

Public Law Research Institute Report:

Approaches to Altering State Constitutions

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ABSTRACT

The methods authorized for constitutional amendments are

prescribed by state constitutions and case law. The states have adopted three primary methods, in one combination or another, for amendment. Such methods include (1) the constitutional convention, (2) the legislative initiative, and (3) the popular initiative. Not all states use all three methods. This paper describes these methods, examines their use in various states, and highlights any procedures which vary significantly from the California approach.

The paper also examines the constitution revision commission and the role such commissions have played in constitutional modification. The role of the commission is considered within the California context and, then, within the context of other states as well.

Finally, the paper looks at data which summarize constitutional changes by number, method, and nature of amendment. Although states that allow amendment by popular initiative have a slightly higher average number of amendments proposed and adopted, the long term average number of amendments adopted per year is consistent, regardless of amendment method. Differences between states are reflected most strongly in their level of activism, that is, in the number of amendments proposed. California, which allows amendment by popular initiative, and Alabama, which does not, have been among the



most active states in proposing constitutional amendments. Further, both states are likely to continue to be national leaders in proposing a large number of constitutional amendments.

METHODOLOGY

Researchers obtained information for this report in three ways: 1) review of state constitutions, 2) review of annotated reference guides, law review articles and other scholarly works; and 3) through access to a data base developed by the Institute of Governmental Studies of the University of California at Berkeley. **ANALYSIS**

METHODS USED TO AMEND OR REVISE.

Amendment by Constitutional Convention.

California

The Constitution of California provides for revision by constitutional convention. [No. 1] The procedure is as follows. Each house of the legislature must vote (by two-thirds) to call a constitutional convention. The electorate must then vote, by a majority, to call the convention. The legislature must provide for the convention within six months after approval by the electorate. Convention delegates must be members of the electorate, and are elected from districts substantially equal in population. [No. 2]

The legislature has issued several proposals calling for a constitutional convention. Such proposals have received the requisite two-thirds vote on only four occasions. [No. 3] Subsequently, on three occasions the ballot measure failed to receive a majority vote by the electorate. [No. 4] In the fourth instance, the measure secured the necessary popular vote, but the legislature then failed to pass enabling legislation, as required by law. [No. 5]

The last constitutional convention was held in 1879. As the above history illustrates, the constitutional convention method has not been a significant tool for changing the California constitution. [No. 6]

Variations in Other States.

There are states that do not authorize conventions for constitutional modifications. [No. 7] States that do allow constitutional conventions differ in their requirements.

No Provision in Constitution for Convention

Where the state constitution is silent on the subject of constitutional conventions, states have taken a few different routes. At least one state supreme court has stepped into the gap, holding that a constitutional convention can be used to revise or amend the constitution. [No. 8] Alternatively, the legislature in another state reacted by submitting a convention proposal to the electorate. The electorate passed the proposal, thereby approving the convention as a method by which to amend the state constitution. [No. 9]

Instead of silence, consider the situation where the state constitution expressly prohibits the calling of a convention to amend or revise the constitution. [No. 10] In such states, a convention may only be called if the people, by referendum, first enact a law that would permit such a convention.

Periodic Election to Decide Whether to Hold a Convention

Some state constitutions that do authorize the use of the constitutional convention opt to let the electorate decide whether or not to call the convention. The question is usually put to the voters at a general election every ten, and sometimes every twenty years. The electorate is simply asked whether or not a convention should be held to revise or amend the constitution. A majority of the voters must respond in the affirmative before a convention can be held. [No. 11]

Legislative Approval Required - Two Successive General Assemblies.

Some states require dual legislative approval before a constitutional convention can be held. Normally, a majority of the members of both houses (of the General Assembly) must vote to call the convention. [No. 12] The members of both houses of the subsequent General Assembly must also approve the measure. Finally, the measure requires a majority approval by the electorate. [No. 13]

Approval by the Electorate and the Governor

The state electorate does not always play a role in calling a constitutional convention. At least one state leaves the decision entirely to the legislature. Under these circumstances, each house of the legislature must approve the convention by a two-thirds vote. [No. 14] Again, no popular ratification is required to call the convention. However, any resulting propositions must be submitted to the electorate and must receive majority approval. [No. 15] Similarly, some states expressly exclude the governor from deciding whether or not a constitutional convention should be called.

Amendment by Legislative Initiative.

California

Article XVIII, section 1 of the state constitution provides for amendment or revision, proposed by a two-thirds vote of both houses and thereafter submitted to the electorate for approval. [No. 16] As regards amendments, each may pertain to only one subject and each must be voted on separately. [No. 17]

Variations in Other States.

Many states allow amendment and/or revision to their constitutions through legislative initiative. Such states differ in their requirements for modification.

Public Notice or Hearing Required.

A few states require public notice or discussion prior to allowing constitutional modification by legislative initiative.

States which require public notice often mandate that such notice be published in local or county newspapers. Such notice is published at least once, sometimes more. Most states require that notice be published at least thirty days before the general election at which the amendment is submitted to the electorate. [No. 18] Another approach is to require public hearings before the legislature may vote on its proposed amendments. [No. 19]

Legal Opinion Required

Another option is to ensure thoughtful amendment of the constitution by submitting the amendment for a formal legal opinion. Under such requirement, amendments are referred to the attorney general for an opinion. The attorney general must issue an opinion before the legislature can formally consider the amendment. The attorney general must give an opinion as to the effect of the proposed amendments on other provisions of the constitution. [No. 20]

Automatic Submittal of Proposed Amendment to Subsequent Legislature.

Some states require approval by two successive general assemblies. This dual submittal may be required where the proposed amendment does not receive the desired level of approval in the first instance. [No. 21] Alternatively, some simply require that two successive general assemblies approve any proposals before they are submitted to the electorate. [No. 22]

The Executive Branch

Recall that with regard to the constitutional convention, certain states expressly stated that the governor should have no role in calling a convention. As regards legislatively proposed initiatives, some states similarly leave the governor out of the process altogether. [No. 23] However, at least one state specifically directs the governor to perform certain duties. [No. 24]

Limitations on the Amendment Process

Simply put, some states limit the number and type of amendments that may be issued by legislative initiative and some do not. Other limitations focus on specialized and limited amendments, e.g., those relating to only one county.

Some states simply restrict the number of topics which may be covered by each amendment submitted to the electorate. For example, some states provide that changes proposed by the legislature may cover only one subject per amendment. [No. 25]

Another option is to restrict the degree to which the constitution may be altered by the legislature. In one state, the legislature may prepare amendments to the constitution, but such amendments may not affect more than six articles during one legislative session. Similarly, some states restrict the number of amendments which the legislature may submit the electorate. [No. 26]

Finally, at least one state limits the amendment process where the proposed amendment will apply to only one county. The state protects that county and ensures thoughtful amendment by requiring the constitutional amendment commission to approve such locally targeted amendments. Note the specialized role of the constitutional commission here and compare it with the role generally assigned to such commissions. Constitutional revision commissions are discussed in a later portion of this paper.

Amendment By Popular Initiative.

California.

Adopting the belief of the early twentieth century progressive movement that "all political

power is inherent in the people," the state's electorate ratified the initiative process. [No. 27] The initiative process provided a means to institute direct legislation and constitutional amendments while bypassing the legislature. [No. 28] The California state constitution is one of few that allows nearly unchecked constitutional amendment by popular initiative.

Article XVIII, section 3 states that "electors may amend the

Constitution by initiative." [No. 29] Article II, section 8 defines an initiative as the power of the electorate to propose statutes and amendments to the Constitution, and to reject or adopt them. [No. 30] Article II also requires the following:

(1) that an initiative to amend the Constitution is proposed by presenting to the Secretary of State a petition with the text of the proposed amendment. The petition must be certified to have been signed by eight percent (8%) of the voters for all candidates for governor in the last gubernatorial election;

(2) that the Secretary of State shall submit the amendments to the voters at the next general election or at a special election called by the governor; and

(3) that the initiative measure may cover only one subject. [No. 31]

Note that the third requirement limits each popular initiative to a single subject.

Also important is the fact that California allows constitutional "amendment," but not "revision," by popular initiative. The legislature, however, has the authority to both amend and revise the state constitution. This difference can be traced to a long standing distinction in California between constitutional revision and amendment. [No. 32]

A revision involves a comprehensive change to the basic governmental plan. Where it appears that a change will substantially alter the basic governmental framework provided in the state constitution (e.g. a change in the role between the judiciary and the rights of criminal defendants), then a constitutional revision, rather than an amendment, must be sought. [No. 33] In contrast, an amendment is somewhat more limited in its purpose and affects fewer constitutional provisions. [No. 34]

To distinguish between revision and amendment, one should make both a quantitative and a qualitative determination [No. 35] For example, proposed alterations are interpreted as calling for constitutional revision when they affect a number of provisions in various parts of the constitution. [No. 36] Additionally, courts have also considered the nature of the changes proposed by the amendment or revision. [No. 37]

In California, the differentiation between amendments and

revisions dates back to the 19th century. The 1879 Constitution precluded revision by amendment, permitting only narrow and specific constitutional amendment by legislative initiative. [No. 38] However, in 1962 the voters approved an amendment which authorized the legislature to propose constitutional revisions just as it proposes amendments. [No. 39] Thus, today constitutional revisions may be proposed by legislative (but not popular) initiative.

Variations in Other States. Most notably, many states do not provide for constitutional modification by popular initiative. [No. 40] There are states, other than California, which

do allow use of the popular initiative to amend the state constitution. Any significant procedures are noted below.

One state, Massachusetts, allows amendment by popular initiative and follows a procedure similar to that of California. The significant difference lies in the several restrictions placed on the type of amendments which may be made by popular initiative. The popular initiative may not do any of the following:

(1) make changes that concern religion, the judiciary, judicial decisions, or the court system; or

(2) be restricted to a particular town, city or other political division of the state;

(3) specifically appropriate money from the state treasury, affect the 18th Amendment to the state constitution (dealing with public funding for to public schools), or limit the power to amend that amendment;

(4) nor restrict certain rights (access to courts, trial by jury, freedom of speech, freedom of press etc.).

The above list is not exhaustive, but illustrates major areas shielded from the popular initiative process.

Some states also include public notice provisions in the rules which govern the use of the popular initiative. In one state, the proposed change, any existing provisions which may be affected, and the question as it will appear on the ballot must be published. Copies of the publication must be posted in each polling place and furnished to the news media. Finally, the ballot itself must contain a statement of the purpose of the proposed amendment, in not more than 100 words. [No. 41]

CONSTITUTION REVISION COMMISSIONS.

California

The state constitution permits the legislature to create a constitution revision commission to study and recommend constitutional revisions to the legislature. [No. 42] The first commission was appointed to consider the need for revisions in 1929, when nearly two hundred amendments had already been approved. [No. 43] More recently, a commission created in 1963 worked until 1976 to propose and secure voter approval to revise all but two articles of the constitution. [No. 45] The commission succeeded where constitutional conventions had not, to substantially revise the constitution.

Variations in Other States.

Not all states provide for the existence of a constitution revision commission like that established in California. However, some states do have and actually make use of such commissions. The main difference seems to be whether or not the commission is a permanent one, acting on its own impetus or one created for a limited purpose. Consider the following, general examples.

In New Mexico, legislation provides for a constitutional revision commission, which meets as it deems necessary. [No. 46] The commission's duty is to review and recommend changes to the constitution, and the it makes full reports to both the governor and the

legislature. If a majority of the commission recommends action, then legislation must be drafted to enact the recommended change. [No. 47] The commission is composed of fifteen voting members, appointed by the governor. [No. 48]

Alternatively, some states opt to create a constitution revision commission for a limited and specified purpose. This may occur where a constitution has stood for a long period of time without amendment or where the legislature generally recognizes a need to amend the existing constitution. [No. 49]

SUMMARY OF DATA REGARDING NUMBER, METHOD AND SUBJECTS OF STATE CONSTITUTIONAL AMENDMENTS.

The Institute of Governmental Studies ("Institute") is an

entity which operates out of the University of California at Berkeley. The Institute has made a recent effort to collect data concerning state constitutional amendments. The data focuses on and provides a breakdown of California's amendments in the following areas: mandated expenditures, education, and taxation. The Institute provides data which may be utilized for a number of purposes. This paper focuses on information regarding constitutional amendments in states other than California. This data is presented for comparative purposes.

The Institute has collected and summarized data which reveals the following: the number of amendments made in other states, the years in which such amendments occurred, the subject of such amendments, and in some instances, the method used for adoption of the amendment. The Institute provided its own data as well as relevant information compiled by other sources.

The information indicates that nineteen states have had a single constitution, [No. 50] but that other states, primarily confederate states, have enacted up to eleven constitutions. [No. 51] Nearly all states have had constitutional amendments, ranging in number from eight [No. 52] to five hundred thirty-eight (538). [No. 53] In California, approximately sixty percent (60%), or four hundred eighty-five (485), of the amendments proposed were adopted. [No. 54] California ranks first among states for the number of amendments proposed (812), and second for the number of amendments adopted (485).

There appears to be a correlation between the method of

amendment and the number of amendments proposed. Since the time that their constitutions were first adopted, the average number of amendments proposed and adopted by states with the initiative process is higher than in states which do not allow amendment by popular initiative. Nationally, the average number of amendments proposed by states with the initiative process is two hundred fifteen (215), and the average number of amendments adopted is one hundred twenty-three (123). For states that disallow the initiative process, proposed amendments average one hundred sixty-nine (169), with one hundred twelve (112) amendments adopted.

However, the correlation between the method used for amendments and the number of amendments proposed and/or adopted is not without exception. Those states with an initiative process do not necessarily have a higher number of proposed and/or adopted amendments than those states which do not authorize the initiative process. For instance, California, the state with the highest number of proposed amendments, does allow the

initiative process for constitutional amendments. [No. 55] Contrast Alabama, the state with the highest number of amendments adopted (five hundred thirty-eight (538)); Alabama disallows amendment by initiative. (emphasis added).

Although states with the popular initiative process have

more amendments proposed, the average number of amendments adopted per year is fairly consistent regardless of method of amendment. States with the initiative constitutional amendment process average 1.33 amendments adopted annually. States without the initiative process average 1.37 amendments per annum. Similarly, states with the legislative constitutional amendment process average 1.3 amendments adopted per year.

The adopted amendments cover a wide range of subjects. The

Institute identified forty-six (46) amendment subjects. The Institute summarized constitutional amendments by subject for four states, namely California, Maryland, Nebraska and New York. Based on frequency, the most popular subjects for amendments were education, energy/public utilities/water/highways, taxation and indebtedness.

NOTES

[No. 1] Cal. Const. art. XVIII, 2.

[No. 2] *Id.*

[No. 3] Joseph R. Grodin, Calvin R. Massey, and Richard B. Cunningham, *The California State Constitution: A Reference Guide*, 18 (1993) (hereafter: *Cal. Reference Guide*).

[No. 4] *Id.*

[No. 5] *Id.*

[No. 6] *Id.*

[No. 7] Such states include the following: Indiana, Massachusetts, and Oregon.

[No. 8] Robert F. Williams, *The New Jersey Constitution: A Reference Guide*, 124 (1990). See also, *Jackman v. Bodine*, 262 A.2d 389 (1990).

[No. 9] Peter J. Galie, *The New York State Constitution: A Reference Guide*.

[No. 10] This prohibition is part of the Oregon constitution.

[No. 11] Peter J. Galie, *The New York State Constitution: A Reference Guide*; *Mo. Const. art. XII, 3*; *Iowa Const. art. X, 3*.

[No. 12] See e.g., *Ky. Const. 258*.

[No. 13] *Id.*

[No. 14] *La. Const. art. XIII, 2.*

[No. 15] *Id.*

[No. 16] *Cal. Const. art XVIII, 1. Many states follow this same procedure. The level of approval required by the legislature varies, but is usually one of the following: majority, two-thirds, three-fifths. See e.g., Ala. Const. art. XVIII, 284; Mo. Const. art. XII, 2.*

[No. 17] *Cal. Const. art. XVIII, 1.*

[No. 18] *La. Const. art. XIII, 1; Md. Const. art. XIV, 1.*

[No. 19] *In New Jersey, the state constitution does authorize the legislature to initiate amendments, but also requires public hearings as stated.*

[No. 20] *N.Y. Const. art. XIX, 1.*

[No. 21] *In New Jersey, an amendment which receives less than a two-thirds majority in each house is resubmitted to the next elected legislature for approval.*

[No. 22] *For example, the following procedure is used in New York. A proposed change is submitted to the legislature for approval. If a majority of both houses approve, the amendment is submitted to the succeeding assembly general. Both houses of the succeeding general assembly also must approve the proposed change by a majority vote. The measure is then submitted to the electorate, which must issue a majority approval.*

[No. 23] *In Kentucky, the approval of the governor is not necessary to any bill, order, or vote of the general assembly proposing an amendment to the constitution. Ky. Const. 256. See also, La. Const. art. XIII, 1.*

[No. 24] *In Alabama, the governor must proclaim the election and proposed amendments before the election, and must also announce the results of the election.*

[No. 25] *Such states include the following: Missouri, Maryland, Ohio and Wisconsin.*

[No. 26] *In Kentucky, the legislature may not submit more than four amendments to the electorate at any one election. Pennsylvania does not allow a proposed amendment to be submitted to the electorate more than once in a five year period.*

[No. 27] *Cal. Reference Guide at 17.*

[No. 28] *Id.*

[No. 29] *Cal. Const. art. XVIII, 3.*

[No. 30] *Cal. Const. art. II, 8.*

[No. 31] *Id.*

[No. 32] *See, Legislature of California v. Eu, 816 P.2d 1309 (Cal. 1991).*

[No. 33] *Cal. Reference Guide at 18.*

[No. 34] *Id.*

[No. 35] See, Peter M. Ullman, *Fifth Annual State Issue on Constitutional Law Developments in State Constitutional Law: 1992; XV. Process of Amendment*, 24 Rutgers L.J. 1422.

[No. 36] Cal. Reference Guide at 303.

No. 37] *Id.* at 303-04.

[No. 38] Cal. Reference Guide at 18.

[No. 39] *Id.*

[No. 40] *The following states disallow use of the popular initiative to modify the constitution: Alabama, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, and Wisconsin.*

[No. 41] Mich. Const. art. XII, 2.

[No. 42] Cal. Reference Guide at 18.

[No. 43] *Id.*

[No. 44] *Id.*

[No. 45] N.M. Stat. Ann. at 12-15-1 through 12-15-7.

[No. 46] *Id.*

[No. 47] *Presumably, in an effort to provide fairness and balance, the members of the group must be selected evenly from the congressional districts. Also, no more than eight members may be from one political group.*

[No. 48] See, Malcom C. McMillan, *Constitutional Development in Alabama, 1798-1901*, University of North Carolina Press, XV (1955).

[No. 49] *Such states include Maine, Minnesota, North Dakota and Oregon; this list is not exhaustive.*

[No. 50] *The state of Louisiana has substantially revised its constitution eleven times. See Council of State Governments, Book of States, 19.*

[No. 51] *The state of Illinois has amended its constitution eight times. Id.*

[No. 52] *The state of Alabama has amended its constitution 538 times. See, General Statistics for Comparative States, Institute for Governmental Studies, 1994.*

[No. 53] *Id.*

[No. 54] *Massachusetts, with one hundred forty-four (144) proposed amendments and Oklahoma, with two hundred eighty-seven (287) proposed amendments also allow amendment by initiative.*