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. Nonpartisan 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.

NOTES

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

2. 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).

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 G. Alan Tarr (ed.), *Constitutional Politics in the States* (Westport, Conn.: Greenwood Press, 1996), table I, p. 50.

5. These six states are California, Florida, Hawaii, Georgia, North Carolina and Oregon. *See* Colantuono (1987), note 33, and Tarr (1998), p. 24.

6. *See* Colantuono (1987), p. 1480 and notes 25 and 34.

7. Art. XII, § 1.

8. Art. XIII, § 2.

9. *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. 1017–50.

10. Art. XI, § 4.

11. Colantuono (1987), p. 1480. For detail on Georgia *see* Joseph Zimmerman, *The Referendum: The People Decide Public Policy* (Westport, Conn.: 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).

12. *Holmes v. Appling* 237 Ore. 546, 392 P. 2d 636 (1964) cited by Colantuono (1987) at note 42.

13. *See* Benjamin (2002) and Albert L. Sturm, *Thirty Years of State Constitution Making: 1938–1968* (New York: National Municipal League, 1970), pp. 23–24.

14. In fact the Alaska Constitution seeks, as far as practicable, to make the entire document self-executing. *See* art. 12, § 9, cited in Zimmerman (2001), p. 74, note 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* (Washington, D.C.: 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.

16. 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. 645–74.

17. 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.

18. 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.

19. Formal Change Provisions for State Constitutions: Alabama §§ 284–287; Alaska, art. XIII; Arizona, art. 21; Arkansas, § 22; California, art. 18; Colorado, art. XIX; Connecticut, arts. XII, XIII; Delaware, art. XVI; Florida, art. XI; Georgia, art. X; Hawaii, art. XVII; Idaho, art. XX; Illinois, art. XIV; Indiana, art. 16; Iowa, art. X; Kansas, art. 14; Kentucky, §§ 256–263; Louisiana, art. XIII; Maine, art. X; Maryland, art. XIV; Massachusetts, art. XLVIII; Michigan, art. XII; Minnesota, art. IX; Mississippi, art. 15, § 273; Missouri, art. XII; Montana, art. XIV; Nebraska, art. CXV; Nevada, art. 16; New Hampshire, art. 100; New Jersey, art. IX; New Mexico, art. XIX; New York, art. XIX; North Carolina, art. XIII; North Dakota, art. III, § 9, art. IV, § 17; Ohio, § 16; Oklahoma, art. 24; Oregon, art. XVII; Pennsylvania, art. XI; Rhode Island, art. XIV; South Carolina, art. XVI; South Dakota, art. XXII; Tennessee, art. XI, § 3; Texas, art. 17; Utah, art. XXII; Vermont, § 72; Virginia, art. XIII; Washington, art. XXIII; West Virginia, art. XIV; Wisconsin, art. XII; Wyoming, art. 97–20.

20. Tarr (1998), pp. 73–74.

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

22. Council of State Governments, *Book of the States, 2000–2001,* Vol. 33 (Lexington, Ky.: The Council, 2000), calculated by the author from table 1.6, p. 11.

23. Council of State Governments (2000), table 1.6, p. 11.

24. Lutz. "Patterns . . ." (1996), p. 40.

25. Council of State Governments (2000), summarized from table 1.2, p. 5.

26. Lutz (1996), table 2.8, p. 41.

27. Bruce E. Cain, Sara Ferejohn, Margarita Najar, and Mary Walther, "Constitutional Change: Is It Too Easy to Amend Our State Constitution?," in Bruce E. Cain and Roger G. Noll (eds.) *Constitutional Reform in California* (Berkeley: Institute of Governmental Studies Press, University of California, 1995), pp. 273 and 276.

28. *State ex. rel. Stevenson v. Tufly* 19 Nev. 391 (1887).

29. Generally on the single subject rule see Martha J. Dragich, "State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges," *Harvard Journal on Legislation,* Vol. 38 (Winter, 2001), pp. 103–67.

30. Art. 4.8.5 (a).

31. But *see* Opinion of the Justices, 81 So. 2s 881 (Ala. 1955). By a 4–3 majority the Alabama Supreme Court, reasoning that no state constitution could be immune from amendment by the people, said that an amendment offered by the legislature would be acceptable that repealed the provision on representation. The minority wrote that such an amendment might be made by a constitutional convention only.

32. *See* the discussion of "Home Rule" ratification provisions, above.

33. *See Book of the States, 2000–2001* (2000), pp. 5–6, table 1.2.

34. *State v. Gonzales* 645 N.W. 2d. 264 (Wis., 2002). *See* Robert Williams and Frank Grad, *State Constitutions for the Twenty-first Century*, Vol. 2 (Albany: State University of New York Press, 2005).

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

36. For a brief but very valuable analysis of the debates in several states on adopting the constitutional initiative *see* John Dinan, "Framing a People's Government: State Constitution Making in the Progressive Era," *Rutgers Law Journal* (Vol. 30, 1999), pp. 979–84.

37. http://www.inadrinstitute.org/factsheets/.

38. This is similar to the provision in the *Model State Constitution.* Art. XII, §§ 12.01–12.02 (New York: National Municipal League, 1968).

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

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

41. See Zimmerman (2001), pp. 84–87, citing *Meyer v. Grant* 108 S. Ct. 1886 (1988) and *Buckley v. American Constitutional Law Foundation, Inc.* 119 S. Ct. 636 (1999). For a history of the use of paid signature gatherers *see* Richard J. Ellis, "Signature Gathering in the Initiative Process: How Democratic Is It" (typescript, files of the author, 2002), pp. 14–17.

42. Ellis (2002), p. 12.

43. Ellis (2002), p. 12. Montana requires 5 percent of those voting in the immediate preceding general election to propose a statutory change by initiative, and twice that to propose a constitutional change. Oregon's signature requirement for a statutory change was 6 percent of those voting in the last gubernatorial election; for a constitutional change it was 8 percent.

44. Ellis (2002), p. 13.

45. *Idaho Coalition United for Bears v. Pete T. Cenarrusa,* Civ. No. 00-0668-BLW cited in Ellis (2002), pp. 58–59.

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

47. Art. 15, § 273.5.

48. *See,* for example, "Developments in State Constitutional Law," *Rutgers Law Journal* (Vol. 32, Summer, 2001), p. 1549ff.

49. Art. XI, §§ 2 and 6.

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

51. Robert Williams, "Is Constitution Revision Success Worth Its Popular Sovereignty Price?" *Florida Law Review* (Vol. 2, No. 2, April 2000), pp. 249–73; Rebecca Mae Salokar, "Constitutional Politics in Florida: Pregnant Sows or Deliberative Revision?" Paper given at the Annual Meeting of the American Political Science Association, San Francisco, California, August 30, 2001. For a range of opinions on the Florida experience *see* other essays in the above cited April 2000 symposium issue of the *Florida Law Review*.

52. New Mexico Constitution, art. XIX, § 1.

53. Utah—Statutes 63.54.1–4, at 63-54-3a,b,c.

54. Those that do not provide for calling conventions are Arkansas, Indiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Texas, and Vermont. *Book of the States* (2000), p. 8, table 1.4.

55. Council of State Governments, *Book of the States* (2000), p. 8, table 1.4. The Alaska majority is drawn from an internal constitutional reference to following procedures for the 1955 convention, but is not explicitly specified. In the Hawaii Constitution the majority is not specified.

56. Benjamin (2002), pp. 1018–19, and footnote 12.

57. Benjamin (2002), p. 1044.

58. They are Minnesota, Nevada, South Carolina, Utah, Washington, and Wyoming.

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

60. Zimmerman (2001), p. 80 citing *Cummings v. Beeler* 189 Tenn. 151, 223 S.W. 2d. 913 (1949) and *Snow v. City of Memphis* 527 S.W. 2d. 55 (1975).

61. Zimmerman (2001), pp. 121–22.

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

63. Benjamin (2002), p. 1021, footnote 31.

64. *See* Peter Galie and Christopher Bopst, "The Constitutional Commission in New York: A Worthy Tradition," *Albany Law Review* (Vol. 64, 2001), p. 1285ff.

65. Art. 18, § 2.

66. Art. XII, § 2.

67. Tarr (2001), p. 12.

68. 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 nonsouthern 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.

69. 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," art. X, § 3.

70. Art. XIX, § 2.

71. Agata (1994), pp. 45–46.

72. *See* Benjamin (2002) passim for a detailed discussion of the 1994–1997 experience in New York.

73. Benjamin (2002), p. 1020.

74. Art. XIX, § 1.

75. Richard Briffault, "The Voting Rights Act and the Election of Delegates to a Constitutional Convention, in Temporary New York State Commission on Constitutional Revision," *Interim Report: The Delegate Selection Process* (Albany: The Commission, 1994), pp. 53–84.

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

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Chapter Eight

State and Local Finance

Richard Briffault

Introduction

Nearly all state constitutions give considerable attention to questions of state and local public finance. The typical state constitution devotes at least two articles to state and local taxation, borrowing, and spending. They limit the purposes for which states and localities can spend or lend their funds, and they expressly address specific spending techniques. Nearly all states also impose significant substantive or procedural restrictions or both on state and local borrowing, and on state and local taxation. Some constitutions limit expenditure levels as well.

This state constitutional focus on government finance differs sharply from the federal Constitution's relative indifference to public finance. The Constitution simply authorizes Congress "to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defense and the general welfare of the United States" and "to borrow money on the credit of the United States."[1] Beyond those brief statements, the Constitution imposes two minor procedural constraints on federal spending and taxation: All bills for raising revenue must originate in the House of Representatives,[2] and no money may be drawn from the Treasury "but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time."[3] There are also a handful of substantive constitutional constraints on federal taxation: "All duties, imposts, and excises shall be uniform throughout the United States."[4] Taxes and duties on exports are barred;[5] so, too, direct or capitation taxes are barred unless apportioned among the states according to population.[6] The apportionment requirement, however, was modified by the Sixteenth Amendment to authorize federal taxation on incomes without regard to apportionment. There are no constitutional limits on federal borrowing at all.

Where the federal Constitution primarily empowers Congress to raise and spend money, the state constitutions operate to limit state and local government financial support for private sector activities, and to protect state and local taxpayers from the burdens of state and local debt and taxation. In effect, they

constitutionalize both the separation of the public from the private sector and the norm of financially limited government.

Or at least they would if they were honored according to their apparent terms. But one of the most striking aspects of the state constitutional law of state and local finance is the enormous gap between the written provisions of state constitutions and actual practice. The public purpose requirements that ostensibly prevent state and local spending, lending, and borrowing in aid of private endeavors are largely dead letters. The substantive and procedural debt limitations have, to a significant degree, been evaded by a host of financial instruments that the courts have held to be beyond the scope of these rules. The constitutional constraints on state and local taxation have been more effective, but their impact, too, has been cushioned by judicial determinations that certain revenue-raising devices are not taxes subject to limitation. Moreover, courts have held that many special-purpose governments are beyond the scope of the constitutional tax and debt limits. As a result, these limits have contributed to the byzantine structure of state and local governance. This chapter will discuss the texts, background, and evolving judicial interpretations of the principal fiscal provisions of state constitutions; and will then consider, in light of the troubled history of these fiscal limits, their place in contemporary state constitutional design.

PUBLIC PURPOSE LIMITS

Constitutional Provisions

By one recent count, forty-six state constitutions contain provisions that expressly limit the authority of their states or local governments to provide financial assistance to private enterprises and, in some cases, public enterprises.[7] The remaining states appear to rely on judicial doctrines that similarly require that state or local taxpayer funds be spent only for public purposes. The New York Constitution is typical in providing that "[t]he money of the state shall not be given or loaned to or in aid of any private corporation or association or private undertaking,"[8] and that "[n]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking."[9]

Many state constitutions supplement this general "public purpose" requirement with further restrictions on specific forms of financial assistance, such as the prohibition on the state or locality giving or lending its credit to private firms, or the ban on the state or local government becoming a shareholder in a public or private corporation.[10] In addition, public purpose requirements typically apply to state and local borrowing, so that debts may be incurred only to support public purpose projects.

History

Public purpose limitations date back to the middle decades of the nineteenth century, and reflect the disastrous consequences of the states' extensive investments in and assistance to private firms in the 1820s and 1830s. The enormous success of the Erie Canal, which opened in 1825, in energizing New York's economy inspired a massive program of state support for turnpikes, canals, and railroads over the next two decades. Many of these projects blurred public and private lines, with states in partnership with private firms, lending or giving funds to private firms, or providing loan guarantees to firms. The states frequently obtained the funds they used to aid private firms by borrowing. Fueled by interstate competition for economic development, this era of state-supported infrastructure finance was marked by waste, overbuilding, and mismanagement. The Panic of 1837 led to a contraction in economic activity and eventually to an economic crisis. Many firms that had borrowed from the states were unable to repay their loans, and many infrastructure projects failed to generate projected revenues. The states had great difficulties meeting their obligations to their creditors; nine defaulted on interest payments and four states—Arkansas, Florida, Michigan, and Minnesota—repudiated all or part of their debts.

In reaction, the states in the 1840s and 1850s engaged in a wave of constitutional revision. To limit state financial support for private firms, state constitutions were amended to require that state spending or lending be for a public purpose; to bar the gift or loan of state credit except for a public purpose; and to ban direct state investment in business corporation obligations. Initially, these provisions applied only to the activities of state governments. As a result, they could be circumvented by state legislation authorizing local governments to provide assistance to private firms, especially railroads. Another round of waste, overbuilding, and economic crisis followed, and in the late nineteenth century most states amended their constitutions to apply the public purpose and aid limitations to local governments.

Changing Interpretations

The public purpose requirement was never a complete bar to all government financial assistance to the private sector. In the leading mid-nineteenth-century case of *Sharpless v. Mayor of Philadelphia*,[11] the Pennsylvania Supreme Court held that aid to a privately owned railroad could serve a public purpose. "The public has an interest in such a road" even if privately owned, because a railroad provides "comfort, convenience, increase of trade, opening of markets, and other means of rewarding labor and promoting wealth." Most nineteenth-century courts, however, treated their states' public purpose requirements as significant