

## ARTICLE XVII

### MODE OF AMENDING THE CONSTITUTION OF THE STATE

Sec. 1. PROPOSED AMENDMENTS; PUBLICATION; SUBMISSION TO VOTERS; ADOPTION. The legislature, at any regular session, or at any special session when the matter is included within the purposes for which the session is convened, may propose amendments revising the constitution, to be voted upon by the qualified electors for statewide offices and propositions, as defined in the constitution and statutes of this state. The date of the elections shall be specified by the legislature. The proposal for submission must be approved by a vote of two-thirds of all the members elected to each House, entered by yeas and nays on the journals.

A brief explanatory statement of the nature of a proposed amendment, together with the date of the election and the wording of the proposition as it is to appear on the ballot, shall be published twice in each newspaper in the state which meets requirements set by the legislature for the publication of official notices of offices and departments of the state government. The explanatory statement shall be prepared by the secretary of state and shall be approved by the attorney general. The secretary of state shall send a full and complete copy of the proposed amendment or amendments to each county clerk who shall post the same in a public place in the courthouse at least 30 days prior to the election on said amendment. The first notice shall be published not more than 60 days nor less than 50 days before the date of the election, and the second notice shall be published on the same day in the succeeding week. The legislature shall fix the standards for the rate of charge for the publication, which may not be higher than the newspaper's published national rate for advertising per column inch.

The election shall be held in accordance with procedures prescribed by the legislature, and the returning officer in each county shall make returns to the secretary of state of the number of legal votes cast at the election for and against each amendment. If it appears from the returns that a majority of the votes cast have been cast in favor of an amendment, it shall become a part of this constitution, and proclamation thereof shall be made by the governor.

#### History

Provision for amending the constitution by legislative proposal has been included in all Texas constitutions, including that of the Republic. Under the constitution of 1836 (General Provisions, Sec. 11), the amendment process was begun when a "majority of the members elected" to both houses of the congress approved a proposed constitutional amendment and referred it to the congress "next to be chosen." If the proposed amendment gained approval in the succeeding congress by a two-thirds majority, the proposal was submitted to the people for ratification, which required a simple majority of those voting on the amendment. Section 11 included two features that have characterized analogous articles in all subsequent Texas constitutions: first, there was no limitation on the number of amendments a congress could propose or refer to the people for ratification in any given year (referral was limited, however, to "no . . . oftener than once in three years"); and, second, publication of each proposed amendment was required.

The Constitution of 1845 (Art. VII, Sec. 37) began a period during which the process of constitutional amendment by legislative initiative was made more rigorous. The policy of requiring two separate legislative passages of a proposed amendment was continued, but the process for constitutional amendment was altered in several significant ways. The 1845 provision increased the initial legislative approval required to a two-thirds majority of both houses; the necessity of a second legislative passage by a two-thirds majority was retained, but this stage of the process was shifted to the next legislature after an intervening general election of representatives, at which proposed amendments were submitted to the voters. Amendment was made more difficult by the requirement that "a majority of all

## Art. XVII, § 1

citizens . . . voting for representatives” in the general election (rather than voting on the amendment itself) ratify a proposed amendment.

The method employed in the Constitution of 1845 of proposal by a two-thirds legislative majority, voter ratification at the intervening general election, and subsequent legislative approval by a two-thirds majority established the pattern adopted for the Constitutions of 1861 (Art. VII, Sec. 37), 1866 (Art. VII, Sec. 38), and 1869 (Art. XII, Sec. 50). In all three the difficulty of amendment was ameliorated somewhat by requiring voter ratification by a majority of those voting on the amendment, rather than in the election, and all three added the provision that a proposed amendment be read on three separate days in each house. The Constitutions of 1861 and 1866 limited proposal of amendments to regular biennial sessions of the legislature.

The issue of how the constitution should provide for amendment was vehemently argued at the Convention of 1875 between those favoring easy and those favoring difficult amendment; both camps regarded the question as one of the most important to come before the convention. (See *Debates*, pp. 135-42.) The committee version reported to the convention copied Article VII, Sections 37 and 38, of the Constitution of 1866 verbatim. But after considerable debate the convention adopted a substitute for Section 38 (pertaining to amendment by legislative proposal) by the narrow margin of 39 to 34. That substitute provided for relatively easy amendment to the constitution, a process that has remained essentially unchanged from 1876 to the present: An amendment is proposed by a two-thirds vote of each house and subsequently ratified by a majority vote of those voting on the amendment.

The original version of present Article XVII, Section 1, limited legislative proposal of amendments to regular biennial sessions. Since 1876 only three attempts have been made to amend this section, and all three represented moves to eliminate the regular session limitation. The first, in 1935, would have allowed the governor to submit proposed amendments to the legislature in special session “in cases of extraordinary emergency affecting the State as a whole.” The 1935 amendment was rejected by the voters, as was the second attempt, almost 40 years later, in 1971. A close reading of the 1971 proposal is required to discern the change it would have made: the deletion of the limiting phrase “at any biennial session” in the first line. A more straightforward proposal to amend Article XVII was submitted to the voters in November 1972, one that permitted the legislature to propose constitutional amendments “at any regular session, or at any special session when the matter is included within the purposes for which the session is convened.” The voters ratified this amendment. The recently amended version of Section 1 also introduced more detailed provisions relating to the official publicity required for proposed amendments.

### Explanation

The process of constitutional amendment by legislative proposal has been comparatively simple in Texas since the adoption of the present constitution. Before November 1972, Section 1 provided that the legislature could propose amendments by a vote of two-thirds of the members of each house at any regular session; the 1972 amendment authorized limited proposal at special sessions. The proposed amendment is then submitted to the people for ratification, which requires a majority vote of those “qualified electors for statewide offices and propositions” who vote on the amendment. Under this section the legislature fixes the time of the election, which has normally coincided with the next general election following legislative passage of the proposal. The proposed amendments are usually placed at the bottom of the

## Art. XVII, § 1

same ballot containing the names of the candidates.

The 1972 amendment also provided more detailed publication requirements than did its immediate predecessor, the 1876 version. Three changes regarding the method of publishing notice of a proposed amendment were made: (1) instead of publishing the amendment text verbatim, publication of a brief explanatory statement, date of election, and wording of the proposition as it will appear on the ballot is required; (2) publication in every Texas newspaper that qualifies for publication of public notices is required, rather than publication in one newspaper in each county; and (3) the requirement of four weekly insertions beginning at least three months before the election is changed to two insertions, one between the 60th and 50th days before the election and the second one week after the first. A fourth requirement, pertaining to rates that can be charged for publication, was added by the 1972 amendment. Previously publication rates were regulated by statute (Tex. Rev. Civ. Stat. Ann. art. 29), but the amended Section 1 sets a ceiling on the rate different from that prescribed by statute. The publication requirements have been ruled mandatory, but substantial compliance with them suffices to preserve an amendment from invalidation. (*Manos v. State*, 98 Tex. Crim. 87, 263 S.W. 310 (1924); *Whiteside v. Brown*, 214 S.W.2d 844 (Tex. Civ. App.—Austin 1948, writ *dism'd*.)

An amendment is adopted upon approval by the voters, and the effective date of adoption is the date of the official canvass of returns showing that the amendment received a majority of the votes cast, not the date of the governor's proclamation of adoption. (*Torres v. State*, 161 Tex. Crim. 480, 278 S.W.2d 853 (1955); *Texas Water & Gas Company v. City of Cleburne*, 21 S.W. 393 (Tex. Civ. App. 1892, *no writ*.) Moreover the attorney general has determined that the governor does not have the power to veto a proposed constitutional amendment (Tex. Att'y Gen. Op. No. M-874 (1971)).

As no version of Section 1 has ever placed an express limitation on the number or scope of amendments that may be proposed, the question arises of how much of the constitution may be changed in a single amendment or election. Courts in other states have split over whether a legislature may propose an entirely new or revised constitution in a single amendment. Two older cases, *Ellingham v. Dye* (178 Ind. 336, 99 N.E. 1 (1912)) and *Livermore v. Waite* (102 Cal. 113, 36 Pac. 424 (1894)), are commonly cited for the negative position. The basis for denying the legislature such authority is generally predicated on one or several of three principles: that a constitutional provision specifically providing for legislative "amendments" precludes the legislature from exercising the broader power of "revision;" that the power to propose amendments is not within the general range of legislative powers but rather is a limited power delegated by the people through the constitution and must be narrowly construed; or that the traditional and only acceptable method for "revising" a constitution or proposing a new one is through a constitutional convention, not legislative amendment. However, several recent court decisions have upheld the legislature's authority to submit a new constitution. (See *Smith v. Cenarrusa*, 475 P.2d 11 (Idaho 1970); *Gatewood v. Matthews*, 403 S.W.2d 716 (Kentucky 1966).) Between 1966 and 1974 at least six state legislatures submitted new or significantly revised constitutions as amendments for approval by the voters. The proposed documents were approved in Florida (1968), North Carolina (1970), and Virginia (1970) but were defeated in Kentucky (1966), Idaho (1970), and Oregon (1970). Although several states have used the amendment process for submitting a new constitution, such action is often criticized as being "politically unwise" and susceptible to abuse by a legislature eager to increase its own powers. (See Keeton, "Methods of Constitutional Revision in Texas," 35 *Texas L. Rev.* 901, 903 (1957); Comment, "Legislature May Disregard Prescribed Revision Procedure

## Art. XVII, § 1

As Long As the Proposed Constitution is Submitted for Popular Ratification," 81 *Harv. L. Rev.* 693 (1968).)

No Texas court has considered whether Section 1 permits the legislature to frame an entirely new constitution and submit it as a single amendment. The nearest a Texas court has come to defining the permissible scope of amendments occurred in *Whiteside v. Brown* (214 S.W.2d 844 (Tex. Civ. App. — Austin 1948, writ *dism'd*)), in which the court upheld an amendment that made changes in two sections of the education article, Article VII. The court noted that the one-subject-per-bill requirement in Section 35 of Article III did not apply to constitutional amendments and indicated that

The Constitution has vested in the legislature a discretion as to the form in which constitutional amendments may be proposed and submitted to the people. (*Id.*, at 850.)

The court went on to observe that the legislature could abuse its discretion, but that it did not do so in an amendment that dealt with "different subjects or issues" that "are interrelated and germane to the general purpose and object of the amendment" and in which "the plan of the amendment was comprehensive, closely knit, and each major provision dependent upon the other." (*Id.*, at 850-51.)

Whatever discretion the legislature had when *Whiteside v. Brown* was decided in 1948 was probably increased by the 1972 amendment of Section 1. As mentioned above, the apparent purposes of the 1972 amendment were to authorize the submission of amendments by special sessions of the legislature and to provide changes in the publication procedure. However, the first sentence of the section also was changed to authorize the legislature to propose amendments "revising" the constitution. This subtle addition to the language of the amendment provision probably removes any doubt concerning the ability of the Texas legislature to propose amendments which change more than one section of the constitution and may permit a single amendment revising the entire document.

Although the courts have had few opportunities to consider the permissible scope of amendments, the legislature has not refrained from exercising its discretion in utilizing a variety of forms in proposed amendments. In 1891, an amendment was proposed and adopted revising virtually all of Article V, the judiciary article, of the constitution. In 1969, a single amendment repealed more than 50 "unnecessary" sections scattered throughout the constitution. On at least two occasions the legislature has proposed at the same election two amendments to the same section of the constitution. This occurred for the November 7, 1972, election when two of the proposed amendments each amended Sections 33 and 40 of Article XVI on dual-officeholding and dual compensation. A similar event occurred in 1935 when the legislature offered voters a choice of two approaches to ending prohibition. Both proposed amendments were to Article XVI, Section 20. One proposed substituting a proscription against "open saloons" in lieu of outright prohibition, while the other proposed a state owned dispensary system for alcoholic spirits. It would have been possible each time for the voters to have approved both amendments. Fortunately, in both 1935 and 1972 the voters adopted only one of the two proposed amendments.

The most ambitious effort at amendment was the attempt in 1975 to completely revise the constitution by means of eight separate amendments submitted at the same election. Each amendment revised all provisions of the constitution relating to a single subject. Each amendment also contained an elaborate schedule for transitions in state law if the amendment were adopted and for making the changes necessary in the constitution to compensate for the adoption or rejection of other amendments. (See Bickerstaff and Yahr, "Multi-Amendment Revision of the Texas Constitution, 38 *Texas Bar Journal* 705 (1975).) All eight amendments were

defeated.

Finally with regard to the legislature's power to propose amendments, it should be noted that the ballot need not contain the entire proposed amendment nor a complete summary of its effect. In *Hill v. Evans* (414 S.W.2d 684 (Tex. Civ. App. — Austin 1967, *writ ref'd n.r.e.*)), the court noted that a voter is presumed to be familiar with the proposed amendment before actually voting and that the purpose of the ballot proposition is to identify the amendment and to show its "character and purpose" in such a manner as to avoid confusing, misleading, or deceiving the voter. In *Hill*, the ballot failed to mention that a new annual voter registration system went along with repeal of the poll tax. The court upheld the amendment.

### Comparative Analysis

*Amendment by Legislative Proposal.* The constitutions of every state except New Hampshire provide for amendment by legislative proposal. Texas is one of some 35 states that permit an amendment to be submitted to the voters after only one passage through the legislature. Eleven states require two passages, most with the requirement that a general election for the legislature intervene. Three states, Connecticut, Hawaii, and New Jersey, have alternative requirements: either two passages by a simple majority or one passage by an extraordinary majority. Delaware requires a two-thirds vote by two consecutive legislatures but no ratification by the people.

The size of the requisite vote to propose an amendment by the legislature in those states requiring only one legislative passage varies. Eighteen states including Texas require a two-thirds majority, eight require a three-fifths, and nine require a simple majority. In the nine states requiring a simple majority, however, an extraordinary majority is required for amendments concerning certain subjects. For example, New Mexico requires a three-fourths majority if the amendment concerns suffrage or education. All but three of the states requiring double passage call for only a simple majority vote each time around.

Forty states including Texas require public notice by publication of proposed amendments, but there is considerable variation in the amount of detail included in the requirement. California's provision is a model of simplicity, requiring only "such publication as may be deemed expedient." Texas, on the other hand, may be counted among those states with more detailed requirements.

Like Texas, most states do not limit the frequency of amending the same article. Four states do, however: Kentucky and Pennsylvania (every five years), Illinois (every four years), and New Jersey (every three general elections). Five states limit the number of amendments that may be submitted at any one election: Arkansas, Kansas, and Montana (three), Colorado (six), and Kentucky (two). The new Illinois Constitution forbids the legislature to propose amendments to more than three articles at the same session. Three states, Florida, Missouri, and Oklahoma, have an equivalent of the "one-subject-per-bill" rule—*i.e.*, a single amendment may apply to only one article or one general subject. Vermont permits the legislature to propose amendments only every tenth year.

About 30 states including Texas call for ratification by a majority of those voting on the amendment itself, while 11 appear to require a majority of those voting in the election. Illinois has alternative ratification requirements: the amendment must receive approval of a majority of those voting in the election or of three-fifths of the electors voting on the amendment. Rhode Island requires a 60 percent majority of those voting on the amendment and Hawaii and Nebraska require a majority on the question, which majority must be at least 35 percent of the total vote. New Mexico allows ratification by a majority of those voting on the amendment, except

## Art. XVII, § 1

amendments pertaining to suffrage or education, which three-fourths of those voting in the election and two-thirds of those voting in each county must ratify.

The *Model State Constitution* provides for legislative proposal of amendments by a simple majority of all the members of the legislature and ratification in a referendum by a majority of those voting on the amendment. Article V of the United States Constitution provides that congress, by a two-thirds vote of each house, may propose amendments subject to ratification by the legislatures or conventions of three-fourths of the states, "as the one or the other Mode of Ratification may be proposed by the Congress . . . ."

*Amendment by Initiative.* A second method of amendment is by the initiative petition; 14 states authorize this method. There is, of course, wide variation possible in an initiative system. For the purpose of illustration the language of the *Model State Constitution* is quoted:

### Sec. 12.01: AMENDING PROCEDURE: PROPOSALS

(a) Amendments to this constitution may be proposed by the legislature or by the initiative.

(b) An amendment proposed by the legislature shall be agreed to by record vote of a majority of all the members, which shall be entered on the journal.

(c) An amendment by the initiative shall be incorporated by its sponsors in an initiative petition which shall contain the full text of the amendment proposed and which shall be signed by qualified voters equal in number to at least \_\_\_\_\_ percent of the total votes cast for governor in the last preceding gubernatorial election. Initiative petitions shall be filed with the secretary of the legislature.

(d) An amendment proposed by initiative shall be presented to the legislature if it is in session and, if it is not in session, when it convenes or reconvenes. If the proposal is agreed to by a majority vote of all the members, such vote shall be entered on the journal, and the proposed amendment shall be submitted for adoption in the same manner as amendments proposed by the legislature.

(e) The legislature may provide by law for a procedure for the withdrawal by its sponsors of an initiative petition at any time prior to its submission to the voters.

### Sec. 12.02: AMENDMENT PROCEDURE: ADOPTION

(a) The question of the adoption of a constitutional amendment shall be submitted to the voters at the first regular or special statewide election held no less than two months after it has been agreed to by the vote of the legislature and, in the case of amendments proposed by the initiative which have failed to receive such legislative approval, not less than two months after the end of the legislative session . . . .

### Author's Comment

Although the constitutions of some states are easier to amend, few can compare with the Texas record for frequency of amendment. (See J. May, *Amending The Texas Constitution: 1951-1972* (Austin: Texas Advisory Commission on Intergovernmental Relations, 1972).) It has been argued that a decision on whether to make the amendment process difficult or easy depends upon whether a constitution is limited to truly fundamental matters or includes statutory detail. It has also been said, in effect, that this argument confuses cause with effect, that constitutions with statutory detail are frequently amended whether or not the process is difficult, and that "true" constitutions do not get amended as often regardless of how easy amendment is. However, both arguments are conjectural, and it is far more important, regardless of the process of amendment adopted, to ensure that the constitution contains only the state's fundamental law. At this point it is worthy of note that none of those states with the most facile amendment procedure is among those states with the highest rates of amendment. (Grad, *The Drafting of State*

## Art. XVII, § 2

*Constitutions* (New York: National Municipal League, 1967), p. 24.)

It is at once fortunate and unfortunate that the Texas Constitution of 1876 provides for relatively easy amendment. It is fortunate because, as the public soon learned, a constitution so restrictive that it inhibits the daily operation of government needs an easy amendment process to meet pressing needs. It is unfortunate for several reasons. First, if an unduly restrictive constitution is difficult to amend, the time will soon arrive when the need for a thorough overhaul will become apparent. With easy amendment the document can be patched and plugged to function well beyond its useful life. Second, easy amendment combined with frequent amendments results in a deterioration of public respect for the constitution. It is obvious that a voter will weigh more carefully a constitutional amendment when he is faced with only one every several years than if he is called to vote on anywhere from 4 to 16 lengthy and complex amendments every other year. Finally, easy and frequent amendment quickly blurs the distinction between fundamental and statutory material, and as statutory material accumulates, so does the need for increasingly more frequent amendment.

It is well known that the story of amendments to the Texas Constitution of 1876 is the story of large numbers. At the end of 1975, the voters had considered some 354 amendments, adopting 218. Every legislature except the first and fifth following adoption of the present constitution has proposed amendments. The number of amendments has just about doubled every 30-year period beginning in 1881: the period 1881-1910 saw 27 amendments adopted and 23 rejected; 1911-1940 saw 57 adopted and 47 rejected; and 1941-1970 saw 115 adopted and 47 rejected. Dr. May estimates the constitution by 2001 will contain 345 amendments. (May, *Amending The Texas Constitution*, p. 1.)

In considering the method of amendment, it must always be remembered that artificial barriers in the amendment process will not, in and of themselves, preserve constitutional stability. Constitutions that have been confined primarily to "core" matters have not, in the main, suffered from excessive amendment.

Section 1, itself, contains too much statutory detail, especially on notice and publication rates. Despite their detail, the publication requirements do not ensure adequate publicity, and in fact seldom do proposed amendments receive a fraction of the media coverage afforded gory murders or political scandal.

One final comment on amendments is in order. The New York Constitution (Art. XIV, Sec. 1) requires a step in the amendment process that should be considered for a new constitution: A proposed amendment must be referred to the attorney general for a written opinion on its need and implications before the legislature votes on the proposal. Few legislators are constitutional scholars—nor are they expected to be—and the demands of regular business often prevent the kind of extensive study a proposed amendment should get. An attorney general's opinion would serve to more fully apprise the legislators of the consequences of an amendment. Of course, it would also reduce unnecessary clutter, of which Article IX, Section 1-A, is a prime example. (See the *Explanation* and the *Author's Comment* on that section.)

Sec. 2. CONSTITUTIONAL REVISION COMMISSION; CONSTITUTIONAL CONVENTION. (a) When the legislature convenes in regular session in January, 1973, it shall provide by concurrent resolution for the establishment of a constitutional revision commission. The legislature shall appropriate money to provide an adequate staff, office space, equipment, and supplies for the commission.

(b) The commission shall study the need for constitutional change and shall report its recommendations to the members of the legislature not later than November 1, 1973.

(c) The members of the 63rd Legislature shall be convened as a constitutional convention at noon on the second Tuesday in January, 1974. The lieutenant governor

## Art. XVII, § 2

shall preside until a chairman of the convention is elected. The convention shall elect other officers it deems necessary, adopt temporary and permanent rules, and publish a journal of its proceedings. A person elected to fill a vacancy in the 63rd Legislature before dissolution of the convention becomes a member of the convention on taking office as a member of the legislature.

(d) Members of the convention shall receive compensation, mileage, per diem as determined by a five member committee, to be composed of the Governor, Lieutenant Governor, Speaker of the House, Chief Justice of the Supreme Court, and Chief Justice of the Court of Criminal Appeals. This shall not be held in conflict with Article XVI, Section 33 of the Texas Constitution. The convention may provide for the expenses of its members and for the employment of a staff for the convention, and for these purposes may by resolution appropriate money from the general revenue fund of the state treasury. Warrants shall be drawn pursuant to vouchers signed by the chairman or by a person authorized by him in writing to sign them.

(e) The convention, by resolution adopted on the vote of at least two-thirds of its members, may submit for a vote of the qualified electors of this state a new constitution which may contain alternative articles or sections, or may submit revisions of the existing constitution which may contain alternative articles or sections. Each resolution shall specify the date of the election, the form of the ballots, and the method of publicizing the proposals to be voted on. To be adopted, each proposal must receive the favorable vote of the majority of those voting on the proposal. The conduct of the election, the canvassing of the votes, and the reporting of the returns shall be as provided for elections under Section 1 of this article.

(f) The convention may be dissolved by resolution adopted on the vote of at least two-thirds of its members; but it is automatically dissolved at 11:59 p.m. on May 31, 1974, unless its duration is extended for a period not to exceed 60 days by resolution adopted on the vote of at least two-thirds of its members.

(g) The Bill of Rights of the present Texas Constitution shall be retained in full.

### History

This section was added to the constitution by amendment in 1972. To its sponsors it represented the culmination of efforts to call a constitutional convention that had begun almost simultaneously with adoption of the 1876 Constitution. However, the convention that convened in 1974 did not produce a revised constitution. Instead, it adjourned after six months without approving a new constitution or amendments to the old one.

Until the 1972 amendment added this section to the constitution, no Texas constitution has contained a provision on how constitutional conventions were to be called or convened. Despite this lack of express authority, each of the six Texas constitutions was written at a convention called for that purpose.

The Constitution of the Republic of Texas was adopted March 17, 1836, by the same convention at Washington-on-the-Brazos that had declared independence 15 days earlier. In anticipation of annexation, a second constitution was written in a convention that met from July 4 to August 27, 1845. When Texas seceded to join the Confederacy, a new constitution was drafted by a convention meeting in Austin from March 2 to March 25, 1861. After the Confederacy surrendered, a convention met in Austin beginning February 7, 1866, and lasting until the middle of April. However, the constitution written by that convention and adopted by Texas voters in June of 1866 was put aside under congressionally controlled reconstruction and a new convention met in Austin on June 1, 1868. The convention dragged on until February 6, 1869, when it adjourned leaving completion of the task of drafting a new constitution to the secretary of state. The present Texas Constitution was drafted at a convention meeting in Austin from September 6 to November 4, 1875.

Perhaps the reason no previous constitution included a provision on constitutional conventions is reflected in the action of the 1875 Convention. During the



## Art. XVII, § 2

convention, the matter was considered and debated at length. A proposed provision specifying a mode of calling a convention was stricken from the draft on a motion by the President of the Convention, E. B. Pickett, who argued that the effect of including such a provision would be to provide the sole method for calling the convention. "He denied the right of the Convention to bind the people of Texas, or to take from them the liberty to alter, amend, or abolish their Constitution." Judge John H. Reagan argued in favor of President Pickett's motion, on the grounds that "it was the inalienable right of the people to meet in convention whenever they so desired, and that it was not within the power of the Legislature to limit them in this right." (See *Debates*, pp. 140-41.)

Almost as soon as the present constitution was adopted in 1876, there were efforts to call a new convention to revise it. In the same year, Governor Richard Coke, in his message to the legislature, spoke of the need for constitutional amendments, particularly in the judiciary article. Between 1879 and 1890, numerous unsuccessful attempts were made to create a joint committee to prepare a resolution encompassing suggested changes in the new constitution. The movement to change the judiciary article succeeded in 1891 when a single amendment substantially revising the entire article was adopted by the voters.

The first recorded legislative attempt to call a constitutional convention occurred 11 years after the ratification of the 1876 Constitution. A joint resolution, introduced in 1887, was the first of many joint or concurrent resolutions proposing a constitutional convention. However, not until 1917 did both houses of the legislature succeed in passing a resolution that called for a convention. This senate concurrent resolution called the convention without a vote of the people but instructed the governor to issue a proclamation for the election of delegates and required submission of any proposed document to the voters for ratification. Governor James Ferguson refused to issue the proclamation calling the election of delegates, thereby aborting the election and the convention.

In an effort to remove objections raised by Governor Ferguson, the legislature in 1919 passed a senate concurrent resolution providing for the submission of the question of a constitutional convention to a public referendum. In November of 1919, the voters overwhelmingly defeated the proposition by a vote of 23,549 to 71,376 with approximately 10 percent of the voters going to the polls.

Between 1919 and 1949, the legislature regularly considered proposals for a constitutional convention—four house concurrent resolutions, three senate concurrent resolutions, eight house joint resolutions, and four senate joint resolutions were introduced. In addition, beginning in 1941, proposals for creation of a revision commission were regularly introduced. But no resolution calling a constitutional convention or creating a revision commission received legislative approval.

In 1949 Governor Beauford Jester called together a group of citizens to form the Citizens Committee on the Constitution. The committee recommended to the legislature that a commission be created to study the need for constitutional revision. A resolution embodying this recommendation and appropriating money to fund the proposed commission died in a committee of the house.

In 1957, a concurrent resolution was passed requiring the Texas Legislative Council to undertake a study of the 1876 Constitution and to submit its recommendations concerning revision of the document. Although the legislature did not provide supplemental appropriations for the council until 1959, an unpaid 18-member Citizens Advisory Committee was authorized, with the governor, lieutenant governor, and the speaker of the house each appointing six members. The council submitted a report to the 57th Legislature in 1961 generally indicating that no constitutional convention or revision commission was necessary.

## Art. XVII, § 2

In 1966, Governor John Connally announced his interest in calling a constitutional convention. In 1967, a resolution was passed calling for creation of a Constitutional Revision Commission. The commission was made up of 25 members, ten appointed by the governor and five each by the chief justice, lieutenant governor, and speaker of the house. When the lieutenant governor refused to appoint any members, the other appointing officers filled the vacancies. The commission, in 1969, presented a draft of a revised and simplified constitution to the 61st Legislature for approval and ratification by the voters. The only affirmative action taken by the legislature was an amendment that was approved by the voters in August of 1969 repealing 56 obsolete sections of the constitution.

In 1971, the legislature passed a joint resolution proposing the constitutional amendment that was adopted by the voters in November 1972 as Section 2 of this article. In 1973, the legislature acted in accordance with the new section and established and funded a commission for studying the need for constitutional change. This commission of 37 members, the Texas Constitutional Revision Commission, was headed by the former Speaker of the Texas House of Representatives and Chief Justice of the Texas Supreme Court, Robert W. Calvert. The commission submitted its report to the legislature on November 1, 1973, recommending a new constitution for the state of Texas.

Beginning January 8, 1974, the legislature met as a constitutional convention. Speaker of the House of Representatives, Price Daniel, Jr., was elected president of the convention. On July 30, 1974, as required by Section 2, the convention was dissolved. Despite numerous and frantic efforts toward the end of the convention to obtain the two-thirds vote required by Section 2 for approval of a new constitution, the convention ended without approving either a new constitution or amendments to the old one. In 1975 the legislature submitted the convention's proposed constitution, substantially unchanged to the voters as a series of eight amendments. All were defeated in November 1975.

### Explanation

Section 2 no longer serves any purpose. However, an examination of the section provides a study of the issues surrounding the calling and convening of a constitutional convention in Texas.

The initial issue is whether any provision is actually necessary to allow a convention. Texas legislators may have felt that because the Texas Constitution failed to provide expressly for a constitutional convention, an amendment was necessary. However, writers are in agreement that the power to call a constitutional convention for a state resides in the legislature without specific mention of such a power in the constitution.

It requires no provision in the existing Constitution to authorize the calling of a convention for the purpose of revising the fundamental law. The legislative department of the government is alone empowered to take the initiative in calling a constitutional convention, unless a different mode of procedure is laid down in the Constitution. And such action may be taken in the form of a joint resolution; a formal statute is not required in order to provide for a lawful convention. (6 *Am. & Eng. Ency. of Law* 896.)

(See also 16 C.J.S. 8; J. A. Jameson, *Constitutional Conventions*, (4th ed., 1887), at 211; W. Dodd, *The Revision and Amendment of State Constitutions* (1910), at 44.)

Several writers have concluded that Section 1, authorizing the legislature to propose constitutional amendments, does not eliminate the right of Texans to act through a constitutional convention to change their constitution. (See Keith, *Methods of Constitutional Revision* (1949), p. 22; Keeton, "Methods of Constitu-

## Art. XVII, § 2

tional Revision in Texas," 35 *Texas L. Rev.* 901, 904 (1957); Hendricks, "Some Legal Aspects of Constitutional Conventions," 2 *Texas L. Rev.* 195 (1924); Comment, "Can a State Legislature Call a Constitutional Convention Without First Submitting the Question to the Electorate?," 1 *Texas L. Rev.* 329 (1923.) The method by which the people of Texas may exercise this power of revision is through acts of the legislature:

But the will of the people to this end can only be expressed in the legitimate modes by which such body politic can act, and which must either be prescribed by the Constitution whose revision or amendment is sought, or by an act of the legislative department of the state, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the Constitution itself. (*Cooley's Const. Lim.*, (6th ed.), p. 42.)

There is some support for the right of citizens to convene a convention without legislative action, but such a convention would be "revolutionary" in nature. (See Bebout and Kass, "How Can New Jersey Get a New Constitution?" 6 *U. of Newark L. Rev.* 1, 34-49 (1941).)

In 1924, Homer Hendricks posed and answered the question of whether an amendment was necessary in Texas to call a constitutional convention.

The first question to arise is whether a convention can be held at all in this state without amending the present Constitution. Provision is made for amendments to be proposed to the people by a regular session of the legislature and it is thinkable that such a provision would inhibit all other means of changing the organic law. And the Supreme Court of Rhode Island has so decided this very question. [In re *The Constitutional Convention*, 14 R.I. 649 (1883).] The decision, however, has been generally discredited and the weight of opinion is that notwithstanding such a provision in the existing constitution, a popular convention can be duly called for revising the fundamental law. This view is probably sustained by the weight of judicial authority.

...

... It may be said safely that constitutional conventions may be held legally in every state in the Union with exception of Rhode Island and possibly Indiana. As for the State of Texas, the validity of the popular convention of 1875 has never been questioned. (Hendricks, "Some Legal Aspects of Constitutional Conventions," 2 *Texas L. Rev.* 195, 196-97 (1924).)

Hendricks indicated that in 1924 there were two states, Indiana and Rhode Island, in which the state constitution might not allow the legislature to call a constitutional convention. In Rhode Island, the view that amendment was required was discarded entirely by the Rhode Island Supreme Court in 1935 in a lengthy and oft-cited decision; In re *Opinion to the Governor* (178 A. 433 (R.I. 1935)). Rhode Island has held six constitutional conventions since 1935, each called without constitutional amendment although the state constitution continues to provide only for legislative amendment. No constitutional convention has been held in Indiana since 1851, but in *Ellingham v. Dye*, 99 N.E. 1 (Ind. 1912), the Indiana Supreme Court by way of dictum acknowledged that the sound rule was the one stated in the *American & English Encyclopedia of Law* (2d ed.), p. 902, that:

On the other hand, long-established usage has settled the principle that a general grant of legislative power carries with it the authority to call conventions for the amendment or revision of the Constitution; and, even where the only method provided in the Constitution for its own modification is by legislative submission of amendments, the better doctrine seems to be that such provision, unless in terms restrictive, is

## Art. XVII, § 2

permissive only, and does not preclude the calling of a constitutional convention under the implied powers of the legislative department. (99 N.E., at 18.)

Currently, eight states other than Texas have constitutions that provide for legislative amendment but do not provide for the calling of a constitutional convention (1976-1977 *Book of the States*, p. 177). In most of these states, the right of the legislature to call a constitutional convention without constitutional amendment has been established by court decision, attorney general opinion, or through the legislature's unchallenged assumption of the power. (Arkansas—Convention called in 1968; Indiana—*Ellingham v. Dye* (dictum), 99 N.E. 1 (1912); Pennsylvania—*Stander v. Kelley*, 250 A.2d 474 (1969); Vermont—Opinion of the Attorney General; Massachusetts—Conventions in 1853 and 1917; North Dakota—*North Dakota v. Dahl*, 68 N.W. 418 (1896); New Jersey—Conventions in 1944, 1947, 1966.)

Despite the lack of court opinions on the subject in Texas, it is clear that the legislature may call a constitutional convention without amending the constitution. A thorough review of the question is presented in the Texas Legislative Council Office of Constitutional Research report, *Authority of the Texas Legislature to Call a Constitutional Convention* (Oct. 1974), available through the Legislative Reference Library at the Texas Capitol. The unresolved legal issue is whether the legislature may call a convention without voter approval.

Respectable legal authority is available for either of two conflicting positions. One view is that the power to call a constitutional convention is inherent in the legislature as part of that body's plenary legislative authority—it being a matter of policy whether the question should be submitted to the voters. The opposing view is that the power of the legislature to change a constitution must be explicitly provided in that document or must be derived by ascertaining from the people their desires in connection with the holding of a constitutional convention—a favorable vote in a public referendum being a necessary prerequisite to the legislature's calling of the convention. A third but not so authoritative view is that even if the power arises because of the reservation of power by the people, the legislature, as agents of the people, could call a convention without submitting the question to the voters in certain extraordinary circumstances.

The 1875 Constitutional Convention in Texas was called by a resolution submitted to and approved by the voters. In 1917, the legislature passed a concurrent resolution that would have called a constitutional convention without a public referendum but required that any document proposed by the convention be submitted to the voters for ratification. As noted in the *History* above, the governor refused to issue the proclamation calling the election of convention delegates and consequently no convention was held. In 1919 a senate concurrent resolution was passed providing for submission of the question of a constitutional convention to a public referendum. The voters overwhelmingly defeated the proposition at the election in November of the same year.

In 1923, the Attorney General of Texas concluded that the Legislature of Texas was "without authority to call a convention without an affirmative popular vote . . . ." (1923 *Report of Tex. Att'y Gen.*, at 208.) The attorney general did not dispute the right of the legislature to call a convention without constitutional amendment but insisted that public approval of the convention must be obtained.

Ordinarily the Legislature can do whatever is not inhibited by the Federal or State Constitution. But whatever it does must be in the nature of legislative power unless there is some express grant in the Constitution conferring additional power. The authorities are overwhelming to the effect that submitting amendments and initiating proceedings

## Art. XVII, § 2

looking to revising the Constitution is not legislative power as that term is ordinarily understood. As stated above, it is only from necessity and custom that the Legislature may even submit to the people the question of calling a constitutional convention; and this only because necessary in order to allow the exercise of a sovereign power reserved to the people. The power of the Legislature ought not to go beyond this necessity until the people have seen fit to make an express grant increasing the Legislature's power in this regard. (1923 *Report of Tex. Att'y Gen.*, at 208.)

One legal writer, Charles Haines, immediately took issue with the attorney general on the need for voter approval:

It would seem, therefore, that though the opinion against the calling of a convention without submission to popular vote may be correct from the standpoint of policy, it raises serious difficulties from the standpoint of the interpretation of state laws and constitutions . . . . It seems strange, indeed, that state governments originally conceived as retaining all reserved powers not granted to the federal government and state legislatures regarded as the residuary legatees of the reserved powers not otherwise provided for or not prohibited in the express language of the Constitution are now to be considered as authorities of delegated powers. (Comment, "Can a State Legislature Call a Constitutional Convention Without First Submitting the Question to the Electorate," 1 *Texas L. Rev.* 329, 335 (1924).)

But in 1924, another writer, Homer Hendricks, reached a conclusion similar to that of the attorney general:

The legislature not possessing the power itself to call a convention, either expressly, or impliedly as arising from the grant of general legislative powers, it should be said definitely that it is for the people themselves, not the legislature; to say whether or not a constitutional convention shall be held. Indeed, the only reason the legislature can submit the matter to the people is that such power exists *ex necessitate* in order to allow the people to act by and through a regular and legal election for ascertaining their will. (Hendricks, "Some Legal Aspects of Constitutional Conventions," 2 *Texas L. Rev.* 195, 202 (1924).)

A more recent writer concluded that the 1923 opinion is contrary to the weight of authority, but went on to state that, from the standpoint of policy, it is wise to submit the question of constitutional revision to the people before calling a convention. (See Keith, *supra* at 25. Dean Page Keeton of The University of Texas School of Law, writing in 1957, acknowledged the disagreement between authorities and attempted no definitive answer, but observed, "It would seem desirable in any event that the question be submitted to the voters before any convention is attempted." (Keeton, "Methods of Constitutional Revision in Texas," 35 *Texas L. Rev.* 901, 905 (1957).)

Like their counterparts in Texas, writers in other states have split over the legality and propriety of a state legislature calling a convention without voter approval. The opinion most often cited for the proposition that voter approval is necessary is the 1917 majority opinion of the Indiana Supreme Court in *Bennett v. Jackson*, 116 N.E. 921 (Ind. 1917). In 1913, the Indiana legislature submitted the question of calling a convention to the voters. By 338,947 to 235,140, the call for a convention was defeated. The Indiana legislature disregarded the outcome of the referendum and proceeded in 1917 to pass an act providing for the election of delegates to a constitutional convention. The Indiana Supreme Court declared the act invalid. The court did not dispute the authority of the legislature to call a convention if authorized to do so by a favorable public referendum but held that the legislature had no inherent right to change or make a constitution and must find a

## Art. XVII, § 2

positive warrant of authority, "if not in the Constitution, then directly from the people."

A lengthy dissent in *Bennett v. Jackson* argued:

If the Legislature has power to provide for the submission of the desirability of a new Constitution to a vote of the people and may afterward call a convention, why deny that it has the power to call the constitutional convention first and provide that the desirability of the new Constitution shall be submitted to the people afterward? Neither of such powers is expressly granted by the Constitution, and neither of such acts is prohibited by it. (116 N.E., at 924.)

The opinion commonly cited as authority for a legislature to call a constitutional convention without voter approval is the 1935 majority opinion of the Rhode Island Supreme Court referred to earlier. The governor requested an opinion as to whether it would be a valid exercise of legislative powers for the general assembly to provide by law for a constitutional convention, with the submission to the people of any constitution or amendments proposed by the convention. The court answered in the affirmative. The court acknowledged the holding of the Indiana Supreme Court in *Bennett* but criticized the opinion as being too affected by the policy issues created by the Indiana legislature's effort to call a convention so soon after the people had refused to call one. The view of the Rhode Island court was that the legislature was possessed of all powers not expressly or impliedly withheld by the federal or state constitution. The court concluded that although it might be wasteful or inexpedient to call a convention without popular consent, the issue was left to legislative discretion.

A dissenting opinion voiced basically the same view of legislative authority as the majority in *Bennett* concluding:

It is largely from this general reservation of power [to the people to change or alter their constitution] that we find the authority to hold a convention at all under the Constitution; the latter being otherwise silent on the matter of calling a convention . . . . The language and intent of the reservation seems wide enough to require that the sovereign people be consulted and their favorable opinion obtained before the Legislature proceeds to call a constitutional convention. (178 A., at 460.)

A number of states have held constitutional conventions without first submitting the question for voter approval. Between 1966-1974, the state legislatures of New Jersey (1966) and Louisiana (1973) called constitutional conventions by legislative act alone. In each state, the convention proposed a constitution that was subsequently submitted to and approved by the voters. A challenge of the Louisiana Convention on the grounds that it was being held without voter approval was denied by the state supreme court and the federal courts. (See *Bates v. Edwards*, 294 S.2d 532 (1974); *Driskell v. Edwards* 518 F.2d 890 (5th Cir. 1975).)

Texas legislators may find adequate rationale, precedent, and authority for proceeding to call a constitutional convention without submitting the question for voter approval. Any such legislation would run head-long into the 1923 attorney general opinion. But sufficient question has been raised concerning the accuracy of the 1923 opinion that the present Attorney General of Texas easily could reach a different conclusion and remain consistent with existing legal authorities. In any event, the legislature could substitute its opinion for that of the attorney general.

If it is clear that a constitutional convention can be called in Texas without constitutional amendment, why was Section 2 added to the constitution? One likely reason is that no effort was made to determine whether the legislature possessed the authority without a constitutional amendment. However, Section 2 did serve several identifiable constitutional functions. It may have been necessary to

## Art. XVII, § 2

authorize the 63rd Legislature to serve as a constitutional convention. There are a number of authorities for the proposition that a legislature may not act as a constitutional convention. (See, generally, *Ellingham v. Dye*, 99 N.E. 1 (Ind. 1912); *Livermore v. Waite*, 36 P. 424 (Cal. 1894).) Moreover, the 1972 amendment specifically exempted legislators from the dual compensation proscription of Section 33 of Article XVI that otherwise might have affected their eligibility to receive compensation as delegates to a convention called by another method.

## Comparative Analysis

As noted earlier, Texas is one of nine states without a general provision for constitutional conventions in its constitution. Only one other state, North Dakota, adopted a provision similar to Section 2 calling for a specific constitutional convention.

In approximately a dozen states, there is a mandatory requirement that every so often, usually every ten or 20 years, the question of whether to hold a convention goes on the ballot automatically. In Maryland this is the only road to a convention; in other states this method is in addition to conventions called by the legislature. Five states permit the legislature to call a convention without a referendum.

Legislative initiative for calling a convention usually requires a two-thirds vote, but a half-dozen states require only a simple majority. In Kentucky a simple majority is required of two successive legislatures.

In most states the referendum on whether to hold a convention must take place at a general election. The states are about equally divided between those requiring approval by a majority of those voting on the question and those voting at the election. In Kentucky the majority must equal at least 25 percent of the total vote cast at the preceding gubernatorial election, and in Nebraska the majority must equal at least 35 percent of the votes cast in the general election.

There are so many variations among the states in the amount of convention detail specified that only a few generalizations can be made. The new Connecticut Constitution simply says that the legislature, by a two-thirds vote, shall prescribe by law the manner of selecting delegates, the date of convening a convention, and the date of final adjournment. The New York Constitution goes to the other extreme and provides so much detail that an enabling act almost seems unnecessary. A good many states specify the size of the convention or a maximum and minimum number of delegates, but only a few identify the districts from which the delegates are to be chosen. Two states, Missouri and New York, provide for election of 15 delegates at-large, a number that is 18 percent of the size of a Missouri convention but only 8 percent of the New York membership.

The United States Constitution provides that "on Application of the Legislatures of two-thirds of the several States" Congress shall call a convention for proposing amendments.

The ratification requirements for convention proposals are spelled out in detail in some states, left up to the convention in others, and in still others are prescribed in part and in part left up to the convention.

There are several interesting suggestions in the *Model State Constitution*. Section 12.03 provides for legislative proposal of a referendum for a convention and also for automatic submission of the question, but only if 15 years have passed since the last referendum. Then appears this subsection:

- (b) The legislature, prior to a popular vote on the holding of a convention, shall provide for a preparatory commission to assemble information on constitutional questions to assist the voters and, if a convention is authorized, the commission shall be continued for the assistance of the delegates. If a majority of the qualified voters voting on the

**Art. XVII, § 2**

question of holding a convention approves it, delegates shall be chosen at the next general election not less than three months thereafter unless the legislature shall by law have provided for the election of the delegates at the same time that the question is voted on at a special election.

The *Model* makes every qualified voter eligible as a delegate and provides for a single delegate from each district of the (unicameral) legislature. The *Model* also sets forth a limited number of convention rules, such as that proposals must be upon the desks of delegates three days before final passage and a self-executing provision for adoption of convention proposals.

**Author's Comment**

The constitutional convention is the traditional method of revising or writing a new constitution. There are some who would suggest that the Texas Constitution should have a general provision for constitutional conventions. However, the more appropriate view is the one expressed in Article I, Section 2 of the Texas Constitution:

All political power is inherent in the people, and all free governments are founded on their authority and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.

The presence of a provision on constitutional conventions only serves to limit the alternatives for reform or revision that otherwise are available to Texans through their legislature. Section 2 should be eliminated from the constitution because it no longer serves any purpose. However, care should be taken to assure that the goal of eliminating the useless section does not become one of replacing it with an unnecessary and limiting general provision for constitutional conventions. This is one area in which constitutional silence is preferable to constitutional specifics.



