The Commonwealth of Massachusetts

LEGISLATIVE RESEARCH COUNCIL

Report Relative To

CONSTITUTIONAL REVISION PROCEDURES

(Proposed Constitutional Amendment)

For Summary, See
Text in Bold Face Type

March 8, 1966
The Commonwealth of Massachusetts

ORDERS AUTHORIZING STUDY

Omnibus Joint Order
House, No. 4117 of 1965

Order, That the Legislative Research Council is hereby directed to make studies and investigations relative to the subject matter of the following current legislative documents and orders, namely: (1) Senate, No. 68 relative to amending the constitution to extend the time allowed for gubernatorial action on enacted bills and resolves; (2) Senate, No. 69, relative to amending the constitution to require initial maturity repayment one year after the date of issue of state bonds; (3) House, No. 694, relative to amending the constitution to provide four-year terms for members of the legislature and of the executive council; (4) House, Nos. 2269, 2978, and 2994, relative to amending the constitution to shorten residence requirements for voting; (5) House, Nos. 922 and 2267, relative to establishing constitutional recodification procedures; (6) Senate No. 136, relative to the functions and powers of the state ballot law commission; and (7) the house order directing the legislative research council to investigate and study the continuing water shortage in Massachusetts, the use of water by industry, and the possibility of purifying and re-using industrial waste water. Said council shall file its statistical and factual reports hereunder with the clerk of the senate not later than the last Wednesday of February in the year nineteen hundred and sixty-six.

Adopted:
By the House of Representatives
July 13, 1965
By the Senate, in concurrence,
July 15, 1965

Unnumbered Senate Order of February 7, 1966

Ordered, That the time be extended to the last Wednesday of March of the current year, within which the Legislative Research Council shall file its reports upon the several matters referred to it by the General Court for study under the joint order, House, No. 4117 of 1965.

Adopted:
By the Senate, February 7, 1966
By the House, in concurrence,
February 7, 1966
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LETTER OF TRANSMITTAL TO THE
SENATE AND HOUSE OF REPRESENTATIVES

To the Honorable Senate and House of Representatives:

GENTLEMEN: — The Legislative Research Council submits herewith a report prepared by the Legislative Research Bureau relative to establishing constitutional recodification procedures. The bases for this report were House, Nos. 922 and 2267, incorporated as one of the subjects covered by omnibus study order, House, No. 4117 of 1965, which was referred to the Bureau for study and report. As usual, this report is confined to statistical research and fact-finding, with no recommendations or legislative proposals. It does not necessarily reflect the opinions of the undersigned.

Respectfully submitted,

MEMBERS OF THE LEGISLATIVE
RESEARCH COUNCIL

Sen. MAURICE A. DONAHUE of Hampden
Chairman

Rep. CHARLES L. SHEA of Quincy
Vice Chairman

Sen. STANLEY J. ZAROD of Hampden
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Rep. BELDEN G. BLY, Jr. of Saugus
Rep. PAUL A. CATALDO of Franklin
RESPECTFULLY SUBMITTED,

LETTER OF TRANSMITTAL TO THE
LEGISLATIVE RESEARCH COUNCIL

To the Members of the Legislative Research Council:

GENTLEMEN: — House Omnibus Order, No. 4117 of 1965, directed the Legislative Research Council, among other assignments, to study the subject matter of House, Nos. 922 and 2267 relative to constitutional revision procedures.

The Legislative Research Bureau herewith submits a report in accordance with the above directive. Its scope and content are restricted to fact-finding only, without recommendations or legislative proposals. This report was the primary responsibility of Robert D. Webb, a Bureau staff member.

Respectfully submitted,

DANIEL M. O'SULLIVAN
Acting Director, Legislative Research Bureau
This report is based on a joint legislative order that called for a study of two 1965 proposals related to procedures to be used in changing the Constitution of Massachusetts, either in form or in substance. One of these proposals would amend the Constitution so as to require the Supreme Judicial Court to make recommendations to the Legislature, at the latter's request, relative to "rearrangement, consolidation, and recodification" of the Constitution (H.922). The other proposal would create by statute, a continuing commission that would study the need for "amendment, revision or simplification" of the Constitution, and submit its recommendations to the Governor and the Legislature (H.2267). To help evaluate these proposals, the report reviews the basic principles of our constitutional system, along with the purposes and functions of a written constitution.

The Constitution as the Basis of Government

Woodrow Wilson once described constitutional government as reflecting an "atmosphere of opinion". He wrote that a written constitution must not only have its roots in the society it serves, but must also respond to changing conditions. If it is too inflexible to reflect the growth and changes in community living, the document will become "too stiff a garment for the living thing."

There are two theories as to what makes a good written constitution. One theory holds that such a document should contain only the essential framework of government, and not be handicapped by detail that properly belongs in statutory law. A second and opposing theory is that society is better protected by a detailed constitution that precludes the development of extensive implied powers of government.
Among the 50 states, both theories are in use. State constitutions range in length from less than 10,000 words to more than 100,000 words. The Massachusetts Constitution, the oldest in existence (1780), is among the briefest documents.

Regardless of length, a sound constitution must be well organized with rights, powers, and functions treated in logical sequence. It must also be literate if it is to be easily understood. How well its parts are fused into a whole determines whether the document will stand the test of time or will become inelastic and unworkable.

Though sufficiently elastic to meet most problems, the Massachusetts Constitution of 1780, as amended, nevertheless continues in need of further amendment. Proponents of revision seek methods of altering that basic document that are less cumbersome than existing procedures now authorized. Some would like to see a thorough recasting of its form to make the document more useful to persons without legal training; others prefer a continuing process of substantive review and alterations.

**Growth of State Constitutions**

The earliest state constitutions, drafted when the colonies broke with England, were generally brief, concise documents, reflecting then prevailing political ideas. Although spawned in an era of violent revolutionary struggle, they were, paradoxically, conservative in expression.

Gradually, the older documents, along with those of newly admitted states, were revised to reflect the evolution of the American democratic pattern. For example, with respect to the total of 134 state constitutions which had been in operation up to 1960, it is estimated that they were amended more than 3,000 times. Some states have had several constitutions, with as many as ten adopted in one state. Only six existing constitutions were adopted before 1850. As of this writing, several states are considering the adoption of new constitutions.

Defective draftsmanship is a prominent reason given for the need for constitutional change. Style and content also come under sharp criticism. Too much detail is cited as a crucial fault. Verbosity and frequency of amendment seem to go hand-in-hand, judging by the fact that the longest state constitutions are also those most fre-
The Massachusetts Constitution is neither unreasonably long nor too often amended in comparison with other state constitutions.

Methods of Constitutional Change

Constitutional change occurs indirectly by way of judicial interpretation, and directly by formal methods of amendment. The latter include legislative amendments, the constitutional convention and the initiative and referendum. More recently the constitutional commission has been a factor in recommending changes. Change may be restricted to the form of the document, or it may include substance. Changes may be made in piecemeal fashion, or they may result from wholesale revisions.

All of these methods of change are available in Massachusetts. The most often used method to effect constitutional change is that of legislative amendment. On only four occasions has the method of an elected convention been employed, most recently in 1917-1918.

Constitutional Change By Commission

Periodic revision by the more formal methods has encountered many barriers. Among these obstacles are public indifference or ignorance with respect to constitutional problems. The people are sometimes inclined to treat even a defective constitution as too sacred to tamper with. Also the difficult process of amendment devised by the early drafters, coupled with efforts by selfish pressure groups to preserve the status quo, make constitutional changes a tiresome and often expensive effort.

To avoid these difficulties and to provide for more frequent constitutional review, the commission method was devised. It has not achieved great success as an instrument of constitutional change yet it still attracts interest as a vehicle of reform. Commissions may be created by statute, by executive order, or by joint legislative resolution. In a few states, the work of a commission has been assigned to an existing public agency.

This report discusses their membership, their work approach, their chief virtues and principal faults. In terms of cost, a temporary constitutional commission is much less expensive than the cost
of holding a convention. However, the Massachusetts proposal calls for a continuing commission.

Legislative control over a commission usually means that a commission will not attempt any revision that would face a legislative veto. Hence, critics of the commission assert that no commission would realistically submit a program that would not win legislative acceptance.

Case studies comparing the commission method with the convention method indicate (1) that a commission can accomplish more in less time and at less expense than a convention, (2) that both methods are subject to the pressures of interests favored by the status quo, (3) that greater resistance to change is likely among (a) members from rural areas as opposed to urban areas, (b) politically experienced members as opposed to political newcomers, and (c) older members as opposed to younger members.

Certainly, a commission’s greatest contribution is as an educational device. It can inform the people of the need for amendment or revision; it can develop greater public understanding of issues; and it can make concrete suggestions for later use as a basis for revision.

The Massachusetts Proposals

Although both Massachusetts proposals, House Nos. 922 and 2267, deal with constitutional revision, their similarity ends there. The former proposal calls for recommended changes by the Supreme Judicial Court under constitutional directive, and the latter proposal calls for recommended changes by a statutory commission. The scope of constitutional review and subsequent recommendations is different in each proposal. Under one of them, the Court would make recommendations relative to “rearrangement, consolidation and recodification,” which are terms that suggest changes in form alone. The Commission, however, is authorized to make recommendations relative to “amendment, revision and simplification,” words that embrace substance as well as form.

The report examines each of these six significant terms and expresses conclusions on their probable meaning based on a consensus of judicial decisions and legal opinions.
Of particular significance to the possible results from unclear terminology is the great "rearrangement" controversy that followed the attempted rearrangement of the Massachusetts Constitution in the wake of the 1917-1918 Constitutional Convention. The report reviews those events; an emerging fact is that unless terms are clearly defined, substantive changes in the Constitution could result even though changes in form alone were intended.

In only one other state is the highest court given authority to "rearrange" the state constitution. Thus, the Chief Justice of Maine is so directed by a constitutional provision that is both more explicit and more restrictive than House, No. 922.

Arguments for and against the proposed amendment are briefly stated. It should be noted that this discussion bears directly on House, No. 2075 of 1966, which is identical with House, No. 922 of 1965.

The report also compares the statutory commission proposed in House, No. 2267, with an existing special commission on constitutional revision that was established in 1962. The work of the latter commission is reviewed so as to familiarize legislators with the results to be expected from a continuing statutory commission.

**Stability v. Flexibility**

A constitution must be both stable and flexible: stability promotes orderly government; flexibility permits social, economic and political changes to be reflected in the document.

Brevity and Readability contribute to stability in such a basic document. Experience shows that the briefer the document, the less likely the need to amend it. A constitution that describes in general language a basic framework of government, defines its powers, assures individual rights and liberties, and makes possible peaceful change, provides a sound foundation for a constitutional system of government. Readability makes for a more informed public, a better utilization of the document, and less chance of the document becoming the private preserve of judicial and legal specialists.

The task of any revision agency is a formidable one. It faces the challenge of preserving the basic framework of the original consti-
tution, yet introducing alterations that are more responsive to modern life. To preserve all that has proven satisfactory while pruning away and replacing that which is demonstrably ineffective is a gruelling yet worthy effort. Certainly, serious deliberation is warranted to select a type of agency and a membership that will best accomplish such a purpose.

Finally, it should not be overlooked that in its long history, the Massachusetts Constitution of 1780 has undergone considerable judicial interpretation. This body of law which clarifies and vitalizes the document would be partly lost by any major revision.
Origin of Study

The legislative order printed on the inside cover page of this report directs the Legislative Research Council to study and report on the subject matter of House, Nos. 922 and 2267 of 1965, "relative to constitutional recodification procedures." The omnibus order was adopted by the House on July 13, 1965 and by the Senate, in concurrence, on July 15, 1965.

House, No. 922 which is identical with House, No. 2075 of 1966, proposes a legislative amendment to the Constitution that would provide for the recodification of the Constitution. It was introduced by Representatives Freyda P. Koplow of Brookline and William H. Finnegan of Everett and is the petition of those two House members and Senator Joseph D. Ward of the Third Worcester District. The text of the proposed amendment reads as follows:

ARTICLE OF AMENDMENT

ART. The supreme judicial court shall, when so requested by the legislature, submit to the general court recommendations for the rearrangement, consolidation and recodification of the constitution of the commonwealth. All the provisions of the constitution relative to a legislative substitute or a legislative amendment shall apply to such recommendations.

House, No. 2267, on the other hand, proposes the creation of a statutory sixteen member commission to study the need for revision of the Constitution. Introduced by Representative Paul C. Menton of Watertown, it is the petition of Mr. Menton and former Lieutenant Governor Francis X. Bellotti. This proposal is titled "An Act Establishing A Continuing Constitutional Conference,"
and states the commission's purpose to be a "continuing study relative to the need for amendment, revision or simplification of the constitution..." The full text is printed as Appendix A.

**Subject and Scope of Study**

Of the above two proposals, the first, House, No. 922, is, ostensibly, concerned only with the *form* of the Constitution, while the second, House, No. 2267, relates to both its form and *substance*.

As noted, House, No. 922 is a constitutional proposal that would require the Supreme Judicial Court to submit to the Legislature, when the latter so requests, its recommendations "for rearrangement, consolidation, and recodification of the constitution of the commonwealth." Thus, the Court would be limited in two ways, (1) to making recommendations only in response to requests of the General Court, and (2) to making recommendations that concern only the form of the basic document. This interpretation of the proposal is based in part on judicial decisions and in part on a consensus of the views of legal specialists in statutory and constitutional drafting.

In contrast, the continuing commission set up under the broader provisions of House, No. 2267 would study the need for "amendment, revision, or simplification of the constitution." Since amendments and revisions may alter the meaning of constitutional provisions, it is apparent that the proposed commission would have to concern itself with comprehensive constitutional aspects of both form and substance.

In general, this recess assignment, then, is concerned with specific, proposed *methods* by which the Constitution of the Commonwealth may be changed, either in substantive language or in mere form. Accordingly, the report will be primarily concerned with two specific procedural means of bringing about constitutional change. Other methods of effecting constitutional change are cited when such information will be helpful to the reader. Analysis and evaluation of the content of the Constitution is not within the scope of this study. The report does, however, make reference to content in general terms to differentiate methods of constitutional change.
CHAPTER II.

THE CONSTITUTION AS THE BASIS OF GOVERNMENT

Before changing the provisions of a constitution, the nature and function of that basic document must be clearly understood. Involved are the origin of written constitutions, their development, their essentials, and departures from original concepts of a brief written constitution through the addition of non-essential matter to the text of some of the more recent state constitutions. These considerations explain why modernization of some state constitutions need only minor alteration while others need major overhaul.

The Atmosphere of Opinion

More than a half century ago, Woodrow Wilson, then President of Princeton University, described constitutional government as reflecting an "atmosphere of opinion" from which our constitutional form of government takes its breath and vigor. Opinion, he wrote, is the atmosphere of every government, whatever its forms and powers. As a part of life, government must change, alike in its objects and in its practices. To maintain liberty, constitutional government must be equipped with proper machinery for constant and quick adaptation to changing times and circumstances.

This is sound doctrine, he wrote, because as life changes from age to age, so opinions also alter and the underlying understandings of a constitutional system must be modified. Obviously, Wilson did not see the system as one that remains fixed in unchanging form.

As an illustration, Wilson pointed to the unwritten constitution of England, mother of all constitutional governments, as "a body of very definite opinion, except for occasional definitions of statute here and there." The life and vigor of that instrument is the thought and habit of a nation,—its conscious expectations and preferences. Around even our own written constitutions, there

has developed a body of practices that have no formal recognition in the written law, which even subtly modify the written stipulations of the system and become the basis of slow transformation. Otherwise, to use Wilson's words, "the written document would become too stiff a garment for the living thing."

The Constitution is no mere lawyers' document; it is, of necessity, a vehicle of life. As such, it must reflect the sentiment of the people being served. Being a living thing, it must be responsive to its environment. In short, a constitution must have its roots in the customs, institutions and the social and political ends of the society concerned in order to qualify as the authoritative law of the government or organized body that is asked to adopt it.

The Essence of a Constitution

There are many definitions of the word "constitution" as the basis of a government of laws. For the purposes of this report, that term is restricted in scope to a written document which the Massachusetts Supreme Judicial Court concisely describes as follows:

"A written constitution is the fundamental law for a government of a sovereign state. It is the final statement of the rights, privileges and obligations of the citizens and the ultimate grant of the powers and the conclusive definition of the limitations of the departments of State and of public officers. In its grants of powers, the bounds set for their exercise, the duties enforced and the guarantees established are found the constitutional liberty of the individual and the foundation for the regulated order and general welfare of the community." Opinions of the Justices, 233 Mass. 603, 611.

A key word here is "fundamental" because a written constitution should contain only the essential framework of government. The document should provide for the organization and powers of government, guarantee certain specific rights to the governed (including the right to amend) and, to a limited extent, describe the relationship between the government and the governed. Many persons argue that to go beyond this framework handicaps the instrument with detail which is more properly provided by statutes. Others argue that society is better protected by a detailed document that precludes the development of extensive implied powers in the government.
These opposing theories have been put to practice among the 50 states and the federal government. The constitutions of some states contain less than 10,000 words, while in other states, the constitutional documents run to nearly 100,000 words. State constitutions authorize the government to regulate all ordinary relations of citizens, i.e.: their property rights, family relations, rights of contract, relations as employer and employee, suits of law and criminal liabilities. In part this content explains why state constitutions are lengthier than the United States Constitution which regulates only those matters in which there is manifestly a common national interest. This contrast is developed more fully in a later chapter.

The essential elements and institutions of a constitutional system consist usually of the four following components:

First, in reasonably complete form, an expression of the rights of individual against the government. An early example is the English Magna Carta; and later examples are our Declaration of Rights, and the Federal Bill of Rights.

Second, an assembly that represents the people and not the government, and that is able to criticize, restrain and control the government.

Third, a government in the manner of an executive that is subject to the laws of the community.

Fourth, and perhaps most important, a judiciary having substantial and independent powers that is protected from arbitrary use of the authority of the government.

These components have their basis, in part, in the theory of "mixt government" developed in the 18th century by Montesquieu. Somewhat akin to our theory of checks and balances, "mixt government" has been briefly described by another writer as follows:

"Any pure form of government such as absolute monarchy, hereditary aristocracy or unlimited democracy, may theoretically be good, yet actually is bad because, owing to the corrupting influence of power, it always degenerates into some different and abominable form. Pure monarchy degenerates into despotism; pure aristocracy into a selfish oligarchy, and pure democracy into mob rule or anarchy. Hence a government, to secure the happiness of the people, should be given a form that is a mixture of the three. Thus, you should have a strong chief executive to represent the monarchial principle, a senate to represent the aristocratic principle, and a house of representatives to represent the democratic principle. Finally, as
a balance wheel to the whole, there should be an independent judiciary to see that the Constitution is observed, and that the rights of the people are protected against the government.”

This theory of “mixt government” was passionately supported by John Adams, architect of the Massachusetts Constitution. Hence it became the theory underlying the section of that instrument establishing a Frame of Government in the Massachusetts Convention of 1780, — and it also controlled the subsequent Federal Constitution of 1787. The original Massachusetts Constitution did not set up a democracy but a mixed government in which democracy had an essential part. However, through the process of amendment, a democratic constitution has been achieved, because (1) the Governor’s power is reduced, (2) the Senate is no longer apportioned according to wealth, (3) property qualifications are abolished, and (4) universal suffrage prevails. But Adams’ judicial structure remains intact.

Both his draft and the finished constitution are logically divided into two equal parts, (1) the Declaration of Rights which has been referred to as the negative part because it limits governmental powers; and the Frame of Government, referred to as the positive part because it states the government’s powers, indicates how these powers are to be exercised and distributed among three departments, and how the officers who are to exercise these powers are to be selected.

Practical Considerations

Practical considerations also enter into written constitutions. Thus, a sound constitution must be more than a well organized document. While rights, powers and functions must be treated in a logical sequence of articles, sections and subsections, the document must also be literate so as to be easily understood. If unity is lacking, if the text is unclear, and if each part is not properly related to the whole, the constitution fails in its purpose.

It has been shown that a constitutional system has four main elements: protection of individual rights; a representative as-

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semblance; an executive subject to the laws of the community; and an independent judiciary. Four main parts are also traditional in our documented state constitutions: a bill of rights; governmental structure; governmental powers; and an amending procedure.

How well these parts are fused into an organic whole determines whether or not the written document will stand the test of time, or will become inelastic and unworkable.

The latter failure often develops when the document is burdened with excessive material that should be assigned to the statutes. Profusion of detail results in a document less adaptable to changing opinions, to the changing complex of the community, and to modified operational functions of government. Such restrictions make difficult the performance of services that government is expected to provide. And where state government cannot act, the Federal Government invariably moves in. Profusion of detail also promotes an unstable system of government; the more detail, the more likely is the need for constant revision which leads to less thoughtful attention by the electorate.

The long life of the present Massachusetts Constitution attests to its quality. Yet age itself creates certain problems. It has been said that a constitution is much like a sturdy oak; its roots are deeply submerged in the past. Yet, the green leaves of the oak, vital to its growth, will turn color and fall with the changing of seasons. Similarly, the changing climate of opinion among the body politic is likened to a seasonal change that affects the vitality of the constitution. If the organic whole is to survive, it must adapt itself to the varied influence of a changing climate.

Proponents of constitutional revision seek methods of altering the constitution that are less cumbersome than existing procedures, such as the initiative and referendum, or the constitutional convention. The climate of opinion has changed, they argue, and we are in a new season. Massachusetts, with the oldest written constitution in existence, was a great maritime state 185 years ago. Now it has evolved into a great industrial-technological complex. Our age has witnessed vast changes that evolved rapidly. Problems arising in the past generation alone could not be foreseen by our Founding Fathers.

Fortunately, the Massachusetts Constitution has proved to be
sufficiently elastic to meet most problems, with a comparatively moderate number of amendments. Nevertheless, as recent events show, additions and revisions in our state constitution continue to be necessary and some are near final adoption, e.g. proposals affecting home rule, local industrial development, executive reorganization and joint election of certain officials. More proposals have been introduced and are now under legislative consideration.

CHAPTER III. GROWTH OF STATE CONSTITUTIONS

The Earliest Drafts

The Declaration of Independence in 1776 transformed the colonies into free and independent sovereign states, with certain powers vested in a central government. The people of the various states began to write constitutions which reflected prevailing political ideas. Although drafted during an era of violent, revolutionary struggle, these documents were, paradoxically, conservative in expression. Compared to constitutions drafted at later dates, they were brief, concise statements of the fundamental principles of popular sovereignty, individual liberty, supremacy of law, the primacy of the legislative body as the true representative of the people, and separation of legislative, executive and judicial powers to create a system of checks and balances.

The task of writing these first state constitutions was formidable, especially since the mother country had no written constitution to serve as precedent. The states preferred a written approach because, (1) written colonial charters had long been an important basis of appeals against arbitrary actions of royal governors; (2) the new citizens intended to protect their individual liberties against excesses of their new governments, drafting bills of rights that utilized the content and phraseology of familiar English written documents; (3) written documents were well suited to translate into action the view of political philosophers like Montesquieu and Locke, and their views with respect to natural law and the social contract; (4) finally, a written document was useful in developing the concept of separation of governmental powers, a basic tenet of the Founding Fathers. Here, there were no
models to consult, and in practice, that concept has not been developed as successfully as was envisioned.

Judicial Review

The practice of judicial review is an essential consideration in any discussion of constitutional revision. Such review has its basis in important colonial experience. Colonists had been accustomed to having decisions of their courts reviewed by the Judicial Committee of the Privy Council in London. Hence the people were ready to accept assertions by the new state courts disallowing legislative acts that conflicted with state constitutions.

The principle of judicial review has become firmly and satisfactorily established in our American governmental system. By common consent it is adhered to in every state as well as in the national government. In the few cases where the public has rejected the decision of the highest court in a given jurisdiction, the tendency has been to amend the constitution rather than forcibly resist.

Evolution and Changing Constitutions

As the decades have passed and new states have been admitted to the Union, old state constitutions have been gradually revised to reflect the evolution of the American democratic pattern. These revisions have, among many other developments, reflected the steady growth of executive power while legislative power has been largely at a standstill, the expanded popular participation in government, the rise of certain economic interests, the Civil War and its racial aftermath in particular, the industrial revolution, and the rise of megalopolis. All of these many profound events are mirrored in the newer constitutions and in revisions of older ones. As one observer has stated:

"The march of national progress, the adoption of amendments to the national Constitution, and the ever-growing number of interpretations of its meaning by the Supreme Court of the United States cause a process of gradual obsolescence in the fundamental law of the states. No state now using a constitution framed and adopted before 1935 could fail to derive substantial benefit from a general review to discover and remove obsolete matter. It is not enough to say, as some do, that these obsolete provisions simply are disregarded. One ideal of every democratic state
should be to inform its citizens fully on the nature and content of its fundamental law. When only the lawyers know what provisions are or are not in effect, how can school children gain a true conception of the institutions under which they live and in whose operation they must soon participate?"  

That the people of various states have had considerable experience in amending their constitutions is an understatement. A total of 134 state constitutions had been in operation up to 1960 for various periods. Of this total it is estimated that those documents were amended more than 3,000 times. In their state histories, Louisiana has had ten state constitutions; Georgia, eight; South Carolina, seven; and Alabama, six. Twelve other states have had at least four constitutions each. Of existing constitutions, only six were drafted before 1850: Massachusetts, the oldest, 1780; New Hampshire, 1784; Vermont, 1793; Maine 1820; Rhode Island 1843; and Wisconsin 1848. Connecticut, which did operate under an 1818 constitution, ratified a revised constitution on December 14, 1965.

Revision activity continues among the states. An unlimited constitutional convention convened in Rhode Island in December, 1964. A limited constitutional convention opened in Tennessee on July 1, 1965. New Jersey's Legislature called a constitutional convention for 1966 with voters electing delegates on March 1, 1966. The New York voters late last year approved a call for a constitutional convention in 1967. A convention call submitted to the voters of West Virginia in 1965 was voided by the State Supreme Court because of illegal delegate apportionment. However, the proposal is once again before the West Virginia Legislature.

Current Appraisal of State Constitutions

The continuous changing of state constitutions also reflects defective craftsmanship. This problem is a serious flaw in many, if not most, state constitutions. Contemporary critics of state constitutions usually insist that the modern state constitutions are seriously defective and need considerable revision. They criticize

2 State Constitutional Revision, p. 138.
both style and content. Among shortcomings frequently mentioned are hollow phrases, defective provisions, antiquated policies, obsolete material, superfluous language, unnecessary detail, dispersed subject matter, confused terminology, inconsistencies, errors, duplications, ambiguities and contradictions, omissions and incorporation by references to other legal documents.

The consensus of leading constitutional scholars seems to be that most of these state constitutions adopted in later years should be rewritten and shortened substantially to achieve clarity, flexibility and comprehension. As to lack of flexibility, the Federal Commission on Intergovernmental Relations in a 1955 report stated that—

... many State constitutions restrict the scope, effectiveness, and adaptability of State and local action. These self-imposed constitutional limitations make it difficult for many States to perform all of the services their citizens require, and consequently have frequently been the underlying cause of state and municipal pleas for federal assistance."

Critics assert that too much detail is a crucial fault of state constitutions. On this score, the Massachusetts Constitution fares very well; until the most recent amendments it had less than 12,000 words, about the same size as the Model State Constitution of the National Municipal League. Only eight states had less wordy constitutional documents as of 1963.¹ In contrast, twenty states had documents of 20,000 words or more. For dramatic contrast, the constitution of California runs to 70,000 words, that of Alabama to 80,000 words and that of Louisiana to some 227,000 words.

As to the overall picture of constitutional revisions, the Alabama constitution has been amended 212 times, that of California 350 times and the Louisiana document no less than 439 times suggesting that verbosity and revision go hand in hand. Vermont, with the shortest constitution, has adopted only 44 amendments since 1793; New Hampshire's short constitution (8,700 words) has been amended only 41 times over the same period; Tennessee has tacked on only 10 amendments to its 8,220 word document adopted in 1870; Massachusetts, with the oldest constitution dat-

ing to 1780, has adopted 85 amendments. Table 1 summarizes this general information.

Details that hardly rise to the dignity of a place in such a solemn document can be found in almost every constitution. Aside from trifling and petty provisions, critics find fault with the lavish attention given to subjects such as local government, public finance, and miscellaneous items that really belong in general statutes.

One reason given for verbose state constitutions is the growth of popular distrust of the legislature, resulting in constitutional commands to the legislature to do certain things. Other provisions stem from the growing complexity of the social and economic order. Amendments have also been adopted that deal with topics that reflect the growth of governmental business and the establishment of new agencies. Often, statutory material finds its way into a constitution because the convention delegates are presumptuous enough to believe that members of future legislatures will not be endowed with as much wisdom and righteousness as the delegates supposedly possess. Still other provisions represent the hopes and fears of special interest groups who are not satisfied with mere statutory assurance.

It is not unreasonable to conclude that constitutional verbosity produces inflexibility and is a constant invitation to litigation and heavier burdens on the courts. It can solidify the entrenchment of vested interests and make temporary matters permanent. It deprives state and local governments of desired flexibility and diminishes their sense of responsibility.

Whether the Massachusetts Constitution of 1780 needs revision in form or substance in the light of foregoing comments is not within the scope of this report. The Legislature has asked only for a study of the procedures of such revision outlined in the two proposals discussed in Chapter I. However, the sketches of the nature and functions of a constitution, and the development of structural problems, have been presented to facilitate understanding of particular methods of changing such a basic document which are discussed in Chapter IV.

---

1 For example, see quotation in State Government, 2d ed. by Walter Dodd. New York, Century Co. 1928, p. 96.
<table>
<thead>
<tr>
<th>State or other jurisdiction</th>
<th>Number of constitutions</th>
<th>Dates of adoption</th>
<th>Effective date of present constitution</th>
<th>Estimated length (number of words)</th>
<th>Number of amendments Proposed</th>
<th>Adopted</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>8</td>
<td>1819; 1861; 1865; 1868; 1875; 1901</td>
<td>1901</td>
<td>80,000</td>
<td>367</td>
<td>212</td>
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<td>Alaska</td>
<td>1</td>
<td>1956</td>
<td>1959</td>
<td>12,000</td>
<td>108</td>
<td>59</td>
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<td>Arizona</td>
<td>1</td>
<td>1912</td>
<td>1912</td>
<td>15,000</td>
<td>(a)</td>
<td>59</td>
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<td>Arkansas</td>
<td>5</td>
<td>1836; 1861; 1864; 1868; 1874</td>
<td>1874</td>
<td>21,500</td>
<td>(a)</td>
<td>59</td>
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<td>California</td>
<td>2</td>
<td>1849; 1879</td>
<td>1879</td>
<td>70,000</td>
<td>600</td>
<td>390</td>
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<td>Colorado</td>
<td>1</td>
<td>1878</td>
<td>1878</td>
<td>15,000</td>
<td>(a)</td>
<td>64</td>
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<td>1813(b)</td>
<td>1813</td>
<td>6,750</td>
<td>(a)</td>
<td>57(g)</td>
</tr>
<tr>
<td>Delaware</td>
<td>4</td>
<td>1776; 1792; 1831; 1897</td>
<td>1897</td>
<td>20,000</td>
<td>(a)</td>
<td>80(d)</td>
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<tr>
<td>Florida</td>
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<td>1839; 1861; 1865; 1868; 1887</td>
<td>1887</td>
<td>14,500</td>
<td>176</td>
<td>117</td>
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<td>Georgia</td>
<td>8</td>
<td>1777; 1789; 1798; 1861; 1897</td>
<td>1897</td>
<td>30,000</td>
<td>85</td>
<td>26</td>
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<td>Hawaii</td>
<td>1</td>
<td>1950</td>
<td>1959</td>
<td>14,670</td>
<td>8</td>
<td>5(e)</td>
</tr>
<tr>
<td>Idaho</td>
<td>1</td>
<td>1889</td>
<td>1890</td>
<td>14,000</td>
<td>102</td>
<td>68</td>
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<td>Illinois</td>
<td>3</td>
<td>1813; 1848; 1870</td>
<td>1870</td>
<td>15,000</td>
<td>30</td>
<td>13</td>
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<tr>
<td>Indiana</td>
<td>2</td>
<td>1816; 1831</td>
<td>1831</td>
<td>7,615</td>
<td>47</td>
<td>20</td>
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<tr>
<td>Iowa</td>
<td>1</td>
<td>1846; 1857</td>
<td>1857</td>
<td>11,000</td>
<td>(a)</td>
<td>21</td>
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<tr>
<td>Kansas</td>
<td>1</td>
<td>1856</td>
<td>1856</td>
<td>8,925</td>
<td>73</td>
<td>48(f)</td>
</tr>
<tr>
<td>Kentucky</td>
<td>4</td>
<td>1872; 1799; 1859; 1891</td>
<td>1891</td>
<td>21,500</td>
<td>40</td>
<td>18</td>
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<tr>
<td>Louisiana</td>
<td>10</td>
<td>1812; 1845; 1892; 1861; 1864; 1891</td>
<td>1921</td>
<td>237,000</td>
<td>566</td>
<td>489</td>
</tr>
<tr>
<td>Maine</td>
<td>1</td>
<td>1820</td>
<td>1820</td>
<td>12,436</td>
<td>107</td>
<td>89</td>
</tr>
<tr>
<td>Maryland</td>
<td>1</td>
<td>1776; 1851; 1864; 1867</td>
<td>1867</td>
<td>15,445</td>
<td>133</td>
<td>103</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>1</td>
<td>1780</td>
<td>1780</td>
<td>11,361</td>
<td>98</td>
<td>81</td>
</tr>
<tr>
<td>Michigan</td>
<td>4</td>
<td>1835; 1850; 1908; 1863</td>
<td>1863</td>
<td>19,203</td>
<td>43</td>
<td>9</td>
</tr>
<tr>
<td>Minnesota</td>
<td>1</td>
<td>1856</td>
<td>1856</td>
<td>14,986</td>
<td>178</td>
<td>90</td>
</tr>
<tr>
<td>Missouri</td>
<td>4</td>
<td>1817; 1822; 1875; 1890</td>
<td>1890</td>
<td>15,902</td>
<td>104</td>
<td>35</td>
</tr>
<tr>
<td>Montana</td>
<td>1</td>
<td>1889</td>
<td>1889</td>
<td>22,000</td>
<td>46</td>
<td>30</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2</td>
<td>1886; 1875</td>
<td>1875</td>
<td>16,500</td>
<td>147</td>
<td>94</td>
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<tr>
<td>Nevada</td>
<td>1</td>
<td>1884</td>
<td>1884</td>
<td>15,840</td>
<td>97</td>
<td>56</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2</td>
<td>1776; 1794 (g)</td>
<td>1794</td>
<td>8,700</td>
<td>105</td>
<td>41(g)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>3</td>
<td>1776; 1844; 1947</td>
<td>1947</td>
<td>12,500</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td>New Mexico</td>
<td>1</td>
<td>1831</td>
<td>1831</td>
<td>22,400</td>
<td>13</td>
<td>5</td>
</tr>
<tr>
<td>New York</td>
<td>6</td>
<td>1777; 1801; 1821; 1846; 1868; 1894</td>
<td>1894</td>
<td>45,000</td>
<td>174</td>
<td>133</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2</td>
<td>1776; 1822</td>
<td>1822</td>
<td>14,000</td>
<td>(a)</td>
<td>(a)</td>
</tr>
<tr>
<td>North Dakota</td>
<td>2</td>
<td>1886; 1888</td>
<td>1888</td>
<td>20,000</td>
<td>(a)</td>
<td>78</td>
</tr>
<tr>
<td>Ohio</td>
<td>1</td>
<td>1802; 1861</td>
<td>1861</td>
<td>10,700</td>
<td>162</td>
<td>88</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>1</td>
<td>1907</td>
<td>1907</td>
<td>36,412</td>
<td>135</td>
<td>49</td>
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<tr>
<td>Oregon</td>
<td>1</td>
<td>1859</td>
<td>1859</td>
<td>22,982</td>
<td>249</td>
<td>110</td>
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<tr>
<td>Pennsylvania</td>
<td>3</td>
<td>1776; 1790; 1838; 1873</td>
<td>1873</td>
<td>15,092</td>
<td>92</td>
<td>7</td>
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<td>Puerto Rico</td>
<td>1</td>
<td>1902</td>
<td>1902</td>
<td>9,000</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1</td>
<td>1843 (b)</td>
<td>1843</td>
<td>6,780</td>
<td>70</td>
<td>36</td>
</tr>
<tr>
<td>South Carolina</td>
<td>6</td>
<td>1776; 1789; 1800; 1865; 1895; 1895</td>
<td>1895</td>
<td>30,000</td>
<td>364</td>
<td>251</td>
</tr>
<tr>
<td>South Dakota</td>
<td>1</td>
<td>1889</td>
<td>1889</td>
<td>25,000</td>
<td>132</td>
<td>71</td>
</tr>
<tr>
<td>Tennessee</td>
<td>3</td>
<td>1796; 1835; 1870</td>
<td>1870</td>
<td>8,920</td>
<td>24</td>
<td>10</td>
</tr>
<tr>
<td>Texas</td>
<td>5</td>
<td>1845; 1861; 1866; 1876; 1878</td>
<td>1878</td>
<td>25,000</td>
<td>247</td>
<td>154</td>
</tr>
<tr>
<td>Utah</td>
<td>1</td>
<td>1896</td>
<td>1896</td>
<td>20,500</td>
<td>(a)</td>
<td>33</td>
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<tr>
<td>Vermont</td>
<td>3</td>
<td>1777; 1786; 1793</td>
<td>1793</td>
<td>4,840</td>
<td>183</td>
<td>44</td>
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<tr>
<td>Virginia</td>
<td>5</td>
<td>1776; 1830; 1851; 1868; 1902</td>
<td>1902</td>
<td>28,101</td>
<td>98</td>
<td>62</td>
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<tr>
<td>Washington</td>
<td>1</td>
<td>1889</td>
<td>1889</td>
<td>28,235</td>
<td>(a)</td>
<td>39</td>
</tr>
<tr>
<td>West Virginia</td>
<td>2</td>
<td>1863; 1872</td>
<td>1872</td>
<td>22,000</td>
<td>61</td>
<td>36</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>1</td>
<td>1848</td>
<td>1848</td>
<td>10,717</td>
<td>99</td>
<td>68(h)</td>
</tr>
<tr>
<td>Wyoming</td>
<td>1</td>
<td>1890</td>
<td>1890</td>
<td>15,000</td>
<td>48</td>
<td>28</td>
</tr>
</tbody>
</table>

(a) Data not available.
(b) Colonial Charters with some alterations, in Connecticut (1662) and Rhode Island (1663), served as the first constitutions for these states.
(c) In 1955, 47 earlier amendments were recodified and incorporated in the constitution. Amendment I, adopted prior to 1955, was incorporated in the constitution in 1961. Nine amendments have been adopted since 1955.
(d) Figure does not include amendments of a local nature.
(e) Three amendments adopted in June, 1959 in accordance with Public Law 86-3, 86th Congress, providing for Hawaii's admission.
(f) If a single proposition amends more than one section of the constitution, it may not be counted as more than a single amendment.
(g) The constitution of 1784 was extensively amended, rearranged and clarified in 1798. Figures show proposals and adoptions since 1793.
(h) Including two amendments subsequently held invalid by the Wisconsin Supreme Court.

CHAPTER IV.

METHODS OF CONSTITUTIONAL CHANGE

As indicated in the following discussion, the changing of a constitution is not a process limited to formal revision. Constitutional revision also includes modifications such as new interpretations of an existing document, piecemeal revision, rearrangement without substantive change, or complete revision including form and substance. Whether these changes be large or small, they reflect social, economic and political forces.

Some of them will be made less rapidly than many persons desire, and some not at all to the scope and nature that other persons urge. The cold fact is that some powerful groups will usually lose power by revision and these groups will therefore usually contest the revision as strenuously as they can. Yet changes there will be, or society's growth will be impeded.

Change by Judicial Interpretation

Among the various methods of constitutional change the power of judicial review to bring about a new meaning through judicial interpretation merits brief mention. No complete constitution has ever been rewritten in this fashion but the meaning of single words and whole phrases have been changed by this process. Cumulatively many individual interpretations bring about broad revisions. This final result is more apparent with the Federal Constitution than with state constitutions because that document is briefer and less detailed than most state documents. As noted by one constitutional scholar:

"The importance of interpretation to state constitutional change and growth should not be overlooked. State constitutions do change and grow by interpretive action of the governors, legislatures, courts, and the people — but with one striking difference of degree when compared with national constitutional growth. The detailed language of most state constitutions leaves far less room for change and growth by interpretation. As a medium of state constitutional change, interpretation may be secondary to the more formal processes of amendment or revision."

The judicial branch may, of course, construe constitutional provisions so strictly that interpretative change or growth becomes

1 Ernest R. Bartley, State Constitutional Revision, p. 23.
almost impossible. In general the high courts of many states have followed the doctrine of strict construction, whereas the federal judiciary has taken a more liberal course. In part, this contrast is explained by the more specific and detailed nature of the language in state constitutions which supports an easier judicial rationalization of the doctrine. Careful studies of interpretive changes in such documents show that the many and detailed limitations placed upon state government exercise a greater effect than do political, judicial and popular influences.

Collectively, these factors discourage substantial change or growth in state constitutions by means of interpretation, and prompt comments such as the following:

"the fact that the national Constitution is brief and is written in broad, general terms has made it flexible enough so that it can be interpreted without change in the basic language to meet the demands of a rapidly expanding and changing society. State constitutions, too, must be adjustable . . . to meet changing circumstances. If such adjustments cannot be effected, the state and its citizens must suffer — and await drastic surgery to correct the situation."1

Using the Federal Constitution as a Model

Many advocates of constitutional revision argue that state constitutions would be improved if, like the Federal Constitution, they were limited to fairly short, generalized statements of fundamental law. These advocates stress the relative infrequency of amendment made over the years in the federal document as one of the principal virtues of its brevity and generality.

However, any consideration of this preference for the Federal Constitution must recognize that certain functions are served by state constitutions which vary basically from those underlying the Constitution of the United States. Thus, the Federal Constitution embodies a delegation of enumerated powers, prescribes the structure of government to exercise those enumerated powers, and places certain limitations upon both the central and state governments. On the other hand, a state constitution invests all governmental powers of the people of a given sovereign state in its state government, except such powers as have been reserved or delegated to the federal government in the Federal Constitution. As one observer puts it, both the Federal Constitution and the

1 Bartley, p. 22.

Our Constitution is too precious to be tinkered with just for the sake of change alone, or to 'modernize' it in the interests of theoretical structural perfection. Neither do I subscribe to the idea that we should have a short, 'model' constitution. The enactment of a new, short, generalized or 'simplified' Texas Constitution would obviously necessitate the generation of an entirely new body of law by way of legislative enactment and judicial interpretation. Actually, there is no such thing as a model constitution in the United States. In this country the states are distinctively individualistic in history, economy, people, popular objectives, et cetera, and hence their constitutions differ. There are, of course, certain threads of governmental philosophy common to the people of all our states, but

this fact alone is not reason enough to advocate and expect the formulation of model constitution that would serve all fifty states equally well."

Change By Formal Means.

Many persons in various jurisdictions who have studied the provisions of their state constitutions believe that full scale revision is necessary to improve their fundamental law. Nevertheless, the tendency persists to seek such improvements from "piecemeal patching" of state constitutions rather than to undertake the more onerous task of revising the entire document. Individual amendment is still the most frequently used method to effect necessary change.

States use different devices at different times to alter their constitutions. Originally, some of the states allowed constitutional changes to be made by the legislatures, while others granted this function to constitutional conventions specially chosen for this purpose. Gradually, a distinction was drawn between amending and thoroughly revising the document. Thereafter the amending process was used when only minor alterations were desired while thorough revision became the province of specially elected constitutional conventions. At the turn of the 20th century, Oregon introduced a third method of change: the constitutional initiative. Finally, the constitutional commission is a fourth method which has recently gained popularity, although it is without express recognition in the constitution of any state.¹

Massachusetts has employed three of these four methods to alter its constitution. Two successive, separately elected legislatures sitting in constitutional convention; may adopt amendments; these amendments must then be submitted to the people for ratification by a majority vote. Use has been made of a specially elected constitutional convention, most recently in 1917-1918; the people must also ratify the work of such a convention. Finally, the initiative and referendum may be used, as set forth in Article 48 of the Amendments to the Massachusetts Constitution. These three

² Albert L. Sturm, Government Research Bulletin, Florida State University, September 1965, p. 3.
Constitutional Change by Amendment

Every state requires two steps be taken before an amendment can be added to the constitution: (1) the amendment must be initiated, and (2) it must be ratified.

As to initiation, three methods are employed among the states: (1) by legislative action, (2) by state convention, and (3) in some states, by formal initiative petitions. Only a few states allow free selection of any one of these three methods to be used. Most of the states authorize the use of either of the first two methods.

All of the states provide at least technically for some kind of legislative initiation. Most of them as shown in Table 2 require an unusual majority of both houses to initiate an amendment, and a few require passage by two successive legislatures. There are numerous other variants. As discussed later, a state legislature may at times create a constitutional revision commission to bring recommendations to the legislature before it considers whether formally to initiate a specific amendment or amendments. This step often reflects a particular need or a political development.

A constitutional convention, on the other hand, is primarily regarded as an instrument for drafting an entirely new constitution or overhauling an old one. But a convention may also be used to initiate amendments to an existing document. The procedure for calling a convention summarized in Table 4 usually involves action by the legislature, followed by an affirmative vote of the people.

In 13 states, Massachusetts included, amendments to the state constitution may be initiated directly by the people through the use of the initiative petition signed by a specified minimum number of persons. In Massachusetts the number must be equal to at least 3 per cent of the voters casting ballots for the governor at the last general election. The initiative petition is used frequently in some states, rarely in others, and in one state, Idaho, it has yet to be utilized.

Ratification of constitutional amendments is achieved by vote
of the people in all states, except Delaware, regardless of how the amendment may have been initiated.

**TABLE 2**

**METHODS OF AMENDING STATE CONSTITUTIONS**

(OTHER THAN CONSTITUTIONAL INITIATIVE)

<table>
<thead>
<tr>
<th>Proposal by Legislature</th>
<th>Popular Ratification</th>
<th>States</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Majority of votes cast</td>
<td>Ill., Wyo.</td>
</tr>
<tr>
<td></td>
<td>Majority vote on amendment and approval of next Assembly</td>
<td>S. C.</td>
</tr>
<tr>
<td>2/3 each house</td>
<td>Majority vote on amendment</td>
<td>Me., Alas.</td>
</tr>
<tr>
<td>(b)</td>
<td>Majority of votes cast</td>
<td>Miss.</td>
</tr>
<tr>
<td>3/5 members elected</td>
<td>Majority vote on amendment</td>
<td>Ala., Fla., Ky., Md., Neb., N. J., Ohio</td>
</tr>
<tr>
<td>3/5 each house</td>
<td>Majority of votes cast</td>
<td>N. C.</td>
</tr>
<tr>
<td>Majority members elected</td>
<td>Majority vote on amendment</td>
<td>Miss., N. M., N. D., Ore., S. D.</td>
</tr>
<tr>
<td>Majority each house</td>
<td>Majority of votes cast</td>
<td>Okla.</td>
</tr>
<tr>
<td>Majority members elected; two successive sessions</td>
<td>Majority vote on amendment</td>
<td>Ind., Ia., Mass., Nev. N. J., N. Y., Pa., Va., Wis.</td>
</tr>
<tr>
<td></td>
<td>3/5 votes on amendment</td>
<td>R. I.</td>
</tr>
<tr>
<td>Other</td>
<td></td>
<td>Conn., Del., N. H., Tenn., Vt., Hawaii</td>
</tr>
</tbody>
</table>

* Ratification may be by a majority of voters at election of members of General Assembly or 2/3 vote on amendment.

* 2/3 vote on each of 3 successive days.

* Either method of initiation may be used.

* Majority lower house; 2/3 each house, next session. Ratification by majority of voters in town meeting.

* 2/3 members elected, two successive sessions. No popular ratification.

* Amendments proposed by convention.

* Majority members elected; 2/3 members elected, next session. Ratification by majority of votes cast for Governor.

* 2/3 vote Senate, majority House; majority members elected next session. Ratification by majority voting on amendment.

* 2/3 vote into each house, after either or both houses give Governor 10 days written notice of final form of proposed amendment or (with or without notice to Governor) majority vote of each house at two successive sessions. Ratification (general election) majority of votes cast, such majority being at least 35% of total votes cast; ratification (special election) majority of votes cast, such majority being 35% of registered voters. Special requirements are set to change representation of senatorial districts.

### TABLE 3.

**AMENDMENT OF STATE CONSTITUTIONS BY INITIATIVE PETITION**

<table>
<thead>
<tr>
<th>State</th>
<th>Size of petition</th>
<th>Referendum vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>15% of total voters for Governor at last election</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>Arkansas</td>
<td>10% of voters for Governor at last election including 5% in each of 15 counties</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>California</td>
<td>8% of total voters for Governor at last general election</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>Colorado</td>
<td>8% of legal voters for Secretary of state at last general election</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>Idaho</td>
<td>10% of total voters for Governor at last general election</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>3% of total vote for Governor at preceding biennial state election, no more than ¼ from any one county</td>
<td>30% of total voters at election and majority vote on amendment</td>
</tr>
<tr>
<td>Michigan</td>
<td>10% of total voters for Governor at last general election</td>
<td>Majority voting in election</td>
</tr>
<tr>
<td>Missouri</td>
<td>8% of legal voters for Governor at last general election in each of 2/3 of the congressional districts in the state (a)</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>Nebraska</td>
<td>10% of total votes for Governor at last general election including 5% in each of 2/5 of the counties</td>
<td>Majority vote on amendment (b)</td>
</tr>
<tr>
<td>Nevada</td>
<td>10% of total votes cast in 75% of the counties at last general election</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>North Dakota</td>
<td>20,000 of electors</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>Ohio</td>
<td>10% of electors</td>
<td>Majority vote on amendment</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>15% of legal voters for office receiving highest number of votes in last general state election</td>
<td>Majority voting in election (c)</td>
</tr>
</tbody>
</table>

(Continued)
TABLE 3. (Continued)

| Oregon | Not more than 10% of Majority vote on amendment legal voters in last election for Justice of Supreme Court (a) |

(a) Legislature is empowered to fix a smaller percentage.
(b) Votes cast in favor of amendment must be at least 35% of total vote at election.
(c) If amendment is voted on at general election, ratification is by majority voting in election. If it is voted on at a special election, ratification is by majority vote on the amendment.


Constitutional Change by Convention Method

Full discussion of the convention as a method of constitutional amendment could command a lengthy volume. However, that method is not the subject of this report and it is discussed here only briefly to distinguish it from other methods of changing a constitution.

The use of the convention to change our fundamental law is popular. It has been employed more than 200 times among the American States. Massachusetts has resorted to this technique on four occasions: The original Constitution of 1780 was the product of the first constitutional convention; a second convention occurred in 1820; a third convention of 1853 proposed an entirely new constitution which was rejected by the people; and the fourth convention in 1917-1918, resulted in further amendments and produced the great "rearrangement" controversy discussed in Chapter VI.

The importance and contribution of the convention as a method of constitutional change has been stressed in many volumes devoted to political science, law and history. In Massachusetts, the significance of its original constitutional convention was dramatically underscored by the following comment of a leading American political scientist some years ago:

"If I were called upon to select a single fact or enterprise which more nearly than any other thing embraced the significance of the American Revolution, I should select — not Saratoga or the French Alliance, or
even the Declaration of Independence — I should choose the formation of the Massachusetts Constitution of 1780; and I should do so because the Constitution rested upon the fully developed convention, the greatest institution of government which America has produced, the institution which answered, in itself, the problem of how men could make governments of their own free will..."

### Table 4.

#### CONSTITUTIONAL CONVENTIONS

<table>
<thead>
<tr>
<th>State or other jurisdiction</th>
<th>Vote required in legislature(s)</th>
<th>Approval by two sessions</th>
<th>Referendum vote</th>
<th>Popular ratification of convention proposals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Maj.</td>
<td>No</td>
<td>ME</td>
<td>(b)</td>
</tr>
<tr>
<td>Alaska</td>
<td>Maj. (c)</td>
<td>No</td>
<td>MP</td>
<td>Y</td>
</tr>
<tr>
<td>Arizona</td>
<td>Maj.</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Maj. (d)</td>
<td>No</td>
<td>—</td>
<td>MP</td>
</tr>
<tr>
<td>California</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>ME</td>
</tr>
<tr>
<td>Colorado</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>ME</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Maj. (d)</td>
<td>No</td>
<td>—</td>
<td>X</td>
</tr>
<tr>
<td>Delaware</td>
<td>2/3</td>
<td>Yes</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Florida</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Georgia</td>
<td>2/3</td>
<td>No</td>
<td>—</td>
<td>MP (e)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>(c)</td>
<td>No</td>
<td>MP</td>
<td>MP (f)</td>
</tr>
<tr>
<td>Idaho</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Illinois</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>ME</td>
</tr>
<tr>
<td>Indiana</td>
<td>(g)</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>Iowa</td>
<td>(h)</td>
<td>—</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Kansas</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Maj.</td>
<td>Yes</td>
<td>MP (1)</td>
<td>X</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Maj. (d)</td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Maine</td>
<td>2/3</td>
<td>No</td>
<td>—</td>
<td>X</td>
</tr>
<tr>
<td>Maryland</td>
<td>(j)</td>
<td>No</td>
<td>ME</td>
<td>MP</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Maj. (d)</td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Michigan</td>
<td>Maj. (k)</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Minnesota</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>(1)</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Maj.</td>
<td>No</td>
<td>—</td>
<td>X</td>
</tr>
<tr>
<td>Missouri</td>
<td>(m)</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Montana</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>ME</td>
</tr>
<tr>
<td>Nebraska</td>
<td>3/5</td>
<td>No</td>
<td>MP (n)</td>
<td>MP</td>
</tr>
<tr>
<td>Nevada</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>(o)</td>
<td>No</td>
<td>MP</td>
<td>(p)</td>
</tr>
<tr>
<td>New Jersey</td>
<td>(g)</td>
<td>—</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>New Mexico</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>New York</td>
<td>Maj. (q)</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
</tbody>
</table>

1 Andrew C. McLaughlin, Quotation from American Historical Review XX, 264.
### SENATE—No. 845.

<table>
<thead>
<tr>
<th>State</th>
<th>rv</th>
<th>No</th>
<th>ME</th>
<th>X</th>
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</thead>
<tbody>
<tr>
<td>North Carolina</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>X</td>
</tr>
<tr>
<td>North Dakota</td>
<td>(g)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>(r)</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Oregon</td>
<td></td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>Maj.</td>
<td>No</td>
<td>MP</td>
<td>Y</td>
</tr>
<tr>
<td>Puerto Rico</td>
<td>2/3</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Maj.</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>South Carolina</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>X</td>
</tr>
<tr>
<td>South Dakota</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>X</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Maj.</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Texas</td>
<td>Maj.</td>
<td>No</td>
<td>MP</td>
<td>MP</td>
</tr>
<tr>
<td>Utah</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>ME</td>
</tr>
<tr>
<td>Vermont</td>
<td>(g)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Virginia</td>
<td>Maj.</td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Washington</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>ME</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Maj.</td>
<td>No</td>
<td>ME</td>
<td>ME</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Maj.</td>
<td>No</td>
<td>MP</td>
<td>X</td>
</tr>
<tr>
<td>Wyoming</td>
<td>2/3</td>
<td>No</td>
<td>ME</td>
<td>Y</td>
</tr>
</tbody>
</table>

**ME**—Majority voting in election.  
**MP**—Majority voting on the proposition.  
**X**—There appears to be no constitutional or general statutory provision for the submission of convention proposals to the electorate in these states, but in practice the legislature may provide by statute for popular ratification of convention proposals in specific instances.  
**Y**—Popular ratification required by no provision for size of vote.  
(a) The figure shown in this column refers to the percentage of elected members in each house required to initiate the procedure for calling a constitutional convention.  
(b) In 1955 the Alabama Supreme Court, in an advisory opinion, indicated that a constitutional convention could not adopt a constitution without submitting it to popular ratification.  
(c) Question must be submitted to the electorate every 10 years.  
(d) In the following 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 convention has been established in practice by statute, opinions of Attorneys General, and court decisions.  
(e) Amendments of a local nature must receive a majority vote only in subdivision affected.  
(f) Majority must be 35% of total vote cast at election; at a special election, the majority must be 35% of the number of registered voters.  
(g) In the following states—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.  
(h) Proposal automatically put on ballot every 10 years since 1970.  
(i) Must equal ¼ of qualified voters at last general election.  
(j) Question must be submitted to the electorate every 20 years beginning 1970.  
(k) Question must be submitted to the electorate every 16 years beginning with the general election in 1978.  
(l) 3/5 voting on question.  
(m) Question must be submitted to the electorate every 20 years.  
(n) Must be 35% of total vote cast at election.  
(o) Question must be submitted to the electorate every seven years.  
(p) 2/3 voting on question.  
(q) Question must be submitted to the electorate every 20 years beginning 1987.  
(r) Question must be submitted to the electorate every 20 years since 1907.  
(s) Convention may not be held oftener than once in six years.

The idea of a constitutional convention was of grass roots origin. As early as 1776, three towns in Massachusetts (Middleborough, Concord and Acton), suggested that a legislature was not the proper body to draft a constitution, and that a constitutional convention should be elected for that purpose. At their town meetings these three communities adopted resolves to that end, apparently the earliest suggestions of a formal constitutional convention. The General Court nevertheless drafted a constitution but the people rejected it. Thereupon, the Legislature, at the suggestion of the three towns, requested the people at their various town meetings to decide whether they wished to elect a constitutional convention. The response was favorable and the Convention of 1779-1780 was called consisting of delegates elected by the towns on the basis of their representation in the General Court. This convention produced the Massachusetts Constitution.

The convention method, based upon the people's election of delegates for the specific purpose of constitutional revision, carries with it a sanction and a prestige not found in other methods. Historically and legally, it is the direct voice of the people. In most states, the legislature places the question of calling a convention upon the ballot for popular decision. If approved, legislation is then enacted covering the mechanics of selection of delegates, appropriations to meet expenses, and the time and place of convening. There is no way of forcing a legislature to put the question of a convention before the people, hence, even in states that require periodic submission of the question to the voters it has been sometimes ignored. Alaska and Hawaii, however, assure the voters of the opportunity to vote on the question by requiring an executive official to submit the question periodically.

But the convention method has come under its share of criticism, as witness the following example:

"... Mythologically, it is the personification of the sovereign people assembled for the discharge of the solemn duty of framing their fundamental law. It is supposed to be above politics and to have no peers among governmental agencies. Yet, experience has shown that the convention rarely rises above the legislature in the quality and experience of its membership and that pressure groups and political parties have

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significant influence upon its deliberations. The cost of convening and
holding a constitutional convention has become practically prohibitive.
Many states in recent years have turned from conventions to constitu-
tional commissions that consist of experts who report to the governor and
legislature and whose handiwork is submitted for popular vote, if ap-
proved by these political organs of the government. The saving in time
and expense and the gain in the quality of the work done should com-
mend this new American institutional device to constitution framers as
a replacement for the constitutional convention.”

Constitutional Change by a Commission

The foregoing discussion has dealt with three of the methods
used by Massachusetts to alter its constitution: (1) legislative
amendments that must be submitted to the people for ratifi-
cation, (2) a specially elected constitutional convention, also
followed by popular ratification, and (3) the initiative and ref-
endum.

A fourth method of constitutional alteration — a constitu-
tional revision commission — has been utilized in this Com-
monwealth, though it appears to be still in the experimental
stage.

Since this method of constitutional revision is the subject of
House, No. 2267, the partial directive of this report, a closer ex-
amination of the commission approach is presented in succeeding
chapters, giving (1) a general discussion of constitutional revi-
sion by commission, (2) recent experience in Massachusetts with
the commission device, and (3) a comparison between the com-
mision proposed by House, No. 2267 and the existing special
commission on constitutional revision.

CHAPTER V.

CONSTITUTIONAL REVISION BY COMMISSION

The Development of Continuous Revision

Extreme difficulty is usually encountered in the periodic revi-
sion of almost every state constitution. There are many reasons

1 Harvey Walker, State Constitutional Revision, pp. 15-16; see also Harold M.
Quarterly Review, pp. 22-23 (December 6, 1947).
for this fact, some elusive complex but a few that can be identified. The more frequent difficulties are cited by one authority as being psychological, legal and political, — along with the resistance of the always present pressure groups. These difficulties are considered separately below.

_Psychological._ In many jurisdictions an otherwise commendable respect for heritage is carried so far with reference to constitutional revision as to adversely affect the community's best interests. Citizens may be ignorant of the contents of their state constitutions, yet they vigorously oppose any attempt at modification. In addition, the passive ignorance and indifference of many members of the public raise barriers. They assume the constitution is a wholly good document without making the effort to understand that the important obstacles to the best government operation are due to various types of constitutional defects.

_Legal and Political._ Doubts of early drafters of state constitutions about the capacity of their successors to match their wisdom and ability have motivated an almost incredible set of legal technicalities which make the achievement of constitutional change most difficult.

_Pressure Groups._ The influence of a wide variety of pressure groups is one of the greatest obstacles to constitutional revision. Well organized and well financed, these groups uncompromisingly oppose revision, whether or not their opposition is in the public interest.

At least some of the Founding Fathers appear to have been fully convinced that continuous revision of our fundamental law was necessary. Jefferson is reported to have advocated the automatic periodic termination of all written laws so that the people would be brought face to face with the problems of their society and its government. Several state constitutions provide for mandatory periodic consideration of proposed amendments at intervals ranging from seven years to 20 years.

Originally, continuous revision appears to have meant periodic review of a constitution and the use of the amending procedure

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1 W. Brooke Graves, 40 Nebraska L. Rev. 560, 561-564.
2 Graves, op. cit., p. 565.
to bring about such changes as might be necessary. Periodic revision has largely failed to accomplish its purpose of keeping constitutions up-to-date. Complete or thorough revisions have been infrequent and difficult. In many cases they have been impossible of achievement. Meanwhile, the social, political, economic and technological changes in our society have continued at an accelerated pace. Effective government cannot remain immobile under such circumstances.

Modifications have been added to the original theory of continuous revision. On this score one assumption is that normal use of the amending procedure will not serve to keep the document up-to-date. Another approach is to look toward an established commission which constantly engages in the study of constitutional problems and makes recommendations to the legislature as need requires.

The modern concept of continuous revision first appeared in Kentucky in 1949, when the Governor created a Constitutional Review Committee by executive order. This body was continued by law as an independent agency in 1950. Subsequently, expressions of the same idea appeared, almost a decade later, in the three widely separated states of New York, North Carolina, and Texas.

In North Carolina, the concept of continuous revision involves nothing more than the normal use of the amending procedure. By adopting 125 of 161 proposed amendments affecting the content of all but one article of the constitution in the last ninety years, it is contended that the state has in fact been following a policy of continuous revision.¹

In New York and Texas, continuous revision has quite a different connotation, which envisions a procedure more in keeping with present needs. The Texas Citizens Advisory Committee on the Revision of the Constitution expressed the idea in this rather guarded and cautious proposal:

"And finally, when this Committee completes its allotted tasks, thought should be given to whether or not the State should establish a permanent constitutional committee, which would make continuing studies of the effectivity of the Constitution and periodically report to the legislature and the people of Texas on its findings."

In New York, two conflicting facts caused difficulties, namely, a popular rejection of a proposal to call a constitutional convention in the face of a generally recognized need for constitutional change;\(^1\) against this background, state leaders seek a means of providing guidance and momentum to the kind of continuous revision to make the state constitution "more responsive to the needs of modern life." For this purpose they reconstituted a previously existing commission as the Temporary Commission on the Revision and Simplification of the Constitution. This Commission has published a number of significant reports.

\textit{The Commission as a Revision Device}

As a device for achieving constitutional change, the commission method of approach has a rather meager record. Still, it continues to attract interest as a vehicle of instituting change and several such commissions have been established in recent years.

\textit{Commission Types and Operations}\(^2\)

Constitutional commissions have been classified into four categories discussed below: (a) statutory, (b) executive, (c) legislative, and (d) special advisory. The first three are concerned almost exclusively with constitutional matters while the fourth embraces a variety of official groups concerned directly or indirectly with constitutional amendment and revision.

(a) \textit{Statutory Commissions}. A statutory commission is one created by law to recommend constitutional change to the legislature. Membership varies, e.g., Florida established a 37 member body in 1955, while Kentucky set up a seven member commission five years earlier. Recent statutory commissions in New York, North Carolina and Pennsylvania each consisted of 15 members. Vermont, which sets up a constitutional commission at the end of every decade, has kept its membership at eight.

As to the authority which appoints commission members, practice again varies. The Governor of Kentucky appointed all the members to the state's commission. In Florida, the Governor appointed only eight of the 37 members; another 18 of the members were appointed by the Florida Legislative Joint Committee on Constitutional Revision and Development.

\(^1\) A convention has been called for 1967, see p. 22 supra.

\(^2\) Most of the material on the commission method is drawn from various articles by Dr. Bennett M. Rich, noted author and professor of Political Science.
ship were legislators, namely, the Senate President, the House Speaker and the eight members from the two houses who constitute the Legislative Council; five appointments were made by the state supreme court Chief Justice; another five members were appointed by the state bar; and finally, the Attorney General was also a member. In Pennsylvania and New York, the 15 appointments were equally divided among the Governor, the Senate President pro tem and the House Speaker. North Carolina, on the other hand, directed the Governor to make all 15 appointments.

Not every statutory commission reports to the Legislature. A commission may, for example, be instructed to collect and prepare information for the use of the delegates to a constitutional convention. In Pennsylvania the enabling act authorized the commission to recommend amendments, or to act as a preparatory commission for a convention if the commission determined a general revision of the constitution was to be attempted.

(b) Executive Commissions. This category is restricted to those constitutional commissions that are created by action of the Chief Executive alone. Like statutory commissions, their primary function is to recommend revision. Among the five states that have utilized this type of commission are Florida and Kentucky, both of whom used the statutory commission as well. In Kansas, the Governor appointed a 21 member commission and instructed it to establish its own objectives and procedures.

(c) Legislative Commissions. The third category consists of commissions that are responsible to the Legislature alone. Four legislatures have created this type of commission in recent years, but most states authorize the Governor to share in the appointment of members. The legislatures have employed concurrent or joint resolutions in establishing such commissions. These commissions act independently of the legislative bodies and are distinguished from legislative joint committees.

(d) Special Advisory Units. This category differs mainly from the above three commissions in that constitutional revision may be only one of many concerns. The Texas Legislative Council, for example, made a constitutional revision study for the Legislature as did a specially created-Citizen Advisory Committee authorized by the same resolution. Kentucky's General Assembly in 1960
created a constitutional revision committee as an agency of its Legislative Research Commission. Connecticut's Commission of State Government Organization, popularly known as the "Little Hoover Commission", prepared a draft of a completely revised constitution in its 1950 report. Louisiana's State Law Institute, an official law revision agency, was directed by statute to prepare a draft of a new constitution.

Aside from their mode of origin, constitutional commissions can also be classified according to purpose. One such category includes those commissions that recommend changes to the legislature, while another is comprised of those that prepare materials and discussions for a convention. Yet the manner of a commission's creation may be of the utmost importance for its success, particularly with respect to the degree of acceptance of its recommendations by the legislature and by the people. Thus, commissions established by law have at least the nominal support of the legislative and executive branches. On the other hand, a commission created by only one of these two branches may not have the support of the other. Experience shows that commissions created by the Chief Executive have the most difficulty.

The origin of a commission also may explain why a particular method of originating the body was chosen. In one state the manner of creation was directly linked to political maneuvering incident to a gubernatorial election. In this case the bill to create a commission was vetoed by the Governor because he could not control enough of the appointments, whereupon the legislature created the commission by joint resolution.

Persons selected to serve on a constitutional commission are usually prominent in business, education and government. Perhaps the major problem in the establishment of a commission is to obtain members who have available a sufficient amount of time to become fully informed on complex constitutional issues. The nature of a constitution requires that members of such commissions possess both an adequate background and political sensitivity. An intimate understanding of the issues, coupled with the patience to seek appropriate solutions, is more likely to come from persons having the time and disposition to devote to the varied problems that will arise.
Most constitutional commissions operate in a similar manner regardless of their basis of classification. They usually establish committees to share the total work load, and so assign members as to obtain the maximum benefits from the specialized knowledge of the appointees. Such committees are assigned substantive areas in which to work, for example, local government, executive branch and elections. Some committees are established to deal with procedural areas, such as a steering committee or a public information committee.

Another approach is to establish committees to analyze the Constitution by sections and to recommend work only on those sections that are in need of revision. This approach requires some form of liaison or work coordination when the constitutional provision relates to more than one subject.

It is now standard practice to hold public hearings, the number and location of which will vary according to policies established by each commission. In some cases the hearings may be restricted to certain groups such as representatives of state organizations, state officials and legislators. Adequate funds to provide technical assistance to the commission are not always forthcoming. As a result, some commissions with generous appropriations may be able to complete a substantial amount of work whereas others can accomplish little with only meagre funds. New York and Florida have been particularly generous, for example, with appropriations of $150,000 and $100,000, respectively. Other states have appropriated only token sums. The revision commission established in Massachusetts in 1962 received an appropriation of $10,000.¹

**Legislative Control**

The Legislature makes or breaks a constitutional commission, since it must approve or reject whatever the commission recommends. Hence, the commission at the outset must decide whether to limit its recommendations to what the Legislature will probably accept, thereby gaining greater assurance that the commission's recommendations will be looked upon with legislative favor. On the other hand the commission may decide on a major revision

employing boldness. Such an approach improves the opportunity to dramatize needs and set the sights of the public somewhat higher, but it faces greater difficulties when legislative considerations are to the fore.

Control by the Legislature begins with the jurisdictional scope of the commission. This scope is fixed by the Legislature in an enabling act or in a joint resolution or other method of establishing the commission. Authority to consider certain constitutional issues can be denied at this stage. Direct representation on the commission is another means of control by the Legislature. Thus, with the power (a) to limit the scope of a commission, (b) to place its own members on the commission, and (c) to screen all recommendations of the commission, the Legislature is obviously in a position either to give its blessing to, or to emasculate, the work of a commission.

Substantial benefits have been obtained in a few states from the work of constitutional commissions, but over the past several decades, the results achieved by constitutional commissions have not been distinguished. Yet the constitutional commission continues to be a popular device. Reasons for this continued popularity vary among the states. Probably the ease in setting up a commission, as distinguished from the difficulties of the formal and formidable convention process, is a very important consideration. A more practical consideration also deserves mention; obstacles arising from a convention approach may cause a commission to be created as a necessary alternative. Furthermore, the commission is an ideal vehicle for a Governor to suggest when difficult problems call for solution.

Commissions have also been employed as a delaying tactic against reform movements. For those individuals who want to preserve the status quo, a commission becomes a useful defense. As long as it is in existence there is the appearance of something being done, and in that interval the strategy can be devised to avoid action or simply to wear out the proponents who wish to see changes adopted. Obviously, legislators can be happy with the commission approach. Nothing a commission does can have any effect without legislative approval. Its recommendations cannot
go on the ballot directly because all proposals must go first to
the Legislature for approval, modification or rejection.

The very nature of a commission puts it at a disadvantage insofar as promotion of its program is concerned. Meeting only sporadically, faced with difficulty in sustaining interest in its operations, commission members must wait upon legislative action before campaigning for public support of its recommendations if indeed its proposals get that far. Nevertheless, it is argued that the constitutional commission has its place. It can help to educate the public on important constitutional issues. It can propose amendments of a technical nature even though the commission lacks a strong legal position and the dynamic character and drama of a constitutional convention.

*Commission v. Convention: Pros and Cons*

Because commissions came into use later than the convention as a revision instrument, proponents of the commission method claim it has certain advantages that are an improvement over the convention.

Thus, proponents of the commission frequently claim that establishment of a constitutional commission is politically more feasible than the calling of a constitutional convention. They point out that state legislators realize that any proposals made by the commission must clear the legislature before they can be submitted to the electorate in constitutional amendments. On the other hand, the product of a constitutional convention goes directly to the voters, or is promulgated by the convention, without any legislative check.

"Consequently, the state legislature will be less fearful of creating a revision agency in the form of a commission over whose work the legislature will have final scrutiny than it would be in taking steps for the calling of a convention over whose final product the legislature would have no further jurisdiction.”

Proponents emphasize that the personnel of a constitutional commission is generally of higher caliber than that of a consti-

tutional convention. More capable persons are said to be obtained through appointment than by election. As an example proponents note that services of an expert can often be obtained more readily through appointment and that many individuals hesitate to engage actively in a political campaign to win a convention seat.

It is also claimed that a commission appointee tends to be less partisan than is a convention member. Proponents believe that a commission is less susceptible to influences of special interests, and that commission members are less prone to fall into the usual factional alignments that show up in a convention.

Finally, proponents claim experience demonstrates that commissions can perform their work more quickly and at less cost than do conventions. Seldom does a commission exceed 20 members. Thus, a commission can dispense with the time consuming formalities and rules necessary to a larger body. Such procedure in turn stimulates informal discussion and better resolution of a consensus on the major issues.

Opponents of the commission method hold, however, that the electorate is more suspicious of proposals framed by a small, appointive group than those framed by a popular elected body. They believe that the smallness of a group restricts its ability to be as representative of all interests. A small group also eliminates the readier acceptance of proposals that emerges from the hard bargaining and compromising that is characteristic of a larger, more democratic group.

The most common defect ascribed to the commission, when compared to the convention, is that the legislature's ability to check the proposals of the commission makes it much more difficult to bring about a major revision. Critics say that a commission, knowing this, is more likely to measure its proposals in terms of legislative acceptance. Thus, highly controversial measures that would generate the wrath of the legislature are deliberately avoided. There are other frequently cited obstacles to constitutional revision, the most important of which were mentioned at the outset of this chapter. In sum, it may be said that revision must be indigenous to the people and this requires an educational campaign as well.
Comparative Analysis in 1962

In a comparison of theory with practice, two political scientists\(^1\) made a study of constitutional revision, basing their analysis on 20 hypotheses which they applied to such revisions in Georgia and Tennessee. Some of their hypotheses could not be tested but of those that were their findings are of interest. Georgia had used the commission method in a 1945 revision and Tennessee employed the convention method in a 1953 revision. The case studies produced the following conclusions:

**Experience in Georgia, 1943-44.** The Georgia Assembly overwhelmingly approved the Governor's proposal to establish a 23 member commission to revise the constitution of Georgia. The background of that commission's membership is of interest: (a) seventy-four percent of its members were current officeholders and another thirteen percent were previous officeholders; (b) seventy percent held college degrees; (c) of those appointed from the legislature, the average length of service was ten years and several were chairmen of important committees; (d) seventy-four percent of its personnel were members of the Georgia Bar (four were judges); (e) the average age was 48 and the median age was 47; and (f) fifty-seven percent were urban residents, twenty-one percent from predominantly rural areas. (The legislature itself was weighted in favor of rural areas.)

No special research agency was established to assist the Georgia Commission either before or during its deliberations. But its chairman, the Governor, secured the advisory services of four well known figures in the field of state constitutional revision: (1) Frank Bane, Executive Secretary of the Council of State Governments; (2) Walter Dodd, Professor of Political Science who had drafted the administrative reorganizations of the Illinois and Ohio Constitutions; (3) W. Brooke Graves, Professor of Political Science; and (4) Congressman Hattow Summers of Texas, Chairman of the U.S. House Judiciary Committee.

In a fourteen month period, the Commission was in formal session for only eleven days, because most of the work was done by standing committees in informal settings. No formal roll calls

\(^1\) Allen and Ransone, *supra.*
were taken, instead all voting was by voice and a show of hands. The total cost was $11,000.

**Political Feasibility of the Commission and the Convention.** One advantage cited in theory for the commission over the convention is the greater political feasibility of the former. This alleged superiority is based on the fact that any proposal made by the commission must be approved by the state legislature before it can be submitted to the electorate. Therefore the legislature will always have final check on the work of the commission, and hence is much more likely to approve its establishment.

On the other hand, the proposals of the constitutional convention are not referred back to the legislature. Any convention proposals submitted to the people go directly to the voters.

According to Allen and Ransone, experience in Tennessee (Convention) and Georgia (Commission) support their hypothesis that the Commission approach is politically more feasible.

**Time and Expense.** Because the membership of the commission is usually much smaller than that of the convention, it is alleged that the commission can perform its work more quickly and cheaply. Again the above case studies for Tennessee and Georgia confirm that claim since there were eight weeks of formal sessions in the Tennessee convention and only eleven formal meetings of the Georgia commission. Comparative costs reflected similar ratios — $73,000 for the convention as against only $11,000 spent for the commission. Moreover, the convention was considerably restricted in its activities whereas the commission dealt with the entire constitution.

**The Status Quo Barrier.** That opposition to constitutional revision comes principally from those who are afforded some special status in the existing document was borne out by developments in Tennessee and Georgia.

Aside from the final check that the Georgia Legislature had on the commission draft and the restricted jurisdiction of the Tennessee constitutional convention, there were also legislative deletions of the Georgia commission draft and active opposition and lobbying by affected interests in both states against the upsetting of any preferred status they had.
Makeup of a Constitutional Commission. A political commission has a unique character. Much of the general theory relative to the pros and cons of the constitutional commission versus the constitutional convention is based on the concept of an “expert” commission. Those experts consist of specialists, largely in law and political science, who ordinarily are not actively engaged in politics. However, as the authors of the case studies point out, generalizations based on this type of commission would not apply to a commission composed almost entirely of politicians.

Politicians would (as in Georgia) operate under different conditions than would a commission comprised largely of individuals previously removed from public life. Thus, in Georgia, many members of that commission were holding public office under the prevailing constitutional system. No doubt, as was observed, many had aspirations for future political life. “Naturally they were going to display deep concern for the reaction of the legislature, of special interests, and of certain segments of the electorate to their proposals.”

Patterns of Behavior of the State Constitution Makers. Based on experience in the two states being studied, certain types of members exhibit a similar pattern of behavior concerning their degree of willingness to accept constitutional reform. Three such types were found by Allen and Ransone, as follows: (1) members with either clearly urban or clearly rural background, (2) members with political experience and those without political experience, and (3) older and younger members. They exhibit the following characteristics.

(1) The members of constitutional revision agencies from rural areas are more reluctant to accept constitutional change than are those from urban areas. This reluctance reflects the fact that most state constitutions were framed when populations were largely rural, whereas pressures for change tend to come from urban areas that seek to adjust for population growth and related socioeconomic problems. By nature, rural dwellers are said to be more conservative than urban people in accepting new ideas.

(2) The influence of public office is such that revision commissioners with past political experience are more likely to resist constitutional reform than those with no prior political experience. Political officeholders with experience are cautious because of (a) reluctance to upset the status quo, (b) their personal security or ambition, and (c) a more thorough knowledge of what is politically possible in a given state.

(3) Older members are not as likely to accept constitutional revision as are younger members. Even when the welfare of older persons is not at stake, they dislike to depart from the prevailing way of doing things.

Hence, Allen and Ransone urge in their study that those who decree the makeup of any revision agency should take into account the geographic factor, the influence of public office and the age of members.

Practical Reasons Justifying the Commission

In support of constitutional revision by a commission, advocates assert that there are practical reasons which may dictate this approach. Thus, the desired changes may be technical in nature. Or it may be that constitutional restrictions surrounding the calling of a convention may make the commission appear to be the only feasible solution. As opposed to the longer time needed for a convention approach, the commission method may offer a quicker reward. Or efforts to call a convention may have failed and only a commission approach will keep the revision issue alive.

Notwithstanding individual cases where exist special grounds for a commission, one observer cites three basic reasons for the commission's continued use, as follows: ¹

First, the commission appeals to revisionists because of the apparent ease with which proposals for constitutional change may be formulated. (However, it is often overlooked that amendments proposed by a commission are rarely adopted.)

Second, the commission is inexpensive, and may cost only a fraction of a convention's expenses. (But it must be remembered that most commissions fail whereas most conventions succeed.)

¹ Bennett M. Rich, Revision by Commission, 40 National Municipal Review 201 (1951)
Third, legislators are more receptive to a commission than to a convention because of the legislative veto, whereas a convention's work is submitted directly to a referendum. Thus, the creation of a commission has a dual result. The cry for action by the revisionist is met, at least temporarily. At the same time, any proposal endangering the legislative status quo may be sent to a committee for appropriate burial.

As previously stressed, the attitude of the commission may become not "what is in the best interests of the state . . . but . . . what proposals will the legislature accept?" This aspect has been described as the "one inherent and fatal weakness"1 of the commission approach. Thus, certain subjects may be considered with thoroughness, while other basic issues are left untouched. A commission avoids the futility of suggesting reforms that a legislature would refuse to consider.

As stated in one commentary, "... few commissions measure up to expectations. Their members appear to be subject to the same prejudices and the same political pressures as the members of a legislature or a convention.2

It appears that a commission's greatest virtue is its contribution as an educational device. Through studies, hearings and reports, commissions have served (a) to inform the people of the need for amendment or revision, (b) to develop a greater public understanding of constitutional issues, and (c) to make suggestions of later use as a basis for revision. Were it not for these valuable educational services, the record of the commission in recent years would merit harsh judgment. One authority on the commission concludes:

"Persons seriously interested in thorough-going revision will do well to avoid the commission unless they have no alternative or unless they use it simply to prepare the ground for a constitutional convention."3

Notwithstanding this kind of criticism, it should not be overlooked that constitution-making is fundamentally political. And even though a commission does not have its basis in the constitu-

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It would be naive to think that any constitutional revision method can be wholly removed from politics, for the essence of politics is to acquire power, make policy, and control its execution. And writing or revising a constitution is applying politics and law making on their highest levels. It would be wholly unrealistic to suggest that members of a commission or any other agency of revision would or could be immune from the combined pressures of public opinion and interests affected by public issues.

CHAPTER VI.

THE MASSACHUSETTS PROPOSALS

Terminology of Bills Under Study

This chapter considers the text and objectives of two Massachusetts proposals, House, Nos. 922 and 2267. Both of them contain certain terms with important legal distinctions. Of these terms, the following half dozen are discussed below: the three words "rearrangement", "consolidation", and "recodification", which are used in House, No. 922, and the three words "amendment", "revision" and "simplification", found in House, No. 2267.

Selection of these words appears to have been deliberate, for the three words quoted from House, No. 922, are definitely more restrictive as grants of authority, according to a consensus of legal specialists.¹ The Supreme Judicial Court has indicated that the term "rearrangement" does not express revision, codification

¹ These opinions are those of (a) The Supreme Judicial Court in its decisions and opinions, (b) lawyers with specialized experience who replied to a request of the Legislative Research Bureau, i.e., the Executive Secretary to the Supreme Judicial Court; Senate Counsel; House Counsel; and Counsel to the Special Commission on Constitutional Revision, and (c) with respect to the term "rearrangement", the Chief Justice of the Maine Supreme Judicial Court. The Massachusetts Recodification Counsel did not reply to the request.
or the establishment of something new.\textsuperscript{1} Other authoritative sources concur in this view.

Senate Counsel states as his opinion that the three words used in House, No. 922, namely, "'rearrangement, consolidation and recodification' do not include or permit changes of substance or meaning."\textsuperscript{2} House Counsel agrees that these words, along with "simplification", used in House, No. 2267, "do not anticipate any change in the substantive law but rather to rearrange the present provisions of the Constitution in a more readable and easier to find code or complete system of positive law."\textsuperscript{3}

This view is also the case in Maine where the Supreme Judicial Court has the constitutional duty to "arrange" the state constitution at prescribed intervals. The Chief Justice of the Maine Court has stated that "The arrangement . . . has nothing whatsoever to do with substance."\textsuperscript{4} Similarly, Dr. Ernest R. Bartley, states that "A rearrangement is not considered a new constitution, or a revision of an old one, no substantive changes of importance are made."\textsuperscript{5}

Of interest are comments with respect to the use of the term "recodification" in House, No. 922. When used in connection with the constitution, Senate Counsel observes, the term "recodification" is peculiar in that the constitution is not a code which can be recodified. Counsel to the Special Commission on Constitutional Revision agrees that "A 'Recodification' would probably be a misnomer for the Constitution of Massachusetts as it has never undergone 'Codification'". Even "codification", he adds, would be a peculiar constitutional term as it is normally used with reference to statutory law of a given subject matter.

There is general agreement that the words "amendment" and "revision" permit substantive changes. House Counsel views an amendment as an act that "effects a change, adds or takes away

\textsuperscript{1} Opinion of the Justices, 233 Mass. 603, 609; Loring v. Young, 239 Mass. 349, 375.
\textsuperscript{2} Letter from Senate Counsel to Director of the Legislative Research Bureau, October 14, 1965.
\textsuperscript{3} Letter from House Counsel to Director of the Legislative Research Bureau, October 18, 1965.
\textsuperscript{4} Letter from Chief Justice Robert B. Williamson to Director of the Legislative Research Bureau, November 22, 1965.
\textsuperscript{5} State Constitutional Revision, ed. W. Brooke Graves, p. 24 fn. 2.
a substantive part.” “Revision” has a sweeping connotation in his view; it “contemplates a redrafting and simplification of the entire Constitution . . . (involving) the elimination of duplications, contradictions, obsolete . . . provisions, redundant, tautological, prolix and verbose provisions — it is a complete restatement of the law.” An individual amendment could have the broad impact of a revision depending on how it is drafted. Senate Counsel interprets “revision” as a term implying “that no mere rearrangement or consolidation without substantive changes is adequate.” Counsel to the Special Commission on Constitutional Revision believes that the only difference between revision and amendment is that the former possibly implies a “greater degree or size of amendment.”

The definition of “simplification” is more difficult. Apparently the term can mean substantive change if it is used with respect to deletions of words or phrases. But it is considered to be only a change in form when it is used with respect to rearranging sections or subject matter for easier readability or more effective utilization of the document. One commentator finds the term to be too vague to be used in important legislation.

“Consolidation” of material implies a shifting or rearranging which solidifies loosely connected or widely scattered materials. With one exception, “consolidation” received no special comment from the sources consulted. However, the Counsel to the Special Commission on Constitutional Revision feels that a “consolidation” would go further than a rearrangement by deletion of material that would be retained by a rearrangement, although perhaps in a different place in the document.

From such sources, it appears reasonable to conclude that a body authorized to “amend” or “revise”, or to make recommendations relative to “amending” or “revising”, is empowered to deal with changes in substance. It is also a reasonable conclusion that a body authorized to “rearrange”, or “consolidate” or “recodify” is limited to dealing with changes in form. When the word “simplify” is used with either category, it would seem that it would take on the general meaning of other words in the particular category in which it is found.

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1 See reference of Attorney General to grammatical use of these words in the Constitution, p. 58, infra, this report.
This proposal in the form of a constitutional amendment (its full text is reprinted in Chapter I) would introduce a new method whereby the Constitution of the Commonwealth could be improved and updated in so far as the form of the document is concerned. Its text is identical with House, No 2075 of 1966.

It is a novel approach in that it extends to the judicial branch, functions generally reserved to the people or their elected representatives. On the surface, the proposal does not suggest any drastic change and the evident deliberate choice of words indicates that the petitioners did not intend to grant the Supreme Judicial Court power to make substantive changes in the Constitution. However, it does give the court a toehold on changing the fundamental law of the Commonwealth, hence the inherent dangers of this proposal are indicated below.

House, No. 922 would require the state’s highest court, upon request of the Legislature to make recommendations for the rearrangement, consolidation and recodification of the Constitution. Clearly the initiative is with the Legislature, and the Court cannot act until the Legislature asks it for recommendations. Even after the proposed article is implemented by the Legislature another limitation is placed on the Court. It can only make recommendations which the Legislature can then accept, modify or reject. Thus, this Court invasion of the province of constitutional drafting is to be made with manifest restrictions.

Yet there are underlying uncertainties. For example, the Court already has authority to revise constitutional provisions through its power to interpret the constitution. To add even restricted authority to rearrange, or to consolidate provisions of the constitution, would put the Court in the unique position of drafting changes in the document that it alone will ultimately interpret. The Court has already defined a “rearrangement”, so as to limit that aspect of its activities under the proposed article. However, the Court conceivably might consider its prerogatives to be broader under the other two aspects of “consolidation and recodification of the Constitution”. Furthermore, if the Legislature accepted court recommendations and they were ratified, the Court would
still be the interpreter to decide whether the changes it recommended were of form or of substance. It is entirely possible that a "consolidation" of the constitution might change the fundamental law of the Commonwealth in whole or in part, as the following discussion indicates.

The Great "Rearrangement" Controversy

A great "rearrangement" controversy raged as a result of the Constitutional Convention of 1917-1918. This convention was the fourth in Massachusetts history to assemble for the purpose of revising the Constitution. One of its final acts of 1918 was the creation of a "Special Committee on Rearrangement" that was to meet after the 1918 election and seek to simplify the Constitution. As background, the Convention of 1853 had proposed an entirely new Constitution as an alternative to several specific amendments, but the people rejected the entire work of that third convention.

The proposed rearrangement drafted by the Special Committee on Rearrangement of 1918 reflected realization by the delegates during the debates in the 1917-1918 convention that adoption of all of their proposals by the people (as subsequently occurred), would mean that the Constitution would include 66 specific amendments since 1780.

The Special Committee reported its proposed rearrangement to a Special Convention Session in 1919. The rearrangement, consisting of a preamble and 158 articles classified by subjects and numbered consecutively, departed from the arrangement of the Constitution of 1780 and its amendments. The Convention quickly adopted the proposal and the people ratified it in November, 1919 by an overwhelming vote of more than 4 to 1 (263,354 to 64,978).

Problems arose almost immediately due to a single clause in Article 157 of the Rearrangement. In an earlier draft of this Article, the Rearrangement was explicitly referred to as a new Constitution, but, as finally passed by the Convention, it was referred to only as the "rearranged form" of the Constitution.

The Legislative Research Council gratefully acknowledges the commentary of Morris M. Goldings, Esq., Counsel to the Special Commission on Constitutional Revision, on this controversy, parts of which are incorporated in the text above.
Moreover, the debates in 1919 clearly recorded the question of one delegate who asked: "What is going to be the Constitution of Massachusetts, . . . Is it in this document?" The answer given from the delegates then on the floor was that the Rearrangement was not a substituted Constitution, but a rearranged one, and that the only legally binding document was the Constitution of 1780. Research indicates that the advocates of the Rearrangement as a new Constitution were then absent from the floor, and that, had they been present, they would have responded differently. As a result of these developments Article 157 came to be known as the "suicide clause" of the Rearrangement.

Not long after the 1919 approval, the Supreme Judicial Court rendered an advisory opinion on the question of whether the official title of the State Treasurer was that appearing in the Constitution of 1780 (Treasurer and Receiver-General) or that appearing in the Rearrangement (Treasurer) which had been ratified shortly before by the electorate. Placing heavy reliance on the debate on the floor, which is summarized above, the Court pointed out that the Convention failed to call for a gubernatorial proclamation announcing adoption of the Rearrangement by the people. It finally concluded that:

"Such a great charter cannot . . . be made subject in its 'meaning or effect' to another instrument . . . (The) Rearrangement is a rearrangement of the old, it is not the creation of a new form of government."


The Justices felt that the Rearrangement must be considered an important document, but they decided that the Constitution continued to be the 1780 document with amendments.

Advocates of the Rearrangement refused to give up. Since the Justices had not gone beyond expressing their views in an advisory opinion, they brought a test case to require the printing of the Rearrangement in every edition of the General Laws. Extensive briefs were filed and formal arguments followed. The Supreme Judicial Court invalidated the attempted Rearrangement, in Loring v. Young, 239 Mass. 349 (1921).

The important aspect of this experience is that (a) the Convention in authorizing a committee to draft a rearrangement, (b) the committee in carrying out its assignment, and (c) the Con-
vention in subsequently adopting its recommendations, *never tended* to alter the meaning, scope or effect of the then exist Constitution. Yet, as the Court pointed out in the Loring decision, changes in substance indeed resulted from the so-called rearrangement that purported to change only form. 239 Mass. 369-371. majority of the Court stated that this was enough to hold that the Constitution of 1780, as amended, stood as the fundamen law. It cited the statement in its earlier related opinion, "If the rearrangement were to be the Constitution, it would not be 'rearranged form;' it would be itself the entire substance and nature of the Constitution of 1780, as amended should prevail, (c) that the voters did not intend to adopt a new form of government, and (d) that the Constitution of 1780, with its amendments, was therefore still the fundamental law.

The depth of the Rearrangement controversy is emphasized by the fact that two members of the Court wrote lengthy dissents, a practice uncommon to the Massachusetts Court. One dissenting justice expressed the view that it could be inferred that the word "rearrangement" was in effect synonymous with the word "revision" or "codification" when related to the proceedings of the convention and subsequent adoption by the people. What was the minority view of that day might conceivably be the majority view of today or tomorrow.

Although the Loring decision still stands, the subject of "Rearrangement" did not immediately die. A Senate Resolve of 1924 providing that the Rearrangement of 1919 shall be the Constitution of the Commonwealth was referred to the Attorney General (Hon. Jay R. Benton) for an opinion. While the Opinion of the Attorney General could not affect the Loring conclusion, what he stated is of interest:

"Aside from the provision in article VII of the Bill of Rights, declaring the right of the people to reform, alter or totally change their govern-"
ment, the only provisions contained in the existing Constitution for making changes therein are in the forty-eighth amendment. This amendment speaks only of amendments to the Constitution. If, then, a 'revision' or a 'rearrangement' of the Constitution means something different from an amendment, there is no provision in the forty-eighth amendment for such a change.

"The meaning of the words 'rearrangement' and 'revision' received careful consideration in Opinion of the Justices, 233 Mass. 603, and in Loring v. Young, 239 Mass. 349. According to the views there expressed, 'rearrangement' means a change in form without change in substance, while 'revision' means a change in substance as well as form and contemplates the substitution of the new for the old. The word 'amendment', on the other hand, whatever else it may connote, at least implies that one thing is to be altered or added to by another. It presupposes an existing structure. It contemplates that, upon adoption, the thing so designated shall become a part of the preexisting structure. An amendment is not a self supporting entity. It must be an amendment to something.

"Both a revision and a rearrangement which substitute a new constitution for the old are essentially different from an amendment. This was the conclusion of the Justices in Opinion of the Justices, 233 Mass. 603, 609, and in both majority and minority opinions in Loring v. Young, 239 Mass. 349, 373, 375, 380, 400. In chapter VI, article X, of the original Constitution the words 'revision' and 'amendment' are used disjunctively.

"I conclude, therefore, that the power to amend the Constitution is different from the power to establish a new constitution superseding and replacing the old. The power to amend the Constitution is the power to add to or alter, but not to supersede. That the power conferred upon the General Court by the forty-eighth amendment to the Constitution is the power to initiate amendments to the Constitution, not to initiate a revision of that Constitution, seems to me beyond question. Amendments are to be submitted to the voters; and such amendments are to 'become part of the Constitution if approved.'"

The Attorney General concluded that the proposed Rearrangement was a revision of the Constitution rather than an amendment. It proposed to substitute a new constitution for the old and thus was, in his opinion, not within the terms of the amending power.

From all of this pointed legal discussion, it would seem that one cannot assume that giving the court the constitutional authority to draft a rearranged, or consolidated or recodified constitution, limits that body to recommending changes in form only. While that may be the intent, and while the court may exercise its restraint in carrying out the provisions of the proposed amendment, there is no certainty that changes in form alone would result.
The Court itself has pointed out that the rearrangement of 1911, if validated, would not be a rearranged form, "... it would be the entire substance and not a 'form', rearranged or otherwise." Opinions, 233 Mass. 603, 609. Such uncertainties could be eliminated if the terms used in House, No. 922 were explicitly defined in the proposed article.

A search for similar provisions in other state constitutions reveals no article that imposes the same duty upon a state supreme court. Only in Maine is there anything comparable. The Maine Constitution, in its Article X, s. 6, requires the Chief Justice of the Maine Supreme Judicial Court to arrange the constitution periodically as follows:

"The chief justice of the supreme judicial court shall arrange the constitution, as amended, under appropriate titles and in proper article, parts and sections, omitting all sections, clauses and words not in force, and making no other changes in the provisions or language thereof, and shall submit the same to the legislature; and such arrangement of the constitution shall be made and submitted whenever a new revision of the public laws of the state is authorized; and the draft and arrangement when approved by the legislature, shall be enrolled on parchment and deposited in the office of the secretary of state."

This provision has been in force since 1875. According to the Chief Justice of the Maine Court, the above arrangements have been made with each new revision of the Maine Public Laws and no particular problems have arisen. The chief value in the arrangement provision appears to be that it achieves an up-to-date constitution. However it is an exacting task, in the words of the Chief Justice, and the importance of accuracy is evident. As previously indicated, the arrangement has nothing to do with the substance of Maine's constitution.

Pros and Cons

Proponents of House, No. 922 assert that the proposal would facilitate the task of keeping the state constitution in good order. More enthusiastic supporters of the bill would go further. To increase its effectiveness they urge that the Court be authorized on its own initiative to submit recommendations whenever it believes the need exists. Such authority for the Court, it is added, would also increase the probability of the proposal accomplishing
its purpose. An even more ardent view would be to give the Court authority to make substantive changes as well; if such an increased scope were to work satisfactorily, the problem of a safe and effective method of continuous constitutional revision might be solved.

The value of this proposal is questioned by critics who object to the imposition of another non-judicial duty upon the court. Adequate machinery is believed to be already available for constitutional changes necessary to provide an adequate frame of government as the social, economic and political order undergo transitions. Admittedly, concede these critics, the present text of the Constitution could be improved by rearrangement that would simplify and abbreviate the text.

Such improvement requires skilled editorial work that would eliminate all deleted material consisting of amended or annulled articles whose text is still carried in copies of the Constitution to provide information related to historical development of the law and to help in the interpretation of existing law. For example, the Constitution of the Commonwealth, published in the 1965-66 edition of the General Court Manual, contains 90 pages of text, including the provisions that have been annulled. A lay reader gains an impression of needless length, compounded by references to other provisions. In general, the end result for the unschooled person, is that the document is a confusing legal product that cannot be understood in many of its sections. The same subject matter appears by way of addition or deletion in several articles of amendment at widely scattered positions.

Critics believe that if these faults of the present document could be corrected, namely, by preparing and publishing a text that would omit all the annulled material and would assemble in proper order the various subject matter and material related thereto without any change in the context, the purpose of the proposed article would be appropriately served. Such a task could be performed by a group skilled in the consolidating of laws.

House, No. 2267 of 1965

Unlike House, No. 922 which would amend the Constitution to obtain a new method of constitutional change, House, No. 2267 of 1965 (Reprinted as Appendix A) proposes statutory creation of
a body that is similar in structure to an existing special commission established by resolve (Resolves of 1962, chapter 88, reprinted as Appendix B). The most important difference is that House No. 2267 proposes a special act establishing “a continuing constitutional conference.”

In effect, this proposal sets up a continuous revision agency. Section 1 of the proposed act is identical to the first paragraph of chapter 88 of the 1962 Resolves, except that the latter chapter created “an unpaid special commission”, whereas House, No. 2267 would establish “a commission” and is entirely silent as to remuneration.

Section 2 of the proposal is identical to paragraph two of the resolve. However, in section 3, the proposal provides for the employment of such professional and non-professional help as may be necessary, a provision that was implicit in the creation of the special commission.

In section 4, the proposed commission is directed to report at least annually to the Governor and the Legislature and to submit “recommendations, if any, together with drafts of legislative proposals for amendment to the constitution.” This differs from paragraph three of Chapter 88 in that the special commission reports “from time to time to the general court” and files its recommendations and drafts with the Senate Clerk. While the special act proposed by House, No. 2267 would make the commission a continuing constitutional conference, paragraph three of the resolve provides that the life of the special commission shall expire in March of 1967. Finally, section 5 of House, No. 2267 limits the terms of commissioners appointed by the Governor to the term of the appointing Governor.

The composition of the sixteen member commission follows exactly the language of the resolve and would be as follows: Eight persons would be legislators, of whom three would come from the Senate and five from the House of Representatives. The Governor would appoint the other eight persons with the following stipulations: three of his appointees must hold or have held elective state, county and municipal office, respectively; he must also select two of his appointees from lists furnished by the Massachusetts Bar Association and the Boston Bar Association; finally, one
of his appointees must be a professor of constitutional law at an accredited law school.

The nature and functions of this type of commission have been discussed above in a comparative study of revision commissions. However, the work of the existing Special Commission on Revision of the Constitution indicates what may be expected of a continuing commission if it is set up under House, No. 2267.

The special commission held an organizational meeting in mid-November, 1962, followed by ten subsequent meetings of the full commission before the commission filed a voluminous report with the Senate Clerk in March of 1963.* Committees of the commission had been created to study specific subject areas for constitutional revision.

In an initial report, the commission devoted some eight pages to a survey of recent proposals for constitutional amendments which it considered most useful in calling attention to areas in which citizens have expressed a desire for constitutional revision.

These specific areas were: (1) the structure of government relative to executive and legislative branches and local government, (2) fiscal affairs, (3) electoral matters, (4) the Declaration of Rights, (5) the amendment procedure, and (6) technical legal matters. The Commission found that by far the most active area during the period considered was the structure of government. For example, in its study of the 19 year period, 1945-1963, a four year term for Governor and other constitutional officers was considered 16 times. Abolition of the Governor's Council came up nine times; reducing the size of the General Court, 11 times; limiting legislative sessions, 11 times; home rule, 13 times; imposing a graduated income tax, 14 times; and reducing the voting age, 18 times.

The balance of the document of more than 80 pages, was given over to initial reports on specific areas of amendment. This result was the product of subcommittees set up to consider assigned areas and to prepare initial reports and guidelines for studies in depth. The subcommittees reported on several areas in which

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* The report was not printed by the Senate. The Commission published a limited supply of mimeographed copies which ran to 107 pages of text and 149 pages of appendix material.
the pros and cons of each subject were discussed. Their coverage included terms of office for constitutional officers, home rule and local government developments in Massachusetts, the basis of representation and the size of the General Court, limitations of legislative sessions, limitations on pledging the credit of the Commonwealth, classification of property for taxation, constitutional earmarking of taxes, and advisory opinions of the Supreme Judicial Court.

The initial report contained no drafts of the commission recommendations, — these were to be submitted in a later report. Appended to the text was a 149 page history of the Massachusetts Constitution, written by Samuel Eliot Morison, noted historian, and originally published in 1917. The history was supplemented by additional text prepared by Morris Goldings, Counsel to the Commission, recording constitutional developments through 1962.

The main text of the Commission's report stated that determination of the need for amendment, revision, or simplification of the Constitution required familiarity with this history. Hence its inclusion as an appendix to the report.

In connection with the specific areas that were examined, the Commission took note of particular problems that had arisen and promised to submit later studies in depth of several subject areas, including appropriate recommendations. All of these areas dealt with the structure of government. The Commission found "no pressing need, and no popular suggestion that there is a need for amendments" dealing with sections of the Constitution under the Declaration of Rights; hence no recommendations were made in this area. But with the provisions related to the structure of government, it concluded that there is need for constitutional amendment in specific areas. It was the belief of the Commission that the subject of rearranging or simplifying the document "is of less immediate importance and probably of less ultimate importance than the problem of making the necessary specific amendments to the structure of government provisions." The Commission withheld a recommendation on simplification but intended to consider it in a future report. No drafts of proposed changes of substantive provisions accompanied the Commission's report, and this probably influenced the Senate's decision not to print the bulky document.
A second Interim Report of the Commission was submitted a few weeks later that consisted of a two page statement recommending adoption of an amendment proposed in Senate, No. 665 of 1963 relative to four year terms for Governor and other constitutional officers.

The Commission did not submit any report in 1964 or 1965. It is not required to submit its final report until March of 1967.

Some of the provisions of the Constitution related to structure of government which the Commission felt needed revision have since been amended or are moving toward that end. Thus, four year terms for constitutional officers have been approved by two separately elected legislatures and ratified by the people; and candidates will be chosen on this basis at the next state election late this year. A second amendment providing that the candidates for Governor and Lieutenant Governor run as a party team has received the necessary approval of two legislatures and the proposed amendment goes before the people in 1966. The same status holds (a) for municipal home rule, discussed at length by the Commission, and (b) reorganization of the executive branch, and (c) making industrial development of cities and towns a public function.

An amendment related to advisory opinions of the Supreme Judicial Court, briefly discussed by the Commission but which it considered in need of further study, nevertheless has been adopted (Article 85 of the Amendments). Similarly, an amendment was adopted requiring a 2/3 roll call vote of each house of the Legislature when the credit of the Commonwealth is pledged (Article 84 of the Amendments). Also approved in 1964 was an amendment dealing with continuity of government in the event of an emergency resulting from an enemy attack (Article 83 of the Amendments); the Commission did not deal with this subject.

It seems likely that other revisions suggested by the Commission will receive more attention. For example, only brief mention was made by the Commission of a proposal to limit the powers and the length of sessions of the General Court. The Commission noted that discussion and controversy on this score has been traditional in the Commonwealth, and suggested that a study in depth of the effect of constitutionally imposed limitations on legislative
sessions must concern itself with such questions as whether these restrictions have had a salutary effect on daily workings of state governments; whether they have adversely affected the technical product of legislative sessions; whether a thorough examination of legislative rules and procedures by the General Court is in order; what relationship exists between the length of the session and the services provided by legislators such as office space, secretarial assistance, adequate research and legal drafting staffs.

A recent report of the Legislative Research Council examined the relationship of the workload of the General Court to the length of the legislative session, and discussed some related issues (Senate, No. 990 of 1965).

The record length of the 1965 session will undoubtedly revive discussion of these proposed amendments. In addition proposed amendments dealing with fiscal affairs also appear to be in for further consideration in view of the general financial crisis that confronts the state government.

CHAPTER VII.

THE BASIC CHALLENGE: STABILITY V. FLEXIBILITY

A constitution must be both stable and flexible. Serving as the legal foundation for the commonwealth, it must supply the stability that orderly government requires; yet it will fail of its purposes if the door is closed too tightly against change and adaptation. Indeed, in many ways the central problem is to find a proper balance between stability and change.

There has never been a state constitution that is ideal for all states. A document that is suitable for the needs of this commonwealth with its historic maritime influence and industrial-technological makeup would certainly not be well suited to the needs of an arid western state with active mining industries. If it is to be viable, a constitution must necessarily reflect the local social and economic structure it is designed to serve; no document can function in a vacuum. Moreover the constitution must keep pace with the times if it is to retain its quality over any period of time.
Society is not static, and as communities change in character the new needs and desires of the people must be reflected.

Certain requisites have been laid down by constitutional scholars as constituting the basis of a good constitution. First among these qualities is brevity. No document can say everything and a cardinal error in drafting a constitution is the attempt to say too much. The document should do no more than set down fundamental and enduring first principles.

In general language, with deliberate avoidance of detail, it should describe the basic framework of government, assign the institutions their powers, spell out the fundamental rights of man, and provide for peaceful change. Legal codes, the appeasement of special interests and caveats that hamstring action have no place in a constitution.

Secondly, a constitution must be readable. One of its central purposes is to educate the public in first principles. If the average citizen is to be encouraged to read the document then it must be written in good, modern English. Obsolete language should be avoided, ambiguous phraseology clarified, and repetitious or contradictory terminology corrected. A logical and orderly arrangement of the various articles and sections is necessary if the document is to make sense to the average citizen. When the constitution becomes primarily a tool intelligible only to the judiciary and the practitioners of law it will lose both the confidence and the reverence of the people. As the people's charter, it expresses basic governmental concepts and should therefore be phrased in such language that can be understood by the people.

Passing judgment on the need for a rearrangement or revision of the content or structure of the Massachusetts Constitution is all beyond the scope of this report. As to the qualities of brevity and readability, the Supreme Judicial Court, which has great familiarity with the document as a working instrument, had this to say:

Simple and dignified diction has characterized our Constitution and most of its amendments rather than technical and narrow definition. Terse statement of governmental principles in clear language is to be expected rather than the niceties of fine distinctions in the use of words inviting controversy as to their significance. Loring v. Young, 239, Mass. 349, 372.
If our Constitution, the oldest written constitution in existence, retains matters that are transient reflecting concern for one particular condition, it also preserves from our past our accumulated wisdom in governmental matters. Consequently there is always present the conflict of preparing a blueprint that will preserve the basic framework of the original architect yet introducing alterations that are more responsive to the needs of modern life. If this is the goal that is sought then in one fashion or another there must be a periodic re-examination of our organic law to separate the proven from the inadequate, the permanent from the temporary, and the fundamental from the occasional.

Finally, whatever the advantages of constitutional rearrangement or revision, it must always be remembered that the present ancient constitution is a living and working document that has been clarified and vitalized by a vast body of judicial interpretation. This content would be lost, in part at least, by any change in wording. Hence, the difficult task facing any revision agency is to preserve all that has proven satisfactory while pruning away and replacing that which is demonstrably ineffective.

As succinctly put by one observer in another state, "The problem is not to replace a bad constitution with a good one, but to make a good one better...." ¹

AN ACT ESTABLISHING A CONTINUING CONSTITUTIONAL CONFERENCE.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. There shall be created a commission, to consist of three members of the senate, five members of the house of representatives, and eight persons to be appointed by the governor, of whom three shall hold or have held elective state, county and municipal office, respectively, one shall be selected from a list furnished by the Massachusetts Bar Association, one shall be selected from a list furnished by the Boston Bar Association, and one shall be selected by a professor of constitutional law at an accredited law school, is hereby established for the purpose of making a continuing study relative to the need for amendment, revision or simplification of the constitution of the commonwealth.

SECTION 2. Said commission shall, in the course of its investigation and study, consider current and recent proposals for amendments to the constitution and shall prepare and distribute such materials relative to constitutional problems and proposals for amendments as will in its opinion contribute to citizen understanding of such matters.

SECTION 3. Said commission may employ such professional and nonprofessional personnel as may be necessary to perform its duties.

SECTION 4. Said commission shall report at least once each year to the governor and general court the results of its investigation, study and its recommendations, if any, together with drafts of legislative proposals for amendment to the constitution.

SECTION 5. Those members of said commission which are appointed by the governor shall not serve a term of office beyond the term of the governor making the appointment.
Resolved, That an unpaid special commission, to consist of three members of the senate, five members of the house of representatives, and eight persons to be appointed by the governor, of whom three shall hold or have held elective state, county and municipal office, respectively, one shall be selected from a list furnished by the Massachusetts Bar Association, one shall be selected from a list furnished by the Boston Bar Association, and one shall be a professor of constitutional law at an accredited law school, is hereby established for the purpose of making an investigation and study relative to the need for amendment, revision or simplification of the constitution of the commonwealth.

Said commission shall, in the course of its investigation and study, consider current and recent proposals for amendments to the constitution and shall prepare and distribute such materials relative to constitutional problems and proposals for amendments as will in its opinion contribute to citizen understanding of such matters.

Said commission may travel without the commonwealth. Said commission shall report from time to time to the general court the results of its investigation and study and its recommendations, if any, together with drafts of legislative proposals for amendment to the constitution necessary to carry its recommendations into effect by filing the same with the clerk of the senate. Said commission shall file its initial report not later than the fourth Wednesday of March, nineteen hundred and sixty-three and its final report not later than the fourth Wednesday of March, nineteen hundred and sixty-seven.

Approved May 18, 1962.