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FOREWORD: IS CONSTITUTIONAL REVISION SUCCESS WORTH ITS POPULAR SOVEREIGNTY PRICE?

*Robert F. Williams**

> 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 and municipalities, of 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. In fact, with apologies for the hyperbole, I almost would go so far as to say that the confluence of factors needed to bring about the ratification of a new state constitution approaches that needed for the creation of life itself!
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> *Georgia Governor George D. Busbee (1983)*[1]

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

All political power is inherent in the people.[2]

I am honored to write this Foreword to the Law Review's symposium on the recent adoption of the Constitution Revision Commission's suggested changes to the Florida Constitution. The faculty at the University of Florida College of Law and the editors of the *Law Review* must be commended for taking on this important and timely topic. After all, as Professor Richard Kay of the University of Connecticut School of Law has observed:

> The transformation of a law school from an institution of vocational competence into one of intellectual excellence is often associated with an increased attention to legal subjects that are national in scope. . . .
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> It is also true, however, that this broadening of interest need not be accompanied by an abandonment of a special concern for the legal issues and problems that are peculiar to a law school's home.[3]

Florida constitutional law has long interested me, as a student,[4] as a participant in Florida constitutional revision,[5] as a commentator[6] on Florida Constitutional Law, and as a speaker to this most recent Commission.[7]

The members of the 1997-98 Constitution Revision Commission (Commission) were certainly not persons who were "faint of heart." The Commission succeeded in achieving a number of important revisions to Florida's constitution. These changes were accomplished through the process described above by Governor Busbee. Members of the Commission will agree, I am sure, that the work was "incredibly difficult,

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2. FLA. CONST. art. I, § 1.

3. Richard S. Kay, *The Jurisprudence of the Connecticut Constitution*, 16 CONN. L. REV. 667, 667 (1984).

4. *See generally* Robert F. Williams, Note, *Property Tax Exemptions Under Article VII, Section 3(a) of the Florida Constitution of 1968*, 21 U. FLA. L. REV. 641 (1969).

5. *See* Robert F. Williams, *A Generation of Change in Florida State Constitutional Law*, 5 ST. THOMAS L. REV. 133, 136-39 (1992) [hereinafter *A Generation of Change*]; Stephen T. Maher, *The Conference on the Florida Constitution*, 68 FLA. B.J., Dec. 1994, at 66, 67 n.10; Robert F. Williams, *The Anatomy of Law Reform: Dissecting a Decade of Change in Florida In Forma Pauperis Law*, 12 STETSON L. REV. 363, 385-86 (1982) [hereinafter *Anatomy of Law Reform*].

6. *See* Robert F. Williams, *Introduction: The Stories of State Constitutional Law*, 18 NOVA L. REV. 715 (1994) (introducing the Symposium on Florida Constitutional Law).

7. *See* Robert F. Williams, *The Florida Constitution Revision Commission in Historic and National Context*, 50 FLA. L. REV. 215 (1998) (address to Commission). The original address was published in the JOURNAL OF THE 1997-1998 CONSTITUTION REVISION COMMISSION 14 (Tuesday, June 17, 1997).

sometimes tedious, sometimes exhilarating, always challenging. . . ."[8] The Commissioners' participation reflected a tremendous commitment to public service. In Florida, of course, it could never have been a "Sunday drive in the *mountains*."

Throughout the history of our country, the states have been experimenting both with the *processes* by which state constitutions are drafted, adopted, amended, and revised, as well as with the *content* of state constitutions. The recent Florida state constitutional revisions are a product of the latest in a continuing series of experiments with the processes of state constitutional change. The substantive content of the new changes will have to be subjected to the tests of time and judgements of history, illuminated from the beginning, to be sure, by the light shed on them by the articles in this symposium.

The standard approach to revising American state constitutions has been the constitutional convention. This is a mechanism that makes the maximum use of popular sovereignty or the voters' expressed will. As I have said elsewhere, "the use of a constitutional convention usually relies on three expressions of popular will: deciding the question whether there should be a convention, electing the delegates, and voting on whether to ratify the convention's recommendations."[9] Thus, conventions used to have a high degree of popular legitimacy. As the Tennessee Supreme Court noted:

> It must be remembered that the Convention method, whether limited or unlimited, is subjected to two votes by the people, the ultimate repository of all power. The primary purpose of the call vote is to determine whether or not the people are willing to *permit* a convention to *consider* altering, amending or abolishing the whole Constitution, or specified parts thereof. An affirmative vote for a convention, for limited or unlimited purposes, is a grant by the people to a historic deliberative body to write constitutional, fundamental law as distinguished from statutory law. Imperfection in the call, such as affirmative proposals exceeding the limits heretofore defined, does not invalidate the amending process. The second vote ratifies or rejects the word for word end result of the Convention's deliberative effort. The final validating step by the people is the most significant action in the entire amending process.[10]

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8. *See supra* note 1, at 1.

9. 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, 3 (1996).

10. Snow v. City of Memphis, 527 S.W.2d 55, 63-64 (Tenn. 1975), *appeal dismissed*, 423

If Governor Busbee of Georgia was correct in 1983 when he said, based on his experience, "Constitutional revision is not for the faint of heart,"[11] then Floridians are the least fainthearted people in the United States when it comes to state constitutional revision. Florida is generally considered to have the most easily changed state constitution in the country.[12] This is because, in addition to the more common mechanisms of constitutional convention, legislatively-proposed amendment, and citizen initiative, Florida also utilizes its unique, appointed Constitution Revision Commission which may put its proposals directly on the ballot.[13] Although this mechanism was invented in 1968, the 1978 Commission's proposals were rejected at the polls, making this most recent experience the first successful utilization of the full Commission mechanism.

People differ, of course, on whether they believe that it is better for a state constitution to be easily amended or more difficult to amend. For most people, this question will even depend on the nature of the proposal itself that is being considered. In other words, rarely do people speculate on this question in the abstract, but rather wait to confront it when they are faced with a proposal they either support or oppose. It is in that context that the question of ease of amending state constitutions usually arises.

U.S. 1083 (1976).

11. *See supra* note 1, at 1.

12. *See* TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE 146 (1991) ("The Constitution of Florida has more processes for amendment and revision than any other state constitution."); *see also* Joseph W. Little & Julius Medenblik, *Restricting Legislative Amendments to the Constitution*, 60 FLA. B.J., Jan. 1986, at 43; Albert L. Sturm & Janice C. May, *State Constitutions and Constitutional Revision: 1980-81 and the Past 50 Years*, *in* 24 THE BOOK OF THE STATES 1982-83, at 115, 116-18 (1982).

Interestingly, one can make the argument that the easier it is to amend a state's constitution, the more rigid its court's adherence should be to the doctrine of *stare decisis* for decisions interpreting the state constitution. Justice Brandeis' famous defense of a reduced weight of *stare decisis* for United States Supreme Court interpretations of the federal constitution was based on the difficulty of overruling such interpretations. *See* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 409 n.5 (1932) (Brandeis, J., dissenting). Brandeis, however, specifically excluded state constitutional interpretations from his argument, stating that "[t]he policy of *stare decisis* may be more appropriately applied to constitutional questions arising under the fundamental laws of those States whose constitution may be easily amended. The action following the decision in *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271, . . . shows how promptly a state constitution may be amended to correct an important decision deemed wrong." *Id.* No Florida court appears to have addressed this point. *See generally* Thad B. Zmistowski, Note, City of Portland v. DePaolo*: Defining The Role of Stare Decisis in State Constitutional Decisionmaking*, 41 ME. L. REV. 201(1989). *But see* James C. Rehnquist, *The Power that Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 351-52 (1986) (arguing that other factors than just ease of amendment should support reduced weight of precedent in constitutional interpretation).

13. *See* D'ALEMBERTE, *supra* note 12, at 15-16; Steven J. Uhlfelder, *The Machinery of Revision*, 6 FLA. ST. U. L. REV. 575 (1978).

The Florida Constitution Revision Commission operates with many of the attributes of a state constitutional convention, but it does not have the first two expressions of popular will described above. It could, therefore, be viewed as having less popular legitimacy than a convention. There can be no prior restraint, imposed by the people, on the consideration of state constitutional revision; the only limits come through the Commission's own self-imposed restraint.[14] The commissioners are not, technically, "representatives."[15] Voting Rights Act[16] and one-person-one-vote issues,[17] arguably applicable to constitutional conventions, do not arise with respect to the choice of the Commission's members. Florida's Commission is a reflection, albeit a unique manifestation, of a much larger national trend in state constitutionalism. As noted by Alan Tarr, the earlier reliance on popular sovereignty and state constitutional conventions has been giving way to an increased influence of professional reformers and political elites, thus reflecting probably "the most striking trend" in twentieth century state constitutional politics.[18]

In some ways, it is even a misnomer to refer to the Florida body as a "commission." The word itself connotes a principal/agent relationship of some sort, and until Florida's new invention in 1968, constitutional commissions had served their creators rather than acting independently, like constitutional conventions. Commissions had only been used:

> 1) in conjunction with constitutional conventions, either to help implement their work after a failure at the polls, or through background study and analysis to lay the groundwork

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14. *See infra* note 24 and accompanying text.

15. *See generally* Robert S. Friedman & Sybil L. Stokes, *The Role of Constitution—Maker as Representative*, 9 MIDWEST J. POL. SCI. 148 (1965), *reprinted in* JOSEPH F. ZIMMERMAN, SUBNATIONAL POLITICS: READINGS IN STATE AND LOCAL GOVERNMENT 76 (2d ed. 1970).

16. *See* Richard Briffault, *The Voting Rights Act and the Election of Delegates to a Constitutional Convention*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 445 (Gerald Benjamin & Henrik N. Dullea eds., 1997).

17. *See id.* at 456-57; Priest v. Polk, 912 S.W.2d 902 (Ark. 1995) (concluding that the one-person-one-vote principle was *inapplicable* to state constitutional conventions).

18. G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 170 (1998) ("Perhaps the most striking trend is toward the professionalization of state constitutional change. Illustrative of this shift is the decline of the constitutional convention. In the nineteenth century, conventions served as a mechanism for popular influence on politics, often called by reluctant officials in response to popular pressures. But in the twentieth century far fewer conventions have been called, and their character has changed. 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. The professionalization of state constitutional change is also evident in the increasing use of constitutional commissions, expert bodies established without popular input, to set the agenda of constitutional change, identifying the problems that deserve attention and the appropriate solutions to those problems.").

> for such conventions; 2) as devices for assisting legislatures in avoiding conventions, and thus retaining control of constitutional change; [or] 3) to work together with the legislative branch in studying and recommending state constitutional change . . . .[19]

Under none of these circumstances could a commission place its recommended changes directly on the ballot. It was, rather, implementing *its commission*, direction, or mandate, from another body or officer that would review its work. Certainly the Florida Commission is not subject to such review and cannot be accused of being beholden to the Legislature![20] Further, Florida's new innovation does not rely on either of the justifications for use of commissions in the past: expertise and efficiency.[21]

Still, however, as noted above, the Commission has a number of attributes of an unlimited constitutional convention. I told the Commission, in an introductory address:

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19. Williams, *supra* note 9, at 4.

20. James Henretta made the following criticisms of other legislatively-created commissions:

> In many other states, such as Georgia in the 1940's and Kentucky and California in the 1960s, legislatures dispensed completely with a constitutional convention. To meet the pressing need for the reform of outmoded constitutional structures, the legislatures appointed commissions to consider revisions and to report their recommendations. These commissions were not democratic bodies responsible to the people. Their proposals came before the voters only after being carefully reviewed and revised by legislators, governors, and other state officials.
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> Whatever the gloss . . . the commission revision process . . . represented a diminution of activist popular sovereignty. In a carefully calculated fashion, these maneuvers removed power from the hands of the citizenry. The result was a constitution revised as much through administrative procedures as through constitutional debate and political compromise.

James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 830-31 (1991). For excellent analysis of the origins of the importance of popular sovereignty in state constitutionalism, *see* Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287 (1997).

21. *See* Williams, *supra* note 9, at 9:

> The constitutional commissions came into being in New York and New Jersey based on the justifications of efficiency and expertise, neither of which were regarded, according to Galie's analysis, as attributes of the constitutional convention ("cumbersome") or the legislative amendment process ("ad hoc"). The commission, under these circumstances, served as a research and study group (expertise) and as a technique for agenda-setting in the legislature (efficiency).

> You should consider yourselves a constitutional convention because you will operate from here forward with all of the attributes of a constitutional convention in the traditional sense, except that you don't have an elective constituency. Maybe that's a good thing, for a lot of you it's probably a relief. Each one of you now has a statewide constituency which in other respects is only shared by the Governor, the Cabinet members and the United States Senators from Florida.[22]

The unique Florida Commission mechanism, which was premised on the need felt in the 1960s for a periodic reconsideration of the state constitution, is thus made more effective by a corresponding reduction in the role of popular sovereignty. This model "operates to shift the burden of political inertia away from the status quo and toward the possibility of change."[23] The Commission's mandate is unlimited, and, apparently, unlimitable.[24] This is evidence of the optimistic faith in future generations exhibited by the framers of the 1968 Constitution and the voters who ratified it. The 1997-98 Commission's work was characterized by prudence and a spirit of compromise, both self-imposed limitations.

Florida's choice in 1968 to embark on a new experiment with an automatic, appointed revision commission was a practical response to the real problem of experience with constitutional rigidity, rather than a response based on theory. The commission idea, though, was not only based on concern about *past* rigidity; it was grounded as well on optimism concerning *future* possibilities in coming generations, unattainable in 1968, such as judicial and cabinet reform. The 1968 innovation was 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.[25] At the operational level, it binds future generations to consider state constitutional revision without mandating that any change actually be approved.

The 1968 Florida Constitution, with its important new content and

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22. Williams, *supra* note 7, at 222. For a comprehensive analysis of the politics of state constitutional conventions, see ELMER E. CORNWELL ET AL., STATE CONSTITUTIONAL CONVENTIONS: THE POLITICS OF THE REVISION PROCESS IN SEVEN STATES (1975).

23. Williams, *supra* note 7, at 222.

24. *See id.* at 223 ("Yours is an unlimited commission. I think that's good and bad. You have an open mandate. But it means you'll have to focus; you'll have to set priorities. You'll probably have to limit yourselves."). This unlimited quality is one of Professor Little's major criticisms. *See* Joseph W. Little, *The Need to Revise the Constitution Revision Commission*, 52 FLA. L. REV. 475 (2000).

25. Professor Little provides a different assessment, concluding that the Revision Commission idea was "slipped by or gobbled down by the electorate without a hiccup." Little, *supra* note 24, at 477.

constitutional change processes, was one of the outcomes of the change in the Florida Legislature following the one-person-one-vote revolution.[26] Earlier attempts to stimulate the malapportioned Legislature to consider state constitutional change had failed.[27] The automatic, appointed commission idea is the logical outgrowth of the periodic, automatic referendum on whether to call a constitutional convention. Although this idea has apparently been considered for adoption in a few other states, so far none has emulated Florida's experiment.[28] The following excerpts from the debates in the 1967 New York Constitutional Convention illustrate some of the concerns about such commissions:

> MR. SHAPIRO: Mr. President and gentlemen: This matter was very carefully considered by the members of the Committee on the Legislature. We have before us a number of proposals similar in character, although not in every detail as the Cooper proposal .... We went through them very, very thoroughly and the members came to the conclusion that it would be a very dangerous practice to have a commission not elected by the people and over whom they had no control to propose amendments and then necessarily have those go on the ballot to be voted upon by the people without any choice by anybody as to whether they should go or should not go without any veto power.
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> MR. COOPER: Mr. President, I would just like to make the following brief comments on the criticisms. First of all, I am very happy that at least it has focused [sic] some attention on what I consider to be a problem in the minds of most of us here.

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26. *See* D'ALEMBERTE, *supra* note 12, at 12; *A Generation of Change*, *supra* note 5, at 135. This was part of a national trend:

> [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.

Henretta, *supra* note 20, at 839.

27. *See, e.g.*, William C. Havard, *Notes on a Theory of State Constitutional Change: The Florida Experience*, 21 J. POL. 80 (1959). *See generally* Albert L. Sturm, *The Procedure of State Constitutional Change—With Special Emphasis on the South and Florida*, 5 FLA. ST. U. L. REV. 569 (1977).

28. *See* John Dinan, "'The Earth Belongs Always to the Living Generation:' A Reevaluation of the American State Constitutional Tradition," Paper delivered at 1999 American Political Science Association Meeting, at 17 n.50 (on file with author).

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> With respect to some of the comments made by Judge Shapiro, I think you ought to be aware that the people who would be responsible for the commission would be the elected public officials, except for the case of the Board of Regents. These elected public officials would be charged with the responsibility and would be answerable to the people that they selected to this commission, and in the final analysis, nothing that the commission would have done would have been without the approval of the people finally when it came to ratifying the work of this commission.[29]

The Florida appointed commission *process* has worked now twice this generation, after the "failed"[30] 1978 Commission. The Tax and Budget Reform Commission, modeled directly on the Constitution Revision Commission, successfully met and proposed revisions which were adopted in 1992.[31] Florida has, thus, been relatively successful in updating its constitution over the past several generations. Professor Little's article, however, disagrees with this assessment.[32]

Other states, by contrast, have had difficulty in the past generation stimulating public support for a process of even considering state constitutional change. Most recently, in 1997, despite strong bipartisan support,[33] New Yorkers voted against calling a state constitutional convention in a referendum held automatically every 20 years.[34] Illinois

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29. 3 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 28-29 (1967); *see also* 2 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII, 1978, at 109-12 (1980) (proposal for an appointed commission with authority to put proposals directly on the ballot rejected in committee). I am indebted to Dr. John Dinan not only for pointing out the existence of the debates on this question, but also for locating them and sending me copies.

30. The failure was short-lived. *See generally* D'Alemberte, *supra* note 12, at 15; Steven J. Uhfelder & Robert A. McNeely, *The 1978 Constitution Revision Commission: Florida's Blueprint for Change*, 18 NOVA L. REV. 1489 (1994); *infra* note 92 and accompanying text. 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).

31. *See* 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); *A Generation of Change*, *supra* note 5, at 137 n.23.

32. *See generally* Little, *supra* note 24.

33. *See* Mario N. Cuomo & Gerald Benjamin, *New Yorkers Need a Constitutional Convention*, N.Y. TIMES, July 3, 1997, at A22; Alan Finder, *Gridlocked State Government Needs an Overhaul, Panel Says*, N.Y. TIMES, Feb. 25, 1995, at 25; Richard Pérez-Peña, *Scorn for Albany Unites Forces Urging a New Constitution*, N.Y. TIMES, Oct. 26, 1997, at 31.

34. *See* Richard Pérez-Peña, *Voters Refuse to Take Chances on Bond Act and Convention*, N.Y. TIMES, Nov. 6, 1997, at B3; Gerald Benjamin & Thomas Gais, *Constitutional Conventionphobia*, 1 HOFSTRA L. & POL'Y SYMP. 53, 70 (1996) (describing opposition to convention). *See generally* Janice C. May, *Amending State Constitutions, 1996-97*, 30 RUTGERS

voters, in a similar automatic referendum, rejected a convention in 1988.[35] Florida's periodic Commission, however, is constituted *automatically* every 20 years, without preliminary input from the current generation. The 1968 ratification of this idea by those voters, its source of popular legitimacy, continues in force until changed.

There has developed what Gerald Benjamin and Thomas Gais call "conventionphobia" in this country.[36] This resistance to a constitutional convention is not just a national phenomenon, resisting a federal constitutional convention, but also manifests itself at the state level, leading to resistance to state constitutional conventions. As noted above, even states with an automatic vote on whether to call a convention have not had recent success. "In the quarter century between 1960 and 1985 automatic convention calls were approved only in New Hampshire, Rhode Island and Alaska.... In each of four states that provided for an automatic convention call during the early 1990s—Alaska, New Hampshire, Ohio and Michigan—majorities have rejected the opportunity."[37] This resistance to the calling of conventions has been occurring at the same time that widespread dissatisfaction with state government has been increasing. The public seems to view the possibility of a constitutional convention as political business as usual by the "government industry."[38] Constitutional conventions seem to have lost their *legitimacy* in the public mind.

Under these circumstances, in states like Florida 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*.[39] Gais and Benjamin

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L.J. 1025 (1999).

35. *See* Janice C. May, *State Constitutions and Constitutional Revision: 1988-89 and the 1980s* in 28 THE BOOK OF THE STATES 1990-91, at 20, 22-23 (1991). The Illinois Constitution had undergone a major revision in 1970, and many thoughtful people concluded there was no need for a convention.

36. Benjamin & Gais, *supra* note 34, at 70.

37. *Id.* at 69. 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) [hereinafter *Public Discontent*].

38. *Public Discontent*, *supra* note 37, at 1304; Benjamin & Gais, *supra* note 34, at 71.

39. *See Public Discontent*, *supra* note 37, at 1301:

conclude:

> 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.[40]

Interestingly, this sounds like a description of Florida's Constitution Revision Commission process, both in 1978 and in 1997-98. Is Florida's solution the answer other states are looking for? Do these attributes, fostering widespread deliberation in the modern information and transportation age, compensate for reduced popular sovereignty (legitimacy?) at the outset of the process?

Gais and Benjamin called for another characteristic for meaningful, publicly acceptable state constitutional revision: *independence*.[41] The initiative method also provides independence but, as mentioned before, does not provide for *deliberation*. Based on this, I suggested to the Florida Commission:

> 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. For a critical evaluation of the initiative process, see Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787 (1997); *see also* Eric Lane, *Men Are Not Angels: The Realpolitik of Direct Democracy and What We Can Do About It*, 34 WILLIAMETTE L. REV. 579 (1998). For critiques aimed specifically at Florida, see Thomas C. Marks, Jr., *Constitutional Change Initiated By The People: One State's Unhappy Experience*, 68 TEMP. L. REV. 1241 (1995); Joseph W. Little, *Does Direct Democracy Threaten Constitutional Governance in Florida?*, 24 STETSON L. REV. 393 (1995). For a more neutral analysis, see Jim Smith, *So You Want to Amend the Florida Constitution? A Guide to Initiative Petitions*, 18 NOVA L. REV. 1509 (1994).

40. *Public Discontent*, *supra* note 37, at 1303.

41. *Public Discontent*, *supra* note 37, at 1299.

> The question, I think, is quite clearly whether you as a Commission can operate in a way that will convince the public that you are independent of the regular processes of government. I think you have the potential to do that. Gerald Benjamin says, "To channel the public discontent now targeted at state governments we need a method of constitutional revision which is *independent* of existing governmental institutions."
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> Try, if you can, to distance yourself somewhat from your current, regular constituency. You do have a statewide constituency now. If you can, distance yourself from your appointing authority, at least in some respects. You need to do this to make the inside job work, to be able to work together over the next year in this process. It's going to go beyond the next year if you think about the ratification campaign, if you suggest any changes. You need to have independence to work inside this chamber together and also to present an independent face to the public. Selling your product to the public is your outside job.[42]

Apparently, looking back at the process, the Commission was able to operate in a way that did not present merely a "government industry" picture to the Florida voters. The makeup of the Commission did, in fact, include a number of individuals who were not governmental officials, although they were appointed by government officials.[43]

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. Clearly the Commission seems to have met the central challenge of state constitutional revision, delineated by the leading scholars of state constitutional conventions:

> In short, constitutional revision potentially polarizes state communities, or the attentive portions of them, along predictable lines. Change and reform must win acceptance

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42. Williams, *supra* note 7, at 226, 228.

43. *See* W. Dexter Douglass, *The 1997-98 Constitution Revision Commission: Valuable Lessons from a Successful Commission*, 52 FLA. L. REV. 275, 277 n.12 (2000). Professor Little sees this as a major defect in the commission mechanism, concluding that the appointees follow the political agenda and government branch loyalty of their respective appointing authorities. *See* Little, *supra* note 24, at 477-78.

> against groups and points of view that are latent in every state and, experience has shown, are readily mobilized. Thus the politics of the constitutional revision pose the central problem of achieving enough reform to satisfy those who favor and work for such efforts, but at the same time not so much as to frighten or alienate too many vested interests or too many of the potential opponents in the citizenry.[44]

The Commission seems, as well, to have been able to mesh the politics of state constitutional revision with ongoing Florida and national politics.[45]

The processes of preparing for and carrying through the Commission's mandate is explained in a revealing fashion in the article by Chairman W. Dexter Douglass.[46] Of particular interest is the importance of the Commission's self-imposed super-majority rule,[47] and the preparatory work performed by the Constitution Revision Commission's Steering Committee that was created by Governor Chiles' Executive Order.[48] This Steering Committee adopted a draft of rules of procedure, made provisional staffing decisions, and prepared and submitted a budget to the legislature for the Commission's work.

The new gun control amendment, and particularly the political process leading to its adoption, is explained in the article by Katherine Rundle and Paul Mendelson.[49] This provision, a compromise permitting counties to impose restrictions on firearms sales at gun shows, builds upon an earlier 1991 amendment to the constitution.[50] The new amendment functions, in effect, to overrule a statute withdrawing authority over such regulations from counties.[51] An extremely interesting technique used by the proponents

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44. CORNWELL ET AL., *supra* note 22, at 206.

45. *See* CORNWELL ET AL., *supra* note 22, at 192:

> The first point we stressed is that constitutional revision is a political process. As such it does tap the full range of motives and interests called into play by the other political subprocesses at the state level. And like these other forms of state politics, it varies from jurisdiction to jurisdiction in response to local differences in political culture and style.

See generally CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS (G. Alan Tarr, ed., 1996).

46. Douglass, *supra* note 43, at 275; *see also* Talbot D'Alemberte, Essay, *The 1997-98 Constitution Revision Commission: Reflections and Commentary from the Commission's First Chairman*, 25 FLA. ST. U. L. REV. 19 (1997).

47. *See* Douglass, *supra* note 43, at 278.

48. *See* Douglass, *supra* note 43, at 276-78.

49. *See* Katherine Fernandez Rundle & Paul Mendelson, *Closing The Deadly Loopholes in the Firearms Laws: The History and Impact of Amendment 12*, 52 FLA. L. REV. 457 (2000).

50. *See* FLA. CONST. art. I, § 8(b).

51. *See* Rundle & Mendelson, *supra* note 49, at 458, n.1.

of the amendment was to utilize a public opinion poll during the deliberations of the Commission to convince the membership that such an amendment was politically palatable to the voters.[52] This is reminiscent of a suggestion made by Benjamin and Gais for the use of "deliberative opinion polls."[53] The entire area of gun control has been one where there has been increasing activity at the state constitutional level in recent years.[54]

The amendment bringing at least partial reform[55] to the Cabinet is analyzed in historical and political context by Deborah Kearney.[56] These changes, also clearly reflecting compromise, could be seen as at least partially rewarding the optimism of the architects of the 1968 Constitution. Importantly, it seems clear that the political groundwork for this recent change in the Cabinet was laid by the earlier amendment applying term limits to the Cabinet officers.[57] Thus, none of the elected Cabinet officials had an incentive to oppose the amendment vigorously because they were disqualified from succeeding themselves.[58]

The two articles on the new Conservation Amendment reflect the range of analysis that can be brought to bear on state constitutional change. The article by Clay Henderson[59] provides a careful look at the state-specific context—historical, political, and legal—in which the new Conservation Amendment fits. By contrast, John Tucker's article[60] places Florida's new provision in broad, comparative context, within the American state constitutional realm, in comparison to environmental provisions in the constitutions of other countries, and within international law.[61] The new

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52. *See* Rundle & Mendelson, *supra* note 49, at 457; Williams, *supra* note 7, at 226-27.

53. *Public Discontent*, *supra* note 37, at 1313 (describing "deliberative opinion poll").

54. *See, e.g.*, Davil B. Kopel et al., *A Tale of Three Cities: The Right to Bear Arms in State Supreme Courts*, 68 TEMP. L. REV. 1177 (1995).

55. *But see* Little, *supra* note 24, at 490.

56. *See* Deborah K. Kearney, *The Florida Cabinet in the Age of Aquarius*, 52 FLA. L. REV. 425 (2000). *See* Henretta, *supra* note 20, at 822-23 (tracing the growth of plural state executives); Tarr, *supra* note 18, at 121-22.

57. *See* FLA. CONST. art. VI, § 4; Williams, *supra* note 6, at 722-23; P.C. Doherty, *A Quodlibet, a Mumpsimus, and the Rule of Infield Flies: The Unfinished Business of Term Limits in Florida*, 18 NOVA L. REV. 921 (1994).

58. *See* Kearney, *supra* note 56, at 427-32.

59. *See* Clay Henderson, *The Conservation Amendment*, 52 FLA. L. REV. 285 (2000).

60. *See* John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299 (2000).

61. Interestingly, even *state* constitutions in other countries contain environmental provisions. *See, e.g.*, PETER E. QUINT, THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION 93 (1997) ("Environmental provisions were particularly important in Thuringia which, like Mecklenburg-Vorpommern, contains areas of great natural beauty."); CHRISTIAN STARCK, THE CONSTITUTIONS OF THE NEW GERMAN LÄNDER AND THEIR ORIGIN: A COMPARATIVE ANALYSIS 31 (1995).

"amendment" is a wide-reaching set of related provisions building upon the 1968 environment clause.[62] Both articles raise the important question of whether such provisions are self-executing.[63]

Professor Tucker asserts that the adoption of the Conservation Amendment reflects society's adoption of an "environmental ethic."[64] This illustrates a general point made a number of years ago by Willard Hurst, that "the constitutional provisions merely registered an already formed public opinion whose weight, rather than the force of law, changed the operations of government."[65]

The wide variety of provisions brought together under the Conservation Amendment illustrate a very important distinction between constitutional amendments proposed by the initiative, on the one hand, and amendments proposed by constitutional conventions or the Constitution Revision Commission on the other hand: the single-subject rule does not apply. The rationale for this distinction is, most likely, that the convention or Commission process permits deliberation and accommodation, whereas the initiative process does not. As the Florida Supreme Court observed:

> Under article XI, Florida Constitution, a thirty-seven member Constitution Revision Commission is required to convene, adopt rules of procedure, examine the constitution, hold public hearings, and prepare a report on proposed revisions. The report is published to the electorate prior to election. No single-subject requirement is imposed because this process embodies adequate safeguards to protect against logrolling and deception.[66]

The absence of a single-subject restriction on the Commission's proposals forms the basis for one of Professor Little's major criticisms of the commission process.[67] This is a criticism that merits some serious consideration. On the merits, it remains to be seen whether the various provisions in the Conservation Amendment "measure up"[68] in practical

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62. *See* FLA. CONST. art. II, § 7(a).

63. *See* Henderson, *supra* note 59, at 288-89; Tucker, *supra* note 60, at 309-11. *See generally* José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333 (1993).

64. Tucker, *supra* note 60, at 326 ("The constitutionalization of an environmental ethic is being driven by society.").

65. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAWMAKERS 246 (1950).

66. Charter Review Comm'n of Orange County v. Scott, 647 So. 2d 835, 837 (Fla. 1994).

67. *See* Little, *supra* note 24, at 494; *see also* Kelly H. Armitage, *Constitutional Revision Commissions Avoid Logrolling, Don't They?*, 72 FLA. B.J., Nov. 1998, at 62.

68. *See* J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245 (1999).

terms as well as those set forth by thoughtful academic commentators.[69]

The areas of school finance and measures of adequate school performance have provided one of the most important, significant, and enduring areas of state constitutional litigation since the 1973 United States Supreme Court decision to leave the matter to the states.[70] Recent litigation in Florida on these issues resulted in an inconclusive decision by the Florida Supreme Court in 1996.[71] The recent amendment to the Florida constitution, however, seems to be the first *textual* change in a state constitution aimed at these problems. The exhaustive article by Jon Mills and Timothy McLendon analyzes the Florida amendment in light of the litigation in other states and the texts contained in other state constitutions.[72] The recent Florida changes seem to respond to both the equity and adequacy concerns that had been raised about school funding and performance over the last generation.[73] A new round of litigation will test Florida's school system against the new state constitutional provisions.

The judicial changes successfully proposed by the Commission, also the product of deliberation and compromise, are ably analyzed by Martha Barnett.[74] These changes also reward the optimism of the 1968 designers of the commission mechanism.

Although not covered in these pages, the Commission's suggested change in the nature of a "state equal rights amendment" promises to raise interesting questions as to whether it will "make a difference."[75] New

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69. *See, e.g.*, Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863 (1996) (focusing on how state constitutions should address various environmental and natural resource issues).

70. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

71. *See* Coalition for Adequacy & Fairness in Sch. Funding, Inc. v Chiles, 680 So. 2d 400 (Fla. 1996). *See* E. John Wagner, Comment, *Florida Constitutional Law: What is the Legislature's Duty to Provide for the State's Educational System*, 49 FLA. L. REV. 339 (1997); Barbara J. Staros, *School Finance Litigation in Florida: A Historical Analysis*, 23 STETSON L. REV. 497 (1994).

72. *See* Jon Mills & Timothy McLendon, *Setting A New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329 (2000).

73. *See, e.g.*, Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281 (1998); Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151 (1995).

74. *See* Martha W. Barnett, *The 1997-98 Florida Constitution Revision Commission Judicial Election or Merit Selection*, 52 FLA. L. REV. 411 (2000); *see also* Joseph W. Little, *An Overview of the Historical Development of the Judicial Article of the Florida Constitution*, 19 STETSON L. REV. 1 (1989).

75. Wolfgang P. Hirczy de Miño, *Does an Equal Rights Amendment Make a Difference?* 60 ALBANY L. REV. 1581 (1997) (analyzing what difference the Texas ERA has made); Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907 (1997) (measuring the significance of the state equal rights provisions).

Jersey adopted a similar provision back in 1947.[76]

Professor Joseph Little concludes that neither the process nor results of Florida's commission model compare favorably with earlier constitution revision commissions that reported to the legislature.[77] Based on a number of grounds, his criticism is at least partially based on his view that the state constitution should legitimately limit itself to provisions structuring and allocating governmental powers, and limiting those powers to protect the people.[78] This is, of course, the dichotomy between fundamental constitutional material, on the one hand, and mere legislative detail on the other hand.[79] While this distinction is always extremely important, and was clearly on the minds of the members of the Commission, it must be considered in light of the political situation and the specific constitutional context within a state. Professor Frank P. Grad noted:

> Recognition must, of course, be given in such an endeavor, first, to the need for inclusion of certain "core" subjects which common experience and tradition support as basic for the proper functioning of state government, and second, to the practical necessity—depending on the particular circumstances in a state at a given time—of including other matters so important to the state as to call for constitutional treatment.[80]

Practical necessities and specific Florida constitutional context would certainly have influenced the Commissioners to retain a constitutional agency for environmental regulation, to utilize the constitution to "overrule" a statute removing county authority to regulate gun sales, and such other provisions as could be subject to the charge that they are not

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76. *See* Robert F. Williams, *The New Jersey Equal Rights Amendment: A Documentary Sourcebook*, 16 WOMEN'S RTS. L. RPTR. 69, 70 (1994).

77. *See* Little, *supra* note 24, at 475.

78. *See* Little, *supra* note 24, at 478-79.

79. *See* Frank P. Grad, *The State Constitution: It's Function and Form For Our Time*, 54 VA. L. REV. 928, 945 (1968):

> [A] consideration of the problems and criteria of constitutional inclusion and exclusion must concern itself with a balancing of the purposes of the constitution and the needs of government, rather than with an attempt to supply a fixed meaning for the valuative terms "fundamental" and "legislative." It is argued here that although there is a more or less agreed upon "core" area of constitutional content, criteria of inclusion and exclusion must take account of the needs of government as conditioned by time and place.

Id.

80. *Id.* at 946.

necessarily "fundamental" constitutional material. 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. 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. These constitutionmakers believed that they needed to include more material in state constitutions, even if it was in areas that could, theoretically, be governed by legislation.[81] Professor Fritz concluded:

> The key to explaining the growing length of nineteenth-century constitutions lies in the delegates' understanding of the purpose of constitutions. There was common agreement that the nature and object of constitutions extended beyond fundamental principles to what delegates called constitutional legislation. Delegates willingly assumed an institutional role that occasionally supplanted the ordinary legislature.
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> Restraining corporations and limiting governmental debt provided the most dramatic expression of the rule of the conventions acting in lieu of legislatures. In the case of controlling corporate power, including the railroad companies, conventions claimed that legislatures were institutionally unable to respond. Moreover, many delegates regarded the control of corporations and debt as matters on which the people had given conventions a mandate to act.[82]

The Florida Commission, of course, can claim no *mandate* from the people in the same way a constitutional convention could, but it is supported by the mandate of the people in 1968.[83] In any event, the limitation of a state constitution to "fundamental" matters is inevitably subject to political reality, constitutional past practice within the state, and the acknowledged additional function of a state constitution as a "tool of lawmaking."[84]

Professor Little's other criticisms of both the Commission process and its accomplishments deserve careful consideration. Perhaps his most significant, albeit controversial, recommendation is that Commission

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81. *See* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 964-71 (1994); Christian G. Fritz, Book Review, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969 (1995).

82. Fritz, *supra* note 81, at 964-65, 968.

83. *But see* Little, *supra* note 24, at 477-78.

84. *See* Robert F. Williams, *State Constitutional Law Processes*, 24 WILLIAM & MARY L. REV. 169, 175-77 (1983); *see also Anatomy of Law Reform*, *supra* note 5, at 386 n.127.

proposals be submitted to the legislature before they are placed on the ballot.[85] This is a response to the popular sovereignty and legitimacy questions, discussed herein, that arise with respect to the Commission mechanism. Adoption of such a change, of course, would end the most unique aspect of Florida's 30-year experiment with this new form of state constitutional revision.

This Commission's success completes an effective generation of state constitutional change at the close of the millennium, via commissions, but the question remains whether this set of accomplished changes was worth the price of reduced popular sovereignty. Once again, one's answer to this process question may depend on what one thinks of the content of the successful proposals. This, of course, may even be a mixed opinion. In any event, Florida seems to have embraced the Jeffersonian, rather than the Madisonian, theory that state constitutions should be reviewed and repaired periodically so as to serve as the constitution of the living generation.[86]

> For Madison tradition and stability gave foundational principles their force; periodic revision would "engender pernicious factions" and "agitate the public mind more frequently and more violently than might be expedient." In other words, the best-designed constitutions are created once and then avoid later public scrutiny. Madison endorsed this program primarily because he worried that public tampering would affect the security of rights, especially property rights. . . . Of course, Madison recognized that popular sovereignty was one of the important principles constitutions aver, but he clearly gave it secondary status. . . . This Madisonian approach to constitutionalism leans toward a traditionally liberal understanding of good government, wherein rights and standing law take precedence over popular sovereignty.
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> During America's formative years, not everyone wanted

85. *See* Little, *supra* note 24, at 478.

86. *See* Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), *in* THOMAS JEFFERSON, WRITINGS 1395, 1402 (Library of America ed., 1984). Jefferson's letter is quoted in Albert L. Sturm, *The Development of American State Constitutions,* 12 PUBLIUS: THE JOURNAL OF FEDERALISM 57, 66 n.24 (1982). For a complete analysis of Jefferson's attitudes toward constitutional change, see JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN THOUGHT 59-78 (1992); *see also* Sanford Levinson, *"Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment*, 21 TEX. TECH. L. REV. 2443 (1990); Merrill D. Peterson, *Mr. Jefferson's "Sovereignty of the Living Generation,"* 52 VA. Q. REV. 437 (1976). On the need for amending constitutions, see RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson, ed., 1995). For a thorough consideration of Jefferson's constitutional philosophy, see DAVID N. MAYER, THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON 295-319 (1994).

> foundational documents to establish such an explicit value hierarchy. Thomas Jefferson opposed Madison's ideal and spoke disparagingly of those who "look[ed] to constitutions with sanctimonious reverence, and deem[ed] them like the ark of the covenant, too sacred to be touched." Although Jefferson explicitly denied that he was "an advocate for frequent and untried changes in laws and institutions," he explicitly recommended that constitutions and their imbedded principles be subject to regular popular scrutiny, knowing full well that this would facilitate evolutionary change. . . . However, the force of his case derived from his simple belief that "each generation . . . has . . . a right to choose for itself the form of government it believes most promotive of its own happiness." For Jefferson, lawmaking—even the writing of constitutional laws—belonged to the living. . . . This Jefferson approach to constitutionalism endorses a far more populist sense of good government, wherein the people's reasoned understanding of the good state guides—and if necessary takes precedence over—rights and standing law.
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> Jefferson and Madison offered two different ways of balancing America's allegiance to private rights and popular sovereignty. Jefferson tipped the scales toward self-government whereas Madison tipped them toward rights.[87]

Florida, since 1968, has followed the Jeffersonian view of the need for periodic reconsideration, which did not rely on popular sovereignty as a stimulus for the study of state constitutional revision. Possibly, as we have seen in modern times, the study of state constitutional revision will not take place if it is dependent on popular sovereignty. Maybe the public

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87. LAURA J. SCALIA, AMERICA'S JEFFERSONIAN EXPERIMENT: REMAKING STATE CONSTITUTIONS 1820-1850, at 4-5 (1999). For another thoughtful consideration of the Jefferson-Madison debate, including the ideas of Thomas Payne and others, see Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY 195 (Jon Elster & Rune Slagstad eds. 1988). Holmes argues that constitutionalism can reinforce democracy, rather than always producing conflict:

> Their disagreement neatly represents the quarrel—if I can put it this way—between democrats who find constitutions a nuisance and constitutionalists who perceive democracy as a threat. 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.

Id. at 197.

discontent discussed by Benjamin and Gais would prevent the adoption of a such a mechanism now.[88] The optimism of 1968 stands in stark contrast to the current public dissatisfaction that seems to block efforts to call state constitutional conventions. Of course, as Madison and Jefferson understood, content and process are intertwined, and their differing views on constitutional stability were based on pragmatic concerns as well. The judgements of history on whether the Florida commission idea was a good one will likewise be based on practical, rather than theoretical, assessments.[89]

A Florida-style commission relies on popular sovereignty as a *check* on the commission's proposals, rather than as a *stimulus* for them. After all, the voters did reject one of the Commission's proposals.[90] This certainly constitutes an expression of the "consent of the governed," comporting with Locke's view of constitutionalism.[91] Also, we have learned that the "failed" 1978 Constitution Revision Commission was really not a failure. Its efforts were initially checked by the electorate, but the agenda was set for useful, piecemeal constitutional change, approved by the electorate, over the next generation.[92] A future commission that "fails" because the electorate exercises its checking function may still have a similar constructive agenda-setting impact.

Is only one expression of assent by the electorate to state constitutional change adequate as we begin the twenty-first century? Is a retrospective popular *check* enough, or do we need a prospective popular *stimulus* as well? Certainly the voters who wish to obtain information have greater access now than ever before. The media and on-line interactive sources of receiving and offering information are greater than ever, and were utilized effectively by the recent Florida Commission. These efforts began even before the Commission was formed.[93] A citizen's guide was published and

88. *See supra* notes 34, 36-41 and accompanying text.

89. *See supra* notes 34, 36-41 and accompanying text.

90. *See* Douglass, *supra* note 43, at 282.

91. *See, e.g.*, James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 192-213 (1990).

92. *See supra* note 30. This phenomenon clearly has taken place in other states. *See* Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 529 (1999) ("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."); G. Theodore Mitau, *Constitutional Change by Amendment: Recommendations of the Minnesota Constitutional Commission in Ten Years' Perspective*, 44 MINN. L. REV. 461 (1960).

93. *See* Mark D. Killian, *Constitution Steering Panel Launches Education Effort*, 23 THE FLORIDA BAR NEWS 1 (Nov. 1, 1996) (reporting the early efforts of the foundation to educate Floridians about the revision process and to encourage public involvement).

disseminated.[94] The Commission published a free newsletter, including a "Kids Page,"[95] and a Web site.[96] Dozens of public hearings were conducted around the state. Commission Chairman Dexter Douglass reported the following process:

> Over the past nine months I have traveled across the state with the 37 members of the Constitution Revision Commission in an effort to ensure that citizens of Florida do, indeed, have a voice in making changes to our state's basic document. Our travels took us more than 2,000 miles for 15 public hearings. We heard more than 100 hours of testimony, from nearly 1,000 speakers.
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> At the public hearings last summer we considered about 600 proposals. Then the commission diligently studied the issues, wrote them into official proposals, examined them further in committees, voted numerous times on their merits, and finally approved the nine revisions to go on the ballot.[97]

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. Chairman Douglass would no doubt agree with Georgia governor Busbee about the rigors of state constitutional revision![98] Popular *participation* and *deliberation* have taken the place of popular *stimulus* in Florida constitutional revision. Is this an adequate substitute?

There has been an explosion in interest group representation, both public interest and private interest, even since the 1978 Commission met.[99]

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94. *See* THE COLLINS CENTER FOR PUBLIC POLICY, YOU AND FLORIDA'S CONSTITUTION REVISION COMMISSION: A CITIZEN'S GUIDE TO PROPOSING CHANGES FOR 1997-1998 (1996).

95. *See* REVISION WATCH 1 (Florida Constitution Revision Commission, Tallahassee, Fla.), Sept. 1997.

96. *Florida Constitution Revision Commission Web site*, <http://www.law.fsu.edu/crc> (visited Feb. 27, 2000).

97. W. Dexter Douglass, *1997-98 Constitution Revision Commission: A Progress Report*, 72 FLA. B.J., June 1998, at 14; *see also* Douglass, *supra* note 43, at 275. Douglass' positive role as Chair of the Commission can not be overemphasized. *See* CORNWELL ET AL., *supra* note 22, at 177 ("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.").

98. *See supra* note 1.

99. *See A Generation of Change*, *supra* note 5, at 138-39:

> The 1977-78 Florida Constitution Revision Commission proceeded . . . to engage in one of the most open, far-reaching examinations of a state constitution, and proposals for its change, in American history. Its proceedings were extraordinarily

These organizations play an important two-way role in alerting and educating their members to the possibilities of state constitutional change and then in bringing their collective views to the Commission. By contrast, New Jersey's quite successful 1947 Constitutional Convention met during the summer in a college gymnasium, in relative secret.[100] Such changed circumstances and new attitudes toward, and technologies for, public information and participation support a rethinking of state constitutional revision processes.

Florida's "experimental laboratory"[101] of state constitutionmaking,

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well documented.

Id. On the documentation of the 1978 Commission's work, see L. Harold Levinson, *Interpreting State Constitutions By Resort to the Record*, 6 FLA. ST. U. L. REV. 567 (1978).

100. *See* RICHARD J. CONNORS, THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY: 1940-1947, at 132-33, 184-85 (1970).

101. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting):

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

Id. at 311.

Interestingly, in a case eleven years before Justice Brandeis' famous statement, Justice Holmes, in a similar context, dissented from a decision striking down a state statute. *See* Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). He stated, using the now-familiar metaphor:

> There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of *social experiments* that an important part of the community desires, *in the insulated chambers afforded by the several States*, even though the *experiments* may seem futile or even noxious to me and to those whose judgement I most respect.

Id. (emphasis added); *see also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 85-86 (1995); Maeva Marcus, *Louis D. Brandeis and the Laboratories of Democracy*, *in* FEDERALISM AND THE JUDICIAL MIND 75 (Harry N. Scheiber ed., 1992). *See generally* Samuel Krislov, *Oliver Wendell Holmes and the Federal Idea*, *in* FEDERALISM AND THE JUDICIAL MIND, *supra* at 37. Justice Brandeis also dissented in the case, but his opinion said nothing about experiments. Eleven years later he used the "states-as-laboratories" metaphor in the way we all now recognize. *Truax*, 257 U.S. at 354 (Brandeis, J., dissenting).

Professor James Gardner joins Earl Maltz in suggesting that the experimental model does not really further the objectives of federalism. *See* James A. Gardner, *The "States-As-Laboratories" Metaphor in State Constitutional Law*, 30 VAL. U.L. REV. 475 (1996); Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 100-01 (1988); *see also* Earl M. Maltz, *False Prophet—Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988). Still, the laboratory metaphor is a powerful one. *See* DAVID OSBORNE, LABORATORIES OF DEMOCRACY: A NEW BREED OF GOVERNOR

though, continues to operate without any other states adopting it. Once again, the climate of the times may make it impossible for the public to exhibit the spirit of optimism underpinning the 1968 commission idea. In any event, the substantive product of this most recent Commission has now passed from the Commission through the voters, to the three branches of state government and the people of Florida. Most importantly, the new substantive provisions are in the hands of the judicial branch which will most certainly be called upon to apply and interpret them.

Interestingly, one of the most important judicial doctrines in interpreting the state constitution provides direct recognition of the role of popular sovereignty in state constitutionmaking. The maxim is that the "presumption is in favor of the natural and popular meaning in which the words are usually *understood by the people* who have adopted them."[102] This judicial doctrine places emphasis only on the *final* expression of popular sovereignty in state constitutional adoption, revision, or amendment; the checking function.[103] It is not predicated on any other expression of voters' will, such as that authorizing a constitutional convention or electing delegates (popular authorization). As noted earlier, the Florida commission process relies only on this final involvement of the voters, as a check on Commission proposals. This can be seen as a check on both the legitimacy of the process and the content of the proposals. Maybe it is time to acknowledge that this is the most important expression of popular sovereignty in the process of modern state constitutionmaking, if that process includes public deliberation and widespread public information and access.

Florida has hit on a new balance between Jefferson's concern with the living generation being able to form its own constitutional norms and Madison's concern with instability of rights and the influence of public

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CREATES MODELS FOR NATIONAL GROWTH (1988).

102. City of Jacksonville v. Continental Can Co., 151 So. 488, 489-90 (Fla. 1933) (emphasis added). *See* Levinson, *supra* note 99, at 568-69:

> The cases and literature on state constitutional interpretation seem to reflect a strong consensus that original intent must be ascertained and respected. The ultimate success in this endeavor would be achieved if the original intent of the people who adopted the constitutional provision could be ascertained. If the language of the constitutional text is clear on its face, this plain language is deemed to have been understood by the people, and their intent is deemed to coincide with that plain meaning. If, however, the constitutional text does not yield a plain meaning, resort may be had to other sources in order to find the original intent of the people.

Id.

103. *See supra* note 10 and accompanying text.

"passion" rather than "reason."[104] Madison was even concerned that the process of state constitutional revision itself would inflame passions and stimulate the formation of factions.[105] Could the Florida Commission's appointed structure actually shield it from the extremes of democratic passion that seem to underlie the modern "conventionphobia" while, at the same time, facilitating a deliberative, independent, periodic review of the state constitution? Does this filtering function come at too high a cost in terms of legitimacy arising from actual public authorization, and are open information, access, and deliberation inadequate substitutes for popular sovereignty, serving as mere justifications for elite and professional domination of the state constitution revision process? It must be remembered that Florida's Commission does not supplant, but rather merely supplements, the more familiar processes for state constitutional amendment and revision.

These are the kinds of questions Floridians and others around the country should be asking themselves. The answers lie both in theory and in practice.

104. Holmes, *supra* note 87, at 216 (quoting Federalist No. 49). Apparently, Madison also worried about dislocation and uncertainty if periodic review meant a complete rethinking of the entire constitution. *See id.* at 217-18. Florida's Commission is certainly not required, and is unlikely, to engage in such a zero-based constitutional revision.

105. *See id.* at 217-18.