THE OXFORD COMMENTARIES
on the State Constitutions of the United States

The NEBRASKA State Constitution

Robert D. Miewald
Peter J. Longo

OXFORD

- The Nebraska State Constitution

The Oxford Commentaries on the State Constitutions of the United States
G. Alan Tarr, Series Editor

Professor G. Alan Tarr, Director of the Center on State Constitutional Studies at Rutgers University, serves as General Editor for this important new series which in its entirety will cover each of the 50 states. Each volume of The Oxford Commentaries on the State Constitutions of the United States contains a historical overview of the state's constitutional development, plus a section-by-section analysis of the state's current constitution. Other features included in the volumes are the text of the state's constitution, a bibliographic essay, table of cases, and index. This series provides essential reference tools for those investigating state constitutional development and constitutional law.

The Nebraska State Constitution

Robert D. Miewald
and
Peter J. Longo

Foreword by Robert M. Spire

THE OXFORD COMMENTARIES ON THE STATE CONSTITUTIONS OF THE UNITED STATES
G. Alan Tarr, Series Editor

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Oxford University Press, Inc., publishes works that further Oxford University's objective of excellence in research, scholarship, and education.

Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid Melbourne Mexico City Nairobi New Delhi Shanghai Taipei Toronto

With offices in
Argentina Austria Brazil Chile Czech Republic France Greece Guatemala Hungary Italy Japan Poland Portugal Singapore South Korea Switzerland Thailand Turkey Ukraine Vietnam

Previously published in 1993 by Greenwood Press

Published by Oxford University Press, Inc.
198 Madison Avenue, New York, New York 10016

Oxford is a registered trademark of Oxford University Press
Oxford University Press is a registered trademark of Oxford University Press, Inc.

Library of Congress Cataloging-in-Publication Data

Miewald, Robert D.
The Nebraska State Constitution / Robert D. Miewald and Peter J. Longo ; foreword by Robert M. Spire.
p. cm. — (The Oxford commentaries on the state constitutions of the United States)
Includes bibliographical references and index.
ISBN 978-0-19-977931-4 ((hardback) : alk. paper)
1. Constitutions—Nebraska. 2. Constitutional law—Nebraska.
3. Constitutional history—Nebraska. I. Longo, Peter Joseph.
II. Nebraska. Constitution (1875) III. Title.
KFN4011875.A6 M538 2011
342.78202—dc22 2011003229

1 2 3 4 5 6 7 8 9

Printed in the United States of America on acid-free paper

CONTENTS

■ 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 sister states. In Europe, the new constitutions found a ready audience seeking enlightenment from the American experiments in self-government. ven 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. 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, at least as interpreted by state courts, did not adequately protect rights and therefore 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 United States 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 during Warren's tenure 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 civilliberties claims that they advanced in state courts.

The "new judicial federalism," as it came to be called, quite quickly advanced beyond its initial concern to evade the mandates of 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 altogether, these discoveries underlined the importance for the legal community of developing a better understanding of state constitutions.

Yet 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 too 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.

Miewald and Longo's excellent study of the Nebraska Constitution is the thirteenth volume in the series, The Oxford Commentaries on the State Constitutions of the United States, which reflects this renewed interest in state constitutions and will contribute to our knowledge about them. Because the constitutional tradition of each state is distinctive, the volume begins with the history and development of the Nebraska Constitution. It then provides the complete text of Nebraska's current constitution, with each section accompanied by commentary that explains the provision and traces its origins and its interpretation by the courts and by other governmental bodies. For readers with a particular interest in a specific aspect of Nebraska's constitutional experience, the book offers a bibliography of the most important sources dealing with the constitutional history and constitutional law of the state. Finally, the book concludes with a table of cases cited in the history and the constitutional commentary, as well as a subject index.

G. Alan Tarr

FOREWORD

"He is most powerful who has power over himself." This thoughtful counsel of Seneca nineteen centuries ago underscores our practical need to control ourselves, both individually and collectively, if we are to live together in harmony. We achieve collective control over ourselves through the institution of constitutional government. The result is a political and social environment that makes possible for each of us our search for personal fulfillment. Viewed in this context, our federal and state constitutions serve as truly living documents, absolutely vital to our everyday needs and aspirations.

In this engaging study, Professors Miewald and Longo describe in fascinating detail the development, historical significance, and very real present day meaning of the Nebraska constitution. The professors make it clear that the Nebraska constitution is no museum piece collecting dust, but rather an exciting reflection of, and legal basis for, the ambitions and dreams of Nebraskans today.

What special characteristics does the Nebraska constitution contain? What does it say about Nebraskans? What lessons does it provide as we seek answers to the complexities and challenges of contemporary life? Pertinent insights and answers to these questions appear throughout this well-researched, clearly written, and informative work. Professors Miewald and Longo describe many instances in which the Nebraska constitution sheds light upon these questions.

I suggest that three separate and unrelated Nebraska constitutional provisions are particularly instructive.

1. the initiative and referendum procedures that reserve to individual citizens profound direct legislative power, and prevent legislators from ever forgetting that they are servants, not masters
2. The establishment of a unicameral legislature, which requires a high degree of accessibility by legislators to their constituents and, at least to some extent, holds down the size of government
3. the imposition of substantial restrictions upon corporate ownership of farms and ranches

These seemingly disparate constitutional edicts, when examined both individually and together, tell us many things.

1. Nebraskans like to think for themselves. They want to direct their own lives, not be smothered by an omnipresent or overreaching government.
2. Government must be genuinely accessible to citizens. It must recognize that those citizens do in fact have highly independent views and are not guided by a "pack mentality."

3. Nebraskans value a fundamental relationship between the family as a unit and the farm as a means of livelihood. This presupposes that traditional Nebraskan rural lifestyles and values should not be lost in our increasingly impersonal and urban age of high technology and giant institutions.
4. Government functions best which understands that fierce individual independence and sincere group cooperation are complementary, not adversarial concepts. There is a time and a place for each, as Nebraskans demonstrate through constitutional precepts that stress both individual independence and collective cooperation.

State constitutions today are assuming more influence upon our lives. Many issues that have recently been decided by federal courts interpreting the U.S. constitution are now being adjudicated in state courts on the basis of state constitutions. Thus, this timely work of Professors Miewald and Longo reminds us of the wisdom of Cicero' s admonition: "It is not by muscle, speech or physical dexterity that great things are achieved, but by reflection, force of character and judgment."

As we plan for the future, we must exercise this "reflection, force of character and judgment" as we ask: Will Nebraskans independent and individualistic views meet the necessary cooperative challenges of the future—better education for all, effective economic development, cures for the ravages of poverty? The sound analysis of Professors Miewald and Longo demonstrates that the Nebraska constitution is broad enough, and can be reasonably amended, to provide a flexible legal base for the future. In short, the Nebraska constitution creates present stability with the means for the necessary future changes that are inevitable as society evolves. This is all that can be asked of a constitution.

As citizens we have the obligation to responsibly use and build upon our Nebraska constitution. Professors Miewald and Longo have competently provided us with the background and knowledge we must have for this task. The rest is up to us. As Shakespeare wrote in *Julius Caesar*, Act I, Scene II: "Men at some time are master of their fates. The fault, dear Brutus, is not in our stars, but in ourselves."

Robert M. Spire

PART ONE

The History of the Nebraska Constitution

This page intentionally left blank

In a strict sense, the Nebraska Constitution is that document written and approved in 1875. As such, only seventeen states have older basic laws. The authors and voters of 117 years ago, however, might not recognize their work since, from its adoption on October 12, 1875 through May 1992, it has been amended 194 times. The creation of the unicameral legislature was only the most notable of these many changes.

The durability of the 1875 Constitution cannot be attributed to its elegant construction or its deathless prose. As state constitutions go, it is certainly not a masterpiece of elegant construction. Yet Nebraskans seem comfortable with it, and there have been few demands in the past decade for any great revisions. The major interests in the state apparently regard it as a level playing field for their political games. It works, Nebraskans feel, or at least at each election, this or that side has an adequate opportunity to try for amendments.

In 1875, given the history of the previous efforts at constitution making, one might not have predicted a long life for the document. Indeed, some Nebraskans, disillusioned by the hard life on the Great Plains, probably did not see much hope for the state itself. Nebraska survived and prospered, and the 1875 Constitution continues to shape the political life of the state.

■ LURCHING TOWARD STATEHOOD[1]

It was a long time before a political community was established in Nebraska within which a viable constitution could take root. The territory that was to become the state moved from one jurisdiction to another for more than fifty years. As the state began to take form, it was usually shaped by national considerations such as slavery or Manifest Destiny. And the politicians who wrote the first constitution may have been more concerned with their careers than with the public interest.

The few non-Indian trappers and other adventurers who wandered across what is now Nebraska before 1803 were governed, if at all, by a succession of French and Spanish colonial administrators located in New Orleans. After the Louisiana Purchase, Nebraska was part of the Indiana Territory from 1804 to 1805, the Louisiana Territory from 1805 to 1812, and finally part of the Missouri Territory from 1812 until Missouri became a state in 1821. The Nebraska area, after 1821, was included in a vaguely defined region called the "Indian country." All these formal changes were probably irrelevant since Nebraska had no non-Indian inhabitants and little in the way of organized government.

The situation came into clearer focus with the passage of the Indian Country Act in 1834.[2] The legislation was a short-lived effort by the federal government to solve the "Indian question" by prohibiting further settlement west of the Mississippi. The pressure of westward expansion soon made a mockery of the law, as trappers, traders, farmers, religious groups, gold seekers, and assorted pilgrims began their quests for something and somewhere new.

Nebraska has always been the most convenient place to get from here to there and back again. Regardless of the reason driving people to the west, Nebraska just seemed to be in the way. Although some early explorers tried to depict the land between the Missouri River and the Rockies as the Great American Desert, the climate, soil, topography, flora, and fauna do not make it the most forbidding real estate in the country. Some of the transients gave up their dreams of wealth or freedom in California, Oregon, or Utah and stopped just on the other side of the Missouri.

Some pioneers, that is, saw potential, even if they could not say for sure what it was, in the vast tract stretching toward the west. They were encouraged by policy makers in Washington and elsewhere who realized this land bridge was critical to the development of the nation. The future of the area immediately

[1] The general outline of Nebraska's constitutional history is derived largely from the following sources: Albert Watkins, rev. and ed. *Official Report of the Debates and Proceedings in the Nebraska Constitutional Convention*, 3 vols. (Lincoln: Nebraska State Historical Publications, 1913); Addison E. Sheldon, *Nebraska: The Land and the People*, vol. I (Chicago: Lewis Publishing, 1931); and James C. Olson, *History of Nebraska*, 2nd ed. (Lincoln: University of Nebraska Press, 1966).

[2] 4 Statutes 729 (1834).

became tied to the foreign and domestic controversies of the time. "Nebraska was born of the Oregon controversy with England" when Secretary of War William Wilkins in 1844 suggested the organization of a territory to protect the immigrants to the Pacific Northwest.[3]

A more powerful impulse behind the "idea of Nebraska" was the competition between the North and the South for a railroad route to the Pacific and, ultimately, for the destiny of the unsettled regions of the nation. Opponents of a southern route had a masterful advocate in Stephen Douglas of Illinois, as a Representative and as a Senator. Major impediments to the northern route included the Indian Country Act of 1834 as well as all the high drama of the impending crisis over the issue of slavery. The solution of Congress to both obstacles was the KansasNebraska Act of 1854.

Bills to organize a Nebraska Territory were introduced in 1844, 1848, and 1853. With one eye on a Chicago-Pacific railroad and the other on the presidency, Douglas was instrumental in all the actions. The Senator from Illinois was finally successful when he backed a measure which effectively nullified the Missouri Compromise of 1820. The earlier law had, for Northerners, guaranteed that most of the old Louisiana Purchase territory would be admitted as free states. The Kansas-Nebraska Act opted for the more ambiguous concept of "popular sovereignty." The act provided that when Nebraska achieved statehood, it "shall be received into the Union with or without slavery as [its] constitution may prescribe."[4] The Missouri Compromise was specifically repealed when Congress stated that "the true intent and meaning of this act [is] not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."[5]

"The people thereof" in the newly created Nebraska Territory were few and far between. It was a vast area, including land that is now part of the states of Colorado, Wyoming, Montana, North Dakota, and South Dakota. The first census of November 1854, which may have included several Kansans, counted only 2,732 whites of whom 929 were males over the age of twenty-one. The Kansas-Nebraska Act provided the most rudimentary form of government. A governor was appointed for four years and a secretary for five years by the President. The judicial power was vested in a supreme court of three members who were also to serve as district court judges. The legislature was the legislative assembly, composed of a thirteen-member council and a twenty-six-member house of representatives, elected by white males over the age of twenty-one.

[3] Sheldon, *Nebraska*, 230.

[4] 10 Statutes 277 (1854).

[5] 10 Statutes 283 (1854).

This bare framework of government for a handful of eligible participants was enough to keep the political pot boiling for several years. The state's agricultural wealth was yet to be realized and, although wild hopes abounded, there were few mineral resources to exploit. In the first years, the most reliable sources of income in Nebraska were real estate speculation and government. The two fields of endeavor were often intertwined. As James Olson notes of those territorial heroes, "early pioneers seem to have come to Nebraska in significant numbers for the express purpose of carving political careers for themselves in the new territory; others to use politics as one means of financial gain."[6] The creation of a model political commonwealth may not have had a high priority with the men who drove Nebraska toward statehood.

Instead, many of the state's founders were keen watchers of the main chance. Government positions were a stable source of income and were available if one backed the right political faction. Wildcat banking was lucrative, especially since undersubscribed banks could easily obtain a charter from the legislature. Land speculation was another option and the "boomers," some honest and some out for a quick profit, soon covered the map of the prairie with imaginary cities. If any of the would-be cities had a chance, it would require the location of some facility, so government offices became a great prize, second only to winning a railroad. The grandest prize of all was the territorial capital. Omaha had managed to seize that jewel, but other communities were always ready to tear it away. In fact, the location of the state capital was not finally resolved until well into the nineteenth century, and the desire to keep it in Lincoln, or to remove it, colored future constitutional developments.

While town fought town for any advantage, a larger sectional question emerged around which territorial politics was organized. The Platte River, noted for being too wet to plough and too muddy to drink, posed a formidable geographical barrier to territorial unity. It was too shallow to ferry, its bottom was too soft to ford, and its wide expanse made bridge building prohibitively expensive. The North Platters and the South Platters developed a sense of antagonism toward each other and were suspicious of any government initiative which might benefit the other's territory. So disgruntled were the South Platters that at one time they sought annexation to Kansas. This sectional split was to influence Nebraska politics even after statehood.

In its first official census in 1860, the Nebraska Territory contained 28,841 people. The first serious effort at achieving statehood also took place in that year, a move largely promoted by South Platters who saw statehood as an opportunity to reopen the question of the location of the state capital and, perhaps, to wrest it away from Omaha.[7] Whatever the reasons, the legislature passed a measure

[6] Olson, *History of Nebraska*, 116.

[7] Watkins, *Official Reports*, III, 474.