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## SURVEY OF CONSTITUTIONAL REVISION

*The first section of the symposium contains articles introductory to the subject by three professors of government. The first article, of a general nature, is written by Dr. W. Brooke Graves who is considered the leading academic authority in the field of state constitutional revision. Dr. Walter Sandelius, the author of the second article, relates his experiences as chairman of the Kansas Commission on Constitutional Revision. A member of the faculty of the University of Nebraska, Dr. A. B. Winter, concludes this section with a history and commentary on the Nebraska Constitution.*

*The Editors*

### Current Trends in State Constitutional Revision

**W. Brooke Graves\***

Americans have been writing and rewriting state constitutions for almost two hundred years. In that time, on the basis of a fund of experience acquired in individual states and in the nation, something approaching an art—or at least a method—of constitutional revision ought to have developed. But a study of the record gives little support for such an assumption. Some of the skills and fine judgment of the early framers of state constitutions appears to have been almost completely lost, but there are now signs of a more or less serious effort to regain them. In addition, some bad habits were acquired as time elapsed, so that it is now necessary to try to change these practices and overcome certain unfortunate effects flowing from them.

At the same time, the record is not all bad. Some desirable practices have been developed. A renewed interest in the subject of constitutional revision over the last decade or so has resulted in a somewhat higher standard of performance in the last four conven-

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tions that have written new constitutions or made general revisions, and whose proposals have been approved by the voters: New Jersey (1947), Hawaii (1950), Puerto Rico (1951), and Alaska (1955).<sup>1</sup> The purpose here is to examine current trends in broad historical perspective, and to analyze certain recent practices that, if continued, may develop into trends.

## I. GENERAL RELUCTANCE TO UNDERTAKE REVISION

No one who has ever studied state constitutions and the history of constitution-making in this country can fail to note the extreme difficulty normally encountered in revising or rewriting the constitution of almost any of the states. The reasons in any given instance are as complex as are the personalities of the people involved, but many of them are readily identifiable. In the belief that it may be of service to a state, such as Nebraska, considering constitutional revision, several of the more common roadblocks—as they have been called—are listed here with brief comment.

### A. PSYCHOLOGICAL BARRIERS

Respect for the heritage of one's past is a fine thing, and is to be commended. But it can be carried so far that it becomes a serious barrier to the best interests of the community. This has proved to be the case in many jurisdictions with respect to the revision of state constitutions. Although few have actually read their state constitution, or would understand it if they did, most persons have been disposed to place it on a pedestal, as though its words should not be modified or changed by mere humans.

In view of its generally unfavorable estimate of the elected members of representative assemblies, the public's extraordinary regard for the elected members of past constitutional conventions is inconsistent and difficult to understand. As Harold M. Dorr has written:<sup>2</sup>

Fact and fiction have conspired over the years to destroy public confidence in state legislatures. Yet, by some strange magic,

<sup>1</sup> The New Jersey Convention was limited to the extent that apportionment was excluded from its consideration. The Tennessee Convention, though successful, was limited to consideration of certain specified subjects, and did not have general revision as its purpose.

<sup>2</sup> Dorr, *The Myth of the Constitutional Convention*, 54 MICH. ALUM. Q. REV. 22, 23 (1947).

these same factors have glorified another popular assembly beyond its institutional significance. Myth, legend and fiction attribute to the constitutional convention all the virtues of popular assemblies, leaving to its institutional cousin, the state legislature, only the dregs of virtue. "It is assumed," said a convention delegate, "that when we depart from this hall all the virtue and all the wisdom of this state will have departed with us. We have assumed that we alone are honest and wise."

Whatever the reason, these psychological attitudes toward the past and its leaders represent a major obstacle to constitutional revision in many states.

Just as an undue reverence for the past can engender an active opposition to constitutional revision, the general apathy, ignorance and indifference of large portions of the public may constitute a sort of passive barrier. The people generally seem to know little about their state constitutions. They assume that they are good, but they have no comprehension of the fact that, in countless different ways, antiquated, outmoded, and obsolete constitutional provisions prevent public officials from doing their jobs, or make the performance of their duties needlessly difficult, and impede the efficient operation of government.

#### B. LEGAL AND POLITICAL BARRIERS

The second major barrier to constitutional revision is a logical consequence of the first. Although the framers of earlier constitutions had themselves exercised broad constituent powers, apparently with few qualms concerning their ability to do so, they seem frequently to have doubted the capacity of future generations to perform in like manner. These doubts were made manifest in the form of an almost unbelievable network of legal technicalities designed to make future constitutional change difficult if not impossible to achieve. While legislative proposal of amendments is possible in most jurisdictions, requirements with respect to the number of legislative approvals, the size of the vote, the number of proposals and the frequency with which they may be submitted to the voters serve to make this method of amending the constitution very difficult if not actually unworkable.

If it is difficult in many states to obtain favorable legislative action on constitutional amendments, it is well nigh impossible to get legislatures to take the steps necessary to obtain general constitutional revision by a convention. Some state constitutions make no provision for calling a constitutional convention. In these states as well as in those whose constitutions so specify, it is the legislature that must set in motion the machinery for bringing a convention into being. It must provide for a referendum to ascertain whether or

not the people want a convention. If they do, it must then provide for the election of delegates, although in many jurisdictions, these two steps can be combined, with the assurance that the delegates elected will meet and function only if the proposition to hold the convention receives the required majority. Next, the legislature is responsible for the enactment of legislation specifically providing for such things as the convention, its place of meeting, organization, and expenses.

It often becomes very difficult to obtain a referendum, and difficult to obtain legislative action providing for the convention even after a majority of the voters have indicated that they want one. The Iowa Legislature ignored a mandate some years ago, the Maryland General Assembly has consistently ignored one since 1951, and it took a full decade of sustained effort before New Jersey citizens succeeded in obtaining a constitutional convention in 1947.

### C. PRESSURE GROUP BARRIERS

One of the strongest barriers erected against conventions for general constitutional revision arises from the influence of a wide variety of pressure groups. The pattern varies somewhat from state to state, and from time to time, depending upon local conditions. But in at least one important aspect, these groups are all much alike. They are well organized, well financed, and quite uncompromising in pressing their opposition to revision—whether or not their position is in the public interest. If it is not, they diligently pursue the objective of confusing the public interest with their own. Many excellent examples are available, of which only a few may be cited here. While none of these have been recorded in Nebraska, this should not be interpreted to mean that they may not arise.

In Florida, for example, it has been possible for the opposition to constitutional revision to marshal the forces of several different pressure groups whose only common ground was a fear that some present advantage might be disturbed. The home owners were a large and powerful nucleus for this band, but there were others.<sup>3</sup>

Among these who do not want a general revision have been some who fear that it would lead to a reapportionment that would be unfavorable to some of the older and less populous parts of Florida; those, especially business interests, who fear that it might lead to repeal of the prohibition against an income tax, and possibly upward revision of the inheritance tax; and those including average citizens who fear it might lead to abolition of the homestead ex-

<sup>3</sup> Letter From Wilson K. Doyle to W. Brooke Graves, June 15, 1953.

emption provision. For a long time there was another group who feared that it might lead to a change in the location of the State capital from Tallahassee to a point further south.

In Pennsylvania, the opposition has long been led by the business, industrial, and financial organizations whose members live in mortal fear of a state income tax. The Pennsylvania Constitution contains a uniformity clause of the usual variety<sup>4</sup> which has been interpreted by the state supreme court as barring any form of graduated tax. Consequently, the only form of income tax presently permissible is a flat rate wage or salary tax such as the Philadelphia wage tax. And there are those who want to keep it that way.

In California, two groups, the insurance<sup>5</sup> and grape and citrus

<sup>4</sup> PA. CONST. art. IX, § 1.

<sup>5</sup> Some years ago when the insurance business in California was relatively small, and struggling to get itself established, its representatives succeeded in persuading the legislature (and the electorate) that constitutional tax exemptions for real property owned and used by insurance companies for headquarters office purpose would help to promote and strengthen the industry. Accordingly, a long section on the taxation of insurance companies was framed and presented to the voters, who adopted it. CAL. CONST. art. XIII, § 14 4/5, originally adopted November 8, 1910, and in turn amended June 27, 1933, and November 4, 1952. This extraordinary section is replete with unusual regulations, the most astonishing of which not only exempts an insurer from payment of future taxes but, under certain circumstances, authorizes him to deduct tax payments made in the past, as follows:

"(e) Each insurer shall have the right to deduct from the annual tax imposed by this section upon such insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within thirty days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this State. Such real property may consist of one building or of two or more adjacent buildings in which such an office is located, the land on which they stand, and so much of the adjacent land as may be required for the convenient use and occupation thereof.

"Where, as a result of merger, consolidation, or other method of acquisition of substantially all of the assets of one or more insurers by another insurer, effected prior to January 1, 1939, an insurer owns more than one parcel of real property in this State in which was located a home office or principal office of an insurer immediately prior to such acquisition, the owner shall designate one of such properties as its home or principal office. Real estate taxes paid by it in any of the years 1943 to 1952, inclusive, before, or within thirty days after, becoming delinquent, on such property owned by it at the time of payment and not so designated may also be deducted from the annual tax imposed by this section in respect to such year and are included within the deduction provided for in this subdivision." Insurance companies, now large and prosperous, have gone into the development of real estate holdings in a big way;

industries,<sup>6</sup> by constitutional amendment, have managed to place themselves in a preferred position tax-wise, and they are now prepared to put up a vigorous fight against holding a constitutional convention which might—and very likely should and would—do away with its constitutional basis.

## II. THE CONCEPT OF CONTINUOUS REVISION

Some recent developments in constitutional revision prompted the author, several years ago, to include in a biennial survey of constitutional change, a brief comment on the concept of continuous revision.<sup>7</sup> It appeared at the time to be an interesting and attractive idea, developing more or less spontaneously in several states in different parts of the country, whereas, in fact, it goes back at least to the days of the founding of the Union. Then, it must be remembered, "the inalienable rights of man and the principles of the fundamental law (as embodied in the common law) were regarded as eternal and immutable."<sup>8</sup> It was only the means of realizing them that were to be subject to the sifting processes of revision and review. But the founders appear to have been fully convinced that such revision and review were necessary on a continuing basis. Jefferson went so far as to advocate the automatic termination of all written laws at certain intervals so that the people would be brought face to face with the problems of their society and its government. Although several of the new state constitutions—such as that of Massachusetts—contained no provision for change, many of them did. The original Virginia Constitution was merely an act of the legislature which could be changed at any time. Pennsyl-

apartments and office buildings are exempt from tax as long as any portion of them—not necessarily a very large portion—is designated as a home office or principal office. This was too good to pass unnoticed, and it did not.

<sup>6</sup> If tax exemption was a good thing for stimulating the growth of the insurance industry, it might also be used to help grape and citrus growers. And it was. When the section on ad valorem taxes, CAL. CONST. art. XIII, § 1, (adopted November 4, 1924, and revised without changing the provisions in question on May 16, 1944, and now called Property to Be Taxed), was revised and amended in 1924, the two words "growing crops" were slipped in between "free public libraries and museums" and "property owned exclusively for public schools," in a listing of types of tax exempt property.

<sup>7</sup> *State Constitutions and Constitutional Revision*, THE BOOK OF THE STATES 3-11 (1960).

<sup>8</sup> This problem is discussed in 3 CHANNING, HISTORY OF THE UNITED STATES 434-44 (1912).

vania, in its original Constitution of 1776, in addition to its one-house legislature, had a council of censors which had a dual purpose: (1) to examine the actions of both the executive and the general assembly, and (2) to consider the desirability of revision of the state constitution and to propose, at regular seven-year intervals, amendments to the constitution. New Hampshire similarly included a provision, effective to this day, for a vote on the calling of a constitutional convention for the purpose of considering amendments every seven years. Other states, as is the case today, had somewhat longer intervals.<sup>9</sup>

Thus, originally, continuous revision appears to have meant periodic review of a constitution plus use of the amending procedure to bring about such changes as might be needed. Periodic revision has largely failed to accomplish its purpose of keeping constitutions up to date. Revisions have been infrequent, difficult—or, in many cases—impossible to obtain. Meanwhile, changes in our society—social, political, economic, technological—continue at an accelerated pace. Government, if it is going to be effective, cannot remain immobile.

In its present form one or two modifications have been added to the original theory. One is the assumption that normal use of the amending procedure cannot and will not serve to keep the document up to date, while another looks toward an established commission, constantly engaged in the study of constitutional problems and making recommendations to the legislature as need requires. What these procedures may come to mean in the years ahead, in the solution of the vexing problem of constitutional revision, it is much too early to say. The modern concept of continuous revision first appeared in Kentucky in 1949, when a Constitutional Review Committee was created by the governor, by executive order. This body was continued by law as an independent agency in 1950. While an independent statutory agency is certainly a continuing agency, no evidence has come to the attention of this writer that this step was taken consciously and deliberately for the purpose of achieving what is now being called continuous revision. Subsequently, expressions of the idea appeared, almost a decade later, in three other widely separated states—New York, North Carolina, and Texas.

<sup>9</sup> The submission of the question is mandatory every seven years in New Hampshire, N.H. CONST. art. 99; ten years in Iowa, IOWA CONST. art. X, § 3; sixteen years in Michigan, MICH. CONST. art. XVII, § 4; and twenty years in Maryland, MD. CONST. art. XIV, § 2; Missouri, MO. CONST. art. XII, § 3(a); New York, N.Y. CONST. art. XIV, § 2; Ohio, OHIO CONST. art. XVI, § 3; and Oklahoma, OKLA. CONST. art. XXIV, § 2. The interval in the Model State Constitution is fifteen years. MODEL STATE CONSTITUTION, art. XIII, § 1301 (1948).

In North Carolina, the concept of continuous revision involves nothing more than the normal use of the amending procedure. In this state, it is contended that by adopting 125 amendments (thirty-six others were rejected) affecting the content of all but one article of the constitution in the last ninety years, the state has in fact been following a policy of continuous revision.<sup>10</sup>

In New York and Texas, continuous revision has quite a different connotation, a connotation which envisions a procedure more in keeping with present needs. The Citizens Advisory Committee on the Revision of the Constitution of Texas expressed the idea in these words:<sup>11</sup>

And finally, when this Committee completes its allotted tasks, thought should be given to whether or not the State should establish a permanent constitutional committee, which would make continuing studies of the effectivity of the Constitution and periodically report to the legislature and the people of Texas on its findings.

To this rather guarded and cautious proposal may be added a somewhat similar one from New York. Confronted with two facts not easily reconcilable—a popular rejection of a proposal to call a constitutional convention, and the generally recognized need for constitutional change, the state leaders sought a means of providing guidance and momentum to the kind of continuous revision that would accomplish the objective of making the state constitution “more responsive to the needs of modern life.” For this purpose they reconstituted a previously existing commission as the Temporary Commission on the Revision and Simplification of the Constitution—an agency whose title should, in turn, be simplified. This commission has published a number of significant reports.<sup>12</sup>

The Commission undertook the revision of the judiciary article in 1958, the article on local government in 1959, and in 1960, it came to grips with the remaining hard core of constitutional simplification, the complex of local finance, state finance, and housing. This work resulted in about a dozen proposals for change, most of them in the form of deleting detailed, outmoded, and unnecessary pro-

<sup>10</sup> See Gardner, *The Continuous Revision of Our State Constitution*, 36 N.C.L. REV. 297 (1958).

<sup>11</sup> Interim Report to the 58th Legislature and the People of Texas, 57 (1959).

<sup>12</sup> REPORT ON THE PROBLEMS OF SIMPLIFICATIONS OF THE CONSTITUTION (N.Y. Legis. Doc. No. 57, 1958); FIRST STEPS TOWARD A MODERN CONSTITUTION (N.Y. Legis. Doc. No. 58, 1959); SIMPLIFYING A COMPLEX CONSTITUTION (N.Y. Legis. Doc. No. 14, 1961).

visions. After pointing out ways in which its procedures differ from those normally employed, the Commission goes on to state that:<sup>13</sup>

The Commission believes that the effort is worth continuing. The complementary observation should be made, however, that the task is a long-range one. We are reminded, for example, that the current revision of the Judiciary Article was twelve years in the making. Whether the continuing effort should be made through a temporary commission or through the permanent agencies of government is a question which should now be posed, although the Commission does not suggest an answer.

### III. THE LIMITED CONSTITUTIONAL CONVENTION

The American concept of a written constitution was evolved over a long period of time through an ingenious combination of the principles contained in the great "compromise documents" of English constitutional history and in the early trading company charters. The use of a constitutional convention as a device for the writing of such constitutions is a uniquely American practice. The theory has always been that the powers of a constituent assembly, when acting within the confines or in furtherance of its avowed purpose, were complete and plenary.

There has, at times, been extended argument as to what extent, if any, a constituent body was subject to legislative control. The weight of informed opinion has always been that after it had performed its duty of aiding in bringing the convention into existence, and appropriating the funds required to pay its necessary expenses, the legislature had no authority and could exercise no control over the convention and its work.<sup>14</sup> For nearly one hundred years, the classic statement of this view has been that of Chief Justice Agnew in *Woods' Appeal*.<sup>15</sup> For a long period of time after this decision, its view appears to have been generally accepted in theory and observed in practice.

After World War II, however, there developed a practice of establishing conventions whose authority was limited in advance to the consideration of specified subject-matter areas. These bodies are commonly referred to as limited or restricted constitutional

<sup>13</sup> SIMPLIFYING A COMPLEX CONSTITUTION, *op. cit. supra* note 12, at 11.

<sup>14</sup> This problem is discussed in JAMESON, *THE CONSTITUTIONAL CONVENTION* (1867); HOAR, *CONSTITUTIONAL CONVENTIONS* (1917); and DODD, *REVISION AND AMENDMENT OF STATE CONSTITUTIONS* (1910).

<sup>15</sup> 75 Pa. 59 (1874).

conventions. The basic reason for this practice is, of course, that the legislature has found in it a means by which it can exercise controls over constitutional conventions previously denied to legislatures. Two obvious questions are immediately presented: Are such controls legal and binding, and if so, is it desirable that the legislature be permitted to exercise this power? The correct answer to both questions is probably "No."

Out of twelve conventions held in seven states between 1938 and 1958, only one—Missouri—was actually unlimited. The New Jersey convention is the one that has usually been selected as a model by those attracted to the limited constitutional convention device. Over a period of a decade, a good deal of popular interest in constitutional revision had been built up in that state, an interest which even the legislature felt called upon to heed. Whereas, over a period of many years, they had in the past been able to stave off any effective action on apportionment by some type of delaying action, demands for constitutional revision were now too strong to be safely ignored. The legislature's answer was, in substance, "Well, all right, you can have your convention, but it must not do anything about apportionment." The stipulation was defined in language that seemed to leave no loophole whatsoever for convention consideration of this major problem.

As evolved in New Jersey in 1947, in a period of crisis in the campaign for constitutional revision, the supporters of revision made, under strong pressure, a decision that most of them have subsequently greatly regretted. The leaders were in a difficult situation; they had to choose between revision without reapportionment or no revision at all. The decision they made was more or less inevitable under the circumstances. When the convention met, it was, of course, confronted with the same problem. While the delegates knew (or were informed) that they were under no legal obligation to abide by the restriction imposed upon their authority, they decided that, as a matter of policy, they would abide by it. The reasoning was that, if they did not, they would be faced with a charge of bad faith which might be far more damaging to the cause of constitutional revision than a failure to deal with the important problem of apportionment. And, anyway, once a satisfactory general revision was accomplished, the apportionment problem could be dealt with separately at a later time. Incidentally, this took fourteen years. It was not until the legislative session of 1961 that a reapportionment of the House was accomplished, though the Senate is still governed by the constitutional rule of one senator per county, under the so-called federal plan.

The idea of the limited convention caught on very quickly,

with the result that—as has been noted—only one convention since 1938 has been unlimited.<sup>16</sup> The increased use of this device is as unfortunate as it is easy to explain. To those who do not want general revision and who do not really believe in the democratic process anyway, it provides a made-to-order means of avoiding the opening up of the whole array of constitutional problems for general discussion, and the possibility that theorists, crackpots and radicals will tamper with the sacred law. More than that, it makes readily available a tool by which powerful special interest groups may, with a high degree of certainty, protect whatever type of “sacred cow” in which they happen to be interested.

#### IV. THE LEGISLATURE IN THE ROLE OF A CONVENTION

Doubtless some mention should be made of a device for constitutional revision, common in the early days, but long forgotten, where the legislature acts in the role of a constitutional convention. In November 1941, the New Jersey legislature took upon itself this role and function, first creating a seven-man Commission on Revision of the New Jersey Constitution to do the preliminary work. The Commission reported in 1942, and following a vote of approval on the part of the electorate in November 1943, the legislature proceeded to appoint a joint committee to hold public hearings and to prepare a draft of a constitution. This draft was endorsed by the legislature in January 1944, but was defeated at the polls in November of that year. This defeat was in no wise attributable, however, to the new and unusual role that had been assumed by the legislature in the revision process.<sup>17</sup>

Another attempt to utilize the legislature as a means of accomplishing constitutional revision was approved by the voters of Oregon at the November 1960 election. Although the legislature had rebuffed a proposal of the governor to call a constitutional convention, it did approve for submission to the voters an amendment which would permit the legislature, by a vote of two-thirds of the membership of both houses, to revise the constitution in whole or in part and to refer their proposals for change to the voters. This did not modify in any way the established right of the legislature to submit individual amendments to the people by majority vote,

<sup>16</sup> For a more complete discussion, see Graves, *Major Problems in State Constitutional Revision*, PUB. ADMIN. SER. (1960); and Bebout, *Recent Constitutional Writing*, 35 TEXAS L. REV. 1071 (1957).

<sup>17</sup> See Bebout, *New Task for a Legislature*, 33 NAT'L MUNIC. REV. 17 (1944).

the right of the people to amend the constitution by popular initiative, or by constitutional convention. Nevertheless, there is good reason for questioning the soundness of this new procedure. In the first place, is the legislature the proper agency to undertake general revision of the constitution, and in the second place, is this body likely to do the job well?

#### V. REVISION THROUGH PIECEMEAL AMENDMENT

Several of the devices for constitutional change here discussed rely, to be sure, upon use of the amending procedure. Even a constitutional convention may, and often does, accomplish its purpose, not by writing a new constitution or rewriting an old one, but by recommending a series of amendments, which was the case in Nebraska in 1920. In such cases, however, the proposals are submitted to the voters all at a single election, either in a single package, take-it-or-leave-it basis, or as in New York in 1938, as a series of separate proposals covering the more controversial items and an omnibus proposal including numerous non-controversial items. Taken as a whole, such series of amendments represent a concerted attack upon the problem of modernizing the state's basic law.

The idea of using the piecemeal amending procedure, such as has been the Nebraska practice in recent years, with individual proposals submitted on a more or less haphazard—or certainly unplanned—basis is quite a different thing. There has been much speculation as to whether the task of general revision could be accomplished by one or two amendments at a time. In an attempt to obtain an answer to this question, the author—working in cooperation with the National Municipal League—undertook, a few years ago, a study of all amendments submitted to, and voted upon by the voters in all of the states in the period 1946-1956, inclusive. Although it was agreed that this sample was not an adequate one, either in the number of proposals considered or in the time-span covered, a preliminary report on the project was written and published.<sup>18</sup> The conclusion therein reached was that this procedure tends to clutter the constitutions with a rank growth of underbrush, and that it offers little hope as a means of obtaining, even by sustained effort over a period of time, anything approaching a thorough and comprehensive revision of a state constitution.

Because so many of the constitutions are encumbered with masses of detail, many of the amendments proposed—frequently

<sup>18</sup> Graves, *op. cit. supra* note 16, at 19.

of a trival and transitory nature—are concerned with the modification of one or another of these details. Many of them are of purely local application. In some states, the constitution has to be amended to authorize public borrowing, and many amendments deal with this subject.<sup>19</sup> A relatively small percentage of the proposals deal with basic questions of governmental organization and powers. Under these circumstances, it appears to this writer to be virtually hopeless to expect to accomplish by this method, in any given state, anything even approaching a systematic and thorough revision of the state constitution. Nevertheless, there are bits of evidence that indicate that the attempt is being made in a few states in which it has long been impossible to obtain a constitutional convention. This was the philosophy behind the persistent effort to obtain approval of the famous Gateway Amendment in Illinois, the supporters of which reasoned that once it became possible to amend the constitution, the document could then be revised on an article by article basis. A similar philosophy guided, for a time, the movement for constitutional revision in Florida. Using the judicial article as a point at which to begin, a number of states—including Arizona, Illinois, Massachusetts, New York, and North Carolina—some of them for as much as a decade—have been struggling to accomplish a revision of particular articles.

In at least four states—Kansas, Minnesota, Pennsylvania, and West Virginia—in which constitutional commissions have recently functioned, there is some evidence that subsequent efforts have been or are being made to make certain commission recommendations effective through the use of the piecemeal amending procedure. All of these commissions recommended against holding a constitutional convention. Rightly or wrongly they did not think that the situation was that bad, but they did recognize weaknesses for which corrective action was needed, and made recommendations accordingly.

The time that has elapsed since the Pennsylvania Commission reported in 1959 is short, with the result that not too much evidence is available.<sup>20</sup> While there was much activity on constitutional amendments in the last session of the General Assembly, nothing

<sup>19</sup> The New York Times, Nov. 13, 1960, reported: "Voters across the nation approved bond issues totaling more than \$3,000,000,000 in the election Tuesday . . . . California topped the states with a \$1,750,000,000 water bond plan, one of the biggest bond issues ever authorized by a state." Not all of these approvals were, of course, in the form of constitutional amendments.

<sup>20</sup> Pa. Const. Rev. Rep. (1959).

actually happened. Late in the 1961 session, however, it appeared that a number of commission recommendations might be started on their way to consideration by the electorate. The Minnesota record extends over a longer period of time, and is, therefore, more impressive. In the ten years from 1948 to 1958, twenty-two amendments were submitted to the electorate, and of these, exactly half were adopted. In a careful analysis of the commission's work in the perspective of a decade, Professor G. Theodore Mitau finds that, though much work remains to be done, there has been some substantial accomplishment. Much of what he says by way of summary of the Minnesota experience may in time be true in Pennsylvania and the other states mentioned.<sup>21</sup>

Those who favor reform via constitutional convention may see little in the record of the last ten years to challenge their preference for the convention method as against the piecemeal amendment process. To their way of thinking, complicated and fundamental problems, such as dedicated funds, taxation, mandatory reapportionment, periodic constitutional conventions, further streamlining of the governorship and legislature, and possible provisions for referendum and popular initiative, do not lend themselves readily to the fragmentary treatment afforded by the mere amending of existing documents.

Minimalists, on the other hand, may regard Minnesota's ten-year record on constitutional reform as an ample warrant for continued confidence in the amendment process, especially if this process were to be vitalized by the recommendations of a second constitutional commission. Such a commission, approaching its task with the professional competence and civic dedication of its distinguished predecessor, might review present needs; intensify the scrutiny of obsolete constitutional language, which when embodied in amendments, would enable this state to continue and perhaps accelerate its slow and patient program of limited ad hoc constitutional reform.

## VI. CONCLUSION: RESPONSIVENESS AND RESPONSIBILITY

The use of the amending procedure, as a means of recording in the basic law a considered judgment of the voters has, on occasion, raised difficult constitutional questions. Such a judgment is, in theory, and should be in practice, a mandate binding upon all. But experience shows that this does not necessarily follow. In an attempt to avoid possible disregard of such mandates, constitutional draftsmen have frequently sought to make the provisions of the constitution self-executing, or as nearly so as possible. Even

<sup>21</sup> Mitau, *Constitutional Change by Amendment: Recommendations of the Minnesota Constitutional Commission in Ten Years' Perspective*, 44 MINN. L. REV. 461, 480 (1960).

when this has been done, legislative ingenuity may still find ways of thwarting or nullifying the mandate of the voters.

Two instances may serve to illustrate how serious this problem can be on such an important matter as legislative apportionment. The South Dakota Constitution contains the usual provision requiring apportionment after each federal census. As in other jurisdictions, the courts have held that the legislature cannot be forced by mandamus to perform its constitutional duty. After the legislature failed to act in the matter of apportionment in the sessions held in 1931 and 1933, an ex-officio board which would act if the legislature failed to do so was provided for in 1936. This was followed in 1948 by a constitutional amendment intended to make action doubly sure.<sup>22</sup> Since provisions for the establishment of the board were adopted, the legislature has made apportionments—of a sort—in 1937, 1947, and 1951, so the board has never been activated. Strong suspicions have been expressed that the trifling changes made, where a thorough reapportionment of representation seemed to be indicated by the census figures, were made on a pro forma basis in order: (1) to prevent the activation of the board, and (2) to prevent any thorough and systematic reapportionment.

In Washington in 1956, the State League of Women Voters sponsored an initiative petition for a redistricting which had not been accomplished since the approval of a previous initiated measure in 1930. Although the provisions of the new act were carefully and accurately worked out on a purely factual basis, it was opposed by both parties, the leadership of both of which came from over-represented areas. But the measure was approved by the voters, thus becoming law. In 1957, the legislature saw fit to amend practically the entire act, in substance restoring the previously existing arrangements. When this action was challenged in the courts, the state legislature was upheld in 1957 by the state supreme court, and no organized effort to improve the situation has since been undertaken.<sup>23</sup>

The problem suggested by these incidents is not unique; it is, in fact, as old as written constitutions. It is the problem of making popular government both responsive and responsible. Achievement of these objectives must continue to be the goal of all efforts in the writing and revising of state constitutions.

<sup>22</sup> S.D. Legis. Res. Council Staff Memorandum, Legislative Apportionment in South Dakota (1960); Nat'l Munic. League, Compendium on Legislative Apportionment (1960).

<sup>23</sup> For a good account of the campaign for the amendment, see Stuart, *Women Carry the Day*, 46 NAT'L MUNIC. REV. 66 (1957).