balance in executive-legislative relationships.
- (2) A veto that is close to being absolute is undemocratic.

Arguments favoring rigid vote requirements to override include:

- (1) The governor is in the best position to assess the merits of a bill and its relationship to overall state policies.
- (2) If the requirements are relaxed, it may make it possible for a minority of legislators to control legislative decisions.

Post-Adjournment Veto Sessions

If the legislature meets for a limited period and is unable to reconvene itself in special session, post-adjournment veto decisions become final. The desirability of this practice has been questioned as giving an unfair advantage to the governor. Three proposals have been suggested to meet the situation.

The Model State Constitution solves the problem by eliminating the possibility. That document provides for continuous legislative sessions, interrupted only by recesses. Since a recessed legislature can be recalled by its leaders, there is ample opportunity to reconsider bills that are vetoed out-of-session at the legislature's discretion. A second method is to grant the legislature the general power to reconvene in special session. The third approach, taken by Connecticut, Hawaii, Louisiana, Missouri, and Washington, is to authorize the legislature to reconvene itself in special session for the sole purpose of considering post-adjournment vetoes.

Conditional Veto

The conditional veto, or executive amendment, permits the governor to return a bill unsigned to the house of origin with suggestions for changes which would make a bill acceptable. The legislature has the choice of amending the bill only in the manner proposed by the governor or forcing the original bill into law by a specified extraordinary majority vote. Illinois and Massachusetts provide for the conditional veto. Arguments favoring the conditional veto include:

- (1) Use of the conditional veto is usually based on the governor's objection only to part of the bill and by use of this formal communication, the objection can be resolved.
- (2) The procedure promotes a closer working relationship between the governor and the legislature and at the same time retains clear accountability for the action of each.

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- (3) Experience in the states where it is used shows that governors use the conditional veto more often than the regular veto.

Arguments opposing the conditional veto include:

- (1) The effect of the conditional veto can be achieved through informal communications between the governor and the legislature.
- (2) The conditional veto would result in enlarging the governor's authority in areas where the governor is already sufficiently strong.

Partial Veto

The partial veto consists of an item veto over nonappropriation measures; in most instances, it is final unless overridden by the legislature in the same manner as a veto of a complete bill. Oregon and Washington provide for the partial veto.

The partial veto is recommended as a device to increase the choices available to the governor in acting upon legislation which the governor favors partially. It is opposed on the ground of violation of the separation of powers by diffusing responsibility between the executive and legislature.

Legislative Sessions

The governor exercises 3 principal powers which affect legislative sessions. They are: (1) the convening of the legislature in special session, (2) determining the agenda of a special session, and (3) extending the duration of regular and special sessions. The major controversy in this area is whether these powers should be shared with the legislature or exercised by the governor alone.

Vesting in the Governor Alone

- (1) Since the governor functions in office on a year-round basis and is supported by a large, well-staffed bureaucracy, the governor is in the best position to determine when and what problems require a special session and if the state's business warrants the extension of any session.
- (2) By authorizing only the governor to exercise the powers, the legislature is compelled to complete its work promptly and efficiently during the regular session.

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- (3) The governor's role as legislative leader is enhanced by offering the governor significant discretion in determining if and when certain policy questions will be dealt with.

Sharing with the Legislature

- (1) Constitutionally, the legislature is the policy-making branch of government and as such should be able to decide when certain problems require legislative attention.
- (2) The increased responsibility exhibited by state legislatures in the last several decades has largely removed any basis for fears that these powers will be abused.
- (3) Many prominent organizations in the field of state government such as the National Municipal League recommend sharing the 3 powers between the 2 branches.

THE OFFICE OF GOVERNOR

Constitutional requirements and conditions for the office of governor, equally applicable to the office of lieutenant governor, are set forth with particularity in state constitutions. Two of the significant items among these qualifications and conditions are presented below.

Time of Election

The basic concern in setting the time of gubernatorial elections is whether they are to be separated from presidential elections and local elections. Arguments favoring nonpresidential year gubernatorial elections include:

- (1) There is a need to keep state and national issues separate.
- (2) The governor should be elected on the basis of the candidate's stand on state issues instead of riding into office on "presidential coattails".
- (3) Nonpresidential year elections keep political parties alive between presidential elections.

Arguments favoring presidential year gubernatorial elections include:

- (1) Voter turnout is smaller for state elections than it is for presidential elections.

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- (2) Additional elections are costly.
- (3) Additional elections impose excessive burdens on government, political parties, and voters.

Limitations on the Number of Terms

Arguments favoring unlimited terms for governors include:

- (1) The people should be able to retain a governor if they feel the person is the best qualified. To deprive the people of this right, denies them the service and experience of able public servants whom they know the most about and denies them the right to elect a person of their choice.
- (2) Knowledge of the administrative machinery is so involved that a governor should have at least a 4-year term and unlimited succession rights to develop and implement programs to which the governor is committed.
- (3) The powerful political machines built by bosses and special interests are not weakened by constitutional limitations on reeligibility whereas the political power of the people is more easily fragmented. If the governor has a sufficiently long term and can be reelected, there is more opportunity to organize public support so that the governor may win succession to office by the governor's own right.
- (4) Limiting the number of terms results in such periodically heavy turnovers of administrative executives appointed by the governor that there is no continuity in administration, administrative offices are less attractive, and the incentive for doing a good administrative job is weakened.
- (5) Numerous other checks upon the governor exist in the form of legislative and judicial controls, the 2-party system, the constitution, public opinion, and the desire for re-election.
- (6) Limited terms diminish a governor's political leadership and effectiveness near the end of the allotted time because party leaders, legislators, and the public are considering who the next governor will be.

Arguments favoring limited terms for governors include:

- (1) There is a fear that unlimited re-election enables the governor to build a political machine which may be used to perpetuate the governor's regime. Continuance in office, unrestricted as to succession, allows the governor to amass so much political power as to threaten creation of a dictatorship.

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- (2) A constitutional limitation on gubernatorial re-election makes the office available to new individuals with new ideas more frequently and is more likely to keep the governor responsive to the wishes of the people.
- (3) The governor, in fostering self-perpetuation, will usually do what is necessary to win the next election rather than what is right.
- (4) Political experience indicates that it is often difficult to defeat an incumbent governor who is seeking re-election regardless of qualifications.

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THE JUDICIARY

A fundamental function of every state is to preserve itself and its citizens from internal danger. It must also prevent the undermining of the social order by keeping open the avenues of social progress, including the adjudication of disputes between citizens. It is in this process that the courts play a prominent role. "They provide the instrumentality for the trial of disputes between the individuals and between the state and individuals...." While performing this function, the courts safeguard the democratic processes and the rights of the individual. In doing so, the court and the entire judiciary system serve as the formal mechanism for resolving conflicts and lessening the frictions between individuals within the state.

The recent history of Hawaii's judiciary has been a positive one. Prior to the 1968 Constitutional Convention, Retired Associate Justice Tom Clark of the United States Supreme Court, in a speech in Hawaii, declared that, "Hawaii, in its seventh year of statehood, has one of the best judicial structures in the nation." Among the features of the judiciary that elicited praise were: the centralization of administrative, budgetary, and statistical control in the chief justice; the creation of the office of administrative director; the granting of broad rule-making power to the Supreme Court; the establishment of the judicial council to serve in an advisory capacity; and the flexibility provided by its provisions on court structure and jurisdiction.

Notwithstanding the smooth functioning of the judiciary in the recent past, modifications improving the system's capacity to deal with future judicial needs are possible. In general, however, all such concerns should be considered within the context of how detailed provisions dealing with the judiciary should be written into the Constitution. In the past, many states' constitutions contained judicial articles with great detail. With the growth of population, shifts in economic base, and industrial and agricultural expansion, most states have found their judicial provisions outmoded and have resorted to repeated constitutional amendments. Recognizing that the process of constitutional amendment is arduous and time consuming, commentators have urged that the judicial provisions be drafted so as to provide a flexible structure by which a court system could adjust to changes dictated by an expanding society.

JUDICIAL ORGANIZATION

The judicial system reflects the collective preference for public order and individual justice as compared with the advancement of other social objectives. In considering the size and service level associated with a structure of judicial administration it is possible to frame the analysis in a manner similar to that of establishing any other social welfare program. For example, relative to the judicial system, the questions raised can take the form of: "How important is

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having well-trained judges in all courts?" or "How much public resources should we commit to cutting back the backlog of court cases and minimizing delay?" The answer to such questions involve the size and quality of the judicial administration system. In turn, those factors reflect a public commitment to the establishment of a formal structure for the resolution of social conflicts. The level of such a commitment in Hawaii was approximately 1.7 per cent of the State's total resources in the past few years. Even accounting for such cost considerations from the standpoint of judicial organization the issue most relevant for constitutional design involves the capacity of the judicial structure to resolve the disputes of Hawaii's citizens. Two types of forces bear upon judicial capacity--the demand for judicial services and the ability of the organization to meet those demands.

The ability of the judicial structure to dispose of the conflicts brought before it is, in part, determined by the magnitude of the demands made upon its services. Given a fixed organizational structure, the demand for court services may be higher or lower than its short nonservice capacity. In recent years, a number of factors which explain the magnitude of demand for judicial services and changes in court caseloads have been identified. Five such factors are briefly set out below:

- (1) Underlying Social Activity. There is a positive relationship between the volume of social activity and the number of cases arising out of that activity.
- (2) Certainty of the Law. A negative relationship can be expected between the certainty (predictability) of the law and the number of litigated cases.
- (3) Substantive Legal Rights. The creation of new or the expansion of existing substantive legal rights produces an increase in the number of cases.
- (4) Cost of Legal Services. Decreases in the cost of legal services increase the number of cases brought.
- (5) Court Response Time. Courts can react to increased demand for their services by increasing the waiting period for litigants.

Each of the above forces are factors outside the determinants of judicial capacity. However, each, in turn, affects the perceived adequacy of the courts' ability to resolve social conflicts. Acknowledging that many factors influence the demand for judicial services, analysis turns to whether Hawaii's judiciary has been able to meet such demand.

Analysis of judicial organization can be broken down into 2 types of adjudicatory functions. First is the capacity and ability of trial courts to dispose of the controversies brought to them. A second dimension involves judicial appeal.

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Trial courts have traditionally been the initial public forum for resolving the disputes brought to the judiciary. Generally, without altering current procedural safeguards, the number and organization of the trial courts determine how many cases the judicial system can dispose of in a given time period. During the last few years, the number of cases brought to Hawaii's trial courts have shown a gradual increase. At the same time, there does not appear to be a substantial decline in the court's ability to resolve those cases. Preliminary evidence shows that different types of courts have varying capacities to dispose of the cases brought before them. Such differences might be explained by the varying levels of judicial and other resources available to the different types of courts. However, a more plausible explanation rests in the differences of severity and complexity associated with the types of cases allocated to the different classes of courts. To the extent that such jurisdictional requirements of the courts are related to the termination rates of the 3 types of courts, the ability of the courts to dispose of their caseloads may reflect less upon their capacity than their ability to tailor justice to the seriousness of the controversy.

An altogether different dimension of the judiciary's function involves appellate review.

In Hawaii, the appellate function is presently vested in the Hawaii Supreme Court. The 5-member Court is responsible for resolving cases taken on appeal from the State's trial courts. Its ability to accommodate demands for its services appears to have declined in the past few years.

At the beginning of this decade, the Hawaii Supreme Court successfully disposed of 73.82 per cent of all appellate proceedings. However, that termination rate fell to 59.91 per cent by 1976.

At the same time, the Court's ability to successfully review its cases has declined, the time needed for terminating an appellate case has lengthened. Between 1972 and 1976, the average time from the date an appeal was filed until an opinion is rendered rose from 12.6 to 19.5 months. The number of justices on the Court remained constant over that period. Such evidence suggests that judicial productivity may be lagging. However, further analysis dispels this notion.

Two points can be made. First, the number of written opinions produced by the Court in recent years has not changed substantially. Second, the Supreme Court has experienced a radical increase in its workload, especially during the last 2 years. While approximately 400 appellate matters were brought to the Supreme Court in 1971, the number exceeded 600 in 1976.

Such evidence indicates that the appellate capacity of Hawaii's judiciary is inadequate for dealing with the demands placed upon it.

There are a number of alternative ways for expanding the appellate capacity of the judiciary. The listing below outlines the most frequently mentioned strategies and their related alternatives for supplementing Hawaii's present appellate capacity:

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<u>Strategy</u>	<u>Alternatives</u>
1. Increase Supreme Court resources	(A) Add professional staff authority to make recommendations to the court regarding the final outcome of selected cases. (B) Add law clerks.
2. Change Supreme Court structure	(A) Increase Supreme Court size. (B) Reorganize the Supreme Court, e.g., into panels.
3. Change Supreme Court jurisdiction	(A) Restrict the right of review. (B) Provide for appeal by certiorari
4. Create more appellate courts	(A) Intermediate appellate court. (B) Appellate division for circuit courts.

The types of state actions needed to remedy what can be called the "appellate capacity problem", can be categorized for the purposes of constitutional analysis.

Assuming that recent increases in demand for Supreme Court services evidence a problem of sufficient magnitude for state action, there are 3 constitutional methods for correcting the problem.

Constitutional Status Quo

The status quo method entails leaving the constitutional provisions regarding the judiciary untouched. Reliance on this method forecloses both the creation of intermediate appellate court structures and changing the Supreme Court's organization.

Increasing Legislative Discretion

In addition to those legislative options available if no constitutional changes are made, constitutional amendments can be designed to broaden the range of discretion given to the legislature. Two types of amendments would cast the judiciary's problem regarding appellate capacity completely in the arms of the legislature. A first type of constitutional change would expand the legislature's authority to create courts inferior to the Supreme Court. The second type of amendment would maximize the flexibility of the Supreme Court structure by deleting references to its size from the Hawaii Constitution.

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Constructing a New Appellate Structure

Antithetical to increasing legislative discretion is the method of constitutionally producing additional appellate capacity in the judiciary. In addition to adding to the number of justices on the Supreme Court, focus here turns to establishing an intermediate appellate court. An amendment creating such a court would mandate that the legislature appropriate the funding necessary for its operation. However, the extent to which the legislature would have control over that new court would be determined by the specificity of details built into the constitutional amendment.

In summary, the structure of Hawaii's judiciary can be viewed from the perspective of its capacity to resolve the conflicts among the State's people. In doing so, awareness of the factors affecting the level of service demanded from the judiciary is separable from those determinative of the courts' ability to cope with those controversies brought before them. Because government is better equipped to affect the latter set of factors, discussion of judicial organization focuses on the trial and appellate courts and their ability to settle those conflicts introduced to their fora. While there is little evidence that trial court resources have inadequately grown to accommodate the increased demands for their services in recent years, questions regarding the sufficiency of current appellate capacity have been raised. In fashioning a constitutional design accommodating such questions, different policy consequences result. On the one hand, giving the legislative discretion in constructing appellate capacity increases flexibility in tailoring appellate organization to the type of demands placed upon it. On the other hand, firmly delineated constitutional standards insure independence in judicial functioning.

SUPREME COURT SIZE

The size of Hawaii's Supreme Court is presently established in the Hawaii Constitution. In contrast, some state constitutions and the U.S. Constitution do not set the size of their supreme courts. It may be argued that not prescribing the size of the Hawaii Supreme Court allows for greater flexibility in judicial structure. For example, where workload increases of the court warrant it, the size of the court may be expanded or contracted to fit the circumstances. Where no provisions regarding supreme court size are included in a constitution the number of justices is set by statute. On the other hand, such flexibility may threaten the independence of the judiciary. The potential for "court-packing" undermines the doctrine of separation of powers inherent in our present constitutional scheme.

In Hawaii, the State's highest court is composed of 4 associate justices and a chief justice. There are a number of considerations in setting the number of judgeships on the supreme court. Five such factors are:

- (1) Court Workload. It can be argued that the most important criterion in fixing the number of justices is the amount of work facing the court. There should be a sufficient number of justices to insure ample time for reflection and deliberation in the preparation of opinions.

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- (2) Range of Views. The court should have enough members to insure a breadth of views. The larger the size of the court, the greater the potential for differing viewpoints.
- (3) Ease of Deliberation. The size of the court should also be small enough to allow meaningful and close deliberations. The number should facilitate the formation of the types of working relationships required to establish concurrence of opinion on difficult legal questions.
- (4) Cost. A limiting consideration in fixing the size is the expense of a large tribunal, especially in smaller states. Aside from added judges' salaries, a large court can become quite costly if adequate staff services for each additional judge, e.g. law clerks and secretaries, and office accommodations are taken into account.
- (5) Odd Number Justices. A supreme court should have an odd number of justices so that decisions can be reached by majority vote. The odd number avoids, as far as is possible, an even division of the court.

In Hawaii and the great majority of states, the Supreme Court represents the whole state rather than a district. The justices are selected at large. A minority of states choose their supreme court justices on the basis of geographic districts. The means for selecting chief justices vary from state to state but they can be categorized into 3 groups:

- (1) The chief justice seat is treated as a separate office and a person is either elected or appointed as the chief justice. Hawaii falls within this category;
- (2) The chief justice designation automatically goes to the judge who is oldest in service or who has the shortest term remaining; or
- (3) The members of the supreme court select the chief justice from among themselves.

Related to the issue of court size is the mechanism for finding temporary replacements for supreme court justices. The need for appointing substitute justices on a case-by-case basis may arise because of vacancy due to illness, disqualification, death, or when a justice has retired but no successor has been named. Present Hawaii constitutional provisions create 2 pools from which temporary judges to the supreme court can be selected, circuit court judges or justices retired from the Hawaii Supreme Court.

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JUDICIAL ADMINISTRATION

The concept of court unification has been central to nearly all proposals for state court reform in this century. A unified system of courts is organized according to uniform and simple divisions of jurisdiction and operates under a common administrative authority. The premise underlying the movement toward unifying court systems is the expectation that "[r]endition of equal justice throughout a court system is possible only if the system, as a whole, applies equal standards through rationally allocated effort." Hawaii has moved towards unifying its judicial system in the last decade which is evidenced by 4 types of changes in court administration:

- (1) Reorganization and coordination of the district court system;
- (2) Centralized organization with administrative responsibility vested with the chief justice and the supreme court;
- (3) Unitary budgeting and financing of the courts at the state level; and
- (4) Separate personnel system centrally run by the state court administrator covering a range of personnel functions (recruitment, selection, promotion) and encompassing all personnel including clerks of court.

There recently have been questions raised regarding the desirability of such a judicial structure. In general, such critics contend that a judicial system may continue to remain dysfunctional in spite of evidencing characteristics of centralization and unification. There is little empirical evidence to suggest that the unified court system is better than a nonunified one. On the other hand, there is also no hard evidence indicating that the converse is true.

While such a debate can be expected to continue for the next decade, it is sufficient at this point to understand that the judiciary can be viewed as an organization in many ways similar to other social welfare agencies. To the extent that the judiciary is organized as a decentralized and adaptive system, it can be said that the resulting system will not administer justice equally. On the other hand, a centralized, unified system can result in an inflexible bureaucratic system whose ability to tailor justice to the needs of the citizenry is impaired. As applied to the State of Hawaii, however, it has generally been recognized that the direction toward court unification has been the correct approach for revitalizing and overhauling the State's judicial branch of government.

JUDICIAL SELECTION

Selecting competent judges is the most important aspect of establishing and maintaining an excellent court system. Judges perform the central function in resolving societal conflicts and providing standards of proficiency and

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conscientiousness that guide members of the bar, court auxiliary staff, and the general public.

The task of choosing judges is a difficult matter of judgment. No reliable yardsticks have been developed for measuring those characteristics essential for a judge: professional competence, intellectual ability, integrity of character, and a knowledge of human relations.

Because there are no hard standards for what constitutes a good judge, the search for the most competent boils down to seeking the best method of selection. No constitutional provision can guarantee that those charged with the task of judicial selection will in fact exercise good judgment. What is desirable is a selection mechanism that minimizes the likelihood that the best qualified will not be selected.

In the United States, 5 alternative processes for selecting judges have evolved since the country's birth. Two of them involve popular elections. They are either based on partisan or nonpartisan politics. Another 2 mechanisms for judge selection entail appointments by either the executive or legislative branches of government. The fifth alternative, originally designed in Missouri, includes both appointment and election.

At present, the bulk of the states still rely on the election process for choosing judges for their highest court.

THE MAJORITY OF STATES STILL ELECT JUDGES

<u>Selection Mechanism</u>	<u>Number of States</u>
Election	24
Appointment	11
Missouri or Merit Plan	15

A number of states have switched to the Missouri Plan in the last decade. Why a state would prefer one selection process over another has been the subject of much debate. Of the 11 states using the appointive mechanism for choosing supreme court justices, 4 rely on the state legislature to make such selections. Under the legislative appointment scheme, the typical process for selection involves a judicial election in which only members of the state legislature are allowed to participate. The remaining 7 states, including Hawaii, place primary reliance on the governor for choosing judges. Generally, the executive appointment process calls for gubernatorial nomination followed by confirmation by the legislature, typically the state senate.

Appointive systems for judge selection, be they legislative or gubernatorial, have been associated with the following arguments:

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ARGUMENTS RAISED BY AN APPOINTIVE SYSTEM OF JUDGE SELECTION

For

- The appointing officer can develop the staff and resources to obtain information and make intelligent assessments of judicial candidates.
- The appointing official is clearly responsible for the quality of judicial applicants and a series of bad appointments can politically be damaging.
- The appointive system can produce a balanced as well as a qualified judiciary--in that the governor can appoint certain candidates with particularly good qualifications, notwithstanding that they have little political backing.
- The appointive system will produce qualified candidates who would not otherwise subject themselves to the rigors of a political campaign.
- The appointive system at the federal level has produced judges of generally high caliber.
- A judge, once appointed to the bench, is not obligated to the executive or anyone else, but is responsive and obligated only to do justice according to law and conscience.

Against

- The appointive method, far from divorcing judges from politics, increases the political considerations involved in the selection of judges since the appointing officer is a political officer subject to political pressures.
- Even if the governor has made a series of bad judicial appointments, the electorate may not want to throw the governor out because he may be a good executive in all the other functions of government.
- Appointment by the governor and confirmation by the senate undermines the independence of the judiciary and destroys the separation of powers of the 3 branches of our government.
- Judges who are selected by the governor under the appointive system may become subservient to the executive.
- There is as much politics involved in an appointive system as there is in an elective system, but the politics involved in an appointive system is more invidious in that there is participation by a few and the appointee only looks to a few after appointment.
- The purely appointive system does not provide a regularized method of actively seeking out talent for the benches in a nonpolitical way.
- An appointive system is inherently undemocratic in that it deprives the people of direct control of the judicial branch of the government.

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For

Against

- Even where judicial appointments must receive confirmation by somebody independent of the appointing officer, there is no substantial protection against inferior selection. At best confirming bodies have only a veto power--while they may reject one appointee, they cannot be certain that the next appointee proposed will be better qualified.

Although the election process remains the most frequently used means for choosing judges, the number of states relying on this procedure has decreased sharply in the last decade. A total of 31 states determined the membership of their highest courts by popular election in 1968. By 1976, this figure dropped to 24. Among those states presently electing supreme court judges, 13 tie the campaign and voting processes to political party affiliations. The remaining 11 states have nonpartisan elections.

The salient arguments related to elective judicial systems can be presented as follows:

ARGUMENTS RAISED BY AN ELECTIVE SYSTEM OF JUDGE SELECTION

For

Against

- | | |
|--|---|
| <ul style="list-style-type: none">- The elective method has worked well in the past and produced a qualified, impartial, and effective judiciary.- The elective system assures that the judicial branch of government is directly responsible to the people so that it will not be in a position to impose political, social, and economic policies which are contrary to the fundamental aims of the people.- The elective system is said to have the advantage of assuring the selection of judges representative of the various ethnic, religious, and other groups of the community. | <ul style="list-style-type: none">- The voters, as a whole, know relatively little about judicial candidates, nor do they have any great desire to know much more. Studies have shown that voters either do not vote for judicial candidates at all or else vote solely on the basis of party affiliation or some other more or less arbitrary basis.- The elective system engenders a loss of public confidence in the independence of the judiciary in that it fosters the impression that elected judges, in order to keep up their political connections, must refrain from taking action which offends the party leaders. |
|--|---|

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For

- Since the voters are deemed qualified to elect the governor and the legislators, they are equally qualified to elect their own judges.
- The election of judges insures that the judiciary is an independent branch of our government in that a judge need not look to the executive or legislative branch for appointment and confirmation.

Against

- The elective system forces the incumbent judge to take time from judicial duties to campaign, thereby increasing the work of the other judges and disrupting the court schedule.
- The elective system is not designed to select the most able judges in that local political leaders do the nominating, not on the basis of ability, character, and professional standing but with primarily political factors in mind.
- The elective method compels judges to become politicians, operates to discourage able individuals from seeking judicial office, and once they achieve the office, it may operate to remove them for reasons not fundamentally connected with judicial performance.
- It is practically impossible for the public to know which candidates possess the requisite abilities to make competent judges since judicial campaigns receive relatively little news coverage.

The Missouri Plan, sometimes called the Merit Selection Plan, is presently used to select judges for the court of last resort in 15 states. Although there are numerous variations on the plan, the process generally consists of 3 steps:

- (1) Nomination of slates of judicial candidates by nonpartisan, lay-professional nominating commissions;
- (2) Appointment of the judge by the governor from the slate submitted by the nominating commission; and
- (3) The appointee serves an initial term, then submits to a noncompetitive election in which the electorate decides whether or not to retain the individual for a regular term.

The Missouri Plan has been the topic of much debate within the last decade. Even though there is no hard evidence that the claims made by its proponents are true, especially the argument that the Missouri Plan eliminates politics from the selection process, the campaign for the plan has been fairly successful in a number of states. In such debates, the points raised can be summarized as follows:

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ARGUMENTS RAISED BY THE MISSOURI SYSTEM OF JUDGE SELECTION

For

- Use of the nominating commission helps insure that only well-qualified candidates are considered for judicial office and prevents mediocre candidates from being selected for political reasons.
- The Plan retains the important advantages of the appointive scheme, that is, participation in the selection process of an authority (the governor) who is qualified and able to assess judicial candidates and who is directly answerable to the people.
- The nominating committee arrangement insulates judicial selection from the adverse effect of politics, inevitable in appointive selection of judges. It is immaterial if the executive chooses to select only nominees from the executive's political party so long as the nominating committee submits only the best qualified appointees.
- In Missouri, the Plan has resulted in a partisan composition of the bench. Of the first 60 judges appointed under the Plan, 70 per cent were from the same political party of the governor and 30 per cent were from the opposite political party.
- Public confidence in the Plan in Missouri has been good. In 1940, the Plan was adopted by a 90,000 vote majority. Resubmitted in 1942 at the insistence of opponents who argued that the people had not understood the Plan,

Against

- Removal of judges from election by the people deprives the people of a basic inherent right.
- The courts are not taken out of politics but the traditional politics of party leaders and machines have been replaced by bar and gubernatorial politics.
- The system diffuses the responsibility of selection since a governor could claim that good selections could not be made due to the inferior quality of those on the lists.
- It appears that only one Missouri judge has been defeated under the referendum feature of the Plan since it went into operation in 1940 which shows that the Plan perpetuates present judges in office for the balance of their lives, making it almost impossible to remove unqualified judges.
- The attorneys have too much power and authority over the nominating process.
- The nominating committee places the governor's "preferred" candidates on the list of nominees to accommodate the governor.
- There is no reason that in the retention election, the public would be any better informed after a judge has served one or more years in office.
- Since nominating commissions predominantly consist of judges and attorneys, their orientation in judicial selection will be to emphasize

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For

voters reendorsed it by a 180,000 vote majority.

- Under the Plan, any judge, being free of political preoccupations, will be a better judge because the judge's working hours and mind will be devoted only to judicial work.
- Since the retention election under the Plan is disassociated from politics, the chances that a judge will be removed from office on political grounds unconnected with ability as a judge are greatly reduced.
- The Missouri Plan still reserves to the people a veto on judicial candidates. The public is rarely in a position to know in advance how good a judicial candidate is, but if the candidate's record as a judge is outstandingly poor, the voters can ascertain the facts and remove the judge.
- The security of tenure provided by the Plan attracts attorneys who would not have submitted themselves to the ordeals of the old political system.

Against

strictly technical abilities rather than other qualities and types of experience which may be more relevant to the needs of the community.

It should be noted that the Hawaii Constitution provides for the appointment only of the justices of the Supreme Court and the judges of the circuit court. The method of selecting district court judges is left to the legislature which has provided that district judges be appointed by the chief justice of the Supreme Court. District judges hold office for 6 years and until their successors are appointed and qualified. Any district judge may be summarily removed from office and the judge's commission removed by the Supreme Court whenever the Supreme Court deems such removal necessary for the public good.

Beyond the arguments that can be advanced for different means for selecting judges, little evidence substantiating the claims associated with each alternative exist. In the last few years, however, a number of empirical studies comparing the differential impacts of the various selection mechanisms have been undertaken. Their findings shed some light on whether the selection process is related to who are chosen and how they resolve the conflicts brought before them. The conclusions of the studies comparing selection systems can be

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broken down into 2 categories. Much of the data from existing studies have focused on the characteristics of those selected for judgeships under the different schemes. To the extent that selection systems tend to single out different classes or types of persons for judgeships, such mechanisms indirectly influence public acceptance and the authority of the judicial system. In contrast, little data regarding the nature of decisional outcomes under the different mechanisms have been gathered. The decisional propensities of the judges selected under the various plans have a direct impact on how conflicts are resolved and the policy prejudices of the judiciary.

Empirical data suggest that different judge selection mechanisms have a smaller impact on the characteristics of those chosen than the arguments raised above might indicate. First, it is not clear that the various different selection processes tend to choose judges with substantially different prior career experiences. Second, there is virtually no difference in the technical competence of elected and appointed state supreme court justices. Third, social factors characterizing judges are affected only slightly by the selection process.

Like those works characterizing the judges produced by the different selection systems, empirical studies documenting judicial decisional propensities are few. One researcher found that elected judges tend to be more liberal than those who are appointed. Such a conclusion held true even when political party affiliation was held constant. Another dimension of the decisional inclination of judges regards partisanship in conflict resolution. When appointed and elected judges are compared, some data show that judges on appointed courts tend to be more nonpartisan than judges on elected courts. Appointed judges are less likely to vote like typical democrats or typical republicans.

Even though existing behavioral studies show that little difference in impact results from alternative selection systems, they do provide a tentative picture of the nature of the trade-offs involved. Where liberalism and public participation are valued over nonpartisanship and technical competence, a selection process embodying an election mechanism may be preferred to one including judicial appointment. Even acknowledging the existence of such trade-offs, however, 2 factors must be kept in mind. The magnitude of the trade-offs and the certainty with which they occur in a particular state speak loudly against immediate exclusion of any judicial selection alternatives.

Once the method of selecting a judge has been determined, a related issue involves whether minimal qualifications for judgeship should be set out in the constitution. A majority of states include minimum standards for judgeship in their constitutions. Only 4 states' constitutions do not provide for judicial qualifications. It can be argued that constitutional silence regarding judicial qualifications increases the pool of candidates available to those choosing judges and gives the legislature wide discretion in setting statutory criteria. However, without constitutionally established minimums, the selection process becomes vulnerable to tampering and increases the likelihood of producing judges of poor quality.

State constitutions contain 4 common types of qualifications required for judges. They involve United States citizenship, state residency, minimum age, and legal training. The number of states relying upon each type of prerequisite for judgeship is shown in the table below:

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PREREQUISITES FOR JUDGESHIP

<u>Type of Qualification</u>	<u>States Having Qualifications</u>
U.S. Citizenship	40
State Residency	33
Minimum Age	21
Legal Training	36

It is interesting to note that Hawaii presently has no U.S. citizenship requirement for judicial eligibility. Prior to 1976, citizenship was a prerequisite because judges were required to be members of the state bar association. Eligibility standards for the Hawaii Bar before 1976 included U.S. citizenship. However, the Supreme Court Rules were amended in May of 1976 to allow noncitizens to practice before the state courts. Given the present 10-year requirement for legal practice in the State, aliens, although potentially eligible for judgeship positions, cannot meet all the prerequisites for a judicial seat until 1987.

JUDICIAL TENURE AND COMPENSATION

Judicial tenure and compensation are related to the selection process in that they should be designed to bring to and maintain on the bench the best judicial talent that is available. Adequate tenure and compensation provisions are also fundamental in insuring the independence of the judiciary. A judge who must be reelected or reappointed after a short term of years or whose compensation is subject to legislative change may find it difficult to make fully impartial decisions on controversial issues.

The arguments in favor of longer tenure are that longer tenure will attract highly qualified and competent persons to the bench and preserve the independence and impartiality of the judiciary. The arguments for limiting tenure are that it makes it possible to remove judges who have not performed their duties well; that shorter terms would help make our judges acutely aware of the social and economic changes going on in our society; and that it prevents judges from remaining on the bench to advanced ages when their efficiency is severely curtailed.

Related to the original term of office for judges is the method of judicial retention. Most of the states, including Hawaii, require that the incumbent judge be reelected or reappointed, whichever method is used by the state. However, in recent years there has been some modification. In New Jersey, the judge serves an initial 7-year term and upon reappointment serves for life. Under this system the governor and indirectly, the people, are given a chance, after reflection on the judge's record, to decide whether or not the judge should be given life tenure. Under the Missouri Plan, an incumbent judge seeks retention in office at the end of the judge's term by simply filing a declaration to that effect. At the next election, the judge's name is placed on a ballot without opposition and the voters are asked whether the judge should be retained for another term. The benefits of this retention plan are:

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- (1) There is no need for political campaigns. The judge need not solicit funds from a political party or friends;
- (2) No judicial time is lost on the campaign trail; and
- (3) While assuring incumbent judges of longer tenure, it still reserves to the people a veto on judicial candidates, a privilege which is thwarted under the appointment for life tenure.

On the other hand, critics of this retention plan point out that it is unlikely that the voters will be any more interested or capable of determining the judge's qualifications after the judge has served one term and that the effect of the plan would be to ensure the judge's retention and make it harder to remove the mediocre or mildly unethical judge.

It is generally agreed that judicial compensation should be set so as to attract to the bench able and well-qualified persons. The major problem in this area is the extent to which details of the compensation scheme are set out in the constitution. It is said that the failure to incorporate judicial salaries into the constitution permits the legislature to reflect disapproval of decisions by reducing the judge's salary, thereby endangering the independence of the judiciary. However, in view of price-level fluctuations, incorporation in the constitutions of specific judicial salaries is generally not recommended. The difficulty of constitutional amendment results in delaying the adoption of rectifying change until long after the need has become manifest.

Adequate retirement benefits also contribute to attracting highly qualified candidates for judicial positions. Retirement benefits serve to provide security for judges who have devoted a major portion of their working lifetime to public service. An ideal retirement plan offers sufficient benefits to encourage judges to retire when they can no longer work at full capacity. Furthermore, with liberal disability pensions as inducements, disabled judges can be persuaded to retire voluntarily. If pension benefits are low or unavailable, judges may be compelled by necessity to resist efforts to persuade or compel them to retire. Related to retirement benefits are those payable to judges' beneficiaries at their death. Like retirement benefits, death benefits help attract marginally interested candidates for judgeships because of the financial security they offer the judge's family.

RETIREMENT, REMOVAL, AND DISCIPLINE

In the public mind, it is the judge who is the primary guardian of justice and the impartial arbiter of disputes between individuals. As a consequence, the legitimacy of the entire judicial process rests on the confidence of the public in the rationality and integrity of those acting as judges. Regardless of the method of judicial selection, all states are occasionally faced with the problem of judges and justices who cannot properly discharge their duties because of their age, incompetency, arbitrariness, judicial misconduct, extra-judicial misconduct or other breaches of judicial ethics. In view of the trend to ensure longer

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tenure for judges through merit retention plans and longer terms, the need for some reasonable system for the discipline, retirement, or removal of judges when circumstances warrant such action becomes apparent.

The problem of discharging judges who can no longer undertake their duties properly has been recognized by all states and they all possess mechanisms for removing judges. In the last few years, however, focus has turned to designing more effective procedures for dealing with judges whose performances are tainted with misconduct or disability. An initial point of departure in examining these mechanisms is the retirement standards applicable to judges.

Although there is no unanimous consensus, it is generally accepted that there should be an age for compulsory retirement of judges. The mandatory retirement age is designed primarily to protect the legal system from extreme advanced age and senility in judges. It is said that younger individuals appointed as successors would sharply increase the productivity of the courts. The objection that it would deprive the courts of the services of experienced judges is usually answered by a provision allowing a retired judge to be recalled to the bench for special cases or when the judicial dockets are overcrowded.

Over the years, a number of procedures for dealing with judicial misconduct and disability have developed. The mechanisms can be described as being either traditional or modern. Historically, instances of judicial incompetence or misconduct were handled by 3 traditional procedures--impeachment, address, and recall.

Both the impeachment and address process vests the power to remove judges in the legislative branch of government. The arguments associated with whether legislative authority in this area is desirable are set forth below:

LEGISLATIVE POWER TO REMOVE JUDGES

Pros

- Legislative supervision discourages flagrant misuse of judicial authority.
- Where the judiciary may not be able to discipline its own members, the legislature may be the only body with the requisite independence, power, and direct responsibility to the people to perform this disciplinary function.

Cons

- The pressure of regular legislative business makes it difficult, if not impossible, to devote the required time to hold a formal trial of a particular judge.
- The legislature is a policy making, not an adjudicative body. Its size and procedures are poorly fitted to trying cases and its members are not prepared to assume the role of judges in an area with which they have little familiarity.

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Pros

Cons

- Since the legislature is a partisan body, political considerations may predominate in a disciplinary trial of a judge.

In contrast, the recall process vests power for removing judges in the public. The facts indicate that the impeachment, address, and recall mechanisms have only rarely been used in the past.

Whatever the reason for disuse of the traditional procedures, recent years have found the traditional disciplinary procedures either superseded or supplemented, or both, by modern mechanisms. Although the variations among these procedures, both potential and existing, are numerous, the 2 developed in New York and California are prototypes for other states.

The New York court on the judiciary is composed of 5 judges who convene only when a complaint is filed by specifically authorized officials. The judiciary court has the power to censure, suspend, or remove for cause any judge within the New York judicial system. Removal for cause includes misconduct in office, persistent failure to perform duties, habitual intemperance, and conduct prejudicial to the administration of justice. The court is also empowered to retire a judge for mental or physical disabilities. Once charges are considered by the judiciary court, notice of the case and the hearing date must be given to the governor, the president of the senate and the speaker of the assembly. After such notice, the legislature may act to prefer its own charges for removal and stay the proceedings of the court on the judiciary. A 1974 amendment to the New York Constitution establishes a commission on judicial conduct whose function is to review judicial performance and recommend the convening of the judiciary court. The arguments associated with this New York model are set forth below:

ARGUMENTS ASSOCIATED WITH THE NEW YORK PLAN FOR JUDICIAL DISCIPLINE

Pros

Cons

- | | |
|---|---|
| <ul style="list-style-type: none">- The New York system has proven to be particularly well-suited to providing confidential, flexible, and effective treatment of problems of judicial discipline. | <ul style="list-style-type: none">- The court on the judiciary operates on an <u>ad hoc</u> basis only. It has no permanent staff which can receive complaints and investigate charges on a confidential basis. |
| <ul style="list-style-type: none">- Several senior appellate judges, who share in the responsibility for the administration of the entire judicial system are represented on the court on the judiciary and are | <ul style="list-style-type: none">- The court on the judiciary does not observe basic rules of fair procedure, since it acts both as prosecutor and judge, and there is no appeal from its decisions. |

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Pros

- directly involved in the entire proceeding.
- The New York system has worked well when called upon, operates at little cost to the taxpayer, and is particularly well-suited to a state like New York where other disciplinary procedures exist.

Cons

- From the moment notice of any case is given to the governor and the presiding officers of both legislative houses, the proceedings of the judiciary court are no longer confidential.

The essence of the New York system is its reliance on the judiciary to police the actions of its members. In general, the variations on the model have tended to differ primarily in the extent of centralized control held by a state's supreme court.

The California commission on judicial performance, created in 1960, is composed of 9 members--5 judges selected by the state supreme court, 2 attorneys elected by the board of governors of the state bar association, and 2 members of the public appointed by the governor with the advice and consent of the senate. It has jurisdiction over all levels of the state judiciary. It is empowered to investigate a complaint submitted by any person concerning the incapacity or misconduct of a state judge and to recommend to the supreme court that the judge be retired or removed. To aid in its investigation, the commission is given the power to subpoena witnesses, order hearings and make findings, and has been given professional staff.

The commission can only make recommendations to the California Supreme Court. The Supreme Court, after reviewing the record of the proceedings and, if necessary, ordering additional evidence, may order the removal or retirement as recommended or it may wholly reject the commission's recommendations.

Upon recommendation of the commission, the Supreme Court may retire a judge for a disability that seriously interferes with the judge's performance and is or is likely to become permanent. The Supreme Court may also censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term that constitutes wilful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. However, the commission is also empowered to "privately admonish a judge found to have engaged in an improper action or a dereliction of duty, subject to review in the Supreme Court in the manner provided for review of causes decided by a court of appeal".

The arguments relating to the desirability of a commission structure similar to California's are outlined in the table below:

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ARGUMENTS ASSOCIATED WITH THE CALIFORNIA DISCIPLINARY PROCEDURE

Pros

- The plan has proved to be a success in California and has had a marked effect in raising the already high level of the California judiciary.
- The commission is a permanent agency with a full-time staff to receive and investigate complaints in any form from attorneys, other judges, or from the public.
- The confidentiality of its actions protects the innocent judge from irreparable damage caused by publicity resulting from the filing of a claim which later proves to be groundless.
- The commission can only make recommendations. The supreme court, after reviewing the evidence, makes the final decision thereby giving the accused judge a second chance to present a case.
- The provision allowing the commission to retire a judge with pension benefits provides a flexible and workable remedy which can be used when outright removal is too harsh a punishment.
- The plan provides an effective means for a private citizen to seek relief against the wrongful act of a judge.
- In a number of instances, complaints disclose situations which, while not serious enough to warrant removal, nevertheless disclose practices which should be discontinued or improved.

Cons

- The ability of the commission to induce problem judges to resign or retire before there is any public proceeding might lead to an atmosphere where judges would be unwilling to criticize the commission for fear of reprisal.
- It is improper for the same body--the commission--to investigate, prosecute, and adjudicate a case.
- The sensitivity of disciplinary proceedings makes it desirable that the commission be controlled only by senior appellate judges who are fully familiar with the workings of the state judicial system.
- A permanent disciplinary commission would have a strong incentive to produce "results", that is, to cause a certain number of judges to leave the bench. It could make a commission unduly zealous in putting pressure on judges to resign for reasons which would not in fact justify removal or involuntary retirement.

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Pros

- The very existence of the commission acts as a deterrent to judicial misconduct.

Cons

Generally, major variations to the procedure in other states have expanded the powers of the commission or vested the removal power in the governor rather than the Supreme Court.

The thrust of the commission approach to reviewing judicial performance is to place the mechanism for judicial discipline in the hands of an independent agency. To the extent that an understanding of the state's legal system is necessary for effective functioning of a commission member, however, it is desirable to impose qualifications for membership.

It can be said that whatever disciplinary procedure is adopted, trade-offs are involved. Confidentiality is needed for full and impartial investigation, as well as to protect the reputation of the judge in question until completion of the inquiry. Public confidence in the judiciary, however, and its disciplinary machinery are dependent upon the visibility of their attempts to maintain its quality. Because both these objectives cannot be advanced in harmony, it is necessary to devise a disciplinary mechanism that provides the most appropriate balance for the unique social setting of each state. To the extent that such a balance can be struck, the aims of judicial independence and public accountability can also be properly served.

Article VI

TAXATION AND FINANCE

(Prepared by the Office of the Legislative Auditor)

Compared with provisions in other state constitutions, Hawaii's article on taxation and finance is a model in simplicity. By and large, it deals with fundamental questions and is free of detailed prescriptions and restrictions, thereby providing the executive and the legislature with substantial latitude and flexibility in formulating taxation and finance policies. This was the framework for the original 1950 provisions as it was for the 1968 amendments.

That taxation and finance provisions in other state constitutions are among the most badly battered and cluttered is traceable to 2 reasons. The history of the states does reveal widespread abuses in the conduct of financial affairs, particularly in the nineteenth century, and the response was to include in state constitutions detailed provisions to prevent financial mismanagement and fraud and to curb executive and legislative authority. But apart from the effort to formulate constitutional protection from the actual and potential abuses of government, there is a second reason for the proliferation of taxation and finance provisions. Powerful interest groups have frequently sought to advance their financial interests through constitutional provisions, and to the extent that they succeeded, the result has been not merely cluttered constitutions, but more seriously, the insulation of special interest from the overall public interest.

To the credit of the 1950 and 1968 drafters of Hawaii's Constitution, the taxation and finance article reveals no excesses in checking executive and legislative authority or provisions designed to shield any particular interest group. Structurally, the taxation and finance article contains 7 sections: a statement that the power of taxation shall not be surrendered, suspended, or contracted away (section 1); a prohibition against using public money, property, or credit except for a public purpose (section 2); the establishment of debt limits for the state and counties (section 3); a requirement for the governor to submit a budget to the legislature (section 4); a requirement for the legislature to pass a general appropriations bill, covering the operating expenditures of state government, in the odd-numbered year or a supplemental appropriations bill in the even-numbered year before passing other appropriation bills (section 5); a requirement for the legislature to establish a system for expenditure controls (section 6); and the establishment of an auditor responsible to the legislature (section 7). The 1950 Constitution contained an additional section specifying that the land and other property of nonresident citizens could not be taxed at a higher rate than the land and property of residents. This section was deleted by the 1968 Convention which believed that the section was redundant because substantial equality of taxation is already required by the equal protection clause of the U.S. and state constitutions.

Among the issues which are likely to emerge in the 1978 Convention are a number of old issues including the search for a rational debt limit formula; the

taxing powers of the counties; controls over government spending; and organization and application of governmental auditing. There may also be a number of new issues, including the powers of the executive in fiscal matters versus the powers of the legislature, the conformance of state income tax laws to those of the federal government, and constitutional sanction of certain types of bonds. The remainder of this chapter summarizes these and other issues under the heading of: (1) executive-legislative fiscal relations; (2) fiscal restrictions; (3) state and local debt; (4) county taxing powers; and (5) governmental auditing.

Executive-Legislative Fiscal Relations

In the decade of the 1970's, there has been growing conflict between the executive and legislative branches over the expenditure policies of state government. Briefly, the issue is this: as perceived by the legislature, its status as a separate and co-equal branch of government and the source of authority derived from its control over the purse have been diminished by the executive branch's unwillingness to execute all of the appropriations provided for by the legislature. For its part, the executive branch views the problem as one of the legislature's own making, i.e., there would be no problem if the legislature were to limit its appropriations to the revenue raising capacity of the state, and that because the legislature appropriates funds which exceed the aggregate requests of the executive branch, the governor has no alternative but to restrict some legislative appropriations in order to maintain the state's fiscal integrity.

The drafters of the 1950 Constitution foresaw that there might be disagreements between the governor and the legislature as to either the level of appropriations for any particular program or whether appropriations should have been made for a program in the first place. Therefore, they provided in the Constitution the formal mechanism by which this disagreement could be expressed and resolved.

Article III, section 17, of the Constitution provides that the governor may veto any specific item or items in any bill which appropriates money for specific purposes by "striking out or reducing the same". The item veto is of Organic Act vintage. The reduction veto was on the initiative of the 1950 drafters. In either case, the 1950 drafters believed that the formal and open mechanism of the item and reduction veto, together with the provisions for the legislature to override the veto, was in keeping with the concept of checks and balances.

The 1950 drafters also considered that situations might arise where revenues would be less than originally anticipated and that, under such a condition, the government would have to economize and conserve funds. Therefore, it included in the taxation and finance article the requirement that the legislature enact provisions for the control of the rate of expenditures of appropriated state funds and for the reduction of expenditures under prescribed conditions.

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The laws enacted by the legislature regarding expenditure controls comprise what is known as the allotment system as provided for in part II of chapter 37, Hawaii Revised Statutes. The legislature has declared its policy that the appropriations made by it are maximum amounts and that the governor and the director of finance are empowered to effect savings by careful supervision and by promoting more effective and efficient management. In addition, if the director of finance determines at any time that the probable receipts from taxes or any sources for any appropriation will be less than anticipated, the director of finance can, with the approval of the governor, reduce the amount allotted or to be allotted after giving notice to the department concerned.

The administrations in the last decade have not used the item or reduction veto to delete or reduce appropriations passed by the legislature, except in a few cases where there have been duplications or other technical errors in the appropriations legislation. In practice, deletions or reductions of appropriations are accomplished internally within the executive branch through the allotment process.

Appropriations made by the legislature can be grouped into 2 broad but distinct categories. One category would include those appropriations requested by the executive branch for specific programs which it has identified. The second category includes those appropriations initiated by the legislature in response to needs perceived by the legislature. The legislative-executive conflict centers on the second category of expenditures. The legislature believes that the appropriations for its own programs are being side-tracked in favor of established and ongoing executive programs. In turn, the executive argues that where legislative programs are deferred, it is not because of executive unwillingness to execute the programs but because there are insufficient resources to implement all of the appropriations made by the legislature. There is no easy answer to this dilemma.

Legislative efforts to resolve the issue have been inconclusive. In the past several years, a number of separate legislative measures have been introduced in response to the dispute over the execution of legislative appropriations, but no measure has passed both houses of the legislature. One measure, originating in the house of representatives, would have limited the conditions under which the governor or the director of finance would be able to restrict appropriations. Another measure, originating in the senate, would have established a joint senate-house controlling committee to oversee execution of appropriations. Still another measure would have established a system of impoundment control, patterned after the system established by the U.S. Congress, whereby all proposed executive deferments or rescissions of legislative appropriations would be subject to legislative review. At the time of the issuance of this report, no legislative remedy is in sight, leading some legislators to observe that the basic issue of executive vs. legislative controls over spending is one for the constitutional convention to resolve.

Another issue bearing on executive-legislative fiscal relations, which has emerged in other states but has not been fully examined in Hawaii, is the question of executive vs. legislative control over federal funds, which have come to comprise a significant portion of state budgets. Elsewhere, state

legislators argue that many millions of federal dollars escape review by state legislatures because the grants are funnelled directly to a particular program or department. The result, according to some legislators, is that executive agencies have used federal funds to thwart the will of the legislature by using the funds to restore or expand programs which the state legislature thought it had terminated. Some state legislatures see this as a further erosion of legislative prerogatives and have attempted to assert controls over how federal funds are spent.

In Hawaii, the issue over federal funds has been less urgent, partly because the Executive Budget Act, which governs the form and content of the budget submitted to the legislature, requires programs to reveal all sources of funding, state funds as well as federal funds. In turn, the legislature treats federal funds, from an appropriations standpoint, in the same way that it treats state funds, i.e., it identifies all sources of funding in making appropriations. In practice, the actual realization of federal funds may be quite unlike what is anticipated in the appropriations acts, and the specific purposes for which the federal funds are finally applied may not have been intended by the legislature. To the extent that the legislature may be said to exercise limited control over federal funds, this condition may be partly a function of the vagaries of federal funding and the uncertainty of their receipt, although charges raised elsewhere that executive handling of federal funds represents deliberate efforts to circumvent the legislative appropriations process may merit constitutional review and examination.

Fiscal Restrictions

Hawaii's Constitution is free of the type of fiscal restrictions commonly found in other state constitutions. Some constitutions are replete with detailed prescriptions earmarking revenues for specific purposes or providing for tax exemptions. The only significant restrictions in the taxation and finance article are those dealing with debt (discussed in the ensuing section of this chapter); the requirement for biennial budgeting and biennial appropriations; the specification on priority in the legislative process for the general appropriation bill and the supplemental appropriations bill over other appropriation bills; the public purpose clause governing the use of state funds, property, or credit; and the prohibition against delegation of taxing powers. These existing restrictions have not been the subject of wide controversy, although some restrictions may need to be reviewed in the context of new issues or conditions. There is, in addition, renewed discussion over limitations on government expenditures or revenues, flowing from taxpayer disenchantment over government spending and taxation policies.

Spending Limitations. From individual members of the legislature as well as from interest groups and the public, various constitutional proposals have been advanced to limit state government spending in some way. These proposals include requiring the legislature to impose an overall ceiling under which appropriations would be made; limiting the increase of government spending from one period to the next; and tying government spending to a percentage of some economic base, such as the gross state product or individual

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income. One proposal would indirectly limit government spending by requiring that a portion of general fund surpluses be returned to taxpayers in the form of tax rebates. Other proposals would check tax increase measures by channelling them into a referendum process.

Those arguing for government spending limitations feel that the costs of government are imposing an increasingly intolerable burden on taxpayers. Those against the imposition of spending limitations contend that the governor and the legislature must have the flexibility to fashion government spending and revenue policies in response to changing needs and conditions. The issue of spending limitations is likely to turn on how much faith one has in the ability of government, particularly the legislature, to act responsibly in balancing spending needs against taxpayer interests.

The Budget. The basic instrument through which state government spending policies are proposed is the budget. Hawaii has what can be categorized as an executive budget system, inasmuch as the Constitution assigns to the governor the responsibility for presenting to the legislature a complete plan of proposed expenditures and revenues. The 2 changes made in 1968 to the budget provisions were the requirement for budgets to cover a biennial period and for the legislature to specify the form of the budget.

A question which surfaces from time to time is whether the Constitution requires the governor to submit a "balanced budget". The term itself does not appear in the Constitution, although the section on the budget requires the governor to submit bills for any recommended additional revenues or borrowings by which the proposed expenditures are to be met. The Executive Budget Act also requires the governor to disclose how revenues are to be raised to meet expenditures if the estimated receipts from current revenue sources are insufficient to meet proposed expenditures.

The difficulty with pursuing the concept of the "balanced budget" is that since all budget projections and revenue estimates are just that--estimates which may or may not be accurate, budgets can be made to balance or they can be made to show a deficit, depending on what ultimate result is desired by the executive in the way of expenditure and revenue changes. Moreover, there is the difficulty in determining what time frame should be used to consider whether a budget is balanced. For example, the governor's multi-year financial plan for the state's general fund shows a deficit of \$3.9 million for 1978-79 but surpluses in each of the next 4 fiscal years.

If the concern of the "balanced budget" advocates is that the state should not risk going into deficit spending of any magnitude, a more direct approach would be to limit the deficit which the state can incur for any particular period.

Appropriations. The 1968 amendments require the legislature, in every odd-numbered year, to appropriate funds through the general appropriations bill for a 2-year period, consistent with the cycle for biennial budgeting. The Constitution also allows the governor to propose, and the legislature to pass, a supplemental appropriations bill in the even-numbered year to amend the general appropriations bill. These provisions went into effect in 1971, and in practice, every general appropriations bill in the odd-numbered year has been

followed by a supplemental appropriations bill in the even-numbered year. Thus, while the Constitution provides for biennial appropriations, the system also has characteristics of annual appropriations. There has been no strong movement to return to annual appropriations, although the issue may deserve examination in view of the apparent continuing necessity to amend biennial appropriations.

Both the general appropriations bill and the supplemental appropriations bill are accorded constitutional priority in the legislative process. They must be passed before other appropriations bills are passed. The only exceptions are bills recommended by the governor for immediate passage or bills to cover the expenses of the legislature. These provisions were enacted so that the major spending program would not be side-tracked by other miscellaneous appropriations and so that the budget would be out of the way early enough in the session to prevent a legislative logjam.

In practice, the general appropriations bill in the odd-numbered year and the supplemental appropriations bill in the even-numbered year are passed in the last days of the session, and the constitutional drafters' intention of preventing a legislative logjam has not been realized. One alternative is to establish a deadline for passage of the budget bills, and another is to discard the priority requirement entirely.

Public Purpose. The Constitution requires that no public funds, property, or credit be used, directly or indirectly, except for a public purpose. In recent years, various legislative measures which have been enacted or proposed may require a review of the public purpose clause as to what its specific intent might be. The measures calling for the issuance of bonds for special purposes include the following:

Economic development bonds. These bonds, previously called industrial development bonds when they were authorized by the legislature in 1964, are general obligation or revenue bonds to finance the development of agricultural, industrial, commercial, or hotel enterprises. Properties and facilities acquired and constructed by the bonds would be leased to private parties who would be required to pay rentals in an amount sufficient to pay the principal and interest due on the bonds. The 1968 Convention considered the subject of these bonds but decided not to specifically provide for them in the Constitution.

Anti-pollution bonds. In 1973, the legislature authorized the issuance of revenue bonds to finance anti-pollution projects for private firms which would reimburse the government in amounts sufficient to pay the principal and interest on the bonds issued. The bonds were the subject of review by the Hawaii Supreme Court. It found that the purpose of the act authorizing the bonds constituted a public purpose. However, it also found that the revenue bonds did not qualify as revenue bonds defined by the Constitution, and that therefore, they would have to be counted against the debt limit. Since the legislature's intent was that the act would not be implemented if the bonds were to be counted against the limit, no anti-pollution bonds have been issued.

Health facility revenue bonds. Legislation proposing these bonds have been introduced but not enacted. It would authorize the issuance of revenue bonds to construct health facilities on behalf of private firms.

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Electric energy and gas facilities. Legislation was introduced in 1975 to provide a means whereby facilities providing for electrical energy or gas would be financed by tax-exempt revenue bonds to be issued by the department of budget and finance. The legislation did not pass, possibly because of the Supreme Court's ruling on the anti-pollution bonds.

Land reform bonds. These general obligation bonds were authorized to implement the Land Reform Act of 1967 whereby leasehold development tracts could be acquired for conversion to fee simple ownership. The state comptroller contends that the act authorizing the issuance of the bonds is in violation of the Constitution's public purpose clause as well as Article I, section 18, which prohibits the taking of private property for other than public use. The executive branch was to have sought a ruling in the courts on these bonds, but the issue is still outstanding.

Advocates of the foregoing types of financing are likely to press for constitutional support for their positions. Both the 1950 and 1968 Conventions resisted efforts to enumerate the specific purposes covered by the public purpose clause, but the issue is likely to emerge once again.

Delegation of Taxing Powers. Section 1 of the taxation and finance article provides: "The power of taxation shall never be surrendered, suspended or contracted away." This section has been reviewed by those advocating conformance of the state's income tax laws to the federal Internal Revenue Code. They see in the nondelegation of tax powers clause a constitutional barrier should the legislature attempt to pass legislation which would have Hawaii's income tax laws conform automatically to federal changes and amendments.

This possible constitutional issue was sharpened by the response of the department of the attorney general to a question raised by the department of taxation as to whether the legislature could enact legislation providing for state income tax liability based upon a percentage of federal tax liability. The attorney general's opinion was that any such legislation could incorporate existing federal law but that a statute automatically incorporating future amendments by Congress would violate the state constitution. Thus, advocates of state-federal income tax conformance view constitutional amendment as the only solution.

State and Local Debt

The large capital investment authorizations in recent years, the effects of borrowing on debt service requirements, the mushrooming backlog of authorized but unissued bonds, the notoriety of New York City's financial crisis, all have contributed to renewed concern over the constitutional debt limit, particularly with respect to state government.

State Debt Limit Formula. The original Constitution provided for a state debt limit based on a percentage of net assessed real property valuation. Because real property taxes are solely the revenues of the counties, the 1968 drafters reasoned that a much more rational base for the calculation of the debt

limit would be the state's general revenues. They adopted the present debt limit formula which establishes the constitutional debt limit at three and one-half times the average of the general fund revenues in the 3 preceding fiscal years. Translated into dollars, the constitutional debt limit stood at \$2.3 billion on November 1, 1977. Of the state's debt, slightly less than \$2 billion was chargeable against the debt limit, leaving a constitutional debt margin of some \$372 million.

Critics of the current debt limit formula contend that it allows the debt limit to be set too high. They believe that the formula has allowed the state to accumulate a backlog of \$1 billion in authorized but unissued bonds, an amount which the state could not afford to issue in its entirety.

While various alternatives to the debt formula have been discussed, the measure which has gained the most attention is one which relates debt service (the annual amount which the state is obligated to pay in principal and interest) to state revenues. This formula is usually referred to as the debt service ratio. Advocates would establish a fixed percentage of state revenues as the maximum amount which could be applied to debt service. The precedent for this formula is Puerto Rico, which established in its constitution a maximum annual debt service limit of not more than 15 per cent of the average of the last 2 years' revenues.

Authorized But Unissued Debt. On November 1, 1977, the state had \$1,227,129,000 in outstanding general obligation bonds. It also had \$1,098,825,587 in authorized but unissued general obligation bonds.

Normally, appropriations made by the legislature are effective only for a particular fiscal year. However, bond authorizations have been for longer periods, 3 or 4 years being the more common practice, and these authorizations, in turn, may be further extended by acts amending the original legislation. The result is that authorized but unissued general obligation bonds date back as far as 1970.

An alternative to this system is for the Constitution itself to cancel authorized but unissued debt and to specify the period during which bond authorizations would be effective and beyond which they would lapse.

Procedure for Authorizing Debt. The Constitution provides that bonds may be issued by the state when authorized by an extraordinary two-thirds vote of each house of the legislature. The drafters of this requirement believed that a two-thirds requirement would make for more soundly conceived bond authorizations and capital improvement budgets.

Critics, including some in the legislature, contend that the two-thirds requirement has had the opposite effect. They believe that the requirement for an extraordinary majority to pass the bond authorization means that more legislative members have to be mustered to support passage of the bill, that this in turn means that the special interests of more members need to be accommodated, and that the result is larger bond authorizations than would be the case if a simple majority were needed to pass the bill.

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Other critics of the current authorization procedure would go the opposite route and apply more stringent authorization measures. These center around the process of referendum, a process commonly used in other jurisdictions to authorize debt but not widely supported in either the 1950 or 1968 Conventions.

Local Debt. The constitutional debt limit of the counties is established at 15 per cent of the assessed real property valuation for a particular county. The limit applies to debt which is outstanding and unpaid at any time.

The 15 per cent limit represents an increase from the 1950 constitutional limit of 10 per cent. None of the counties is anywhere close to its constitutional debt ceiling, leading some observers to suggest that the limit has been set too high. The Tax Foundation of Hawaii has suggested lowering the limit to 10 per cent.

Some county officials believe that the current debt limit formula does little to influence debt management policies and that a more meaningful limit could be constructed around a debt service ratio. Other officials feel that the present legal limits provide the opportunity to at least portray to investors their outstanding debt and debt margins from a favorable position.

County Taxing Powers

Over the years, some of the counties have expressed a long list of grievances against the state in its conduct of financial affairs: the continuing county assumption of debt for facilities taken over by the state; the proliferation of types of exemptions and increases in exemptions which erode the counties' real property tax base; the uncertainties of state grants-in-aid; the real property assessment practices of the state; the establishment of a state motor vehicle weight tax; and other grievances which county officials say can be ultimately corrected only by giving local government greater taxing powers and financial authority.

Counties have no taxing powers under the current Constitution. Article VII, section 3, reserves the taxing power to the state except so much as may be delegated by the legislature to the political subdivisions. While there were efforts in the 1968 Convention to obtain greater taxing powers, the counties were unsuccessful. They have also been unsuccessful in obtaining taxing powers from the legislature. Rather than a movement for broad residual or concurrent taxing powers, as was pushed by some county officials in the past, the counties are zeroing in on 2 measures which they hope to obtain through constitutional amendment. As expressed by the position of the Hawaii State Association of Counties, these 2 measures are: (1) control over the administration of the real property tax; and (2) authority to levy a general excise tax.

The Real Property Tax. Under the Hawaii Revised Statutes, the state is responsible for assessing all real property subject to taxation and for levying and collecting real property taxes. The specific tax rates applied in each county are established by its county council. Each year, all revenues derived

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from the tax, less the cost incurred by the state in administering the tax during the previous year, are remitted by the state to the counties.

The counties have long held that the administration of the real property tax should be a county function. This position was buttressed by the unprecedented number of tax appeals filed in 1975 against assessments made by the state. Against the background of taxpayer outrage, the counties have insisted that they could do a better job if all real property tax policymaking and administration functions and powers were to be transferred to the county governments.

Those who oppose such a transfer argue that there would be a lack of uniformity in assessment and exemptions and that decentralized administration would mean greater costs. However, the counties believe that there is a growing loss of confidence in state government, and with the recent widespread protest over assessments, they have a stronger case than before.

The Excise Tax. The general excise tax has been the largest revenue source for state government. It generates over 50 per cent of the state's general fund tax revenues. Retail goods and services are taxed at 4 per cent, which yield 95 per cent of the excise tax revenues. The remaining 5 per cent of excise tax revenues comes from activities which are taxed at less than the 4 per cent rate. In terms of dollars, the general excise tax is expected to produce \$454 million in fiscal year 1979-80, or 53 per cent of general fund tax revenues.

A one per cent tax on retail goods and services would yield in the neighborhood of \$90 million. It is the great money producing potential of the excise tax which has attracted the counties into viewing the tax as their most promising alternative revenue source.

The legislature has not looked with favor on the counties' push for the excise tax. Some legislators believe that state-county functions need to be sorted out first, before making any adjustments in revenue sources. Some believe that taxpayers will not accept a large tax levy simply for the sake of generating more revenues for the counties. Nonetheless, the counties appear to be determined to obtain through the convention what they have been unable to obtain through the legislature.

Governmental Auditing

The current provisions for an auditor appointed by the legislature to conduct post-audits are those of the original 1950 Constitution. In 1968, the provisions were reviewed by the convention's taxation and finance committee. There was some sentiment at the time to clarify the provisions and define the post-audit function to include financial as well as performance audits. However, the committee reported that it has "determined that the current provisions are sufficient to encompass the on-going audit activities of the auditor, including financial, program and performance audits, and that it is not necessary to enumerate the specific sub-categories of audit which the auditor is empowered to conduct".

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Nationally, among the states, there continues to be a trend towards locating the post-audit function in the legislative branch. There is little support for self-auditing in the executive branch. There also continues to be a trend in enlarging the scope of governmental auditing from its once traditional focus on financial audits to other nonfinancial areas, called variously, performance audits, management audits, program audits, operations audits, and effectiveness audits. In practice, these are the types of audits conducted by Hawaii's legislative auditor.

The section of Hawaii's Constitution dealing with post-auditing has been used as a model by the National Municipal League in its Model State Constitution. It provides for an auditor appointed by a majority vote of each house in joint session, for a term of 8 years and thereafter until a successor shall have been appointed; it empowers the auditor to conduct post-audits of all transactions; it allows for removal of the auditor for cause by a two-thirds vote of the members of the legislature in joint session; and it authorizes the auditor to conduct such other investigations as may be directed by the legislature. There have been no constitutional proposals by the legislature to change these provisions.

One issue which might be considered is that while the legislative auditor is the official charged by the Constitution to conduct post-audits, post-audits are also conducted by agencies of the executive branch or by accounting firms under contract to executive agencies. The question is whether executive auditing is tantamount to self-auditing and whether such audits should be treated or consolidated under the framework of constitutional provisions.

Article VII

LOCAL GOVERNMENT

Throughout the United States local government is a recognized necessity for effective democracy. It is necessary for 3 reasons. First, it serves as a government arm, administering the laws and directives of the state and federal governments. Second, it is responsible for handling local community problems and providing local services. Third, local governments work with other government agencies to consolidate traditional government functions.

Each unit of local government is essentially an agent of the state government, with its structure, organization, functions, and powers derived either from the state constitution, charter, or statutory enabling legislation. Historically, the legal doctrine of state supremacy over local government was established by Judge John Dillon in 1868. "Dillon's rule" provided that municipal corporations owed their origin to, and derived their powers and rights wholly from, the legislature.

To counter this restrictive ruling a movement developed to allow local governments their own written charters. Known as "home rule", local governments have sought the power to frame, adopt, and amend charters for their governments and to exercise powers of local self-government, subject to the constitution and general laws of the state.

Constructive guidelines to effective, efficient, and equitable local government for modern democracy have been provided by a number of prominent organizations. On the national level there is the National Municipal League (NML) and its Model State Constitution which has produced 6 editions since its inception in 1928 and the National Association of Counties (NACO). In its "American County Platform", NACO incorporated its official policy that counties require the following:

- (1) Flexibility of form;
- (2) Flexibility of function; and
- (3) Flexibility of finance.

A third source, the U.S. Advisory Commission on Intergovernmental Relations (ACIR), is an agency in which all governmental levels are represented. The ACIR has provided a suggested performance standard criteria which calls for consideration of the following:

- (1) Economic efficiency;
- (2) Equity;

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- (3) Political accountability; and
- (4) Administrative effectiveness.

On the state level, 2 reports have been produced since 1968, which provide needed input and recommendations for Hawaii's local government. In 1974, the governor's ad hoc commission on operations, revenues and expenditures produced the CORE Report which assessed state government operations and expenditures based on improving efficiency and effectiveness in government. Part of its recommendation was for a temporary commission on organization of government to study and report on all state and county agencies' powers, functions, services, and responsibilities and to make recommendations concerning the consolidation of similar services and elimination of duplications. The commission on government (COG) reported these findings to the ninth state legislature at the 1977 session. Based on a criteria centered around uniformity, equity, and economy, the commission report provided insight to state/county relations in regards to functions and responsibilities.

HAWAII'S LOCAL GOVERNMENT

Local government in the State of Hawaii consists of 4 political subdivisions. The city and county of Honolulu, largest in population, is the only recognized metropolitan area. The 3 nonmetropolitan counties are: Hawaii, Kauai, and Maui. The fifth county, Kalawao, a portioned off area on the island of Molokai, also known as Kalaupapa, is administered by the state department of health as a center for Hansen's disease treatment.

The noncontiguous makeup of Hawaii's counties has created a unique demographic profile for local government. The largest county, Hawaii, comprises 63 per cent of the State's land and yet has just under 10 per cent of the state population. The county of Maui, which includes the islands of Maui, Molokai, Lanai, and Kahoolawe, has all but 10 per cent of its population on Maui, and 6 per cent of the state population. Kauai county, which includes the privately owned island of Niihau, is the third largest but the least populous of the 4 counties with a resident population totaling about 4 per cent of the State's total population. Although the city and county of Honolulu is the smallest of the 4 counties in geographical size, four-fifths of the state population resides on Oahu. The bulk of Hawaii's business and tourist industry is also on Oahu.

STRUCTURE AND ORGANIZATION

Two sections of Article VII of the Hawaii Constitution deal with the creation, structure, and organization of local government. Section 1 allows the creation of political subdivisions, local government units, by the legislature. Section 2 concerns the structure and organization of each political subdivision's self-government. Hawaii's governmental structure is unique in its simplicity. There is only the state and county level of government, and each county has organized and structured its own self-government charter during the last 10 years.

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Traditionally, county governing bodies have had little direct control over the structure of their government. Charters, referred to in some state constitutions as "home rule" charters, are a recent development in local government. In the early 1960's, the ACIR recommended that the constitution of each state grant authority to counties to determine their own form of county government. Prior to Hawaii's 1968 Constitutional Convention, only Honolulu had a charter. The other counties were still under government by statute. The 1968 Constitutional Convention added the following provision to section 2 of Article VII:

Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

Known as the "superior clause" this gave the counties full responsibility for the structure and organization of their government. The State can only affect county structure or organization when transferring a power or a function from the county to the State or vice versa.

In 1970, Hawaii was one of only 7 states to permit all counties in the State to exercise home rule powers. Since then numerous states have joined this progressive movement. Some states have provided constitutional amendments, and others have legislatively provided alternatives to their local government units self-government.

Both state and county governments in the United States have demonstrated interest in strengthening and improving intergovernmental cooperation. This includes such intergovernmental activities as: state planning, construction, and transportation. Also relevant is the development during the 1970's of coordinating offices between state and local governments.

FUNCTION

At the core of the American federal system lies an institutional fact that each level of government has certain responsibilities for the performance of public functions. Traditionally, local government functions have been as administrative arms of the state and federal governments, and as service units for their areas. More recently, local governments have functioned with other units of government in coordinating, consolidating, and/or sharing responsibilities.

In the early 1970's, the intergovernmental system entered a new phase, commonly called the New Federalism, which dictates decentralization of some governmental functions and centralization of others. The major trend has been to turn away from tinkering with structure to developing pragmatic functional programs which are able to bring about improvement in the delivery of government services. Functional reorganization may come about in either of these 5 following ways:

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- (1) Local government consolidation: a geographic consolidation, as with cities and counties, like the City of Miami and Dade County, Florida;
- (2) Joint service agreements: a formal agreement in which 2 or more governments participate in providing a particular service, with financing, servicing, and policy decisions shared by all participants;
- (3) Functional consolidation: when 2 or more units of government agree that one level of government will perform a service;
- (4) Intergovernmental service contracts: governments undertake mutual obligations to one another to purchase a particular service;
- (5) Functional transfer: either by centralizing or decentralizing a particular function by transferring it from one unit of government to another.

Although the units of local government in Hawaii are designated and known as counties and possess a form and structure generally analogous to the prevailing mainland patterns, they are not generally comparable to the traditional mainland county. Many of the functions, such as education, which are traditionally performed by mainland counties as agents of the state are performed directly by the State of Hawaii. Conversely, the counties perform most services which on the mainland are traditionally assigned to cities, towns, and villages. Recent legislation has enhanced intergovernmental cooperation through establishing such programs as the Oahu metropolitan planning organization, the state policy plan, and coastal zone management.

State Mandate

From the viewpoint of many local government officials, one of the principal irritants in present-day state-local relations is the "state mandate". A state mandate may be defined as a legal requirement--constitutional, statutory, or administrative provision--that a local government must undertake a specified activity or provide a service meeting minimum state standards. The objection raised by local officials is the failure of the state government to fully reimburse local governments for the additional costs attributable to the mandates.

The functions of local government units in Hawaii have not been defined by the Constitution but instead the power to define these functions has been assigned to the legislature by section 2, of Article VII, in Hawaii's Constitution. Neither the CORE nor COG Report recommended any constitutional changes, but both recognized the need for consolidation and close coordination and communication between government units.

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POWER

The states have plenary powers by virtue of their original sovereignty; they retain all the powers it is possible for government to have except insofar as these powers have either been delegated to the federal government or have been limited by the state constitution. State constitutions have carried provisions relating to the establishment, powers, and control of local government. Local government power is defined either in the state constitution, by charter, or by state law. What powers are allowed local government units are the key to defining their responsibilities and functions.

There are 2 approaches to determining power provided constitutionally to local government units:

- (1) The allocated powers method. This approach to the division of powers is an effort to constitutionally designate certain functions as exclusive local government concerns. The power to carry out functions are stated in (A) specific listings, such as the acquisition, care and management of streets and avenues; (B) general terms such as powers over "local affairs, property, and government"; or (C) a combination of general terms with a specific listing.
- (2) The concurrent or shared powers method. This approach basically calls for constitutional language granting certain local governments all legislative powers except that specifically denied them by the constitution, law, or charter. The approach is based on the premise that powers should be shared by state and local governments, rather than allocated or parceled out between them. Under this method full legislative authority is granted to the local government subject to control by the state legislature through enactments which restrict local legislative action or which deny power to act in certain areas.

The traditional and popular approach for greater home rule has been the allocated powers method in order to separate what is municipal or local, from what is a matter of statewide concern. The more recent approach was introduced by Jefferson Fordham for the American Municipal Association (now the National League of Cities) in the early 1950's. The concept of a shared powers method of distribution was to avoid the general versus local affairs issue which left local government at times subject to the court's determination of what are and what are not local as opposed to statewide concerns. In the past, local governments have not fared well in these court tests.

With these 2 alternatives for their model, the NML most recently presented both for states to consider. Priority was given to a variation of the Fordham formulation and the traditional doctrine was moved to an alternative position. The new power section is as follows:

A county or city may exercise any legislative power or perform any function which is not denied to it by its charter, is not denied

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to counties or cities generally, or to counties or cities of its class, and is within such limitations as the legislature may establish by general law. This grant of home rule powers shall not include the power to enact private or civil law governing civil relationships except as incident to an exercise of an independent county or city power, nor shall it include power to define and provide for the punishment of a felony.

The alternative power provision includes only the general grant of power as follows:

...each city is hereby granted full power and authority to pass laws and ordinances relating to its local affairs, property and government; and no enumeration of powers in this constitution shall be deemed to limit or restrict the general grant of authority hereby conferred; but this grant of authority shall not be deemed to limit or restrict the power of the legislature to enact laws of statewide concern uniformly applicable to every city.

In 1962, the ACIR came out with their proposal. Simply, it states:

Municipalities and counties shall have all powers and functions not denied or limited by this constitution or by State law. This section shall be liberally construed in favor of municipalities and counties.

The ACIR has described it as providing for the "residual powers of local government". Although the NML prefers to use the term "shared powers", the method is the same for the ACIR proposal, the NML model and Fordham's American Municipal Association proposal. All 3 use the term "not denied" in the limiting provision and recognize that the state through its constitution and statutes may deny powers to local governments. NACO's American County Platform recommends that the states, by popular referendum, in their constitutions grant to selected units of local government all functions and financing powers not expressly reserved, pre-empted, or restricted by the legislature.

Concurrent with the support for the more recent residual power method approach has been a continual support for the allocated method by Dr. Arthur W. Bromage of the University of Michigan. Dr. Bromage's concern is that the Fordham plan of home rule power makes it subject to any state legislative limitation by general law. Dr. Bromage has been more willing to trust the fate of local self-government to the courts, than leave it to the legislature.

The problem of judicial interpretation concerning whether a power or function belongs at the state or local level is only part of the argument against the use of the allocated method. Many question whether functions of government can any longer be assigned to one level of government because all levels--local, state, and federal--participate in them. Governmental power cannot be allocated, it is argued, but must be shared.

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With the residual or shared powers method, the hazards of judicial interpretation are avoided because the courts, rather than weigh statewide or local concern, need only decide that power has been specifically denied by the state. It should be noted, though, that this method does not provide the protection for local government authority that supposedly is provided through the allocated powers method; yet it does allow local governments to take the initiative in legislative action with the state legislature less likely to act negatively, merely to defeat the city or county's power.

Present State Practices

The concept of giving more authority to local governments through expressed constitutional language, the allocated power method, has been adopted in most states. Many states have given constitutional authority for at least some of their local government units to write their own charters. Other states do not grant home rule powers to local governments directly, but rather authorize or instruct the legislature to enact home rule powers.

The number of residual power method constitutions now in effect is difficult to determine. Various sources cite different numbers, depending on their understanding of the residual or shared power method. At least 5 have adopted residual or shared powers language in their constitutions. Alaska quite clearly states in Article X, section 11, "A home rule borough or city may exercise all legislative powers not prohibited by law or by charter."

There has also been a recent trend to depart from the old strict construction principle of constitutional provisions by specifying "liberal" construction of local government powers. Probably because of growing dissatisfaction with court rulings confining local self-government powers, states increasingly are inserting into their constitutions language calling for liberal construction of local government articles. Illinois, for example, states, "Powers and functions of home rule shall be construed liberally."

Hawaii

Hawaii's Constitution approaches local government power by the allocated power method. The "superior clause" mentioned earlier allocates to the counties the power to structure and organize their own charters for self-government. Other functions and powers remain with the legislature to allocate and reallocate as is appropriate. Hence, the state legislature dictates all other county responsibilities, except those of structure and organization for local government.

The control of personnel and procedure by the state or county was considered in the 1968 Constitutional Convention. At that time the committee on local government felt that those powers should be left with the legislature, since the legislature should not be deprived of the power to enact and maintain laws such as the civil service law or the Administrative Procedure Act. Unlike a

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constitutional provision of these powers, any delegation thereof by the legislature on such matters as personnel would not be irrevocable. The counties have sought for the inclusion of these 2 particular areas as part of their campaign for more home rule. They advocate a constitutional provision that would give them the option of adopting independent pay plans. There is also a conflict in this area with the long established concept of "equal pay for equal work". The issue of personnel is complex and must also include consideration of collective bargaining and the merit system.

General and Special Law

Not only does a necessity exist to clarify state/county responsibilities from time to time but there are other legal considerations that can arise. Hawaii, like well over three-quarters of the states, provides that the legislature enact only "general" laws for its political subdivisions. The purpose for this is to protect local governments from abusive legislative action through "special" or "local" laws.

A "general" law is defined as follows:

A statute is ordinarily regarded as a general law, if it has a uniform operation. Within the meaning of this rule, a statute has a uniform operation, if it operates equally or alike upon all persons, entities, or subjects within the relations, conditions, and circumstances prescribed by the law, or affected by the conditions to be remedied, or, in general, where the statute operates equally or alike upon all persons, entities, or subjects under the same circumstances. Mere classification does not preclude a statute from being a general law....

Conversely, a "special" law is:

...one which relates to particular persons or things or to particular persons or things of a class... instead of all the class.

So also, a "local" law is one which:

...operates over a particular locality instead of over the whole territory of the state or any properly constituted class or locality therein.

Hawaii's department of the attorney general has dealt with a number of inquiries for clarification in this area. Primarily, these center around the fact that prior to statehood there were enacted special laws relating to specific counties. These laws remain valid, and have been superseded, but no new special or local laws are constitutionally permitted. It is also difficult to repeal these laws since to do so requires a special law.

This dilemma continues. Laws that were special, or local, before the constitution was established have continued to be amended, perhaps

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questionably, and are impossible to repeal. In order to repeal, it must be done in such a manner as to be regarded as a superseding general law. A solution would be to provide that a special law is repealed when superseded by general law, or as Pennsylvania's Constitution, Article III, section 32, states, "...but laws repealing local or special acts may be passed".

Classification

The general law system, while necessary to prevent special acts by the legislature, has proven unsatisfactory when applied to many cities and counties of widely varying populations. Therefore, under general laws a doctrine of classification by population arose. This is not to say legislation by classification is limited to population, but that reasonable classification of local government units by population has been conceded by state courts as a necessary constitutional means of legislation.

Legally, legislation limited to a specific classification must walk a fine line. The classification adopted, or used, must bear a reasonable and valid relation to the objects and purpose of the legislation. In order to be valid, a classification must be open to let in localities subsequently falling within the class, and also to let out localities should they no longer meet the description.

No specific constitutional authorization to classify is necessary as many states have used classification for years without express constitutional authorization to do so. To avoid misuse of classification a number of states constitutionally provide for limited types of classifications allowed.

Legislation by classification is used in Hawaii. With four-fifths of Hawaii's population on the island of Oahu, there are diverse needs for legislation. Responses by Hawaii's local government officials indicate an awareness of county diversification and a plea for county participation in this type of legislation. The Hawaii State Association of Counties (HSAC), in 1968 and again in 1976 stated:

While this [classification] sometimes has meritorious application, it does amount to special legislation. An alternative solution is to provide that the legislature may enact general legislation on municipal matters, but that such legislation would not become effective in a county unless and until that county's legislative body adopts it by ordinance.

Constitutional provisions requiring local approval of legislation affecting only certain areas can be found in a number of state constitutions, such as in regard to the transfer of functions in Florida, Michigan, and New York. The Minnesota Constitution, Article XI, section 2, special law, states:

...a law shall become effective only after its approval by the affected unit expressed through the voters or the governing body and by such a majority as the legislature may direct.

TAXATION AND FINANCE

The constitutional issue of taxation and finance in local government follows that of power. Local governments do not possess any inherent powers to tax. The power to tax is an attribute of the sovereignty of the state. Consequently, local government taxing powers must be acquired by constitutional provision or delegated by legislative statute.

There are 3 possible approaches to constitutional grants of taxing power. First, the constitution may provide limits of what can be taxed and the amount set. Second, the constitution could leave the entire question of local government tax provisions to the legislature; or third, the constitution could directly grant taxing powers to local government units.

Many state constitutional provisions, including Hawaii's, specifically reserve to the state legislature the power to authorize the particular forms of taxation and the extent of their use by local governments. Although some of the more recent constitutions have provided for greater home rule, more often local taxing powers have specifically been retained by legislative control.

Some taxing authority, however, has been allowed in a number of states. The Alaska Constitution provides for home rule charter units to levy any tax not prohibited by law or charter. Also, legislatively, in recent years some states have provided greater taxing power to their local government units.

A principal argument advanced in favor of financial home rule is based upon the proposition that the unit responsible for a function should also be responsible for its financing. Opponents stress the dangers associated with introducing rigid constitutional provisions relating to local government finance, in an age when swift and decisive action is essential if the needs of the people are to be met.

The National Municipal League (NML) supports leaving the entire matter of local taxation with the legislature. In commenting on the lack of inclusion of either a state or local taxation section in its Model State Constitution, the NML states:

Ideally, some authorities believe, a state constitution should be silent on matters of taxation and finance, thus giving the legislature and the governor complete freedom to develop fiscal policies to meet current and emerging requirements. Even if such a situation is not likely to materialize immediately, the Model should not mirror the complex and lengthy fiscal articles found in many state constitutions and which obviously are barriers to responsible government.

Converse to this, the Public Administration Service, in a report prepared for the Alaska Constitutional Convention, supported local fiscal authority stating:

It may well be pointed out that the authority to tax one's self is seldom a dangerous authority. It is likely that the legislature will

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have just as effective control and fewer troublesome local taxation problems to face if it allows local units to tax all that is not prohibited by law rather than restricting them to only those taxes specifically authorized by law.

The ACIR recommends that when equipped with proper safeguards, local income and sales taxes should be viewed as appropriate local revenue sources and wide latitude should be given to local officials in selecting revenue instruments.

Hawaii

The Hawaii Constitution clearly provides for legislative control over taxation and finance. The committee on local government of the 1968 Constitutional Convention deliberated changes to the local government section on taxation and finance and recommended retention of the section as it presently read. They agreed with the recommendation of the committee on taxation and finance that for purposes of, "efficiency, integrated statewide tax policy, simplicity and uniformity of taxation", the taxing power should remain with the legislature.

Although not without recommended legislative changes, Hawaii's tax system has received overall praise from a number of sources. The ACIR devised a test to measure the quality of state-local revenue systems and Hawaii placed highest in the nation with 86.1 points out of a possible 100. The Tax Foundation of Hawaii concluded that Hawaii's tax system is "high quality and extremely productive." CORE and COG also reported little need for change. Hawaii's county officials, on the other hand, have stated a preference for greater control of their revenue collections and a concern for state-mandated functions.

An Overview of Hawaii's Local Government Revenue System

The cost of running county governments in Hawaii grew by 26 per cent between 1975 and 1976, reaching \$328 million. Of that total the city and county of Honolulu, with 80 per cent of the State's population was responsible for 76 per cent, or \$25 million of that increase. The COG Report reviewed budgets, financial reports, and other selected compilations and suggests:

...that Counties generally are in good financial shape although there were no signs of abatement in the disparity between Honolulu and the Neighbor Island Counties in population, employment, and economic resources and therefore the ability to support a full level of service.

Hawaii's county government revenue system may be viewed in 2 parts. First, there are the tax revenues and second, and just as significantly, there are the nontax revenues. The tax revenues consist of: the real property tax,

county fuel tax, motor vehicle weight tax, and the public utility franchise tax. The nontax sources of revenue are the counties' fees and charges, the State's grant-in-aid, and the federal moneys such as the federal (or general) revenue sharing.

Taxes

Real Property. Hawaii is the only state with a completely centralized real property tax administration for which it has received nationwide attention. The real property tax is exclusively for county government use and represents a considerable percentage of each county's revenue. It comprised 47 per cent of Honolulu's \$249 million, 35 per cent of Maui's \$34 million, 41 per cent of Kauai's \$15 million, and 53 per cent of Hawaii's \$35 million in revenue for 1976. The outstanding feature of the county revenue picture during recent years has been the very large increases in property tax receipts. This has been due primarily to the spiraling values of property which has made it unnecessary to increase property tax rates.

Under the Hawaii Revised Statutes, chapters 246 and 248, the State is responsible for the administration, assessment, and collection of the real property tax, while the counties are responsible for setting the rate. Until recent legislation the counties have not needed to change their rates to obtain more revenues since assessed property values have continued to rise each year. The "Florida Plan" enacted in 1976, has provided greater responsibility to the counties by requiring the state director of taxation at the time of certifying the real property tax base of each county for the coming year, also to certify the tax rate for each category of real property such that there is no increase or decrease in the revenue due each county over the previous year. This rate will stand unless it is increased or decreased by the county councils.

The repeal of the "Pittsburgh Plan" of assessing real property in 1977 by the state legislature further streamlined the real property tax structure. The Act repealed the 7 general classes of land divided into 4 categories and instead provides for 6 general classes. Instead of setting real property tax rates for each separate category, and separately for buildings and land, the total revenue to be raised from real property in a county is divided by the aggregate value of the taxable real property in the county.

Each year all revenues derived from the real property tax, less the cost incurred by the State in administering the tax during the previous year and certain other charges are remitted by the State to the counties for their use. The administrative costs are divided among the counties in proportion to the assessed valuation of all taxable real property in each county.

Other Taxes. One of the few rate increases in the last 10 years in the Hawaii tax system has been in the fuel tax which is an "earmarked" tax assigned to state or county highways depending on whether it is the state or county fuel tax which is collected. The State administers and collects both the state and county fuel tax, while the counties set the county rate. The only other major tax source for the counties is the motor vehicle weight tax which is also

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earmarked for county highway use and is administered and collected by the counties, who also set the rate.

Nontax Sources

Fees and Charges. In many situations, a fee is charged in conjunction with the issuance of a license or permit. Moneys collected generally are related to the level of the cost of the administration of the particular government activity and do not generate revenue substantially greater than the cost associated with that administration.

The sum of fees and charges collected in 1976 for liquor licenses, parking meter fees, fines, forfeits, and departmental earnings; which includes rental, interest, and other earnings were: \$13,816,563 for the city and county of Honolulu, \$2,089,798 for the county of Maui, \$2,418,978 for the county of Hawaii, and \$1,540,179 for the county of Kauai.

State Grants. Unlike tax revenues which directly relate to the individual counties, grants-in-aid and other state grants, such as the capital improvement project funds (CIP), are simply moneys from the State to the counties, are based on need, and may be administered under a fixed formula. The most recent grants-in-aid system from the State to the counties was established in 1965 under Act 155, an omnibus tax reform measure which reduced previous county subsidies and was in conjunction with Act 97 which transferred a number of county functions to the State.

The increase in property tax revenues plus federal revenue sharing has decreased the relative importance to the counties of state grants from excise tax sharing. Grants are used to balance inequalities of ability to finance local needs and match state/county interest of particular projects.

Federal Moneys. Generally known as the Federal (or General) Revenue Sharing Act, the State and Local Fiscal Assistance Act of 1972, appropriated money to be distributed to state and local general governments, over a 5-year period. This past year Congress renewed federal revenue sharings for 3-3/4 years. State governments continue to receive one-third of each allocation and two-thirds is distributed to their local governments according to a particular formula. As with the original act, states are still required under the law to maintain assistance to local governments equal to a 2-year average of their intergovernmental transfers. Additionally, both state and local governments are required to publish in the local newspaper notice of proposed use prior to budget hearings and after budget adoption. Also required are public hearings on proposed use. There are very few restrictions on the use of revenue sharing funds.

In Hawaii, the federal revenue sharing moneys have not been used so much for budget balancing, but rather the counties have largely used it for capital improvement projects, mostly in recreation, culture, and transportation. Honolulu and Kauai have also used sizable amounts for police service.

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Another form of federal assistance to state and local governments is the block grants. There are now broad programs of support in 5 areas: community development, manpower, law enforcement, social services, and health.

The total operating revenues from federal grants in Hawaii for 1976 were approximately: \$83.5 million for Honolulu, \$11 million for Maui, \$6.3 million for Hawaii, and \$2 million for Kauai.

Debt Limitation

Even the best possible systems of taxation and state aid to local government would not halt the need for another major component of local government finance; that of the power to sell bonds and go into debt to finance long-term projects. The concern is that of setting a limit up to which a local government unit may go into debt. A majority of state constitutions limit local indebtedness in at least one of 2 ways:

- (1) A maximum level of debt is set, usually stated as a percentage of the property value; and/or
- (2) Approval of local voters (a voter referendum), is required before the debt can be incurred.

A majority of state constitutions specify some percentage limitations on outstanding debt of their local government units in relation to the property tax. In addition, many of these same states and others have constitutional or statutory requirements for a voter referendum to approve proposed debt.

The debt limitation for Hawaii's local government units is set in Article VI, section 3, of the Constitution. In general, while the State has relied on borrowing from the bond market to finance its capital projects, the counties have largely relied on cash. The Tax Foundation of Hawaii stated:

However, during 1976, actual as well as contemplated sales of bonds by the counties seem to indicate that local governments in Hawaii will turn to the bond market more frequently in the future.

Article VIII

PUBLIC HEALTH AND WELFARE

Since the last Constitutional Convention in 1968, state public health, welfare, and housing programs have grown at a phenomenal rate. Today, government programs in these areas provide a broad array of services which are not necessarily limited to the "traditionally poor". Because it is difficult to predict future trends in services, constitutional alternatives must be viewed within the context of the purpose and direction of each provision. Some individuals hold that constitutional provisions should be broadly stated giving the legislature the flexibility to provide necessary services, programs, and enact laws to meet changing needs. Others attribute the increasing scope of government activity to vague constitutional grants of authority or definitions of responsibility. Clearly, this vagueness is one of the sources of criticism directed at expanding social, health, and housing programs involving large expenditures of public funds.

The essential purpose of constitutional provisions is to provide a philosophical and legal framework in which legislative action and executive direction can be developed to create solutions to problems and needs of the public. The purpose of this summary is to provide a view of the issues involved in decision making on constitutional provisions affecting health, public assistance, housing, care of the handicapped, and public sightliness and good order.

Constitutional Framework

Article VIII of the Hawaii State Constitution contains the provisions relating to public health and welfare. The article defines the state's responsibility in the protection and promotion of the public health, the "treatment and rehabilitation...of the mentally or physically handicapped", the provision of "assistance for persons unable to maintain a standard of living compatible with decency and health", the provision of or assistance in "housing slum clearance and development or rehabilitation of substandard areas", and the conservation and development of the state's "natural beauty, objects and places of historic and cultural interest, sightliness, and physical good order".

In creating these provisions, the delegates at the 1950 Constitutional Convention intended the provisions to "indicate state responsibility in health and welfare, leaving the legislature to implement the concept". The 1968 Convention agreed with this approach and made no substantive changes in the Article. As noted by one of the delegates, "the broad grant of legislative power contained in these 5 sections pinpoint state responsibility..." and "that under these broad grants the legislative and executive branches of our state government have been able to carry on very meaningful effective public...programs in cooperation with the federal and county governments".

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The only substantive change in the Article occurred in 1976 when the electorate approved an amendment to section 4 on Housing which broadened the state's responsibility in providing housing for its people.

PUBLIC HEALTH

Public Health in Hawaii

Government responsibility for public health in Hawaii was first authorized under the Organic Act which stated that the "legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States locally applicable". Under this broad statement, the territorial legislature established a department of health to administer programs protecting, preserving, and improving the physical and mental health of the people.

The 1950 Constitutional Convention delegates included a provision on health in its constitutional draft as an indication of the type of health programs which should be undertaken and as a general recognition that health was a usually accepted state responsibility in the area of conserving and developing human resources. The broad mandate retained by the 1968 Constitutional Convention has given lawmakers and the executive great flexibility in fulfilling the health needs of the people of the state. As is the trend on the federal level, state participation in health was increased over the last 2 decades. Today, the department of health is the third largest state department operating a network of health care services including physical health, mental health, mental retardation, community health, medical standards and enforcement, and overall program support such as public health nursing, health education, records and data collection, research and analysis, planning, evaluation, and budgeting. In addition, the department of health is responsible for the operations of the state/county hospital system which includes 12 facilities.

Health Issues

Medicare/Medicaid. Perceived as essentially a social welfare program, Medicare and Medicaid are being discussed under this section because of their impact on the total health care system which is the source of the experience of the program.

Medicare is a medical insurance program which is federally administered and funded through employer contributions and available to persons over 65 years of age. The program operates in 2 parts: part A covers all hospital costs for persons over 65 and is available to anyone in that category; part B is an optional program covering doctor's office visits and other additional benefits and can be obtained through individual contributions similar to health insurance plans.

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Medicaid is a joint federal/state partnership to provide health care financial assistance to those persons who qualify for the categorical public assistance programs and, optionally, those who may be defined as medically needy. Administration for the program is a state responsibility within federal guidelines and fiscal responsibility is shared between both levels of government.

Within the last 2 years, state expenditure for Medicaid reimbursement has come under heavy criticism because of cost overruns, physician fee abuses, and payment delays. As a result, the Hawaii legislature has asked for an audit of the state program to determine the source of the problem for correction. Yet the problem of Medicaid cost overruns is not an isolated phenomenon. It lies within the context of the large issue of health care costs.

Cost of Health Care. In Hawaii, health care cost increases have a specific impact in 2 areas of government expenditure--Medicaid reimbursements and hospital costs. Medicaid has been discussed previously. The second area is hospital operations in which health care costs have a direct impact on the state's finances. Since the state assumption of responsibility for the county hospitals in 1965, program costs have increased requiring a 100 per cent increase in hospital rates just within the last 4 years. Yet, the fee increases have not covered the cost of operations and each year, the state is required to increase the general fund supplementation to support the hospitals. Subsidies to private hospitals have also been on the increase, and in the case of some rural privately owned hospitals, the state has become the major source of financial support.

Several reports reviewing the hospital situation have recommended that the state look at divesting itself of running the hospital system, establishing a semi-autonomous authority, and developing a self-supporting system.

Right to Health Care. Right to health care is becoming recognized as a fundamental human right and has been used as the programmatic base for efforts to allocate more resources to increase accessibility and equalize the distribution of services. Although not constitutionally recognized, right to health care has been upheld by court decisions particularly in the area of the mentally retarded and mentally ill. Patient rights movements have been started and attempts have been made to formalize and legalize a patient's bill of rights.

Constitutional Provisions in Other States

A review of constitutional provisions in other states illustrates the diverse ways in which the responsibility for public health is assumed. In spite of the diversity, however, there seems to be a basic pattern in expressing that responsibility. The first is to have the constitution authorize the legislative body to provide services or facilities to specific groups of people such as the mentally ill, aged, disabled, mentally retarded, low income, and handicapped. Secondly, constitutional provisions authorize the establishment of a specific entity to be responsible for the state's health program. Thirdly, state involvement in health programs are sanctioned through authorization for issuance of bonds for health purposes or designation of tax funds for health programs. Finally, health responsibility may be expressed in broad and general

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terms, such as Hawaii's, where the policy statement is made without reference to specific programs, responsibilities, or agencies.

Constitutional Alternatives

Expressing Policy with Respect to the Health of the People

1. Retain present provision

- For:
- (1) The present provision offers a simple and direct statement of state responsibility giving the legislature the flexibility to meet the changing needs of the people.
 - (2) Developing interest in health and all aspects of the health care industry on the part of the government warrants a statement that health is a matter of public concern.
- Against:
- (1) Broad statements do not provide any real direction or meaning to the state's responsibility in the matter of health.
 - (2) The provision is not necessary since the legislature already has the power to legislate under its plenary powers.

2. Modify the present provision

- For:
- (1) Present health programs are reactionary in nature, usually responding out of a crisis situation. Shifting the constitutional posture to express health care as a right would change the ground of being from reaction to anticipation.
 - (2) Any statement expressing the rights of an individual would provide a clear mandate to extend health care services to all individuals.
- Against:
- (1) Health care in Hawaii has generally been available to all persons either through private or public programs and by implication, the state has been fulfilling the needs of the people.
 - (2) The expression of any benefit as a "right" may result in judicial relief if any individual felt the individual's rights were being denied. While bringing suit does attract attention to the issue, it must be weighed against other ways to accomplish change.

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3. Broaden the provision

- For: (1) Adding a reference to environmental health would legitimately recognize this area as a public health responsibility.
- (2) The term "public health" does not seem to be inclusive enough to account for the development of an environmental health field.
- Against: (1) This Article may not be appropriate for a statement on environmental concerns.
- (2) To begin to specify areas of public health concerning the Constitution opens the door to include other programs. Constitutional provisions should remain on a broad contextual level.

Prescribing the Method by which Responsibility is to be Fulfilled

- For: Constitutional provisions often state intent but leave executory aspects to the legislature for implementation. Adding a prescriptive method to policy statements would provide a specific framework for legislative action.
- Against: A statement of methodology is not necessary since state agencies are already involved in these areas and adding methodology does not necessarily spur action.

Expressing Policy with Respect to Financing of Health Care Services and Construction

- For: Such a provision ensures continuing support for health care facilities in meeting the needs of the population by offering incentives to modernize, and provides a method by which equality of health care services can be achieved.
- Against: There is no need for this type of constitutional provision since the state already accomplishes this goal through its public hospital program and private hospital subsidy program.

CARE OF THE HANDICAPPED

Mental retardation and mental health have gained prominence in federal activity since the 1960's. The commitment at the federal level influenced state

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programs such that services for both groups have expanded from the traditional institutional care setting to community programs in which the mentally ill and mentally retarded are treated within a community setting. Services for the physically handicapped have also received attention and most recently, the rights of the handicapped to employment and equal access to public buildings gained legal recognition.

Programs for the mentally and physically handicapped in Hawaii have grown with the federal government's activity. The concept of community health services operates as the basis for both the mental retardation and the mental health programs. During the middle 1960's, the community mental health program came into being, providing those persons who could function in the community an opportunity to be with friends and family while being provided services in a community mental health center. The Hawaii State Hospital became a place for those persons whose mental state was such that they could not function within the community on a daily basis or were a danger to themselves and others. Deinstitutionalization of the Waimano Training School and Hospital marks the beginning of a community mental retardation program. According to the department of health, the full implementation of this approach to the treatment of the mentally retarded will be completed by the early 1980's.

Rehabilitative services to the handicapped have traditionally been offered through the department of social services and housing's vocational rehabilitation program and through the department of health's services to the handicapped programs. Recently, state activity in the area has increased, particularly with the establishment of the commission on the handicapped whose responsibility it is to coordinate and develop a comprehensive services program for the handicapped.

Issues of the Physically and Mentally Handicapped

Civil and Personal Rights. The rights of the mentally retarded and the mentally ill have been emphasized by the courts, particularly in the area of right to treatment, right to liberty, and right to the least restrictive alternative. As individuals within this society, the mentally ill and mentally retarded are already granted those rights provided under the Constitution. Extenuating circumstances, however, namely their mental condition lends itself to usurpation of those rights albeit in the "best interest". It may be that the only way to fully insure the rights of these individuals is to include a constitutional reaffirmation of their rights with respect to treatment of their condition. On the other hand, statutory provisions outlining basic rights of mentally retarded and mentally ill individuals can offer the necessary protection so that these rights are not violated. The key to resolving this issue lies in the interpretation of "rights". Any statement of rights serves a purpose, and that is, it questions whether (1) state purposes are legitimate, (2) procedures fair, (3) conditions in an institution are humane and suitable for any effort toward treatment, and (4) the state is acting in good faith. A resolution of the issue of the right to treatment involves the decision on whether the right is a theoretical concept or a practical means of guaranteeing proper and humane treatment of the individual while guaranteeing protection to both the individual and society.

Constitutional Provisions in Other States

For the most part, constitutional provisions relating to mentally ill or physically handicapped are antiquated. Archaic terms such as "insane" and "feeble-minded" are still being used. The constitutional statements reflect an obsolete approach to the treatment and care of the mentally and physically handicapped which generally means confinement in an institution. Where provisions are updated as in Michigan, the terminology used reflects the advances in treatment.

Constitutional Alternatives

1. Retain existing provisions

For: The provision has served as a basic policy for the mental health, retardation, and physically handicapped programs for 28 years and has provided an adequate base for continually expanding state programs.

Against: Terminology used in the provision is fast becoming antiquated. New terms such as "developmental disabilities" provide a broader mandate for state responsibility and reflect the general trend of national programs.

2. Modify the existing provision

For: The federal law and professional circles have created new terminology to reflect new attitudes and approaches to the treatment of the handicapped. Updating of provisions will provide the necessary legal base for the legislature to adopt these new approaches.

Against: Terminology in any given professional area often is a result of a passing trend. In the area of mental health and mental retardation this pattern is particularly true. To change the Constitution on the basis of a trend undermines the permanency of the foundation of state laws.

3. Add to the existing provision

For: The activism in the area of the rights of the developmentally disabled and the mentally ill and handicapped reflects a human concern over the deprivation of rights. Constitutional statements in this area would clearly set the policy on the rights issue and guarantee adherence to the concept of equal rights under the law.

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Against: Including the rights of the mentally ill, mentally retarded, and handicapped in the Constitution may set up a group with special rights and privileges. A statutory statement of rights would serve to emphasize the particular problems of these groups without constitutionally treating them as special.

PUBLIC ASSISTANCE

Hawaii's public welfare program began in 1937 providing services to the aged or blind, and providing general assistance and Aid to Families with Dependent Children. By the end of that year, 2 additional programs were instituted, foster parents and child care institutions for neglected, abused, and delinquent children. Since its inception, the public assistance program has been following the national trend and experiencing a doubling and tripling of program costs and clients.

Recent actions by both the state and federal governments have been aimed at cost reduction and program effectiveness. The department of social services and housing's flat grant program, the work requirement for single able-bodied recipients under general assistance, and the institution of a child support enforcement program exemplify this trend.

Constitutional Provisions in Other States

States run the 2 extremes in describing state responsibility for public welfare. On the one hand, most states do not have any explicit statement of responsibility for public welfare since direct programs have traditionally been the responsibility of the counties or local governments. Where constitutional provisions are explicit, descriptions detail board, department, and program responsibilities. In some cases, fiscal limitations are set on expenditures for welfare or at least listed as authorized expenditures under taxation and budgetary powers of the legislature.

Constitutional Issues

Entitlement to Public Assistance Benefits. The issue of recipient rights became prominent in the 1960's out of the social activism created in the War on Poverty and the Model Cities program. In 1966, a Federal Advisory Council on Public Welfare recommended that the Social Security Act be amended to provide, in cooperation with the states, a program of basic social guarantees. As a result, the Social Security Act now contains entitlement provisions under federal eligibility requirements for public assistance and care and is reinforced by policies contained in the Department of Health, Education and Welfare policies and regulations. Moreover, each state must include in its state plan,

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requirements that assure their programs will be administered so as to protect certain basic rights of needy individuals including the right to privacy.

The constitutional issue is whether entitlement to public welfare should be specified in the Constitution. If these rights are specified, then the question arises as to whom these rights are to be applied and under what conditions. That issue would require statutory and administrative implementation.

Residency. Imposition of a residency requirement for eligibility in welfare benefits has been seen as a solution to cut program costs. In 1977, Governor Ariyoshi proposed a U.S. constitutional amendment permitting states to establish residency requirements for new arrivals in publicly supported programs such as welfare, employment, and housing.

The history of court cases regarding residency requirements has left the issue still unresolved. While the U.S. Supreme Court has been sympathetic to state policies on growth and the importance of population limitation measures to promote aesthetic, cultural, social, and environmental values, however, the concept of durational residency is still generally held to be against the fundamental right to travel and in violation of the equal protection clause.

Constitutional Alternatives

Constitutional alternatives in the area of welfare seem limited in view of increasing federal participation. There are some areas, however, in which constitutional changes may be appropriate in anticipation of the evolution of public assistance in this country.

1. Retain the present provision

For: (1) The statement provides basic support for legislation by giving flexibility to the legislature to act within the best interest of the people.

(2) It provides an assurance of minimum programs by the nature of its assumption of responsibility and power to provide assistance to persons unable to maintain a decent standard of living.

Against: (1) The broad policy statement seems too vague and lends itself to supporting a limitless number of programs and benefits.

(2) Broad statements also provide no specific direction or way of ensuring that the legislature or the executive will carry out the intent of the Constitution. Specificity will provide needed control and accountability in fulfilling constitutional responsibility.

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2. Include entitlement as a matter of right, as well as affirmative guarantee or rights

- For:
- (1) It would insure that persons in need of public welfare programs would be treated according to standards of procedural due process.
 - (2) Welfare recipients should have the same information as others so that they may make intelligent choices in services and payments concerning their lives. A statement on the right to information will ensure this fact.
 - (3) The state should ensure the rights of welfare recipients without regard to conditions imposed upon the state by the federal government.
 - (4) The right to counsel would allow many individuals who are not familiar with the language or the procedures an opportunity to operate on par with welfare officials.

- Against:
- (1) Entitlement provisions are unnecessary since statutes can prescribe mandatory standards for welfare administration.
 - (2) If a situation does in fact exist concerning a recipient's right to information, present constitutional protection and guarantees allow for it to be remedied.
 - (3) Constitutional action is not required as the federal government has a provision in its law which provides protection against invasion of privacy, and state statutes already define confidentiality of records.
 - (4) Having the right to counsel may lead to unnecessary demands for counsel causing great complications in welfare administration and increases in cost. The presence of counsel implies that the recipient and the welfare administrator have an inherently adversary role.

3. Include a residency provision

For: It would discourage persons coming into the state from depending on public assistance as a form of financial support.

Against: It is unnecessary since statutory enactments could serve the same purpose. At the same time,

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the risk of imposing residency requirements involves the possible loss of federal funds.

HOUSING

The development of housing programs in Hawaii closely parallels the federal housing laws. Beginning in 1947, the legislature enacted a series of housing acts responding to the acute shortage of housing in the state. Under the direction of the Hawaii housing authority (HHA), the program has expanded to include 5 major programs:

- (1) Federally aided low-rent housing which involves the development of housing for low-income families with rent being set at a level to cover cost of operations and a federal Department of Housing and Urban Development (HUD) subsidy financing the rest of the project.
- (2) Elderly housing which supports projects for the housing of the elderly including actual construction of units and rent supplements.
- (3) State nonsubsidized projects which provide HHA with the authority to offer low-rent housing without reliance on federal subsidies. Nonsubsidized housing tenants have the option of becoming homeowners by dedicating 20 per cent of their rent to down payment on a future home.
- (4) Federal-leased housing programs lease housing units in communities with a 3 per cent vacancy factor to low-income families at 25 per cent of their adjusted gross income. If the rents do not cover the cost of the lease, then HUD reimburses the state for the difference.
- (5) Hawaii State Rent Supplement program authorizes HHA to help families who do not qualify under federal housing requirements with rental assistance up to \$70 paid directly to the landlord. HHA certifies each individual family and tenants provide up to 20 per cent of adjusted gross income for rent.

Housing: A Constitutional Amendment

In 1976, the Hawaii electorate voted to amend the housing provision in the Constitution to delete the phrase "including housing for persons of low income" and substituting the phrase "and the exercise of such power is deemed to be for public use and purpose". The change expanded the constitutional authorization to include programs for persons other than those traditionally defined as low income.

Constitutional Provisions in Other States

Only 6 states other than Hawaii have specific provisions relating to housing. Of the 6, Hawaii's provision appears to be the broadest and simplest. The most complicated provision is New York state's housing article which details the state's responsibility, the debt limitation in carrying out that responsibility, the authorization to guarantee loans or provide loans for political subdivisions and private corporations, the authorization of eminent domain powers to be used in the public interest, and the provision of powers to the legislature to enact appropriate laws to carry out the purposes of the section.

Housing Issues

Rights to Housing. Federal policy has always been concerned with providing equal access for all groups of people to housing. The 1968 Civil Rights Act prohibits discrimination in the sale or rental of private housing and several federal agencies have taken administrative steps to equalize access to mortgage credit, federally insured housing and subsidized housing. The issue, however, has become broader than discrimination and equal access. It is one of a guaranteed right to live in decent housing without regard to economic or racial factors.

Hawaii's constitutional provision presents the state's responsibility in the matter of housing but does not insure a "decent home for all". Legislative acts, in their findings and purpose clauses, describe conditions which require correction. Yet nowhere in the law is there an affirmative statement of rights to decent housing.

Constitutional Alternatives

Expressing Policy with Respect to the Needs of the People

1. Retain the present provision

For: Hawaii's housing provision provides a clear definition of the state's role in housing which includes providing and assisting in housing, slum clearance, and the rehabilitation of substandard areas which are considered areas of public interest.

Against: The statement does not provide a broad enough perspective for housing program development over the next 10 years. Clearly from national housing trends, the idea of community development is becoming more prominent. Community development includes the basic activities of housing development, slum clearance

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and rehabilitation of substandard areas but goes beyond to allow for the inclusion of such factors as the environment, land use, social, health, and economic considerations.

2. Modify the present provision

For: Declaration of rights are essentially self-operative provisions requiring no legislative or executive action and provides for accountability of government action. The statement gives the citizenry the option to monitor state actions to see if the constitutional obligation is being fulfilled. If the obligation is neglected, then citizens have the power to bring suit in the courts demanding the state fulfill its obligation.

Against: Any statement of rights, particularly in the case of the right to a decent home involves fiscal repercussions. With the magnitude of the housing problem in Hawaii it may be fiscally irresponsible to declare a decent home as the right of every citizen and expressing an essential "benefit" as a "right" could lead to judicial relief if any individual felt his or her rights were being denied. Too many suits will most likely place a heavy burden on court calendars and consequent costs.

Prescribing the Method by which Responsibility is to be Fulfilled

- For: (1) In response to the report by the Governor's Commission on the Organization of Government, reference should be provided to clarify state and county partnership in the development of housing programs. Since 1974, each county has established a county housing department and the federal trends seem to be moving in the direction of providing more housing funds to local governments.
- (2) Expanding county participation in housing could relieve the state of some fiscal liability and indebtedness. Moreover, it would change the role of the Hawaii housing authority from an agency involved in actually developing and running housing development to a planning and coordinative policy making agency with the counties involved in the actual development and operations of housing.

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- Against: (1) Act 105, the State's Omnibus Housing Act, provides counties with the same powers as the Hawaii housing authority in the development of housing in their respective counties making constitutional provisions redundant.
- (2) General obligation bond indebtedness for housing projects are not considered as part of the state's constitutional debt, therefore, any fiscal relief for bond indebtedness would be negligible.

PUBLIC SIGHTLINESS AND GOOD ORDER

Development of Public Sightliness and Good Order

Concern for the environmental aspects of life is found in section 5, Article VIII. According to the proceedings of the 1950 Constitutional Convention, the purpose of including the Article was to emphasize that "in order to maintain the proper health of a people, it is necessary that they have available to them parks, playgrounds, and beaches where everyone may obtain fresh air, sunshine and the opportunities for recreation...." The described purpose of the section is to "emphasize that public sightliness is basic to the total health program of a community".

During the 1968 Convention, deliberations on section 5 included specific language calling for "a constitutional basis for positive action in such specific areas of concern as air and water pollution, noise abatement, environmental health and welfare, and fish and wildlife control".

Some members of the committee on public health, education, and welfare, labor and industry "felt very strongly that the state responsibility in the area of environmental health should be specified somewhere in Article VIII". However, a majority did not agree with this viewpoint. It concluded that all proposals for changes in section 5 are unnecessary because the recommended public health programs are already being carried out and others can be initiated under the broad grant of legislative power in Article VIII, sections 1 and 5.

Public Good and Sightliness in Hawaii

Historic Preservation. In 1976, the state legislature enacted a comprehensive historic preservation law making historic preservation mandatory for the state. Previously, the program was limited to public activities and historic preservation of public lands. The new law reorganized the provisions in the old law and expanded historic preservation to include preservation of artifacts, sites, and other historically significant items found on private property.

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Most significantly, the new law declared historic preservation as a matter of public policy that the state (1) provide leadership in preserving, restoring, and maintaining historic and cultural property; (2) ensure the administration of such historic and cultural property in a spirit of stewardship and trusteeship for future generations; and (3) conduct activities, plans, and programs in a manner consistent with the preservation and enhancement of historical and cultural property.

Environmental Preservation. Probably, the most important provision in the statutes is the state environmental policy statute, chapter 344, Hawaii Revised Statutes, which establishes "a state policy which will encourage productive and enjoyable harmony between man and his environment, promote efforts which will present or eliminate damage to the environment and biosphere and stimulate the health and welfare of man and enrich the understanding of the ecological systems and natural resources important to the people of Hawaii".

The policy statement itself provides a commitment of the state to safeguard its "unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of Hawaii".

Environmental Rights and the Constitution

Constitutional protection of the environment has become a major policy issue, particularly in Hawaii where the tension between the consumptive needs of the people appear to be in conflict with the preservation and conservation forces. While this discussion will focus on constitutional declarations concerning the physical environment, it should be kept in mind that "public sightliness and good order" encompass not only physical, but the social, economic, and aesthetic environment. Therefore, the whole discussion should be held within this broad context.

Constitutional rights to environmental protection provide a higher level of commitment than common statutes and can be viewed as the "ultimate repository of a people's considered judgment about basic matters of public policy". In all states that have included environmental declarations in their constitutions, the proposals have won by overwhelming margins.

The impact of a constitutional declaration is that it guarantees citizens the right to a decent environment and requires all state agencies to consider the impact of their decisions on the environment. Moreover, constitutional declarations offer goals and guidelines for legislative and executive action. Once a declaration is part of a constitution, citizen challenge in the courts hold the government responsible for its obligations.

Constitutional Provisions in Other States

For the most part, constitutional provisions dealing with the environment are general policy statements, lacking specificity. Unlike the basic bill of rights whose generality such as "freedom of speech" acquires meaning and definition out of a specific historical experience which created a common understanding of that right in the community, environmental bill of rights lack that historical experience.

Constitutional Alternatives

1. Retain the present provision

For: Constitutional proceedings from 1950 and 1968 show that delegates in both conventions intended for this provision to be a broad grant of legislative power to protect total environmental health.

Against: The terms "public sightliness and good order" seem vague and out of date. Changes to reflect the present view of environmental conservation are necessary to support the state in its goal of having a socially, economically, aesthetically, and physically balanced environment.

2. Establish an Environmental Bill of Rights

For: Constitutional bill of rights provides a strong commitment and basis for state activity by establishing state goals and guidance for state agencies and adherence by state agencies would be mandatory thereby assuring total state commitment. Moreover, the provisions would also extend over the private sector, offering a basis for enforcement of environmental policies.

Against: Hawaii has already adopted an environmental policy statement which provides the goals and guidelines of the state. The experience of other states with provisions relating to the environment shows the difficulty in having such a provision be effective particularly since language used to describe that environmental condition to be achieved has remained vague.

Article IX EDUCATION

PUBLIC EDUCATION (LOWER EDUCATION)

The responsibility for public education has from the outset of the Republic been considered to be within the "reserved powers" of the states and each state has exercised its authority over education in a different manner. Public education in Hawaii dates back to 1840 and is provided for in Article IX of the Hawaii Constitution. In the broadest sense, the term "public education" refers to all educational activities which are wholly or partially supported by public funds, including education programs from kindergarten through college, and graduate and post graduate programs. However, "public education" is also commonly used to refer to only those state or locally funded and administered educational institutions and programs which are normally graded K to 12. For the purposes of this discussion the term "public education" encompasses the latter. Institutions of learning which accommodate post high school students, such as community colleges, 4-year colleges, and universities or other post-secondary institutions are discussed in a separate higher education section.

While the constitutional treatment of education varies among the 50 states, the basic issue underlying a reexamination of the education article is, first, the extent to which provisions for the educational functions and institutions should be treated in the document. On the one hand, there is the view that a constitution should be as specific as possible taking into consideration all existing aspects of education. In this manner, a constitution serves as a guideline for future action. On the other hand, there is a view that a constitution is a preamble to statutory enactment and should be unencumbered by detail and references.

Article IX of Hawaii's Constitution is cited as a model of terse language and brevity. The article notes that the State should provide for higher and lower public education, prohibit discrimination and prohibit the use of public funds to support private education. The article also provides for a state board of education, a superintendent of education, a state board of regents, and a president of the University of Hawaii.

In the 1968 Constitutional Convention, the argument for retaining the present brief constitutional language generally prevailed. It was noted that under the constitutional provisions, the State had developed an adequate system for the administration, supervision, and coordination of education without unduly hampering the legislature in making needed changes in the structure and organization of education in the State. While there appears to be broad agreement on the basic issue of retaining the general nature of Article IX, a number of specific issues regarding structure, governance, and finances have been raised since 1968 which may require amendments to the Constitution. The major issues and their implications for change are examined here.

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Of prime concern are the interrelated issues of the structure and governance of the public education system in Hawaii. Traditionally, Hawaii has had a centralized school system where administrative, fiscal, and policy-making functions are maintained to a large degree at the state level. Arguments for a centralized system have been based on economic efficiency and equitableness in terms of facilities, personnel, and curriculum. Recently, however, state-sponsored studies have recommended increased decentralization of education in the managerial context calling for more delegation of power to the subunits of the department of education; namely, the districts and the individual schools. Arguments favoring increased decentralization have focused on the need to foster greater public participation and concern, greater educational experimentation, and greater accommodation of unique local community conditions and needs.

A great deal of attention has also been focused since 1968 on the issue of governance in the same state studies as well as in a number of legislative proposals to amend Article IX. The role of education in government, as unique or similar to other governmental services, is a central consideration to this issue. If education is viewed as unique, it is argued that it should be removed from politics and the executive branch of government. This may best be accomplished by an elected board, whether partisan or nonpartisan, which would have the responsibility to appoint the superintendent of education. While such boards may have fiscal autonomy, in Hawaii this is not the case although the elected partisan board does appoint the superintendent. The opposite view maintains that the management of education should be established in the same manner as other government departments or agencies by gubernatorial appointment. This would place the responsibility and accountability for education on one person, the governor, who is the elected head of the executive branch. If there is a board at all, it would be a lay board acting in an advisory capacity to the department head. The proponents contend that a single individual would then be accountable for carrying out the administration's policies in education.

Equality of educational opportunity has also received a great deal of attention in major federal and state legislation in the past decade, although there have been few examples of constitutional guarantees of equality of educational opportunity in state constitutions. The concept of egalitarianism has traditionally been acknowledged as a dominant American value, and education has been viewed as one of the means to achieve it. The feasibility, however, of constitutionally including the concept lies essentially in how the concept can be defined. Many feel the decision on how to achieve equality of educational opportunity should be left to the legislature and the state's educational authorities. On the other hand, there are those who argue that an adequate definition of equal educational opportunity can be achieved and that the inclusion of a provision is a matter of social urgency. The issue in Hawaii has largely centered on providing equally for handicapped children or others with educational disadvantages and for prohibiting discrimination in participation in educational programs because of race, religion, sex, or ancestry.

Public aid to nonpublic schools presents another issue for possible consideration since Article IX explicitly prohibits such assistance. In recent years, U.S. Supreme Court decisions as well as the response to growing public

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sentiment have tended to expand the types of assistance which have been provided to nonpublic sectarian or nonsectarian schools. While attention in Hawaii has focused on the needs of higher education and private colleges to receive public assistance, the issue in public lower education nationally has been tied primarily to the relationship of religion and the public schools. While direct aid is generally prohibited, the U.S. Supreme Court has found that indirect aid to religious schools by such methods as textbooks and transportation does not violate the First Amendment of the U.S. Constitution. In this area, according to the Court, the U.S. Constitution is silent, therefore, a state constitution is free to either prohibit or permit such indirect aid. Of the several arguments used for and against public aid to nonpublic schools, the most frequently expressed is the "general welfare-child benefit" theory. This theory asserts that education and its auxiliary benefits are public benefits to the individual citizen. Legislation, in this instance, is not void if it achieves a public purpose, even though in the process a private end is incidentally aided. Those who argue against the general welfare benefits of public aid to nonpublic schools contend that public funds in any shape or form which aids nonpublic schools only work to promote their growth, accommodate their financial deficits, increase their demands for additional forms of public aid and work to the disadvantage of public schools where such funds properly belong.

HIGHER EDUCATION

Constitutional recognition of higher education is an affirmation of the fundamental right to and importance of higher education. Whether state constitutions should be phrased to include higher education at all is the first issue to be addressed. Although the National Municipal League finds a system of free lower education an important provision in state constitutions, it leans toward a posture of nonrecognition of higher education. State constitutions usually provide for higher education by recognizing higher education in general, by establishing one or more systems of higher education, by creating one or more governing boards for higher education institutions or systems, or by declaring educational institutions, systems, or governing boards as corporate bodies.

The fundamental guarantee of higher education in Hawaii has constitutional basis in Article IX, sections 1, 4, and 5. Sections 1 and 4 establish the University of Hawaii as a state university: "The state shall provide for the establishment, support, and control of...a state university". Section 4, Article IX, confers corporate status upon the University of Hawaii. Corporate status provides the university with autonomy in its internal governance, control, and management. By granting constitutional autonomy, the State acknowledges the university as a legal entity with freedom from outside controls. According to the attorney general of Hawaii, the University of Hawaii is a constitutionally autonomous body and not an administrative or executive agency of the State.

In actuality, controls are imposed by the legislature, the executive, and state agencies and departments over the fiscal and academic affairs of the university. In efforts to seek appropriations for its operation, the university

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has had to yield some of its corporate independence and is held accountable for the internal allocation of higher education revenues. Fiscal accountability and responsibility of university appropriations are subject to executive and legislative supervision.

The legislature, in addition to fiscal control over the university, initiates legislation regarding various phases of higher education. Since the 1920's the influence of the governor has also been increasing with the creation of executive line agencies vested with administrative powers and controls overlapping those of the university. Hawaii's budget office has assumed considerable influence in the budgeting process by making final recommendations concerning higher education appropriations for the executive budget and by performing audits on the use of funds. Further, state government involvement in the affairs of higher education can be seen by the recent proposal to create a department of life-long learning. This new executive line agency would consolidate some higher education services and would handle the continuing education and community service programs presently administered by the University of Hawaii.

Section 5, Article IX, establishes the board of regents as the governing body for the University of Hawaii. It appears that all state-supported institutions of higher education are governed by boards or a collective group of individuals rather than any other form of governing body. Basically, there are 2 kinds of governing boards: single institutions governing boards and coordinating boards.

Boards responsible for a single institution are considered to be somewhat antiquated forms of management in view of the increasing number of colleges and universities. Nevertheless, several arguments support this particular form of management:

- (1) The problems of the individual institution can best be handled by a board serving and having responsibility for only one institution.
- (2) Public interest can be served by single institution governing boards in which more people are directly involved in the decision-making process.
- (3) Needs particular to an institution can be precisely handled through a governing board of that institution.
- (4) There is more opportunity for board members to handle responsibilities and to make direct, important decisions affecting the institution.

Some argue that even within a multicampus institution, the establishment of separate boards for each campus might prove advantageous, particularly if the campuses are large and have educational program and characteristic campus differentiations.

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The arguments against single institution boards are:

- (1) With a profusion of boards, lines of responsibilities tend to become confused.
- (2) Separate boards promote their own interest in a competitive manner to the disadvantage of the entire higher education system.
- (3) It is difficult to recruit enough able members to fill positions of a number of boards.
- (4) A multiplicity of boards tends to create red tape and inefficient operation which could result in added cost to the public.

With the rapid growth of universities and colleges, governing boards with legal responsibilities over a single institution are unlikely to be the most appropriate form of governance. Even in states where the constitutionally established higher education institutions are presently served by single institution governing boards, the need for a coordinating agency may be indicated by the desire to include the state vocational institutions, community colleges, and private higher education institutions in the coordinating process and to handle the planning function of higher education for the state.

In many states, effective planning for statewide higher education goals and objectives has resulted in the inauguration of some form of board with coordinating powers. The concept of the coordinating board has been utilized as a means of organizing the various higher education operations. These boards with coordinating powers can be insertions in the line of control between the legislature and the governing boards of separate public colleges and universities.

In general, boards with coordinating, but not governing powers, are limited in both responsibility and authority. They have overall responsibility of planning and facilitating the development of statewide systems of higher education, achieving balance and effectiveness by delegating authority, and recommending proper apportionment of funds to individual institutions. In most cases, however, they have no direct legal power to interfere with the university in administrative details and in the management of its educational affairs.

State constitutions more frequently provide for higher education boards with both governing and coordinating powers. Hawaii appears to fall into the category of states having a coordinating-governing board of higher education. The community colleges as well as the 4-year campuses are under the administrative jurisdiction of the board of regents of the University of Hawaii. The board also sits as the postsecondary education commission and has administrative authority as the state board for vocational education. Thus, the board of regents not only governs the university and its campuses, but it must also coordinate technical, vocational, semi-professional, and general education services and programs for the state.

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In response to the past phenomenal growth of the University of Hawaii and to the increase of interest in higher education, recommendations have been made to review the present governance structure of the university system. Particularly, concern has been expressed over the priority and articulation accorded community colleges and a recommendation has been made by the governor's ad hoc commission on operations, revenues and expenditures to assure their adequate representation.

The Hawaii board of regents is given "power, in accordance with law, to formulate policy and to exercise controls over the university". Specific powers of the board, however, are not constitutionally stated, as is the case of some state constitutions. Rather, the specific powers of the board of regents are dictated by statute. Broadly phrased constitutional provisions for powers and functions of the board can imply fairly extensive and exclusive powers and functions of the board over institutional affairs and yet can be vulnerable to legislation which amends, modifies, diminishes, or restricts board powers. The Hawaii Constitution appears to give rather free reign to its governing board and yet imposes control by the phrase "in accordance with law". Therefore, although the board of regents has power to govern the university, the final authority over decisions made by the board rests upon the law-making body, the state legislature.

By statute, the board of regents of the University of Hawaii basically has the power to make governing laws for the university, to control property, to enter business contracts, to allocate funds appropriated to the institution, and to sue or be sued in its corporate name. Definitionally, then, the board is an administrator and a policy maker. The extent to which board members exercise and assume these powers is an operational problem rather than a constitutional one.

Section 5, Article IX, additionally provides for an appointed membership of the board of regents of the University of Hawaii. There are 2 widely used methods of selecting members of boards of higher education: (1) gubernatorial appointment, often with senatorial consent; and (2) popular election. The appointment method occurs more frequently in constitutional provisions for the selection of higher education board members.

The merits of an elected board are:

- (1) Education problems are of vital importance to the general public welfare and therefore election of public representatives to control such activity is of political importance.
- (2) The public can appraise the effectiveness of control and appropriateness as is reflected in the actions of their representatives at established intervals through the ballot.
- (3) Elected members are held more accountable to the public because of the public decisions concerning them at the polls.
- (4) By electing members, actions of the board members regarding educational policy could not be construed as reflections of views of the elected officials who make the appointments.

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In contrast, the following reflect arguments in favor of an appointed board:

- (1) Appointment eliminates the danger of voting for a person without sufficient comprehension of the abilities needed to be a good governing board member and adequate appraisal of the candidate's qualifications.
- (2) Better board members are acquired via appointment; well-qualified people are sought out and drafted for this type of public service.
- (3) By appointing members, education is kept out of politics.

The members of the 1968 Constitutional Convention rejected a proposal for an elected board of regents. It was declared that, in contrast to lower education, attendance at the university was voluntary and that, therefore, decisions made by the governing board did not affect almost every member of the public. Consequently, a means for giving the public a direct voice in the governance of the institutions was felt unnecessary. Additionally, no evidence was presented to indicate that the appointive process failed to obtain dedicated and qualified persons to serve as members of the board of regents.

Over the past decade, the board of regents has been delegated increasing responsibilities for the administration of not only higher education, but also of all postsecondary education which includes such areas as vocational, proprietary, adult, and continuing education. To assist the board to better handle its duties, the nature of the board, i.e., qualifications for membership, length of member's terms, the number of members, and representation by members of various constituencies, may be examined.

There are no specific requirements in Hawaii's Constitution regarding regent qualifications except to mandate that "at least part of the membership of the board shall represent geographic subdivisions of the state". The number of board members for the University of Hawaii board of regents as well as the length of terms are set by statute. The Hawaii Constitution also remains silent on student, faculty, and ex officio representation on the board. Faculty and students have, in the past, sought representation on the board as a means of actively participating in the decision-making process of university operations. Several state constitutions contain provisions for student, faculty, and ex officio representation on the governing boards of higher education.

Since the enactment of the G.I. Bill of World War II, federal effort in the area of higher education has escalated. In contrast to federal legislation for elementary-secondary education, many of the programs affecting higher education were instituted without reference to state roles and responsibilities except in the automatic appropriation distribution formulas. The Education Amendments of 1972, however, required states to establish state postsecondary education commissions (1202 commissions) to plan for and coordinate all postsecondary education in the state including private colleges and proprietary institutions as a condition for the receipt of certain federal funds for higher and postsecondary education. Significantly, the creation of 1202 commissions stimulated interest and concern of the states in their relationship with private

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higher educational institutions. Constitutional conflict may be involved, however, if state funds are used for any planning or distribution of moneys for the nonpublic sector of postsecondary education. In varying phraseology, all states, except Vermont, have constitutional provisions prohibiting the expenditure of state funds for sectarian purposes.

Federally funded higher education programs providing scholarships, fellowships, loans, and other aid generally make no distinction as to whether the schools for which these federal funds are to be used are sectarian, private, or public. Due to statements made by the U.S. Supreme Court in Tilton v. Richardson, it appears that certain types of federal aid may be permissible for higher education while the same might not hold true at the lower educational level. More rigid prohibitions against grants of public funds to sectarian schools are found, however, in the constitutions of many states, even if such grants are found to be within the limits allowed by the U.S. Constitution. The Hawaii Constitution expressly prohibits the use of state funds for private purposes and the attorney general of Hawaii has found state tuition subsidies for students attending nonpublic institutions of postsecondary education in violation of the Hawaii constitutional provisions.

Among the statutory powers of the board of regents of the University of Hawaii is the regulation of tuition fees. At the 1968 Constitutional Convention, there was heated debate on a tuition-free policy for the University of Hawaii. The proposal was defeated primarily on the grounds that such policy could be more efficiently handled by the legislature. Other reasons given by opponents of the proposal were:

- (1) Such a generalized constitutional provision for no tuition would restrict the power of the legislature in determining educational policies in terms of needs, resources, and the best approach in terms of conditions existing at any given time;
- (2) The greatest economic barrier to higher education may not be tuition but other barriers such as living away from home, family economics, and high fees and the high cost of campus activities;
- (3) The cost to the State would be prohibitive, and the effort of the State to fully support the K-12 public school system may be seriously impeded;
- (4) Specific reference to "no tuition" would still permit the legislature or the board of regents to impose substantial fees in lieu of tuition, as is being done in many state universities; and
- (5) Setting a high out-of-state tuition for nonresident students will not make up for the anticipated loss of tuition revenue.

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Proponents of a tuition-free undergraduate education argued that:

- (1) States such as Alaska, Arizona, Arkansas, California, Delaware, Florida, and Idaho provide free tuition for higher education and Hawaii should do the same.
- (2) Tuition-free education could supply the State with professionals rather than recruiting from other states.
- (3) A tuition-free policy would enable the State to provide higher education and equal educational opportunity to all students.
- (4) The available scholarship and loan programs are not adequate and pose qualification requirements which hinder those needing financial aid from receiving assistance.
- (5) Monetary value cannot be placed on an investment such as higher education.

Although the convention defeated the proposal for a tuition-free higher education, the need for some form of state aid to assist students attending institutions of higher education has been recognized. Recent recommendations have encouraged a low tuition policy and long-term state loan programs to aid qualified persons pursue further education.

Hawaii, along with states such as Kansas, Montana, New York, Ohio, and Wyoming, has adopted the policy of providing each high school graduate or otherwise qualified person an opportunity to enter a state higher education institution. This policy of universal access means an opportunity for disadvantaged groups to obtain higher education by having factors, which would otherwise prohibit admission of these disadvantaged groups at institutions of higher learning, equalized. Universal access places identified disadvantaged groups in Hawaii--the low-income, geographically isolated, and ethnic minority groups--on equal footing with all other applicants to state higher educational institutions. State efforts to provide adequate financial support to equalize educational opportunity is a major factor in realizing universal access. A few state constitutions contain language which indicates state policy of equal educational opportunity. Universal access by means of tuition subsidies or other state tuition policies and programs can provide timely and effective aid to students attending institutions of higher education.

Article X

CONSERVATION AND DEVELOPMENT OF RESOURCES

Hawaii's Constitution is brief in its treatment of natural resources. Article X is limited to 5 sections: a general statement mandating the legislature to promote the conservation, development, and utilization of natural resources; authority to create one or more boards to manage those resources; recognition of fishing rights established during the Hawaiian Monarchy; a provision to control the alienation of public lands; and a general statement urging the use of public lands for farm and home ownership.

Most state constitutions do not devote an entire article to natural resources. Of those that do, about a dozen contain sections that are more comprehensive than our own. In terms of its general policy statement on such areas as water rights, provisions establishing institutions and outlining their powers and duties, dedication of lands, mineral rights, ownership of resources, cultural resources, or the right to sue for environmental grievances, Hawaii has left the details to the legislative branch. Our constitutional provisions are neither as comprehensive nor as specific as that of many others.

Section 1 contains a general policy statement mandating the legislature to promote the conservation, development, and utilization of agricultural resources and fish, mineral, forest, water, land, game, and other natural resources. This general policy statement recognizes state authority to manage resources, explicitly delegates that responsibility to the legislature, and calls for an active role in promoting conservation, development, and utilization. No distinction is made between publicly and privately owned resources, nor is there a definition of "agricultural". Our present language provides the justification for almost any legislative action. Difficulty arises, however, when trying to apply notions of conservation, development, and utilization to the same resource, in the same place at the same time. It may be argued that clarification is needed, especially in terms of the limits that may be imposed on the use of resources in the name of conservation. The key to management is the ability to impose limits. Since conservation is the most potentially restrictive concept in section 1, constitutional clarification may be useful.

The 1968 Constitutional Convention did not produce a great many proposals to change section 1. Most suggestions would have simply expanded the general policy statement. A few, like the proposal to preserve conservation lands as forever wild, represented major amendments. None of these proposals, however, were reported out of committee, since all were possible under existing legislative authority.

A related section of Hawaii's Constitution deals with public sightliness and good order, Article VIII, section 5, and could be considered in conjunction with Article X, section 1. It represents a fusion of health, beauty, culture, history, and environment. Increasingly, states are recognizing that humanity creates environment, as well as dwells in it. Places become "resources" because of what people have built or done. States that offer similar constitutional treatment to both natural and man-made resources include Alaska, California, Indiana,

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Massachusetts, Montana, New Mexico, New York, and Virginia. Several provide for the purchase of lands for historical, cultural, and aesthetic purposes. As the meaning of environment takes on greater social implications, the impacts of beauty, "view-planes", cultural sites, etc., on land and resource management will increase.

Constitutional alternatives to section 1 include:

- (1) Abolish section 1, under the theory that the legislature already has such powers and does not need constitutional guidance;
- (2) Make no change in section 1;
- (3) Incorporate the historic, cultural, and aesthetic concerns of Article VIII, section 5, into an expanded use of "environment" under Article X, section 1;
- (4) Expand section 1 into a broader policy statement, and apply it not only to the legislature but to all branches of government as well as the general public;
- (5) Define "conservation", and establish priorities or guidelines in the conflict between conservation, development, and utilization;
- (6) Define agriculture, and set priorities in terms of the availability of water and land for agriculture;
- (7) Set priorities for the use of freshwater in general.

Three additional alternatives should be discussed: (1) assertion of state ownership of resources, (2) guidelines for the conversion of lands to more intensive land uses, and (3) establishment of the right of every citizen to a healthful environment and the right to sue for environmental grievances.

In order to manage a resource, there must be control over it. The most obvious source of control is ownership. Our shoreline, freshwater resources, and the potential harnessing of geothermal steam have been injected into the ownership question. The shoreline and tidelands are sites of a delicate balance between terrestrial (land based) and marine (ocean based) ecosystems. They are also coveted for their usefulness in the tourist industry, desirable residential developments, small boat harbors, commerce-oriented shoreline facilities, recreation, and an accessible supply of sand for concrete. It is generally agreed that at some point on any beach, private property ends and public ownership begins. Since there are a number of changing conditions along the shoreline, including the tides, the movement of sand, the high and low water marks, the vegetation line, etc., it may be necessary to establish some rule in deciding the seaward boundary of private property.

Hawaii's freshwater resources are an obvious need for agricultural, industrial, and residential consumption. Both fresh and ground water systems

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are intimately related; imprudent consumption at one site could affect a larger area. As demand catches up with supply, sacrifices will have to be made. Ownership and control of freshwater have a major impact on public and private decisions and may need constitutional clarification.

As our fossil fuels diminish, the availability of alternate, affordable sources of energy will play a significant role in Hawaii's future. Geothermal steam is thus a most valuable resource to control. Not only could it enhance our energy independence, it could stimulate new industry, such as the processing of manganese nodules. There are 2 main issues involved:

- (1) The nature of geothermal steam: is it a mineral or water?
Such a classification could determine the set of legal rules by which this resource would be governed.
- (2) Who owns it?

Both questions may be considered by the Constitutional Convention.

One of the greatest dangers of an incomplete or inadequate management system is the permanent destruction of valuable resources through the irreversible conversion of sensitive conservation and agricultural lands to urban development. In the current jargon of bureaucracy, this is called "losing a management option". Examples of such losses might include the filling in of a lake, the polluting of a bay, or the construction of a commercial building in a very remote scenic area. In Hawaii, the apparent willingness of the state land use commission to rezone lands for urbanization reflects the flexibility permitted by both the legislature and the Hawaii Constitution. It may be argued that our management system would benefit from greater constitutional guidance for the rezoning of lands.

Finally, a third major alternative would be to establish a direct relationship between constitutional rights and the management of natural resources. An example would be the Illinois Constitution, which reads:

Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitations and regulation by law.

At issue here is the ability of any citizen to insist on the enforcement of general policy statements. Without the right to sue, it may be argued that general constitutional statements have little effect on the management system.

In section 2 the legislature is mandated to "vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be authorized by law".

The mandatory provisions of section 2 do not apply to the natural resources owned or under the control of a political subdivision or a department thereof.

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Section 2 deals with the specific institutional authority to manage resources. The legislature has the authority to establish a single board or to distribute responsibility among several. The present system is a mixture of county and state involvement. At both levels there are networks of agencies and boards. Such a decentralized approach has been criticized as overregulation and undermanagement. Problems include waste and inefficiency, uncertainty in the decision-making process, lack of accountability, ad hoc decision making, and general lack of coordination. Two major issues emerge: first, the nature of a specific management agency, contrasting a single executive with a board; second, the nature of the entire management system, contrasting the distribution of authority among numerous agencies (including counties) with a more centralized, coordinated approach.

The 1968 Constitutional Convention considered a proposal to change section 2 from "one or more boards or commissions" to "a single executive". This was ultimately rejected on the grounds that a board is a safer, more democratic institution than a more independent executive. The convention did not consider the management system as a whole.

Major alternatives to section 2 include:

- (1) Abolish section 2, and leave all decisions in the hands of the legislature;
- (2) Make no change;
- (3) Decentralize all management authority by expanding the responsibilities of the counties;
- (4) Centralize all state management into a single executive, eliminating state boards and commissions;
- (5) Centralize all state management into a single board;
- (6) Remove all county authority to manage resources;
- (7) Spell out in detail our management system, specifying powers, duties, membership, whether or not officials shall be full time or part time, etc., thus removing this flexibility from the legislature.

Section 3 of the article declares that all fisheries in the sea waters of the State which are not enclosed shall be free to the public subject to vested rights and state regulation. Vested rights refer to "konohiki" fishing rights, granted during the days of the Hawaiian Monarchy. The need for this section is decreasing as more and more of these rights are condemned and purchased by the State. Section 3 is significant in that it recognizes public ownership of a resource.

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Constitutional alternatives would include:

- (1) Abolish section 3;
- (2) Make no change, since not all the konohiki rights have been condemned;
- (3) Clarify on a general basis the historic Hawaiian "ownership" of resources;
- (4) Clearly define the boundaries of the state, which are a matter of debate between the state and the federal government; and
- (5) Assert state authority to manage resources beyond the 3-mile territorial limit but between the island channels.

This last item would be important for the management of precious coral.

Section 4 is a constitutional safeguard controlling the disposition of state lands by requiring that legislative disposition be exercised only by general law. Arguments favoring its retention stress lands might be alienated through special interest legislation, and that it also provides some uniformity and equity in selling state lands. Arguments for the elimination of this provision note that the problem no longer exists, and that this is unnecessary.

Section 5 contains a statement promoting the development of public lands for farm and home ownership use on as widespread a basis as possible. This sets a general priority for the use of public lands by encouraging private use and ownership, and by ranking private housing and farming as preferable to other, unmentioned uses.

Possible alternatives would include:

- (1) Abolish section 5;
- (2) Make no change;
- (3) Provide guidance in the distribution of public lands to avoid favoring a particular economic group;
- (4) Prioritize the uses for public lands;
- (5) Integrate the management of public lands with other land use policies.

Other Approaches

In Hawaii, a more comprehensive and detailed constitutional approach to natural resources management has surfaced in the last few years. One version is being called Aina Malama, or Preservation of the Land. While still in its

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formative stages, Aina Malama backers propose a new article to Hawaii's Constitution that would create new land classifications, detail the process for nominating lands in the various categories, detail the permitted uses in each classification, require a public referendum to approve such zoning, establish a special commission to manage Aina Malama lands, and include a very detailed description of the powers, duties, and membership of such a commission.

The Aina Malama approach is one approach to increase public participation in the zoning and use of sensitive and valuable lands. It would reduce the discretionary powers of the land use commission in the rezoning of lands, and the department of land and natural resources in the management of conservation lands. Once classified under such a provision, it would be more difficult to rezone to a more intensive land use, since a public referendum would be required.

Article XI

HAWAIIAN HOME LANDS

Article XI involves 2 distinct sets of concerns: the historical background of the use and ownership of land in Hawaii and its relationship to the Hawaiian people; and the constitutionality of certain provisions in Hawaii's Constitution, such as the ability of the State to effect changes in policy without the need for federal approval. Historical issues include the symbolic recognition of Hawaiian rights, the contradictory provisions of the Hawaiian Homes Commission Act of 1920, promotion of homesteading, special protection for the sugar industry, low-income housing, admission of Hawaii to the Union, and efforts to "rehabilitate" the Hawaiian people.

The history of Hawaii is the history of land use. From the days of Kamehameha I when all land belonged to the King, to the arrival of foreigners and their slow but steady influence on land use policies; from the Great Mahele in the 1840's where western concepts of ownership gained a foothold, to the transfer of lands to foreign entrepreneurs, to twentieth century efforts to reserve a small portion of Hawaii's resources for the Hawaiian people...ownership and use of land have been the barometers of social change and justice. They are the primary arena of cultural interaction: the clash between private property and traditional values applied to Hawaii's resources.

In little over 100 years, the Hawaiian's percentage of land "ownership" had gone from 100 per cent to 2-1/2 per cent, a reduction by 97.5 per cent. The population of Hawaiians had dwindled to less than 25,000. Efforts to "rehabilitate" culminated in the passage of the Hawaiian Homes Commission Act (HHCA) of 1920, which did more for the existing power structure than for native Hawaiians. The poorest lands were provided for homesteading, and the promise of social and economic relief was not fulfilled. The history of land ownership illuminates 3 grievances of the Hawaiian community: the cultural subjugation of Hawaiians by the West, the individual and collective success of Westerners in acquiring lands belonging to the Hawaiian people, and the dramatic decline in the Hawaiian population.

To these is added a fourth, which is often confused with the above: the loss of Hawaiian sovereignty and independence that culminated in annexation to the United States. Here, the controversy revolves around the political and legal efforts to achieve annexation, and more particularly the role of the American government in the overthrow of the Monarchy. Whereas the land ownership questions have been treated through the Hawaiian homes program, responsibility for the overthrow of the Kingdom has recently been directed at native Hawaiian claims, or reparations. Reparations would involve some kind of monetary compensation to the Hawaiian people for the loss of their sovereignty. There are at least 2 bases for such claims: first, is the assertion that by accepting Hawaii, the United States accepted responsibility for the plight of the Hawaiians; second, is the charge that the United States unlawfully participated in a conspiracy to overthrow the Monarchy.

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Rehabilitation and reparations are not to be confused. One is an ongoing cultural, social, and economic program; the other a singular attempt to redress a specific grievance. The success or failure of one should not affect the other. The rehabilitation program is focused on the needs of the Hawaiian people. The reparation movement appears to be more concerned with their rights to compensation, regardless of need.

The current Hawaiian homes program represents a significant change from the original. Its emphasis is on the satisfaction of material needs, and poses several philosophical questions. The original program, with its concentration on homesteading, did incorporate the needs of the Hawaiian culture. Hawaiians needed land, not only for economic survival, but for the preservation of a life-style. The direction has shifted from the preservation of an ethnic group's identity, land, and culture to the integration of that group into the predominant western way of life. Except for the target group, the Hawaiian homes program is hardly distinguishable from federal and state attempts to "rehabilitate" other segments of society. If the constitutional convention desires to clarify the direction of the Hawaiian homes program, it could define "rehabilitation", and the relationship of that process to land, culture, economics, and life-style.

Article XI of the state constitution endows the constitutional convention with an extremely broad scope of power with regard to Hawaiian home lands. The convention has the ability to propose amendments to the statutory provisions of the Hawaiian Homes Commission Act of 1920, as well as the power to propose changes in the constitutional provisions of Article XI of the state constitution. In order to exercise this broad power with appropriate discretion, the convention delegates need to understand: (1) the reasons for the guarantee of the HHCA, 1920, in the state constitution; (2) the arguments concerning the constitutionality of the HHCA and the legality of the Hawaiian homes compact; (3) the required methods for amending or repealing the HHCA and the provisions of Article XI; and (4) the alternative courses of action open to the convention with regard to the Hawaiian homes program.

During the period 1921 to 1959, the HHCA was administered as a federal law for the Territory of Hawaii. It was the task of the 1950 Constitutional Convention to determine what the status of the Act would be after Hawaii became a state. The convention concluded that the HHCA should be guaranteed as a state law by the new constitution. Their decision was based on a conviction that the Hawaiian homes program served a worthwhile public purpose, and also on a belief that Hawaii had an implied mandate from the U.S. Congress to constitutionally provide for the Hawaiian homes program. At the time the convention was meeting, the 81st Congress was considering a statehood enabling bill for Hawaii which required that the new state constitution include a guarantee for the continuance of the HHCA as a condition of Hawaii's entrance into the Union. The Admission Act of 1959 contained an identical requirement.

The first 2 sections of Article XI of the state constitution were drafted by the 1950 Constitutional Convention to comply with the directives of the then proposed statehood enabling bill. Section 1 adopts the HHCA, 1920, as a law of the state subject to amendment or repeal only in the manner provided by Congress. Section 2 accepts as a compact with the U.S. the requirement that the HHCA be constitutionally guaranteed, and agrees to the conditions of the

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compact as these may be prescribed by Congress. Section 4 of the Admission Act of 1959, later added to Article XI as section 3, established the conditions of the compact by enumerating those sections of the HHCA which may be amended solely by state legislation or constitutional amendment and those sections which may be amended or repealed only with the consent of Congress.

Several of the 1950 Constitutional Convention delegates expressed grave reservations on the advisability of including the provisions of Article XI in the new state constitution. Their first major reservation concerned the question of the constitutionality of the HHCA, 1920. This question was given its most thorough consideration by the U.S. Congress in 1920, at the time the Act was originally adopted. Several witnesses at the congressional hearings claimed that the proposed HHCA discriminated unconstitutionally against all those not of Hawaiian blood who could not qualify for homesteading benefits. However, the Attorney General of the Territory of Hawaii and the Solicitor of the U.S. Department of Interior held that enactment of the HHCA would be a legitimate exercise of the federal government's plenary power over the Territory of Hawaii. Both the Senate and House Committees on Territories concluded that the Hawaiian Homes Commission Act was constitutional.

A majority of delegates to the 1950 Constitutional Convention agreed with the conclusion of the 1920 House and Senate Committees on Territories. They maintained that the opinions of the Attorney General and the Solicitor were as valid in 1950 as they had been in 1920. However, the constitutionality of the Hawaiian Homes Commission Act has never been tested in either the federal or state courts. Even though the opinion of those responsible for the original enactment of the HHCA and of the majority of delegates to the 1950 Constitutional Convention was that the Hawaiian homes program is constitutional, there is no way that the question of constitutionality can be finally resolved except by a ruling of the Supreme Court of the United States.

The second major issue of concern to many of the 1950 Convention delegates was the legality of the compact between the United States and Hawaii provided for in section 2 of Article XI. The compact was required by the United States as a condition of Hawaii's admission into the Union. The question concerning its legality can best be phrased as follows: Is the requirement that Hawaii enter into a compact with the United States to guarantee the continuance of the Hawaiian homes program in violation of the federal constitutional provision that new states be admitted upon equal terms with the old?

The 1950 delegates who felt that the required Hawaiian homes compact did indeed violate the principle that new states be admitted upon equal terms with the old cited the landmark case of Coyle v. Smith. The holding in this famous Supreme Court case was that Congress cannot at the time of admission impose conditions on a new state which operate to place it upon a plane of inequality with its sister states in the Union. However, the holding continued, if Congress has power over the subject matter of a compact with a new state, then Congress may impose limitations, for the state's power is not then diminished.

The legality of the Hawaiian homes compact can be defended on the grounds that the subject matter of the compact--public lands--is within the conceded powers of Congress rather than exclusively within the sphere of state

power. The Newlands Resolution in 1898 transferred fee simple title of the public lands of the Republic of Hawaii to the United States, thus making them the public lands of the United States. Therefore, when transferring these public lands back to the State of Hawaii, the United States had full plenary power to impose any conditions of limitations upon their use that Congress chose to impose.

The conditions of Hawaii's required compact with the United States were specified in section 4 of the Admission Act, now section 3 of Article XI, and they relate to the procedure required for amending the HHCA of 1920. All amendments to the HHCA are divided into 2 categories: (1) amendments which may be made without the consent of the United States, such as amendments to the administrative sections of the HHCA and amendments to increase the benefits of lessees; and (2) amendments which require the consent of the United States, such as amendments which impair the funds set up under the HHCA, change the qualifications of lessees or in any other way diminish the benefits to lessees. This category would also include any proposal to repeal the HHCA in its entirety.

Section 3 of Article XI provides that amendments belonging to the first category above may be made "in the manner required for state legislation". All amendments to the Act since statehood have been accomplished in this manner. Amendments in the first category may also be made "in the Constitution". This means that such amendments may be proposed by the constitutional convention or by the state legislature in accordance with the constitutional amending procedures provided by Article XV of the state constitution.

Although the method for making amendments belonging to the first category is clearly stated in section 3, the method for proposing amendments which belong to the category requiring the consent of the United States is not so clearly specified. The unanswered question regarding the procedure for amendment of the substantive sections of the HHCA may be stated as follows: Must the substantive provisions of the HHCA be amended by constitutional amending procedures with the consent of Congress or by state legislative act with the consent of Congress? Or is either method of proposing amendments acceptable to Congress? The question of the proper amending procedure to be used mainly concerns the acceptability to Congress of amendment proposals made by state legislative act rather than by constitutional action. It appears safe to assume that the constitutional amending procedure provided for in Article XV of the state constitution would prove acceptable to Congress.

Thus, according to the provisions of section 3 of Article XI, the constitutional convention can conceivably propose any change in the HHCA it desires. It can propose amendments to the administrative provisions or amendments to impair the basic provisions of the HHCA. The former would require only ratification by the voters of Hawaii, while the latter would require the consent of the U.S. Congress as well. The vital question then is one of determining what the appropriate function of the convention is. Should the convention involve itself in statutory revision?

It is generally agreed that the amendment of statutory provisions is a function of the legislature, not of a constitutional convention. All amendments

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to the HHCA since statehood have been accomplished by simple legislative act. In light of the desirability of limiting a constitution to broad basic principles and excluding detailed items more properly covered by statute, it may appear wise for the convention to continue to leave amendment of the HHCA to the state legislature and to appropriately limit itself to a review of the constitutional provisions for Hawaiian home lands in Article XI of the Constitution.

In their simplest terms, the provisions of Article XI do nothing more than agree to a compact with the United States guaranteeing the continuance of the Hawaiian Homes Commission Act as a state law, subject to amendment or repeal only in the manner specified by Congress. This presents a limited number of alternatives. The convention may propose to:

- (1) Maintain the status quo by leaving the provisions of Article XI unchanged;
- (2) Amend Article XI to include a statement of general policy to guide the administration of the Hawaiian homes program;
- (3) Eliminate all constitutional guarantees for the HHCA, while allowing the Act to continue as a state law; or
- (4) Eliminate the Hawaiian homes program completely.

The first alternative listed requires no action by the convention. The second alternative requires a determination by the convention delegates of what the basic objectives of the Hawaiian Homes Commission Act should be. The third and fourth alternatives would be drastic steps with serious legal implications. They could not become effective without the final consent of the United States.

Any choice among the possible courses of action open to the convention must necessarily be based on some value judgment regarding the Hawaiian homes program. If, in the judgment of the convention delegates, the Hawaiian homes program is serving a useful and worthwhile purpose as presently constituted, the convention may choose to maintain the status quo. If the delegates feel that a special program for the Hawaiian people is desirable but that the program might be administered more effectively if there were some clear constitutional statement of the policy to be pursued by the program, then the second alternative may be chosen. If the delegates feel that the Hawaiian homes program should continue in existence and yet feel that either (1) it does not merit the special status accorded by a constitutional guarantee, or (2) the Hawaiian Homes Commission Act should be completely within the power of the State to amend or repeal rather than being subject to amendment or repeal only in the manner specified by the U.S. Congress, then the third alternative may be chosen. Finally, if the delegates feel that the Hawaiian homes program is unfairly discriminatory or that it is not serving a useful purpose either for the Hawaiian people or for the State as a whole, then the convention may choose to propose the repeal of the provisions of Article XI.

Article XII

ORGANIZATION AND COLLECTIVE BARGAINING

Article XII of Hawaii's Constitution contains 2 provisions pertaining to employee rights. The first provision, section 1, deals with the rights of private employees which are set forth as follows:

Persons in private employment shall have the right to organize for the purpose of collective bargaining.

Section 2 of Article XII deals with the rights of public employees and provides:

Persons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law.

The provision pertaining to private employees was initially adopted by the 1950 Constitutional Convention and was retained in its original form by the 1968 Constitutional Convention. The present provision pertaining to public employees, on the other hand, represents a significant change from its initial form adopted at the 1950 Constitutional Convention which provided that "persons in public employment shall have the right to present and make known their grievances and proposals to the State, or any political subdivision or any department or agency thereof".

At the 1968 Constitutional Convention, a number of proposals were presented pertaining to collective bargaining for public and private employees, the right to work, and the right of public employees to strike. The issue of amending Article XII to include collective bargaining rights for public employees became one of the vital issues before the delegates at the 1968 Constitutional Convention. Those in favor of such an amendment contended that (1) the general lobbying role granted to public employees by section 2 of Article XII was inadequate to handle the presentation of employee concerns to public employers; (2) a constitutional amendment granting public employees the right to bargain collectively was necessary in order to reassure the legislature that it can enact laws pertaining to public sector collective bargaining; (3) although the existing language of section 2 could be interpreted to include the right to bargain collectively, specific language is necessary to avoid long and costly court appeals; (4) the concept that public employees should be permitted to determine the terms and conditions of employment is now widely accepted; and (5) the power to strike already exists and the legislature should be given the opportunity to determine what rights should be prescribed by law. Those opposed to amending section 2 contended that (1) government employment is not a right but a privilege and the public employee has the duty to continue to perform the services for which hired; (2) collective bargaining does include the right to strike, which if left to legislative action will be legislatively authorized resulting in disruption of essential services; (3) public employees have access to means to remedy grievances which private sector employees do not have; they can organize to elect or defeat at the polls the representatives at the legislature who determine their pay; (4) the present provision of section 2 does not

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prohibit collective bargaining; the proposed amendment will mandate the legislature to take action on the issue of collective bargaining; and (5) government employees have job security, enjoy fringe benefits, and already have a voice in the determination of matters affecting conditions of their employment through the rules and regulations governing employment in the civil service.

At the 1950 Constitutional Convention, delegates were concerned with whether the right to organize and bargain collectively for both public and private sector employees should be included in the Constitution. Those who opposed the inclusion of such a right in the Constitution argued that (1) the right is already protected by statutory enactments; (2) the right is already included in various sections of the Bill of Rights; (3) the right is not fixed or well-defined and its meaning depends on legislation, administrative rulings, and court decisions; it is not a matter to be frozen by constitutional decree; (4) the right, if included in the Constitution, would prevent the State from protecting itself from abuse by unions or employers; and (5) the right is not found in many constitutions. Those who favored the inclusion of such a right in the Constitution contended that (1) the historical development of the right in statutory enactments has developed so far that it is now of fundamental importance and hence should be included and incorporated into the state constitution; (2) although various aspects of the right to organize and bargain collectively may be related to other sections of the Bill of Rights (such as free speech and assembly), the concepts of organization and collective bargaining have developed to the point where they require specific and direct consideration apart from other related rights; (3) granted that the right to organize and bargain collectively is not fixed or permanently defined, like other rights incorporated in the Bill of Rights, decisions of the Supreme Court have made it quite clear that such fundamental concepts as the right of free speech and the right of assembly are not immutable but depend upon their occurrence in time and place; (4) inclusion of such a right in the Constitution would not prohibit reasonable regulation by the State to protect itself from abuse by unions or employers, just as much as none of the basic rights commonly found in the Constitution are not absolute and beyond the scope of reasonable regulation; and (5) with respect to the argument that the right is not found in many constitutions, those supporting inclusion of the right contended that if a right is desirable the fact that it has not found its place in many constitutions should not be held to prevent its inclusion.

It is clear that the discussions and the results of the discussions at both the 1950 Constitutional Convention and the 1968 Constitutional Convention reflected the development of employee organizations during those periods. At the 1950 Constitutional Convention, delegates were concerned mainly with the rights of private sector employees. It is to be noted that private sector employees already had been organized at the time of the 1950 Constitutional Convention; the organization of public sector employees did not take place until the 1960's. Thus, during the 1950 Constitutional Convention, interest in the rights of public sector employees to organize and bargain collectively--a topic of central concern in the 1968 Constitutional Convention--was minimal and limited in the final result to an expression that public employees shall have the right to organize and to present and make known their grievances and proposals to the employer.

ORGANIZATION AND COLLECTIVE BARGAINING

The delay in the organization of public employees can be explained, in part, as due to the widespread belief that because government is and should be supreme, it is immune from forces and pressures such as collective bargaining; the sovereign power therefore could not be delegated and public decision making could only be done by elected officials. Other reasons for the delay include the preoccupation of private sector unions with attempts to organize the private sector, lack of interest of public employees to organize and press for collective bargaining rights, and relative satisfaction of these employees with the greater fringe benefits and job security traditionally associated with public employment.

During the 1960's, however, the situation had changed dramatically. In 1962 President Kennedy issued E.O. 10988 which established procedures for recognition of unions and for exclusive bargaining rights with individual agencies of government for those unions which had achieved significant organizational strength. In addition, a number of states had either enacted public employment collective bargaining laws or were considering such legislation. There was also increased effort on the part of unions to organize public employees. Finally, public employees had become more aware of benefits of collective bargaining enjoyed by private sector employees.

It is also important to note that in both 1950 and 1968, the consensus of the delegates to the Constitutional Convention was that the right of employees to organize for the purpose of collective bargaining should be recognized as a matter of policy. It was made very clear that it was not intended that a proposal dealing with "statutory matter" be written into the Constitution, nor was it intended to make statutory rights constitutional rights. Finally, it was also recognized that the right of employees to organize for the purpose of collective bargaining, although set forth as a constitutional right, is subject to "reasonable regulation" by the legislature, but it was not intended to mean that the legislature can take that right away or remove the right. Thus, in proposing the present language pertaining to the rights of public employees, it is clear that the delegates to the 1968 Constitutional Convention perceived differences in the responsibilities of public and private employees, and it was determined that the right of public employees to bargain collectively was to be shaped by the legislature.

Hawaii is not the only state which has a constitutional provision pertaining to the rights of employees to organize and bargain collectively. New York, Missouri, New Jersey, and Florida also have provisions in their state constitutions dealing with the right to organize and bargain collectively. Both the Missouri and the New York Constitutions provide that "employees shall have the right to organize and bargain collectively through representatives of their own choosing." The New Jersey Constitution contains separate provisions for public and private employees. Although both public and private employees are granted the right to organize, private employees are granted the right to bargain collectively and public employees are granted the right to present and make known their grievances and proposals to the state or any political subdivision or agency. Florida's Constitution recognizes the right of employees to bargain collectively but expressly prohibits public employees from striking.

With respect to the issue of the right to strike, the New York State Temporary Commission on the Constitutional Convention, in preparation for the

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New York State 1967 Constitutional Convention, reviewed and studied, among other provisions, the state constitution's provision pertaining to the right of employees to organize and bargain collectively, including the merits of incorporating an express policy pertaining to the right to strike in the state constitution. Among the arguments presented in favor of the inclusion of an express policy in the Constitution were:

The subject is an important one and its solution has become a matter of the gravest practical concern as increasingly public employees have organized and resorted to strike action. Therefore, the subject is of such magnitude that it should be included in the Constitution.

This subject is one on which a popular consensus is difficult to reach. A constitutional expression of that policy, requiring and obtaining the approval of the electorate, should assist in obtaining a greater degree of acceptance.

Arguments cited against the inclusion of an express policy on the right to strike included:

The subject is one on which no universally accepted answer has been found. Some experimentation may be required before acceptable solutions emerge. The Legislature should be free, therefore, to experiment with varying techniques. This process will be promoted if no constitutional restrictions are imposed.

These questions can be resolved within the existing constitutional framework; no additional specification is necessary.

The issue was finally resolved with no express policy on the matter of strikes being adopted by the 1967 Constitutional Convention, leaving intact the broad language protecting the right of employees to organize and bargain collectively.

The issue of public employee strikes, some authorities feel, receives more attention than it deserves. It is noted that on a national basis, the public employee strike problem is not an overwhelming one. In addition, although public employee strikes in the past decade have grown in frequency from approximately one a month to one a day, strike activity in the public sector is still far below that in the private sector. It is to be noted also that despite the de jure absence of this right in most governmental jurisdictions, in practice, public employees can and do strike, often with impunity.

Particularly where the strike is determined to be inappropriate in the public service, alternative mechanisms to resolve negotiation disputes are increasingly being adopted. Among these, mediation and fact-finding are the most commonly used devices. In cases where it is determined that a strike would endanger the public health or safety, as is almost invariably the decision with fire fighters and police officers, compulsory arbitration is frequently used. Final-offer selection, in which the arbitrator is given no power to compromise issues in dispute and is limited to selecting one or the other of the parties' final offers, is the most recent innovation developed primarily for the resolution of public sector impasse disputes. The Hawaii state legislature, in the 1977

legislative session, passed a bill providing for final-offer selection by whole package covering fire fighter disputes only; the bill, however, was vetoed by the governor.

There is a wide range of opinions with respect to the right to strike in the public sector. Most unionists argue for the unlimited right of public employees to strike, while most governmental officials and managers argue against granting the right to strike. In contrast, academic observers of the public sector labor scene tend to focus on alternatives to the strike such as mediation, fact-finding, and voluntary or compulsory arbitration of negotiation disputes.

Arvid Anderson, former commissioner of the Wisconsin Employment Relations Commission and present chairperson of the New York City Office of Collective Bargaining, believes that the strike issue must be taken into account in any consideration of the development of collective bargaining in public employment, but that the growth in public employee unionism and in strikes has caused the question--should public employees have the right to strike--to be transcended by demands for orderly procedures to be developed which will prevent strikes from occurring or which will effectively deal with strikes which do occur.

Another view on public employee strikes is that the issue on the "right to strike" should not be stated in the framework of "public" vs. "private" employees, but rather within the framework of the essentiality of the services provided. It is argued that there are some occupations--hospitals, public utilities, sanitation, and schools--in public employment which are not crucial to the health and welfare of the citizens and such services can be interrupted for a brief period of time but not indefinitely. On the other hand, there are public services which would rank very high on any list of essential services which the public should not be deprived from using. Finally, there are services in which work stoppages can be sustained for extended periods without serious effects on the community. In the first instance, strikes should not be prohibited but should be made subject to injunctive relief through the courts when they begin to threaten the health, safety, or welfare of the community. Strikes by the second group, which would include only police and fire protection and prisons would not be permitted and compulsory arbitration would be invoked after all other methods have failed. Work stoppages in the other activities would be permitted on the same basis as in private industry. This view has been criticized, however, because all government functions are essential; in almost every instance, the government is the only supplier of the services involved.

In the opinion of David Lewin, Professor of Business, Columbia Business School, cyclical downturns in the mid-1970's have generated increasing citizen concern about the costs of government, particularly the levels of public employee wages and benefits. The role of unions in the fiscal problems of the government has led elected officials, including many who traditionally have received strong labor support, to respond to these concerns by reexamining their commitment to public sector collective bargaining, reappraising the costs of labor peace in terms of mandated settlements, and supporting more permissive policies toward public employee strikes.

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Enacted to implement the constitutional mandate of Article XII, section 2, the Hawaii law on collective bargaining in public employment was passed by the Hawaii state legislature on May 6, 1970, signed by Governor John A. Burns on June 30, and became effective on July 1, 1970. The law grants public employees the right to organize and to be represented by organizations of their choice in collective bargaining with their employers, including a limited right to strike. In addition, the law authorizes parties to incorporate into their agreement an impasse procedure, culminating in final and binding arbitration to be invoked in the event of an impasse over the terms of an initial or renewed agreement. The Hawaii Public Employment Relations Board (HPERB), composed of 3 members (one representing management, another representing labor, and one public representative who serves as chairperson), administers the law. Nearly 40,000 state and county employees are covered by the Hawaii law. Of this total, about 75 per cent are employed by the State with 18.9 per cent employed by the city and county of Honolulu.

There have been several notable developments during the span of the law's 7 years of existence, including negotiation of nearly 55 collective bargaining agreements; processing of employee grievances of which less than 40 have been required to be resolved through final and binding arbitration; and resolution of nearly 30 negotiated impasse disputes, with only one disruption involving withdrawal of employees' services for any extended period of time. In addition, over 80 decisions have been issued by HPERB out of the more than 200 cases brought before the board. The Hawaii law has been assessed as one of the most comprehensive public employment relations statutes in terms of its coverage of all state and local government employees and in its treatment of the important issues of public sector collective bargaining.

With respect to attitudes and views concerning Article XII and other aspects related to the right of public employees to bargain collectively, it is a near unanimous view that there is no need for any change in Article XII and that changes or modifications which are needed should be limited to the law and are proper matters for deliberation in the legislative forum. In general, except for a small minority, representatives of labor and management and other participants believe that the collective bargaining process in the public sector has worked out reasonably well and an appropriate response would be to allow a reasonable period of time for the process to work and for parties to adjust to it before the process is abandoned through constitutional or legislative changes.

Article XIII

STATE BOUNDARIES, CAPITAL, FLAG

Boundaries

The boundaries of Hawaii contain 8 principal islands, plus a number of small islands, atolls, shoals, and reefs. A principal question concerning the boundaries of the State has centered on the seaward boundaries. It has been judicially ruled that the seaward boundaries extend only to a 3-mile belt around the islands. While the Constitution of the State of Hawaii contains a statement of the Hawaiian boundaries, these boundaries actually were set by Congress, and the State cannot alter the boundaries without the consent of Congress.

State Capital

A constitutional provision respecting the location of a state capital may cover the following topics: fixing the site, setting forth the conditions and means under which the capital may be changed should the desire to do so arise, and providing for the forced relocation of the seat of government in emergency situations.

State Flag

The use of heraldic symbols dates from antiquity. At all times and in all parts of the world, individuals have used symbols to express ideas and sentiments. The states commonly make use of 10 types of heraldic symbols. They are the flag, motto, seal, song, flower, nickname, tree, bird, colors, and birthstone. Only the first has been recognized in the Hawaii Constitution.

Article XIV

GENERAL AND MISCELLANEOUS PROVISIONS

The general or miscellaneous article of the various state constitutions probably contains the most colorful provisions of the document. Such an article inevitably will contain all of the disparate and unrelated provisions which do not quite fit elsewhere in the constitution, yet at the same time do not quite warrant an article by themselves. The provisions housed in such a single catch-all article generally relate to specific issues of time and place. For this reason, the miscellaneous article often presents the only indication that it is a state constitution which is being read, rather than the federal document or some textbook example of constitutional language. Miscellaneous provisions tend to reflect each state's unique history and background as well as regional circumstance, over and above the more conventional constitutional language contained in other articles.

Hawaii's Article XIV to some extent exhibits such uniqueness, particularly in its extensive provisions regarding federal requirements. One aspect of the Constitution resulting from the 1950 Hawaii Constitutional Convention was its part in the ongoing movement for Hawaiian statehood; and in fact, at the time of the 1950 Convention, a bill for statehood was pending before Congress. Several provisions in Article XIV are direct reflections of some of the requirements contained in that enabling bill, thus illustrating the tenor of that time and place in Hawaii's political history.

Although Article XIV contains 15 sections, it basically covers the broad areas of: civil service, retirement system, oaths and loyalty, code of ethics, intergovernmental relations, federal requirements, the general powers of the State, and the mechanics of constitutional language. Some of these ideas are contained in a single terse sentence, such as the statement on civil service, and others continue at length, such as the 6 separate sections dealing with federal requirements. Each of these subjects will be discussed separately below.

Civil Service

The first section of Article XIV mandates that the civil service of or under the State will be guided by merit principles. The merit principle meets with general acceptance today, and the problem of "spoils" is no longer common. Indeed, with the changes that have occurred since the heyday of civil service reform in American society, in general, and in government specifically, it is nearly impossible that a resurgence of the spoils system could occur in the proportions common in the mid-1800's. On the other hand, the principle of merit has come into conflict with other recent democratic values and public policies, such as the need to hire minorities, the handicapped, and women which need may result in preferential treatment which does violence to the idea of hiring on merit alone. Considering these and other points, the problem lies in determining whether it is necessary or even desirable to retain in the

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Constitution a principle basically agreed upon, but from which deviation is acceptable, perhaps even expected.

Retirement Systems

Section 2 of Article XIV does not guarantee a retirement system per se, but it does mandate that in any retirement system of the State or its political subdivisions, the membership shall be a contractual relationship and the accrued benefits of any such system shall not be diminished or impaired. Such guarantees are considered to be important since they insure any such retirement plan is a part of the contract of employment and as such, the benefits extended to the employees or added to the plan after employment of an individual are forever promised to that individual.

A retirement plan for public employees is distinctive from other lifetime government payment programs, such as social security or pension plans, in that it derives its revenues from regular contributions made by members while still in government service, legislative appropriations, and the interest or proceeds derived from the investment of the fund itself. State and local retirement plans are also intimately related to public personnel administration policies. An attractive retirement plan serves to attract and retain a stable work force of well-qualified employees. Such retirement plans additionally are intended to provide a benefit sufficient to maintain a standard of living in retirement which is in some degree proportionate to that enjoyed during a member's working years.

The basic argument against the existing public employee retirement provision in the Hawaii Constitution is that it is fiscally unsound to lock in such financial commitments in a constitution and that it unduly restricts legislative power by guaranteeing a contractual relationship and accrued benefits. On the other hand, it is argued that such a provision does not limit the legislature in making general changes in the system which can be made applicable to new entrants, future services of persons already in the system, and even past members, so long as the changes do not necessarily reduce the benefits attributable to past services. Also arguable is the fact that even in the absence of a constitutional provision to that effect, the courts have nevertheless ruled that participation in a retirement system does constitute a contractual relationship, and the benefits should not be diminished.

Of timely concern is the dual participation of employees in the retirement and social security systems. As benefits have increased, so have the costs of supporting participation in both systems. Moreover, having a static retirement system alongside a dynamic social security system could serve to defeat the goals of any retirement policy.

INTRODUCTION AND ARTICLE SUMMARIES

Oaths and Loyalty

Section 3 of Article XIV establishes a condition of disqualification from public office or employment, and section 4 contains an oath which all public officers must take before entering upon the duties of their office. Both sections deal with what can be considered 2 aspects of the same subject, i.e., conditions prerequisite to public employment in the State of Hawaii and in its political subdivisions. Virtually all state constitutions contain an oath of office requiring public officers to affirm their defense and support of the U.S. and state constitutions, and to perform their duties faithfully. Little controversy exists among the several states concerning the inclusion of some mention of official oaths in the constitution.

Loyalty provisions are not as simple a matter. As there were opinions that the disqualification provision in Hawaii's original constitution violated some constitutional rights reserved to the people, the delegates of the 1968 Constitutional Convention rewrote the language to make it constitutionally acceptable. While mere association with a subversive group would have disqualified one from public office and employment under the original language drafted in 1950, subversive action bordering on treason will have to be committed before one can be disqualified under the present provision. There are dangers, however, that in any loyalty-security program, due process offenses may occur in a greater degree than usual. Although problems inherent in loyalty-security programs can be dealt with statutorily, there is the larger question of the desirability of retaining a disqualification provision, such as this, considering the historical hindsight we now possess.

Code of Ethics

In response to the credibility crisis in government, many state governments have recently enacted ethics legislation governing some or all of their public officers and employees. The constant intermingling of public and private affairs, making it more difficult to distinguish where one ends and the other begins, have also necessitated the need for codes of ethics to serve as guides to public officials.

Hawaii's provision, drafted during the 1968 Constitutional Convention, directs codes of ethics to be adopted for all public officers and employees of or under the State. This general directive may allow too much room for breach of public trust; however, with the numerous cases in litigation involving various aspects of codes of ethics, to write a too detailed and inflexible provision into the Constitution may be an unwise course of action.

Intergovernmental Relations

The growing complexities of modern life, the increasing burdens placed on all levels of government within the federal system, and the changes in the concept of federalism itself, indicate a freedom and even a necessity to engage

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in intergovernmental undertakings to a greater degree than in the past. It is argued by some that the need for intergovernmental cooperation in providing for the public welfare calls for a constitutional pattern that will not inadvertently present obstacles to such efforts. While Hawaii's present constitutional provision compares favorably with the various recommendations made by students in the field of intergovernmental relations, further consideration should be given to the possible obstructions to cooperation that could be presented by the lack of a positive provision for international relations, and the provisions limiting dual office holding by the State's public officers.

Federal Requirements

Sections 7 through 12 of Article XIV were intended to comply with the provisions of an Admission Act under which Hawaii would enter the Union. Sections 7 through 11 deal specifically with the terms and conditions imposed by the United States government regarding public lands. Section 12 is concerned with the consent of the State to the judicial powers and rights of the United States government. The constitutional amendments required by 73 Stat. 4, P.L. 86-3, which admitted Hawaii into the Union in 1959, affected the following areas: (1) disclaimer and agreement between the United States and the State; (2) Hawaiian Homes Commission Act; (3) state boundaries; and (4) first elections for state and congressional elected officers. The number of available alternatives in terms of amending most of these sections are limited. It may be determined, for example, that the present 6 sections should be maintained without any change since these provisions have not created any major problems in the history of the State of Hawaii. Or, because Hawaii is not confronted with the same problem it had in 1950, i.e., the achievement of statehood, such constitutional compliance with the terms of the Admission Act may be accommodated by a general statement of agreement in accordance with the amendment required by the Admission Act, thereby refining and reducing verbiage. Or, constitutional compliance could consist of only what is required by the Admission Act, i.e., only those sections required as constitutional amendments by the Act. This latter alternative may mean a reorganization in constitutional format to include these specific amendments collectively in the present miscellaneous article, or as a separate article, or as part of some other existing article.

Titles, Subtitles, Personal Pronouns; Construction Provisions Self-Executing

Section 13 functions to prevent the use of titles and subtitles for the purpose of construing the Constitution, and makes explicit that the use of any personal pronoun in the document is to be interpreted to mean either sex. Although there appears to be no question of any substantive sex discriminating language in Hawaii's Constitution, it may be desirable to purge all traces of masculine and feminine pronouns in the Constitution as California has recently done.

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Section 15 provides for the self-execution of provisions in the Constitution to the fullest extent possible.

General Powers of Government

Section 14 of Article XIV restricts any interpretation of the powers of the State which would be limited to only those which are constitutionally enumerated or specified. The overriding consideration for such a provision is to avoid a strict construction of specified governmental powers. Hawaii's statement is the result of Article VIII, Public Health and Welfare, where particular areas of state responsibility in public health and public assistance are specified. The basic arguments for or against such a provision on the general powers of the State revolve around establishing a major rule for tautology vs. construction. The primary objection to such a provision is the contention that it is unnecessary and superfluous to a constitution since it is accepted that a state constitution is a document of limitations, not of grant. The argument favoring such a provision is that it negates any interpretation that a specific grant of power implies a limitation on the exercise of all powers not expressly granted. It is further maintained that such a provision operates for the benefit of "responsible state government" by reinforcing the idea that the constitution is not the sole repository of power, and that it operates to discourage unnecessary and frivolous amendment.

Article XV

REVISION AND AMENDMENT

Hawaii's emergence as a state, the adoption of the 50th State's Constitution and the ensuing Constitutional Convention of 1968 occurred during a period of widespread constitutional activity, a period that one authority states "...will remain for a long time the most productive period of constitutional change since the...1820's".

Hawaii's Constitution also came into being during a period of federal dominance over broad social and economic components of American society resulting from World War II, but also partly due to the inability of the states to cope with burgeoning urban problems stemming from the depression years. So dominant was the federal government that one scholar lamented that "The only real 'state right' today is the right to decline to accept federal aid, but not to refuse to pay federal taxes." The federal Congress imposed several conditions upon Hawaii, which were to be acknowledged in the state constitution, as a condition for entry into the Union. And, the United States Supreme Court, in a series of far-reaching decisions during the early 1960's, mandated legislative reapportionment for all the states. Under these circumstances the question of the ability of state constitutions to cope with federal dominance and with the continuing and increasing problems arising from modern living, much of it centering upon urban-related concerns, naturally arises.

Methods of Effecting Constitutional Change

There are several methods of effecting constitutional changes in state constitutions. By far the most widely used is the constitutional convention. With the exception of the Georgia Constitution, all state constitutions came into being under conventions. All state constitutions, except 9, provide for the calling of constitutional conventions, and in even those 9 states there is implicit protection afforded to the citizens that such conventions may be held through court rulings and custom.

Constitutional change may also be effected by state legislative action. All 50 state constitutions authorize their legislative bodies to initiate constitutional changes, but most states limit the legislatures to proposing amendments. A few states, including California and Oregon, grant their legislatures the right to propose amendments or revision. Hawaii's experience has been to refrain from extensive use of legislative constitutional proposals and to rely upon the constitutional convention to suggest changes to the electorate. Consequently, there has not been a test case in the courts to decide the authority of the Hawaii legislature to revise the Constitution. This authority was challenged by an opinion of the attorney general's office in 1961 despite the wording of Article XV, section 1, which states: "Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature."

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The constitutional initiative is a third method of effecting constitutional change. Introduced in Oregon in 1902, this method is incorporated in the constitutions of 17 states. The mechanics of implementing the constitutional initiative vary in detail among the 17 states, but the proposed amendment is either submitted to the legislature (indirect initiative) or to the voters (direct initiative) once the required number of persons sign a petition submitting the amendment. If the amendment is submitted to the legislature and they fail to act it then goes to the voters. The voters may either accept or reject the amendment. Hawaii is one of 33 states that does not include the constitutional initiative measure in its Constitution. The initiative proposal was debated in both the 1950 and 1968 Constitutional Conventions, but was defeated both times. In both instances, the key argument advanced for defeating the measure was the absence of any significant public interest in or support of the principle.

The use of constitutional commissions to effect constitutional change received a substantial boost when the new Florida Constitution, in 1968, provided for such a commission. This marks the first time that a constitutional revision commission has been accorded constitutional status. It calls for a 37-member commission whose members are to be appointed by the governor, the speaker of the house of representatives, the president of the senate, and the chief justice of the State Supreme Court.

Constitutional commissions have generally been extensions of state legislative bodies, whose work consisted of preparatory work prior to conventions, or of research work, also prior to conventions. They are created to study existing constitutions and to recommend changes, and to assist in drafting new constitutions in some instances. Their duties also extend to assisting in the physical preparations of a convention, publicizing the convention, and developing the staff for the convention.

Constitutional commissions are becoming increasingly popular among the states. Between 1951 and 1972 some 66 commissions were operative. They were created by executive order, by statutory law, and by legislative resolution. Hawaii has not had a constitutional commission since the statehood commission which functioned in a manner similar to such a commission.

Limitations on Effecting Constitutional Change

The process of effecting constitutional change is rarely easy, whether at the federal level or at the state level. The limitations imposed by state constitutions are in themselves often formidable barriers to change. Most states seem to adhere to the principle that constitutional change should not come too easily or too quickly. Many states limit the number of amendments that may be proposed at a constitutional convention. Hawaii is one of the minority of states that holds unlimited conventions.

The difficulty of effecting constitutional change is witnessed in the majorities required in the legislatures calling for amendments. In almost all cases, except for Nebraska, both legislative houses must share in the initiation process. Vermont requires that the proposal originate in the senate, by a two-

thirds vote. After the lower house approves the measure by majority vote, the proposal must then be held over until the next biennial session, where a majority of both houses must again approve the measure. Eighteen states require a two-thirds affirmative vote of the legislature to propose an amendment; 9 states require a three-fifths affirmative vote of each house; and 12 states require favorable action by successive legislatures. In Hawaii, a proposal may be initiated by a two-thirds vote of each house in one session, or a majority vote of each house in 2 sessions.

Limiting the number of constitutional articles which may be amended is another barrier to constitutional change. At least 5 states impose such limits: Arkansas, Colorado, Illinois, Kansas, and Kentucky.

Broadly speaking, constitutional conventions have virtually unlimited powers to change constitutions, subject to restrictions imposed by the U.S. Constitution, congressional enabling acts, and the Bill of Rights. In states such as Hawaii, where constitutional conventions are given virtual "carte blanche" to propose amendments or broad-scale revision, the issue of convention powers is clearer than in states which feature limited conventions. Scholars disagree, as might be expected, on this issue of convention "sovereignty". One school of thought holds that because convention delegates represent the people, their actions are truly "the voice of the people", and are therefore of paramount importance and power. Another school holds that even convention powers are limited by boundaries established by the state legislature, or by previous constitutions. A third school argues that from a practical viewpoint the issue is academic because the electorate holds the final decision in its collective hands.

The Hawaii Constitution of 1950

The Hawaii Constitution of 1950 was drafted in the idealistic period following World War II, and its form and shape was influenced by the constitutional reform movement on the U.S. mainland. Hawaii, like Alaska and Puerto Rico, was able to draft an entirely new constitution to fit its hoped-for statehood dreams. Having the advantage of the failings and faults of older states to draw upon, the delegates to Hawaii's Constitutional Convention of 1950 drafted a state charter that has been heralded as an example of progressive constitution-making. The National Municipal League stated categorically that the Hawaii Constitution of 1950 "set a new high standard in the writing of a modern state constitution by a convention".

That constitution was essentially a conservative document, crafted for Congress' review, upon which Hawaii's statehood dreams would depend. The brief (14,000 words) constitution dealt primarily with fundamental law, with some exceptions. A "loyalty" provision was inserted to allay the suspicions of those who feared the infiltration of communist supporters into organized labor in Hawaii.

The executive branch of government was strengthened by providing for the election of only the governor and the lieutenant governor. The governor was also empowered to appoint department heads and judges with the approval of the state senate. The legislative branch was given broad powers.

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Essentially, this Constitution, adopted by an overwhelming majority, which became effective on August 21, 1959, is the same document, with some modifications, under which Hawaii operates today.

The Hawaii Constitutional Convention of 1968

Article XV of the Hawaii Constitution included a provision that a question calling for a constitutional convention would be presented to the electorate every 10 years. Between 1962-64, however, the U.S. Supreme Court decisions on the "one man, one vote" cases, starting with Baker v. Carr, started a chain of events which led directly to the 1968 Hawaii Constitutional Convention. The convention proposed 23 constitutional amendments, of which 22 were finally adopted.

The 1968 Convention, like the 1950 Convention, was guided by the provisions of the enabling legislation setting up the "specifications" of the meeting. In many respects, the 2 conventions were similar: both were dominated by conservative elements; both witnessed lengthy and impassioned debates on matters relating to constitutional change; both set the form in which the final convention work was to be presented; and both were highly successful in obtaining ratification of the end product. There were some obvious differences: where the 1950 document was presented to the electorate on a "take it or leave it" basis, the 1968 amendments were presented to the voters on a ballot that was weighted in favor of the propositions in that a negative vote had to be implemented each time, otherwise an affirmative vote was achieved. The 1968 ratification process witnessed a considerable drop in the number of registered voters voting, compared to 1950: 45 per cent in 1968 and 73 per cent in 1950. Finally, the basic difference between the 2 conventions was that the 1950 Convention delivered a new (state) constitution, whereas the 1968 Convention produced only a series of amendments to the basic document.

One significant revelation about the ratification of the 1968 Convention proposals surfaced after the election results were tabulated. Dr. Norman Meller, a close observer of the convention proceedings, noted in his book (With an Understanding Heart: Constitution Making in Hawaii) that if each of the 23 propositions had been presented individually on a yes or no basis to the voters under the "35 per cent rule" governing the adoption of Hawaii constitutional amendments, fewer of the proposals would have passed.

Background to the 1978 Hawaii Constitutional Convention

Hawaii's 1968 Constitutional Convention occurred during a peak period of state constitutional activity. From 1966 to 1974, 27 states revised their amendment processes to facilitate constitutional change. Six states successfully promulgated new constitutions, and 2 others (California and Hawaii) were able to obtain electorate approval of extensive constitutional amendments. On the other hand 7 new state constitutions were rejected during this same period.

REVISION AND AMENDMENT

The product of all this state constitutional activity was not of uniform high quality. Even adopted state constitutions contained some basic flaws, as witness criticisms of Florida's Constitution of 1968 by one scholar who noted that the new constitution did not resolve some of the basic reasons for having changed the state constitution.

Analysis by political scientists of several defeated state constitutions during this period also reveals some very basic flaws, as in the case of Idaho, Maryland, New York, Rhode Island, and Virginia. But Montana's new constitution, and the Illinois Constitution of 1970, reveal some basic changes, including, in the latter case, the removal of the previous limit on the number of proposed constitutional amendments permitted on any one ballot; and in both states, inclusion of the initiative.

One conclusion to be drawn from this analysis of recent state constitutional activity is that the voters are becoming increasingly negative about adopting new constitutions. Another is that new state constitutions no longer contain major innovations such as the initiative, recall, and referendum devices featured during the Progressive Era. One scholar commented that "...very few...of the revisions in state constitutions... in the past quarter of a century have featured any significantly new propositions of government or constitutional duties".

Calling the 1978 Hawaii Constitutional Convention

Hawaii's second state constitutional convention was called into being during the 1977 Ninth Legislature, by Act 17, 1977 First Special Session. This action followed the presentation of the convention question to the electorate on November 2, 1976, at which time the voters voted in favor of the convention with 64.4 per cent in favor and 22.4 per cent opposed.

The enabling legislation setting up the 1978 Constitutional Convention closely follows the precedents established for the 1950 and 1968 Conventions in setting forth the election procedure, qualifications of electors and delegate candidates, elimination of partisan designation of candidates, filling of vacancies by the governor, setting the time and place of the convention, and calling for the ratification election to be held at the general election of November, 1978. The number of delegates was increased to 102, which delegates were to be elected from 27 districts. The legislature also extended extraordinary powers to the convention by specifying that "In addition to its inherent powers under the Constitution, the Convention may exercise the powers of the legislative committees...." The sum of \$1,500,000 was allotted to cover convention expenses, a separate appropriation of \$485,599 allotted to the lieutenant governor's office to conduct the special election of delegates, and \$72,000 was allotted to the legislative reference bureau for "...necessary services and assistance for the convention, including the updating of the Hawaii Constitutional Convention Studies."

The enabling act is silent, as was the 1967 enabling law for the 1968 Convention, on a number of important matters. These include the scope of the

convention's studies and proposals; the organization and management of the convention operations; and the manner and form in which the convention proposals are to be submitted to the electorate. As was inferred in 1968, this silence apparently means that the legislature is giving the constitutional convention "carte blanche" on such matters.

The Meaning of State Constitutional Change

The significance of the mechanics of constitutional change lies in the steps which the process opens up to possible influence, pro or con, whereby popular control may be exercised or thwarted. The degree to which this popular interest or concern is applied, by various means, at different stages in the process, is a fairly accurate measure of citizen interest and concern. Thus, constitutional activity is a barometer of citizen interest and concern. It is to be expected that this barometer will register high or low levels according to the subject matter presented to the electorate.

But interpreting the effectiveness of the constitutional process is much more difficult to measure. The conservative view holds that the measurement of constitutional effectiveness depends upon the degree or absence of modernization in state constitutions. This view maintains that states with outmoded, highly detailed, complex constitutions are severely handicapped in trying to face the problems of modern society. In general, these conservative scholars tend to be pessimistic about the ability of the states to operate effectively in today's complex and urban pressures.

A more realistic and optimistic view is presented by the "empiricists", who tend to view the constitutional process in a more scientific light. One such empiricist argues that with the advent of general revenue sharing in 1972, the national government "...turned to the states as a device to offset what was perceived as the sluggish Federal bureaucracy". Another empiricist notes that "Today almost every State is structurally equipped to meet modern demands on government."

One issue that separates the conservatives from the empiricists is the relationship of constitutional length to constitutional effectiveness. The conservatives hold that long and complex state constitutions are less effective than short and concise documents. Thus, John P. Wheeler, Jr. argues that "A needlessly complicated constitutional structure will not only hamstring majority rule...but may very well establish rule by entrenched minorities."

An empiricist rebuts this view by noting that the State of New Jersey "...has one of the best, least restrictive state constitutions, yet it has one of the most outmoded and inadequate state tax systems in the country".

REVISION AND AMENDMENT

An Empirical View of Hawaii's 1968 Constitutional Convention

A recent study of 7 state constitutional conventions, including the 1968 Hawaii Convention, provides some insight into the dynamics of the constitutional process. The major theme of constitutional conventions, according to this study, is the struggle between those interested in change and those opposed to change. In the study's words, "...the key basis of division and conflict in constitutional revision is between reformers and the guardians of the status quo."

In Hawaii's case, the scholars who undertook the study noted that there was a strong "stand-pat" leaning to the convention delegation, which helps to explain why "...the changes that the delegates found to make were scattered and relatively minor". The authors also discovered that the convention delegates themselves observed the cleavage between "reformers" and "stand-patters", and had themselves "...concluded that this is what constitutional revision is all about". Even the electorate divides along similar lines, according to this study.

The importance of this empirical study of constitutional conventions needs to be underlined. The authors' findings are sobering because of what they tell us about the electorate and its reaction to the constitutional process:

...our work indicates that if modernization and meeting citizen needs are interpreted to be synonymous with structural reform, resistance is likely to be strong. Everyone must realize that devising increasingly sophisticated programs and making them work has to be carried on in an environment where electorates are no longer willing to assume that change and innovation are automatically beneficial. (Emphasis added)

Article XVI

SCHEDULE

The Schedule article provides a smooth transition from an old to a new constitution. It authorizes either the continuation of certain old constitutional provisions or the implementation of new ones. The provisions of this article are therefore usually temporary, and many may easily be dropped from the Constitution.

The fact that the Schedule is essentially a temporary article, however, does not indicate that its provisions may be less controversial or important. In Hawaii's Constitution, the Schedule includes the description of legislative districts and the establishment of legislative salaries, both of which were debated heatedly in the 1968 Constitutional Convention.

Sections relating to certain reapportionment procedures, biennial budgeting, home rule for county governments, continuity of laws, debts of the Territory, residence requirements of the Territory, and condemnation of fisheries are also included in the Schedule.

The main issue relating to the first section, districting and apportionment, is whether the apportionment scheme meets the standards of the United States Supreme Court, which since its decision in Reynolds v. Sims have been fairly extensive. Hawaii's Constitution currently provides for a reapportionment commission to periodically handle apportionment and districting. The 1968 constitutional provisions concerning the legislative districts are obsolete due to the 1973 legislative districting plan of the reapportionment commission.

Section 7 sets the salaries of the legislature. It has not been changed since 1968. The main issue relating to this section is where the burden of setting legislative salaries should fall. Even though there is a legislative salary commission making recommendations to the legislature, the Constitution still specifies that the legislature be responsible for setting its own salaries.

The intent of section 10, relating to the continuity of laws, is that all laws in force before amendments to the Constitution take effect, remain in force unless contrary to the amendments.

Section 13 provides for the condemnation of vested fishery rights, commonly called konohiki rights. This section mandates the State to condemn and purchase for public use all of the existing konohiki rights.

The other provisions of the Schedule are largely obsolete since they have either been implemented, have been declared unconstitutional, or are no longer applicable.

Appendix

THE CONSTITUTION OF THE STATE OF HAWAII

As Amended by the Constitutional Convention of 1968 and Ratified by the Electorate on November 5, 1968.

PREAMBLE

We, the people of the State of Hawaii, grateful for Divine Guidance, and mindful of our Hawaiian heritage, reaffirm our belief in a government of the people, by the people and for the people, and with an understanding heart toward all the peoples of the earth do hereby ordain and establish this constitution for the State of Hawaii.

FEDERAL CONSTITUTION ADOPTED

The Constitution of the United States of America is adopted on behalf of the people of the State of Hawaii.

ARTICLE I

BILL OF RIGHTS

POLITICAL POWER

Section 1. All political power of this State is inherent in the people; and the responsibility for the exercise thereof rests with the people. All government is founded on this authority.

RIGHTS OF MAN

Section 2. All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

FREEDOM OF RELIGION, SPEECH, PRESS, ASSEMBLY AND PETITION

Section 3. No law shall be enacted respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

DUE PROCESS AND EQUAL PROTECTION

Section 4. No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of his civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

SEARCHES, SEIZURES AND INVASION OF PRIVACY

Section 5. The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted. [Am Const Con 1968 and election Nov 5, 1968]

RIGHTS OF CITIZENS

Section 6. No citizen shall be disfranchised, or deprived of any of the rights or privileges secured to other citizens, unless by the law of the land.

ENLISTMENT, SEGREGATION

Section 7. No citizen shall be denied enlistment in any military organization of this State nor be segregated therein because of race, religious principles or ancestry.

INDICTMENT, DOUBLE JEOPARDY, SELF-INCRIMINATION

Section 8. No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases

arising in the armed forces when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy; nor shall any person be compelled in any criminal case to be a witness against himself.

BAIL, EXCESSIVE PUNISHMENT

Section 9. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. The court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment. [Am Const Con 1968 and election Nov 5, 1968]

TRIAL BY JURY, CIVIL CASES

Section 10. In suits at common law where the value in controversy shall exceed one hundred dollars, the right of trial by jury shall be preserved. The legislature may provide for a verdict by not less than three-fourths of the members of the jury.

RIGHTS OF ACCUSED

Section 11. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, or of such other district to which the prosecution may be removed with the consent of the accused; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense. The State shall provide counsel for an indigent defendant charged with an offense punishable by imprisonment for more than sixty days. [Am Const Con 1968 and election Nov 5, 1968]

JURY SERVICE

Section 12. No person shall be disqualified to serve as a juror because of sex.

HABEAS CORPUS AND SUSPENSION OF LAWS

Section 13. The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. The power of suspending the privilege of the writ of habeas corpus, and the laws or the execution thereof, shall never be exercised except by the legislature, or by authority derived from it to be exercised in such particular cases only as the legislature shall expressly prescribe.

SUPREMACY OF CIVIL POWER

Section 14. The military shall be held in strict subordination to the civil power.

RIGHT TO BEAR ARMS

Section 15. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

QUARTERING OF SOLDIERS

Section 16. No soldier or member of the militia shall, in time of peace, be quartered in any house, without the consent of the owner or occupant, nor in time of war, except in a manner prescribed by law.

IMPRISONMENT FOR DEBT

Section 17. There shall be no imprisonment for debt.

EMINENT DOMAIN

Section 18. Private property shall not be taken or damaged for public use without just compensation. [Am Const Con 1968 and election Nov 5, 1968]

LIMITATIONS ON SPECIAL PRIVILEGES

Section 19. The power of the State to act in the general welfare shall never be impaired by the making of any irrevocable grant of special privileges or immunities.

CONSTRUCTION

Section 20. The enumeration of rights and privileges shall not be construed to impair or deny others retained by the people.

EQUALITY OF RIGHTS

Section [21]. Equality of rights under the law shall not be denied or abridged by the State on account of sex. The legislature shall have the power to enforce, by appropriate legislation, the provisions of this section. [L 1972, S B No 1408-72 and election Nov 7, 1972]

ARTICLE II

SUFFRAGE AND ELECTIONS

QUALIFICATIONS

Section 1. Every citizen of the United States who shall have attained the age of eighteen years, have been a resident of this State not less than one year next preceding the election and be a voter registered in accordance with law, shall be qualified to vote in any state or local election. [Am Const Con 1968 and election Nov 5, 1968; am L 1971, S B No 41 and election Nov 7, 1972]

DISQUALIFICATIONS

Section 2. No person who is non compos mentis shall be qualified to vote. *No person convicted of a felony shall be qualified to vote except upon his final discharge or earlier as provided by law.* [Am Const Con 1968 and election Nov 5, 1968]

RESIDENCE

Section 3. No person shall be deemed to have gained or lost residence simply because of his presence or absence while employed in the service of the United States, or while engaged in navigation or while a student at any institution of learning.

REGISTRATION, VOTING

Section 4. The legislature shall provide for the registration of voters and for absentee voting; and shall prescribe the method of voting at all elections. Secrecy of voting shall be preserved.

GENERAL AND SPECIAL ELECTIONS

Section 5. General elections shall be held on the first Tuesday after the first Monday in November in all even-numbered years. Special elections may be held in accordance with law. [Am Const Con 1968 and election Nov 5, 1968]

PRESIDENTIAL PREFERENCE PRIMARY

Section 6. A presidential preference primary may be held in accordance with law. [Add Const Con 1968 and election Nov 5, 1968]

CONTESTED ELECTIONS

Section 7. Contested elections shall be determined by a court of competent jurisdiction in such manner as shall be provided by law. [Part of §5, ren Const Con 1968 and election Nov 5, 1968]

ARTICLE III

THE LEGISLATURE

LEGISLATIVE POWER

Section 1. The legislative power of the State shall be vested in a legislature, which shall consist of two houses, a senate and a house of representatives. Such power shall extend to all rightful subjects of legislation not inconsistent with this constitution or the Constitution of the United States.

SENATE; COMPOSITION

Section 2. The senate shall be composed of twenty-five members, who shall be elected by the qualified voters of the respective senatorial districts. Until the next reapportionment the senatorial districts and the number of senators to be elected from each shall be as set forth in the Schedule. [Am Const Con 1968 and election Nov 5, 1968]

HOUSE OF REPRESENTATIVES; COMPOSITION

Section 3. The house of representatives shall be composed of fifty-one members, who shall be elected by the qualified voters of the respective representative districts. Until the next reapportionment, the representative districts and the number of representatives to be elected from each shall be as set forth in the Schedule.

REAPPORTIONMENT REAPPORTIONMENT YEARS

Section 4. The year 1973 and every eighth year thereafter shall be reapportionment years.

REAPPORTIONMENT COMMISSION

A legislative reapportionment commission shall be constituted on or before March 1 of each reapportionment year and whenever reapportionment is required by court order. The commission shall consist of nine members. The president of the senate and the speaker of the house of representatives shall each select two members. Members of each house belonging to the party or parties different from that of the president or the speaker shall designate one of their number for each house and the two so designated shall each select two members of the commission. The eight members so selected shall, promptly after selection, be certified by the selecting authorities to the chief election officer and shall within thirty days thereafter select, by a vote of six members, and promptly certify to the chief election officer the ninth member who shall serve as chairman of the commission.

Each of the four officials designated above as selecting authorities for the eight members of the commission shall, at the time of the commission selections, also select one person from each basic island unit to an apportionment advisory council for that island unit. The councils shall remain in existence during the life of the commission and each shall serve in an advisory capacity to the commission for matters affecting its island unit.

A vacancy in the commission or a council shall be filled by the initial selecting authority within fifteen days after the vacancy occurs. Commission and council positions and vacancies not filled within the times specified shall be filled promptly thereafter by the supreme court.

The commission shall act by majority vote of its membership and shall establish its own procedures except as may be provided by law.

Not more than one hundred twenty days from the date on which its members are certified the commission shall file with the chief election officer a reapportionment plan, which shall become law after publication as provided by law. Members of the commission shall hold office until the reapportionment plan becomes effective or until such time as may be provided by law.

No member of the reapportionment commission or an apportionment advisory council shall be eligible to become a candidate for election to either house of the legislature in either of the first two elections under any such reapportionment plan.

Commission and apportionment advisory council members shall be compensated and reimbursed for their necessary expenses as provided by law.

The chief election officer shall be secretary of the commission without vote and, under the direction of the commission, shall furnish all necessary technical services. The legislature shall appropriate funds to enable the commission to carry out its duties.

CHIEF ELECTION OFFICER

The legislature shall provide for a chief election officer of the State, whose responsibilities shall be as prescribed by law and shall include the supervision of state elections, the maximization of registration of eligible voters throughout the State and the maintenance of data concerning registered voters, elections, apportionment and districting.

APPORTIONMENT AMONG BASIC ISLAND UNITS

The commission shall allocate the total number of members of each house being reapportioned among the four basic island units, namely (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau, on the basis of the number of voters registered in the last preceding general election in each of the basic island units and computed by the method known as the method of equal proportions, except that no basic island unit shall receive less than one member in each house.

MINIMUM REPRESENTATION FOR BASIC ISLAND UNITS

The representation of any basic island unit initially allocated less than a minimum of two senators and three representatives shall be augmented by allocating thereto the number of senators or representatives necessary to attain such minimums which number, notwithstanding the provisions of Sections 2 and 3 of this article shall be added to the membership of the appropriate body until the next reapportionment. The senators or representatives of any basic island unit so augmented shall exercise a fractional vote wherein the numerator is the number initially allocated and the denominator is the minimum above specified.

APPORTIONMENT WITHIN BASIC ISLAND UNITS

Upon the determination of the total number of members of each house to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of registered voters per member in each district is as nearly equal to the average for the basic island unit as practicable.

In effecting such redistricting, the commission shall be guided by the following criteria:

1. No district shall extend beyond the boundaries of any basic island unit.
2. No district shall be so drawn as to unduly favor a person or political faction.
3. Except in the case of districts encompassing more than one island, districts shall be contiguous.
4. Insofar as practicable, districts shall be compact.
5. Where possible, district lines shall follow permanent and easily recognized features, such as streets, streams and clear geographical features, and when practicable shall coincide with census tract boundaries.
6. Where practicable, representative districts shall be wholly included within senatorial districts.
7. Not more than four members shall be elected from any district.
8. Where practicable, submergence of an area in a larger district wherein substantially different socio-economic interests predominate shall be avoided.

MANDAMUS AND JUDICIAL REVIEW

Original jurisdiction is vested in the supreme court of the State to be exercised on the petition of any registered voter whereby it may compel, by mandamus or otherwise, the appropriate person or persons to perform their duty or to correct any error made in a reapportionment plan, or it may take such other action to effectuate the purposes of this section as it may deem appropriate. Any such petition must be filed within forty-five days of the date specified for any duty or within forty-five days after the filing of a reapportionment plan. [Am Const Con 1968 and election Nov 5, 1968]

ELECTION OF MEMBERS; TERM

Section 5. The members of the legislature shall be elected at general elections. The term of office of members of the house of representatives shall be two years beginning with their election and ending on the day of the next general election, and the term of office of members of the senate shall be four years beginning with their election and ending on the day of the second general election after their election.

VACANCIES

Section 6. Any vacancy in the legislature shall be filled for the unexpired term in such manner as may be prescribed by law, or, if no provision be made by law, by appointment by the governor for the unexpired term.

QUALIFICATIONS OF MEMBERS

Section 7. No person shall be eligible to serve as a member of the senate unless he shall have been a resident of the State for not less than three years, have attained the age of majority and be a qualified voter of the senatorial district from which he seeks to be elected. No person shall be eligible to serve as a member of the house of representatives unless he shall have been a resident of the State for not less than three years, have attained the age of majority and be a qualified voter of the representative district from which he seeks to be elected. [Am Const Con 1968 and election Nov 5, 1968]

PRIVILEGES OF MEMBERS

Section 8. No member of the legislature shall be held to answer before any other tribunal for any statement made or action taken in the exercise of his legislative functions; and members of the legislature shall, in all cases except felony or breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same.

DISQUALIFICATIONS OF MEMBERS

Section 9. No member of the legislature shall hold any other public office under the State, nor shall he, during the term for which he is elected or appointed, be elected or appointed to any public office or employment which shall have been created, or the emoluments whereof shall have been increased, by legislative act during such term. The term "public office", for the purposes of this section, shall not include notaries public, reserve police officers or officers of emergency organizations for civilian defense or disaster relief. The legislature may prescribe further disqualifications.

SALARY; ALLOWANCES; COMMISSION ON LEGISLATIVE SALARY

Section 10. The members of the legislature shall receive allowances reasonably related to expenses and a salary, as prescribed by law. Any change in salary shall not apply to the legislature that enacted the same.

There shall be a commission on legislative salary, which shall be appointed by the governor on or before June 1, 1971, and every four years after the first commission is appointed. Within sixty days after its appointment, the commission shall submit to the legislature recommendations for a salary plan for members of the legislature, and then dissolve. [Am Const Con 1968 and election Nov 5, 1968]

SESSIONS

Section 11. The legislature shall convene annually in regular session at 10:00 o'clock a.m. on the third Wednesday in January.

At the written request of two-thirds of the members to which each house is entitled, the presiding officers of both houses shall convene the legislature in special session. The governor may convene both houses or the senate alone in special session.

Regular sessions shall be limited to a period of sixty days, and special sessions shall be limited to a period of thirty days. Any session may be extended a total of not more than fifteen days. Such extension shall be granted by the presiding officers of both houses at the written request of two-thirds of the members to which each house is entitled or may be granted by the governor.

Any session may be recessed by concurrent resolution adopted by a majority of the members to which each house is entitled. Saturdays, Sundays, holidays and any days in recess pursuant to a concurrent resolution shall be excluded in computing the number of days of any session.

All sessions shall be held in the capital of the State. In case the capital shall be unsafe, the governor may direct that any session be held at some other place. [Am Const Con 1968 and election Nov 5, 1968]

ADJOURNMENT

Section 12. Neither house shall adjourn during any session of the legislature for more than three days, or sine die, without the consent of the other.

ORGANIZATION; DISCIPLINE; RULES; PROCEDURE

Section 13. Each house shall be the judge of the elections, returns and qualifications of its own members and shall have, for misconduct, disorderly behavior or neglect of duty of any member, power to punish such member by censure or, upon a two-thirds vote of all the members to which such house is entitled, by suspension or expulsion of such member. Each house shall choose its own officers, determine the rules of its proceedings and keep a journal. The ayes and noes of the members on any question shall, at the desire of one-fifth of the members present, be entered upon the journal.

Twenty days after a bill has been referred to a committee in either house, the same may be recalled from such committee by the affirmative vote of one-third of the members to which such house is entitled.

QUORUM; COMPULSORY ATTENDANCE

Section 14. A majority of the number of members to which each house is entitled shall constitute a quorum of such house for the conduct of ordinary business, of which quorum a majority vote shall suffice; but the final passage of a bill in each house shall require the vote of a majority of all the members to which such house is entitled, taken by ayes and noes and entered upon its journal. A smaller number than a quorum may adjourn from day to day and may compel the attendance of absent members in such manner and under such penalties as each house may provide.

BILLS; ENACTMENT

Section 15. No law shall be passed except by bill. Each law shall embrace but one subject, which shall be expressed in its title. The enacting clause of each law shall be, "Be it enacted by the legislature of the State of Hawaii."

PASSAGE OF BILLS

Section 16. No bill shall become law unless it shall pass three readings in each house on separate days. No bill shall pass third or final reading in either house unless printed copies of the bill in the form to be passed shall have been made available to the members of that house for at least twenty-four hours.

Every bill when passed by the house in which it originated, or in which amendments thereto shall have originated, shall immediately be certified by the presiding officer and clerk and sent to the other house for consideration.

Any bill pending at the final adjournment of a regular session in an odd-numbered year shall carry over with the same status to the next regular session. Before the carried-over bill is enacted, it shall pass at least one reading in the house in which the bill originated. [Am Const Con 1968 and election Nov 5, 1968]

APPROVAL OR VETO

Section 17. Every bill which shall have passed the legislature shall be certified by the presiding officers and clerks of both houses and shall thereupon be presented to the governor. If he approves it, he shall sign it and it shall become law. If the governor does not approve such bill, he may return it, with his specific objections to the legislature. Except for items appropriated to be expended by the judicial and legislative branches, he may veto any specific item or items in any bill which appropriates money for specific purposes by striking out or reducing the same; but he shall veto other bills, if at all, only as a whole.

The governor shall have ten days to consider bills presented to him ten or more days before the adjournment of the legislature sine die, and if any such bill is neither signed nor returned by the governor within that time, it shall become law in like manner as if he had signed it.

RECONSIDERATION AFTER ADJOURNMENT

The governor shall have forty-five days, after the adjournment of the legislature sine die, to consider bills presented to him less than ten days before such adjournment, or presented after adjournment, and any such bill shall become law on the forty-fifth day unless the governor by proclamation shall have given ten days' notice to the legislature that he plans to return such bill with his objections on that day. The legislature may convene at or before noon on the forty-fifth day in special session, without call, for the sole purpose of acting upon any such bill returned by the governor. In case the legislature shall fail to so convene, such bill shall not become law. Any such bill may be amended to meet the governor's objections and, if so amended and passed, only one reading being required in each house for such passage, it shall be presented again to the governor, but shall become law only if he shall sign it within ten days after presentation.

In computing the number of days designated in this section, the following days shall be excluded: Saturdays, Sundays, holidays, and any days in which the legislature is in recess prior to its adjournment as provided in Section 11. [Am Const Con 1968 and election Nov 5, 1968; am L 1974, SB No 1943-74 and election Nov 5, 1974]

PROCEDURES UPON VETO

Section 18. Upon the receipt of a veto message from the governor, each house shall enter the same at large upon its journal and proceed to reconsider the vetoed bill, or the item or items vetoed, and again vote upon such bill, or such item or items, by ayes and noes, which shall be entered upon its journal. If after such reconsideration such bill, or such item or items, shall be approved by a two-thirds vote of all members to which each house is entitled, the same shall become law.

PUNISHMENT OF NONMEMBERS

Section 19. Each house may punish by fine, or by imprisonment not exceeding thirty days, any person not a member of either house who shall be guilty of disrespect of such house by any disorderly or contemptuous behavior in its presence or that of any committee thereof; or who shall, on account of the exercise of any legislative function, threaten harm to the body or estate of any of the members of such house; or who shall assault, arrest or detain any witness or other person ordered to attend such house, on his way going to or returning therefrom; or who shall rescue any person arrested by order of such house.

Any person charged with such an offense shall be informed in writing of the charge made against him, and have opportunity to present evidence and be heard in his own defense.

IMPEACHMENT

Section 20. The governor and lieutenant governor, and any appointive officer for whose removal the consent of the senate is required, may be removed from office upon conviction of impeachment for such causes as may be provided by law.

The house of representatives shall have the sole power of impeachment of the governor and lieutenant governor and the senate the sole power to try such impeachments, and no such officer shall be convicted without the concurrence of two-thirds of the members of the senate. When sitting for that purpose, the members of the senate shall be on oath or affirmation and the chief justice shall preside. Subject to the provisions of this paragraph, the legislature may provide for the manner and procedure of removal by impeachment of such officers.

The legislature shall by law provide for the manner and procedure of removal by impeachment of the appointive officers.

Judgments in cases of impeachment shall not extend beyond removal from office and disqualification to hold and enjoy any office of honor, trust or profit under the State; but the person convicted may nevertheless be liable and subject to indictment, trial, judgment and punishment according to law.

ARTICLE IV

THE EXECUTIVE

ESTABLISHMENT OF THE EXECUTIVE

Section 1. The executive power of the State shall be vested in a governor.

The governor shall be elected by the qualified voters of this State at a general election. The person receiving the highest number of votes shall be the governor. In case of a tie vote, the selection of the governor shall be determined in accordance with law.

The term of office of the governor shall begin at noon on the first Monday in December next following his election and end at noon on the first Monday in December, four years thereafter.

No person shall be eligible for the office of governor unless he shall be a qualified voter, have attained the age of thirty years, and have been a resident of this State for five years immediately preceding his election.

The governor shall not hold any other office or employment of profit under the State or the United States during his term of office. [Am Const Con 1968 and election Nov 5, 1968]

LIEUTENANT GOVERNOR

Section 2. There shall be a lieutenant governor, who shall have the same qualifications as the governor. He shall be elected at the same time, for the same term, and in the same manner, as the governor; provided that the votes cast in the general election for the nominee for governor shall be deemed cast for the nominee for lieutenant governor of the same political party. He shall perform such duties as may be prescribed by law. [Am HB 19 (1964) and election Nov. 3, 1964]

COMPENSATION: GOVERNOR, LIEUTENANT GOVERNOR

Section 3. The compensation of the governor and of the lieutenant governor shall be prescribed by law, but shall not be less than thirty-three thousand five hundred dollars, and twenty-seven thousand five hundred dollars, respectively, a year. Such compensation shall not be increased or decreased for their respective terms, unless by general law applying to all salaried officers of the State. When the lieutenant governor succeeds to the office of governor, he shall receive the compensation for that office. [Am Const Con 1968 and election Nov 5, 1968]

**SUCCESSION TO GOVERNORSHIP;
ABSENCE OR DISABILITY OF GOVERNOR**

Section 4. When the office of governor is vacant, the lieutenant governor shall become governor. In the event of the absence of the governor from the State, or his inability to exercise and discharge the powers and duties of his office, such powers and duties shall devolve upon the lieutenant governor during such absence or disability.

When the office of lieutenant governor is vacant, or in the event of the absence of the lieutenant governor from the State, or his inability to exercise and discharge the powers and duties of his office, such powers and duties shall devolve upon such officers in such order of succession as may be provided by law.

In the event of the impeachment of the governor or of the lieutenant governor, he shall not exercise the powers of his office until acquitted.

EXECUTIVE POWERS

Section 5. The governor shall be responsible for the faithful execution of the laws. He shall be commander in chief of the armed forces of the State and may call out such forces to execute the laws, suppress or prevent insurrection or lawless violence or repel invasion. He shall, at the beginning of each session, and may, at other times, give to the legislature information concerning the affairs of the State and recommend to its consideration such measures as he shall deem expedient.

The governor may grant reprieves, commutations and pardons, after conviction, for all offenses, subject to regulation by law as to the manner of applying for the same. The legislature may, by general law, authorize the governor to grant pardons before conviction, to grant pardons for impeachment and to restore civil rights denied by reason of conviction of offenses by tribunals other than those of this State.

The governor shall appoint an administrative director to serve at his pleasure.

**EXECUTIVE AND ADMINISTRATIVE OFFICES AND
DEPARTMENTS**

Section 6. All executive and administrative offices, departments and instrumentalities of the state government and their respective functions, powers and duties shall be allocated by law among and within not more than twenty principal departments in such manner as to group the same according to major purposes so far as practicable. Temporary commissions or agencies for special purposes may be established by law and need not be allocated within a principal department.

Each principal department shall be under the supervision of the governor and, unless otherwise provided in this constitution or by law, shall be headed by a single executive. Such single executive shall be nominated and, by and with the advice and consent of the senate appointed by the governor and he shall hold office for a term to expire at the end of the term for which the governor was elected, unless sooner removed by the governor; except that the removal of the chief legal officer of the State shall be subject to the advice and consent of the senate.

Except as otherwise provided in this constitution, whenever a board, commission or other body shall be the head of a principal department of the state government, the members thereof shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. The term of office and removal of such members shall be as prescribed by law. Such board, commission or other body may appoint a principal executive officer, who, when authorized by law, may be ex officio a voting member thereof, and who may be removed by a majority vote of the members appointed by the governor.

The governor shall nominate and, by and with the advice and consent of the senate, appoint all officers for whose election or appointment provision is not otherwise made by this constitution or by law. If the manner of removal of an officer is not prescribed in this constitution, his removal shall be in a manner prescribed by law.

When the senate is not in session and a vacancy occurs in any office, appointment to which requires the confirmation of the senate, the governor may fill the office by granting a commission which shall, unless such appointment is confirmed, expire at the end of the next session of the senate; but the person so appointed shall not be eligible for another interim appointment to such office if the appointment shall have failed of confirmation by the senate.

No person who has been nominated for appointment to any office and whose appointment has not received the consent of the senate shall be eligible to an interim appointment thereafter to such office.

Every officer appointed under the provisions of this section shall be a citizen of the United States and shall have been a resident of this State for at least one year immediately preceding his appointment; except that this residence requirement shall not apply to the president of the University of Hawaii. [Am Const Con 1968 and election Nov 5, 1968]

ARTICLE V

THE JUDICIARY

JUDICIARY POWER

Section 1. The judicial power of the State shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. The several courts shall have original and appellate jurisdiction as provided by law.

SUPREME COURT

Section 2. The supreme court shall consist of a chief justice and four associate justices. When necessary, the chief justice shall assign a judge or judges of a circuit court to serve temporarily on the supreme court. As prescribed by law, retired justices of the supreme court also may serve temporarily on the supreme court at the request of the chief justice. In case of a vacancy in the office of chief justice, or if he is ill, absent or otherwise unable to serve, an associate justice designated in accordance with the rules of the supreme court shall serve temporarily in his place. [Am Const Con 1968 and election Nov 5, 1968]

APPOINTMENT OF JUSTICES AND JUDGES

Section 3. The governor shall nominate and, by and with the advice and consent of the senate, appoint the justices of the supreme court and the judges of the circuit courts. No nomination shall be sent to the senate, and no interim appointment shall be made when the senate is not in session, until after ten days' public notice by the governor.

QUALIFICATIONS

No justice or judge shall hold any other office or position of profit under the State or the United States. No person shall be eligible for the office of justice or judge unless he shall have been admitted to practice law before the supreme court of this State for at least ten years. Any justice or judge who shall become a candidate for an elective office shall thereby forfeit his office.

TENURE; COMPENSATION; RETIREMENT

The term of office of a justice of the supreme court and of a judge of a circuit court shall be ten years. They shall receive for their services such compensation as may be prescribed by law, but no less than twenty-eight thousand dollars for the chief justice, twenty-seven thousand dollars for associate justices and twenty-five thousand dollars for circuit court judges, a year. Their compensation shall not be decreased during their respective terms of office, unless by general law applying to all salaried officers of the State. They shall be retired upon attaining the age of seventy years. They shall be included in any retirement law of the State. [Am Const Con 1968 and election Nov 5, 1968]

RETIREMENT FOR INCAPACITY AND REMOVAL

Section 4. Whenever a commission or agency, authorized by law for such purpose, shall certify to the governor that any justice of the supreme court or judge of a circuit court appears to be so incapacitated as substantially to prevent him from performing his judicial duties or has acted in a manner that constitutes wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute, the governor shall appoint a board of three persons, as provided by law, to inquire into the circumstances. If the board recommends that the justice or judge should not remain in office, the governor shall remove or retire him from office. [Am Const Con 1968 and election Nov 5, 1968]

ADMINISTRATION

Section 5. The chief justice of the supreme court shall be the administrative head of the courts. He may assign judges from one circuit court to another for temporary service. With the approval of the supreme court he shall appoint an administrative director to serve at his pleasure.

RULES

Section 6. The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.

ARTICLE VI

TAXATION AND FINANCE

TAXING POWER INALIENABLE

Section 1. The power of taxation shall never be surrendered, suspended or contracted away.

APPROPRIATIONS FOR PRIVATE PURPOSES PROHIBITED

Section 2. No tax shall be levied or appropriation of public money or property made, nor shall the public credit be used, directly or indirectly, except for a public purpose. No grant shall be made in violation of Section 3 of Article I of this constitution. [§6, ren Const Con 1968 and election Nov 5, 1968]

BONDS; DEBT LIMITATIONS

Section 3. For the purposes of this section, the term "bonds" shall include bonds, notes and other instruments of indebtedness; the term "general obligation bonds" means all bonds for the payment of the principal and interest of which the full faith and credit of the State or a political subdivision are pledged; and the term "revenue bonds" means all bonds payable solely from and secured solely by the revenues, or user taxes, or any combination of both, of a public undertaking, improvement or system.

All bonds issued by or on behalf of the State or a political subdivision must be authorized by the legislature, and bonds of a political subdivision must also be authorized by its governing body.

Bonds may be issued by the State when authorized by a two-thirds vote of the members to which each house of the legislature is entitled, provided that such bonds at the time of authorization would not cause the total of state indebtedness to exceed a sum equal to three and one-half times the average of the general fund revenues of the State in the three fiscal years immediately preceding the session of the legislature authorizing such issuance. For the purpose of this paragraph, general fund revenues of the State shall not include monies received as grants from the federal government and receipts in reimbursement of any indebtedness that is excluded in computing the total indebtedness of the State.

By majority vote of the members to which each house of the legislature is entitled and without regard to any debt limit, there may be issued by or on behalf of the State: bonds to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, if required to be paid within one year; bonds to suppress insurrection, to repel invasion, to defend the State in war or to meet emergencies caused by disaster or act of God; and revenue bonds.

A sum equal to fifteen percent of the total of the assessed values for tax rate purposes of real property in any political subdivision, as determined by the last tax assessment rolls pursuant to law, is established as the limit of the funded debt of such political subdivision that is outstanding and unpaid at any time.

Bonds to meet appropriations for any fiscal period in anticipation of the collection of revenues for such period or to meet casual deficits or failures of revenue, if required to be paid within one year, may be issued by any political subdivision under authorization of law and of its governing body without regard to any debt limit.

All general obligation bonds for a term exceeding one year shall be in serial form maturing in substantially equal installments of principal, or maturing in substantially equal installment of both principal and interest, the first installment of principal to mature not later than five years from the date of the issue of such series, and the last installment not later than thirty-five years from the date of such issue. The interest and principal payments of general obligation bonds shall be a first charge on the general fund of the State or political subdivision, as the case may be.

In determining the total indebtedness of the State or funded debt of any political subdivision, the following shall be excluded:

(a) Bonds that have matured, or that mature in the then current fiscal year, or that have been irrevocably called for redemption and the redemption date has occurred or will occur in the then fiscal year, and for the full payment of which monies have been irrevocably set aside.

(b) Revenue bonds, authorized or issued, if the issuer thereof is obligated by law to impose rates and charges for the use and services of the public undertaking, improvement or system, or to impose a user tax, or to impose a combination of rates and charges and user tax, as the case may be, sufficient to pay the cost of operation, maintenance and repair of the public undertaking, improvement or system and the required payments of the principal of and interest on all revenue bonds issued for the public undertaking, improvement or system, and if the issuer is obligated to deposit such revenues or tax or a combination of both into a special fund and to apply the same to such payments in the amount necessary therefor. For the purposes of this section a user tax shall mean a tax on goods or services or on the consumption thereof, the receipts of which are substantially derived from the consumption, use or sale of goods and services in the utilization of the functions or services furnished by the public undertaking, improvement or system.

(c) Bonds authorized or issued under special improvement statutes when the only security for such bonds is the properties benefited or improved or the assessments thereon.

(d) General obligation bonds authorized or issued for assessable improvements, but only to the extent that reimbursements to the general fund for the principal and interest on such bonds are in fact made from assessment collections available therefor.

(e) General obligation bonds issued for a public undertaking, improvement or system from which revenues, user taxes, or a combination of both may be derived for the payment of all or part of the principal and interest as reimbursement to the general fund, but only to the extent that reimbursements to the general fund are in fact made from the net revenue, net user tax receipts, or combination of both, as determined for the immediately preceding fiscal year. For the purposes of this section, net revenue or net user tax receipts shall be the revenue or receipts remaining after the costs of operation, maintenance and repair of such public undertaking, improvement or system and the required payments of the principal of and interest on all revenue bonds issued therefor have been made.

(f) General obligation bonds of the State, authorized but unissued, for an existing public undertaking, improvement or system that produces revenues, or user tax receipts, or a combination of both, but only if in the fiscal year immediately preceding the authorization, the public undertaking, improvement or system produced a net revenue, net user taxes or a combination of both, that was sufficient to pay into the general fund the full amount of the principal and interest then due for all general obligation bonds then outstanding for such public undertaking, improvement or system.

(g) General obligation bonds of the State, authorized but unissued, for an existing public undertaking, improvement or system that has not been self-sustaining as determined for the immediately preceding fiscal year, and that produces revenues, or user tax receipts, or a combination of both, but only if the rates or charges for the use and services of the undertaking have been, or the rate of such user tax has been, increased by law or by the issuing body as authorized by law, in an amount that is determined will produce sufficient net revenue or net user taxes, or any combination thereof, for reimbursement to the general fund for the payment of principal and interest on all general obligation bonds then outstanding and authorized for such public undertaking, improvement or system.

(h) General obligation bonds issued by the State for any political subdivision, whether issued before or after the effective date of this section, but only for as long as reimbursement by the political subdivision to the State for the payment of principal and interest on such bonds is required by law; provided that in the case of bonds authorized or issued after the effective date of this amendment, the consent of the governing body of the political subdivision has first been obtained; and provided further that during the period that such bonds are excluded from total indebtedness of the State, the principal amount then outstanding shall be included within the funded debt of such political subdivision.

Determinations of the exclusions from the total indebtedness of the State or funded debt of any political subdivision provided for in this section shall be made annually and certified by law or as prescribed by law. For the purposes of this section, amounts received from on-street parking may be considered and treated as revenues of a parking undertaking.

Nothing in this section shall prevent the refunding of any bond at any time. [Am Const Con 1968 and election Nov 5, 1968]

THE BUDGET

Section 4. Within such time prior to the opening of each regular session in an odd-numbered year as may be prescribed by law, the governor shall submit to the legislature a budget setting forth a complete plan of proposed expenditures and anticipated receipts of the State for the ensuing fiscal biennium, together with such other information as the legislature may require. The budget shall be submitted in a form prescribed by law. The governor shall also, upon the opening of each such session, submit bills to provide for such proposed expenditures and for any recommended additional revenues or borrowings by which the proposed expenditures are to be met. Such bills shall be introduced in the legislature upon the opening of each such session. [Am Const Con 1968 and election Nov 5, 1968]

LEGISLATIVE APPROPRIATIONS; PROCEDURES

Section 5. In each regular session in an odd-numbered year, the legislature shall transmit to the governor an appropriation bill or bills providing for the anticipated total expenditures of the State for the ensuing fiscal biennium. In such session, no appropriation bill, except bills recommended by the governor for immediate passage, or to cover the expenses of the legislature, shall be passed on final reading until the bill authorizing operating expenditures for the ensuing fiscal biennium, to be known as the general appropriations bill, shall have been transmitted to the governor.

In each regular session in an even-numbered year, at such time as may be prescribed by law, the governor may submit to the legislature a bill to amend any appropriation for operating expenditures of the current fiscal biennium, to be known as the supplemental appropriations bill, and bills to amend any appropriations for capital expenditures of the current fiscal biennium, and at the same time he shall submit a bill or bills to provide for any added revenues or borrowings that such amendments may require. In each regular session in an even-numbered year, bills may be introduced in the legislature to amend any appropriation act or bond authorization act of the current fiscal biennium or prior fiscal periods. In any such session in which the legislature submits to the governor a supplemental appropriations bill, no other appropriation bill, except bills recommended by the governor for immediate passage, or to cover the expenses of the legislature, shall be passed on final reading until such supplemental appropriations bill shall have been transmitted to the governor. [Am Const Con 1968 and election Nov 5, 1968; am L 1972, S B No 1947-72 and election Nov 7, 1972]

EXPENDITURE CONTROLS

Section 6. Provision for the control of the rate of expenditures of appropriated state monies, and for the reduction of such expenditures under prescribed conditions, shall be made by law. [§7, ren Const Con 1968 and election Nov 5, 1968]

AUDITOR

Section 7. The legislature, by a majority vote of each house in joint session, shall appoint an auditor who shall serve for a period of eight years and thereafter until a successor shall have been appointed. The legislature, by a two-thirds vote of the members in joint session, may remove the auditor from office at any time for cause. It shall be the duty of the auditor to conduct post-audits of all transactions and of all accounts kept by or for all departments, offices and agencies of the State and its political subdivisions, to certify to the accuracy of all financial statements issued by the respective accounting officers and to report his findings and recommendations to the governor and to the legislature at such times as shall be prescribed by law. He shall also make such additional reports and conduct such other investigations as may be directed by the legislature. [§8, ren Const Con 1968 and election Nov 5, 1968]

ARTICLE VII

LOCAL GOVERNMENT

POLITICAL SUBDIVISIONS; CREATION, POWERS

Section 1. The legislature shall create counties, and may create other political subdivisions within the State, and provide for the government thereof. Each political subdivision shall have and exercise such powers as shall be conferred under general laws.

LOCAL SELF-GOVERNMENT; CHARTER

Section 2. Each political subdivision shall have power to frame and adopt a charter for its own self-government within such limits and under such procedures as may be prescribed by general law. The prescribed procedures, however, shall not require the approval of a charter by a legislative body.

Charter provisions with respect to a political subdivision's executive, legislative and administrative structure and organization shall be superior to statutory provisions, subject to the authority of the legislature to enact general laws allocating and reallocating powers and functions.

A law may qualify as a general law even though it is inapplicable to one or more counties by reason of the provisions of this section. [Am Const Con 1968 and election Nov. 5, 1968]

TAXATION AND FINANCE

Section 3. The taxing power shall be reserved to the State except so much thereof as may be delegated by the legislature to the political subdivisions, and the legislature shall have the power to apportion state revenues among the several political subdivisions.

MANDATES; ACCRUED CLAIMS

Section 4. No law shall be passed mandating any political subdivision to pay any previously accrued claim.

STATE-WIDE LAWS

Section 5. This article shall not limit the power of the legislature to enact laws of state-wide concern.

ARTICLE VIII

PUBLIC HEALTH AND WELFARE

PUBLIC HEALTH

Section 1. The State shall provide for the protection and promotion of the public health.

CARE OF HANDICAPPED

Section 2. The State shall have power to provide for treatment and rehabilitation, as well as domiciliary care, of mentally or physically handicapped persons.

PUBLIC ASSISTANCE

Section 3. The State shall have power to provide assistance for persons unable to maintain a standard of living compatible with decency and health.

SLUM CLEARANCE, REHABILITATION AND HOUSING

Section 4. The State shall have power to provide for, or assist in, housing, slum clearance and the development or rehabilitation of substandard areas, and the exercise of such power is deemed to be for a public use and purpose. [Am HB 54 (1975) and election Nov 2, 1976]

PUBLIC SIGHTLINESS AND GOOD ORDER

Section 5. The State shall have power to conserve and develop its natural beauty, objects and places of historic or cultural interest, sightliness and physical good order, and for that purpose private property shall be subject to reasonable regulation.

ARTICLE IX

EDUCATION

PUBLIC EDUCATION

Section 1. The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control, a state university, public libraries and such other educational institutions as may be deemed desirable, including physical facilities therefor. There shall be no segregation in public educational institutions because of race, religion or ancestry; nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution.

BOARD OF EDUCATION

Section 2. There shall be a board of education composed of members who shall be elected by qualified voters in accordance with law. At least part of the membership of the board shall represent geographic subdivisions of the State. [Am HB 4 (1963) and election Nov. 3, 1964]

POWER OF THE BOARD OF EDUCATION

Section 3. The board of education shall have power, in accordance with law, to formulate policy, and to exercise control over the public school system through its executive officer, the superintendent of education, who shall be appointed by the board and shall serve as secretary to the board. [Am HB 421 (1964) and election Nov. 3, 1964]

UNIVERSITY OF HAWAII

Section 4. The University of Hawaii is hereby established as the state university and constituted a body corporate. It shall have title to all the real and personal property now or hereafter set aside or conveyed to it, which shall be held in public trust for its purposes, to be administered and disposed of according to law.

BOARD OF REGENTS; POWERS

Section 5. There shall be a board of regents of the University of Hawaii, the members of which shall be nominated and, by and with the advice and consent of the senate, appointed by the governor. At least part of the membership of the board shall represent geographic subdivisions of the State. The board shall have power, in accordance with law, to formulate policy, and to exercise control over the university through its executive officer, the president of the university, who shall be appointed by the board. [Am HB 253 (1964) and election Nov. 3, 1964]

ARTICLE X

CONSERVATION AND DEVELOPMENT OF RESOURCES

RESOURCES; CONSERVATION, DEVELOPMENT AND USE

Section 1. The legislature shall promote the conservation, development and utilization of agricultural resources, and fish, mineral, forest, water, land, game and other natural resources.

NATURAL RESOURCES; MANAGEMENT AND DISPOSITION

Section 2. The legislature shall vest in one or more executive boards or commissions powers for the management of natural resources owned or controlled by the State, and such powers of disposition thereof as may be authorized by law; but land set aside for public use, other than for a reserve for conservation purposes, need not be placed under the jurisdiction of such a board or commission.

The mandatory provisions of this section shall not apply to the natural resources owned by or under the control of a political subdivision or a department or agency thereof.

SEA FISHERIES

Section 3. All fisheries in the sea waters of the State not included in any fish pond or artificial inclosure shall be free to the public, subject to vested rights and the right of the State to regulate the same.

GENERAL LAWS REQUIRED; EXCEPTIONS

Section 4. The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, a political subdivision, or any department or agency thereof.

FARM AND HOME OWNERSHIP

Section 5. The public lands shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law.

ARTICLE XI

HAWAIIAN HOME LANDS

HAWAIIAN HOMES COMMISSION ACT

Section 1. Anything in this constitution to the contrary notwithstanding, the Hawaiian Homes Commission Act, 1920, enacted by the Congress, as the same has been or may be amended prior to the admission of the State, is hereby adopted as a law of the State, subject to amendment or repeal by the legislature, provided, that, if and to the extent that the United States shall so require, said law shall be subject to amendment or repeal only with the consent of the United States and in no other manner, provided, further, that, if the United States shall have been provided or shall provide that particular provisions or types of provisions of said Act may be amended in the manner required for ordinary state legislation, such provisions or types of provisions may be so amended. The proceeds and income from Hawaiian home lands shall be used only in accordance with the terms of said Act, and the legislature may, from time to time, make additional sums available for the purposes of said Act by appropriating the same in the manner provided by law.

COMPACT WITH THE UNITED STATES

Section 2. The State and its people do hereby accept, as a compact with the United States, or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that Section 1 hereof be included in this constitution, in whole or in part, it being intended that the Act or Acts of Congress pertaining thereto shall be definitive of the extent and nature of such compact, conditions or trust provisions, as the case may be. The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

AMENDMENT AND REPEAL

Section 3. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of [this] State, as provided in Section 7, subsection (b) of [the Admission Act], subject to amendment or repeal only with the consent of the United States, and in no other manner. Provided, that (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act. [Add 73 Stat 4 and election June 27, 1959]

ARTICLE XII

ORGANIZATION; COLLECTIVE BARGAINING

PRIVATE EMPLOYEES

Section 1. Persons in private employment shall have the right to organize for the purpose of collective bargaining.

PUBLIC EMPLOYEES

Section 2. Persons in public employment shall have the right to organize for the purpose of collective bargaining as prescribed by law. [Am Const Con 1968 and election Nov 5, 1968]

ARTICLE XIII

STATE BOUNDARIES, CAPITAL, FLAG

BOUNDARIES

Section 1. The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of [the Admission Act]; except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to include the Midway Islands, Johnston Island, Sand Island (offshore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters. [Am 73 Stat 4 and election June 27, 1959]

CAPITAL

Section 2. Honolulu, on the Island of Oahu, shall be the capital of the State.

STATE FLAG

Section 3. The Hawaiian flag shall be the flag of the State.

ARTICLE XIV

GENERAL AND MISCELLANEOUS PROVISIONS

CIVIL SERVICE

Section 1. The employment of persons in the civil service, as defined by law, of or under the State, shall be governed by the merit principle.

EMPLOYEES' RETIREMENT SYSTEM

Section 2. Membership in any employees' retirement system of the State or any political subdivision thereof shall be a contractual relationship, the accrued benefits of which shall not be diminished or impaired.

DISQUALIFICATIONS FROM PUBLIC OFFICE OR EMPLOYMENT

Section 3. No person shall hold any public office or employment who, knowingly and intentionally, does any act to overthrow, or attempts to overthrow, or conspires with any person to overthrow the government of this State or of the United States by force or violence. [Am Const Con 1968 and election Nov 5, 1968]

OATH OF OFFICE

Section 4. All public officers, before entering upon the duties of their respective offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, and the Constitution of the State of Hawaii, and that I will faithfully discharge my duties as to the best of my ability." The legislature may prescribe further oaths or affirmations.

CODES OF ETHICS

Section 5. The legislature and each political subdivision shall adopt a code of ethics, which shall apply to appointed and elected officers and employees of the State or the political subdivision, respectively, including members of the boards, commissions and other bodies. [Add Const Con 1968 and election Nov 5, 1968]

INTERGOVERNMENTAL RELATIONS

Section 6. The legislature may provide for cooperation on the part of this State and its political subdivisions with the United States, or other states and territories, or their political subdivisions, in matters affecting the public health, safety and general welfare, and funds may be appropriated to effect such cooperation. [§5, ren Const Con 1968 and election Nov 5, 1968]

FEDERAL LANDS

Section 7. The United States shall be vested with or retain title to or an interest in or shall hold the property in the Territory of Hawaii set aside for the use of the United States and remaining so set aside immediately prior to the admission of this State, in all respects as and to the extent set forth in the act or resolution providing for the admission of this State to the Union. [§6, ren Const Con 1968 and election Nov 5, 1968]

COMPLIANCE WITH TRUST

Section 8. Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation. [§7, ren Const Con 1968 and election Nov 5, 1968]

ADMINISTRATION OF UNDISPOSED LANDS

Section 9. All provisions of the Act of Congress approved March 18, 1959 reserving rights or powers to the United States, as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people. [§8, am 73 Stat 4 and election June 27, 1959; ren Const Con 1968 and election Nov 5, 1968]

FEDERAL PROPERTY; TAX EXEMPTION

Section 10. No taxes shall be imposed by the State upon any lands or other property now owned or hereafter acquired by the United States, except as the same shall become taxable by reason of disposition thereof by the United States or by reason of the consent of the United States to such taxation. [§9, ren Const Con 1968 and election Nov 5, 1968]

HAWAII NATIONAL PARK

Section 11. All provisions of the act or resolution admitting this State to the Union, or providing for such admission, which reserve to the United States jurisdiction of Hawaii National Park, or the ownership or control of lands within Hawaii National Park, are consented to fully by the State and its people. [§10, ren Const Con 1968 and election Nov 5, 1968]

JUDICIAL RIGHTS

Section 12. All those provisions of the act or resolution admitting this State to the Union, or providing for such admission, which reserve to the United States judicial rights or powers are consented to fully by the State and its people; and those provisions of said act or resolution which preserve for the State judicial rights and powers are hereby accepted and adopted, and such rights and powers are hereby assumed, to be exercised and discharged pursuant to this constitution and the laws of the State. [§11, ren Const Con 1968 and election Nov 5, 1968]

TITLES, SUBTITLES, PERSONAL PRONOUNS; CONSTRUCTION

Section 13. Titles and subtitles shall not be used for purposes of construing this constitution.

Whenever any personal pronoun appears in this constitution, it shall be construed to mean either sex. [§12, ren Const Con 1968 and election Nov 5, 1968]

GENERAL POWER

Section 14. The enumeration in this constitution of specified powers shall not be construed as limitations upon the power of the State to provide for the general welfare of the people. [§13, ren Const Con 1968 and election Nov 5, 1968]

Former §14 renumbered §15.

PROVISIONS SELF-EXECUTING

Section 15. The provisions of this constitution shall be self-executing to the fullest extent that their respective natures permit. [§14, ren Const Con 1968 and election Nov 5, 1968]

ARTICLE XV

REVISION AND AMENDMENT

METHODS OF PROPOSAL

Section 1. Revisions of or amendments to this constitution may be proposed by constitutional convention or by the legislature.

CONSTITUTIONAL CONVENTION

Section 2. The legislature may submit to the electorate at any general or special election the question, "Shall there be a convention to propose a revision of or amendments to the Constitution?" If any ten-year period shall elapse during which the question shall not have been submitted, the lieutenant governor shall certify the question, to be voted on at the first general election following the expiration of such period.

ELECTION OF DELEGATES

If a majority of the ballots cast upon such question be in the affirmative, delegates to the convention shall be chosen at the next regular election unless the legislature shall provide for the election of delegates at a special election.

Notwithstanding any provision in this constitution to the contrary, other than Section 3 of Article XIV, any qualified voter of the district concerned shall be eligible to membership in the convention.

Unless the legislature shall otherwise provide, there shall be the same number of delegates to the convention, who shall be elected from the same areas, and the convention shall be convened in the same manner and have the same powers and privileges, as nearly as practicable, as provided for the convention of 1968.

ORGANIZATION; PROCEDURE

The convention shall determine its own organization and rules of procedure. It shall be the sole judge of the elections, returns and qualifications of its members and, by a two-thirds vote, may suspend or remove any member for cause. The governor shall fill any vacancy by appointment of a qualified voter from the district concerned.

RATIFICATION; APPROPRIATIONS

The convention shall provide for the time and manner in which the proposed constitutional revision or amendments shall be submitted to a vote of the electorate. The revision or amendments shall be effective only if approved at a general election by a majority of all the votes tallied upon the question, this majority constituting at least thirty-five percent of the total vote cast at the election, or at a special election by a majority of all the votes tallied upon the question, this majority constituting at least thirty percent of the total number of registered voters.

The provisions of this section shall be self-executing, but the legislature shall make the necessary appropriations and may enact legislation to facilitate their operation. [Am Const Con 1968 and election Nov 5, 1968]

AMENDMENTS PROPOSED BY LEGISLATURE

Section 3. The legislature may propose amendments to the constitution by adopting the same, in the manner required for legislation, by a two-thirds vote of each house on final reading at any session, after either or both houses shall have given the governor at least ten days' written notice of the final form of the proposed amendment, or, with or without such notice, by a majority vote of each house on final reading at each of two successive sessions.

Upon such adoption, the proposed amendments shall be entered upon the journals, with the ayes and noes, and published once in each of four successive weeks in at least one newspaper of general circulation in each senatorial district wherein such a newspaper is published, within the two months' period immediately preceding the next general election.

At such general election the proposed amendments shall be submitted to the electorate for approval or rejection upon a separate ballot.

The conditions of and requirements for ratification of such proposed amendments shall be the same as provided in Section 2 of this article for ratification at a general election.

VETO

Section 4. No proposal for amendment of the constitution adopted in either manner provided by this article shall be subject to veto by the governor.

CONFLICTING REVISIONS OR AMENDMENTS

Section 5. If a revision or amendment proposed by a constitutional convention is in conflict with a revision or amendment proposed by the legislature and both are submitted to the electorate at the same election and both are approved, then the revision or amendment proposed by the convention shall prevail. If conflicting revisions or amendments are proposed by the same body and are submitted to the electorate at the same election and both are approved, then the revision or amendment receiving the highest number of votes shall prevail. [Add Const Con 1968 and election Nov 5, 1968]

ARTICLE XVI SCHEDULE

DISTRICTING AND APPORTIONMENT

Section 1. [Omitted as obsolete. For current districts and apportionment, see note appended to HRS Chapter 25.]

1968 SENATORIAL ELECTIONS

Section 2. Senators elected in the 1968 general election shall serve for two-year terms. [Add Const Con 1968 and election Nov 5, 1968]

Former §2 renumbered §10.

TWENTY-SIXTH SENATOR, ALLOCATED TO KAUAI

Section 3. Effective for the first general election following ratification of the twelfth paragraph of Section 4 of Article III and until the next reapportionment, one senator shall be added to the twenty-five members of the senate as provided and with the effect set out in the twelfth paragraph of Section 4 of Article III and such senator shall be allocated to the basic island unit of Kauai. [Add Const Con 1968 and election Nov 5, 1968]

EFFECTIVE DATE FOR APPORTIONMENT AND DISTRICTING

Section 4. The senatorial and representative districts and the numbers to be elected from each as set forth in Sections 1A and 1B of this article shall become effective for the first general election following ratification of the amendment to Section 2 of Article III and of Sections 1A and 1B of this article. [Add Const Con 1968 and election Nov 5, 1968]

Former §4 deleted.

REAPPORTIONMENT COMMISSION; ACTIVATION

Section 5. Anything in this constitution to the contrary notwithstanding, if Sections 1A and 1B of this article are not ratified, the reapportionment commission shall be constituted on or before March 1, 1969. [Add Const Con 1968 and election Nov 5, 1968]

CONFLICTS BETWEEN APPORTIONMENT PROVISIONS

Section 6. Sections 2 and 4 of Article III and Sections 1A, 2, 3, 4 and 5 of Article XVI, as amended and added by the constitutional convention of 1968, upon ratification, shall supersede Senate Bill No. 1102 of the Regular Session of 1967 even if the latter shall also be ratified. If less than all of the above sections are ratified, then those ratified shall supersede Senate Bill No. 1102 to the extent they are in conflict therewith, even if the latter should be ratified. [Add Const Con 1968 and election Nov 5, 1968]

SALARIES OF LEGISLATORS

Section 7. Until otherwise provided by law in accordance with Section 10 of Article III, the salary of each member of the legislature shall be twelve thousand dollars a year. [§17, ren and am Const Con 1968 and election Nov 5, 1968]

START OF BIENNIAL BUDGETING AND APPROPRIATIONS

Section 8. Anything in this constitution to the contrary notwithstanding, the provisions relating to biennial budgeting and appropriations in Article VI shall take effect for the biennial period beginning July 1, 1971. [Add Const Con 1968 and election Nov 5, 1968]

EFFECTIVE DATE AND APPLICATION OF ARTICLE VII, SECTION 2

Section 9. The amendments to Section 2 of Article VII shall take effect on the first day of January after three full calendar years have elapsed following their ratification. When the amendments take effect, Article VII shall apply to all county charters, whether adopted before or after the admission of Hawaii into the Union as a state. [Add Const Con 1968 and election Nov. 5, 1968]

CONTINUITY OF LAWS

Section 10. All laws in force at the time amendments to this constitution take effect that are not inconsistent with the constitution as amended shall remain in force, mutatis mutandis, until they expire by their own limitations or are amended or repealed by the legislature.

Except as otherwise provided by amendments to this constitution, all existing writs, actions, suits, proceedings, civil or criminal liabilities, prosecutions, judgments, sentences, orders, decrees, appeals, causes of action, contracts, claims, demands, titles and rights shall continue unaffected notwithstanding the taking effect of the amendments and may be maintained, enforced or prosecuted, as the case may be, before the appropriate or corresponding tribunals or agencies of or under the State or of the United States, in all respects as fully as could have been done prior to the taking effect of the amendments. [§2, ren and am Const Con 1968 and election Nov 5, 1968]

DEBTS

Section 11. The debts and liabilities of the Territory shall be assumed and paid by the State, and all debts owed to the Territory shall be collected by the State. [§3, ren Const Con 1968 and election Nov 5, 1968]

RESIDENCE, OTHER QUALIFICATIONS

Section 12. Requirements as to residence, citizenship or other status or qualifications in or under the State prescribed by this constitution shall be satisfied pro tanto by corresponding residence, citizenship or other status or qualifications in or under the Territory. [§7, ren Const Con 1968 and election Nov 5, 1968]

CONDEMNATION OF FISHERIES

Section 13. All vested rights in fisheries in the sea waters not included in any fish pond or artificial inclosure shall be condemned to the use of the public upon payment of just compensation, which compensation, when lawfully ascertained, shall be paid out of any money in the treasury of the State not otherwise appropriated. [§9, ren Const Con 1968 and election Nov 5, 1968]

EFFECTIVE DATE

This constitution shall take effect and be in full force immediately upon the admission of Hawaii into the Union as a State. Done in Convention, at Iolani Palace, Honolulu, Hawaii, on the twenty-second day of July, in the year one thousand nine hundred fifty and of the Independence of the United States of America the one hundred and seventy-fifth.