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## Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?\*

Today's conference on constitutional reform in Oregon could not be more timely. It marks a quarter-century since the last effort to modernize our state charter.

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Oregon needed a modern constitution twenty-five years ago. It needs a modern constitution today. The need will become more severe into the next century if nothing is done to meet it.

Hans A. Linde (1987)<sup>1</sup>

More than two-thirds of the states now operate under constitutions that are more than a century old, that were designed to meet the problems of another era, and that are riddled with piecemeal amendments that have compromised their coherence as plans of government. In addition, the public disdain for government at all levels, together with the increasing reliance on direct democracy for policy making in the states, suggests a need for constitutional reforms designed to increase the responsiveness of state institutions and to promote popular involvement that does not preclude serious

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I wish to acknowledge Justice Hans A. Linde's twenty-five years of collegiality and support for my work.

<sup>1</sup> Hans A. Linde, *Future Directions in State Constitutional Reform*, 67 OR. L. REV. 65, 65-66 (1988).

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deliberation about policy options. Many state constitutions would benefit from substantial changes designed to make state governments more effective, equitable, and responsive, and to equip them to deal with the challenges of the twenty-first century.

G. Alan Tarr (2006)<sup>2</sup>

**D**oes Dr. Alan Tarr's assessment apply to Oregon? Is this state's constitution obsolete? These are fundamentally different questions from whether the constitution contains specific defects. Another generation has now passed since Hans Linde's assessment, quoted above, so Oregonians are "back to the future."

The Oregon Constitution is more than a century-and-a-half old. Operating under its original statehood constitution of 1859, Oregon is one of the few states to retain its original, albeit often amended, constitution.<sup>3</sup>

In Part I, this Article offers a brief description of the Oregon Constitution itself and compares it to other state constitutions, focusing on its several different mechanisms for amendment and revision. Part II provides a brief review of the earlier attempts to revise the Oregon Constitution, including the significant inclusion of the initiative as one of the methods, followed by a review of recent proposals to improve on the use of the initiative to amend state constitutions. In Part III, this Article briefly surveys the processes of state-constitutional revision in a number of other states during the twentieth century, drawing a number of general lessons from these states' experiences. Finally, Part IV discusses current public attitudes toward state-constitutional revision, particularly by state-constitutional conventions and adds a cautionary note that each method of amendment or revision should be carefully linked to the best method to accomplish it.

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<sup>2</sup> G. Alan Tarr, *Introduction* to STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 1, 3-4 (G. Alan Tarr & Robert F. Williams eds., 2006).

<sup>3</sup> See ROBERT L. MADDEX, STATE CONSTITUTIONS OF THE UNITED STATES 327 (2d ed. 2006); see also John Dinan, *State Constitutional Developments in 2007*, in THE BOOK OF THE STATES 3, 10-16 (Council of State Gov'ts ed., 2008) (listing adoption and amendment dates of state constitutions).

## I

## THE OREGON CONSTITUTION

The Oregon Constitution is relatively long.<sup>4</sup> It has been amended on average nearly one-and-a-half times per year.<sup>5</sup> This amendment rate is somewhat above the mean rate of amendment for state constitutions.<sup>6</sup>

The adoption of Oregon's 1859 constitution is well documented.<sup>7</sup> It is possible, under one view, to see the Oregon Constitution as having been obsolete as soon as it was adopted. The well-known legal scholar James Willard Hurst noted that specific policies reflected in state constitutions "did not direct, but merely recorded, the currents of social change. Most of this constitutional wisdom was the wisdom of hindsight."<sup>8</sup> Given the fact that some of the provisions of Oregon's original constitution were "borrowed" from other state constitutions, there is evidence that much of that constitution was already accepted practice.<sup>9</sup>

This process of modeling, or copying state-constitutional provisions from others, is one of the most significant and, upon reflection, understandable features of the evolution of state constitutions. There is even evidence that the 1902 initiative and referendum provisions of the Oregon Constitution were based on an

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<sup>4</sup> See MADDEX, *supra* note 3, at 327; Dinan, *supra* note 3, at 10; see also Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 24, 32–34 tbl.2.1 (G. Alan Tarr ed., 1996) [hereinafter Lutz, *Patterns in Amending*]; Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 367 tbl.A-1 (1994) [hereinafter Lutz, *Toward a Theory*].

<sup>5</sup> Lutz, *Patterns in Amending*, *supra* note 4, at 33 tbl.2.1.

<sup>6</sup> See *id.* at 34 tbl.2.1.

<sup>7</sup> See THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857 (Charles Henry Carey ed., 1926). This work is regularly relied upon by Oregon courts and scholars. See, e.g., *State v. Hirsch*, 114 P.3d 1104, 1112 (Or. 2005); *Vannatta v. Keisling*, 931 P.2d 770, 782 (Or. 1997); *Billings v. Gates*, 916 P.2d 291, 298 (Or. 1996); *State v. Conger*, 878 P.2d 1089, 1094 (Or. 1994); David Schuman, *The Creation of the Oregon Constitution*, 74 OR. L. REV. 611, 611 n.1 (1995).

<sup>8</sup> JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW* 246 (1950).

<sup>9</sup> See W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200 (1926). As James Willard Hurst noted: "There was a sort of *stare decisis* about this making of constitutions; it was altogether natural in a country in which men moved about readily, taking with them the learning and institutions of their former homes." HURST, *supra* note 8, at 224–25.

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idea of direct democracy reflected in the constitutions of the cantons of Switzerland.<sup>10</sup>

As Frank Grad and I have recently contended, there is no “ideal” state constitution.<sup>11</sup> We characterized state constitutions as tools or instruments of government, the “suitability and adaptability” of which “can only be gauged in the relationship to its set task.”<sup>12</sup> Therefore, the question of whether the current Oregon Constitution is obsolete should be analyzed through an evaluation of how it actually functions within the state. This needs to be a hard-nosed assessment in “the trenches,” not a library exercise. Do problems with Oregon’s government arise *from* the state constitution, or do such problems have some effective remedy *through* the constitution? Many governmental problems, of course, have nothing to do with the state constitution.

Professor Grad and I concluded:

The least we may demand of our state constitutions is that they interpose no obstacle to the necessary exercise of state powers in response to state residents’ real needs and active demands for service. . . .

Any review of the adequacy of a state’s constitution must begin, therefore, not by comparing the state’s present constitution with the more recently adopted charter of another state or with the provisions of some “model” draft, but rather by systematically examining the entire machinery and operation of the state’s government.<sup>13</sup>

How would one measure the functional effectiveness, or lack thereof, of the Oregon Constitution? It is obvious that any assessment of a current state constitution such as Oregon’s must take account of the authoritative judicial interpretations as well as informal adjustments to the state constitution.<sup>14</sup>

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<sup>10</sup> See David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U’Ren and “The Oregon System,”* 67 TEMP. L. REV. 947, 950 (1994).

<sup>11</sup> See FRANK P. GRAD & ROBERT F. WILLIAMS, *STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS* 7, 13 (2006).

<sup>12</sup> *Id.* at 8; see also Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS 27, 31 (1982) (“A written constitution is a political technology. In a sense it is the very embodiment of the technology for achieving the good life.” (footnote omitted)).

<sup>13</sup> GRAD & WILLIAMS, *supra* note 11, at 12; see also TERRY SANFORD, *STORM OVER THE STATES* 189 (1967) (suggesting revision of state constitutions which had been “for so long the drag anchors of state progress”). Comparisons may, however, be interesting and useful.

<sup>14</sup> See Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 69 (2005).

In considering the stability of the Oregon Constitution, it is clear that it has been *changed* through amendment and judicial interpretation but has never been either *replaced* or *reformed*. These are very important distinctions in the area of state-constitutional development. Alan Tarr explained the distinction:

Of course, it is possible to introduce significant constitutional reform without calling a convention or adopting a new constitution—amendments proposed by constitutional commissions, by initiative, or by state legislatures may also produce constitutional reform. But in thinking about constitutional reform, it is important to distinguish it from the ordinary constitutional change that is so prevalent in the states. Any alteration of a state constitution, no matter how technical or minor, qualifies as constitutional change. In contrast, constitutional reform involves a more fundamental reconsideration of constitutional foundations. It introduces changes of considerable breadth and impact, changes that substantially affect the operation of state government or the public policy of the state. The replacement of one constitution by another obviously qualifies as constitutional reform. So too may major constitutional amendments or interconnected sets of amendments.<sup>15</sup> However, most constitutional change in the states does not qualify.

These are, of course, not perfect, bright-line distinctions, but they are important distinctions all the same.<sup>16</sup> Therefore, the fundamental questions in evaluating the functionality of the Oregon Constitution are whether “piecemeal amendments . . . have compromised [its] coherence as [a] plan[] of government”<sup>17</sup> to such an extent that there is a necessity of “fundamental reconsideration of constitutional foundations.”<sup>18</sup> Under this view, even if a number of specific problems or defects were identified in Oregon’s constitution (and people would differ on each of these), those problems might continue

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<sup>15</sup> G. Alan Tarr, *Introduction* to STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 1, 2 (G. Alan Tarr & Robert F. Williams eds., 2006) (footnotes omitted); see also Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment over Revision*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra*, at 59, 64 (“In theory, constitutional revision should be more comprehensive and qualitatively more significant than a constitutional amendment. But what if revision occurs increasingly through amendment: What is gained and what is lost? The most important advantage should lie in the ability of a Revision Commission to consider how all the pieces fit together. Where the amendment process is piecemeal and sequential, the revision process affords the opportunity to logically relate proposals to goals, and to make the entire package of proposal[s] coherent.”).

<sup>16</sup> See Tarr, *supra* note 15, at 3.

<sup>17</sup> Tarr, *supra* note 2, at 3.

<sup>18</sup> Tarr, *supra* note 15, at 2.

to be addressed by *amendment*, short of state-constitutional *reform* or *revision*.

In evaluating the Oregon Constitution to determine whether it is obsolete and in need of reform or revision, the state constitution should definitely not be compared to the U.S. Constitution.<sup>19</sup> There are a variety of reasons for the impropriety of this comparison. All state constitutions, including Oregon's relatively long one, are substantially longer than the federal Constitution.<sup>20</sup> But the two kinds of constitutions are also called upon to perform different functions and are therefore not comparable on the basis of length. The federal Constitution is incomplete as a governing document; it depends on the state governments to function within it and serves to delegate a limited set of powers to the national government. State constitutions structure a subnational government—a government functioning within a government—and serve primarily to limit the plenary authority retained by states at the time of formation of the Union. Therefore, the federal and state constitutions perform different legal and political functions, and there is simply a wider variety of subject matter to be regulated by a state constitution than there is under the U.S. Constitution.<sup>21</sup>

Further, even by the time of Oregon's adoption of its original constitution, state constitutions had already begun to evolve from basic charters of government and protections of rights to encompass *policy* matters that could have been left to the state legislature. Dr. Tarr noted that “[s]tate constitutions, in contrast [to the U.S. Constitution], deal directly with matters of public policy, sometimes in considerable detail.”<sup>22</sup> These sorts of policy provisions may prohibit legislative action, mandate the enactment of certain policies, or directly enact the policies themselves.<sup>23</sup> Dr. Tarr concluded that during the nineteenth century “state constitutions increasingly became instruments of government rather than merely frameworks for government.”<sup>24</sup> The Oregon Constitution's coverage of, for example,

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<sup>19</sup> See GRAD & WILLIAMS, *supra* note 11, at 14.

<sup>20</sup> See Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?* 64 ALB. L. REV. 1327, 1329 (2001).

<sup>21</sup> See *id.*; see generally Donald S. Lutz, *The United States Constitution As an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1988).

<sup>22</sup> G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 20 (1998).

<sup>23</sup> See *id.* at 21.

<sup>24</sup> *Id.* at 132; see also Hammons, *supra* note 20, at 1332–33.

tax and finance,<sup>25</sup> water development,<sup>26</sup> and corporations,<sup>27</sup> while not so different from that of other state constitutions, clearly illustrates this point. Do policy-oriented provisions in state constitutions become obsolete or incoherent more quickly than framework-oriented provisions?

The Oregon Constitution is older, longer, and more often amended than most state constitutions, and it is also, not surprisingly, relatively easier to amend. The question of whether to call a constitutional convention may only be presented to the voters by the legislature.<sup>28</sup> Oregon permits use of the initiative to propose amendments to the state constitution,<sup>29</sup> although its constitution does not have any required automatic mechanism of review built into it,<sup>30</sup> so Oregon is located toward the easier end of the spectrum of amendment procedures.<sup>31</sup> Oregon's procedure for legislatively proposed state-constitutional amendments is somewhat rigorous, requiring passage by a majority vote of *elected* legislators and separate presentation of issues to the voters.<sup>32</sup> Also, since 1960 the legislature may propose a *revision* of the state constitution, including alternative proposals, to the voters after a two-thirds vote of its members.<sup>33</sup> At the time Oregon originally adopted its procedures for amendment, the issue

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<sup>25</sup> OR. CONST. art. IX.

<sup>26</sup> *Id.* art. XI-D(1).

<sup>27</sup> *Id.* art. XI.

<sup>28</sup> *Id.* art. XVII, § 1.

<sup>29</sup> *Id.* art. IV, § 1(2)(c), art. XVII, § 1.

<sup>30</sup> See G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1079 (2005) ("Fourteen state constitutions mandate that the question of whether to hold a convention be submitted to voters periodically."). This mechanism shifts the burden of persuasion from those who advocate a vote on the possibility of state-constitutional revision to those who oppose it.

<sup>31</sup> See *id.* at 1075 n.1.

<sup>32</sup> OR. CONST. art. XVII, § 1. On this latter question of separate presentation of amendments to the electors, see the very interesting, in-depth consideration of this matter by the California Supreme Court in *Californians for an Open Primary v. McPherson*, 134 P.3d 299 (Cal. 2006). For the Oregon Supreme Court's treatment of this issue, see *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998). See also GRAD & WILLIAMS, *supra* note 11, at 70, 72; Gerald Benjamin & Melissa Cusa, *Constitutional Amendment Through the Legislature in New York*, in CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 4, at 47 (discussing legislatively proposed amendments).

<sup>33</sup> OR. CONST. art. XVII, § 2.

was one of importance in state-constitutional conventions across the country.<sup>34</sup>

The Oregon Constitutional Convention originally rejected, though probably not consciously, the Jeffersonian view that state constitutions should be considered for revision once every generation<sup>35</sup> in favor of the Madisonian preference for a more stable state constitution.<sup>36</sup> The 1902 addition of the initiative as a means of proposing state-constitutional amendments seems to have modified this position. The conflict between stability and ease of change has persisted through the entire evolution of state constitutions. Stephen Holmes captured the modern conflict:

Some theorists worry that democracy will be paralyzed by constitutional straitjacketing. Others are apprehensive that the constitutional dyke [sic] will be breached by a democratic flood. Despite their differences, both sides agree that there exists a deep, almost irreconcilable tension between constitutionalism and democracy. Indeed, they come close to suggesting that “constitutional democracy” is a marriage of opposites, an oxymoron.<sup>37</sup>

If state-constitutional revision is too difficult, constitutionalism overwhelms democracy; if it is too easy, democracy overwhelms constitutionalism. It is difficult to achieve exactly the right balance, and the optimum balance might change over time. Any assessment of the Oregon Constitution’s obsolescence must also take account of, and consider adjustments to, the processes of changing or revising the constitution. A major adjustment was already accomplished by the 1960 amendment permitting the Oregon Legislative Assembly to propose revisions, not just single amendments, to the constitution.<sup>38</sup>

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<sup>34</sup> See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 32–47 (2006).

<sup>35</sup> Jefferson’s letter on this subject is quoted in Albert L. Sturm, *The Development of American State Constitutions*, 12 *PUBLIUS* 57, 66 n.24 (1982). See also JOHN R. VILE, *THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT* 59–78 (1992); John Dinan, “*The Earth Belongs Always to the Living Generation*”: *The Development of State Constitutional Amendment and Revision Procedures*, 62 *REV. POL.* 645, 647–51 (2000); Merrill D. Peterson, *Mr. Jefferson’s ‘Sovereignty of the Living Generation,’* 52 *VA. Q. REV.* 437 (1976).

<sup>36</sup> See LAURA J. SCALIA, *AMERICA’S JEFFERSONIAN EXPERIMENT* 4–5 (1999); see also Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY* 195 (Jon Elster & Rune Slagstad eds., 1988).

<sup>37</sup> Holmes, *supra* note 36, at 197.

<sup>38</sup> OR. CONST. art. XVII, § 2(1).

What about the content of the Oregon Constitution? Dr. Christopher Hammons formulated the distinction between “framework-oriented” and “policy-oriented” provisions in state constitutions.<sup>39</sup> Dr. Hammons analyzed all of the state constitutions according to this distinction and concluded that forty-three percent of Oregon’s constitution is made up of policy-oriented provisions.<sup>40</sup> This is just a little above the national average of forty percent.<sup>41</sup> Of course what constitutes a policy-oriented provision, rather than a framework-oriented provision, can be in the eyes of the beholder, and neutral academic observers may not appreciate the important historic and political reasons why state constitutions contain certain detailed provisions.<sup>42</sup> Interestingly, Dr. Hammons concluded that the longer and more policy oriented a state constitution is, the longer it endures before replacement.<sup>43</sup> Oregon’s experience seems consistent with this conclusion.

It would be important to determine if, over time, the ratio of structural amendments to policy-oriented amendments, particularly those governing private conduct, has changed. If it were demonstrated that the proportion of these latter amendments has increased, this would raise a serious concern that this process was being used (intentionally, no doubt) to make an “end run” around both the state constitution and the state courts in what should be ordinary

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<sup>39</sup> See Hammons, *supra* note 20, at 1338 (“*Framework provisions* are those provisions that deal exclusively with the principles, institutions, powers, and processes of government. They provide the basic building blocks of government. *Policy provisions* are defined as those provisions that deal with ‘statute law’ or ‘public-policy’ type issues, do not relate to the establishment of the government, are rather specific, typically do not apply to all citizens, and often provide differential benefits. It is these provisions that most political scientists and legal scholars consider ‘extra-constitutional.’”); see also *id.* at 1351 (examples of each type of provision); Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837, 846–47 (1999) (more detailed lists of examples).

<sup>40</sup> Hammons, *supra* note 39, at 848 (referring to policy-oriented provisions as “particularistic”).

<sup>41</sup> Hammons, *supra* note 20, at 1333; see also Hammons, *supra* note 39, at 840 (thirty-nine percent).

<sup>42</sup> For each provision in a state constitution, no matter how seemingly trivial, there is a story to be told. It may be a political story rather than an epic “constitutional” story. As Lawrence Friedman stated, “There was a point to every clause in these inflated constitutions. Each one reflected the wishes of some faction or interest group, which tried to make its policies permanent by freezing them into the charter. Constitutions, like treaties, preserved the terms of compromise between warring groups.” LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 75 (3d ed. 2001).

<sup>43</sup> See Hammons, *supra* note 20, at 1338–41; Hammons, *supra* note 39, at 845.

statutory regulation of private conduct.<sup>44</sup> By placing policy-oriented matter in the state constitution itself, any existing substantive limitations in the state constitution that might be applied by the courts if the policy had been adopted as a statute are eliminated. This leaves only the federal Constitution as a substantive limit.

Perhaps consideration should be given to reviving the 1962 Oregon Commission for Constitutional Revision's proposal to move certain policy-oriented provisions to a "statutory article" in the constitution.<sup>45</sup> A similar approach, a "two-tiered" constitution, with an easier amendment procedure for "statutory" provisions, was briefly considered in New York in the 1960s.<sup>46</sup>

## II

### PROPOSALS TO REVISE THE OREGON CONSTITUTION

The fact that the question is again being raised in Oregon as to whether its constitution is obsolete, and therefore in need of revision or reform, puts the state in the company of several others that have considered reform in response to realizations such as those reflected in the introductory quote from Dr. Tarr.<sup>47</sup> Further, calls for revision or reform of the Oregon Constitution are not new.

Although it is clear that Oregon's constitution has not been *revised*, it has been *amended* more frequently than the national average.<sup>48</sup> This means that state-constitutional change, but not revision, has been regularly on the minds of Oregon political actors and citizens. And, even though the Oregon Constitution has never been formally reformed or revised, the possibility has certainly been considered by the legislature, but never presented to the voters. Thus, the call for a

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<sup>44</sup> Cf. David B. Frohnmayer & Hans A. Linde, *Initiating "Laws" in the Form of "Constitutional Amendments": An Amicus Curiae Brief*, 34 WILLAMETTE L. REV. 749, 753–54 (1998) (arguing that rules imposing sanctions for private conduct are not proper subjects for "constitutional amendments").

<sup>45</sup> Comm'n for Constitutional Revision, State of Oregon, *A New Constitution for Oregon: A Report to the Governor and the 52nd Legislative Assembly*, 67 OR. L. REV. 127, 207–09 (1988).

<sup>46</sup> Tarr & Williams, *supra* note 30, at 1117–18.

<sup>47</sup> See also Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265 (2007); Hammons, *supra* note 20, at 1327 ("During the last decade the four most populous states in the Union—California, New York, Florida, and Texas—each conducted a serious review of its state constitution.").

<sup>48</sup> See *supra* notes 5–6 and accompanying text.

“frequent recurrence to fundamental principles” is neither new in Oregon nor in other states.<sup>49</sup>

In fact, one might see the major change to the Oregon Constitution in 1902, which permitted use of the initiative to amend the state constitution, as constituting a form of revision.<sup>50</sup> After all, it is this development that has led to major changes in the Oregon Constitution and that, to this day, leads to many of the calls for change in the Oregon Constitution.

Actually, a movement for constitutional revision in Oregon began after World War II.<sup>51</sup> Then, after the important 1960 amendment to authorize the legislature to submit a revised constitution to the voters, the Commission for Constitutional Revision made an ambitious proposal to the legislature,<sup>52</sup> which passed the House but failed by one vote in the Senate.<sup>53</sup> It does not appear that there has been another serious movement for revision until now. Interestingly, the 1960s wave of interest in the Oregon Constitution slightly predated the wave of attention to state constitutions following the U.S. Supreme Court’s one-person, one-vote decisions.<sup>54</sup>

As noted, the advent of the initiative method of amending Oregon’s constitution could be seen as a “revision.”<sup>55</sup> It has certainly resulted in many changes in the state’s governing document, constituting a sort of “continuous revision.” No doubt any current revision efforts in Oregon would focus on modifications to the initiative process, at

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<sup>49</sup> See John Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531, 547–51, 556 (1979).

<sup>50</sup> Howard Leichter, *Oregon’s Constitution: A Political Richter Scale*, in *THE CONSTITUTIONALISM OF AMERICAN STATES* 756, 765 (George E. Connor & Christopher W. Hammons eds., 2008). An analogy could be drawn here to the limitation in some states on using the initiative to *revise*, as opposed to *amend*, the state constitution. This can be analyzed both quantitatively and qualitatively. See OR. CONST. art. IV, § 1(2)(c); *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970).

<sup>51</sup> See Alfred T. Goodwin, *The Commission for Constitutional Revision*, 67 OR. L. REV. 1, 2 (1988).

<sup>52</sup> Comm’n for Constitutional Revision, *supra* note 45.

<sup>53</sup> Goodwin, *supra* note 51, at 10.

<sup>54</sup> See James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 839 (1991) (“[S]tate legislatures have once again become relatively democratic and representative bodies as a result of the reapportionment revolution begun in 1962 by *Baker v. Carr*. Not accidentally, that decision spurred a wave of constitutional revision. No fewer than thirteen states revised their basic charters between 1963 and 1976, reviving at least in part, the tradition of activist popular sovereignty.” (footnote omitted)).

<sup>55</sup> See *supra* note 50 and accompanying text.

least in the area of state-constitutional change. One limitation has already occurred, when in 1998 the Oregon voters approved an amendment mandating that any proposed state-constitutional amendment imposing a supermajority voting requirement be ratified by at least an equivalent supermajority.<sup>56</sup> It is quite unlikely that Congress, assuming it has the power to do so, will step in to limit the states' use of the initiative for state-constitutional amendments.<sup>57</sup>

It appears that the avenues for *judicially imposed* (even by state courts) limits on the substance<sup>58</sup> of initiated amendments to state constitutions, championed by Hans Linde, have been foreclosed.<sup>59</sup> He and others have convincingly pointed out that when the U.S. Supreme Court, in a 1912 case that originated in Oregon, upheld the initiative process against a federal-constitutional challenge under the Guarantee Clause,<sup>60</sup> it was dealing with a *statutory* initiative rather than a *state-constitutional* initiative.<sup>61</sup> Of course, the statutory initiative merely supplements the legislature's power, and initiated

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<sup>56</sup> OR. CONST. art. II, § 23; see generally Cody Hoesly, Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191 (2005). Florida recently amended its constitution (by majority vote) to require a sixty-percent majority vote to ratify any future state-constitutional amendment, from any source. See Marvin Krislov & Daniel M. Katz, *Taking State Constitutions Seriously*, 17 CORNELL J.L. & PUB. POL'Y 295, 316 n.60 (2008).

<sup>57</sup> Would it be possible for Congress, rather than the federal or state courts, to provide some enforceable limits on state initiatives, along the lines outlined by Justice Linde? See Catherine Engberg, Note, *Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?*, 54 STAN. L. REV. 569 (2001); Elizabeth R. Leong, Note, *Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677 (1997).

<sup>58</sup> For judicial enforcement of *procedural* limits, see *Armatta v. Kitzhaber*, 959 P.2d 49 (Or. 1998). See also Philip Bentley, Note, *Armatta v. Kitzhaber: A New Test Safeguarding the Oregon Constitution from Amendment by Initiative*, 78 OR. L. REV. 1139 (1999); *Lehman v. Bradbury*, 37 P.3d 989, 994–1001 (Or. 2002); *Swett v. Bradbury*, 43 P.3d 1094, 1099–1101 (Or. 2002).

<sup>59</sup> See, e.g., *State ex rel. Huddelston v. Sawyer*, 932 P.2d 1145 (Or. 1997), cert. denied 522 U.S. 994 (1997); *State v. Wagner*, 752 P.2d 1136, 1197 n.8 (Or. 1988) (Linde, J. dissenting); David B. Frohnmayer & Hans A. Linde, *State Court Responsibility for Maintaining "Republican Government": An Amicus Curiae Brief*, 39 WILLAMETTE L. REV. 1487 (2003); Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735 (1998); Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993); Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government?"*, 17 HASTINGS CONST. L.Q. 159 (1989).

<sup>60</sup> *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912); see also *Kadderly v. City of Portland*, 74 P. 710 (Or. 1903).

<sup>61</sup> *Pacific Telephone*, 223 U.S. at 135.

statutes would still be subject to limits contained in the state constitution.

The State of Florida has what has been referred to as the most amendable state constitution in the country.<sup>62</sup> A proposed state-constitutional amendment to be placed on the ballot by a citizens' initiative, mandating humane treatment for pregnant pigs, was evaluated by the Florida Supreme Court for its validity (a requirement) prior to the referendum.<sup>63</sup> The court approved the proposed amendment, letting it go to the ballot, and Justice Barbara Pariente concurred, noting:

[T]he issue of whether pregnant pigs should be singled out for special protection is simply not a subject appropriate for inclusion in our State constitution; rather it is a subject more properly reserved for legislative enactment. I thus find that former Justice McDonald's observations made when this Court reviewed the net fishing amendment continue to ring true today: "The merit of the proposed amendment is to be decided by the voters of Florida and this Court's opinion regarding the wisdom of any proposed amendment is irrelevant to its legal validity. I am concerned, however, that the net fishing amendment is more appropriate for inclusion in Florida's statute books than in the state constitution."<sup>64</sup>

One could predict that at least some Oregon judges have similar opinions.

Harry Scheiber has argued effectively that the use of the initiative to amend state constitutions does not advance the purposes of federalism.<sup>65</sup> There have, of course, been a host of other arguments both against and in support of direct state-constitutional lawmaking, all of which are beyond the scope of this Article.

In the absence of *legal* limits, what is the likelihood of limits *politically imposed* through changes to the Oregon Constitution that would modify either (1) the *processes* for the state-constitutional initiative, or (2) the *substance* of state-constitutional change that can be accomplished specifically through the initiative rather than through

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<sup>62</sup> See TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE 146 (1991) ("The Constitution of Florida has more processes for amendment and revision than any other state constitution.").

<sup>63</sup> Advisory Opinion to the Attorney General Re Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy, 815 So. 2d 597 (Fla. 2002).

<sup>64</sup> *Id.* at 600 (Pariente, J., concurring) (quoting Advisory Opinion to the Attorney General—Limited Marine Net Fishing, 620 So. 2d 997, 999–1000 (Fla. 1993) (McDonald, J., concurring)).

<sup>65</sup> See Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787 (1997).

the other avenues of state-constitutional change? Any detailed analysis of this question must be undertaken within the specific Oregonian context and is, in any event, also beyond the scope of this article. It will be difficult to convince the voters to give up, or even modify, their “democratic” rights. Recent recommendations, however, do bear brief mention.

Marvin Krislov and Daniel M. Katz examined the literature and empirical research on state-constitutional amendments through the initiative process and concluded that several moderate reforms, with particular reference to voters’ confusion and lack of information, should be considered.<sup>66</sup> They concluded generally that state-constitutional initiatives were increasing in number<sup>67</sup> and noted that, in Oregon and many other states, the incentive structure encouraged interest groups to propose constitutional amendments rather than statutes because the requirements and methods of disclosure to the voters were very similar.<sup>68</sup> In response Krislov and Katz propose a number of *procedural* changes to differentiate constitutional from statutory initiatives and increase the information to the voters concerning the substance of the proposal and time for deliberation. Further, they recommend clearer disclosure to the voters that it is the relatively permanent state constitution they are being asked to amend, with the consequence of adoption being that the existing state constitution would be eliminated as any limit on the substance of the proposed amendment.<sup>69</sup>

These are sober and moderate recommendations with bases in empirical data. These and other proposed reforms of the constitutional initiative should be carefully considered in Oregon, regardless of the process that is utilized. After all, despite the fact that the initiative is democratic, it is a *constitution* that voters are amending.

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<sup>66</sup> See Krislov & Katz, *supra* note 56; see also Glen Staszewski, *The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17. For an assessment of initiatives (not just constitutional ones) from 1959 to 1993, concluding that they have had a negative impact on the civil rights of minority groups, see Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997).

<sup>67</sup> See Krislov & Katz, *supra* note 56, at 307–08.

<sup>68</sup> See *id.* at 319.

<sup>69</sup> See *id.* at 329–42.

## III

## TWENTIETH CENTURY CONSTITUTIONAL REVISION IN OTHER STATES

A good deal can be learned from other states that have addressed the question of whether to revise their state constitutions. Looking at these experiences indicates that a number of different mechanisms have been utilized, that there have been successes and failures, and that in the final analysis each state presents its own unique set of state-constitutional concerns and challenges. The following brief summary is intended to suggest some key features in state-constitutional revision attempts in a number of states.

*A. New Jersey (1947)*

New Jersey held a highly successful state-constitutional convention in 1947, which culminated many years of attempts at revision, including a legislatively proposed constitution that was voted down in 1944.<sup>70</sup> This constitutional convention took place in the period of postwar optimism and confidence in government. Very strong gubernatorial leadership was a key element in both the approval of the constitutional convention and ratification of the convention's recommended revised constitution by the voters.<sup>71</sup> Furthermore, a key *limitation* was placed on the convention, thereby taking the question of reapportionment of the state senate off the table. This divisive issue, which threatened the control that small counties had over the state, had stood in the way of state-constitutional revision for more than a century.<sup>72</sup> The convention met at Rutgers University, not in the state capital, to avoid the appearance of "politics as usual."<sup>73</sup>

The leading commentator on the New Jersey State Constitutional Convention of 1947 concluded:

First of all, the convention leaders had limited objectives, basically to update the court system and modernize the executive branch. They did not visualize their job as one of righting all the wrongs in New Jersey's political and social system. Rather, they looked at the old constitution, at what history had shown to be its basic weaknesses, and tried to correct those that seemed alterable in

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<sup>70</sup> See generally RICHARD J. CONNORS, *THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY: 1940–1947* (1970).

<sup>71</sup> See *id.* at 192–93; ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE* 15–16 (1990).

<sup>72</sup> See CONNORS, *supra* note 70, at 124–25; WILLIAMS, *supra* note 71, at 15–16.

<sup>73</sup> See CONNORS, *supra* note 70, at 132–33.

terms of the current political milieu. This provided marketability for the document and helped ensure its substantive integrity. The 1947 New Jersey constitution was relatively free from reformist gimmicks and untested panaceas. Limited goals also gave the constitution a more enduring character.<sup>74</sup>

Out of the 1947 process, New Jersey achieved a revised state constitution that gave it one of the best judicial systems in the United States, a very strong governor, and modern rights provisions concerning women's rights, collective bargaining, and racial segregation.<sup>75</sup>

### *B. Michigan (1961–1962)*

After the 1960 adoption of an initiative amendment to the state constitution, which eased the requirements for calling a state-constitutional convention and required the question of whether a constitutional convention should be called to be placed on the ballot in 1961 and every sixteen years thereafter, Michigan held a constitutional convention in 1961 and 1962.<sup>76</sup> The Governor created a study commission to prepare for the convention.<sup>77</sup> After the legislature refused to provide funding for the operation of the commission, a private foundation stepped forward with financing.<sup>78</sup> Slightly more than two-thirds of the delegates to the convention were Republican.<sup>79</sup> The convention, by a wide margin, proposed a modernized constitution that was ratified by the voters and, with amendments, is still in effect today.<sup>80</sup>

### *C. Maryland (1966–1968)*

Following the U.S. Supreme Court's one-person, one-vote decisions, the Governor of Maryland initiated the formation of a

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<sup>74</sup> *Id.* at 194.

<sup>75</sup> For an excellent symposium commemorating the fiftieth anniversary of New Jersey's constitution, see *Tenth Annual Issue on State Constitutional Law*, 29 RUTGERS L.J. 673 (1998). For a very interesting analysis of the 1947 ban on racial segregation, the first of its kind in the country, see Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 RUTGERS L.J. 1267 (2004).

<sup>76</sup> See SUSAN P. FINO, *THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE* 20–21 (1996).

<sup>77</sup> *Id.* at 21.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 21–22.

<sup>80</sup> *Id.* at 23–24.

Constitutional Convention Commission to prepare for a 1966 automatic (but not always honored by the legislature) referendum on whether to call a constitutional convention.<sup>81</sup> The convention call was approved by the voters, convention delegates were elected, and the convention met from 1967 to early 1968.<sup>82</sup> The convention's proposed constitutional revision was soundly defeated at the polls in 1968.<sup>83</sup> This has led Maryland's experience to be referred to as the "Magnificent Failure."<sup>84</sup> One commentator has summarized the various views about the reasons for this failure:

Some commentators have blamed the content of the proposed constitution, suggesting that it was "too liberal" for Maryland. Some have argued that the convention delegates themselves were too intellectual or too liberal to represent the Maryland electorate. Some political scientists point to the fact that the entire constitution was submitted to the voters for a single vote, as a "single package deal," and suggest convincingly that this contributed to the defeat. Still others blame the convention delegates and those responsible for the ratification campaign for their lack of political skill. But all commentators agree that the proponents of the constitution failed to persuade the electorate of the necessity of constitutional revision.<sup>85</sup>

Interestingly, however, the convention's proposals that were rejected in 1968 formed the basis for a number of specific state-constitutional changes over the following generation.<sup>86</sup>

#### D. Illinois (1968–1970)

In the 1960s, the state of Illinois built on several "decades of effort by civic groups to provide a climate of opinion favorable to

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<sup>81</sup> See Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 530–32 (1999).

<sup>82</sup> See *id.* at 532–33; see generally WAYNE R. SWANSON ET AL., *POLITICS AND CONSTITUTIONAL REFORM: THE MARYLAND EXPERIENCE, 1967–1968* (1970).

<sup>83</sup> See Friedman, *supra* note 81, at 534; see also DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 9–10 (2006); Robert J. Martineau, *Maryland's 1967–68 Constitutional Convention: Some Lessons for Reformers*, 55 IOWA L. REV. 1196 (1970).

<sup>84</sup> See, e.g., JOHN P. WHEELER, JR. & MELISSA KINSEY, *MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967–1968* (1970).

<sup>85</sup> Friedman, *supra* note 81, at 534–35 (footnotes omitted).

<sup>86</sup> See *id.* at 529 ("This Article assesses the success or failure of the Maryland Constitutional Convention in light of the later adoption—by constitutional amendment, statute, or regulation—of many of the important innovations proposed in the 1967–1968 constitution.").

constitutional reform.”<sup>87</sup> Despite the adoption in 1950 of an amendment to the state constitution that liberalized Illinois’s constitutional-amendment process, substantial revision had not taken place.<sup>88</sup> The Illinois legislature created a Constitution Study Commission in 1965 and, after several years of deliberation, recommended the calling of a constitutional convention. The legislature followed this recommendation, together with the commission’s other suggestion that no other amendments be submitted to the voters at the 1968 general election.<sup>89</sup> The voters approved the convention call after a privately funded campaign for adoption, which included substantial gubernatorial support. The private group relied on statewide opinion polls in designing its campaign.<sup>90</sup>

Interestingly, after the convention call was approved by the voters, a second commission was established by the legislature to advise it and the Governor on framing the “enabling act for the election of delegates and organization of the convention.”<sup>91</sup> There was even a third commission created by the legislature to make preparations immediately before the convention was convened.<sup>92</sup> The constitutional convention delegates, elected on a nonpartisan basis, worked from December 1969 through September 1970.<sup>93</sup> The site of the convention was moved from the legislative chambers to a different location, primarily to make room for the legislative session, but also to put some distance between the convention and “ordinary politics.” This had been done successfully with New Jersey’s 1947 constitutional convention and Alaska’s 1955 to 1956 convention.<sup>94</sup> The convention succeeded in proposing a modernized constitution for Illinois that voters adopted in December 1970.<sup>95</sup>

The president of the Illinois constitutional convention, Samuel Witwer, reflected on the experience:

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<sup>87</sup> JANET CORNELIUS, *CONSTITUTION MAKING IN ILLINOIS, 1818–1970*, at 138 (1972).

<sup>88</sup> *See id.* at 123–37.

<sup>89</sup> *See id.* at 139–40.

<sup>90</sup> *See id.* at 142.

<sup>91</sup> *Id.* at 144.

<sup>92</sup> *Id.* at 144 n.6.

<sup>93</sup> *See id.* at 149–55.

<sup>94</sup> *Id.* at 153.

<sup>95</sup> *See id.* at 162–63; *see generally The Illinois Constitution of 1970: A Symposium Issue*, 6 J. MARSHALL J. PRAC. & PROC. 213 (1973).

From the outset, the convention delegates were reminded, with an eye to ultimate voter approval, that their task was to write not the best possible constitution but rather the best constitution that could possibly be adopted in this politically complex state. I believe that we came close to that goal. But such a choice implies unmet governmental needs and continued opportunities for further constitutional reforms.<sup>96</sup>

### *E. Virginia (1968–1970)*

Substantial revision of the Virginia Constitution was accomplished through the constitutional commission process.<sup>97</sup> The commission, with strong gubernatorial backing,<sup>98</sup> was authorized by the legislature, and its members were named by the Governor in 1968.<sup>99</sup> After detailed study, public hearings, and deliberation, the commission submitted its report to the Governor and the legislature at the beginning of 1969.<sup>100</sup> Based on the commission's recommendations, the legislature debated the proposals and presented its proposed revisions to the voters in four separate questions rather than as "a take-it-or-leave-it package in which they were obliged to approve or disapprove all the constitutional changes in a single question."<sup>101</sup> It is very important to note that in Virginia, after the proposals of the commission were debated, revised, and placed before the voters by the legislature, a privately funded committee was created to inform the people of Virginia about the proposed changes and to encourage their support.<sup>102</sup> The leading commentator on Virginia's successful constitutional revision, Professor A.E. Dick Howard (a participant in the process himself), has thoughtfully compared Virginia's success with problems encountered in constitutional revision in other states during this period.<sup>103</sup> He

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<sup>96</sup> Samuel W. Witwer, *Introduction*, 6 J. MARSHALL J. PRAC. & PROC. 213, 213 (1973).

<sup>97</sup> See A.E. Dick Howard, *Adopting a New Constitution: Lessons from Virginia*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 15, at 73, 74.

<sup>98</sup> See *id.* at 74, 101.

<sup>99</sup> *Id.* at 74–75.

<sup>100</sup> See *id.* at 75; see also COMM'N ON CONSTITUTIONAL REVISION, THE CONSTITUTION OF VIRGINIA (1969).

<sup>101</sup> Howard, *supra* note 97, at 78, 95.

<sup>102</sup> See *id.* at 78–85.

<sup>103</sup> See *id.* at 86–96; see generally A.E. Dick Howard, "For the Common Benefit": *Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker*, 54 VA. L. REV. 816 (1968).

pointed to strong political support, effective background research, moderation in making proposals, and an effective public-relations campaign in support of the revised constitution as factors contributing to Virginia's success.<sup>104</sup>

*F. Montana (1967–1972)*

In 1967, the Montana legislature assigned its Legislative Council to prepare “a study of the Montana Constitution, to determine if it was adequately serving the current needs of the people.”<sup>105</sup> Based on the Council's recommendation, the legislature created a Constitutional Revision Commission in 1969.<sup>106</sup> The Montana Constitution includes a provision requiring an automatic question to be placed on the ballot every twenty years as to whether there should be a constitutional convention.<sup>107</sup> The creation of the Constitutional Revision Commission was taken in anticipation of that vote in 1970, which was approved by a wide margin. Following legislative authorization and creation of a commission to prepare for the convention, the Montana Constitutional Convention met in 1972.<sup>108</sup> The convention met at a time when it could draw on two significant trends in state constitutionalism. The first was the movement toward “managerial constitutionalism”:<sup>109</sup>

These managerial reformers believed that state government had to be restructured to facilitate vigorous action. Failure to create such proactive state governments, they argued, would result in the erosion of state power, as citizens increasingly looked to the national government to address their concerns. To establish an effective state government, they insisted, required a constitution that was flexible and adaptable, that placed few restrictions on how the state government addressed current and future problems.<sup>110</sup>

Second, there was a more recent trend called “constitutional populism”:<sup>111</sup>

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<sup>104</sup> See Howard, *supra* note 97, at 86–96.

<sup>105</sup> LARRY M. ELISON & FRITZ SNYDER, *THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE* 8 (2001).

<sup>106</sup> *Id.*

<sup>107</sup> MONT. CONST. art. XIV, § 3.

<sup>108</sup> See ELISON & SNYDER, *supra* note 105, at 9–10.

<sup>109</sup> G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 13 (2003).

<sup>110</sup> *Id.* (footnote omitted).

<sup>111</sup> *Id.* at 14.

The adherents of this newer view . . . distrust activist government. They are skeptical about their state legislature becoming a “little Congress,” their governor a “little president,” or their supreme court a “little Warren Court.” They want not a resurgence of state government but greater control over what they perceive as overly expensive and powerful state governments that are insulated from popular concerns and popular control.<sup>112</sup>

Dr. Tarr concluded that the Montana Constitution “reflects a judicious blending of the recommendations of both these reform movements.”<sup>113</sup> But he also concluded that the 1972 Montana Constitutional Convention went beyond these two themes and included a number of important innovations, including concern for the cultural heritage of Native Americans, expressions of the right to privacy and rights against private entities, and concern for the environment.<sup>114</sup>

Interestingly, voters adopted the 1972 Montana Constitution, which was submitted as a revised constitution, by an extremely narrow margin even though it had separate votes on three controversial issues: a unicameral legislature, the death penalty, and legalized gambling.<sup>115</sup> A legal challenge, contending that the constitution was actually not ratified by a majority, was rejected by the Montana Supreme Court by a three-to-two vote.<sup>116</sup> Despite this narrow margin of approval, the Montana voters rejected overwhelmingly the opportunity to call another constitutional convention twenty years later in 1990.<sup>117</sup>

### *G. Louisiana (1973)*

The people of Louisiana, also after a number of attempts and with the help of strong gubernatorial leadership,<sup>118</sup> convened a constitutional convention in 1973. One leading commentator concluded, with respect to the convention’s product, “[l]ittle

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 15.

<sup>114</sup> *See id.* at 16–17.

<sup>115</sup> *See* ELISON & SNYDER, *supra* note 105, at 14–15.

<sup>116</sup> *State ex rel. Cashmore v. Anderson*, 500 P.2d 921, 929 (Mont. 1972); *see also* ELISON & SNYDER, *supra* note 105, at 15–16.

<sup>117</sup> *See* ELISON & SNYDER, *supra* note 105, at 16; Tarr, *supra* note 109, at 20–21; *see generally* *The Honorable James R. Browning Symposium, The 1972 Montana Constitution: Thirty Years Later*, 64 MONT. L. REV. 1 (2003).

<sup>118</sup> *See* LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE* 16 (1991).

substantive change resulted, but the document was superior technically. It was simplified, shortened, and made more consistent. It was more of a triumph of the legal technicians than of the reformers.”<sup>119</sup> There were, however, some interesting modern innovations in the rights provisions of the Louisiana Constitution, including an equal protection clause as well as a provision stating that “[n]o law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.”<sup>120</sup>

#### H. Texas (1971–1975)

After the U.S. Supreme Court reapportionment decisions and early gubernatorial support, the Texas Legislature proposed a constitutional amendment that would authorize the legislature itself to serve as a unicameral constitutional convention in 1974.<sup>121</sup> This amendment also provided for a preparatory constitutional revision commission. After approval of this amendment by the voters, the legislature established the Constitutional Revision Commission, which was widely representative of the Texas citizenry.<sup>122</sup> The commission engaged in a broadly inclusive process and recommended a revised state constitution to the Texas Legislature, which convened as a constitutional convention for six months in 1974. Ultimately, the convention adjourned “after failing by three votes to approve the final revision package.”<sup>123</sup> Dr. Janice May, a member of the Constitutional Revision Commission, explained this failure:

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<sup>119</sup> *Id.* at 17.

<sup>120</sup> LA. CONST. art. I, § 3; *see also* Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6–10 (1974); Louis “Woody” Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 16–19 (1975). Paradoxically, this provision, which stimulated support by the NAACP for the 1974 constitution, was held by the Louisiana Supreme Court to ban all forms of affirmative action. *La. Associated Gen. Contractors, Inc. v. State*, 669 So. 2d. 1185, 1188 (La. 1996); *see also* Robert F. Williams, *Shedding Tiers “Above and Beyond” the Federal Floor: Loving State Constitutional Equality Rights to Death in Louisiana*, 63 LA. L. REV. 917, 917–18 (2003).

<sup>121</sup> *See* JANICE C. MAY, *THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE* 24–25 (1996).

<sup>122</sup> *See id.* at 25.

<sup>123</sup> *Id.* at 26; *see also* TEX. CONSTITUTIONAL REVISION COMM’N, *A NEW CONSTITUTION FOR TEXAS: SEPARATE STATEMENTS OF COMMISSION MEMBERS* (1973); TEX. CONSTITUTIONAL REVISION COMM’N, *A NEW CONSTITUTION FOR TEXAS: TEXT, EXPLANATION, COMMENTARY* (1973).

Several reasons have been put forward to explain the convention's failure to agree on a new constitution. Among the most plausible are the following: the lame-duck status and relative inexperience of the convention president; the legislative political environment in an election year that exacerbated divisive tendencies; several controversial propositions, including a constitutional right-to-work proposal that generated bitter labor union opposition; the solid Black Caucus bloc vote against the final package; a spirited race for the speakership for the next legislature that was going on during the convention; and the two-thirds vote requirement of the authorizing constitutional amendment, which under normal conditions might not have mattered but possibly did in the highly unusual and politically charged situation at the convention.<sup>124</sup>

Interestingly, at its next regular session, the Texas Legislature submitted most of the proposed changes it had considered but failed to recommend in 1974, while sitting as a constitutional convention, to the voters in 1975 as eight separate amendments at a special election. In a very light turnout, after a poorly funded campaign, the voters overwhelmingly rejected the proposals.<sup>125</sup>

### I. Georgia (1983)

Based on the recommendations of a Constitutional Revision Commission, the Georgia legislature engaged in a two-month extraordinary session in 1964 and adopted a new constitution.<sup>126</sup> The document was, however, never submitted to the people because of a federal court decision declaring that it was the product of a malapportioned legislature.<sup>127</sup> Despite the fact that the U.S. Supreme Court ultimately vacated the judicial decision,<sup>128</sup> the new constitution was never submitted to the voters.<sup>129</sup>

In the 1970s, however, strong gubernatorial leadership led to the recommendation that the legislature prepare a revised constitution, but one without substantive revision. This revision was

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<sup>124</sup> MAY, *supra* note 121, at 26–27.

<sup>125</sup> See *id.* at 27, 404; see also Janice C. May, *Texas Constitutional Revision: Lessons and Laments*, 66 NAT'L CIVIC REV. 64 (1977).

<sup>126</sup> MELVIN B. HILL, JR., *THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE* 14 (1994).

<sup>127</sup> *Toombs v. Fortson*, 205 F. Supp. 248, 258–59 (N.D. Ga. 1962), *vacated*, 379 U.S. 621 (1965); see also HILL, *supra* note 126, at 14.

<sup>128</sup> *Fortson v. Toombs*, 379 U.S. 621, 622 (1965).

<sup>129</sup> HILL, *supra* note 126, at 14.

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accomplished, and the voters adopted the document in 1976 by a wide margin.<sup>130</sup>

The legislature immediately embarked on a process leading to substantive revision of the Georgia Constitution. The process was also based on strong gubernatorial leadership.<sup>131</sup> A multiyear legislative process culminated in 1982, and the legislative product was submitted to the people and adopted overwhelmingly.<sup>132</sup>

A commentator on the Georgia legislative process concluded:

Perhaps because the document was supported by the leadership of all three branches of state government, perhaps because there was an organized public education campaign to explain it, perhaps because there was no organized opposition to the proposal, or perhaps just because the people had grown weary of twenty years' worth of "talk" about constitutional revision, the proposed new constitution was approved overwhelmingly at the 1982 election . . .<sup>133</sup>

#### *J. California (1993–1996)*

In California, a Constitutional Revision Commission met beginning in 1993 during a budget crisis and made its recommendations to the legislature in 1996.<sup>134</sup> Dr. Bruce Cain, a member of the Commission, noted, "[t]his Commission undertook a comprehensive look at California governance and ultimately proposed some far-reaching and imaginative ideas. But in the end, these recommendations never got to a vote in the legislature, let alone a place on the ballot."<sup>135</sup> Apparently, the Revision Commission's proposals were essentially doomed when they were sent to the legislature because of an improved economy, the complexity of some

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<sup>130</sup> See *id.* at 15.

<sup>131</sup> See *id.* at 16.

<sup>132</sup> See *id.* at 19.

<sup>133</sup> *Id.* There was criticism of the Georgia process on the ground that it did not adequately involve the people in "popular sovereignty." See Henretta, *supra* note 54, at 830–31.

<sup>134</sup> See Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment Over Revision*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 15, at 59, 67.

<sup>135</sup> *Id.* at 60; see also CAL. CONST. REVISION COMM'N, FINAL REPORT AND RECOMMENDATIONS TO THE GOVERNOR AND THE LEGISLATURE (1996), [http://www.caforward.org/dynamic/subpages/sb\\_subpages\\_text\\_9\\_english\\_2248.pdf](http://www.caforward.org/dynamic/subpages/sb_subpages_text_9_english_2248.pdf).

of the issues, and the vested interests of a number of legislators and other elected officials.<sup>136</sup>

*K. Florida (1967, 1977, 1997)*

Beginning in 1965, the Florida Legislature authorized a constitutional commission to prepare a revised draft of its 1885 constitution. The Commission's product was presented to the legislature, which held a special session during the summer of 1967 to consider and modify the Commission's recommendations. The legislature's recommended revised constitution was adopted by the people and went into effect in 1968.<sup>137</sup> Florida's 1968 constitution contained a unique mechanism for future state-constitutional change: an *appointed* constitution revision commission would be automatically created every twenty years (ten years for the first cycle), with the power to place its recommendations directly on the ballot for the voters' approval without sending the recommendations to the legislature.<sup>138</sup> This new mechanism was unprecedented and constituted "a leap of faith into the future, a license to later generations with no guarantees as to the substantive outcomes that would flow from the new process."<sup>139</sup> This mechanism was, of course, highly disturbing to the state legislature, but the people of Florida rejected an amendment to the state constitution to remove the constitutional revision commission process.<sup>140</sup> In fact, the Florida Constitution was amended to authorize the same commission procedure, with direct access to the ballot, for budget and finance

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<sup>136</sup> See Cain, *supra* note 134, at 65–70; see also CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE (Bruce E. Cain & Roger G. Noll eds., 1995).

<sup>137</sup> Rebecca Mae Salokar, *Constitutional Revision in Florida: Planning, Politics, Policy, and Publicity*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 15, at 19, 21–22; D'ALEMBERTE, *supra* note 62, at 11–13.

<sup>138</sup> D'ALEMBERTE, *supra* note 62, at 13; Salokar, *supra* note 137, at 22; Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 220 (1998).

<sup>139</sup> Robert F. Williams, *Foreword: Is Constitutional Revision Success Worth Its Popular Sovereignty Price?*, 52 FLA. L. REV. 249, 255 (2000).

<sup>140</sup> See D'ALEMBERTE, *supra* note 62, at 15.

matters.<sup>141</sup> Several other states have considered Florida's commission mechanism, but none have adopted it.<sup>142</sup>

Florida's initial experience with this constitution revision mechanism ended in a failure. The 1977 Commission submitted eight propositions to the voters and all of them were defeated.<sup>143</sup> A casino gambling amendment was also on the ballot and the Governor exerted great energy opposing it, which left him with little time to support the Commission's proposals.<sup>144</sup> Further, there was no organization or funding to support the proposed revisions. Interestingly, however, the Commission's proposals set the agenda for state-constitutional discussions over the next decade, and a number of its recommendations were later adopted through the amendment process.<sup>145</sup>

The 1997 Constitution Revision Commission, however, was much more successful. A preparatory committee developed background research and even proposed rules for the Commission.<sup>146</sup> It learned a number of lessons from the unsuccessful commission of twenty years earlier and made a number of recommendations that were accepted by the voters.<sup>147</sup> The commission successfully utilized opinion polling during its deliberations.<sup>148</sup> The proposals were much more moderate than those of 1978 because the Commission required a super-majority vote before recommending a state-constitutional change, and an organization was put into place to support the proposed revisions.<sup>149</sup>

As a member of the Florida Bar, and a native Floridian, I had some involvement in these processes and asked the following question:

So, the question to be asked by Floridians, as well as those in other states who are watching Florida's experiment in the processes of state constitutionmaking, is whether the very expansive

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<sup>141</sup> FLA. CONST. art. XI, § 6; *see generally* Donna Blanton, *The Taxation and Budget Reform Commission: Florida's Best Hope for the Future*, 18 FLA. ST. U. L. REV. 437 (1991).

<sup>142</sup> *See* Williams, *supra* note 138, at 256–58.

<sup>143</sup> *See* D'ALEMBERTE, *supra* note 62, at 15; Salokar, *supra* note 137, at 26. For a complete analysis of the 1978 Commission's proposals, *see Symposium on the Proposed Revisions to the Florida Constitution*, 6 FLA. ST. U. L. REV. 565 (1978).

<sup>144</sup> *See* Salokar, *supra* note 137, at 47.

<sup>145</sup> *Cf.* Williams, *supra* note 139, at 257 n.30 (citing sources supporting this proposition).

<sup>146</sup> *See* Salokar, *supra* note 137, at 34.

<sup>147</sup> *See id.* at 35–37, 44.

<sup>148</sup> *See id.* at 48–49.

<sup>149</sup> *See id.* at 35–37, 47; Williams, *supra* note 139, at 260–61.

*deliberative* record of the commission, its arguable *independence*, and its success in convincing the voters to accept its proposals make up for its seemingly reduced *legitimacy* on account of its appointed, rather than elected, membership.<sup>150</sup>

I concluded:

It is probably safe to say that Florida conducted the most open and accessible review of a state constitution in the history of our country. This is the source of the Commission's legitimacy with the living generation, even in the absence of prospective authorization by the current generation. . . . Popular *participation* and *deliberation* have taken the place of popular *stimulus* in Florida constitutional revision.<sup>151</sup>

Florida's process has been characterized by substantial preparatory work and gubernatorial leadership.<sup>152</sup> The 1997 process, in contrast to that in 1977, included an important post-commission process of publicizing and supporting its proposals.<sup>153</sup>

#### L. New York (1967, 1997)

New York had a constitutional convention in 1967 that was highly partisan and dominated by legislative leaders.<sup>154</sup> The revised constitution presented by that convention was defeated at the polls by the voters.<sup>155</sup> One recent analyst of these events noted:

Sitting legislators and others in the government industry were heavily represented at the convention. And, especially offensive to some, during the year that the convention met, the constitutional provision for delegate compensation "required" the legislators who

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<sup>150</sup> Williams, *supra* note 139, at 260. The Florida process was criticized for not adequately involving the voters. See generally Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475 (2000).

<sup>151</sup> Williams, *supra* note 139, at 270.

<sup>152</sup> See Salokar, *supra* note 137, at 26–33.

<sup>153</sup> See *id.* at 44–51.

<sup>154</sup> Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 15, at 145, 155; see generally HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION (1997).

<sup>155</sup> Benjamin, *supra* note 154, at 155; see also Lewis B. Kaden, *The People: No! Some Observations on the 1967 New York Constitutional Convention*, 5 HARV. J. ON LEGIS. 343 (1968); Robert B. McKay, *Constitutional Revision in New York State: Disaster in 1967*, 19 SYRACUSE L. REV. 207 (1967).

were also delegates, and others on public payrolls, to collect two salaries and the attendant pension benefits.<sup>156</sup>

In 1993, in preparation for the 1997 automatic vote in New York on whether to call a constitutional convention, the Governor appointed a Constitutional Revision Commission to educate the public prior to the vote and to develop possible constitutional proposals to obviate the necessity of calling a constitutional convention. There was no legislative funding, so the Commission had to operate with gubernatorial discretionary funds.<sup>157</sup> The Commission ultimately recommended a unique action-producing alternative to a state-constitutional convention. The Commission's report sought to change the focus from the constitutional convention to specific policy areas that were in need of reform. These were "fiscal integrity, state [and] local relations, education, and public safety."<sup>158</sup> One analyst explained:

The Commission proposed the creation of four Action Panels designed to break the political/policy logjam in all of these issue areas. The panels would create integrated packages of legislation and constitutional amendments by the close of the 1996 legislative session. In creating these panels, the Commission also asked that the governor and legislature "clearly commit themselves to take definitive action on these final proposals by a date certain."<sup>159</sup>

When the legislature failed to act, the Commission recommended that the voters approve the call for a constitutional convention. Despite a vigorous campaign, including strong gubernatorial support, the voters rejected the call in 1997.<sup>160</sup> Dr. Gerald Benjamin concluded that the 1997 vote did not come at a propitious time, that legislators opposed the calling of a convention that was unlimited and not their idea, that there was a lack of a strong campaign supporting the constitutional convention call, and that there was an array of interest groups that feared a constitutional convention and potential changes to the status quo.<sup>161</sup>

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<sup>156</sup> Benjamin, *supra* note 154, at 155; *see also* PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* 28–29 (1991).

<sup>157</sup> Benjamin, *supra* note 154, at 153.

<sup>158</sup> *Id.* at 157.

<sup>159</sup> *Id.* (citing TEMPORARY STATE COMM'N ON CONSTITUTIONAL REVISION, *EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY* (1995)); *see also Documents*, 26 RUTGERS L.J. 1355, 1394–95 (1995) (excerpts from the Commission's report).

<sup>160</sup> *See* Benjamin, *supra* note 154, at 158–63.

<sup>161</sup> *See id.* at 159–66; *see generally* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK (Gerald Benjamin & Henrik N. Dullea eds., 1997).

*M. Alabama (1994–present)*

Alabama is still operating under its 1901 constitution. Efforts at reforming the constitution go back many years, but there has been a renewed emphasis on reform in the past decade or so.<sup>162</sup> Despite strong gubernatorial leadership, and a broad grassroots organization that supported constitutional revision, voters rejected overwhelmingly a package of tax reforms and an amendment permitting the simplification of Alabama's longest-in-nation state constitution.<sup>163</sup> Despite this defeat, the activities of the past decade have gone a long way to raise the level of civic debate about the state constitution, and possibly the "events of 2003 may prove to be the opening skirmish for a greater battle ahead."<sup>164</sup>

*N. Lessons for the Future*

There are a number of lessons that can be learned even from this kind of superficial review of state-constitution making over the past several generations:

- State-constitutional revision can be a long, multistage, difficult process with no guarantee of success, that sometimes spans a number of decades. In Oregon, the movement for constitutional revision beginning either now, or in the 1960s, or even earlier after World War II,<sup>165</sup> may provide this background.
- Sometimes the existing processes of state-constitutional change must themselves be reformed, even on a one-time basis, to make way for successful state-constitutional revision. Oregon's 1960 change permitting a legislatively proposed revision brought real revision to within one Senate vote of success in 1962 (at least for presentation to the voters).
- The timing of state-constitutional revision must be right for both citizens and political actors. State-constitutional revision, regardless of its merits, can be overshadowed by other matters such as other proposed constitutional amendments, legislative

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<sup>162</sup> See H. Bailey Thomson, *Constitutional Reform in Alabama: A Long Time in Coming*, in STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 15, at 113, 113–24; see generally *Symposium on the Alabama Constitution*, 33 CUMB. L. REV. 187 (2003).

<sup>163</sup> See Thomson, *supra* note 162, at 126–38.

<sup>164</sup> *Id.* at 139; see also Symposium, *Celebrating the Centennial of the Alabama Constitution: An Impetus for Reflection*, 53 ALA. L. REV. 1 (2001).

<sup>165</sup> See Goodwin, *supra* note 51, at 2.

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reapportionment (as in Oregon in 1962), changing economic conditions, election campaigns, and changing political climate.

- Strong, active gubernatorial leadership is necessary, but not always sufficient, for successful state-constitutional revision. Even gubernatorial support for constitutional revision in Oregon in the 1950s and '60s was not sufficient, but probably contributed to the almost successful effort.
- State-constitutional revision takes place within the state's ongoing political structure, and changes in state constitutions involve important political questions.
- Detailed preparations must be attended to, concerning the following issues: (1) whether a constitutional convention call should be made or a constitutional commission created; (2) how the commission should inform and educate the public prior to the vote if a constitutional convention call is to be made; (3) what should be included within the constitutional convention call (i.e., an unlimited or a limited convention) or commission mandate; (4) which process to use when electing delegates if a constitutional convention call is to be made, or appointing members if a commission is to be used, with a preference for a nonpartisan approach;<sup>166</sup> (5) how to legislatively implement a positive decision by the voters on a convention call; and (6) prior to a constitutional convention or commission, how to conduct background research and create a proposal of draft rules, preferably prepared by a separate committee or commission.
- The legislature may refuse, through an exercise of legislative "passive aggression,"<sup>167</sup> to provide funding for any of these preparatory activities. Under such circumstances there may be a need for private or gubernatorial funding.
- The convention or commission must focus on what is politically achievable, rather than the best theoretical state-constitutional revision. The convention or commission must therefore engage in self-restraint and structure its deliberations and voting so that proposed revisions are recommended by substantial consensus. State-constitutional revision is the art of the possible.

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<sup>166</sup> See Richard Briffault, *Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 RUTGERS L.J. 1125, 1156–57 (2005).

<sup>167</sup> Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, 65 ALB. L. REV. 1017, 1023 (2002); Tarr & Williams, *supra* note 30, at 1100 n.130.

- Leadership in constitutional conventions and commissions is absolutely crucial to the success of such bodies.<sup>168</sup>
- Consideration should be given to holding the convention or commission sessions away from the state capital, as in New Jersey in 1947, to avoid the appearance of “politics as usual.”
- Widespread use of modern information technology, such as interactive websites, email, and live internet video coverage should be used to educate and involve the public in a transparent, deliberative constitutional-revision process. Modern public-opinion polling and focus group techniques can be used during deliberations to predict the political acceptance of certain proposed constitutional changes and to inform constitution-makers of needed modifications prior to adoption and submission of final proposals to the voters.
- The convention or commission or, in states like Oregon, the legislature, should give serious consideration to separating controversial proposals for their individual presentation to the voters rather than a single “take-it-or-leave-it” package. On the other hand, if proposals are interdependent as part of a coherent revision, they should be identified as such to the voters and presented together if possible under the state’s established processes. If required to be presented separately, the proposals should be interlocked so that the adoption of each is dependent on the adoption of the others.
- There must be a well-funded organization (probably not governmental) to advocate for the proposed revisions after the convention or commission has made its recommendations.
- Even a disappointing, apparent “failure” of substantial state-constitutional revision or reform may actually have the positive effect of setting the terms of debate concerning piecemeal constitutional change by amendment over the following generation. To some extent, this has been said of Oregon’s 1962 one-vote “failure.”<sup>169</sup>

These and many other lessons can be drawn from the state-constitutional revision experience in other states in the second half of

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<sup>168</sup> See ELMER E. CORNWELL, JR., ET AL., *STATE CONSTITUTIONAL CONVENTIONS* 199 (1975) (“The key roles played by the presidents of the various conventions emerged unmistakably. All that we know descriptively about convention behavior underscores the vital importance of the role of the presiding officer.”).

<sup>169</sup> See Goodwin, *supra* note 51, at 10.

the twentieth century. Such lessons must be applied, however, in the current, Oregonian context.

#### IV

#### STATE-CONSTITUTIONAL REVISION IN THE TWENTY-FIRST CENTURY

Constitutional revision is not for the faint of heart. It is not a Sunday drive in the mountains. It is an incredibly difficult, sometimes tedious, sometimes exhilarating, always challenging undertaking requiring the cooperation of the leadership of all three branches of state government, of counties, municipalities, and local school boards, of the business community and the labor community, of public interest groups and private interest groups, of people inside the government and people outside the government—in short, it requires the cooperation of just about everybody.

Georgia Governor George D. Busbee (1983)<sup>170</sup>

Since the drafting of the 1859 Oregon Constitution, both the processes for revising and the content of state constitutions have undergone dramatic change. First, the process of state-constitutional reform or revision has been transformed from an exercise of citizens' popular sovereignty<sup>171</sup> to a more elite and professional exercise. According to Alan Tarr:

Perhaps the most striking trend is toward the professionalization of state constitutional change. . . . Typically, it has been political elites and professional reformers who have campaigned for constitutional revision, with the populace reduced to rejecting convention calls and proposed constitutions to register its distrust of a process that it no longer feels it controls.<sup>172</sup>

Could this view accurately describe the current concern for constitutional revision in Oregon? Is there any grassroots wave of concern about the Oregon Constitution? Could there be with adequate public education?

Further, since Oregon's original constitution was drafted, the content of many of the states' constitutions (including Oregon's) has evolved from short, basic documents of government organization and citizen rights to longer constitutions that include a number of specific

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<sup>170</sup> George D. Busbee, *An Overview of the New Georgia Constitution*, 35 MERCER L. REV. 1, 1–2 (1983).

<sup>171</sup> See Henretta, *supra* note 54, at 826.

<sup>172</sup> TARR, *supra* note 22, at 170.

policies that could have been left to the legislature.<sup>173</sup> In fact, there has been a major shift in the idea of what the function of a state constitution should be and what matters are important enough to be contained therein.<sup>174</sup> Christian Fritz noted this shift in the attitudes of constitution-makers during the nineteenth century as the American society and economy became more complex, particularly with the rise of powerful corporations.<sup>175</sup> These constitution-makers believed that they needed to include more material in state constitutions, even if it was in areas that could, theoretically, be governed by legislation. Professor Fritz concluded:

The key to explaining the growing length of nineteenth-century constitutions lies in the delegates' understanding of the purpose of constitutions. There was common agreement that the nature and object of constitutions extended beyond fundamental principles to what delegates called constitutional legislation. Delegates willingly assumed an institutional role that occasionally supplanted the ordinary legislature.<sup>176</sup>

Oregon has a number of available opportunities for state-constitutional *revision* as opposed to piecemeal amendment. Of course, a process of piecemeal amendment may turn out to be adequate for state-constitutional problems that exist in Oregon. In any event, the Texas approach of a one-time state-constitutional amendment, which authorizes the legislature to convene as a constitutional convention and submit its proposed revised constitution to the people either as a single package or separate propositions, is already a possibility. The Michigan and Illinois changes in their processes of constitutional change are other approaches. These processes would represent a form of staged constitutional revision, utilizing a vote of the people at two points: first, to approve the amendment modifying the process of revising the constitution (even on a one-time basis); and second, at the point of approval or rejection of the revision proposal or proposals. A variation on this approach would be to propose an amendment adopting a Florida-style appointed constitution revision commission, even on a one-time basis,

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<sup>173</sup> See *id.* at 9–12.

<sup>174</sup> See *id.* at 132–33.

<sup>175</sup> See Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969 (1995) (book review).

<sup>176</sup> Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 964–65 (1994).

with authority to submit its proposal or proposals directly to the people. This would also involve two exercises of popular sovereignty or votes by the people of Oregon.

Next, the “extratextual” approach of a constitution revision commission that would make recommendations to the legislature could be utilized.<sup>177</sup> State-constitutional commissions can be created either by the legislature or the governor, and may receive funding from either source.<sup>178</sup> Such commissions can be limited in their mandate. Legislatures have sometimes authorized state-constitutional commissions as a *substitute* for a constitutional convention that is feared by the legislature.<sup>179</sup> State-constitutional commissions can also be utilized to prepare for and assist a constitutional convention.<sup>180</sup> New Jersey even recently utilized a commission (“Task Force”) to advise the legislature on how to call and structure a *limited* constitutional convention on property tax.<sup>181</sup> In a number of states, commissions have failed at certain points in time only to succeed in a later generation, and vice versa. Just because commissions failed in Oregon in the 1960s does not mean one or more of them would fail now. Finally, commissions can evaluate the need for mere change or more extensive revision and the possible processes for each. In this way, these questions can be fully evaluated rather than prejudged without sufficient consideration.

With respect to calling a constitutional convention itself, article XVII, section 1 of the Oregon Constitution only requires that a onetime majority vote of the legislature is necessary to ask the voters to approve or reject a constitutional convention. This leaves maximum flexibility with the legislature to provide for the election of delegates, the timing of the convention, and other details. Only states whose constitutions do not mention constitutional conventions at all possess greater flexibility.<sup>182</sup> By contrast, some states specify the nature of the question to be put to the voters concerning a

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<sup>177</sup> Robert F. Williams, *Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 HOFSTRA L. & POL’Y SYMP. 1, 2 (1996); see also Peter J. Mazzei & Robert F. Williams, “Traces of Its Labors”: *The Constitutional Commission, The Legislature, and Their Influence on the New Jersey State Constitution, 1873–1875*, 33 RUTGERS L.J. 1059, 1062–68 (2002).

<sup>178</sup> Williams, *supra* note 177, at 4–5.

<sup>179</sup> *Id.* at 9.

<sup>180</sup> *Id.* at 11.

<sup>181</sup> See Tarr & Williams, *supra* note 30, at 1104–05.

<sup>182</sup> *Id.* at 1086, 1090.

constitutional convention, the form of which sometimes precludes the possibility of a limited constitutional convention.<sup>183</sup> Therefore, it seems as though the Oregon Constitution would provide no barrier to a limited constitutional convention, if the limits were specified by the legislature and approved by the voters.<sup>184</sup> This way certain controversial or hot-button topics could be taken off the table, leaving room to achieve necessary state-constitutional revision.

Gerald Benjamin and Thomas Gais have observed what they call “conventionphobia” in this country.<sup>185</sup> Even states with an automatic vote on whether to call a convention have not had recent success. “In the quarter century between 1960 and 1985 automatic convention calls were approved only in New Hampshire, Rhode Island and Alaska. . . . In each of four states that provided for an automatic convention call during the early 1990s—Alaska, New Hampshire, Ohio and Michigan—majorities have rejected the opportunity.”<sup>186</sup> This has also occurred in New York, Rhode Island, Illinois, and Montana and, in 2008, in Hawaii, Illinois, and Connecticut. The rejection of convention calls has been occurring at the same time that dissatisfaction with state government has been increasing. The public seems to view a constitutional convention as political business as usual by the “government industry.”<sup>187</sup>

Constitutional conventions seem to have lost their *legitimacy* in the public mind. At the time Oregon’s original constitution was drafted, the politicians and special interests were afraid of the people acting through constitutional conventions. Now, by contrast, the people are afraid of politicians and special interests acting through constitutional conventions. In 1859, limited constitutional conventions were not used to alleviate the fears of voters, politicians, and vested interests.

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<sup>183</sup> *Id.* at 1086–87.

<sup>184</sup> *See id.* at 1086–92.

<sup>185</sup> Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL’Y SYMP. 53, 69 (1996).

<sup>186</sup> *Id.* (footnote omitted). Gais and Benjamin had observed a year earlier:

The number of active constitutional conventions has also dropped from seven between 1968 and 1969, to just two between 1978 and 1979, to *none* between 1990 and 1991. Moreover, all of the convention calls that some states are required to put on their ballots have gone down to defeat in recent years: New Hampshire, Alaska, and Montana placed such questions before the voters between 1990 and 1992, but all were defeated, as was Michigan’s in 1994.

Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1303 (1995).

<sup>187</sup> Gais & Benjamin, *supra* note 186, at 1304; Benjamin & Gais, *supra* note 185, at 71.

Under these circumstances, in states, like Oregon, that permit the state constitution to be amended through the initiative, that avenue is likely to be seen by the public as having more popular legitimacy than a convention. But the initiative lacks the possibility of *deliberation*.<sup>188</sup> Gais and Benjamin concluded:

What we need instead are constitutional revision procedures that are deliberative as well as legitimate—procedures that command legitimacy by providing for direct citizen participation and control, but that also generate and assess alternative proposals, take into account the best available information about their likely effects, consider the interactions between the proposed changes and the rest of the constitutional structure, and afford opportunities for discussion<sup>189</sup> and accommodation among significant political interests.

Gais and Benjamin called for an additional element to achieve meaningful, publicly acceptable state-constitutional revision: *independence*.<sup>190</sup> The initiative method also provides independence but, as mentioned before, does not provide for *deliberation*.

Obviously, it's very important to try to gauge opposition or status quo instincts ahead of time. A massive study of seven constitutional conventions concluded, “[j]ust as the delegates and the political activists in each state tended to break down, ultimately, into ‘reformers’ and supporters of the ‘status quo,’ so the electorate divides in a similar fashion. . . . In short, constitutional revision potentially polarizes state communities, or the attentive portions of them, along predictable lines.”<sup>191</sup>

It is clear, however, that opportunities have arisen for the exercise of high levels of statesmanship in a number of states as a result of perseverance, the proper leadership, and the right timing. Under the

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<sup>188</sup> See Gais & Benjamin, *supra* note 186, at 1301.

A more important question is whether the constitutional initiative is a *deliberative* process, one that involves discussion, learning, and accommodation among all citizens or their representatives regarding common problems. Deliberation is crucial in settling constitutional questions. If we want people to view a constitution as legitimate, we must be sure they believe the rules and institutions it prescribes to be reasonable and fair. That is not an easy task, particularly now, when government institutions must often make decisions which many citizens and interest groups oppose.

*Id.*; see also Arne R. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMP. L. REV. 1203 (1996).

<sup>189</sup> Gais & Benjamin, *supra* note 186, at 1303.

<sup>190</sup> *Id.* at 1299.

<sup>191</sup> CORNWELL, JR., ET AL., *supra* note 168, at 205–06.

right circumstances, state political actors have transcended ordinary, short-term politics and have embarked on high level, far-reaching “recurrence to fundamental principles” in reforming their state’s constitution for the betterment of themselves and future generations.<sup>192</sup> Sometimes this process takes a period of debate and collegiality before a higher level constitutional-revision culture is achieved by members of a constitutional commission or convention. Sometimes it never happens.

Careful consideration must be given to the important connection between the identified problems in the *content* of a state constitution and the mechanism or *process* chosen to address the problems. The mechanism should be tailored to the nature of the problems. Alan Tarr and I have suggested a number of ways of “thinking outside the box” with reference to state-constitutional change.<sup>193</sup> Once again, of course, people may disagree about the nature of the problems, but if a consensus develops on the areas in need of change, that consensus may dictate the process of state-constitutional change that should be utilized.

#### CONCLUSION

Frank Grad and I have argued that the burden of persuasion should be upon those who seek to include material in state constitutions.<sup>194</sup> It can be argued that a similar presumption should be applied to those who advocate the calling of a state-constitutional convention. This is a time-consuming, expensive, and uncertain process. It can yield great rewards for a state, but it can also fail or result in the inclusion of problematic material within a state constitution. There are, as noted herein, a number of less ambitious or even preliminary alternatives, such as legislatively proposed amendments, constitutional commissions, or limited state-constitutional conventions to assess the current state constitution.

Voting for a constitutional convention can be a major leap of faith for the future or an act of desperation concerning the state-constitutional status quo. Voting against a constitutional convention can reflect fear of the future, satisfaction concerning the state-constitutional status quo, or an opinion that defects in the state constitution may be cured by less complex amendment or revision

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<sup>192</sup> Sundquist, *supra* note 49, at 556.

<sup>193</sup> See Tarr & Williams, *supra* note 30, at 1106–21.

<sup>194</sup> GRAD & WILLIAMS, *supra* note 11, at 30; see also Linde, *supra* note 1, at 70.

processes. All of these attitudes, in addition to others, are likely to be held by Oregon voters.

The issues that would come before an Oregon state-constitutional convention now, or in the near future, would be substantially different from those associated with reform proposals in earlier decades or generations. The functions and responsibilities of states have evolved over time.<sup>195</sup> As one of the most in-depth studies of state-constitutional conventions concluded:

Doubtless one could take a cluster of constitutional conventions in any era—the Jacksonian period, the years of reconstruction or post-reconstruction, the turn-of-the-century progressive era—and find patterns of issue uniformity in each. In other words, there are broad areas of agreement in any one period as to what “modern,” “effective,” “democratic” state government consists of, but little such agreement over time. Conventions in one era meet to undo the careful reforms of an earlier generation.<sup>196</sup>

In other words, a state-constitutional convention would not only be concerned with revisions of the existing constitution, but would be confronted with the local, regional, and national issues of importance at that point in time.<sup>197</sup>

All of these concerns point to the conclusion that decision-makers in Oregon should carefully evaluate the question of whether state-constitutional *revision* or *reform* is really called for, and if so, whether the time and expense of a state-constitutional convention is merited. Possibly, even if there is a need for reform or revision, a state-constitutional *commission* would be the logical starting point. Further, a possible initial step would involve some changes, even onetime-only changes, in Oregon’s mechanisms of state-constitutional change or legislative consideration of revisions in the constitution. This was utilized unsuccessfully in Texas, but saw more success in Michigan and Illinois. Finally, a careful evaluation must focus on whether the passage of time and the accretion of specific amendments over the years have rendered the Oregon Constitution *functionally* incoherent. Is there really a need for fundamental reconsideration of Oregon’s constitutional foundations?<sup>198</sup> Are any

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<sup>195</sup> See GRAD & WILLIAMS, *supra* note 11, at 8–14.

<sup>196</sup> CORNWELL, JR., ET AL., *supra* note 168, at 203; see also GRAD & WILLIAMS, *supra* note 11, at 24–25.

<sup>197</sup> For a consideration of current issues in state constitutional change, see generally STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM, *supra* note 2.

<sup>198</sup> Cf. Tarr, *supra* note 2, at 2.

of Oregon's governmental structures so fundamentally flawed in their operation, or is the interrelationship among them so dysfunctional, as to require fundamental reconsideration of their constitutional foundations in an independent, deliberative process such as the "heavy artillery" of a constitutional convention that can assess proposed changes?<sup>199</sup> If such fundamental flaws do exist, leading to incoherence, are they located in one or several parts of the constitution, such that they could be addressed by a limited constitutional commission or convention to avoid the "Pandora's box" element of "conventionphobia?"<sup>200</sup> How can the legislature be convinced to take any of these steps? It is these difficult questions which must be addressed to determine if the Oregon Constitution is obsolete and in need of fundamental reform, and if so, whether anything can be done about it.

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<sup>199</sup> See Robert J. Martin, *Calling in Heavy Artillery to Assault Politics as Usual: Past and Prospective Deployment of Constitutional Conventions in New Jersey*, 29 RUTGERS L.J. 963, 964–65 (1998).

<sup>200</sup> See Gais & Benjamin, *supra* note 186, at 1304 ("Citizens may fear that constitutional conventions would open up a 'Pandora's box' or 'can of worms' in which delegates would make enormous constitutional changes with little or no public accountability."); see also Benjamin & Gais, *supra* note 185.

