

CHAPTER SEVENTEEN

CONSTITUTIONAL AMENDMENTS AND REVISIONS

1. BACKGROUND
 2. CONSTITUTIONAL AMENDMENT
 3. CONSTITUTIONAL REVISION
 4. ENABLING LEGISLATION; SELF-EXECUTING AMENDMENTS OR REVISIONS
 5. OREGON RATIFICATION OF PROPOSED AMENDMENT TO FEDERAL CONSTITUTION
-

1. BACKGROUND.

Adequate background research is required in preparing a constitutional amendment or revision, just as in drafting a bill. Since any change in the Oregon Constitution must be approved by the people, correcting an error made in drafting a constitutional amendment or revision is much more difficult than correcting an error made in drafting a bill.

In drafting a constitutional amendment or revision, the drafter must check the annotations to the Constitution. Reference to the report and files of the Oregon legislative interim committees on constitutional revision may be useful to pick up background information relating to the proposed amendment or revision and to find any notes concerning obsolete related parts of the Constitution. Comparative constitutional provisions of other states may be helpful in preparing a constitutional amendment. States having a particular type of constitutional provision can be located by referring to the *Index Digest of State Constitutions*, a copy of which is in the Legislative Counsel library. The library also has a set of volumes containing the text of all state Constitutions. For the source of original sections of the Oregon Constitution, *A History of the Oregon Constitution* by Carey is often useful. For background on amendments to the Constitution, the voters' pamphlet for the election at which the amendment was adopted may provide the arguments pro and con.

A STAIRS search should be conducted when amending or repealing a section of the Constitution.

There are significant differences between **amendment** and **revision** of which the drafter must be aware. The terms are not interchangeable.

2. CONSTITUTIONAL AMENDMENT.

The people may amend the Constitution through use of the initiative procedure (see section 1, Article IV, Oregon Constitution). The amendments proposed by the people by petition do not require the referendum clause.

The method for legislatively adopting amendments to the Oregon Constitution is prescribed in section 1, Article XVII, Oregon Constitution. That section provides that:

- ◆ An amendment may be proposed in either house of the Legislative Assembly.
- ◆ The amendment must be agreed to by a **majority** of all the members elected to each of the two houses.
- ◆ The amendment must be referred to the people for their approval or rejection at the next **regular general election**, except when the Legislative Assembly orders a special election for that purpose.
- ◆ The amendment must be approved by a majority of the votes cast on the amendment.
- ◆ If the majority of votes cast on the amendment is in favor of the amendment, the Governor by proclamation declares the amendment adopted, and the amendment takes effect 30 days after the day on which it is approved by a majority of the votes cast. Or. Const. Art. IV, §1 (4)(d).
- ◆ When “two or more amendments shall be submitted” at the same election, they shall be so submitted that each amendment shall be voted upon separately.

Drafters should pay special attention to the separate-vote requirement. This requirement applies to constitutional amendments proposed by initiative petition and to constitutional amendments referred by the Legislative Assembly. See Armatta v. Kitzhaber, 327 Or. 250 (1998). If a court determines that a measure was not adopted in compliance with the separate-vote requirement of section 1, Article XVII, the measure is void in its entirety.

The separate-vote requirement does not prohibit an amendment that affects more than one article or section. “At most it prohibits the submission of two amendments on two different subjects in such a manner as to make it impossible for the voters to express their will as to each.” Baum v. Newbry, 200 Or. 576 (1954). The test for determining whether a measure contains more than one constitutional amendment that must be voted on separately is described in Armatta v. Kitzhaber, 327 Or. 250 (1998), Lehman v. Bradbury, 333 Or. 231 (2002), and Swett v. Bradbury 333 Or. 597 (2002).

In Armatta, the court said:

We conclude that the proper inquiry is to determine whether, if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not closely related. If the proposal would effect two or more changes that are substantive and not closely related, the proposal violates the separate-vote requirement. Armatta at 277.

In Lehman, the court said that to determine whether changes are closely related the court will examine (1) whether the constitutional provisions affected by the measure are related, and (2) whether the changes made to those constitutional provisions are closely related. The court said:

First, we examine the relationship among the constitutional provisions that the measure affects If the affected provisions of the existing constitution themselves are not related, then it is likely that changes to those provisions will offend the separate-vote requirement. . . . [T]he fact that a proposed amendment asks the people, in one vote, substantively to change multiple provisions of the Oregon Constitution that are not themselves related is one indication that the proposed amendment might violate the separate-vote requirement.

Next, we must consider the constitutional changes themselves. That is, . . . we must determine whether the changes made to those . . . constitutional provisions are closely related. If they are closely related, the measure under consideration survives scrutiny under Article XVII, section 1. If they are not, it does not. Lehman at 246.

Finally, in Swett v. Bradbury, 333 Or. 597, 607 (2002), the court said that “it is equally valid analytically to start the inquiry by focusing on the changes themselves.”

See also Carey v. Lincoln Loan Co., 342 Or. 530 (2007); Meyer v. Bradbury, 341 Or. 288 (2006); Lincoln Interagency Narcotics Team v. Kitzhaber, 341 Or. 496 (2006); League of Oregon Cities v. State of Oregon, 334 Or. 645 (2002).

a. Form of Constitutional Amendments.

A constitutional amendment is proposed by a joint resolution.

The following are examples of the parts of a joint resolution proposing a constitutional amendment:

Preamble:

Although a preamble (“whereas” clauses) is rarely used in a joint resolution proposing a constitutional amendment, one can be included if the requester wishes. House Joint Resolution 7 (1967) is an example.

Resolving Clause:

Be It Resolved by the Legislative Assembly of the State of Oregon:

Amending Clause:

In a joint resolution proposing a constitutional amendment, only **one** amending clause is used. The amending clause immediately follows the resolving clause.

b. Amendment of Existing Section.

Probably the most common type of constitutional amendment is an amendment of an existing section of the Constitution. Brackets and boldfaced type are used to mark the changes to be made by the amendment, the same as in a bill. The following example illustrates the form used for amending a section or sections of the Constitution:

PARAGRAPH 1. Sections 3 and 7, Article IV of the Constitution of the State of Oregon, are amended to read:

Sec. 3. The Senators and Representatives shall be chosen. . . .

Sec. 7. A senatorial district, when. . . .

c. Adding New Section.

The Oregon Constitution also may be amended by adding a new section or sections. In a joint resolution proposing such an amendment, the following is suggested: <spm addc>

PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating new sections 2 and 3 to be added to and made a part of Article III, such sections to read:

SECTION 2. The Legislative Assembly shall. . . .

SECTION 3. The Legislative Assembly may. . . .

The numbers assigned to the new sections in the proposed amendment should be the numbers that they will have when placed in the Constitution. This is an exception to the general rule that a drafter does not assign permanent identifying numbers to new enactments. Note, too, that the section designation is not underlined, as it would be in a bill.

d. Repeal.

In a joint resolution proposing the repeal of a section of the Oregon Constitution, the following form should be used:

PARAGRAPH 1. Sections 37 and 38, Article I of the Constitution of the State of Oregon, are repealed.

e. Repeal and Adoption in Lieu.

In a joint resolution proposing the repeal of a section of the Oregon Constitution and the adoption in lieu thereof of a new section, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing section 6, Article IV, and by adopting the following new section 6 in lieu thereof, such section to read:

Sec. 6. (1) The number of Senators shall be. . . .

No separate statement is required to repeal the former section 6.

f. Repeal of Existing Section and Amendment of Existing Section in Same Proposed Amendment.

In a joint resolution proposing the repeal of a section or sections of the Oregon Constitution and also proposing the amendment of existing sections, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing section 18, Article VII (Original), and by amending section 5, Article VII (Amended), such section to read:

Sec. 5. In civil cases. . . .

g. Repeal of Existing Section and Creation of New Sections in Same Proposed Amendment.

In a joint resolution proposing the repeal of a section or sections of the Oregon Constitution and also proposing the enactment of new sections, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by repealing sections 2, 3, 4, 5, 6, 7 and 8, Article IV, and section 17, Article V, and by creating new sections 2 and 3 to be added to and made a part of Article IV, such sections to read:

SECTION 2. The Senate shall be. . . and the House of Representatives shall be. . .

SECTION 3. (1) The Senators and Representatives shall be. . . .

h. Amendment of Existing Sections and Creation of New Sections in Same Proposed Amendment.

The form for an amendment of an existing section and the creation of a new section in the same proposed amendment depends on the circumstances. Usually, in a joint resolution proposing the amendment of an existing section and the creation of a new section, the following should immediately follow the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new section 5 to be added to and made a part of Article III, and by amending section 2, Article IV, such sections to read:

SECTION 5. The Legislative Assembly. . . .

In some cases when it is necessary to create new sections, the amendment may be easier to understand if existing sections are repealed (rather than amended) and reenacted in the form of new sections.

An example of an amendment changing the title of an Article of the Constitution may be found in House Joint Resolution 5 (1959).

i. Adding a New Article.

Subject to the separate-vote requirement discussed above, a joint resolution may propose a new Article to the Oregon Constitution. To propose a new article, use the following form after the resolving clause:

PARAGRAPH 1. The Constitution of the State of Oregon is amended by creating a new Article to be known as Article XI-K, such Article to read:

ARTICLE XI-K

SECTION 1. (Insert text)

SECTION 2. (Insert text)

SECTION 3. (Insert text)

j. Referendum Clause.

Constitutional amendments proposed by the Legislative Assembly must be referred to the people for their approval or rejection. The referred amendment is to be voted on at the next regular general election, unless the Legislative Assembly orders a special election. Therefore, in a joint resolution proposing a constitutional amendment, a referendum clause must be included.

The following (to follow the text of the proposed amendment) is prescribed for submission by the Legislative Assembly of a proposed constitutional amendment at a **regular general election:** <spm general>

PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout this state.

At the primary election: <spm primary>

PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at a special election held throughout this state on the same date as the next primary election.

At a special election:

A drafter may be asked to refer a constitutional amendment to the people at an election date that is different from the primary election or regular general election. If so, the resolution may require a bill to provide for a special election. For a discussion of special election bills, see “Referral at Special Election” under “Referendum” in chapter 12 of this manual.

If requested to submit an amendment at a special election, or at the primary election or regular general election if the bill calling the special election does not pass, the drafter should insert the following language in the referral paragraph: <spm special-option>

PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at a special election held throughout this state on the date specified in section __, chapter __, Oregon Laws (year) (Enrolled _____ Bill ____). If a special

election is not held throughout this state on the date specified in section __, chapter __, Oregon Laws (year) (Enrolled _____ Bill __), the amendment proposed by this resolution shall be submitted to the people for their approval or rejection at [insert either “a special election held throughout this state on the same date as the next primary election” or “the next regular general election held throughout this state”].

If requested to submit an amendment at a special election only, the drafter should insert the following language in the referral clause (note that the amendment will not be referred if the special election bill does not pass): <spm special>

PARAGRAPH 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at a special election held throughout this state as provided in chapter __, Oregon Laws (year) (Enrolled _____ Bill __).

Note that any referral to a special election will require a separate special election bill as described above.

An initiative petition does not require any referendum clause. The election date (regular general election) is fixed by the Oregon Constitution, unless a different election date is ordered by the Legislative Assembly in a separate bill. (Section 1 (4)(c), Article IV, Oregon Constitution.) For an example of a bill ordering a different election date on a referendum petition, see chapter 1050, Oregon Laws 1999.

k. Ballot Title.

If directed to prepare a ballot title, the drafter should consult ORS 250.035 and 250.075. The ballot title may be included in the bill providing for the special election or may be drafted as a separate bill. Political circumstances may dictate the approach. The bill may alter or suspend the ballot title provisions of ORS 250.035, including provisions allowing judicial review of the ballot title. See discussion of ballot titles under “Referendum” and “Setting Special Elections” in chapter 12 of this manual.

L. Rescission of a Proposed Amendment.

In the 2002 second special session, the Legislative Assembly adopted Senate Joint Resolution 76, which rescinded Senate Joint Resolution 50 adopted in the 2002 first special session. See also House Joint Resolution 8 (1963 special session) and House Joint Resolution 2 (1967 special session). The authority of the Legislative Assembly to rescind a proposed amendment to the Oregon Constitution and to refer a different proposed amendment to the voters was upheld by the Marion County Circuit Court. See State ex rel. Simmons v. Bradbury, No. 02C11917 (March 12, 2002). See also Legislative Counsel opinions 73-27 and 2002-34.

Note that the 2002 rescission occurred prior to printing of ballots or of the voters’ pamphlet. An attempt to rescind a proposed amendment after ballots have been printed might or might not be upheld by a court.

3. CONSTITUTIONAL REVISION.

Section 1, Article XVII, Oregon Constitution, provides that a convention to amend or propose amendments to the Constitution or to propose a new Constitution can be called only if the law providing for such convention first is approved by the people at a regular general election. An example of a bill calling a constitutional convention is House Bill 351 (1959).

The method for adopting a constitutional revision is prescribed in section 2, Article XVII, Oregon Constitution. Subsection (1) of that section provides that:

- ◆ A revision of all or part of the Constitution may be proposed in either house of the Legislative Assembly.
- ◆ The revision must be agreed to by **two-thirds** of all the members of each house.
- ◆ The revision must be referred to the people for their approval or rejection at the next regular statewide primary election, except when the Legislative Assembly orders a special election for that purpose.
- ◆ The revision must be approved by a majority of the votes cast on the revision.
- ◆ If the majority of votes cast on the revision is in favor of the revision, the Governor by proclamation declares the revision adopted, and the revision is in effect as the Constitution or as a part thereof from the date of the proclamation.
- ◆ The scope of a revision is not as limited as that of an amendment. A revision “may deal with more than one subject and shall be voted upon as one question.”

Subsections (2) and (3) of section 2, Article XVII, Oregon Constitution, provide for a method of submitting an amendment in the form of alternative provisions so as to achieve consistency with a revision. Senate Joint Resolution 19 (1963) and House Joint Resolution 20 (1963) are examples.

The people may not initiate a constitutional revision. Holmes v. Appling, 237 Or. 546 (1964).

a. Joint Resolution.

A constitutional revision, like a constitutional amendment, is proposed by a joint resolution. However, revision proposals differ in several respects. The resolving clause of a joint resolution proposing a constitutional revision reflects this difference, as follows:

Be It Resolved by the Legislative Assembly of the State of Oregon, two-thirds of all the members of each house concurring:

b. Revision of Sections.

Since a proposed constitutional revision may deal with more than one subject and is voted on as one question, a resolution may propose the revision of any number of existing sections of the Constitution. These sections should be arranged in the same order in which they appear in the Constitution, unless some other arrangement is clearer or more logical. Bracketing and boldfacing the changes are the same in a revision as in a bill.

As in the case of a proposed constitutional amendment, one revising clause for several existing sections of the Constitution revised in the resolution may be used. However, it is preferable to use a separate revising clause for each existing section revised. For example:

PARAGRAPH 1. Section 3, Article IV of the Constitution of the State of Oregon, is revised to read:

Sec. 3. (Insert text)

PARAGRAPH 2. Section 7, Article IV of the Constitution of the State of Oregon, is revised to read:

Sec. 7. (Insert text)

c. Adding New Sections.

The Constitution may be revised by adding a new Article, section or sections. In a joint resolution proposing such a constitutional revision, all of the new sections may be grouped under a single revising clause. For example:

PARAGRAPH 1. The Constitution of the State of Oregon is revised by creating new sections 5, 6, 7 and 8 to be added to and made a part of Article III, (or, “to be added to and made a part thereof and to be designated Article XIX,”) such sections to read:

The numbers assigned to the new sections in the proposed revision should be the numbers that they will have when placed in the Constitution. To avoid confusion, a separate numbered paragraph and revising clause in the resolution should be used for each Article of the Constitution that is affected by the proposed revision.

d. Repeal of Sections and Other Revisions.

Existing sections of the Constitution may be repealed in the same manner as in a joint resolution proposing a constitutional amendment. For example:

PARAGRAPH 1. Sections 37 and 38, Article I of the Constitution of the State of Oregon, are repealed.

Normally, all sections of the Constitution to be repealed by the proposed revision would be placed under one revising clause, except in those instances of repeal of an existing section and adoption of a new section in lieu thereof.

Revising clauses that approximate amending clauses used in proposed constitutional amendments should be used for instances of repeal and adoption in lieu, repeal of existing sections and amendment of existing sections in the same proposed amendment, repeal of existing sections and creation of new sections in the same proposed amendment and amendment of existing sections and creation of new sections in the same proposed amendment. However, it may be preferable to use a separate numbered paragraph and revising clause for each category of revision proposed in the resolution. House Joint Resolution 30 (1961) is an example.

e. Renumbering Existing Sections of Constitution.

Some existing sections of the Constitution are not located in the most appropriate place, and transferring an existing section from one place to another in the Constitution in order to carry out the scheme of the proposed revision may be desired. This **may** be done by repealing a section to be relocated and adopting a new section in lieu thereof, adding the new section to the proper Article and giving it the proper section number. However, the revision may be more intelligible if the existing section is redesignated in the following manner:

PARAGRAPH 3. Section 8, Article XV of the Constitution of the State of Oregon, is redesignated section 32, Article IV.

f. Referendum Clause.

Constitutional revisions proposed by the Legislative Assembly must be referred to the people for their approval or rejection. The referred revision is to be voted upon at the next **primary** election, unless the Legislative Assembly orders a special election. A referendum clause must be included in the joint resolution proposing a constitutional revision.

The following form (to follow the text of the proposed revision) is prescribed for submission of a proposed constitutional revision at a statewide primary election:

PARAGRAPH 4. The revision proposed by this resolution shall be submitted to the people for their approval or rejection at the next primary election.

If a special election to vote on the proposed constitutional revision is desired, the referendum clause must be adjusted, as in the case of a proposed constitutional amendment under the same circumstances. For example, the following form is prescribed for submission of a proposed constitutional revision at a regular general election:

PARAGRAPH 4. The revision proposed by the resolution shall be submitted to the people for their approval or rejection at a special election held on the same date as the next general election.

If requested to refer a constitutional revision to the people at an election date that is different from the primary or regular general election, adjust the special election referral language described in section 2.j. of this chapter, "Referendum Clause." Be sure to change the word "amendment" to "revision" and remember that any referral to a special election

will require a separate special election bill. For a discussion of special election bills, see “Referral at Special Election” under “Referendum” in chapter 12 of this manual.

4. ENABLING LEGISLATION; SELF-EXECUTING AMENDMENTS OR REVISIONS.

A requester who wants an amendment or revision of the Constitution often also wants enabling legislation to be operative if the constitutional amendment or revision is approved by the people. An Act may be made to take effect upon the adoption by the people of a constitutional amendment authorizing the Act. State v. Rathie, 101 Or. 339 (1921); (overruled on other grounds, State v. Brewton, 238 Or. 590 (1964).

Enabling legislation prepared at the same time as a constitutional amendment or revision must include a provision in the enabling Act to the effect that if the constitutional amendment or revision is not approved by the people at the election at which it is to be submitted, the enabling Act is not effective. If the enabling legislation is to be adopted by initiative, the provision should indicate that the enabling legislation does not become “operative” unless the accompanying constitutional amendment or revision is approved by the people (because section 1 (4)(d), Article IV, Oregon Constitution, says that an initiative law becomes effective 30 days after the election at which it is approved). For example:

SECTION ____. This (year) Act does not become effective (operative) unless the Oregon Constitution is revised by vote of the people at the primary election in (year) to provide that This (year) Act becomes effective (operative) on the effective date of that revision.

OR

SECTION ____. This (year) Act does not become effective (operative) unless the Oregon Constitution is amended by vote of the people at the regular general election in (year) to repeal section 18, Article II of the Oregon Constitution. This (year) Act becomes effective (operative) on the effective date of that amendment.

OR

SECTION ____. This (year) Act does not become effective (operative) unless the amendment to the Oregon Constitution proposed by House Joint Resolution 79 ((year)) is approved by the people at the regular general election held in November (year). This (year) Act becomes effective (operative) on the effective date of that amendment.

An additional example may be found in section 6, chapter 625, Oregon Laws 1963. If this type of provision is included in the enabling Act, it is unnecessary to repeal the enabling Act if the proposed constitutional amendment or revision is rejected by the voters. Section 6, chapter 625, Oregon Laws 1963, reads as follows:

Sec. 6. This Act shall not become effective (operative) unless the Constitution of the State of Oregon is amended by vote of the people at the regular general election held in 1964, so as to repeal sections 37 and 38, Article I thereof. If that amendment is so approved by vote of the people, this Act shall become effective (operative) on the effective date of the amendment.

It may be desirable that the constitutional amendment or revision specifically recognize as enabling legislation an Act passed before its adoption. Boyd v. Olcott, 102 Or. 327 (1921). The following may serve as a guide for drafting such a constitutional provision:

(3) Any Act passed prior to the effective date of this constitutional amendment that purports to execute this section is considered to have been passed pursuant to this section and is ratified, adopted and confirmed as if passed after the adoption of this section.

Instead of relying on enabling legislation to implement a constitutional amendment or revision, it may be necessary to draft an amendment or revision that will be self-executing. Such an amendment or revision probably will contain matters ordinarily covered by statute. If this is the case, it should be made plain that at least some of these matters are controlled by provisions of the amendment or revision only so long as later enacted statutes do not otherwise provide. Examples of self-executing constitutional amendments may be found in LC Request No. 92 (1969).

SECTION ____. The State of Oregon acting through its appropriate administrative agency shall proceed with all reasonable speed to define, establish and quiet its title to all ocean beach lands and easements and other means of public access thereto owned or claimed by it.

SECTION ____. Fee title to ocean beach lands now owned or hereafter acquired by the State of Oregon shall not be sold or conveyed, and all the lands shall be forever preserved and maintained for public use. No interest less than fee title and no rights or privileges in the lands now owned or hereafter acquired by the state shall be conveyed or granted by deed, lease, license, permit or otherwise, except as provided by law.

5. OREGON RATIFICATION OF PROPOSED AMENDMENT TO FEDERAL CONSTITUTION.

HJR 2 (1967), HJR 13 (1973) and SJR 4 (1973) are joint resolutions ratifying proposed amendments to the United States Constitution. HJR 62 (1977) proposed the reaffirmation of the ratification of a proposed amendment to the United States Constitution. HJM 15 (1985) is a joint memorial requesting Congress to propose an amendment to the United States Constitution that requires a balanced federal budget and the withdrawal of previous memorials on the same subject.

The drafter should be aware that Article V of the U.S. Constitution specifies the procedures for proposing and ratifying amendments to the U.S. Constitution. If two-thirds of both houses of Congress agree and propose an amendment, Congress may direct how states may ratify the amendment, either by three-quarters of the state legislatures or by convention in three-quarters of the states.

If Congress directs ratification by state legislatures or by conventions, the ratification is not subject to a popular vote because the ratification is not an Act, a constitutional amendment or a constitutional revision under section 1, Article IV or Article XVII of the Oregon Constitution. Further, Article V of the U.S. Constitution specifically directs that the ratification be done by either state legislatures or by convention.

In the past, the Oregon Legislative Assembly has ratified and attempted to rescind ratification by use of a joint resolution.

Finally, the Legislative Assembly could pass an Act that submits an advisory question to the people regarding the merits of ratifying a proposed amendment to the United States Constitution. The “referral” of the advisory question would not qualify as a referral of an Act under section 1, Article IV of the Oregon Constitution, would not constitute a vote on ratification and would not have the force of law.

