

Draft  
Formal State Constitutional Change Processes  
Gerald Benjamin  
Friday, October 1, 2002

Constitutions are written by people. Humans are neither infallible nor prescient. Thus no written constitution ought to be regarded as immutable. All must anticipate the need for change.

**Two Means of Change:** Constitutional change in democracies occurs in two ways: by altering the meaning of the document through interpretation, or by altering the text of the document through amendment or revision. For the United States Constitution, change through interpretation predominates. State constitutions are also frequently changed through interpretation, but for them textual change is far more common. This essay confines its attention to methods for achieving textual change, or "formal" change, in American state constitutions.

**Democratic Theory Requires Popular Ratification:** Contemporary formal constitutional change processes almost always includes two steps: proposing changes and adopting changes. Taking the second of these first, at the beginning of the twenty-first century in all states but Delaware the adoption of a formal constitutional change required a popular vote. Alan Tarr has clearly demonstrated the degree to which early American state constitutions explicitly or indirectly emphasized popular authority.<sup>1</sup> Relatively early in the nation's history state constitutions came to be created through special processes -- conventions elected for the explicit, singular purpose of drafting and proposing them -- with the results of their work subject to public ratification.<sup>2</sup> This gave the final word on the structure of governance to the sovereign people. Since the highest authority in democracy, the sovereign people, is the source of state constitutions, it follows that this same authority must also authorize alterations to them: thus the requirement for popular ratification of constitutional amendments or revisions.

**Constitutional Location of Change Processes:** Modern drafters usually include provisions for legislatively initiated constitutional amendment or revision, or for the calling of constitutional conventions, in a separate article in the document devoted to constitutional change.<sup>3</sup> Some constitutions, however, place provisions for amendment in the legislative article, or in a general or omnibus article. Provisions for popularly initiated amendment or revision are variously including in the article on the amending process, the legislative article, or in separate articles providing for initiative and referendum.<sup>4</sup> To reduce complexity

---

<sup>1</sup> . . . G. Alan Tarr. *Understanding State Constitutions* (Princeton: Princeton University Press, 1998) pp. 73-74.

<sup>2</sup> . John Alexander Jameson. *The Constitutional Convention: History, Powers and Modes of Proceeding* (New York: Charles Scribner and Company, 1867) chapter VII.

<sup>3</sup> . Five early American state constitutions, New York's among them, lacked amending clauses. Tarr, (1998) .p. 35. See also Burton C. Agata. "Amending and Revising the New York Constitution," in Gerald Benjamin. *The New York State Constitution: A Briefing Book* (Albany: The Temporary State Commission on Constitutional Revision, 1994) p. 42.

<sup>4</sup> . Formal Change Provisions for State Constitutions: Alabama sections 284-287; Alaska, Article XIII; Arizona, Article 21; Arkansas, Section 22; California, Article 18; Colorado, Article XIX; Connecticut, Articles XII, XIII; Delaware, Article XVI; Florida, Article XI; Georgia, Article X; Hawaii, Article XVII; Idaho, Article XX; Illinois, Article XIV; Indiana, Article 16; Iowa, Article X; Kansas, Article 14; Kentucky, Sections 256-263; Louisiana, Article XIII; Maine, Article X; Maryland, Article XIV; Massachusetts, Article XLVIII; Michigan, Article XII; Minnesota, Article IX; Mississippi, Article 15, Section 273; Missouri, Article XII; Montana, Article, XIV; Nebraska, Article CXV; Nevada, Article 16; New Hampshire, Article 100; New Jersey, Article IX; New Mexico, Article XIX; New York, Article XIX; North Carolina, Article XIII; North Dakota, Article III, Section 9, Article IV, Section 17; Ohio, Section 16; Oklahoma, Article 24; Oregon, Article XVII; Pennsylvania, Article XI; Rhode Island, Article XIV; South Carolina, Article XVI; South Dakota, Article XXII; Tennessee, Article XI, Section 3; Texas, Article 17;

and assure full understanding of available options, there is virtue in a single constitutional location for all means for formal constitutional change available to the polity.

**Amendment and Revision:** Analysts distinguish between textual change of constitutions by amendment and by revision. Amendment is "the alteration of an existing constitution by the addition or subtraction of material." Revision is "replacement of one constitution by another."<sup>5</sup> "Revision" is specifically referenced in the constitutions of twenty-three states.<sup>6</sup> The language of many state constitutions is not as precise as is desirable regarding this distinction between amendment and revision.

**Four Means of Proposing Amendments:** All states constitutions permit amendments to be formally proposed by state legislatures. As beneficiaries of the political and governmental status quo legislators are frequently resistant to change in the structure and process of the state government. Twenty five state constitutions therefore provide methods for amendments to be proposed without legislative participation: by popular petition (the constitutional initiative), state constitutional commission, or constitutional convention.<sup>7</sup> All states should consider the inclusion in their constitutions of paths to change that do not rely on acquiring the support of those holding power in the sitting government.

**Revision by Convention, and Elsewise:** Broader scale constitutional revision is likely to require the calling of a state constitutional convention, though at least six states allow constitutional revision through the legislature, and at times "sets of amendments" passed simultaneously have "substantially altered the character of state government."<sup>8</sup> Forty-one state constitutions explicitly provide for conventions to be called by state legislatures. Courts in other states have found in their constitutions an implied power to call a convention.<sup>9</sup> Perhaps to avoid this, Missouri's document states explicitly that "This constitution may be revised and amended only as therein provided."<sup>10</sup> North Carolina's constitution also expressly limits change methods to those specified in it.<sup>11</sup> Fourteen state constitutions provide for automatic periodic placement on the ballot of the question of whether a constitutional convention should be held.<sup>12</sup>

---

Utah, Article XXII; Vermont, Section 72; Virginia, Article XIII; Washington, Article XXIII; West Virginia, Article XIV; Wisconsin, Article XII; Wyoming, Article 97-20.

<sup>5</sup> . Tarr. (1998) p. 23. Writing in 1987, Michael Colantuono noted that six state courts had established "nonrevision requirements" limiting the scope of state constitutional change permissible through amendment. He cites as the leading case *McFadden v. Jordan*, 32 Cal. 2d. 330, 196 P. 2d 787 (1948). See his "The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change," 75 *California Law Review* 1473, at 1478 and note 27.

<sup>6</sup> . Alaska, Alabama, California, Colorado, Florida, Hawaii, Idaho, Illinois, Kansas, Louisiana, Michigan, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah and Virginia.

<sup>7</sup> . See Gerald Benjamin and Melissa Cusa. "Constitutional Amendment Through the Legislature in New York," in G. Alan Tarr (ed.) *Constitutional Politics in the States* (Westport: Greenwood Press, 1996) Table I, p. 50.

<sup>8</sup> . These six states are California, Florida, Hawaii, Georgia, North Carolina and Oregon. See Colantuono, note 33. Tarr (1998). P. 24.

<sup>9</sup> . See Colantuono (1987) p. 1480 and notes 25 and 34.

<sup>10</sup> . Article XII. Section 1.

<sup>11</sup> . Article XIII. Section 2.

<sup>12</sup> . See Gerald Benjamin. "The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context," 65 *Albany Law Review* 1117 ( 2002).

The Florida constitution explicitly provides for the calling of a convention by the use of initiative and referendum.<sup>13</sup> In Georgia, Idaho and Kentucky courts have permitted legislatures to seek ratification of constitutions they have drafted without explicit constitutional authority to do so.<sup>14</sup> An attempt to revise the Oregon constitution through the initiative was invalidated in the courts.<sup>15</sup>

**Detail:** State constitutions are frequently criticized for inclusion in them of material that is "statutory in nature."<sup>16</sup> Christopher Hammond has calculated that "States devote an average of forty percent of their constitutions to ... matters that most political scientists and constitutional experts consider extraneous at best. When measured in total number of provisions, states devote an average of 324 provisions to policy type issues, [c]ompared to the U.S. Constitution, which devotes only fourteen ... of its 240 provisions to policy type issues."<sup>17</sup> The result, critics argue, is constitutions that are excessively and inappropriately detailed.

What has been less noticed is that provisions for change that bypass the legislature are themselves a locus of considerable constitutional detail. Specificity in this area of constitutional process is a means of protection from legislatures' oft manifest hostility to the prospect of being bypassed in the restructuring of state government. There is ample experience that legislatures, either through action or inaction, raise barriers to constitutional processes that might produce results contrary to their interests.<sup>18</sup> To avoid being stymied by legislative hostility, constitution makers seek to make these provisions for amendment or revision "self executing," that is, operable without any need for legislative action.<sup>19</sup> The goal is to set out in detail in the constitution, beyond the easy reach of the legislature, when, how and by whom these amendment processes are to be made to work.

Yet detailed specification of the processes for amendment and revision used to bypass the legislature may have a number of unintended consequences. The first is to specially empower state high courts - already the key sources of constitutional change through interpretation -- in the textual change process. When detailed procedures are embedded in the constitution these courts not only get to say with finality what the constitution means, but what the constitutional change process requires. The second may be to block rather than facilitate change efforts. A constitutional provision designed in one era to bypass barriers to change -- e.g., the New York provision making the pay for a convention delegate equal to that of a legislator -- might itself become a barrier in a later era, in a very different political context. Finally, detail in the constitution does not bar further detail and process specification through legislation. The resulting

---

<sup>13</sup> . Article XI. Section 4.

<sup>14</sup> . Colantuono (1987) p. 1480. For detail on Georgia see Joseph Zimmerman. *The Referendum: The People Decide Public Policy* (Westport, Ct: Praeger, 2001) pp. 73-74, citing *Wheeler v. Board of Trustees of Fargo Consolidated School District, et. al* 200 Ga. 323, 37 S.E. 322 (1946).

<sup>15</sup> . *Holmes v. Appling* 237 Or. 546, 392 P. 2d 636 (1964) cited by Colantuono (1987) at Note 42.

<sup>16</sup> . See, for example, Zimmerman (2001) pp. 229-230. See also National Conference of State Legislatures Initiative and Referendum Task Force. *Initiative and Referendum in the 21<sup>st</sup> Century: Final Report and Recommendations*. (Washington: the Conference, 2002) p 10.

<sup>17</sup> . Christopher W. Hammond, "State Constitutional Reform: Is It Necessary?," *Albany Law Review* (Vol. 64, 2001) p. 1333.

<sup>18</sup> . See Benjamin (2002) and Albert L. Sturm, *Thirty Years of State Constitution Making: 1938 - 1968* (New York: National Municipal League (1970) pp. 23-24.

<sup>19</sup> . In fact the Alaska Constitution seeks, as far as practicable, to make the entire document self-executing. See Article 12, section 9, cited in Zimmerman (2001) p. 74, f.n. 25.

combined effect of constitutional provisions, added statutory requirements and court interpretations might considerably enhance the relative difficulty of constitutional change without legislative participation.<sup>20</sup>

**Difficulty of Change Compared to Passing State Law.** Whatever means is used, the process for proposal of constitutional amendment or revision in the states is intentionally structured to make constitutional change more difficult than the adoption ordinary legislation. Moreover, the difficulty is enhanced by the requirement of an additional step for ratification (in all states but Delaware). This is as it should be, most authorities think, for constitutions are (or ought to be) fundamental law. Moreover, protections that constitutions afford minorities would mean little if they were as easily changeable by majorities as is ordinary law.

**Change Easier at the State than the National Level.** As we shall see below, there are differences in detail from state to state in processes for constitutional amendment and revision that make them more or less difficult. But generally, formal state constitutional change is far more frequent than formal change at the national level for at least three reasons.

First, the U.S. constitution has importance as a symbol of national unity. Amendment of this iconic document is therefore approached with enormous caution.

Second, the formal national amending process is far more difficult than that of any single state; at minimum, it requires supportive action by thirty nine separate governments (the national government and thirty-eight state governments). Within the states John Dinan has documented a general evolution over the nineteenth and twentieth centuries to a "more flexible" amending process.<sup>21</sup> The result is more frequent amendment, and greater constitutional length.

Third, the substance of state constitutions, the inclusion in them of much detail (often of matter that some might not regard as "constitutional") invites -- even requires - more frequent amendment for the effective operation of state government. Writing in 2001, Christopher Hammond noted that "[w]hile the U.S. Constitution has only been amended twenty-seven times in over 200 years, ... state have an average of 130 amendments, with Alabama having a high of 664 ... (most of them dealing with local issues) and Illinois having a low of eleven. The median number of amendments is 102 for all fifty state constitutions."<sup>22</sup>

What is true for amendment is also true for revision. The process provided in the U.S. Constitution for revision has never been used. In contrast, state constitutional revision has been relatively frequent. There have been more than 230 separate constitutional conventions in the United States, and 146 state constitutions adopted.

---

<sup>20</sup> . The constitutionality of statutory provisions in Colorado attendant to the initiative process were addressed in *Buckley v. American Constitutional Law Foundation, Inc.* 525 U.S. 182 (1999) and discussed in T.J. Halstead. *State Regulation of the Initiative Process* (Washington: Congressional Reference Service, February 16, 1999. RL30067). See also Garriga, "Initiative and Referendum..." for a discussion of a statutory scheme in Mississippi that, the author argues, combined with a detailed constitutional provision renders the Mississippi indirect initiative extremely difficult to actually employ.

<sup>21</sup> . John Dinan, "The Earth Belongs Always to the Living Generation": The Development of State Constitutional Amendment and Revision Procedures," *The Review of Politics* (Vol. 62, No. 4, 2000) pp. 645 - 674.

<sup>22</sup> . Hammond, ( 2001) pp 1333-34.

## PROPOSAL OF AMENDMENTS

Over the course of American history about nine of ten state constitutional amendments have been proposed through state legislatures. Generally, amendments offered through the legislature have been far more likely to be ratified by the voters than those offered by popular initiative, but have enjoyed a lesser success rate than those offered by conventions.<sup>23</sup> Research on New York demonstrated that amendments proposed by the legislature "rarely deal with the distribution of power in state government, and those that do are not designed to limit or constrain the principle political institutions or actors."<sup>24</sup> Legislatively initiated amendments are still more likely to be ratified than those proposed by other means, though the rate of approval for those offered as the result of the constitutional initiative have increased in recent years.<sup>25</sup>

### Through the Legislature

There are three approaches in state constitutions for proposal for constitutional amendment through the legislature.<sup>26</sup>

- Nine states use single passage by simple majorities of members elected to both legislative houses.
- Fifteen states require passage in two successive sessions, with some requiring an intervening general election. Simple majorities at each passage are required in twelve of these. In Massachusetts this is a simple majority of the two chambers sitting together. In Delaware (where, recall, no popular ratification is required) two thirds majorities of each house must pass an amendment twice for it to be adopted. Tennessee requires first passage of an amendment by majorities in both houses; second passage, however, requires two thirds majorities. In Vermont in partial contrast, the proposal of an amendment requires a two thirds majority in the Senate and a simple majority in the House on first passage. Second passage requires a simple majority in both chambers. In South Carolina, two-thirds of each house is needed to propose an amendment. Unlike in other states, the second legislative vote follows popular ratification; for it, simple majorities in each house are required.
- Twenty-nine states require extraordinary majorities in each house to propose amendments. In ten of these a three-fifths majority is required. In eighteen, the requirement is two-thirds. And in one, Connecticut, it is three quarters.

Note that the number of methods for proposing a constitutional amendment exceeds the number of states, because Connecticut, Hawaii, New Jersey and Pennsylvania -- four states with relatively recently adopted constitutions -- offer their legislatures alternatives: simple majorities with dual passage, or extraordinary majorities with single passage (though in Pennsylvania, only for emergencies). Provisions for size of majority and frequency of passage are often linked. Single passage appears with extraordinary majority required; passage twice with simple majority.

Between 1992 and 2000, 862 constitutional amendments were proposed in American state legislatures, and 664 adopted, for an adoption rate of 77%.<sup>27</sup> Research by Donald S. Lutz has shown that

---

<sup>23</sup> . Lutz. "Patterns..." (1996) p. 40.

<sup>24</sup> . Benjamin and Cusa (1996) p. 67.

<sup>25</sup> . Council of State Governments. *Book of the States, Volume 33* (Lexington, Ky.: The Council, 2000) Table 1.6, p. 11.

<sup>26</sup> . Council of State Governments. (2000) Summarized from Table 1.2, p. 5.

<sup>27</sup> . Council of State Governments (2000) Calculated by the author from Table 1.6, p. 11.

when a simple majority is used to propose an amendment, requiring double passage does not make the amending process substantially more difficult. However, requiring extraordinary majorities does make amendment significantly harder to achieve. And requiring extraordinary majorities and double passage raises very substantial barriers to the possibility of constitutional amendment.<sup>28</sup> However Bruce Cain and associates have shown that . "States with more onerous procedures have yearly adopted LCA... [legislative constitutional amendment]... rates that are as great or greater than those with less onerous procedures." They conclude also that "States that make it more difficult to pass LCAs out of the legislature tend to have the highest LCA success rates."<sup>29</sup>

**Process:** Amendments may generally be introduced by any member in either house. In some states a minimum time or a number of readings is specified before the legislature may act. Additionally, the New Jersey constitution requires a public hearing before a legislative vote on an amendment. Where a second passage in a following session is required, an elapsed time before second passage is also often indicated. Most constitutions require that the results of the legislative vote on an amendment be properly recorded in the Journal of each house. Failure to follow a constitutionally specified recording procedure caused at least one state high court to invalidate an amendment after passage.<sup>30</sup> The Illinois constitution specifies that a majority of the legislature that proposes an amendment may withdraw it (though three fifths are required to submit it). California provides for withdrawal by the same majority as passage.

**Responsibility of Other State Officials:** Though many leave it entirely to the legislature, some state constitutions charge the secretary of state with receiving proposed amendments after passage, assuring that they are properly considered by the electorate and proclaiming the results. In those states, the secretary of state is usually also responsible for preparing the form of the ballot question, sometimes within constitutionally prescribed guidelines requiring impartiality. Alternatively, as in Alaska, the task may fall to the lieutenant governor. In Alabama and Vermont the governor must timely "give notice" of or "proclaim" an election on a constitutional amendment. In Ohio responsibility for preparing ballot language (with an explanation of proposed amendments and arguments in favor and against) is given to a board that includes the secretary of state and four others, no more than two of whom may be in the same political party. The sole constitutional responsibility of the Attorney General in New York is "to render an opinion in writing to the senate and assembly as to the effect of ...[an] amendment or amendments" within twenty days after it is filed.

**Limits:** Constitutional limits on the amending process through the legislature seek to assure that the ratification process is manageable for voters, and that they have the unbiased information they need about proposed amendments so that they may vote intelligently.

*Number of Amendments offered by One Session:* In Arkansas the legislature may propose to the voters no more than three amendments in any one year. In Kentucky the limit is four; in Kansas five. Similarly, the Illinois legislature may propose to amend no more than three articles of the constitution in any one year. The Colorado legislature is limited to seeking alteration of six articles in any one session.

---

<sup>28</sup> . Lutz (1996) Table 2.8, p. 41.

<sup>29</sup> . Bruce E. Cain, Sara Ferejohn, Margarita Najjar and Mary Walther. "Constitutional Change: Is It Too Easy to Amend Our State Constitution?" in Bruce E. Cain and Roger G. Noll (eds.) *Constitutional Reform in California* (Berkeley: Institute of Governmental Studies Press, University of California, 19995) pp. 273 and 276.

<sup>30</sup> . *State ex. rel. Stevenson v. Tufly* 19 Nev. 391 (1887)

*Single Subject:* Amendments are generally limited to a single purpose (or in Louisiana, "object"), though a number of state constitutions specifically allow a number of articles to be altered by an amendment pursuant to a single purpose.<sup>31</sup>

*Election Timing:* In most states, amendments may be considered at either general or special elections. A few -- Connecticut, Kentucky and New Hampshire are examples -- require submission at a general election only. In West Virginia, if a special election is used for consideration of constitutional amendments it may not be used for another purpose.

*Separate Vote:* State constitutions generally provide for a separate vote on each proposed amendment. In Oregon, however, an amendment submitted by the initiative and one submitted by the legislature may be framed as alternatives in a single question so that "one provision will become a part of the Constitution if a proposed revision is adopted by the people and the other provision will become a part of the Constitution if a proposed revision is rejected by the people."

*Limits on Resubmission:* If an amendment proposed by the legislatures of New Jersey fails, neither it nor a similar change may be submitted again to the voters until two general elections have passed. In Pennsylvania, five years must pass before resubmission.

*Time for Consideration, Publicity and Information:* Most constitutions specify a minimum period of time that must pass after legislative approval (three months is common) before a vote on an amendment may occur. During this time publication of the text, a summary description and other information about the amendment or amendments is often required. The Missouri constitution requires publication in "two newspapers of different political faiths" in each county. In Georgia, a summary of any proposed amendment must be prepared by the attorney general, the legislative counsel, and the secretary of state and published throughout the state. Idaho specifically requires publication of arguments for and against each amendment. As noted, Ohio has a similar requirement. A unique provision in New Mexico requires publication in both English and Spanish, with the legislature also making "reasonable efforts" to communicate the substance of proposed constitutional amendments in indigenous languages and minority language groups.

*"Cumulative" Provisions:* the California constitution bars amendments with cumulative provisions under which "one or more.... [elements]...would become law depending upon the casting of a specified percentage of votes for or against the measure."<sup>32</sup>

**Court Challenges:** In Ohio, a constitutional deadline is established for court challenges to a proposed amendment. The state Supreme Court is given original jurisdiction. Amendment language may be invalidated only if found likely to "to mislead, deceive, or defraud the voters." The Ohio constitution also provides that "An election on a proposed constitutional amendment submitted by the general assembly shall not be enjoined nor invalidated because the explanation, arguments, or other information is faulty in any way."

**Home Rule:** In Georgia constitutional amendments must have "uniform and general applicability throughout the state." The Louisiana constitution requires amendments that affect five or fewer parishes to be passed by both statewide and parish-wide majorities to become effective. Similarly, in Maryland if an amendment is found by the legislature to affect just one county or the city of Baltimore, it must pass with a majority in the potentially effected locality as well as one statewide. The California constitution prevents the legislature from passing amendments that "Include or

---

<sup>31</sup>. Generally on the single subject rule see Martha J. Dragich, "State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges" *Harvard Journal on Legislation* Vol. 38 (Winter, 2001) pp. 103 - 167.

<sup>32</sup>. Article 4.8.5 b)

exclude any political subdivision of the State from the application or effect of its provisions based upon approval or disapproval of the measure, or based upon the casting of a specified percentage of votes in favor of the measure," within a jurisdiction.<sup>33</sup>

**Substantive Limits:** A provision in the Alabama constitution that the legislature may not amend the constitution to change the basis of legislative representation from population echoes the requirements of federal law. The constitution of New Mexico requires higher popular majorities to change provisions on franchise and education than to make other amendments.

**Ratification:**<sup>34</sup> In Delaware, as noted, no popular ratification is required to amend the state constitution. The vast majority of states (forty-three) require a majority of those voting on the question to ratify amendments proposed by the legislature. In Hawaii this number must also equal fifty percent of those voting in a general election is also required, or the equivalent of thirty percent of those registered in a special election. In Nebraska this majority must also exceed thirty-five percent of those voting in the election.

In some states specified substantive changes require special majorities. Support of two thirds voting on the question in Florida is needed if an amendment imposes a new tax or fee.<sup>35</sup>

New Hampshire requires a two-thirds favorable vote on the question to adopt an amendment. Passage of amendments requires support of a majority of those voting in the election in Minnesota and Wyoming. In Tennessee adoption requires backing by the number of voters equal to a majority voting in the gubernatorial election. In Illinois support is required by either a majority in voting in the election or three fifths voting on the question.

**Effective date:** Most state constitutions specify an effective date for amendments once they are ratified.

### Without Legislative Participation

As noted above, twenty five states provide for a means of constitutional amendment that bypasses the legislature. Tax limitation and legislative term limitation, the two most far reaching structural reforms in state government of the late twentieth century, were achieved largely through the use of the constitutional initiative.<sup>36</sup> Sixteen states, most in the mid-west and west, permit direct access to the ballot

---

<sup>33</sup> . Article 4.8.5 a)

<sup>34</sup> . See *Book of the States, 2000-2001*, (2000) pp. 5-6, Table 1.2.

<sup>35</sup> . See the discussion of "Home Rule" ratification provisions, above.

<sup>36</sup> . Alan Tarr summarized developments in the use of the constitutional and statutory initiative in the states during the 1990's thusly: "...]D]uring the 1990s, voters in twenty-one states established term limits for state legislators, and in five states they placed such limits on executive branch officials as well. California complemented its attack on incumbency with the adoption of Proposition 140 which prohibited legislators from earning state retirement benefits and required major reductions in legislative agencies and staff. Other states have amended their constitutions to authorize the recall of state elected officials. Minnesota in 1996 brought the number of states employing this device to eighteen. Initiatives in three states have required a super-majority in the legislature to enact tax increases. Initiatives in two other states have tied increases in spending to the rate of inflation and to population increases. Additionally, a Colorado initiative has required voter approval for all new taxes. Indeed, the proliferation of constitutional initiatives itself suggests a profound skepticism about whether the institutions of state government can be relied upon to enact good policy. "The State of State Constitutions," *Louisiana Law Review* (Volume 62, Fall 2001) pp. 3ff. (footnotes deleted). See also Harry N. Scheiber, "The Direct Ballot and State Constitutionalism," *Rutgers Law Journal* (Volume 28, 1997) pp. 787 ff.

for constitutional amendments proposed by popular initiative.<sup>37</sup> In one of these (Illinois), however, the use of the initiative for constitutional revision is confined to the Legislative Article only, perhaps because this is the area of the constitution in which the legislature is likely to be most self-interested, and therefore least likely to initiate change.

An additional two states, Massachusetts and Mississippi, allow the use of the indirect initiative to propose amendments.<sup>38</sup> In Massachusetts, an amendment may not reach the ballot unless passed in two consecutive sessions by one quarter of the legislature sitting jointly. Upon first consideration, but not thereafter, an initiative proposal may be amended by three quarters of the legislature. The legislature may simultaneously present a substitute proposal with an initiative measure it passes. The Mississippi provision is closer to that suggested by the model state constitution.<sup>39</sup> There a constitutional initiative may reach the ballot without legislative action. If a proposal sent to it as a result of the indirect initiative is amended by the legislature both the original and the amended versions are placed on the ballot.

The indirect initiative has not yet been used in Mississippi, and is rarely successful in Massachusetts.<sup>40</sup> "Few initiated constitutional amendments survive this ...[the Massachusetts]... process and ultimately land on the ballot (three in the history of the state)," the Council of State Legislatures Task Force writes, but many initiatives that fail to pass the legislature succeed in prodding the legislature to take action on an issue."<sup>41</sup>

The use of the initiative process to achieve constitutional change is hotly debated. Critics argue that it is insufficiently deliberative, overly demanding upon voters, excessively susceptible to manipulation by moneyed interests, inconsiderate of minorities and, therefore, ultimately undermining of republican government. Defenders, with greater faith in the capacity of referendum voters to make reasonable choices, argue the legitimacy of direct action by citizen majorities and the utility of this mechanism for constraining entrenched self-interested elected officials. Resultant policies, they say, are no more subject to special interest influence than those made by legislatures, nor are they, in general, substantively less defensible.<sup>42</sup>

Of the states that use the direct initiative, six also provide for a periodic automatic referendum on whether to call a constitutional convention. Additionally, in eight non-initiative states there is a

---

<sup>37</sup> . For a brief but very valuable analysis of the debates in several states on adopting the constitutional initiative see John Dinan, "Framing a People's government: State Constitution Making in the Progressive Era," *Rutgers Law Journal* (Volume 30 , 1999) pp. 979 - 984.

<sup>38</sup> . <http://www.inadrinstitute.org/factsheets/>

<sup>39</sup> . Model State Constitution. Article XII, Sections 12.01 - 12.02. (New York: the National Municipal League, 1968).

<sup>40</sup> . Mark Garriga, "Initiative and Referendum in Mississippi, Dead Again? Available at [Ibid.](#), filed under "In Depth Studies."

<sup>41</sup> . CCL Task Force (2002) p. 9. For frustrations connected with the Massachusetts process in 2002 see Justin Pope, "Voter Initiatives Die at the Statehouse Door in Massachusetts, the Cradle of Liberty," Associated Press, Friday, August 2, 2002.

<sup>42</sup> . See David Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (Baltimore: Johns Hopkins, 1984), Thomas Cronin, *Direct Democracy: the Politics of Initiative, Referendum and Recall* (Cambridge: Harvard University Press, 1989), Shaun Bowler and Todd Donovan, *Demanding Choices: Opinion, Voting and Direct Democracy* (Ann Arbor: University of Michigan Press, 2000), David S. Broder, *Democracy Derailed: Initiative Campaigns and the Power of Money* (New York: Harcourt, 2000).

requirement for such an automatic voter referendum.<sup>43</sup> The Florida constitution specifically provides that the initiative process may be used to call a convention. Additionally in that state two commissions periodically come into existence that may propose constitutional amendments directly to the people.

### **Constitutional Initiative**

**Administration of the Process:** Because of their general responsibility for administering elections, Secretaries of State are typically charged in state constitutions with administering the constitutional initiative. In some states the Attorney General is constitutionally required to receive petitions, put them in proper form and prepare an official title and summary. It is important that the locus of responsibility for effecting this or any constitutional change process be clearly identified in the document.

**Correction of Error:** If he or she finds an error or errors in an initiative petition, the North Dakota constitution requires the Secretary of State to allow petitioners a period of twenty days to correct it.

**Timing:** State constitutions often require that complete initiative petitions advancing a constitutional amendment be filed by a specified date ( for example, four months in Arkansas, 90 days in Nevada) before the question is scheduled for a vote.

**General or Special Election:** Selection of the election at which a question will be considered is one key factor affecting the size of the electorate that will consider it. Most states allow constitutional amendments to be voted upon at general elections or, with legislative authorization, at special elections. However, Michigan, Montana n Nebraska, Nevada and Ohio specify a general election. Colorado allows constitutional change through initiative to be considered at the regular biennial general election only. Florida requires a three-quarters vote in each legislative house to permit a special election, and restricts its use to a single amendment question.

**Signature Gatherers:** North Dakota specifies that petitions be circulated only by electors. Oregon requires that signature gatherers be registered to vote in the state. Massachusetts specifically empowers the legislature, if it chooses, to bar paid signature gathers from circulating petitions. Oregon constitutionally empowers it legislature to bar payment on a per signature basis to paid gatherers. Limitations on the signature gathering process (most are statutory, not constitutional) that have been successfully challenged as violations of the First Amendment to the United States Constitution bring into question the viability of these state constitutional provisions.<sup>44</sup>

**Time Parameters for Gathering Signatures:** In Illinois, signatures advancing a constitutional amendment by initiative must be gathered within 24 months of the election date at which the matter will be placed on the ballot. In Nevada the person who intends to circulate a petition is required to file a copy with the secretary of state before beginning circulation and not earlier than September 1 of the year before the year in which the election o it is to be held.

**Public Information:** State constitutions include requirements that voters get neutral information on it before a question is brought to a vote, but also in at least one case while it is being circulated. Requirements are common that the text of amendments proposed through the initiative be published in newspapers of general circulation throughout the state at a specified time or during a specified period prior to the general vote. In Colorado the legislative research and drafting staff review proposed amendments and must comment on them in a public meeting within two weeks of their being filed with it. This same

---

<sup>43</sup> . See Gerald Benjamin, "The Mandatory Constitutional Convention Question Referendum: the New York Experience in National Context," 65 *Albany Law Review* 1017 (No. 4, 2002), and Robert J. Martineau,, "The Mandatory Referendum on Calling A state Constitutional Convention: Enforcing the People's Right to Reform Their Government," 31 *Ohio State Law Journal* 421 (1970).

<sup>44</sup> . See Zimmerman (2001) pp. 84 - 87, citing *Meyer v Grant* 108 S. Ct. 1886 (1988) and *Buckley v. American Constitutional Law Foundation, Inc.* 119 S. Ct. 636 (1999).

nonpartisan staff is required to prepare and publishes a voter information pamphlet thirty days prior to the vote on a constitutional initiative question. No publication or information requirements yet require or allow the use of television, the internet or interactive technologies.

**Signature requirements:** Paralleling the higher threshold for legislative action to propose formal constitutional change, petitions proposing amendments to state constitutions generally require more signatures than those proposing ordinary law.

*The Base.* The signature requirement is universally stated as a percentage of a base. The selection of the base is critical; a base election with higher turnout elevates the signature requirement. Most commonly, the base is the vote in the previous gubernatorial election. Other bases used are voters in the previous election for secretary of state (Colorado), for presidential electors (Florida), for the state office receiving the highest number of votes (Oklahoma), or those who voted in the entire state (Nevada). North Dakota does not use an election as the base for determining the petition signature requirement, but the population of the state.

*The Percentage.* Percentages required vary from a low of 3% (Massachusetts) to a high of 15% (Arizona), with 8% or 10% most common.

*Geographic Distribution.* In nine states a geographic distribution of signatures (e.g. in Nebraska, signatures equal to 10% of the gubernatorial vote in the last election must include at least 5% of that vote in 2/5 of the counties) or a maximum proportion of signatures from a specified geographic location (e.g. in Mississippi, no more than 20% from any one Congressional District) may add to the demands of the signature gathering process. Such a requirement does assure that support for a proposal is not concentrated in a single large population center.

*The Number.* Massachusetts sets an absolute minimum of 25,000 for the signature requirement. In other states the number of signatures required shifts with voting participation, which itself is partly a function of population growth.

*Petition Form or Format:* Some state constitutions (e.g. Colorado, Nevada) constitutionally specify petition form or format.

**Procedural Limitations.** A study of court challenges to attempts to amend state constitutions through the use of the initiative in California, Colorado, and Oregon described "structural and procedural rules" as one of two primary categories on which challenges were based. These included "a requirement that an initiative not contain more than a single subject; a rule that an initiative cannot revise the state constitution; a rule that if two competing initiatives are in conflict, the one receiving the larger number of affirmative votes prevails over the one receiving fewer votes; a requirement that states cannot impose additional qualifications for members of Congress beyond those contained in the U.S. Constitution; and a rule that states cannot enact laws that directly conflict with federal law."<sup>45</sup>

**Single Subject or Single Article and Clear Identification of the Amendment Subject in the Title.** A constitutional limitation of each amendment to a single subject, or a single article, is common for constitutional amendments advance by popular initiative. These rules are similar to

---

<sup>45</sup> . Kenneth P. Miller. "The Role of Courts in the Initiative Process: The Search For Standards," Paper delivered at the 1999 Annual Meeting of the American Political Science Association, Atlanta Marriott Marquis and Atlanta Hilton and Towers, September 2-5, 1999. On this rule and the initiative in California see Daniel Lowenstein, "California and the Single Subject Rule" *University of California Law Review* Vol. 30 (June, 1983), pp 936 - 975.

those that constrain the ordinary legislative process in most states. Such limitations have often been the subject of litigation.<sup>46</sup>

**Substantive Limitations.** According to one authority, half of the states that provide for constitutional amendment through the initiative process place no restrictions on the subject matter they may address.<sup>47</sup> Massachusetts bars the use of the initiative for matters concerning religion, judicial tenure, judicial decisions, abolition of courts, local matters, appropriations and protected rights. In California the initiative cannot be used to name a person to office or designate a private entity to perform a function or exercise a governmental power or duty. In Missouri, appropriations through the initiative process are bared. The Mississippi constitution bars the use of the initiative process to modify the state Bill of Rights, to amend or repeal statutory or constitutional provisions relating to the state public employee retirement system, to repeal the constitutional "right to work" provision, or to modify the initiative process itself.<sup>48</sup>

**Question Form:** In some states (Arkansas, Massachusetts, Missouri), the general form of initiative petitions or ballot questions is specified in the constitution.

**Financial Impact:** The Mississippi constitution requires that a fiscal analysis of proposed amendments be prepared by the chief legislative budget officer and be included on the ballot.

**Conflicting Outcomes:** If two conflicting amendments are passed in a single election, some state constitutions provide that the one that gained the most votes must prevail. In Hawaii, if an amendment proposed by a convention and one proposed by the legislature conflict, and both pass at referendum, the former prevails.

**Resubmission:** the Nebraska constitution bars the resubmission by the initiative of the same question (in form or substance) more than once in every three years. In Mississippi, a provision that fails at the polls must be off the ballot for two years before it is offered again to the voters.

**Vote to Ratify:** In Illinois ratification requires three fifth voting on the question or a majority voting in the election. Arizona and Michigan require amendments to be passed by a majority of those voting in the election. Nebraska requires that the vote of a successful initiative amendment be a majority on the question, and at least thirty-five per cent of the total vote cast at the election. In Nebraska, amendments must be ratified by majorities on the question in two successive elections. In the Mississippi indirect process an initiative or legislative alternative must receive a minimum of forty percent the total votes cast. Moreover, if an initiative proposal and a legislative alternative are presented, voters must vote twice: first for approval of either measure or against both measures, and then for one or the other measure.

**Effective Date:** It is common for state constitutions to specify an effective date for an amendment offered by this method, once it is adopted.

### The Constitutional Commission

As an alternative means of bypassing the legislature to achieve constitutional change, the Florida constitution provides for two commissions. These commissions may place proposals directly on the ballot, are constitutionally required to convene automatically every ten years, no more than thirty days after the

---

<sup>46</sup> . See, for example, "Developments in State Constitutional Law," Rutgers Law Journal (Vol. 32, Summer, 2001) p.p. 1549ff.

<sup>47</sup> . Todd Donovan and Shawn Bowler. "An Overview of Direct Democracy in the States," at <http://www.inandrinstitute.org/> filed under "In Depth Studies."

<sup>48</sup> . Article 15, Section 273.5.

close of the legislative session.<sup>49</sup> The Constitutional Revision Commission, which may consider the entire document, has thirty seven members, with no single political actor controlling a majority: fifteen are appointed by the governor, nine by the Speaker of the House; nine by the President of Senate, and three by the Chief Justice of the Supreme Court. The chair is designated by the Governor. The Taxation and Budget Reform Commission acts only on matters concerning the state's fiscal need and policies and budgetary processes. It has twenty-nine members. Eleven are selected by the governor, seven by the Majority Leader, and seven by the Speaker. Legislators may not be among these twenty five. However, two from each house -- one from the major and one from the minority party- are appointed by the Speaker and Majority Leader to participate as non-voting members. The group chooses its own chair, who may not be a sitting legislator.

Though not immediately upon first use, the commission process in Florida has resulted in considerable constitutional change. A legitimacy issue arises concerning commission proposals because most commission members, unlike legislators and constitution convention delegates, are not popularly elected. But the commission mechanism was popularly ratified, most commissioners are appointed by elected officials, and their work -- like that of all sources of constitutional change proposals -- is subject to popular ratification. Moreover in 1980, Florida votes rejected an amendment proposed by the legislature that would have abolished the revision commission process.<sup>50</sup> Analysts of successes in 1997-98 emphasized the dependence of commission success upon extensive preparatory work, outreach in agenda formation, a self imposed super-majority rule for decision making and effective communication prior to the vote.<sup>51</sup>

The New Mexico constitution provides for an "independent commission established by law" that might propose constitutional changes to the legislature.<sup>52</sup> In Utah such a commission is not constitutionally based but established by statute to "Conduct a comprehensive examination of the Utah Constitution, as amended, and make recommendations to the governor and the Legislature as to specific proposed constitutional amendments to implement the commission's recommendations for changes in the constitution."<sup>53</sup> The Utah Commission has had some success in initiating constitutional changes that have gained legislative approval. Neither the New Mexico nor the Utah Commission is provided direct ballot access to present their proposals.

---

<sup>49</sup> . Article XI, Sections 2 & 6.

<sup>50</sup> . Robert Williams, "The Role of the Constitutional Commission in State Constitutional Change, in Gerald Benjamin (ed.) *The New York State Constitution: A Briefing Book* (Albany: New York State Commission on Constitutional Revision, 1994) p. 78.

<sup>51</sup> . Robert Williams, "Is Constitution Revision Success Worth Its Popular Sovereignty Price?" *Florida Law Review* (Vol. 2, No. 2, April 2000) pp. 249 - 273; Rebecca Mae Salokar, "Constitutional Politics in Florida: Pregnant Sows or Deliberative Revision?" Paper given at the Annual Meeting of the American Political Science Association, San Francisco California, August 30, 2001. For a range of opinions on the Florida experience see other essays in the above cited April, 2000 symposium issue of the *Florida Law Review*.

<sup>52</sup> . New Mexico Constitution, Article XIX, Section 1

<sup>53</sup> . Utah - Statutes 63.54.1-4, at 63-54-3a,b, c.

## REVISION BY CONVENTION

Constitutions in all but nine states explicitly specify processes for the calling of constitutional conventions.<sup>54</sup> They provide that state constitutional conventions may be proposed or called by legislatures, or be called as a result of automatic call provisions, or through use of the initiative.

**Proposed by the legislature:** In Illinois and Nebraska three quarters of the legislators elected must support a convention for a referendum on the matter to be authorized. South Dakota also requires three quarters, but no following popular vote is needed. Two thirds of the members elected are required to authorize a convention in an additional twenty states; in five of these, no popular referendum must be held. (In Maine the two-thirds majorities must be concurrent.) Finally, in sixteen states majorities elected to both houses may put a convention question on the ballot for voter approval. In Louisiana, these majorities must be obtained in two successive legislatures.<sup>55</sup> In Alabama a vote to call a convention may be repealed on by a vote at the same legislative session, requiring the same majority -at same session, by same vote, as when called.

**Proposed Through the Initiative:** the Florida Constitution provides for calling a convention only through use of the initiative. In South Dakota the initiative may be used to call a convention in the same manner as it is used to amend the state constitution.

**Automatic Convention Call:** Fourteen state provide that the people be automatically asked periodically whether they wish to hold a constitutional convention. In eight of these the period is twenty years, and in four ten years. Michigan has a convention question vote every sixteen years, and Hawaii every nine years.<sup>56</sup>

**Referendum Election Timing :** Constitutions generally require the referendum on a convention to be held in a general election year. Connecticut specifies a general election in an even numbered year. In Oregon and Oklahoma the question may be put at either a general or special election.

**Preparation for the Convention Vote:** The Rhode Island constitution requires the legislature to create a non-partisan commission to inform voters of potential constitutional issues prior to a vote on whether to call a convention.

**Popular Vote Requirement:** Of those states that call for popular ratification of a legislatively proposed convention before it is called, most (twenty-one) require the majority to be of those voting *on the question*. Two of these also specify a minimum required vote: one-quarter of those voting in the last general election in Kentucky, and at least thirty-five percent of the vote in the general election in which the referendum is held, in Nebraska. Ten states require support a majority of those voting *in the election* for a convention to be called. (Alternatively in Illinois a convention may be authorized by three fifths voting on the question.) Six of the ten states with the more demanding popular vote requirement also mandate extraordinary legislative majorities to propose a convention.<sup>57</sup> Finally, three states -- Arizona, Oklahoma, and Oregon -- are silent on the base of the popular majority required to call a constitutional convention.

---

<sup>54</sup> . Those that do not provide for calling conventions are Arkansas, Indiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Texas and Vermont. *Book of the States, 2000-2001* (Volume 33, 2000) p. 8, Table 1.4.

<sup>55</sup> . Council of State Governments. *Book of the States, 2000-2001*, p. 8, Table 1.4. The Alaska majority is drawn from an internal constitutional reference to following procedures for the 1955 convention, but is not explicitly specified. In the Hawaii constitution the majority is not specified.

<sup>56</sup> . Benjamin (2002) pp. 1018-1019, and footnote 12.

<sup>57</sup> . They are Minnesota, Nevada, South Carolina, Utah, Washington and Wyoming.

For automatic periodic referenda, a majority vote on the proposal is generally required for calling a convention. In Hawaii in 1996 an automatic convention call was supported by a majority of those voting on the question, but the measure failed because a majority of those voting in the election was required.<sup>58</sup>

**Limited or Unlimited Convention:** The Kansas constitution is most specific in providing for calling a constitutional convention with a limited agenda. Both the North Carolina and Tennessee constitutions also allow limited conventions. In Tennessee the legislature can limit a convention's substantive reach, but not its range discretion in acting on a specified subject one it is called.<sup>59</sup> A convention called in Pennsylvania in 1967 was limited to consideration of "...the judiciary, local government, reapportionment, and state finance articles and specifically prohibited consideration of a graduated income tax, alteration of the current requirement that all taxes be uniform within the jurisdiction of each taxing authority, or alteration of the motor vehicle license fund."<sup>60</sup> An attempt to use the indirect initiative to call a limited convention was blocked by the Supreme Judicial Court in Massachusetts in 1970.<sup>61</sup>

In contrast the Montana constitution specifies that a convention called through the use of the initiative be unlimited and the Alaska constitution refers to the power of a convention as "plenary," and says "No call for a constitutional convention shall limit these powers of the convention." Nine states in automatic referendum states specify the ballot question in their constitutions.<sup>62</sup> This precludes a limited convention resulting from this process. Inability to limit a convention if one is called, and the possibility of the calling of an unlimited convention resulting opening a "Pandora's Box," has been an argument used against calling a convention.<sup>63</sup>

### **Staffing, Convening, Structuring and Operating a Convention**

State constitutions vary enormously in the degree of detail with which they deal with the specifics of staffing, convening, structuring and operating a constitutional convention once it is called. There are three general approaches: minimal detail, maximum detail, and reliance on the legislature with constraining detail.

**Minimal Detail:** In those states in which legislatures control calling conventions constitutional provisions regarding conventions tend to be relatively simple and flexible. For example, the California constitution provides:

"The Legislature by roll call vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the

---

<sup>58</sup> . Benjamin (2002), p. 1044. Election outcomes for all mandatory constitutional convention referenda between 1970 and 2000 are given on page 1044.

<sup>59</sup> . Zimmerman (2001) citing *Cummings v. Beeler* 189 Tenn. 151, 223 S.W. 2d. 913 (1949) and *Snow v. City of Memphis* 527 S.W. 2d. 55 (1975).

<sup>60</sup> . Zimmerman (2001) pp. 121-122.

<sup>61</sup> . Zimmerman (2001) p. 75, citing *Cohen v. Attorney General* 357 Mass. 564, 259 N.E. 2d. 539 (1970).

<sup>62</sup> . Benjamin (2002) p. 1021, footnote 31.

<sup>63</sup> . See Peter Gailie and Christopher Bopst. The Constitutional Commission in New York: A Worthy Tradition, Albany Law Review (Volume 64, 2001) pp 1285ff.

convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable."<sup>64</sup>

Similarly, the Wisconsin constitution says:

"If at any time a majority of the senate and assembly shall deem it necessary to call a convention to revise or change this constitution, they shall recommend to the electors to vote for or against a convention at the next election for members of the legislature. And if it shall appear that a majority of the electors voting thereon have voted for a convention, the legislature shall, at its next session, provide for calling such convention."<sup>65</sup>

Provisions like these leave the legislature free, through enabling statutes dealing with such matters as delegate election and convention structure and operations, to allay fears that commonly arise about these venues for constitutional change being "...seen as distant from the general populace, another forum in which elite reformers and entrenched interests compete for political power."<sup>66</sup> Moreover, because ballot language for a convention call is not specified, there is even room in these provisions to test whether the agenda of a convention may be limited in the legislative call presented to the electorate. But this flexibility means little, because history shows that legislators rarely call conventions.

Politicians in power will rarely create a forum they may not control that might seriously alter the power relationships in the polity they govern. It is instructive that only three of the sixteen non-southern states in which the legislature has sole control over calling a constitutional convention have had more than one constitution in their history.<sup>67</sup> The average constitution's longevity in these states is significantly higher, and the number of constitutions adopted lower, than for non-southern states with an automatic referendum provision or that make no provision at all for calling a convention. (See Table I)

---

<sup>64</sup> . Article 18, Section 2.

<sup>65</sup> . Article XII, Section 2.

<sup>66</sup> . Tarr (2001) p. 12.

<sup>67</sup> . These states are California, Nebraska, and West Virginia. The other states in this group are: Arizona, Colorado, Idaho, Kansas, Maine, Minnesota, Nevada, New Mexico, Oregon, South Dakota, Washington, Wisconsin, and Wyoming. This analysis is confined to non-southern states because secession, reconstruction and reunification resulted in an extraordinary level of constitutional change in for the eleven states in the south that joined the Confederacy.

Table I

Convention Call Provisions, Mean Number of Constitutions and Average Constitution Longevity

(Non-Southern States Only)

Revision Provision	Number of States	Mean Number of Constitutions	Average Longevity (in years)
Periodic Automatic Referendum*	14	3.0	54.5
No Provision**	6	2.5	79.9
Legislative Call Only***	19	1.5	94.2
Total	39	2.2	80.3

\*Alaska, Connecticut, Hawaii, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, New Hampshire, New York, Oklahoma, Ohio, Rhode Island

\*\* Indiana, New Jersey, North Dakota, Pennsylvania, Massachusetts, Vermont

\*\*\* Arizona, California, Colorado, Delaware, Idaho, Kansas, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, West Virginia, Wisconsin, Wyoming

Source: Calculated by the author from data in Council of State Governments. *Book of the States, 2000-2001* (Lexington, Ky.: the Council, 2000) Tables 1.1 and 1.4, pp 3 and 8.

**Maximum Detail:** In states in which legislatures may be bypassed to call conventions, those with periodic automatic convention referenda, constitutional provisions tend to be highly detailed. This complexity arises from an effort to make the election of delegates and the organization and operation of the convention as minimally dependent as possible upon legislative support.<sup>68</sup>

In the case of New York the constitutional provision concerning calling a convention -- not dissimilar from that of a number of other automatic call states -- is more than six times as long as that of Wisconsin. It provides:

At the general election to be held in the year nineteen hundred fifty-seven, and every twentieth year thereafter, and also at such times as the legislature may by law provide, the question "Shall there be a convention to revise the constitution and amend the same?" shall be submitted to and decided by the electors of the state; and in case a majority of the electors voting thereon shall decide in favor of a convention for such purpose, the electors of every senate district of the state, as then organized, shall elect three delegates at the next ensuing general election, and the electors of the state voting at the same election shall elect fifteen delegates-at-large. The delegates so elected shall convene at the capitol on the first Tuesday of April next ensuing after their election, and shall continue their session until the business of such convention shall have been completed. Every delegate shall receive for his or her services the same compensation as shall then be annually payable to the members of the assembly and be reimbursed for actual traveling expenses, while the convention is in session, to the extent that a member of the assembly would then be entitled thereto in the case of a session of the legislature. A majority of the convention shall constitute a quorum for the transaction of business, and no amendment to the constitution shall be submitted for approval to the electors as hereinafter provided, unless by the assent of a majority of all the delegates elected to the convention, the ayes and noes being entered on the journal to be kept. The convention shall have the power to appoint such officers, employees and assistants as it may deem necessary, and fix their compensation and to provide for the printing of its documents, journal, proceedings and other expenses of said convention. The convention shall determine the rules of its own proceedings, choose its own officers, and be the judge of the election, returns and qualifications of its members. In case of a vacancy, by death, resignation or other cause, of any district delegate elected to the convention, such vacancy shall be filled by a vote of the remaining delegates representing the district in which such vacancy occurs. If such vacancy occurs in the office of a delegate-at-large, such vacancy shall be filled by a vote of the remaining delegates-at-large. Any proposed constitution or constitutional amendment which shall have been adopted by such convention, shall be submitted to a vote of the electors of the state at the time and in the manner provided by such convention, at an election which shall be held not less than six weeks after the adjournment of such convention. Upon the approval of such constitution or constitutional amendments, in the manner provided in the last preceding section, such constitution or constitutional amendment, shall go into effect on the first day of January next after such approval.<sup>69</sup>

---

<sup>68</sup> . A number of other states, Delaware, for example, also have detailed provisions. Two automatic call states, Iowa and Maryland are exceptions. They have very simple revision articles that rely entirely on the legislature for implementation. Iowa's reads: " in case a majority of the electors so qualified, voting at such election, for and against such proposition, shall decide in favor of a convention for such purpose, the general assembly, at its next session, shall provide by law for the election of delegates to such convention, and for submitting the results of said convention to the people, in such manner and at such time as the general assembly shall provide" Article X. Section 3.

<sup>69</sup> . Article XIX, Section 2.

The automatic convention call on a twenty year cycle was added to the New York Constitution in 1846. In a referendum vote required by this provision, the state's voters approved a convention in 1886. However, partisan difference between the Republican state legislature and a Democratic Governor blocked the election of delegates until 1893 and the convening of this convention until 1894. In reaction to this experience, delegates at this convention added detail to New York's provision for constitutional amendment and revision to assure that a convention, once called, would be staffed, and then could meet and do its work in a timely manner, the partisan circumstances in state government notwithstanding.<sup>70</sup>

In 1997, the requirements of these self-executing provisions were used as arguments against a convention when the automatic question provision again required a referendum. One of several possible examples illustrates the point. The New York Senate has been Republican controlled for almost the entire post-World War II period. Senate districts are redesigned every decade by incumbents to assure continuing GOP control of this body. Given this history, the use of these districts for delegate selection as required by the constitution, it was argued by opponents, would likely produce a Republican bias in any potential convention. Moreover, the employment of Senate districts as multi-member districts and the election of fifteen convention delegates at-large, both required by the constitution, raised voting rights concerns, and almost certainly assured litigation if a convention was authorized.<sup>71</sup> Thus a provision added in 1894 to expedite the convening of a convention if it was called came, a century later, to be the basis of arguments against one being called in the first place. The 1997 automatic convention question in New York was decisively defeated at the polls. This outcome was typical. Since 1970 only four of the twenty-five referenda held in states with periodic automatic call provisions have had positive outcomes, the last in 1984.<sup>72</sup>

**Reliance on the legislature, With Some Constraining Detail:** A third approach is to rely on the legislature to actually effect a convention if one is called, but direct its activity or build in constraints in specified areas where difficulties might be encountered. Thus, the Colorado constitution provides:

"Constitutional convention - how called. The general assembly may at any time by a vote of two-thirds of the members elected to each house, recommend to the electors of the state, to vote at the next general election for or against a convention to revise, alter and amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the general assembly shall, at its next session, provide for the calling thereof. The number of members of the convention shall be twice that of the senate and they shall be elected in the same manner, at the same places, and in the same districts. The general assembly shall, in the act calling the convention, designate the day, hour and place of its meeting; fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States, and of the state of Colorado, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of members of the senate; and vacancies occurring shall be filled in the manner provided for filling vacancies in the general assembly. Said convention shall meet within three months after such election and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary; which shall be submitted to the electors for their ratification or rejection at an election appointed by the convention for that

---

<sup>70</sup> . Agata (1994) pp. 45-46.

<sup>71</sup> . See Benjamin (2002) *passim* for a detailed discussion of the 1994-1997 experience in New York.

<sup>72</sup> . Gerald Benjamin, "The Mandatory Constitutional Convention Question Referendum: the New York Experience in National Context," *Albany Law Review* (Volume 65, No. 4, 2002) p. 1020.

purpose, not less than two nor more than six months after adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect."<sup>73</sup>

The difficulty of this and similar approaches (and even the most detailed approaches), of course, is that they may fail to anticipate all the means in which a hostile legislature might thwart the holding of a convention.

**Specific Areas of Detail:** A further review of specific areas of detail in state constitutional provisions concerning conventions reveals the concerns of drafters as they reacted to historic experience and drew lessons from the record in other states.

*Frequency of Conventions:* The Tennessee constitution limits the state to no more than one constitutional convention every six years.

*Size of the Convention:* Delaware's constitution calls for a convention of forty-one delegates. But generally when the size of a convention is constitutionally specified, it is with reference to the size of the state legislature. In Idaho the convention is to be twice the size of the most numerous legislative house; in Colorado twice the size of the Senate. A convention in Kentucky has the same number of members as the Assembly. In Maryland its total membership is equal to the combined membership of the legislative houses.

*Districting for Delegate Elections:* California requires that delegates be selected from "districts that are as nearly equal in population as may be practicable." Georgia has a similar requirement. Legislative districts are frequently specified for use in delegate selection. In Illinois, for example, two delegates are to be selected from each legislative district. Delaware uses representative districts, augmented by "two... from New Castle County, two from Kent County and two from Sussex County."

*Election of Members:* Ohio specifies nonpartisan election of convention delegates. In Missouri nonpartisan election is specified for at-large members. A limited nomination and voting system within Senate districts used to elect two delegates each there is used to assure that the two major parties will be equally represented from these districts.

*Qualification to Serve:* Kansas specifies that legislators may serve as convention delegates. In direct contrast, Missouri bars from service as convention delegates (with a few minor exceptions) persons "...holding any other office of trust or profit ..." in the state. The Hawaii constitution provides that "any qualified voter of the district concerned shall be eligible" to serve in the convention. Somewhat similarly, the Illinois constitution provides that "To be eligible to be a delegate a person must meet the same eligibility requirements as a member of the General Assembly."

*Filling Vacancies:* It is common for vacancies in delegate positions to be filled in the same manner as those for one or the other house of the legislature. In Hawaii the governor fills vacancies with "a qualified voter from the district concerned." In Missouri, the governor must appoint to any vacancy a person of the same party, from the same district as the person vacating the post.

*Time and Place of First Convening:* It is common for constitutions to specify a date on which or by which a convention must first meet. The state capitol is often designated as the location of that meeting. With legislatures now in session for far longer than they were when most constitutional amendment and revision provisions were written, there arises the possibility that both the legislature and the convention will have need of the use of the capitol chambers simultaneously.

*Leadership, Rules and Process:* Where details are provided, state constitutional conventions are generally charged with selecting their own leadership, adopting their own rules, hiring and compensating staff, keeping a record of their proceedings, and being judge of the qualifications of

---

<sup>73</sup> . Article XIX Section 1.

their own members. Quorum rules and similar procedures appear similar to those constitutionally specified for state legislatures.

*Compensation of Delegates:* The Delaware and Hawaii constitutions require that the rate of pay for delegates to a constitutional convention be set by statute. The Missouri constitution sets delegate pay at \$10 per day, plus mileage. In New York, Constitution delegates must receive the same salaries and be reimbursed for expenses at the same rate as state legislators. As a result of this provision, and because there was no bar to service by legislators as convention delegates, many New York legislators who were elected as delegates to the 1967 constitutional convention -- to great public consternation about "double dipping" -- were paid two salaries and gained double pension benefits.

*Finance:* Constitutions often contain general directives that the state legislature provide necessary support for a convention. The Alaska constitution specifies that "The appropriation provisions of the...[convention]... call shall be self-executing and shall constitute a first claim on the state treasury." Hawaii has a similar provision.

*Time for Consideration and Publicity:* Timely submission of the work of a convention, while also allowing enough time for voters to consider it, is an apparent concern in some revision provisions. For example, the Illinois constitution requires that the work of a convention "shall be submitted to the electors in such manner as the Convention determines, at an election designated or called by the Convention occurring not less than two nor more than six months after the Convention's adjournment." The Georgia constitution imposes the same obligations to publicize its results upon a convention as it does upon the legislature to publicize any amendments it proposes. Regarding publicity, the Hawaii constitution requires that: "At least thirty days prior to the submission of any proposed revision or amendments, the convention shall make available for public inspection, a full text of the proposed amendments. Every public library, office of the clerk of each county, and the chief election officer shall be provided such texts and shall make them available for public inspection. The full text of any proposed revision or amendments shall also be made available for inspection at every polling place on the day of the election at which such revision or amendments are submitted." The Hawaii document also says that "The convention shall, as provided by law, be responsible for a program of voter education concerning each proposed revision or amendment to be submitted to the electorate." As is the case with legislatively initiated amendments, more recently developed electronic technologies are not specified in constitutions for publicizing convention results.

*Submission of Results:* Conventions are almost always left discretion regarding the form in which they submit their work to the public. This may be in a single question or in multiple questions. Decisions about the form of submission of convention results may be very important in determining outcome. The submission of the work of the 1967 convention in New York as a single question is widely regarded as a major reason for the draft constitution's failure at the polls.<sup>74</sup>

*Ratification:* In Missouri and South Dakota ratification of convention proposals must be sought at a special election. The general election must be used in Florida, Missouri and New Hampshire (where ratification must also be in an even numbered year). Twenty one states require a majority voting on the question or questions for ratification of constitutional convention proposals. In Michigan three-fifths support on the proposal is required, and in New Hampshire two-thirds. In Colorado the majority must be of those voting in the election. In Hawaii the requirement is at least 50 percent of those voting in a general election, or in a special election, the equivalent of thirty percent of those registered. In other states ratification majorities are not constitutionally specified. Such specification is desirable to avoid ambiguity, and potential litigation.

---

<sup>74</sup> . Henrik N. Dullea. Charter Revision in the Empire State: The Politics of New York's 1967 Constitutional Convention (Albany: the Rockefeller Institute of Government, 1997) Chapter 13. In contrast, the 1938 convention in New York submitted its work to the voters in nine questions. Six passed, incorporating fifty eight proposals for change. See Dullea, p. 30.

*Conflict:* If both pass and are in conflict, revisions proposed by a convention are given precedence in Hawaii over those proposed by the legislature.

*Gubernatorial Veto:* The Alabama, Hawaii and Georgia constitutions specifically bar gubernatorial veto of convention proposals.

*Effective Date:* As for amendments adopted by various means, most constitutions specify an effective date for constitutional revisions proposed by conventions that receive popular support.

## **Guidelines for Developing a Constitutional Change Process**

### **A. General**

1. **Popular ratification.** To assure legitimacy, all constitutional changes should be popularly ratified. Ratification is best done by a majority voting on a proposal for revision or amendment. Provision that a higher turnout election be used for this vote (a general election in an even numbered year) or - less desirable - that this majority also be a specified proportion, but not a majority, of those voting in the election assures that the change will not be pushed through by a very small proportion of the eligible electorate. Because significant proportions of voters in any election commonly fail to vote on propositions, requiring that a ratifying majority be of all those voting in an election is a high barrier to change, as is requiring special majorities for amendments concerning specific subject matter (e.g. tax increases).
2. **A single article** - To reduce complexity and assure full understanding of available options, there is virtue in a single constitutional location for all means for formal constitutional change available to the polity.
3. **Amendment and Revision** - The constitution should define the difference between amendment and revision.
4. **Both Through and Without the Legislature** - Both Amendment and Revision should be achievable with or without legislative participation.
5. **Interactive Effects**- consideration should be given to the interactive effects of the availability of multiple procedures for constitutional change.
6. **Responsible Parties** - To assure accountability a specific official or specific officials (e.g. the Secretary of State, the Attorney General) should be charged in the constitution with effecting specific elements of the change process.
7. **Time** - Sufficient time should be allowed to accomplish crucial elements of the change process (e.g., example signature gathering, correction of error, informing the public of potential changes).
8. **Clarity and Understandability** - Ballot language for all proposed constitutional changes should be vetted through a prescribed procedure to assure that they are understandable to a state's citizen with the average level of education for that state. One possible approach is review and certification of the language by the state's highest ranking Education Department official.
9. **Voter Information** - Provision should be made for informing voters about a proposed change neutrally, as early as practicable and in a manner that may engage them in an interactive and deliberative process.

10. **Resubmission and Reconsideration** - If a constitutional change fails of ratification, a time period should pass before it may be resubmitted.
11. **Effective Date** - Clear provision should be made for an effective date for adopted constitutional changes.

## **B. Amendment**

1. **Single subject** - Amendments are best limited to a single subject or object.
2. **Impact on Existing Constitution and Inter-provision Relationships** - The Attorney General or another responsible state official should be charged with timely assessment and public reporting regarding the "fit" of any proposed amendment within the framework and provisions of the existing constitution.
3. **Home Rule** - Constitutional changes with specific impact upon a place or class of places within a state should be done only with its or their specific request or consent.
4. **Correction of Error** - An alternative procedure to litigation should be constitutionally provided for the identification and correction of error in a proposed amendment before certified for the ballot.
5. **Legislative Proposal** - At least a simple majority of those elected to each legislative house should be required to propose and amendment. Remain mindful that requiring higher majorities, but not second consideration, significantly reduces the number of amendments advanced to voter consideration.
6. **The Initiative** -
  - a. The percentage of signatures required to qualify a constitutional initiative should be based upon a high turnout statewide race, for example the previous election for governor.
  - b. This percentage should be higher than that for a statutory initiative.
  - c. A requirement that assures that signatures are gathered from across the state is desirable.
  - d. Provision should be made for expedited judicial review of procedural or substantive challenges to constitutional initiatives made at any stage of the initiative process.
  - e. Qualification of an initiative should immediately trigger a neutral process for public information at public expense, including forums, hearings, publications and the use of contemporary information technology (e.g. websites).
  - f. Limitations on the reach of the constitutional initiative should be clearly specified.
7. **The Commission** - A commission on the Florida model, automatically called to life at specified intervals, should be considered to directly propose to citizens amendments to the constitution's legislative article and to other specified constitutional provisions that directly engage the self interest of sitting legislators.

## **C. Revision:**

1. **Revision by Convention** - Constitutional revision should be done by a convention authorized by a majority of voters, at the time and in the manner outlined above, and explicitly convened for this purpose.

2. **Legislature Authorizes But Is Not Itself a Convention** - The legislature should be explicitly empowered to request that the voters call a constitutional convention, but the legislature is not itself a constitutional convention and should be barred from functioning as a convention.
3. **Authorization of a Convention Without the Legislature** - A means is necessary for bypassing the legislature to place the question of whether to call a constitutional convention before the voters. Two options are available;
  - a. use of the initiative to advance the question; or
  - b. the automatic periodic constitutional convention ballot question.
4. **Automatic Ballot Question** - If the provision is adopted, responsibility should be directly and clearly placed in a specified official to assure that it is asked as constitutionally provided.
5. **Limited or Unlimited Convention** - Whatever the origin of the convention ballot question, the constitution should explicitly authorize both limited and unlimited conventions.
6. **Self Executing** - To the greatest degree practicably, provisions for convening a convention without legislative participation should be self executing.
7. **Constitutional Commission** - Concomitant with the authorization of a constitutional convention vote, a publicly financed and professionally staffed nonpartisan commission appointed by multiple appointing authorities (e.g., the governor, legislative leaders from both parties, other statewide elected officials, the Chief Justice of the state high court ) should be established to publicize potential constitutional issues before the state. If a convention is authorized, this commission would continue to further engage the public and do necessary preparatory work.
8. **Delegate Election** - The number of convention members and the manner of their election should be constitutionally specified. Non-partisan elections are desirable. Public financing of these elections should be considered.
9. **Eligibility to Serve** - Persons holding federal or state elected office should not be eligible to serve as constitutional convention delegates.
10. **First Meeting** - The time and place of the convention's first meeting should be specified.
11. **Organization** - The Convention should judge the qualifications of its members, provide for filling vacancies, select its own officers, retain staff and adopt its own rules and generally govern its own proceedings.
12. **Resources and Staffing**- Provision should be made to assure that the convention is adequately staffed and supported in its work.
13. **Time for Deliberation** - the convention should have adequate time for deliberation before reporting, but should place the results of its work on the ballot no later than the second general election day after it first convenes.
14. **Delegate Compensation** - Delegates should be compensated at a level equivalent to the average compensation for a state worker at the date of the convening of the convention, and receive reimbursement for expenses in accord with normal state practice for state workers. Persons should be compensated either as delegates or be provided paid leave from other employment while acting as delegates, but should not be compensated twice while delegates.
15. **Public Engagement** - The convention should be explicitly charged with assuring public engagement during the course of its work through public hearings and forums, publications, the use of electronic media and other methods of outreach.

16. **Ballot Questions** - Subject to the general guidelines outlined above, and the single subject rule notwithstanding, The convention, a source of constitutional revision not amendment, should have discretion in offering its work to the public in a single question or series of questions.