CONstitutional CONcepts

Number 6

A series of condensations of the scholars' research papers prepared by the Illinois Constitutional Research Committee which was appointed by Governor Richard B. Ogilvie to furnish background material for delegates to the Constitutional Convention.

SELF RENEWAL: THE AMENDING PROCESS IN STATE CONSTITUTIONS

Robert W. Bergstrom

How difficult should it be to amend a state constitution?

What are the practices in other states?

What have we learned by our Illinois experience?

Robert W. Bergstrom, attorney and constitutional scholar, answers these questions and draws pertinent conclusions in his paper, Self Renewal: The Amending Process in State Constitutions. Commissioned for the Governor's Constitution Research Group, this paper will be one of the background materials for the Constitutional Convention delegates.

This is an abbreviated summary of the original and does not purport to contain all the detail of the original, which was accompanied by significant tabulations. (See the back page for further information.)

No framers of a state constitution can foresee all possible future events; and no state constitution, however modern, can warrant that the future will find it totally satisfactory. A well-conceived amendment procedure is, therefore, an essential part of any new state constitution.

Three alternative amending procedures have been used or proposed. These are: (1) Proposal of amendments by the legislature and approval or rejection by the electorate in a referendum; (2) Proposal of amendments by "initiative petition" signed by some designated percentage of voters, and a referendum thereon; and (3) Proposal of amendments by a constitutional convention, and a referendum thereon.

Variations of these three alternatives consist only of the degrees to which these are either streamlined to facilitate amendment, or hedged about with complications in the interest of deliberateness of decision. Thus, the required vote in the legislature may be a majority or ⅔. Submission to two successive legislatures may be required. the required vote of the electorate may range from a majority of all those voting at the election, which makes a negative vote out of every voter who simply disregards the issue, to ⅔, 3/5, or a simple majority of those who actually vote on the amendment. The initiative petition may require signature of from 3%-15% of the voters; and the initiative proposal may go directly on the referendum ballot or be subject to legislative veto or legislatively proposed alternative.

In addition, three states (Georgia, Louisiana and New Mexico) do have certain requirements as to approval by a specified percentage of votes within counties or parishes. Thus, certain local governments have immutable constitutional rights which are not subject to legislative revision. To the extent that such rights are "frozen in" to a constitution, they represent a conflict with the principle that state government should be adaptable to changes in circumstances.

A number of factors need consideration in determining how easy the amending process should be. As the constitution should be a broad, general charter rather than detailed legislation, probably amendments will be less necessary and such amendments will be so fundamental that they must receive the most careful deliberation.

"Checks and Balances" should be established to assure: (1) A determined minority should not be able to use the apathy of voters to frustrate the public will. Thus, the provision requiring concurrence of a majority of all electors voting at the election, which turns apathetic non-voters into negative voters. (2) A temporary majority, formed in momentary passion, should not be able to impose tyranny through an "instant amendment" process, without deliberation, which converts a constitution into a "one-way train ticket, good for today only." (3) A determined minority should not be able, by constitutional amendment, to impose legislation which the minority is unable to persuade the legislature to adopt. Nonetheless, perhaps there should be a way for the public to launch the amending process if the legislature is dilatory.

The most important method of amendment of state constitutions has been proposal by the legislature and referendum thereon. The commentary to the National Municipal League's proposed Model State Constitution says: "Probably more than 95% of all amendments proposed annually in the states come from the legislatures."

Proposal of Amendments

The present Illinois Constitution requires amendment proposal by ⅔ of each house and submission to the electorate at the next election of the General Assembly. Approval requires (1) a majority of the electors voting at the election, including those who do not vote at all on the amendment, or (2) ⅔ of those voting on the proposed amendment. The General Assembly may not propose amendments to more than 3 articles at the same session, nor to the same article more than once every 4 years. The proposition must be submitted in a separate ballot.

When the 1870 Constitution was adopted, the requirement that an amendment be approved by a majority of those voting at the election was hardly more stringent than a mere requirement of a majority of those voting on the proposition. This was because the "party ticket" system was in operation at that time. Political parties printed their own ballots, and ballots cast were counted as votes for whatever was not stricken from them. Included on such ballots were the constitutional amendments they recommended. Hence, casting of party ballots required a direct expression of opinion if the vote was to be against the recommended amendments.

In 1891 the legislature reformed election procedures by substituting the secret Australian ballot for party ballots. Proposals for constitutional amendment were placed on separate ballots or in columns separate from the party columns. The drastic effect of this change was immediately apparent. All 5 proposals submitted prior to 1891 had been approved. But, on the 1892 Gateway Amendment proposal, 79.6% of the voters failed to cast ballots; on the 1894 Labor Laws Amendment proposal, 75.4% failed to vote; and on the 1896 Gateway Amendment proposal, 78.9% failed to vote.

Of 37 propositions submitted since 1870, only 3 were defeated by actual negative vote of those voting on the proposition. Although approved by a majority of those voting thereon, 19 went to defeat by virtue of the "negative" vote of those who went to the polls and failed to mark their constitution ballots. Of the 15 adopted, 13 met the test of approval by a majority of all voting at the election.

The Gateway Amendment of 1949 has not affected the amending process significantly. Since 1950, 15 constitutional amendments have been submitted, of which 6 were adopted. Only the County Officers (Compensation) and Banking (Double Liability) Amendments of 1952 qualified under the Gateway ⅔ test alone. Three amendments in 1954—Reapportionment, State Treasurer's (Tenure) and Illinois-Michigan Canal (Land Disposal) —met both the ⅔ and majority of all voting tests. Since 1954 no proposal has received approval by ⅔ of those voting on the issue. The Judicial Reform Amendment of 1962 passed only under the original test of a majority of those voting at an election.

Opponents of too easy or too rapid an amending process cite the "Continuity of Government" or "Emergency Power" Amendment enacted unanimously in both houses at the end of the 1963 session which received 64.3% of votes cast on the proposition. This was an unrestricted grant of power to suspend constitutional guarantees under ambiguous conditions. However, the official Blue Ballot explanation represented incorrectly to voters that the amendment was applicable only to Apocalyptic conditions and had been adopted by 48 other states.

Danger of hasty passage where the public has not had adequate opportunity to develop a true "will of the majority" would exist especially in the case of an "initiative petition" amendment, if a low requirement for number of signatures were combined with minimum requirements for ratification by referendum.

Here is a summary of some of the various states' provisions for legislative and initiative proposal. Nineteen states (including Illinois) require a ⅔ vote of each house; 9 require a 3/5 vote; and 9 permit a majority of each house to submit amendments. Fifteen states (overlapping the foregoing figures) have unique provisions, frequently dealing with double passage. For example, Connecticut requires a ¾ vote of both houses or a majority of both houses in two successive legislatures; and Hawaii provides the same alternative to a ⅔ vote of both houses. Indiana requires a majority of both houses in two successive legislatures. New York has a similar requirement. In Delaware, the amendment is adopted without any

general election, by a ⅔ vote of both houses in two successive legislatures. The signatures required on initiative petitions (in the 11 states which permit this method) range from 3% to 15% of the registered voters or of those last voting for certain offices.

Of the 49 states requiring voter ratification of amendments, 32 require a simple majority of those voting on the proposition. Five require a majority of all votes cast at a general election. Twelve have unique variations: three of these permit a simple majority for ratification of the legislature's proposals but add other hurdles for initiative proposals: 30% or 35% of the total vote, or a majority voting thereon at two successive general elections. Rhode Island has a 3/5 requirement; Indiana requires ⅔; Hawaii requires a majority of those voting thereon and not less than 35% of the total vote at the election.

Only 3 states join Illinois in providing that an amendment to the same article cannot be resubmitted for a designated period. Illinois and 5 other states restrict the number of amendments which can be offered at one time. Two states have a requirement that an amendment can apply to only one general subject. Twenty-four states require that each amendment must be voted on as a separate proposition.

The National Municipal League's proposed Model State Constitution would permit amendments to be proposed by majority vote of the legislature or by initiative petition subject to majority approval of the legislature. Voter ratification would be by simple majority of votes cast on the proposition.

Constitutional Conventions

Americans have held over 200 state constitutional conventions. Eleven state constitutions contain no provisions for a convention; in 15 states proposal for a convention is launched by majority vote of both houses; in 21 (including Illinois) a vote of ⅔ of each house is required; in one the requirement is 3/5. Seven states which provide for convention proposals by the legislature also backstop this with a mandatory referendum in periods of from 10 to 20 years if no convention has been called in a designated period.

Four states do not require a referendum on the legislature's call for a convention. Approval of the call by a majority of those voting thereon is permitted by 21 states; 14 (including Illinois) require a majority of all the votes cast at an election, with 2 of these 14 states having additional requirements. States vary greatly in the amount of convention procedural detail set forth by constitutional provision as contrasted with a legislative enabling act. Only a few states join Illinois in predetermining the districts from which delegates are elected.

Ratification of the convention's proposals is not provided for in 12 of the 39 constitutions which provide for conventions. Of the remainder, 24 permit ratification by a majority of those voting thereon. Two require an unusual majority.

Judicial construction, in some states, has permitted constitutional conventions even where no express authority is given, and has required voter ratification of a convention's proposals. A constitutional commission, created by statute, is sometimes utilized. However, it is merely an auxiliary device, used to prepare proposals for consideration by legislature or convention.

The Model State Constitution proposes that a majority of the legislature be empowered to submit a convention call to the voters; that there be a mandatory referendum whenever a convention shall not have been held for 15 years; that there shall be one delegate from each legislative district; and that a majority of the voters voting on the issue shall suffice both for convention call and referendum.

Conclusion

The devising of the amending process for Illinois is the charge of the convention delegates, but the following general conclusions seem to follow from materials presented. First, the amending process should be sufficiently deliberate and so highly visible as to insure a true expression of public will. Second, it should not be so burdensome as to frustrate the matured public will.

Third, the greater the number of forums for successive deliberation and the higher the visibility, the less the necessity for complex voting requirements. For example, an amending process which has gone through a legislative vote for call of a convention, a referendum, a convention, and a referendum on the convention's proposals needs less audit than one where a small group, through the initiative process, puts an amendment on the ballot with little notice to the electorate. If the adoption of the initiative process is contemplated, some safeguard such as a period for legislative consideration might well be in order.

Fourth, the past record shows that the method of submission of amendment by the legislature to the electorate is the most used and most important part of the amending process; the requirements for amendment by this method shall not be such as to make it an unworkable amending process. As has been seen, the ostensibly prosaic fractions and formulas of the amending process affect essential rights and liberties.

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WHY these DIGESTS?

Preparing for a constitutional convention requires advance background and research. Accordingly, Governor Richard B. Ogilvie called upon a group of scholars to prepare research papers for the use of delegates and appointed Dr. Samuel K. Gove, director of the Institute of Government and Public Affairs of the University of Illinois as project director. Sixteen papers on various aspects of state government are being assembled. These will be issued in condensed form in continuing issues of Constitutional Concepts. A sincere attempt has been made to retain the concepts and ideas of the writers whose papers run from up to 80 pages or more. Any errors which result from the condensations clearly are not those of the scholars originating the research.

As no public funds were available to the Constitution Research Group, the Union League Club of Chicago made an initial grant of $10,000 to the group so the work might proceed. The Club took no part in the selection of the scholars nor the topics to be researched; made no effort to influence either research or conclusion; and did not, in any manner, direct the group. Nor does the Club necessarily endorse any suggestions, proposals or ideas expressed by the scholars.

This is one of a series of condensed research papers, prepared and published as a public service by the Public Affairs Committee of the Union League Club of Chicago.