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Special Comment

By Charles W. Shull

LEGISLATURE AND THE PROCESS
OF CONSTITUTIONAL AMENDMENT

In the welter of controversy over the apportionment of legislatures at the level of the American States, there has been a failure to recognize how many subsidiary issues and processes have additionally been caught in the range of the current conflict. In the wake of the June 15, 1964, decision of the United States Supreme Court in Reynolds v. Sims that all state legislative chambers must be substantially based upon population, and as equally districited on that basis as may be possible of attainment, what significant side issues, secondary to the immediate crisis, are capable of definition and denomination?

Among these corollary issues is that of the entire process of constitution-making and alteration or amendment of the basic law of the states. What is at stake here is this. Of the methods of amending state constitutions found in the United States, the two most common involve in some way action by the legislatures, and consequently the crucial issue of apportionment and districting. Only amendment by popularly initiated proposal escapes contact with legislative bodies themselves as integral to the process of amendment of state constitutions.

Direct legislative proposal of state constitutional amendments by the law making body of any state, or resort to a constitutional convention for general revision of a state government, necessarily requires action by the very legislative bodies under attack, as being unrepresentative, unconstitutionally apportioned, and altogether illegal assemblies.

In forty-nine of the states, constitutional amendments may be proposed by action of the legislature. New Hampshire is the lone

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exception since in that state proposal of amendments must be consummated by a constitutional convention. All of these fifty states would present what are known as rigid constitutions, meaning that extraordinary procedures are utilized to effect constitutional changes, and that the routine operation of the ordinary law-making process does not suffice for this purpose.

Nineteen states require a two-thirds vote of their legislatures to propose specific constitutional amendments. Seven more prescribe a three-fifths vote. A majority vote is specified by an additional seventeen states. There are further variations in the legislative method of proposal which must be noted.

Connecticut asks that her House of Representatives first propose the measure by a majority vote, and then requires that both chambers in the next session approve the measure by a two-thirds majority. Hawaii requires approval at two successive sessions if the original votes on a proposed amendment are majorities less than two-thirds. Massachusetts decrees that the constitutional majority for the proposal of amendments to the fundamental law of that Commonwealth shall be a majority of members elected, sitting in joint session. New Jersey has an option; either three-fifths of all members of each house, or a majority of all members of each chamber for two successive sessions. In New Mexico, amendments dealing with certain sections on elective franchise or education must be proposed by a three-fourths vote of the entire body. Tennessee turns in a provision that there must be a majority of members elected voting for the measure on its first passage and two-thirds of those elected on the second action on the proposed amendment. Vermont is also different; thre two-thirds of the Senate and a majority of the House are required on the first passage; the second confirming

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2 Alaska, California, Colorado, Delaware, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, South Carolina, Texas, Utah, Washington, West Virginia, and Wyoming.
3 Alabama, Florida, Kentucky, Maryland, Nebraska, North Carolina, and Ohio.
4 Arizona, Arkansas, Indiana, Iowa, Minnesota, Missouri, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia, and Wisconsin.
5 Constitution of Connecticut, Article XI.
6 Constitution of Hawaii, Article XVI, Section 3.
7 Massachusetts Constitution, Article IX of Amendments.
8 Constitution of New Jersey, Article IX, paragraph 1.
9 Constitution of New Mexico, Article XIX, Section 1.
10 Constitution of Tennessee, Article XI, Section 3.
trip through the Vermont chambers demands but a majority in both.\footnote{Constitution of Vermont, Section 68.}

In Connecticut, Delaware, Indiana, Iowa, Massachusetts, Nevada, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, and Wisconsin an amendment proposed by the legislature to the state constitution must be passed in two successive legislative sessions. Fourteen states are found in this category.

It is not meant that there should be a lengthy review of this particular mode of proposing state constitutional amendments. These facts have been detailed and set forth with one objective: to demonstrate that there must necessarily be a very close connection, almost integral and elemental in character, between a state legislature and its use as an amending agent, and in turn the structure and composition, the apportionment and districting of the legislative body itself.

In the American states there are these practices with relation to constitutional conventions which will be noted. First is the fact that in all states utilizing constitutional conventions as a means of revising or amending their basic law, there is the requirement that such a convention must, in effect be called. While a number of states make provision for the periodic submission of the question of a call for a constitutional convention to the electors, in all of them it is either a specific power of the legislature to do this or it exists as an optional, discretionary route to reform.

Twenty-one of the states\footnote{Here I have relied upon Book of the States 1964-65, Table of Data on page 13.} decree that a two-thirds majority in each chamber of the legislature is requisite to place the question of a call for a constitutional convention upon the ballot. Nebraska requires a three-fifths vote of its unicameral Senate. Nineteen more make provision for a majority vote in favor of the submission of a call for a constitutional convention. In a group of states, Arkansas, Connecticut, Louisiana, Massachusetts, Pennsylvania, Rhode Island, and Texas, the constitution does not provide for the calling of a constitutional convention, but legislative authority to call such a body has been established in practice by statute, opinions of Attorneys General, and court decisions. In
Indiana, New Jersey, North Dakota, and Vermont, the constitution does not provide for the calling of a constitutional convention and there appears to be no established procedure in this regard. Mandatory submission of the question of a call for a constitutional convention at regularly recurrent intervals is resorted to by an additional group of states, without denial of this power to the legislature to act at other times.

The next area of concern in this study has to do with the composition and structure of the state constitutional conventions. Not merely do these bodies require the extraordinary action of a call, but they too have to have their memberships established and related to what we would otherwise call an electoral or representative basis. This groundwork is either fixed by constitutional provision or remains free to be set up as the legislature of the state in question may desire at the time of the calling of a constitutional convention. Attention will now be centered upon this phase of the apportionment problem.

As was indicated earlier, four of the American states make no provision at all for the call or structure of a constitutional convention, and there appears to be no established procedure in this regard. Another group of states make no specific provision for constitutional conventions in their own individual basic documents, but practice, and legal opinions and decisions have sustained such employment of the convention procedure in the amendment or revision of constitutions. Here all details of structure will be largely at the discretion of the legislature itself.

The positions of the states with regard to the membership and apportionment of state constitutional convention delegates will exemplify these situations which we will enumerate.

1. No provisions for convention at all.
2. No specific provisions for conventions but pragmatic procedures have been established.
3. Where constitutional conventions are authorized, but no provisions are specifically made as to mode or organization of such bodies.

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13 Again reliance for this and the immediate ensuing paragraphs has been placed upon Book of the States 1964-65, Table on Constitutional Conventions, p. 15.
4. Where discretion is constitutionally vested in the legislature with no directions whatsoever.
5. Where discretion on the part of the legislature exists, but some limitations are imposed by specific constitutional provisions.
6. Where the pattern is set upon the basis of previous, pre-statehood practice in terms of constitutional convention structure and composition.
7. Those instances where detailed provisions relate the apportionment and districting of constitutional convention delegates to the regular legislative bases of representation and districting.

A group of four states, Indiana, New Jersey, North Dakota, and Vermont, would exemplify the first of these seven situations or positions since the state constitution does not provide for the calling of a constitutional convention, and there appears to be no established procedure in this regard. In another group of states, there is no specific authorization for constitutional convention but pragmatic and quite practical acceptance of their use has been made, predicated upon the cumulative force of precedent and judicial decisions supporting such actions in the past. Seven different states fall into this category, i.e., Arkansas, Connecticut, Louisiana, Massachusetts, Pennsylvania, Rhode Island, and Texas. In these situations, the effective power and discretion of the legislatures in initiating procedures for the call and in the specific structures of the conventions themselves will be great and potentially be affected by the apportionment and districting patterns of these law-making bodies themselves.

The third situation outlined above was that where constitutional conventions are authorized in the individual states, but no provisions are specifically made as to the mode of organizing such bodies. It would appear that Alabama, Arizona, Maine, Mississippi, North Carolina, Ohio, Oklahoma, Oregon, Tennessee, Virginia, West Virginia, and Wisconsin would constitute this class of states. In Iowa and Kansas, the legislature is directed to provide for the apportionment and election of the delegates to the constitutional convention.
Georgia leaves the matter to legislative discretion but prescribes population as nearly equal as may be possible as the basis upon which these delegates are to be apportioned and districted for purposes of election. In Idaho a minimum number is fixed at twice the membership of the most numerous branch of the state legislature; that body has discretion to vary this number of delegates above that basic limit defined. Nebraska may have no more than 100 persons in any constitutional convention called in that state; but the legislature defines the manner of electing these convention members and establishes their particular districts.

Likewise Nevada sets a minimum equal to the total of her two chambers; again the legislature has the power and the discretionary right to determine upon a greater universe of convention delegates. New Mexico demands as many members in any convention in that state as there are representatives in her lower chamber, but apparently does not require that they come from the identical districts.

Wyoming calls for double the number of the most numerous branch as a minimum. Washington decrees the minimum number of conventions seats as equal to the most numerous branch of her legislature. South Carolina echoes her most numerous branch or House of Representatives as the desired number of seats in a constitutional convention in that state. While Utah sets the total legislative membership as the base for the convention.

It would seem, however, that discretion does vest in the legislature to increase the corps of delegates in a convention above these prescribed minima; thus some power abides in the law making body in this matter.

This brings the discourse down to the last two situations posited above. The norm for these is the containment of legisla-

14 Constitution of Georgia, Article XIII, paragraph 2.
15 Constitution of Idaho, Article 20, Section 3.
16 Constitution of Nebraska, Article XVI, Section 2.
17 Constitution of Nevada, Article 16, Section 2.
18 Constitution of New Mexico, Article 19, Section 2.
19 Constitution of Wyoming, Article XIX, Section 3.
20 Constitution of Washington, Article XXIII, Section 2.
21 Constitution of South Carolina, Article XVI, Section 3.
22 Constitution of Utah, Article XXIII, Section 2.
tive discretion to a great degree by constitutional stipulations. Alaska\textsuperscript{23} and Hawaii\textsuperscript{24} are seemingly bound to follow the set up used in 1955 and 1950 respectively in the calling and organizational structure of their pre-statehood conventions.

California has a membership limit in that no convention may exceed in its total membership that of the two chambers of her bicameral legislature, and in the further provision that these constitutional convention delegates are to be chosen in the same manner as are its state legislators.\textsuperscript{25} Colorado decrees a convention of twice the number of its Senate to be elected in the same manner and from the selfsame senatorial districts.\textsuperscript{26}

Delaware prescribes 41 members for a convention; two from each of the three counties of the state, and one apiece from the 35 present representative districts.\textsuperscript{27} Florida’s constitutional conventions equal in number of delegates the total membership of its House of Representatives and according to the constitution of this state these convention delegates are to be apportioned in the same way as the House of Representatives.\textsuperscript{28}

Illinois establishes her constitutional convention membership as double that of her Senate, elected in the same way and from the same districts.\textsuperscript{29} Kentucky duplicates her House of Representatives in number and electoral areas.\textsuperscript{30} Maryland\textsuperscript{31} and Michigan\textsuperscript{32} allot one delegate for each member of their legislative chambers and utilizes the existing House and Senate districts for purposes of distribution throughout the state in question. Minnesota employs her House of Representatives, numerically and electorally as the basis for any constitutional convention.\textsuperscript{33}

Missouri chooses fifteen delegates from the state at large plus two from each Senatorial district.\textsuperscript{34} Montana decrees that her constitutional conventions shall have the same number of persons as does her House of Representatives; they are to be selected in

\textsuperscript{23} Constitution of Alaska, Article XIII, Section 2.
\textsuperscript{24} Constitution of Hawaii, Article XV, Section 2.
\textsuperscript{25} Constitution of California, Article XVIII, Section 2.
\textsuperscript{26} Constitution of Colorado, Article XIX, Section 1.
\textsuperscript{27} Constitution of Delaware, Article XVI, Section 1.
\textsuperscript{28} Constitution of Florida, Article XVII, Section 2.
\textsuperscript{29} Constitution of Illinois, Article XIV, Section 1.
\textsuperscript{30} Constitution of Kentucky, Section 259.
\textsuperscript{31} Constitution of Maryland, Article XIV, section 2.
\textsuperscript{32} Constitution of Michigan, Article XII, Section 3.
\textsuperscript{33} Constitution of Minnesota, Article XIB, Section 2.
\textsuperscript{34} Constitution of Missouri, Article XII, Section 3a.
the same manner, at the same places, and from the same districts as are the members of her lower chamber.

New Hampshire uses her General Court, or lower chamber, apportionment as the legal basis for picking delegates to her recurrent constitutional conventions. New York provides for the choice of 15 delegates at large plus three from each senatorial district of the state. South Dakota uses her House of Representatives as her guide both as to number of convention delegates and the areas from which they are to be elected.

This review of data relevant to the amendment and revision of state constitutions has been presented, not as an exercise in intellectual pleasure, but to demonstrate the close connection and dependence of this process upon state legislatures and state representative systems. Disturb or challenge the latter, invalidate them, and the expanding ripples of development involve the machinery by which the seemingly required reforms are to be fashioned and proposed. This being true, the old maxim of *quis custodit custodes* (who will watch the watchers) must be kept forward in the minds of those seeking solutions. Can institutions needing to be changed be altered by others themselves susceptible?

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35 Constitution of Montana, Article XIX, Section 8.
36 Constitution of New Hampshire, Article 99.
37 Constitution of New York, Article XIX, Section 2.
38 Constitution of South Dakota, Article XIII, Section 2.