

Louisiana Law Review

Volume 62 | Number 1
Fall 2001

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Repository Citation

G. Alan Tarr, *The State of State Constitutions*, 62 La. L. Rev. (2001)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol62/iss1/4>

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THE STATE OF STATE CONSTITUTIONS*

G. Alan Tarr**

For the American states, this might well seem like the best of times. Over the past few years, thanks to a vibrant national economy, the fiscal situation in most states has seldom been better. Tax revenues have outpaced estimates in recent years, allowing many states to cut taxes without reducing spending on popular programs, and several states have boasted substantial budget surpluses.¹ In addition, the devolution of power from Washington, D.C. has afforded the states new opportunities to innovate and to experiment.² Meanwhile, recent Supreme Court rulings on federalism, together with congressional enactments such as the Unfunded Mandates Reform Act of 1995, have guaranteed to the states a measure of autonomy.³ One can well understand, then, why Governor Cecil Underwood would proclaim to the West Virginia legislature that "I can't remember a time brimming so completely with optimism and opportunity."⁴

Yet, if one surveys the challenges facing the American states as they embark on the new millennium, one might well choose to temper that optimism. After all, the optimism about state prospects

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* This article is a slightly revised version of the keynote address delivered at a conference on "The State of State Constitutions," conducted by the Center for State Constitutional Studies in Philadelphia, Pennsylvania, on May 4-6, 2000. As Director of the Center for State Constitutional Studies, I wish to acknowledge the generous financial support of The Ford Foundation, which made the conference possible, the invaluable research assistance of Helen Safos and Nancy Leso, and the valiant secretarial assistance of Karen McGrath.

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1. Every state reported revenues exceeding expenditures in both 1997 and 1998. See 33 Book of the States 2000-01, at 270 tab. 6.8; 271 tab. 6.9 (2000) [hereinafter 33 Book of the States].

2. See Jerry L. Mashaw & Dylan S. Calsyn, *Constructing a New Federalism*, 14 Yale L. & Pol'y Rev. 297 (1996); Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 Stan. L. & Pol'y Rev. 115 (1998).

3. 2 U.S.C. §§ 1501-1571 (2000); see also *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219 (1999); *Printz v. United States*, 521 U.S. 549, 117 S. Ct. 2365 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114 (1996); *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144, 112 S. Ct. 2408 (1992).

4. Dag Ryen, *Introduction to 32 Book of the States 1998-99*, at xvii, xv (1998).

stems largely from the fact that a robust American economy has filled state coffers to overflowing. Obviously, one cannot expect the economic boom to last forever—indeed, as I write in mid-2000, there are disquieting signs on the horizon—although one suspects that most politicians are fervently praying that the boom continues at least until after the next election. When the economic good times end, as inevitably they must, will the states be able to generate the revenues necessary to meet their responsibilities?

This is not an idle question. Devolution has not only increased the states' autonomy but has also expanded their responsibilities, and meeting those responsibilities costs money. Moreover, the states may discover that their ability to generate revenue has diminished. Traditionally, a major source of funding for state governments has been the sales tax, but the expansion of internet commerce is likely to reduce revenues from that source.⁵ And, there is no obvious new source of revenue, like gambling during the 1980s and 1990s, that states can look to as a substitute for funding via taxes.⁶ Further complicating the fiscal future of certain states are constitutional restrictions that have been imposed in recent decades in California, Colorado, Nevada, and other states that limit the authority of state legislatures to tax and/or spend.⁷

5. Sales and gross receipts taxes accounted for 47.9% of state revenues in 1997. See 33 Book of the States, *supra* note 1, at 304 tab. 6.27. However, a substantial proportion of transactions now occur on the internet. In the last quarter of 1999, for example, internet transactions amounted to \$5.3 billion. See U.S. Bureau of the Census, Retail E-commerce Sales for the Fourth Quarter 1999 Reach \$5.3 Billion 1 (2000). This increasing use of the internet has helped erode the traditional sales-tax base available to the states, because Congress in 1998 enacted the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, 112 Stat. 2681-719 (1998) (codified at 47 U.S.C. § 151 (1994 & Supp. IV 1999) and 19 U.S.C. § 2241 (1994 & Supp. 2000)), which included a moratorium on new or "discriminatory" internet taxes. The Act also established the Advisory Commission on Electronic Commerce, which was directed to report to Congress on the various issues involving internet commerce. *Id.* at 1102. Although the Commission attained the required super-majority support for several recommendations, it failed to achieve it for the topic of internet taxation. The consequences of failing to attain a satisfactory resolution of the issue may be substantial. Estimates of the potential revenue loss range from \$500 million in 1999 to as high as \$10 billion by 2003. See James McQuivey & Gillian DeMaulin, States Lose Half a Billion in Taxes to Web Retail 2 (2000). For a thorough overview of the issue, see David C. Powell, *Internet Taxation and U.S. Intergovernmental Relations: From Quill to the Present*, 30 *Publius* 39 (2000).

6. In 1997, gross revenues in the American states from parimutuel and amusement taxes and lotteries totaled \$35,844,000,000. See U.S. Census Bureau, Statistical Abstract of the United States 333 tab. 528 (1998).

7. See e.g., Cal. Const. art. XIII A. The key development here was the adoption of Proposition 13 in California in 1978, which permanently limited property tax rates. Other states followed California's lead. For overviews of these

The challenges facing state governments at the dawn of the twenty-first century, of course, are not exclusively fiscal. The devolution of policy-making responsibility from Washington D.C., as well as the responsibilities that state governments have traditionally shouldered, means that the states must discover how to address new problems and must seek solutions for long-standing, intractable ones. During the 1960s and 1970s, commentators frequently raised questions about state government capacity and whether states had the ability to manage and implement programs to deal with pressing concerns.⁸ These concerns led to notable reforms in state government, ranging from strengthening the governors' appointment, personnel, and budgetary powers to professionalizing state legislatures and consolidating state bureaucracies.⁹ Despite these noteworthy innovations, one must acknowledge that those same questions remain today.

Finally, state governments must address the twin specters of citizen disinterest and citizen dissatisfaction, or what might be called the D & D challenge. Public interest and involvement in state

developments, see John L. Mikesell, *The Path of the Tax Revolt: Statewide Expenditure and Tax Control Referenda Since Proposition 13*, 18 *State & Local Govt. Rev.* 5 (1986); Terry Schwadron, *California & the American Tax Revolt: Proposition 13 Five Years Later* (1984); Steven D. Gold, *The Tax Revolt 10 Years Later*, 14 *St. Legis.* 17 (1998). The revenue limitations had some effect on state expenditures, since most state constitutions contain balanced-budget provisions that prohibit deficit spending, although how effective these provisions are in practice is open to question. See Richard Briffault, *Balancing Acts: The Reality Behind State Balanced Budget Requirements* (1996).

States have also imposed limitations on the taxing power. Three states have established a supermajority requirement for the enactment of tax increases. See Okla. Const. art. V, § 33; Ariz. Const. art. IX, § 22; Nev. Const. art. IV, § 18. Three other states have tied increases in spending to the rate of inflation and population increases. See Cal. Const. art. XIII B, § 1; Colo. Const. art. X, § 20(7); Wash. Rev. Code § 43.135.035 (1994). The California provision was subsequently amended by Proposition 98 in 1988 and Proposition 111 in 1990, thereby blunting its effect on state expenditures. See Joseph R. Grodin et al., *The California State Constitution: A Reference Guide* 251-252 (1993). Finally, Colorado has mandated that voters approve by referendum all new taxes. See Colo. Const. art. X, § 20.

8. These concerns are summarized in U.S. Advisory Comm'n on Intergovernmental Relations, *The Question of State Government Capability* (1985). For arguments that the states had developed the capacity to govern effectively, see Mavis Mann Reeves, *The States as Polities: Reformed, Reinvigorated, Resourceful*, 509 *Annals Am. Acad. Pol. & Soc. Sci.* 83 (1990); Ann O'M. Bowman & Richard C. Kearney, *The Resurgence of the States* (1986).

9. Thad Beyle, *Governors: The Middlemen and Women in Our Political System*, in *Politics in the American States* (Virginia Gray & Herbert Jacob eds., 5th ed. 1996) [hereinafter Beyle]; Larry Sabato, *Goodbye to Good-Time Charlie: The American Governorship Transformed* 61-63 (2nd ed. 1983); John Kincaid, *The New Federalism Context of the New Judicial Federalism*, 26 *Rutgers L.J.* 913, 927 (1995).

government is minimal. The turnout of eligible voters in state elections was abysmal and it is declining from that level. In 1998, for example, congressional seats and important state races were at issue; however, the national turnout was only thirty-six percent, just over 1/3 of the eligible electorate.¹⁰ In states that hold their state elections in odd-numbered years, when there are no national races to excite interest, the figures are even more discouraging. In my own state of New Jersey, for example, only thirty-one percent of eligible voters bothered to participate in electing the state legislature in 1999.¹¹ These figures illustrate a continuing pattern of citizen disengagement from state government and from government in general. This pattern is troubling and must be addressed.

Even as state legislatures reduced taxes and funded programs in the late 1990s, presumably popular courses of action, poll data revealed a pervasive dissatisfaction and distrust of state government. Once again, this is part of a nationwide pattern affecting all levels of government. A national poll conducted in 1995, for example, found that only a quarter of respondents indicated "a great deal" or "quite a lot" of confidence in state government.¹² And when citizens have had the opportunity, they have expressed their distrust by approving measures designed to limit the tenure of state officeholders, to circumscribe their powers, and to transfer policymaking responsibilities to the people acting directly.

Thus, during the 1990s, voters in twenty-one states established term limits for state legislators, and in five states they placed such limits on executive branch officials as well.¹³ California complemented its attack on incumbency with the adoption of Proposition 140, which prohibited legislators from earning state

10. Richard M. Scammon et al., *America Votes 23: A Handbook of Contemporary American Election Statistics* (1998). The voting age population consists of all citizens of minimal voting age, including those not registered to vote. *Id.*

11. <http://www.state.nj.us/lps/elections/elec1999/gen_turnout_1999.html> (web site no longer available) (on file with the State of New Jersey Department of Law & Public Safety, Division of Elections, P.O. Box 304, Trenton, New Jersey, 08625).

12. Poll Data collected by the Council for Excellence in Government (Apr. 18, 1995), available at <<http://www.excelgov.org/publication/poll95/survey.htm>>.

13. For an overview of state constitutional provisions imposing term limitations on state legislators, see Keon S. Chi & Drew Leatherby, *State Legislative Term Limits* (1998). On the development of term limitations in the states, see John D. Rausch, Jr., *The Politics of Term Limitations*, in *Constitutional Politics in the States: Contemporary Controversies and Historical Patterns* (G. Alan Tarr ed., 1996); *Congressional Quarterly, Limiting Legislative Terms* (Gerald Benjamin & Michael J. Malbin eds., 1992); Samuel C. Patterson, *Legislative Politics in the American States*, in *Politics in the American States: A Comparative Analysis* 135 (Virginia Gray & Herbert Jacob eds., 6th ed. 1996); Beyle, *supra* note 9, at 180.

retirement benefits and required major reductions in legislative agencies and staff.¹⁴ Other states have amended their constitutions to authorize the recall of state elected officials. Minnesota in 1996 brought the number of states employing this device to eighteen.¹⁵ Initiatives in three states have required a super-majority in the legislature to enact tax increases. Initiatives in two other states have tied increases in spending to the rate of inflation and to population increases. Additionally, a Colorado initiative has required voter approval for all new taxes.¹⁶ Indeed, the proliferation of constitutional initiatives itself suggests a profound skepticism about whether the institutions of state government can be relied upon to enact good policy.¹⁷

It would be naive, of course, to suggest that all of the problems I have described are constitutional problems, or that they all are susceptible to a constitutional resolution. Yet, I think it would be equally naive to assume that state constitutions are irrelevant to solving any of these problems. Simply put, state constitutions *do* matter. They create the institutions of state government, and the structure of those institutions affects the policies that they produce. State constitutions influence how effectively state governments can address policy concerns. They also forge the links between state governments and the citizens of those states, and at their best, they embody the aspirations of those citizens.¹⁸

The crucial role played by state constitutions underscores the importance of reexamining them periodically.¹⁹ Several basic questions suggest themselves. What *is* the state of state constitutions? Do they need to be revised to deal with the aforementioned problems and with other challenges facing state governments as they enter the twenty-first century? If they do, *how* should they be changed to promote more effective, more responsive,

14. Cal. Const. art. IV, § 1.5.

15. For a listing of the twenty states that permit the recall of elected officials, see 33 the Book of the States, *supra* note 1, at 248-49 tab. 5.23 (2000).

16. *See supra* note 7.

17. For a discussion of the genesis and implications of this new constitutional populism, see G. Alan Tarr, *Understanding State Constitutions* 157-161 (1998) [hereinafter Tarr, *Understanding State Constitutions*]; G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition, in Reason or Folly? Public Opinion and Direct Democracy Today* (Elliott Abrams ed., forthcoming Dec. 2001).

18. For illuminating discussions of the functions served by American state constitutions, see Donald S. Lutz, *The Purposes of American State Constitutions*, 12 *Publius* 27 (1982); Robert F. Williams, *State Constitutional Law Processes*, 24 *Wm. & Mary L. Rev.* 169 (1983); Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 *Va. L. Rev.* 928 (1968) [hereinafter Grad].

19. The importance of periodic reexamination of state constitutions was recognized from the very outset. *See Va. Decl. of Rights art. I, § 15.*

and more accountable government? And once reformers have determined the direction of constitutional reform, how can they overcome the obstacles that have blocked such reform in the past?

I offer no pat answers to those questions.²⁰ But, let me offer a few broad-brush observations about contemporary American state constitutions, keeping in mind always that, given their diversity, almost any statement made about state constitutions is bound to be true of some of them and not true of others.

First, American state constitutions tend to be "old"—the average state constitution has been in operation for over a century.²¹ Most current constitutions date from the late nineteenth century. Only twelve states revised their constitutions during the twentieth century, although five others did draft their initial constitutions within the last one hundred years. Of course, there is nothing intrinsically wrong with "old" constitutions—the Federal Constitution was drafted in Philadelphia two hundred and thirteen years ago, and most of us have no desire to see it replaced. Indeed, one might suggest that for constitutions, durability is a virtue rather than a vice.²² Yet, unlike

20. For expert assessments of the strengths and weaknesses of current state constitutions, see Center for State Constitutional Studies, Rutgers University-Camden, Conference on "The State of State Constitutions" (May 4-6, 2000), available at <<http://www-camlaw.rutgers.edu/statecon/index21sta.html>>.

21. For a convenient listing of the dates of adoption of all the constitutions of the American states, see 33 Book of the States, *supra* note 1, at 3 tab. 1.1.

22. This, at least, was the opinion of James Madison. See *The Federalist* No. 49 (James Madison). However, not all constitutional commentators shared Madison's concern for constitutional stability. Thomas Jefferson, for example, argued that constitutions should be periodically revised, in part to ensure that they reflected the perspective of each new political generation and in part to take advantage of developments in constitutional knowledge and experience. See *Letter of September 6, 1789*, in *Writings of Thomas Jefferson* 959 (Merrill Peterson ed., 1984). Madison responded to Jefferson's letter with a critique of Jefferson's position and a reiteration of his own. See *Letter of February 4, 1790*, in 13 *The Papers of James Madison* 22 (Charles Hobson & Robert Rutland eds., 1981). The Madison-Jefferson debate is brilliantly analyzed in Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *Constitutionalism and Democracy* (Jon Elster & Rune Slagstad eds., 1988). Whatever the merits of the competing positions, the Jeffersonian perspective found considerable support in the American states. During the nineteenth century, the states regularly revised their constitutions to take account of advances in constitutional knowledge. This understanding of constitution-making as a progressive enterprise, requiring the constant readjustment of past practices and institutional arrangements in light of advances in knowledge and changes in circumstances, is documented in Christian G. Fritz, *Constitution Making in the Nineteenth-Century American West*, in *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* 292, 302-04 (John McLaren et al. eds., 1992); Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 *Rutgers L.J.* 945, 975-84 (1994); Daniel T. Rodgers, *Contested Truths: Keywords in American*

the Federal Constitution, contemporary state constitutions do not continue in operation because of popular veneration for the document or for its drafters.²³ Indeed, state constitution-makers during the nineteenth century, when most of these constitutions were written, would have rejected outright such a deference to the past. They viewed constitution-making as a progressive enterprise, and they assumed that periodic revision of state constitutions was not only proper but necessary.²⁴ Certainly the poll data mentioned earlier belie any notion that the "old" state constitutions have survived because of widespread popular satisfaction with the governments that they have created.²⁵

If a constitutional amendment indicates a defect in a constitution, then one can conclude that these older state constitutions—and the "younger" ones too, for that matter—have not survived because they have successfully solved the problems besetting the states.²⁶ Most state constitutions have been amended more than once for every year that they have been in operation, a proliferation of amendments that shows that there is no reluctance to tinker with the handiwork of the founders of state constitutions.²⁷ Indeed, the frequency of amendment has actually risen as the twentieth century has drawn to a close.²⁸ Regardless of the wisdom of particular amendments, there is simply something wrong with that picture. If nothing else, the number of amendments over time has destroyed whatever initial coherence a state constitution might have had.²⁹ And piecemeal

Politics Since Independence 91 (1987).

23. A telling statistic: in a 1991 survey, only 52 percent of respondents even knew that their state had its own constitution. See U.S. Advisory Comm'n on Intergovernmental Relations, *Changing Public Attitudes on Governments and Taxes* 14 (1991).

24. See Fritz, *supra* note 22; Rodgers, *supra* note 22.

25. See *supra* note 12 and accompanying text.

26. James Madison, in Federalist No. 49, makes the argument that constitutional changes are indicative of constitutional deficiencies and thus undermine popular attachment to a constitution. His views are analyzed in Sanford Levinson, "Veneration" and Constitutional Change: James Madison Confronts the Possibility of Constitutional Amendment, 21 Tex. Tech. L. Rev. 2443, 2450-55 (1990). For a discussion of the view that the frequency of state constitutional change reflects deficiencies in state constitutions, see Tarr, *Understanding State Constitutions*, *supra* note 17, at 37-40.

27. This figure is computed from data in 33 Book of the States, *supra* note 1, at 3 tab. 1.1. See also *id.* for data on the pace of state constitutional change in recent years.

28. *Id.*

29. Bruce Ackerman has explored the notion of constitutional coherence and the effects of constitutional amendment on such coherence with regard to the Federal Constitution. See 1 Bruce Ackerman, *We the People: Foundations*, chapter 4 (1991). For discussion of the problem of constitutional coherence at the state

amendment may actually have precluded the more encompassing review of the adequacy of a state constitution that would have been possible in a constitutional convention.

When one turns from the process of constitutional change to the substance of state constitutions, there is also cause for concern. I am not worried about state provisions dealing with ski trails in New York or highway routes in Minnesota³⁰—such provisions, while quaint and faintly comical, have no significant effect on the performance of state government.³¹ But one can easily generate a litany of important questions. Does a plural executive, such as exists in states that elect their secretary of state, their attorney general, and so on, promote accountability, or does such a fragmentation of executive power imperil governmental effectiveness?³² Do the procedural checks imposed on state legislatures promote deliberation and transparency, as their proponents insist, or do they merely impede the enactment of important legislation?³³ Do constitutional debt limits and constitutional requirements of balanced budgets promote fiscal responsibility, or do they merely preclude necessary flexibility in fiscal management?³⁴ Does the election of judges undermine judicial independence, or does it promote a necessary accountability?³⁵ Does the inclusion of public policy provisions in state constitutions promote popular control over government, or do

level, see Tarr, *Understanding State Constitutions*, *supra* note 17, at 191-94.

30. N.Y. Const. art. XIV, § 1; Minn. Const. art. XIV, § 2.

31. See generally James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 Mich. L. Rev. 761, 819-20 (1992) (providing additional examples of such provisions).

32. For data on the number of independently elected executive officials in the various states, see 33 Book of the States, *supra* note 1, at 33 tab. 2.10.

33. For surveys of these various provisions and their effects, see Tarr, *Understanding State Constitutions*, *supra* note 17, at 16-17; Michael W. Catalano, *The Single Subject Rule: A Check on Anti-Majoritarian Logrolling*, 3 Emerging Issues in State Con. Law 77 (1990); Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 Minn. L. Rev. 389 (1958); Robert F. Williams, *State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 17 Publius 91 (1987).

34. See Briffault, *supra* note 7.

35. The literature on this topic is vast and contentious. For valuable contributions to the debate, see Philip L. Dubois, *From Ballot to Bench: Judicial Elections and the Quest for Accountability* (1980); Richard A. Watson & Rondal G. Downing, *The Politics of the Bench and the Bar: Judicial Selection Under the Missouri Non-Partisan Court Plan* (1969); Stephen B. Bright, *Political Attacks on the Judiciary*, 80 *Judicature* 165 (1997); Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. Rev. 759 (1995); Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. Miami L. Rev. 1 (1994); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 Fla. St. U. L. Rev. 1 (1995).

they unduly hamper legislatures seeking to respond to changing problems?³⁶

To anyone with more than a cursory acquaintance with state constitutions, this list of questions should sound quite familiar. These questions reflect the concerns that underlay the development of the Model State Constitution in the early years of the twentieth century.³⁷ This, in turn, suggests two overarching questions that will help focus the reexamination of the state of state constitutions. First, is the agenda of constitutional reform that dominated most of the twentieth century, and is implicit in these questions, still pertinent for dealing with the problems confronting state governments in the early decades of the twenty-first century? And second, even if it is, do the solutions proposed by twentieth-century reformers still make sense today? Note that the reformers' prescriptions do almost nothing to address the "D & D problems" identified earlier.³⁸

The very fact that I am reiterating the concerns of previous generations of reformers, of course, underscores a further point. For the most part, these earlier reformers failed. Otherwise, one would not see so many states operating under nineteenth-century—or even eighteenth-century—constitutions. Moreover, most states that revised their constitutions during the twentieth century introduced only limited changes. And, when constitutional conventions proposed strongly reformist constitutions, as in Maryland for example, their proposals went down to ignominious defeat.³⁹ For

36. For the case in favor of inclusion of such provisions, see Tarr, *Understanding State Constitutions*, *supra* note 17, at 125-26. For the case against their inclusion, see David Fellman, *What Should a State Constitution Contain?*, in *Major Problems in State Constitutional Revision* (W. Brooke Graves ed., 1960); Grad, *supra* note 18.

37. See *Model St. Const.* (1st ed. 1924). For the development of the Model State Constitution, see Frank M. Stewart, *A Half Century of Municipal Reform: A History of the National Municipal League*, chapter 2 (1950). For the political theory underlying the Model State Constitution, see Daniel J. Elazar, *The Principles and Traditions Underlying American State Constitutions*, 12 *Publius* 22 (1982); Kermit L. Hall, *Mostly Anchor and Little Sail: The Evolution of American State Constitutions*, in *Toward a Usable Past: Liberty Under State Constitutions* 388, 407-10 (Paul Finkelman & Stephen E. Gottlieb eds., 1991).

38. See *supra* notes 10-11 and accompanying text.

39. For a discussion of the failed Maryland effort at constitutional reform, see John P. Wheeler, Jr. & Melissa Kinsey, *Magnificent Failure: The Maryland Constitutional Convention of 1967-1968* (1972). Whether the effort can be pronounced a complete failure is open to question because several proposals by the delegates were subsequently adopted seriatim. See Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 *Md. L. Rev.* 528 (1999). For a more general overview of the politics of state constitutional conventions, see Elmer E. Cornwell, Jr. et al., *State Constitutional Conventions: The Politics of the Revision Process in Seven States* (1975)

whatever reasons, the constitutional reformers were unable to "sell" their vision of state government and state constitutions to the public. Perhaps they were inept politicians. Or perhaps they had the wrong message.⁴⁰ The exact cause of their failure is worth considering as we seek to chart directions for constitutional reform in the twenty-first century.

How will that reform come to pass? Although states vary in the mechanisms they have instituted for constitutional amendment, they share the view that constitutional revision should come via a constitutional convention.⁴¹ During the nineteenth century, such conventions were common—over the course of the century, the American states held one hundred and forty-four constitutional conventions.⁴² In one decade alone, over half the existing states held conventions.⁴³ For most of the nineteenth century, constitutional conventions were viewed as a mechanism for popular government, a means by which the people could outflank established governmental institutions and replace the ordinary politics of parochial advantage and corruption with a politics of the popular will and the common good.⁴⁴

During the twentieth century, however, that understanding of the constitutional convention largely disappeared. The convention instead came to be seen as distant from the general populace, another forum in which elite reformers and entrenched interests competed for political power. There was very little interest in popular perspectives or popular concerns. Whatever the validity of that understanding of

[hereinafter Cornwell].

40. See Tarr, *Understanding State Constitutions*, *supra* note 17, at 157; John Kincaid, *The New Federalism Context of the New Judicial Federalism*, 26 Rutgers L.J. 913 (1995).

41. Even those states that have instituted the constitutional initiative typically distinguish between amendment and revision of the state constitution, requiring that initiatives deal only with a single subject rather than undertaking more comprehensive constitutional change. See, e.g., Cal. Const. art. XVIII, § 3; Fla. Const. art. XI, § 3. State courts have enforced these single-subject requirements. See, e.g., *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *In re Initiative Petition No. 344*, 797 P.2d 326 (Okla. 1990); *Evans v. Firestone*, 457 So. 2d 1351 (Fla. 1984); *Adams v. Gunter*, 238 So. 2d 824 (Fla. 1970). For overviews of state judicial supervision of the process of constitutional amendment in the states, see Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 Rutgers L.J. 787 (1997); Robin Charlow, *Judicial Review, Equal Protection and the Problem with Plebiscites*, 79 Cornell L. Rev. 527 (1994); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L. J. 1503 (1990).

42. For data on nineteenth-century constitutional conventions in the states, see Albert L. Strum, *The Development of American State Constitutions*, 12 *Publius* 57, 83 (1982).

43. Rodgers, *supra* note 22, at 94 (showing that more than half of the existing states held conventions from 1844-1853).

44. See Tarr, *Understanding State Constitutions*, *supra* note 17, at 125-26.

conventions, it had its effect. The number of constitutional conventions declined precipitously over the course of the twentieth century.⁴⁵ State electorates regularly voted against calling conventions, and on several occasions they rejected the constitutions submitted to them by conventions.⁴⁶ Therefore, if constitutional reform is to proceed through constitutional revision, an initial step must be to ensure that the constitutional convention once again becomes a people's institution and, equally important, an institution that fairly represents *all* segments of the state's population.⁴⁷

Failing that, reform will have to occur piecemeal through constitutional amendment, whether proposed by the legislature, constitutional commissions, or initiative.⁴⁸ There are certainly disadvantages with such a piecemeal approach. Among them, as mentioned earlier, is the possibility of undermining constitutional coherence. Nevertheless, amendments *can* introduce significant reforms, as illustrated by the success of the recent constitutional commission in Florida.⁴⁹ And, Florida is not an isolated example: within the past two years, campaigns for constitutional reform have begun in Alabama, Oklahoma, and Texas.⁵⁰ Other states may follow suit. Indeed, over the next decade, voters in ten states will have the

45. For data on twentieth-century constitutional conventions, see Sturm, *supra* note 42, at 56-60 tab. 11; Tarr, *Understanding State Constitutions*, *supra* note 17, at 136-137. For an analysis of the causes and consequences of the disappearance of the constitutional convention, see Robert F. Williams, *Are Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change*, 1 Hofstra J. Pub. Pol'y 1 (1996).

46. From 1950 to 1968, for example, state legislatures proposed twenty-two conventions, but in only eleven instances were the convention calls approved. See Sturm, *supra* note 42, at 81. During that same period, voters in three states rejected proposed constitutions. *Id.* at 56-60 tab. 11.

47. On the issue of fair representation in state constitutional conventions, 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).

48. For a comprehensive overview of the mechanisms for constitutional amendment in the various states, see 33 *Book of the States*, *supra* note 1, at 5.9 tabs. 1.2-1.4.

49. See Robert F. Williams, *Is Constitutional Revision Success Worth its Popular Sovereignty Price?*, 52 Fla. L. Rev. 249 (2000).

50. For information on the Alabama campaign, see the Alabama Citizens for Constitutional Reform, available at <<http://www.constitutionalreform.org/home.html>> (last visited Nov. 2, 2001). For information regarding the Oklahoma Academy's annual conference, held Apr. 6-7, 2000, on the reform of the Oklahoma Constitution, see *The Oklahoma Academy, News from the Academy*, available at <<http://www.okacademy.org/whatsnew.html>> (last visited Nov. 2, 2001). On the efforts to revise the Texas constitution, see House Select Comm. On Constitutional Revision, H.R. Rep. 2000 (Tex. 2000).

opportunity to determine whether or not a constitutional convention should be called.⁵¹ Certainly, these opportunities for constitutional reform underscore the point that an inquiry into the state of state constitutions is both timely and important.

AN AGENDA FOR CONSTITUTIONAL REFORM

The American states are assuming new responsibilities for policy development and implementation as power is devolved from the Federal Government to state governments. The constitutional frameworks in these states will have a significant influence on how effectively the states meet these new responsibilities. Yet, more than two-thirds of the American states operate under constitutions that are more than a century old, and were designed to meet the problems of another era. Furthermore, they are riddled with piecemeal amendments that have destroyed their coherence as plans of government. Moreover, public disdain for government at all levels demonstrates the need for constitutional reforms designed to increase the responsiveness of state institutions. Finally, the increasing resort to direct democracy for policymaking in the states suggests the importance of crafting mechanisms for direct popular involvement that do not preclude serious deliberation about policy options.⁵²

Can such reforms be introduced? Part of the problem is political. One can scarcely overestimate the inertia and distrust that will have to be overcome to introduce significant constitutional reforms, even in those states most in need of constitutional change. Thus, such change will not occur without strong political leadership and broad grass-roots support.⁵³ Nevertheless, the legal requirements for

51. Voters in fourteen states will have that opportunity because of provisions in their state constitutions that mandate a periodic submission to the voters of the question of whether to have a constitutional convention. See 33 Book of the States, *supra* note 1, at 8 tab. 1.4.

52. For data on the increasing use of the initiative and referendum in recent years, see the Initiative & Referendum Institute, In Depth Studies, available at <<http://www.iandrinstute.org>> (last visited Nov. 2, 2001). For useful discussions of the phenomenon, see Shaun Bowler et al., *Citizens as Legislators: Direct Democracy in the United States* (Shaun Bowler et al. eds., 1998); Jack Citrin, *Who's the Boss? Direct Democracy and Popular Control of Government, in Broken Contract: Changing Relationship Between Americans and Their Government* (Stephen C. Craig ed., 1996); Shaun Bowler & Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* (1998). For proposals on how to make direct democracy more deliberative, see Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age* (1984).

53. As former Governor George D. Busbee of Georgia observed:

constitutional amendment and revision in most states are considerably less onerous than are the requirements for changing the Federal Constitution.⁵⁴ Moreover, the success stories of the twentieth century, such as the introduction of dramatically improved constitutions in New Jersey, Montana, and Virginia, demonstrate that reform is not an unreasonable goal.

The other part of the problem is, of course, determining what changes should be made in state constitutions. In deciding what changes to introduce, reformers have characteristically looked to constitutional models in revising their state constitutions. During the nineteenth century, delegates to constitutional conventions used compendia of state constitutions to guide their deliberations.⁵⁵ During the twentieth century, they usually consulted the Model State Constitution that was originally developed by the National Municipal League in the 1920s.⁵⁶ However, it is unlikely that a document devised during the Progressive Era and reflecting the political perspective dominant during that period will be adequate for addressing twenty-first-century problems. A crucial step in promoting constitutional reform, therefore, is the development of a new model that can inform and structure the debate in states contemplating constitutional reform. The new model can provide a resource and a weapon for those advocating positive constitutional change.⁵⁷ Such a model would draw upon the experience of the states and analyze the effects of various constitutional choices that the states have made. It would also identify the major problems facing state governments at the outset of the twenty-first century and the ways in which constitutional choices might affect the ability of the

Constitutional revision is not for the faint of heart. It is not a Sunday drive in the mountains. It is an incredibly difficult, sometimes tedious, sometimes exhilarating, always challenging undertaking requiring the cooperation of the leadership of the three branches of state government, of counties, and 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.

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

54. These requirements are summarized in 33 Book of the States, *supra* note 1, at 5-7 tabs. 1.2-1.3 (providing a summary of most states' requirements for constitutional amendment and revision). Cf. U.S. Const. art. V (providing the established mode of amending the Constitution of the United States).

55. See G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 Wis. L. Rev. 729, 734.

56. See Cornwell, *supra* note 39, at 156-59; Tarr, *Understanding State Constitutions*, *supra* note 17, at 153-156.

57. See generally Tarr, *supra* note 55.

states to deal with those problems. Finally, it would seek to anticipate the problems likely to emerge in the first half of the twenty-first century and to show how state constitutions might be crafted to enable the states to deal most effectively with those problems. Although the task is a daunting one, it is crucial for serious constitutional reform, and, thus, one that should be the highest priority for state constitutional scholars.