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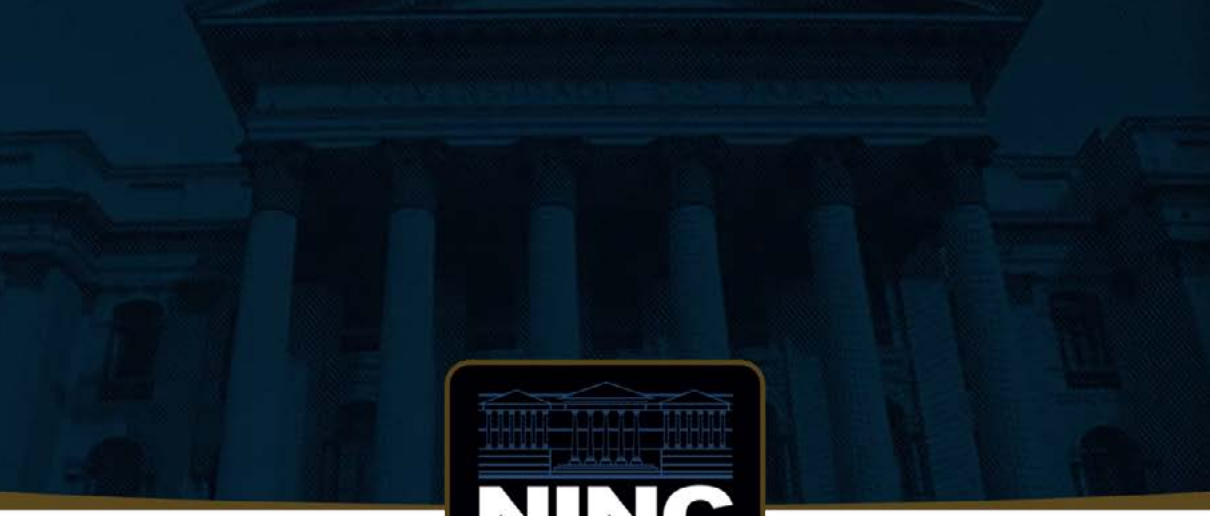

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Explaining state constitutional changes*

Explicando as alterações nas Constituições estaduais

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Resumo

O artigo tem o objetivo de analisar os fundamentos e os métodos de alteração das Constituições estaduais nos Estados Unidos. Reconhece um certo padrão nos processos politicos de mudança das Constituições estaduais, mas também destaca que, em cada caso, alguns grupos sociais específicos atuam de modo mais intenso. Além disso, analisa como forças políticas externas podem influenciar as alterações das Constituições estaduais. Por fim, conclui que, em regra, os Estados Unidos estão atualmente passando por um período em que existe uma certa resistência quanto à criação de novas Constituições estaduais, havendo uma maior preferência popular por alterações pontuais nas Constituições já existentes.

Palavras-chave: Alteração constitucional; Constituição estadual; Estados Unidos; Federalismo; Emenda constitucional.

Abstract

The article aims to analyze the fundamentals and the methods of state constitutional changes in the United States. It recognizes a certain pattern in the political processes of state constitutional changes, but it also points out that, in each case, some specific social groups act more intensely. Furthermore, it analyzes how external political forces can influence changes in state Constitutions. Finally, it concludes that, as a rule, the United States is currently undergoing a period in which there is a certain resistance to the creation of new state Constitutions, with greater popular preference for specific changes in the existing Constitutions.

Keywords: *Constitutional change; State Constitution; United States; federalism; constitutional amendment.*

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1. INTRODUCTION

The U.S. Constitution mandates that each state (component unit) have "a republican form of government" and empowers the federal government to enforce this requirement.[1] It also asserts its supremacy and that of other federal law, including statutes and treaties, over state constitutions, as well as over other state laws.[2] Yet these requirements and restrictions are not particularly burdensome, and if one compares the "constitutional space" available to state constitution-makers in the United States with that available to their counterparts in other federations, there are far greater opportunities for constitutional innovation and experimentation in the United States than in most other federations.[3]

The states have made use of the broad constitutional space available to them, changing their constitutions frequently, either by totally replacing them (constitutional revision) or by amending them. Altogether the fifty states have adopted 145 constitutions, with Louisiana and Georgia leading the pack with eleven and ten constitutions respectively.[4] Michigan, with four constitutions, is closer to the norm.[5] States also have regularly amended their constitutions: as of 2013, current state constitutions had been amended more than 10,000 times—indeed, Alabama, which has the nation's (and the world's) longest constitution, adopted ten amendments in 2012 alone.[6] These data reveal only part of the story, because they do not include amendments to earlier state

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[1] U.S. Const., Art. IV, Sec. 4. For discussion of the clause's relevance for state constitutional development, see MERRITT, Deborah Jones. The Guarantee Clause and State Autonomy: Federalism for a Third Century. **Columbia Law Review**, New York, vol. 88, n. 1, p. 1-78, jan. 1988.

[2] U.S. Const., Art. VI, Sec. 2. This supremacy extends to congressional enactments setting requirements for what should be included or excluded in the constitutions of territories seeking statehood. See TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 39-41.

[3] On the concept of "constitutional space" and its pertinence to the comparative study of sub-national constitutions in various federal systems, see BURGESS, Michael D.; TARR, G. Alan; MARKO, Josef (Ed.). **Constitutional dynamics in federal systems: sub-national perspectives**. **Montreal: McGill-Queen's University Press,** 2012; and WILLIAMS, Robert F.; TARR, G. Alan (Ed.). **Federalism, sub-national constitutions, and minority rights**. Santa Barbara: Praeger, 2004.

[4] For a listing of the number and years of constitutions adopted by the various states, see THE COUNCIL OF STATE GOVERNMENTS. **Book of the States**. 2012. Available on: <http://knowledgecenter.csg.org/kc/category/content-type/bos-2012>. p. 11, tbl. 1.1.

[5] THE COUNCIL OF STATE GOVERNMENTS. **Book of the States**. 2012. Available on: <http://knowledgecenter.csg.org/kc/category/content-type/bos-2012>.

[6] THE COUNCIL OF STATE GOVERNMENTS. **Book of the States**. 2012. Available on: <http://knowledgecenter.csg.org/kc/category/content-type/bos-2012>.

constitutions. For example, the Louisiana Constitution of 1921 was amended 535 times before its replacement in 1974, which occurred only after the electorate in 1970 had rejected all fifty-three proposed amendments.[7] Michigan, with sixty-eight amendments from 1963 to 2012, is again closer to the national norm.[8]

As important as the frequency of constitutional change are the uses states have made of the opportunities presented to them, that is, the types of changes they have introduced. States have charted their own constitutional direction by adopting provisions that have no analogue at the federal level. In some instances, these distinctive provisions have been necessitated by the nature of state constitutions. For example, given the plenary character of state legislative power and state courts' tendency to construe that power broadly, state constitution-makers have found it necessary to detail in the fundamental law the limitations they sought to impose on state legislatures.[9] In other instances, state constitution-makers have felt obliged to deal with matters, such as local government and education, because the federal Constitution does not address them.[10] But in many instances the distinctive provisions state constitution-makers have crafted represent free choices, oftentimes responding to the constitutional experience of the state. These provisions have addressed the process of legislation—for example, state regulation of legislative procedures designed to ensure a more open and orderly deliberative process, such as bans on special legislation and requirements of committee referral and of multiple readings of bills.[11] The provisions have also created alternative paths for legislation, allowing the people themselves to decide on public policy through mechanisms such as the initiative and referendum.[12] Distinctive state provisions have structured the selection, powers, and operation of the branches of state

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7 CARLETON, Mark T. Elitism Sustained: The Louisiana Constitution of 1974. **Tulane Law Review**, New Orleans, vol. 54, p. 560-588, 1980; and STURM, Albert L. The Development of American State Constitution. **Publius: The Journal of Federalism**, Oxford, vol. 12, n. 1, p. 57-98, jan./mar. 1982. p. 80.

8 See THE COUNCIL OF STATE GOVERNMENTS. **Book of the States**. 2012. Available on: <http://knowledgecenter.csg.org/kc/category/content-type/bos-2012> for information through 2011, and see <http://ballotpedia.org/wiki/index.php/Michigan_2012_ballot_measures> for information on 2012. Prior to the adoption of Michigan's current constitution, voters in the state in a single decade (1946-1956) approved 23 of 28 proposed amendments proposed, and this more frequent amendment might have suggested the need for comprehensive change. STURM, Albert L. **Thirty years of State Constitution-making**: 1938-1968. New York: National Municipal League, 1970. p. 102. The need for revision was also suggested by the failure to secure needed reforms via constitutional amendment. For example, "efforts to secure county home rule were defeated in four separate constitutional referendums between 1934 and 1944." See BOWMAN, Anne O'Malley; KEARNEY, Richard C. **The Resurgence of the States**. New Jersey: Prentice-Hall, 1986. p. 248.

9 See WILLIAMS, Robert F. **The Law of American State Constitutions**. Oxford: Oxford University Press, 2009. ch.4.

10 To some extent the decision to address these matters is a matter of choice, not necessity. On the development of state provisions dealing with education, see ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. ch. 5.

11 See WILLIAMS, Robert F. State Constitutional Limits on Legislative Procedure: Legislative Compliance and Judicial Enforcement. **Publius: The Journal of Federalism**, Oxford, vol. 17, n. 1, p. 91-114, jan./mar. 1987.

12 See BENJAMIN, Gerald. Constitutional Amendment and Revision. In: WILLIAMS, Robert F.; TARR, G. Alan (Ed.). **State Constitutions for the Twenty-first Century**. vol. 3. Albany: State University of New York Press, 2006.

government—term limits, the multi-member executive, the item veto, the recall, and the election of judges are prime examples. They have also dealt in detail with public finance—taxing, borrowing, and spending—and they have committed the state government to various policy goals, such as a clean environment and a quality education for all children.[13] Finally, the states have recognized rights not found in the federal Constitution--such as guarantees of privacy, of gender equality, and of a right to hunt and fish—as well as other distinctive substantive restrictions on governmental action, such as balanced budget requirements and limitations on state and local borrowing.[14]

The states' vigorous use of the constitutional space available to them raises several questions. Some relate to the progress of constitutional change over time. Is state constitutional innovation a continuous phenomenon, or have there been eras in which state constitutional reform has been particularly prevalent and others in which it has not? Summary figures describing the level of state constitutional volatility—the number of constitutions and constitutional amendments—obscure major variations in the form and frequency of constitutional change. The nineteenth century was an era of extraordinary constitution-making, with states holding 144 constitutional conventions and adopting ninety-fourt constitutions.[15] But during the twentieth and twenty-first centuries, the pace of constitutional revision slowed as states adopted only twenty-three new constitutions, with five of these the original constitutions in states that were being admitted to the Union. It is now more than three decades since a state has adopted a new constitution.[16] Yet even as constitutional revision has decreased, the pace of constitutional amendment has quickened, reflecting a preference for piecemeal change or perhaps a distrust of comprehensive reforms.[17] Some of these piecemeal changes have themselves initiated major shifts in the states---consider, for example, the broad impact on policy and politics of introducing direct democracy, imposing term

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[13] See TRACTENBERG, Paul L. Education. In: WILLIAMS, Robert F.; TARR, G. Alan (Ed.). **State Constitutions for the Twenty-first Century**. vol. 3. Albany: State University of New York Press, 2006.

[14] See TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. ch. 1; and WILLIAMS, Robert F. **The Law of American State Constitutions**. Oxford: Oxford University Press, 2009. ch.5.

[15] KOGAN, Vladimir. The Irony of Comprehensive State Constitutional Reform. **Rutgers Law Journal**, Camden, vol. 41, n. 4, p. 881-905, july 2010. p. 888.

[16] Georgia in 1982 was the last state to adopt a new constitution. For discussion of the public's unwillingness to undertake comprehensive constitutional reform, see TARR, G. Alan. Introduction. In: WILLIAMS, Robert F.; TARR, G. Alan (Ed.). **State Constitutions for the Twenty-first Century**. vol. 3. Albany: State University of New York Press, 2006; and CAIN, Bruce E.; NOLL, Roger G. Malleable Constitutions: Reflections on State Constitutional Reform. **Texas Law Review**, Austin, vol. 87, n. 7, p. 1517-1544, june 2009. p. 1544.

[17] TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 139-144; and CAIN, Bruce E. Constitutional Revision in California: The Triumph of Amendment over Revision. In: WILLIAMS, Robert F.; TARR, G. Alan (Ed.). **State Constitutions for the Twenty-first Century**. vol. 1. Albany: State University of New York Press, 2005. p. 59

limits, or instituting balanced-budget requirements.[18] Nonetheless, most amendments have been far narrower, addressing specific problems, overruling disfavored judicial decisions, constitutionalizing particular public policies, clarifying obscure constitutional language, or dealing with other mundane problems. Yet if this is true, what accounts for these peaks and valleys of constitutional reform?

Other questions pertain to the substance of reform. Insofar as states include provisions in their constitutions without analogue in the federal Constitution, where do they get the ideas that they include? An obvious answer is "from other state constitutions," and certainly interstate constitutional borrowing is widespread, facilitated by collections of state constitutions in the nineteenth century, by constitutional commissions in the twentieth, and by the internet in the twenty-first.[19] But this ultimately begs the question, because some state provisions have no analogue in other state constitutions, and even provisions now common to several state constitutions had to originate somewhere. And with regard to such provisions, why do some states choose to include them in their charters, whereas others do not?

2. THE PATTERN OF STATE CONSTITUTIONAL CHANGE

If skepticism about comprehensive constitutional reform dominated most of the twentieth century, it was not true throughout the century. The adoption of the Michigan Constitution of 1963 inaugurated a period during which state constitutional revision was common and efforts to revise state constitutions even more common. From 1920-1960, only four states revised their constitutions.[20] But from 1960-1976, nine

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[18] On the effects of direct democracy in the states, see SMITH, Daniel A.; TOLBERT, Caroline J. **Educated by initiative**: the effects of direct democracy on citizens and political organizations in the American States. Ann Arbor: The University of Michigan Press, 2004; and BOWLER, Shaun; GLAZER, Amihai. **Direct democracy's impact on American political institutions**. New York: Palgrave MacMillan, 2008. On the effects of term limits, see CARESS, Stanley M.; KUNIOKA, Todd T. **Term limits and their consequences**: the aftermath of legislative reform. Albany: State University of New York Press, 2012; and SARBAUGH-THOMPSON, Marjorie. **Political and institutional effects of term limits**. New York: Palgrave MacMillan, 2004. On the effects of balanced-budget requirements, see BRIFFAULT, Richard. Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law. **Rutgers Law Journal**, Camden, vol. 34, n. 4, p. 907-957, june/sept. 2003; and SUPER, David A. Rethinking Fiscal Federalism. **Harvard Law Review**, Cambridge, vol. 118, n. 8, p. 2544-2652, june 2005.

[19] On twentieth-century constitutional commissions, see RICH, Bennett M. Revision by Constitutional Commission. In: GRAVES, W. Brooke (Ed.). **Major problems in State Constitutional revision**. Chicago: Public Administration Service, 1960; and for materials available online during the twenty-first century, see the web site of the Center for State Constitutional Studies at camlaw.rutgers.edu/statecon/frontpage.html . A pertinent local example: When Michigan created an environmental article in 1963, it drew its inspiration from the Alaska Constitution, and other states would later emulate Michigan. See ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. p. 164, and DEMPSEY, Dave. **Ruin and recovery**: Michigan's rise as a conservation leader. Ann Arbor: The University of Michigan Press, 2001.

[20] States revising their constitutions during this period included Georgia, Louisiana, Missouri, and New Jersey. During the 1950's, Hawaii and Alaska adopted constitutions, when they were admitted to the Union. See TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 137, tbl. 5.1.

states adopted new constitutions; conventions in three other states proposed constitutions that ultimately were rejected by voters; and five additional state legislatures proposed conventions to revise their state constitutions, only to have their convention calls rejected by the voters.[21] To understand what might account for this surge in activity and for state constitutional change more generally, it is useful to review the scholarly literature on constitutional politics, recognizing that the various explanations are not mutually exclusive and that no single explanation can account for all state constitutional change.

3. ELITE ENTRENCHMENT

The most influential recent analysis of constitutional politics is Ran Hirschl's *Toward Juristocracy*.[22] Studying constitutional change in Canada, Israel, New Zealand, and South Africa, Hirschl found that the dominant political elites in those countries were the primary proponents of constitutional reform. Those in power sought to enshrine their political preferences in the constitution, in order to make it more difficult for their political opponents to repudiate them should they gain power, that is, to insulate them from democratic forces. In some instances, the changes the elites introduced were designed to make it more difficult to remove them from office, as when they enlarged or contracted the electorate or banned competing political parties in order to cement their hold on power. In other instances the changes involved constitutionalizing favored policies, thereby "moving policy-making authority from majoritarian decision-making arenas to the courts," particularly when shifting political fortunes made the prospect of their political opponents attaining power more likely and when those in power "possess disproportionate access to and influence over the legal arena."[23] As one commentator framed it, "rights are created by dominant regimes in an attempt to maintain the status quo by ushering the judiciary into politics."[24]

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[21] The states adopting new constitutions include: Michigan, Connecticut, Florida, Illinois, North Carolina, Virginia, Montana, Louisiana, and Georgia. States in which voters rejected proposed constitutions include Maryland, New Mexico, and New York. States in which voters rejected convention calls include Data are drawn from STURM, Albert L. **Thirty years of State Constitution-making**: 1938-1968. New York: National Municipal League, 1970; and STURM, Albert L. **State Constitutions and Constitutional Revision**: 1978-79 and the 1970's. In: **The Book of the States**, 1980-81. Lexington: Council of State Governments, 1980.

[22] HIRSCHL, Ran. **Toward Juristocracy**: the origins and consequences of the new constitutionalism. Cambridge: Harvard University Press, 2007. For analysis of Hirschl's argument with particular attention to American constitutionalism, both federal and state, see GRABER, Mark A. Symposium: The Maryland/Georgetown Constitutional Law Schmooze – Foreword from the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power. **The Maryland Law Review**, Baltimore, vol. 65, n. 1, p. 1-14, 2006.

[23] HIRSCHL, Ran. **Toward Juristocracy**: the origins and consequences of the new constitutionalism. Cambridge: Harvard University Press, 2007. p. 11-12.

[24] ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. p. 14. Zackin pioneered applying Hirschl's analysis to state constitutional change.

Although Hirschl developed his theory of hegemonic constitutional change in analyzing national constitutional change in several foreign countries, his analysis has application to constitutional change in the United States as well. At the federal level, the Reconstruction amendments might be seen as an instance of hegemonic constitutional change, because the Republicans sought to enshrine favored rights and policies in the Constitution before the Democrats regained political power. The Fifteenth Amendment, which enlarged the electorate in a way that benefited the Republican Party at a time when the Democratic Party's political fortunes were rising, likewise fits Hirschl's model.[25] But in a country in which it is extremely difficult to amend the Constitution, one can also find instances in which the prevailing political forces sought to entrench their favored views not by changing the text of the constitution but by changing its interpretation through the appointment of sympathetic judges.[26] Thus the fundamental constitutional shift that validated the New Deal occurred not by constitutional amendment but by Franklin Roosevelt's appointments to the Supreme Court. It may also be that the failed appointment of Robert Bork to the Supreme Court represented a repudiation of conservative Republicans' efforts to realign the Court once again.[27]

At the state level, one example of hegemonic constitutionalism (among many) might be the amendments adopted when the Progressives gained political power in California in 1911. Under the leadership of Governor Hiram Johnson, the Progressives used a series of constitutional amendments to constitutionalize major elements of their political agenda. These amendments that established a railroad commission to regulate all public utilities, revised the tax system to shift more of the burden to banks and corporations, provided for employers' liability, secured a minimum wage, enhanced governmental powers of eminent domain, and introduced other reforms.[28] Another example involves the adoption of new constitutions in the South following the end of Reconstruction, with the primary aim of disenfranchising African-American voters and thereby ensuring the dominance of the white elite in the Democratic Party.[29] More

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[25] See the discussion in ACKERMAN, Bruce. **We the People**: Transformations. Cambridge: Belknap Press, 1998. chs. 4-8.

[26] On the extraordinary difficulty of amending the U.S. Constitution, in contrast to other national constitutions, see LUTZ, Donald S. Toward a Theory of Constitutional Amendment. **American Political Science Review**, vol. 88, n. 2, p. 355-370, 1994.

[27] This is the argument presented in ACKERMAN, Bruce. **We the People**: Foundations. Cambridge: Belknap Press, 1991. ch. 5.

[28] On these developments, see DEALEY, James Q. **Growth of American State Constitutions from 1776 to the end of the year 1914**. Boston: Ginn and Company, 1915. p. 107-108; OLIN JR., Spencer C. **California's prodigal sons**: Hiram Johnson and the progressives 1911-1917. Berkeley: University of California Press, 1968. p. 12-17; and GRODIN, Joseph R.; MASSEY, Calvin R.; CUNNINGHAM, Richard B. **The California State Constitution**. Oxford: Oxford University Press, 2011. p. 8-9.

[29] On this "restoration" and entrenchment of the white elite, see J KOUSSER, J. Morgan. **The shaping of southern politics**: suffrage restrictions and the establishment of the one-party south: 1890-1910. New Haven: Yale University Press, 1974; MCMILLAN, Malcolm C. **Constitutional development in Alabama**, 1789-1901: a study

recently, one might also view the adoption restricting marriage to opposite-sex couples as an attempt by those with political power to enshrine their values in the constitution, although here the judiciary was seen as a possible threat to those values rather than as an ally enforcing them.[30] A particularly egregious recent example of a political elite seeking to control state constitutional change for its own advantage occurred in Louisiana in 1992, when Governor Edwin Edwards called a special session of the legislature, which designated itself as a constitutional convention and wrote a constitution. The voters overwhelmingly rejected the proposed constitution, and the governor later publicly apologized to the state.[31]

4. OUTSIDER GROUPS

An alternative understanding, more or less the polar opposite of Hirschl's, views constitutional change as originating with groups that find themselves stymied by the ordinary political processes in the states and therefore execute an "end run" around those processes by appealing directly to the people. Often these activists are seeking major constitutional changes—they hope, in Emily Zackin's words, "to rewrite the rules of politics and transform their societies."[32] In some instances outsider groups may wish to constitutionalize mandates so they can enlist courts in enforcing them. This, for example, was the aim of the environmental movement when it proposed that environmental protections be inserted into state constitutions in the latter half of the twentieth century.[33] In other instances outsider groups may wish to avoid judicial involvement, contra Hirschl, seeking instead through their additions to the constitution to activate state legislatures and neutralize a judiciary that they perceived as hostile. Labor groups

in politics, the negro, and sectionalism. Chapel Hill: The University of North Carolina Press, 1955; and PERMAN, Michael. **The Road to Redemption**: Southern Politics: 1869-1879. Chapel Hill: The University of North Carolina Press, 1984.

30 Altogether, twenty-nine states have adopted constitutional amendments prohibiting same-sex marriage. See <http://www.ncsl.org/issues-research/human-services/state-doma-laws.aspx>.

31 See W HARGRAVE, W. Lee. **The Louisiana State Constitution**. Oxoford: Oxford University Press, 2011. In 1970 new constitutions were proposed by the legislatures of Idaho, Oregon, and Virginia, but only the Virginia proposal was ratified by voters. See STURM, Albert L. **Thirty years of State Constitution-making**: 1938-1968. New York: National Municipal League, 1970. p. 80.

32 ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. p. 4. In her study of the addition of education rights in the nineteenth century, labor rights in the early twentieth century, and environmental rights in the 1970s and thereafter, Zackin found that the "leaders of each constitutional movement maintained that government's obligation to protect its people was too important to remain optional, and the protections they sought were too critical to leave at the mercy of legislative discretion."(3)

33 ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. ch. 7.

in the early twentieth century employed just such a preemptive approach.[34] Finally, in some instances outsider groups may seek to constitutionalize policies because they distrust state legislatures and wish to preclude their involvement in policy. Thus in New York conservation groups that feared the legislature would not be sympathetic to their concerns inserted the "forever wild" provisions in the state's constitution.[35]

This understanding of state constitutional politics as outsider politics makes sense particularly in those states that have the constitutional initiative, which allows insurgent groups to propose constitutional amendments without going through the state legislature.[36] It also may apply when an automatic convention call provides an opportunity to mount a constitutional offensive.[37] They can either campaign for a convention or use the prospect of a convention to induce legislators to propose constitutional changes to deal with problems that if left unaddressed, might be used to rally public support for a convention. However, in states in which only the legislature may propose a constitutional amendment or authorize a vote on whether to call a convention, outsider groups may find themselves with little recourse. Constitutional change may be completely blocked, and dissatisfaction may fester.

In the early nineteenth century, groups disadvantaged by prevailing constitutional arrangements, particularly systems of legislative apportionment, were sometimes able to pressure state legislatures into calling conventions. Yet because the representation at those conventions typically mirrored the prevailing distribution of power in the state, the demands of underrepresented areas were seldom fully met.[38] In other instances outsider groups have been able to achieve some constitutional change by agreeing beforehand not to challenge strongly defended privileges, as occurred during the adoption of a new constitution in New Jersey in 1947. Rural legislators for

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34 ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. ch. 6.

35 ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. p. 29-32.

36 Eighteen states have adopted the constitutional initiative. For a listing, see the web site of the Initiative and Referendum Institute, at <http://www.iandrinstitute.org/statewide_i%26r.htm>. It should be noted that the initiative does not necessarily empower political outsiders. Incumbent politicians have also proved adept at using at using the constitutional initiative to advance their own political agendas. Former governor Peter Wilson of California is a prime example. See MCCOY, Candace. Crime as a Bogeyman: Why Californians Changed Their Constitution to Create a Victims' Bill of Rights. In: TARR, G. Alan (Ed.). **Constitutional politics in the States**: contemporary controversies and historical patterns. Santa Barbara: Praeger, 1996.

37 Fourteen states mandate that a ballot question as to whether to call a constitutional convention be periodically submitted to the citizenry. See BENJAMIN, Gerald. Constitutional Amendment and Revision. In: WILLIAMS, Robert F.; TARR, G. Alan (Ed.). **State Constitutions for the Twenty-first Century**. vol. 3. Albany: State University of New York Press, 2006. p. 93.

38 TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 102-105. Virginia was a prime example of regional conflict rooted in the constitution's favoritism toward the coastal regions, regardless of population shifts. See DINAN, John. **The Virginia State Constitution**. Oxford: Oxford University Press, 2011.

many years had blocked a constitutional convention because they wanted to protect the equal representation of counties in the Senate, and they only agreed to a convention after a deal was struck ensuring that the convention would not address legislative apportionment.[39] Finally, when the legislature refused to call a convention in Rhode Island in the early 1840's, dissatisfied citizens convened an unofficial convention, drafted a constitution, and held elections under the new constitution. But the Dorr Rebellion (as it was called) had an unhappy ending, and such a challenge to duly constituted state authority is hardly imaginable today.[40] In sum, outsider groups typically achieve major constitutional change only when there is an available alternative to the normal political process.

5. ORDINARY POLITICS

Implicit in both Hirschl's and Zackin's analyses is the view that constitutional politics involve a continuation of the "ordinary politics" of group advantage, albeit conducted in a different political arena. Much of the literature on constitutional conventions supports this interpretation. Those who serve as delegates in constitutional conventions are usually already active in state or local politics, particularly when political parties control the nomination of candidates and the election of delegates is by partisan ballot, and convention deliberations may be affected by the same interest groups that seek to influence the legislative and executive branches. The divisions within conventions may track the partisan divide among delegates, particularly when the convention is organized along political party lines, and what emerges from the delegates' deliberations may reflect the partisan division within the convention. Indeed, in Minnesota in 1857 the Democratic and Republican delegates split into separate conventions which each proposed its own constitution.[41] If the partisan balance within the convention mirrors the partisan balance in the state legislature, the delegates are likely to resist dramatic changes that might endanger their party's predominance. If the partisan balance within the convention differs from that in the state legislature, the majority delegates may use the opportunity to incorporate policy changes in the constitution or seek to introduce changes that could undermine that predominance. Insofar as this understanding of constitutional politics is correct, state constitutions can be expected

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[39] See CONNORS, Richard J. **The process of constitutional revision in New Jersey**: 1940-1947. New York: National Municipal League, 1970.

[40] See GETTLEMAN, Marvin E. **The Dorr rebellion: a study in American radicalism**: 1823-1849. New York: Random House, 1973; and on extraconstitutional conventions more generally, see HENRETTA, James A. The Rise and Decline of "Democratic-Republicanism": Political Rights in New York and the Several States. In: FINKELMAN, Paul; GOTTLEIB, Stephen (Ed.). **Toward a usable past**: liberty under State Constitutions. Athens: University of Georgia Press, 1991. p. 62-63.

[41] MORRISON, Mary Jane. **The Minnesota State Constitution**. Oxford: Oxford University Press, 2011.

to register the results of group conflict within the state at the time at which their various provisions were adopted.

There is considerable anecdotal evidence supporting this understanding of constitutional politics as ordinary politics. Take, for example, the notion that insofar as the convention replicates the political divisions in the state, there is little reason to expect dramatic constitutional change. The Rhode Island convention of 1964 offers a prime example. When the Democratic Party was disadvantaged by a malapportioned state legislature in the 1930s, it argued for an unlimited convention and hoped to introduce dramatic changes. But by the early 1960s, the Democrats had secured a firm control of the legislature, and so they opposed major changes. Ultimately, the legislature did acquiesce in an unlimited convention, but it mandated partisan election of delegates, ensuring that the Democrats would control the convention. When the convention met, it "tidied up" the constitution and eliminated obsolete provisions, such as the $300 annual salary for legislators, but it did not significantly reform state government in ways that might diminish the Democrats' power or make it less secure.[42]

Or take the notion that when the delegates to a convention differ in their orientation from the state legislature, they are more likely to propose significant constitutional reforms. One example is the New York convention of 1967, in which Democrats enjoyed a majority at a time that Republicans dominated the state legislature. The Democratic delegates championed the elimination of literacy and property requirements for voting, hoping thereby to enlarge the electorate in a way that would enhance their prospects in subsequent elections. They also proposed greater decentralization of power to local governments, which they were more likely to control. Finally, the Democratic delegates wrote into the proposed constitution policies unlikely to be embraced by their political opponents in the state legislature, including provisions for the education and protection of consumers, a commitment that the state foster and promote economic security, and a repeal of the Blaine Amendment that prohibited public aid to denominational schools.[43] The Maryland convention of 1967-1968, in which delegates were chosen in non-partisan elections, offers another example. Elected without party labels and thus freed from partisan attachments, the Maryland delegates mandated "major changes in the bill of rights, in the legislative, executive, and judicial branches, in local government, and elsewhere, [thereby] very substantially moderniz[ing] and streamlin[ing] the state's basic law."[44] However, these attempts in New York and Maryland to pursue policies

[42] CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. p. 19-20; 134-135.

[43] CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. p. 136.

[44] CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. p. 140.

opposed by the dominant political forces in the state led to electoral defeat, as substantial majorities rejected the proposed constitutions.[45]

Yet political realities in the states may be more complicated than these examples suggest. For one thing, there may not be partisan divisions on the primary issues confronting a state contemplating constitutional change. For example, in the mid-twentieth century both Republicans and Democrats tended to favor fewer outdated restrictions on the legislature, a more coherently organized executive, and a unified judiciary. Thus despite the strong partisan divisions in New Jersey at the outset of the 1947 convention, "there was a wide area of agreement among civic organizations and enlightened political leaders of both parties concerning what needed to be done."[46] For another thing, the balance of political forces may be changing in the state at the time a convention is called—indeed, the transition may itself provide the impetus for calling a convention. Several conventions in the 1840's arose from just such a political shift. The economic collapse of the late 1830's revealed that states had borrowed excessively and unwisely underwritten corporate ventures to develop infrastructure (railroads, canals, turnpikes, bridges, etc.), in part from promotional enthusiasm and in part because of corruption.[47] These promotional policies were popular before the collapse, but public opinion shifted dramatically, and several states called conventions for the express purpose of reining in state legislatures and preventing future abuses.[48] In the twentieth century the period of greatest constitutional revision coincided to a considerable extent with the reapportionment revolution that changed the balance of political forces in most states (which is discussed in greater detail below).

It should also be noted that not all constitutional conventions divide along partisan lines. Such divisions are less likely if delegates are selected in non-partisan elections, if the conventions are not organized along partisan lines, and if there are divisions within the political parties (e.g., urban vs. rural). Even when partisan divisions do surface, they may appear on only a select set of issues that divide the parties rather than on the full range of issues the convention is addressing. For example, in the New Jersey convention of 1947, there were few divisions among the delegates along partisan lines, with the primary one involving whether to guarantee in the constitution a

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[45] CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. p. 161, tbl. 6.1.

[46] BEBOUT, John H.; HARRISON, Joseph. The Working of the New Jersey Constitution of 1947. **William and Mary Law Review**, Williamsburg, vol. 10, n. 2, p. 337-365, 1968. p. 341.

[47] On the states' promotional efforts, see TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 109-112.

[48] See SHUGERMAN, Jed Handelsman. **The people's Courts**: pursuing judicial independence in America. Cambridge: Harvard University Press, 2012. chs. 4-5.

right to collective bargaining.[49] Moreover, the delegates may view themselves and their responsibilities as distinctive, more concerned with the future of the state than with immediate political advantage. Bruce Ackerman has argued that Americans distinguish between ordinary politics and higher law-making, and this may hold true of convention delegates as well. They may view their responsibilities as requiring a longer time perspective than is generally expected of legislators and an obligation to rise "above politics" and pursue the public interest.[50] My own discussions with convention delegates confirm this perception—as the last living delegate to the 1947 New Jersey convention put it, "I knew my colleagues well, and they were politicians before the convention and politicians after the convention, but at the convention they were statesmen."[51]

Finally, concerns about ratification may constrain what delegates do, even when they have a secure majority in the convention. Realizing that voter opposition to particular provisions may lead them to reject the entire constitution, delegates may temper their search for partisan advantage out of fear that clearly partisan proposals could excite controversy and offer political opponents a basis for rallying opposition to the constitution.[52] They may also decide to submit controversial proposals separately, lest opposition to one or more of those proposals doom the entire document. In 1970 in Illinois, for example, by separately submitting to voters four contested issues (the eighteen-year-old vote, capital punishment, election or appointment of judges, and single-member or multi-member legislative districts), the delegates virtually ensured

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[49] This guarantee – New Jersey Const., Art. I, sec. 19-- was approved by the delegates on close to a party-line vote.

[50] ACKERMAN, Bruce. **We the People**: Foundations. Cambridge: Belknap Press, 1991. chs. 1; 10. Elmer Cornwell suggests that a sizable number of delegates come to the convention with such a "statesman" orientation, though for some that orientation changes as a result of their experience as delegates. See CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. ch. 3.

[51] Statement of Wesley Lance, delegate to the 1947 New Jersey Constitutional Convention, found in the PBS documentary *The Opportunity of a Century* (1997), copy on file with author.

[52] Vladimir Kogan has observed that voting on ratification is largely cue voting, which "means that, even if delegates at a constitutional convention work carefully to give every group in the electorate a reason to vote in favor of the proposed changes, there is little guarantee that voters will actually know all the details when the revisions appear on the ballot. Second, voters do not appear to weigh the costs and benefits of various policy proposals in a risk-neutral manner, in the same way that an actuary might compare two courses of action by carefully adding up the risk and reward of each one. In studying the behavior of voters in initiative elections, political scientists Shaun Bowler and Todd Donovan have argued that many voters are fundamentally risk-averse, preferring to vote against ballot measures in the face of controversy, uncertainty, or confusion." (Kogan is here referencing BOWLER, Shaun; DONOVAN, Todd. **Demanding Choices**: opinion, voting, and direct democracy. Ann Arbor: The University of Michigan Press, 1998.) Kogan further noted: "By expanding the scope of constitutional change, major revisions are more likely to unite small groups, each opposed to a particular provision, into a coalition of sufficient size to block the package of proposals. If each provision were considered separately by the voters, no group of opponents would be large enough to be decisive in the election. When these provisions are brought together in a logroll, however, the final package is more likely to contain enough "poison pills" to bring together a majority against their passage." (KOGAN, Vladimir. The Irony of Comprehensive State Constitutional Reform. **Rutgers Law Journal**, Camden, vol. 41, n. 4, p. 881-905, july 2010. p. 886).

ratification of the constitution.[53] But when delegates ignore how the voters might perceive their efforts, they have often seen their proposals rejected.[54]

6. CONSTITUTIONAL MODERNIZATION

During the twentieth century, proponents of state constitutional reform argued that revision of state constitutions was necessary not only to deal with specific problems but also because the state's constitutional machinery was outdated, inadequate for dealing with the needs of a changing society, and so had to be modernized. Thus, when states confronted particular crises, as Michigan did with its financial crisis of the late 1950's, they often were willing to undertake a comprehensive review of their state constitution, with the idea of updating them in response to changes in society, changes in attitudes, and their experience under existing constitutional arrangements.[55] The idea that constitutions require periodic updating was hardly new. It can be traced back to Thomas Jefferson, who wrote that "laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the circumstances, institutions must advance also, and keep pace with the times."[56]

But the notion gained greater currency during the mid-twentieth century, because organized reform groups had for decades kept up a full-scale assault on the efficiency, effectiveness, and probity of state governments. A few quotes give the flavor of the critique. The federal Commission on Intergovernmental Relations opined that "many state constitutions restrict the scope, effectiveness, and adaptability of State

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53 CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. p. 174-175.

54 In assessing the claim that state constitutional politics represent a continuation of ordinary politics, one should also take into account the politics of constitutional amendment and consider the role of interest groups as well as political parties. On the latter, with particular reference to how related groups in different states cooperate to advance their common goals, see ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. Writing of education interest groups in the nineteenth century, she notes: "Although they were organized at the state level, these groups stayed in continuous contact with one another." (p. 69) What was true of education interest groups in nineteenth century has been even more true of groups in later eras. Thus, writing of environmental groups in the mid-twentieth century, Zackin observed: "Activists who understood problems as national in scope still worked to forge nationwide policies through the coordination of state governments and state constitutional mandates."(p. 158)

55 On the impetus for the Michigan convention of 1961-1962, see FINO, Susan P. **The Michigan State Constitution**. Oxford: Oxford University Press, 2011. p. 22-24.

56 Letter to Samuel Kercheval, July 12, 1816, in PETERSON, Merrill D. (Ed.). **The Portable Thomas Jefferson**. New York: Viking Press, 1975. p. 559. Jefferson wrote in the same letter: "Some men look at constitutions with sanctimonious reverence, and deem them like the ark of the covenant, too sacred to be touched. They ascribe to the men of the preceding era a wisdom more than human, and suppose what they did to be beyond amendment. I knew that age well; I belonged to it, and labored with it. It was very like the present, but without the experience of the present; and forty years of experience in government is worth a century of book-reading."(p. 558-559)

and local action. These self-imposed constitutional limitations make it difficult for many States to perform all of the services their citizens require."[57] Governor Terry Sanford of North Carolina was even more outspoken, referring to state constitutions as "the drag anchors of state programs, and permanent cloaks for the protection of special interests and points of view."[58] The Committee for Economic Development concurred, recommending that "state constitutional revision should have highest priority in restructuring state governments to meet modern needs," and that "most states should hold constitutional conventions, at the earliest possible date, in order to draft completely new documents."[59] The National Municipal League published and regularly updated a Model State Constitution in order to guide the task of constitutional reform.[60] The reformers' concerns are perhaps best summed up in Robert Allen's tirade: "State government is the tawdriest, most stultifying unit of the nation's political structure. In state government are to be found in their most extreme and vicious forms all the worst evils of misrule in this country."[61]

Several things are noteworthy about these calls for constitutional modernization. First, the proponents of reform were speaking to a potentially receptive audience, given the widespread American distrust of government and cynicism about its probity and effectiveness.[62] The idea that fundamental change might be necessary thus did not seem unreasonable, although it competed with popular skepticism about whether reformers could produce the results they promised. Second, the call for modernization was consciously framed as non-partisan and non-ideological—who could oppose a more efficient and effective state government? Yet the modernizers' claim of political

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[57] THE COMISSION ON INTERGOVERNMENTAL RELATIONS. **A Report to the President for Transmittal to Congress**. Washington: Government Printing Office, 1955. p. V. "Our states are attempting to provide governmental services in twentieth century conditions under the outmoded and hampering restrictions which abound in eighteenth and nineteenth century constitutions."

[58] SANFORD, Terry. **Storm Over States**. Columbus: McGraw-Hill, 1967. p. 189. He notes that outdated state constitutions have in particular fostered a corrupt legislative process: "To indict the states is to indict the legislatures that legislatures are inefficient and corrupt, that they procrastinate on public business while habitually kowtowing to private economic interests, that legislators get drunk and disorderly and consort with ladies procured by avaricious lobbyists, that they line their pockets, scratch their own backs and roll their own logs, all the while stamping out progressive legislation in the name of protecting their constituents." (p. 39)

[59] COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE (Ed.). **The Model State Constitution**. 4. ed. New York: National Municipal League, 1941. p. 19; 68.

[60] See COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE (Ed.). **The Model State Constitution**. 4. ed. New York: National Municipal League, 1941, which also contains essays explaining the League's recommendations and, more generally, GRAVES, W. Brooke (Ed.). **Major problems in State Constitutional revision**. Chicago: Public Administration Service, 1960.

[61] ALLEN, Robert S. **Our Sovereign State**. New York: Vanguard Press, 1949. p. VIII. Allen also charged that state constitutions bore "no more resemblance to a constitution than a garbage dump does to a park." (p. XVI)

[62] See E DIONNE JR., E. J. **Why Americans Hate Politics**. New York: Simon & Schuster, 1991; and more generally LIPSET, Seymour Martin. **The Confidence Gap**: business, labor, and government in the public mind. New York: The Free Press, 1983; If anything, support for government has declined since the constitutional reformers first sought to eliminate the causes of governmental ineffectiveness and unresponsiveness.

neutrality was suspect: people rarely engage in political advocacy without considering what groups and interests might be benefited by a particular course of action, and so analysis of who is urging change can be instructive in assessing its likely effects. Thus, some commentators have charged that "many reforms were tailored specifically to benefit the reformers themselves—mainly corporate and business interests—who sought to change state government to better accommodate their own needs for a more predictable, manageable political climate."[63] Third, implicit in the very call for constitutional revision was the assumption that the manifest deficiencies of state governments were largely tied to problems in the basic law, that the problems were institutional rather than political. Finally, the idea of "modernization" was (perhaps intentionally?) vague, and undertaking constitutional modernization would thus require replacing this vagueness with a concrete set of reforms for improving state government. For the constitutional modernizers, this provided an opportunity--even as they denied that there was a single template applicable to all state constitutions, their publications put forth a clear agenda for action, drawing heavily on the reform ideas of the Progressive era.[64]

What the constitutional modernizers wanted was to restructure state government so that it could act more forcefully in addressing the problems confronting the states. The modernizers favored enhancing the power of state governments and repealing limitations that prevent constructive legislative and executive action. They believed that state legislatures should be professionalized, meeting annually without time limits on the length of their meetings, and supplied with adequate salary and staff resources for what the reformers saw as a full-time job. They favored eliminating most constitutional restrictions on the legislature, which they dismissed as the unfortunate product of eras in which demands on state government were fewer, so that legislators could respond vigorously to the problems confronting the state.[65] Modernizers also proposed streamlining the executive branch under the control of the governor. They wanted the myriad boards and agencies in state executives combined into a limited number of departments under the control of the governor, the elimination of the independent

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[63] See BOWMAN, Anne O'Malley; KEARNEY, Richard C. **The Resurgence of the States**. New Jersey: Prentice-Hall, 1986. p. 48. This is particularly obvious in the case of so-called merit selection of judges; the proponents were of this reform were typically business interests, with strong support from the organized bar. See SHUGERMAN, Jed Handelsman. **The people's Courts**: pursuing judicial independence in America. Cambridge: Harvard University Press, 2012. ch. 10.

[64] See TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 155-156. For elaborations of the reform agenda, see GRAVES, W. Brooke (Ed.). **Major problems in State Constitutional revision**. Chicago: Public Administration Service, 1960; COMMITTEE ON STATE GOVERNMENT OF THE NATIONAL MUNICIPAL LEAGUE (Ed.). **The Model State Constitution**. 4. ed. New York: National Municipal League, 1941. The discussion in this paragraph is based on these sources.

[65] As Brooke Graves put it, the restrictions on state legislatures "add up to a lack of confidence in the legislative organs of the government." They become "an incubus preventing the adoption of modern legislation and tying the living present to the dead past." (GRAVES, W. Brooke (Ed.). **Major problems in State Constitutional revision**. Chicago: Public Administration Service, 1960. p. 17).

election of other executive officials, and a strengthening of the fiscal powers of the governor through the executive budget, the line-item veto, and other devices. They also believed that the state judiciary should be consolidated into a unified court system under the administrative authority of the chief justice, its funding provided by the state government rather than local governments, and its judges chosen by merit selection rather than by contested elections. Finally, they proposed enhancing the powers of local government through guarantees of home rule. Given the modernizers' emphasis on a concise document with clear lines of authority and few restrictions on the exercise of that authority, a leading federalism scholar characterized their proposals as rooted in a "managerial model" of state constitutionalism.[66]

In the era following World War II, the modernizers enjoyed considerable success. Some of this success occurred through piecemeal reform—for example, from 1947 to 1995, state voters approved ninety percent of amendments proposed to reform state executive branches, and from 1965 to 1975 twenty states comprehensively restructured their executive branches, while another twenty reorganized at least one executive agency or department.[67] But much of their success occurred when states created their initial constitutions or revised their existing constitutions. The delegates who drafted the 1947 New Jersey Constitution, the 1950 Hawaii Constitution, and the 1956 Alaska Constitution all drew heavily on the reform literature.[68] In the latter two cases the need to create an entirely new framework of government meant that there were no pre-existing power centers to oppose the reform prescriptions. In the New Jersey case, a bipartisan consensus that the state's 1844 constitution was hopelessly outdated encouraged an openness to new ideas—as Robert Williams has observed, "The difficulty in achieving constitutional revision had permitted a consensus to build around the major reforms that were finally adopted."[69]

When Michigan and other states undertook constitutional revision in the 1960's and 1970's, they too looked to the modernizers for ideas about what should be included in a well-designed state constitution. State constitutional commissions, groups of experts formed to prepare materials for the delegates, played a crucial role in disseminating the reform perspective.[70] In a study of seven constitutional conventions

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66 ELAZAR, Daniel J. The Principles and Traditions Underlying State Constitutions. **Publius: The Journal of Federalism**, Oxford, vol. 12, n. 1, p. 11-25, jan./mar. 1982. p. 22.

67 GARNETT, James L. **Reorganizing State Government**: the Executive Branch. Boulder: Westview Press, 1980. p. 55.

68 See generally LEE, Anne Fedder. **The Hawaii State Constitution**. Oxford: Oxford University Press, 2011; and MCBEATH, Gerald A. **The Alaska State Constitution**. Oxford: Oxford University Press, 2011.

69 WILLIAMS, Robert F. **The New Jersey State Constitution**. 2. ed. Oxford: Oxford University Press, 2013.

70 TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 154. Michigan prepared for its convention by appointing a commission to in 1960, which produced materials to inform and guide its convention delegates. An independent group, the Citizens Research Council, also developed

held during this period, Elmer Cornwell and his associates found that all the revised state constitutions moved closer to the Model State Constitution, some dramatically so.[71] Michigan's 1963 constitution was not part of Cornwell's study, but it too deleted obsolete provisions, eliminated statute-like detail, removed earmarks from most taxes, strengthened the office of the governor, and reorganized the judiciary.[72]

It is hard therefore to gainsay the influence of the modernizers or to dispute with Albert Sturm's conclusion in 1982 that constitutional revision had contributed "to the remarkable resurgence and modernization of state government during the past 20 years."[73] Other commentators have reached similar conclusions.[74] Yet the modernizers' record is more mixed than this might suggest. From 1960-1976 voters in three states rejected proposed constitutions, and in five others they rejected proposals to call constitutional conventions, suggesting that they were not altogether persuaded of the need for constitutional modernization. Indeed, Cornwell's study of constitutional conventions found that voters rejected proposed constitutions precisely in those states (Maryland and New Mexico) where delegates had most completely embraced the modernizers' suggestions.[75] Constitutional modernization was part of the story from 1960-1976, but it was not the whole story.[76]

7. EXTERNAL POLITICAL FORCES

Sometimes the impetus for state constitutional change comes from outside the state. A prime example of this is the U.S. Supreme Court's one person, one vote rulings.[77] Almost all the states were obliged to change their systems of legislative apportionment

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a two-volume analysis of Michigan's 1908 constitution. See FINO, Susan P. **The Michigan State Constitution**. Oxford: Oxford University Press, 2011. p. 25.

71 CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. p. 156-159.

72 FINO, Susan P. **The Michigan State Constitution**. Oxford: Oxford University Press, 2011. p. 26-27 and *passim*.

73 STURM, Albert L. **Thirty years of State Constitution-making**: 1938-1968. New York: National Municipal League, 1970. p. 115.

74 See TEAFORD, Jon C. **The Rise of the States**: evolution of American State government. Baltimore: The Johns Hopkins University Press, 2002; and BOWMAN, Anne O'Malley; KEARNEY, Richard C. **The Resurgence of the States**. New Jersey: Prentice-Hall, 1986.

75 CORNWELL JR., Elmer; GOODMAN, Jay S.; SWANSON, Wayne R. **State constitutional conventions**: the politics of the revision process in seven States. New York: Praeger Publishers, 1975. p. 158, tbl. 5.6.

76 It should also be noted that in the decades after 1976 the modernizers' agenda was largely replaced by another reform agenda, focused on ensuring greater governmental responsiveness through direct democracy and on imposing limits on state legislatures and courts. See TARR, G. Alan. **Understanding State Constitutions**. Princeton: Princeton University Press, 2000. p. 157-161.

77 In Baker v. Carr, 369 U.S. 186 (1962), the Supreme Court ruled that apportionment issues were justiciable. In Reynolds v. Sims, 377 U.S. 533 (1964), it held that "one person, one vote" was the constitutionally prescribed standard for apportionment of both houses of state legislatures. This meant that states had to devise legislative districts with equal numbers of inhabitants in order to meet Chief Justice Warren's insistence that population be "the controlling criterion for judgment in legislative apportionment controversies."

in order to conform to the Court's rulings, and reapportionment was the principal factor leading to the calling of conventions in Rhode Island (1964), Connecticut and Tennessee (1965), New Jersey (1966), New York (1967), and Hawaii (1968).[78] Whereas some of these conventions were limited to the issue of reapportionment, in other instances states used the occasion of this change to undertake more comprehensive reform. And this was not always a matter of design: for example, the 1965 Connecticut convention, which was called only to deal with legislative apportionment and propose new amending procedures, instead proposed a new constitution, which was ratified by voters.[79] Beyond that, post-reapportionment legislatures tended to be more supportive of comprehensive reform than were their predecessors. In part, the change in membership as a result of reapportionment brought new persons into the state legislature, who had not benefited from the practices and arrangements of the past and who consequently felt less attachment to them. In part, the new state legislators had less to fear from fundamental constitutional change than did their predecessors, who had blocked the calling of constitutional conventions, lest the power they enjoyed be undermined by reapportionment. The experience in New Jersey discussed earlier is a case in point. In part, too, the new legislators may have found that by blocking of comprehensive reform in the past, their predecessors had allowed a number of problems to fester that urgently demanded consideration. Finally, the new legislatures often differed politically from their malapportioned predecessors and thus may have wanted to introduce constitutional changes in line with their priorities.

The impetus for constitutional change may also come from other states. When some states have comprehensively reformed their constitutions, there is a pressure for other states to follow their example and reap the benefits of reform.[80] Thus it is hardly surprising that there are periods of intense state constitutional revision as well as periods of relative inactivity. This process of emulation can apply to individual provisions as well as to comprehensive reform. For example, Michigan in 1963 added a strong

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78 STURM, Albert L. **Thirty years of State Constitution-making**: 1938-1968. New York: National Municipal League, 1970. p. 61. On state legislative apportionment pre-Reynolds and on the steps states took following that ruling, see DIXON, Robert G. **Democratic Representation**: reapportionment in law and politics. Oxford: Oxford University Press, 1968; and O'ROURKE, Timothy G. **The Impact of Reapportionment**. New Jersey: Transaction Publishers, 1980.

79 STURM, Albert L. **Thirty years of State Constitution-making**: 1938-1968. New York: National Municipal League, 1970. p. 67.

80 This calls to mind Justice Louis Brandeis's famous characterization of the states as "laboratories of democracy." See his dissenting opinion in New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932). On the transmission of constitutional reforms across state borders, often referred to as the diffusion of innovations, see GRAY, Virginia. Innovation in the States: A Diffusion Study. **American Political Science Review**, Cambridge, vol. 67, n. 4, p. 1174-1185, dec. 1973.

environmental guarantee to its constitution because the delegates were inspired by and relied upon Alaska's recent adoption of a similar provision.[81]

8. CONCLUSION

Writing in the late twentieth century, scholars described a "conventionphobia" rooted in popular distrust of the fundamental changes that might be introduced by constitutional revision.[82] Even when voters were willing to authorize conventions, they tended to prefer piecemeal change rather than the creation of new constitutions. Thus the successful conventions in Rhode Island (1973, 1986), New Hampshire (1974, 1984), Arkansas (1978-1980), Hawaii (1978), and Tennessee (1977) all involved the submission of specific amendments to the voters.[83] Change via constitutional amendments proposed by the legislature, by the constitutional initiative, or in Florida by constitutional commission likewise superseded more comprehensive reform. But this is not unprecedented: the frequency of constitutional revision has fluctuated throughout American history, and it is not inconceivable that in the future states will again embrace comprehensive constitutional reform. Should they do so, it is likely that the same dynamics of constitutional change described in this article will again operate. Until then, much can be gained by reflecting on the last great period of state constitutional revision, in which Michigan played an important role.

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81 ZACKIN, Emily. **Looking for rights in all the wrong places**: why State Constitutions contain America's positive rights. Princeton: Princeton University Press, 2013. p. 158. On interstate borrowing of environmental provisions, see also PINGUELO, Fernando. Laboratory of Ideas: One State's Successful Attempt to Constitutionally Ensure a Healthier Environment. **The Buffalo Environmental Law Journal**, Buffalo, vol. 4, n. 2, july/dec. 1997.

82 BENJAMIN, Gerald; GAIS, Thomas. Constitutional Conventionphobia. **Hofstra Law & Policy Symposium**, Hempstead, vol. 1, p. 53-77, 1996.

83 KOGAN, Vladimir. The Irony of Comprehensive State Constitutional Reform. **Rutgers Law Journal**, Camden, vol. 41, n. 4, p. 881-905, july 2010. p. 893-894, app. 1.

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