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Constitutional Revision in Pennsylvania— Problems and Procedures

Robert Sidman*

There was this young coed in a Zoology class who was called on to tell about the mating habits of the Australian Wallaby. She looked her professor straight in the eye and said, "I wouldn't have the slightest interest in the subject unless I were a lady Wallaby."

That is the way it so often is when you talk to people in one state about the revision of another state's constitution. They may have the same kind of governments that do the same kind of things, but they could not be less interested in what happens to the form or powers of their neighboring state's courts or legislatures or executive departments or local governments.

Nevertheless, wherever I get a chance, I urge people to examine carefully the way in which the people of Pennsylvania managed to get their 94-year-old Constitution revised, after trying for 77 years.

First, let me emphasize that this was no little pin-scratch of a revision. Without getting into the substance, it made 85 *major* changes in the constitution. No part of the original constitution escaped some kind of rewriting or rearrangement. One 12-section Article was repealed entirely. Five or six other Articles consisting of 78 sections in all (one section was almost 1,500 words long), were replaced by new and less verbose provisions. Eighteen Articles became 11. The word-count of the entire document was reduced by almost ten percent.

Furthermore, this was not mere *change*. This was *improvement*. It was modernization, forward motion, progressiveness, creative governmental reform.

Now, how did all this come about?

Pennsylvania's Constitution became effective in 1874. Even in those days, it did not take long to realize how inappropriate it was to the government of a state which, then as now, had a large urban population and strong industrial orientation, and yet was largely dependent on its agriculture and mines.

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Sentiment for a new constitution rose so rapidly that in 1891, after only 17 years of this new constitution, the legislature agreed to a referendum on the question of whether another constitutional convention should be held.

That referendum was defeated, but the seeds had been sown. In the next 75 years, there were few days when responsible Pennsylvanians were not gathered somewhere, planning to revise that Constitution of 1874. Whenever enough of the right people made things hot enough for them, the legislature would reluctantly call for another referendum.

It helps to remember that Pennsylvania has always been pretty much a one-party state. At one time in the legislature, only 3 of 50 senators and 14 of 207 representatives were Democrats. No matter which party you favor, such a lopsided majority is hardly conducive to progressive legislation. In 1918, Governor Sproul appointed a Commission on Constitutional Revision, but the legislature called for a referendum on a convention before the Commission was quite prepared to report in 1921. The Commission rushed to complete its draft of a proposed new constitution and released it just a week before the referendum with 130 needed changes by the proposed convention. Nevertheless, the referendum was defeated, about 5 to 4, and so were the Commission's proposals. Another referendum was held in 1924, but it was clobbered 3 to 1.

To prepare for another referendum in 1935, Governor George Earle formed a new commission. However, the vote went against a convention, about 5 to 4, and the excellent commission proposals died.

There was great disparity between the total vote on these four referenda and the number of voters at the gubernatorial and presidential elections in the preceding and following years. As a rough estimate, for every 100 eligible voters in the state, 60 would vote for president, 40 for governor, but fewer than 25 on a convention referendum.

With the ill-fated 1935 Commission, a man named William A. Schnader came onto the scene. I urge every constitutional revision advocate in every state to find a William A. Schnader. He may not be indispensable, but he will make matters much easier. Maryland had its H. Vernon Eney, Illinois its Sam Witwer. West Virginia

has its Hulett Smith and Cecil Underwood and Dave Francis. Other states will simply have to make their own arrangements.

Schnader was a former (and excellent) Attorney General. He had the dubious honor to be the first Republican candidate for Governor ever to be defeated by a Democrat. He was the vice chairman of the 1935 Constitutional Revision Commission. And he was a prestigious Philadelphia lawyer. He now began a personal crusade to revise Pennsylvania's Constitution. He was held up by World War II, but as soon as possible after the fighting stopped, he began urging another convention referendum.

It was finally held in 1953. Unfortunately its support was weak, and the opposition was strong. They said, "A vote for a convention is a vote for a graduated income tax"—and out and out lie—but they said it in full page ads throughout the state on the day before the referendum.

So constitutional revision took another licking, again 5 to 4.

A new commission was appointed in 1957, headed by Superior Court Judge Robert E. Woodside. Largely influenced by five successive defeats—four in the preceding 36 years—they opposed another try for a convention. Instead, they drafted amendments, about half of which they classified as "critically needed," or "very desirable."

The Woodside Commission report was hailed everywhere except in the legislature, where all their proposals were either defeated or ignored. This snub was too much for many Pennsylvania leaders, among them General Schnader, who was then vice president of the Pennsylvania Bar Association. Formerly he had favored a convention, but he was now persuaded that the amendment route was a better road to revision.

In 1961, at his urging, the Pennsylvania Bar Association created "Project Constitution." He became—and remained—its chairman, spokesman, principal driving force and chief architect.

"Project Constitution" mobilized some 300 lawyers—the most competent in the entire state. They drafted a proposed new Constitution of 11 Articles, retaining some of the existing language, adopting most of the Woodside Commission proposals, borrowing from other states, and adding a few new ideas of their own. Then,

they packaged it in only 12 amendments—each amendment designed to repeal or revise an entire constitutional article at one time—and submitted them to the legislature.

This seems to be the first time that any state had contemplated a revision of its entire constitution by article-by-article amendments.

Meanwhile, in December, 1961, a different kind of citizen activity, the Committee for State Constitutional Revision, led by the wealthy, progressive Philadelphia industrialist, Milton J. Shapp, got underway.

Its position was uncomplicated:

1. The existing constitution was wasting \$100 million a year of state and local tax revenues in excessive borrowing costs and mandated useless jobs.
2. The 1953 Income Tax argument was a red herring. A graduated income tax was possible, even if no change were to be made in the constitution.
3. The legislature could not be expected to undertake any amendment program as complex as the Bar Association's article-by-article amendments since they had refused to act on even the least controversial of the Woodside Commission's proposals in the four years since 1959.
4. Therefore a convention to write a new constitution was essential.

The Committee forced the legislature to call for a referendum on a constitutional convention in 1963—the sixth since 1873. As the voting neared, the committee was conscious of its lack of "Establishment" support, and so it asked the Governor, William W. Scranton, to set up a bipartisan, top level, big name "Vote Yes" Committee. He did, and the Committee for State Constitutional Revision merged with it. However, three factors worked against the Governor's committee's success:

1. It never raised enough funds to finance an adequate campaign.
2. There was no appropriate place of honor in the "Vote Yes" committee for Milton Shapp, who, as much as any other citizen, had brought about this referendum. This snub certainly dampened the enthusiasm of the Democratic rank and file and many party leaders.

3. William A. Schnader, believing that victory for a convention was no more likely in 1963 than it had been on the five previous tries, exerted extraordinary pressures to keep the Bar Association in line, opposing the convention and favoring his article-by-article amendment method. In so doing he caused wide splits, not only among lawyers, but in many other elements in the state.

For example, Bill Schnader spoke that summer to a luncheon of the state's Republican Women. Afterwards, the Republican ladies took a stand against the convention, and nothing the Republican Governor, Scranton, could do ever changed their minds.

Many other advocates of revision also voted against the convention, and the 1963 referendum failed by about two-tenths of one percent, with 2,250,000 votes having been cast.

Bill Schnader wasted no time brooding about the extent of his miscalculation. He proposed a new Constitutional Revision Commission, to study and report on the Bar Association's Project Constitution proposals. It was named in November, 1963.

Early in 1964, it approved the 14 Bar Association proposals almost without change, and transmitted them through the Governor to the legislature as draft amendments.

At that time, amendments could be made in only one way—in Pennsylvania, regardless of their nature—by majority vote of both houses, after three readings in each, in each of two successive, separately elected legislatures; and, finally, by approval of a majority of the voters voting upon the question in a statewide referendum.

The proposed amendments divided into three categories. The first had little opposition, because they seemed neither to increase nor decrease anyone's power.

The second category had a mixed reception. They included amendments that could affect political jobs and powers—among them: to permit the Governor to run for reelection; to abandon the requirement to elect a Secretary of Internal Affairs (and presumably to get rid of that department); to make the legislature a continuing body; to permit speedy amendment of the constitution in case of emergency; and a long additional list. To get the approval of legislative leaders on both sides, it was necessary to twist some of the language around. But it was done, and without damage to principle.

The third category was the tough one! This included specific proposals: for *compelling* periodic reapportionment of the legislature; for repealing the constitutional prohibition against state debt; for permitting the possible elimination of some of the elected officers of the state's 67 counties; and, most formidable of all, a completely new judicial article which proposed—among many other things—to unify the state's court system, provide for administration of all courts by the Supreme Court, eliminate all 4,500 justices of the peace, institute a merit system for the nonpartisan selection of judges, establish a retirement age for all judges, and set up a procedure for the disciplining or retirement or removal of judges who fail to discharge their duties properly.

Amendments like these struck at the very heart of partisan political control. It was decided to leave these hot potatoes until last—to try to get the rest of the proposals through and ratified as smoothly as possible.

Lawyers are usually poor advocates for their own causes. It was felt advisable to create a new kind of citizens organization, known as A Modern Constitution for Pennsylvania, Inc., working full time, under professional leadership, for revision of a state constitution. Further, I believe it is still the only such organization ever to be declared tax exempt under the present I.R.S. code, and whose supporters have been permitted to deduct their contributions for income tax purposes.

Without lobbying, and without campaigning for or against any issue or candidate, this organization was decisive in the successful revision of Pennsylvania's Constitution.

It can now be duplicated here or in any other state. The National Council for Revision of State Constitutions, Inc., of which Hulett C. Smith, Cecil Underwood and Dave Francis are all board members, (and Governor Smith is president) is prepared to help leaders in any state set up such organizations, and to secure the same tax exemption and tax deductibility for them that was so vital in Pennsylvania.

By the time A Modern Constitution for Pennsylvania, Inc. was ready to roll in 1965, the first two "Project Constitution" amendments had already been approved once by the legislature. A new legislature had been elected in November, 1964, and the amendments were reintroduced in March, 1965.

They cleared the Senate, 36-7, and 39-4, and the House, 203-0 and 204-1. In the May primary, 1966, 1.2 million voters gave almost 2 to 1 approval to the new Article on Public Officers. In November, 1.9 million okayed the new Private Corporations Article, again 2 to 1.

This started a gradual but constant, step-by-step march toward ultimate success of the program. From May, 1966, through April, 1968, in 5 consecutive elections—3 primaries and 2 general elections—there was always at least one constitutional revision question on the ballot.

The next four amendments—to the Declaration of Rights and the articles on the Legislature and on Legislation, as well as the total repeal of the article on Railroads and Canals—passed their first rounds in 1965, almost unanimously. (One representative voted against one amendment, and three against the repeal of Railroads and Canals. The rest had no opposition.)

The proposed amended articles on the Executive, Elections, and Amendments were not passed by both houses for the first time until 1966, the second year of the legislative session. However, they did almost as well—unanimous, except for 19 representatives who held out against a proposal permitting faster amendment of the constitution, in case of emergency.

Now we come to the beginning of a new and unexpected development. At the November election, 1966, adoption of the first two of the series of proposed amendments was complete, and there were 7 more awaiting passage by the new legislature elected that day. But Pennsylvania was also electing a new governor. Their choice was the then Lieutenant Governor, Raymond P. Shafer, who promptly announced that he wanted a constitutional convention as soon as possible.

Hastily, Mr. Shafer and his Lieutenant Governor-elect, Raymond Broderick, were briefed: (a) on the plans for article-by-article revision, (b) on the strong bipartisan agreement in the legislature, (c) on the obvious public support for the program, and (d) on the advantages of completing what was well underway. It was also pointed out that, since they both had given campaign endorsements to the seven proposed and pending article-by-article amendments, it would be inconsistent to abandon them in favor of a convention which might offer very different proposals,

Agreement was finally reached, in principle, that the incoming Administration would resume its support of the pending amendments. Meanwhile, a limited convention should be sought, limited in two respects: it would not propose changes to any part of the constitution which had been modernized by any of the article-by-article amendments; nor would it propose any change in the so-called Uniformity Clause which Pennsylvania courts have consistently interpreted as a prohibition against a graduated personal income tax.

A Modern Constitution for Pennsylvania, Inc., contributed much to this solution. We provided a neutral zone where adversaries could discuss and resolve their differences. This device was more than helpful—it was essential.

The 1967 legislature gave priority to constitutional revision. Senate Bill 1 was the convention enabling bill. Senate Bills 2 through 8 were the seven article-by-article amendments that had been awaiting second passage.

We ought to talk about the convention enabling bill, because this is a ticklish piece of legislation in any state. Pennsylvania's experience may help others.

The enabling act must define the convention, so that it can stand against any court challenges. Many authorities insist that no legislature has the right and power to limit a convention, once it is convened. However, Pennsylvania wrote the limitations into the ballot question on the referendum. Therefore, the limitation was being imposed by the voters, rather than by the legislature, and it was safely beyond challenge.

We rejected the idea of nonpartisan election of delegates; how can you prevent Republicans working for known Republican candidates, and Democrats for Democrats, no matter how they are listed on the ballot? Instead, we devised a plan by which we hoped the 150 elected delegates would divide very evenly. Actually, it worked well.

The bill also established the Lieutenant Governor, and the 12 top legislative leaders, divided evenly between the parties and houses, as a Preparatory Committee, to study and report to the delegates on issues that would confront them, and to set up physical arrangements for the convention.

I would never want to recommend this formula, but it worked well for us. We were lucky in having a Lieutenant Governor who,

as chairman of this committee, and later as president of the convention, fought constantly to prevent any kind of partisanship and to achieve the most desirable results.

When the convention started, all the Preparatory Committee members became *ex officio* delegates. This worked out poorly. Only the Lieutenant Governor and 3 or 4 others contributed to—or even attended—convention or committee sessions.

Governor-elect Shafer had wanted the bill to call for electing delegates at the same time as the referendum. He hoped to have the convention sit throughout the summer of 1967, submit proposals to the voters at the regular November election, and enjoy the advantages of a new constitution for the last three years of his term.

However, Democrats in the legislature were offended by not having had a chance even to read this supposedly bipartisan measure before its introduction, and they were suspicious. They found Republican allies who opposed any kind of revision, and were willing to drag out the process as long as they could. So the enabling act was held up long enough to upset Shafer's timing. A new schedule was then necessary. It ran like this:

Passage: As soon as possible, but before March 17, in order to get the question on the Primary Election ballot.

Referendum: May 16, 1967.

Preparatory Committee: Start as soon as referendum vote could be certified.

Election of Delegates: November 7, 1967.

Convention start: December 1, 1967.

Convention adjourn: February 29, 1968.

Referendum on convention proposals: April 23, 1968.

A provision to have the Republican Attorney General approve every convention proposal before it could be considered by the delegates added fuel to the Democratic fire, and made our task of maintaining peace between the two political camps in the legislature infinitely more difficult. However, I believe the new Attorney General himself persuaded everyone that the provision was neither necessary nor welcome, so it was dropped.

Ultimately, the final bill took shape and was approved, 43-5 in the Senate, 166-33 in the House. Meanwhile, the legislature also approved the 7 pending article-by-article amendments, and put them in position to be submitted to the voters at the same time as the convention referendum.

Governor Shafer named his two immediate predecessors in office—Republican William W. Scanton and Democrat George M. Leader—to head a statewide drive for a favorable vote on the convention referendum, the seven article-by-article amendments, an important but unrelated \$500 million conservation bond issue. It was happily called *The Committee for 9 Yes Votes*.

Almost all the forces of the state mobilized on one side. Both political parties endorsed all nine ballot questions. So did organizations as dissimilar as the State Chamber of Commerce, the Pennsylvania AFL-CIO, the Associated Railroads of Pennsylvania and the State Council of Churches.

In the end, between 1,200,000 and 1,250,000 voted to ratify each of the 7 article-by-article amendments, while the No votes ranged from 600,000 to 638,000. The convention referendum did only slightly less well—1,140,000 to 700,000.

Starting the next morning, the question was, “How do we get the best, most qualified people in the state to serve as delegates in the convention?”

The state chairmen of the two parties tried informally to get their county committees, who were to make the nominations, to name their best people. However, their performance was spotty. In at least one instance, those who were being considered for nomination were told that they would be expected to vote as instructed by their county chairman, to contribute all of their salaries as delegates to the party treasury, and to campaign actively for everybody on their party ticket in the coming election for local officials.

Nevertheless, the 100 Republicans, 100 Democrats and 26 Independents who ran for the 150 elected delegate seats rated well.

The next job was to encourage and help the electorate to select the most qualified of them. *A Modern Constitution for Pennsylvania, Inc.* printed and circulated hundreds of thousands of pamphlets and booklets throughout the state—lists of all the candidates and

their qualifications, a Q. and A. folder on the convention, and others. Other organizations did their bit, too—most notably, the League of Women Voters, the Bar Association and the State Chamber of Commerce. The press, radio and TV were, as always, cooperative and helpful.

A Modern Constitution for Pennsylvania also had put together a sort of subsidiary organization to serve as a two-way sounding board on convention questions for about 25 large statewide membership associations. We had planned a seminar for their officers, staffs and members, but we expanded it to include all candidates for delegate to the convention. While it was only a one-day affair, it was extremely well attended and effective. We rushed a printing of a 164 page book, a verbatim account of the seminar proceedings and gave it wide distribution. Many of the delegates and candidates for delegate to the convention had attended the seminar. Many told me later that it was the first realization they had had of the enormous complexity of the task before them.

The election resulted in the hoped-for tight balance between Republicans and Democrats—about 80 to 70. Surprisingly, non-lawyers outnumbered the lawyers, 3 to 2. And the quest for quality had borne some fruit—as one index, all but 17 of the delegates had attended college.

Elected delegates included several former government officials—a former governor, lieutenant governor, state senator, congressman (who had also been governor-general of Puerto Rico), Speaker of the House, several Cabinet officers and judges. They included a college president, a vice president of Penn State, a law professor who became dean of law of his university while the convention was in progress, and several political scientists. They included a past president of the State Bar Association, and the chairman and another member of the 1957 Constitutional Revision Commission. And they included, in all, no fewer than 25 delegates who had had experience in drafting or revising constitutions, including the state of Maine and post-war Japan.

On the negative side, the winning candidates also included several who had opposed the convention and had campaigned against it. It included several lobbyists, one who was paid to represent the most potent of the organizations who had frightened the voters into rejecting a constitutional convention in 1953 and in 1963, another who represents one of the minor judiciary organizations.

Lieutenant Governor Broderick was elected President of the convention, and a Democrat and Republican were chosen 1st and 2nd Vice Presidents. And, a remarkable matter in these incongruous times, for Secretary the convention elected the delegate who had written more and better than any of them, James A. Michener, author of "South Pacific," "Hawaii," "The Source," and "Iberia"—and whose newest book, "Presidential Lottery" is a provocative study of the national electoral system.

This bipartisanship also marked two other decisions: to have every committee set up with an equal number of Republicans and Democrats, even to having two coequal cochairmen for each; and to copy Maryland's ingenious arrangement of seating all the delegates alphabetically by their last name. This last seems most important to me. It prevented the delegates of either party or of any one area from sitting and conspiring together. Some delegates tried to push through an arrangement whereby they would be seated numerically, according to the senatorial district numbers. But this attempt to create power blocs was quickly defeated.

I recall only one time when unvarnished, raw political pressures dominated the convention. This was when a proposal on the size of the Pennsylvania legislature was debated. Even so, the importance of their victory is questionable.

The convention considered all of the Bar Association proposals, and adopted most of them. However, they went much further than the Bar in their proposed revisions of the articles on Local Government, and Taxation and Finance.

It did, however, follow the Bar's precedent by submitting each of its five sweeping proposals as separate proposals for the April, 1968, referendum.

There were some who were not pleased by the convention. Among them were many high placed judges, including the chief justice, and even some county bar associations. People who wanted to see public utilities taxed by local governments were unhappy, but so were the public utilities people, themselves. The more you were inclined to power politics, the less you liked the local government proposals. There was sizable opposition to the new debt provisions. And so it went.

Once more, there was a big campaign. The Scranton-Leader committee was revived, now diminished to The Committee for 5

"Yes" Votes. All but two of the convention delegates took the stump for it. Town meetings sprang up throughout the state in the 11 weeks that elapsed between the convention's adjournment and the statewide referendum.

The press, radio and TV again were superlative in their presentation. The Pittsburgh Press was the only major publication I can recall that wanted a split ballot. Nobody seemed to be against all the proposals, except one man who publicly denounced the whole thing as a plot by the Masons and the Jews to take over all of Pennsylvania.

About 1.6 million voters made the decision on April 23, 1968. On one proposal, only 882,116 voters said "Yes," and 763,745 said "No." A shift of less than 60,000 votes would have defeated this.

Another question carried, 910,855 to 729,845. A shift of 90,000 votes would have beaten it.

The others carried with larger margins, generally about 1 million for and 600,000 against. So all five proposals were approved, and Pennsylvania's 94-year-old Constitution was finally modernized.

But the day was saved only by the convention's decision to submit the 5 proposals separately. However acceptable or unacceptable its proposals, if the convention had put them before the voters in one lump, saying "Take it or leave it; vote yes or no on the whole thing," what would have happened then?

Well, probably the same number of voters would have come out—1.6 million. And the 763,745 voters who didn't like the Taxation proposal probably would still have voted "No." But they would almost certainly have picked up another 100,000 or so who may have had no quarrel with the Taxation proposal, but who wanted to preserve the JP system, or who wouldn't approve a 203 member House of Representatives, or who felt that public defenders were the last thing we need in Pennsylvania. And where would we have been then? Down the drain, with New York and Maryland and Rhode Island.

We succeeded in Pennsylvania, in the last analysis, because we kept our options open, always. And we set our sights high. And we never stopped trying.

There was also undoubted advantage in the regularity with which constitutional problems kept coming before the public, these last few years. There was always a crisis—a proposed amendment that was stuck in a committee in the House, or a close vote for an amendment coming up on the floor, or a plot by some lobbyists and legislators to emasculate one of the amendments, or a referendum or a hearing The fire bell was ringing constantly.

Finally, we had a plan—a plan whose beginnings went back at least 75 years, but which was honed and stropped by many keen minds and skillful hands through the years. It was flexible enough to fit contingencies as they arose. What started as a defeat for an unlimited convention found victory within the next 5 years as a dozen recommendations from a commission, as nine unprecedented article-by-article amendments, and as five separate proposals from a limited convention. There is even further irony in the fact that many of the new provisions in our new constitution had been urged for more than 35 years, and had been rejected often by both the legislature and the voters.

Let me close by proclaiming a new axiom, which—if you'll permit me—shall be called "The Pennsylvania Corollary." It goes like this:

"The older the Constitution is, the more time you have to figure out how to make it young again."