BACK STORY

BY BRADLEY SCHRAGER, ESQ.

WHAT'S THE MATTER WITH THE NEVADA CONSTITUTION?

Polling shows the vast majority of Americans are unaware that each state has a constitution and that the rest do not know what is contained in their state's constitution, how it operates as the law of the state, or how it differs from or interacts with either the U.S. Constitution or state statutes.

This is unsurprising. Here in Nevada, we do not revere our state constitution, recite its tenets or tell tales of its drafters; we give it none of the veneration we give to the U.S. Constitution. As attorneys, we know that the Nevada Supreme Court and the many district courts treat the state constitution, appropriately, as "the organic and fundamental law of this state," and seek to read the text of the document as a harmonic whole, when it is possible. *See Nevadans for Nevada v. Beers*, 122 Nev. 930, 142 P.3d 339, 351 (2006); *Ramsey v. City of North Las Vegas*, 392 P.3d 614, 620–21 (Nev. 2017). But most people, if they think about it at all, consider the Nevada Constitution as perhaps a set of super-statutes, rather than as a fundamental statement of the rights of Nevadans.

In truth, we treat the Nevada Constitution pretty shabbily. Since its early days, the state constitution has been loaded up with amendments, some of them the fruits of wise deliberation of the people, certainly; others are the product of the immediate interests of groups wielding political power. But print it out, flip through its pages. You will read little that is memorable or inspiring, but you may notice that there are strange appendages at the back, extra pages that run on, unincorporated and without article designations. One of these is a lengthy set of provisions, even featuring a preamble, setting out term limits for members of the U.S. Senate and House of Representatives from Nevada. It was the product of an initiative approved by the voters at the 1996 and 1998 general elections, but a U.S. Supreme Court decision in 1995 invalidated its provisions as unconstitutional before it ever made it to the voters. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Now it sits at the back of the Nevada Constitution, useless, defunct and confusing.

Other provisions lead to questions as to whether drafters and proponents of constitutional amendments deliberate much over the question of whether a particular idea for constitutional change is best suited for inclusion in the state's organic law. Whatever one thinks of minimum wage laws, it is fair to ask whether such provisions should be in the state constitution (Art. XV, § 16), rather than in statute. Constitutional provisions are hard to amend or replace, and having such laws enshrined in its text makes it very difficult for the Nevada Legislature to respond to changing economic conditions or exigencies. The same is true of tax provisions affecting individual industries (Art. X, § 5 & 6), or details affecting eminent domain proceedings (Art. I, § 22), for example.

For many years, I have represented groups proposing ballot measures, and I am often involved in the early stages of drafting. One thing I can report is that the choice between circulating a constitutional amendment versus a statutory initiative rarely comes down to which form best suits the kind of law being proposed. More often, the choice is a political one. Ballot measure proponents are attracted to constitutional measures for a variety of reasons, including:

1. If successful, constitutional measures are harder for opponents to amend later on, so a long-term legal impact is assured;
2. Many times initiative proponents have been frustrated by legislative attempts at lawmaking, and constitutional measures go directly to the people at a general election; and
3. Due to the specific calendar of constitutional initiative procedure in Nevada law, it is far easier to run those efforts to coincide with a targeted election cycle, to the benefit of those who want to raise turnout or draw sharp distinctions between political parties or candidates.

It is no use suggesting a constitutional convention (Art. 16, § 2) to revise and refresh the Nevada Constitution; in our current political climate, that could do more harm than good. What we can do—as lawyers and electors—is begin to raise the level of respect we show the state constitution in our practices, and to educate our fellow Nevadans. There is nothing wrong with the Nevada Constitution that is not, first and foremost, a reflection of what may be wrong with us. Let's start there.

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