

IS THE WISCONSIN STATE CONSTITUTION OBSOLETE? TOWARD A TWENTY-FIRST CENTURY, FUNCTIONALIST ASSESSMENT*

ROBERT F. WILLIAMS**

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 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 Tarr¹

I. INTRODUCTION

Does Dr. Alan Tarr's assessment apply to Wisconsin? Is the state constitution obsolete? This is a fundamentally different question from whether it contains specific defects. That is the focus of this conference.

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** Distinguished Professor of Law, Rutgers University School of Law, Camden; Associate Director, Center for State Constitutional Studies, <http://www.camlaw.rutgers.edu/statecon>.

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

The Wisconsin Constitution is, without doubt, well over a century-and-a-half old. Operating under its original statehood constitution of 1848,² which followed quickly upon the heels of the failed constitution of 1846,³ Wisconsin is one of the few states to retain its original, albeit often amended, constitution.⁴

At the close of the 1848 Wisconsin Constitutional Convention, its President, Morgan L. Martin of Brown County, told the delegates:

The result of our labors, if approved, becomes henceforth the supreme law of our adopted land, and whether well or ill done it stands forth as the record of our united opinions upon the form of government best suited to the condition of our people. Following the example set by the Great Architect of the universe, we may without irreverence look upon the pages of our constitution and pronounce the work of our hands to be good. It abounds in the declaration of those great principles which characterize the age in which we live, and which, under the protection of Heaven, will—nay, must—guard the honor, promote the prosperity, and secure the permanent welfare of our beloved country.⁵

It is highly doubtful that Martin or any of his colleagues could have imagined that we would be here in the twenty-first century evaluating their often-amended, but still basically intact handiwork.

II. THE WISCONSIN CONSTITUTION

Wisconsin, as noted above, is still operating under its original state constitution, which is relatively short.⁶ The Wisconsin Constitution has

2. Ray A. Brown, *The Making of the Wisconsin Constitution*, 1949 WIS. L. REV. 648, 648.

3. Gordon B. Baldwin, *Introduction: Celebrating Wisconsin's Constitution 150 Years Later*, 1998 WIS. L. REV. 661, 668–71; Ray A. Brown, *The Making of the Wisconsin Constitution*, 1952 WIS. L. REV. 23, 23. For an exhaustive documentation of the consideration, and defeat, of the 1846 Constitution see WISCONSIN HISTORICAL SOC'Y, *THE STRUGGLE OVER RATIFICATION 1846–1847* (Milo M. Quaife ed. 1920).

4. ROBERT L. MADDEX, *STATE CONSTITUTIONS OF THE UNITED STATES* 431 (2d ed. 2006); see also R. Lawrence Hachey, *Jacksonian Democracy and the Wisconsin Constitution*, 62 MARQ. L. REV. 485 (1979).

5. WIS. HISTORICAL SOC'Y, *THE ATTAINMENT OF STATEHOOD* 883 (Milo M. Quaife ed. 1928).

6. 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 (G. Alan Tarr ed., 1996) [hereinafter *CONSTITUTIONAL*

been amended an average of less than once per year.⁷ This amendment rate is actually substantially below the mean rate of amendment for state constitutions.⁸

It is possible, under one view, to see Wisconsin's 1848 constitution as obsolete as soon as it was adopted. The well-known Wisconsin legal scholar, James Willard Hurst, noted that, at least with respect to specific policies reflected in state constitutions, they "did not direct, but merely recorded, the currents of social change. Most of this constitutional wisdom was the wisdom of hindsight."⁹ One piece of evidence to illustrate this view was that the major reasons for the defeat of the 1846 constitution were the progressive provisions on married women's property, on the homestead exemption, and on limiting banks; there was not a social consensus on those matters.¹⁰ In addition, they are not issues of state constitutional magnitude today. The Wisconsin Constitution was adopted during the 1844–1853 decade when over half of the existing states held constitutional conventions.¹¹ To the extent that some of the provisions of Wisconsin's original constitution were "borrowed" from other state constitutions, there is at least further evidence that much of that constitution was already accepted practice.¹²

As Frank Grad and I have recently contended, there is no "ideal" state constitution.¹³ We characterized state constitutions as tools or instruments of government, the "suitability and adaptability" of which

POLITICS IN THE STATES]; see also Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 367 (1994) [hereinafter Lutz, *Toward a Theory*].

7. Lutz, in CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 6, at 34. The rates have varied over the decades. JACK STARK, *THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE* 8 (Reference Guides to the State Constitutions of the United States, No. 28, G. Alan Tarr series ed., 1997).

8. Lutz, in CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 6, at 34.

9. JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 246 (1950).

10. MADDEX, *supra* note 4, at 430–431; STARK, *supra* note 7, at 4–6; Brown, *supra* note 2, at 669–73, 676–84. The homestead exemption provision is thoroughly analyzed in Bernard R. Trujillo, *The Wisconsin Exemption Clause Debate of 1846: An Historical Perspective on the Regulation of Debt*, 1998 WIS. L. REV. 747.

11. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 94 (1998).

12. G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 729. As 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 9, at 224–25.

13. FRANK P. GRAD & ROBERT F. WILLIAMS, *2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS* 7, 13 (2006).

“can only be gauged in the relationship to its set task.”¹⁴ Therefore, the question of whether the current Wisconsin 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. We 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.¹⁵

How would one measure the functional effectiveness, or lack thereof, of the Wisconsin Constitution? The tax uniformity provision, article VIII, section 1, has been interpreted to ban a partial property tax freeze for redeveloped property in urban areas.¹⁶ The provisions on taxation and education, article VIII, section 1 and article X, section 3, were held to prohibit the shifting of local tax revenue from property-rich

14. *Id.* at 8; *see also* Donald S. Lutz, *The Purposes of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 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).

15. GRAD & WILLIAMS, *supra* note 13, 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. *See, e.g.*, Jack Stark, *A Comparison of the Wisconsin and Iowa Constitutions*, 31 RUTGERS L.J. 1019, 1019 (2000) (concluding that because Wisconsin has some provisions not found in Iowa, and “Iowa’s courts have been more hesitant to declare statutes unconstitutional. . . . Iowa’s constitution has had less effect on Iowa’s legal system and, thus, less effect on that state than Wisconsin’s constitution has had on Wisconsin”).

16. *Gottlieb v. City of Milwaukee*, 33 Wis. 2d 408, 431, 147 N.W.2d 633, 645 (1967); Jack Stark, *The Uniformity Clause of the Wisconsin Constitution*, 76 MARQ. L. REV. 577, 596 (1993). Such a holding was congruent with Morton Horwitz’s argument that the state constitutional uniformity provisions, particularly as analyzed in Judge Thomas Cooley’s 1876 TREATISE ON THE LAW OF TAXATION, served as a strong impediment to the use of state and local taxation as mechanisms for the redistribution of wealth. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 20–24 (1992).

districts to poor districts.¹⁷ On the other hand, the state constitutional debt limit provision has been interpreted not to limit major public investment in a new stadium.¹⁸ Nothing in the Wisconsin Constitution has stood in the way of use of public money to support students in private, even religious, schools.¹⁹ A major “tort-reform” statute has been struck down under the Wisconsin Constitution.²⁰ Wisconsin’s constitutional free speech provision has been interpreted so as not to require free expression on private property such as shopping malls.²¹ I express no opinion whether these decisions should lead to state constitutional change. It is obvious, though, that any assessment of a current state constitution such as Wisconsin’s must take account of the authoritative judicial interpretations,²² as well as informal adjustments to the state constitution.²³

In considering the stability of the Wisconsin Constitution, it is clear that it has been *changed* through amendment and judicial interpretation, but has never been either *replaced* or *reformed*.²⁴ These are very important distinctions in the area of state constitutional development. Alan Tarr explained the distinction:

17. *Buse v. Smith*, 74 Wis. 2d 550, 580–81, 247 N.W.2d 141, 155 (1976); Comment, *State Constitutional Restrictions on School Finance Reform: Buse v. Smith*, 90 HARV. L. REV. 1528, 1530 (1977); Erik LeRoy, Comment, *The Egalitarian Roots of the Education Article of the Wisconsin Constitution: Old History, New Interpretation, Buse v. Smith Criticized* 1981 WIS. L. REV. 1325, 1327–28.

18. *Libertarian Party of Wis. v. State*, 199 Wis. 2d 790, 826, 546 N.W.2d 424, 440 (1996); Jack Stark, *A History of the Internal Improvements Section of the Wisconsin Constitution*, 1998 WIS. L. REV. 829, 838–39.

19. *Jackson v. Benson*, 218 Wis. 2d 835, 906, 578 N.W.2d 602, 632 (1998), *cert. denied*, 525 U.S. 997 (1998).

20. *Bartholomew v. Wis. Patients Comp. Fund*, 2006 WI 91, ¶ 3, 295 Wis. 2d 38, ¶ 3, 717 N.W.2d 216, ¶ 3; see Michael S. Kenitz, Comment, *Wisconsin’s Caps on Noneconomic Damages in Medical Malpractice Cases: Where Wisconsin Stands (and Should Stand) on “Tort Reform,”* 89 MARQ. L. REV. 601, 602–07 (2006).

21. *Jacobs v. Major*, 139 Wis. 2d 492, 530, 407 N.W.2d 832, 848 (1987); Brady C. Williamson & James A. Friedman, *State Constitutions: The Shopping Mall Cases*, 1998 WIS. L. REV. 883, 895–903.

22. Jack Stark noted that because Wisconsin has never replaced its original constitution “its history after ratification consists of legal opinions that interpreted it and of amendments.” STARK, *supra* note 7, at 8.

23. Michael Besso, *Constitutional Amendment Procedures and the Informal Political Construction of Constitutions*, 67 J. POL. 69, 69 (2005).

24. For an excellent, broad-brush summary of the Wisconsin constitution’s evolution see STARK, *supra* note 7, at 8–32, and Joseph A. Ranney, *Wisconsin’s Constitutional Amendment Habit: A Disease or a Cure?*, 90 MARQ. L. REV. 667 (2007).

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. However, most constitutional change in the states does not qualify.²⁵

These are, of course, not perfect, bright-line distinctions, but they are important distinctions all the same.²⁶ Therefore, the fundamental questions in evaluating the functionality of the Wisconsin Constitution are whether “piecemeal amendments . . . have compromised [its] coherence as [a] plan[] of government,”²⁷ to such an extent that there is a necessity of “fundamental reconsideration of constitutional

25. G. Alan Tarr, *Introduction* to 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM 1, 2 (G. Alan Tarr & Robert F. Williams eds., 2006); see also 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*, at 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.

Id. at 65 (internal citations omitted).

26. Tarr, *supra* note 25, at 3.

27. Tarr, *supra* note 1, at 3.

foundations.”²⁸ Under this view, even if a number of specific problems or defects were identified in Wisconsin’s constitution (and people would differ on each of these), those might continue to be addressed by *amendment*, short of state constitutional *reform* or *revision*.

In evaluating the Wisconsin Constitution in an attempt to determine whether it is obsolete and in need of reform or revision, it should definitely not be compared to the United States Constitution.²⁹ There are a variety of reasons for this lack of fit. State constitutions, even Wisconsin’s relatively short one, are substantially longer than the Federal Constitution.³⁰ 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 sub-national 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 United States Constitution.³¹

Further, even by the time of Wisconsin’s adoption of its original constitution, state constitutions had already begun to evolve from basic charters of government and protections of rights to encompass, in addition, *policy* matters that could have been left to the state legislature. Dr. Tarr has noted that “[s]tate constitutions, in contrast [to the U. S. Constitution], deal directly with matters of public policy, sometimes in considerable detail.”³² These sorts of policy provisions may prohibit legislative action, mandate the enactment of certain policies, or directly enact the policies themselves.³³ Dr. Tarr concluded that during the nineteenth century “state constitutions increasingly became instruments of government rather than merely frameworks for government.”³⁴ The

28. Tarr, *supra* note 25, at 2.

29. See GRAD & WILLIAMS, *supra* note 13, at 14.

30. Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1329 (2001).

31. *Id.* at 1329. See generally Donald S. Lutz, *The United States Constitution as an Incomplete Text*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 23 (1988).

32. TARR, *supra* note 11, at 20; see also *infra* note 164 and accompanying text.

33. TARR, *supra* note 11, at 21.

34. *Id.* at 132; see also Hammons, *supra* note 30, at 1332–33.

Wisconsin State Constitution's coverage of, for example, tax and finance,³⁵ education,³⁶ and corporations,³⁷ while not so different from 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 Wisconsin Constitution is not only older, shorter, and less often amended than most state constitutions, but it is also, relatively, more difficult to amend. The question of whether to call a constitutional convention may only be presented to the voters by the legislature. Because Wisconsin does not permit use of the initiative to propose amendments to the state constitution, nor does it have any required automatic mechanism of review built into it,³⁸ it is located toward the more difficult end of the spectrum of amendment procedures.³⁹ Even Wisconsin's procedure for legislatively-proposed state constitutional amendments is quite rigorous, requiring passage by a majority vote of *elected* legislators, passage through two successive sessions, and separate presentation of issues to the voters.⁴⁰ At the time Wisconsin adopted these rigorous procedures for amendment, the issue was one of importance in state constitutional conventions across the country.⁴¹

35. WIS. CONST. art. VIII.

36. *Id.* art. X.

37. *Id.* art. XI.

38. 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."). Interestingly, the failed 1846 Wisconsin constitution included a provision, borrowed from New York, requiring that an automatic convention question be placed on the ballot every ten years. Brown, *supra* note 2, at 691. The 1848 Constitution did not include this provision. Brown, *supra* note 3, at 61.

39. Tarr & Williams, *supra* note 38, at 1075 n.1.

40. WIS. CONST. art. XII, § 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). See also GRAD & WILLIAMS, *supra* note 13, at 70, 72; Gerald Benjamin & Melissa Cusa, *Constitutional Amendment Through the Legislature in New York*, in CONSTITUTIONAL POLITICS IN THE STATES, *supra* note 6, at 47.

41. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 29-47 (2006); see Brown, *supra* note 2, at 691. In 1960, a constitutional commission in Wisconsin recommended easing these processes for legislatively-proposed amendments. The first proposal would have permitted an amendment to be submitted to the voters after passage through only one legislative session if it received a two-thirds vote in each house on its first consideration. This proposal was defeated in the legislature in 1961. The second proposal would have given the legislature broader latitude in submitting "in a single question a revision of a portion of the constitution or of items reasonably related to each other." This proposal passed the 1961 and 1963 legislatures but was defeated at the polls in April 1964. See Justice

Wisconsin has rejected, though probably not consciously, the Jeffersonian view that state constitutions should be revised once every generation⁴² in favor of the Madisonian preference for a more stable state constitution.⁴³ This conflict between stability and ease of change has persisted through the entire evolution of state constitutions. Stephen Holmes has captured the modern conflict:

Some theorists worry that democracy will be paralyzed by constitutional straitjacketing. Others are apprehensive that the constitutional dyke 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.⁴⁴

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 this point might change over time. Any assessment of the Wisconsin Constitution’s obsolescence must also take account of, and consider adjustments in, the processes of changing or revising the constitution.

Recently Jack Stark, a well-known scholar of the Wisconsin Constitution, assessed the reason that the Wisconsin Constitution, although amended fairly often, has remained basically stable:

Thomas E. Fairchild, *Governor’s Commission on Constitutional Revision*, 37 WIS. BAR BULL. June 1964, at 6, 7. For the recommendations, see COMMISSION ON CONSTITUTIONAL REVISION, A REPORT TO THE GOVERNOR 4–6, 9, 15 (Dec. 1960).

42. Jefferson’s letter on this subject is quoted in Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS: J. FEDERALISM 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).

43. LAURA J. SCALIA, *AMERICA’S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS 1820–1850*, at 4–5 (1999); see also Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *CONSTITUTIONALISM AND DEMOCRACY 195–97* (Jon Elster & Rune Slagstad eds., 1988).

44. Holmes, *supra* note 43, at 197.

This generality has reduced the need to undergo the cumbersome process of amending the constitution when one of its provisions becomes dated or obviously bad public policy. A fairly large number of amendments have been ratified, but the constitution's basic shape has changed little. This generality also makes the legislature accountable to the electorate; whereas, a very specific constitution would have allowed legislators to argue credibly that the constitution had tied their hands. In short, on this matter the delegates chose wisely.⁴⁵

What about the content of the Wisconsin Constitution? A recent commentator, Dr. Christopher Hammons, has formulated the distinction between "framework-oriented" and "policy-oriented" provisions in state constitutions.⁴⁶ Dr. Hammons analyzed all of the state constitutions according to this distinction and concluded that only thirty percent of Wisconsin's constitution is made up of policy-oriented provisions.⁴⁷ This is well below the national average of about forty percent.⁴⁸ 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.⁴⁹ Interestingly, Dr. Hammons concluded that the

45. STARK, *supra* note 7, at 8; *see also* GRAD & WILLIAMS, *supra* note 13, at 15.

46. Hammons, *supra* note 30, 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 id. at 1351 (examples of each type of provision); *see also* Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short Framework-Oriented Constitution*, 93 AM. POL. SCI. REV. 837, 846-847(1999) (more detailed list of examples).

47. Hammons, *supra* note 46, at 837, 848 (referring to policy-oriented provisions as "particularistic").

48. Hammons, *supra* note 30, at 1333; *see also* Hammons, *supra* note 46, at 840 (thirty-nine percent).

49. 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 "[t]here 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

longer and more policy oriented a state constitution is, the longer it endures before replacement.⁵⁰ Wisconsin's constitution seems to defy this conclusion.

III. PROPOSALS TO REVISE THE WISCONSIN CONSTITUTION

The fact that the question is now being raised in Wisconsin 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 reflected in the introductory quote from Dr. Tarr.⁵¹ Further, calls for revision or reform of the Wisconsin Constitution are not new. For example, in 1950, the state attorney general, Thomas Fairchild, called for a constitutional convention to be convened and made a number of specific recommendations.⁵² Attorney General Fairchild in an article co-authored with Charles P. Siebold observed:

The Constitution of Wisconsin is now over one hundred years old, and general revision has not been attempted since its adoption by the 1848 Constitutional Convention and its subsequent ratification by the people of Wisconsin. Because of the changes in the needs of our society, it seems timely to consider the problems and techniques of revision of the Constitution as a whole.⁵³

He was anticipating the distinction between state constitutional *change* and *reform*, later espoused by Alan Tarr.⁵⁴ The same words, of course, are being uttered today and that is the purpose of this conference. From this vantage point, it is difficult to determine how seriously the attorney general's recommendations were taken, but it is clear that no general revision of the state constitution took place in response to his call. Among his recommendations were reforming the

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* 119 (2d ed. 1985).

50. Hammons, *supra* note 30, at 1338-1341; Hammons, *supra* note 46, at 845.

51. Hammons, *supra* note 30, 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.").

52. Thomas E. Fairchild & Charles P. Siebold, *Constitutional Revision in Wisconsin*, 1950 WIS. L. REV. 201, 201.

53. *Id.*

54. Tarr, *supra* note 25, at 2.

judiciary, making executive branch officials appointed rather than elected, adopting a unicameral legislature, reforming county government, making the reapportionment process independent of the legislature, and adopting initiative and referendum as avenues of direct legislation.⁵⁵ A useful exercise might be to analyze carefully Attorney General Fairchild's 1950 proposals to see if they responded to an actual functional *incoherence* in the Wisconsin Constitution, necessitating constitutional *revision*, or were, rather, a series of constitutional *changes* that could be accomplished individually. Some, but not all, of his proposals have been accomplished without general revision of the state constitution. Thus, the call for a "frequent recurrence to fundamental principles" is neither new here in Wisconsin nor in other states.⁵⁶

Although it is clear that Wisconsin's constitution has not been revised and is amended at a rate less frequently than the national average, this does not mean that state constitutional change, and even revision, has not been regularly on the minds of Wisconsin political actors and citizens. The Wisconsin Legislative Reference Bureau noted, in a 1966 report:

From 1848–1965 a total of 1,389 proposals were introduced, but only 120 proposed changes reached the final stage of submission to the electorate. Including the amendments voted on in 1965, Wisconsin voters have now cast a total of 107 separate votes on constitutional questions at 52 separate elections since the Constitution was adopted. The 83 ratified changes involved 44 sections (including 9 sections created and 4 sections repealed), and the 37 rejected changes involved 16 sections. Of those ratified, the Supreme Court later invalidated 4 changes to 4 sections.⁵⁷

55. Fairchild & Siebold, *supra* note 52, at 208, 210, 212, 222–23, 225.

56. WIS. CONST. art. I, § 22. John Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531, 547–551 (1979).

57. WIS. LEGISLATIVE REFERENCE BUREAU, RESEARCH BULLETIN 66-5, CONSTITUTIONAL AMENDMENT PROPOSALS, SUCCESSFUL AND UNSUCCESSFUL, 1961–1965 WISCONSIN LEGISLATURES 1 (1966) [hereinafter WIS. LEGISLATIVE REFERENCE BUREAU, RESEARCH BULLETIN 66-5] (emphasis omitted); *see also* WIS. LEGISLATIVE REFERENCE LIBRARY, RESEARCH BULLETIN 129, DISPOSITION OF AMENDMENTS TO THE WISCONSIN CONSTITUTION CONSIDERED BY THE 1941 TO 1959 LEGISLATURES (1960) [hereinafter WIS. LEGISLATIVE REFERENCE LIBRARY, RESEARCH BULLETIN 129].

In fact, a number of proposals have been introduced in the Wisconsin legislature to study the need for a constitutional convention,⁵⁸ and a number of constitutional commissions have been utilized, often without legislative funding, particularly beginning in the early 1960s.⁵⁹ Interestingly, this wave of interest in the Wisconsin Constitution slightly predated the wave of attention to state constitutions following the United States Supreme Court's one-person, one-vote decisions.⁶⁰

In addition, proposals to call a state constitutional convention in Wisconsin have been regularly introduced in the legislature since at least 1907.⁶¹ None of these proposals sought a *limited* constitutional convention and none of them were recommended by the legislature to the voters.⁶² It is unclear from this vantage point what the level of popular support was during these legislative considerations of whether to call a constitutional convention. Therefore, even though the Wisconsin Constitution has never been reformed or revised, the possibility has certainly been considered by the legislature but never presented to the voters.

IV. TWENTIETH CENTURY CONSTITUTIONAL REVISION IN OTHER STATES

There is a good deal that can be learned from other states that have addressed the question of revising 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

58. See WIS. LEGISLATIVE REFERENCE BUREAU, RESEARCH BULLETIN 65-2, CONSTITUTIONAL REVISION IN WISCONSIN 28-29 (1965) [hereinafter WIS. LEGISLATIVE REFERENCE BUREAU, RESEARCH BULLETIN 65-2].

59. *Id.* at 27. For a listing of the commission's December 1960 recommendations see *id.* at 30-32. See also Fairchild, *supra* note 41, at 6.

60. James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 839 (1991) (citations omitted):

[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.

61. WIS. LEGISLATIVE REFERENCE BUREAU, RESEARCH BULLETIN 65-2, *supra* note 58, at 1, 4-6.

62. *Id.*

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, culminating a number of years of attempts at revision, including a legislatively-proposed constitution that was voted down in 1944.⁶³ This constitutional convention took place in the period of post-war optimism and confidence in government. Very strong gubernatorial leadership was a key element in the approval of the constitutional convention and ratification of the convention's recommended revised constitution by the voters.⁶⁴ 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, threatening the control that small counties had over the state, had stood in the way of state constitutional revision for over a century.⁶⁵ The convention met at Rutgers University, not in the state capital, to avoid the appearance of "politics as usual."

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 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.⁶⁶

63. See generally RICHARD J. CONNORS, *THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY: 1940-1947* (1970).

64. *Id.* at 192-93; ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 15-16* (Reference Guides to the State Constitutions of the United States, No. 1, G. Alan Tarr series ed., 1997).

65. CONNORS, *supra* note 63, at 124-125; WILLIAMS, *supra* note 64, at 15-16.

66. CONNORS, *supra* note 63, at 194.

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.⁶⁷

B. Louisiana (1973)

The State of Louisiana, also after a number of attempts and with the help of strong gubernatorial leadership,⁶⁸ convened a constitutional convention in 1973. One leading commentator concluded, with respect to the convention's product, "[l]ittle 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."⁶⁹ 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."⁷⁰

C. Virginia (1968–1970)

Substantial revision of the Virginia Constitution was accomplished through the *constitutional commission* process.⁷¹ The commission, with

67. 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 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).

68. LEE HARGRAVE, *THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE* 16 (Reference Guides to the State Constitutions of the United States, No. 4, G. Alan Tarr series ed., 1991).

69. *Id.* at 17.

70. LA. CONST. art. I, § 3; see Lee Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 LA. L. REV. 1, 6 (1975); Louis "Woody" Jenkins, *The Declaration of Rights*, 21 LOY. L. REV. 9, 16–17 (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); 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, 918 (2003).

71. A.E. Dick Howard, *Adopting a New Constitution: Lessons from Virginia*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 25, at 74.

strong gubernatorial backing,⁷² was authorized by the legislature, and its members were named by the governor in 1968.⁷³ After detailed study, public hearings, and deliberation, the commission submitted its report to the governor and the legislature at the beginning of 1969.⁷⁴ 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."⁷⁵ 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.⁷⁶ The leading commentator on Virginia's successful constitutional revision, Professor A.E. Dick Howard (a participant in the process himself), has thoughtfully compared that state's success with problems encountered in constitutional revision in other states during this period.⁷⁷

D. Montana (1967–1972)

In 1967, the legislature in Montana assigned the legislative council to prepare "a study of the Montana Constitution, to determine if it was adequately serving the current needs of the people."⁷⁸ Based on the council's recommendation, the legislature created a Constitution Revision Commission in 1969.⁷⁹ The Montana Constitution includes the provision requiring an automatic question to be placed on the ballot every twenty years as to whether there should be a constitutional convention.⁸⁰ These preparatory actions were taken in anticipation of that vote in 1970, which was approved by a wide margin. Then,

72. *Id.* at 74, 101.

73. *Id.* at 74–75.

74. *Id.* at 75; COMMISSION ON CONSTITUTIONAL REVISION, THE CONSTITUTION OF VIRGINIA: REPORT (1969).

75. Howard, *supra* note 71, at 78, 95.

76. *Id.* at 78–85.

77. *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).

78. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 8 (Reference Guides to the State Constitutions of the United States, No. 31, G. Alan Tarr series ed., 2001).

79. *Id.*

80. MONT. CONST. art. XIV, § 3.

pursuant to legislative authorization and creation of another commission to prepare for the convention, the constitutional convention met in 1972.⁸¹ The Montana convention met at a time when it could draw on several trends in state constitutionalism. First was the movement toward “managerial constitutionalism.”⁸²

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.⁸³

There was a second, more recent trend.

The adherents of this newer view, which I call constitutional populism, 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.⁸⁴

Dr. Tarr concluded that the Montana Constitution “reflects a judicious blending of the recommendations of both these reform movements.”⁸⁵ 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, important expressions of the right to privacy, and rights

81. ELISON & SNYDER, *supra* note 78, at 9–10.

82. G. Alan Tarr, *The Montana Constitution: A National Perspective*, 64 MONT. L. REV. 1, 13 (2003).

83. *Id.*

84. *Id.* at 14.

85. *Id.* at 15.

against private entities, together with an important concern for the environment.⁸⁶

Interestingly, the 1972 Montana Constitution, which was submitted as a revised constitution, with separate votes on three controversial issues: a unicameral legislature, the death penalty, and legalized gambling, was adopted by the voters by an extremely narrow margin.⁸⁷ A legal challenge, contending that the constitution was actually not ratified by a majority, was rejected by the Montana Supreme Court by a 3–2 vote.⁸⁸ Despite this narrow margin of approval, the Montana voters overwhelmingly rejected the opportunity to call another constitutional convention twenty years later in 1990.⁸⁹

E. Michigan (1961–1962)

After the adoption in 1960 of an initiative amendment to the state constitution easing the requirements for the calling of a state constitutional convention, and requiring 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 1961–1962.⁹⁰ The Governor created a study commission to prepare for the convention.⁹¹ After the legislature refused to provide funding for the operation of the commission, a private foundation stepped forward with financing.⁹² Slightly over two-thirds of the delegates to the convention were Republican.⁹³ Michigan, like Wisconsin, traces its constitutional origins to the Northwest Ordinance.⁹⁴

86. *Id.* at 16–17.

87. ELISON & SNYDER, *supra* note 78, at 14–15.

88. State *ex rel.* Cashmore v. Anderson, 500 P.2d 921, 929 (Mont. 1972); ELISON & SNYDER, *supra* note 78, at 14–15.

89. Tarr, *supra* note 82, at 20–21; ELISON & SNYDER, *supra* note 78, at 16. See generally The Honorable James R. Browning Symposium, *The 1972 Montana Constitution: Thirty Years Later*, 64 MONT. L. REV. 1 (2003).

90. SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE 20–21 (Reference Guides to the State Constitutions of the United States, No. 24, G. Alan Tarr series ed., 1996).

91. *Id.* at 21.

92. *Id.*

93. *Id.*

94. *Id.* at 23. Interestingly, this fact has not seemed to play heavily in Wisconsin Supreme Court interpretations the way it has in other states. See Patrick Baude, *Interstate Dialogue in State Constitutional Law*, 28 RUTGERS L.J. 835, 842–43 (1997).

F. Georgia (1983)

In Georgia, 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.⁹⁵ 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.⁹⁶ Despite the fact that the United States Supreme Court ultimately vacated the judicial decision,⁹⁷ the new constitution was never submitted to the voters.⁹⁸

In the 1970s, however, strong gubernatorial leadership led to the recommendation that the legislature prepare a revised constitution, but one without substantive revision. This was accomplished, and the voters overwhelmingly adopted the document in 1976.⁹⁹

The legislature immediately embarked on a process leading to substantive revision of the Georgia Constitution. This process was also based on strong gubernatorial leadership.¹⁰⁰ A multi-year legislative process culminated in 1982, and this legislative product was submitted to the people and adopted overwhelmingly.¹⁰¹

A commentator on the Georgia 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. . . .¹⁰²

95. MELVIN B. HILL, JR., *THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE* 14 (Reference Guides to the State Constitutions of the United States, No. 21, G. Alan Tarr series ed., 1994).

96. *Toombs v. Fortson*, 205 F. Supp. 248, 258-59 (N.D. Ga. 1962), *vacated*, 379 U.S. 621 (1965); HILL, *supra* note 95.

97. *Toombs*, 379 U.S. at 622.

98. HILL, *supra* note 95, at 14.

99. *Id.* at 15.

100. *Id.* at 16.

101. *Id.* at 19.

102. *Id.* There was criticism of the Georgia process on the ground that it did not adequately involve the people in "popular sovereignty." Henretta, *supra* note 60, at 830-31.

G. Florida (1967, 1977, 1997)

Beginning in 1966, the state of Florida utilized a constitutional commission to prepare a revised draft of that state's 1885 constitution. The commission's product was presented to the legislature, which held an extraordinary 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 1968.¹⁰³ Florida's 1968 constitution contained a unique mechanism for future state constitutional change: an *appointed* constitution revision commission, 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 them to the legislature.¹⁰⁴ 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."¹⁰⁵ 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 constitution revision commission process.¹⁰⁶ In fact, the Florida Constitution was amended to authorize the same commission procedure, with direct access to the ballot, for budget and finance matters.¹⁰⁷ Several other states have considered Florida's commission mechanism, but none have adopted it.¹⁰⁸

Florida's initial experience with this constitution revision mechanism ended in a failure. The 1977 commission submitted eight separate

103. 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 25, at 19, 21-22; TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE 11-13 (Reference Guides to the State Constitutions of the United States, No. 5, G. Alan Tarr series ed., 1991).

104. Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215, 220 (1998); D'ALEMBERTE, *supra* note 103, at 13; Salokar, *supra* note 103, at 22.

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

106. D'ALEMBERTE, *supra* note 103, at 15.

107. 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).

108. Williams, *supra* note 105, at 256-57.

propositions to the voters and all of them were defeated.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

The 1997 Constitution Revision Commission, however, was much more successful. A preparatory committee developed background research and even proposed rules for the commission.¹¹² It learned a number of lessons from the unsuccessful commission of twenty years earlier and made a number of recommendations to the voters that were accepted.¹¹³ The commission successfully utilized opinion polling during its deliberations.¹¹⁴ The proposals were much more moderate than those of 1978 because the commission required of itself a super-majority vote before recommending a state constitutional change and an organization was put into place to support the proposed revisions.¹¹⁵

As a member of the Florida Bar, and a native Floridian, I had some involvement in these processes and recently 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 *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.¹¹⁶

109. D'ALEMBERTE *supra* note 103, at 15; Salokar, *supra* note 103, 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).

110. Salokar, *supra* note 103, at 47.

111. Williams, *supra* note 105, at 257 n.30.

112. Salokar, *supra* note 103, at 34.

113. *Id.* at 35–37, 44.

114. *Id.* at 48–49.

115. *Id.* at 35–37, 47; Williams, *supra* note 105, at 260–61.

116. Williams, *supra* note 105, at 260. The Florida process was criticized for not adequately involving the voters. See Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 FLA. L. REV. 475 (2000).

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.¹¹⁷

Florida's process has been characterized by substantial preparatory work and gubernatorial leadership.¹¹⁸ The 1997 process, by contrast to that in 1977, included an important post-commission process of publicizing and supporting its proposals.¹¹⁹

H. New York (1967, 1997)

New York had a constitutional convention in 1967 that was highly partisan and dominated by legislative leaders.¹²⁰ The revised constitution presented by that convention to the voters was defeated at the polls.¹²¹ 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 were also

117. Williams, *supra* note 105, at 270.

118. Salokar, *supra* note 103, at 26–33.

119. *Id.* at 44–51.

120. Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 25, at 155. See generally HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION (1997).

121. Benjamin, *supra* note 120, at 155; see 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).

delegates, and others on public payrolls, to collect two salaries and the attendant pension benefits.¹²²

In preparation for the 1997 automatic vote in New York on whether to call a constitutional convention, in 1993 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.¹²³ 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."¹²⁴

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."¹²⁵

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 1997.¹²⁶ 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

122. Benjamin, *supra* note 120, at 155; see also PETER J. GALIE, *THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE* 28–29 (Reference Guides to the State Constitutions of the United States, No. 3, G. Alan Tarr series ed., 1991).

123. Benjamin, *supra* note 120, at 153.

124. *Id.* at 157.

125. *Id.* (citing TEMPORARY STATE COMMISSION ON CONSTITUTIONAL REVISION, *EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR, AND THE LEGISLATORS OF NEW YORK* (1995)); see also *Documents*, 26 RUTGERS L.J. 1355, 1394 (1995) (excerpts from the commission's report).

126. Benjamin, *supra* note 120, at 158–63.

was a lack of a strong campaign supporting the constitutional convention call, and that there was an array of interest groups who feared a constitutional convention and potential changes to the status quo.¹²⁷

I. Alabama (1994–present)

Alabama is still operating under its 1901 constitution. Efforts at reforming it go back many years but saw renewed emphasis in the past decade or so.¹²⁸ Despite strong gubernatorial leadership, and a broad, grassroots organization supporting constitutional revision, the voters overwhelmingly rejected a package of tax reforms and an amendment permitting the simplification of Alabama's longest-in-nation state constitution.¹²⁹ 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."¹³⁰

J. Texas (1971–1975)

After the 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 1974.¹³¹ 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.¹³² 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

127. *Id.* at 159–66. See generally DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK (Gerald Benjamin & Henrik N. Dullea eds., 1997).

128. H. Bailey Thomson, *Constitutional Reform in Alabama: A Long Time in Coming*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE POLITICS OF STATE CONSTITUTIONAL REFORM, *supra* note 25, at 113–24. See generally *Symposium on the Alabama Constitution*, 33 CUMB. L. REV. 189 (2002–2003).

129. Thomson, *supra* note 128, at 126–38.

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

131. JANICE C. MAY, THE TEXAS STATE CONSTITUTION: A REFERENCE GUIDE 24–25 (Reference Guides to the State Constitutions of the United States, No. 26, G. Alan Tarr series ed., 1996).

132. *Id.* at 25.

three votes to approve the final revision package.”¹³³ Dr. Janice May, a member of the Constitutional Revision Commission, explained this failure:

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.¹³⁴

Interestingly, at its next session, the Texas legislature submitted most of the proposed changes it had considered sitting as a constitutional convention to the voters as eight separate amendments at a special election in 1975. In a very light turnout, after a poorly-funded campaign, the voters overwhelmingly rejected the proposals.¹³⁵

K. 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 1996.¹³⁶ Dr. Bruce Cain, a member of the commission, noted, “This Commission undertook a comprehensive look at California governance and ultimately proposed some far-reaching and imaginative

133. *Id.* at 26; *see also id.* at 422 (citing A NEW CONSTITUTION FOR TEXAS: TEXT, EXPLANATION, COMMENTARY (1973); A NEW CONSTITUTION FOR TEXAS: SEPARATE STATEMENTS OF COMMISSION MEMBERS (1973)).

134. MAY, *supra* note 131, at 26–27.

135. *Id.* at 27; *see also id.* at 404; Janice C. May, *Texas Constitutional Revision: Lessons and Laments*, 66 NAT’L CIVIC REV. 64 (1977).

136. 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 25, at 59, 67.

ideas. But in the end, these recommendations never got to a vote in the legislature, let alone a place on the ballot.”¹³⁷ Apparently, because of an improved economy, the complexity of some of the issues, and the vested interests of a number of legislators and other elected officials, the revision commission’s proposals were essentially doomed when they were sent to the legislature.¹³⁸

L. Illinois (1968–1970)

The state of Illinois in the 1960s built on several “decades of effort by civic groups to provide a climate of opinion favorable to constitutional reform.”¹³⁹ Despite the adoption in 1950 of an amendment to the state constitution that liberalized Illinois’ constitutional amendment process, substantial revision had not taken place.¹⁴⁰ The Illinois legislature created a Constitution Study Commission in 1965, and after several years of deliberation, it 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.¹⁴¹ 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.¹⁴²

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.”¹⁴³ There was even a third commission created by the legislature to make preparations immediately before the convention was convened.¹⁴⁴ The constitutional convention delegates, elected on a nonpartisan basis, worked from December 1969

137. *Id.* at 60; *see also* CALIFORNIA CONSTITUTION REVISION COMMISSION, FINAL REPORT AND RECOMMENDATIONS TO THE GOVERNOR AND THE LEGISLATURE (1996).

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

139. JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS 1818–1970, 138 (1972).

140. *Id.* at 123–37.

141. *Id.* at 139–40.

142. *Id.* at 142.

143. *Id.* at 144.

144. *Id.* at 144 n.6.

through September 1970.¹⁴⁵ 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 1955–1956 convention.¹⁴⁶ The convention succeeded in proposing a modernized constitution for Illinois which was adopted by the voters in December of 1970.¹⁴⁷

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

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.¹⁴⁸

M. Maryland (1966–1968)

In Maryland, following the United States Supreme Court’s one-person, one-vote decisions, based on the initiative of the governor, a constitution commission was formed to prepare for a 1966 automatic (but not always honored by the legislature) referendum on whether to call a constitutional convention.¹⁴⁹ The convention call was approved by the voters, convention delegates were elected, and the convention met from 1967 to early 1968.¹⁵⁰ The convention’s proposed constitutional revision was soundly defeated at the polls in 1968.¹⁵¹ This has lead

145. *Id.* at 149–55.

146. *Id.* at 153.

147. *Id.* at 162–63. See generally *The Illinois Constitution of 1970: A Symposium Issue*, 6 J. MARSHALL J. PRAC. & PROC. 213 (1973).

148. Samuel W. Witwer, *Introduction*, 6 J. MARSHALL J. PRAC. & PROC. 213, 213 (1973).

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

150. *Id.* at 532–33. See generally WAYNE R. SWANSON ET AL., *POLITICS AND CONSTITUTIONAL REFORM: THE MARYLAND EXPERIENCE, 1967–1968* (1970).

151. Friedman, *supra* note 149, at 534; see also DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 9–10 (Reference Guides to the State

Maryland's experience to be referred to as the "Magnificent Failure."¹⁵² 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.¹⁵³

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.¹⁵⁴

* * *

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.

- (1) State constitutional revision can be a long, multi-stage, difficult process with no guarantee of success, and sometimes spanning a number of decades. In Wisconsin, the movement for

Constitutions of the United States, No. 41, G. Alan Tarr series ed., 2006); Robert J. Martineau, *Maryland's 1967-68 Constitutional Convention: Some Lessons for Reformers*, 55 IOWA L. REV. 1196 (1970).

152. JOHN P. WHEELER, JR. & MELISSA KINSEY, *MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-1968* (1970).

153. Friedman, *supra* note 149, at 534-35 (citations omitted).

154. *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 revision beginning either now (and actually in the 1960s), or even earlier, may provide this background.

- (2) 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.
- (3) 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 reapportionment, changing economic conditions, election campaigns, etcetera. Political circumstances can change while state constitutional revision is being considered.
- (4) Strong, active gubernatorial leadership is necessary but not always sufficient for successful state constitutional revision.
- (5) State constitutional revision takes place within the state's ongoing political structure, and changes in state constitutions involve important political questions.
- (6) Detailed preparations must be attended to, concerning:
 - a. whether a constitutional convention call should be made or a constitutional commission created;
 - b. informing and educating the public prior to the vote if a constitutional convention call is to be made;
 - c. what should be included within the constitutional convention call (i.e. an unlimited or a limited convention) or commission mandate;
 - d. careful consideration of processes for 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;¹⁵⁵
 - e. legislative implementation of a positive decision by the voters on a convention call;
 - f. prior to a constitutional convention or commission, background research and even the proposal of draft rules, preferably prepared by a separate committee or commission.

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

- (7) The legislature may refuse, through an exercise of “legislative passive aggression,”¹⁵⁶ to provide funding for any of these preparatory activities. Under such circumstances there may be a need for private or gubernatorial funding.
- (8) 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.
- (9) Leadership in constitutional conventions and commissions is absolutely crucial to the success of such a body.¹⁵⁷
- (10) Consideration should be given to holding the convention or commission sessions away from the state capital to avoid the appearance of “politics as usual.”
- (11) 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.
- (12) The convention or commission 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, or if required to be presented separately, they should be interlocked so that

156. 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 38, at 1100 n.130.

157. ELMER E. CORNWELL, JR., JAY S. GOODMAN & WAYNE R. SWANSON, *STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES* 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.”).

the adoption of each is dependent on the adoption of the other(s).

- (13) 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.
- (14) 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.

These and many other lessons can be drawn from the state constitutional revision experience in other states in the second half of the twentieth century. Such lessons must be applied, however, in the current, Wisconsin context.

V. 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 a 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)¹⁵⁸

Since the drafting of the 1948 Wisconsin 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 citizens’ exercise of

158. George D. Busbee, *An Overview of the New Georgia Constitution*, 35 *MERCER L. REV.* 1, 1–2 (1983).

popular sovereignty¹⁵⁹ 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.¹⁶⁰

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

Further, since Wisconsin's original constitution was drafted, the content of many of the states' constitutions has evolved from short, basic documents of government organization and citizen rights to longer constitutions that have been expanded to include a number of specific policies that could have been left to the legislature.¹⁶¹ 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.¹⁶² 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.¹⁶³ 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

159. Henretta, *supra* note 60, at 826.

160. TARR, *supra* note 11, at 170.

161. *Id.* at 9–12.

162. *Id.* at 132–33.

163. See Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969 (1995) (reviewing DAVID A. JOHNSON, *FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840–1890* (1992)).

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.¹⁶⁴

Wisconsin 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 Wisconsin. In any event, the Texas approach of a one-time state constitutional amendment authorizing 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 one possibility. The Michigan and Illinois changes in their processes of constitutional change are others. 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(s). 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, with authority to submit its proposal(s) directly to the people. This would also involve two exercises of popular sovereignty or votes by the people of Wisconsin.

Next, the “extratextual” approach of a constitution revision commission that would make recommendations to the legislature could be utilized.¹⁶⁵ State constitutional commissions can be created either by the legislature or the governor, and receive funding from either source.¹⁶⁶ 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.¹⁶⁷ State constitutional commissions can also be

164. 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); *supra* notes 32–34 and accompanying text.

165. 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).

166. Williams, *supra* note 165, at 4–5.

167. *Id.* at 9.

utilized to prepare for and assist a constitutional convention.¹⁶⁸ 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.¹⁶⁹ 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 Wisconsin 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 XII, section 2 of the Wisconsin Constitution only requires that a one-time 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.¹⁷⁰ By contrast, some states specify the nature of the question to be put to the voters concerning a constitutional convention, the form of which sometimes precludes the possibility of a limited constitutional convention.¹⁷¹ Therefore, it seems as though the Wisconsin Constitution would provide no barrier to a limited constitutional convention if the limits were specified by the legislature and approved by the voters.¹⁷² 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.¹⁷³ 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—

168. *Id.* at 11.

169. Tarr & Williams, *supra* note 38, at 1104–05.

170. *Id.* at 1086, 1090.

171. *Id.* at 1086–87.

172. *See id.* at 1086–92.

173. Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 70 (1996).

majorities have rejected the opportunity.”¹⁷⁴ This has also occurred in New York, Rhode Island, Illinois, and Montana. 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.”¹⁷⁵ Constitutional conventions seem to have lost their *legitimacy* in the public mind. At the time Wisconsin’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 1848, limited constitutional conventions used to alleviate the fears of voters and politicians, and vested interests were not utilized.

Under these circumstances, in states, unlike Wisconsin, 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*.¹⁷⁶ Gais and Benjamin concluded:

174. *Id.* at 69 (citation omitted). Benjamin and Gais 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).

175. Gais & Benjamin, *supra* note 174, at 1304; Benjamin & Gais, *supra* note 173, at 71.

176. *See* Gais & Benjamin, *supra* note 174, 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.

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 and accommodation among significant political interests.¹⁷⁷

Gais and Benjamin called for an additional element to achieve meaningful, publicly acceptable state constitutional revision: *independence*.¹⁷⁸ 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:

Just 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.¹⁷⁹

It is clear, however, that in a number of states as a result of perseverance, the proper leadership, and the right timing, opportunities have arisen for the exercise of high levels of statesmanship. Under the right circumstances, state political actors have transcended ordinary, short-term politics and embarked on high-level, far-reaching "recurrence to fundamental principles" in reforming their state's constitution for the betterment of themselves and future generations.¹⁸⁰ 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.

177. *Id.* at 1303.

178. *Id.* at 1299.

179. CORNWELL, JR., GOODMAN, & SWANSON, *supra* note 157, at 205–06.

180. Sundquist, *supra* note 56, at 556.

Careful consideration must be given to the important connection—the linkage—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. 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 may dictate the process of state constitutional change that should be utilized.

VI. CONCLUSION

Frank Grad and I have argued that the burden of persuasion should be upon those who seek to include material in state constitutions.¹⁸¹ 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.

The issues that would come before a Wisconsin 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.¹⁸² 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

181. GRAD & WILLIAMS, *supra* note 13, at 30.

182. *Id.* at 8–14.

era meet to undo the careful reforms of an earlier generation.¹⁸³

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.¹⁸⁴

All of these concerns point to the conclusion that decision-makers in Wisconsin 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 one-time-only changes, in Wisconsin's mechanisms of state constitutional change. This was utilized in Texas, albeit unsuccessfully, and with more success in Michigan and Illinois.¹⁸⁵ Finally, a careful evaluation must focus on whether the passage of time and the accretion of specific amendments over the years have rendered the Wisconsin Constitution *functionally* incoherent. Is there really a need for "fundamental reconsideration" of Wisconsin's "constitutional foundations?"¹⁸⁶ Are any of Wisconsin'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, in terms of their coherence with the rest of the Wisconsin Constitution?¹⁸⁷ 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

183. CORNWELL, JR., GOODMAN & SWANSON, *supra* note 157, at 203; *see also* GRAD & WILLIAMS, *supra* note 13, at 24-25.

184. For a consideration of current issues in state constitutional change, *see generally* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM, *supra* note 1.

185. *See supra* Parts IV.E, J, L.

186. *See* Tarr, *supra* note 1, at 2.

187. *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).

the “Pandora’s box” element of “conventionphobia?”¹⁸⁸ How can the legislature be convinced to take any of these steps? It is these difficult questions, the evaluation of which begins here at this conference, which must be addressed to determine if the Wisconsin Constitution is obsolete and in need of fundamental reform, and if so, whether anything can be done about it.

188. Gais & Benjamin, *supra* note 174, 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.”).

* * *