

NEW JERSEY CONSTITUTIONAL REFORM

BACKGROUND PAPER #1

Background on Constitutional Amendment and Revision

Center for State Constitutional Studies
Rutgers, The State University of New Jersey, at Camden

411 Cooper St.
Camden, NJ 08102
856-225-6625 (phone)
856-225-6628 (fax)
cscs@camden.rutgers.edu

Background on Constitutional Amendment and Revision*

Constitution writers are neither infallible nor prescient, so all constitutions must anticipate the need for change. Indeed, the process of altering the basic arrangements for governance may itself be salutary for citizens in a democracy. As Thomas Jefferson wrote in 1816, "Each generation [has]... a right to choose for itself the form of government it believes most promotive of its own happiness..."¹

Constitutional change in democracies occurs in two ways--either by altering the meaning of the document through interpretation or by altering the text of the document through amendment or revision. Whereas for the United States Constitution, change through interpretation predominates, for state constitutions textual change is far more common.

Basic Principles

Experience suggests that constitutional change in the states should be guided by seven fundamental principles:

1. Because constitutional amendment and constitutional revision are not the same, provisions for each should be separate and distinct.
2. Constitutions should provide for at least two means for *amendment*; one through governmental institutions established by the constitution, and one that bypasses the existing institutions.
3. Constitutional *revision* may be initiated by the legislature or without the legislature, but once started revision should proceed in a manner entirely distinct from the legislative process.
4. Sufficient constitutional detail is required defining amendment and revision methods that bypass the legislature to assure that these will be truly available and effective when used.
5. Whether achieved through the legislature or without its participation, procedural requirements for changing the constitution should be more demanding than those for passing ordinary legislation.
6. Constitutional change processes should be all treated in the same location in the state constitution.
7. Because all constitutional change should be subject to popular ratification, necessary information must be provided in understandable form to inform public choice.

* - This material is drawn from a chapter written by Professor Gerald Benjamin of SUNY at New Paltz that will appear in *State Constitutions for the Twenty-first Century*, vol. 3, ed. G. Alan Tarr (Albany: SUNY Press, 2005). It has been edited to focus on material germane to constitutional reform in New Jersey, so – for example – material on the constitutional initiative has been deleted. The full chapter is available on the Center's web site at: www-camlaw.rutgers.edu/statecon/. "State Constitutions for the Twenty-first Century" is a multi-year project of the Center for State Constitutional Studies, funded by The Ford Foundation.

1. *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 the "replacement of one constitution by another."² "Revision" is specifically referenced in the constitutions of twenty-three states.³ The language of many state constitutions is not as precise as is desirable regarding this distinction between amendment and revision.

2. *Proposing Amendments Through the Legislature or Without It*: All states constitutions permit amendments to be formally proposed by state legislatures, and most constitutional change is accomplished in this manner. However, as beneficiaries of the political and governmental status quo, legislators frequently resist change in the structure and process of the state government. Twenty-five state constitutions therefore expressly provide methods for amendments to be proposed without legislative participation: by popular petition (the constitutional initiative), state constitutional commission, or constitutional convention.⁴

3. *Constitutional Revision*: 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."⁵ 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.⁶ Perhaps to avoid this, Missouri's document states explicitly that "This constitution may be revised and amended only as therein provided."⁷ North Carolina's constitution also expressly limits change methods to those specified in it.⁸ Recognizing that legislatures may be the target of revision and therefore resistant to calling a convention, fourteen state constitutions provide for automatic periodic placement on the ballot of the question of whether a constitutional convention should be held.⁹ Additionally, the Florida and Montana constitutions provide for the calling of a convention by the use of initiative and referendum.¹⁰

State legislatures are created by and subordinate to state constitutions. Constitutions that have originated in the legislature without specific constitutional authorization or the calling of a convention have engendered controversy. In Georgia, Idaho, and Kentucky, courts have permitted legislatures to seek ratification of constitutions that they have drafted without explicit constitutional authority to do so.¹¹ An attempt to revise the Oregon constitution through the initiative was invalidated in the courts.¹²

4. *The Necessity for and Disadvantages of Detail*: State constitutions are often criticized for being excessively detailed. Provisions for constitutional change that bypass the legislature are frequently a locus of considerable of this detail, and for good reason. Specificity is a means of protection from legislatures' oft-manifested 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.¹³ 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.¹⁴ 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 unintended consequences. One effect 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 say not only what the constitution means, but what the constitutional change process requires. Another effect 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 combined effect of constitutional provisions, added statutory requirements and court interpretations may add to the complexity, and therefore the relative difficulty, of constitutional change without legislative participation.¹⁵

5. *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 structured to make constitutional change more difficult than the adoption of ordinary legislation. Moreover, this difficulty is further enhanced by the requirement of the additional step of popular *ratification* (in all states but Delaware). This is as it should be, for constitutions are fundamental law. Moreover, protections that constitutions afford minorities would mean little if they were as easily changeable by majorities as is ordinary law.

These demanding procedural requirements notwithstanding, 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, and amendment of it is therefore approached with enormous caution. Second, the formal national amending process is far more difficult than that of any state; at minimum, it requires supportive action by thirty-nine separate governments (the national government and thirty-eight state governments). Within the states there has been a general evolution over the nineteenth and twentieth centuries to a "more flexible" amending process.¹⁶ The result is more frequent amendment, and greater constitutional length. Third, the inclusion in state constitutions 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.¹⁷

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

6. *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.¹⁸ 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 included in the article on the amending process, the legislative article, or in separate articles providing for initiative and referendum.¹⁹ 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.

7. Democratic Theory Requires Popular Ratification: The first American state constitutions explicitly or indirectly emphasized popular authority.²⁰ 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.²¹ This gave the final word on the structure of governance to the sovereign people. As of 2004, the adoption of formal constitutional change in all states but Delaware required a popular vote. 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. Because of the necessity of popular ratification, constitutional assurance that understandable unbiased information be provided to inform the public is essential.

PROPOSAL AND ADOPTION OF AMENDMENTS

Through the Legislature

Over the course of American history about ninety percent of state constitutional amendments have been proposed through state legislatures. Between 1992 and 2000, 862 constitutional amendments were proposed in American state legislatures, and 664 adopted, for an adoption rate of 77%.²² Generally, amendments offered through the legislature have been far more likely to be ratified by the voters than those offered by popular initiative (though the rate of approval for those offered as the result of the constitutional initiative has increased in recent years).²³ However, amendments offered by legislatures have enjoyed a lower success rate than those offered by conventions.²⁴

Process

Amendments may generally be introduced by any member in either house. In some states a minimum passage of time or a number of readings is specified before the legislature may act. The New Jersey constitution requires a public hearing before a legislative vote on an amendment.²⁵

Locating responsibility for elements of the amending process in a specific official helps to assure that these tasks are performed and builds accountability. 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.²⁶ In Alabama and Vermont the governor must "give notice" of or "proclaim" an election on a constitutional amendment in a timely fashion.²⁷ 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.²⁸ 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.²⁹

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. Among the limits are those dealing with:

Single Purpose: 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.³⁰

Election Timing: In most states, amendments may be considered at either general or special elections. A few states--Connecticut, Kentucky and New Hampshire are examples--require submission at a general election only.³¹ In West Virginia, if a special election is used for consideration of constitutional amendments it may not be used for another purpose.³²

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.³³ In Pennsylvania, five years must pass before resubmission.³⁴

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.³⁵ 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.³⁶ Idaho specifically requires publication of arguments for and against each amendment.³⁷ As noted, Ohio has a similar requirement.³⁸ 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.³⁹

Effective Date

Most state constitutions specify an effective date for amendments once they are ratified. Clarity on this matter is important. Litigation in Wisconsin in 2002 established that a constitutional amendment there did not take effect until the canvass of the vote adopting it was completed.⁴⁰

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. They are constitutionally required to convene automatically every ten years, no more than thirty days after the close of the legislative session.⁴¹ 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 commission chair is designated by the Governor. The Taxation and Budget Reform Commission acts only on matters concerning the state's fiscal 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 majority 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 cannot be a sitting legislator.

The commission process in Florida has resulted in considerable constitutional change. This is an effective method of bypassing the legislature to make reforms in state government structure or processes that are not in accord with the interests of incumbent power holders. 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, the rejection by Florida voters in 1980 of an amendment proposed by the legislature that would have abolished the revision commission process added to the process's popular underpinning.⁴²

There is some concern about commissions that come into existence on a fixed schedule rather in response to a felt political need. However, 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.⁴³

REVISION BY CONVENTION

Constitutions in all but nine states expressly detail processes for calling constitutional conventions.⁴⁴ They provide that state constitutional conventions may be proposed or called by legislatures or may be called as a result of automatic call provisions or through use of the initiative.

Proposal by the Legislature

In Illinois and Nebraska three-fifths of the legislators elected must support a convention for a referendum on the matter to be authorized.⁴⁵ South Dakota also requires three-quarters, but no popular vote is needed.⁴⁶ Two-thirds of the members elected are required to authorize a convention in twenty additional states; in five of these, no popular referendum is required. (In Maine the two-thirds majorities must be concurrent.⁴⁷) Finally, in sixteen states majorities elected to both houses may put a convention question on the ballot for voter approval.⁴⁸ In Alabama a vote to call a convention may be repealed only by a vote at the same legislative session, requiring the same majority as when called.⁴⁹

Proposal Through the Initiative

The Florida Constitution provides for calling a convention only through use of the initiative.⁵⁰ 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.⁵¹

Automatic Convention Call

Fourteen states provide that the people be automatically asked periodically whether they wish to hold a constitutional convention. In eight of these states, the period is twenty years, and in four it is ten. Michigan has a convention question vote every sixteen years and Hawaii every nine years.⁵² In 2002, votes were negative by wide margins on the automatic convention question in Alaska, New Hampshire, and Missouri. Rhode Island's convention in 1985 was the most recent called by use of the automatic question. Between 1970 and 2002 the outcome of votes on the automatic convention call was positive four times (Rhode Island, Hawaii (1976) and New Hampshire (1972, 1982)) and negative twenty-five times.⁵³ Recent history notwithstanding, constitutional conventions have been more frequently called in states with automatic call provisions.

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.⁵⁴ Ten states require support of 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.⁵⁵) Six of the ten states with the more demanding popular vote requirement also mandate extraordinary legislative majorities to propose a convention.⁵⁶ Finally, three states--Arizona, Oklahoma, and Oregon--are silent on the base of the popular majority required to call a constitutional convention.

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.⁵⁷

Limited or Unlimited Convention

The Kansas constitution is most specific in providing for calling a constitutional convention with a limited agenda.⁵⁸ Both the North Carolina and Tennessee constitutions also allow limited conventions.⁵⁹ In Tennessee the legislature can limit a convention's substantive reach, but not how it may act on a specified subject once it is called.⁶⁰ A convention called in Pennsylvania in 1967 was limited to consideration of some specified matters and barred from taking up others.⁶¹ An attempt to use the indirect initiative to call a limited convention was blocked by the Supreme Judicial Court in Massachusetts in 1970.⁶² In contrast, the Montana constitution specifies that a convention called through the use of the initiative must be unlimited.⁶³ 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."⁶⁴ Nine automatic referendum states specify the ballot

question in their constitutions.⁶⁵ This precludes a limited convention resulting from this process.

The 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.⁶⁶ This argument is effective because powerful groups in state politics--e.g., labor unions, tax limitation advocates, public employees--often have won inclusion in state constitutions of provisions that protect their interests. They do not wish to see these put at risk of change or removal, however remote the political risk may be. The possibility of a limited convention may remove or reduce this source of opposition.

Staffing, Convening, Structuring and Operating a Convention

State constitutions vary enormously in their level of detail with regard to 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.

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 that: two-thirds majorities in both houses of the state legislature may schedule a vote on whether to call a convention; if one is called that it should be scheduled within six months; and that delegates should be voters elected from districts as equal as possible in population.⁶⁷ Even more simply, 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.⁶⁸

Provisions like these leave the legislature free, through enabling statutes, to deal with such matters as delegate election and convention structure and operations. Such laws may be used to allay fears that commonly arise that these venues for constitutional change are "...distant from the general populace, another forum in which elite reformers and entrenched interests compete for political power."⁶⁹ 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 rarely create a forum they do not control if it 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.⁷⁰

In states in which legislatures may be bypassed to call conventions--those with periodic automatic convention referenda--constitutional change 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.⁷¹ One example is the New York constitutional provision concerning calling a convention. Not dissimilar from that of a number of other automatic call states, it is more than six times as long as that of Wisconsin. It specifies the ballot question to be used for a convention call by the legislature or as the result of the state's automatic referendum provision; it indicates the necessary majority for calling a convention; it details the districts to be used for the election of delegates; it identifies the time and place the convention will first meet and its duration; it provides for the compensation of delegates; it establishes the convention's quorum rule; it enumerates many of its powers and internal procedures; it specifies the required majority for acting; it makes provision for filling delegate vacancies; and it indicates when its work is to be submitted and how it is to be approved.⁷²

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 under federal law, and almost certainly assured litigation if a convention was authorized.⁷³ 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.⁷⁴

A third approach is to rely on the legislature to actually effect a convention if one is called, but to direct its activity or build in constraints in specified areas where difficulties might arise. Thus, the Colorado constitution provides that the general assembly may place a convention call on the ballot by a two-thirds vote of both houses. A majority of those voting is needed to authorize a convention, with delegates elected from state Senate districts numbering twice the membership of that body. Those who seek to serve in the convention must meet the same qualifications as state Senate candidates; vacancies are filled in the same manner as those in the legislature. The convention must begin within three months of delegates' election, and must report between two and six months after adjournment. Most other details are left to the legislature.⁷⁵ 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 state legislature, if hostile, 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. Thus, the Tennessee constitution limits the state to no more than one constitutional convention every six years.⁷⁶

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 at least twice the size of the most numerous legislative house; in Colorado twice the size of the Senate.⁷⁷ A convention in Kentucky has the same number of members as the Assembly.⁷⁸ In Maryland its total membership is equal to the combined membership of the legislative houses.⁷⁹

California requires that delegates be selected from "districts that are as nearly equal in population as may be practicable."⁸⁰ Georgia has a similar requirement.⁸¹ Legislative districts are frequently specified for use in delegate selection. In Illinois, for example, two delegates are to be selected from each legislative district.⁸² Delaware uses representative districts, augmented by "two... from New Castle County, two from Kent County and two from Sussex County."⁸³ Provisions for using multi-member districts or at-large statewide elections for all or some convention delegates may raise voting rights concerns under federal law.⁸⁴

With regard to the election of delegates, Ohio and South Dakota specify nonpartisan election.⁸⁵ In Missouri nonpartisan election is specified for at-large members. A limited nomination and voting system for two delegates from each Senate districts is used to assure that the two major parties will be equally represented from these districts.⁸⁶

With regard to qualifications to serve as convention delegates, some have argued that because legislators fully control the legislative route for proposing amendments, they should not be permitted to participate in the alternative route (designed to bypass the legislature) as convention delegates. Such a ban should be extended, some think, to all government elected officials and employees, because those in public service should not design the document that creates their jobs, and empowers them. The contrasting view is that such bans are tantamount to "barring doctors from the operating room," excluding the most knowledgeable and interested from convention service. The Kansas constitution specifies that legislators may serve as convention delegates.⁸⁷ 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.⁸⁸ The Hawaii constitution provides that "any qualified voter of the district concerned shall be eligible" to serve in the convention.⁸⁹ 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."⁹⁰

When vacancies in delegate positions occur, it is common for them 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."⁹¹ 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.⁹²

To assure that a convention is actually held in a timely manner once it is called, state constitutions commonly specify a date on which and a place at which the 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.

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

Establishing the proper level of compensation for convention delegates is less simple than it may appear. Some constitutions are silent on the matter, leaving it entirely to the legislature. The Delaware constitution requires that the rate of pay for delegates to a constitutional convention be set by statute, still providing an opportunity for a hostile legislature to act mischievously.⁹³ The Missouri constitution sets a fixed rate of pay--\$10 per day, plus mileage--that has little connection with contemporary economic realities.⁹⁴ The use of some benchmark that changes over time seems sensible, but it too may be problematic. In New York, delegates must receive the same salaries and be reimbursed for expenses at the same rate as state legislators.⁹⁵ 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.

Anticipating another problem that might arise from legislative hostility, state constitutions often contain general directives that the legislature provide the necessary support for a convention. For example, 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."⁹⁶

Assuring timely submission of the work of a convention, while also allowing enough time for voters to consider it, is a concern addressed 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."⁹⁷ 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.⁹⁸ Regarding publicity, the Hawaii constitution requires that the text of convention recommendations be available at least thirty days prior to their submission to voters at every public library, office of the clerk of each county, and through the chief election officer. 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."⁹⁹ As is the case with legislatively initiated amendments, more recently developed electronic technologies are not specified in constitutions for publicizing convention results.

Conventions are almost always left discretion regarding the form in which they submit their work to the public. The Alabama, Hawaii and Georgia constitutions specifically bar gubernatorial veto of convention proposals.¹⁰⁰ The convention may submit their proposals as a single question or in multiple questions. Decisions about the form of submission of convention results may be very important in determining

outcomes. 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. 101

In Missouri and South Dakota ratification of convention proposals must be sought at a special election.102 The general election must be used in Florida and New Hampshire (where ratification must also be in an even numbered year).103 Twenty-one states require a majority voting on the question or questions for ratification of constitutional convention proposals. In New Hampshire two-thirds in support on the proposal is required. In Colorado the majority must be of those voting in the election.104 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.105 In other states ratification majorities are not constitutionally specified. Such specification is desirable to avoid ambiguity and potential litigation. If a convention and the legislature propose amendments that are in conflict and both pass, the revisions proposed by a convention are given precedence in Hawaii.106 Finally, most constitutions specify an effective date for constitutional revisions proposed by conventions that receive popular support.

A Checklist for Developing a Constitutional Change Process

These guidelines are derived from the foregoing consideration of state provisions for constitutional change and the experience in the states with these provisions, in light of the seven principles identified as fundamental to the change process.

General Concerns

1. Popular ratification. To assure legitimacy, all constitutional changes should be popularly ratified. Ratification is best done by a majority of those voting on a proposal for revision or amendment. A requirement that a higher turnout election be used for this vote (a general election in an even numbered year) assures that the change will not be pushed through by a very small proportion of the eligible electorate. An alternative, though less desirable, is that the majority of those voting on a proposed constitutional change be a specified proportion, but not a majority, of those voting in the election. 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 and the possible interactive effects of alternative approaches, there should be 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 and distinctly detail the processes for each.

4. Both with and without the legislature. Both amendment and revision should be achievable without legislative participation, as well as with it.

5. Responsible parties. To assure that constitutional requirements are actually effected, accountability for implementation of specific aspects of the change process

should be located by the constitution in a specified official or officials (e.g. the Secretary of State, the Attorney General).

6. Time. Sufficient time should be allowed to accomplish crucial elements of the change process. Many states require at least three months to pass after an amendment is proposed or the results of a convention are presented before a vote is taken.

7. Clarity and understandability. Ballot language for all proposed constitutional changes should be vetted through a prescribed procedure to assure that it is understandable to a state 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.

8. 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. Options available as the result of the development of new or emerging communications technologies might be anticipated.

9. Resubmission and reconsideration. If a constitutional change fails of ratification, a time period should pass before it may be resubmitted. The passage of at least two general elections before reconsideration may be reasonable.

10. Effective date. Clear provision should be made for an effective date for adopted constitutional changes.

Constitutional Revision

1. Revision by convention. Constitutional revision should be undertaken by a convention authorized by a majority of voters, at the time and in the manner, 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, either through use of the initiative to advance the question or through the automatic periodic constitutional convention ballot question.

4. Automatic ballot question. If the provision for an automatic ballot question 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 practicable, 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 study and 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 but not the 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 they should 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. The convention should have discretion in offering its work to the public in a single question or series of questions.

Notes

1. THOMAS JEFFERSON, THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 575

(Adrienne Koch and William Peden eds., 1944) (____).

2. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23 (1998). 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*, 196 P.2d 787 (Cal. 1948),

which dealt with whether an amendment made by initiative could revise rather than

amend. *See also* Michael Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1478 n.27 (1987); *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *Adams v. Gunther*, 238 So. 2d 824 (Fla. 1970).

3. 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.

4. *See* GERALD BENJAMIN AND MELISSA CUSA, *Constitutional Amendment Through the Legislature in New York*, in *Constitutional Politics in the States* 50 (G. Alan Tarr ed., 1996) (table I).

5. These six states are California, Florida, Hawaii, Georgia, North Carolina and Oregon. *See* COLANTUONO, *supra* note 2, at n.33; TARR, *supra* note 2, at 24.

6. *See* Colantuono, *supra* note 2, at 1480, n.25, n.34.

7. MISS. CONST. art. XII, § 1.

8. N.C. CONST. art. XIII, § 2.

9. *See* Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1017-1050 (2002).

10. FLA. CONST., art. XI, sec. 4; MONT. CONST., art. XIV, sec. 2.

11. Colantuono, *supra* note 2, at 1480. For detail on Georgia, *see* JOSEPH ZIMMERMAN, *THE REFERENDUM: THE PEOPLE DECIDE PUBLIC POLICY* 73-74 (2001), citing *Wheeler v. Bd. of Tr. of Fargo Consol. Sch. Dist.*, 37 S.E.2d 322 (Ga. 1946).

-
12. Colantuono, *supra* note 2, at n.42 (*citing* Holmes v. Appling, 392 P.2d 636 (Or. 1964)).
13. *See* BENJAMIN, *supra* note 4; ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION MAKING: 1938-1968 23-24 (1970).
14. In fact the Alaska Constitution seeks, as far as practicable, to make the entire document self-executing. *See* ALASKA CONST. art. XII, § 9; ZIMMERMAN, *supra* note 11, at 74 n.25.
15. 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 (Congressional Reference Service, February 16, 1999. RL30067). *See also* Mark Garriga, *Initiative and Referendum in Mississippi, Dead Again?*, available at <http://www.iandrinstitute.org/Studies.htm>, 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.
16. John Dinan, *"The Earth Belongs Always to the Living Generation": The Development of State Constitutional Amendment and Revision Procedures*, 62 REVIEW OF POLITICS 645 (2000).
17. Christopher W. Hammond, *State Constitutional Reform: Is It Necessary?* 64 ALB. L. REV. 1327, 1333-34 (2001).
18. Five early American state constitutions, New York's among them, lacked amending clauses. TARR, *supra* note 2, at 35. *See also* BURTON C. AGATA, *Amending and Revising*

the New York Constitution, in THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 42 (1994).

19. Formal Change Provisions for State Constitutions: ALA. CONST. art. XVIII, §§ 284-287; ALASKA CONST. art. XIII; ARIZ. CONST. art. XXI; ARK. CONST. art. XIX, § 22; CAL. CONST. art. XVIII; COLO. CONST. art. XIX; CONN. CONST. arts. XII, XIII; DEL. CONST. art. XVI; FLA. CONST. art. XI; GA. CONST. art. X; HAW. CONST. art. XVII; IDAHO CONST. art. XX; ILL. CONST. art. XIV; IND. CONST. art. XVI; IOWA CONST. art. X; KAN. CONST. art. XIV; KY. CONST. §§ 256-263; LA. CONST. art. XIII; ME. CONST. art. X; MD. CONST. art. XIV; MASS. CONST. art. XLVIII; MICH. CONST. art. XII; MINN. CONST. art. IX; MISS. CONST. art. XV, § 273; MO. CONST. art. XII; MONT. CONST. art. XIV; NEB. CONST. art. III; NEV. CONST. art. XVI; N.H. CONST. pt. 2, art. 100; N.J. CONST. art. IX; N.M. CONST. art. XIX; N.Y. CONST. art. XIX; N.C. CONST. art. XIII; N.D. CONST. art. III, § 9; N.D. CONST. art. IV, § 17; OH. CONST. art. XVI; OKLA. CONST. art. XXIV; OR. CONST. art. XVII; PA. CONST. art. XI; R.I. CONST. art. XIV; S.C. CONST. art. XVI; S.D. CONST. art. XXII; TENN. CONST. art. XI, § 3; TX. CONST. art. 17; UTAH CONST. art. XXII; VT. CONST. ch. II, § 72; VA. CONST. art. XIII; WASH. CONST. art. XXIII; W. VA. CONST. art. XIV; WIS. CONST. art. XII; WY. CONST. art. XX.

20. TARR, *supra* note 2, at 73-74.

21. JOHN ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION: HISTORY, POWERS AND MODES OF PROCEEDING, ch. VII (1867).

22. Council of State Governments, BOOK OF THE STATES 11 (2000) (calculated by the author from Table 1.6).

23. *Id.*

-
24. DONALD S. LUTZ, *Patterns in the Amending of American State Constitutions*, in CONSTITUTIONAL POLITICS IN THE STATES 40 (G. Alan Tarr ed., 1966).
25. N.J. CONST. art. IX, § 1.
26. ALASKA CONST. art. XIII, § 1.
27. VT. CONST. ch. II, § 72; ALA. CONST. art. XVIII, § 284.
28. OH. CONST. art. XVI, sec. 1.
29. N.Y. CONST. art. XIX.
30. LA. CONST. art. XIII, § 1(b). 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*, 38 HARV. J. ON LEGIS. 103 (2001).
31. CONN. CONST. art. XII; KY. CONST. § 256; N.H. CONST. pt. 2, art. 100(b).
32. W. VA. CONST. art. XIV, § 2.
33. N.J. CONST. art. IX, § 7.
34. PA. CONST. art. XI, § 1.
35. MO. CONST. art. XII, § 2(b).
36. GA. CONST. art. X, § 1, ¶ 2.
37. IDAHO CONST. art. XX, § 1.
38. OH. CONST. art. XVI, sec. 1.
39. N.M. CONST. art. XIX, § 1.
40. *State v. Gonzales*, 645 N.W.2d. 264 (Wis. 2002). *See* FRANK GRAD AND ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 000 (Albany: SUNY Press, 2004).

-
41. FLA. CONST. art. XI, §§ 2, 6.
42. ROBERT F. WILLIAMS, *The Role of the Constitutional Commission in State Constitutional Change*, in NEW YORK STATE TEMPORARY COMMISSION ON CONSTITUTIONAL REVISION 78 (1994).
43. Robert F. Williams, *Is Constitution Revision Success Worth Its Popular Sovereignty Price?*, 52 FLA. L. REV. 249, 249-273 (2000); REBECCA MAE SALOKAR, *Constitutional Politics in Florida: Pregnant Sows or Deliberative Revision?*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY (G. Alan Tarr ed., 2004). 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.
44. 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, *supra* note 22, at 8 (table 1.4).
45. ILL. CONST. art. XII, § 1(a); NEB. CONST. art. III, § 2.
46. S.D. CONST. art. XXIII, § 2.
47. ME. CONST. art. IV, pt. 3, § 15.
48. BOOK OF THE STATES, *supra* note 22, at 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.
49. ALA. CONST. art XVIII, § 286.
50. FLA. CONST. art XI, § 4.
51. S.D. CONST. art. XXII, § 2.
52. Benjamin, *supra* note 9, at 1018-1019, n.12.

-
53. Benjamin, *supra* note 9, at 1044.
54. KY. CONST. § 258; NEB. CONST. art. III, § 1.
55. ILL. CONST. art. XIV, § 1(c).
56. They are Minnesota, Nevada, South Carolina, Utah, Washington and Wyoming.
57. Benjamin, *supra* note 9, at 1044. Election outcomes for all mandatory constitutional convention referenda between 1970 and 2000 are given on page 1044. *Id.*
58. KAN. CONST. art. XIV, § 2.
59. N.C. CONST. art. XII, § 1; TENN. CONST. art. XI, § 3.
60. Zimmerman, *supra* note 11, at ___ (*citing* Cummings v. Beeler, 223 S.W.2d. 913 (Tenn. 1949); Snow v. City of Memphis, 527 S.W.2d. 55 (Tenn. 1975)).
61. Zimmerman, *supra* note 11, at 121-122.
62. *Id.* at 75 (*citing* Cohen v. Attorney General 259 N.E.2d. 539 (Mass. 1970)).
63. MONT. CONST. art. XIV, § 2(1).
64. ALASKA CONST. art. XIII, § 4.
65. Benjamin, *supra* note 9, at 1021 n.31.
66. See Peter Galie and Christopher Bopst, *The Constitutional Commission in New York: A Worthy Tradition*, 64 ALB. L. REV. 1285 (2001).
67. CAL. CONST. art. XVIII, § 2.
68. WIS. CONST. art. XII, § 2.
69. Tarr, *supra* note 65, at 12.
70. 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.

71. 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." IOWA CONST. art. X, § 3.

72. N.Y. CONST. art. XIX, § 2.

73. See Benjamin, *supra* note 9, for a detailed discussion of the 1994-1997 experience in New York.

74. Benjamin, *supra* note 9, at 1020.

75. COLO. CONST. art. XIX, § 1.

76. TENN. CONST. art. XI, § 3.

77. IDAHO CONST. art. XX, § 3; COLO. CONST. art. XIX, § 1.

78. KY. CONST. § 1259.

79. MD. CONST. art. XIV, § 2.

80. CAL. CONST. art. XVIII, § 2.

81. GA. CONST. art. X, § 1, ¶ 4.

82. ILL. CONST. art. XV, § 1(d).

-
83. DEL. CONST. art. XVI, § 2.
84. RICHARD BRIFFAULT, *The Voting Rights Act and the Election of Delegates to a Constitutional Convention*, in NEW YORK TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION. *INTERIM REPORT: THE DELEGATE SELECTION PROCESS* 53-84 (1994).
85. OH. CONST. art. XVI, sec. 2; S.D. CONST. art. XXIII, § 2.
86. MO. CONST. art. XV, § 3(a).
87. KAN. CONST. art. XIV, § 2.
88. MO. CONST. art. XV, § 3(a).
89. HAW. CONST. art. XVII, § 2.
90. ILL. CONST. art. XIV, § 1(a).
91. HAW. CONST. art. XVII, § 2.
92. MO. CONST. art. XV, § 3(b).
93. DEL. CONST. art. XVI, § 2.
94. MO. CONST. art. XV, § 3(b).
95. N.Y. CONST. art. XIX, § 2.
96. ALASKA CONST. art. XIII, § 3.
97. ILL. CONST. art. XIV, § 2(f).
98. GA. CONST. art. X, § 1, ¶ 4.
99. HAW. CONST. art. XVII, § 2.
100. ALA. CONST. art XVIII, § 287; HAW. CONST. art. XVII, § 4.; GA. CONST. art. X, § 1, ¶ 5.

101. HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION Ch. 13 (1997). 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. *Id.* at 30.

102. MO. CONST. art. XV, § 3(c); S.D. CONST. art. XXIII, § 2.

103. FLA. CONST. art. XV, § 5, ¶ 1(a); N.H. CONST. pt. 2, art. 100(c).

104. N.H. CONST. art. XIX, § 1.

105. HAW. CONST. art. XVII, § 2.

106. HAW. CONST. art. XVII, § 5.