



Amending the PA Constitution

JAMES S. BOWMAN INN OF COURT
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Amending the PA Constitution:

An Overview

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Two Paths

1. Proposals of the General Assembly

2. Calling a Constitutional Convention



Legislatively referred constitutional amendments (Article XI)

1. Passed in first General Assembly
 - Published in two newspapers in every county three months before next general election
2. Passed in second General Assembly
 - Published again
3. Majority vote in referendum
4. Becomes a part of the Constitution

Note: no amendment can be submitted more than once every five years; two or more amendments must be voted on separately.



Emergency procedures for legislatively referred amendments (Article XI(a), (b))



Joint Resolution No. 6 in 1976 added emergency procedures for amending the Constitution:

1. Major emergency that requires prompt amendment of the Constitution
2. Majority vote in both houses
3. Published in two newspapers in every county
4. Majority vote in referendum (held at least one month after General Assembly vote)

Constitutional Conventions

Article I, § 2. Political powers.

All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper.



Constitutional Conventions



“[S]o long as a Constitutional Convention is not expressly prohibited by the then existing Constitution, it represents a proper manner and method in which the citizens of Pennsylvania may initiate an amendment of their Constitution”

Stander v. Kelley, 433 Pa. 406, 250 A.2d 474, 478 (1969).

See also *League of Women Voters of Pennsylvania v. DeGraffenreid*, 265 A.3d 207, 227 n.1 (Pa., 2021) (dicta)

Procedures for Conventions



- “majority of the electors vote in favor of such a call”
- “the people have the right to determine initially or by ratification the manner and matter of notice and times of publication which they desire or are willing to sanction”
- “The function of the Constitutional Convention was to propose and Recommend to the electorate of Pennsylvania changes and alterations in the existing State Constitution.”

Stander v. Kelley, 433 Pa. 406, 250 A.2d 474 (1969).

1967-68 Convention - Act 2 of 1967

- Section 1 : Referendum to the electorate to hold convention
- Sections 2-4 : Membership and Qualifications, Nomination and Selection of Delegates
- Section 5 : Preparatory Committee and Appropriation
- Section 6 : Organization of Convention
- Section 7 : Substantive Powers of the Convention
- Sections 8-9 : Submission of Proposals to Electorate





Practical Considerations

GLADYS DUTRIEUILLE

ISAAC GAYLORD

PHILLIP DEMANCHIK

CLIFF KELLY

MAX FLESSNER

JOHN DERNBACH

Heritage Transportation Projects



How to Begin?



Amendment Process or Legislation?



When is a Constitutional Convention Appropriate?

- Constitutional conventions should be reserved when there are major structural changes that are needed.
- In 1967, the voters initiated a constitutional convention to holistically modernize the constitution, including better financing for state government, streamlining local government, and revising the judiciary branch.

Considerations During the 1967 Convention

- After a decades long process, voters passed a convention referendum convening the 1967 Convention.
- One important issue is the convention enabling bill. Many authorities insist that no legislature has the right and power to limit a convention, once it is convened. Thus, in 1967, the legislature wrote limitations into the referendum on the ballot to constrain the convention's parameters.
- Legislators had to determine how to get the most qualified people to serve in a balanced manner. A Modern Constitution for Pennsylvania, Inc. was instrumental in circulating information materials of the candidates for the delegation. The election resulted in a tight balance between Republicans (80) and Democrats (70). Non-Lawyers outnumbered lawyers 3 to 2.

Considerations During the 1967 Convention (Cont'd)

The 1967 Convention resulted in seven proposals organized into five ballot questions in the 1968 primary election:

- ❑ (1) concerning the composition of the general assembly as well as the timing and manner of reapportionment;
- ❑ (2) limiting GA borrowing power and imposing other fiscal controls;
- ❑ (3) providing for certain tax exemptions as well as state reimbursement to local taxing authorities to account for lost tax revenue for certain exemptions;
- ❑ (4) affecting local governments by making home rule charters available to any unit of local government as well as imposing certain restraints on local governments; and
- ❑ (5) creating the Unified Judicial System, including the genesis of the Commonwealth Court.

How do you become a delegate?

- The total number of delegates and the manner of their selection is not set in stone.

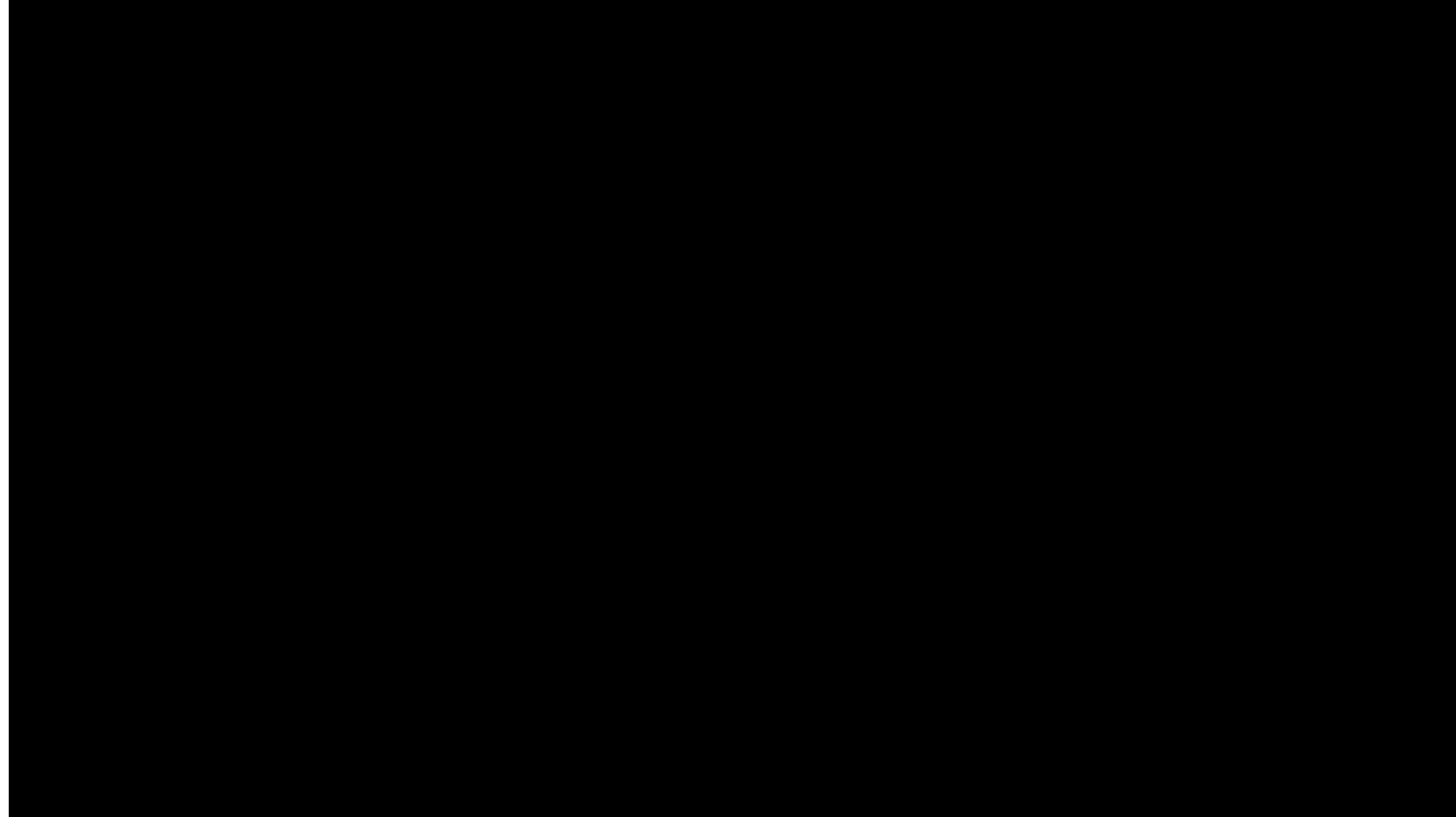
1870

In 1870, 133 delegates were selected by use of a limited ballot. 28 were to be elected from the state at large with each voter able to vote for 14, 6 were to be elected from Philadelphia at large, with each voter to vote for no more than 3, and 99 were to be elected from the senatorial districts.

1967

Act 2 of 1967 created a referendum on whether to establish a limited constitutional convention. The convention would consist of 163 delegates, with three from each senatorial district. Each voter could vote for no more than two delegates. It also provided for a variety of elected officials to have ex officio seats at the convention.

Additional Thoughts on Convention?



What other types of issues are dealt with in the amendment process?

Since January 2021, legislators have proposed more than 70 changes to the PA constitution. Two could be on the ballot this year:

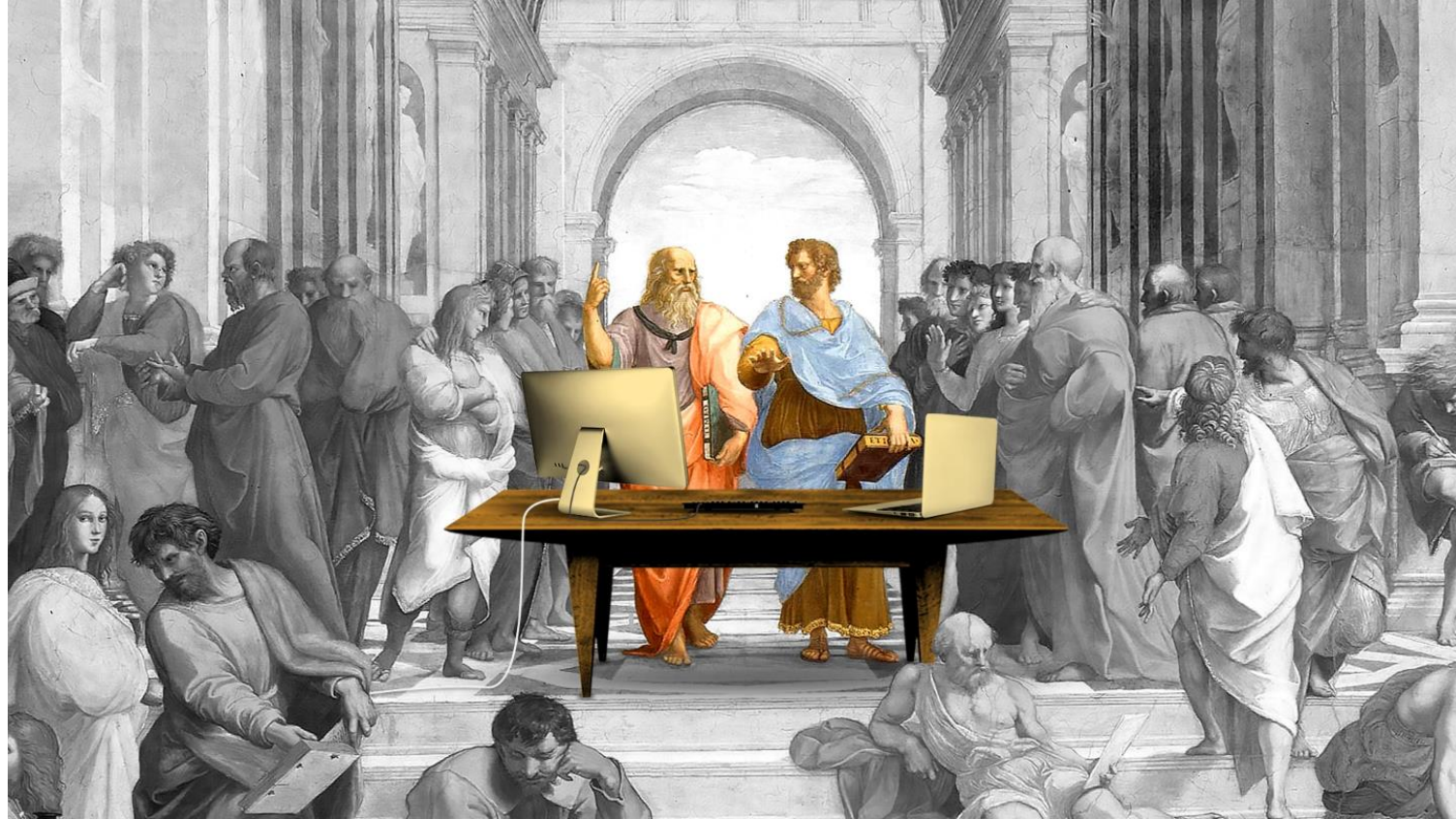
- ❑ HB 38: Creating Judicial Districts for Statewide Elections - It would eliminate statewide elections for Pennsylvania's appellate judges and allow legislature to draw regional judicial districts.
- ❑ SB 106: Omnibus Amendment - It would, *inter alia*:
 - ❑ expand the General Assembly's power to reject regulations
 - ❑ require government-issued ID to vote
 - ❑ require the auditor general to audit elections
 - ❑ change the way the lieutenant governor is selected, and
 - ❑ add language declaring the state constitution does not grant any right relating to abortion

Is a Citizen's Petition Allowed?



- ❑ Not in Pennsylvania. Other states, however, allow this process.
- ❑ For example, Michigan allows an issue to become a statewide ballot proposal where a citizen's petition is filed. For constitutional amendments, signatures of registered voters must equal at least 10 percent of the number of votes cast for all candidates in the last gubernatorial election for the matter to go before the electorate. Any proposal that is approved by a majority of voters voting on the proposal thus becomes part of the constitution and goes into effect at the end of 45 days after the date at which it was approved.
- ❑ There have been 68 proposed amendments to the Michigan Constitution of 1963. 26 of these have were from citizen-initiated petitions, while 42 have been placed on the ballot by the legislature.

Drafting the Amendment



Strategies and Tactics?



Specific Drafting Limitations?



Advertising/Voting



Advertising

- ❑ The Department of State is responsible for advertising the proposed amendment and drafting the ballot question. 25 P.S. § 3041.2; *see also* 25 P.S. § 2755.
- ❑ Secretary of the Commonwealth has some discretion in phrasing the ballot question, but:
 - ❑ The Ballot question must fairly, accurately, and clearly apprise the voter of the question or issue on which the electorate must vote. *Stander v. Kelley*, 250 A.2d 474, 480 (Pa. 1969).
 - ❑ Cannot be more than 75 words. 25 P.S. § 3010(b).
- ❑ House Bill No. 1201 seeks to upend this process by tasking the Legislative Reference Bureau, a legislative agency, with preparing the Ballot Question. Currently laid on the table.

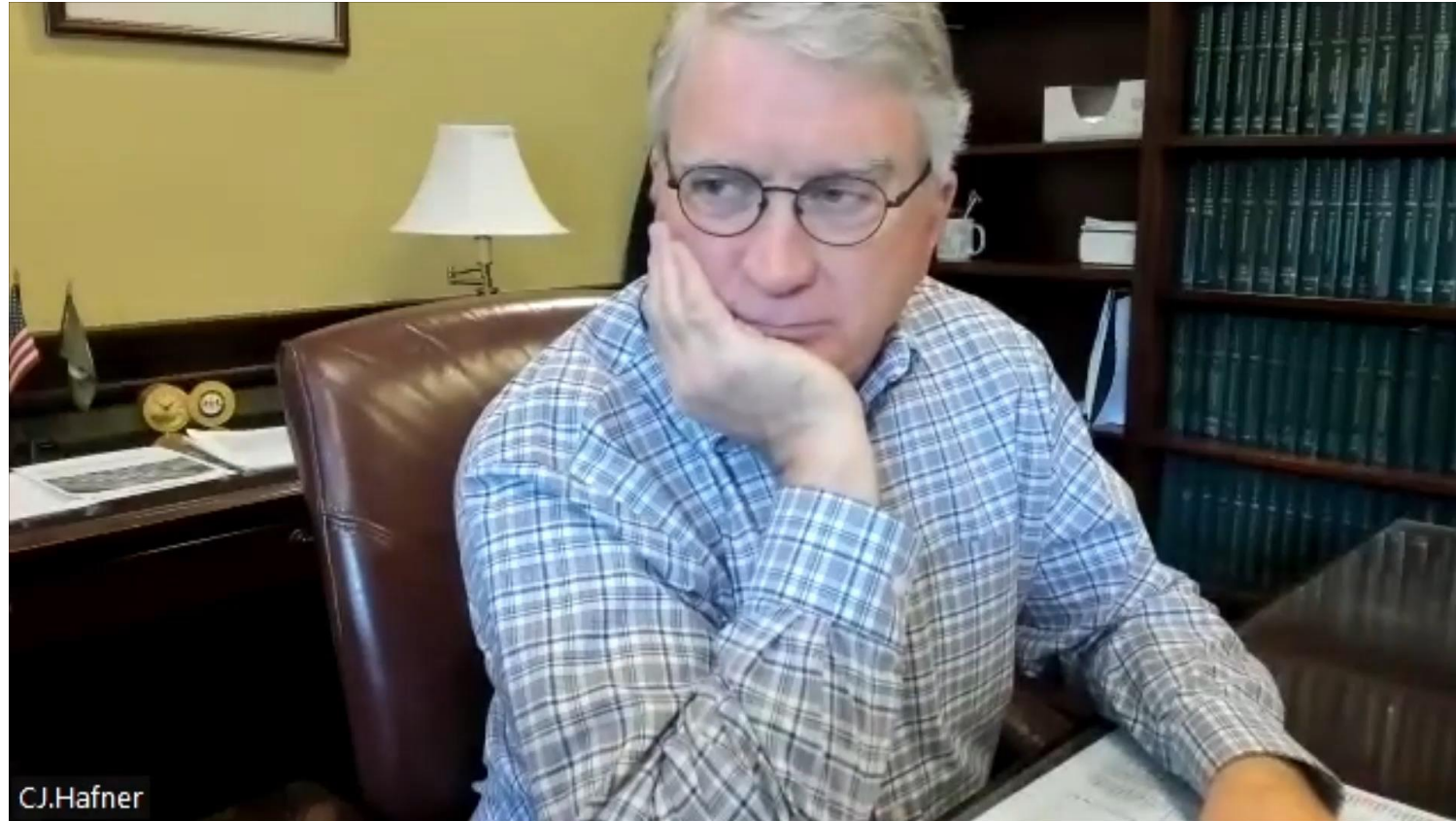
Voter Concerns

- ❑ Are constitutional amendments always on the ballot in November?
 - ❑ No, they can be in other months. In May 2021, three amendments were on the ballot:
 - ❑ To give the general assembly the unilateral right to terminate or extend a disaster emergency
 - ❑ Automatic expiration of disaster emergencies after 21 days unless the General Assembly takes action, and
 - ❑ Adding a new section providing that equality of rights under the law shall not be denied or abridged because of race or ethnicity.
- ❑ What if I cannot understand how the amendment is written on the ballot? The Office of Attorney General provides a plain English explanation of the ballot question to better inform voters.
- ❑ What if I disagree with the amendment proposal? All proposals, whether through the legislature or a constitutional convention must be approved by voters.

Implementing the Amendment



Executive Discretion



Executive Discretion (Cont'd)

❑ *Davis v. Burke*, 179 U.S. 399, 403, 21 S.Ct. 210, 212, 45 L.Ed. 249:

❑ Where a constitutional provision is complete in itself, it needs no further legislation to put it in force. When it lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative. In other words, it is self-executing only so far as it is susceptible of execution

❑ *Com. by Shapp v. National Gettysburg Battlefield Tower, Inc.*, 311 A.2d 588, (Pa. 1973)

❑ When power is given simply to the Commonwealth, it is power to be shared by the government's three co-equal branches. The governor cannot decide, alone, how or when he shall exercise the powers of a trustee. It is not for him alone to determine when the 'natural, scenic, historic, and esthetic values of the environment' are sufficiently threatened as to justify the bringing of an action.

Refusing to Implement

- ❑ The executive may choose not to enforce the amendment, but would risk being subject to a mandamus action.
- ❑ *Morganelli v. Casey*, 646 A.2d 744, 747 (Pa. 1994).
 - ❑ A District Attorney filed a mandamus action after Governor Casey failed to certify the death penalties for two individuals. The Governor was directed by the court to certify the judgements in a reasonable amount of time.
- ❑ *Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020).
 - ❑ Several members of the GA filed a mandamus action calling on the Governor to terminate his COVID-19 emergency declaration following a concurrent resolution. In dicta, the Court states, “The Governor would simply be bound to follow the law. If a statute or resolution is passed over the Governor's veto, the Governor still must abide by that law, even if the General Assembly does not specifically require that the Governor enforce that law. See PA. CONST. Art. IV, § 2 (“The supreme executive power shall be vested in the Governor, who shall take care that the laws be faithfully executed”).” *Wolf v. Scarnati*, 233 A.3d 679, 696 (Pa. 2020).

Federal/State Conflict

- ❑ Where the national and state constitutions conflict irreconcilably, the latter must yield under the Supremacy Clause and provisions in state constitutions are held void as inconsistent with federal constitutional provisions. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (“When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.”). However, a federal court may defer to a state court's interpretation of its own state constitution. *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 911 (1st Cir. 1988).
- ❑ If, however, there is a disagreement between the federal and state government, not a conflict, i.e. abortion, there is little the federal executive can do. For example, the Biden administration has been utilizing Executive Orders to protect access to abortion and contraceptives, where possible, but noting that a real resolution is needed from Congress.



Your Move Central PA

Judicial Review

BRIANNA EDWARDS, KAYLA
HAMMOND, REBECCA
MCCULLOUGH, RAYMOND
PEPE

Separate Vote Question

- Separate Vote Question
 - Pa. Constitution Article XI, § 1: “When two or more amendments shall be submitted they shall be voted upon separately.”
 - “Nothing less than an independent vote on each and every proposed change to the constitution.”
- Pennsylvania courts have interpreted this provision to mean that the electorate should be able to vote “yes” to the provisions they approve and “no” to the provisions they oppose.

Bergdoll v. Commonwealth, 731 A.2d 1261 (Pa. 1999)

Proposed amendments to Art. I, § 9:

- 1) In all criminal prosecutions the accused hath a right to be heard by himself and his counsel, to demand the nature and cause of the accusation against him, to **[meet the witnesses face to face] be confronted with the witnesses against him**,
- 2) “[T]he General Assembly may by statute provide for the manner of testimony of child victims or child material witnesses in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television.”

Challenged as a violation of the requirement for a separate vote on each amendment.

Bergdoll v. Commonwealth, 731 A.2d 1261 (Pa. 1999)

The ballot question presented to the voters in November 1995 read:

Shall the Pennsylvania Constitution be amended to provide (1) that a person accused of a crime has the right to be "confronted with the witnesses against him," instead of the right to "meet the witnesses face to face," and (2) that the General Assembly may enact laws regarding the manner by which children may testify in criminal proceedings, including the use of videotaped depositions or testimony by closed-circuit television?

Bergdoll v. Commonwealth, 731 A.2d 1261 (Pa. 1999)

- The Supreme Court determined that the proposed amendment violated Art. XI, § 1 because it constituted two separate amendments, i.e., both an amendment to Art. I, § 9 and a substantive change to Art. V, § 10(c) which restricted the Supreme Court's exclusive authority to establish rules of procedure.
- “In reaching the present decision, we are not unmindful that the voters should be given free opportunity to modify the fundamental law as may seem to them fit, but this must be done in the way they themselves have provided, if stability, in the carrying on of government, is to be preserved. It is the duty of the courts to follow the rules fixed by the Constitution.”

Pa. Prison Society v. Commonwealth, 776 A.2d 971 (Pa. 2001)

The text of the amendments provided that Article IV, Section 9 be amended to read:

(a) In all criminal cases except impeachment the governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.

(b) The Board of Pardons shall consist of the Lieutenant Governor who shall be chairman, the Attorney General and three members appointed by the Governor with the consent of [two-thirds or] a majority of the members elected to the Senate [as is specified by law] for terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania [and shall be recognized leaders in their fields; one]. One shall be a [member of the bar,] crime victim; one a [penologist,] corrections expert, and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.

Challenges to Amendments

Challengers viewed the proposed amendments as having the following, separate effects:

- (1) to require a unanimous, rather than majority, recommendation of the Board of Pardons before the Governor can pardon or commute the sentence of an individual sentenced in a criminal case to death or life imprisonment;
- (2) to require a majority, rather than two-thirds, vote of the Senate to approve the Governor's three appointments to the Board of Pardons;
- (3) to substitute a crime victim for an attorney on the Board of Pardons;
- (4) to substitute a corrections expert for a penologist on the Board of Pardons; and
- (5) to delete the “recognized leaders in their fields” qualification for the Governor's three appointees to the Board of Pardons.

Challenged as a violation of the requirement for a separate vote on each amendment.

Pa. Prison Society v. Commonwealth, 776 A.2d 971 (Pa. 2001)

- The Supreme Court determined that the question of whether the board should be restructured and the requirement for a unanimous vote by the board in some cases was properly submitted as a single question.
- However, the Supreme Court stated that “any change to the Senate's exclusive authority to confirm the appointees to the Board was required to be submitted for a separate vote by the electorate.”
 - But, because this amendment did not constitute a “substantive change” to the Senate’s confirmation process, it was upheld.

Grimaud v. Commonwealth, 865 A.2d 835 (Pa. 2005)

Proposed amendments:

- Art. 1, § 14, All prisoners shall be bailable by sufficient sureties, unless for capital offenses or for offenses for which the maximum sentence is life imprisonment or unless no condition or combination of conditions other than imprisonment will reasonably assure the safety of any person and the community
- Art. 1 § 6, In criminal cases the Commonwealth shall have the same right to trial by jury as does the accused.

Bail ballot question:

Shall the Pennsylvania Constitution be amended to disallow bail when the proof is evident or presumption great that the accused committed an offense for which the maximum penalty is life imprisonment **OR** that no condition or combination of conditions other than imprisonment of the accused will reasonably assure the safety of any person and the community?

Grimaud v. Commonwealth, 865 A.2d 835 (Pa. 2005)

Challenges:

- 1) Whether the amendments to Art. I, §§ 6 and 14 violated the single subject test because of their implicit impact on other provisions of the Constitution.
- 2) Whether the changes to Art. I, § 14 impermissibly contained two separate questions.

Under the PA Supreme Court's **single subject test**, a determination of whether a proposed amendment making multiple changes to the Pennsylvania Constitution violates Pa. Const. art. XI, § 1 requires a reviewing court to examine whether the changes are *sufficiently interrelated* to justify their presentation to the electorate in a single question.

- “Merely because an amendment ‘may possibly impact other provisions’ does not mean it violates the separate vote requirement.”
- “After examining the ballot question, we conclude the proposed changes were related to a single subject, bail. The changes were sufficiently interrelated (all concerned disallowance of bail to reinforce public safety) to justify inclusion in a single question.”

League of Women Voters of PA, 265 A.2d 207 (Pa. 2021)

Added new Art. I, § 9.1 granting crime victims rights to:

- Treatment with fairness and respect for their safety, dignity & privacy;
- Have their family considered in fixing bail and release conditions;
- Be present at all public proceedings involving accused;
- Be notified and allowed to participate in parole proceedings;
- Be notified of parole; release and escape;
- Reasonable protection from accused and persons acting for accused;
- Refuse interview, deposition or discovery requests of accused and persons acting on behalf of accused;

League of Women Voters of PA, 265 A.2d 207 (Pa. 2021)

Added new Art. I, § 9.1 granting crime victims rights to:

- Full and timely restitution and prompt return of property used as evidence
- Proceedings free from unreasonable delay;
- Confer with prosecutors;
- Be present at all public proceedings involving accused; and
- Assert at trial and in other proceedings all rights granted by the constitution or law.

Challenged as a violation of the requirement for a separate vote on each amendment.

League of Women Voters of PA, 265 A.2d 207 (Pa. 2021)

- Subject matter test of Art. XI, § 1 requires “multiple changes” in a proposed amendment to “function in an interrelated matter to accomplish one single objective” and “depend on one another for the fulfilment of that objective”.
- The proposed amendment “creates separate rights not dependent on each other to be effective,” *e.g.*, the right to restitution does not depend on the right to participate in parole proceedings; the right to be treated with respect does not depend on the right to be heard in release, plea and sentencing proceedings; right to be free from unreasonable delay does not depend on right to refuse pretrial discover or be notified of escape of accused.

League of Women Voters of PA, 265 A.2d 207 (Pa. 2021)

The proposed amendment also alters other provisions of the constitution, i.e.,

- The right of the accused to bail under Art. I, §14, by authorizing additional release requirements beyond cash security;
- The exclusive power of the Supreme Court to create rules of procedure under Art. V, § 10, by giving the legislature the right to create additional victims rights; and
- The power of the Governor to issue pardons under IV, § 9, by requiring hearing from victims before acting on Pardons Board recommendations.

Wolf v. General Assembly of the Commonwealth of Pennsylvania (2022)

- Gov. Wolf filed a challenge to the General Assembly's advancement of 5 amendments (SB 106) that would appear together on PA voters' ballots.
 - [Wolf takes lawsuit on Pennsylvania constitutional changes to lower court \(abc27.com\)](#)
- Denied King's Bench review by PA Supreme Court on September 12, 2022.
 - [High court tells Wolf it won't fast track amendments lawsuit | AP News.](#)
- The case is currently pending in Commonwealth Court.

Proposed SB 106 Constitutional Amendments

- This Constitution does not grant the right to taxpayer-funded abortion or any other right relating to abortion.
- Gubernatorial veto power does not apply to any legislative concurrent order, resolution or vote that disapproves a regulation.
- Gubernatorial nominee, subject to approval of the candidate's party, may select the party's lieutenant governor candidate.
- Require voters to present valid identification prior to receiving ballots.
- General Assembly shall by statute provide for auditing of elections and election results by auditor general or independent auditor.

Governor's General Challenges to SB 106

- Denys voters the right to know how their representatives voted on each amendment.
- Proposes “multiple and complex amendments” that may only be proposed by a Constitutional Convention.
PA Prison Society v. Commonwealth, 727 A.2d 732, 634-5 (Pa. Cmwlth. 1999), rev'd on other grounds 776 A.2d 971 (Pa. 2001)

Challenges to Abortion Amendment

- Amendment poses two discrete questions.
- Infringes on and Alters Art. I, § 1 (Inherent Rights of Mankind).
- Alters Art I, § 15 (Reservation of power to the people).
- Alters Art I, § 25 (No governmental denial of civil rights or discrimination against any person in exercise of civil rights).
- Alters Art I, § 28 (No denial or abridgment of rights b/c of sex).
- Irredeemably vague and therefore invalid.

Challenges to Other Amendments

- Eliminating governor's power to veto resolutions disapproving regulations alters Art. IV, § 2 (vesting supreme executive power in the Governor) and the separation and balance of powers.
- Voter identification amendment alters Art. I, § 5 (requiring “free and equal” elections and prohibiting interference with the exercise of the right of suffrage).
- Requiring audits of elections and election results by auditor general or independent auditor alters Art. VII, § 13 (requiring contested elections to be resolved by courts or judges as provided by law)

Timing and Notice Requirements

- Under Pa. Const. Article XI, § 1 amendments to the Constitution:
 - ***must be published three months before the next general election, in at least two newspapers in every county in which such newspapers shall be published***
- This process must be completed each of the two times an amendment passes both chambers of the General Assembly.
- The proposed amendment will then be presented to the electorate at least 3 months after approval by the General Assembly.

Timing and Notice Challenges

- *Kremer v. Grant*, 606 A. 2d 433 (Pa. 1992)
 - “[T]he duty to advertise is mandatory, [and] the failure to accomplish what is prescribed by Article XI infects the amendment process with an incurable defect. . . .”
- *Stander v. Kelly*, 432 Pa. 1 (Pa. 1968)
 - The electors have the right to determine the manner and matter of notice and times of publication they desire, or what notice and times they are willing to sanction.
- *Tausig v. Lawrence*, 328 Pa. 408 (Pa. 1937)
 - The failure of Secretary of State (or clerks or deputies) to abide by timing/notice requirements subjects them to criminal responsibilities for malfeasance or nonfeasance in office.