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Montana. Constitutional Convention Commission

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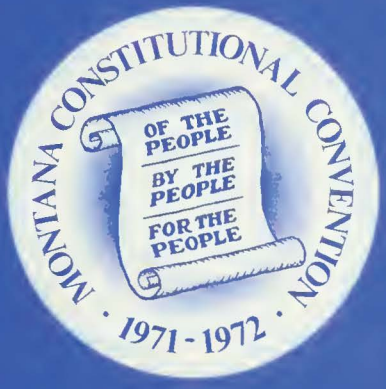

Prepared By: Montana Constitutional Convention Commission

Selected Readings on the Organization of Constitutional Conventions

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MONTANA CONSTITUTIONAL CONVENTION

1971-1972

SELECTED READINGS ON THE ORGANIZATION OF CONSTITUTIONAL CONVENTIONS

CONSTITUTIONAL CONVENTION RESEARCH MEMORANDUM NO. 9

PREPARED BY

MONTANA CONSTITUTIONAL CONVENTION COMMISSION

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PREFACE

The delegates to the 1971-1972 Montana Constitutional Convention will need historical, legal and comparative information about the Montana Constitution. Recognizing this need, the 1971 Legislative Assembly created the Constitutional Convention Commission and directed it to assemble and prepare essential information for the Convention.

To fulfill this responsibility, the Constitutional Convention Commission is preparing a series of research reports under the general title of Constitutional Convention Studies. In addition the series of research reports the Commission has authorized the reprinting of certain documents for the use of Convention delegates.

This research memorandum, a collection of readings on the organization of constitutional conventions was prepared under the supervision of the Commission's Convention Arrangements Committee consisting of William Sternhagen, Chairman; Clyde Hawks; Leonard Schulz; and Charles Bovey.

The selection of readings is designed to provide a background for the delegates on the organization of recent constitutional conventions. Although all items selected are published in other sources, the Commission felt that the collection of these essays into a single volume would be especially useful to the delegates. The Commission's appreciation is extended to the various authors and publishers who so graciously granted permission to use the selections contained herein.

This report is respectfully submitted to the people of Montana and their delegates to the 1971-1972 Constitutional Convention.

ALEXANDER BLEWETT

CHAIRMAN

The major questions in calling and assembling the convention are legal questions. In contrast, the problem of successfully organizing the convention so that its work may be done in an effective and expeditious manner is primarily a practical one.

Carrol L. Wagner, Jr.
Virginia Law Review
54 (1968) p. 1016

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CHAPTER I

STATE CONSTITUTIONAL CHANGE: THE CONSTITUTIONAL CONVENTION

By Carrol L. Wagner, Jr.

Reprinted by permission of author and publisher from: Carrol L. Wagner, Jr. "State Constitutional Change: the Constitutional Convention." Virginia Law Review 54 (1968); pp. 995-1030.

STATE CONSTITUTIONAL CHANGE: THE CONSTITUTIONAL CONVENTION

[E]ach generation . . . [has] a right to choose for itself the form of government it believes most promotive of its own happiness.

Thomas Jefferson[1]

Constitutionalism has been defined as

> the . . . proposition that the government is a set of activities organized by and operated on behalf of the people, but subject to a series of restraints which attempt to insure that the power which goes with such governance is not abused by those who are called upon to do the governing.[2]

In conjunction with Jefferson's commendation of structural change in government to maximize public happiness, this proposition is likely to command universal assent in the United States.[3] A written constitution is generally regarded as a fundamental law performing certain fundamental functions: defining the structure of government over a long period of time, restraining governmental powers, protecting individual rights, and symbolizing the social consensus or the basic unity of the body politic. Through these functions a constitution creates confidence among the various segments

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[1] Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816, in 7 WRITINGS 13 (Ford ed.).

[2] C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY 33 (1941).

[3] The right of the people to determine the manner in which they are to be governed has been widely expressed in American political theory. As early as 1690, John Locke in England articulated a political philosophy which recognized the inherent right of every people ". . . to resume their original liberty, and by the establishment of a new legislature (such as they shall think fit), provide for their own safety and security, which is the end for which they are in society." J. LOCKE, *Two Treatises of Government* in GREAT POLITICAL THINKERS 409 (W. Ebenstein ed., 3d ed. 1963). Thomas Jefferson drew upon Locke's theories in drafting the Declaration of Independence. The compact theory of the state, the concept of natural law and rights, the doctrine of popular sovereignty, and the notion of a right of revolution, all theories identified with John Locke, were the philosophical basis of the document adopted on July 4, 1776. George Mason anticipated Jefferson's ideas in drafting the Virginia Bill of Rights of June 12, 1776. This famous document recognized that: ". . . when any government shall be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish it, in such manner as shall be judged most conducive to the public weal." *The Virginia Bill of Rights* in DOCUMENTS OF AMERICAN HISTORY 103 (H. Commager ed., 7th ed. 1962).

of society that governmental decisions and actions will be circumscribed by procedural and substantive safeguards.[4]

Both the Federal Constitution and state constitutions perform these general functions. However, this general similarity does not dictate a uniform mode of analysis for both national and state constitutions. There is a real difference in functional emphasis, as Professor Frank Grad suggests in another article in this Symposium;[5] state constitutions are primarily concerned with restraining governmental powers while the Federal Constitution is devoted in large part to symbolic and protective functions.

There are two related reasons for this difference in functional emphasis. In the first place, state constitutions now play a relatively minor role in preserving the rights of citizens.[6] Most of these rights, whether because of the states' failure to fulfill this responsibility or otherwise, are already protected by the Federal Constitution against encroachment by the states as well as the Federal Government.[7] State constitutions are now primarily concerned

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[4] For a wide-ranging discussion of the theoretical nature of constitutionalism as seen by a political theorist, see C. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND DEMOCRACY (rev. ed. 1950). Friedrich remarks:

> Rights are constitutional, not natural. The constitution, . . . which is the process by which governmental action is effectively restrained, functions also as the most effective symbol of unifying forces operative in a community. Our insight into social motivation owing to modern research enables us to distinguish fairly well between the system of institutional safeguards, patterned in many different ways but always designed to prevent the concentration of power, and the congeries of symbols expressive of communal traditions and general agreements. Through recognizing this, we should avoid the cynicism which springs from a naive rational search for close correspondence between symbols and the things they refer to. It is equally important to recognize the need for continual change. An appreciation of the symbolic value of the constitution need not obscure the dynamic, changing nature of the traditions and agreements which it symbolizes.

Id. at 172.

[5] Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928 (1968).

[6] In 1873 the United States Supreme Court's interpretation of the privileges and immunities clause of the Fourteenth Amendment left responsibility for protecting civil rights from state action to the state constitutions. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873). However, later cases utilized the due process clause of the Fourteenth Amendment to require that states avoid abridging those rights protected by the Federal Constitution, *infra* note 7, thereby taking the protection of these rights from the exclusive domain of state constitutions.

[7] The United States Supreme Court has construed the Fourteenth Amendment to prohibit the states from abridging certain rights embodied in the first eight amendments to the United States Constitution. The federal rights which the Fourteenth Amendment presently guarantees are, from the First Amendment, the establishment clause, Everson v. Board of Educ., 330 U.S. 1 (1947), freedom of religion, Cantwell v. Connecticut, 310 U.S. 296 (1940), freedom of speech and press, Gitlow v. New York, 268 U.S. 652 (1925), and the right of assembly, DeJonge v. Oregon, 299 U.S. 353 (1937); from the Fourth Amendment, the freedom from unreasonable searches and seizures, Mapp v. Ohio, 367

instead with organic matters—with structuring the interrelationship between coordinate branches of state government and with defining the powers of state government *vis a vis* units of local government. In the second place, the Federal Government is one of delegated powers. Its powers and those of its separate branches must emanate from a specific grant; no power is implied which is not necessary to fulfill a clearly expressed constitutional duty. State governments, on the other hand, are assumed to possess plenary power in those areas not within the federal sphere.[8] The difficulty in construing a state constitution is not, as it is under the Federal Constitution, one of discovering a *grant* of authority so much as it is one of finding a constitutional *denial* of authority. Explicit limitations on governmental powers must therefore be included in a state constitution, and in formulating these necessarily detailed limitations the document inevitably performs a function which in the federal system is accomplished through legislation—a function which may be appropriately termed "super-legislative."

This difference in functional emphasis has important ramifications for the processes of state constitution-making. The withdrawal of certain areas from legislative discretion usually demands the inclusion of a considerable amount of detail in the constitution in order to make the denials of power explicit. Much of this detail will be keyed to the state and local governmental structures and entities existing at the time the document is fashioned, and will embody many value choices which are much less permanent than those values embedded in the Federal Constitution. Periodic alteration is thus a necessity if the complicated organic structure is not to degenerate into a compilation of archaic technicalities. This means that state

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U.S. 643 (1961); from the Fifth Amendment, the right to just compensation, Chicago, B. & Q. R. R. v. Chicago, 166 U.S. 226 (1897), and the privilege against self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964); from the Sixth Amendment, the right to assistance of counsel, Gideon v. Wainwright, 372 U.S. 335 (1963), the right to confront witnesses, Pointer v. Texas, 380 U.S. 400 (1965), the right to a speedy trial, Klopfer v. North Carolina, 386 U.S. 213 (1967), and the right to have compulsory process served upon witnesses, Washington v. Texas, 388 U.S. 14 (1967); from the Eighth Amendment, the prohibition against cruel and unusual punishment, Robinson v. California, 370 U.S. 660 (1962); and from the "penumbra" of the Bill of Rights, a right to privacy, Griswold v. Connecticut, 381 U.S. 479 (1965).

[8] Dodd, *The Function of a State Constitution*, 30 Pol. Sci. Q. 201-12 (1915). Professor Cooley said of state constitution legislative provisions:

> In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion.

T. Cooley, 1 Constitutional Limitations 175 (8th ed. 1927).

constitutions should be more susceptible to alteration than the Federal Constitution: details must be revamped whenever the specific situation which prompted their inclusion has changed. But the fundamental law embedded in the state constitution, the provisions protecting fundamental rights, should be secure and relatively immune from change. The differing nature of fundamental and super-legislative provisions in a state constitution suggests that they should be subject to different procedures for alteration.

Modes of Constitutional Change

There exist two orderly modes by which constitutions are changed: interpretation of constitutional language and amendment or revision of the document. "Interpretation" refers to changes in the application of existing constitutional provisions, accomplished through a gloss on the words of the document without changing the words themselves. This gloss is usually provided by the judiciary, but may also result from legislative, executive or private interpretation. "Amendment" and "revision" refer to a formal political procedure which results either in limited changes in the words of the document ("amendment") or in a comprehensive, formal rewriting of a substantial part of the document ("revision").

Interpretation

To the extent that written constitutional language states general principles of law, interpretation of the language is necessary in deciding concrete cases. The most common form of interpretation is that practiced by the judiciary, and is well illustrated by the United States Supreme Court decisions concerning the scope of the Bill of Rights of the Federal Constitution.[9] Interpretation is also practiced, less formally, by other branches of the government. For example, "political questions" represent those areas of constitutional law in which the courts expressly defer to the constitutional interpretations of coordinate branches of the government.[10] The constitutionality of proposed legislation is a legitimate subject of debate in the legislative process. And governmental practices approved by or unknown to the populace and unchallenged in the courts may shape the application of constitutional provisions. In one sense, then, all governmental activity is a continuous process of interpreting fundamental law.

In many cases interpretation is static and analogous to statutory construction: for example, inconsistent provisions are harmonized or a decision is made as to which of a number of provisions control. On the other hand, dynamic interpretation—interpretative constitutional change—can be said to

[9] See note 7 *supra*.

[10] *See, e.g.*, Colegrove v. Green, 328 U.S. 549 (1946); Coleman v. Miller, 307 U.S. 433 (1939).

occur when new meaning is given to constitutional language: this may be meaning which is required for the solution of problems uncontemplated by the framers of the document, but which is consistent with their value judgments; or it may be meaning which seems contrary to the express or implied intentions or presumptions of the framers; or it may be meaning which inserts a new value into the constitution.

Several factors interact to determine whether judicial interpretation in a given jurisdiction will be static or will manifest constitutional change. First, the more general the language of the document, the more susceptible it is to interpretation guaranteeing rights or permitting governmental activities uncontemplated by the framers, while the detailed delineation of rights and powers and the inclusion of quasi-statutory material in the constitution is more conducive to statutory-like interpretation.[11] Second, insofar as interpretative change depends upon action or acquiescence by the judiciary, it also depends upon the attitudes of judicial personnel and the bench's position in the state's legal and social order. The tradition of constitutional jurisprudence, the position of community esteem occupied by the judiciary, and their dependence upon periodic reelection or reappointment all influence the bench's willingness to effect constitutional change.[12] Third, the

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[11] Careful study shows that the state constitutional change by interpretation and informal processes does occur but that state constitutions have not been broadly susceptible to growth by political, judicial, and popular interpretation. The many limitations placed upon the instruments of state government, together with the common practice of outlining governmental powers in detail, discourages substantial constitutional growth and change through interpretive means.

Bartley, *Methods of Constitutional Change*, in STATE CONSTITUTIONAL REVISION 23-24 (W. Graves ed. 1960).

[12] For example, the Supreme Court of the United States occupies the highest judicial position in the eyes of the public, and its members are independent of the political system. Consequently, it is not surprising that the Court's interpretation of the Federal Constitution is a paradigm of dynamic interpretation. The Court has overruled itself over one hundred times on constitutional interpretations. THE CONSTITUTION OF THE UNITED STATES OF AMERICA 1541-49 (Government Printing Office 1964). See Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 229 (1955), where Mr. Justice Frankfurter states:

> No doubt, these provisions of the Constitution were not calculated to give permanent legal sanction merely to the social arrangements and beliefs of a particular epoch. Like all legal provisions without a fixed technical meaning, they are ambulant, adaptable to the changes of time. That is their strength. . . .

Although we usually describe constitutional law as fundamental or organic law, many state constitutions have provisions which are in no way fundamental or organic law.

> Such particulars have been inserted in these documents for various reasons, but most of them add up to a lack of confidence in the legislative organs of government. Since these constitutional provisions cannot readily be changed to harmonize with the changes in society and culture, they become an incubus preventing the adoption of modern legislation and tying the living present to the dead past. We must learn to distinguish what is fundamental and lasting in value

possibility of changing constitutional language directly through the political processes may affect the judiciary's attitude toward dynamic constitutional interpretation. The ease with which a change can be effected through political processes is dependent not only on formal requirements but also on the nature of the document. The short Vermont constitution (4,840 words) uses general language and has been amended only forty-five times in one hundred eighty-three years; by contrast, the long and detailed Louisiana constitution (236,000 words) has been amended four hundred sixty times in only forty-five years.[13] When a constitution is rather elaborate, and when change through the political processes is not especially difficult, the judiciary is most apt to avoid dynamic interpretation. State constitutional interpretation is generally static because political revision is so frequent. In a ten-year period following World War II, over fifteen hundred constitutional changes were proposed in the fifty states, and almost twelve hundred were adopted.[14]

The Political Processes

The political processes of amendment and revision represent formal and instantaneous modes of changing the actual wording of the constitution. Consequently, both processes are clearly distinguishable from interpretative change, but it is difficult to draw a sharp line of distinction between the two processes themselves. The most commonly verbalized distinction is an ambiguous quantitative difference;[15] "amendments" are usually specific and isolated changes, though not necessarily limited to alteration of a single provision, while a "revision" usually involves changing a group of provisions and may entail a rewriting of the entire document. The essential difference in the results which the words "amendment" and "revision"

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from what is temporary and include only the fundamentals in our constitutional documents, leaving other matters to be acted upon by properly constructed and competent legislatures.

Walker, *Myth and Reality in State Constitutional Development*, in STATE CONSTITUTIONAL REVISION 13 (W. Graves ed. 1960).

[13] THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1966-67, at 10 (1966) [hereinafter cited as THE BOOK OF STATES].

[14] Graves, *Use of the Amending Procedure Since World War II*, in STATE CONSTITUTIONAL REVISION 100, 102-03 (W. Graves ed. 1960).

[15] In A. STURM, METHODS OF STATE CONSTITUTIONAL REFORM 25 (1954), the distinction between "amendment" and "revision" is noted:

> The former refers to a change of very specific nature and limited application, although more than a single section of the constitution may be affected. "Revision" is a term of much broader scope implying the rewriting of several sections or even the major part of a document thereby accomplishing comprehensive changes, perhaps of structure, power relationships, and basic policies. Any attempt to classify all constitutional alterations either as "amendments" or "revisions" is doomed to failure. The terms are relative, and the one shades into the other. Nonetheless, the designations are of common currency and provide useful tools in describing the technique of constitutional reform.

describe is small: nothing more substantial than the circumstance that a change affects a large or a small portion of the document. The terms do not differ in procedural consequence except in those states where different procedures are defined in the constitution, or where the number of amendments which may be proposed by the legislature is limited. In most states the methods by which "amendment" or "revision" may be effected are the same, and this situation is preferable in that it facilitates the selection of a method of change according to the qualitative nature of the change that is proposed, rather than by reference to an artificial terminological dichotomy between "amendment" and "revision."

The procedures for amendment prescribed in the fifty state constitutions are not uniform. The method most often prescribed is that change be proposed by the legislature and ratified by a popular vote, some states requiring approval by more than a majority of those voting on the proposal.[16] Fourteen states provide for a "constitutional initiative" whereby proposed amendments may be placed on the ballot upon the petition of a certain number of voters.[17] The legislatures of forty-six states are authorized, either by constitutional provision or judicial decision, to call a convention to make any constitutional changes,[18] but this method is not often used for a single amendment.

Revision by its very nature usually entails a more protracted procedure than amendment, although the same spectrum of methods may be available. The legislature is often the vehicle for change. It may submit for ratification a sweeping series of amendments or an entirely new document. Absent constitutional restrictions on the number and type of proposed amendments, the weight of authority appears to be that legislatures have the power to frame and submit a new constitution.[19] Where the legislature does have this power, lack of time and expertise may necessitate the appointment of a commission to study the existing constitution and to propose changes.[20]

The primary alternative to legislative constitutional revision is the constitutional convention. Thirty-eight state constitutions provide specifically for such conventions, and in most of the other states it is established that the legislature may authorize the convocation of a convention.[21] The pro-

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[16] THE BOOK OF STATES 11.

[17] *Id.* at 12.

[18] *Id.* at 13.

[19] STURM, *supra* note 15 at 22.

[20] Such a commission may be the product of joint action by the legislative and executive branches, or of independent action by either branch. *See* Rich, *Revision by Commission*, 40 NAT'L MUN. REV. 201-02 (1951).

[21] *See, e.g., In re* Opinion of the Governors, 55 R.I. 56, 178 A. 433 (1935); THE BOOK OF STATES 13; W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 44-45

cedure for calling a convention and the extent of its power varies from state to state.[22] The typical process is for the legislature to submit to the electorate the question of whether a convention should be called. If the vote is affirmative, the legislature thereafter enacts legislation providing for the selection of delegates, the assembling and organization of the convention, and compensation of the delegates. The convention then meets and discharges its obligation. Usually, but not always, the convention's product must be submitted to the voters before it becomes effective.

The popular initiative offers another possible method of constitutional revision. However, while there may be no legal impediment to revision by initiative in those states which authorize amendment by initiative, this method is usually limited as a practical matter to specific amendments.

Evaluative Considerations

Several basic values should be considered in deciding which method of constitutional change is appropriate in a given situation. The foremost value is democracy; it is desirable to utilize a procedure which will reflect the popular will as accurately as possible. Such a procedure, in addition to implementing a fundamental American value, will best insure ratification of the final product.

A corollary of this democratic value is an educational value; the process of change should be calculated to inform both the drafters and the citizenry of all relevant substantive factors in order to insure a fully knowledgable decision. If the change proposed is a complex one involving special knowledge—such as altering city boundaries or changing the judicial system—it may require appointment of an expert body. A proposal which involves extensive change of the constitutional scheme or which may have a significant effect on the integrated nature of the document demands a more deliberative method than does a relatively simple proposal.

(1910); H. WALKER, THE LEGISLATIVE PROCESS 55 (1948); Dodd, *State Constitutional Conventions and State Legislative Power*, 2 VAND. L. REV. 27, 29-30 (1948).

The preamble to the state constitution may provide the judiciary with grounds for recognizing the inherent right to the citizens to convoke a convention. See, *e.g.*, N.J. CONST. art. I, § 2, which provides:

> Government is instituted for the protection, security, and benefit of the people, and they have the right at all times to alter or reform the same, whenever the public good may require it.

[22] In STURM, *supra* note 15 at 85, the author categorizes the procedures for calling a convention as follows:

> (1) those [constitutions] which vest power in the legislative assembly to call a convention without popular referendum, (2) those [constitutions] which authorize the legislature to submit the convention question to the voters whenever it is considered necessary, (3) those [constitutions] which require periodic submission of the question, and (4) those states which make no provision for constitutional conventions.

A third important value is that of disinterested rationality, and the achievement of this value is especially contingent upon the character of the body which participates in drafting the provision or document. The body should be composed of individuals who are as free as possible from interest group or partisan pressure, and who are themselves unbiased. If, for example, the question is reapportionment of the legislature, the legislators may be in an excellent position to judge the effects of a particular scheme. Nevertheless, allowing the legislators to draft the provision is objectionable because it facilitates political maneuvering on a matter where self-interest may be intense.

The final value is a purely practical one—the cost to society. Some processes, notably the convention, require far more time, effort and money than the others. This value should not be a primary determinant unless resources are limited. Ordinarily expense should be taken into account only when consideration of other values has not resulted in selection of a clearly desirable method.

Choosing the Method

From the foregoing discussion it is apparent that there is no a priori, correct method of changing a constitution. The best method at any time is determined by balancing the values outlined above in terms of the qualitative nature of the particular change sought. In order to facilitate this balancing of values, a state constitution should allow change by all of the established methods: the popular initiative, the special or general commission, the constitutional convention, and submission by the legislature. The availability of a full range of methods will provide the flexibility necessary to prevent the constitution's super-legislative provisions from becoming obsolete, while at the same time safeguarding certain fundamental principles. Additional refinements might be prescribed to accomplish these purposes; for example, the vote needed to ratify a modification of fundamental personal rights might be higher than that needed to approve an organic change. An extensive alteration of the document might require ratification in two elections while a change in super-legislative provisions would require only one. Or certain methods might be prohibited in situations where they are particularly susceptible to abuse—for example, the legislature might be prohibited from making proposals for amendments affecting its own powers or composition.

Where extensive changes are proposed for the typically complex current state constitution, a deliberative method of change is required. Often a series of isolated amendments will have produced redundancies, inconsistencies and problems in interpreting the original document, and the task of revision will require a comprehensive study and reorganization. Moreover, many of

the advocates of change suggest alterations such as abolition of certain elective offices, reallocations of power among the branches of the government, or modification of the bicameral structure of the state legislature[23]—alterations which affect the basic core of a state's organic scheme. Usually the method most likely to insure the deliberation necessary for these complex and fundamental changes will be the constitutional convention.

In such a situation demanding constitutional revision of large proportions, the constitutional convention is generally compatible with the evaluative considerations mentioned above. Since the delegates to the convention will be popularly elected from all parts of the state for the express purpose of constitutional change, this method offers potentially high effectiveness in accurately representing the popular will. The time and manpower involved in a convention facilitate detailed and comprehensive consideration of major problems and communication of relevant information to the public. The use of special committees to draft technical provisions provides the expertise needed in particular areas. If convention delegates are elected on a nonpartisan basis, the convention will probably be less susceptible to partisan politics than a legislative commission. Although the convention is by far the most expensive method of constitutional change, a successful convention is obviously a worthwhile investment.

As demonstrated recently in New York, Kentucky, Rhode Island, and Maryland, a constitutional convention may waste large amounts of public resources and energies if popular ratification is not secured. Such failures may suggest to some that the convention is no longer a viable method of change, but the failures are more probably the result of mistakes in the operation of those conventions than of inherent defects in the convention method itself. The remainder of the present Note will explore the preparation procedures, internal organization, and ratification process which are most likely to produce a useful and successful convention, one which is consistent with the evaluative considerations noted above.

Preconvention Procedures

During the Revolutionary and immediate post-revolutionary periods, many state constitutions as well as the Federal Constitution itself were drafted and adopted by ad hoc and irregular processes.[24] These constitutions might be termed revolutionary in character since they were not formulated according to an orderly procedure established by a pre-existing gov-

[23] *See generally* Modernizing State Government (CED 1967).

[24] In North Carolina, South Carolina, Georgia, Virginia and New Jersey an ad hoc legislative body adopted a constitution in the same manner as it enacted statutes. R. Hoar, Constitutional Conventions 1-10 (1917); Sturm, *supra* note 15 at 5; Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure,* 10 Utah L. Rev. 390 (1966).

ernment. Their legality derived from the attainment of sovereignty by victorious forces and from the absence of any independent authority to pass on their validity.[25] They were commonly justified in terms of the sovereign right of the people to ordain their own forms of government.[26]

Except for the Civil War era, which precipitated the irregular adoption of many state constitutions,[27] the judiciary in the United States has tended to insist that constitutional conventions occur in accordance with procedures derived directly or indirectly from the constitution already in existence.[28] However, in several instances courts have refused to accept challenges to the methods used to promulgate new constitutions, usually on the grounds that a "political question" was involved or that the public had acquiesced.[29] But like the Revolutionary and Civil War constitutions, the charters involved in these decisions were products of a major political upheaval—that of the post-Reconstruction era. Consequently they are not viable precedent for modern state constitutional revision. Absent comparable social disorder, proponents of revision are well advised to adhere scrupulously to the legal procedural requirements stated in existing constitutions.

Calling a Constitutional Convention

Thirty-nine states have constitutional provisions providing for the convocation of a constitutional convention.[30] In seven other states, legislative authority to call a convention has been established by a combination of statutes, judicial decisions, and opinions of the attorney general.[31] Thus only four states[32] appear not to have an established procedure for calling a convention. Of the states which authorize the convention method of revision, twenty constitutionally require a two-thirds vote of the legislature to initiate the call, one requires a three-fifths vote of its unicameral legislature, and the others require approval by a majority of the legislature.[33]

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[25] The distinction has been made between "revolutionary" conventions, such as those mentioned here, and "constitutional" conventions called by the people through the legislature and subject to an existing constitution. See Braxton, *Powers of Conventions*, 7 VA. L. REG. 79 (1901).

[26] *E.g.*, Kamper v. Hawkins, 3 Va. 20, 36-37 (1793) (opinion by Spencer Roane).

[27] See White, *Amendment and Revision of State Constitutions*, 100 U. PA. L. REV. 1132, 1133 n.4 (1952).

[28] For a defense of the theoretical right of the people to change an unworkable constitution by whatever means they may choose, see White, *supra* note 27, at 1137-38.

[29] *See* Taylor v. Commonwealth, 101 Va. 829, 44 S.E. 754 (1903); Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892); Wood's Appeal, 75 Pa. 59 (1874).

[30] THE BOOK OF STATES 13.

[31] *Id.*

[32] *E.g.*, Indiana, New Jersey, North Dakota and Vermont. *Id.*

[33] *Id.*

There has been debate as to whether a convention may be called by popular initiative in those states which permit the use of this device for constitutional amendment.[34] While the answer to this question is likely to depend in large part upon the terms of the constitutional clause authorizing the initiative and upon the receptiveness of the particular state to constitutional change, the procedure of initiative is an expression of democratic values and thus should be allowed unless there is some overwhelming practical reason why the people should be required to act through their representatives on this matter. One such reason might be that constitutional change should not be too easy—that the interposition of the experience and legal knowledge of the legislature is necessary to guarantee that the constitution will not be unduly subjected to ephemeral popular passions. However, the same protection could presumably be achieved by establishing a high vote requirement for successful popular initiative. And it should be remembered that the initiative is but the first step in a lengthy process; the convention itself should function as a protection against rash changes. While an ill-considered popular initiative would result in the public expense of a fruitless convention, this expense is surely a prerogative of the people. Indeed, there are eight states with constitutional provisions that not only provide for the popular initiative but also require that the question of holding a constitutional convention be submitted to the voters periodically.[35]

The Referendum on the Convention

In all but ten states the passage of a legislative resolution is but the first step in authorizing a constitutional convention.[36] Voter approval must also be obtained in a referendum.[37] The question put to the voters is usually

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[34] *See* Goldings, *The Use of the Popular Initiative Petition for a Constitutional Convention Act*, 47 MASS. L.Q. 367 (1962). Goldings argues that such a use of the initiative is consistent with the Massachusetts constitution. *Compare* Grinell, *Does the Initiative and Referendum Amendment Authorize an Initiative Petition for Another Constitutional Convention?*, 9 MASS. L.Q. 35 (1924).

[35] Alaska, Iowa and Hawaii require the question to be submitted to the voters every 10 years; Michigan, every 16 years; and Maryland, Missouri, New York and Oklahoma, every 20 years. THE BOOK OF STATES 13.

[36] *Id.* at 13. Even if a referendum is not required, it may be desirable to ascertain popular sentiment and avoid the waste involved in calling a convention if its product is unlikely to be ratified.

[37] In at least one instance, popular approval for calling a convention has been judicially required even where the constitution did not demand it. In Bennett v. Jackson, 186 Ind. 533, 116 N.E. 921 (1917), the court held that, where the people had previously voted against calling a convention, the legislature could not call for a new convention without requiring a second referendum. This case is discussed, and criticized, more extensively in White, *supra* note 27, at 1137-38.

"shall a constitutional convention be called?" [38] Constitutions speaking to the point usually require that the question be submitted to the people at the next general election following the legislative action.[39]

The proportion of the vote required for affirmation of the referendum varies among the states. In nine states a majority of all persons voting in the election must affirm the proposition.[40] This requirement has hindered the calling of a convention since those who vote for an office-seeker but not on the convention issue are counted with those who voted against the proposition.

This difficulty may be met rather easily in most states by holding a special election. Three states require a certain minimum proportion, but less than a majority, of the total vote. This approach has been praised[41] for preventing the danger that the convention will be called by too small a minority while avoiding the possibility of inaccurate representation of the popular will. In the remaining states requiring a referendum, a simple majority of those voting on the proposition is sufficient to pass it. This procedure seems unsatisfactory because it may allow a well-mobilized minority to authorize a convention when a majority of the people are opposed to change and will probably vote against the final product.

The requirement of a referendum as a prerequisite to the calling of a convention poses the problem of educating the public to the need for change. The proponents of change will have to overcome or combat certain recurrent negative attitudes. There will be a virtually automatic aversion to change on the part of those with a vested interest in the status quo.[42] Others may object because of an almost religious belief that fundamental law is immutable and that to tamper with it is to desecrate it.[43] The educational task should be simplest when the legislature and executive advocate revision. As the Maryland experience indicates, circulation of flyers may

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[38] STURM, *supra* note 15, at 90.

[39] *Id.* at 89.

[40] THE BOOK OF STATES 13.

[41] STURM, *supra* note 15, at 91.

[42] The polarization of attitudes during the 1961 Michigan convention is an example. Generally, those groups which represented general interest in good government, such as the Junior Chamber of Commerce, League of Women Voters and PTA, supported reform, while organizations which represented more specific economic and vocational interests, such as associations of bankers, sheriffs, manufacturers, highway contractors, and the Grange, opposed at least parts of it, evidently in fear of a possible encroachment on their status. A. STURM, CONSTITUTION-MAKING IN MICHIGAN 25-26 nn. 13, 15 (1963).

[43] Hindman, *Road-Blocks to Conventions*, 37 NAT'L MUN. REV. 129, 131-32 (1948) describes these attitudes:

> [T]here is the citizen who has the approach indicated in Kentucky: "If it was good enough for grandfather it is good enough for me." Related to this is the point of view reported from Missouri in the slogan: "Why rewrite the Bible?"

be sufficient when the circulation has been undertaken at the Governor's direction.[44] When such official support is lacking, the task will fall to various civic and special interest groups. Although educating the people appears more difficult in this situation, the results of the Michigan convention, which was supported by groups such as the Junior Chamber of Commerce, the League of Women Voters, and the PTA,[45] prove that it can be done effectively.

Assembling the Convention

After an affirmative response in a popular referendum, a constitutional convention does not automatically spring into existence. Except in the rare cases where the details of the convention are set forth in the resolution submitted to the people,[46] the legislature must enact further legislation in reference to the convention and the election of delegates. The degree to which these details are constitutionally prescribed or committed to legislative discretion varies from state to state.[47]

A positive referendum vote imposes a duty on the legislature to pass the required enabling legislation.[48] But this obligation may be unenforceable[49] since it is unlikely that mandamus will issue against the legislature; thus the legislature which has changed its collective mind since passing the resolution calling for the convention may successfully defy the popular will, at least until the next general election. In those states which do not require a referendum, the legislature would presumably authorize the convention and enable it to operate in the same act.

The legislature must consider many political variables and convention

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[44] This excellent series of flyers is reprinted in Maryland Report of the Constitutional Convention Commission 575-94 (1967).

[45] See note 42 *supra*.

[46] The Maryland General Assembly simultaneously enacted two bills, one providing for a popular referendum and the other calling the convention if the first met with a favorable response. Maryland Report, *supra* note 44 at 451.

[47] Sturm, *supra* note 15 at 91-103; Shull, *Legislature and the Process of Constitutional Amendment*, 53 Ky. L.J. 531 (1965).

[48] Sturm, *supra* note 15 at 91. The existence of the duty is shown by the use of the word 'shall' in many state constitutional provisions directing the legislature to provide for the elecrion of delegates. *E.g.*, Va. Const. art. XV, § 197.

[49] *See* Wells v. Bain, 75 Pa. 39 (1874), where the court commented:

> [The vote in favor of calling the convention] was not even a mandate, further than the moral force contained in an expressed desire of the people. It is very evident, had the matter dropped there, and the legislature had made no call, no convention and no terms would ever have existed. Not a line, nor a word, nor a syllable in this act expresses an inrent of the people to make the call themselves, or on what terms it shall be made, or what powers should be conferred.

Id. at 50-51; Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure*, 10 Utah L. Rev. 390, 397 (1966).

needs in its enabling act. Among the most important are the number, qualifications, apportionment and compensation of delegates, the time and place of the convention, and the method of pre-convention research.

Selection of Delegates

The only generalization that can be made regarding the proper number of delegates is that it should be neither so small that it does not reflect accurately the diverse interests of the people nor so large that effective operation of the convention is impossible. Administrative convenience may dictate selecting a number of delegates which corresponds to the number of members in one house of the state legislature.[50] If the larger house is too large or the smaller house too small, the easiest thing to do may be to allocate several convention members to each district represented in the smaller house.

Apportionment for the election of delegates should ordinarily follow the lines of existing legislative districts. However, if the legislature is unequally apportioned, it is arguable that the election of delegates to the convention may be enjoined on the ground that it violates the Fourteenth Amendment of the Federal Constitution. The principle of "one man one vote" enunciated in *Reynolds v. Sims*[51] in 1964 is one of the most important principles of current Constitutional jurisprudence, and it is clear that the principle applies to convention delegate selection if the state's constitutional jurisprudence allows the constitution drafted by the convention to take effect without popular ratification. The question still unresolved is whether the principle extends to constitutions which are not effective until ratified by the people.

If a constitution is subject to direct popular ratification, it is arguable that the convention does not adopt fundamental law but merely proposes it. In its most recent extension of the "one man one vote" principle, the Supreme Court applied the principle to a county commissioners court.[52] The Court was careful to point out, however, that its application reached a local unit of government which exercised "general governmental powers over the entire geographic area served by the body."[53] A constitutional convention, like a commissioners court, may have the "power to make a large number of decisions having a broad range of impact on all citizens,"[54] but it is not a governing body. The Court has refused to apply the *Reynolds v. Sims*

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[50] STURM, *supra* note 15 at 93-94. The constitutions of six states contain provisions on the qualifications of delegates. *Id.* at 94. Several others imply that they shall possess the same qualifications as members of one of the two houses of the legislature. *Id.*

[51] 377 U.S. 533 (1964).

[52] Avery v. Midland County, 36 U.S.L.W. 4257 (U.S. April 2, 1968).

[53] *Id.* at 4260. Its specific powers are enumerated at 4257-58, 4259.

[54] *Id.* at 4259.

principle to a county school board because the board performed an essentially administrative, nonlegislative function.[55] Yet the Court indicated, in the same opinion, that the function of a particular body is not necessarily dispositive.[56] Any absolute distinction between a governing and nongoverning body may therefore be untenable, especially in the context of the constitutional convention which serves an unusually significant function.

Only one Justice has ever written on the point. In *Forston v. Toombs*[57] the majority vacated and remanded on procedural grounds an injunction issued by a federal district court which restrained Georgia election officials from placing a proposal to adopt an amendment to the state constitution on the ballot until the state legislature was reapportioned. Mr. Justice Harlan, writing for himself and Mr. Justice Stewart, objected to this disposition of the case, arguing that the lower court decree was improper on the merits. According to Justice Harlan the composition of the body which proposes constitutional change should not be subject to the *Reynolds v. Sims* principle,[58] regardless of whether the legislature or a convention initiates the change.[59]

While only two lower federal courts[60] have spoken to the issue of apportionment of convention elections, several state courts have dealt directly with the question. The supreme court of West Virginia[61] held that a statute governing the choice of convention delegates contravened the state constitutional provision requiring that "[e]very citizen . . . be entitled to equal representation in the government, and, in all apportionments of representation, equality of number of those entitled thereto . . . be preserved."[62] In the absence of a similar state constitutional command, the state courts are split.[63] But regardless of the resolution of the apportionment issue in the

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[55] Sailors v. Board of Educ., 387 U.S. 105 (1967).

[56] If we assume *arguendo* that where a State provides for an election of a local official or agency, the requirements of . . . *Reynolds v. Sims* must be met, we are still short of an answer to the present problem . . . .

Id. at 109.

[57] 379 U.S. 621 (1965).

[58] *Id.* at 626.

[59] *Id.* at 626 n.3.

[60] Butterworth v. Dempsey, 237 F. Supp. 302 (D. Conn. 1965); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962), *rev'd on other grounds*, 379 U.S. 621 (1965).

[61] Smith v. Gore, 150 W. Va. 71, 143 S.E.2d 791 (1965).

[62] W. VA. CONST. art. II, § 4.

[63] *Compare* Jackman v. Bodine, 43 N.J. 453, 205 A.2d 713 (1964), *with* West v. Carr, 212 Tenn. 367, 370 S.W.2d 469 (1963).

The Maryland Constitutional Convention Commission decided that the Supreme Court rulings did not require the application of the "one man one vote" principle in selecting convention delegates. MARYLAND REPORT, *supra* note 44 at 483. The official flyers dismissed the apportionment question by stating that the "constitutional interpretation does not apply at the vote to be taken to elect convention delegates because this

courts, sound policy dictates that population be the basic criterion for apportioning representation in the Convention.

> **Not only can a poorly apportioned convention lead to a constitution** biased toward particular groups, but unfair apportionment of the delegates in itself can render the whole document suspect, regardless of its merits and engender sufficient hostility among the people to threaten its acceptance.[64]

Compensation of Delegates

Delegates should be compensated sufficiently to attract qualified people to candidacy, but the salary should not provide an incentive to prolong deliberations.[65] Delegates should be encouraged to consider their task as a full-time undertaking, should be compensated accordingly, and should be recompensed for their reasonable expenses. State legislative salaries may in most instances prove viable guidelines.

Time and Place of the Convention

In determining the appropriate site for the convention, the legislature should consider both physical and less tangible factors. Of necessity, there must be a large meeting room, an ample supply of conference rooms, press rooms, office space, and conveniently located living accommodations. The atmosphere should be conducive to the intensive and deliberate pursuit of constitution-making. Most recent conventions have been held in either the state capital or in a university town. Other factors being equal, the academic atmosphere is probably preferable. New Jersey, for example, chose to locate the convention at Rutgers University:

> While the distance between New Brunswick and Trenton is short in miles, the political distance between the Rutgers University gymnasium and the State House is considerably greater.[66]

A reasonable time limit should be placed on the duration of the convention. Unlimited deliberations breed factionalism and delay and may pro-

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will be a special election." *Id.* at 575. But the question was somewhat academic since the state's legislative districts had been recently reapportioned and it was this reapportioned districting scheme that was utilized for the election of delegates. *Id.* at 484.

[64] *Id.* at 483, *quoting from* J. WHEELER, THE CONTSITUTIONAL CONVENTION 33 (1961).

[65] At least one observer felt that the limitation on payment of salaries to seven and one-half months was a more powerful encouragement to the Michigan delegates than any time limits placed on the convention itself. A. STURM, CONSTITUTION-MAKING IN MICHIGAN 84 (1963).

[66] Bebout & Sady, *Staging a State Constitutional Convention,* in STATE CONSTITUTIONAL REVISION 76 (W. Graves ed. 1960).

duce a listlessness among the delegates. No mandatory time limit was placed on the Rhode Island Convention, and it remained in a state of suspended animation for well over two years.[67] Six months of concentrated effort should ordinarily suffice if the convention has been preceded by ample research.

Preconvention Research

Every convention held since World War II has been preceded by a comprehensive research effort. The research may be undertaken by various groups including an official commission, a university study group, or ad hoc civic organizations. Of these groups, the official commission is most likely to receive extensive financial support and to be prestigious enough to attract high calibre, knowledgable personnel. However, the commission has the potential disadvantage of being a creature of either the legislature or the executive. Its effectiveness will be severely limited if its membership consists of partisan political appointees or if its scope of inquiry has been confined. University studies, while less subject to the risks inherent in official control, may suffer from insufficient financial resources. Civic groups dominated by particular classes or interests may have more adequate resources but may tend to produce self-interested results.

The Authority of a Constitutional Convention

The convention is brought into legal existence upon the performance of constitutionally and legislatively prescribed acts. Complex questions may arise concerning its legal nature, powers and limitations. The Federal Constitution imposes obvious limitations upon the convention. It cannot, for example, institute a monarchy or impose an ex post facto law.[68] It has generally been held, however, that special limitations imposed upon a state as a condition to its admission to the Union will not bind a subsequent state constitutional convention.[69]

In areas not governed by the Federal Constitution, arguments regarding the authority of the convention have drawn upon two polarized theoretical approaches. One approach stresses the role of the convention as the creator of the highest law and as the embodiment of the sovereign popular will. In its extreme form, this view has amounted to a natural law assertion that the convention itself possesses sovereignty.[70] A less extreme variant of this

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[67] Washington Post, May 28, 1967, at B1, col. 1.

[68] Frantz v. Autry, 180 Okla. 561, 590, 91 P. 193, 203 (1907); State v. Keith, 63 N.C. 140 (1869); Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure*, 10 Utah L. Rev. 390, 401 (1966).

[69] *E.g.*, Coyle v. Smith, 221 U.S. 559 (1911).

[70] *See, e.g.*, Livermore v. Waite, 102 Cal. 113, 117, 36 P. 424, 426 (1894) (dictum);

theory concludes that, where the existing constitution so provides, the convention is the direct voice of the people.[71]

The opposing theory stresses the limitations inherent in a convention which is merely the agent of the people and which owes its very existence to extant law, especially to the legislative act establishing it. In its most extreme form this approach regards the convention as a purely legislative creature which may be completely circumscribed by legislative acts.[72]

Koehler v. Hill, 60 Iowa 543, 555, 14 N.W. 738, 744 (1883) (dictum); McMullen v. Hodge, 5 Tex. 34, 43 (1849) (dictum).

At the New York constitutional convention of 1821, Mr. Livingston, one of the delegates declared

> Sir, the people are here themselves. They are present by their delegates. No restriction limits our proceedings. . . . Sir, we are standing upon the foundations of society.

Quoted in White, *supra* note 27 at 1139-40. An even more fervent delegate at the 1847 Illinois convention argued

> We are the sovereignty of the State. We are what the people of the State would be if they were congregated here in one mass meeting. We are what Louis XIV said he was, "We are the State?" We can trample the Constitution under our feet as waste paper, and no one can call us to account save the people.

J. JAMESON, CONSTITUTIONAL CONVENTIONS 303 (4th ed. 1887), *quoted in* White, *supra* note 27 at 1140.

A similar but more sophisticated and restrained view is taken by Gooch, *The Recent Limited Constitutional Convention in Virginia,* 31 VA. L. REV. 708, 725-26 (1945). He argues, in effect, that since the constitution is the highest law, the authority to amend it possessed by the convention is the highest authority, and that, by hypothesis, there is no higher form of law to limit the convention.

[71] Thus, a fairly recent South Carolina document declares that

> The South Carolina Constitution of 1895 clearly states that once a constitutional convention meets, its delegates are to all intents and purposes the people of South Carolina in convention assembled. As such, the delegates exercise all the power of the people. As a practical matter . . . the electors . . . could not bind the convention.

R. UHL, R. STOUDEMIRE & G. SHERRILL, CONSTITUTIONAL CONVENTIONS: ORGANIZATION, POWERS, FUNCTIONS AND PROCEDURES 19 (1951).

[72] Judge Black in the Pennsylvania convention of 1873 argued:

> Suppose the Legislature had seen proper to say that we should not assemble at all, or that we should make no amendments to the Constitution . . . then the question is, whether we could, in defiance of that mandate, assemble ourselves together in Convention, representing, as we do, the whole people of the Commonwealth, and against the will of the people, and against the authority of the organized government now existing, proceed to alter the body of it. I say we could not do that. That would be revolutionary. Where do we get the power? Where does it come from? Nobody will deny that we are setting here in pursuance of certain acts of the legislature. . . . If we derive our power from that source, is it possible that we can take it without the limitations that were imposed upon it by those who created it? I don't think the question can be answered in any but one way.

1 DEBATES OF THE CONSTITUTIONAL CONVENTION 157 (Pa. 1873), *quoted in* White, *supra* note 27 at 1140-41 n. 29.

Such an extreme position is untenable, however; the convention is not a mere agent of the legislature since the legislature itself cannot resolve itself into a constitutional convention.[73]

The prevailing view accepts neither of these theories in toto. On the one hand, the convention is not regarded as a supreme sovereign and may not usurp the powers of the existing branches of the government. For example, with certain rare exceptions, it may not pass ordinary legislation,[74] but rather is limited to the specific task of writing a new constitution.[75] On the other hand, the prevailing view tends to treat the convention not as an agent of the legislature but as a unique legal entity, especially when the convention has an independent constitutional source.

Two problems in particular have generated disputes concerning the authority of the constitutional convention. First, the power of the convention to revise the constitution without popular ratification was long a source of debate; however, this is no longer a disputed issue in most states and will be treated in the section of this Note discussing the ratification process.[76] The second and most currently controversial issue concerns the validity of limitations placed by the legislature on the scope of convention activity.

There is authority to the effect that such limitations imposed by the legislature are invalid.[77] This view reflects the theory of convention sovereignty, and may draw upon the argument that the legislature by calling a limited convention deprives the electorate of the opportunity to call an unlimited convention. However, the most prevalent view upholds such restrictions as impliedly ratified by the people through their endorsement of the convention or election of delegates.[78] Under this view the limitations are theoretically imposed by the people rather than the legislature,[79] and the complex question of the relationship of convention to legislature is

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[73] *See In re* Opinion to the Governor, 55 N.J. 56, 97-98, 178 A. 433, 452 (1935); Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1 (1912), *appeal dismissed*, 231 U.S. 250 (1913).

[74] *See* Note, *Constitutional Revision by a Restricted Convention*, 35 MINN. L. REV. 283, 290-92 (1951) and authorities cited therein.

[75] R. HOAR, CONSTITUTIONAL CONVENTIONS 11 (1917); White, *supra* note 27 at 1145.

[76] See note 149 *infra*.

[77] *See* Staples v. Gilmer, 183 Va. 613, 632, 33 S.E.2d 49, 54-55 (1945) (dictum); Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); W. DODD, THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS 80 (1910); Gooch, *The Recent Limited Constitutional Convention in Virginia*, 31 VA. L. REV. 708 (1945).

[78] Staples v. Gilmer, 183 Va. 613, 33 S.E.2d 49 (1945); *accord*, Cummings v. Beeler, 189 Tenn. 151, 223 S.W.2d 913 (1949); State v. American Sugar Refining Co., 137 La. 407, 68 So. 742 (1915); Opinion of the Justices, 60 Mass. (6 Cush.) 573 (1883). *See also* J. JAMESON, CONSTITUTIONAL CONVENTIONS 350 et seq. (4th ed. 1887).

[79] *See, e.g.*, Gaines v. O'Connell, 305 Ky. 397, 204 S.W.2d 425 (1947); Sproule v. Fredericks, 69 Miss. 898, 11 So. 472 (1892); Wood's Appeal, 75 Pa. 59 (1874); R. HOAR, CONSTITUTIONAL CONVENTIONS 121 (1917); White, *supra* note 27 at 1142.

thereby avoided. Of course, if the constitution itself specifies that the convention be unlimited, that provision will control.

The limitation-by-the-people theory requires a decision as to when the statutory restrictions take effect. One writer contends that the election of delegates places the stamp of popular approval on the restrictions.[80] Another asserts that the limitations may be ratified only by the vote on the question of calling the convention.[81] Actual legislative practice renders this distinction significant. It will be recalled that the legislature usually passes two acts—one providing for a referendum on whether a convention should be called and, upon an affirmative vote, a second establishing the machinery for the convention. It would appear more consistent with the limitation-by-the-people theory that the legislature be precluded from restricting the convention after the first referendum.[82] In any case, legislative attempts to limit the convention after it has been assembled have never been sustained.[83]

In addition to the authority to draft a constitution, the convention possesses certain inherent internal powers, absent a constitutional provision confining such powers.[84] The convention's internal authority includes the power to organize itself, elect officers, preserve its records, hire and fire employees and perhaps, in the absence of a contrary limitation, provide for submitting its work to the people.[85] It may have the power to discipline its members, although expulsion is the most extreme penalty it may im-

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[80] White, *supra* note 27 at 1141-42, *citing* Wood's Appeal, 75 Pa. 59 (1874).

[81] Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure*, 10 UTAH L. REV. 390, 404 (1966).

[82] *Id.*

[83] White, *supra* note 27 at 1142.

[84] Goodrich v. Moore, 2 Minn. 61 (1856); STURM, *supra* note 15 at 98; Dodd, *State Constitutional Conventions and State Legislative Power*, 2 VAND. L. REV. 27, 31 (1948). Some state constitutions specifically grant this authority to the convention. For example, DEL. CONST. art. XVI, § 2 provides:

> The Convention shall have power to appoint such officers, employees, and assistants as it may deem necessary, and fix their compensation, and provide for the printing of its documents, journals, debates and proceedings. The Convention shall determine the rules of its proceedings, and be the judges of the elections, returns and qualifications of its members.

The Hawaii constitution simply states that "The convention shall determine its own organization and rules of procedure." HAWAII CONST. art. XV, § 2. See MO. CONST. art. X, § 10.04 (as adopted by the convention). Moreover, the few state constitutions which include provisions governing the power of the convention are not necessarily restrictive. The Missouri constitution goes so far as to grant the convention the authority to "appropriate money for the expenditures incurred." MO. CONST. art. XII, § 3b.

[85] White, *supra* note 27 at 1146.

pose.[86] Conventions have sometimes exercised the power of calling witnesses, but it is unclear whether they could discipline someone for failing to appear.[87] Generally speaking, the convention is dependent for funds on appropriations from public officials and the legislature,[88] although it has been suggested that it has authority to take steps necessary to secure its own comfort, to protect and foster its dignity and efficiency, and to insure the orderly procedure of its business.[89]

The Internal Organization of the Convention

Up to this point, discussion of the convention method of constitutional change has been essentially legalistic. The major questions in calling and assembling the convention are legal questions. In contrast, the problem of successfully organizing the convention so that its work may be done in an effective and expeditious manner is primarily a practical one.

The Partisanship Issue: General Comments

The constitutional convention involves frequent exercise and mobilization of the popular will—to convoke the convention, to elect the delegates, and to ratify the proposed document. Consequently a study of the convention method must consider the activity of the political party—the usual institutional apparatus for this mobilization—and the effect of this activity upon the various phases of the convention, the public image of the convention, and the success of its product. A consideration of the convention activity of political parties ultimately raises the question of whether the election of delegates should be conducted on a partisan or nonpartisan basis.

When convention delegates are chosen on a partisan basis, the party structure usually will enable the majority party to control the convention. This control will extend not only to organizational aspects of the convention such as the selection of procedures, committee structure and committee members, but also to the substance of the final document. Moreover, important decision-making in a partisan convention may be made in party caucuses, removed from public scrutiny and minority party dissent.[90] Party

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[86] Note, *The Constitutional Convention, Its Nature and Powers—And the Amending Procedure*, 10 Utah L. Rev. 390, 409 (1966).

[87] *Id.*

[88] White, *supra* note 27 at 1146.

[89] J. Jameson, Constitutional Conventions 455-56 (4th ed. 1887).

[90] During the Michigan convention, both Democrats and Republicans held frequent caucuses, particularly during the later phases of the convention. The Democratic caucuses proved more effective although they were criticized for pressure tactics. The Republicans complained of inept caucus leadership and of the chairmen's insistence that their own views be accepted. Nonetheless, despite poor attendance, these meetings

meetings of delegates held soon after their election may substantially organize the convention before it is convoked. This was the case, for example, in Michigan where the Republican Party held a pre-convention organizational meeting.[91] On the other hand, while a nonpartisan convention will certainly contain cohesive groups which represent similar geographic, political or economic interests, it will probably lack the institutionalized party structure necessary to unite and control disparate interests.

The specific effects of partisan elections in a given state will of course depend upon the disipline and belligerency of the state's parties and upon the character of the party leadership. The New York and Michigan conventions illustrate concretely the advantages and disadvantages of a partisan convention. Both states have strong two-party systems.[92] In New York, only a slight Democratic majority (98 to 88) was elected. But party machinery was so effective that the Democrats were able to dominate the convention and write what was in essence a one-party constitution.[93] Over unified Republican objection, the Democrats defeated a proposal for separate ratification vote of a controversial provision concerning state aid to parochial schools. Through strict party voting, the Democrats shaped the final document to provide for state assumption of many public welfare obligations and for free college education of state residents.[94] The strict adherence to party lines was criticized as discouraging the kind of negotiation that would have resulted in constructive compromise and enabled

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were important instruments of policy guidance and helped develop a greater consensus among party members. A. STURM, CONSTITUTION-MAKING IN MICHIGAN 111-12 (1963).

91 *Id.*

92 Thomas, *Michigan's Party System: Blessing or Curse?*, in PARTIES AND POLITICS IN MICHIGAN 3-14 (1961).

93 Some were of the opinion that it was the work not only of one party, but of one man in that party. Anthony Travia, speaker of the State Assembly and an old hand at manipulating party machinery, was elected president of the convention on a straight partisan vote. He was reported to have "developed his control over the delegates to the point where he [had] the final say in how the new charter [would look]." Washington Post, Sept. 7, 1967, at F14, cols. 1-4 (quote at col. 2).

Assembly Speaker Travia, in a speech on February 16, 1967, at Syracuse University, stated: "I believe in short conventions, short constitutions, and short speeches." At the same speech he stated that "this Convention, if it is to succeed, must be 'Open with a capital O' and 'democratic with a small d.'" The post-mortem caused Robert McKay, Dean of the New York University School of Law, to remark: "Unfortunately, it was in fact more 'closed with a small c' and 'democratic with a capital D.'" McKay, *Constitutional Revision in New York State: Disaster in 1967*, 19 SYRACUSE L. REV. 207, 217 (1967).

94 Washington Post, Sept. 7, 1967, at F14, cols. 1-4; *id.*, at F15, cols. 1-7. It was reported that the convention "quickly became infused with party politics. The Democrats controlled the gathering and almost every controversial issue was pushed through by them over the objections of the Republican minority." New York Times, Nov. 8, 1967, at 30, col. 1.

both parties to support the final document.[95] The proposed constitution was opposed both by the Republican party and by interest groups which were antagonistic to controversial provisions. As a result of this opposition, a 2½ to 1 majority of voters rejected the constitution, which had been drafted at a cost of ten million dollars.[96]

In Michigan, the voters elected a 2 to 1 Republican majority.[97] Although rural conservative Republicans and urban Democrats usually vied for control of the statehouse with roughly equal success, the convention election was marked by large inroads into suburban areas by moderate Republicans. Thus there were in effect three political groups represented—liberal Democrats, moderate Republicans, and conservative Republicans.[98] This split prevented the Republicans from utilizing their majority as effectively as the New York Democrats.

The Michigan experience illustrates the pervasive influence of extraconvention political factors upon convention activity. Although aspects of convention organization such as allocation of committee chairmanships and membership were drawn along party lines, the convention did not plunge immediately into party combat. However, a gradual deterioration of bipartisan unity culminated in the mid-convention announcement by George Romney, its moderate Republican vice-president, of his gubernatorial candidacy. The parties then drew ranks for the upcoming elections and any possibility of interparty compromise was effectively foreclosed.[99] Romney, desiring to unite the party for his campaign, negotiated a package compromise with conservative Republicans which literally became the new constitution.[100] This action was vigorously denounced by the Democrats.[101]

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[95] Ostwald, *How Not to Hold a State Con-Con*, Wall Street Journal, Sept. 25, 1967, at 18, col. 3.

[96] New York Times, Nov. 9, 1967, at 1, cols. 6-7, at 31, col. 1. See Schanberg, *What Now for New York Constitution?*, New York Times, Nov. 12, 1967, at E3, cols. 6-7.

[97] A. Sturm, Constitution-Making in Michigan 44-45 (1963).

[98] *Id.* at 105-109 (1963).

[99] *Id.* at 109-27.

[100] *Id.* at 117-22, Professor Pollack, himself a delegate, reports that:

> When Republican factionalism threatened to split the Convention and endanger the enactment of a new, modern constitution, Mr. George Romney emerged as an effective leader in unifying Republican views. This was about mid-way in the Convention, and from that point forward, he was the leader who, in most important matters, was able to produce majority agreement. This subjected him to much vilification by the Democrats, who finally broke with the large Convention majority and voted against adoption of the Constitution.

J. Pollack, Making Michigan's New Constitution 42 (1962).

[101] It is with great shock and sorrow that we read there has been a deal by the majority delegates to write a constitution without participation of all the delegates. More decisions have apparently been made off the floor in secret meetings than are being made on the convention floor.

Detroit Free Press, March 17, 1962, at 8.

Moreover, several other delegates announced their candidacy for political office at the same time. In short, according to one delegate, "[e]fforts for political self-preservation were abundantly evident in the Michigan convention." [102] This extensive involvement in political campaigns adversely affected the convention's public image; many citizens naturally feared that personal political ambitions weighed too heavily in the voting of the politically involved delegates on important constitutional issues.[103]

Despite the adverse effects of partisanship and despite the prevalent opinion that "[i]t made the convention's work harder than it should [have been]," [104] the convention did accomplish its task successfully. The proposed document was ratified by a substantial margin. Furthermore, a majority of the delegates apparently thought the partisan organization was, on the whole, an advantage in their effort, for they voted sixty-seven to fifty-seven to provide for partisan elections in future conventions.[105] One delegate favored partisan elections because he thought they encouraged more qualified candidates to run and avoided the election of irreconciliable interest groups.[106]

In contrast to Michigan and New York, Maryland delegates were elected on a nonpartisan basis, and less than one-half of the delegates had ever been political officeholders. "It took newsmen several days to sort out which delegates were Democrats or Republicans or independents." [107] Delegates largely voted as their consciences dictated and freely changed their minds, since they owed their allegiance to no particular party.[108] The only visible disadvantage of the nonpolitical atmosphere was that "the convention floundered during every major floor debate, but this was disastrous in only a few instances." [109] Leaders gradually emerged, and "[i]nterestingly enough, none of those who contributed the most to the writing of the new constitution [was] an active politician." [110] The leaders tended to be natural leaders

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[102] A. STURM, CONSTITUTION-MAKING IN MICHIGAN 127 (1963).

[103] *Id.* at 117.

[104] State Journal (Lansing), April 17, 1962, at 7A.

[105] MICHIGAN CONVENTION JOURNAL, No. 135, May 9, 1962, at 1292.

[106] J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 16 (1962).

One factor that diminished the political overtones of the Michigan convention was the decision to seat delegates alphabetically rather than by party or district. This encouraged some spirit of unity and facilitated compromise. *Id.* at 25. The Maryland convention followed suit and seated delegates alphabetically. Washington Post, Sept. 7, 1967, at F1, col. 4.

[107] Washington Post, Jan. 7, 1968, at B1, col. 5.

[108] Washington Post, Jan. 7, 1968, at B1, cols. 5-6, at B2, col. 6.

[109] Washington Post, Jan. 7, 1968, at B2, col. 6.

[110] Washington Post, Jan. 11, 1968, at A16, col. 1. The editorial went on to note:

> That, in itself, may demonstrate why this convention was able to make so many far-reaching reforms in the document it has now presented to the people. The entire process through which this proposed constitution has been written

rather than party leaders. The non-politicians produced a document which was "clearly the most advanced state constitution ever written." [111] The Michigan and New York conventions ended on a note of acrimony; "Maryland's closed in an atmosphere of pleasantries and virtual unanimity." [112] Nevertheless, the "draft constitution [which] had been born and raised in an atmosphere of pure democracy [was rejected by the same] democratic process by which it was drawn." [113]

It is generally argued that partisan elections produce a greater number of qualified delegates who are experienced with the workings of government. Furthermore, party machinery promotes more efficient decision-making. When the hard decisions must be made, party leaders know when and where pressure must be applied, compromises made, and threats issued. Consequently, they can prevent hopeless deadlock and muster the necessary majority vote. But the high caliber of Maryland's apolitical delegates and the leading role they played in writing the new constitution suggest that partisan elections may discourage the candidacy of outstanding citizens not closely linked with regular parties.[114] Furthermore, Maryland's experience negates the argument that the party structure is necessary to avoid chaos and prevent deadlock, since the only time lack of party structure had any adverse effect was during floor debates.

On the whole, these convention studies provide strong support for the basic arguments against partisan conventions. Partisan elections encourage self-interested decision-making on matters at the heart of the public interest. It has been noted, for example, that in the Michigan convention voting independence varied inversely with the intensity of political ambition.[115] It is highly questionable whether decisions regarding the state's fundamental law are best made by party members who have one eye on pleasing party leaders and the other on future political office. Of course the influence of political parties will not be missing from conventions where delegates are elected on a nonpartisan basis. Even the Maryland convention felt the weight of such influence in the hard fights over the office of comptroller

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is a demonstration of democracy at its finest. The delegates and the State can only be richer because it came about this way.

111 Washington Post, Jan. 7, 1968, at B2, col. 6. The commentator noted earlier that: One suspects, and it is only a suspicion, that if Maryland had their convention to do over, it would not be the same. The political forces in the state would not let it get out of their control, as it often did.

W. Brooke Graves, a specialist in state government, noted that "Maryland is giving us a convention that will serve as model for some time to come." Wall Street Journal, Dec. 6, 1967, at 10, col. 2.

112 Washington Post, Jan. 11, 1968, at A19, col. 5.

113 Washington Post, May 16, 1968, at A20, col. 1.

114 Ostwald, *How Not to Hold a State Con-Con*, Wall Street Journal, Sept. 25, 1967, at 18, col. 3.

115 A. Sturm, Constitution-Making in Michigan 106 (1963).

(which resulted in a compromise) and over single-member districts (won by the reformers).[116] But while this influence cannot be purged from the convention process, it can be minimized through the use of nonpartisan elections. A nonpartisan convention will resemble more closely than a partisan convention the ideal of a meeting of public spirited citizens who make decisions on the basis of merit alone.

It was widely felt that partisanship caused the defeat of the New York document. Maryland, heeding the New York example, avoided partisanship in an effort to dissipate the influence generated by announcements of support or opposition from political parties or interest groups. Adversaries of constitutional reform are given powerful ammunition when one party dominates the convention. However, when a nonpartisan convention frames the document, a disgruntled party or interest group attacks not the decision of another party or interest group but, in theory, the decision of the very citizens it wishes to attract to its cause. In fact Maryland did avoid much of the normal political and interest group opposition to ratification. Although both parties strenuously objected to some of the provisions proposed by the Maryland convention and although organized labor was disappointed by the rejection of a labor bill of rights, they all ultimately urged ratification of the document. But the established political and interest groups urged ratification in vain. "It was the rank and file trampling the officers; the grass roots strangling the trees and the self-proclaimed little man deciding for himself what kind of government he would have." [117]

The result in Maryland may cast doubt upon the viability of achieving constitutional reform by the convention method. But perhaps Maryland moved too quickly, too progressively. The Maryland

> vote was explained by many . . . as an outgrowth of a widespread fear of change during a period of social unrest and civil disorder and resentment at the expansion of an already large government. The fact that the document was pushed by urban liberals and labeled as reform may have only increased the wariness of Maryland's traditionally conservative electorate.[118]

This movement in part can be attributed to the unfettered nature of the convention. Partisan bodies, in contrast, generally move incrementally through compromise which never reaches an ideal but gradually improves existing models. A partisan structure thus places a check upon the suddenness of constitutional change at the convention. But, although the partisan

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116 Washington Post, Jan. 7, 1968, at B1, cols. 5-6; *id.* at B2, col. 6.

117 Washington Post, May 16, 1968, at A5, col. 1.

118 *Id.*

convention in most cases may be relied upon to prevent radical change, the New York convention proved that such reliance may be misplaced. In the final analysis, there is no reason why a nonpartisan convention should be incapable of restricting its progress to what is tolerable to the populace. The independent delegates must accept as part of their problem the fact that there is a distance between their idealism and the reality of the limited changes that the people may be willing to accept.

Convention Procedural Rules

With the exception of some modifications to allow informal deliberation on the convention floor, most convention procedural rules closely follow those used by the lower house of the state legislature.[119] Ordinarily convention procedural rules are brief, defining such things as the necessary majority and quorum, the officers of the convention and standing committees, the powers of these respective bodies, the floor procedures as to debate and the introduction of motions and drafts, and often the number and duties of convention employees such as secretaries, clerks and reporters. For authority in the event of parliamentary conflict, many conventions adopt such comprehensive works as *Robert's Rules of Order* or *Mason's Manual of Legislative Procedure*.[120] There is always the danger that a relaxation of normal legislative procedural rules will lead to prolonged and uninformative debate,[121] or debate on proposals which are introduced by a delegate to enhance his image with his constituents or his political superiors.[122] Limitations on debate are therefore necessary, provided they can be equally ap-

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119 See, *e.g.*, M. FAUST, ORGANIZATIONAL MANUAL FOR THE MISSOURI CONSTITUTIONAL CONVENTION OF 1943 (1943); OFFICIAL RULES ADOPTED BY THE CONSTITUTIONAL CONVENTION OF NEW JERSEY (1947); MARYLAND REPORT, *supra* note 44 at 405-18; A. STURM, CONSTITUTION-MAKING IN MICHIGAN 78-79 (1963).

In Michigan, the preparatory commission drafted the procedural rules and outlined the steps considered necessary for the convention's first three sessions. These tentative suggestions were generally followed by the delegates. STURM, *id.* at 55. Such a practice seems advisable because it saves time and effects a more careful consideration of the procedural rules than would otherwise be made.

120 P. MASON, MASON'S MANUAL OF LEGISLATIVE PROCEDURE FOR LEGISLATIVE AND OTHER GOVERNMENTAL BODIES (1953); H. ROBERT, ROBERT'S RULES OF ORDER (rev. ed. 1951).

121 Detroit News, Feb. 27, 1962, at 10A (statement by delegate D. Hale Brake of the Michigan Constitutional Convention). Other delegates agreed that there was too much wasteful debate. Professor Pollack suggested adoption of the rule used by the New Jersey Convention:

> Before a proposal shall be considered by the committee of the whole, any delegate, the chairmen particularly, shall be privileged to move a limitation upon the time of debate and consideration by the committee and the committee may fix in advance of consideration a time for the committee to rise and report.

J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 39 (1962).

122 A. STURM, CONSTITUTION-MAKING IN MICHIGAN 116-17 (1963).

plied. It is often helpful to appoint an experienced parliamentarian or secretary to be available for consultation on procedural matters.[123]

Committee Structure

A substantial number of important convention decisions, like those of other formal deliberative bodies, are made away from the convention floor. It is inconceivable that the full convention could operate effectively without preliminary decision-making by special committees composed of delegates with knowledge and competence in particular areas.[124] These committees generally are concerned with either substantive matters, such as the study and writing of particular articles in the new constitution, or procedural matters, such as organization, publicity, and style and drafting. Typical functions of the substantive committees include the following: (1) study of existing provisions to ascertain past interpretation and practice, adequacy in light of contemporary state needs, and areas where improvement is desirable; (2) consideration of proposed changes (possibly in conjunction with public hearings),[125] whether the proposals come from delegates, ex-

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[123] Michigan had great success with the appointment of Fred Chase as secretary. He was the chief executive officer of the state Senate and was therefore experienced in administrative and parliamentarian duties. *Id.* at 64-65. The Maryland preparatory commission recommended a similar figure to the Maryland convention, with the following responsibilities:

> The secretary shall be the chief administrative officer of the Convention and shall be primarily responsible for its administration, under the direct authority of the president. The secretary, under the supervision and authority of the president, shall be responsible for the employment and assignment of personnel, the supervision of payroll, the registration of lobbyists or any special interest groups pursuant to any requirements imposed by rule or resolution of the Convention, and communications with the press. He shall be director of the Convention's budget and shall supervise the acquisition and care of facilities, services and supplies needed by the Convention.

MARYLAND REPORT, *supra* note 44 at 408-09.

[124] In the New Jersey Convention five substantive committees were created: Rights, Privileges, Amendments and Miscellaneous Provisions; Legislative; Executive, Militia, and Civil Officers; Judiciary; Taxation and Finance.

Michigan had nine substantive committees: Declaration of Rights, Suffrage and Elections; Legislative Organization; Legislative Powers; Executive Branch; Judicial Branch; Finance and Taxation; Local Government; Education; and Miscellaneous Provisions and Schedule.

The Maryland Convention opened with committees as follows: Personal Rights and Preamble; Suffrage and Elections; Legislative Branch; Executive Branch; Judicial Branch; Local Government; State Finance and Taxation; General Provisions.

The substantive committees of the Alaska Convention were: Ordinances and Transitional Measures; Preamble and Bill of Rights; Suffrage, Elections and Apportionment; Legislative Branch; Executive Branch; Judicial Branch; Resources; Finance and Taxation; Local Government; District Legislation, Amendment and Revision.

[125] At the Michigan Convention, some committees had open meetings in Lansing and

ternal organizations, or the committee itself; and (3) submission to the convention of the committee proposal or alternative proposals, along with a report explaining all relevant facts and arguments.[126]

All recent conventions have had separate committees concerned with each of the three branches of government.[127] Occasionally, the convention will divide these branch committees into two or more committees, as in Michigan where there were separate committees on legislative organization and legislative powers.[128] In addition to these three basic committees, there usually is a committee concerned with the preamble, bill of rights, suffrage and election provisions, and other matters not within the specific jurisdiction of another committee.[129] Also, there is ordinarily a separate committee concerned with taxation, finance and problems of local government.[130] Although many variations are possible, these five substantive committees are all that are strictly necessary.

If past practice is any indication, most conventions will be unsuccessful in properly limiting the number of committees.[131] For instance, the New York convention of 1938 felt compelled to have separate committees on matters such as Indian affairs and canals, and individual committee treatment of cities, counties, towns and villages.[132] What often happens is that the convention creates enough committees to insure that all delegates can serve on at least one, that all convention leaders can obtain a committee chairmanship, and that certain interest groups can obtain strategic representation in their areas of concern. The result can be disastrous. State constitutions are almost universally too lengthy, yet each committee usually will contribute some material to the proposed constitution.[133] As committees be-

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other parts of the state where citizens could voice their opinions. J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 32 (1962).

[126] MICHIGAN CONSTITUTIONAL CONVENTION JOURNAL, No. 14, Oct. 26, 1961, at 73. *See also* A. STURM, CONSTITUTION-MAKING IN MICHIGAN 86 (1963).

[127] Note 124 *supra.*

[128] Note 124 *supra.*

[129] Note 124 *supra.*

[130] See note 124 *supra.* The financial crisis occurring in many cities would seem to make financial matters and local government an ideal match. This is particularly so with regard to the state tax structure, which should be integrated with municipal taxes, county taxes, and property and sales taxes.

[131] Although the New Jersey Convention showed admirable restraint, *supra* note 124, as a general rule too many substantive committees are created. *Id.*

[132] The 1967 New York Convention divided the work among fifteen standing committees, a considerable diminution from the thirty-four that operated at the 1938 New York Convention. McKay, *Constitutional Revision in New York State: Disaster in 1967*, 19 SYRACUSE L. REV. 207, 219 (1967).

[133] The excellent commentary that followed the Michigan convention reveals a feeling that too many committees were created, despite the fact that Michigan, in compari-

come more numerous, their work becomes more detailed and jurisdictional lines less precise. A successful constitution must be an internally integrated, consistent and unified document. A mere accumulation of technical provisions drafted by many different hands will inevitably result in inconsistencies, duplications, omissions, and inclusion of material more properly left to legislation.[134]

In addition to the substantative committees, conventions invariably find it necessary to establish certain operational or procedural committees.[135] Most conventions place the important work of integrating and polishing the proposed or adopted constitutional language in a committee on style,

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son with other conventions, created relatively few committees. Professor Sturm reports that:

> Practically all delegates interviewed agreed that the number of committees should be kept small; some declared that one or two of the substantive committees could have been omitted without causing the convention's work to suffer. The consensus was that no delegate should serve on more than one substantive committee.

A. STURM, CONSTITUTION-MAKING IN MICHIGAN 275 (1963).

[134] An example of the types of committee jurisdictional problems that can arise is noted by Professor Pollack who reports that, at the Michigan convention, a problem arose as to whether gubernatorial elections were to be considered by the executive committee or the elections committee. J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 35 (1962).

When there is an abundant number of committees, it is often necessary to have delegates serve on more than one committee. This presented a problem to the Michigan convention, for the delegates had time to follow the proceedings of only one committee. *Id.* at 26-27.

Although it seems desirable to appoint delegates to committees which deal with topics of particular interest to them, this can apparently be overdone. Of twenty-one members on the Michigan Judicial Committee, twenty were lawyers and the other a pharmacist. These specialists were unable to agree with one another, and their report was unduly delayed. Ann Arbor News, May 12, 1962, at 12. Overlapping committee assignments added to this burden. A. STURM, CONSTITUTION-MAKING IN MICHIGAN 276 (1963). Furthermore, judicial matters are of general interest to the state and should not be made the peculiar province of the lawyers. J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 24 (1962).

At Michigan there was also a problem of keeping the convention informed of what was going on in the committees. It was felt that problems should be considered by delegates outside the particular committee before a proposal comes to the convention floor. *Id.* at 35-36.

[135] Maryland had operational committees on the following matters: Style, Drafting and Arrangement; Calendar and Agenda of the Convention; Rules, Credentials and Convention Budget. Washington Post, Sept. 7, 1967, at F1, col. 5.

New Jersey established the following committees: Arrangement and Form; Submission and Address to the People; Rules, Organization, and Business Affairs; and Credentials, Printing, and Authentication of Documents.

Michigan had four operational committees: Style and Drafting; Administration; Public Information; and Rules and Resolutions.

drafting and arrangement.[136] It is often convenient to centralize rules policy, business affairs, and other organizational matters in a special committee.[137] Finally, many conventions have had success with a committee which coordinates publicity and general outside contact.[138] The importance of these committees cannot be overemphasized. It is essential to the overall success of the convention that it be able to function smoothly; it is therefore necessary that capable and interested delegates be placed on these committees. Although they will not be concerned with substantive constitutional issues, these members perform the important task "of easing and implementing the process of constitution-making." [139]

Committee Membership

A nonpartisan convention would seem more capable of appointing committee chairmen and members on the basis of merit than a partisan convention. In both Michigan[140] and New York[141] the dominant party appointed only party members to committee chairmanships, while in Maryland appointments were made regardless of political affiliation. It is difficult to match correctly the interests, ability and experience of delegates with the needs of the various committees. When the convention can select chair-

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136 The Michigan convention utilized its committee on style and drafting at several stages. Committees concerned with substantive matters referred the proposal to the committee of the whole. The committee of the whole then reported the proposal to the style and drafting committee, which in turn reported its draft to the committee of the whole. There was a second vote by that body and, if the item was accepted, it was again referred to the style and drafting committee, and this committee again reported its product to the committee of the whole for a final vote. MICHIGAN CONSTITUTIONAL CONVENTION JOURNAL, Res. No. 72, No. 94, March 7, 1962, at 722.

137 It is particularly helpful if this committee controls employment practices at the convention since this avoids preferential hiring by the delegates themselves. The committee is able to test potential employees objectively and employ applicants on the basis of relative merit. The overall level of the ability of employees is consequently increased. J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 34-35 (1962).

138 Michigan found their Committee on Public Information very helpful during the convention. J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 33 (1962). The need to coordinate public information was, perhaps erroneously, apparently not considered necessary at the Maryland convention, where one delegate reported that "[a] $10,000 fire or an assault and robbery get a helluva [*sic*] lot more news coverage than we do." Wall Street Journal, December 6, 1967, at 1, col. 1.

The Maryland public information committee was of the opinion that it was not the business of the convention to promote the new constitution but that this was a task for organizations and persons not directly related to the convention. Baltimore Sun, Dec. 8, 1967, at A12, col. 1.

139 A. STURM, CONSTITUTION-MAKING IN MICHIGAN 80-81 (1963).

140 *Id.* at 73-77.

141 Note 93 *supra.*

men from only one party, and when the dominant party insists that the party ratio at the convention as a whole be reflected by an equivalent ratio in the various committees, as in Michigan,[142] the task of selecting responsible committeemen and chairmen is all the more difficult.

It is obvious that delegates will be interested in particular committees. Interests may often depend upon vocation or profession. It is only natural that attorneys and judges will wish to revise the judiciary, that legislators will want to serve on the legislative committee, that local government officials will want to sit on the local government committee, and that bankers and businessmen will be drawn to a finance or taxation committee. To some extent, vocational backgrounds and interests should control in appointing delegates to the committees, but caution should be exercized to avoid overloading committees with especially interested members. It is essential that the constitution have a broad appeal and that fresh approaches be taken to old problems. The judicial system is no more the exclusive domain of the bar than the legislature is the sole concern of legislators. It is important that some experienced members be available to point out current problems and possible solutions, but all citizens are interested in constitutional matters and all committees should be structured to achieve a roughly equal balance between members with special interests and those whose interests are more general.

External Pressures

The importance of a constitutional convention is of such magnitude that it is impossible to have it function in a vacuum, free from outside pressures. Indeed, delegates are elected representatives who should be subject to the desires of their constituents. But it is necessary to limit external pressures in some manner in order to assure that delegates concentrate on their task and are left free from coercive pressures. The basic purpose of a constitutional convention transcends the purpose of normal partisan political processes. The decisions of the delegates cannot be repealed by a simple majority when the passions of the day have passed. Moreover, many delegates may be inexperienced at shedding lobby pressures. Accordingly, convention delegates should be insulated to a greater extent than legislators from lobbying activity.

There are innumerable methods of exerting pressure from outside. Political leaders in the state will attempt to influence decisions at the convention both through the party machinery and through statements made to the press.[143] Nonpartisan delegates are of course better able to ignore such

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[142] Note 140 *supra*.

[143] New York had this experience. Governor Rockefeller objected to many of the same constitutional proposals that Republican delegates disliked. Washington Post,

pressures than partisan delegates who must cater to the wishes of party leaders and must answer to their constituents if they seek election to another office.

Prolific lobbying tactics may impede the internal workings of the convention. Professor Pollack, a delegate at the Michigan convention, noted that open committee meetings meant that lobbyists and newspaper reporters were always present. Although he approved of the open meetings, he noted that the presence of these groups sometimes made agreement more difficult, and delegates tended to talk for newspapermen and lobbyists rather than for other delegates.[144] To regulate lobby pressure, the Michigan convention required that lobbyists register and keep a record of their expenses for publicity and entertainment of delegates. These records were open to the public.[145]

Maryland experienced lobbying activity but, because the delegates had few political party ties, these pressures were largely ignored.[146] Despite the opposition of virtually the entire legislature, the Republican governor, and Democratic organizations in the Baltimore area, the convention approved a single-member districting proposal by a vote of 83 to 52. Furthermore, after a tie vote rejected a labor bill of rights "labor organizations began a blitz campaign of personal contact and telegrams."[147] However, the

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Sept. 7, 1967, at F15, cols. 1-7. However, his views were more widely publicized by the press than those of the delegates.

[144] J. POLLACK, MAKING MICHIGAN'S NEW CONSTITUTION 29-30 (1962).

[145] MICHIGAN CONVENTION JOURNAL, Res. No. 106, No. 135, May 9, 1942, at 1280.

[146] A. STURM, CONSTITUTION-MAKING IN MICHIGAN 134-35 (1963) describes the lobby situation in Michigan:

> Lobbying methods and tactics at the constitutional convention differed considerably from those usually employed in the regular lawmaking process. In the first place, far fewer lobbyists registered at the convention than with the legislature. With a few exceptions, such as the highway interests, there was much less overt lobbying activity, and, generally, it lacked the luster and excitement that often characterizes lobbying at the legislature. Major factors that differentiated lobbying activity at the convention from pressure on legislators were: first, the convention's excellent research staff greatly reduced delegates' reliance on interest groups for information; second, the nature of the convention with its diversified membership made lobbying difficult for representatives of interest groups, who were personally acquainted with relatively few delegates; third, some traditional techniques could not be effectively applied to delegates elected for a single purpose and who would not run for re-election; and fourth, the strong stand that the convention took on regulating agents of pressure groups and their activities discouraged many from registering.

The Maryland convention listed among its registered lobbyists youngsters from the University of Maryland Student Government Association, who pushed for a reduction in the voting age, a representative from the City of Baltimore to protect its interests, and a minister who stated on the registration form that the subject of his lobby were "Christian principles." Wall Street Journal, Dec. 6, 1967, at 10, col. 3.

[147] Washington Post, Jan. 4, 1968, at E1, col. 6.

independent delegates ignored the pressure and properly decided that labor relations and rights were better left to the legislature.

The Ratification Process

The ratification process is an integral and decisive part of constitutional change. Although it was formerly held, pursuant to the most extreme view of convention authority, that a convention is empowered to declare its document to be the law,[148] the modern view is that no such power exists.[149] Nevertheless, the constitutions of twelve states require no ratification of a proposed constitution,[150] and the remnants of the earlier view still color modern decision-making; one of the official reasons for the recent selection of the commission method rather than the convention in Virginia was that the convention could dispense with popular ratification.[151]

If the constitution is to be submitted to the electorate for its approval, the manner in which it is submitted should be calculated to ascertain as completely and conveniently as possible the public will.[152] There are several alternatives. The constitution may be submitted in toto; each provision may be voted on separately; or all controversial provisions not essential to the constitutional scheme may be submitted separately.

Submission of the constitution in toto is administratively convenient, necessitating only one election and a simple "yes" or "no" response. However, if the proposed constitution contains a controversial provision, this procedure may cause the defeat of an otherwise sound document. For example, the voters of New York recently rejected a constitution largely be-

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148 *E.g.* Sproule v. Fredericks, 68 Miss. 898, 11 So. 472 (1892). See generally J. Jameson, Constitutional Conventions (1887).

149 *Id.* See Gaines v. O'Connell, 305 Ky. 397, 204 S.W.2d 425 (1947).

150 White, *supra* note 27 at 1144-45.

151 In Taylor v. Commonwealth, 101 Va. 829, 44 S.E. 754 (1903), the Virginia court held as effective a convention document promulgated in defiance of the legislative limitations. However, the Governor and other state officials had already sworn allegiance to the constitution. The question was whether the convention had to follow legislative instructions requiring that the proposed document be submitted to popular vote. The convention declared the instrument effective without popular ratification, and the court upheld the declaration. *Accord*, Miller v. Johnson, 92 Ky. 589, 18 S.W. 522 (1892). For a comprehensive summary of the earlier cases on point, see 15 L.R.A. 524 (1892).

Apparently, this declarative ratification in Virginia has become firm precedent. When under attack by Republicans for calling for a constitutional commission rather than a convention, Governor Mills E. Godwin of Virginia answered that a convention could proclaim the document effective without submitting it for ratification whereas the commission document would have to be approved by the people. Evening Star (Washington, D.C.), Nov 11, 1967, at B2, cols. 2-3.

152 See J. Jameson, Constitutional Conventions 530 (1887).

cause of opposition to controversial provisions.[153] But in situations where only minor changes have been made in an existing constitution, or where estimation of the popular will suggests no such controversies, submission of the entire document may be feasible.

Independent submission of each part of a proposed constitution will rarely be advisable for major changes. It is inconvenient, necessitating an extremely long ballot (or many separate elections) and a vast amount of organization. Moreover, such a method would not produce a well-ordered constitution but rather a clutter of unstructured and perhaps inconsistent provisions. Separate submission of non-integrated controversial provisions is quite desirable, however, since it reduces the possibility that an otherwise sound constitution will be defeated at the polls. Moreover, it permits ratification of a new constitution to take place with a minimum of administrative inconvenience.

The decision on the manner of submission is usually made at the convention. However, further decisions regarding the mobilization of popular support for the new document must be made during the post-convention ratification campaign. No matter how sound the document or how universal the official acclaim, an intense educational effort must be made. Otherwise the opponents of ratification may be able to rally enough support to defeat it while the potential proponents remain at home.

It has been suggested that failure to mobilize support was the cause of the Maryland failure, but it is probable that the cause lies deeper.[154] Whatever the method of political change, the members of the body drafting the constitution must appreciate fully the art of the possible. "It's not just how well you draw your new laws, but how well you understand your voters when you go submit them." [155]

C. L. W., Jr.

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[153] C. Lobingier, The People's Law 340-44 (1909). See text *supra* at notes 94-96.

[154] See text *supra* at note 118.

[155] Life, May 31, 1968, at 4.

CHAPTER II

ORGANIZING THE CONSTITUTIONAL CONVENTION

By John E. Bebout

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Organizing the Constitutional Convention

JOHN E. BEBOUT

The organization and conduct of a "successful" or useful constitutional convention does not simply happen. It requires administrative and political statesmanship, endowed with foresight, a conviction of the special public importance of the enterprise, and a sense of purpose or direction. Too many conventions have failed to live up to their high calling because they were organized and conducted much too casually.

Important decisions affecting the organization and conduct of a convention are made before, some long before, the convention is called. More of these decisions are written into the New York Constitution than in those of most other states. These provisions need to be examined both because of their bearing on the action of the organizers and managers of the forthcoming convention and because some of them should probably be changed for the benefit of future conventions. A review of the pertinent provisions of the New York Constitution will also throw light on issues that in one form or another must be faced in other states.

I

The size of a convention and the basis of representation are among the most significant factors conditioning its organization and behavior. The fact that the 1967 convention will have 186 members was determined basically by the constitutional stipulation that

there shall be three delegates elected from each senate district plus fifteen more elected at large. The provision for delegates elected at large is another significant organizational fact. Only the Missouri Constitution makes a similar prescription.

There is little reason to question the soundness of provisions requiring an absolute majority of the convention for a quorum and for the final vote on proposals, giving the convention control over its rules, the selection and compensation of its staff, and the choice of its own officers, and giving the convention discretion as to the manner and the time, after a lapse of six weeks, of submission of its work to the voters.

A question might be raised about the use of the words "after the adjournment of the convention" in designating the beginning of the minimum period of six weeks before the election at which the proposals are voted on by the people. One reason for this is the growing belief that a convention and its members have a duty to explain and, subject to the right of dissent on the part of individual delegates, to espouse their work to the people. While arrangements presumably can be made, as they were by the New Jersey convention of 1947 and the Michigan convention of 1961, for continuing staff work to handle public information until election, there is something to be said for preserving the body itself, in case official action is needed.

The provision that a convention shall meet the first Tuesday in April following its election is not necessarily so innocuous as it may sound. As to the place of meeting, two states in recent years, New Jersey and Alaska, have chosen to hold their conventions on the campus of the state university. In each case the decision was based on the belief that the campus setting would be more conducive to the kind of deliberation that was hoped for than the chambers and corridors of the capitol. There is widespread opinion in both states, an opinion in which I concur, that the belief was justified by events.

The April meeting date means that there is a period of five months between election and organization during which the convention has no control over its own destiny. This is one month longer than the old waiting period between the election of a new president and his inauguration on March 4. During this period the convention can do nothing to influence the nature of whatever

official preparatory work may be done for it. It seems obvious that the convention could make better use of its total time and resources if it could organize at a time closer to its election. There is one other reason why a late fixed date for the first meeting of any convention is of doubtful propriety; it limits the possible use of a convention in case of an emergency. It may be argued that there is no such thing in an American state as an emergency requiring such action, although Rhode Island and Virginia both used quickie conventions during the Second World War to facilitate soldier voting. Moreover, a constitution so stuffed with essentially legislative detail as that of New York is subject to more rapid obsolescence than a short, general constitution like that of New Jersey or Alaska. In a time of rapid change and mounting demands on government, this could cause a state unable to change its basic law in much less than two years considerable embarrassment. The Twenty-first Amendment to the United States Constitution became effective less than ten months after it was approved by the Senate. The convention may wish to review the timetable prescribed by the constitution with a view to giving the people of New York greater flexibility in the use of future conventions.

The members of the New York convention of 1967 will be the highest paid convention delegates in American history, with annual salaries of $15,000 and $3,000 expense allowances. This is the result of the constitutional provision equating the pay of delegates with that of legislators. In contrast, Rhode Island today, and New Jersey in 1947, have allowed only modest expenses. The New York pay scale is surely high enough to justify expectation that the delegates will make the convention their major business for any reasonable duration. That it is high enough, as some have cynically suggested, to tempt them to protract their proceedings into a second or third year seems doubtful. On the other hand, should it seem necessary to achieve a good result to continue into a second year, as in the case of the Missouri convention of 1943-44, the delegates should not hesitate to do so, even though it would mean another annual salary. Happily, argument over the cost of a convention has been less a deterrent to investment in foresight in New York than in most other states. However, the convention may wish to consider whether the constitutional provision for the compensation of delegates should be modified.

The New Jersey and Rhode Island no-pay plan certainly is not to be recommended in any state under modern conditions, unless, perhaps, for a convention limited by law or common consent to a very short agenda and time schedule. For a large state like New York, where the agenda is general review and revision of a difficult, complex constitution, it is undoubtedly important to pay delegates enough to expect them to concentrate on the job for a considerable period of time.

How much time? The Michigan convention, which had the benefit of substantial background preparation and excellent staff work, opened October 1, 1961, took just over seven months to complete its draft adopted on May 11, 1962, and then recessed until August 1, when it made a few changes, mainly for clarification and other technical reasons, and adjourned *sine die*. The delegates received $7,500 each, plus mileage to and from the convention once a month, for this service.

Delegates to the Michigan convention were able to point to a number of ways in which its work might have been expedited. However, the actual timetable does not seem unreasonably long, given the fact that almost everyone goes into a convention without specific prior experience. Since the Michigan Constitution was shorter and less complex than that of New York, this state will do well if it gets a serious, competent job in much less time.

This brings us to the provision in the New York Constitution which directs the convention delegates to "continue their session until the business of such session shall have been completed." Some, observing the dispatch with which the Alaska and New Jersey conventions, both limited by law to three months, completed their work, and comparing them with the more protracted proceedings of the recent Michigan convention and the Missouri convention of 1943-44 and the almost interminable proceedings of the latest Rhode Island convention, argue for a mandatory deadline. There is no doubt that a deadline has considerable disciplinary value. There were other factors, however, in both Alaska and New Jersey, that tended to reinforce and make feasible the completion of a sound job within the time allotted.

It seems quite likely that any such deadline would have doomed the Missouri and Michigan conventions to futility. In either case success would have required an administrative and political mir-

acle. Even in Alaska, some observers who felt that the three-month period was enough to do the basic job believe that the document could have been approved if the convention, like the Michigan convention, could have returned briefly, after a period of staff work over the document, to reconsider matters of style and a few matters of substance. On balance, it seems best to leave the duration of the convention to the delegates themselves, although some states might wish to encourage reasonable dispatch by some limitation in the pay scheme.

II

As constitutional conventions go, the 1967 body will be a large one, although not so large as the four hundred-odd-member convention in New Hampshire and the 320-member convention in Massachusetts in 1917. This fact will impose difficult problems on the managers and delegates and raises a serious question about the desirability of changing the constitutional basis for representation in future conventions. Missouri, the only other state with constitutional provision for delegates-at-large, elects only two instead of three members from each senate district. This rule in New York would have reduced the forthcoming convention to 129, fifteen less than the 144-member Michigan convention, which seemed a little too large for ideal committee work and convention debate. If it is possible to achieve representativeness in a body of less than one hundred, experience in the smaller conventions in Alaska, Hawaii, Puerto Rico, New Jersey, and some other states suggests that the efficiency of such a body as a deliberative assembly is worth reaching for.

Although the delegates-at-large are an unusual feature of the New York convention and increase its size, experience in both New York and Missouri points to the desirability of retaining them. In both states it has proved possible to attract as delegates-at-large elder statesmen and especially qualified persons who might not have run or been elected as district delegates. It is not surprising that a disproportionate number of the official and intellectual leaders of conventions in both states have tended to appear among the delegates-at-large. In view of the crucial importance of leadership and experience in a convention, this asset should be preserved.

The most important factor to be considered in the organization and conduct of a convention is the nature and scope of its mission. Some states have in recent years held conventions limited to dealing with certain parts of the constitution. Obviously, such a convention may require less time, less preparation, and less management than one charged with responsibility for general revision.

However, most conventions have been expected to review the whole constitution and have had a license to propose changes in any or all parts of the constitution. This is and has always been the mission of constitutional conventions in New York. The wording of Article XIX, Section 2, clearly precludes the possibility of legal limitation similar to that which denied the New Jersey convention of 1947 access to the provisions on legislative representation. Moreover, the generous compensation for delegates would make little or no sense if the delegates were not expected to concern themselves with the entire document. Finally, the detailed and interlocking nature of the provisions of various parts of the New York Constitution makes it impossible to do a sound job of revision of any fundamental nature without looking at the document as a whole.

This is not to say that specific changes might not well be made in various provisions without affecting other related provisions. It is to say, however, that if the constitution is to be treated as an integral document and if a convention is to produce anything like a general revision which has internal integrity and consistency, the convention must organize to deal with the constitution as a whole as well as with its separate parts. The fact is that its parts have over the years become more and more complexly intertwined. This is partly the result of piecemeal amendment and partly a cause of the increasing necessity to submit individual amendments to the people. One of the principal justifications of the constitutional convention is that it has a single and comprehensive mandate to take a general look at the constitution as a whole.

Two additional predetermined conditions not set by the New York Constitution that are important to the organization and conduct of the convention must be noted. One is the partisan election of delegates, with all delegates presumably bearing primary al-

legiance to either the Democratic or the Republican party. Certain implications of this will be discussed later. Suffice it to observe here that some states forbid party nomination or party labels and regard partisan election as incompatible with the long-range constituent purpose of a convention.

The second condition is the background preparation already made or under way. It has long been recognized that the effectiveness of a convention may be greatly affected by the nature and quality of such preparation. The preparation for the New York convention of 1915 set a standard for preparatory work that has been imitated if not always matched by preparation for conventions in many other states. The convention to meet in April will start with access to background material prepared by The Temporary Commission on the Revision and Simplification of the Constitution between 1956 and 1961 and with the material now being prepared by The Temporary Commission on the Constitutional Convention. Unfortunately, as everyone knows, the work of the latter commission has been delayed and will necessarily be limited in scope because of a long period of dissension in the commission and the consequent resignation of two staff directors before the present staff was assembled. Under the circumstances, The Academy of Political Science is especially to be congratulated for following its own 1914 precedent by devoting these proceedings to problems of the convention.

In addition, it is to be hoped that those who assume leadership responsibility for the convention will use the remaining time to supplement these preparations, especially by making plans to engage the convention with the task not of mere tinkering with constitutional details but of writing what amounts to a new integral constitution for the Empire State. New York has not had such a constitution for a good many years.

Without careful planning and expert management, constitutional tinkering is about all that can be expected. One is tempted to suggest that the convention should prepare for a job of constitutional slum clearance, for the elimination of the jumble of complex, outworn, and interpenetrating provisions that make it increasingly difficult for the government of the day to deal in a straightforward manner with rapidly emerging and changing situations.

III

There is neither space nor need here to discuss in detail the rules and the logistics of convention operation. These have all been critically and sensibly discussed again and again during the last half century or so. Some of the most useful sources are listed in the bibliographical note at the end of this paper.

In view of the method of election of delegates and the political tradition of the state, the future of the convention lies largely in the hands of the party leadership. The parties exist. Only they can act in advance to inject some order, dispatch, and sense of direction into the early proceedings of the convention. In so doing, it is to be hoped that they will remember that their job is to write a constitution for all the people of New York for at least a generation ahead. A statute defeated or marred by excessive partisanship can be revived or repealed by the next legislature. A constitution lost or flawed by short-range political considerations cannot be so easily retrieved.

The record shows that in well run conventions, relatively few matters raise genuine and legitimate party issues. The parties can and should compete in the convention for credit in writing a good constitution that both parties and most of the voters will wish to support. This was, in fact, the essence of the bipartisan spirit of the New Jersey convention of 1947. That convention and some others demonstrate that if the leaders of parties or factions deal with one another fairly, in terms of their common task and objective, a spirit of community develops among the delegates which raises the level of their aspiration and performance as they learn to know one another and to sense the excitement and importance of their mission. This state of affairs depends heavily on accidents of personality and position, but the extent to which it is achieved depends also on the working conditions that result from specific aspects of convention organization and management.

It must be recognized that the size of the convention intensifies the difficulty of achieving optimum member involvement and deliberation without excessive delays. The size of the body, together with its partisan cleavage, also complicates the problem of organizing a representative and effective committee system related to the grand objective of integral constitutional revision.

The committee structure may prove to be the principal clue to the nature of the convention's end product and the key test of the devotion of the leadership of both parties to the public interest.

Observers of constitutional conventions generally agree that the number of committees should be kept small, with each substantive committee charged with responsibility for a broad segment of the constitution and with no member serving on more than one such committee. The New Jersey convention of 1947 had only five subject-matter committees in addition to the Committee on Arrangement and Form, often known as the Committee on Style. The subject-matter committees were as follows: Rights, Privileges, Amendments and Miscellaneous Provisions; Legislative; Executive, Militia, and Civil Officers; Judiciary; Taxation and Finance. In addition, there were committees on Submission and Address to the People; Rules, Organization, and Business Affairs; and Credentials, Printing, and Authentication of Documents. The Michigan convention of 1961-62 had nine substantive committees and four others. One of the worst models was set by the New York convention of 1938, which established thirty-four committees, including committees on such world-shaking matters as Canals and Indian Affairs and separate committees on Cities, Counties and Towns, and Villages. A committee structure of this sort is almost guaranteed to increase rather than to diminish the detail and prolixity in a constitutional document. Its only advantages lie in the fact that it provides committee chairmanships and vice-chairmanships for a substantial proportion of the delegates and so fractionates the work of the delegates that the only possible way to achieve any kind of acceptable order at the end of the convention is by back-room negotiation among a few leaders. If the convention of 1967 were to start out with such a committee structure, some delegate could perform a great service to the state by introducing a motion to adjourn *sine die* immediately.

If the convention is ready to consider writing a basic constitution, it could achieve its purpose with very few substantive committees. Logically, these five committees would be enough: (1) bill of rights, suffrage and elections, revision and amendment; (2) legislative organization; (3) executive; (4) judiciary; (5) legislative power. This last committee would be responsible for reviewing and, hopefully, recommending the elimination or reduction of a

host of provisions relating to local government, state and local finance, economic regulation, and education and social welfare that now have the principal effect of limiting legislative power and curtailing the adaptability of the state-local system to changing conditions. It would doubtless be more realistic to think in terms of separate committees on local government; finance; economic regulation, conservation, and development; and education and social welfare in place of the committee on legislative power. This would come to eight substantive committees. In addition, of course, there would need to be a committee on style and drafting, a committee on rules and administration, or separate committees on each, and a committee on public information. Admittedly it will take considerable political restraint to keep the number of committees so low. Another difficulty lies in the fact that in order to put every member of the convention on a substantive committee, an absolute necessity from almost any rational point of view, the average committee would have to have twenty-three members, which is a larger number than would be ideal.

The size problem can be mitigated by management. Each of the major subjects suggested as a basis for committee division can be divided into aspects upon which different members of the committee may usefully specialize. Moreover, the structure of the present constitution is such that certain clauses will need to have the attention of more than one committee, a fact which points to the desirability of establishing inter-committee task forces or joint subcommittees on particular topics. Obviously it would be a great deal easier to maintain useful communication and perhaps develop some harmony of views and recommendations with respect to interrelated or overlapping provisions by arrangements among from two to four committees than by arrangements among a larger number with more limited assignments.

As to the problem of achieving full discussion and open action on all crucial matters without permitting the proceedings to bog down, the more fully engaged all members are in significant committee work, the less temptation there will be for individual members to make Brownie points on the floor. With committees of approximately twenty-three each, conscientiously selected with a view to fair representation of a cross-section of the convention, much debate that would otherwise occur on the floor should take

place in the committee rooms. This would permit the focusing of floor debate on significant issues that had been previously threshed out and defined by discussion within the committees. The convention should certainly avoid the error made in the current Rhode Island convention of requiring a convention vote on every proposal submitted by a member. Committees should have freedom to amalgamate, reconcile, or reject individual proposals, reserving the right of petition, signed by a reasonable but relatively small number of members, to force out a question for convention action.

IV

Experience in a number of conventions, including those in Alaska, New Jersey, and Michigan, all point to the need for a strong staff with varied specialists to work intensively with the committees. Members of this staff should be chosen under the authority of the convention in such manner as to insure that they are acceptable to the committees that they serve.

One special caution should be observed in the selection of certain committees. The convention should avoid loading a committee with a particular kind of expertise supposedly related to the subject-matter of the committee. Competent observers have suggested that the committees on the judiciary in the Alaska and Michigan conventions might have been more effective if they had not both been overloaded with lawyers. In like manner, a committee on finance should not be overloaded with bankers, accountants, or finance officers.

The committee on style and drafting should organize and start work as early as any other committee. It should begin to develop, hopefully on the basis of preparatory work completed before the convention assembles, some suggestions regarding form and style, and with its technical staff should be available to subject-matter committees at all times. The committee on style and drafting, moreover, if it is kept abreast of draft proposals from other committees, can serve as a communication link between the committees whose subject-matter areas impinge upon each other. While a committee on style and drafting should not have authority to make changes in substance, it should call attention to substantive inconsistencies between different parts of the document and should

not hesitate to raise any substantive matter which it deems potentially inconsistent with the general tenor of the convention's work. Either the committee on style and drafting or an ad hoc committee near the end of the convention, perhaps a committee which would include chairmen of the other committees, should audit the document, before it is finally approved, for substance as well as for style, with a view to raising for one more possible review any issues that it feels may have been, for some reason, inadequately considered.

One of the most important and sensitive tasks will be that of the committee on public information. Like the committee on style and drafting, this committee should start work at once and see to it that the public is constantly and adequately informed of the progress of the convention, making use of all media and maintaining contact with all citizen and official groups that display an interest in the convention. It should, in consultation with the other committees, develop a strategy for the use of public hearings and for inviting suggestions for change or comment on tentative proposals from individual citizens or citizen organizations.

This committee should continue in active business until the election on the convention's proposals. It should be responsible for preparing and disseminating not only the text of the new constitution or amendments, but also an explanatory report to the people setting forth the reasoning behind and the significance of the changes to be voted on. Among the better models for such statements are those prepared by the Missouri, New Jersey, Alaska, and Michigan conventions. The committee should also provide information by way of all the available media. Finally, it should assist the individual members of the convention in the discharge of their duty to give the people an accounting of their stewardship by helping the voters make an informed decision.

Bibliographical Note

One of the best short statements on the organization, procedure, and conduct of a convention was made by Walter F. Dodd: "The Constitutional Convention: Preliminary Work, Procedure and Submission of Conclusions" in "The Revision of the State Constitution," *Proceedings of the Academy of Political Science*, V (1914), 54-72. A good practical manual prepared for the recent Michigan constitutional convention by William J. Pierce, professor of law, University of Michigan, was issued by the Constitutional Convention Preparatory Commis-

sion, September 1961, under the title "Michigan Constitutional Convention Studies." This includes a complete set of suggested rules with comments. See also: Albert L. Sturm, *Constitution-Making in Michigan 1961-1962* (Ann Arbor, 1963); James K. Pollock, *Making Michigan's New Constitution 1961-1962* (Ann Arbor, 1962); Theodore R. Ervin, *Crosscurrents of Influence in the Committee on Legislative Organization in Michigan's Constitutional Convention* (East Lansing, 1964); Albert L. Sturm and James B. Craig Jr., "State Constitutional Conventions: 1950-1965," *State Government*, XXXIX (1966), 67-85; *The Constitutional Convention, A Manual on Its Planning, Organization and Operation*, prepared by John P. Wheeler Jr. (National Municipal League, New York, 1961); and John E. Bebout and Emil J. Sady, "Staging a Constitutional Convention," Chap. V in W. Brooke Graves (ed.), *State Constitutional Revision* (Public Administration Service, Chicago, 1960).

CHAPTER III

CONSTITUTIONAL CONVENTIONS

By Albert L. Sturm

Reprinted by permission of author and publisher from: Albert L. Sturm. "Constitutional Conventions." Chapter 4 and Epilogue in Thirty Years of State Constitution-Making: 1938-1968, pp. 51-80 and 112-116. New York; National Municipal League, 1970.

Constitutional Conventions

Traditionally, American states have employed the constitutional convention for extensive revision of an old constitution or the writing of a new one. Although this method has been used primarily for major changes, in recent years some conventions have proposed more limited modifications in the form of one or more amendments when other methods were unauthorized or inexpedient. Indigenous to the United States, constitutional conventions are expressly authorized in the basic laws of approximately four-fifths of the states and the commonwealth of Puerto Rico (see Table 4 and Appendix C). In the remaining states, judicial interpretation and practice have established this method extraconstitutionally.[15] Since the formation of the Union, at least 218 constitutional conventions had been held in the United States through 1968.

Use of Constitutional Conventions

An Overview through 1968

Table 9, below, lists the numbers and dates of constitutional conven-

[15] Albert L. Sturm, *Methods of State Constitutional Reform* (Michigan Governmental Studies No. 28; Ann Arbor: University of Michigan Press, 1954), chap. v. For example, Louisiana, whose constitution contains no provision for a constitutional convention, has held 10 such constituent assemblies. Similarly, Arkansas and Mississippi have called six and seven constitutional conventions, respectively, without express constitutional provision.

tions held in the 50 states and Puerto Rico, as of January 1, 1969. (Authorities differ in their determination of the number of constitutional conventions held in the states. Some include constitutional commissions, and some count the instances in which the legislature has served as a convention. In compiling the data for Table 9, information provided by state officials and leading authorities on the constitution in the respective states has been used. Constitutional commissions and instances in which legislatures have acted as conventions are excluded.) New Hampshire with 15 (until 1964 the convention was the only authorized method for constitutional alteration in New Hampshire, with required submission of the convention question to the voters every seven years), Georgia with 12, Vermont with 11 and Louisiana with 10 lead all other states in the numbers of conventions. New York and Virginia each have called nine such assemblies, and three states—Mississippi, Missouri, and New Mexico—have convened seven each. Six states have held six conventions each (Alabama, Arkansas, North Carolina, Rhode Island, Tennessee and Texas), and seven states have assembled five of these constituent bodies

TABLE 9

NUMBER AND DATES OF CONSTITUTIONAL CONVENTIONS

As of January 1, 1969

State	*Total Number*	*Dates*
Alabama	6	1819, 1861, 1865, 1867, 1875, 1901
Alaska	1	1955-56
Arizona	1	1910
Arkansas	6	1836, 1861, 1864, 1868, 1874, 1917-18
California	2	1849, 1878-79
Colorado	1	1875-76
Connecticut	3	1818, 1902, 1965
Delaware	5	1776, 1792, 1831, 1853, 1897
Florida	5	1838-39, 1861, 1865, 1868, 1885
Georgia	12	1777, 1788, 1789 (2 in 1789), 1795, 1798, 1833, 1839, 1861, 1865, 1868, 1877
Hawaii	2	1950, 1968
Idaho	1	1889
Illinois	5	1818, 1847, 1862, 1869-70, 1920-22
Indiana	2	1815, 1850-51
Iowa	3	1844, 1846, 1857
Kansas	4	1855, 1857, 1858, 1859
Kentucky	4	1792, 1794, 1849-50, 1890-91

TABLE 9 (Continued)

State	*Total Number*	*Dates*
Louisiana	10	1812, 1845, 1852, 1861, 1864, 1868, 1879, 1898, 1913, 1921
Maine	1	1819
Maryland	5	1776, 1850-51, 1864, 1867, 1967-68
Massachusetts	4	1779-80, 1820, 1853, 1917-19
Michigan	5	1835, 1850, 1867, 1907-08, 1961-62
Minnesota	1	1857
Mississippi	7	1817, 1832, 1851, 1861, 1865, 1868, 1890
Missouri	7	1820, 1845-46, 1861-63, 1865, 1875, 1922-23, 1943-44
Montana	3	1866, 1884, 1889
Nebraska	3	1871, 1875, 1919-20
Nevada	2	1863, 1864
New Hampshire	15	1776, 1778-79, 1781-83, 1791-92, 1850-51, 1876, 1889, 1902, 1912, 1918-23, 1930, 1938-41, 1948, 1956-59, 1964
New Jersey	3	1844, 1947, 1966 (1944 legislature acted as convention)
New Mexico	7	1848, 1849, 1850, 1872, 1889-90, 1907, 1910
New York	9	1776-77, 1801, 1821, 1846, 1867, 1894, 1915, 1938, 1967
North Carolina	6	1776, 1835, 1861-62, 1865-66, 1868, 1875
North Dakota	1	1889
Ohio	4	1802, 1850-51, 1873, 1912
Oklahoma	1	1906-07
Oregon	1	1857
Pennsylvania	5	1776, 1789-90, 1837-38, 1872-73, 1967-68
Rhode Island	6	1842, 1944, 1951, 1955, 1958, 1964-69
South Carolina	5	1790, 1861, 1865, 1868, 1895
South Dakota	3	1883, 1885, 1889
Tennessee	6	1796, 1834, 1870, 1953, 1959, 1965
Texas	6	1836, 1845, 1861, 1866, 1868-69, 1876
Utah	1	1895
Vermont	11	1777, 1786, 1793, 1814, 1822, 1828, 1836, 1843, 1850, 1857, 1870
Virginia	9	1776, 1829-30, 1850-51, 1861, 1864, 1867-68, 1901-02, 1945, 1956
Washington	2	1878, 1889
West Virginia	2	1861-63, 1872
Wisconsin	2	1846, 1847-48
Wyoming	1	1889
Puerto Rico	1	1951-52

(Deleware, Florida, Illinois, Maryland, Michigan, Pennsylvania and South Carolina). Four such assemblies have convened in each of four states (Kansas, Kentucky, Massachusetts and Ohio—in addition, nine conventions were held in Kentucky prior to statehood). Six states have called three conventions (Connecticut, Iowa, Montana, Nebraska, New Jersey and South Dakota), seven states have held two each (California, Hawaii, Indiana, Nevada, Washington, West Virginia and Wisconsin), and 11 states and Puerto Rico have had only one such assembly (Alaska, Arizona, Colorado, Idaho, Maine, Minnesota, North Dakota, Oklahoma, Oregon, Utah and Wyoming). The conventions in those states in which only one has been held formulated the original constitution that still serves as the basic instrument of government.

Table 10 shows the number of constitutional conventions held during each quarter-century period from 1800 through 1950, those convened before 1801, and the number held from 1950 through 1968. Almost a third of the total were called during the period 1851-1875, which includes the Civil War and Reconstruction years. Approximately three-fifths of the conventions convened during this period are attributable to the north-south conflict, its prelude and aftermath.

TABLE 10

USE OF CONSTITUTIONAL CONVENTIONS
GROUPED PERIODICALLY

Period	*Number of Conventions*
Before 1801	26
1801-1825	14
1826-1850	38
1851-1875	67
1876-1900	25
1901-1925	20
1926-1950	9
1951-1968	19*
Total	218

* Including the 1951-52 convention in Puerto Rico.

Compared with the number of conventions assembled during each of the two preceding half-centuries, the first 50 years of the twentieth century witnessed substantially fewer such bodies. The figures for each successive 50-year period are as follows: 1801-1850, 52 conventions; 1851-1900, 92 conventions; and 1901-1950, 29 conventions. In contrast with the

relatively small amount of activity during the first half of the twentieth century, American states showed increasing interest in constitutional reform during the following 18 years. This recent burgeoning concern is especially evident if those conventions assembled precedent to statehood and others attributable to the political disruption of the Civil War and Reconstruction era are disregarded in long-range comparisons.

Increasing use of other methods of constitutional change, as explained in the two preceding chapters, affords additional evidence of the growing recognition in American states of the necessity for modernizing the legal foundations of their governments.

Constitutional Conventions, 1938-1968

This chapter focuses attention on the use of constitutional conventions during the 31-year period 1938-1968, inclusive, and particularly since midcentury. Table 11 includes data on 27 constitutional conventions assembled in that period. These bodies were convened in 14 jurisdictions, including 12 existing states, to modify their constitutions or to write new ones, and in three territories to prepare new instruments of government. (The 12 existing states included Hawaii, which also held a convention in 1968 to propose extensive revision of the document written by the 1950 convention before statehood.) In Hawaii (1950) and Alaska (1955-1956) new basic laws were formulated in anticipation of statehood, and Puerto Rico (1951-1952) wrote a new charter as the basis for commonwealth status. Of the 27 conventions, eight convened between 1938 and 1950, and 19 were held in the 18 years after midcentury. Significantly, in the latter period the number of constitutional conventions has averaged more than one a year. (The average is higher if 1969 is added. Three constitutional conventions were held this year—in Arkansas, New Mexico and Illinois.)

Limitations of this study preclude detailed analysis of even the procedural aspects of constitution-making by convention since 1938.[16] The

[16] For an analysis of political as well as procedural aspects of recent state constitutional conventions, see Albert L. Sturm, *Constitution-Making in Michigan, 1961-1962* (Michigan Governmental Studies No. 43; Ann Arbor: Institute of Public Administration, University of Michigan, 1963); Albert L. Sturm and Margaret Whitaker, *Implementing A New Constitution: The Michigan Experience* (Michigan Governmental Studies No. 50; Ann Arbor: Institute of Public Administration, University of Michigan, 1968); Elmer E. Cornwell, Jr. and Jay S. Goodman, *The Politics of the Rhode Island Constitutional Convention* (New York: National Municipal League, 1969); and other forthcoming State Constitutional Convention Studies to be published by the National Municipal League.

TABLE 11
CONSTITUTIONAL CONVENTIONS
1938-1968

State	*Convention Dates*	*Type of Convention*	*Referendum on Convention Question*	*Preparatory Body*	*Appropriation*	*Number of Convention Delegates*	*Convention Proposal(s)*	*Referendum on Convention Proposal(s)*
Alaska	Nov. 6, 1955-Feb. 6, 1956	Unlimited	None	Alaska Statehood Committee	$300,000	55	New constitution	April 24, 1956: constitution adopted. Vote: 17,477 7,180[a]
Connecticut	July 1-Oct. 28, 1965	Unlimited	None[b]	Constitutional Convention Commission	$500,000	84	New constitution	Dec. 14, 1965: constitution adopted. Vote: 178,432 84,129
Hawaii	1. Apr. 4-July 22, 1950	Unlimited	None	State Constitution Commission	$655,000	63	New constitution	Nov. 7, 1950: constitution adopted. Vote: 82,788 27,109
	2. July 15-Oct. 21, 1968	Unlimited	Nov. 8, 1966 Vote: 119,097 62,120	Legislative Reference Bureau	$1,680,000 ($875,000 expended)	82	23 amendments (revised constitution)	Nov. 5, 1968: 23 proposals submitted; 22 adopted
Maryland	July 11, 1967; Sept. 12, 1967-Jan. 10, 1968	Unlimited	Sept. 13, 1966 Vote: 160,280 31,680	Constitutional Convention Commission	$1,230,000 (plus $750,000 for referendum)	142	New constitution	May 14, 1968: constitution rejected. Vote: 284,033 367,101
Michigan	Oct. 3, 1961-May 11, 1962, Aug. 1, 1962	Unlimited	Apr. 3, 1961 Vote: 596,433 573,012	Constitutional Convention Preparatory Commission	$2,000,000	144	New constitution	April 1, 1963: constitution adopted. Vote: 810,860 803,436

[a]For all referenda the first figure gives the favorable vote; the second, the opposing vote.
[b]A special federal court ordered the legislature to call the convention.

TABLE 11 (Continued)
CONSTITUTIONAL CONVENTIONS
1938-1968

State	*Convention Dates*	*Type of Convention*	*Referendum on Convention Question*	*Preparatory Body*	*Appropriation*	*Number of Convention Delegates*	*Convention Proposal(s)*	*Referendum on Convention Proposal(s)*
Missouri	Sept. 21, 1943-Sept. 29, 1944	Unlimited	Nov. 3, 1942 Vote: 366,018 265,294	Faculty group at University of Missouri	$916,875	83	New constitution	Feb. 27, 1945: constitution adopted. Vote: 312,032 185,658
New Hampshire	1. 11 days between May 11 and June 1, 1938; Sept. 23-26, 1941	Unlimited	Sense of people taken in annual town meetings in 1937	None	$25,000 (1938); $26,244 (1939); $12,000 (1941)	481 (1938) 451 (1941)	4 amendments in 1938 3 amendments in 1941	Nov. 8, 1938: 4 amendments submitted; 1 adopted. Nov. 3, 1942: 3 amendments submitted; 3 adopted.
	2. 12 days between May 12 and June 4, 1948	Unlimited	Nov. 5, 1946 Vote: 49,230 29,336	None	$60,000	446	11 amendments	Nov. 2, 1948: 6 amendments submitted; 1 adopted. Nov. 7, 1950: 5 amendments submitted; 2 adopted.
	3. May 15-June 13, 1956, Dec. 2-4, 1959	Unlimited	Nov. 2, 1954 Vote: 64,813 37,497[c]	None	$75,000[d]	447 (1956) 420 (1959)	6 amendments in 1956 3 amendments in 1959	Nov. 6, 1956: 3 amendments submitted and adopted. Nov. 4, 1958: 3 amendments submitted and adopted. Nov. 8, 1960: 3 amendments submitted and adopted.

[c]The 1956 convention was reconvened in 1959 by a letter from the president to the delegates.
[d]It was not until 1961 that the legislature appropriated an additional $15,000 to pay the staff for work done during the 1959 session.

TABLE 11 (Continued)
CONSTITUTIONAL CONVENTIONS
1938-1968

State	*Convention Dates*	*Type of Convention*	*Referendum on Convention Question*	*Preparatory Body*	*Appropriation*	*Number of Convention Delegates*	*Convention Proposal(s)*	*Referendum on Convention Proposal(s)*
Pennsylvania	Dec. 1, 1967-Feb. 29, 1968	Limited	May 16, 1967 Vote: 1,140,931 703,576	Preparatory Committee	Budget for Conv: $1,560,000 (Approx. $200,000 not used)	163	5 proposals	April 23, 1968: 5 proposals submitted and adopted.
Rhode Island	1. March 28, 1944	Limited	March 14, 1944 Vote: 15,683 524	None	$25,000	200	1 amendment	April 11, 1944: amendment adopted. Vote: 7,122 119
	2. June 1-3, 1951	Limited	May 25, 1951 Vote: 16,738 4,209	None	$25,000	200	8 amendments	June 28, 1951: 8 amendments submitted; 6 adopted.
	3. June 20, 1955	Limited	June 9, 1955 Vote: 24,077 20,120	None	$25,000	200	3 amendments	July 12, 1955: 3 amendments submitted; 1 adopted.
	4. Jan. 31, and Feb. 7, 1958	Limited	Jan. 22, 1958 Vote: 12,476 1,903	None	$50,000	200	2 amendments	Feb. 27, 1958: 2 amendments submitted; 2 adopted.
	5. Dec. 8, 1964-Feb. 17, 1969	Unlimited	Nov. 3, 1964 Vote: 158,241 70,975	None	$224,000 ($179,182 expended)	100	New constitution	April 16, 1968: constitution rejected. Vote: 17,464 68,940
Tennessee	1. Apr. 21-June 5, 1953, July 14-16, 1953	Limited	Aug. 7, 1952 Vote: 196,376 106,583	*Ad hoc* group of political scientists from state colleges and universities	Not fixed (Delegates allowed legislators' pay and expenses)	99	8 amendments	Nov. 3, 1953: 8 amendments submitted; 8 adopted.

TABLE 11 (Continued)
CONSTITUTIONAL CONVENTIONS
1938-1968

State	*Convention Dates*	*Type of Convention*	*Referendum on Convention Question*	*Preparatory Body*	*Appropriation*	*Number of Convention Delegates*	*Convention Proposal(s)*	*Referendum on Convention Proposal(s)*
Tennessee	2. July 21-31, 1959	Limited	Aug. 8, 1958 Vote: 129,554 114,998	None	Same as 1953	99	1 amendment	Nov. 8, 1960: amendment submitted and adopted.
	3. July 26-Aug. 26, 1965, Nov. 29-Dec. 10, 1965	Limited	Nov. 6, 1962 Vote: 216,977 206,390	Legislative Council Committee	Same as 1953 and 1959	99	9 amendments	Nov. 8, 1966: 9 amendments submitted; 9 adopted.
Virginia	1. April 30-May 2, 22, 1945	Limited	March 6, 1945 Vote: 54,515 30,341	None	"a sum sufficient" ($60,037 including $49,373 election costs)	40	1 proposal	May 2, 1945: proposal proclaimed by convention
	2. Mar. 5-7, 1956	Limited	Jan. 9, 1956 Vote: 304,154 146,164	None	"a sum sufficient" ($93,804, including $83,366 election costs)	40	1 amendment	March 7, 1956: amendment proclaimed by convention
Puerto Rico	Sept. 17, 1951-Feb. 6, 1952	Unlimited	June 4, 1951 Vote: 387,016 119,164	*Ad hoc* group organized by Director of School of Pub. Admin. at University of P.R.	$250,000	92	New constitution	March 3, 1952: constitution adopted. Vote: 373,594 82,877

TABLE 11 (Continued)
CONSTITUTIONAL CONVENTIONS
1938-1968

State	*Convention Dates*	*Type of Convention*	*Referendum on Convention Question*	*Preparatory Body*	*Appropriation*	*Number of Convention Delegates*	*Convention Proposal(s)*	*Referendum on Convention Proposal(s)*
New Hampshire	4. May 14-June 10, 1964, July 7, 8, 1964	Unlimited	Nov. 6, 1962 Vote: 94,597 49,418	Commission to Study the State Constitution	$100,000	462	21 amendments	Nov. 3, 1964: 8 amendments submitted; 5 adopted. Nov. 8, 1966: 7 amendments submitted; 6 adopted. Nov. 5, 1968: 6 amendments submitted; 5 adopted.
New Jersey	1. June 12-Sept. 10, 1947	Limited	June 3, 1947 Vote: 275,209 53,280	Governor's Committee on Preparatory Research	$350,000 (plus $125,000 for election costs)	81	New constitution	Nov. 3, 1947: constitution adopted. Vote: 653,096 184,632
	2. March 21-June 15, 1966	Limited	None	Law Revision and Legislative Service Commission	$250,000	126 delegates (112 votes)	1 reapportionment amendment	Nov. 8, 1966: amendment adopted. Vote: 890,710 506,884
New York	1. April 5-Aug. 25, 1938	Unlimited	Nov. 3, 1936 Vote: 1,413,604 1,190,275	New York State Constitutional Committee	$1,350,000	168	9 amendments	Nov. 8, 1938: 9 amendments submitted; 6 adopted.
	2. April 4-Sept. 26, 1967	Unlimited	Nov. 2, 1965 Vote: 1,681,438 1,486,431	Temporary State Commission on Revision and Simplification of the Constitution and to Prepare for a Constitutional Convention	$10,000,000 ($6,477,000 expended)	186	New constitution	Nov. 7, 1967: new constitution rejected. Vote: 1,309,877 3,364,630

factual data on the features of constituent assemblies provided in Table 11 and other significant aspects of these bodies and their work are summarized and analyzed in the remainder of this chapter.

Causes and Attitudes

The first chapter identifies many state constitutional deficiencies that have contributed to the calling of constitutional conventions in recent years. Among the most prominent of these in the older states is legislative reapportionment to conform to the "one man, one vote" rule. This was the principal reason for calling conventions in Rhode Island in 1964, Connecticut and Tennessee in 1965, New Jersey in 1966, New York in 1967 and Hawaii in 1968. Reapportionment was also one of several factors that led to the 1951 Rhode Island constituent assembly, and to conventions in New Hampshire, Michigan and other states. After judicial intervention made state legislative reapportionment inevitable, a principal stumbling block to calling constitutional conventions was removed, namely, the reluctance of legislative bodies to take the necessary action. For many decades legislatures had frustrated efforts to call conventions because they feared that these bodies would include reapportionment in their proposals for change, thereby jeopardizing the existing advantage of rural interests in the legislative power structure.

Besides reapportionment and the growing pressure for general constitutional reform, in the older states other factors stemming from particular needs and weaknesses in their constitutional systems contributed to convention calls. Two illustrations were the cumbersome amending process in Virginia, necessitating conventions in 1945 and 1956 to expedite alterations, and a fiscal crisis in Michigan. Pressures in various states for municipal and county home rule, improvements in the legislative process and judicial reform were among the prominent issues that accounted for calling most conventions.

Official and Private Attitudes

The calling of any constitutional convention connotes support by both official and private organizations. Strong and aggressive leadership by state officials, civic leaders and groups is precedent to practically all such assemblies. Prominent roles in calling a constitutional convention are usually played by governors, legislative assemblies, political parties, the press, "good government" organizations and occasionally the judiciary.

With very few exceptions governors have advocated calling constitu-

tional conventions in those jurisdictions where this method has been used.[17] Either they have provided strong support for convention calls initially, or have endorsed them publicly after the voters had approved the calls. Tennessee Governor Frank G. Clement's neutrality toward the 1959 convention, however, is a noteworthy exception. Governors George M. Leader, William W. Scranton and Raymond P. Shafer exemplify the vigorous bipartisan gubernatorial leadership that led ultimately to the 1967-1968 convention in Pennsylvania. The same type of leadership featured the long effort in New Jersey, culminating in the 1947 convention during the administration of Governor Alfred E. Driscoll. Initially, Michigan Governor John B. Swainson and Connecticut Governor John Dempsey were neutral, but both later supported convention calls.

Compared with the strong advocacy of constitutional conventions by governors, the attitudes of legislatures have been less favorable, ranging from active political and financial support through perfunctory provision for popular referenda on the question to outright hostility. Because of the crucial role of state lawmaking bodies in the whole process of altering constitutions, legislative attitudes have been particularly significant in efforts to modernize state government. Generally, legislative assemblies have tended to be more favorable toward limited constitutional conventions, since they can be controlled more easily than the unlimited conventions. Legislative support for limited conventions in Rhode Island, Virginia and Tennessee is typical. Territorial legislatures have also provided ample support for preparatory work and financing conventions. Exemplifying legislative hostility toward unlimited constitutional conventions was the refusal of the Michigan legislature to finance preparations for the 1961-1962 convention, and its hesitancy to provide for the salaries of delegates and other convention expenses.

Political parties have shown mixed attitudes toward constitutional conventions. Most successful efforts have had bipartisan support. Unless revision directly involves sensitive state political issues, constitutional reform efforts and their opposition usually cut across party lines. The recent conventions in Michigan and New York afford notable examples of partisan stands on reform proposals. As the 1961-1962 Michigan convention progressed, opposition to the emerging new document grew among Democrats and resulted in their proposing a substitute draft. The New York convention of 1967 was featured by partisanship throughout much

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[17] For annual summaries of the contents of governors' messages pertaining to constitutional reform and other subjects, see the various spring issues of *State Government*.

of its proceedings, and there was sharp partisan division between Democrats (supporting) and Republicans (opposing) in the final vote on its document. In Connecticut, both parties initially opposed constitutional revision because of their fear of the results of legislative reapportionment. But, when reapportionment was removed as a political issue and a judicial order directed the legislators to call a convention, both major parties favored an unlimited convention, although a small right-wing Republican group continued to oppose constitutional revision.

The press has usually supported constitutional conventions called for purposes of basic legal reform, although some newspapers have opposed constitutional change. In 1964 the Rhode Island press strongly endorsed the call of an unlimited convention, but later was critical when it became apparent that major reforms stood little chance of adoption. Similarly, in New York the press generally supported initial efforts leading to the 1967 convention, but many of the large metropolitan newspapers opposed the proposed document, most notably the *New York Times*. In Tennessee in 1953 the press was practically unanimous in supporting constitutional reform by the convention method; but in 1959 and 1965 the urban press opposed rurally dominated conventions. The prosegregation limited convention of 1956 in Virginia was opposed by the *Norfolk Virginia-Pilot* and the *Norfolk Ledger Dispatch*, but it was favored by most other state newspapers, especially the *Richmond Times-Dispatch*, commonly regarded as the voice of the Byrd machine. States in which recent reform efforts by the convention method have had substantial press support include Michigan, Maryland, Pennsylvania, Hawaii and others.

Of the numerous citizens' groups that have supported constitutional revision, the most active in most jurisdictions have been the Leagues of Women Voters. They have initiated campaigns for convention calls, worked for the adoption of reforms proposed by conventions and otherwise sought to promote state constitutional modernization. In several states they instituted litigation that resulted in conventions ordered by the courts. (For example, *Butterworth* v. *Dempsey*, 229 F. Supp. 754 D.C. Conn., 1964.) In most states that have held unlimited conventions in recent years ad hoc citizens' organizations were formed, both to campaign for a favorable vote on convention calls and to work for adoption of proposed reforms. Illustrative of these were Citizens for Michigan, the Committee for State Constitutional Revision (Pennsylvania), the Pennsylvania Bar Association's "Project Constitution," A Modern Constitution for Pennsylvania, Inc., and, in Maryland, Governor J. Millard Tawes' Citizens' Committee on the Constitutional Convention Referendum. Bar associations, the Jaycees, municipal leagues, labor organizations and other

groups, especially including those that expected to benefit from specific constitutional changes, participated in campaigns for conventions.

Groups opposing these assemblies usually have been those that expected their interests to be adversely affected by proposed constitutional changes. In Alaska and Hawaii, for example, absentee and local business interests opposed statehood (and a constitutional convention) because of taxation. Rural and small-town interests in Connecticut opposed a convention because they feared the loss of representational advantages they had long enjoyed under the old legislative apportionment formula. In Michigan, constitutional revision by convention was opposed by rural interests, road builders, some bankers' and manufacturers' associations, affiliates of the AFL-CIO, the Michigan Farm Bureau, and rural and local officials' associations. Opposing the Virginia limited convention in 1956 called to amend the constitution to preserve segregation in the schools were the NAACP, the Virginia Council on Human Relations, the Virginia Teachers' Association, the Virginia League of Women Voters and other groups.

Convention Calls and Authority

The constitutional procedure for calling a convention in most states requires the submission of the question to the voters before enactment of enabling legislation. Of the 27 conventions assembled during the 31-year period 1938-1968 on which Table 11 provides information, 23 had the advance approval of the electorate. The four conventions assembled without the expressed mandate of the voters included two in Hawaii and Alaska convened before statehood and two resulting from court orders relating to legislative apportionment.

Table 12 shows the results of the votes on convention call referenda during the 19 years from January 1, 1950 to January 1, 1969. (On November 5, 1968, the voters of Massachusetts approved an initiative proposal providing for a vote on the convention question in 1970.) Thirty-three referenda on the convention question were held in 19 states and Puerto Rico during these years. The voters approved 21 calls in 13 states and Puerto Rico, and rejected 12 calls in 10 states. Distinguishing between unlimited and limited convention calls, there were 23 referenda in 16 states and Puerto Rico on the question of an unlimited constitutional convention, and 10 in five states on a limited convention. Results of voter action on unlimited conventions were 12 approvals in nine states and Puerto Rico and 11 rejections in nine states. Six states each voted on the issue twice (Iowa, Maryland, Michigan, New Hampshire, New York and Pennsyl-

TABLE 12

VOTER ACTION ON CONVENTION CALLS

January 1, 1950—January 1, 1969

State	*Date of Election*	*Type*	*Result*
Arkansas	November 5, 1968	Unlimited	Approved: 227,429 to 214,432
Hawaii	November 8, 1966	Unlimited	Approved: 119,097 to 62,120
Illinois	November 5, 1968	Unlimited	Approved: 2,979,977 to 1,135,440
Iowa	(1) November 7, 1950	Unlimited	Defeated: 221,189 to 319,704
	(2) November 8, 1960	Unlimited	Defeated: 470,257 to 534,628
Kentucky	November 8, 1960	Limited	Defeated: 342,501 to 324,777
Louisiana	November 6, 1956	Unlimited	Defeated: 50,888 to 298,469
Maryland	(1) November 7, 1950	Unlimited	Approved: 200,439 to 56,998[a]
	(2) September 13, 1966	Unlimited	Approved: 160,280 to 31,680
Michigan	(1) November 4, 1958	Unlimited	Defeated: 821,282 to 608,365[b]
	(2) April 3, 1961	Unlimited	Approved: 596,433 to 573,012
Missouri	November 6, 1962	Unlimited	Defeated: 295,972 to 519,499
New Hampshire	(1) November 2, 1954	Unlimited	Approved: 64,813 to 37,497
	(2) November 6, 1962	Unlimited	Approved: 94,597 to 49,418
New Mexico	November 5, 1968	Unlimited	Approved: 78,353 to 35,854
New York	(1) November 5, 1957	Unlimited	Defeated: 1,242,568 to 1,368,063
	(2) November 2, 1965	Unlimited	Approved: 1,681,438 to 1,486,431

[a] Bill providing for convention was defeated in the House of Delegates.

[b] Total vote cast on proposal: 1,429,647. Total vote cast in election: 2,341,829. Proposal failed because it was not approved by a majority of those voting in the election.

TABLE 12 (Continued)

State	*Date of Election*	*Type*	*Result*
Ohio	November 4, 1952	Unlimited	Defeated: 853,614 to 1,056,855
Oklahoma	November 7, 1950	Unlimited	Defeated: 159,908 to 347,143
Pennsylvania	(1) November 3, 1953	Unlimited	Defeated: 533,380 to 682,823
	(2) November 5, 1963	Unlimited	Defeated: 1,106,388 to 1,148,060
	(3) May 16, 1967	Limited	Approved: 1,140,931 to 703,576
Rhode Island	(1) May 25, 1951	Limited	Approved: 16,738 to 4,209
	(2) June 9, 1955	Limited	Approved: 24,077 to 20,120
	(3) January 22, 1958	Limited	Approved: 12,476 to 1,903
	(4) November 3, 1964	Unlimited	Approved: 158,241 to 70,975
Tennessee	(1) August 7, 1952	Limited	Approved: 196,376 to 106,583
	(2) August 8, 1958	Limited	Approved: 129,554 to 114,998
	(3) November 6, 1962	Limited	Approved: 216,977 to 206,390
	(4) November 5, 1968	Limited	Five subjects were proposed; only the third was approved: 422,812 to 301,863[c]
Utah	November 8, 1966	Unlimited	Defeated: 42,638 to 237,461
Virginia	January 9, 1956	Limited	Approved: 304,154 to 146,164
Puerto Rico	June 4, 1951	Unlimited	Approved: 387,016 to 119,164

[c] The respective votes on the four other proposed subjects were: (1) 260,270 to 301,798; (2) 234,613 to 302,220; (4) 211,925 to 276,104; and (5) 236,214 to 290,922.

vania). Two states (Iowa and Pennsylvania) rejected the call for an unlimited conv ıtion twice; two states (Michigan and New York) each approved and ı jected a call for such a convention; and Maryland and

New Hampshire approved two such calls, but Maryland acted on only one of these. Of the 10 states voting only once on unlimited convention calls, Arkansas, Hawaii, Illinois, New Mexico and Rhode Island were the only states that registered a favorable vote. The five states that voted on calls once and rejected them were Louisiana, Missouri, Ohio, Oklahoma and Utah.

Referenda on limited constitutional convention calls resulted in a higher percentage of approvals than those on unlimited bodies. Of the 10 referenda in five states on the issue, nine were approved in four states; Kentucky was the only state in which the call was defeated. It is noteworthy that the Rhode Island voters approved three limited constitutional conventions in addition to one unlimited convention.

Convention mandates in the 14 states holding them between 1938 and 1968 ranged from consideration of a single restricted issue, such as financial assistance for private schools in the Virginia convention (1956), to plenary authority to propose a new constitution. In recent years the limited convention has grown greatly in popularity. With the notable exception of the 1947 New Jersey body, the authority of these assemblies has been limited to stated subjects. The New Jersey convention, which produced the present state constitution, was restricted only by the express prohibition against reapportionment of legislative seats. In some cases limited conventions have proceeded with a general revision of the constitution. The 1965 Connecticut convention, for example, proposed a new document, although mandated only to effect legislative apportionment and to propose appropriate amending procedures.

Considerable difference of opinion exists among legal authorities about the extent to which a state legislature can limit the power of a convention.[18] The prevailing view is that a constitutional convention is bound by its popular mandate, but not by legislatively imposed limitations on its proper powers. To avoid legislative limitation of convention authority, a few state constitutions expressly forbid restriction on their powers. The Alaska constitution, for example, provides that:

> Constitutional conventions shall have plenary power to amend or revise the constitution, subject only to ratification by the people. No call for a constitutional convention shall limit these powers of the convention. (Art. XIII, Sec. 4.)

[18] See, for example, Ernest R. Bartley, "Methods of Constitutional Change," in W. Brooke Graves (ed.), *Major Problems in State Constitutional Revision* (Chicago: Public Administration Service, 1960), p. 34; and Sturm, *Methods of State Constitutional Reform*, pp. 101-103, and the cases there cited.

Preparatory Research

The importance of research as a prerequisite for informed constitution-making under modern conditions is evidenced in the emphasis placed on preparatory studies for recent constitutional conventions. Table 11 indicates that more than half the conventions held since January 1938 were preceded by preparatory bodies which assembled essential information for the delegates. Of the unlimited conventions, only the 1964-1969 Rhode Island body and three of the New Hampshire conventions did not have the benefit of special advance preparation. Officially designated bodies and ad hoc groups prepared basic materials for convention delegates in 10 existing states and three territories before conventions assembled.

Chapter 3 deals with major aspects of preparatory commissions. In addition to these formally designated bodies, ad hoc groups in Puerto Rico and Tennessee made valuable pre-convention studies without official sanction; similarly, both before and during the Michigan convention of 1961-1962, the Citizens Research Council of Michigan supplemented the work of official bodies by preparing useful materials. The nature, method of designation, composition, work and products of these preparatory groups have varied widely. The official bodies have usually been appointed by the governor alone or with participation by legislative leaders or assemblies. As indicated in Chapter 3, the membership of official preparatory bodies ranged upward from three on the Arkansas Constitutional Convention Advisory Commission to 27 on the Maryland Constitutional Convention Commission. Members of these commissions were appointive and ex officio. In most cases preparatory bodies employed a staff, which varied greatly in size and professional expertise; some commissions, including those in Alaska, Hawaii, Maryland, Michigan, New York and Pennsylvania, sought the assistance of professors of law, political science and other disciplines.

Some jurisdictions used existing governmental staff units or outside professional consulting organizations. The Legislative Research Bureau of the University of Hawaii, for example, provided research services for the Hawaii Statehood Commission in 1950, and again assisted the 1968 convention; and the Public Administration Service prepared a series of studies for the Alaska Statehood Committee. Like other characteristics of the preparatory organs, their research has varied widely. Typically it has been of a factual, background nature designed to provide information essential for informed basic decision-making and action. In 1968 the Legislative Reference Bureau of the University of Hawaii prepared a series of 17 background and comparative studies on particular aspects

of the constitutional system, citing the experience in other states and relating the data specifically to the Hawaiian situation. Comparable studies were prepared by commissions in Michigan, New York, Pennsylvania and other jurisdictions. In a number of cases, well exemplified by constitutional commissions in Arkansas and Maryland, preparatory work included substantive recommendations in the form of a draft constitution.

Although the principal function of these bodies was pre-convention research, some were assigned or assumed other duties. The Michigan and Maryland preparatory commissions afford excellent examples. The Michigan Constitutional Convention Preparatory Commission, besides supervising the preparation of a series of studies, made arrangements for convention facilities, staff, a library and other essential resources. In Maryland the Constitutional Convention Commission followed the same general pattern. The staffs of both bodies, like those in a number of other states, were retained and served during the convention.

Legislative funding of pre-convention research and planning ranged upward to the $800,000 appropriated to the New York preparatory commission during the period 1965-1967. This is by far the largest sum of money expended to date in preparation for any constitution-making body. In some instances, exemplified by the ad hoc preparatory work done before the 1953 limited convention in Tennessee, there was little or no official funding. Variations in financing preparatory work included partial funding by a statehood commission (Hawaii), a grant from the W. K. Kellogg Foundation (Michigan), joint funding by a university and the Carnegie Corporation (Puerto Rico), payment from the convention's general fund (Connecticut) and other means.

Convention Membership and Organization

The Delegates

Table 11 indicates that the number of delegates to the 27 constitutional conventions held from January 1, 1938 through 1968 ranged from 40 in both the 1945 and 1956 limited conventions in Virginia to a maximum of 481 elected to the 1938 New Hampshire unlimited body. The average number of delegates for all 27 assemblies was 170. For unlimited bodies the average was 202, and for limited conventions, 129.

Most delegates were elected from state representative, state senatorial or congressional districts. Some were elected at large and a few were ex officio members. The 163 delegates to the 1967-1968 Pennsylvania convention, for example, included 150 elected from senatorial districts

(three from each) and 13 ex officio delegates, who were the legislative officers constituting the preparatory committee. The New Hampshire delegates were elected by towns and city wards. Of the delegates to the 1950 Hawaii convention, two-thirds were from special districts and the remaining third were elected at large, as were all delegates to the Alaska convention. Lower house districts were the representative areas from which delegates were chosen to the Rhode Island (1964-1969), Maryland (1967-1968) and Hawaii (1968) unlimited conventions. The 186 delegates to the 1967 New York convention included three selected from each senatorial district and 15 elected at large.

Election of delegates to most conventions has been on a partisan basis. The nonpartisan selection of delegates to the Maryland and Hawaii bodies are recent notable exceptions; New Hampshire combined both methods. Enabling acts in some states have required even division of convention membership between the two major parties. The 1943-1944 Missouri convention is an earlier example of such a bipartisan body; more recently, the Connecticut convention and the limited bodies in Rhode Island have had an equal number of Democrats and Republicans. A common minimum eligibility requirement was that a convention delegate be a qualified elector; in some states he was required to have the same qualifications as a legislator.

Delegates to constitutional conventions in all states were allowed travel and per diem expenses, except in Rhode Island where the members of the 1964-1969 convention were reimbursed for travel expenses only. Prior to 1960 the delegates to few conventions received a stated salary. But since 1960 only in Rhode Island have delegates to unlimited conventions who assembled for any extended period of time received no salary payment. In Michigan delegates received $1,000 per month for seven months; compensation in Connecticut was $2,000 for the four months of the convention; Maryland delegates were paid $2,000 for the four months' duration; and delegates to the 1968 Hawaii convention received the same compensation as legislators—$2,500 plus per diem ($32.50 for Oahu delegates, and $45 for those from other islands) for approximately three and a half months. New York topped all other states in paying members of the 1967 convention $15,000 for their work, which required less than six months. Officers of most conventions have not received additional compensation.

Most constitutional conventions have been heavily weighted with representatives of the legal profession. In most recent conventions lawyers comprised from a quarter to half of the membership. Of the 142 delegates to the 1967-1968 Maryland convention, for example, 74 were lawyers (52.1 percent), 15 were educators (10.6 percent), 19 were small businessmen

(13.4 percent) and 12 were housewives (8.5 percent). There were 11 incumbent legislators and 22 others had served previously in the General Assembly. Incumbent or former legislators have likewise been prominent in these constituent bodies. Many businessmen, bankers and industrialists, also, have been delegates. Academicians were elected relatively infrequently, and labor leaders were only a little more in evidence. Thus, in Michigan, the center of the automobile industry and with strong labor organizations, avowed representatives of organized labor comprised only 3 percent of the total membership, reflecting the disproportionate rural representation in the convention. In contrast, a tenth of the Puerto Rican convention were labor leaders. Prominent among the delegates of most conventions have been many distinguished citizens who had served or were serving in other official capacities—incumbent and former governors, past and present supreme court justices, United States senators, congressmen, judges, and other state and local officials. Respondents to the writer's questionnaire predominantly expressed the opinion that the quality and competence of convention delegates in their states compared very favorably with the members of their respective legislative assemblies. Generally, convention delegates had attained a higher level of education and seemed to be more receptive to political innovation.[19]

Officers, Staff and Committees

Officers commonly elected by convention delegates have included a president or chairman, one or more vice presidents or vice chairmen, and a secretary. (The presiding officer of the Connecticut convention was designated "chairman" and there was one vice chairman. The Rhode Island conventions also used the term "chairman.") Below the top executive level of a typical convention organization are administrative assistants, parliamentarians, assistant secretaries, clerks, sergeants-at-arms and other lesser functionaries. In constituent assemblies organized on a partisan basis, there may be floor leaders of the major party delegations; these persons are not formally designated officers of the convention. The Connecticut convention, which was equally divided between Democrats and Republicans, had two powerful floor leaders, each of whom could prac-

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[19] For a demographic and behavioral analysis of the delegates to the Rhode Island convention, see Cornwell and Goodman, *The Politics of the Rhode Island Constitutional Convention*, chap. vii; see also Sturm, *Constitution-Making in Michigan, 1961-1962*, chap. iii.

tically exercise a veto over any proposal brought before the convention.[20]

Invariably, the president has been formally elected in plenary sessions of constitutional conventions. Informal agreement on the person to be elected, however, has usually been reached before the convention meets. Convention vice presidencies commonly have been used to secure representation of political groups or factions, geographical areas or divisions, or to reflect other significant political aspects of constitution-making. Thus, the 1968 Hawaii convention had five vice presidents, two from Oahu and one from each of the neighboring islands. The 1961-1962 Michigan convention had three vice presidents, two Republicans and one Democrat, reflecting roughly the two-to-one partisan ratio in the membership.

All conventions have had their own staffs. Most staff personnel perform administrative, housekeeping or clerical functions; in addition, practically all conventions involved in extensive revision or the writing of a new document have had a research component, headed by a director or co-directors. As the problems confronting conventions have grown more complex the size of their staffs has increased significantly, especially in the larger states. Prior to the 1960s, the usual convention staff consisted of 15 to 35 people.

Illustrative of the size of staff components in the more recent constitutional conventions with broad mandates are the following: Michigan (1961-62), average of approximately 75 staff members; Connecticut (1965), 80; Rhode Island (1964-69), 20; Maryland (1967-68), 105 authorized positions; Pennsylvania (1967-68), 237 positions; and Hawaii (1968), approximately 180 positions, some of which were divided—total 210 persons. Largest of all convention staffs by far was that of the 1967 New York body. One observer has described the number and compensation of its staff members as follows:

> The 1967 New York State Constitutional Convention can be described as the best staffed and best financed convention in our history. In addition to the $2.8 million paid to the delegates, $2.9 million was paid to approximately 900 employees of the convention, including workers in the administrative offices and the secretaries and clerks hired by each delegate. A great collection of talent, in all pertinent fields, was assembled quickly to aid the committees and the delegates. And the professional staff was paid generous salaries. For a six-month period, executive directors received $12 860; counsel for the Democratic side of each committee received $9 90; research associates for the majority received $8,040, and other pos...ons were paid on a declining scale. On the Republican side,

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[20] See Karl V. Bosworth, "1965 Constitutional Convention: Its Politics and Issues," *Connecticut Government*, Vol. 19, No. 3 (March, 1966).

the salaries paid did not fit into a systematic pattern, but the amounts were equally generous.[21]

Never had any previous convention recruited a staff of such size that there were approximately five supporting employees for each delegate. Overstaffing was one of the administrative problems of the New York body.

As we have noted, recent conventions have often benefited from research done by preparatory commissions. Permanent governmental agencies also provided valuable research assistance to some conventions. In addition, recent constitution-making bodies have drawn extensively on the expertise of professional and academic consultants to augment the efforts of their regular staff personnel.

Committees comprise another important part of convention organization. Convention committees have been of two general types: first, operational committees that have performed administrative, housekeeping and procedural functions, with such titles as rules, credentials, agenda, finance and printing, public information, submission and address to the people, and style and drafting; and, second, the substantive committees whose attention was focused on specific areas of the constitutional system—the bill of rights, suffrage and elections, the legislature, the executive, the judiciary, finance, local government, amendment and revision, and others.

Usually appointed by the president, sometimes with the advice of other officers, convention committees have varied in number with the extent of constitutional change contemplated. Profiting from the experience of the 1938 New York convention which had more than 30 committees, later conventions have used a smaller number. The number of operational committees in conventions since 1950 has ranged from one (Connecticut, 1965) to eight (New Hampshire, 1964); substantive committees, from one (Virginia, 1956) to 17 (Hawaii, 1950). The following tabulation lists the numbers of both types of committees in seven recent conventions:

	Operational	*Substantive*
Michigan (1961-62)	4	10
Rhode Island (1964-69)	4	8
Connecticut (1965)	1	2
New York (1967)	3	12
Maryland (1967-68)	4	8
Pennsylvania (1967-68)	4	4
Hawaii (1968)	4	10

[21] Richard I. Nunez, "Some Aspects and Problems of Staffing the 1967 New York State Constitutional Convention" (Prepared for delivery at the 1968 National Conference on Public Administration, Boston, March 27-30, 1968), p. 10.

Procedure and Phases of Work

Constitution-making by convention is lawmaking on the highest level. Its procedure is similar to that of state lawmaking bodies in many respects, although there are also substantial differences. Some conventions have adopted the procedural rules of one of the houses of the legislature. The 1956 Virginia convention, for example, used the Rules of the House of Delegates and *Jefferson's Manual*. The procedural manual most frequently adopted by conventions has been *Robert's Rules of Order*, often modified by additional rules or used in conjunction with legislative rules. The 1951-1952 Puerto Rico convention relied on rules largely of its own drafting. In Michigan the preparatory commission submitted a proposed set of rules to the convention, which were adopted with some modification.[22] *Mason's Manual* was the authority specified for all cases not covered by these rules. Some conventions in other states have drawn heavily on the rules of the Michigan body in preparing their own procedural manuals.

Convention committees commonly held hearings and meetings open to the public. In the limited Rhode Island conventions, however, all committee meetings were closed. Although most of their meetings were open, committees in most conventions held some executive (closed) sessions. Typically, the required vote for adoption of committee reports and other proposals was either a majority of the delegates or a majority voting on the proposal. The 1965 Connecticut body was a major exception, requiring a two-thirds vote (56 of the 84 delegates) to adopt all motions and resolutions.

The work of practically all constitutional conventions usually has proceeded through three phases or stages: the organizational phase, consisting of seating delegates, adopting rules, electing officers, appointing committees and attending to other formalities in getting the convention under way, lasting up to two weeks in the major conventions; the committee stage, in which the substantive committees received proposals,

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[22] See William J. Pierce, *A Prepared Manual of Organization and Procedure for a State Constitutional Convention*, Prepared for the Constitutional Convention Preparatory Commission, September, 1961, pp. 28-107. In designing the proposals for the 1961-1962 convention, the rules of the Michigan legislature, those of the 1907-1908 constitutional convention, and the rules of constitutional conventions in other states were studied carefully; of these, the source relied upon most was the rules of the Michigan House of Representatives. Sturm, *Constitution-Making in Michigan, 1961-1962*, pp. 78-79.

held hearings, made decisions and prepared recommendations for submission to the plenary body; and the final phase of full-scale debate, final decision-making and action on proposals by the entire convention. Duration of these stages has varied greatly, depending on the nature and scope of a convention's mandate.

Blocs and Issues

The membership of most recent conventions has seldom divided into well-defined factions or blocs, but there were a few notable exceptions. Partisan lines were very evident in the 1967 New York body; and, as the work of the Michigan convention progressed, voting blocs developed in the final decision-making phase. The Republican majority in Michigan split into conservative, middle-of-the-road, and liberal groups; one of the discernible voting blocs in the late stages of the convention included conservative, rural Republicans and urban Democrats. Factional alignments also played a significant role in the course of the very lengthy proceedings of the unlimited Rhode Island convention. In this body, the Democratic majority divided into two groups, the legislative faction and the more independent group. A major objective of the legislator-delegates was to maintain the existing balance of power between the legislative and executive branches.

Partisan conflict generally was muted in most conventions. Urban-rural controversy, however, often exacerbated by malapportioned representation, figured prominently in several conventions; such division occurred in the 1966 New Jersey assembly, and in the 1950 Hawaii convention in which there were differences between delegates from Oahu (Honolulu) and the outlying islands. But factional dissension was usually contained within party caucuses or by the leadership. The 1967-1968 Maryland convention, which has been described as predominantly a body of civic reformers, affords an outstanding example of the nonpartisan approach to constitution-making.[23] Recent constitutional assemblages, reportedly, were not significantly affected by personal rivalries, except for occasional competition for convention offices in the initial stages.

Legislative apportionment has been one of the most troublesome issues confronting most recent conventions. In fact, it probably ranks first in importance among the factors responsible for the calling of conventions

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[23] See John P. Wheeler, Jr., and Melissa Kinsey, *Magnificent Failure: The Maryland Constitutional Convention of 1967-1968* (New York, National Municipal League, 1970), chap. 9.

since midcentury. Illustrative of other divisive problems faced by recent constituent assemblies are the following: in New York (1967), state aid to parochial schools; in Pennsylvania (1967-1968), tax exemptions, selection of judges and the entire judicial article; in Maryland (1967-1968), the comptroller's office (elective or appointive), single-member legislative districts, and the labor "bill of rights"; and, in Hawaii (1968), 18-year-old voting, judicial selection, legislative salaries, collective bargaining for public employees and debt limits. Besides the issues pertaining to the bill of rights, the three branches of government, and suffrage and finance, other matters that most frequently occupied the attention of most conventions included home rule for cities and counties, other local government issues, constitutional amendment and revision, and excision of essentially statutory matter.

Duration

The 27 constitutional conventions that assembled during the 31-year period 1938-1968 ranged in duration from one day to more than 50 months. Rhode Island has the distinction of having held both the shortest conventions, those of 1944 and 1955 each of which was in session only one day, and the longest, which convened December 8, 1964, and did not adjourn sine die until February 17, 1969. The second longest was the Missouri convention which met September 21, 1943, and adjourned September 29, 1944. (Not included in this calculation are the two "adjourned" conventions of New Hampshire. The first was in session for 11 days between May 11 and June 1, 1938, and was recalled for a reconvened session September 23-26, 1941; similarly, another convention was in session from May 15 to June 13, 1956, and met the second time December 2-4, 1959.) Average length of the 27 conventions, including both unlimited and limited bodies, was 4.4 months; excluding the lengthy Rhode Island convention, the average is 2.6 months, which is a more realistic figure.

Averages for unlimited and limited conventions, when computed separately, show substantial differences. The 15 unlimited bodies averaged approximately seven months in duration, but only four months if the Rhode Island assembly is excluded; four months is the median in the durational sequence of the unlimited conventions. As noted above, the Rhode Island and Missouri assemblies ranked first and second in length, respectively. The unlimited conventions of shortest duration were held in New Hampshire, which had two in session for less than one month each. Duration of the 12 limited bodies was substantially shorter. The longest, approximately three months each, were in Pennsylvania (1967-

1968) and New Jersey (1947 and 1966); as previously noted, Rhode Island held two one-day conventions. The median in the durational sequence of limited conventions was approximately nine days.

Proposals, Referenda and Promotion

Convention Products and Voter Action

The 27 constitutional conventions listed in Table 11 proposed 11 new or revised constitutions and 120 amendments to existing documents. Table 11 lists these proposals and indicates the results of the voters' action on them. The 15 unlimited bodies produced 10 new or revised constitutions. Two of these were drafted in Hawaii and Alaska and became their fundamental laws on admission to statehood; a third was prepared for Puerto Rico's new status as a commonwealth. Four new or revised constitutions were approved by the voters of Connecticut, Hawaii, Michigan and Missouri. Thus, Hawaii was the only state to have both a new constitution and an extensive revision of it within the period of this study.[24] The 1947 assembly in New Jersey was the only limited convention to propose a new constitution, and it was approved. Of the 11 proposed new or revised documents, three were rejected in Maryland (1968), New York (1967) and Rhode Island (1968).

All amendments proposed by conventions were submitted to the voters except those in Virginia (1945 and 1956) which were formally proclaimed in effect by the conventions. Of the 118 proposed amendments submitted to the respective electorates, 94 were adopted. This represented a rate of voter acceptance of approximately 81 percent, which was far greater than that accorded proposed amendments submitted by legislatures in the same states during the same period.

Promotional Activity

Delegates to recent constitutional conventions actively sought to inform the voters of their actions and to mobilize popular support for proposals, both before and after adjournment. Methods commonly used involved all communication media. The Hawaii, Puerto Rico and Michigan assemblies and others also regularly issued press releases, and some conventions created public information committees with mandates to exploit all

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[24] See Hebden Porteus, "The Constitutional Convention of Hawaii of 1968," *State Government*, XLII, No. 2 (Spring 1969), 97-104.

media in developing a comprehensive educational program. The committee on information and submission of the 1968 Hawaii convention, for example, employed a full-time communications specialist for this purpose; daily live educational TV presentations and weekly taped summaries of convention highlights were other major features of the Hawaii program. Radio or television or both were extensively employed in Alaska, Michigan, Rhode Island and some other states. Distribution of printed drafts of convention proposals and verbatim printing in the press became practically standard practice for the more recent conventions.

Post-adjournment efforts to gain support for proposals involved some, and often many, delegates of all recent conventions. Both Republicans and Democrats campaigned actively for adoption of the five proposals of the 1967-1968 Pennsylvania body; the president of the convention reported that 161 of the 163 delegates joined the Committee for 5 "Yes" Votes, of which former Governors George M. Leader and William W. Scranton served as co-chairmen. More than a hundred delegates to the Maryland convention carried the burden of the campaign for adoption of the proposed new document. The Connecticut, Maryland, Hawaii and other conventions established speakers' bureaus; in Connecticut the delegates formed a series of "task forces" which appeared before citizens' groups throughout the state.

With few exceptions governors have expressed support for proposals of conventions. Governor Nelson A. Rockefeller gave "lukewarm" endorsement to the proposed new constitution of New York in 1967, although most Republican leaders in the convention opposed it. In Michigan, Democratic Governor John B. Swainson opposed adoption of the new constitution in 1962, but his Republican successor, George W. Romney, strongly endorsed and campaigned for it. Former Rhode Island Governor Dennis J. Roberts, who served as president of the 1964-1969 convention, opposed its document; Republican Governor John H. Chafee also opposed it.

Generally, legislators have supported most convention proposals, especially those made by the limited conventions over which state lawmaking bodies have exercised substantial initial controls in specifying the limits of their authority. Illustrative of the exceptions to usual legislative support was the continued active hostility of some Michigan legislators in 1962-1963 to the proposed new document. Official opposition to proposed new or revised constitutions has tended generally to come from local government officers and state elective officials who have feared a threat to their status in the power structure.

Civic groups that have actively supported state governmental reform

efforts in the initial stages and worked originally for conventions have usually been favorable to their proposals. There are notable exceptions, however, well exemplified in New York where the League of Women Voters opposed adoption of the proposed new constitution in 1967, mainly because of dissatisfaction with the judicial article and some provisions dealing with education and reapportionment. Organizations and official groups that previously opposed conventions because they desired to maintain the status quo have usually extended their opposition to proposals for constitutional change made by these constituent assemblies.

Convention Funding

State and territorial legislatures appropriated funds for all 27 conventions. Table 11 lists the appropriation figures which, although not precise for all conventions because exact data were not available to the writer, are sufficiently accurate to provide a general index or guide. Except for five limited conventions (the three in Tennessee and two in Virginia), initial funding was for stated sums. The enabling acts in Tennessee merely placed convention delegates on the same pay scale as members of the legislature; in Virginia the appropriation language specified "a sum sufficient" to fulfill the needs of the special constituent assemblies. Excluding the expenses of electing delegates to the two Virginia bodies, the cost of each of these conventions approximated only $10,000 for the short periods they were in session. Fixed appropriations for all conventions ranged from $25,000 for each of the limited assemblies in Rhode Island (1944, 1951 and 1955) to $10 million for New York's unlimited convention in 1967.

Legislative funding of the 15 unlimited conventions ranged upward from $60,000 for New Hampshire in 1948 to the New York high. It is noteworthy that New York's $10 million appropriation exceeded the total legislative funding combined for the other 14 unlimited conventions. As Table 11 indicates, however, only approximately $6.5 million was actually spent for the operation of the New York body. The average appropriation for the 15 unlimited conventions was $1,294,608. If New York is excluded, the average drops to a more realistic $672,794. Probably an even closer approximation to the cost of recent unlimited constitutional assemblies ($910,588) results if the New Hampshire bodies are also excluded because they proposed more limited constitutional changes, were in session for shorter periods and had lower appropriations than the other conventions. The median in the sequence of appropriations for un-

limited conventions arranged in order of their magnitude is the $500,000 appropriation to the 1965 Connecticut body.

Three territories held unlimited constitution-making assemblies during the 1950s, and the legislatures provided substantial financial support. Alaska made the largest initial appropriation, $300,000, but total legislative funding for the 1950 Hawaii convention amounted to $655,000. Puerto Rico's appropriation of $250,000 was the smallest.

The figures for limited conventions are much lower than those for the unlimited bodies because their mandates restricted their activity and they were in session for shorter periods with resulting lower costs. Legislative appropriations for limited conventions ranged upward from $25,000 for each of the three Rhode Island bodies to $1,560,000 for the 1967-1968 Pennsylvania convention. Excluding the three Tennessee assemblies for which data are not available, average legislative funding for the nine remaining bodies was $256,234. Because its appropriation was almost four and a half times that of the next highest (New Jersey, 1947), inclusion of the Pennsylvania figure is distorting and produces an atypical result; excluding it, the resulting average is $93,263.

The appropriation figures listed in Table 11 generally reflect the costs of holding constitutional conventions at the particular times that they were convened. Rising costs and inflationary trends, during the last decade especially, are reflected in the relatively higher figures for the 1960s. A comparison of the two unlimited conventions in Hawaii, each of which was operative for approximately three and a half months, is illustrative: Total funding for the 1950 body was $655,000; for the 1968 convention, $1,680,000. Thus, unless adjustments are made, comparison of the costs of holding constitutional conventions at different times during a 30-year period presents a distorted result. If appropriate adjustments are made, however, the resulting comparisons can be useful to planners of future conventions.

EPILOGUE: DEVELOPMENTS DURING 1969

Three constitutional conventions were officially operative at some time during 1969 in Arkansas, New Mexico and Illinois. The voters approved the respective convention calls at referenda held November 5, 1968. Each of the constituent assemblies had unlimited authority to propose changes; each was composed of delegates elected on a nonpartisan basis—those in Arkansas and New Mexico from the same districts as members of the lower house of the legislature, and those in Illinois from state senatorial districts. The New Mexico convention was the only one to complete its work and submit a proposed new constitution to the electorate during 1969. The other two continued into 1970. Table 16 provides general information on the three conventions, each of which is described in further detail below.

Arkansas' Seventh Convention

The 100 delegates to the Arkansas convention were elected on November 5, 1968, at the same time the voters approved the convention call. A two-day organizational meeting was held January 7-8, 1969. Robert A. Leflar, former dean of the University of Arkansas Law School and chairman of the study commission, was elected president; four vice presidents were also elected, one from each congressional district. Ten substantive and four operational committees and approximately 33 employees assisted the delegates.

With a total appropriation of $605,200 the convention began its work on May 27 and was authorized to operate for four months. It recessed on August 21 after completing second reading of a proposed new constitution. Among the major issues that developed were usury, right to work, voting age, executive reorganization, independence of the game and fish and highway commissions, selection of judges and limitations on the taxing power. The convention reconvened on January 12, 1970, and completed its work on February 10. Ninety-eight delegates approved the proposed new constitution, one dissented, and one abstained.

The document, like most such instruments, contained numerous compromises reflecting the efforts of the delegates to accommodate as many interest groups as feasible. A sample of delegates' opinions indicated a general consensus that they had produced a practical, conservative in-

TABLE 16
CONSTITUTIONAL CONVENTIONS
Operative in 1969

State	*Convention Dates*	*Type of Convention*	*Referendum on Convention Question*	*Preparatory Body*	*Appropriation*	*Number of Convention Delegates*	*Convention Proposal(s)*	*Referendum on Convention Proposal(s)*
Arkansas	January 7-8, 1969; May 27-August 21, 1969; January 12-February 10, 1970	Unlimited	November 5, 1968 Vote: 227,429 214,432	Constitutional Revision Study Commission and Constitutional Convention Advisory Commission	$605,200	100 (Elected Nov. 5, 1968 from representative districts; nonpartisan)	New Constitution	To be referred to electorate November 3, 1970
New Mexico	August 5-October 20, 1969	Unlimited	November 5, 1968 Vote: 80,242 35,997	Constitutional Revision Commission	$250,000 (plus $280,000 for election of delegates and referendum on convention proposal)	70 (Elected June 17, 1969, from single member representative districts; nonpartisan)	New Constitution	December 9, 1969 constitution rejected Vote: 59,685 63,387
Illinois	December 8, 1969-	Unlimited	November 5, 1968 Vote: 2,979,977 1,135,440	Constitution Study Commission	$2,880,000 (plus $5,000,000 for election of delegates and referendum on convention proposals; total: $7,880,000)	116 (Elected Nov. 18, 1969; 2 from each provisional state senatorial district; nonpartisan)	In Preparation	Proposal(s) to be submitted to the voters at election appointed by the convention not less than 2 mos. nor more than 6 mos. after convention adjourns

strument that was a great improvement over the present constitution. Total words in the new document are 16,740, including a 3,169-word schedule, as contrasted with an estimated 46,000 words in the 1874 constitution. The referendum will be on November 3, 1970. Careful and economical administration of the convention, reflected in the $25 per diem and $10 per day expense payments to delegates, resulted in an estimated savings of approximately $125,000 which will be returned to the state treasury.

The New Mexico Convention

New Mexico's first constitutional convention since statehood was the second such assembly to convene in 1969. The New Mexico body was supported by an appropriation of $250,000 and was given 60 days to perform its task. Compensation of delegates was $20 per day and a mileage allowance for one round trip. The 70 delegates, who were elected June 17, 1969, began their work on August 5 at the state capitol in Santa Fe. A former speaker of the House of Representatives, Bruce King, was elected president, and he appointed four vice presidents. General administrative framework of the convention included nine substantive and four operational committees and a staff of approximately 65 secretarial, clerical and custodial personnel. Principal issues that developed focused mainly on the short ballot, executive reorganization, judicial selection, local home rule and public support for parochial education. After 64 days of arduous labor, the delegates approved a proposed new constitution and adjourned sine die on October 20.

Among the significant changes proposed were: annual legislative sessions without limit, reapportionment of the legislature every 10 years, executive reorganization subject to legislative veto, increased gubernatorial powers of law enforcement, a shorter ballot, integration of executive agencies into 20 departments, a limit of two successive four-year terms for elective officers, reduction of the voting age to 20 and permissive legislative authority to relax requirements for voting in presidential elections, limited local home rule, reorganization of the state board of education, legislative authority to provide for local initiation of ordinances, and a liberalized amendment and revision procedure. The most significant changes were in the legislative and executive branches and local government. The proposed document contained an estimated 15,000 words, approximately 9,000 shorter than the present constitution.

Less than two months intervened between sine die adjournment of the convention and the referendum on the constitution, which was submitted as a single proposition on December 9. Convention delegates bore

the major campaign burden in support of the document, which was endorsed by most statewide organizations. Major opponents included legislators, public employees and some conservation groups. The voters rejected the proposed constitution by a vote of 59,685 to 63,387—a margin of only 3,702 in a total vote of 123,072. The urban areas gave the document the greatest support; it lost heavily in the state's Spanish-speaking areas.

Illinois' Sixth Constituent Assembly

Almost 100 years to the day after the constitutional convention that drafted Illinois' present constitution met, the state's sixth constituent assembly convened on December 8, 1969, in the chamber of the House of Representatives in Springfield.[8] The constitutional convention enabling act, approved by Governor Richard B. Ogilvie on May 7, 1969, provided for 116 delegates, two elected on a nonpartisan basis from each senatorial district at a special election on November 18. To choose nominees in those districts where five or more persons filed petitions for nomination, the act provided for a primary election on September 23. Besides provision for nomination and election of delegates, the enabling legislation appropriated $2.88 million to defray convention expenses. Designated rate of compensation for delegates was $625 per month for a period not to exceed eight months, plus $75 per diem for a maximum of 100 days, in addition to mileage, a postage allotment and expenses; the act specified appropriate adjustments for officeholder delegates and convention officers.

The delegates elected Samuel W. Witwer, a Chicago attorney and former Republican candidate for the U. S. Senate (1960), president of the convention; also named were three vice presidents and a secretary. Additional organizational components for accomplishing the mission of the convention were nine substantive and three procedural committees. The tentative schedule for convention procedure is as follows: February—committee hearings; March—preparation of committee proposals and supporting reports; April and May—first reading of committee proposals in committee of the whole; June—convention debates on second reading; July—final convention action on third reading, determination of the method of submission, and approval of the "Address to the People" (constitution submission).[9] Although there is no time limit on the convention, the

[8] The present constitution of Illinois, ratified July 2, 1870, was the product of the state's fourth constitutional convention which met from December 13, 1869 to May 13, 1870.

[9] *The Weekly Illinois Constitutional Convention Summary*, No. 4, week ending February 7, 1970, p. 1.

delegates' pay will terminate after eight months (or on August 8, 1970). The enabling act directed the convention to submit its proposal(s) to the voters not less than two nor more than six months after adjournment. On April 14 the convention adopted the recommendation of its Rules Committee "that revisions, alterations or amendments to the constitution proposed by the convention be submitted to the voters at an election to take place after the November 3 general election."[10] In an earlier action the convention had agreed that the special election for ratification be set not less than 27 days before, nor 27 days following, the general election.