

THE HAWAII STATE CONSTITUTION

A Reference
Guide

Anne Feder Lee

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Foreword by John Waihee

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Series Foreword

In 1776, following the declaration of independence from England, the former colonies began to draft their own constitutions. Their handiwork attracted widespread interest, and draft constitutions circulated up and down the Atlantic seaboard as constitution makers sought to benefit from the insights of their counterparts in other states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. Even the delegates to the Constitutional Convention of 1787, despite their reservations about the course of political developments in the states during the decade after independence, found much that was useful in the newly adopted constitutions. And when James Madison, fulfilling a pledge given during the ratification debates, drafted the federal Bill of Rights, he found his model in the famous Declaration of Rights of the Virginia Constitution.

By the 1900s, however, few people would have looked to state constitutions for enlightenment on fundamental rights or important principles. Instead, a familiar litany of complaints was heard whenever state constitutions were mentioned. State constitutions were too long and too detailed, combining basic principles with policy prescriptions and prohibitions that had no place in the fundamental law of a state. By including such provisions, it was argued, state constitutions deprived state governments of the flexibility they needed to respond effectively to changing circumstances. This—among other factors—encouraged political reformers to look to the federal government, which was not plagued by such constitutional constraints, thereby shifting the locus of political initiative away from the states. Meanwhile, civil libertarians concluded that state bills of rights, as least as interpreted by state courts, did not adequately protect rights, and they looked to the federal courts and the federal Bill of Rights for redress.

As power and responsibility shifted from the states to Washington, so too did the attention of scholars, the legal community, and the general public.

During the early 1970s, however, state constitutions were rediscovered. The immediate impetus for this rediscovery was former President Richard Nixon's appointment of Warren Burger to succeed Earl Warren as chief justice of the U.S. Supreme Court. To civil libertarians, this appointment seemed to signal a decisive shift in the Supreme Court's jurisprudence because Burger was expected to lead the Court away from the liberal activism that had characterized the Warren Court. They therefore sought ways to safeguard the gains they had achieved for defendants, racial minorities, and the poor from erosion by the Burger Court. In particular, they began to look to state bills of rights to secure the rights of defendants and to support other civil-liberties claims that they advanced in state courts.

This new judicial federalism, as it came to be called, quickly advanced beyond its initial concern to evade the Burger Court. Indeed, less than two decades after it originated, it has become a nationwide phenomenon, for when judges and scholars turned their attention to state constitutions, they discovered an unsuspected richness. They found not only provisions that paralleled the federal Bill of Rights but also constitutional guarantees—of the right to privacy and of gender equality, for example—that had no analogue in the U.S. Constitution. Careful examination of the text and history of state guarantees revealed important differences between even those provisions that most resembled federal guarantees and their federal counterparts. Looking beyond state declarations of rights, jurists and scholars discovered affirmative constitutional mandates to state governments to address such important policy concerns as education and housing. Taken all together, these discoveries underlined the importance for the legal community of developing a better understanding of state constitutions.

The renewed interest in state constitutions has not been limited to judges and lawyers. State constitutional reformers have renewed their efforts, with notable success. Since 1960, ten states have adopted new constitutions, and several others have undertaken major constitutional revisions. These changes have usually resulted in more streamlined constitutions and more effective state governments. Also, in recent years political activists on both the left and the right have pursued their goals through state constitutional amendments, often enacted through the initiative process, under which policy proposals can be placed directly on the ballot for voters to endorse or reject. Scholars have begun to rediscover how state constitutional history can illuminate changes in political thought and practice, providing a basis for theories about the dynamics of political change in America.

Anne Feder Lee's fine study of the Hawaii Constitution, part of the Reference Guides to the State Constitutions of the United States series, reflects this renewed interest in state constitutions and contributes to our knowledge of them. Because the constitutional tradition of each state is distinctive, Lee's volume begins by tracing the history and development of Hawaii's constitutions. It then provides

the full text of the state's current constitution, with each section accompanied by commentary that explains the provision and traces its origins and its interpretation by the courts and other governmental bodies. For readers with a particular interest in a specific aspect of Hawaii constitutionalism, this book offers a bibliography of the most important sources examining the constitutional history and constitutional law of the state. It also contains a table of cases cited and a subject index.

G. Alan Tarr

Foreword

Dr. Anne Lee's thorough work blends history and legal thought, giving all who will read this book a solid understanding of the major factors shaping Hawaii's constitution. For the first time, we have one volume that traces our constitutional history and analyzes, section by section, our constitution as it exists today.

Part I presents a very readable overview of the major historical events so important to our constitutional development, from the time of the Hawaiian kingdom, through the republic, the territory, the 1950 Constitutional Convention called as a prelude to statehood, and the conventions of 1968 and 1978. In Part II, Dr. Lee clearly explains the purpose of each section, giving insight into how the framers' intentions and judicial interpretations have shaped the document.

I have had the honor of serving the people of Hawaii as a delegate to the 1978 Constitutional Convention, as a member of the state house of representatives, as lieutenant governor, and as governor. Throughout, I have been keenly aware of the special role that the constitution plays in our body politic, not only by establishing the framework of government and the rights and responsibilities of all, but also by reflecting our extraordinary past, our unique blend of peoples, and the natural beauty of our island state.

Those of us who met in 1978 were dedicated to making certain that we would perpetuate—and enhance—these features through our constitution. We were of an activist mind, and we saw our role as establishing an agenda for the ensuing decade.

It should not trouble us that some constitutional issues remain unresolved or that they become the object of legal challenge or the subject of heated debate. The ultimate responsibility for determining when and if constitutional changes are needed rests with the people of Hawaii who will, I know, continue to enter

into such deliberations in the spirit captured by the words of our Preamble: “with an understanding and compassionate heart.”

John Waihee
Governor

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