Automatic Convention Call

Fourteen states provide that the people be automatically asked periodically whether they wish to hold a constitutional convention. In eight of these the period is twenty years, and in four ten years. Michigan has a convention question vote every sixteen years, and Hawaii every nine years.[56] In 2002, votes were negative by wide margins on the automatic convention question in Alaska, New Hampshire, and Missouri. Rhode Island's convention in 1985 was the most recent called by use of the automatic question. Between 1970 and 2002 the outcome of votes on the automatic convention call was positive four times (Rhode Island, Hawaii [1976] and New Hampshire [1972, 1982]) and negative twenty-five times.[57] Recent history notwithstanding (and as is demonstrated below [table 1]) constitutional conventions have been more frequently called in states with automatic call provisions.

Referendum Election Timing

Constitutions generally require the referendum on a convention to be held in a general election year. Connecticut specifies a general election in an even numbered year. In Oregon and Oklahoma the question may be put at either a general or special election.

Preparation for the Convention Vote

The Rhode Island constitution requires the legislature to create a nonpartisan commission to inform voters of potential constitutional issues prior to a vote on whether to call a convention.

Popular Vote Requirement

Of those states that call for popular ratification of a legislatively proposed convention before it is called, most (twenty-one) require the majority to be of those voting *on the question*. Two of these also specify a minimum required vote: one-quarter of those voting in the last general election in Kentucky, and at least 35 percent of the vote in the general election in which the referendum is held, in Nebraska. Ten states require support of a majority of those voting *in the election* for a convention to be called. (Alternatively in Illinois a convention may be authorized by three-fifths voting on the question.) Six of the ten states with the more demanding popular vote requirement also mandate extraordinary legislative majorities to propose a convention.[58] Finally, three states—Arizona, Oklahoma, and Oregon—are silent on the base of the popular majority required to call a constitutional convention.

For automatic periodic referenda, a majority vote on the proposal is generally required for calling a convention. In Hawaii in 1996 an automatic convention call was supported by a majority of those voting on the question, but the measure failed because a majority of those voting in the election was required.[59]

Limited or Unlimited Convention

The Kansas Constitution is most specific in providing for calling a constitutional convention with a limited agenda. Both the North Carolina and Tennessee constitutions also allow limited conventions. In Tennessee the legislature can limit a convention's substantive reach, but not how it may act on a specified subject one it is called.[60] A convention called in Pennsylvania in 1967 was limited to consideration of some specified matters and barred from taking up others.[61] An attempt to use the indirect initiative to call a limited convention was blocked by the Supreme Judicial Court in Massachusetts in 1970.[62]

In contrast, the Montana Constitution specifies that a convention called through the use of the initiative be unlimited. The Alaska Constitution refers to the power of a convention as "plenary," and says "No call for a constitutional convention shall limit these powers of the convention." Nine automatic referendum states specify the ballot question in their constitutions.[63] This precludes a limited convention resulting from this process. Inability to limit a convention if one is called, and the possibility of the calling of an unlimited convention resulting opening a "Pandora's Box," has been an argument used against calling a convention.[64] This argument is effective because powerful groups in state politics—for example, labor unions, tax limitation advocates, and public employees—often have won inclusion in state constitutions of provisions that protect their interests. They do not wish to see these put at risk of change or removal, however remote the political risk may be. The possibility of a limited convention may remove or reduce this source of opposition.

Staffing, Convening, Structuring, and Operating a Convention

State constitutions vary enormously in the degree of detail with which they deal with the specifics of staffing, convening, structuring, and operating a constitutional convention once it is called. There are three general approaches: minimal detail, maximum detail, and reliance on the legislature with constraining detail.

Minimal Detail: In those states in which legislatures control calling conventions constitutional provisions regarding conventions tend to be relatively simple and flexible. For example, the California Constitution provides that: two-thirds majorities in both houses of the state legislature may schedule a vote on whether to call a convention, if one is called that it should be scheduled within six months, and that delegates should be voters elected from districts as equal as possible in population.[65] Even more simply, the Wisconsin Constitution says:

> If at any time a majority of the senate and assembly shall deem it necessary to call a convention to revise or change this constitution, they

> shall recommend to the electors to vote for or against a convention at the next election for members of the legislature. And if it shall appear that a majority of the electors voting thereon have voted for a convention, the legislature shall, at its next session, provide for calling such convention.[66]

Provisions like these leave the legislature free, through enabling statutes dealing with such matters as delegate election and convention structure and operations, to allay fears that commonly arise about these venues for constitutional change being "seen as distant from the general populace, another forum in which elite reformers and entrenched interests compete for political power."[67] Moreover, because ballot language for a convention call is not specified, there is even room in these provisions to test whether the agenda of a convention may be limited in the legislative call presented to the electorate. But this flexibility means little, because history shows that legislators rarely call conventions.

Politicians in power will rarely create a forum they may not control that might seriously alter the power relationships in the polity they govern. It is instructive that only three of the sixteen nonsouthern states in which the legislature has sole control over calling a constitutional convention have had more than one constitution in their history.[68] The average constitution's longevity in these states is significantly higher, and the number of constitutions adopted lower, than for nonsouthern states with an automatic referendum provision or that make no provision at all for calling a convention. (See table 1.)

TABLE 1
Convention Call Provisions, Mean Number of Constitutions, and Average Constitution Longevity (Nonsouthern States Only)

Revision Provision	*Number of States*	*Mean Number of Constitutions*	*Average Longevity (in years)*
Periodic Automatic Referendum*	14	3.0	54.5
No Provision†	6	2.5	79.9
Legislative Call Only‡	19	1.5	94.2
Total	39	2.2	80.3

*Alaska, Connecticut, Hawaii, Illinois, Iowa, Maryland, Michigan, Missouri, Montana, New Hampshire, New York, Oklahoma, Ohio, and Rhode Island.

†Indiana, New Jersey, North Dakota, Pennsylvania, Massachusetts, and Vermont.

‡Arizona, California, Colorado, Delaware, Idaho, Kansas, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

Source: Calculated by the author from data in Council of State Governments, *Book of the States, 2000–2001* (Lexington, Ky.: The Council, 2000), tables1.1 and 1.4, pp. 3 and 8.

Maximum Detail: In states in which legislatures may be bypassed to call conventions—those with periodic automatic convention referenda—constitutional change provisions tend to be highly detailed. This complexity arises from an effort to make the election of delegates and the organization and operation of the convention as minimally dependent as possible on legislative support.[69]

One example is the New York constitutional provision concerning calling a convention. Not dissimilar from that of a number of other automatic call states, it is more than six times as long as that of Wisconsin. It specifies the ballot question to be used for a convention call by the legislature or as the result of the state's automatic referendum provision; indicates the necessary majority for calling a convention; details the districts to be used for the election of delegates; identifies the time and place the convention will first meet and its duration; provides for the compensation of delegates; establishes the convention's quorum rule; enumerates many of its powers, processes, internal procedures, and required majority for acting; makes provision for filling delegate vacancies; and indicates when its work is to be submitted and how it is to be approved.[70]

The automatic convention call on a twenty-year cycle was added to the New York Constitution in 1846. In a referendum vote required by this provision, the state's voters approved a convention in 1886. However, partisan difference between the Republican state legislature and a Democratic Governor blocked the election of delegates until 1893 and the convening of this convention until 1894. In reaction to this experience, delegates at this convention added detail to New York's provision for constitutional amendment and revision to assure that a convention, once called, would be staffed, and then could meet and do its work in a timely manner, the partisan circumstances in state government notwithstanding.[71]

In 1997, the requirements of these self-executing provisions were used as arguments against a convention when the automatic question provision again required a referendum. One of several possible examples illustrates the point. The New York Senate has been Republican controlled for almost the entire post–World War II period. Senate districts are redesigned every decade by incumbents to assure continuing GOP control of this body. Given this history, the use of these districts for delegate selection as required by the constitution, it was argued by opponents, would likely produce a Republican bias in any potential convention. Moreover, the employment of Senate districts as multimember districts and the election of fifteen convention delegates at-large, both required by the constitution, raised voting rights concerns under federal law, and almost certainly assured litigation if a convention was authorized.[72] Thus a provision added in 1894 to expedite the convening of a convention if it was called came, a century later, to be the basis of arguments against one being called in the first place. The 1997 automatic convention question in New York was decisively defeated at the polls. This outcome was typical. Since 1970 only four of the twenty-five referenda held in states with periodic automatic call provisions have had positive outcomes, the last in 1984.[73]

Reliance on the Legislature, With Some Constraining Detail: A third approach is to rely on the legislature to actually effect a convention if one is called, but direct its activity or build in constraints in specified areas where difficulties might be encountered. Thus, the Colorado Constitution provides that the the general assembly may place a convention call on the ballot by a two-thirds vote of both houses. A majority of those voting is needed to authorize a convention, with delegates elected from state Senate districts numbering twice the membership of that body. Those who seek to serve in the convention must meet the same qualifications as state Senate candidates; vacancies are filled in the same manner as those in the legislature. The convention must begin within three months of delegates' election, and must report between two and six months after adjournment. Most other details are left to the legislature.[74]

The difficulty of this and similar approaches (and even the most detailed approaches), of course, is that they may fail to anticipate all the means in which a state legislature, if hostile, might thwart the holding of a convention.

Specific Areas of Detail

A further review of specific areas of detail in state constitutional provisions concerning conventions reveals the concerns of drafters as they reacted to historic experience and drew lessons from the record in other states.

Frequency of Conventions: The Tennessee Constitution limits the state to no more than one constitutional convention every six years.

Size of the Convention: Delaware's constitution calls for a convention of forty-one delegates. But generally when the size of a convention is constitutionally specified, it is with reference to the size of the state legislature. In Idaho the convention is to be twice the size of the most numerous legislative house; in Colorado twice the size of the Senate. A convention in Kentucky has the same number of members as the Assembly. In Maryland its total membership is equal to the combined membership of the legislative houses.

Districting for Delegate Elections: California requires that delegates be selected from "districts that are as nearly equal in population as may be practicable." Georgia has a similar requirement. Legislative districts are frequently specified for use in delegate selection. In Illinois, for example, two delegates are to be selected from each legislative district. Delaware uses representative districts, augmented by "two . . . from New Castle County, two from Kent County and two from Sussex County." Provisions for using multimember districts for electing convention delegates may raise voting rights concerns under federal law.[75]

Election of Members: Ohio specifies nonpartisan election of convention delegates. In Missouri nonpartisan election is specified for at-large members. A limited nomination and voting system within Senate districts used to elect two delegates each there is used to assure that the two major parties will be equally represented from these districts.

Qualification to Serve: Because legislators fully control the legislative route for proposing amendments, some argue that they should not be permitted to participate in the alternative route (designed to bypass the legislature) as convention delegates. Such a ban should be extended, some think, to all government elected officials and employees, because those in public service should not design the document that creates their jobs, and empowers them. The contrasting view is that such bans are tantamount to "barring doctors from the operating room," excluding the most knowledgeable and interested from convention service.

The Kansas Constitution specifies that legislators may serve as convention delegates. In direct contrast, Missouri bars from service as convention delegates (with a few minor exceptions) persons "holding any other office of trust or profit" in the state. The Hawaii Constitution provides that "any qualified voter of the district concerned shall be eligible" to serve in the convention. Somewhat similarly, the Illinois constitution provides that "To be eligible to be a delegate a person must meet the same eligibility requirements as a member of the General Assembly."

Filling Vacancies: It is common for vacancies in delegate positions to be filled in the same manner as those for one or the other house of the legislature. In Hawaii the governor fills vacancies with "a qualified voter from the district concerned." In Missouri, the governor must appoint to any vacancy a person of the same party, from the same district as the person vacating the post.

Time and Place of First Convening: It is common for constitutions to specify a date on which or by which by which a convention must first meet. The state capitol is often designated as the location of that meeting. With legislatures now in session for far longer than they were when most constitutional amendment and revision provisions were written, there arises the possibility that both the legislature and the convention will have need of the use of the capitol chambers simultaneously.

Leadership, Rules, and Process: Where details are provided, state constitutional conventions are generally charged with selecting their own leadership, adopting their own rules, hiring and compensating staff, keeping a record of their proceedings, and being judge of the qualifications of their own members. Quorum rules and similar procedures appear similar to those constitutionally specified for state legislatures.

Compensation of Delegates: The Delaware and Hawaii constitutions require that the rate of pay for delegates to a constitutional convention be set by statute. The Missouri Constitution sets delegate pay at $10 per day, plus mileage. In New York, delegates must receive the same salaries and be reimbursed for expenses at the same rate as state legislators. As a result of this provision, and because there was no bar to service by legislators as convention delegates, many New York legislators who were elected as delegates to the 1967 constitutional convention—to great public consternation about "double dipping"—were paid two salaries and gained double pension benefits.

Finance: Constitutions often contain general directives that the state legislature provide necessary support for a convention. The Alaska Constitution specifies that "The appropriation provisions of the . . . [convention] . . . call shall be self-executing and shall constitute a first claim on the state treasury."

Time for Consideration and Publicity: Timely submission of the work of a convention, while also allowing enough time for voters to consider it, is an apparent concern in some revision provisions. For example, the Illinois Constitution requires that the work of a convention "shall be submitted to the electors in such manner as the Convention determines, at an election designated or called by the Convention occurring not less than two nor more than six months after the Convention's adjournment." The Georgia Constitution imposes the same obligations to publicize its results on a convention as it does on the legislature to publicize any amendments it proposes. Regarding publicity, the Hawaii Constitution requires that the text of convention recommendations be available at least thirty days prior to their submission to voters at every public library, office of the clerk of each county, and through the chief election officer. The Hawaii document also says that "The convention shall, as provided by law, be responsible for a program of voter education concerning each proposed revision or amendment to be submitted to the electorate." As is the case with legislatively initiated amendments, more recently developed electronic technologies are not specified in constitutions for publicizing convention results.

Submission of Results: Conventions are almost always left discretion regarding the form in which they submit their work to the public. This may be in a single question or in multiple questions. Decisions about the form of submission of convention results may be very important in determining outcome. The submission of the work of the 1967 convention in New York as a single question is widely regarded as a major reason for the draft constitution's failure at the polls.[76]

Ratification: In Missouri and South Dakota ratification of convention proposals must be sought at a special election. The general election must be used in

Florida, Missouri, and New Hampshire (where ratification must also be in an even numbered year). Twenty-one states require a majority voting on the question or questions for ratification of constitutional convention proposals. In Michigan three-fifths support on the proposal is required, and in New Hampshire two-thirds. In Colorado the majority must be of those voting in the election. In Hawaii the requirement is at least 50 percent of those voting in a general election, or in a special election, the equivalent of 30 percent of those registered. In other states ratification majorities are not constitutionally specified. Such specification is desirable to avoid ambiguity, and potential litigation.

Conflict: If both pass and are in conflict, revisions proposed by a convention are given precedence in Hawaii over those proposed by the legislature.

Gubernatorial Veto: The Alabama, Hawaii, and Georgia constitutions specifically bar gubernatorial veto of convention proposals.

Effective Date: As for amendments adopted by various means, most constitutions specify an effective date for constitutional revisions proposed by conventions that receive popular support.

GUIDELINES FOR DEVELOPING A CONSTITUTIONAL CHANGE PROCESS: A CHECKLIST

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

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., 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.

AMENDMENT PROCESSES

1. **SINGLE SUBJECT**—Amendments are best limited to a single subject or object.
2. **IMPACT ON EXISTING CONSTITUTION AND INTERPROVISION 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 on 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 on 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 percent and 10 percent 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.

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