Notes

1. Terry Sanford, *Storm Over the States* (New York: McGraw Hill, 1967): 188.

2. Ibid., 187.

3. David McCullogh, *John Adam*s (New York: Simon & Schuster, 2001): 220–25.

4. Ibid., 225.

5. Ibid., 222. See also Rob Gurwitt, "The Massachusetts Mess," *Governing* (December 2001): 25.

6. Robert S. Rankin, *The Government and Administration of North Carolina* (New York: Thomas Y. Crowell, 1955): 75.

7. A. E. Buck, *The Reorganization of State Government in the United States* (New York: Columbia University Press, 1938): 7, 12.

8. Ibid., 44.

9. Ibid., 14–28, passim.

10. Sanford, 43.

11. Herbert Kaufman, "Emerging Conflicts in the Doctrines of Public Administration," *The American Political Science Review* v. 50 (December 1956): 1065.

12. Terry Sanford created "A Study of American States" at Duke University with grants from major national foundations. His agenda was to take the lead in developing a multistate Compact for Education to help the states develop nationwide educational policies. Out of this came the establishment of the Education Commission of the States. He also wrote *Storm Over the States* (1967) as an agenda for the states to follow in reforming how state governments operated and set policy goals. Jess Unruh directed the newly formed the Citizens Conference on State Legislatures as an organization that would assist the legislatures of the fifty states bring their structures and processes up to date. This CCSL project was also funded by major national foundations. Change was needed in the states, and these two state leaders were instrumental in helping the states chart their way forward.

13. Larry Sabato, *Goodbye to Good-Time Charlie: The American Governorship Transformed,* 2d ed. (Washington, D.C.: CQ Press, 1983): 57.

14. Keon S. Chi, "State Executive Branch Reorganization: Options for the Future," *State Trends Forecasts* 1:1 (December 1992). South Carolina, which reorganized in the early 1990s, is added to Chi's list.

15. James K. Conant, "In the Shadow of Wilson and Brownlow: Executive Branch Reorganization in the States, 1965 to 1987," *Public Administration Review* 48:5 (September–October 1988): 895.

16. Joseph A. Schlesinger, "The Politics of the Executive," in *Politics in the American States,* 1st and 2d eds., edited by Herbert Jacob and Kenneth N. Vines (Boston: Little Brown, 1965 and 1971).

17. Thad L. Beyle, "The Governors," in *Politics in the American States,* 8th ed., edited by Virginia Gray and Russell Hanson (Washington, D.C.: CQ Press, 2003).

Earlier versions of this Index by the author also appeared in the 4th edition (1983), 5th edition (1990), 6th edition (1996), and 7th edition (1999).

18. The specific functional officials were those directing the following departments or agencies: corrections, K–12 education, health, highways/transportation, public utility regulation, and welfare/social services.

19. The following states are included in this definition of the South: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

20. The Council of State Governments, *The Book of the States, 2000–01,* 33rd ed. (Lexington, Ky.: CSG, 2000): 15–16.

21. The National Municipal League's "Model State Constitution" can be seen in my edited book, *State Government: CQ's Guide to Current Issues and Activities, 1985–86* (Washington, D.C.: CQ Press, 1985): 193–205.

22. In 1987, I revised the National Municipal League's "Model State Constitutional" with the help of some sage state government participants and observers. This version was presented as a "Prototype State Constitution," which can be seen in my edited book, *State Government: CQ's Guide to Current Issues and Activities, 1987–88* (Washington, D.C.: CQ Press, 1987): 195–204. This version called for the joint election of the governor and lieutenant governor.

23. Section 2 of the Twenty-fifth Amendment reads: "Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both houses of Congress."

24. Thad Beyle, "Voter Falloff Down the Ballot, 1984–2000," *North Carolina Data-Net* #27 (February 2001): 12–13.

25. Ibid., 13.

26. The Council of State Governments, *The Book of the States* 2003 ed., vol. 35 (Lexington, Ky.: CSG, 2003): 201.

27. Ibid., 204.

28. Ibid., 201.

29. Ibid.

30. CSG, *Book of the States,* 2003 ed.: 219–21.

31. Ibid., 190–91.

32. Conant, op. cit.

33. The National Conference of State Legislatures, *Legislative Budget Procedures* (Denver: NCSL, 1997).

34. "The Power to Cut," *State Policy Reports* 19:21 (November 2001): 8.

35. Ibid., 9.

36. Ibid., 8.

Chapter Four

The Judicial Branch

G. Alan Tarr

Introduction

For almost a century, since Roscoe Pound's famous address to the American Bar Association in 1906 on "The Causes of Popular Dissatisfaction with the Administration of Justice," the reform of state court systems has remained a high-priority item for state constitutional reformers, for national organizations within the legal profession, and for judges and other court professionals.[1] Since 1913, the American Judicature Society has sought to educate the public about the deficiencies of state court systems, especially with regard to judicial selection, and to promote a more efficient administration of justice. The American Bar Association (ABA) has contributed to state court reform by disseminating standards pertaining to court organization, judicial administration, and judicial selection. More recently, the National Center for State Courts and the State Justice Institute have assisted state judicial branches in developing trial and appellate court performance standards and in developing strategic planning processes.

Reformers within the states have drawn on these standards in championing changes in the structure and administration of state court systems and changes in the mode of selection of state judges. In the decades following World War II, these reformers enjoyed considerable success.[2] Several states completely revised their judicial articles or used the occasion of adopting a new constitution to institute major reforms. Other states, although eschewing comprehensive reform, nonetheless introduced changes that took account of the national standards. As a consequence, in contrast with most other articles of state constitutions, the judicial articles of many (but not all) state constitutions have been subject to thorough reexamination and reformulation during the last half century.

This does not mean that all the problems confronting state court systems have disappeared. For one thing, the reformers did not enjoy complete success. For example, although administrative and structural reforms were introduced, the campaign to substitute "merit selection" for election of judges bogged down, and in recent years it has pretty much ground to a halt.[3] For another thing, the success of the reformers is a positive development only if they accurately diagnosed the

problems afflicting state court systems and proposed constitutional remedies that in fact solved those problems. Finally, new problems may have arisen that the reformers did not anticipate but that may be susceptible to constitutional resolution. Nevertheless, the reform perspective provides a useful starting point for considering possible changes in state judicial articles.

GUIDING PRINCIPLES

Four concerns should guide the reform of state judicial articles:

- *Judicial Independence:* Judicial independence involves the insulation of judges from undue or improper influence by other political institutions, interest groups, and the general public, so that they can render impartial judgments according to law in the cases they decide. This decisional independence is designed to serve not the parochial interests of judges but rather the interest of the public in even-handed justice. In serving that interest, judicial independence also promotes public confidence in the integrity of the judicial branch.[4]
- *Institutional Independence (Autonomy) of the Judicial Branch:* Complementing decisional independence of the judiciary is institutional independence or autonomy. Separation-of-power principles require recognition of the autonomy of the judicial branch as a coequal partner in state government. This means that the judicial branch, like the other branches of state government, must have the authority to govern and manage its internal affairs, free from undue interference by other branches of government, although not free from the scrutiny of those branches or of the public.
- *Effective Delivery of Judicial Services:* State judicial systems must be structured, organized, and managed so that they ensure access to justice for all citizens and provide for the expeditious and cost-effective administration of justice.
- *Accountability of the Judiciary:* The American system of government embraces the notion of accountability for public officials in order to prevent corruption or other abuses of power and to ensure that governmental policy reflects the values and interests of the community. This underlies the creation of a system of separate institutions sharing power to ensure checks and balances and the establishment of mechanisms for public scrutiny of the performance of government officials.

  Like the other branches of state government, the judiciary too must be accountable. With respect to the judiciary, two different types of accountability can be distinguished. With regard to their decisions, judges must be accountable to the law, i.e., their rulings must be con-

> sistent with the law. For trial court judges and lower appellate court judges, this accountability is enforced in part within the judicial branch through appellate review of judicial decisions. For state supreme court justices, this accountability comes from the need to justify decisions in written opinions that are subject to legal and public scrutiny. The courts' interpretation of statutes can be overridden by the enactment of corrective legislation, and their interpretations of the state constitution by constitutional amendment.
>
> With regard to the operation of the judicial branch, the judiciary is accountable to the people and to their representatives through the normal processes of legislation and appropriations.
>
> Among the mechanisms for enforcing judicial accountability are: (a) appellate review of judicial decisions, (b) judicial retention processes, whether electoral or appointive, sometimes guided by judicial performance evaluations, (c) judicial discipline processes enforcing codes of professional conduct, and (d) impeachment.

Two points deserve particular emphasis. First, the principles that should guide the reform of state judicial articles are not ends in themselves. Rather, they are important because they enable state courts to do justice. Second, these principles may be in some tension with one another. Accountability and decisional independence may seem at odds. So too may accountability and institutional independence (judicial-branch autonomy). Such tensions are not unusual—state constitution makers must also balance competing concerns in dealing with the other branches of state government, with the scope of state powers, and with the protection of rights. Moreover, such tensions need not be viewed as negative. Our discussion will both identify those instances in which constitution makers must choose between apparently conflicting principles and highlight those opportunities for reconciling or striking a balance between competing concerns.

The Structure of the State Court System

Trial-Court Consolidation

For much of the nation's history, most state court systems were essentially "nonsystems," characterized by a proliferation of limited-jurisdiction and specialized courts, often with their own distinctive rules of procedure and with overlapping or ill-defined jurisdictions. This led to uneven workloads among courts and to an unnecessary duplication of support personnel and facilities. Judges found their time consumed in hearing jurisdictional rather than substantive arguments and in unnecessary retrials resulting from an erroneous

choice of forum. Even more important, the proliferation of courts interfered with the administration of justice. Litigants, unsuccessfully searching for the proper forum to hear their cases, too often were unable to get a ruling on the merits of their claims.

Over the course of the twentieth century, most states recognized the problem posed by multiple trial courts and, following reform prescriptions, consolidated their trial courts into either one-tier or two-tier systems. A two-tier system retains a trial court of general jurisdiction and a separate trial court of limited jurisdiction. Virginia provides an example of a two-tier system. Its District Court is a limited jurisdiction court, while the Circuit Court is a general jurisdiction trial court that also hears appeals de novo from the District Court. Illinois provides an example of a one-tier system. Its Circuit Court is the state's sole trial court, hearing all cases of first instance.

In most states the coherence of the state court system no longer is a pressing issue. However, in some states—including populous states such as Georgia, New York, and Texas—it remains a concern. The experience of the states that have consolidated their trial courts suggests that consolidation has contributed to a more effective administration of justice, although there remains some dispute about how far consolidation and hierarchy should proceed.[5] Thus, those states that have failed to consolidate their trial courts because of political or historical factors should consider seriously the potential gains likely to follow from consolidation. This is an area in which the models developed in other states lend themselves to adoption in states consolidating their courts. In addition, those states that continue to maintain separate courts for law and for equity should reexamine this choice.

In recent years there have been renewed calls for specialized state courts, such as drug courts, family courts, and business courts.[6] Typically, state court systems have responded to calls for such "problem-solving courts" by creating divisions within existing trial courts, by devising special "calendars" or "dockets," or by special assignment of judges. However, some advocates of specialized courts insist that they should not be created as divisions within existing trial courts, because they will not in such circumstances attract the resources and committed judges they need to succeed. The validity of this argument is open to question. But whatever its validity, it does not follow that these specialized courts should be enshrined in the state constitution. Different eras may have quite different views of what specialized courts (if any) are desirable, and giving specialized courts constitutional status may produce undesirable rigidities, empower vested interests, and promote unproductive competition for scarce resources among court constituencies.

This leads to a more general consideration of constitutional provisions relating to the structuring of state court systems.

Constitutionalization of Court Structure

A structural issue on which no consensus has emerged involves the extent to which the structure of the state court system should be constitutionalized. States have adopted a variety of approaches:

- *The Federal Model:* Some state constitutions, following the example of Article III of the Federal Constitution, require the establishment of a Supreme Court but leave it to the Legislature to create and empower all additional courts. For example, the Maine Constitution vests the judicial power in a supreme court and such other courts as the Legislature shall create.[7]
- *The Modified Federal Model:* Some state constitutions establish various appellate and trial courts but allow the Legislature to create and empower additional courts. Illustrative is the Arizona Constitution, which creates the Supreme Court and the Superior Court (the general-jurisdiction trial court) but allows the Legislature to create an intermediate court of appeals and limited-jurisdiction trial courts.[8] Some state constitutions—for example, the Connecticut Constitution—restrict the Legislature to creating additional limited-jurisdiction trial courts.[9] Other constitutions—for example, the Michigan Constitution—grant the Legislature the power to create additional courts but seek to discourage a proliferation of separate courts by requiring an extraordinary majority (two-thirds of the total membership of each house) for the creation of courts.[10]
- *The Full-Articulation Model:* Some state constitutions establish the state's appellate and trial courts and expressly or implicitly prohibit the Legislature from creating additional courts. Thus, the Florida Constitution specifies all state courts and bans the creation of additional courts, while the Georgia Constitution requires that the judicial power be vested exclusively in those courts designated in the Judicial Article.[11]

An advantage of the Full-Articulation Model is that it can ensure a unified court system with clear divisions of jurisdiction and clear lines of authority. (However, in a nonunified system, constitutional specification of the court structure can impede the efforts of reformers to create more unified courts.) The advantage shared by the Federal Model and the Modified Federal Model is that they build in flexibility, allowing states to respond to changing needs and changed perceptions of desirable institutional design. The disadvantage of those latter models is that they encourage special interests to petition the Legislature to create specialized courts, thus undermining the coherence and unity of the court

system. The Michigan requirement of an extraordinary majority for the creation of additional limited-jurisdiction trial courts has proved an effective safeguard in that state against an unwise proliferation of courts. States departing from the Full-Articulation Model should therefore consider emulating Michigan's approach of requiring an extraordinary majority for the creation of new courts.

Degree of Unification

Another structural issue on which no consensus has emerged involves the degree of consolidation appropriate to a state court system. States that have adopted the full-articulation model have adopted three alternative approaches in their constitutions:

- *The Single-Court Model:* Some state constitutions conceive of the court system as a single court, with divisions including the supreme court, perhaps an intermediate appellate court, the general-jurisdiction trial court, and perhaps a limited-jurisdiction trial court. Thus, the Michigan Constitution states: "The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house."[12]
- *The Multiple-Level Model:* Most state constitutions expressly distinguish a supreme court, an intermediate court of appeals, a trial court of general jurisdiction, and (in most states) one or more trial courts of limited jurisdiction. The Indiana Constitution exemplifies this model.[13]
- *The Multiple-Court Model:* Some state constitutions treat each intermediate court of appeals, each trial court of general jurisdiction, and each trial court of limited jurisdiction as a separate court.

There is no evidence that these differences in design or designation substantially affect the operation of state courts or the administration of justice, and state constitution makers might well retain the existing provisions in their states.

THE JURISDICTION OF STATE COURTS

Closely related to the issue of whether to constitutionalize court structure is the issue of whether to constitutionalize the jurisdiction of various courts. One possibility is to assign the allocation of jurisdiction to the Legislature—the Alaska Constitution, for example, mandates that jurisdiction "shall be prescribed by

law."[14] This maximizes flexibility. Another possibility is to allocate the jurisdiction of each court in the constitution. This is problematic, particularly if the Legislature is authorized to create additional courts, as it hampers the reallocation of jurisdiction to those new courts. Many state constitutions grant broad authority to the Legislature to allocate jurisdiction but nonetheless constitutionalize certain choices, particularly as they relate to the jurisdiction of the supreme court, and there are advantages to this approach. More specifically, the following choices may be appropriate for constitutionalization:

- *Are there appeals that the constitution should require be heard by the state's highest court as a matter of right?* Several states mandate in their constitutions that their supreme court hear certain classes of appeals as a matter of right. The Louisiana Constitution, for example, requires that the court hear appeals in capital cases and in cases in which a law or ordinance is declared unconstitutional.[15] Other states have expanded this list. One should be hesitant about expanding the list too much, however, since that may overburden the supreme court and impair its ability to focus on cases with the broadest legal and political significance for the state. In states that have an intermediate court of appeals, that court should have the task of error correction, while the supreme court should focus on the most important issues and on legal development in the state. States that do not have an intermediate court of appeals should consider whether the case pressures on the state's supreme court prevent it from performing its primary role of supervising the development of law in the state.
- *Should the constitution authorize the supreme court to issue advisory opinions or address the constitutionality of bills before their enactment into law?* Federal courts are not permitted to issue advisory opinions. As of 2004, however, the constitutions in seven states authorized their supreme courts to do so.[16] These opinions are precisely what their name indicates, advisory; they are not binding as a matter of law, and they do not preclude constitutional challenges to laws after their enactment. Internationally, the movement has been to empower supreme courts/constitutional courts to rule authoritatively on the constitutionality of bills before they have been enacted into law upon petition from legislators or from the executive (so-called abstract review).[17] State constitutional reformers should contemplate both the state and international experience in determining what state courts should do during the twenty-first century. However, if a state supreme court is given the power to issue advisory opinions or to rule on the constitutionality of bills prior to final passage, it will undoubtedly have major implications for the political process in the state. Thus, it seems reasonable that the citizenry should decide whether or not to grant this power through the process of constitutional amendment or revision.

- *Should the constitution authorize the supreme court (or some other body) to rule on whether proposed initiatives meet state constitutional requirements governing the initiative process before the proposals appear on the ballot?* Eighteen states authorize the citizenry to propose constitutional amendments via the initiative, and twenty-one allow the citizenry to enact laws via the initiative.[18] State constitutions, however, impose restrictions on the changes that can be introduced through initiative. They typically restrict the use of the constitutional initiative to amendment, rather than revision, of state constitutions. Courts in several states have aggressively enforced this restriction, striking down constitutional initiatives.[19] Similarly, courts have enforced against statutory initiatives state constitutional requirements that the titles of laws accurately reflect their contents and that laws deal with only a single subject.[20] Whatever the validity of particular decisions overturning initiatives or upholding them against legal challenges, the fact remains that invalidation of initiatives after their approval by voters is a costly procedure. The costs include those expenditures of time, effort, and money associated with campaigns for and against proposed initiatives. They also include the animosity generated by courts when they invalidate popular measures after their adoption. Finally, the costs include the missed opportunity to remedy constitutional defects in proposals at an early stage in the process, so that only constitutionally valid proposals are submitted to the voters for approval. States can reduce these costs by establishing a procedure for review of the procedural regularity of initiatives before their appearance on the ballot. Should state courts overreach in this area, citizens can amend their constitution so as to reduce the impediments to propositions finding their way onto the ballot.[21]
- *Should the constitution protect against legislative use of its power over jurisdiction to infringe on the autonomy of the judiciary?* This seems a desirable goal in order to maintain the separation of powers. The Idaho Constitution deals with this effectively: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government."[22] Other states should consider adopting similar provisions.

THE ADMINISTRATION OF THE STATE COURT SYSTEM

Paralleling the movement for structural unification of state courts has been a movement for administrative unification.[23] Administrative unification has been championed as necessary to rescue trial courts from immersion in local politics, to ensure procedural uniformity throughout the state court system, and to encourage better management of the courts—in short, to promote a more effi-

cient and uniform administration of justice. The reforms to achieve these ends included: (1) vesting rule-making authority in the state supreme court in order to encourage uniform procedures throughout the court system, (2) making the chief justice the administrative head of the court system in order to promote a systemwide management perspective, (3) creating and empowering chief judges of trial courts in order to strengthen management at that level, and (4) establishing vertical lines of authority within the court system. We turn now to constitutional provisions relating to specific aspects of judicial administration.

Administrative Authority

Most state constitutions vest administrative authority over the court system in the state supreme court, with the chief justice serving as the chief administrative officer. As the judicial article of the Kansas Constitution succinctly states: "The supreme court shall have general administrative authority over all courts in this state."[24] This power to ensure the efficient and effective delivery of court services typically extends to selection of the administrative director of the courts and other personnel, to regulation of the bar and disciplinary authority over members of the legal profession, and to reassignment of judges from their "home" court in order to allocate workload equitably.[25] This administrative authority may also include rule making over practice and procedure in the courts. It may likewise include preparation of a budget for the entire judicial branch. Finally, the supreme court's responsibility for the operation of the judicial branch may lead to delivery of a "state of the courts" address and to less formalized contacts between the chief justice or his or her staff and members of the executive and legislative branches.

The California Constitution provides the major alternative to vesting administrative responsibility in the supreme court and the chief justice. It creates a Judicial Council comprised of judges from both appellate and trial courts that exercises rule-making authority, oversees the work of the state's courts, reports to the governor and the legislature regarding that work, and makes recommendations for the more effective administration of justice.[26] The aim of the California model is to encourage widespread participation in making major decisions affecting the court system. Such a model may work well in large, populous, and diverse states such as California, but its value is not so limited. Utah, for example, a relatively small and homogeneous state, has had considerable success with its judicial council. Of course, vesting administrative responsibility in the supreme court or the chief justice rather than in a judicial council need not preclude consultation. In fact, ABA Standard 1.32, Administrative Policy, states: "All judges and judicial officers of the court system should share in deliberations and discussions concerning the procedure and administration of the courts."[27] Some states also encourage consultation. The Alaska Constitution creates a Judicial Council of seven members—the chief justice, three attorneys