

Formal State Constitutional Change Processesⁱ

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Because the authors of constitutions are neither infallible nor prescient 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..."ⁱⁱⁱ

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. Review of the extensive experience of the American states with "formal" textual alteration of sub-national constitutions suggests that change should be guided by seven basic principles. Additionally, this experience reveals a range of more specific guidelines for constitution makers in the design of provisions for formal sub-national constitutional change.

Basic Principles

Experience suggests that constitutional change 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.

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 "replacement of one constitution by another."ⁱⁱⁱ "Revision" is specifically referenced in the constitutions of

twenty-three states.^{iv} The language of many state constitutions is not as precise as is desirable regarding this distinction between amendment and revision.

2. Proposing *Amendments* Through or Without the Legislature: 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.^v

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."^{vi} 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.^{vii} Perhaps to avoid this, Missouri's document states explicitly that "This constitution may be revised and amended only as therein provided."^{viii} North Carolina's constitution also expressly limits change methods to those specified in it.^{ix} 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.^x

Additionally, the Florida and Montana constitutions explicitly provides for the calling of a convention by the use of initiative and referendum.^{xi}

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 they have drafted without explicit constitutional authority to do so.^{xii} An attempt to revise the Oregon constitution through the initiative was invalidated in the courts.^{xiii}

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 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.^{xiv} 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.^{xv} 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.^{xvi}

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 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, 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.

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 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.^{xvii} 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.^{xviii}

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 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.^{xix} 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.^{xx} 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.^{xxi} 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.^{xxii} This gave the final word on the structure of governance to the sovereign people. At the beginning of the twenty-first century the adoption of a 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.

Guidelines for the Constitutional Change Process: A Checklist

These guidelines are offered in three categories: those of general applicability, those specifically applicable to amendment processes, and those pertaining to constitutional revision.

A. General

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. 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 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 through 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 (e.g., example signature gathering, correction of error, informing the public of potential constitutional changes). Many states allow

one year for signature gathering. Twenty days may be given for error correction. 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'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.
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 election before reconsideration may be reasonable.
10. **Effective date** - Clear provision should be made for an effective date for adopted constitutional changes.

B. Amendment Processes

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 effect of a proposed amendment on existing constitutional provisions.
3. **Home rule** - Constitutional changes with specific impact upon a single place or class of places within a state should be effective 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** - Constitutional change through the legislature should be more difficult than the passage of ordinary legislation. Extraordinary majorities should be required: two thirds of those elected to each house is common; three fifths is an alternative.
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 one and a half to two times as great as for a statutory initiative; between 8% and 10% are commonly used for constitutional change in the states.
 - 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 the range of available information technology.
 - f. Limitations on the reach of the constitutional initiative should be clearly specified in the constitution. (e.g., prohibitions on diminishing individual rights through the initiative).
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. Constitutional 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, either use of the initiative to advance the question, or 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 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 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** - The convention should have discretion in offering its work to the public in a single question or series of questions.

ⁱ . This summary is derived from a larger empirical work on this subject to be published in connection with the project on *State Constitutions for the 21st Century* of the Center for State Constitutional Studies, Rutgers Law School, Camden New Jersey.

ⁱⁱ . Adrienne Koch and William Peden (eds.) *The Life and Selected Writings of Thomas Jefferson* (1944) p. 575.

ⁱⁱⁱ . G. Alan Tarr. *Understanding State Constitutions* (Princeton: Princeton University Press, 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) which dealt with whether an amendment made by initiative could revise rather than amend. 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. See also *Raven v. Deukmejian* 801 P. 2d 1077 (cal. 1990) and *Adams v. Gunther* 238 So. 2d 824 (Fla. 1970).

^{iv} . 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.

^v . 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.

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- ^{vi} . These six states are California, Florida, Hawaii, Georgia, North Carolina and Oregon. See Colantuono (1987), note 33, and Tarr (1998). p. 24.
- ^{vii} . See Colantuono (1987) p. 1480 and notes 25 and 34.
- ^{viii} . Article XII. Section 1.
- ^{ix} . Article XIII. Section 2.
- ^x . See Gerald Benjamin. "The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context," 65 *Albany Law Review* 1117 (Vol 65, 2002) pp. 1017 - 1050.
- ^{xi} . Article XI. Section 4.
- ^{xii} . 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).
- ^{xiii} . *Holmes v. Appling* 237 Or. 546, 392 P. 2d 636 (1964) cited by Colantuono (1987) at note 42.
- ^{xiv} . See Benjamin (2002) and Albert L. Sturm, *Thirty Years of State Constitution Making: 1938 - 1968* (New York: National Municipal League, 1970) pp. 23-24.
- ^{xv} . 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, note 25.
- ^{xvi} . 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.
- ^{xvii} . 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.
- ^{xviii} . This point is explored in detail in Christopher W. Hammond, "State Constitutional Reform: Is It Necessary?," *Albany Law Review* (Vol. 64, 2001) pp 1333-34.

^{xix} . 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.

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

^{xxi} . Tarr. (1998) pp. 73-74.

^{xxii} . John Alexander Jameson. *The Constitutional Convention: History, Powers and Modes of Proceeding* (New York: Charles Scribner and Company, 1867) chapter VII.