

# Constitutional Revision: Ohio Style

STEVEN H. STEINGLASS\*

## TABLE OF CONTENTS

I.	INTRODUCTION.....	282
II.	AN OVERVIEW: THE OHIO STATE CONSTITUTION AND THE TOOLS FOR REVISION.....	283
III.	THE NORTHWEST ORDINANCE AND THE PATH TO STATEHOOD...	286
IV.	THE 1802 CONVENTION AND THE NEW CONSTITUTION .....	289
	A. <i>The 1802 Constitution</i> .....	289
	B. <i>Popular Constitutionalism</i> .....	291
	1. <i>Political Participation</i> .....	291
	2. <i>Ratification</i> .....	291
	3. <i>Constitutional Change</i> .....	292
V.	THE EXPERIENCE UNDER THE 1802 CONSTITUTION.....	293
	A. <i>The Effort to Reform the First Constitution</i> .....	293
	B. <i>Samuel Medary and the Second Ohio Constitutional         Convention</i> .....	295
VI.	THE 1851 CONSTITUTION AND THE FUTURE OF CONSTITUTIONAL REVISION IN OHIO .....	297
	A. <i>General Assembly Proposed Conventions</i> .....	297
	B. <i>Mandatory Convention Calls</i> .....	298
	C. <i>General Assembly Proposed Amendments</i> .....	299
	D. <i>Popular Ratification</i> .....	299
	E. <i>Fear of Failure</i> .....	300
VII.	THE NEW TOOLS AND CONSTITUTIONAL REVISION IN THE SECOND HALF OF THE NINETEENTH CENTURY.....	301
	A. <i>Legislatively Proposed Amendments</i> .....	301
	B. <i>Constitutional Conventions</i> .....	302
VIII.	CONSTITUTIONAL REVISION IN OHIO AT THE DAWN OF THE TWENTIETH CENTURY.....	304
IX.	THE CONSTITUTIONAL CONVENTION OF 1912.....	306
X.	THE END OF THE SUPERMAJORITY REQUIREMENT .....	309
XI.	THE OHIO EXPERIENCE WITH THE CONSTITUTIONAL INITIATIVE .....	311
	A. <i>The Ohio Constitutional Initiative</i> .....	311
	B. <i>The Ohio Experience</i> .....	312

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\*Dean Emeritus & Professor Emeritus, Cleveland-Marshall College of Law, Cleveland State University. The author is currently the Senior Policy Advisor for the Ohio Constitutional Modernization Commission. The views expressed in this Article are those of the author and not the Commission.

C. <i>Margins of Success and Voter Turnout</i> .....	317
XII. LIMITATIONS ON THE DIRECT CONSTITUTIONAL INITIATIVE .....	317
A. <i>Limitations on the Use of the Constitutional Initiative</i> .....	317
B. <i>Litigation</i> .....	319
C. <i>Limitations on the Ohio Constitutional Initiative</i> .....	320
1. <i>One Amendment, Separate-Vote Requirement</i> .....	320
2. <i>Constitutional Revisions vs. Constitutional</i> <i>Amendments</i> .....	323
3. <i>Antimonopoly Amendment</i> .....	326
D. <i>Judicial Review of Limitations on the Use of the</i> <i>Initiative</i> .....	329
XIII. CONSTITUTIONAL CONVENTIONS AND COMMISSIONS TODAY .....	332
XIV. THE OHIO CONSTITUTIONAL REVISION COMMISSION .....	334
A. <i>The Creation of the Ohio Constitutional Revision</i> <i>Commission</i> .....	334
B. <i>Initial Setbacks</i> .....	338
C. <i>OCRC Successes and Failures</i> .....	340
XV. THE COLLOQUIUM PLANNING COMMITTEE AND THE OHIO CONSTITUTIONAL MODERNIZATION COMMISSION .....	345
A. <i>The Creation of the Ohio Constitutional Modernization</i> <i>Commission</i> .....	345
B. <i>The Colloquium Planning Committee</i> .....	346
C. <i>The Organization, the Work, and the Future of the Ohio</i> <i>Constitutional Modernization Commission</i> .....	349
XVI. CONCLUSION.....	354

## I. INTRODUCTION

Unlike the other contributions to this excellent Symposium, this Article looks at state constitutional law in a single state—Ohio—and focuses on the history of constitutional revision in it.<sup>1</sup> Consistent with the Symposium’s theme of popular constitutionalism,<sup>2</sup> the Article reviews the expansion—albeit the slow expansion—of the groups that were permitted to participate in the political process in Ohio as well as the expansion and use of the tools available to those seeking constitutional change. As for the substantive constitutional

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<sup>1</sup> In some states, “revision” and “amendment” are terms of art with distinct legal implications. See generally *infra* Part XII.C.2. Nonetheless, this Article will generally use the terms interchangeably.

<sup>2</sup> See generally Jeffrey S. Sutton, Introduction, *State Constitutions in the United States Federal System* 77 OHIO ST. L.J. 195 (2016) (outlining themes and topics of the 2015 *Ohio State Law Journal* Symposium on State Constitutional Law).

changes that have taken place in Ohio, the Article reviews them summarily, primarily to put the topic of constitutional revision in context.

To understand constitutional revision in a single state, it is helpful to know what is happening in other states, and this Article places Ohio in a national context. But its primary purpose is to provide a clear review of the history of constitutional change in Ohio. And given its single-state focus as well as its attempt to provide a straightforward explanation of the development of the Ohio Constitution, it is hoped that this Article will be useful not simply to academics but also to all who are interested in the Ohio Constitution, in how it has evolved, and in how change is likely to take place in the future.

The writing of the history of the constitution of a single state is a daunting task, and the full story cannot be told without an examination of the social, economic, and political currents of the day. And the history of the constitution of any state cannot be undertaken without a review of the role of the courts. These are projects for another day.<sup>3</sup> Instead, this Article focuses more narrowly on the expansion of the players in constitutional revision, on the expanding toolkit for constitutional revision in Ohio and on the uses to which the tools, including state constitutional revision commissions, have been put.

## II. AN OVERVIEW: THE OHIO STATE CONSTITUTION AND THE TOOLS FOR REVISION

First, a snapshot. Today, Ohio operates under its 165-year-old 1851 Constitution, the sixth oldest in the nation and the second oldest outside New England.<sup>4</sup> With approximately 56,800 words,<sup>5</sup> the Ohio Constitution is the

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<sup>3</sup> There are many excellent histories of Ohio, but none focus comprehensively on the history of the Ohio Constitution. See CHARLES B. GALBREATH, *HISTORY OF OHIO* (1925) (5 volumes); THE HISTORY OF THE STATE OF OHIO (Carl Wittke ed., 1941) (6 volumes); EMILIUS O. RANDALL & DANIEL J. RYAN, *HISTORY OF OHIO* (1912) (5 volumes); EUGENE H. ROSEBOOM & FRANCIS P. WEISENBURGER, *A HISTORY OF OHIO* (James H. Rodabaugh ed., 2d ed. 1967). The history of the Ohio Constitution is reviewed in STEVEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION 3–75* (2011). See also Barbara A. Terzian, *Ohio's Constitutions: An Historical Perspective*, 51 CLEV. ST. L. REV. 357 (2004); Howard McDonald, *A Study in Constitution Making—Ohio, 1802–1874* (Apr. 29, 1916) (unpublished Ph.D. dissertation, University of Michigan) (on file with the University of Cincinnati).

<sup>4</sup> The constitutions of Massachusetts (1780), New Hampshire (1784), Vermont (1793) and Maine (1819) are older than the current Ohio Constitution of 1851, as is the Wisconsin Constitution (1848). The Indiana Constitution, like the Ohio Constitution, was ratified in 1851, but it did not become effective until November 1, 1851. See John Dinan, *State Constitutional Developments in 2014*, in *BOOK OF THE STATES 2015*, at 3, 11 (2015), <http://knowledgecenter.csg.org/kc/system/files/Dinan%202015.pdf> [<https://perma.cc/C36C-KCJN>]. The Ohio Constitution was ratified on June 17, 1851, and became effective on September 1, 1851. See OHIO CONST. sched., § 9 (1851). The 1802 Ohio Constitution and the 1851 Ohio Constitution are reprinted in ISAAC FRANKLIN PATTERSON, *THE CONSTITUTIONS OF OHIO 73–97, 117–58* (1912).

tenth longest in the nation, and Ohio voters have amended it 169 times since 1851.<sup>6</sup>

Ohio has a full toolkit for revising its constitution. Like virtually all states, Ohio permits its legislature to propose amendments to the voters for approval and permits its legislature to propose constitutional conventions to the electorate.<sup>7</sup> Where Ohio differs from most states is its commitment to direct democracy and its guarantee that voters will be asked periodically whether to have a state constitutional convention. Ohio is one of sixteen states that currently have a direct constitutional initiative in which voters by petition can propose amendments directly to the electorate<sup>8</sup> and one of fourteen states that have a mandatory convention call.<sup>9</sup> Finally, like most states, Ohio requires only a simple majority vote for approval of constitutional amendments regardless of how the amendment was proposed.<sup>10</sup>

When these methods of constitutional revision are looked at cumulatively, Ohio is one of only five states—the others being Michigan, Missouri, Montana, and Oklahoma—that have all four devices: legislatively proposed amendments, legislatively proposed conventions, a direct constitutional

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<sup>5</sup> The Ohio Constitution had 53,239 words as of the end of 2014. See *Table 1.1: General Information on State Constitutions*, in BOOK OF THE STATES 2015, *supra* note 4, at 11, <http://knowledgecenter.csg.org/kc/system/files/1.1%202015.pdf> [<https://perma.cc/M3MQ-B7Y5>] [hereinafter BOOK OF THE STATES 2015, *Table 1.1*] (reporting based on a submission from the author of this Article). The approval of one constitutional amendment in 2014 (which is not included in the above total) and two in 2015 increased the Ohio word count to approximately 56,800 words.

<sup>6</sup> See *Ohio Constitution—Law and History: Statistical Tables of Amendments Proposed and Adopted*, CLEV.-MARSHALL L. LIBR., <http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionstatisticaltables> [<https://perma.cc/KZ4Z-YRJ8>] (last updated Feb. 5, 2016) [hereinafter *Statistical Tables of Amendments*].

<sup>7</sup> *Table 1.2: Constitutional Amendment Procedure: By the Legislature*, in BOOK OF THE STATES 2015, *supra* note 4, at 13, 13–14, <http://knowledgecenter.csg.org/kc/system/files/1.2%202015.pdf> [<https://perma.cc/KF5B-H4X9>] [hereinafter BOOK OF THE STATES 2015, *Table 1.2*].

<sup>8</sup> See *Table 1.3: Constitutional Amendment Procedure: By Initiative*, in BOOK OF THE STATES 2015, *supra* note 4, at 15, 15, <http://knowledgecenter.csg.org/kc/system/files/1.3%202015.pdf> [<https://perma.cc/3VK7-74FZ>] [hereinafter BOOK OF THE STATES 2015, *Table 1.3*]. Two states—Massachusetts and Mississippi—have indirect constitutional initiatives in which proposed constitutional amendments are presented to the state legislature before they can be presented to the voters. *Id.*

<sup>9</sup> *Table 1.4: Procedures for Calling Constitutional Conventions*, in BOOK OF THE STATES 2015, *supra* note 4, at 16, 16, <http://knowledgecenter.csg.org/kc/system/files/1.4%202015.pdf> [<https://perma.cc/5V3Z-NDWH>] [hereinafter BOOK OF THE STATES 2015, *Table 1.4*]. See generally John Dinan, *The Political Dynamics of Mandatory State Constitutional Convention Referendums: Lessons from the 2000s Regarding Obstacles and Pathways to Their Passage*, 71 MONT. L. REV. 395 (2010); Robert J. Martineau, *The Mandatory Referendum on Calling a State Constitutional Convention: Enforcing the People's Right to Reform Their Government*, 31 OHIO ST. L.J. 421 (1970).

<sup>10</sup> BOOK OF THE STATES 2015, *Table 1.2*, *supra* note 7, at 13; BOOK OF THE STATES 2015, *Table 1.3*, *supra* note 8, at 15.

initiative, and a mandatory convention call.<sup>11</sup> And, as discussed more fully below, Ohio has embraced the use of constitutional revision commissions as an alternative to constitutional conventions.

Ohio had three successful constitutional conventions during the 110-year period from 1802 to 1912, with each convention expanding the tools available for revising the constitution and addressing the issue of who participates in the political process. These conventions took place during or near each of the three major periods of state constitutional revision in this country: the Founding Era, the Jacksonian Era, and the Progressive Era.

The Constitutional Convention of 1802, which took place after the Founding Era, adopted the 1802 Constitution, which moved Ohio forward on the path to statehood and permitted it to become the seventeenth state. However, it adopted a flawed constitution that embraced legislative supremacy, that placed unreasonable burdens on the judiciary, that constitutionalized gender and racial restrictions on voting, and that was almost impervious to change.<sup>12</sup>

The Ohio Constitutional Convention of 1850–1851, which was held near the end of the Jacksonian Era, proposed the current constitution, which corrected many of the defects of the 1802 Constitution. It “re-calibrated” the relationship among the three branches of government, ended the era of legislative supremacy, made the judiciary independent of the legislature, expanded the role of the people in the political process, and made major expansions in the tools available for constitutional revision. However, the 1850–1851 Convention made no significant changes in suffrage.<sup>13</sup>

Ohio’s third significant constitutional event, though its fourth convention, the Progressive-Era Constitutional Convention of 1912, did not propose a new constitution but rather proposed forty-two separate amendments. The voters approved thirty-four of them, including the adoption of an omnibus amendment embracing direct democracy—the direct constitutional initiative, the indirect statutory initiative, and the referendum—as well as important change in the rules for counting votes on amendments proposed by the General Assembly, but it did not extend suffrage to women.<sup>14</sup>

There have been no conventions or even serious efforts to call a convention in the last century, and constitutional revision in Ohio has been characterized by a century of ad hoc constitutional change, punctuated by two experiments with commission-based constitutional revision, the second of which is taking place today.

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<sup>11</sup> In addition to the direct constitutional initiative, Ohio has other tools of direct democracy, including the indirect statutory initiative and the referendum. *See* OHIO CONST. art. II, § 1(b)–(c). The focus of this Article is on constitutional revision.

<sup>12</sup> *See* Randolph C. Downes, *Ohio’s Second Constitution*, 25 NW. OHIO Q. 71, 71 (1953) (“The difficulty with Ohio’s first constitution as adopted in 1802 was that it was practically unamendable.”).

<sup>13</sup> *See* STEINGLASS & SCARSELLI, *supra* note 3, at 34–39.

<sup>14</sup> *See id.* at 47–55.

### III. THE NORTHWEST ORDINANCE AND THE PATH TO STATEHOOD

The important role Ohio plays in the political life of the nation began prior to its admission as the nation's seventeenth state. On July 13, 1787, the Confederation Congress (formally known as the United States in Congress Assembled) adopted the Ordinance of 1787, popularly known as the Northwest Ordinance,<sup>15</sup> to establish the framework "for the government of the territory of the United States northwest of the river Ohio."<sup>16</sup> Subsequently "reenacted" by the first United States Congress in 1789,<sup>17</sup> the Northwest Ordinance created the road map that was initially designed to permit between three and five states to join the new nation on an "equal footing with the original States,"<sup>18</sup> setting the pattern for the admission of thirty-one of the fifty states.<sup>19</sup> Ultimately, five new states (and a small portion of a sixth) were carved out of the Northwest Territory, following the path created by the Northwest Ordinance. This path to statehood included a stint at territorial governance when the Territory reached a population threshold of 5,000 "free male inhabitants" and the adoption of a permanent constitution and government that was "republican, and in conformity to the principles" of the Northwest Ordinance.<sup>20</sup>

Initially, the Northwest Ordinance provided that the Territory would be governed by a governor, a secretary, and three judges appointed by the Confederation Congress.<sup>21</sup> On October 5, 1787, Congress appointed Arthur St. Clair as Governor of the Territory.<sup>22</sup> When the population reached the 5,000 threshold, a General Assembly was to be created, consisting of the governor, a legislative council,<sup>23</sup> and a House of Representatives. The House of Representatives consisted of one elected representative for every 500 free male inhabitants up to a maximum of twenty-five members.<sup>24</sup> To qualify as an elector, a "man" had to have been a resident of the district, had to have a

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<sup>15</sup> See Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929, 929–31, 929–30 nn.6–7 (1995).

<sup>16</sup> Northwest Ordinance of 1787, pmb., reprinted in 1 U.S.C. at LVII–LIX (2012).

<sup>17</sup> In 1789, the first United States Congress reenacted the Northwest Ordinance in virtually the same form. See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

<sup>18</sup> Northwest Ordinance, *supra* note 16, § 14, art. V.

<sup>19</sup> See Duffey, *supra* note 15, at 929–30.

<sup>20</sup> Northwest Ordinance, *supra* note 16, § 9; *id.* § 14, art. V.

<sup>21</sup> *Id.* §§ 3–4.

<sup>22</sup> This appointment by the Confederation Congress was pursuant to the authority in section 3 of the Northwest Ordinance. *Id.* § 3. St. Clair continued in this position until President Jefferson removed him on November 22, 1802, in response of intemperate comments that St. Clair made at the Constitutional Convention. See ALFRED BYRON SEARS, THOMAS WORTHINGTON: FATHER OF OHIO STATEHOOD 97 (1958).

<sup>23</sup> The legislative council had three members appointed by Congress from a list of ten persons nominated by the House of Representatives. See Northwest Ordinance, *supra* note 16, § 11.

<sup>24</sup> *Id.* § 9.

“freehold in fifty acres of land in the district,” and had to be either “a citizen of one of the States, and [a] resident in the district” or (presumably if a noncitizen) a two-year resident of the district.<sup>25</sup> Thus, the franchise was not expressly limited to whites or to citizens of the United States; both citizens and noncitizens apparently voted, and there is even evidence that some non-whites voted.<sup>26</sup> On the other hand, women were doubly barred from voting by virtue of the gender and freehold requirements.

Neither the United States Constitution nor the Bill of Rights limited the power of the states to determine who could participate in the political life of the new country, and states had effectively been delegated the power to determine who could vote.<sup>27</sup> The common pattern among the original thirteen states and the three new states admitted prior to the admission of Ohio was to condition the franchise on property ownership, although taxpayer status was sufficient to permit a male to be an elector in a few states.<sup>28</sup>

The Northwest Ordinance contained the requirements for moving the three states that comprised what might be called the lower Northwest Territory to statehood when each met a population threshold of 60,000 “free inhabitants.”<sup>29</sup> Congress also provided that it could carve two additional states in the northern portion of the Northwest Territory (essentially what became Michigan and Wisconsin), and it expressly acknowledged that the process of admission could begin before the population threshold was met.<sup>30</sup> To be admitted to the Union, aspiring states were required to adopt a permanent constitution and state government that conformed to republican principles.<sup>31</sup>

An effort to slow down statehood for Ohio and thus aid the Federalists was led by Arthur St. Clair, a former President of the Confederation Congress<sup>32</sup>

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<sup>25</sup> *Id.*

<sup>26</sup> See Terzian, *supra* note 3, at 359 & n.15.

<sup>27</sup> See U.S. CONST. art. I, § 2, cl. 1 (“[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”).

<sup>28</sup> Prior to the Revolutionary War, seven of the thirteen colonies required that men own land of a specified acreage or monetary value in order to participate in elections; in other colonies ownership of personal property of a designated value could substitute for real estate. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 4 (2000). Prior to the enactment of the Northwest Ordinance, eleven of the thirteen colonies had a property ownership requirement, while New Hampshire and Pennsylvania allowed for the payment of a poll, county or state tax. See *id.* tbl.A.1.

<sup>29</sup> Northwest Ordinance, *supra* note 16, § 14, art. V.

<sup>30</sup> *Id.* (“[S]o far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.”).

<sup>31</sup> *Id.*

<sup>32</sup> St. Clair was President of the Confederation Congress from February 2, 1787, until his appointment as Governor of the Northwest Territory, during which time the Confederation Congress approved the Northwest Ordinance. See *supra* note 22; see also 1 WILLIAM HENRY SMITH, *THE ST. CLAIR PAPERS* 117 (1882); *supra* note 16.

and the controversial, autocratic Federalist Governor of the Northwest Territory.<sup>33</sup> The veto-prone St. Clair, who had made many enemies in the Northwest Territory, and his allies in Cincinnati and Marietta attempted to divide what would become Ohio into two smaller states, thus delaying statehood and pushing aside the ambitions of those who sought to make Chillicothe the capital of the new state.<sup>34</sup>

Not surprisingly, Congress and the Jefferson Administration rejected St. Clair's efforts.<sup>35</sup> On April 30, 1802, President Jefferson signed the Enabling Act for Ohio,<sup>36</sup> despite the fact that the state's population fell short of the 60,000 population threshold contemplated by the Northwest Ordinance. The purpose of the Enabling Act was "to enable the people of the Eastern division of the territory northwest of the river Ohio to form a constitution and state government, and for the admission of such state into the Union, on an equal footing with the original States."<sup>37</sup>

Why the rush? The emerging leadership in what would become Ohio wanted very badly to get rid of the despised Arthur St. Clair, but obtaining statehood was even more important.<sup>38</sup> And the Democratic-Republicans and President Jefferson wanted to strengthen their hand in Congress.<sup>39</sup> After all, the initially stalemated presidential election of 1800, which was resolved in the House of Representatives, had highlighted the importance to President Jefferson of a sympathetic Congress.<sup>40</sup>

The Enabling Act defined the boundaries of the new state<sup>41</sup> and set up the process for electing delegates who would determine "whether it be or be not expedient at that time to form a constitution and state government for the people, within the said territory" and, if expedient, "form a constitution and state government." The Act further provided that the state government "shall be republican, and not repugnant to the ordinance."<sup>42</sup>

No doubt because of their antipathy toward St. Clair, the drafters of the Enabling Act did not leave many decisions to him nor to chance. The Act accepted the date selected by the Territorial Legislature for the election of delegates, apportioned thirty-five delegates among the nine counties included within the territory, and specified the date and place for the constitutional

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<sup>33</sup> See generally STEINGLASS & SCARSELLI, *supra* note 3, at 10–14.

<sup>34</sup> See generally SEARS, *supra* note 22, at 51–52, 73–77.

<sup>35</sup> See *id.* at 81–85.

<sup>36</sup> Act of Apr. 30, 1802, ch. 40, 2 Stat. 173 [hereinafter Enabling Act].

<sup>37</sup> *Id.* at pmb., 2 Stat. at 173.

<sup>38</sup> See SEARS, *supra* note 22, at 79–81.

<sup>39</sup> See Randolph Chandler Downes, *Thomas Jefferson and the Removal of Governor St. Clair in 1802*, 36 OHIO ARCHAEOLOGICAL & HIST. Q. 62, 66 (1927).

<sup>40</sup> The 1800 election was ultimately resolved in the House of Representatives with the states voting as states. See generally JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800* (2004).

<sup>41</sup> Enabling Act § 2.

<sup>42</sup> *Id.* § 5.



convention.<sup>43</sup> The Enabling Act also made clear who could vote for delegates by dropping the freehold requirement of the Northwest Ordinance, but it expressly limited the franchise to “male citizens of the United States, who . . . shall have paid a territorial or county tax.”<sup>44</sup>

Finally, the Act said nothing about the procedures for ratifying a new constitution, but this is not surprising given the fact that the policy of holding ratification votes on proposed constitutions was rare in the eighteenth century.<sup>45</sup>

#### IV. THE 1802 CONVENTION AND THE NEW CONSTITUTION

##### A. *The 1802 Constitution*

“The last quarter of the eighteenth century was a period of intense constitution-making” and “[b]y 1800, the sixteen states that comprised the Union had adopted twenty-four constitutions.”<sup>46</sup> Ohio was the first state in the nineteenth century to adopt a state constitution, and virtually everything about Ohio’s first constitutional convention Constitution was rushed. The eastern division of the Northwest Territory had not met the “60,000 free inhabitants” population threshold of the Northwest Ordinance, but President Jefferson and his allies in Ohio and Washington badly wanted another sympathetic state in Congress.

The Enabling Act required an election for thirty-five delegates from nine counties on October 12, 1802, and the convening of the convention a scant twenty days later.<sup>47</sup> Thus, on November 1, 1802, the delegates met in Chillicothe, and in the space of twenty-five working days hammered out a constitution for the new state.<sup>48</sup>

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<sup>43</sup> *Id.* §§ 4–5.

<sup>44</sup> *Id.* § 4 (“[A]ll male citizens of the United States, who shall have arrived at full age, and resided within the said territory at least one year previous to the day of election, and shall have paid a territorial or county tax, and all persons having in other respects, the legal qualifications to vote for representatives in the general assembly of the territory, be, and they are hereby authorized to choose representatives to form a convention . . .”).

<sup>45</sup> See WALTER F. DODD, *THE REVISION AND AMENDMENT OF STATE CONSTITUTIONS* 62–64 (Da Capo Press 1970) (1910) (reviewing state policies on the submission of new constitutions to the voters in the eighteenth century and noting that “before 1784 only those [constitutions] of New Hampshire and Massachusetts were formally submitted to a vote of the people”); see also G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 30 n.1 (1998) (“Since the 1820s, it has been standard practice to submit proposed state constitutions to the state electorate for ratification.”).

<sup>46</sup> TARR, *supra* note 45, at 60.

<sup>47</sup> Enabling Act § 4.

<sup>48</sup> There is no transcript of Ohio’s 1802 Constitutional Convention, but the journal identifies the issues that the convention addressed and shows that the convention did not meet on Sundays, thus leaving the convention twenty-five working days to complete its task. See *Journal of the Convention* (1802), reprinted as *First Constitutional Convention*,

The new constitution rejected a strong executive in favor of what could fairly be called a system of legislative supremacy. Borrowing liberally from constitutions adopted in 1790 by Pennsylvania, in 1796 by Tennessee and in 1799 by Kentucky, but especially Tennessee<sup>49</sup> (and also influenced by their experiences with Governor St. Clair), the delegates adopted a constitution that created a weak governor without the veto power and with only a limited power of appointment. The governor was responsible for appointing the adjutant general, for filling vacancies when the General Assembly was in recess, for serving as the commander-in-chief of the militia, and for granting pardons and reprieves.<sup>50</sup> There was also an early form of gubernatorial term limits—six years in any eight-year period.<sup>51</sup>

The bicameral General Assembly, on the other hand, had few limitations on its plenary power. Representatives were elected for one-year terms (presumably making them closer to the people), and Senators were elected for two-year terms.<sup>52</sup> However, there were no limits on the number of terms that legislators could serve. The General Assembly had a broad power of appointment, including the secretary of state, the state treasurer, the state auditor, and all judges except justices of the peace.<sup>53</sup> It also had unrestricted power to apportion seats in the General Assembly, the power within limits to fix the number of seats in the House and Senate,<sup>54</sup> and the power to create new counties.<sup>55</sup>

The judges serving on the Supreme Court and the courts of common pleas were appointed by a joint ballot of both Houses of the General Assembly for seven-year terms,<sup>56</sup> but the Supreme Court was effectively hobbled by circuit-riding responsibility that required it to hold court annually in each county.<sup>57</sup> Such a requirement might have been appropriate in 1802 in a rural state that had nine counties, but (as soon became apparent) it would not work for a rapidly growing state in which the General Assembly had broad power to create new counties.<sup>58</sup>

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*Convened November 1, 1802, in 5 OHIO ARCHAEOLOGICAL & HIST. Q.* 80, 80 (1897) [hereinafter *Journal of the 1802 Convention*].

<sup>49</sup> JOHN D. BARNHART, *VALLEY OF DEMOCRACY: THE FRONTIER VERSUS THE PLANTATION IN THE OHIO VALLEY 1775–1818*, at 157–58 (1953).

<sup>50</sup> OHIO CONST. art. II (1802).

<sup>51</sup> *Id.* art. II, § 3.

<sup>52</sup> *Id.* art. I, §§ 3, 5.

<sup>53</sup> *Id.* art. II, § 16 (Secretary of State); *id.* art. VI, § 2 (State Treasurer and Auditor); *id.* art. III, § 8 (judges).

<sup>54</sup> *Id.* art. I, §§ 2, 6 (apportionment).

<sup>55</sup> *Id.* art. VII, § 3 (new counties).

<sup>56</sup> OHIO CONST. art. III, § 8 (1802) (judges).

<sup>57</sup> *Id.* art. III, § 10 (circuit riding).

<sup>58</sup> *See Downes, supra* note 12, at 72.

## B. *Popular Constitutionalism*

On the three large issues that implicated the role of the people—political participation, ratification, and constitutional change—broadly speaking, what can be seen as popular constitutionalism—the results of the 1802 Constitution were mixed.

### 1. *Political Participation*

The 1802 Constitution included three provisions that addressed who could participate in the political process. First, it dropped the references to “citizens” that were used to define electors in both the Northwest Ordinance and the Enabling Act, thus seeming to expand the franchise to noncitizens.<sup>59</sup> Second, it continued the liberalization of property qualifications for voting begun by the Enabling Act by not including a freehold requirement. However, it still limited the franchise to those “who have paid or are charged with a State or county tax” or are “compelled to labor on the roads of their respective townships or counties”,<sup>60</sup> an expansion that future United States Supreme Court Justice Salmon P. Chase in his 1833 history of Ohio characterized as “universal suffrage.”<sup>61</sup> And third, in its most controversial action, the delegates rejected African-American suffrage by only one vote when the President of the convention Edward Tiffin, who was to become Ohio’s first governor, left the chair and cast a tie-breaking vote to defeat African-American suffrage by a 18–17 margin.<sup>62</sup> In adopting a racial restriction for voting by expressly limiting the franchise to “white male inhabitants,” the delegates made Ohio the first northern state to include a racial restriction on voting in its constitution.<sup>63</sup>

### 2. *Ratification*

The Enabling Act neither required nor prohibited popular ratification. On November 3, 1802, the third day of deliberations, the delegates by a 32–1 margin had voted to form a constitution and a state government.<sup>64</sup> Judge

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<sup>59</sup> *But see* Johnston v. England (1817), reprinted in OHIO UNREPORTED JUDICIAL DECISIONS PRIOR TO 1823, at 149, 149–59 (Ervin H. Pollack ed., 1952) (unreported Ohio Supreme Court decision interpreting this provision against the background of well-established principles and holding that the language was not sufficiently clear to reject a statute that denied noncitizens the right to vote).

<sup>60</sup> OHIO CONST. art. IV, §§ 1, 5 (1802).

<sup>61</sup> Salmon P. Chase, *A Preliminary Sketch of the History of Ohio*, in 1 THE STATUTES OF OHIO AND OF THE NORTHWESTERN TERRITORY 9, 34 (Salmon P. Chase ed., 1833) (“All elections are by ballot and by universal suffrage.”).

<sup>62</sup> Terzian, *supra* note 3, at 368.

<sup>63</sup> G. Alan Tarr, *The Ohio Constitution of 1802: An Introduction* 4 (unpublished manuscript), <https://statecon.camden.rutgers.edu/sites/statecon/files/publications/ohio.pdf> [<https://perma.cc/9DKA-TTL8>] (quoting OHIO CONST. art. IV, § 1 (1802)).

<sup>64</sup> *Journal of the 1802 Convention*, *supra* note 48, at 88.

Ephraim Cutler, a Federalist delegate from Washington County, was the only delegate to vote in opposition, but on the final day of the convention he joined all the delegates in unanimously ratifying the constitution.<sup>65</sup> Earlier in the proceedings, Cutler had moved to have the new constitution submitted to the voters for their approval. The adoption of state constitutions without submission to state voters was still a common practice at the time,<sup>66</sup> and the pro-statehood delegates were not interested in delay. In a 27–7 vote on November 13, 1802, the pro-statehood delegates rejected Cutler’s proposal.<sup>67</sup>

### 3. *Constitutional Change*

The 1802 Constitution provided that the voters had “at all times a complete power to alter, reform or abolish their government, whenever they may deem necessary.”<sup>68</sup> But short of revolution or what has been called a “circumvention convention,”<sup>69</sup> the only provision on structured constitutional change was the section permitting the General Assembly to propose a convention to the voters by a two-thirds vote. The voters would then have the opportunity, by a majority of those voting for members of the Ohio House of Representatives, to approve a convention.<sup>70</sup> This provision was silent on the procedures that a convention would be required to follow, and it said nothing about whether a successor constitution would have to be submitted to the voters for their approval.<sup>71</sup>

On February 19, 1803, Congress recognized Ohio’s adoption of a constitution and formation of a government,<sup>72</sup> thus making Ohio the seventeenth state in the Union and the first state carved out of the Northwest Territory.

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<sup>65</sup> *Id.* at 128.

<sup>66</sup> *See supra* note 45.

<sup>67</sup> *Journal of the 1802 Convention*, *supra* note 48, at 98.

<sup>68</sup> OHIO CONST. art. VIII, § 1 (1802).

<sup>69</sup> *See* George Phillip Parkinson, Jr., *Antebellum State Constitution-Making: Retention, Circumvention, Revision* 144 (1972) (unpublished Ph.D. dissertation, University of Wisconsin) (on file with author).

<sup>70</sup> The supermajority requirement for votes on convention calls remained in the Ohio Constitution until 1912. *See infra* notes 211–14 and accompanying text.

<sup>71</sup> OHIO CONST. art. VII, § 5 (1802).

<sup>72</sup> On February 19, 1803, Congress adopted “[a]n Act to provide for the due execution of the laws of the United States, within the State of Ohio” in which it recognized that the people of Ohio did “form for themselves a constitution and state government” pursuant to the enabling act and noted that “the said state has become one of the United States of America.” Act of Feb. 19, 1803, ch. 60, 2 Stat. 202, 202–03.

## V. THE EXPERIENCE UNDER THE 1802 CONSTITUTION

A. *The Effort to Reform the First Constitution*

Ohio's first constitution may have been well-suited for a rural state with only nine counties and less than 45,000 people. It did not, however, meet the needs of a state that had experienced meteoric growth, expanding to 230,760 people and thirty-six counties by 1810 and to almost two million people and eighty-seven counties by 1850, when it was the young nation's third largest state.<sup>73</sup>

Concerns about the operation of the 1802 Constitution built up slowly but inexorably. Ironically, these concerns did not initially focus on the concentration of power in the General Assembly, but rather on the inability of the General Assembly to address caseload and other problems with the judiciary.<sup>74</sup> In 1817, Governor Thomas Worthington, Ohio's sixth governor and an influential member of the 1802 Constitutional Convention, urged the holding a convention, as did his successor, Governor Ethan Allen Brown, the following year.<sup>75</sup>

In 1818, by the requisite two-thirds vote in each house the General Assembly voted to put a convention call on the ballot. The 1802 Constitution had embedded a supermajority voting requirement on the convention call by requiring the call be approved by a majority of those voting for members of the Ohio House of Representative. However, on October 12, 1819, the voters rejected the call by a vote of 29,315 to 6,987,<sup>76</sup> an action one commentator characterized as reflecting the continued satisfaction with the constitution.<sup>77</sup>

Still, all was not well. Interest in revision of the state constitution increased as a result of the financial crises that began with the Panic of 1837,<sup>78</sup> and in 1838, Caleb Atwater, in the first book-length history of Ohio, identified many problems with the constitution, especially those relating to the great power in the hands of the General Assembly. Atwater expressed his surprise "that no efforts have yet been made, to obtain, the greatest and principal amendment, imperiously demanded, if we wish for permanency of a republican form of government, in Ohio."<sup>79</sup> Atwater acknowledged the

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<sup>73</sup> U.S. DEP'T OF COMMERCE, NAT'L TECH. INFO. SERV., DECENNIAL CENSUS OF POPULATION, 1800 TO 2000, BY COUNTY (Mar. 2001).

<sup>74</sup> McDonald, *supra* note 3, at 62.

<sup>75</sup> *Id.* at 63.

<sup>76</sup> PATTERSON, *supra* note 4, at 161–62; *see also Ohio Constitution—Law and History: Calls for Conventions*, CLEV.-MARSHALL L. LIBR., <http://guides.law.csuohio.edu/ohioconstitution/callsconventions> [<https://perma.cc/C47S-Z6FF>] (last updated Feb. 26, 2016) [hereinafter *Calls for Conventions*].

<sup>77</sup> *See* Parkinson, *supra* note 69, at 145.

<sup>78</sup> *See generally* FRANCIS P. WEISENBURGER, THE PASSING OF THE FRONTIER STATE, 1803–1850, in 3 THE HISTORY OF THE STATE OF OHIO, *supra* note 3, at 328–62 (discussing the Panic of 1837 and its aftermath).

<sup>79</sup> CALEB ATWATER, A HISTORY OF THE STATE OF OHIO 172 (2d ed. 1838).

difficulty of amending the constitution, but he suggested that amendments be placed “before the people, article by article.”<sup>80</sup> There was no express authority under the Ohio Constitution for conventions placing limited constitutional revision on the ballot, and Atwater did not discuss whether his proposal could be implemented. Nonetheless, there is no evidence that Atwater’s specific suggestion gained any traction, though support for a new convention continued to build through the 1840s.

The movement for constitutional change in Ohio took place during what Professor Alan Tarr, a participant in this Symposium,<sup>81</sup> has colorfully described as the “orgy of nineteenth-century constitution-making” that swept the country.<sup>82</sup> Between 1830 and 1850, sixteen of the twenty-eight states in the Union (excluding Ohio) held constitutional conventions that resulted in the adopting of initial or new constitutions. Eight of these states adopted their first constitutions<sup>83</sup> while the other eight states held conventions to adopt new or revised constitutions.<sup>84</sup> Thus, on the eve of Ohio’s 1850–1851 convention, more than half the states had held constitutional conventions during the prior two decades.<sup>85</sup> As in Ohio, the people of many of these states had experienced severe economic problems resulting in overspending for internal improvements, bank failures, and the profligate use of the state’s credit; also like Ohioans, the people generally blamed their legislatures for these economic woes.<sup>86</sup>

Interest in constitutional revision and concerns about the legislative branch in Ohio began to peak in the 1840s. Support for the Jeffersonian ideal—trust in the legislative branch, the branch of government closest to the people—began to wane, and the people no longer trusted the General Assembly.

Most of the popular concerns involved fiscal issues, including adoption of new forms of taxation, heavy state borrowing, expenditures, special tax breaks, and other subsidies for banks and canal, turnpike, and railroad companies. These concerns were exacerbated by the continued fallout from the Panic of

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<sup>80</sup> *Id.* at 175.

<sup>81</sup> See generally G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 OHIO ST. L.J. 237 (2016).

<sup>82</sup> TARR, *supra* note 45, at 97.

<sup>83</sup> These include Rhode Island (1842); Arkansas (1836); California (1849); Florida (1839); Iowa (1846); Michigan (1835); Texas (1845); Wisconsin (1848). Rhode Island, one of the original 13 states, had been operating under its Colonial Charter until the adoption of its first state constitution in 1842. See BOOK OF THE STATES 2015, Table 1.1, *supra* note 5, at 11.

<sup>84</sup> New constitutions were adopted in this period in the following states: Delaware (1831); New York (1846); Pennsylvania (1938); Virginia (1830); Tennessee (1835); Illinois (1848); Louisiana (1845); Mississippi (1832). See JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 8–9 (2006).

<sup>85</sup> See McDonald, *supra* note 3, at 59 (“While the Ohio convention was in session, conventions in five other states were engaged in a similar work.”).

<sup>86</sup> TARR, *supra* note 45, at 111–13 (“The main impetus for constitutional change came from the economic collapse of 1837, when nine states defaulted on their debts.”).

1837; there were also concerns about the legislative process, which was characterized by special or private legislation and the adoption of special legislation for corporate charters as well as by logrolling, gerrymandering, and the wholesale creation of new counties.<sup>87</sup> And the judiciary was not able to function efficiently with heavy caseloads and a supreme court that had burdensome circuit-riding responsibilities.<sup>88</sup>

Despite the popular support for a convention, the General Assembly refused to approve constitutional calls in 1844, 1846, and 1847.<sup>89</sup> During this period, “[c]onstitutional reform quickly became the leading topic of state politics.”<sup>90</sup> The Democrats supported a convention, and the Democratic press “derided the 1802 constitution [and] reiterated standard tenets of [Jefferson’s] generational revision theory.”<sup>91</sup> Whigs, on the other hand, opposed a convention call, and their press derided the Democrats as radicals.<sup>92</sup> Ultimately, it took not only the financial crises of the 1830s, including the fiscal abuses of the General Assembly, but also the threat of a circumvention convention and a reapportionment fight in Hamilton County in 1840s to break the political stalemate.<sup>93</sup>

With the support of Whig Governor William Bebb and the Free Soil Party, a new political party committed to the abolition of slavery, on March 23, 1849, the General Assembly provided the two-thirds vote necessary to put the question of holding a constitutional convention on the fall ballot.<sup>94</sup>

### B. Samuel Medary and the Second Ohio Constitutional Convention

The issues before the voters on the convention call had been framed, at least in part, by the work of the controversial Samuel Medary. Best known for his national activities in the 1860s as a Peace Democrat, as a fierce opponent of Lincoln’s conduct of the Civil War, as the publisher of the controversial anti-war newspaper, *Crisis*, and for his indictment in 1864 for conspiracy against the federal government,<sup>95</sup> early in his career Medary had been deeply engaged in Ohio politics. A Jacksonian Democrat, he served single terms in both the Ohio Senate and the Ohio House in the 1830s, and in 1838 he became editor of the *Ohio Statesman*, the key Democratic newspaper.

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<sup>87</sup> See DAVID M. GOLD, *DEMOCRACY IN SESSION: A HISTORY OF THE OHIO GENERAL ASSEMBLY* 214–15 (2009); WEISENBURGER, *supra* note 78, at 478; Downes, *supra* note 12, at 71–74.

<sup>88</sup> See WEISENBURGER, *supra* note 78, at 478; Downes, *supra* note 12, at 71–72.

<sup>89</sup> McDonald, *supra* note 3, at 70.

<sup>90</sup> Parkinson, *supra* note 69, at 152.

<sup>91</sup> *Id.* at 151.

<sup>92</sup> *Id.* at 158–59.

<sup>93</sup> See *id.* at 153–62.

<sup>94</sup> *Id.* at 162; see also McDonald, *supra*, note 3, at 71 & n.4.

<sup>95</sup> See REED W. SMITH, *SAMUEL MEDARY & THE CRISIS: TESTING THE LIMITS OF PRESS FREEDOM* 1–3 (1995).

Medary was a zealous supporter of constitutional revision for Ohio. After the March 23, 1849 vote to put a convention call on the ballot, he announced his plan to publish twenty-six weekly pamphlets, suitable for binding, titled *The New Constitution*.<sup>96</sup> True to this commitment, he published weekly pamphlets devoted to constitutional revision from May 5, 1849, to November 17, 1849.<sup>97</sup> Strongly criticizing the Ohio Constitution and the abuses of the General Assembly and freely sharing stories about constitutional revision in other states, Medary sought to reassure Ohioans who might have feared the changes that a new constitution might introduce. His “emphasis was a response to Whig fears of untried, drastic Democratic ideas. He showed the Ohio revision movement would not necessarily bring chaos and an end to ‘law and order.’”<sup>98</sup>

On October 9, 1849, the voters approved the convention call by a vote of 145,698 to 89,672 (which included 51,167 “no” votes and 38,505 voters who did not vote on the convention call).<sup>99</sup> In the final issue of *The New Constitution*, Medary celebrated this outcome and urged his readers to continue the fight: “The battle is not yet ended—the friends of Constitutional Reform have yet a task to perform, if they would reap the advantages which a change of the Constitution offers to the state.”<sup>100</sup>

He also warned the friends of constitutional reform that:

Those who opposed the Convention are untiring in their efforts still to defeat a new Constitution. They will seek the suffrages of the people, as Delegates to the Convention, and while professing to aid in the formation of a new Constitution, they will support such measures, as, if engrafted on the Constitution, will ensure its defeat . . . .<sup>101</sup>

Finally, he urged his readers to take great care in electing delegates. He reminded them of the issues he thought a convention should address, most of which concerned the need to curb the General Assembly.<sup>102</sup>

On February 22, 1850, pursuant to the vote on the convention call, the General Assembly passed an act calling for the election of delegates on April 1, 1850, and scheduled the convention for May 6, 1850, in Columbus.<sup>103</sup>

<sup>96</sup> Samuel Medary, *Prospectus of the New Constitution*, 1 NEW CONST. 1, 1 (1849).

<sup>97</sup> Samuel Medary, *The End of the Volume—To the Friends of Constitutional Reform*, 1 NEW CONST. 401, 401 (1849).

<sup>98</sup> Parkinson, *supra* note 69, at 156–57.

<sup>99</sup> See PATTERSON, *supra* note 4, at 99. The total votes cast at the election were 235,370 and 145,698 or 61.9% of the voters supported the convention call, easily meeting the supermajority voting requirement.

<sup>100</sup> Medary, *supra* note 97, at 401.

<sup>101</sup> *Id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See* Act of Feb. 22, 1850, 48 Ohio Laws 19, 19.



## VI. THE 1851 CONSTITUTION AND THE FUTURE OF CONSTITUTIONAL REVISION IN OHIO

The Constitution proposed by the 1850–1851 Convention addressed many of the substantive defects of the 1802 Constitution. It “re-calibrated” the relationship among the three branches of government by placing substantive and procedural limitations on the General Assembly.<sup>104</sup> It slightly expanded the governor’s power but rejected the effort to give the governor the veto power.<sup>105</sup> Significantly, it gave voters the power to elect officials that previously had been selected by the General Assembly, including the Auditor, Secretary of State, Treasurer, Attorney General, and both common pleas and Ohio Supreme Court judges.<sup>106</sup> It also created the new position of an elected Lieutenant Governor.<sup>107</sup>

The 1851 Constitution did not expand participation in the political process. It continued to limit the vote to white males by summarily rejecting efforts to extend the franchise to non-whites and to women,<sup>108</sup> and it expressly limited the franchise to citizens.<sup>109</sup> Nonetheless, it broadened the role of white male voters in constitutional revision by adopting new methods for amending the constitution. It continued the policy of permitting the General Assembly by a two-thirds vote to put convention calls on the ballot, but and it adopted a new provision requiring that the question of whether to have a convention be automatically placed on the ballot every twenty years.<sup>110</sup> Finally, it also adopted a new provision permitting the General Assembly to propose amendments to the voters by a three-fifths vote, and it required that all amendments proposed by future conventions be submitted to the voters.<sup>111</sup>

### A. General Assembly Proposed Conventions

The policy of permitting the General Assembly by a two-thirds vote to put a convention call on the ballot was not controversial, and the proposed

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<sup>104</sup> STEINGLASS & SCARSELLI, *supra* note 3, at 35–36.

<sup>105</sup> *Id.* at 37–38.

<sup>106</sup> *See id.*

<sup>107</sup> *See id.* at 34–39; *see also* Downes, *supra* note 12, at 72.

<sup>108</sup> *See* STEINGLASS & SCARSELLI, *supra* note 3, at 30–33.

<sup>109</sup> *See* OHIO CONST. art. V, § 1 (1851) (“Every white . . . male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the state one year next preceding the election, . . . shall . . . be entitled to vote at all elections.”). In the mid-nineteenth century, a number of states followed the lead of Wisconsin and adopted a two-step procedure extending the vote to aliens who had declared their intent to become citizens. *See* KEYSSAR, *supra* note 28, at 27. The issue of alien voting was a contested issue in the 1850–1851 Convention, but the delegates limited the vote to citizens, thus effectively agreeing with 1817 decision of the Ohio Supreme Court limiting the vote to citizens. *See* Johnston v. England (1817), *reprinted in* POLLACK, *supra* note 59, at 149–59.

<sup>110</sup> *See* OHIO CONST. art. XVI, §§ 2–3 (1851).

<sup>111</sup> *See id.* art. XVI, §§ 1, 3.

constitution borrowed the substance of this provision from the 1802 Constitution, including the supermajority requirement for voter approval of the call.<sup>112</sup>

### B. *Mandatory Convention Calls*

The proposed constitution contained a new provision requiring the General Assembly to put the following question on the ballot every twenty years: “Shall there be a convention to revise, alter, or amend the constitution[?]”<sup>113</sup> This proposal was hotly debated. Proponents wanted a method to empower the people and eliminate the need to first go through the General Assembly.<sup>114</sup> Mindful of the recent difficulty of getting the General Assembly to act, they were not willing to wait another half century before another convention.<sup>115</sup> They wanted each generation to have a chance to act and address the fundamentals of the constitution.<sup>116</sup> Opponents, on the other hand, objected because the proposal took the initiation of constitutional change away from the legislature.<sup>117</sup>

Mr. Rufus P. Ranney, a delegate from Trumbull County, future Ohio Supreme Court Justice, and Chairman of the standing committee on Future Amendments to the Constitution, strongly supported the proposed mandatory call:

We calculate that a generation of men passes way about once in twenty years, and this therefore is the period that has been fixed upon, for the laws of one to pass into the hands of another. I see no objections to such a provision. It is right in theory, and if it is right in theory, it will work no wrong in practice. It certainly cannot be false to say that each generation is the best judge of what institutions are best fitted for its condition; and if it is true, it must be also true that no wrong is done either to them or to us, to place it in their power to give their assent or dissent to those that exist, and if necessary, to take the earliest, easiest and most feasible means, to adapt their institutions to their peculiar condition and circumstances.<sup>118</sup>

The delegates were aware that a handful of states, including New York in its recently adopted 1846 Constitution,<sup>119</sup> had adopted mandatory convention

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<sup>112</sup> See *id.* art. XVI, § 2.

<sup>113</sup> See *id.* art. XVI, § 3.

<sup>114</sup> See 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850–51, at 429–37 (1851) [hereinafter 1850–51 DEBATES].

<sup>115</sup> See *id.* at 428.

<sup>116</sup> *Id.* at 430.

<sup>117</sup> See *id.* at 429–37.

<sup>118</sup> *Id.* at 430.

<sup>119</sup> Fourteen states currently have mandatory convention calls, but when the 1850–1851 Convention convened, only New Hampshire, Indiana, and New York had mandatory

calls, a device with philosophical roots in the writings of Thomas Jefferson.<sup>120</sup> And one delegate even suggested that “an appeal to the people, once in twenty years, would have a salutary effect upon their public character.”<sup>121</sup> Some delegates, however, were concerned about the need for a mandatory convention call, especially in light of the decision to give the General Assembly the power to propose amendments directly to the voters.<sup>122</sup> Mr. Ranney did not buy these arguments, and he sought to assuage the concerns of those who expressed concern about voters being forced to vote on convention calls by pointing to the supermajority requirement for the vote on convening a new constitution. In addition, he stated that “[i]f the people do not need a revision of their organic law, all they have to do is not to vote for it. To refrain from voting is to vote in the negative.”<sup>123</sup>

### C. General Assembly Proposed Amendments

The new constitution also proposed giving the General Assembly the power to propose amendments directly to the voters by a three-fifths vote, but it subjected such amendments to a supermajority vote requirement.<sup>124</sup> There was no sentiment expressed in support of eliminating the supermajority requirement.<sup>125</sup> There was, however, a proposal to permit the General Assembly to propose amendments by a bare majority, but this proposal would have required legislative approval in two successive sessions.<sup>126</sup> After hearing the argument from Mr. Ranney that the double assent requirement could lengthen the time for an amendment to five years (given Ohio’s commitment to biennial legislative sessions), the delegates rejected this proposal.<sup>127</sup>

### D. Popular Ratification

The 1802 Constitution had not addressed the issue of popular ratification, but the proposed 1851 Constitution contained a provision requiring that no amendments to the constitution proposed by a convention “shall take effect, until . . . submitted to the electors of the state, and adopted by a majority of

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calls. See BOOK OF THE STATES 2015, *Table 1.4*, *supra* note 9, at 16; Dinan, *supra* note 9, at 399–401.

<sup>120</sup> Dinan, *supra* note 9, at 398.

<sup>121</sup> 1850–51 DEBATES, *supra* note 114, at 430.

<sup>122</sup> See *id.* at 429–30.

<sup>123</sup> *Id.* at 430.

<sup>124</sup> See OHIO CONST. art. XVI, § 1 (1851) (“[I]f a majority of the electors, voting at such election, shall adopt such amendments, the same shall become a part of the constitution.”).

<sup>125</sup> McDonald, *supra* note 3, at 195.

<sup>126</sup> See 1850–51 DEBATES, *supra* note 114, at 427–28.

<sup>127</sup> See McDonald, *supra* note 3, at 195; see also 1850–51 DEBATES, *supra* note 114, at 428.

those voting thereon.”<sup>128</sup> This provision rejected the application of a supermajority requirement not only to new constitutions proposed by conventions but also to amendments proposed by conventions.<sup>129</sup> And this rejection of the supermajority requirement for convention-proposed amendments would become important in the twentieth century when the 1912 Convention submitted multiple amendments, but not a new constitution, to the voters.<sup>130</sup>

Though not required to do so by the 1851 Constitution, the delegates also submitted the new constitution to the voters. As part of its legislation implementing the vote to hold a convention, the General Assembly had adopted a statutory provision requiring the submission of the new constitution to the voters, a provision that may not have been binding on the Convention.<sup>131</sup> In any case, given the political climate surrounding the Convention, it is difficult to imagine the delegates not submitting the new constitution to the voters. The Constitution included Schedules providing for the submission of the proposed constitution to the voters on June 17, 1851, and, assuming its approval, establishing September 1, 1851, as the effective date of the new constitution.<sup>132</sup>

The Schedule, however, contained a supermajority requirement, conditioning approval on a favorable vote of “a majority of all the votes, cast at such election.”<sup>133</sup> The fact that the proposed constitution and the companion proposal on liquor were the only issues on the 1851 ballot effectively negated the supermajority requirement. The voters by a comfortable, though not overwhelming, majority approved the new constitution by a vote of 125,564 to 109,276, excluding two counties that did not timely submit their returns.<sup>134</sup>

### E. *Fear of Failure*

Of great concern to the delegates was the fear that controversial proposals could lead to the rejection of the entire constitution. This concern arose during the discussions of the judicial Article, but the controversial liquor issue was the greatest threat to the new constitution. The Convention was divided between those who wanted to bar completely the sale of liquor and those who wanted to license liquor and thus permit its sale.<sup>135</sup> Cleverly, the Convention presented the liquor question as a separate, though confusing, issue to the

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<sup>128</sup> OHIO CONST. art. XVI, § 3 (1851).

<sup>129</sup> *See id.*

<sup>130</sup> *See infra* notes 193–201 and accompanying text.

<sup>131</sup> McDonald, *supra* note 3, at 74.

<sup>132</sup> *See* OHIO CONST. sched., § 9 (1851).

<sup>133</sup> *Id.* sched., § 17.

<sup>134</sup> *See* PATTERSON, *supra* note 4, at 109.

<sup>135</sup> *See* Terzian, *supra* note 3, at 375–76.

voters, thus making it unlikely that this issue would lead to the rejection of the constitution.<sup>136</sup>

## VII. THE NEW TOOLS AND CONSTITUTIONAL REVISION IN THE SECOND HALF OF THE NINETEENTH CENTURY

The 1851 Constitution created new tools for future revisions of the Ohio Constitution, but these new tools did not make constitutional revision appreciably easier.

### A. Legislatively Proposed Amendments

The biggest disappointment to those who believed that additional constitutional change was needed resulted from the application of the supermajority voting requirement to amendments proposed by the General Assembly.<sup>137</sup> The requirement that a proposed amendment receive positive votes from a majority of those voting at an election (and not simply a majority of those voting on the particular issue) created an impediment to constitutional revision in elections that involved complex proposals, crowded ballots, or uninterested voters. Prior to 1912, proposed amendments and convention calls could only be presented to voters at general elections,<sup>138</sup> and voter fatigue—as the political scientists now call it—contributed to the defeat of many popular proposals in the years following the adoption of the 1851 Constitution.

For example, on October 13, 1857, a proposal for annual legislative sessions received 151,202 positive votes and 31,890 negative votes, but despite this almost 5-to-1 margin it failed because the positive 151,202 votes it received were less than 50% of the total vote of 332,126 at that election.<sup>139</sup> Likewise, on November 3, 1891, a proposal involving the taxation of real estate and tangible and intangible personal property received 303,177 positive votes and 65,014 negative votes, but despite this almost 5-to-1 margin it failed

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<sup>136</sup>Under the separate-vote on the liquor issue, which was presented on a separate ballot, the voters were asked whether they wanted to permit licenses to sell intoxicating liquors. *See* OHIO CONST. sched., § 18 (1851). Regardless of the vote, a provision on liquor would be included in the new constitution, assuming the voters approved the proposed constitution. *See id.* (License to Traffic in Intoxicating Liquors). On the liquor question, there were 104,255 “yes” votes and 113,237 “no” votes, thus resulting in the adoption of Article XV, section 9, prohibiting the granting of licenses to traffic in intoxicating liquors. *See id.*; *see also* STEINGLASS & SCARSELLI, *supra* note 3, at 34.

<sup>137</sup>*See* OHIO CONST. art. XVI, § 2.

<sup>138</sup>*See id.* art. XVI, §§ 1–3.

<sup>139</sup>*See* PATTERSON, *supra* note 4, at 161–62; *see also* *Ohio Constitution—Law and History: Table of Proposed Amendments*, CLEV.-MARSHALL L. LIBR., <http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionamendmentstable> [<https://perma.cc/E9XU-A64A>] (last updated Jan. 28, 2016) [hereinafter *Table of Proposed Amendments*].

because the 303,177 positive votes it received were less than 50% of the total vote of 803,328 at that election.<sup>140</sup>

Indeed, between 1852 and 1911, the voters approved only eleven of the thirty-seven amendments proposed by the General Assembly.<sup>141</sup> But of the twenty-six amendments that the voters defeated, nineteen received more positive than negative votes, but they failed under the supermajority requirement.<sup>142</sup> The only significant exception to this pattern occurred during the brief period between 1903 and 1905, when state law permitted votes for party tickets to constitute positive votes on party-endorsed ballot issues.<sup>143</sup> During this period, the voters approved five of the eight proposed amendments by large margins, including a 1903 amendment that first gave the Ohio governor the veto power.<sup>144</sup>

### B. *Constitutional Conventions*

Nor did Ohio have a positive experience with constitutional conventions during the last half of the nineteenth century. Pursuant to the mandatory call, the voters in 1871 approved a convention with a 72% favorable vote of those voting on the call,<sup>145</sup> but in 1874 they rejected the proposed constitution by a similar overwhelming margin.<sup>146</sup> The proposed constitution was long and detailed and appeared to have something to offend almost everyone; “[t]he convention itself was in session so long that people grew suspicious.”<sup>147</sup> That might have been enough to doom it, but the supporters of a new constitution also had to contend with the baggage of controversial side issues.<sup>148</sup>

As in 1850–1851 when the delegates had to deal with the liquor issue,<sup>149</sup> the 1873–1874 delegates were confronted with issues that they feared could jeopardize the constitution—propositions on minority party representation on the courts, on aid to the railroads, and on traffic in intoxicating liquors.<sup>150</sup> By

<sup>140</sup> PATTERSON, *supra* note 4, at 271.

<sup>141</sup> See *Table of Proposed Amendments*, *supra* note 139.

<sup>142</sup> See STEINGLASS & SCARSELLI, *supra* note 3, at 44.

<sup>143</sup> *Id.*

<sup>144</sup> See *id.*; see also *Table of Proposed Amendments*, *supra* note 139.

<sup>145</sup> See PATTERSON, *supra* note 4, at 170–71; see also *Calls for Conventions*, *supra* note 76. Of the 459,990 voters who voted for Representatives, 267,618 voted for the call, 104,231 voted against the call, and 88,141 did not vote on the call. *Id.* Thus, 58.2% of the total votes at the election were in favor of the call, which easily met the supermajority requirement.

<sup>146</sup> See *infra* note 152.

<sup>147</sup> See PATTERSON, *supra* note 4, at 26; see also *id.* at 26–27, 345–48 (detailing public suspicion and contemporary newspaper comments on the proposed Constitution of 1874).

<sup>148</sup> See STEINGLASS & SCARSELLI, *supra* note 3, at 39–41 (discussing the 1873–1874 convention).

<sup>149</sup> See *supra* notes 135–36 and accompanying text.

<sup>150</sup> See Proposed Constitution of 1874 sched., § 10, reprinted in PATTERSON, *supra* note 4, at 182, 232–34.

placing these propositions on the ballot separately, the delegates hoped that opposition to any of the controversial issues would not lead to the rejection of the new constitution. The Schedule, however, required that a separate proposition would only be adopted if the voters approved both it and the constitution,<sup>151</sup> thus giving opponents of the three separate propositions a strong incentive to urge votes against the constitution. And the voters rejected the proposed constitution and the three side issues by substantial margins.<sup>152</sup>

On November 3, 1891, the voters—perhaps chastened by the experience with the proposed 1874 Constitution—rejected the convention call by a vote of 161,722 to 99,789 in an election in which 541,817 voters declined to cast a ballot on the convention call.<sup>153</sup> Nonetheless, interest in a convention continued in the 1890s,<sup>154</sup> and in 1896 the General Assembly voted to put a convention call on the ballot.<sup>155</sup> The joint resolution placing the call on the ballot, however, contained details concerning the mode of voting, the printing of ballots, the length of the convention (no more than 90 days), and the compensation of delegates.<sup>156</sup> Joint resolutions, which are not signed by governors, cannot supplant state statutes, so the Ohio Supreme Court concluded the joint resolution was void and ordered state officials not to put the convention call on the ballot.<sup>157</sup> As a result, voters did not have an opportunity to vote on a proposed convention in the last decade of the 1800s.

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<sup>151</sup> *See id.* sched., § 13.

<sup>152</sup> Isaac Patterson summarized the results of the 1874 vote:

The Constitution was submitted to the electors August 18, 1874. The total vote cast was 353,054, of which there were cast for the Constitution 102,885, and against it 250,169. Three separate propositions were submitted with the following results: for minority representation, 73,615, and 259,415 against; for railroad aid, 45,416, and 296,658 against; for licensing the liquor traffic 172,252, and 179,538 against.

*See* PATTERSON, *supra* note 4, at 176; *see also* STEINGLASS & SCARSELLI, *supra* note 3, at 41.

<sup>153</sup> *See* PATTERSON, *supra* note 4, at 269. The total vote cast at the 1891 election was 803,328, so the convention call would have had to receive 401,665 votes to approve the convention call under the applicable supermajority voting requirement. *See id.* at 269–70; *see also* OHIO CONST. art. XVI, § 3 (1851) (establishing the supermajority requirement).

<sup>154</sup> The proposed 1874 Constitution would have retained the provisions permitting the General Assembly to propose amendments and to put convention calls on the ballot, but it would have rejected the 20-year mandatory convention calls. *See* Proposed Constitution of 1874 art. XVII, reprinted in PATTERSON, *supra* note 4, at 182, 228–29.

<sup>155</sup> *See* S.J. Res. 14, 72d Gen. Assemb., Reg. Sess. (Ohio 1896), 92 Ohio Laws 787.

<sup>156</sup> *Id.*

<sup>157</sup> *State ex rel. Attorney General v. Kinney*, 47 N.E. 569, 569 (Ohio 1897). *But see State ex rel. Foreman v. Brown*, 226 N.E.2d 116, 118 (Ohio 1967) (holding that “the General Assembly may authorize such special election on a certain date by a joint resolution without enacting a statute”).

### VIII. CONSTITUTIONAL REVISION IN OHIO AT THE DAWN OF THE TWENTIETH CENTURY

State constitutional revision came to Ohio during the Progressive Era, when the nation had its third and final wave of state constitutional conventions and Ohio held its fourth constitutional convention, the Constitutional Convention of 1912. Between 1900 and 1920, thirteen states held constitutional conventions.<sup>158</sup> And beginning with South Dakota in 1898 and ending with Massachusetts in 1918, sixteen states, primarily in the west and upper Midwest,<sup>159</sup> embraced the constitutional initiative through their conventions or through other methods of constitutional revision.

Support for the initiative and referendum had been building in Ohio during the first decade of the 1900s. In 1906 the Senate approved a proposed amendment for the initiative and referendum, but the House ignored it.<sup>160</sup> Two years later the Senate and the House approved different versions of the initiative and referendum, but they were not able to or at least did not reconcile the differences.<sup>161</sup> The state's leading proponent of direct democracy, Herbert S. Bigelow, a minister at Cincinnati's Vine Street Congregational Church, a protégé of Cleveland's legendary mayor Tom Johnson, and a strong backer of Henry George's single-tax policies, saw this as political chicanery; he "declared that he would take the issue before the people at the next election."<sup>162</sup>

After another unsuccessful attempt to get the General Assembly to propose an initiative and referendum amendment in 1910, Bigelow and his allies turned their attention to the mandatory convention call that was scheduled to be on the ballot in 1911.<sup>163</sup> Political pressure for a convention led the General Assembly to put the call on the ballot in 1910, one year ahead of schedule, and Ohio voters who voted on the convention call approved it by an overwhelming vote of greater than 10-to-1.<sup>164</sup> That margin of support (notwithstanding those who did not vote on the call) was made possible not only by the broad array of interests that supported a convention but also by a state law that provided that straight party votes were counted as votes in favor

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<sup>158</sup> DINAN, *supra* note 84, at 8–9.

<sup>159</sup> See Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 16 tbl.1 (1997) (discussing the regional origins of direct democracy).

<sup>160</sup> HOYT LANDON WARNER, *PROGRESSIVISM IN OHIO 1897–1917*, at 181, 195–96, 204 n.21 (1964).

<sup>161</sup> *Id.* at 195–96.

<sup>162</sup> *Id.* at 196.

<sup>163</sup> *Id.* at 236, 295–96.

<sup>164</sup> The vote was 693,263 to 67,718 with 171,281 not voting on the convention call. See *Calls for Conventions*, *supra* note 76.



of issues endorsed by the political parties; and the two leading parties had endorsed holding a convention.<sup>165</sup>

Support for a constitutional convention was not limited to those whose primary focus was the initiative and the referendum. Diverse segments of the population, including many who viewed the current constitution as an obstacle for the proper governance of the state, lined up in favor of a convention.<sup>166</sup> There was, in the words of Hoyt Landon Warner, the foremost Ohio historian of this era, a “pent-up demand . . . for such reforms.”<sup>167</sup> Warner identified support for a constitutional convention as coming from several groups:

The Ohio State Board of Commerce, the precursor of the Ohio Chamber of Commerce, which wanted changes in the tax system.<sup>168</sup>

The Direct Legislation League (a national Progressive organization with heavy Ohio involvement), which supported direct democracy—the constitutional initiative, the statutory initiative, and the referendum—as ways to get around the General Assembly and appeal directly to the people.<sup>169</sup>

Labor, which wanted to remove the role of the constitution and the courts as obstacles to social welfare legislation.<sup>170</sup>

The liquor interests, which wanted a loosening of restrictions on the sale of liquor.<sup>171</sup>

Municipalities, which wanted home rule so that cities could manage their own affairs without having to repeatedly run to Columbus for special legislative enactments.<sup>172</sup>

The Ohio Woman Suffrage Association, which wanted Ohio to become the first state east of the Mississippi to extend the vote to women.<sup>173</sup>

The 1851 Constitution contained scant details about the operation of a convention other than specifying that the number of delegates would be the same as the number of members in the House of Representatives (which at the time was 119).<sup>174</sup> In 1911, however, the General Assembly accepted the proposal of William Green, President of the Senate and future President of the American Federation of Labor, that the delegates be elected on a non-partisan

<sup>165</sup> See STEINGLASS & SCARSELLI, *supra* note 3, at 47.

<sup>166</sup> WARNER, *supra* note 160, at 295.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> WARNER, *supra* note 160, at 295.

<sup>173</sup> *Id.*

<sup>174</sup> Prior to the reapportionment revolution and the approval by the voters in 1967 of an amendment that established the size of the House of Representatives at ninety-nine, the number of representatives was based on a complex, fluctuating formula. See GOLD, *supra* note 87, at 423–25; see also OHIO CONST. art. XI § 2 (as amended in 1967). At the time of the 1912 Convention, there were 119 members in the House of Representatives. See Lloyd Sponholtz, *The 1912 Constitutional Convention in Ohio: The Call-up and Nonpartisan Selection of Delegates*, 79 OHIO HIST. 209, 212 (1970).

basis.<sup>175</sup> This decision to circumvent the political parties, according to the Cleveland Federation of Labor, “gives workers the opportunity to unite on good men . . . who will guard the interest of the workers in making a new Constitution.”<sup>176</sup> In addition to requiring a non-partisan ballot, the Act provided for the nomination of delegates only by petition.<sup>177</sup>

Under the constitutionally based apportionment standards in effect at the time, every Ohio county had at least one state representative, and the larger counties had multiple representatives.<sup>178</sup> The election of convention delegates was on a county-by-county basis, so the effort to organize county slates, especially in the larger multidelegate counties, was an important part of the effort to elect sympathetic delegates.<sup>179</sup>

Though non-partisan, the election of delegates was vigorously contested with the Progressive forces led by the Progressive Constitutional League (PCL), a new organization founded by Herbert S. Bigelow.<sup>180</sup> The PCL organized extensively, working with other organizations, especially advocates of home rule and the labor movement, to put forward slates of candidates pledged to the pro-direct democracy position.<sup>181</sup> Their efforts were successful, as a majority of the delegates to the Convention had pledged their support for some version of direct democracy before the start of the convention.<sup>182</sup>

## IX. THE CONSTITUTIONAL CONVENTION OF 1912

Convened on January 8, 1912, in Columbus, the Constitutional Convention elected Herbert S. Bigelow president on the eleventh ballot.<sup>183</sup>

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<sup>175</sup> See S.B. 15, 79th Gen. Assemb., Reg. Sess. § 15 (Ohio 1911), 102 Ohio Laws 298, 302; see also Michael Pierce, *Organized Labor and the Law in Ohio*, in 2 THE HISTORY OF OHIO LAW 883, 897 (Michael Les Benedict & John F. Winkler eds., 2004).

<sup>176</sup> See Pierce, *supra* note 175, at 897 (alteration in original) (quoting Cleveland Federation of Labor, *Labor Day Year Book and Souvenir Program of the Ohio State Federation of Labor* 26 (1912)); see also *id.* at 896–99 (discussing the important role labor played in securing and supporting the convention).

<sup>177</sup> Ohio S.B. 15 § 6, 102 Ohio Laws at 299. The Act also permitted, but did not require, delegates to file a statement on whether they favored the separate submission to the voters of a question on the licensing of liquor. See *id.* § 11, 102 Ohio Laws at 301.

<sup>178</sup> Amendment Giving Each County at Least One Representative, 1903, *reprinted in* PATTERSON, *supra* note 4, at 279 (amending OHIO CONST. art. XI, § 2 (1851)) (“[E]ach county shall have [at least] one representative.”).

<sup>179</sup> See generally Sponholtz, *supra* note 174, at 213–14.

<sup>180</sup> See *id.* at 213. Bigelow was a long-time supporter of the initiative and referendum, but Warner suggests that Bigelow and his allies were primarily interested in the single-tax and that they saw the initiative as a way to achieve that goal. See WARNER, *supra* note 160, at 195, 295–96, 307–08 & n.3.

<sup>181</sup> See Sponholtz, *supra* note 174, at 213–14.

<sup>182</sup> See Landon Warner, *Ohio’s Constitutional Convention of 1912*, 61 OHIO ST. ARCHEOLOGICAL & HIST. Q. 11, 17 (1952).

<sup>183</sup> See WARNER, *supra* note 160, at 313–14.

The 1912 Ohio Convention was an important national event. Taking place in the midst of a pitched battle for the Republican presidential nomination, the convention was a magnet for prominent political figures. Those addressing the convention included the sitting President (and presidential candidate) William Howard Taft, former President (and insurgent Republican presidential candidate) Theodore Roosevelt (who gave a major address touting direct democracy, including his version of judicial recall), three-time presidential candidate (and future Secretary of State) William Jennings Bryan, California Governor Hiram Johnson, Ohio Governor Judson Harmon, and Cleveland Mayor (and future Secretary of War) Newton D. Baker.<sup>184</sup>

The most hotly contested issue concerned the initiative and referendum with the delegates spending more time on this than on any other issue.<sup>185</sup> The debates on these issues were long and emotional and included twelve roll call votes.<sup>186</sup> The rhetoric was elevated.

Stepping down from the chair, Bigelow exhibited the religious-like fervor with which he viewed the issue of direct democracy:

Oh! my friends, we are striking down tyranny. We are forging the greatest tools democracy ever had. We are building grander institutions for freedom and for humanity than the world has ever known. We are engaged not only in an important civic work—our task is a profoundly religious one.<sup>187</sup>

Not to be overshadowed, the opponents treated the initiative as a socialist plot designed to install the single tax and to soak those whose wealth came from real property. James Halfhill of Lima, made this argument:

Obviously the money that foots the bills for this radical unlimited initiative comes from men looking beyond the present to the use they can make of this machine after it is created; and it is an open secret that the special end desired and expected is to put into effect in Ohio the single, or exclusive land tax. Rich men, whose property is personal, are joining hands with socialism to throw all the burdens of government upon the soil and take from private owners all title to their income from the land.<sup>188</sup>

Despite the strong final vote in favor of the direct democracy proposal,<sup>189</sup> there had been sharp disagreements about the shape of direct democracy

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<sup>184</sup> *See id.* at 318–19.

<sup>185</sup> *See id.* at 319; *see also* Lloyd Luther Sponholtz, *Progressivism in Microcosm: An Analysis of the Political Forces at Work in the Ohio Constitutional Convention of 1912*, at 148 (1969) (unpublished Ph.D. dissertation, University of Pittsburgh) (on file with author) (reviewing roll call votes).

<sup>186</sup> Sponholtz, *supra* note 185, at 148.

<sup>187</sup> 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 942 (1912) [hereinafter 1912 DEBATES].

<sup>188</sup> *Id.* at 696.

<sup>189</sup> *See 2 id.* at 1940–41 (1913) (favorable vote of 85–14).

among its supporters. Ultimately, the delegates approved a compromise that rejected the use of a fixed number of required signatures without a geographical distribution requirement (in favor of a fixed statewide percentage with a geographic distribution requirement) and that rejected the direct (as contrasted to the indirect) statutory initiative.<sup>190</sup> They also rejected a proposal to permit the initiation of constitutional conventions.<sup>191</sup> And finally, they rejected an effort by opponents of the initiative to include a poison pill that would have removed the property tax exclusion from the statutory initiative.<sup>192</sup>

The delegates to the 1912 Convention also paid close attention to Ohio's experience with constitutional revision. They wisely decided not to risk a repeat of the 1874 debacle in which the voters, presented with an up-or-down vote on the entire proposed constitution (along with three controversial side issues), rejected both the proposed constitution and the side issues.<sup>193</sup> Instead, the delegates avoided a winner-take-all gamble and submitted forty-two discrete proposals to the voters.<sup>194</sup>

The delegates also strategically scheduled the vote for a special election on Tuesday, September 3, 1912, the day after Labor Day,<sup>195</sup> in the expectation that organized labor, which supported all forty-two proposed amendments, would have an opportunity to encourage its members to vote.<sup>196</sup>

Although turnout was light, the voters approved thirty-four of the forty-two proposed amendments.<sup>197</sup> This included not only the amendment

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<sup>190</sup> See *id.* at 1901; see also WARNER, *supra* note 160, at 321–23; Robert Crosser, *The Initiative and Referendum Amendments in the Proposed Ohio Constitution*, XLIII ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 191 (1912) (article by Chairman of the Committee on The Initiative and Referendum).

<sup>191</sup> See 2 1912 DEBATES, *supra* note 187, at 1368.

<sup>192</sup> See *id.* at 1938–40; see also HERBERT S. BIGELOW, NEW CONSTITUTION FOR OHIO: AN EXPLANATION OF THE WORK OF OHIO'S FOURTH CONSTITUTIONAL CONVENTION 14–15, H.R. DOC. NO. 62-863 (1912) (discussing the “resourcefulness of the enemy” and an “attack that had failed” in explaining why the proponents of the initiative and referendum did not vote against the constitutional provision barring the use of the indirect statutory initiative to adopt the single tax).

<sup>193</sup> See *supra* notes 149–52 and accompanying text.

<sup>194</sup> *Table of Proposed Amendments*, *supra* note 139.

<sup>195</sup> Warner, *supra* note 182, at 28.

<sup>196</sup> See Pierce, *supra* note 175, at 899. The State Federation of Labor distributed a two-sided card listing all forty-two proposed amendments and stating that it “recommends the adoption of the whole forty-two Amendments, believing that the work of the Convention should be approved in its entirety.” Ohio State Fed'n of Labor, *The New Emancipation* (1912) (Ohio History Connection reproduction). The voters approved all the pro-labor amendments with the exception of the proposal to limit the use of the labor injunction. See Pierce, *supra* note 175, at 899.

<sup>197</sup> See WARNER, *supra* note 160, at 341 (noting that “citizens had become absorbed in the Taft-Roosevelt-Wilson presidential campaign and were apathetic to the constitutional changes” and that “[t]he predicted light vote was realized”); *Table of Proposed Amendments*, *supra* note 139. The number of total votes on the proposal that received the most votes—woman's suffrage—was 586,295, while the number of total number of votes

embracing direct democracy, but also amendments providing cities with home rule powers, overruling seven Ohio Supreme Court decisions, embracing the direct primary, authorizing the sale of liquor, and expanding employee rights.<sup>198</sup> On the other hand, the voters rejected eight proposed amendments, including proposals to extend the vote to women, ban capital punishment, limit labor injunctions, issue bonds to raise funds for road and highway construction, and delete “white” from the voting qualifications.<sup>199</sup>

Interestingly, the success of the convention at the polls would not have been possible had a supermajority requirement been applicable to amendments proposed by conventions. In fact, ten of the thirty-four amendments approved by the voters would have been rejected because they did not receive a majority of those who voted at the election.<sup>200</sup> That would have led to the rejection of the most important amendment for changing the approval process for future constitutional amendments—the provision rejecting the use of a supermajority requirement for legislatively proposed amendments.<sup>201</sup>

## X. THE END OF THE SUPERMAJORITY REQUIREMENT

The 1912 Convention is best known for its adoption of the amendment that brought direct democracy to Ohio, but the cause of ad hoc constitutional revision also received a major boost from the rejection of the supermajority requirement.

Delegates at the 1912 Convention were keenly aware that the supermajority requirement had made it practically impossible to obtain voter approval of amendments proposed by the General Assembly.<sup>202</sup> Mr. Starbuck Smith of Hamilton County, Chairman of the Method of Amending the Constitution Committee, criticized the system in place since 1851, which

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on the proposal that received the least votes—licensing in intoxicating liquors—was 462,186. By way of comparison, in the 1910 and 1912 gubernatorial elections the total number of votes was 924,463 and 1,036,731 respectively. *See* 2 1912 DEBATES, *supra* note 187, at 2112–13.

<sup>198</sup> *See* STEINGLASS & SCARSELLI, *supra* note 3, at 49–53; *see also* *Table of Proposed Amendments*, *supra* note 139.

<sup>199</sup> *See* 2 1912 DEBATES, *supra* note 187, at 2112–13 (listing proposals and votes); *see also* *Table of Proposed Amendments*, *supra* note 139.

<sup>200</sup> *See* *Table of Proposed Amendments*, *supra* note 139. There were no items on the September 3, 1912, ballot other than the proposed constitutional amendments. *See* 2 1912 DEBATES, *supra* note 187, at 2112–13. Using the turnout of 586,295 votes on the proposed woman’s suffrage amendment as the benchmark, *see id.*, an amendment would have had to receive 293,148 votes for approval had the supermajority requirement had been applicable.

<sup>201</sup> *See* 2 1912 DEBATES, *supra* note 187, at 2113. The vote on eliminating the supermajority requirement was 271,827 in favor and 246,687 against, a comfortable margin, but given the 293,148 benchmark, *see supra* note 200, on the largest turnout issue the vote on eliminating the supermajority was less than what would have been required had the supermajority requirement been applicable to convention-proposed amendments.

<sup>202</sup> *See generally* 2 1912 DEBATES, *supra* note 187, at 1365–68.

required a majority of all voters voting at the election.<sup>203</sup> He noted that thirty of the forty-eight states provided that a majority voting on the amendment was sufficient, and that three states accomplished the same result by requiring that proposed amendments only be submitted to voters at separate elections.<sup>204</sup>

Describing the proposal to rely on a favorable vote of a majority voting on the question as “the greatest fundamental change,”<sup>205</sup> Mr. Smith encountered no serious opposition to his proposal to eliminate the supermajority requirement.<sup>206</sup> And the delegates supported the proposal by a vote of 105–1.<sup>207</sup>

As a result of the removal of the supermajority requirement, the success rate of amendments proposed by the General Assembly improved dramatically.<sup>208</sup> Prior to 1912, Ohio voters approved only eleven of thirty-seven amendments proposed by the General Assembly,<sup>209</sup> But since 1913, the voters approved 106 of the 154 amendments proposed by the General Assembly, a success rate that increased from 27% to 69%.<sup>210</sup>

The 1912 Convention also proposed an amendment to the voting requirements on the constitutional call to eliminate the requirement that a majority of those voting at the election support the calling of a convention.<sup>211</sup> This supermajority provision (and a similar one in the 1802 Constitution)<sup>212</sup> applied to all pre-1932 votes on convention calls, including the 1911 vote.<sup>213</sup> The votes on convention calls, however, were never close, and thus this supermajority requirement did not have an impact on the results of such elections.<sup>214</sup>

<sup>203</sup> *Id.* at 1366.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1913.

<sup>207</sup> *Id.* at 1913. There was a proposal to permit the initiative to be used to call a convention, a proposal to eliminate the mandatory twenty-year vote on convention calls, and a proposal to permit the General Assembly to ask the voters to approve the appointment of a fifteen-person commission to recommend changes in the constitution. *See id.* at 1368, 1910–12. The delegates rejected the first of these proposals by a vote of 68–29, and the second and third by a vote of 84–15. *Id.* at 1368, 1911.

<sup>208</sup> *See Table of Proposed Amendments, supra* note 139.

<sup>209</sup> *See id.* The thirty-seven proposed amendments do not include either the three amendments presented to the voters as side issues with the proposed 1874 Constitution or the proposed constitution. *Id.* Because a convention proposed the three amendments, the supermajority requirement did not apply to them. *See supra* notes 128–29 and accompanying text. The voters rejected both the proposed constitution and the three side issues. *See supra* note 152.

<sup>210</sup> *See infra* Table 1.

<sup>211</sup> *See* OHIO CONST. art. XVI, §§ 1, 3 (1912).

<sup>212</sup> *See, e.g.,* OHIO CONST. art. VII, § 5 (1802).

<sup>213</sup> *See* OHIO CONST. art. XVI, § 1 (1851).

<sup>214</sup> *See Calls for Conventions, supra* note 76.

## XI. THE OHIO EXPERIENCE WITH THE CONSTITUTIONAL INITIATIVE

### A. *The Ohio Constitutional Initiative*

Proposed by the Ohio Constitutional Convention of 1912 and approved by the voters by a vote of 312,592 to 231,312,<sup>215</sup> the adoption of the initiative and referendum was the singular accomplishment of the Convention and the culmination of many years of organizing by its proponents.

Under Ohio's direct constitutional initiative, proponents of initiated amendments must collect valid signatures of 10% of the number of votes in the most recent gubernatorial election.<sup>216</sup> To assuage concerns of rural interests about urban domination,<sup>217</sup> there is a county-based geographic distribution requirement that 5% of the signatures coming from forty-four of Ohio's eighty-eight counties.<sup>218</sup> Proposed initiated amendments, unlike amendments proposed by the General Assembly<sup>219</sup> or by a convention,<sup>220</sup> may only be placed on the ballot in the fall general election.<sup>221</sup> And, unlike virtually all other states,<sup>222</sup> there is no time limit in Ohio by which these signatures must be obtained.<sup>223</sup>

Fearful of meddling by the General Assembly, the delegates made the provisions of the initiative "self-executing."<sup>224</sup> But the delegates were also aware of the possible need to supplement the constitution provisions, and they

<sup>215</sup> *Table of Proposed Amendments*, *supra* note 139.

<sup>216</sup> OHIO CONST. art. II, § 1a.

<sup>217</sup> *See* Sponholtz, *supra* note 185, at 146–47.

<sup>218</sup> *See* OHIO CONST. art. II, § 1g. Of the eighteen states with the constitutional initiative, Ohio is one of nine that currently has a geographic distribution requirement. *See* BOOK OF THE STATES 2015, *Table 1.3*, *supra* note 8, at 15. The Ninth Circuit struck down on Equal Protection grounds the Nevada "all counties" geographic distribution requirement. *ACLU of Nev. v. Lomax*, 471 F.3d 1010, 1012 (9th Cir. 2006) (striking down requirement that signatures be obtained from at least 10% of the eligible voters in at least thirteen of the state's seventeen counties). *But see* *Angle v. Miller*, 673 F.3d 1122, 1126 (9th Cir. 2012) (affirming Nevada's subsequent adoption of a revised geographic distribution requirement based on congressional districts).

<sup>219</sup> Prior to 1912, amendments proposed by the General Assembly could only be put on the general election ballot. *See* OHIO CONST. art. XVI, § 1 (1851).

<sup>220</sup> The 1851 Constitution did not specify when a constitutional convention could present its proposals to the voters. *See id.* art. XVI, §§ 2–3.

<sup>221</sup> *See* OHIO CONST. art. II, § 1a.

<sup>222</sup> *See* NAT'L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE 21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE 36 (July 2002), [http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR\\_report.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR_report.pdf) [<https://perma.cc/ZGU7-E4DA>].

<sup>223</sup> Constitutional Amendment—Initiative and Referendum Self Executing—No Time Limit as to Presenting of Petition After Signature Placed Thereon—Power of Legislature to Provide Further Regulations, 1913 ANN. REP. ATT'Y GEN. 1116, 1119 (Ohio 1914).

<sup>224</sup> OHIO CONST. art. II, § 1g ("The foregoing provisions of this section shall be self-executing, except as herein otherwise provided.").

gave the General Assembly the power to enact legislation to facilitate, but not limit or restrict, the initiative.<sup>225</sup>

Under the “facilitating” provisions of the Ohio Revised Code, the proponent of an initiated constitutional amendment must first submit a written petition to the Attorney General signed by 1,000 Ohio qualified electors.<sup>226</sup> The petition must include the full text of the proposed amendment as well as a summary of it.<sup>227</sup> The Attorney General then reviews the submission and determines whether the summary is a “fair and truthful statement” of the proposed amendment.<sup>228</sup> This review by the Attorney General, which must be completed within ten days of receipt of the petition,<sup>229</sup> is nonsubstantive. Thus, it does not contemplate the Attorney General addressing either the wisdom of the proposed amendment or whether, if approved by the voters, it would be constitutional.

Once a proposed amendment is certified, the Attorney General forwards the petition to the Ballot Board, which has ten days to determine whether the proposal contains only one constitutional amendment.<sup>230</sup> If these hurdles are overcome, the petitioners may begin collecting the signatures of qualified electors.<sup>231</sup>

Signatures collected are reviewed by the Secretary of State, who determines their validity, and the Ballot Board, a body created by constitutional amendment in 1974, is responsible for preparing the language for the ballot, including a summary of the proposed amendment.<sup>232</sup>

### B. *The Ohio Experience*

Despite the heated and lengthy debates at the 1912 Convention, the constitutional initiative did not deliver what its proponents wanted or what its opponents feared. In the more than 100 years since adopting the initiative and referendum, Ohio voters have approved only eighteen of the sixty-nine

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<sup>225</sup> *Id.* (“Laws may be passed to facilitate their operation but in no way limiting or restricting either such provisions or the powers herein reserved.”).

<sup>226</sup> OHIO REV. CODE ANN. § 3519.01(A) (West Supp. 2015).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*; see also Schaller v. Rogers, 2008-Ohio-4464, at ¶¶ 13–16 (Ohio Ct. App. Sept. 4, 2008) (describing the development of these facilitating provisions, beginning in 1929, and reviewing the evolution of the statutory provisions requiring those proposing a constitutional amendment to submit a petition to the Attorney General for a fair and truthful determination).

<sup>229</sup> OHIO REV. CODE ANN. § 3519.01(A).

<sup>230</sup> See *id.* § 3505.062(A).

<sup>231</sup> *Id.* § 3519.01(B)(1).

<sup>232</sup> See OHIO CONST. art. II, § 1g; see also OHIO REV. CODE ANN. § 3505.062. After the submission of the requisite number of signatures, the Ballot Board makes a determination on compliance with the antimonopoly amendment. See *infra* notes 319–26 and accompanying text.



constitutional amendments proposed by initiatives,<sup>233</sup> but during the same period, they approved 106 of the 154 constitutional amendments proposed by the General Assembly.<sup>234</sup>

Table 1: *Constitutional Revision in Ohio, 1913–2015*<sup>235</sup>

	Initiative-Petition	General Assembly	Total
Approved	18	106	124
Rejected	51	48	99
Total	69	154	223
Approval Percentage	26.1%	68.8%	55.6%

There was an initial flurry of activity with voters approving four amendments proposed by initiative in the remaining years of the decade, but during that same seven-year period the voters rejected ten amendments proposed by initiative.<sup>236</sup>

There was even less successful initiative activity in the 1920s with the voters rejecting all five of the proposed initiated constitutional amendments.<sup>237</sup> Indeed, in 1926, Newton D. Baker, an icon of the Progressive Movement, a close associate of Cleveland's legendary Mayor Tom Johnson, a future Mayor of Cleveland, and Secretary of War under President Wilson, shared his disappointment with the tools of direct democracy.<sup>238</sup> In a symposium in *The Survey*, a leading journal of the social work profession and social reform, the editors asked a group of prominent activists to address: *Where Are the Pre-War Radicals?*<sup>239</sup> Baker identified the success of the home rule movement,

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<sup>233</sup> See *Statistical Tables of Amendments*, *supra* note 6; see also *Ohio Constitution—Law and History: Table of Initiated Constitutional Amendments Approved by Ohio Voters*, CLEV.-MARSHALL L. LIBR., <http://guides.law.csuohio.edu/c.php?g=190570&p=3200756> [<https://perma.cc/BB6X-623M>] (last updated Mar. 19, 2016) [hereinafter *Table of Proposed Initiated Amendments*]. The courts rejected two of the eighteen voter-approved amendments that had been proposed by initiative. See *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (holding that an initiated amendment that permitted the referendum to be used to override the ratification of federal constitutional amendments by the General Assembly was inconsistent with Article V of the United States Constitution); *State ex rel. Greenlund v. Fulton*, 124 N.E. 172, 177 (Ohio 1919) (rejecting an initiated amendment on the classification of property for taxation because it received fewer affirmative votes than a conflicting legislatively proposed amendment).

<sup>234</sup> *Table of Proposed Amendments*, *supra* note 139.

<sup>235</sup> *Id.*

<sup>236</sup> See *id.*

<sup>237</sup> See *id.*

<sup>238</sup> See, Newton W. Baker, *Where Are the Pre-War Radicals?*, 8 *SURVEY* 556, 556 (1926).

<sup>239</sup> *Id.*

large issues concerning post-war Europe, and peace, but he also addressed the reform agenda of the Progressives, not necessarily focusing only on Ohio.<sup>240</sup>

[W]e must admit that some of the things radicals contended for have been tried and found of less value in practice than they promised in theory. Among these are the initiative and referendum, the recall, the non-partisan primary, the commission form of government and proportional representation. That some of these have proved useful is clear, but their absolute importance is plainly less than was once supposed.<sup>241</sup>

The experience that contributed to Baker's disappointment continued well into the twentieth century. There was a slight increase of activity in the 1930s with three of five proposed initiated amendments being approved, but in the five decades from 1940 to 1990, the voters approved only three of twenty-two constitutional amendments proposed by initiative.<sup>242</sup> Thus, from the adoption of the initiative in 1912 until 1990, the voters approved only ten of forty-nine initiated amendments, an approval rate of 20.4%.<sup>243</sup> Since 1990, however, there has been an increase in the successful use of the constitutional initiative. In this period, the voters approved eight of twenty proposed initiated amendments,<sup>244</sup> a 40% success rate, which may be explained in part by the number of politically popular issues on the ballot, including term limits, a ban on same-sex marriage, minimum wage, and freedom to choose healthcare (i.e., anti-Obamacare).<sup>245</sup> Moreover, there has been a discernible (though not unprecedented) effort in recent years to place issues on the ballot that are likely to gin up voter turnout and benefit general election candidates.<sup>246</sup>

Despite the recent increase in the successful use of the constitutional initiative, Ohio is in a peculiar position when compared to the other states that have the constitutional initiative. Of the eighteen states with the constitutional initiative, Ohio has the sixth highest number of proposed initiated amendments, behind only Arkansas, California, Colorado, Michigan, and

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Table of Proposed Amendments, supra* note 139.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *See id.*

<sup>246</sup> *Id.* The proposed amendments on term limits in 1992, on same-sex marriage in 2004, and on the minimum wage in 2006 can all be seen in this light, but so can the depression-era initiated amendment to prohibit the application of the sales tax to food to be consumed off-premises, a proposal advanced to further the 1936 re-election effort of Governor Martin L. Davey. *See Unsound Method*, CLEV. PLAIN DEALER, Oct. 27, 1936, at 8:2; *see also* Ralph J. Donaldson, *Martin L. Davey 1935–1939*, in OHIO HISTORICAL SOC'Y, THE GOVERNORS OF OHIO 179 (1954).

Oregon, but its approximately 25% rate of approval is the lowest of all eighteen states that have the constitutional initiative.<sup>247</sup>

A full review of the history of the constitutional initiative, including a substantive review of the proposed amendments that the voters rejected, is beyond the scope of this Article, but there were important, but unsuccessful, efforts to use the constitutional initiative to alter the constitutional initiative itself. In 1915, a proposed “Stability Amendment” would have created a six-year bar on using the initiative to propose an amendment that had been defeated twice.<sup>248</sup> In 1939, Herbert S. Bigelow surfaced again and was the moving force behind a proposed amendment to substitute a fixed number of 100,000 signatures gathered at large to place a constitutional amendment on the ballot, thus eliminating the percentage requirement for signatures as well as the geographic distribution requirement.<sup>249</sup> And in 1976, a proposed amendment to “simplify” the initiative process would have also substituted a fixed number of 250,000 signatures and eliminated the geographic distribution requirement.<sup>250</sup>

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<sup>247</sup> See Jennie Bowser, Chart on National Initiative Activity (2012) (unpublished) (on file with author). The average passage rate for states with the constitutional initiative is 46.2%. See *id.* Since 1912, Ohio voters have only approved 26.1% of proposed initiated amendments, the lowest percentage of any of the eighteen states with the constitutional initiative. *Id.*

<sup>248</sup> See John A. Lapp, *Legislative Notes and Reviews: The Initiative and Referendum in 1915*, 10 AM. POL. SCI. REV. 320, 323–24 (1916). The proposed “Stability Amendment,” which was supported by the brewing industry and its apparent creation, the Constitutional Stability League, was aimed at the repeated efforts to place prohibition amendments on the ballot. *Id.*; see also ‘Stability’ May Mean Stagnation, CLEV. PLAIN DEALER, July 15, 1915, at 8. But see *Should Ohio’s Constitution Be a Political Football?*, CLEV. PLAIN DEALER, Oct. 28, 1915, at 15 (political advertisement supporting the proposed stability amendment); WARNER, *supra* note 160, at 437–38 n.13.

<sup>249</sup> See *Ohio Initiative and Referendum System, Amendment 3 (1939)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio\\_Initiative\\_and\\_Referendum\\_System,\\_Amendment\\_3\\_\(1939\)](https://ballotpedia.org/Ohio_Initiative_and_Referendum_System,_Amendment_3_(1939)) [<https://perma.cc/U8V8-W8SD>] (quoting amendment summary on the ballot). The Bigelow proposal would have also made significant changes in the statutory initiative. See *id.* A companion proposal also advanced by Bigelow would have required the state to provide old age pensions. The voters overwhelmingly rejected both proposed amendments by more than a 3-to-1 margin, see *Table of Proposed Amendments*, *supra* note 139, in an election in which Bigelow became the main issue. See, e.g., *Foes of Bigelow Organized Here*, CLEV. PLAIN DEALER, Oct. 15, 1939, at 6-A.

<sup>250</sup> See *Ohio Initiative & Referendum Procedures, Amendment 7 (1976)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio\\_Initiative\\_%26\\_Referendum\\_Procedures,\\_Amendment\\_7\\_\(1976\)](https://ballotpedia.org/Ohio_Initiative_%26_Referendum_Procedures,_Amendment_7_(1976)) [<https://perma.cc/977A-KDLA>] (quoting amendment summary on the ballot).

The proponent of the 1976 amendment was Ohioans for Utility Reform, a consumer organization that sponsored four separate initiated amendments, including an amendment to change the initiative and three others addressing nuclear power plant safety and the residential utility rates. See *Citizens League Says Vote No on Four Utility Reform Issues*, CLEV. PLAIN DEALER, Oct. 17, 1976, at 10; “No” to Issues 4, 5, 6, 7, CLEV. PLAIN DEALER, Oct. 21, 1976, at 34-A. In including initiative reform in its package, Ohioans for Utility

On the other hand, beginning in the 1970s the voters approved several constitutional changes proposed by the General Assembly in the procedures concerning the adoption of constitutional amendments. In 1971, the voters approved an amendment to eliminate the requirement that all proposed amendments be mailed to electors, requiring notice by publication for five weeks in newspapers of general circulation instead.<sup>251</sup> In 1974, the voters approved an amendment, based on a 1973 recommendation from the Ohio Constitutional Revision Commission (OCRC), to create the Ballot Board and simplify the preparation of ballot language and information for voters about amendments proposed by the General Assembly.<sup>252</sup> In 1975, the OCRC made a far-ranging proposal to change both the constitutional and statutory initiative (including the elimination of the geographic distribution requirement).<sup>253</sup> The General Assembly, however, put a more modest proposal on the ballot, but not until 1978, when the voters approved it.<sup>254</sup> The 1978 amendment reduced the required number of weekly publications to three, expanded the role of the Ballot Board to include amendments proposed by initiative and made the ballot-preparation procedures, which were applicable to General Assembly proposed amendments, also applicable to initiated amendments (arguably including the one amendment, separate-vote requirement).<sup>255</sup> In 2008, the voters approved an amendment that made changes in the filing deadlines for initiated amendments and that gave the Ohio Supreme Court original and exclusive jurisdiction over all challenges to petitions and signatures.<sup>256</sup> In 2015, the voters also approved an antimonopoly amendment that placed obstacles in the way of proposed initiated amendments that would create

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Reform relied on the recommendations of the OCRC, which in 1975 had recommended the use of a fixed 250,000 signature requirement and the elimination of the geographic distribution requirement. See OHIO CONSTITUTIONAL REVISION COMM'N, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION PART 9 (1975) [hereinafter OCRC PART 9], <http://www.lsc.ohio.gov/ocrc/recommendations%20pt9%20initiative%20and%20referendum.pdf> [https://perma.cc/4YH9-TU53]; see also OHIO CONSTITUTIONAL REVISION COMM'N, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION: FINAL REPORT 343–70 (1977) [hereinafter OCRC FINAL REPORT], [http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/OCRCFinalReport\(summaryofhistory\)\(excerpts\)FinalReport.pdf](http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/OCRCFinalReport(summaryofhistory)(excerpts)FinalReport.pdf) [https://perma.cc/P868-AH3L].

<sup>251</sup> See OHIO CONST. art. II, § 1g (as amended in 1971).

<sup>252</sup> See *id.* art. XVI, § 1 (as amended in 1974); see also OCRC FINAL REPORT *supra* note 250, at 188–91 (1977).

<sup>253</sup> See OCRC FINAL REPORT, *supra* note 250, at 25, 343–70. The OCRC recommendation to eliminate the geographic distribution requirement was based, at least in part, on concerns about whether it was consistent with the “one man one vote requirement.” See *id.* at 368–69.

<sup>254</sup> See OHIO CONST. art. II, § 1g (as amended in 1978); see also OCRC FINAL REPORT, *supra* note 250, at 368–69.

<sup>255</sup> See OHIO CONST. art. II, § 1g (as amended in 1978); see also *infra* Part XII.C.1 text (discussing the one amendment, separate-vote requirement).

<sup>256</sup> See OHIO CONST. art. II, § 1g (as amended in 2008).

monopolies, specify or determine tax rates, or provide special benefits not generally available to others.<sup>257</sup>

### *C. Margins of Success and Voter Turnout*

The margins by which the voters approved initiated amendments have changed over the years. Five of the first six initiated amendments that the voters approved received less than a 60% favorable vote.<sup>258</sup> But since 1935, thirteen of the sixteen approved constitutional initiatives received more than 60% of the vote. The only approved constitutional initiatives receiving less than 60% of the vote since 1935 were the adoption of the office-type ballot in 1949, the increase in the minimum wage in 2006, and casino gambling in 2009.<sup>259</sup>

Voter turnout, as measured by the number of voters who vote on proposed amendments, has been uneven with a slight trend of an increasing turnout. Of the first nine approved initiatives between 1914 and 1949, two had turnouts over 90%, two had turnouts over 80%, and three had turnouts in the 70% range.<sup>260</sup> The two highest turnouts occurred in 1914 (home rule power over liquor) and 2009 (casino gambling), when 96.0% and 98.2% of the voters respectively voted on the proposed amendments.<sup>261</sup> For the nine most recent successful initiated amendments from 1977 to 2011, the turnout was above 93% in every election with the exception of the 1992 vote on term limits (for which the turnout was approximately 87%).<sup>262</sup>

## XII. LIMITATIONS ON THE DIRECT CONSTITUTIONAL INITIATIVE

### *A. Limitations on the Use of the Constitutional Initiative*

Sixteen states have direct constitutional initiatives and two have indirect constitutional initiatives.<sup>263</sup> Most of these states do not place substantive limitations on the use of the constitutional initiative, but some do.<sup>264</sup> The

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<sup>257</sup> See *Ohio Initiated Monopolies Amendment, Issue 2 (2015)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio\\_Initiated\\_Monopolies\\_Amendment\\_Issue\\_2\\_\(2015\)](https://ballotpedia.org/Ohio_Initiated_Monopolies_Amendment_Issue_2_(2015)) [<https://perma.cc/G79L-WYVM>]; see also *infra* Part XII.C.3.

<sup>258</sup> See *Table of Proposed Initiated Amendments*, *supra* note 233.

<sup>259</sup> See *id.*

<sup>260</sup> See *id.*

<sup>261</sup> See *id.*

<sup>262</sup> See *id.*

<sup>263</sup> See BOOK OF THE STATES 2015, *Table 1.3*, *supra* note 8, at 15.

<sup>264</sup> See M. DANE WATERS, INITIATIVE AND REFERENDUM ALMANAC 18 (2003) (chart on limitations on the initiative).

courts, however, have rejected efforts to challenge substantive limitations on the initiative.<sup>265</sup>

Illinois, though generally included in the list of sixteen states with direct constitutional initiatives, has a very limited constitutional initiative that may not be used to address subjects other than the structure and procedures of the legislature and which has been used successfully on only one occasion.<sup>266</sup> California prohibits initiated constitutional amendments “that name[] any individual to hold any office” or that require private corporations “to perform any function.”<sup>267</sup> And Missouri prohibits the use of the initiative to appropriate existing revenues.<sup>268</sup>

Massachusetts and Mississippi, both of which have indirect constitutional initiatives, remove a significant number of issues from their constitutional initiatives. In Massachusetts, the constitutional initiative may not be used for (a) measures that relate to religion, religious practices or religious institutions; (b) measures that relate to the appointment, qualification, tenure, removal, recall or compensation of judges, or to the reversal of judicial decisions; (c) measures that relate to the powers, creation or abolition of courts; (d) measures that make specific appropriations of state money; (e) measures that relate to the state’s ban on public funding of religious schools; (f) measures that relate to exclusions from the initiative process; or (g) propositions inconsistent with a broad range of individual rights.<sup>269</sup> In Mississippi, the constitutional initiative may not be used (a) to propose, modify, or repeal any portion of the Bill of Rights; (b) to amend or repeal any law or any provision of the Constitution relating to the Mississippi Public Employees’ Retirement System; (c) to amend or repeal the constitutional guarantee that the right of any person to work shall not be denied or abridged on account of membership or nonmembership in any labor union or organization; or (d) to modify the initiative process for proposing amendments to the state constitution.<sup>270</sup>

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<sup>265</sup> See *infra* Part XII. B. *But cf.* Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182 (1999) (striking down state constitutional provisions concerning the initiative process on First Amendment grounds).

<sup>266</sup> See ILL. CONST. art. XIV, § 3 (“Amendments shall be limited to structural and procedural subjects contained in [the Legislative Article].”); ANN M. LOUSIN, THE ILLINOIS CONSTITUTION 264–66 (2010) (describing state court decisions narrowly construing the Illinois constitutional initiative).

<sup>267</sup> CAL. CONST. art. II, § 12 (“No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.”).

<sup>268</sup> MO. CONST. art. III, § 51 (prohibiting the use of initiatives “for the appropriation of money other than of new revenues created and provided for thereby”).

<sup>269</sup> MASS. CONST. amend. art. XLVIII, § (II)2.

<sup>270</sup> MISS. CONST. art. 15, §§ 273(5)(a)–(d).

## B. *Litigation*

The presence of substantive limitations on the use of the initiative has led many academic commentators to conclude that the limitations infringe upon the First Amendment,<sup>271</sup> but the few courts that have addressed these issues have rejected federal constitutional challenges to these limitations.

The leading case addressing the validity of subject-matter limitations on the use of constitutional initiatives is *Wirzburger v. Galvin*.<sup>272</sup> The plaintiffs wanted to amend the Anti-Aid provision of the Massachusetts Constitution to allow public financial support for private, religiously affiliated schools, but the state constitution had prevented initiatives on this subject since the adoption of the religious exclusion as a result of the Massachusetts Constitutional Convention of 1917–1918.<sup>273</sup> The United States Court of Appeals for the First Circuit held that the state constitutional provisions prohibiting ballot initiatives on this subject constituted a restriction on speech subject to intermediate scrutiny.<sup>274</sup> Nonetheless, the court rejected the challenge to this state limitation on the constitutional initiative.<sup>275</sup>

The other principal case involving a limitation on the initiative involves a Utah limitation on the use of the statutory initiative. In 1998, Utah amended its constitution to require a two-thirds majority for future ballot initiative

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<sup>271</sup> See, e.g., J. Michael Connolly, *Loading the Dice in Direct Democracy: The Constitutionality of Content- and Viewpoint-Based Regulations of Ballot Initiatives*, 64 N.Y.U. ANN. SURV. AM. L. 129, 132 (2008) (arguing that “both content- and viewpoint-based regulations of ballot initiatives should be held to implicate the First Amendment” but that “viewpoint-based regulations of ballot initiatives should require strict scrutiny, while content-based regulations of ballot initiatives should require intermediate scrutiny” (footnote omitted)); Russell Patrick Plato, *Selective Entrenchment Against State Constitutional Change: Subject Matter Restrictions and the Threat of Differential Amendability*, 82 N.Y.U. L. REV. 1470, 1470 (2007) (arguing that “the current framework used to evaluate subject matter restrictions . . . provides insufficient protection against the serious harms such restrictions create”); John Gildersleeve, Note, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment?*, 107 COLUM. L. REV. 1437, 1437 (2007) (arguing “that subject matter restrictions burden expressive conduct composed of non-speech and speech elements” and proposing “that courts apply intermediate scrutiny to restrictions on the subject matter of initiatives, affirming those that insulate state constitutional rights but invalidating those that simply calcify the electoral gains of transient political majorities”); Anna Skiba-Crafts, Note, *Conditions on Taking the Initiative: The First Amendment Implications of Subject Matter Restrictions on Ballot Initiatives*, 107 MICH. L. REV. 1305, 1315 (2009) (arguing that subject matter restrictions on ballot initiatives constrain “core political speech” and so should receive strict First Amendment scrutiny).

<sup>272</sup> *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005), *cert. denied*, 546 U.S. 1150 (2006).

<sup>273</sup> See *id.* at 280–81 (discussing the origin of the Religious Exclusion and its alleged anti-Catholic bias).

<sup>274</sup> *Id.* at 271.

<sup>275</sup> *Id.*

involving the taking of wildlife.<sup>276</sup> This supermajority requirement was designed to protect Utah's wildlife practices from proposals from animal and wildlife protection groups. This subject-specific supermajority requirement on the use of the statutory initiative was challenged as a violation of the First Amendment, but in *Initiative and Referendum Institute v. Walker*,<sup>277</sup> the United States Court of Appeals for the Tenth Circuit held "that a constitutional provision imposing a supermajority requirement for enactment of initiatives on specific topics does not implicate the freedom of speech."<sup>278</sup>

### C. *Limitations on the Ohio Constitutional Initiative*

Unlike the Ohio indirect statutory initiative, which has always had an explicit substantive limitation barring its use in certain tax matters,<sup>279</sup> the Ohio direct constitutional initiative, when adopted, did not contain any textual or substantive limitations on its use.<sup>280</sup> But there are three possible limitations on the use of the constitutional initiative in Ohio: (a) the one amendment, separate-vote requirement, (b) the exclusion of constitutional revisions from the initiative, and (c) the recently adopted antimonopoly amendment.

#### 1. *One Amendment, Separate-Vote Requirement*

The 1851 Constitution included a one amendment, separate-vote requirement under which constitutional amendments proposed by the General Assembly (as contrasted to those proposed by constitutional conventions) had to be submitted to the voters in such a way as to permit a vote "on each amendment, separately."<sup>281</sup> This one amendment, separate-vote requirement was not included in the language adopting the constitutional initiative in 1912,

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<sup>276</sup> UTAH CONST. art. VI, § 1(2)(a)(ii).

<sup>277</sup> *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082 (10th Cir. 2006), *cert. denied*, 549 U.S. 1245 (2007).

<sup>278</sup> *Id.* at 1085.

<sup>279</sup> OHIO CONST. art. II, § 1e (1912) ("The powers defined herein as the 'initiative' and 'referendum' shall not be used to pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property."). This provision was adopted to foreclose the use of the statutory initiative to enact a tax plan based on the single-tax theories of Henry George. *See* WARNER, *supra* note 160, at 321–22 (discussing the political maneuvering around this limitation on the statutory initiative).

<sup>280</sup> At the 1912 Constitutional Convention, the delegates rejected a proposal to bar the use of the constitutional initiative to adopt constitutional provisions that authorized the tax policies that could not be adopted through the statutory initiative. *See* 2 1912 DEBATES, *supra* note 187, at 1897–98.

<sup>281</sup> OHIO CONST. art. XVI, § 1 (1851) ("When more than one amendment shall be submitted at the same time, they shall be so submitted, as to enable the electors to vote on each amendment, separately.").



but in 1978 the voters amended the constitution to provide that ballot language, including the presentation of amendments to be voted upon separately, was “subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this constitution.”<sup>282</sup>

The Ohio Supreme Court in *State ex rel. Ohio Liberty Council v. Brunner*,<sup>283</sup> described the purpose of the separate-vote requirement:

The constitutional mandate that multifarious amendments shall be submitted separately has two great objectives. The first is to prevent imposition upon or deceit of the public by the presentation of a proposal which is misleading or the effect of which is concealed or not readily understandable. The second is to afford the voters freedom of choice and prevent “logrolling” or the combining of unrelated proposals in order to secure approval by appealing to different groups which will support the entire proposal in order to secure some part of it although perhaps disapproving of other parts.<sup>284</sup>

The court has not decided whether the 1978 amendment extended the one amendment, separate-vote requirement to initiated amendments, but in *Ohio Liberty Council*, the court held that state law “imposes a similar requirement on citizen-initiated proposed constitutional amendments.”<sup>285</sup> The court then equated the constitutional and statutory requirements, stating that “[b]ecause this [statutory] separate-petition requirement is comparable to the separate-vote requirement for legislatively initiated constitutional amendments under Section 1, Article XVI of the Ohio Constitution, our precedent construing the constitutional provision is instructive in construing the statutory requirement.”<sup>286</sup> The court then held that the Ballot Board had acted inappropriately in dividing a proposed amendment concerning healthcare into two separate amendments.<sup>287</sup> In so ruling, the court implicitly—but not explicitly—concluded that the constitutional provision giving the General Assembly the power to adopt laws facilitating the operation of the initiative justified the application of the one amendment, separate-vote requirement to initiated amendments.<sup>288</sup>

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<sup>282</sup> OHIO CONST. art. II, § 1g (as amended in 1978) (“The ballot language shall be prescribed by the Ohio ballot board in the same manner, and subject to the same terms and conditions, as apply to issues submitted by the general assembly pursuant to Section 1 of Article XVI of this constitution.”).

<sup>283</sup> *State ex rel. Ohio Liberty Council v. Brunner*, 928 N.E.2d 410 (Ohio 2010) (per curiam).

<sup>284</sup> *Id.* at 418 (quoting *State ex rel. Willke v. Taft*, 836 N.E.2d 536, ¶ 28 (Ohio 2005)).

<sup>285</sup> *Id.* at 415–16 (quoting OHIO REV. CODE § 3519.01(A)).

<sup>286</sup> *Id.* at 416.

<sup>287</sup> *Id.* at 416–17.

<sup>288</sup> OHIO CONST. art. II, § 1g (“Laws may be passed to facilitate [the] operation [of the initiative] but in no way limiting or restricting either such provision or the powers herein reserved.”).

In ruling that the one amendment, separate-vote requirement applied to both legislatively proposed and initiated amendments, the *Ohio Liberty Council* court defined the requirement as follows:

[T]he applicable test for determining compliance with the separate-vote requirement of Section 1, Article XVI, is that “a proposal consists of one amendment to the Constitution only so long as each of its subjects bears some reasonable relationship to a single general object or purpose.” “Thus, where an amendment to the Constitution relates to a single purpose or object and all else contained therein is incidental and reasonably necessary to effectuate the purpose of the amendment, such amendment is not violative of the provisions of Section 1, Article XVI.” Courts have generally taken a “liberal [view] in interpreting what such a single general purpose or object may be.”<sup>289</sup>

Under this test, proposed amendments need not relate to a *single subject* but must only relate to a “single general object or purpose.”<sup>290</sup> Thus, the standard is more forgiving than the “one-subject” requirement<sup>291</sup> that limits the ability of the General Assembly to put unrelated subjects in a single statute.<sup>292</sup>

Nonetheless, the implication of the one amendment, separate-vote requirement is that it may limit the power of the General Assembly and the people (through the initiative) to make significant changes in the state constitution. More than 175 years ago, Caleb Atwater suggested an article-by-article revision of the Ohio Constitution.<sup>293</sup> At the time, the only vehicle for constitutional revision was the convention, but we now have additional tools. It is unclear, however, whether the new tools are suited for the type of constitutional revision that Atwater sought. What is clear is that any effort to push the boundaries to propose broad reform, including article-by-article

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<sup>289</sup> *Ohio Liberty Council*, 928 N.E.2d at 416 (alterations in original) (emphasis omitted) (quoting *State ex rel. Roahrig v. Brown*, 282 N.E.2d 584 (Ohio 1972)); *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 218 N.E.2d 446 (Ohio 1966); *State ex rel. Foreman v. Brown*, 226 N.E.2d 116 (Ohio 1967)).

<sup>290</sup> *Id.* (emphasis omitted).

<sup>291</sup> See OHIO CONST. art. II, § 15(D) (“No bill shall contain more than one subject, which shall be clearly expressed in its title.”); see also *State ex rel. Ohio Civil Serv. Emps. Ass’n v. State*, No. 2014-0319, 2016 WL 541263 (Ohio Feb. 11, 2016) (“The one-subject rule does not prohibit a plurality of topics, only a disunity of subjects. The mere fact that a bill embraces more than one topic is not fatal as long as a common purpose or relationship exists between the topics.” (citation omitted)).

<sup>292</sup> See *State ex rel. Foreman v. Brown*, 226 N.E.2d 116, 120 (Ohio 1967) (“[A]t the same time that the [1850–1851] Constitutional Convention proposed Section 1 of Article XVI, it proposed [the one-subject rule] . . . . It is quite obvious therefore that, if those who submitted Section 1 of Article XVI had intended that each amendment to the Constitution proposed by the General Assembly be confined to one subject, object or purpose, they would have so provided as they did in Section 16 of Article II [Section 15(D), Article II]. They did not.”).

<sup>293</sup> See ATWATER, *supra* note 79, at 175–77.

reform, will be tested by the courts, which will be asked whether “each of its subjects bears some reasonable relationship to a single general object or purpose.”<sup>294</sup>

## 2. *Constitutional Revisions vs. Constitutional Amendments*

There is a distinction in state constitutional law between constitutional *amendments* and constitutional *revisions*, and courts have used this distinction to limit the use of the initiative to amendments and to bar its use for constitutional revisions.<sup>295</sup>

Although this distinction has not been the subject of litigation in Ohio, there is a textual basis for it. The words “revise” or “revision” are not in the 1802 Constitution, which only permitted the General Assembly to recommend the calling of a convention “to amend or change this constitution.”<sup>296</sup> Nonetheless, the delegates to the 1850–1851 Convention did not doubt that they had authority to replace the existing constitution, and that is precisely what they proposed. And they codified this exercise of power by proposing a provision that permitted future General Assemblies to place on the ballot proposals “to call a convention, *to revise*, amend, or change this constitution.”<sup>297</sup> The 1851 Constitution also used the word “revise” in the mandatory twenty-year votes on constitutional call, defining the question to be presented to the voters as: “Shall there be a convention to revise, alter, or amend the constitution?”<sup>298</sup> Thus, the two new provisions relating to conventions included, for the first time, express references to “revise.” At the same time, the 1851 Constitution adopted a new provision giving the General Assembly the power to “propose amendments to this constitution.”<sup>299</sup> Arguably, this power did not extend to permitting the General Assembly to propose amendments that have the effect of *revising* the constitution. Finally, the language creating the direct constitutional initiative in 1912 simply permitted the people to propose amendments to the constitution without any reference to “revise” or “revisions.”<sup>300</sup>

This distinction between constitutional amendments and constitutional revisions is reflected in the text of many state constitutions,<sup>301</sup> and it precedes the first adoption of the constitutional initiative in South Dakota in 1898.

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<sup>294</sup> *Ohio Liberty Council*, 928 N.E.2d at 416 (emphasis omitted).

<sup>295</sup> See KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 179–80 (2009).

<sup>296</sup> OHIO CONST. art. VII, § 5 (1802).

<sup>297</sup> OHIO CONST. art. XVI, § 2 (1851) (emphasis added).

<sup>298</sup> *Id.* art. XVI, § 3.

<sup>299</sup> *Id.* art. XVI, § 1.

<sup>300</sup> OHIO CONST. art. II, § 1 (1912).

<sup>301</sup> One commentator has noted that thirteen of the eighteen states that permit initiated constitutional amendments distinguish constitutional amendments from constitutional revisions and appear to bar the use of the initiatives to revise constitutions. See HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 386 (2014).

Although the distinction may at first seem only semantic, courts have used it to limit not only the use of the constitutional initiative but also the power of the state legislature to proposed wide-ranging changes in state constitutions.

The origin of this distinction is the 1894 California Supreme Court decision in *Livermore v. Waite*,<sup>302</sup> a pre-initiative case involving a dispute concerning the location of the seat of the state government. In the course of addressing the power of the legislature, the court stated:

Article 18 of the constitution provides two methods by which changes may be effected in that instrument—one by a convention of delegates chosen by the people for the express purpose of revising the entire instrument, and the other through the adoption by the people of propositions for specific amendments that have been previously submitted to it by two-thirds of the members of each branch of the legislature. It can be neither revised nor amended, except in the manner prescribed by itself, and the power which it has conferred upon the legislature . . . .<sup>303</sup>

In 1948, in *McFadden v. Jordan*,<sup>304</sup> the California Supreme Court applied the revision-amendment distinction to a dispute involving the initiative. A proposed initiated amendment advanced by what was popularly referred to as the “ham and eggs” movement<sup>305</sup> sought massive changes in the California Constitution. Relying on the revision–amendment distinction, the court held that the proposal could not be submitted to the voters because the measure was a constitutional revision not a constitutional amendment.<sup>306</sup>

The California courts have continued to apply this distinction to limit the use of the constitutional initiative,<sup>307</sup> and other state courts have embraced the

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<sup>302</sup> *Livermore v. Waite*, 36 P. 424, 425 (Cal. 1894).

<sup>303</sup> *Id.* at 425–26.

<sup>304</sup> *McFadden v. Jordan*, 196 P.2d 787, 788 (Cal. 1948).

<sup>305</sup> See *Raven v. Deukmejian*, 801 P.2d 1077, 1091 (Cal. 1990) (discussing background of the proposal at issue in *McFadden* and the subsequent adoption of a single-subject limitation on the constitutional initiative).

<sup>306</sup> The *McFadden* court noted that the proposed amendment consisted of an Article containing 12 separate sections divided into 208 subsections and containing more than 21,000 words. See *McFadden*, 196 P.2d at 790. At the time this issue arose, California did not have a single-subject rule for initiatives, but the proposal led to California’s adoption of such a requirement. See MILLER, *supra* note 295, at 179 n.105.

<sup>307</sup> See, e.g., *Raven*, 801 P.2d at 1078 (holding that an initiated constitutional provision restricting the independent judicial interpretation of enumerated state constitutional rights arising in criminal cases is a revision that cannot be accomplished through the initiative); cf. *Strauss v. Horton*, 207 P.3d 48, 60, 62 (Cal. 2009) (recognizing the distinction between amendments and revisions but concluding that an initiated amendment barring same-sex marriage was a permissible amendment and not a prohibited revision); *Legislature of the State v. Eu*, 816 P.2d 1309, 1309 (Cal. 1991) (recognizing the distinction between amendments and revisions but concluding that the initiated adoption of a budgetary limitations and legislative term limits did not constitute a proscribed constitutional revision), *cert. denied*, 503 U.S. 919 (1992).

distinction to limit the use of the initiative<sup>308</sup> and to place limits on the ability of legislatures to propose constitutional amendments.<sup>309</sup> In distinguishing revisions from amendments, the courts have considered “the effect—both quantitative and qualitative—that the constitutional change will have on *the basic governmental plan or framework* embodied in the preexisting provisions of the California Constitution.”<sup>310</sup>

Despite the textual support for distinguishing between constitutional amendments and constitutional revisions, there is no evidence that this distinction has ever been used in Ohio to attempt to limit the power of either the General Assembly or the initiative. Nonetheless, it is possible that the Ohio courts will, at some point, be asked whether the General Assembly or the initiative may propose a major constitutional revision—or even a new constitution—to the voters.<sup>311</sup> For example, will the courts be asked whether the General Assembly or the initiative could be used to propose the replacement of specific articles of the Ohio Constitution? If the General Assembly is constrained by the revision-amendment distinction, this constraint would surely apply to constitutional changes by proposed initiatives. But if the distinction is not applicable to amendments proposed by the General Assembly, there is an additional and unaddressed issue—at least in Ohio—as to whether the distinction in any way limits the use of the initiative.

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<sup>308</sup> See, e.g., *Holmes v. Appling*, 392 P.2d 636, 639 (Or. 1964) (accepting the distinction between an amendment and a revision of the constitution, and holding that a proposed thorough overhaul of the constitution was either a revision of the constitution or a new constitution either of which could not be submitted to the voters through the initiative); *Adams v. Gunter*, 238 So. 2d 824, 832 (Fla. 1970) (holding that a proposed initiated amendment to create a unicameral legislature was not an authorized use of the initiative because it affected numerous sections of the constitution); *Citizens Protecting Mich.’s Constitution v. Sec’y of State*, 761 N.W.2d 210, 229 (Mich. Ct. App. 2008) (per curiam) (relying on California cases and holding that initiative that sought to alter multiple articles of the Michigan Constitution and fundamentally redesign the framework of the Michigan Constitution was a constitutional revision, not an amendment, and could not be achieved through the initiative), *aff’d without opinion*, 755 N.W.2d 157 (Mich. 2008).

<sup>309</sup> See, e.g., *Bess v. Ulmer*, 985 P.2d 979, 982 (Alaska 1999) (recognizing that “[t]he Framers of the Alaska Constitution distinguished between a revision and an amendment” and holding that a ballot proposition to limit the rights of prisoners to those afforded by the federal Constitution was a “revision” that could not be adopted by a legislative proposal); *cf. Op. of the Justices*, 264 A.2d 342, 342 (Del. 1970) (holding that a legislative proposal to amend the constitution but to make no substantial or fundamental change in state government, and to provide a mere reorganization, restatement, modernization, abbreviation, consolidation, simplification, or clarification of existing document, can be accomplished by legislative amendment without a constitutional convention).

<sup>310</sup> *Strauss*, 207 P.3d at 61, *abrogated on other grounds*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *accord* *Martinez v. Kulongoski*, 185 P.3d 498, 502–03 (Or. Ct. App. 2008).

<sup>311</sup> Litigation in Ohio involving the amendment-revision distinction will raise questions about whether the Ohio Supreme Court can provide pre-election or post-election judicial review, or both. There is no direct guidance in Ohio, but courts will be able to look to cases involving the one amendment, separate-vote requirement. See *supra* Part XII.C.1.

### 3. Antimonopoly Amendment

On November 3, 2015, Ohio voters approved an amendment proposed by the General Assembly to make more difficult the use of the initiative to create monopolies, to specify or determine tax rates, or to confer special benefits on favored groups.<sup>312</sup> This proposal was widely seen as a ploy to undercut a proposed initiated amendment to permit the growth, cultivation, manufacture, distribution, and sale of marijuana products for both recreational and medical uses.<sup>313</sup> The marijuana proposal, described by its proponents as an investor-driven initiative, would have given commercial growing licenses to ten groups of campaign investors.<sup>314</sup> Many of its opponents characterized it as an effort to

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<sup>312</sup> OHIO CONST. art. II, § 1e(B)–(C).

<sup>313</sup> In addition to framing the issues for the public debate, the antimonopoly amendment would have trumped the marijuana legalization amendment had the voters approved both of them. *See* OHIO CONST. art. II, § 1e(B)(3):

If, at the general election held on November 3, 2015, the electors approve a proposed constitutional amendment that conflicts with division (B)(1) of this section with regard to the creation of a monopoly, oligopoly, or cartel for the sale, distribution, or other use of any federal Schedule I controlled substance, then notwithstanding any severability provision to the contrary, that entire proposed constitutional amendment shall not take effect.

If the antimonopoly amendment (with its antiseverability provision) received more affirmative votes than the marijuana legalization amendment, the antimonopoly amendment would have blocked the entire marijuana legalization amendment from taking effect. On the other hand, had the marijuana legalization amendment received more affirmative votes than the antimonopoly amendment, the breadth of the latter, if taken literally, would have also prevented the marijuana legalization amendment from taking effect. Such a result, however, seems inconsistent with the provision of the Ohio Constitution that addresses what happens when the voters approve conflicting amendments. *See* OHIO CONST. art. II, § 1b (“If conflicting . . . proposed amendments to the constitution shall be approved at the same election by a majority of total number of votes cast for and against the same, the one receiving the highest number of affirmative votes . . . shall be the amendment to the constitution.”); *see also* State *ex rel.* Greenlund v. Fulton, 124 N.E. 172, 174 (1919) (holding that in the event of conflicts the amendment with the most affirmative votes prevails). *But see* Press Release, Statement from Ohio Secretary of State Jon Husted (June 19, 2015), <http://www.sos.state.oh.us/sos/mediaCenter/2015/2015-05-19.aspx> [<https://perma.cc/7W8F-X7ZK>] (stating that legislatively proposed amendments, which become effective immediately, prevail in any conflict with initiated amendments, which do not take effect for thirty days after approval, regardless of which receives the most affirmative votes).

<sup>314</sup> Anne Saker, *What You Need to Know About Marijuana Initiative*, CIN. ENQUIRER (July 24, 2015), <http://www.cincinnati.com/story/news/2015/06/17/marijuana-ohio-ballot-initiative-responsibleohio/28897081/> [<https://perma.cc/XY5R-Z4LD>]; *Ohio Marijuana Legalization Initiative, Issue 3 (2015)*, BALLOTPEDIA, [https://ballotpedia.org/Ohio\\_Marijuana\\_Legalization\\_Initiative\\_Issue\\_3\\_\(2015\)#cite\\_note-text-1](https://ballotpedia.org/Ohio_Marijuana_Legalization_Initiative_Issue_3_(2015)#cite_note-text-1) [<https://perma.cc/Y5DM-RANJ>].

embed a monopoly into the Constitution, and the ballot explanation by the Ballot Board so characterized the proposal.<sup>315</sup>

The voters overwhelmingly rejected the proposed marijuana legalization amendment but narrowly approved the antimonopoly amendment.<sup>316</sup> As a result, the Ohio Constitution now contains its only substantive limitation on the use of the constitutional initiative. But it is not an absolute bar to the initiation of the amendments that it targets, though it makes their approval by the voters less likely.

The antimonopoly provision identifies three categories of initiatives that it seeks to keep off the ballot: (a) amendments that “would grant or create a monopoly, oligopoly, or cartel”; (b) amendments that would “specify or determine a tax rate”; and (c) amendments that would “confer a commercial interest, commercial right, or commercial license . . . that is not then available to other similarly situated persons or nonpublic entities.”<sup>317</sup>

Although the antimonopoly amendment seeks to bar the use of the initiative to adopt the disfavored amendments, the amendment is not an absolute bar to initiated amendments that are inconsistent with its provisions.<sup>318</sup> Under the complex procedures in this provision, the Ballot Board is charged with determining whether a proposed amendment conflicts with the new standards.<sup>319</sup> Even if there is a conflict, the proposed amendment may still appear on the ballot, but it will be the second of two separate questions.<sup>320</sup> The first question will ask the voters:

Shall the petitioner, in violation of division (B)(1) of Section 1e of Article II of the Ohio Constitution, *be authorized to initiate a constitutional amendment* that grants or creates a monopoly, oligopoly, or cartel, specifies or determines

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<sup>315</sup> The heading of the ballot stated: “Anti-monopoly amendment; protects the initiative process from being used for personal economic benefit.” OHIO SEC’Y OF STATE, OHIO BALLOT BOARD, ISSUE 2 (2015) [hereinafter OHIO BALLOT BOARD], <http://www.sos.state.oh.us/sos/upload/ballotboard/2015/2-Language.pdf> [https://perma.cc/PE5B-2U2K]; *see also* State *ex rel.* ResponsibleOhio v. Ohio Ballot Bd., No. 2015-1411, 2015 Ohio LEXIS 2391, at \*5–6 (Sept. 16, 2015) (upholding the title of the antimonopoly amendment).

<sup>316</sup> *Table of Proposed Amendments*, *supra* note 139.

<sup>317</sup> OHIO CONST. art. II, § 1e(B)(1). The full text of this limitation is as follows:

[T]he power of the initiative shall not be used to pass an amendment to this constitution that would grant or create a monopoly, oligopoly, or cartel, specify or determine a tax rate, or confer a commercial interest, commercial right, or commercial license to any person, nonpublic entity, or group of persons or nonpublic entities, or any combination thereof, however organized, that is not then available to other similarly situated persons or nonpublic entities.

*Id.*

<sup>318</sup> *See id.* § 1e(B)(2).

<sup>319</sup> *See id.*

<sup>320</sup> *Id.* § 1e(B)(2)(b).

a tax rate, or confers a commercial interest, commercial right, or commercial license that is not available to other similarly situated persons?<sup>321</sup>

The second question will describe the proposed constitutional amendment.<sup>322</sup> If the voters respond affirmatively to both questions, the proposed amendment will be approved.<sup>323</sup> Thus, unlike limitations used in other states,<sup>324</sup> this limitation creates an obstacle, indeed a high obstacle, so that voters may only approve an otherwise prohibited initiated amendment if they respond affirmatively to the question of whether they want to violate the limitation.

This new constitutional provision contains a number of procedural and substantive issues. The provision does not clearly state whether the Ballot Board must make the “monopoly/tax rate/special benefit” determination early in the process when it is addressing the one amendment, separate-vote requirement or late in the process after signatures have been submitted and the Board is determining what will go on the ballot.<sup>325</sup> However, in its first review of a proposed amendment after the adoption of the new procedure the Chair of the Ballot Board stated that the determination will be made at the end of the process.<sup>326</sup> And, like other determinations of the Ballot Board concerning the ballot, the Ohio Supreme Court has original and exclusive jurisdiction over such issues.<sup>327</sup>

Substantively, it is unclear precisely what is barred. The provision does not define “monopoly, oligopoly, or cartel,” but courts should be able to figure

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<sup>321</sup> *Id.* § 1e(B)(2)(a) (emphasis added).

<sup>322</sup> *Id.* § 1e(B)(2)(b).

<sup>323</sup> *Id.* § 1e(B)(2)(c).

<sup>324</sup> See *supra* notes 266–70 and accompanying text.

<sup>325</sup> OHIO CONST. art. II, § 1e(B)(2).

<sup>326</sup> See Transcript, Meeting of the Ohio Ballot Board 3–4 (Nov. 10, 2015) (“[T]hat determination falls on the Ballot Board not at the initial submission of the issue, but after a proposed statewide issue has met all of the requirements to be certified to the ballot, including certification of a single proposed amendment or law and collecting the required number of signatures from qualified voters.”); accord *What Is a Citizen-Initiated Constitutional Amendment?*, OHIO SECRETARY ST., <https://www.sos.state.oh.us/sos/LegnAndBallotIssues/issues/initiatedamendment.aspx> [<https://perma.cc/V6VK-CTSW>].

<sup>327</sup> OHIO CONST. art. II, § 1e(C) (“The supreme court of Ohio shall have original, exclusive jurisdiction in any action that relates to this section.”). Notwithstanding this provision, opponents of the amendment, relying on the language providing that the antimonopoly determination was to be based on the “opinion of the Ohio ballot board,” argued that judicial review was not available. See, e.g., MAURICE A. THOMPSON, 1851 CTR. FOR CONSTITUTIONAL LAW, A CITIZEN’S GUIDE TO UNDERSTANDING STATE ISSUE 2: REASONS TO BE SKEPTICAL OF AMENDING THE OHIO CONSTITUTION 3 (Oct. 28, 2015), <http://www.ohioconstitution.org/wp-content/uploads/2015/10/Issue-2-Policy-Brief.pdf> [<https://perma.cc/2KTT-3ZWW>]. Proponents, on the other hand, might have pointed to the language defining a role for the state supreme court and to the general presumption against implied limitations on judicial review; cf. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (requiring a clear statement by Congress when it eliminates judicial review of the constitutionality of an administrative action).



out their meaning. The limitation on initiatives that “specify or determine a tax rate” seems to be unmodified, but the official explanation issued by the Ballot Board described this prohibition as barring the use of the initiative to “establish a preferential tax status,”<sup>328</sup> presumably based on the limiting language in the final clause of the provision. But it is unclear whether a strict application of the “last-antecedent” rule of construction<sup>329</sup> only limits the “similarly situated” language to the final provisions concerning special benefits or whether it also relates back to the tax provision.<sup>330</sup> What is clear, however, is that proposed initiated amendments that seek to confer special benefits to favored groups (or that seek to establish tax rates) will have to go through a difficult process and will undoubtedly be the subject of litigation.

#### D. *Judicial Review of Limitations on the Use of the Initiative*

The existence of limitations on the use of constitutional initiatives provides opponents of proposed amendments with a basis for seeking to keep proposals off the ballot, and courts around the country have provided both pre-election and post-election judicial review of initiated amendments.<sup>331</sup>

The Ohio Supreme Court has a broad constitutional grant of “exclusive, original jurisdiction in all cases challenging the adoption or submission of a proposed constitutional amendment to the electors.”<sup>332</sup> A companion provision, adopted in 2008, provides the court with “exclusive, original

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<sup>328</sup> See OHIO SEC’Y OF STATE, PROPOSED CONSTITUTIONAL AMENDMENT 6 (2015), <http://www.sos.state.oh.us/sos/upload/ballotboard/2015/2015IssuesReport.pdf> [<https://perma.cc/9XCW-UR4F>] (including sample ballot and ballot explanations).

<sup>329</sup> In *Wohl v. Swinney*, 888 N.E.2d 1062, 1065 (2008), an insurance contract case, the Ohio Supreme Court discussed the last antecedent rule.

“[R]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent . . . .” However, in relying on the last-antecedent rule, appellees overlook the fact that the rule applies only when no contrary intention otherwise appears. Thus, if there is contrary evidence that demonstrates that a qualifying phrase was intended to apply to more than the term immediately preceding it, we will not apply the last-antecedent rule so as to contravene that intent. Before applying the last-antecedent rule, we must therefore examine the contract as a whole to determine whether any contrary intent appears.

*Id.* at 1065 (alteration in original) (quoting *Indep. Ins. Agents of Ohio v. Fabe*, 587 N.E.2d 814 (Ohio 1992); *cf.* *Lockhart v. U.S.*, 136 S. Ct. 958, 962–63 (2016) (treating the “rule of the last antecedent” as a canon of statutory interpretation under which a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows, but noting that the rule can be overcome by other indicia of meaning).

<sup>330</sup> OHIO BALLOT BOARD, *supra* note 315.

<sup>331</sup> See MILLER, *supra* note 295, at 101–24. See generally James D. Gordon III & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298 (1989) (arguing courts should not adjudicate pre-election challenges to a measure’s substantive validity).

<sup>332</sup> OHIO CONST. art. XVI, § 1 (1974).

jurisdiction over all challenges made to petitions and signatures upon such petitions under [the initiative and referendum].”<sup>333</sup> Taken together, these provisions require that certain challenges always be brought before the election. Moreover, the court has held that Ohio courts may not provide *substantive* judicial review of the constitutionality of proposed amendments *before* elections,<sup>334</sup> and state courts around the country generally also take this position.<sup>335</sup>

The court, however, has provided pre-election judicial review in cases alleging non-compliance with the one amendment, separate-vote requirement. Indeed, in 1972 in *State ex rel. Roahrig v. Brown*,<sup>336</sup> the court struck from the ballot the initial proposal from the Ohio Constitutional Revision Commission for violating the one amendment, separate-vote requirement.<sup>337</sup> *Roahrig* involved amendments proposed by the General Assembly (at the behest of the OCRC) not by the initiative,<sup>338</sup> but in *State ex rel. Liberty Council v. Brunner*,<sup>339</sup> the court reviewed the decision of the Ballot Board to divide an initiated amendment on healthcare into two separate amendments. Therefore, it is clear that the court will also provide pre-election judicial review of putative violations of the one amendment, separate-vote requirement in cases involving proposed initiated amendments.

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<sup>333</sup> *Id.* art. II, § 1g. In effect, this is mandatory pre-election review. Cases challenging “the petitions and signatures” must be filed no later than at least ninety-five days prior to the election, and amendments that are approved by the voters may not be struck down “on account of the insufficiency of the petitions.” *Id.* Furthermore, cases “challenging the ballot language, the explanation, or the actions or procedures of the General Assembly in adopting and submitting a constitutional amendment” must be filed no later than sixty-five days before the election. OHIO CONST. art. XVI, § 1 (1974).

<sup>334</sup> *See State ex rel. Cramer v. Brown*, 454 N.E.2d 1321, 1322 (Ohio 1983) (per curiam) (“It is well-settled that this court will not consider, in an action to strike an issue from the ballot, a claim that the proposed amendment would be unconstitutional if approved, such claim being premature.”). This limitation dates back to the early years after the adoption of the initiative. *See Weinland v. Fulton*, 121 N.E. 816, 816 (Ohio 1918) (per curiam) (“In an action to enjoin the Secretary of State from submitting for the approval or rejection of the electors a constitutional amendment proposed by petition . . . a court cannot consider or determine whether such proposed amendment is in conflict with the Constitution of the United States.”); *Pfeifer v. Graves*, 104 N.E. 529, syllabus para. 5 (Ohio 1913).

<sup>335</sup> *See Gordon & Magleby*, *supra* note 331, at 304.

<sup>336</sup> *State ex rel. Roahrig v. Brown*, 282 N.E.2d 584 (Ohio 1972) (per curiam).

<sup>337</sup> *See supra* Part XII.C.1 (discussing the one amendment, separate-vote requirement).

<sup>338</sup> *See, e.g., Roahrig*, 282 N.E.2d at 586 (stating that “a proposal consists of one amendment to the Constitution only so long as each of its subjects bears some reasonable relationship to a single *general* object or purpose” and removing from the ballot the initial proposal from the Ohio Constitutional Revision Commission for violating the one amendment, separate-vote requirement).

<sup>339</sup> *State ex rel. Ohio Liberty Council v. Brunner*, 928 N.E.2d 410, 414 (Ohio 2010) (per curiam).

Despite its willingness to exercise pre-election judicial review of compliance with the one amendment, separate-vote requirement, the Ohio Supreme Court has not explained the basis for its unwillingness to exercise pre-election judicial review to assure *substantive* compliance with provisions of state or federal law. The notion that a provision of the state constitution may be invalid because it violates an earlier enacted *substantive* provision of the same state constitution is difficult to envision,<sup>340</sup> but substantive conflicts between state constitutions and federal law—whether the federal constitution or federal statutes—are commonplace.<sup>341</sup> In declining to provide pre-election substantive judicial review, the Ohio Supreme Court may simply believe that state voters should have the first opportunity to address even arguably unconstitutional amendments and that the proper role of the judiciary is to defer (at least initially) to the voters. And post-election judicial review in the state and federal courts is readily available for determining compliance of state constitutional provisions with federal law.<sup>342</sup>

Although the Ohio Supreme Court has provided pre-election review to enforce the one amendment, separate-vote requirement,<sup>343</sup> it has not addressed whether it will follow the lead of some other states and provide post-election review to strike down an amendment on these grounds after the voters approved it.<sup>344</sup>

The availability of judicial review for alleged violations of the amendment-revision distinction and the antimonopoly amendment will be new

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<sup>340</sup> See *Floridians Against Casino Takeover v. Let's Help Fla.*, 363 So.2d 337, 341–42 (Fla. 1978) (per curiam) (“When a newly adopted amendment does conflict with preexisting constitutional provisions, the new amendment necessarily supersedes the previous provisions.”).

<sup>341</sup> See MILLER, *supra* note 295, at 101–23 (discussing how courts have defended and checked the initiative process).

<sup>342</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that an initiated state constitutional amendment limiting marriage to same-sex couples violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment); *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986) (holding that an initiated state constitutional amendment that prohibited corporations from holding title to ranch or agricultural land did not violate either the federal National Bank Act or the Equal Protection Clause of the Fourteenth Amendment).

<sup>343</sup> See *supra* Part XII.C.1.

<sup>344</sup> See *Lehman v. Bradbury*, 37 P.2d 989, 990 (Or. 2002) (throwing out a voter-approved initiated constitutional amendment adopting a legislative term limit provision for state legislators because the provision was not closely related to the provision limiting the terms of members of Congress); cf. *Raven v. Deukmejian*, 801 P.2d 1077, 1078 (Cal. 1990) (addressing but rejecting the merits of a post-election single-subject challenge to an initiated amendment that barred the state courts from construing the California Constitution to provide criminal or juvenile defendants with greater protections than available under federal law); *Armstrong v. Harris*, 773 So. 2d 7, 18–22 (Fla. 2000) (providing post-election judicial review to hold that a legislative-proposed voter-approved constitutional amendment relating to the Florida death penalty did not comply with the accuracy requirement of the Florida Constitution).

issues for the Ohio courts. In addressing these issue, the Ohio Supreme Court will have to determine whether these limitations are closer to substantive limitations, which are not subject to pre-election judicial review, or to the one amendment, separate-vote requirement and other ballot-supervision requirements, which are subject to pre-election judicial review.

### XIII. CONSTITUTIONAL CONVENTIONS AND COMMISSIONS TODAY

Constitutional conventions, once the principal method for revising state constitutions,<sup>345</sup> have fallen out of favor, and Professor Robert F. Williams, one of the nation's leading state constitutional scholars and a participant in this Symposium,<sup>346</sup> has observed that they "seem to have lost their *legitimacy* in the public mind."<sup>347</sup>

Since 1776, there have been 233 state conventions in the United States, but 170 of them took place in the eighteenth and nineteenth centuries.<sup>348</sup> The trend away from state constitutional conventions as tools of constitutional revision in the twentieth century is clear, but the pattern is not. In the first half of the century there were twenty-seven state constitutional conventions, largely the result of the Progressive Movement.<sup>349</sup> Since 1950 there were thirty-six state constitutional conventions in twenty states,<sup>350</sup> in part the result of the Supreme Court's reapportionment decisions.<sup>351</sup> As a direct result of these conventions, eleven states adopted new or inaugural constitutions since 1950,<sup>352</sup> but the last time a state has used a convention to adopt a new

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<sup>345</sup> DINAN, *supra* note 84, at 7 ("For much of American history . . . the constitutional convention was the primary forum for debating and revising state foundational documents.").

<sup>346</sup> See generally Robert F. Williams, Foreword, *Justice William J. Brennan, Jr. and the Evolving Development of State Constitutional Law*, 77 OHIO ST. L.J. 203 (2016).

<sup>347</sup> Robert F. Williams, *Should the Oregon Constitution Be Revised, and If So, How Should It Be Accomplished?*, OR. L. REV. 867, 901 (2008).

<sup>348</sup> DINAN, *supra* note 84, at 7–8.

<sup>349</sup> See BOOK OF THE STATES 2015, *Table 1.1*, *supra* note 5, at 11 (listing dates of state constitutional conventions).

<sup>350</sup> Thirteen states had only one convention during this period; the other seven had twenty-three conventions. See DINAN, *supra* note 84, at 8–9; see also BOOK OF THE STATES 2015, *Table 1.1*, *supra* note 5, at 11.

<sup>351</sup> Albert L. Sturm, *The Development of American State Constitutions*, 12 PUBLIUS 56, 72–73 (1982).

<sup>352</sup> States that adopted new constitutions as a result of conventions since 1950, listed chronologically by date of adoption, include: Hawaii (1950), Alaska (1956), Michigan (1963), Connecticut (1965), Florida (1968); Pennsylvania (1968), Illinois (1970), North Carolina (1970), Montana (1972), Louisiana (1974), and Rhode Island (1986). See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 364–76 (2009); Sturm, *supra* note 351, at 73.

constitution was Rhode Island in 1986.<sup>353</sup> And since 1950, voters rejected convention-proposed constitutions in six states.<sup>354</sup>

Disillusionment with constitutional conventions, the rejection by voters of proposed new constitutions, and the general acceptability of commissions to state legislators heightened the use of state constitutional revision commissions. In 1982, Professor Albert L. Sturm reported that between 1938 and 1961 states held forty constitutional conventions, but during this period states created eighty-six commissions to address their constitutions.<sup>355</sup>

Constitutional revision commissions come in many different forms. The common feature is that, with the exception of the unique Florida Constitutional Revision Commission, state revision commissions do not have authority to place proposed amendments directly on the ballot.<sup>356</sup> Typically, commissions make recommendations directly to the legislature, and these commissions have been successful in Georgia, Virginia, and Ohio but not in California, Alabama, and Arkansas.<sup>357</sup> Some states have also created commissions to make recommendations to support the work of state constitutional conventions that have been or that might be created.<sup>358</sup>

The success of state constitutional revision commissions is difficult to gauge. There is typically no up-or-down vote on a new constitution, but one can still look at the quantity and quality of constitutional change that results from the use of a commission. And whatever the measure of success, scholars who have studied the use of constitutional revision have looked to whether

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<sup>353</sup> The 1986 Rhode Island Constitutional Convention did not present the voters with an up-and-down vote on a new constitution but put fourteen proposals on the ballot. The voters approved eight of them, and Rhode Island treats the state as having adopted a new constitution in 1986. *See generally* R.I. CONST.; *see also* J.H. Snider & Beverly Clay, *Constitutional Convention and the Out-of-State-Money Bogeyman*, PROVIDENCE J. (Oct. 24, 2014), <http://www.providencejournal.com/article/20141024/OPINION/310249896> [<https://perma.cc/BM9D-4PLV>].

<sup>354</sup> States in which the voters rejected constitutions proposed by conventions during this period include: New York (1967), Maryland (1968), Rhode Island (1968), New Mexico (1969), Arkansas (1970), and North Dakota (1972). *See* Sturm, *supra* note 351, at 73 n.55 (describing failures through 1981).

<sup>355</sup> *See id.* at 86; *see also* WILLIAMS, *supra* note 352, at 364–76.

<sup>356</sup> WILLIAMS, *supra* note 352, at 370. The Florida Constitutional Revision Commission, which was created by the state constitution, has the power to place proposed amendments directly on the ballot without any involvement of the state legislature. *See id.* at 369–71.

<sup>357</sup> *See id.* at 366–74 (discussing successful uses of constitutional revision commissions in Florida and Virginia and the failures in California and Alabama); *see also* Dinan, *supra* note 4, at 4 (discussing the lack of progress with the Alabama Constitutional Revision Commission); Walter H. Nunn, *The Commission Route to Constitutional Reform: The Arkansas Experience*, 22 ARK L. REV. 317 (1969). The 1970s Ohio Constitutional Revision Commission has not received any academic attention. *But see infra* Part XIV.

<sup>358</sup> WILLIAMS, *supra* note 352, at 364–76. State constitutional study commissions were used successfully to support the work of constitutional conventions in Michigan and Montana, but the New York experience was not successful. *See id.* at 367–71.

there are controversial issues, the timing of the process, the existence of bipartisan support for constitutional reform, the leadership of key political leaders as well as commissioners, and the presence of public support.<sup>359</sup>

Despite the successful experiences of some states with constitutional revision commissions, there are limitations. When constitutional revision commissions are charged with proposing amendments to the legislature, the commissions must work through the same legislative and political minefields that have often blocked constitutional revision. As a result, commissions—though ideally deliberative and able to place their imprimatur of expertise and bipartisanship on difficult issues—are part of the existing political system and constrained by it.

As a result, Professor John Dinan has observed that “revision commissions . . . are viewed more favorably by legislators who are generally able to maintain more control over selecting commission members and determining the scope of their work.”<sup>360</sup>

#### XIV. THE OHIO CONSTITUTIONAL REVISION COMMISSION

##### A. *The Creation of the Ohio Constitutional Revision Commission*

The national trend away from state constitutional conventions has been reflected in Ohio. Despite the success of the 1912 convention, Ohio voters have consistently rejected the mandatory twenty-year convention calls.<sup>361</sup> The closest vote was in 1932, when 44.7% of the voters supported a convention, but in none of the four subsequent elections did more than 40% of the voters support a convention.<sup>362</sup>

Nonetheless, there was state interest in state constitutional reform before the 1952 and 1972 convention calls.<sup>363</sup> Prior to the 1952 vote, there was a spirited public debate on the convention call.<sup>364</sup> The League of Women Voters

<sup>359</sup> See, e.g., WILLIAMS, *supra* note 347, at 895–98; John Dinan, *Accounting for Success and Failure of Southern State Constitutional Reform, 1978–2008*, 3 CHARLESTON L. REV. 483, 485–86 (2008).

<sup>360</sup> John Dinan, *State Constitutional Developments in 2012*, in BOOK OF THE STATES 2013, at 3, 4 (2013), [http://knowledgecenter.csg.org/kc/system/files/dinan\\_2013\\_1.pdf](http://knowledgecenter.csg.org/kc/system/files/dinan_2013_1.pdf) [<https://perma.cc/SM54-7PRV>].

<sup>361</sup> See *Calls for Conventions*, *supra* note 76.

<sup>362</sup> *Id.*

<sup>363</sup> See ARCHER REILLY, *A Summary of the Campaigns for and Against the Constitutional Convention*, 25 OHIO B. 685, 685 (1952); see also DINAN, *supra* note 84, at 10 (“[T]he 1960s marked the start of another period of intense constitutional activity.”). See generally W. DONALD HEISEL & IOLA O. HESSLER, *STATE GOVERNMENT FOR OUR TIMES: A NEW LOOK AT OHIO’S CONSTITUTION* (1970); *POLITICAL BEHAVIOR AND PUBLIC ISSUES IN OHIO* (John J. Gargan & James G. Coke eds., 1972) [hereinafter *POLITICAL BEHAVIOR*] (discussing a collection of papers following the November 1969 conference at Kent State University).

<sup>364</sup> See REILLY, *supra* note 363, at 685.

of Ohio, working with the Committee for a Constitutional Convention, led the campaign for a “yes” vote, believing that a convention was the best way to provide a much-needed review of the Ohio Constitution.<sup>365</sup> In opposition, the Ohio Farm Bureau and the Ohio Chamber of Commerce, working with the Committee to Protect Ohio’s Constitution, argued that the Constitution was sound and that needed changes could be made in other ways.<sup>366</sup> Meanwhile, members of the Social Sciences Section of the Ohio College Association published, with the financial assistance of the Stephen H. Wilder Foundation, a monograph containing a series of substantive papers on various topics concerning the Ohio Constitution.<sup>367</sup> The goal was to educate the voters in the hope that they will have “adequate information concerning the nature, virtues and shortcomings of the present Ohio state constitution.”<sup>368</sup> Educated or not, the voters soundly rejected the call on November 4, 1952, with only 34.0% of the voters supporting a convention.<sup>369</sup>

In the early 1970s, the Stephen H. Wilder Foundation continued its efforts and funded and published a number of studies to review the Ohio Constitution and to generate interest in the convention call,<sup>370</sup> and Kent State University held a conference for the same purposes.<sup>371</sup> These efforts produced a series of excellent papers, focusing primarily on substantive constitutional issues.<sup>372</sup> But no significant popular support emerged for a constitutional convention,<sup>373</sup> and on November 7, 1972, the voters again soundly rejected a convention call with only 37.6% of the voters supporting a convention.<sup>374</sup>

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<sup>365</sup> *Id.*

<sup>366</sup> *See id.* at 685–87.

<sup>367</sup> *See generally* HARVEY WALKER, AN ANALYSIS AND APPRAISAL OF THE OHIO CONSTITUTION 1851–1951 (1951).

<sup>368</sup> *Id.* at 5.

<sup>369</sup> *Calls for Conventions*, *supra* note 76.

<sup>370</sup> *See* HEISEL & HESSLER, *supra* note 363, at 1–4.

<sup>371</sup> *See* POLITICAL BEHAVIOR, *supra* note 363, at 1.

<sup>372</sup> The papers supported by the Wilder Foundation in 1970, *supra* note 363, addressed taxation, public debt, home rule and local government, and the judiciary. The papers presented at the Kent State University conference, *supra* note 363, addressed Ohio government and politics, state and local taxation, the legislature, judicial selection, urban policies, and the politics of constitutional revision. In addition, after the creation of the OCRC but before the vote on the mandatory call, a Local Government Symposium, co-sponsored by the Commission, the Ohio State University College of Law, and the Ohio Municipal League, addressed issues of local law that involved the state constitution. *See* Howard P. Fink, *Symposium: Introduction—Constitutional Aspects of Ohio Local Government*, 33 OHIO ST. L.J. 572, 573–74 (1972) (discussing the Symposium and the papers).

<sup>373</sup> Prior to the 1972 vote, the League of Women Voters of Ohio made the Ohio Constitution a statewide study item, but the League, which supported the creation of the OCRC, did not take a position on whether there should be a constitutional convention. *See* POLITICAL BEHAVIOR, *supra* note 363, at v.

<sup>374</sup> *Calls for Conventions*, *supra* note 76.

Prior to the 1972 defeat of the constitutional call, there had been some interest in constitutional reform through a constitutional revision commission. A number of states had used commissions to update their constitutions, and the Citizens League proposed the creation of a constitutional revision commission patterned after a similar commission in California.<sup>375</sup>

Support for a commission also included some who had deep concerns about the prospect of a convention and saw the creation of a commission as a way to blunt a positive vote on the convention call. For example, in the early 1970, after the creation of the OCRC but before the mandatory vote, Plain Dealer reporter Richard G. Zimmerman, stated that “[t]he very idea [of a constitutional convention] sends a chill up my spine.”<sup>376</sup> He elaborated:

This is an era of fear and mistrust, an era of growing tensions between the courts and the legislature, between the people and their government. It is a time when the gap between generations grows and cries for police state tactics increase. . . . In short, it is no time to completely rewrite our basic state Constitution.<sup>377</sup>

And Columbus Dispatch reporter David Lore described the motivation behind the creation of the OCRC: “Hoping to undercut any enthusiasm for such a convention, the assembly . . . created the Ohio Constitutional Revision Commission, a citizens group, to study constitutional reform and report back to the legislature.”<sup>378</sup> Finally, and more recently, Mike Curtin Associate Publisher Emeritus of the Columbus Dispatch and now a state legislator and a member of the Ohio Constitutional Modernization Commission (OCMC), reflected on the times: “The late 1960s were politically and socially tumultuous, and Statehouse leaders were concerned over the direction a constitutional convention might take. The commission was a way to take the steam out of any momentum for a 1972 convention call.”<sup>379</sup>

On August 26, 1969, with the 1972 vote on the mandatory call still slightly more than three years away, Ohio Governor James A. Rhodes signed legislation creating the bipartisan Ohio Constitutional Revision Commission (OCRC) to study the constitution, to make recommendations of proposed amendments to the General Assembly, and to make recommendations to a constitutional convention (should the voters support the convention call).<sup>380</sup>

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<sup>375</sup> See William C. Barnard, *Constitution Overhaul Needed*, CLEV. PLAIN DEALER, Jan. 4, 1970, at 16AA.

<sup>376</sup> Richard G. Zimmerman, *No Time to Rewrite Constitution*, CLEV. PLAIN DEALER, Jan. 4, 1970, at 16AA.

<sup>377</sup> *Id.* (emphasis omitted).

<sup>378</sup> David Lore, *Constitutional Convention Silence Deafens*, COLUMBUS DISPATCH, Oct. 8, 1972, at 23A.

<sup>379</sup> Mike Curtin, Commentary, *Ohio Constitution Could Use Some Tweaking*, COLUMBUS DISPATCH (Nov. 15, 2010), <http://www.dispatch.com/content/stories/editorials/2010/11/14/ohio-constitution-could-use-some-tweaking.html> [<https://perma.cc/VEJ5-FQRJ>].

<sup>380</sup> Am. Sub. H.B. 240, 108th Gen. Assemb., Reg. Sess. (Ohio 1969).



The OCRC was composed of thirty-two members, twelve of whom were legislators—six senators and six representatives—with an equal number from each of the two major political parties.<sup>381</sup> Appointed by the legislative leadership, this core group of legislators in turn appointed twenty non-legislators to serve on the OCRC.<sup>382</sup> All commissioners had two-year terms but could be reappointed,<sup>383</sup> and the OCRC was given ten years to complete its work.<sup>384</sup>

The General Assembly charged the OCRC with reviewing the Ohio Constitution and, by a two-thirds vote, recommending proposed amendments to the General Assembly.<sup>385</sup> The supermajority voting requirement assured that only proposals that could garner strong bipartisan support would be approved by the OCRC and recommended to the General Assembly, which, by the required three-fifths vote, could propose amendments to the voters.<sup>386</sup>

The OCRC got off the ground well in advance of the mandatory call. At its initial organizational meeting on January 8, 1970, it selected two legislative members from different political parties as cochairmen.<sup>387</sup> At its July 28, 1970 meeting, the legislative members appointed the twenty public members, and at the January 21, 1971 meeting, the full commission hired the well-known and well regarded Ann M. Eriksson, the former Assistant Director and Chief of Legal Services for the nonpartisan Legislative Services Commission, as Director of the Commission.<sup>388</sup> And on February 18, 1971, though not required to do so,<sup>389</sup> the OCRC transferred the leadership of the OCRC to the

<sup>381</sup> OHIO REV. CODE ANN. § 103.51 (Anderson 1978) (expired July 1, 1979).

<sup>382</sup> *Id.* Nonlegislators did not have party designations, and there was no political party diversity requirement concerning the permanent leadership of the Commission. *See id.*

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* § 103.56 (expired July 1, 1979).

<sup>385</sup> *Id.* § 103.52 (expired July 1, 1979).

<sup>386</sup> OHIO CONST. art. XVI, § 1.

<sup>387</sup> 1 OHIO CONSTITUTIONAL REVISION COMMISSION 1970–1977, MEETINGS OF THE COMMISSION, BEGINNING JANUARY 8, 1970, at 1 (1971) [hereinafter MINUTES OF THE OCRC], <http://www.lsc.ohio.gov/ocrc/v1%20pgs%201-548%20meetings%20beginning%201-8-1970.pdf> [<https://perma.cc/XJP6-2U47>] (election of Representative James E. Thorpe and Representative John C. McDonald as cochairmen).

<sup>388</sup> *Id.* at 5.

<sup>389</sup> The statute creating the OCRC originally provided that the legislative members select a Chairman and Vice-Chairman prior to the appointment of public members, thus seeming to preclude public members from serving in these leadership positions. *See* Am. Sub. H.B. 240 § 103.51, 108th Gen. Assemb., Reg. Sess. (Ohio 1969) (“On January 1, 1970, and every two years thereafter, the twelve general assembly members shall meet, organize, and elect two co-chairmen, who shall be from different political parties. The members shall then, by majority vote, appoint twenty commission members, not from the general assembly.”). Nonetheless, on February 18, 1971, the full OCRC elected two public members to serve as Chairman and Vice-Chairman. *See* MINUTES OF THE OCRC, *supra* note 387, at 7–8. In 1972, the General Assembly amended the statute governing the OCRC, creating a two-step procedure in which the legislative members initially elect two temporary cochairmen and appoint the nonlegislative members. Am. H.B. 999, 109th Gen.

public members by electing Richard C. Carter, a businessman from Fostoria, and Linda Unger Orfirer, Associate Director, Health Planning and Development Commission, Federation for Community Planning, and an active member of the League of Women Voters, as Chairman and Vice-Chairman respectively.<sup>390</sup> Both these public members held their leadership positions for the entire life of the Commission.

At its March 25, 1971 meeting, the OCRC approved the committee structure, which included four standing committees, four subject matter committees, and a steering committee, and the Chairman made clear that the committee chairs had broad authority over their committees.<sup>391</sup> And on December 31, 1971, the OCRC made its first report to the General Assembly,<sup>392</sup> two years after its initial organizational meeting.<sup>393</sup> In this report, the OCRC recommended numerous amendments, primarily to Article II, the Legislative Branch.<sup>394</sup>

### B. *Initial Setbacks*

Despite the speed with which the OCRC organized, hired staff, and began its work, plus the widely held view of its success,<sup>395</sup> there is another chapter in the story. The OCRC had initial difficulty moving its substantive agenda forward, and its early recommendations ran into opposition from both the courts and the voters.<sup>396</sup> Moreover, a number of substantial proposals did not get through the OCRC, while the General Assembly did not embrace a significant number of the OCRC recommendations.<sup>397</sup>

On April 28, 1972, the Ohio Supreme Court removed the OCRC's first set of proposed amendments from the ballot for having violated the one amendment, separate-vote requirement.<sup>398</sup> And one year later, on May 8, 1973,

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Assemb., Reg. Sess. (Ohio 1972). Only then does the Commission select its leadership. *Id.* ("After all members are appointed, the commission shall organize and select a chairman and vice-chairman.").

<sup>390</sup> See OCRC FINAL REPORT, *supra* note 250, at 1–12 (list of members of OCRC and their biographical sketches).

<sup>391</sup> See MINUTES OF THE OCRC, *supra* note 387, at 12–13.

<sup>392</sup> Letter from Richard H. Carter, Chairman, Ohio Constitutional Revision Comm'n, to the Ohio General Assembly (Dec. 31, 1971), *reprinted in* OHIO CONSTITUTIONAL REVISION COMM'N, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION PART 1, at 3–4 (1971) [hereinafter OCRC PART 1], <http://www.lsc.ohio.gov/ocrc/recommendations%20pt1%20general%20assembly.pdf> [<https://perma.cc/8UXX-KNFF>].

<sup>393</sup> See MINUTES OF THE OCRC, *supra* note 387 and accompanying text.

<sup>394</sup> OCRC PART 1, *supra* note 392, at 15–16 (summary of Part I recommendations); *see also* OCRC FINAL REPORT, *supra* note 250, at 96–149.

<sup>395</sup> See *supra* notes 387–94 and accompanying text. For a discussion of the success of the OCRC, *see infra* Part XIV.C.

<sup>396</sup> See *infra* note 398 and accompanying text.

<sup>397</sup> See *infra* notes 400, 414 and accompanying text.

<sup>398</sup> State *ex rel.* Roahrig v. Brown, 282 N.E.2d 584, 586 (Ohio 1972) (*per curiam*) (holding that proposals to repeal the provision disqualifying persons convicted of

the voters rejected two of the first three proposed amendments to reach them.<sup>399</sup>

These initial setbacks caused the OCRC to review its operations, to focus more on the job of educating the public, and to consider the need to address a problem with the constitutional amendment process that many believed had made it difficult for the voters to understand the issues that were coming before them.<sup>400</sup>

This led to the OCRC's first recommendation concerning the amendment process itself, and on December 31, 1973, the OCRC delivered to the General Assembly a report recommending an amendment to create the Ohio Ballot Board and establish standards for the ballot language being presented to the voters.<sup>401</sup> Chairman Carter, correctly it turned out, predicted that this would become "one of the most important changes to the Ohio Constitution."<sup>402</sup> His transmittal letter identified the proposal as addressing "(1) the need to state constitutional issues on the ballot in clear, nontechnical language which can be

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embezzling public funds from holding public office, to repeal the legislative authority to create Supreme Court Commissions, and to require the governor and lieutenant governor to run together could not be combined in one proposed amendment under the one amendment, separate-vote requirement of Article XVI, § 1); *see also supra* Part XII.C.1 (discussing the one amendment, separate-vote requirement).

<sup>399</sup> *Table of Proposed Amendments*, *supra* note 139. Two of the rejected amendments had earlier been in the proposal that the Ohio Supreme Court kept off the ballot in 1972—the proposals to repeal Article II, § 5 (voting by convicted embezzlers) and Article IV, § 22 (Supreme Court Commissions). *Roahrig*, 282 N.E.2d at 584. A third proposal, which the voters approved on May 8, 1973, significantly revised the organization, administration, and procedures of the General Assembly. *See Table of Proposed Amendments*, *supra* note 139.

<sup>400</sup> Prior to the removal of the initial proposals from the ballot, the OCRC discussed whether they should seek a "gateway" amendment to permit the General Assembly to propose the revision of an entire article or subject matter in a single amendment, but they did not pursue such a strategy on the basis that it was already permitted. *See MINUTES OF THE OCRC*, *supra* note 387, at 10–11. Preliminary, or so-called "gateway" amendments had been used successfully in Illinois and Michigan before the adoption of their 1963 and 1970 Constitutions to smooth the way for subsequent constitutional revisions. *See SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION 24, 248–49 (2011)* (discussing the November 1960 initiated amendment that changed the way of counting votes on constitutional calls in Michigan); *LOUSIN, supra* note 266, at 17–18 (discussing repeated efforts to amend the Illinois Constitution "to loosen the constitutional amending process"). The OCRC revisited this issue from time to time after the court knocked the initial OCRC proposals off the ballot for violation of the one amendment, separate-vote requirement, but the OCRC does not appear to have sought such an amendment. *See MINUTES OF THE OCRC, supra* note 387, at 77, 196–97, 369; *OCRC FINAL REPORT, supra* note 250, at 17.

<sup>401</sup> *See generally* OHIO CONSTITUTIONAL REVISION COMM'N, RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION PART 3 (1973) [hereinafter *OCRC PART 3*], <http://www.lsc.ohio.gov/ocrc/recommendations%20pt3%20constitutional%20amendments.pdf> [<https://perma.cc/YW23-H94F>]. This recommendation is also included in the Final Report of the OCRC, *OCRC FINAL REPORT, supra* note 250, at 188–91.

<sup>402</sup> *OCRC PART 3, supra* note 401.

more easily understood by the voter; and (2) the need to provide the voter with better information about proposed constitutional amendments.<sup>403</sup> And the voters approved this amendment on May 7, 1974, by a vote of 964,885 to 376,022.<sup>404</sup>

### C. OCRC Successes and Failures

After its initial setbacks, the OCRC began to chalk up successes. During the five and one-half years from January 1972 to mid-1977, the OCRC worked its way through the Constitution and submitted ten additional reports with multiple discrete recommendations to the General Assembly.<sup>405</sup> Between 1973 and 1978, the General Assembly proposed twenty amendments that had their origins in recommendations of the OCRC, and the voters approved sixteen of them.<sup>406</sup> The OCRC completed its work two years short of its July 1, 1979, deadline, remarkable for a governmental undertaking, and produced a Final Report with detailed recommendations.<sup>407</sup>

In reviewing the work of the OCRC, many commentators, including this author, have heralded the success of the OCRC, pointing to its superlative record before the voters.<sup>408</sup>

<sup>403</sup> *Id.*

<sup>404</sup> See *Table of Proposed Amendments*, *supra* note 139.

<sup>405</sup> See OCRC FINAL REPORT, *supra* note 250, at 20–21, 24–30. In total, the OCRC submitted eleven reports to the General Assembly on the following broad topics: (1) Administration, Organization, and Procedures of the General Assembly; (2) State Debt; (3) Constitutional Amendments; (4) Taxation; (5) Indirect Debt Limit; (6) Executive Branch; (7) Elections and Suffrage; (8) Local Government; (9) Initiative and Referendum; (10) Judiciary; and (11) Bill of Rights. *Id.* at table of contents. In addition, the OCRC set up a What’s Left Committee to review issues that were not addressed in the reports that had been submitted earlier. *Id.* at 18. These reports are all included in the Final Report of the OCRC. *Id.* apps. A–K.

<sup>406</sup> *Ohio Constitution—Law and History: Constitutional Revision Commission 1970–1977*, CLEV.-MARSHALL L. LIBR., <http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionalrevisioncommission> [<https://perma.cc/HXT5-QYXN>] (last updated Feb. 14, 2016) [hereinafter *Constitutional Revision Commission*]; see also OCRC FINAL REPORT, *supra* note 250, at 24–30 (summary of the OCRC’s recommended constitutional amendments and results as of May 1, 1977).

<sup>407</sup> Letter from Richard H. Carter, Chairman, Ohio Constitutional Revision Comm’n, to the Ohio General Assembly (May 1, 1977), reprinted in OCRC FINAL REPORT, *supra* note 250 (advising the General Assembly of the early completion date). The OCRC also produced a ten-volume treasure trove of proceedings, research studies, and other memoranda in addition to a Final Report, all of which are available on-line at *Ohio Constitutional Revision Commission Reports 1970–1977*, OHIO LEGIS. SERV. COMMISSION, <http://www.lsc.ohio.gov/ocrc/> [<https://perma.cc/3VZU-3VG3>].

<sup>408</sup> *E.g.*, Curtin, *supra* note 379; Steven H. Steinglass, *Constitutional Commission Is the Way to Go*, COLUMBUS DISPATCH (July 27, 2011), <http://www.dispatch.com/content/stories/editorials/2011/07/27/constitutional-commission-is-the-way-to-go.html> [<https://perma.cc/5NZ5-KFKJ>].

The successes of the OCRC included (but were not limited to) important recommendations involving: (1) a major reorganization of the procedures governing the General Assembly (May 1973); (2) the creation of the Ohio Ballot Board and the establishment of standards for ballot language (May 1974); (3) the joint election of the governor and the lieutenant governor and the revision of the lieutenant governor's duties (June 1976); (4) changes in voting requirements, including the reduction of voting age to eighteen and the repeal of the unconstitutional durational residency requirement (June 1976); (5) changes in gubernatorial succession in case of disability or vacancy in the office of governor or lieutenant governor (November 1976); (6) the expansion of the authority of the newly created Ohio Ballot Board to include the preparation of ballot language for proposed initiated amendments, the application of new provisions for proposed initiated amendments, and the grant of exclusive, original jurisdiction to the Ohio Supreme Court in cases challenging the adoption or submission of proposed amendments (June 1978); and (7) the modification of procedures for adopting, amending, and repealing county charters (November 1978).<sup>409</sup> On the other, hand the voters rejected four proposed amendments, including the two that had been defeated in May 1973 and two involving state and local debt that were defeated in June 1976 and November 1977.<sup>410</sup>

These numbers, however, do not tell the whole story. The OCRC, by its count, made sixty-three discrete recommendations to the General Assembly.<sup>411</sup> Because a number of proposed amendments that appeared on the ballot included more than one recommendation for constitutional change, the sixteen approved ballot measures actually included twenty-eight different OCRC recommendations.<sup>412</sup> Similarly, the four rejected amendments included fourteen different OCRC recommendations.<sup>413</sup> As a result, one-third of the

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<sup>409</sup> OCRC FINAL REPORT, *supra* note 250; *see also Approved Commission Proposals*, *supra* note 406.

<sup>410</sup> The four rejected proposals were: (1) the repeal of Article II, Section 5, disqualifying persons convicted of embezzling public funds from holding public office (May 1973); (2) the repeal of Article IV, Section 22, allowing the General Assembly to appoint a commission to assist the Supreme Court in disposing cases (May 1973); (3) a revision of the indirect debt limit in Article XII on political subdivisions (June 1976); and (4) the repeal of the \$750,000 limitation on state indebtedness and the delegation of the power to the General Assembly by a three-fifths vote to contract debt for capital improvements (November 1977). *See Constitutional Revision Commission*, *supra* note 406.

<sup>411</sup> *See* OCRC FINAL REPORT, *supra* note 250, at 24–30 (summary of OCRC recommendations).

<sup>412</sup> *Compare* OCRC FINAL REPORT, *supra* note 250, at 24–30 (summary of OCRC recommendations), *with Constitutional Revision Commission*, *supra* note 406.

<sup>413</sup> *Compare* OCRC FINAL REPORT, *supra* note 250, at 24–30 (summary of OCRC recommendations), *with Constitutional Revision Commission*, *supra* note 406. For example, the proposed amendment to revise Article VIII concerning state debt actually contained ten discrete OCRC recommendations. *See* OCRC FINAL REPORT, *supra* note 250, at 27.

sixty-three OCRC recommendations died in the General Assembly without being presented to the voters.<sup>414</sup> Finally, a number of proposed amendments did not get the two-thirds vote from the Commission that would have permitted them to reach the General Assembly.<sup>415</sup>

The difficult question is why the proposals that did not get out of the Commission died. One likely explanation is that these proposals, regardless of their merits, were, in large part, controversial. The reports of the OCRC, including the minority statements, for example, on changes in compensation for public officials during their terms, on workers' compensation, on the rights of the handicapped and disabled, on apportionment, and on judicial selection, make this clear.<sup>416</sup> The proposed amendments on these issues were all likely to engender serious opposition, and the refusal of two-thirds of the Commission to support them may have only presaged what would likely have happened in the General Assembly.

With respect to the recommendations that died in the General Assembly, there are undoubtedly multiple explanations why the General Assembly did not support one-third of the OCRC recommendations. However, short of a thorough and lengthy examination of the trip taken by each of the unsuccessful proposals, one can only speculate about the reasons for their demise.<sup>417</sup>

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<sup>414</sup> Compare OCRC FINAL REPORT, *supra* note 250, at 24–30 (summary of OCRC recommendations), with Constitutional Revision Commission, *supra* note 406. The twenty-one OCRC recommendations that never got out of the General Assembly included amendments to (a) repeal a provision permitting courts and juries to consider the failure of an accused to testify in a criminal case and permitting prosecutors to comment on the failure to testify; (b) provide an alternative to the grand jury, expand the rights of persons called before grand juries, and require the presentation of exculpatory evidence; (c) permit the General Assembly to reduce the number of counties; (d) permit workers compensation to be provided through a state fund or private insurance; (e) consolidate trial courts and make other changes concerning the organization of the courts; (f) repeal of a provision denying the right to vote to any “idiot, or insane” person; and (g) repeal the requirement that a person appointed to office be an elector when appointed but requiring the appointee to become a resident when assuming the office.

<sup>415</sup> See OCRC FINAL REPORT, *supra* note 250, at 40–42, 44–48, 52–71, 74–81, 397–400, 427–35 (discussing issues on which the OCRC did not make recommendations to amend the constitution). For reasons that differed from issue to issue, the OCRC was not able to put together a two-thirds vote in support of a number of proposals that had generated interest among the commissioners, including the prohibition in the compensation of public officials during their existing terms. *Id.* (discussing workers' compensation, education, the rights of the handicapped and disabled, apportionment, and judicial selection).

<sup>416</sup> See, e.g., *id.* at 42 (compensation of state officers), 48 (worker's compensation), 70–71 (aid to the handicapped and disabled), 79–81 (apportionment), and 427–35 (judicial selection).

<sup>417</sup> The General Assembly accepted some recommendations of the OCRC but only in part. For example, the initial recommendation on the initiative and referendum would have reorganized the relevant provisions of Articles II and XVI, substituted a fixed number of signatures for the percentage approach, and eliminated the geographic distribution requirement. See OCRC FINAL REPORT, *supra* note 250, at 25; see also OCRC PART 9,

To evaluate the work of the OCRC, one should start with its successes, and the successes have multiple explanations. The OCRC operated in an era in which Ohio legislators were willing to put partisanship aside in the search for bipartisan approaches to public issues. The practice was to appoint committed legislators to the OCRC.<sup>418</sup> And the two-thirds rule assured that only proposals with broad bipartisan support could get through the commission.<sup>419</sup>

Of course, the legislative members were ultimately responsible for the biennial appointments of public members, filling vacancies, and convincing their colleagues in the General Assembly to move recommendations to the ballot.<sup>420</sup> The legislative members were willing to place the leadership of the Commission in the hands of the public members, and give them day-to-day control of the OCRC. And much of the success of the OCRC has been attributed to the “commitment and continuity of the public members”<sup>421</sup> and to the quality of the staff.<sup>422</sup>

Even though the public members of the OCRC played a leadership role, the General Assembly did not view its role as merely rubber-stamping commission proposals. The members of the General Assembly exercised independent judgment about which proposals they would move forward.<sup>423</sup>

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*supra* note 250. The General Assembly did not accept these aspects of the recommendation but did send a more modest proposal to the voters for their approval. *See* Am. Sub. H.J. Res No. 12 (Nov. 23, 1977). The voters approved the proposed amendment on June 6, 1978. *See Table of Proposed Amendment, supra* note 139.

<sup>418</sup> CONSTITUTIONAL MODERNIZATION COMM’N COLLOQUIUM PLANNING COMM., SUMMARY OF A COLLOQUIUM (Mar. 22, 2012) [hereinafter SUMMARY OF COLLOQUIUM], <http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/2012-12-10ColloquiumSummary.pdf> [<https://perma.cc/DN4S-V4RY>].

<sup>419</sup> *See infra* notes 456–60 and accompanying text (discussing the presentations at the Colloquium).

<sup>420</sup> OHIO REV. CODE ANN. §§ 103.51–.52 (Anderson 1978) (expired July 1, 1979).

<sup>421</sup> SUMMARY OF COLLOQUIUM, *supra* note 418 (describing the Colloquium’s *Lessons from the 1970s Ohio Revision Commission* panel). The continuity of service of the public members was noteworthy. Nine of the original twenty public members remained on the OCRC for its entire life, and the two public members serving as chairman and vice-chairman held their leadership positions for the duration. *See* OCRC FINAL REPORT, *supra* note 252, at 1 (listing members of the OCRC and identifying original members). In total, thirty-three public members served in the twenty positions, and they came from a broad array of backgrounds with only four having served in the General Assembly. *Id.* at 2–12 (biographical sketches of members). On the other hand, the twelve legislative positions turned over frequently, and thirty-six different legislators filled the twelve legislative slots over the life of the OCRC. *Id.* at 1.

<sup>422</sup> *Colloquium on the Constitutional Modernization Commission*, OHIO CHANNEL 56:10–:30 (Mar. 22, 2012), <http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=134888> [<https://perma.cc/Z2QJ-88PX>] [hereinafter *Colloquium Recording*] (covering the *Lessons Learned from the 1970s Ohio Revision Commission* panel discussion between Jo Ann Davidson, Judge Alan E. Norris, and John C. McDonald); *see also* SUMMARY OF COLLOQUIUM, *supra* note 418.

<sup>423</sup> Interview with John C. McDonald, OCRC Member (1969–1971) and Ohio State Representative (1965–1970), Ohio Gen. Assembly (Jan. 20, 2016).

Undoubtedly, questions of politics and timing, and in many instances both, prevented the emergence of the requisite three-fifths vote needed to put an item on the ballot. It is not inconsistent with the spirit of bipartisanship for legislators to have disagreements, even partisan disagreements, but the disagreements that took place among the legislative members did not have today's partisan rancor. This was an important contribution to the success of the OCRC.<sup>424</sup>

Finally, there is some evidence that members of the General Assembly were reluctant to put too many proposed amendments on the ballot in any one election. Prior to 1912 proposed constitutional amendments could only be placed on the general election ballot,<sup>425</sup> and the most issues at any one election was five in 1857 and 1903.<sup>426</sup> Since 1912, when the voters approved an amendment to permit General Assembly proposed amendments (though not initiated amendments) to appear on any ballot,<sup>427</sup> there has been only one election (in a non-OCRC year) in which more than five issues were on the ballot.<sup>428</sup>

In the ten primary and general elections from May 1974 to November 1978, thirty-seven proposed amendments were on the ballot, including ten initiated amendments, thirteen amendments with OCRC origins, and fourteen legislatively proposed amendments not based on OCRC recommendations.<sup>429</sup> In three of these elections, more issues were on the ballot than in any election other than the iconic 1912 election.<sup>430</sup> Indeed, in each of the three elections in the peak OCRC ballot years—November 1975 to November 1976—the ballot included seven or more issues.<sup>431</sup> These were crowded ballots for Ohio, and this may have made the General Assembly reluctant to move too many issues to the voters.

In conclusion, it is not fair to criticize the OCRC because the General Assembly did not embrace one-third of its recommendations. Constitutional revision commissions have significant limitations, and they are not well-suited for fundamental constitutional change.<sup>432</sup> The legislative process is complex,

<sup>424</sup> See SUMMARY OF COLLOQUIUM, *supra* note 418; *Colloquium Recording*, *supra* note 422, at 53:25–54:30, 59:40–61:30 (covering the *Lessons Learned from the 1970s Ohio Revision Commission* panel discussion between Jo Ann Davidson, Judge Alan E. Norris, and John C. McDonald).

<sup>425</sup> See *supra* note 138 and accompanying text.

<sup>426</sup> See *Table of Proposed Amendments*, *supra* note 139.

<sup>427</sup> Compare OHIO CONST. art. XVI, § 1 (1851) (submission at election for state legislators), with OHIO CONST. art. XVI, § 1 (1912) (submission to the voters at special or general election); see also 1912 DEBATES, *supra* note 187, at 171–72.

<sup>428</sup> See *Table of Proposed Amendments*, *supra* note 139. The November 3, 1953 ballot was an outlier; it contained nine legislatively proposed amendments, six of which sought to repeal obsolete or unconstitutional provisions. See *id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> See *supra* note 360 and accompanying text.



and there are multiple explanations why various proposals failed to clear the General Assembly, including political and timing issues. Nonetheless, despite the clear success of the use of the OCRC to revise the Ohio Constitution, many important proposals did not get to the voters.<sup>433</sup>

## XV. THE COLLOQUIUM PLANNING COMMITTEE AND THE OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

### *A. The Creation of the Ohio Constitutional Modernization Commission*

In 2011, one year before the scheduled vote on the mandatory convention call, the General Assembly created the Ohio Constitutional Modernization Commission (OCMC).<sup>434</sup> The case for a study commission in preference to a convention had been made in 2010 by Mike Curtin, who reviewed the work of the OCRC and argued that “Ohio has not had a constitutional convention since 1912 and doesn’t need one now. But it does need constitutional revision.”<sup>435</sup> The case for a convention had been made a few years earlier by Thomas Suddes, a well-known *Plain Dealer* columnist.<sup>436</sup>

Veteran legislator and Speaker of the House William G. Batchelder<sup>437</sup> embraced the Curtin suggestion and became the primary sponsor of the

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<sup>433</sup> See SUMMARY OF COLLOQUIUM, *supra* note 418 (urging the OCMC to consider the unsuccessful proposals of the OCRC); *Colloquium Recording*, *supra* note 422, at 67:02–68:40 (covering the *Lessons Learned from the 1970s Ohio Revision Commission* panel discussion between Jo Ann Davidson, Judge Alan E. Norris, and John C. McDonald).

<sup>434</sup> Am. H.B. 188, 129th Gen. Assemb., Reg. Sess. (Ohio 2011).

<sup>435</sup> Curtin, *supra* note 378.

<sup>436</sup> Thomas Suddes, *The Ohio Constitution: Is it Time for a Re-Write?*, CLEV. PLAIN DEALER, Dec. 17, 2006, at M1–M3 (arguing Ohio needs a constitutional convention). *But see* Steven H. Steinglass, *The Ohio Constitution: Is it Time for a Re-Write?*, CLEV. PLAIN DEALER, Dec. 17, 2006, at M1–M3 (arguing against a convention and suggesting the creation of a constitutional revision commission).

<sup>437</sup> Speaker Batchelder was elected to the Ohio House of Representatives in 1968, and he served until 1998, *see End of an Era: Bill Batchelder’s Legacy in Ohio House Spans 38 Years*, GAZETTE (Dec. 22, 2014), <http://medinagazette.northcoastnow.com/2014/12/22/end-era-bill-batchelders-legacy-ohio-house-spans-38-years/> [<https://perma.cc/86GE-CRXX>], when the 1992 initiated constitutional amendment imposing eight-year chamber-specific term limits on members of the General Assembly prevented him from seeking re-election. *See* OHIO CONST. art. II, § 2. In 2007, he was re-elected to the House of Representatives, and he served as Speaker from 2011 to 2014, *see* GAZETTE, *supra*, when he was again barred from seeking re-election by the term limits amendment. He served as Co-Chair of the OCMC from December 28, 2011, until he left the General Assembly at the end of 2014. *See* OHIO CONSTITUTIONAL MODERNIZATION COMM’N, 2015 ANNUAL REPORT 2 (Dec. 10, 2015) [hereinafter 2015 OCMC ANNUAL REPORT]; OHIO CONSTITUTIONAL MODERNIZATION COMM’N, 2013–2014 BIENNIAL REPORT 2 (Dec. 11, 2014) [hereinafter 2013–2014 OCMC BIENNIAL REPORT]; OHIO CONSTITUTIONAL MODERNIZATION COMM’N, REPORT OF PROCEEDINGS 7 (Dec. 10, 2012) [hereinafter 2012 OCMC REPORT OF PROCEEDINGS].

proposed bipartisan legislation.<sup>438</sup> The bill passed the House by a 97–1 vote and the Senate by a 32–1 vote; Governor John Kasich signed the legislation on July 15, 2011,<sup>439</sup> and it became effective on October 17, 2011.<sup>440</sup>

Modeled after the OCRC, the OCMC also consisted of thirty-two members of whom twelve were legislators, equally divided by party and chamber.<sup>441</sup> The remaining twenty members were public members whom the legislative members appointed.<sup>442</sup> The broad charge to study the Ohio Constitution and, by a two-thirds vote, make recommendations to the General Assembly for constitutional amendments was identical to the charge given to the OCRC,<sup>443</sup> and the General Assembly also gave the OCMC a ten-year term to complete its work.<sup>444</sup> And, as with the statute creating the OCRC, the statute creating the OCMC provided that if the voters approved the convention call, the OCMC would be required to “report to the general assembly its recommendations with respect to the organization of a convention, and report to the convention its recommendations with respect to amendment of the Constitution.”<sup>445</sup>

The major statutory difference between the OCRC and the OCMC concerned the leadership structure of the commission. In the 1970s, the statute, as amended, provided for a chairman and a vice-chairman, and all members of the OCRC were eligible to serve in those positions.<sup>446</sup> The OCMC, on the other hand, has cochairs, and the timing of their selection effectively requires that they be legislators.<sup>447</sup>

### B. *The Colloquium Planning Committee*

In response to the creation of the OCMC, faculty members of the Ohio State University Moritz College of Law created a new organization, the

<sup>438</sup> See Steinglass, *supra* note 408.

<sup>439</sup> *Id.*

<sup>440</sup> OHIO REV. CODE ANN. § 103.61 (West 2016) (enacted by Am. H.B. 188, 129th Gen. Assemb., Reg. Sess. (Ohio 2011)).

<sup>441</sup> *Id.* § 103.63.

<sup>442</sup> *Id.*

<sup>443</sup> Compare OHIO REV. CODE ANN. § 103.52 (Anderson 1978) (expired July 1, 1979), with *id.* § 103.61 (West 2016).

<sup>444</sup> *Id.* § 103.67 (West 2016) (giving OCMC until July 1, 2021, to complete its work). But see Am. Sub. H.B. 64, 131st Gen. Assemb., Reg. Sess. (Ohio 2015) (reducing the term of the OCMC to six and one-half years to January 1, 2018).

<sup>445</sup> OHIO REV. CODE ANN. § 103.62 (West 2016).

<sup>446</sup> See *id.* § 103.51 (Anderson 1978).

<sup>447</sup> *Id.* § 103.63 (West 2016). The statute creating the OCMC initially required that the co-chairs be from different political parties, but in 2013 the General Assembly amended it to also require that they be from different chambers. See *id.*, as amended by Am. Sub. H.B. 59 § 101.01, 130th Gen. Assemb., Reg. Sess. (Ohio 2013).

Colloquium Planning Committee.<sup>448</sup> Facilitated by Professor Nancy Rogers, former Dean of the College of Law, the Planning Committee assembled an experienced and diverse group of nineteen individuals for the purpose of providing assistance to help the OCMC move forward.<sup>449</sup>

The dual strategy of the Planning Committee was the preparation of a Report that would provide process-based guidance to the OCMC and the sponsorship of a Colloquium to examine commission-based state constitutional revision.<sup>450</sup> But unlike the efforts prior to the 1952 and 1972 votes on the convention calls, the Planning Committee did not identify substantive constitutional issues that needed to be addressed; nor did it express a view on the need for a constitutional convention. Nonetheless, the Report issued by the Planning Committee implicitly accepted the need to modernize the Ohio Constitution.

Meeting from November 2011 to January 2012 and supported by research fellows and law students from the Moritz College of Law, the Planning Committee reviewed the history of the Ohio Constitution and efforts to amend it, particularly the work of the OCRC in the 1970s, as well as the experiences of other states that had undertaken commission-based constitutional revision.<sup>451</sup> It also looked at the research on public participation and group decision-making, and its 90-page report identified process options that the OCMC could consider to permit it to move forward quickly and efficiently.<sup>452</sup>

The Colloquium, which was the culmination of the work of the Planning Committee, was a public event held in Columbus on March 22, 2012,<sup>453</sup> at a time when the legislative members of the OCMC had not yet filled the public member slots on the Commission.

Neither the Colloquium Planning Committee nor the program that it sponsored had any official status, but the Colloquium received support from

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<sup>448</sup>THE OHIO STATE UNIV. MORITZ COLL. OF LAW, OHIO CONSTITUTIONAL MODERNIZATION COLLOQUIUM 2 (Mar. 2012) [hereinafter COLLOQUIUM REPORT], [http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/colloquium\\_materials\\_3-22.pdf](http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/colloquium_materials_3-22.pdf) [https://perma.cc/CN76-KATN].

<sup>449</sup>The members of the Planning Committee were James A. Brogan, Jo Ann Davidson, Robert M. Duncan, Eric Fingerhut, Edward B. Foley, Nathaniel R. Jones, Charles Kurfess, Joan W. Lawrence, Cynthia Lazarus, Harry J. Lehman, Betty Montgomery, John N. Ong, Nancy H. Rogers, Ben Rose, Richard B. Sapphire, Zack Space, Steven H. Steinglass, Bob Taft, and William K. Weisenberg. *Id.* at 72–90. The Committee included several former judges, former state legislators, former Speakers of the Ohio House, law professors, former members of Congress, former Ohio Attorneys General, and a former Ohio Governor. *Id.* at app. E. Four members of the Colloquium Planning Committee were eventually appointed as public members of the OCMC: Jo Ann Davidson, Charles Kurfess, Richard B. Sapphire, and Bob Taft. 2013–2014 OCMC BIENNIAL REPORT, *supra* note 437, at 2. The OCMC also hired this author as Senior Policy Advisor. *Id.* at 3.

<sup>450</sup>COLLOQUIUM REPORT, *supra* note 448, at 2–3.

<sup>451</sup>*See* COLLOQUIUM REPORT, *supra* note 448, at 4.

<sup>452</sup>*See generally* COLLOQUIUM REPORT, *supra* note 449.

<sup>453</sup>*See generally* SUMMARY OF COLLOQUIUM, *supra* note 418.

the embryonic OCMC. The program included presentations from the OCMC co-chairs, from members of the Planning Committee, from members of the OCRC, and from academic experts.<sup>454</sup> The presentations included reviews of the history of the Ohio Constitution, of the work of the OCRC, of efforts at constitutional revision nationally, and of the recommendations contained in the Colloquium Planning Report.<sup>455</sup>

Of particular relevance were presentations reviewing the work of the OCRC by two of its legislative members, Honorable Alan E. Norris, Senior Judge of the United States Court of Appeals for the Sixth Circuit, and John C. McDonald, both of whom had served in leadership positions in the Ohio House of Representatives.<sup>456</sup> Reflecting on the success of the OCRC, they both pointed to the lack of partisanship within the OCRC, to the two-thirds voting requirement, to the important role played by the public members, and to the strength of the staff. And they both emphasized the importance of engaging legislative members from the beginning of the process so that they would be able to sell commission recommendations to their colleagues. Judge Norris also emphasized the special role of the two-thirds voting requirement:

The two-thirds majority requirement will tamp down the enthusiasm of the majority and give comfort to the concerns of the minority. Having a two-thirds majority requirement means that members have to listen to each other with an open mind and be willing to listen to people with divergent viewpoints. Disagreements occurred in the 1970s, but they were not partisan.<sup>457</sup>

In addition, there was an insightful presentation by Professor Robert F. Williams on the national experience with constitutional revision, particularly commission-based constitutional revision.<sup>458</sup> Professor Williams emphasized the need to avoid being too ambitious, the danger of embracing issues that were too controversial, the importance of public involvement, and the importance of strong leadership within the commission and in the larger political community.<sup>459</sup>

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<sup>454</sup> *Id.*

<sup>455</sup> COLLOQUIUM REPORT, *supra* note 449. See generally *Colloquium Recording*, *supra* note 422.

<sup>456</sup> *Colloquium Recording*, *supra* note 422, at 49:36–51:45 (introducing the *Lessons Learned from the 1970s Ohio Revision Commission* panel discussion between Jo Ann Davidson, Judge Alan Norris, and John C. McDonald).

<sup>457</sup> SUMMARY OF COLLOQUIUM, *supra* note 418 (citations omitted); accord *Colloquium Recording*, *supra* note 422, at 54:00–61:00.

<sup>458</sup> *Colloquium Recording*, *supra* note 422, at 25:20–48:20 (presentation by Robert F. Williams on *Experience of Constitutional Commissions Across the States: What Are the Keys to Success or Failure?*); see also SUMMARY OF COLLOQUIUM, *supra* note 418 (summarizing presentation by Professor Williams).

<sup>459</sup> *Colloquium Recording*, *supra* note 422, at 25:20–48:20.

*C. The Organization, the Work, and the Future of the Ohio Constitutional Modernization Commission*

Notwithstanding the valuable work of the Colloquium Planning Committee, the OCMC had difficulty getting started.<sup>460</sup> The statute creating the OCMC became effective on October 17, 2011, but there was not a full slate of commissioners in place until December 10, 2012,<sup>461</sup> and the Commission was not fully staffed until the summer of 2014.<sup>462</sup>

Nonetheless, during 2013, even before the appointment of a full-time staff, the OCMC had begun addressing both organizational and substantive issues with the assistance of borrowed legislative staff and a part-time consultant.<sup>463</sup> To begin its comprehensive review of the Ohio Constitution, the OCMC divided itself into six subject-matter committees each of which had four legislative members, divided by party and generally by chamber, and six or seven public members.<sup>464</sup> Each OCMC member was assigned to serve on two

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<sup>460</sup> The statute creating the OCRC became effective on November 26, 1969. OHIO REV. CODE ANN. § 103.51 (Anderson 1978). By its January 21, 1971 meeting, a period of almost fourteen months, the public members had been appointed and the Director of the Commission had been hired. MINUTES OF THE OCRC, *supra* note 387, at 2, 5. The OCMC, however, did not proceed as quickly, and it took from October 17, 2011 until March 13, 2014, a period of almost twenty-nine months, for the OCMC to take these steps. *See* OHIO REV. CODE ANN. § 103.61 (West. 2016) (reporting that OCMC was effectively established on October 17, 2011); OHIO CONSTITUTIONAL MODERNIZATION COMM'N, MINUTES (Mar. 13, 2014), <http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/2014-03-13%20Minutes.pdf> [<https://perma.cc/L9JK-HUS3>] (reporting that the Executive Director of the OCMC was not hired until March 13, 2014); 2012 OCMC REPORT OF PROCEEDINGS, *supra* note 437, at 3, 10 (reporting that the twenty public members of the OCMC were not appointed until September 13, 2012, and did not attend their first meeting until December 10, 2012).

<sup>461</sup> *See* 2012 OCMC REPORT OF PROCEEDINGS, *supra* note 437, at 10. The process for selecting the public members of the OCMC had begun shortly after the legislative members of the OCMC had their initial organizational meeting on December 28, 2011, but the selection process was extended because more than 250 people expressed interest in serving in these pro bono positions. *Id.* at 7, 10.

<sup>462</sup> OCMC 2013–2014 BIENNIAL REPORT, *supra* note 449, at 3. The OCMC appointed its Executive Director on March 13, 2014, and he began working on May 1, 2014. *Id.* After the Executive Director was hired, the staffing of the OCMC proceeded quickly. *See id.* The staff includes an Executive Director, a Counsel to the Commission, a Communications Director, an Administrative Assistant, and a part-time policy advisor. *Id.* The budget of the OCMC is \$600,000, annually, beginning in fiscal year 2013. Am. Sub. H.B. 59, 130th Gen. Assemb., Reg. Sess. (Ohio 2013).

<sup>463</sup> The author of this Article was the initial consultant for the OCMC and continued in that position until hired as Senior Policy Advisor for the OCMC. *See* OHIO CONSTITUTIONAL MODERNIZATION COMM'N, MINUTES (Sept. 12, 2013), [http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/2013-09-12\\_Minutes.pdf](http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/2013-09-12_Minutes.pdf) [<https://perma.cc/MZ35-9BU3>].

<sup>464</sup> *See* 2013–2014 OCMC BIENNIAL REPORT, *supra* note 449, at 5–13. The six subject committees include the following: Bill of Rights and Voting Committee; Constitutional Revision and Updating Committee; Education, Public Institutions, and Local Government

subject-matter committees, and public members were appointed to serve as Chair and Vice-Chair of all the OCMC committees.<sup>465</sup>

During 2015, the OCMC approved two recommendations for proposed amendments both of which came from the Judicial Branch and the Administration of Justice Committee.<sup>466</sup> These recommendations were for the repeal of obsolete provisions of Article IV authorizing the General Assembly to create courts of conciliation to provide an alternative to traditional adjudication<sup>467</sup> and to create supreme court commissions to address the backlog in cases.<sup>468</sup> The General Assembly had never created a court of conciliation, and 1883 was the last time it had created a supreme court commission.<sup>469</sup>

Not all the work of state constitutional revision commissions involves changes in state constitutions, and state constitutions, including the Ohio Constitution, have many provisions that do not need to be changed. By the end of 2015, the subject-matter committees of the OCMC had approved Reports and Recommendations identifying nine constitutional provisions that did not need to be amended or repealed, and the full OCMC approved seven of these recommendations with the others in the pipeline.<sup>470</sup> Finally, the OCMC and its committees are currently considering multiple proposals for constitutional changes and for “no change,” and it is likely that the Commission will be making a series of recommendations to the General Assembly during the balance of 2016.

Committee; Finance, Taxation, and Economic Development Committee; Judicial Branch and Administration of Justice Committee; and Legislative Branch and Executive Branch Committee. *Id.*

<sup>465</sup> *See id.* In addition, the OCMC created the following four standing committees to address administrative issues: Organization and Administration Committee, Public Education and Information Committee, Liaisons with Public Offices Committee, and Coordinating Committee. *Id.* Each standing committees had three legislative members and five public members, with public members serving as Chair and Vice-chair of each. *See id.* at 14–16.

<sup>466</sup> 2015 OCMC ANNUAL REPORT, *supra* note 437, at 7.

<sup>467</sup> OHIO CONST. art. IV, § 19; *see* OHIO CONSTITUTIONAL MODERNIZATION COMM’N, MINUTES (Apr. 9, 2015) [hereinafter OCMC APRIL 2015 MINUTES], [http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/OCMC%20-%20Approved%20Minutes%20to%20Post%20\(2015.04.09\).pdf](http://www.ocmc.ohio.gov/ocmc/uploads/OCMC/OCMC%20-%20Approved%20Minutes%20to%20Post%20(2015.04.09).pdf) [<https://perma.cc/5MEL-8BH4>].

<sup>468</sup> OHIO CONST. art. IV, § 22; *see* OCMC APRIL 2015 MINUTES, *supra* note 467, at 4–5.

<sup>469</sup> STEINGLASS & SCARSELLI, *supra* note 3, at 207–09.

<sup>470</sup> *Reports and Recommendations*, OHIO CONST. MODERNIZATION COMMISSION, <http://www.ocmc.ohio.gov/ocmc/reports> [<https://perma.cc/34KU-7TTK>]. By the end of 2015, the OCMC approved recommendations that the following constitutional provisions not be changed: Article I, Section 2 (Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges); Article I, Section 3 (Right to Assemble); Article I, Section 4 (Bearing Arms, Standing Armies, and Military Power); Article I, Section 13 (Quartermen Troops); Article I, Section 17 (No Hereditary Privileges); Article VI, Section 1 (Funds for Religious and Educational Purposes); and Article VI, Section 2 (School Funds). *Id.*

The OCMC is limited by statute to recommending constitutional amendments to the General Assembly,<sup>471</sup> but this formal requirement does not prevent its legislative members from working to have the General Assembly move issues under consideration to the ballot before the OCMC has completed its work. And this happened in 2014 and 2015 on two very visible issues, resulting in the approval by the voters on November 3, 2015, of the new Article XI on state apportionment<sup>472</sup> and the state's only substantive limitation on the use of the constitutional initiative.<sup>473</sup>

The state apportionment amendment, which was Issue One on the fall 2015 ballot,<sup>474</sup> sought to reverse an historic Ohio pattern in which the political party in power attempted to draw state district lines to benefit it and disadvantage its opponent.<sup>475</sup> There was strong bipartisan support for addressing this problem,<sup>476</sup> and the Legislative Branch and Executive Branch

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<sup>471</sup> OHIO REV. CODE ANN. § 103.61 (West 2016).

<sup>472</sup> OHIO CONST. art. XI (amended 2015).

<sup>473</sup> OHIO CONST. art. II, § 1e(B)–(C) (adopted in 2015); *see also Table of Proposed Amendments, supra* note 139.

<sup>474</sup> *Table of Proposed Amendments, supra* note 139.

<sup>475</sup> Apportionment and gerrymandering have long been contentious issues in Ohio. *See generally* PETER H. ARGERSINGER, REPRESENTATION AND INEQUALITY IN LATE NINETEENTH-CENTURY AMERICA (2012). The reaction to the gerrymandering of Hamilton County was one of the factors that led to the calling of the 1850–1851 Constitutional Convention, *see supra* note 93 and accompanying text, and the barring of gerrymandering was one of the accomplishments of the 1851 Constitution. *See State ex rel. Herbert v. Bricker*, 41 N.E.2d 377, 383 (Ohio 1942) (“The objective sought by the [1851] constitutional provisions was the prevention of gerrymandering.”). Nonetheless, partisan efforts to draw favorable state legislative district (as well as congressional) lines continued in Ohio for the balance of the nineteenth century and into the twentieth century. *See* ARGERSINGER, *supra*, at 25–26, 45–47, 295 (“In 1903, Ohio amended its constitution to mandate malapportionment by guaranteeing each county, regardless of population, at least one representative in the lower house.”); *see also* Kathleen L. Barber, Comment, *Partisan Values in the Lower Courts: Reapportionment in Ohio and Michigan*, 20 CASE W. RES. L. REV. 401 408–09 (1969) (identifying early twentieth century state malapportionment as a result of the 1903 Hanna Amendment, which benefited rural portions of the state). Partisan attempts to gerrymander state legislative districts continued in Ohio even after the United States Supreme Court’s “one man one vote” decisions in the 1960s. *See* GOLD, *supra* note 87, at 423–29; *see also* *Wilson v. Kasich*, 981 N.E.2d 814, 830 (Ohio 2012) (McGee Brown, J., dissenting) (observing that “in 1971, when Democrats controlled the apportionment board, they created legislative districts that resulted in their party’s gaining control of both houses of the General Assembly, and that in 1981 and 1991, when Republicans controlled the board, they created legislative districts that eventually resulted in their controlling both houses of the General Assembly”).

<sup>476</sup> *See* Jim Siegel, *Voters Approve Issue to Reform Ohio’s Redistricting Process*, COLUMBUS DISPATCH (Nov. 4, 2015), <http://www.dispatch.com/content/stories/public/2015/election/ohio-state-issue-1-redistricting.html> [<https://perma.cc/3FLC-PV4R>]. Issue One created a commission to deal with the apportionment of the General Assembly and not the federal House of Representatives, which Ohio apportions legislatively. *See* OHIO CONST. art. XI (amended 2015). A companion amendment to give a commission responsibility for congressional redistricting was put on hold because of the pendency of

Committee devoted all or portions of twelve meetings to it. But the apportionment issue did not reach the full Commission, and it only moved to the General Assembly because of the bipartisan leadership of two term-limited members of the OCMC, who worked with the support of their political parties. Ultimately, the House and Senate supported an apportionment plan that created a bipartisan Ohio Redistricting Commission and sent an entirely new Article XI to the voters. On November 3, 2015, the voters approved the amendment by a strong vote of 2,073,563 to 827,971.<sup>477</sup>

The antimonopoly amendment, which was Issue Two, sought to make it more difficult to initiate constitutional amendments that created monopolies, that specified tax rates, or that provided special benefits not available to similarly situated persons.<sup>478</sup> Concerned about the 2009 initiated amendment that resulted in the legalization of casino gambling in four designated locations,<sup>479</sup> the Constitutional Revision and Updating Committee of the OCMC had begun focusing on initiative reform in 2013.<sup>480</sup> In early 2015, the Committee reviewed the use by other states of limitations on initiatives and a draft of an amendment designed to keep off the ballot initiated amendments that conferred special benefits that were not generally available to others.<sup>481</sup>

Events overtook the OCMC, as proponents of a proposed “investor-driven” initiated amendment to legalize marijuana for medicinal and personal use began to collect signatures and attract public attention.<sup>482</sup> The prospect of the marijuana proposal (with its alleged monopolistic features)<sup>483</sup> being on the

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*Arizona State Legislature v. Arizona Independent Redistricting Commission*, which had the potential for banning such commissions. See *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2659 (2015). The Supreme Court upheld the use of congressional redistricting commissions. See *id.* at 2659. The Legislative Branch and Executive Branch Committee of the OCMC is considering a proposed amendment to have a commission handle congressional redistricting. OCMC 2015 ANNUAL REPORT, *supra* note 466, at 10–11.

<sup>477</sup> See *Table of Proposed Amendments*, *supra* note 139.

<sup>478</sup> See *supra* notes 312–30 and accompanying text (discussing the antimonopoly amendment more fully).

<sup>479</sup> See OHIO CONST. art. XV, § 6(C)(9)(a)–(d) (designating permissible casino gambling sites by parcel numbers in Cleveland, Franklin County, Cincinnati, and Toledo).

<sup>480</sup> Cf. 2013–2014 OCMC BIENNIAL REPORT, *supra* note 449, at 11.

<sup>481</sup> See Memorandum from Steven H. Steinglass, Senior Policy Advisor, Ohio Constitutional Modernization Comm’n, to the Ohio Constitutional Modernization Comm’n 2–3, *Subject Matter Limitations on the Constitutional Initiative* (Apr. 1, 2015), [http://www.ocmc.ohio.gov/ocmc/uploads/Constitutional%20Revision%20and%20Updating%20Committee/CRU%20-%20Meeting%20Booklet%20\(4-9-2015\).pdf](http://www.ocmc.ohio.gov/ocmc/uploads/Constitutional%20Revision%20and%20Updating%20Committee/CRU%20-%20Meeting%20Booklet%20(4-9-2015).pdf) [<https://perma.cc/YX6S-WCM3>].

<sup>482</sup> See Alan Johnson, *Marijuana Legalization Measure Makes Fall Ballot*, COLUMBUS DISPATCH (Aug. 13, 2015), [http://www.dispatch.com/content/stories/local/2015/08/12/marijuana\\_ballot\\_vote.html](http://www.dispatch.com/content/stories/local/2015/08/12/marijuana_ballot_vote.html) [<https://perma.cc/CP72-3WMQ>].

<sup>483</sup> *Id.* The proposed marijuana amendment provided the ten investors in the initiative with a strong economic stake that many observers believed represented a monopoly on the commercial growth of marijuana in Ohio. See *id.*; see also Mitch Smith & Sheryl Gay



ballot energized many within and outside the General Assembly and led to the General Assembly proposing the antimonopoly amendment.<sup>484</sup> And on November 3, 2015, the voters narrowly approved the antimonopoly amendment by a vote of 1,587,060 to 1,489,703.<sup>485</sup>

Although the voters approved both Issues One and Two, it is difficult to evaluate the contribution of the OCMC. It is clear that the strong bipartisan support that “apportionment reform” received in the General Assembly was, in large part, a function of the role played by two members of the OCMC, but these veteran legislators had political support outside the OCMC to bring this long-simmering issue to a conclusion. Likewise, it is also clear that the broad support that the proposed antimonopoly amendment received in the General Assembly was a function of the efforts of legislators to bring together colleagues concerned about not only an abuse of the initiative but also about both the underlying issue of marijuana legalization and the monopolistic model being advanced. For both Issues One and Two, however, work done by committees of the OCMC helped set up the issues for eventual legislative consideration.

Some may view the fact that neither of the proposals made the full journey through the OCMC as a failure, but others may see the OCMC, particularly its committees, as having played an important role in developing and advancing these proposed amendments. What is unclear, however, is whether this is the beginning of a new pattern of constitutional revision. Will other proposed amendments being considered by the OCMC be presented to the voters before the OCMC has fully addressed them?

What is clear from this limited review is that the OCMC is intimately involved with the larger process of constitutional revision, and that the legislative members of the OCMC have a special role to play on constitutional revision as both members of the OCMC and as legislators. The OCMC may be limited by statute to proposing constitutional amendments by a two-thirds vote, but its work product (and even its works in progress) may be used by the General Assembly even before the work of the OCMC is completed.<sup>486</sup>

With the Commission approaching the fifth anniversary of its creation, it is difficult to predict what success the OCMC will ultimately have. By the comparable five-year mark in the 1970s, the OCRC had already had one proposal shot down by the courts, two rejected by the voters, one approved by the voters, and two heading for the ballot.<sup>487</sup> Thus, despite the initial obstacles

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Stolberg, *On Ballot, Ohio Grapples with Specter of Marijuana Monopoly*, N.Y. TIMES (Nov. 1, 2015), [http://www.nytimes.com/2015/11/02/us/on-ballot-ohio-grapples-with-specter-of-marijuana-monopoly.html?\\_r=0](http://www.nytimes.com/2015/11/02/us/on-ballot-ohio-grapples-with-specter-of-marijuana-monopoly.html?_r=0) [<https://perma.cc/63AU-V2T7>].

<sup>484</sup> See *supra* notes 312–30 and accompanying text (discussing the antimonopoly amendment, which amended Article II, § 1e(B)–(C) of the Ohio Constitution and is Ohio’s only substantive limitation on the constitutional initiative).

<sup>485</sup> *Table of Proposed Amendments*, *supra* note 139.

<sup>486</sup> See *supra* notes 471–86 and accompanying text.

<sup>487</sup> See *supra* Part XIV.B.

it faced, the OCRC was able to regain its footing and move into its most productive period. And the OCMC at a comparable point in its original term is only slightly behind the pace set in the 1970s by the OCRC,<sup>488</sup> but it is poised to catch up.

## XVI. CONCLUSION

This Article has reviewed the history of constitutional revision in Ohio from before statehood to the current effort to use a constitutional revision commission to modernize the Ohio Constitution. Hopefully, readers will find this to be an interesting though still incomplete story. Clearly, additional chapters need to be and will no doubt be written. The OCMC will likely be an integral part of the story of twenty-first century constitutional revision in Ohio, but the full assessment of its work will have to wait. Meanwhile, the substance of forward-looking constitutional revision will continue to be an important topic.

The Symposium held by the Ohio State Law Journal and this Symposium issue provide a useful review of many important topics. However, despite the quality of this work, none of the articles, including mine, shed a great deal of light on the underlying substantive constitutional issues that a conscientious Ohio constitution-maker should consider. Still, the topic of constitutional revision in Ohio will continue to be of interest, and perhaps the editors of this or other journals with an interest in Ohio law, including the Ohio Constitution, will facilitate a serious substantive review of the strengths and weaknesses of the Ohio Constitution.

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<sup>488</sup>The OCRC originally had a ten-year term, but it completed its work two years ahead of the deadline. *See supra* note 384 and accompanying text. Initially, the General Assembly gave the OCMC a ten-year term until July 1, 2021, to complete its work. *See* OHIO REV. CODE ANN. § 103.56 (West 2016). However, in 2015 the state budget bill shortened this period by three and one-half years, adopting a January 1, 2018, sunset date for the OCMC. *See* Am. Sub. H.B. 64, 131st Gen. Assemb., Reg. Sess. (Ohio 2015).