amendment on their next initiative—even though they, themselves, objected in principal to incorporating campaign finance reform in the constitution. When the state legislature is strongly opposed to proposed reforms, the constitutional initiative may very well be the only viable mechanism for reform.

Recent history of campaign finance reform in Colorado reveals how the initiative process, and constitutional initiatives in particular, can be used to fulfill the role for which they were created almost one hundred years ago. Constitutional initiatives can be very effective tools to make government more responsive to the people, by allowing the people to circumvent the institutions of representative government when elected officials are opposed to the views and the interests of the people they are designed to serve.

Notes

1. Thomas E. Cronin and Robert D. Loevy, *Colorado Politics and Government* (Lincoln, Nebraska: University of Nebraska Press, 1993), 53; Robert S. Lorch, *Colorado's Government: Structure, Politics, Administration, and Policy*, 6th ed. (Niwot, Colo.: University Press of Colorado, 1997), 22.

2. Timothy O'Connor, Secretary of State, *Proceedings of the Constitutional Convention Held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado* (Denver, Colorado; Smith-Brooks Press, 1907), 731.

3. Colorado General Assembly, "A History of Statewide Ballot Issues Since 1964," available at www.state.co.us/gov_dir/leg_dir/lcssstaff/research/Ballot_Hist_table_top.htm and Colorado General Assembly's Legislative Council Staff, *Issue Brief #02–03*, updated by this author to include the 2002 elections.

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8. Baumgartner and Jones (1993); Thomas A. Birkland, *After Disaster: Agenda Setting, Public Policy, and Focusing Events* (Washington, D.C.: Georgetown University Press, 1997); Carmines and Stimson, *Issue Evolution*; John W. Kingdon, *Agendas, Alternatives, and Public Policies* (New York: HarperCollins Publishers, 1984).

9. Timothy E. Cook, *Making Laws and Making News* (Washington, D.C.: The Brookings Institute, 1989), 121. Also see, Barbara Sinclair, *The Transformation of the U.S. Senate* (Baltimore: Johns Hopkins University Press, 1989).

10. "Romer vetoes bill to reform campaign laws," *Denver Post*, 12 June 1993, sec B.

11. Richard Bainter, Director of Colorado Common Cause, telephone interview by author, tape recording, 2 June 1997.

12. Patricia Johnson, former President of League of Women Voters of Colorado, interview by author, tape recording, Boulder, Colo., 24 April 1997.

13. *Citizens for Responsible Government State Political Action Committee v. Davidson*, 236 F.3d 1174 (10th Cir. 2000).

14. Colorado General Assembly, House Bill 00-1194.

15. Patricia Johnson, interview by author, tape recording, Boulder, Colo., 15 November 2002.

16. Peter Maysmith, Director of Colorado Common Cause, telephone interview by author, tape recording, November 21, 2002.

17. Johnson, 1997 interview.

18. "Mail-in vote, caucus proposals lose ground in latest poll results," *Denver Post*, 25 October 2002.

19. Based on Colorado Secretary of State's summary records for 1994 ballot initiatives and individual issue committee campaign finance disclosure reports field with the Secretary of State, available on the Secretary of State's *Election Center Data*, official website: www.sos.state.co.us.

20. *Election Center Data* for "Citizens for Honest Elections" in 2002.

21. *Election Center Data* for "First Amendment Committee" in 2002.

22. *Election Center Data* for "Protect Freedom 2002."

23. Patricia Johnson, 1997 interview.

24. *Election Center Data* for "Coloradans for Campaign Reform" in 2002.

25. According to *Election Center Data* for "Coloradans for Campaign Reform," Colorado Common Cause contributed $171,000 (not including personnel costs), Voter Revolt contributed $33,000, and the League of Women Voters of Colorado contributed $3,600 as a group, and several dozen individuals also contributed to the pro-Amendment 27 group.

26. Peter Maysmith, 2002 interview.

27. *Nixon v Shrink Missouri Government PAC*, 528 U.S. 377.

28. Richard Bainter, 1997 interview.

29. "No to 27: too many pitfalls," *Denver Post*, 12 October 2002.

30. Initiative and Referendum Institute, "Comparison of Statewide Initiative Processes," p.2, available at www.iandrinstitute.org.

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Appendix

Mechanisms for State Constitutional Change

The American states employ four basic methods for constitutional change: the constitutional convention, legislative proposal of amendments, the constitutional commission, and amendment via the constitutional initiative. In most cases, states utilize the constitutional convention when revising their state constitutions—not until 1945, when Georgia did so, was a state constitution written by a constitutional commission.[1] Conventions have also been used to propose amendments, but most amendments are proposed by the state legislature. In some instances, the amendments that legislatures propose originate in constitutional commissions, bodies appointed by the political authorities to study constitutional problems in the state and to propose solutions to those problems. In forty-nine states (Florida is the exception), these commissions recommend amendments to the legislature, which then may adopt the recommendations and transmit them to the people for ratification, modify them and submit the modified proposals for ratification, or ignore the recommendations altogether. Finally, eighteen states permit the people by petition to propose amendments, which become part of the constitution when ratified by the people. These broad categories mask considerable interstate variation in how states structure and regulate constitutional change.

Constitutional Conventions

Constitutional conventions maximize the opportunities for popular participation in constitutional reform. The voters decide whether to hold a convention, they elect the delegates who will propose a new constitution (or amendments), and the constitution (or amendments) take effect only when ratified by popular referendum. Some states—for example, Montana in 1972—have prohibited those holding public office from serving

as delegates, to ensure that the convention proceedings not replicate politics as usual. Even in the absence of such restrictions, many convention delegates have never served in the state legislative or executive branches, so conventions provide an opportunity for a new cohort of citizens to become directly involved in the government of the state.

Most state constitutions expressly recognize the power of the people to revise the fundamental law. Several incorporate language drawn from eighteenth-century constitutions, declaring that "all political power is vested in and derived from the people only" and that the people consequently have "an incontestable, unalienable, and indefeasible right" to "reform, alter, or totally change [government] when their protection, safety, prosperity, and happiness require it."[1] However, these provisions offer little guidance about how the people might exercise its power, and so many state constitutions also deal with constitutional conventions in more concrete terms. Some prescribe in detail not only how a convention should be called but also how it will operate. For example, the Delaware Constitution mandates the size of the convention, describes the districts from which delegates will be selected, provides for the filling of vacancies, designates the site at which the convention will meet, and specifies a quorum for convention proceedings.[2] Other state constitutions reserve to the convention the power to determine its own organization, choose its own officers, and determine its rules of procedure.[3] Frequently, however, they direct the legislature to enact laws to carry out the people's will that a convention be held. Thus, the legislature may determine how large the convention will be, how delegates will be elected, how long the convention will meet, and what compensation delegates will receive.[4] Control over these features of the convention can of course have a considerable effect on whether the convention succeeds and on what proposals it puts forth.

Even in states whose constitutions do not expressly deal with constitutional conventions, it is generally acknowledged that the people retain the authority to revise the fundamental law and that the legislature possesses the power to enact laws necessary and proper to enable the people to exercise that authority. Yet the absence of express constitutional language can be important. For example, reasoning from the fact that the Alabama Constitution did not directly authorize limited conventions, the Alabama Supreme Court concluded that the legislature could not restrict the topics that a convention could address or the subjects on which it might propose amendments.[5] This ruling, fueling fears about what an unlimited convention might propose, helped discourage calling a convention in the state.[6]

States vary in the mechanisms they employ to call conventions. All states grant the legislature authority to decide whether a convention call should be placed on the ballot for popular approval, with a two-thirds vote of each house typically required for submission of the question. However, fourteen states—embracing the Jeffersonian notion that no generation can bind future generations on fundamental political matters—also require that the question of whether a convention should be called be placed on the ballot periodically.[7] The effectiveness of this mechanism remains a matter of dispute. In recent years voters have consistently rejected convention calls, and some states have even ignored the constitutional command that the convention question be submitted to the voters.[8] Nevertheless, the prospect of a convention call may induce state officials to address popular concerns, lest they fuel efforts for constitutional reform. In Rhode Island, for example, the legislature in 2003 proposed an amendment to address persistent separation-of-power concerns, one year before the automatic convention call was scheduled to appear on the ballot. Finally, Montana—one of the states that has adopted periodic submission to the voters—has also authorized putting the question of a convention on the ballot via the initiative, although this innovation in the state's 1972 constitution has never been used.[9]

States vary to some extent in the margin they require for ratification of convention proposals. During the nineteenth century several states required that proposals be ratified by a majority of those voting *at the election* rather than of those voting *on the constitutional question*, thus in effect treating the failure to vote on a proposal as equivalent to a "no" vote. Given voter roll-off, this was an almost insuperable barrier to amendment, overcome only by the subterfuge of having parties take positions on proposals and then counting a straight party-line vote as a vote for the proposal. Nowadays, only Minnesota and New Hampshire require a supermajority to ratify convention proposals, and most states permit ratification by a simple majority of those voting on the proposals. Although this might seem to facilitate ratification, convention proposals have enjoyed only mixed success over the last half century.

Proposal of Amendments by the State Legislature

A similar diversity can be found in how states structure constitutional amendment via the state legislature. Forty-nine states require that

amendments proposed by the legislature be ratified by the people. In Delaware, the sole exception, an amendment takes effect if it twice receives a two-thirds vote of the membership of each house of the state legislature, with an intervening election at which voters can presumably make known their views.[10] Delaware's mechanism for tapping public sentiment was fairly common in state constitutions until early in the nineteenth century, when it was replaced in most states by ratification by referendum.

For proposing amendments, eighteen states require a simple majority in each house of the state legislature, seven states require a three-fifths vote in each house, and eighteen state follow the federal Constitution in mandating a two-thirds vote in each house.[11] Three states—Connecticut, Hawaii, and New Jersey—permit the legislature to propose amendments either by an extraordinary majority or by a majority vote in two legislative sessions, the second following an intervening election. Four states—Arkansas, Illinois, Kansas, and Kentucky—limit the number of amendments that the legislature can propose at any one time.

For ratifying amendments, forty-four states require a simple majority in a popular referendum, four require a majority of those voting in the election, and New Hampshire requires a two-thirds vote.[12] There seems to be no correlation between the size of the legislative majority necessary to propose an amendment and the popular majority required to ratify it. States that facilitate legislative proposal of amendments by requiring only a simple majority in each house typically do not attempt to check unwise amendments by requiring an extraordinary majority for ratification.

Constitutional Commissions

Constitutional commissions originated in the United States during the nineteenth century—the first met in New Jersey in 1852—and they became increasingly important in state constitutional reform during the twentieth century.[13] The popularity of this mode of constitutional change derives from two advantages it offers the legislature. First, the commission has resources of time and expertise unavailable to the legislature for considering constitutional problems and for crafting solutions to those problems. Second, legislators have the opportunity to assess the public reaction to commission proposals, and the commission can take the political heat for any unpopular recommendations that it puts forth.

Typically, the selection, size, and composition of a constitutional commission are dealt with by statute or by executive order rather than by the state constitution. The statute or executive order also determines the mandate of the commission—whether it will be a limited commission authorized to address a particular problems or an unlimited commission. Interstate variations among state constitutional commissions have been largely a product of the differing political situations in those states when the commissions were established. However, two states have pioneered distinctive approaches. Utah has by statute created a permanent constitutional commission to study constitutional problems in the state and report its findings and recommendations to the legislature.[14] This innovation has enjoyed considerable success, allowing the commission to identify low-salience constitutional problems and to anticipate future problems, rather than permitting them to reach crisis proportions. Florida in its 1968 constitution authorized the periodic formation of a commission that would recommend constitutional changes directly to the electorate.[15] Florida's innovation resembles somewhat the periodic convention calls found in other states, in that the question of constitutional change is regularly placed before the voters. It also resembles the constitutional initiative (which is also available in Florida) in that it bypasses the legislature altogether in proposing amendments (although legislative leaders do appoint some members of the commission). As Rebecca Mae Salokar's contribution to this volume explains, the Florida commission has enjoyed mixed success in its two efforts at constitutional reform, and thus far no state has emulated Florida's approach.[16] Nevertheless, Florida itself drew on the model of the constitutional commission when in 1988 it created a Taxation and Budget Commission, mandated to meet every ten years, with authority to submit proposals dealing with the state's finances directly to the voters.[17]

Constitutional Initiative

Of the eighteen states with the constitutional initiative, sixteen employ the direct initiative: if proponents collect the required number of signatures on an initiative petition, the initiative amendment is placed on the ballot for popular ratification.[18] Two states—Massachusetts and Mississippi—have the indirect initiative: proposals obtaining a sufficient number of signatures must first be referred to the state legislature and, depending on its

action, may only then be submitted to the voters. Some states by statute, others by constitutional provision determine the number of signatures necessary to qualify for the ballot, whether there is a distributional requirement for signatures (e.g., a certain number or percentage in each county in the state), and other crucial procedural issues. Most states require only a simple majority to ratify a constitutional initiative, imposing the same standard used for ratification of amendments proposed by the legislature. However, Mississippi and Nebraska have sought to ensure that constitutional initiatives reflect the popular will by requiring that proposals receive a minimum percentage of the total vote at the election in which they are considered.[19] This combination of the indirect initiative plus difficult ratification requirements has virtually eliminated the initiative as a mechanism for constitutional reform in Mississippi.

NOTES

1. See, for example, Massachusetts Constitution, part I, article VI.

2. Delaware Constitution, article XVI, section 2. The Delaware Constitution's provisions dealing the allocation of delegates likely violate the Federal Constitution, which requires that representation conform to a "one person, one vote" standard. See Randy J. Holland, *The Delaware State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 2002), pp. 232–33.

3. See, for example, Hawaii Constitution, article XVII, section 2.

4. See, for example, Hawaii Constitution, article XVII, section 2.

5. *Opinion of the Justices*, 263 Ala. 141, 81 So. 2d 678 (1955).

6. See Bailey Thomson, ed., *A Century of Controversy: Constitutional Reform in Alabama* (Tuscaloosa: University of Alabama Press, 2002).

7. For a listing, see *The Book of the States, 2001–2002* (Lexington, Ky.: Council of State Governments, 2001), p. 8. On the development of this idea, see John Dinan, "'The Earth Belongs Always to the Living Generation': The Development of State Constitutional Amendment and Revision Procedures," *Review of Politics* 62 (Fall 2000): 645–74.

8. See the contribution of Gerald Benjamin to this volume, "The Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context."

9. Montana Constitution, article XIV, section 3.

10. Delaware Constitution, article XVI, section 1. To facilitate popular consideration of amendments before the legislature, this provision requires that the amendments "be published three months before the next general election in at least three newspapers in each county in which such newspapers shall be published."

11. *Book of the States*, 3, table 1.1.

12. Ibid.

13. See Peter J. Mazzei and Robert F. Williams, "'Traces of Their Labors': The Constitutional Commission, the Legislature, and Their Influence on the New Jersey State Constitution, 1873–1875," *Rutgers Law Journal* 33 (Summer 2002): 1060. See also Robert F. Williams, "Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change," *Hofstra Law and Policy Symposium* 1 (1996): 1–26.

14. This innovation is discussed in Jean Bickmore White, *The Utah State Constitution: A Reference Guide* (Westport, Conn.: Greenwood Press, 1998), pp. 17, 71, 91, 143, 194.

15. Florida Constitution, article XI, section 2.

16. Rebecca Mae Salokar, "Constitutional Revision in Florida: Planning, Politics, Policy and Publicity."

17. Florida Constitution, article XI, section 6.

18. For a listing of states with the constitutional initiative, as well as up-to-date information on its use, see the web site of the Initiative and Referendum Institute: www.iandrinstitute.org.

19. Mississippi Constitution, article XV, section 273, and Nebraska Constitution, article III, section 4.