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Student Symposium

The New Mexico Constitutional Convention 1969

CONSTITUTIONAL REVISION— CONSTITUTIONAL AMENDMENT PROCESS

Every state constitution must provide some method by which it may be amended as conditions and circumstances dictate. It is imperative that the process be sufficiently difficult to prevent frivolous amendment, but not so difficult as to severely hamper needed change. Achieving this necessary balance is not always easy.

Basically, there are three methods by which a state may amend its constitution: (1) The legislature may introduce proposed amendments; (2) proposed amendments may be introduced by the voters (initiative); or (3) a constitutional convention may be called to revise the constitution completely. The first and third methods are provided for by the present New Mexico constitution.¹ The voter initiative method is not available in this state.² While the amendment process initiated by the legislature has been frequently, but ineffectively, used,³ the convention method has not been resorted to since the constitution was originally drafted in 1911.⁴

This Comment is concerned with the provisions a constitution should contain to permit legislative introduction of amendments. A brief historical review of the present legislative provision⁵ may lend some insight into the problems such a section will face.

The original constitutional amendment provision⁶ approved by the electors on January 12, 1911, was so restrictive that Congress

1. N.M. Const. art. XIX, §§ 1 & 2.

2. N.M. Const. art. XIX, § 3.

3. R. Folmar, *Piecemeal Amendment of the New Mexico Constitution 1911 to 1967*, at 21 (N.M. Legis. Council Service, 1968).

4. *Id.* at 6.

5. N.M. Const. art. XIX, § 1. For text of this section see note 9 *infra*.

6. The original amendment provision read as follows:

Any amendment or amendments to this Constitution may be proposed in either house of the legislature at any regular session thereof; and if two-thirds of all members elected to each of the two houses voting separately, shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon; or any amendment

required it to be liberalized before New Mexico was admitted as a state.⁷ The proposed congressional amendment became known as the "blue ballot" amendment.⁸ It was approved by the electors on November 7, 1911, and as amended, the constitution was accepted by Congress, and New Mexico became a state.

The "blue ballot" provision⁹ for amendment is quite restrictive,¹⁰

or amendments to this Constitution may be proposed at the first regular session of the legislature held after the expiration of two years from the time this Constitution goes into effect, or at the regular session of the legislature convening each eighth year thereafter, and if a majority of all the members elected to each of the two houses voting separately at said sessions shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon. The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state where a newspaper is published, once each week, for four consecutive weeks, the last publication to be not less than two weeks prior to the next general election, at which time the said amendment or amendments shall be submitted to the electors of the state for their approval or rejection. If the same be ratified by a majority of the electors voting thereon and by an affirmative vote equal to at least forty per cent of all the votes cast at said election in the state and in at least one-half of the counties thereof, then, and not otherwise, such amendment or amendments shall become part of this Constitution. Not more than three amendments shall be submitted at one election, and if two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately; provided, that no amendment shall apply to or affect the provisions of sections one and three of article seven hereof on Elective Franchise, and sections eight and ten of article twelve hereof on Education unless it be proposed by a vote of three-fourths of the members elected to each house.

7. Joint Resolution of August 21, 1911, No. 8, 37 Stat. 39 (1911).

8. T. Donnelly, *The Government of New Mexico* 50 (1947):

The only provision of the constitution that drew congressional criticism was the amending process. This, it seemed to the national lawmakers, was too difficult. So before approving the constitution and sending it to President Taft for his signature on August 21, Congress, in the Smith-Flood resolution, required that the people of New Mexico should be allowed to vote on a substitute. The substitute provided that amendments to the constitution could be proposed by simple majorities in each house of the legislature and ratified by a simple majority of the popular vote. The resolution also required that the vote on the substitute amending provision should be on a separate ballot from that used in the state's first general election, and that it should be tinted blue. Thus it became known as the "blue ballot" amendment. . . . In the election held on November 7, 1911, the voters gave the blue ballot amendment their approval by a vote of 34,897 to 22,831.

9. The "blue ballot" provision, never having been amended, is in the present state constitution. N.M. Const. art. XIX, § 1:

Any amendment or amendments to this Constitution may be proposed in either house of the legislature at any regular session thereof; and if a majority of all members elected to each of the two houses voting separately shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon.

The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such

but it is much more liberal than the original provision. Comparison of the original Article XIX, Section 1 with the "blue ballot" amendment reveals several important differences.¹¹

For example, the original provision required, except in certain limited circumstances, that a proposed amendment pass the legislature by a two-thirds vote of each house voting separately. The "blue ballot" provision reduced the vote required to amend the constitution to a simple majority of each house of the legislature as to all provisions except Sections 1 and 3 of Article VII and Sections 8 and 10 of Article XII, where three-fourths was still required. Also, the limitation in the original provision that not more than three amendments could be submitted to the electorate at any one election was eliminated by the "blue ballot" amendment.

The fact that Congress required the constitutional amendment provision to be liberalized is some indication that a provision that is unduly restrictive is not looked upon with favor.

The present New Mexico constitution still contains the "blue ballot" amendment provision. Although it greatly reduced the requirements for constitutional amendment, it is still unduly restrictive. As a result, certain sections of the constitution are virtually unamendable.¹² For example, until last year New Mexico did not have an absentee voting provision although there had been at least ten

counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and the said amendment or amendments shall be voted upon at the next regular election held in said state after the adjournment of the legislature proposing such amendment or amendments, or at such special election to be held not less than six months after the adjournment of said legislature, at such time as said legislature may by law provide. If the same be ratified by a majority of the electors voting thereon such amendment or amendments shall become part of this Constitution. If two or more amendments are proposed, they shall be so submitted as to enable the electors to vote on each of them separately: Provided, that no amendment shall apply to or affect the provisions of sections one and three of article VII hereof, on elective franchise, and sections eight and ten of article XII hereof, on education, unless it be proposed by vote of three-fourths of the members elected to each house and be ratified by a vote of the people of this state in an election at which at least three-fourths of the electors voting in the whole state and at least two-thirds of those voting in each county in the state shall vote for such amendment.

10. Folmar, *supra* note 3, at 3.

Since the adoption of the Blue Ballot Amendment, the people of this state have gone to the polls on 33 separate occasions to vote on 157 proposed changes to the constitution. Not counting the Blue Ballot Amendment, they have adopted 72 amendments to the basic document.

Thus it can be seen that less than one-half of the proposed changes passed. This is some indication of the restrictive nature of the amendment provision.

11. Compare notes 6 and 9, *supra*.

12. Folmar, *supra* note 3, at 8. Sections 1 and 3 of Article VII pertaining to the elective franchise, and sections 8 and 10 of Article XII pertaining to education have often been referred to as the "unamendable sections".

unsuccessful attempts to amend the constitution to provide for it.¹³

The legislature has twice tried to avoid the extraordinary vote required to amend Section 1 of Article VII,¹⁴ which prescribes voting qualifications, by creating a new section or amending another section of the constitution to provide for absentee voting.¹⁵ The state supreme court has rebuffed these efforts, holding that the legislature could not do indirectly what it could not do directly, and that any amendment which seeks to attack the provisions of this section must have the votes required by Article XIX, Section 1.¹⁶

The eleventh attempt to amend¹⁷ Article VII, Section 1 resulted in the New Mexico supreme court holding Article XIX, Section 1 unconstitutional in part.¹⁸ In the election there were 42,101 votes in favor of amending the section and 9,757 opposed. This is over an 80% favorable vote. However, in twelve counties, less than the required two-thirds favorable vote was achieved.¹⁹ A change of only 634 votes was needed to permit the proposed amendment to pass, but more importantly, it had to be a certain number from only twelve different counties so that the amendment would receive the necessary two-thirds favorable vote from each county. The New Mexico supreme court held that the requirements of Article XIX, Section 1, providing that no amendment affecting Sections 1 and 3 of Article VII and Sections 8 and 10 of Article XII would be valid unless ratified by a vote of "at least two-thirds of those voting in each county in the state"²⁰ was invalid as a violation of the "one man, one vote" principle under the equal protection clause of the Fourteenth Amendment to the United States Constitution.²¹

13. It is interesting to note that as early as 1935 only New Mexico and Kentucky did not have an absentee voting provision, and that New Mexico was the last state to provide one.

14. As indicated, in order to amend this section a proposal must pass the legislature by a three-fourths vote of the members elected to each house and be ratified by at least three-fourths of the electors voting in the state as a whole as well as at least two-thirds of those voting in each county of the state. N.M. Const. art. XIX, § 1.

15. Joint Res. No. 12, N.M. Laws 1919, at 370, attempted to add a new section to the constitution. N.M. Const. art. VII, § 6. Senate Joint Res. No. 3, N.M. Laws 1953, at 622, attempted to amend N.M. Const. art. VII, § 4.

16. *Baca v. Ortiz*, 40 N.M. 435, 61 P.2d 320 (1936).

17. The proposed amendment to art. VII, § 1 which appeared on the ballot in the November 7, 1967 general election, was held by the court in *State v. State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968), to have passed, thus amending art. VII, § 1.

18. *State v. State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968).

19. Catron (12); Grant (57); Guadalupe (18); Harding (12); Hidalgo (16); Mora (35); Rio Arriba (1); Sandoval (111); San Miguel (206); Taos (30); Union (17); Valencia (109). The numbers set forth in parentheses following each county name indicate how many votes there were short of a two-thirds vote in favor of the amendment.

20. This is the requirement of the N.M. Const. art. XIX, § 1, set out at note 9.

21. *State Canvassing Board*, *supra* note 18.

The court, in arriving at its conclusion, stretched the "one man, one vote" principle further than any court had done before.²² They found that "the failure to receive two-thirds vote in Harding County where the total vote was 135 could successfully frustrate the wishes of 90.3 percent of the 13,659 voting in Bernalillo County, thereby giving a Harding County vote more than 100 times the weight of a Bernalillo County vote."²³ This they felt was a violation of the "one man, one vote" principle and thus unequal protection of the laws.²⁴ They reasoned that because political subdivisions (counties) of the state are not sovereign entities but only "subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions,"²⁵ there was no rational basis for using the county boundary lines to determine the value or weight of a vote.

The court saw no reason to distinguish between voting for representatives and voting on constitutional amendments. Both they felt were necessary ingredients of democratic government: "Nor can it be said that an equal voice in selection of the legislature is of greater importance to a citizen than equality of weight in expression of views on changes in our basic charter, the constitution."²⁶

The court concluded that the requirement of a two-thirds affirmative vote in each county was placed in the constitution to protect those living in less populous counties. This was in essence protection, foreign to the basic concept of majority rule, of a minority group, and thus a violation of the equal protection clause of the fourteenth amendment.

How strict a requirement should a state constitution provide for proposing and ratifying amendments? This question must be answered in light of the recent state supreme court decision in *State v. State Canvassing Board*.²⁷ Also, a brief review of the amendment requirements of other states may shed some light on the subject.

22. *Lucas v. Forty-Fourth General Assembly of State of Colorado*, 377 U.S. 713 (1964); *Davis v. Mann*, 377 U.S. 678 (1964); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962).

23. *State Canvassing Board*, *supra* note 18 at 686, 437 P.2d at 147.

24. Although the "one man, one vote" principle had only been applied to legislative apportionment and not to voting rights relating to the amendment of a state constitution, the New Mexico supreme court extended it to that area on the assumption that there was little difference between the right of a person to vote for his elected representative or for a constitutional amendment.

25. *State v. State Canvassing Board*, 78 N.M. 682, 689, 437 P.2d 143, 150 (1968), quoting *Reynolds v. Sims*, 377 U.S. 533 (1968).

26. *State Canvassing Board*, *supra* note 18 at 690, 437 P.2d at 151.

27. *State Canvassing Board*, *supra* note 18.

All states provide that constitutional amendments may be proposed by action of the legislature. Nineteen states require a two-thirds vote of their legislature to propose specific constitutional amendments.²⁸ A majority vote is required in 17 states,²⁹ while eight states require a three-fifths favorable vote.³⁰ The remaining six states require varied procedures.³¹ Also, thirteen states require that the proposed constitutional amendment be approved by two separate sessions of the legislature.³² As already noted, the "blue ballot" amendment required only a majority vote in each house to propose a constitutional amendment.

Congress felt that the two-thirds requirement was too restrictive; however, it will be remembered that it was also Congress' intention to make the provision more liberal generally because of the many excessive restrictions in the original provision.³³

The report of the Constitutional Revision Commission changes the present majority vote requirement to a two-thirds vote of each house of the legislature.³⁴ This is not an unreasonable change. In proposing

28. Council of State Governments, *The Book of the States 1968-69*, at 16 (1968): Alaska, California, Colorado, Delaware, Georgia, Idaho, Illinois, Kansas, Louisiana, Maine, Michigan, Mississippi, Montana, South Carolina, Texas, Utah, Washington, West Virginia, and Wyoming.

29. *Id.* Arizona, Arkansas, Indiana, Iowa, Minnesota, Missouri, Nevada, New Mexico, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Virginia and Wisconsin.

30. *Id.* Alabama, Florida, Kentucky, Maryland, Nebraska, New Hampshire, North Carolina, and Ohio.

31. *Id.* Connecticut requires a majority vote in each house in two sessions or a three-fourths vote in each house in one session.

Hawaii requires approval by a two-thirds vote in each house in one session or by a majority vote in two successive sessions.

Massachusetts requires a majority of members sitting in joint session.

New Jersey requires a three-fifths vote of all members of each house; or a majority vote of all members of each house in two successive sessions.

Tennessee requires a majority vote of the members elected for the first passage and two-thirds of the members elected for the second passage.

Vermont requires a two-thirds vote of the Senate and a majority vote of the House for the first passage; and a majority vote of both houses for the second passage. Also, amendments may be submitted only at ten-year intervals.

32. *Id.* Delaware, Indiana, Iowa, Massachusetts, Nevada, New York, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, Wisconsin. Also, some states require approval by two sessions if the proposed amendment does not receive the required vote at the first session. *See* note 31 *supra*.

33. Joint Resolution of August 21, 1911, No. 8, 37 Stat. 39 (1911).

34. Report of New Mexico Constitutional Revision Commission 194 (1967).

Amendments to this constitution may be proposed by a two-thirds vote of each house of the legislature. The officer with whom legislative enactments are filed shall prepare a ballot title and a brief summary of the proposed amendment and shall place them on the ballot at the next general election, or at a special election called for that purpose by the legislature. If a majority of the votes cast on the proposition favor the amendment, it shall be adopted. Unless otherwise provided in the amendment, it shall become effective thirty days after the certifi-

a constitutional amendment, it is reasonable to assume that the legislature will have thoroughly studied the matter to determine if the change is needed. Also, there is a possibility that if a mere majority is required, the vote could be split along party lines, with the party in the majority proposing amendments favorable to them. This possibility may be remote, but it exists. Therefore, if the amendment is desirable, it does not seem unreasonable to require two-thirds of the legislature to approve it before it is submitted to the voters for ratification. This appears to be a reasonable restriction that will prevent the submission of frivolous amendments to the electorate, but yet one that is not so restrictive as to hamper the introduction of necessary amendments.

The Commission also proposes that the voters may ratify a proposed amendment by a majority vote of those voting on the proposition. This is the same requirement contained in the present New Mexico Constitution, as interpreted by the state supreme court in *State v. State Canvassing Board*,³⁵ for ratification of all amendments except those relating to the four excepted sections which still require a three-fourths favorable vote. The court did not determine whether it was permissible for the constitution to provide that some sections could be ratified by a majority vote while others require a three-fourths vote. They summarily dismissed the issue by stating, "No serious attack is made on the constitutionality of this provision."³⁶ The decision turned on whether ratification was required by three-fourths of the electors voting in the election or only three-fourths of those voting on the proposed amendment. The court held the latter the preferred interpretation:

[T]o hold that three-fourths of those voting at any given election is required to amend Art. VII, Sec. 1, would give effect as having cast negative votes to those voters at the election who because of negligence, lack of interest, or some other unexplained reason failed to register their votes on the particular proposition. No logical reason for counting as opposed those who do not express their preference has been suggested. Nevertheless, this is the effect of requiring a three-fourths majority of those voting at an election whether or not they voted on the particular proposition. It would have been just as reasonable if a three-fourths vote of all registered voters had been required, whether voting or not. Such a provision, we submit, would be unsound in any view, but more reasonable only in degree than the present contention here held to be without merit.³⁷

cation of the election returns by the body which certifies the returns for statewide elective offices.

35. *State Canvassing Board*, *supra* note 18.

36. *Id.* at 690, 437 P.2d at 151.

37. *Id.* at 692, 437 P.2d at 153.

As a general rule qualified electors who do not vote on a proposition, or who do not vote at all are presumed to assent to the will of those who actually do cast their ballot.³⁸

It does not appear that different voting requirements for ratification for different types of constitutional amendments depending upon their subject matter could be held unconstitutional. The voter is not denied equal protection of the laws. It is merely more difficult to amend certain sections of the constitution. This appears not only permissible, but also desirable in some instances.

In conclusion, the amendment provision proposed by the Constitutional Revision Commission is adequate and desirable.³⁹ As has been indicated, the present provision is badly in need of revision, especially since it has been held unconstitutional in part.⁴⁰ The proposal appears to provide a process of amendment that is sufficiently difficult to prevent frivolous amendment, but not so difficult as to prevent needed change. It is not likely that any sections of the constitution will be "unamendable" if the proposed amendment provision is enacted. Adoption of this section is strongly recommended.

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38. *Davy v. McNeill*, 31 N.M. 7, 240 P. 482 (1925). There is not as much voting interest for constitutional amendments as there is for public officials. In the 1964 general election the total vote for governor was 318,037. The absentee ballot proposal in 1964 received the greatest number of votes ever cast for a constitutional amendment with a total vote of 130,273. This is a difference of 187,764 votes. In other words, 59.04 per cent of the voters who voted for Governor did not vote on the constitutional amendment. Folmar, *supra* note 3, at 18 and Table IV at 32.

39. Report of New Mexico Constitutional Revision Commission 194 (1967).

40. State Canvassing Board, *supra* note 18.