8. Fla. Const., art. VI, § 2.

9. Conn. Const., art. VI, § 1.

10. For example, Haw. Const., art. II, § 3; Maine Const., art. II, § 1; N.D. Const., art. II, § 1.

11. Colo. Const., art. II, § 30 (1) (emphasis added).

12. *City of Phoenix v. Kolodziejski,* 399 U.S. 204 (1970). See also *Hill v. Stone,* 421 U.S. 289 (1975) (invalidating Texas property qualification in municipal bond election).

13. Robert J. Steinfeld, "Property and Suffrage in the Early American Republic," 41 *Stan. L. Rev.* 335 (1989).

14. *Harper v. Virginia State Board of Elections,* 383 U.S. 663 (1966); *Kramer v. Union Free School District No. 15,* 395 U.S. 621 (1969).

15. *Salyer Land Co. v. Tulare Lake Basin Water Storage District,* 410 U.S. 719 (1973); *Ball v. James,* 451 U.S. 355 (1981).

16. N.C. Const., art. I, § 11.

17. Ore. Const., art. II, § 3.

18. For example, Tenn. Const., art. I, § 5; Wash. Const., art. VI, § 3.

19. For example, Ala. Const., amend. 579; Ga. Const., art. II, § 1 ¶ 3.

20. For example, Kan. Const., art. 5, § 2; Mont. Const., art. IV, § 2.

21. Miss. Const., art. 12, § 253.

22. *Hunter v. Underwood,* 471 U.S. 222 (1985).

23. *Richardson v. Ramirez,* 418 U.S. 24 (1974). This result stands in interesting contrast with a recent decision of the Supreme Court of Canada, in which it invalidated under the Canadian Charter of Human Rights a federal law providing disfranchisement as a punishment for certain crimes. *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. (4th) 519.

24. *See,* for example, *Cotton v. Fordice,* 157 F.3d 388 (5th Cir.), cert. denied, 525 U.S. 893 (1998).

25. For example, Idaho Const., art. I, § 2; Utah Const., art. I, § 2.

26. For example, Ky. Const., § 4; S.D. Const., art. VII, § 26.

27. For example, Cal. Const., art. I, § 3; N.C. Const., art. I, § 12.

28. For example, Neb. Const., art. 1, § 22; Va. Const., art. I, § 6.

29. For example, Del. Const., art. I, § 3; Ill. Const., art. III, § 3.

30. For example, Colo. Const., art. II, § 5; S.C. Const., art. I, § 5.

31. *See,* for example, Matthew C. Jones, "Fraud and the Franchise: The Pennsylvania Constitution's 'Free and Equal Election' Clause as an Independent Basis for State and Local Election Challenges," 68 *Temple L. Rev.* 1473 (1995).

32. Haw. Const., art. I, § 8; N.Y. Const., art. I, § 1.

33. Mont. Const., art. II, § 13.

34. Ind. Const., art. 2, § 12.

35. Wis. Const., art. III, § 3.

36. Conn. Const., art. VI, § 4. *See also,* for example, Ala. Const., art. I, § 33; Cal. Const., art. VII, § 8.

37. For example, Mich. Const., art. II, § 4; Wyo. Const., art. 6, § 13.

38. For example, Ill. Const., art. III, § 4.

39. Md. Const., art. III, § 3.49.

40. Ala. Const., amend. 41.

41. Minn. Const., art. VII, § 8.

42. Vt. Const., ch. II, § 47.

43. Mo. Const., art. IV, § 18.

44. *Butts v. City of New York,* 779 F.2d 141 (2d Cir., 1985), cert. denied, 478 U.S. 1021 (1986).

45. R.I. Const., art. VI, § 6.

46. For example, Tex. Const., art. 6, § 4; Wyo. Const., art. 6, § 11.

47. Maine Const., art. II, § 1.

48. Mo. Const., art. VIII, § 3; Utah Const., art. IV, § 8.

49. A floterial district is one that is overlaid on two or more other districts for the same body and thus resembles a limited at-large district. Voters within a floterial district vote for two representatives: one representative who represents exclusively their "regular" district, and another, floterial representative who represents their own district as well as one or more adjoining districts. Floterial districts sometimes are drawn to comply with the one-person, one-vote requirement by raising the fractional representation of a discrete geographical region without the need to rearrange existing district lines within the region.

50. Alaska Const., art. VI, § 4.

51. W. Va. Const., art. VI, § 6–4. The provision creates an exception for multi-county senatorial districts, which must be partitioned.

52. *Burns v. Richardson,* 384 U.S. 73, 92 (1966).

53. Tex. Const., art. 5, § 7a(f).

54. *Karcher v. Daggett,* 462 U.S. 725 (1983).

55. *Mahan v. Howell,* 410 U.S. 315, 324 (1973), quoting *Reynolds v. Sims,* 377 U.S. 533, 577 (1964).

56. Wash. Const., art. II, § 43(5).

57. *See,* for example, In Re Constitutionality of House Joint Resolution 1987, 817 So.2d 819 (Fla. 2002); *Wilkins v. West,* 571 S.E.2d 100 (Va., 2002).

58. Ohio Const., art. 11, § 7(A).

59. Colo. Const., art. V, § 47(1).

60. For example, In re Livingston, 160 N.Y.S. 462, 469, 96 Misc. 341, 351 (N.Y. Sup. Ct., 1916); *People ex rel. Smith v. Board of Supervisors,* 42 N.E. 592 (N.Y., 1896). Today, the requirement of easy travel around a district is more often subsumed under the requirements of contiguity or compactness. *See,* for example, *Wilkins v. West,* 571 S.E.2d 100, 109 (Va., 2002); *Prosser v. Elections Board,* 793 F. Supp. 859, 863 (W.D. Wis., 1992).

61. Mich. Const., art. IV, § 2.

62. One well-known study describes them as "largely ineffective." Richard H. Pildes and Richard G. Niemi, Expressive Harms, "'Bizarre Districts,' and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno," 92 *Mich. L. Rev.* 483, 528 (1993).

63. Alaska Const., art. VI, § 6.

64. Neb. Const., art. III, § 5.

65. Maine Const., art. IV, pt. 1, § 2.

66. Alaska Const., art. VI, § 6.

67. Hawaii Const., art. IV, § 6(8).

68. Colo. Const., art. V, § 47(3).

69. *Wells v. Edwards,* 347 F. Supp. 453 (M.D. La., 1972), summarily aff'd, 409 U.S. 1095 (1973). The federal Voting Rights Act, however, does apply to judicial districting. *Chisom v. Roemer,* 501 U.S. 380 (1991).

70. Illinois and Mississippi specifically require certain judicial districts to contain approximately equal populations. Nebraska and South Carolina require judicial districts to be contiguous. Kentucky, Montana, Nebraska, Ohio, South Carolina, South Dakota, and Wisconsin require judicial districts to be compact.

71. *See,* for example, Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* (New York: Basic Books 2000), at 232.

72. Wyo. Const., art. 12, § 5.

73. Nev. Const., art. 4, § 32.

74. *See,* for example, George H. Hallett, Jr., *Proportional Representation—The Key to Democracy* (National Home Library Foundation, 1937)

75. Kathleen L. Barber, *Proportional Representation and Election Reform in Ohio* (Columbus: Ohio State University Press, 1995).

76. Ore. Const., art. II, § 16; W.Va. Const., art. VI, § 6–50.

77. Va. Const., art. VII, § 2.

78. Thomas E. Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge, Mass: Harvard University Press 1989).

79. U.S. Const., amend. XXII.

80. *U.S. Term Limits v. Thornton,* 514 U.S. 779 (1995).

81. *California Democratic Party v. Jones,* 530 U.S. 567 (2000).

82. N.D. Const., art. II, § 1.

83. Ariz. Const., art. VII, § 10. A challenge to this provision on federal constitutional grounds is pending. *See Arizona Libertarian Party, Inc. v. Bayless,* 351 F.3d 1277, (9th Cir., 2003).

84. Fla. Const., art. VI, § 5(b).

85. Fla. Const., art. II, § 8(b).

86. Ore. Const., art. II, § 24.

87. R.I. Const., art. IV, § 10.

88. *Vanatta v. Keisling,* 899 F. Supp. 488 (D. Or., 1995), aff'd, 151 F.3d 1215 (9th Cir., 1998), cert. denied, 525 U.S. 1104 (1999).

Chapter Seven

Constitutional Amendment and Revision

Gerald Benjamin

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."[1]

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. For state constitutions textual change is far more common. This chapter focuses on methods for achieving textual change, or "formal" change, in American state constitutions. It begins with seven basic principles that should guide constitutional change. There follows an exploration of the experience in the states with legislative proposal of constitutional amendments, and amendments proposed by initiative or the use of a commission, two methods that bypass the legislature, in the light of these principles. Constitutional revision by convention is then considered. Finally, we derive a series of guidelines for constitution makers that might guide their design or reform of provisions for 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."[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 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.[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 explicitly provides 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 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' often 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.[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—for example, 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 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.[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 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.[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 including 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 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. 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.

Proposal and Adoption of Amendments

Through the Legislature

Over the course of American history about 90 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 percent.[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 have increased in recent years.[23] But they have enjoyed a lower success rate than those offered by conventions.[24] Research on New York demonstrated that amendments proposed by the legislature "rarely deal with the distribution of power in state government, and those that do are not designed to limit or constrain the principle political institutions or actors.

There are three approaches in state constitutions for proposal for constitutional amendment through the legislature.[25]

- Nine states use single passage by simple majorities of members elected to both legislative chambers.
- Fifteen states require passage in two successive sessions, with some requiring an intervening general election. Simple majorities at each passage are required in twelve of these states. In Massachusetts this is a simple majority of the two chambers sitting together. In Delaware (where no popular ratification is required) two-thirds majorities of each house must pass an amendment twice for it to be adopted. Tennessee requires first passage of an amendment by majorities in both houses; second passage, however, requires two-thirds majorities. In Vermont in partial contrast, the proposal of an amendment requires a two-thirds

majority in the Senate and a simple majority in the House on first passage. Second passage requires a simple majority in both chambers. In South Carolina, two-thirds of each house is needed to propose an amendment. Unlike in other states, the second legislative vote follows popular ratification; for it, simple majorities in each house are required.

- Twenty-nine states require extraordinary majorities in each house to propose amendments. In ten of these a three-fifths majority is required. In eighteen, the requirement is two-thirds. And in one, Connecticut, it is three-quarters.

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

Research has shown that when a simple majority is used to propose an amendment, requiring double passage does not make the amending process substantially more difficult. However, requiring extraordinary majorities does make amendment significantly harder to achieve. And requiring extraordinary majorities and double passage raises very substantial barriers to the possibility of constitutional amendment.[26] However another study has shown that "States with more onerous procedures have yearly adopted LCA [legislative constitutional amendment] . . . rates that are as great or greater than those with less onerous procedures." They conclude also that "States that make it more difficult to pass LCAs out of the legislature tend to have the highest LCA success rates."[27]

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. Where a second passage in a following session is required, an elapsed time before second passage is also often indicated. Most constitutions require that the results of the legislative vote on an amendment be properly recorded in the journal of each house. Failure to follow a constitutionally specified recording procedure caused at least one state high court to invalidate an amendment after passage.[28] The Illinois Constitution specifies that a majority of the legislature that proposes an amendment may withdraw it (though three-fifths are required to submit it). California provides for withdrawal by the same majority as passage.

Responsibility of Other State Officials
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. In Alabama and Vermont the governor must timely "give notice" of or "proclaim" an election on a constitutional amendment. In Ohio responsibility for preparing ballot language (with an explanation of proposed amendments and arguments in favor and against) is given to a board that includes the secretary of state and four others, no more than two of whom may be in the same political party. The sole constitutional responsibility of the Attorney General in New York is "to render an opinion in writing to the senate and assembly as to the effect of . . . [an] amendment or amendments" within twenty days after it is filed.

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

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

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.[29]

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