As talk of changing the U.S. Constitution stirs up again, state constitutions serve as examples of what it can mean to alter these documents.

BY JENNIE DRAGE BOWSER

The U.S. Constitution is nearly 230 years old, and its longevity and seeming immutability are both a cause for celebration and a source of debate. You’d be hard-pressed to find a government document more revered. John Adams referred to its creation as “the greatest single effort of national deliberation that the world has ever seen.” Benjamin Franklin teared up while signing it. George Washington called it “the guide which I never will abandon.”

Most Americans agree with the sentiments of our forefathers and the values spelled out in the preamble. But not everyone agrees the U.S. Constitution should be so cherished that it’s untouchable. Critics argue the country would benefit from a constitutional overhaul, or at least an update, but lament the arduous path to amending it.

Indeed, the U.S. Constitution has been amended only 27 times—a testament to just how difficult the process is. Either both houses of Congress must pass an amendment by a two-thirds vote, or two-thirds of the state legislatures must call for what’s known as an Article V Convention. The amendment must then be ratified by three-fourths of the states, either
by the state legislature or by a convention, and Congress can choose which.

Among those pressing for a convention today are some who would rein in the federal government, others bound to a particular cause—balancing the federal budget or overturning what they view as unpalatable Supreme Court decisions—and still others who simply see the Constitution as outdated. Would-be changemakers might want to consider the experience of the states, where amending constitutions is relatively easy and has been done, with mixed results, frequently.

**Antiquated or Timeless?**

Georgetown University law professor Louis Michael Seidman has been vocal in his criticism of Americans’ strict adherence to the document, referring to their reverence as “Constitution worship.” Others defend the Constitution’s relevancy, arguing its longevity reflects the genius of the Founding Fathers. Its general principles have stood the test of time and continue to reflect the values for which this country stands.

When asked whether our Constitution is still relevant hundreds of years after it was written, Richard Epstein, a professor at the New York University School of Law, says yes—at least mostly.

“Sections like the Fugitive Slave Clause are emphatically not relevant, but much of the document is a coherent institutionalization of structures and protection of rights that harness the good in self-interest, while controlling for avarice and fraud.”

And on the question of whether our Constitution should be easier to amend, Epstein says no.

The strict amendment process prevents the adoption of short-lived changes and ensures the approval of only those amendments that enjoy broad support, he argues. If amendments were easy to make the result would be a document cluttered with frivolous changes. “Most amendments, especially if they themselves are amended, will make matters worse,” Epstein says.

Seidman and others disagree. They argue that the difficulty of adapting the document to a changing world is out of step with contemporary needs.

### The Article V Alternative

An Article V Convention is the “other” way to amend the U.S. Constitution. James Madison pushed to include it as a way to empower states and protect their rights. It says that if 34 states call for an amendment, then it’s up to Congress to convene a convention of the states.

The method has never been used, says David Long (R), the Indiana Senate president pro tempore, “because people are afraid of a runaway convention. They fear that if you created this, there would be no way to control it and we might rewrite the Constitution.”

Long is a leading voice in a group of legislators promoting the use of a convention as a way to fix problems in the federal government that Congress is just too broken to fix itself. For Long, the issue is the “serious amount of debt that’s being accumulated right now.”

Before specific amendments are debated, Long’s group, The Assembly of State Legislatures, is attempting to first establish a structure—the rules and regulations—on how a convention would run. According to the group’s website, it is committed to ensuring the states stay in charge, that any convention that gets called be controlled and be limited to the subject proposed by the states.

Driven by the belief that it’s doing exactly what the founders had in mind when they wrote Article V, the group continues to seek support from lawmakers on both sides of the aisle who believe it’s time to stand up to the federal government.

According to Seidman, problems arise because some of the Constitution’s provisions are simply unclear. Political actors end up interpreting what these clauses mean, resulting in “political rather than practical” debates, he says.

To illustrate this, he points to the Affordable Care Act. The debate over its constitutionality under the Commerce Clause forces discussions, he says, that are “away from practical matters, like whether the statute will increase coverage at acceptable costs or force people into coverage they don’t want. Instead, we are talking about who is a true American and who is a traitor to our foundational document.”

It’s simply too difficult to apply a document that’s hundreds of years old to our vastly different modern world, he argues. “A lot of the problem would be solved if we better understood that the Constitution was written by ordinary human beings who suffered from the prejudices, narrowness of vision and inability to foresee the future that all of us suffer from,” he says.

### Amend What?

Many argue the amendments adopted so far were necessary, proof that the amendment system can work. “Today’s Constitution is a realistic document of freedom only because of several corrective amendments,” Thurgood Marshall, the first African-American U.S. Supreme Court justice, wrote after successfully challenging the doctrine of “separate but equal” as a violation of the 14th Amendment.”

Many changes suggested over the years, however, never made it into the document. The list is long, with some proposals breaking sharply along partisan lines. Recently debated ideas include a ban on burning the U.S. flag, statehood for the District of Columbia and proposals from various points of view concerning marriage and reproductive rights.

The most popular of all successful amendment topics has been elections. Ten amendments relate to elections in one way or another, and the topic continues to come up in amendment conversations today. Current election proposals would allow foreign-born citizens to run for president, reverse the controversial Citizens United Supreme Court decision on campaign financing at the federal level, restructure or abolish the Electoral College and limit terms for members of Congress.

For Seidman, one of the most important changes needed—besides doing away with equal state representation in the Senate, which he says is the Constitution’s most egregious flaw—is to the amendment process itself. We need to correct a system that allows “a tiny percentage of the population to block an amendment,” he says.
The Florida Model

Florida’s Constitutional Revision Commission was created when the state adopted its current constitution in 1968. It convenes every 20 years to evaluate the document. Florida’s commission is unique in two ways. First, it’s the only commission permanently established by a state constitution to convene at regular intervals. Second, it’s the only state commission empowered to place recommended constitutional amendments and revisions directly on the ballot. Legislative approval isn’t required, and neither is a petition process.

During 1997 and ’98, the commission placed nine proposed amendments on the ballot, and voters adopted all but one. The work of the commission in 1977 and ’78 wasn’t so well-received. Voters rejected all eight of the proposed amendments.

The next commission will do its work in 2017 and ’18. Its 37 members will be appointed before the 2017 Legislature convenes and will mostly reflect the partisan makeup of their appointers. The governor will choose 15 members; the Senate president and the speaker of the House each will choose nine. The attorney general is an automatic member, and the remaining three will be chosen by the chief justice of the Florida Supreme Court.

Of course, Florida voters will have the final say on what is adopted, regardless of the commission’s makeup.

State Differences

Like the U.S. Constitution, state constitutions provide a framework of government that includes three branches. And, like the U.S. Constitution, state constitutions reflect the time period in which they were written. For instance, every state constitution written during the Progressive Era (roughly 1890 to 1920) enumerates the rights of workers, and those written after 1979 include environmental protections, points out Alan Tarr, director of the Center for State Constitutional Studies and professor of political science at Rutgers University.

From a state legislator’s perspective, what may be the most important difference between state constitutions and the federal one, Tarr says, “is that, while the federal Constitution grants various powers to the legislative branch, state constitutions tend to restrict legislative powers.”

Article I of the U.S. Constitution grants a long list of specific powers to Congress, such as the rights to borrow and coin money, regulate commerce, establish post offices, and define and punish “piracies.”

On the other hand, state constitutions restrict legislatures’ ability to enact local or special laws, create new taxes, increase existing taxes, authorize gambling or regulate the business of local governments without voter approval.

Tarr believes the authors of state constitutions put more trust in people than in politicians. By limiting the power of elected officials, they reflected a “tradition of being skeptical of the people we put into political office.”

Amendment Paths Vary

There are several avenues for amending state constitutions, which are, by and large, far easier to amend than the U.S. Constitution. While the U.S. Constitution contains only 27 amendments, Alabama’s has nearly 900. California’s has more than 500, and Texas’ 484. The average number of amendments for a state constitution is 115.

Delaware is the only state that allows the legislature to amend the constitution without a popular vote. It has done so about 100 times. Approval comes not through a simple majority vote, but only with the support of at least two-thirds of each chamber in two votes, with an election intervening.

The other states require voters’ approval before a constitutional amendment can be adopted by the legislature. In 34 states, it takes a simple majority of voters to approve a change. The requirement is a bit tougher in Florida, where 60 percent of voters must approve proposed changes, and tougher still in New Hampshire, where two-thirds of voters must approve them.

State constitutions also can be amended via a constitutional convention, which most states allow the legislature to call, sometimes requiring voter approval. The convention’s members typically are elected by the voters. In Arizona, Florida and Montana, citizens can bypass the legislature entirely and call a constitutional convention themselves.

Constitutions in 14 states require voters to be asked at regular intervals, usually every 10 or 20 years, whether they’d like to hold a constitutional convention. And a few state constitutions make no mention of conventions at all—among them Indiana, New Jersey and Vermont.

In reality, state constitutional conventions are rare. Massachusetts has held five, Michigan and Missouri each have held four, and the last state to hold one was Rhode Island, in 1984.

A Little Trivia on the Bill of Rights

The U.S. Constitution didn’t last long before it was amended in 1789. Just two years after the document’s ratification, Congress adopted a resolution proposing a set of amendments called the Bill of Rights. Freedom of speech was not originally in the top spot. It moved up to No. 1 only after the original First and Second amendments failed to be ratified by the required 10 out of 14 states at the time.

The original First Amendment proposed a way to determine how the House of Representatives would grow to reflect increases in the U.S. population. It started at one representative for every 30,000 citizens and ended at one for every 50,000. Using the U.S. Census Bureau’s Population Clock, that would amount to 6,418 members in today’s U.S. House. Yikes! If having 435 members makes it tough to get work done, imagine what it would be like with nearly 15 times more.

The original Second Amendment would have prevented members of Congress from giving themselves pay raises. Although dropped from the original Bill of Rights, it was eventually adopted in 1992 and is currently the last amendment to the U.S. Constitution.
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Colorado Representative Lois Court

A Direct Change

The initiative is by far the most controversial tool for amending state constitutions. Available in 17 states (and Massachusetts in a more limited way), the process allows citizens, after acquiring enough signatures of support, to place an amendment on the ballot. The heavy users are California, Colorado and Oregon; more than 150 constitutional amendments have been proposed this way in each state. In all cases, the legislature and the governor are bypassed.

Although Colorado Representative Lois Court (D) supports the idea of a citizen initiative, she’s concerned the process makes it just as easy to change the state constitution as it is to change the statutes. In Colorado, the signature requirements for getting each on the ballot are identical.

“A constitution should be a foundational document,” she says. “It should not be a place for making detailed policy changes, such as the amount our minimum wage should be, or the dollar amount of a tax on marijuana, or the way we regulate wildlife.”

The problem with putting the details into the constitution, Court says, is that it’s too hard to change later. She points to Colorado’s Amendment 64, which legalized recreational use of marijuana, as an example.

When concern grew over the danger marijuana edibles posed to children, some voters wanted a ban on that form of pot, but lawmakers were limited in how they could respond because Amendment 64 specifically legalized marijuana “in all its forms.” Lawmakers eventually chose to regulate the packaging and sale of edibles, as a way around their inability to alter the amendment passed by voters.

Court would like to see proponents encouraged to pose their policy changes as statutes, rather than amendments.

Use of the initiative process varies greatly, however. In Illinois, where it is limited to just one article of the constitution, voters have been faced with exactly one constitutional initiative in state history. On the ballot in 1980, it asked voters to reduce the size of the House of Representatives from 177 to 118. Voters approved, and since 1982, there have been 59 fewer seats in the House.

Do-Over Constitutions

Citizens and lawmakers have been far more willing to make serious changes to state constitutions than to the federal one. Every so often, in fact, a state decides to toss out its constitution entirely and write a new one.

Nine states drafted new documents during the turbulent years between 1964 and 1975. Only two states have adopted new constitutions since then: Georgia in 1983, and Rhode Island in 1986.

Alabama is often mentioned when the idea of a constitutional convention comes up. The state’s current document dates to 1901 and at 376,000 words is about 80 times the length of the original U.S. Constitution, making it by far the longest and most amended of state constitutions. Amendments make up about 90 percent of it. Many local government functions are established by the constitution, and it often takes an amendment proposed by the Legislature to make changes to policies affecting a single county, or even a single town.

According to Nancy Ekberg, vice chair of a group called Alabama Citizens for Constitutional Reform, the state’s current constitution simply doesn’t serve the social and economic realities of the 21st century. She blames the document for numerous injustices, including “keeping those who can’t drive or can’t afford a car from job training, health care, schooling, shopping and jobs” because it prevents the state from using any vehicle fees or gasoline taxes to establish a statewide public transportation system.

In 1983, the Alabama Legislature rewrote the entire 1901 constitution and proposed it as a single amendment. But before it went to
The voters, the state Supreme Court stopped it on the grounds that a new constitution could be proposed only through a convention. That gathering has yet to occur, though not for lack of trying.

An effort to call a convention failed in the 1990s because there was too much uncertainty about how it would work, says Representative Randy Davis (R), who chairs the House Constitution, Campaigns and Elections Committee. The idea was to include two people from each of the 105 House districts as members, but it wasn’t clear who they would be or how they’d be appointed. How long would they meet? Where? How much would it cost? (It was looking to be very costly.) Who would control it and staff it? In Alabama, the only mechanism for calling a convention is via the Legislature, and when it came down to it, lawmakers just weren’t willing to relinquish control over what had the potential to become a “three-ring circus,” Davis says.

Fast-forward to the present. The effort to revise the constitution continues, but the idea of calling a convention has been set aside. Instead, the Constitutional Revision Commission, which includes Davis, meets publicly and frequently, in different locations around the state. The group takes up one article of the constitution at a time, and decides how to re-craft it. A House member writes the bills necessary to make the amendments and shepherds them through the legislative process. It then goes to the voters. Three amendments made it onto the ballot in 2012; two passed. The next batch, dealing with state government, will appear on the ballot in March 2016. So far, the commission has picked what Davis calls the “low-hanging fruit,” the non-controversial issues that are fairly easy to pass. The group hopes to address a tougher topic, education, on the 2018 ballot.

By rewriting the constitution’s core elements—such as the state government sections that the 2016 amendments will address—the commission hopes to bring the 1901 document into the 21st century, and perhaps reduce the need for future amendments. It’s an approach that has bipartisan support and has achieved vital change, Davis says.

“There’s not much glitz in modernizing the constitution—it’s just a lot of housekeeping work—but it’s really important to the future of Alabama. We live in a global economy, and our constitution was getting in the way of doing business.”

Built to Last

Given the procedural hurdles required for amending the U.S. Constitution, not to mention the highly politicized nature of most amendment proposals floating around these days, it’s unlikely we’ll see a successful effort to amend our foundational document anytime soon. More likely, we’ll keep arguing about issues on the fringes but continue to let this document, so widely admired around the world and throughout history, hold together our basic governmental structure and processes.

For all its faults, the U.S. Constitution has done a remarkable job of keeping a diverse and fractious society stable throughout wars, terrorist attacks, civil strife and economic crises, and is likely to do so for many years to come.

State constitutions, for their part, will continue to change at a much more rapid pace than their federal counterpart. The initiative process isn’t going anywhere in the states that have it. In fact, expect the process to gain momentum in the coming years, meaning there will be more citizen-initiated constitutional amendments on ballots nationwide.

No matter where you stand on the amendment process or the amendment proposals themselves, constitution-watching is part of our American heritage, not to mention good fun for political junkies everywhere.