



CROWDSOURCED STATE CONSTITUTIONAL REVISIONS CAN REVIVE OUR DEMOCRACY

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INTRODUCTION

There is a consensus of opinion that something is wrong in this Commonwealth; that the many of the people are not prosperous, that the many of the people are not enjoying their lives and have not the liberties as it was intended. If you say that this Constitution was intended to enable them to enjoy life, then you admit that the several departments have not accomplished it. It necessarily must follow that you have got to change in some way some form of this government in order to change these conditions.¹

The same concern that animated delegates such as Gerry Brown, a delegate to the 1917 Massachusetts Constitutional Convention, and delegates to later Progressive Era state constitutional conventions exists today, if not to an even larger extent. Just as that generation of constitution-makers speculated “that contemporary institutions were ill-suited to meet the current problems of governance,”² many today doubt that our democratic institutions are up for the tasks at hand.³ Back then, constitutional conventions helped “reconstitute[] republican institutions on an appropriate foundation.”⁴ Today, no such foundational reforms are on the table. It is time to launch a new generation of constitution-makers.

Modern democracies have been tested by a slew of wicked problems. Among other issues, climate change, disinformation, and globalization have sparked a wave of constitutional revisions around the world.⁵ States

1. 3 DEBATES IN THE MASSACHUSETTS CONSTITUTIONAL CONVENTION OF 1917–1919, at 346 (1920) (statement of Gerry Brown, delegate to the Massachusetts Constitutional Convention of 1917–1919).

2. John Dinan, *Framing a “People’s Government”*: State Constitution-Making in the Progressive Era, 30 RUTGERS L.J. 933, 944 (1999).

3. See discussion *infra* Section II.

4. Dinan, *supra* note 2, at 944.

5. See, e.g., Somini Sengupta, *Chile Writes a New Constitution, Confronting Climate Change Head On*, N.Y. TIMES (Jan. 6 2022), <https://www.nytimes.com/2021/12/28/climate/chile-constitution-climate-change.html>; Lizzy Rosenberg, *Italian Constitution Edited to Protect Environment From Ongoing Climate Crisis*, GREENMATTERS (Feb. 9 2022, 1:29 PM),

in the United States have missed that wave. No state has held a state constitutional convention since New Hampshire in 1984.⁶ It has been even longer since voters approved the recommendations of a state constitutional convention—last occurring in Louisiana in 1974.⁷ Efforts to serially amend horse-and-buggy era documents by affixing tailpipes, a GPS, and other modern creations to these outdated legal vehicles have only rendered state constitutions more convoluted, rather than more responsive to modern problems.⁸

Numerous countries have used new participatory tools to improve the functionality and legitimacy of their constitutions via constitutional conventions.⁹ Such countries have experimented with tools that allowed for “participatory, partially citizen-led processes [with] intent on revitalizing politics [to be] at the heart of the [process].”¹⁰ Applied to revision efforts in U.S. states, these tools will at once improve the quality of the revised state constitution and increase the legitimacy of the government in the eyes of the public.¹¹ Participatory tools accomplish the latter goal through two means: first, by introducing additional and varied stakeholders into the democratic process; and, second, by giving all stakeholders a meaningful opportunity to contribute to these processes.¹² Constitution-making in Iceland and Ireland serve as case studies for how these tools can apply to revision efforts.¹³ U.S. states should study these international examples, in addition to lessons learned from older domestic efforts at revision, before launching their own revision efforts through a constitutional convention.

<https://www.greenmatters.com/p/italy-constitution-climate>; Daniel Funke & Daniela Flamini, *A Guide to Anti-Misinformation Action Around the World*, POYNTER, <https://www.poynter.org/ifcn/anti-misinformation-actions/#china> (last visited July 1, 2022) (discussing how various countries have sought to regulate disinformation); James M. Boyers, *Globalization and the United States Constitution: How Much Can It Accommodate*, 5 IND. J. GLOB. LEGAL STUD. 583, 584 (1998) (discussing the relevance of globalization to the U.S. Constitution and how trade regulations may cause conflict with constitutional provisions).

6. Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 NW. U. L. REV. 65, 146 (2019).

7. Anne Permaloff, *Methods of Altering State Constitutions*, 33 CUMB. L. REV. 217, 229 (2003).

8. See James Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992).

9. See Silvia Suteu, *Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland*, 38 B.C. INT'L & COMPAR. L. REV. 251, 251–52 (2015).

10. *Id.* at 252.

11. See John M. Carey, *Does It Matter How a Constitution is Created?*, in IS DEMOCRACY EXPORTABLE? 155, 177 (Zoltan Barany & Robert G. Moser eds., 2009).

12. Suteu, *supra* note 9, at 254–55.

13. See *id.* at 252.

Residents of and constitutional reformers in Rhode Island, Michigan, Connecticut, Illinois, and Iowa should be the first in line to study these new approaches.¹⁴ Voters in these states will have the chance to vote in upcoming years on their respective state's scheduled automatic ballot referral for a constitutional convention.¹⁵ The eight other states that have an automatic referral of the same question should also be on notice.¹⁶ By starting their review of the means to carry out a constitutional convention, these voters can better weigh the merits of voting affirmatively.

State constitutions will continue to fall short of their important role in the U.S. democratic system absent revision.¹⁷ Some constitutions can only be defined as primitive, having been created in the nineteenth century and only amended since then.¹⁸ Some are littered with legislative pronouncements ill-suited for a constitution.¹⁹ Other barriers have also reduced the role of state constitutions in their respective state democratic systems.

This paper seeks to pave the way for a single state to use participatory tools in an effort to revise their constitution via a constitutional convention. Just as the successes (and failures) in places like Iceland sparked a number of other democracies to experiment with participatory tools in substantive democratic processes, one state going through this transformative process could inspire several others to pursue their own version of such revision.

Another aim of this paper is to outline ways to democratize constitution-making. Prior to the widespread use of the printing press, only the likes of Thomas Jefferson, who had a private library, could easily access constitutions from other jurisdictions to assess the caliber of his state's own constitution.²⁰ As the publication of multiple constitutions in compilations became possible, constitution-making—"no matter in what

14. See Am. Pol. Sci. Ass'n, *Short Course: A Political Primer on the Periodic State Constitutional Convention Referendum*, POL. SCI. NOW (Apr. 19, 2016), <http://politicalsciencenow.com/short-course-a-political-primer-on-the-periodic-state-constitutional-convention-referendum/>.

15. *Id.*

16. See *id.*

17. See Ann Lousin, *How to Hold a State Constitutional Convention in the Twenty-First Century*, 44 LOY. L.A. L. REV. 603, 603 (2011).

18. See Thomas Gais & Gerald Benjamin, *Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform*, 68 TEMP. L. REV. 1291, 1292 (1995).

19. Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33, 36 (1988).

20. See Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CONST. L.Q. 199, 207–10 (2000).

humble or remote circumstance [a] convention might meet”²¹—became a more democratic activity. The democratic nature of constitution-making has ceased in modern times. As of 2019, just one in four Americans knew the number of amendments to the U.S. Constitution.²² It is likely that their knowledge of the contents of their state constitution was even lower. In fact, a Johns Hopkins University survey disclosed that half of Americans do not know whether their state has a constitution.²³

This paper contains four areas of analysis related to the revival of democratizing constitution-making. The first is an overview of the importance of state constitutions and their revision. The second briefly reviews the history of state constitutional revision. The third outlines the participatory tools used abroad, especially in Iceland and Ireland. The fourth discusses other important factors to the success of a revision effort.

I. THE IMPORTANCE OF STATE CONSTITUTIONS

The value of state constitutions to their respective jurisdictions comes from their content as well as the processes through which they are created and revised. State constitutions have a specific role in our democratic well-being.²⁴ First, they fill in gaps left by the Federal Constitution as to how state governments ought to make use of the governmental powers not delegated to the federal government.²⁵ The omissions of the Federal Constitution also create space for state constitutions to establish novel rights for their respective states.²⁶ Second, state constitutions advance state-level norms and ideals. They are supposed to reflect “the fundamental values, and ultimately the character, of the people of the state that adopted it.”²⁷ Third, state constitutions empower residents to exercise their democratic powers.

21. *Id.*

22. See Press Release, Patrick Riccards, *How Well Do Americans Know the Constitution? Woodrow Wilson Foundation Survey Finds Many Do Not Even Know When the Constitution Was Written*, WOODROW WILSON NAT’L FELLOWSHIP FOUND. (Sept. 10, 2019), <https://woodrow.org/news/how-well-americans-know-constitution/>.

23. Press Release, Jill Rosen, *JHU Survey: Americans Don’t Know Much About State Government*, JOHNS HOPKINS UNIV. (Dec. 11, 2018), <https://releases.jhu.edu/2018/12/11/jhu-survey-americans-dont-know-much-about-state-government/>.

24. See Gardner, *supra* note 8, at 814–15.

25. See Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?*, 64 ALB. L. REV. 1327, 1329 (2001).

26. See *id.* at 1331 (detailing unique provisions of state constitutions, such as prohibitions on expenditures for sectarian purposes, not included in the Bill of Rights).

27. Gardner, *supra* note 8, at 764, 815–16 (stating that the content of a constitution is meant to “reflect some of the most essential and intimate aspects of the character of the people who adopted it”).

They are meant to be “the means by which the people communicate to their agents[,] the scope of authority that may be wielded [on] the people’s behalf,”²⁸ as well as “a direct act of the sovereign people themselves.”²⁹

Yet, contemporary state constitutions no longer represent the “set of values to which [the living generation has] bound ourselves.”³⁰ Instead, the values in state constitutions reflect the values of bygone drafters and the consent of bygone ratifiers. This disconnect represents a nearly severed tether between the people and a core aspect of their democracy. The longer this disconnect lasts, the more people may come to question the legitimacy of their government—worsening the effects of the wicked problems outlined in the Introduction.

The process through which constitutions are created and revised informs the extent to which residents feel like “popular sovereigns.”³¹ The evolution of constitution-making solidified the idea that “popular sovereignty required that constitutions be written by a popularly selected convention, rather than the legislature, and then ratified through a process that elicited popular consent—ideally, in a referendum.”³² State constitutional change though, has increasingly not come about through such processes.³³ Those baseline thresholds for sovereignty—a drafting body that is distinct from the legislature, and a ratification process that can actually elicit consent from across society—have been absent in recent decades.³⁴ The task for modern constitutional efforts is to remind people of their role as sovereigns and to ensure that the procedural mechanisms recognize them as such.

II. A HISTORY OF STATE CONSTITUTIONAL REVISION

Revision of state constitutions tends to happen in “spasms.”³⁵ The last “spasm” took place between 1964 and 1982, when Michigan, Connecticut, Florida, Pennsylvania, Illinois, Virginia, North Carolina, Montana, Louisiana, and Georgia adopted new or revised constitutions.³⁶

28. *Id.* at 814.

29. *Id.*

30. *Contra id.* at 815.

31. *Id.* at 814.

32. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 355 (1994).

33. Robert F. Williams, *Contribution: Evolving State Constitutional Processes of Adoption, Revision, and Amendment: The Path Ahead*, 69 ARK. L. REV. 553, 573 (2016).

34. *See id.* at 574.

35. Friedman, *supra* note 19, at 35.

36. *See id.*

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Since then, state constitutions have been in a prolonged coma, only twitching as amendments continued to get piled on.³⁷

In recent times, constitution-making has ceased to be a regular activity. Only two states—Georgia and Rhode Island—have adopted a new constitution in the last forty years.³⁸ There’s also been a decades-long drought in providing the public with one of the best means for constitution-making: a convention. Between 1961 and 1970, there were eight conventions; between 1971 and 1980, there were seven conventions; and since 1980, there has been one convention.³⁹ The use of constitutional commissions has also been decreasing: thirty-two different commissions were active between 1965 and 1969; nine were active between 1975 and 1981; and just three were active between 1990 and 1991.⁴⁰ Amendments are now the chief means of constitutional-tinkering. This is problematic. The processes for ratifying amendments suffers from serious democratic deficits by way of leaving many of “We the People” on the sidelines.⁴¹

At the opposite end of the timeline, Revolution-Era Americans deeply involved themselves in the processes and content, both in the Federal Constitution as well as the constitutions of their respective states.⁴² Earlier generations of Americans had a greater understanding of constitutions and the capacity to debate constitutions based on primary sources.⁴³ Interest in constitutions was so strong and widespread that there was actually a market for publishers of constitution compilations to create versions suitable for “statesman and . . . the citizens at large.”⁴⁴ Even when the act of constitution-making was completed, the public was expected to consult the constitution compilation on a frequent basis.⁴⁵

Constitution-makers and members of the public took pride in their constitution.⁴⁶ Newspapers reported on how their respective state’s constitution was informing other constitution-making efforts.⁴⁷ No

37. *See id.*

38. *See* 42 THE COUNCIL OF STATE GOV’TS, THE BOOK OF THE STATES 11–12 (Audrey S. Wall & Heather M. Perkins eds., 2010).

39. *See* Marshfield, *supra* note 6, at 146.

40. *See* Gais & Benjamin, *supra* note 18, at 1303.

41. *See* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1641 (2010) (“[T]he principal mechanism by which states now update their constitutions is the amendment process.”).

42. *See* Baum & Fritz, *supra* note 20, at 200.

43. *See id.* at 205, 213–14.

44. *Id.* at 214.

45. *See id.* at 213–14 (detailing the public’s involvement in constitutional matters in the eighteenth and nineteenth centuries).

46. *See id.* at 201–02.

47. *See id.* at 214.

comparable coverage occurs today.⁴⁸ Gone are the days when state constitutionalism even came close to rivaling federal constitutionalism as a sort of civil religion.⁴⁹ Even as far back as 1988, when many Americans could still recall a time in which their state constitutions underwent revision, Friedman labeled the public as “quite ignorant” about state constitutions and found “little evidence that they revere [them].”⁵⁰ As of 2017, Henrik Dullea went so far as to claim that, with respect to the State of New York’s Constitution, “most people aren’t aware of its existence,” including the thousands of public employees in the state that swear to uphold that document as a condition of their employment.⁵¹ Constitution-making has become the sole domain of the “[p]olitical scientists, legal scholars, and politicians” called on when states undertake serious reviews of their constitutions.⁵²

Changes to state constitutions helped the country solidify and build on new definitions of good governance. In the mid-nineteenth century, constitution-makers responded to corrupt state legislatures by instituting new checks on legislators, such as term limits.⁵³ At the turn of the twentieth century, constitution-makers shifted their focus to the corruption associated with big corporations, banks, and railroads.⁵⁴ Another wave of change to constitutions occurred when the public recognized the importance of conserving resources and the natural landscape.⁵⁵ Though disruptions to America’s economy, political culture, and societal norms have not ceased, conventions have become politically impossible.⁵⁶

A. *The Role of Conventions*

Constitutional conventions have “the potential [to] increas[e] citizen attention and interest in politics, governmental problems, and possible

48. See *supra* notes 22–23 and accompanying text.

49. See Friedman, *supra* note 19, at 36; see also Baum & Fritz, *supra* note 20, at 213.

50. Friedman, *supra* note 19, at 36; see also Marshfield, *supra* note 6, at 146.

51. Henrik N. Dullea, *We the People: A Constitutional Convention Opens the Door to Reform*, 89 N.Y. STATE BAR ASS’N J. 32, 32 (2017).

52. See Hammons, *supra* note 25, at 1327–28 (noting that California, New York, Florida, and Texas enlisted the aid of these professions during their own constitutional review in the late 1990s).

53. See Friedman, *supra* note 19, at 37.

54. See *id.* at 38.

55. See *id.*

56. See Michael Leachman & David A. Super, *States Likely Could Not Control Constitutional Convention on Balanced Budget Amendment or Other Issues*, CTR. ON BUDGET & POL’Y PRIORITIES 6–10 (Jan. 18, 2017), <https://www.cbpp.org/sites/default/files/atoms/files/7-16-14sfp.pdf>.

solutions.”⁵⁷ This process also carries the potential to restore faith in democracy by “developing a true public dialogue and debate process.”⁵⁸ Throughout U.S. history, states realized the power of conventions by hosting them on a relatively frequent basis. New York, by way of example, hosted conventions in 1821, 1846, 1867, 1894, 1915, 1938, and 1967.⁵⁹ The eras in which New York and others opted to host conventions are not random. After wars, after recessions, and after depressions, New Yorkers and others realized the importance of updating their state constitutions to respond to new problems.⁶⁰

As constitutions have become frozen, with the exception of amendments aligned with the interests of a small faction or powerful interest, they have stopped advancing individual rights to the extent originally envisioned and have failed to respond to major changes to our political, economic, and cultural realities. The distribution of power seems to have settled in a way that diminishes “We the People.” That distribution can and should be altered by constitutional conventions that rely on participatory tools.

B. The Decline in State Constitutional Quality

Evaluation of the standard metrics for constitutional quality reinforces the notion that state constitutions could be improved by conventions. Constitution quality can be measured in a variety of ways. Key indicators are democraticity, rights-heaviness, and responsiveness.⁶¹ Secondary considerations include aspects such as durability, which are byproducts of the key indicators. Numerous scholars have their own mix of indicators. Robert F. Williams assesses the suitability and adaptability of a state constitution for the task of governing a state.⁶² Donald Lutz regards a constitution as a form of political technology designed to foster a stronger democracy.⁶³ Hélène Landemore acknowledges that constitutions are often reviewed for their interpretability and usefulness.⁶⁴ Finally, Ann Lousin stresses the need for state constitutions

57. Permaloff, *supra* note 7, at 229.

58. *See id.*

59. Marshfield, *supra* note 6, at 146.

60. *See id.* (documenting that Illinois held conventions in years soon after major events, such as in 1847, 1869, 1920, 1969). Maryland similarly held a convention immediately following the Civil War, during Reconstruction, and in the late 1960s. *Id.*

61. Hélène Landemore, *When Public Participation Matters: The 2010–2013 Icelandic Constitutional Process*, 18 INT’L J. CONST. L. 179, 191 (2020); Williams, *supra* note 33, at 553 n.2.

62. Williams, *supra* note 33, at 553–54.

63. *See* Lutz, *supra* note 32, at 363.

64. Landemore, *supra* note 61, at 195.

that have a system of checks and balances, that provide as much transparency as possible, and that avoid infringing the privacy rights of individuals.⁶⁵

The proffered indicators of quality seem to hinge around either the ability of the constitution to create a working government or its ability to foster democratic legitimacy within the public. Perhaps unsurprisingly, Landemore takes her assessment of the democraticity of a constitution one step further by reviewing not just the final constitution (or the proposed one), but also the means for the creation of that constitution.⁶⁶ She cites the theory that “the more participatory a constitutional process is, the more rights and mechanisms for popular participation it should include,” as a justification for reviewing the participatory nature of the drafting process as a test of its quality.⁶⁷

By any of the aforementioned measures, analysts such as James Gardner regard state constitutions as lacking in quality. Gardner’s survey of state constitutional law revealed a “vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”⁶⁸ A myriad of issues with state constitutions explains how Gardner could reach such a damning conclusion, and why their functional capacity has decreased, especially in recent decades.

1. State Constitutions Have Too Many Amendments

State constitutions have had their functional capacity limited by excessive and occasionally conflicting amendments. Michael G. Colantuono clearly articulated the difference between amendments and revisions:

The term “amendment” typically refers to changes to one or a few provisions, usually related to a single subject. The term “revision,” on the other hand, refers to more pervasive changes, ranging from the drafting of an entirely new document to changes that alter multiple provisions and touch upon multiple subjects.⁶⁹

65. Lousin, *supra* note 17, at 604.

66. *See generally* Landemore, *supra* note 61.

67. *Id.* at 191–92.

68. Gardner, *supra* note 8, at 763.

69. Michael G. Colantuono, *The Revision of American Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1478 (1987).

Scholars disagree on whether amendments improve or diminish the quality of state constitutions.⁷⁰ The merit of amendments centers on the characteristics of those amendments, many of which tend to amount to superlegislation. One line of thinking holds that “superlegislation”—meaning provisions that, despite lacking “constitutional flavor” because “they are no different in quality or type from ordinary laws,” have been given constitutional status as a result of some political maneuvering—contributes to constitutional instability.⁷¹ Special interests behind these provisions diminish the quality of the constitution by freezing their policy preference at a certain moment into a document that is meant to lay out frameworks independent of policy cycles.⁷² Superlegislation receiving the same treatment as constitutional principles may also reduce the “transcendent value” of the document and diminish its ability to “inspire and maintain a social consensus.”⁷³ It follows that many constitutional experts consider these provisions “extraneous” and have determined that they rapidly become outdated.⁷⁴

Too many amendments, superlegislation or not, is also problematic. Deliberate and comprehensive revision is preferable to amendments that, at best, may offer some, but insufficient progress, and at worst, may conflict and reduce the coherence and functionality of the constitution.⁷⁵ The likelihood of the latter is increased when, as is often the case, a ballot includes several different initiatives.⁷⁶ When that is true, the interrelationship between those initiatives often goes undiscussed.⁷⁷ Some states try to limit bombarding the electorate with too many amendments on a single ballot.⁷⁸ Yet, even in Arkansas, where the limit is three per ballot, those three amendments could still saddle the constitution with conflicting messages.⁷⁹ Absent deliberate and comprehensive revision, states will continue to see stress build on their

70. Compare Lutz, *supra* note 32, at 365 (“The higher the formal amendment rate, (a) the less likely that the constitution is being viewed as a higher law, (b) the less likely that a distinction is being drawn between constitutional matters and normal legislation, (c) the more likely that the document is being viewed as a code, and (d) the more likely that the formal amendment process is dominated by the legislature.”), with Williams, *supra* note 33, at 554–56 (describing the difficulty in striking the balance of effectiveness of amendments).

71. See Friedman, *supra* note 19, at 36.

72. See *id.* at 36–37.

73. Colantuono, *supra* note 69, at 1510.

74. Hammons, *supra* note 25, at 1333; William E. Scheuerman, *Constitutionalism in an Age of Speed*, 19 CONST. COMMENT. 353, 365 (2002).

75. See Gais & Benjamin, *supra* note 18, at 1292.

76. See *id.* at 1302–03.

77. *Id.*

78. See Permaloff, *supra* note 7, at 223.

79. See *id.*

institutional structures—which have stood since the eighteenth and nineteenth centuries and are ill-suited for new circumstances.⁸⁰

That stress is already weighing on many state constitutions. Most constitutions have more than one hundred constitutional amendments.⁸¹ The “specificity” and “silliness” of some of these amendments fails to advance key indicators of constitutional quality and to imbue the document with a sense of democratic legitimacy.⁸² Too many amendments may trivialize the state constitution and hinder its ability to articulate “fundamental rather than positive law.”⁸³

2. State Constitutions Are Out of Date

“Most present state constitutions were written to provide the legal foundation of government for a far simpler society than that in which we live . . . [, and] most state constitutions have failed to keep pace with the times,” according to legal scholar Albert Sturm, writing in 1970.⁸⁴ The fact that “two-thirds of all states have constitutions that are more than a hundred years old”⁸⁵ helps illustrate how far behind state constitutions have fallen. The importance of “keeping pace with the times” stems from the need for a government to solve contemporary problems and, through those solutions, instill a continued sense of legitimacy among the people.⁸⁶ Written constitutions embody the results of prospective lawmaking and constitution-makers from decades, if not centuries, ago, and therefore could not reasonably have been expected to foresee current technological, social, and economic trends.⁸⁷ For many states, the conditions of the present no longer fall even remotely close to the future settings considered by the constitution-makers of their current documents.⁸⁸

Would-be constitution-makers are increasingly unable to anticipate changes in the technological, social, and economic realities of future generations, let alone design a constitution capable of guiding government efforts to respond to those changes. Constitutions are more

80. Gais & Benjamin, *supra* note 18, at 1292.

81. Devins, *supra* note 41, at 1641.

82. *Id.* at 1642–43 (flagging his own disagreement with this notion).

83. Harvie Wilkinson III, *Gay Rights and American Constitutionalism: What's a Constitution For?*, 56 DUKE L.J. 545, 574 (2006).

84. ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938–1968, at 1 (1970).

85. Devins, *supra* note 41, at 1641.

86. STURM, *supra* note 84, at 1–2.

87. See Scheuerman, *supra* note 74, at 361–62.

88. See *id.* at 363.

likely than ever to become “out of date” at an increasingly faster rate.⁸⁹ That is why states must adopt more regular and deliberative processes for constitutional change. By scheduling out periods of revision and specifying the robust mechanisms for public participation, states can reduce the time lag between the drafting of a constitution and the changes it is meant to address.⁹⁰

3. State Constitutions Fail to Manifest Local Values

State constitutions should serve as expressions of the values and priorities of the state’s residents. It is debatable whether state constitutions have ever fulfilled that aspiration and if they ever can. Still, it is a worthy aspiration because the pursuit of a state-specific constitution will force political actors and the public alike to think critically about what makes their state unique, and to what extent those unique features should be protected by their constitution.

State constitutions will likely always share some aspects in common. Almost no one thinks that constitutional convention delegates can “go to work and build a Constitution out of [their] heads, out of [their] own inner consciences.”⁹¹ That’s why even constitution-makers in “frontier” states—like Texas—relied on constitutions from other states to compile their own documents.⁹² Because no constitution is formed in a vacuum, they often contain similarities—arguably too many. The perhaps excessive overlap between state constitutions is especially likely when comparing constitutions written or revised during the same time period.⁹³ State constitutions also tend to have similar provisions because they all have to respond to similar problems.⁹⁴ An examination of the fifty state constitutions by Frank P. Grad disclosed so little variation between the documents, that a review of the documents in isolation may lead someone to think that states are fungible.⁹⁵

For some scholars of constitutional law, these similarities reduce the merits of studying state constitutions as expressions of the political

89. *See id.*

90. *See id.* (specifying that constitutions must do more than allow for “a modicum of flexibility” for future generations to adapt the document to social change).

91. 1 STATE OFFICE, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENEED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 256 (1880). The exception would be one delegate to California’s 1877–78 Convention, who apparently thought he could do such a thing. *Id.*

92. *See* Baum & Fritz, *supra* note 20, at 220.

93. *See* Devins, *supra* note 41, at 1643–44.

94. *See id.* at 1644.

95. *See* Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 941 (1968).

cultures of their state.⁹⁶ Others, such as Daniel Elazar and Amy Bridges, feel comfortable clumping state constitutions into regional groups.⁹⁷ This duo of constitutional scholars each reviewed early constitutional reforms by region, and discovered that regions tended to adopt specific reforms based on their shared characteristics.⁹⁸ In the West, for example, the states commonly reacted to their “dependence on outsiders for resources and [their] distance, political as well as geographic, from the resources the territories needed.”⁹⁹ Elazar’s analysis of state constitutions detected six types of state constitutions—loosely based primarily on region, and secondarily on constitutional era.¹⁰⁰ Even those who may accept that at one time states had unique political cultures—perhaps interwoven into their constitution—they might challenge whether a modern revision of that constitution would result in anything unique. As a result of the nationalization of politics, globalization of our economy, and atomization of the individual, some argue that state-identity does not play a meaningful role in how individuals perceive their democratic selves.¹⁰¹

Though many state constitutions look alike today, a nuanced look at shared provisions reveals idiosyncrasies and, therefore, hope that state constitutions can manifest local values. One source of variation comes from the fact that the adoption of these shared provisions usually occurs at different rates based on the political culture of that state.¹⁰² For instance, though many states have provisions for direct democracy, the inclusion of initiative and referendum provisions took place in two different waves.¹⁰³ Whether a state joined the first or second wave, or

96. See Dinan, *supra* note 2, at 937 (“[T]he predominant view has been that states have not undertaken many significant institutional innovations.”).

97. See Amy Bridges, *Managing the Periphery in the Gilded Age: Writing Constitutions for the Western States*, 22 *STUD. AM. POL. DEV.* 32, 57 (2008); Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 *PUBLIUS* 11, 18–22 (1982).

98. See Bridges, *supra* note 97, at 57; Elazar, *supra* note 97, at 18–22.

99. Bridges, *supra* note 97, at 57.

100. See Elazar, *supra* note 97, at 18–22 (outlining six different categories of state constitutions, including (1) commonwealth, (2) commercial republic, (3) Southern contractual, (4) civil code, (5) frame of government, and (6) managerial).

101. See Lee Drutman, *America Has Local Political Institutions and Nationalized Politics. This is a Problem*, *VOX: POLYARCHY* (May 31, 2018), <https://www.vox.com/polyarchy/2018/5/31/17406590/local-national-political-institutions-polarization-federalism> (“The nationalization of politics reflects a broad cultural transformation since midcentury, in which Americans have become far more attached to their national identities than their place-based identities.”). *But cf.* Emily Pears & Emily Sydnor, *The Correlates and Characteristics of American State Identity*, 51 *PUBLIUS* 173, 195 (2022) (“Our work shows that . . . Americans still identify with their states, despite narratives of political nationalization, and that Americans’ state identifies drive their trust in state governments.”).

102. See Devins, *supra* note 41, at 1643–44.

103. *Id.* at 1643–44, 1643–44 n.73.

missed the swell entirely, gives some sense of that state's political appetite for major change.¹⁰⁴ In the resulting Venn diagram of which states share some aspects but not others, the distinctness of each starts to emerge.

The differences in these groups can also indicate the unique characteristics of states. As mentioned above, some changes tend to occur by region.¹⁰⁵ The West, for instance, has a higher concentration of direct democracy provisions than elsewhere.¹⁰⁶ Others can be grouped by historical moment, adopting provisions common to the era in which they adopted their original constitution or revised it.¹⁰⁷ New England states, for example, tend to share much in common with the Federal Constitution because of their shared creation periods.¹⁰⁸ The fact that these common bunches do not perfectly overlap with one another, evidences that space exists for each state to have a constitution that contains a unique combination of shared and distinct provisions.¹⁰⁹

States continue to show signs of their idiosyncratic state constitutions by how these documents are interpreted by their respective state's legal community. The idiosyncratic means of applying state constitutions stands out even in this age of nationalized politics, global economics, and interstate mobility—all factors that would suggest that states no longer have distinct identities. Action and inaction with respect to a state's constitution can indicate features of that state's political culture.¹¹⁰ For instance, Schlam believes that change to the Illinois State Constitution has occurred relatively infrequently because of the local political culture, which he describes as “disunified, individualistic, and often factious.”¹¹¹

The distinctiveness of state constitutional systems receives too little attention even when news related to state constitutions receives national

104. *Id.*

105. *Id.* at 1652.

106. *Id.*

107. *Id.* at 1653; *see also* Lawrence Schlam, *State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation*, 43 DEPAUL L. REV. 269, 276 n.15 (1994) (citing several articles noting the similarities between constitutions crafted in similar temporal windows).

108. *See* Devins, *supra* note 41, at 1653.

109. *Compare* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 966 (1982) (“[D]ifferences in our state constitutions are not accidents of draftsmanship . . . [but rather] reflect differences in our tradition.”), *with* Elazar, *supra* note 97, at 18–22 (identifying six types of constitutions that may mark the finest level of distinction that can be drawn between states).

110. *See* Schlam, *supra* note 107, at 271.

111. *Id.*

attention, according to Neal Devins.¹¹² In the rush to nationalize everything, the “distinctive political, historical, and cultural moments” behind state constitution news goes under covered.¹¹³ This under coverage is hard to justify because “state supreme court decision-making increasingly defines the meaning of constitutional rights throughout the country.”¹¹⁴

The work by some state supreme courts to actively engage with their state constitutions in part counters the narrative above that state courts have neglected their respective constitutions. Writing in 2010, Devins argued that “[o]ver the past thirty years, state courts have eclipsed the U.S. Supreme Court in shaping the meaning of constitutional values.”¹¹⁵ Gardner would disagree with that perception of state courts, having concluded that “state constitutional law [as of 1992,] is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”¹¹⁶ Not only does Gardner think that state courts have failed to advance state constitutional law, but he also thinks they have no desire to.¹¹⁷ He theorized that “state courts by and large have little interest in creating the kind of state constitutional discourse necessary to build an independent body of state constitutional law.”¹¹⁸ Regardless of whether the reality today is closer to the interpretation of Devins or Gardner, even those who believe state courts have robustly engaged with their state’s constitution would agree that more education in the legal community around the state constitution would improve the relevance of that document and contribute to the democracy of that state.

The content of state constitutions also reveals the distinct aspects of each state’s culture and history. Two quick examples: first, California’s constitution guarantees an interpreter to residents who do not speak English when charged with a crime;¹¹⁹ second, the Washington State Constitution specifies rights for crime victims.¹²⁰ A state constitutional convention could further bring out the latent characteristics within each

112. See Devins, *supra* note 41, at 1632.

113. *Id.*

114. *Id.* at 1635.

115. *Id.* (identifying that, proportionally by volume, a state supreme court “now issues more opinions about state constitutional law than the U.S. Supreme Court issues decisions about federal constitutional law.”).

116. Gardner, *supra* note 8, at 763.

117. See *id.* at 804.

118. *Id.* at 804.

119. CAL. CONST. art. I, § 14 (“A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.”).

120. WASH. CONST. art. I, § 35 (granting “basic and fundamental rights” to crime victims “[t]o ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect”).

state that make that place a unique political environment. This potential reflects the fact that a revision would dare the public and members of the political elite to paint very state-specific visions of the future.

The demographics of political elites in each state reinforces the idea that state constitutionalism reflects homegrown values.¹²¹ As of 2000, nearly two out of every three state supreme court justices were born in the state in which they serve.¹²² If the California State Legislature is indicative (and it should be, given the high number of people that move to the state), then the majority of state legislators are also from the state in which they serve.¹²³ By virtue of being from the states they represent, these officials likely know the values and norms of voters and officials, as well as the current nuances of the state's political climate.¹²⁴ And although many people continue to move to new states, the vast majority of Americans stay put in their state in any given year, which suggests that members of a political community also immerse themselves in a state's political culture.¹²⁵ This means voters are capable of looking for officials that align with the unique political norms of that state.

States can still form unique political communities and constitutions capable of expressing the values of these communities. The likelihood of state constitutions representing core community values will only increase if states revise their constitutions through conventions informed by participatory tools.

4. State Constitutional Change by Other Means Lacks Democratic Vetting

Constitutional change by way of initiative or judicial interpretation lacks a core feature of any process to change a constitution: deliberation.

121. See Devins, *supra* note 41, at 1668–71.

122. Chris W. Bonneau, *The Composition of State Supreme Courts 2000*, 85 JUDICATURE 26, 28–29 (2001).

123. See Elizabeth Castillo et al., *Interactive: How Diverse Is the California Legislature?*, CALMATTERS (Feb. 16, 2022), <https://calmatters.org/politics/california-legislature/2021/01/how-diverse-california-legislature/> (reporting that nearly sixty-one percent of California state legislators were born in California); see also Eric Ostermeier, *Home Sweet Home: How Many U.S. Senators Serve Their Birth State?*, SMART POLITICS (Jan. 5, 2015), <https://smartpolitics.lib.umn.edu/2015/01/05/home-sweet-home-how-many-us-se/> (finding that sixty-two percent of U.S. Senators over the last 100 years were a state representative in the state in which they were born).

124. See Devins, *supra* note 41, at 1669.

125. See U.S. CENSUS BUREAU, MOVING IN AMERICA: U.S. MOVER RATE AT HISTORIC LOW (2016), https://www.census.gov/content/dam/Census/library/visualizations/2016/comm/cb16-189_migration_graphic.pdf (indicating that the number of Americans moving in any given year has remained below twenty-five percent each year since 1948, while the percentage of people actually leaving their state is even lower).

Initiatives bring too few people into the process and carry little to no opportunities for the public to contribute to the actual text and impact of the proposed amendment.¹²⁶ Constitutional alteration via judicial interpretation also presents “democratic deficits.”¹²⁷ These more expeditious means of constitutional adaptation to new technological, social, and economic realities falls short of the sort of democratic mechanisms meant to accompany such significant changes. Constitutional conventions can prevent the overuse of such speedy mechanisms and produce changes less likely to raise questions of democratic legitimacy.¹²⁸

Initiatives have been overused as a means to change constitutions. Way back in 1987, Janice C. May tallied more than 8,200 amendments submitted to the voters in forty-nine states, with 5,083 adopted in those forty-nine states.¹²⁹ Only a narrow slice of the population tends to participate in elections.¹³⁰ And, of those that do, they are often “manipulated and befuddled by a combination of misleading [advertisements], rock videos, and texts that would baffle a Philadelphia lawyer.”¹³¹ The result is that “the outcome of a single election is less likely to provide a meaningful expression of the will of the people than the outcome of the complex textual procedures.”¹³² Yet, with increasing frequency, these nonrepresentative expressions fundamentally alter the character of the state’s governance, by taking on topics such as taxation and budgetary measures.¹³³

By treating constitutional changes like any other democratic change, initiatives also threaten to bring constitutional reform to the level of “everyday politics.”¹³⁴ This demotion conflicts with the will of the U.S. framers who desired constitutional changes to take place in a higher democratic realm, namely one that ensured the resulting change carried

126. See Gais & Benjamin, *supra* note 18, at 1302.

127. See Scheuerman, *supra* note 74, at 379.

128. See *id.* at 370 (noting that the staunchest defenders of constitutionalism consider democratic legitimacy to be a core feature of the system).

129. Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 153, 162 (1987).

130. See Gais & Benjamin, *supra* note 18, at 1302 (“[T]hose who do not vote on initiatives are quite different from those who do . . . in most instances people with less formal education and lower incomes are under-represented in deciding most propositions.”).

131. Friedman, *supra* note 19, at 39; see also Gais & Benjamin, *supra* note 18, at 1301 (discussing how highly emotional and symbolic appeals related to initiatives can skew the decisions of voters); Colantuono, *supra* note 69, at 1504–05 (discussing how ballot measure “complexity increases both the likelihood of voter noncomprehension and the potential for voter manipulation by campaign advertisers”).

132. Colantuono, *supra* note 69, at 1501.

133. See Gais & Benjamin, *supra* note 18, at 1292–94.

134. Scheuerman, *supra* note 74, at 371.

a heightened degree of democratic legitimacy.¹³⁵ According to Scheuerman, a simple up and down vote on an initiative to change the constitution cannot bring about that degree of legitimacy because it will fail to adequately indicate a sufficient degree of popular consensus.¹³⁶ More generally, “[e]xpeditious revision procedures are ill advised because they undercut deliberation and stability and denigrate state constitutional law.”¹³⁷

Initiatives are an improper democratic setting for the slow discourse required for quality constitutional alteration. If most voters are only truly engaged with the merits of proposed initiatives just a few weeks prior to the election,¹³⁸ then there is not enough time to foster public discourse on these topics. This speedy process could in fact be interpreted as the sort of rapidity in mass politics that indicates the “irrationality” of the resulting decision.¹³⁹

Initiatives also cater to the interest of a specific minority of voters.¹⁴⁰ In today’s expensive political environment, only groups with many members and a lot of money can use the initiative process to realize their goals.¹⁴¹ These groups may employ a number of anti-democratic means to get their suggested change on the ballot.¹⁴² For instance, they may hire out-of-state signature gatherers, rely on funds donated by out-of-state individuals and groups, and confusingly word their petition statement to disguise its true impact and origins.¹⁴³ The upshot is that constitutional change through initiatives falls short of democratic standards that should be associated with such important alterations. Sadly, other common means of constitution change, such as judicial review, also fail to live up to these standards.

One immediate issue with robust judicial review of a constitution is the potential for the court to cross the line from mere interpretation into alteration of the document. Though the existence of formal mechanisms to amend constitutions suggests there is a line between amendment and interpretation, “the line between constitutional interpretation and alteration is hard to draw in legal praxis.”¹⁴⁴ Scheuerman suggests that courts have crossed that line in their Fourth Amendment

135. *See id.*

136. *See id.* at 371–72.

137. Colantuono, *supra* note 69, at 1509.

138. *See id.* at 1506.

139. *See* Scheuerman, *supra* note 74, at 374.

140. *See* Gais & Benjamin, *supra* note 18, at 1302.

141. *See* Permaloff, *supra* note 7, at 235.

142. *See id.*

143. *See id.*

144. *See* Scheuerman, *supra* note 74, at 367.

jurisprudence.¹⁴⁵ Rather than resort to slower, more deliberative means of constitutional alteration, courts have responded to technological, social, and economic changes that weigh on the Fourth Amendment by adopting new interpretations over the decades.¹⁴⁶ Though the line between interpretation and alteration is hard to draw, the closer courts get to altering the constitution, the more that “democratic deficits” emerge.¹⁴⁷ The “democratic deficits” associated with constitutional change via judicial action are severe enough to caution against interpretations even nearing alteration.¹⁴⁸

For one, members of state constitutional courts face varying degrees of public accountability.¹⁴⁹ States with supreme court justices that are elected by the people, tend to adopt interpretations of constitutional provisions that cater to their voters and to the most influential special interests groups that voted for them.¹⁵⁰ In contrast, state supreme court justices that are isolated from the people have more freedom to adopt extreme interpretations.¹⁵¹ Of the seven state supreme courts that adopted pathbreaking interpretations of their constitutions related to same-sex marriage from 1993 to 2009, none subjected their justices to contested judicial elections.¹⁵² This sort of unrepresentative and non-deliberative “pathbreaking” may have helped the respective state constitutions keep pace with society, but arguably conflicts with the overriding priority that constitutional alteration occurred via “broad-based, time-consuming popular deliberation.”¹⁵³

The case-by-case approach to constitutional change through judicial action also raises democratic concerns. As with initiatives, singular changes to a constitution, rather than thoughtful analysis of how several changes may fundamentally alter a constitution, risk reducing the functionality and therefore legitimacy of the constitution.¹⁵⁴ It is also not clear that members of the judiciary have the information and expertise required to think through how best to alter the constitution in response

145. *See id.* (“In a similar vein, the legal implications of a constitutional ‘right to privacy’ will probably have to be revised in the face of permanent innovation in information technology.”).

146. *See id.* at 368.

147. *Id.* at 379.

148. *See id.*

149. *Id.*

150. *See* Devins, *supra* note 41, at 1665.

151. *See id.* at 1676–79 (“No state with contested elections has played a path-breaking role.”).

152. *See id.* at 1676–77.

153. *See* Scheuerman, *supra* note 74, at 375.

154. *See id.*

to technological, social, and economic changes.¹⁵⁵ As Scheuerman points out, “[t]he fact that social and economic acceleration probably has helped transform constitutional courts into a kind of Constitutional Assembly in continuous session should worry us.”¹⁵⁶

Briefly, in comparison to initiatives passed by an unrepresentative segment of the population without sufficient means for deliberation and alterations made by judicial action, constitutional changes made by the legislature theoretically carry fewer democratic deficits. Unlike voters in initiatives, legislators can more forcefully claim to bring broad-based representation to a debate on the merits of any constitutional alteration.¹⁵⁷ And, unlike courts, legislatures have a more deliberative and general process for considering constitutional changes.¹⁵⁸ In practice, it is not clear that legislatures are indeed representative or reliable in the exercise of deliberative exchange.¹⁵⁹ Absent these important factors, the legislative route to constitutional change may only add to the document’s lack of clarity and inability to adjust to new conditions.¹⁶⁰ In particular, the lack of sufficient deliberation could result in the legislature too frequently altering the constitution and, consequently, injuring its legal constancy.¹⁶¹

It is also not clear that the legislature will take on the full scope of issues with their state’s constitution. As pointed out by Gais and Benjamin, legislative members may shy away from certain fundamental changes to the constitution because those alterations could threaten their own position by, for example, devolving more power to local governments or to the people themselves.¹⁶² Absent a willingness to consider the sum of the reforms that could emerge from a convention, the legislature is not an acceptable substitute for constitutional revision.

The history of legislative amendments also suggests that “We the People” have long been skeptical of even these supposedly representative bodies having the power to make constitutional changes. Slowly but surely, “We the People” have demanded a greater role in legislative efforts to amend the constitution. Early constitutions “stipulated that

155. Compare Devins, *supra* note 41, at 1668–71 (discussing justices’ capacity to make informed decisions accounting for potential backlash in their home states), with Scheuerman, *supra* note 74, at 376–77 (noting that courts may be better suited to update constitutional systems in accordance with social and economic realities).

156. See Scheuerman, *supra* note 74, at 379 (internal quotations omitted).

157. See *id.* at 383.

158. See *id.* at 381.

159. *Id.* at 380.

160. *Id.* at 382.

161. See *id.* at 382; see also JAMES BRYCE, CONSTITUTIONS 13–22 (1901) (warning that easy legislative changes to a constitution could result in a complicated document).

162. See Gais & Benjamin, *supra* note 18, at 1298.

state legislatures enjoyed sole responsibility for enacting amendments.”¹⁶³ In those days, a state legislature could amend the constitution in a single legislative session, usually with a supermajority vote.¹⁶⁴ Later, the people demanded a greater say in that process and made it so legislative changes had to receive approval from two separate sessions, in order to provide the people with a chance to vote out legislators championing the change.¹⁶⁵ Still not satisfied, the next generation of “We the People” added to the consecutive legislatures requirement by subjecting that change to a popular referendum in the early nineteenth century.¹⁶⁶

The path to constitutional change must not rely on a single institution, such as a court or legislature, nor the perspectives of a narrow set of society.

III. PARTICIPATORY TOOLS USED ABROAD

The provision of more frequent and meaningful opportunities for public participation in substantive decision making can result in an increased willingness for participants to get involved again down the road.¹⁶⁷ Several countries around the world have realized this pattern and used it to improve their respective constitutions.¹⁶⁸ These tools have been employed in broad crowdsourcing exercises to formulate nationally-significant policies such as a new constitution in Iceland, as covered more below, and a new policy on outdoor recreation vehicles in Finland.¹⁶⁹ Specifically, in the context of constitutional revision, states in the United States have missed the practice and theory of what Landemore calls “participatory constitution-making.”¹⁷⁰ This new practice, as instituted in varying degrees by Iceland, Chile, Egypt, Tunisia, and Ireland, reflects

163. Dinan, *supra* note 2, at 975.

164. *See id.*

165. *See id.* at 975–76.

166. *See id.*

167. *See* Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENV'T AFFS. L. REV. 263, 301 (1999).

168. *See generally* HÉLÈNE LANDEMORE, *OPEN DEMOCRACY: REINVENTING POPULAR RULE FOR THE TWENTY-FIRST CENTURY* xiv–xv (2020) (noting that in the last few decades, “countless experiments in so-called democratic innovation” have proven successful across the world).

169. *Id.* at xv–xvi; *see generally* MARION GRET & YVES SINTOMER, *THE PORTO ALEGRE EXPERIMENT: LEARNING LESSONS FOR BETTER DEMOCRACY* (Stephen Wright trans., 2005) (discussing participatory budgeting in Brazil).

170. *See* Landemore, *supra* note 61, at 181 (describing “participatory constitution-making”—the effort to include ordinary citizens in the process of amending constitutions—as a trend toward “open government”).

how “our understanding of constitution-*making* has evolved to now mean having direct influence on the content and shape of the constitutional text itself, as opposed to just performatively bringing a ready-made text into existence or shaping it indirectly via elected representatives,” as summarized by Landemore in her review of the Iceland constitutional process.¹⁷¹ These constitutional revision efforts have incited “public spiritedness” and “foresight” in pursuit of establishing “popular veneration” of the document.¹⁷² Participatory tools and techniques produced those critical components of a strong democracy.

Participatory tools generally increase deliberation, which is foundational to constitution-making. Attributes typical of deliberative processes include: accessibility, the creation of a space for sharing in which participants have no fear of repercussions, relevance, transparency, equality of participatory opportunities, inclusivity, informed participants, and facilitation by a moderator.¹⁷³ Some of these attributes do not readily fit into the process of constitution-making. For instance, the need for a small body of constitution-makers makes complete equality of participatory opportunities a non-starter.¹⁷⁴ Similarly, not every participatory tool will work in the context of constitution-making. Participatory tools include “citizen assemblies[,] . . . citizen juries, deliberative polls[,] and participatory budgeting.”¹⁷⁵ Citizen assemblies are the typical tool applied to constitutional conventions because they “stand out [from other tools] as constituting the most extensive modern form of collective decision-making by common folk.”¹⁷⁶

In the context of constitutional conventions, citizen assemblies provide several deliberative benefits: first, they bring together “ordinary” people; second, they provide selected citizens with educational resources about the process as well as time to deliberate; and third, they rely on consensus-based decision making.¹⁷⁷ Other participatory tools can be

171. *Id.* at 179–80.

172. *See generally* Dinan, *supra* note 2, at 933 (discussing James Madison’s warnings that constitutional conventions “would rarely achieve the same level of public spiritedness and foresight” or engender public trust as strongly as the convention of 1787).

173. *See* Beth Simone Noveck, *Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer*, 9 B.U. J. SCI. & TECH. L. 1, 12–17 (2003).

174. *See id.* at 15–17 (discussing value conflicts regarding equal representation, pluralism, and informed decision-making).

175. *See* Suteu, *supra* note 9, at 258.

176. PATRICK FOURNIER ET AL., WHEN CITIZENS DECIDE: LESSONS FROM CITIZEN ASSEMBLIES ON ELECTORAL REFORM 10 (2011).

177. *See* Suteu, *supra* note 9, at 258; *see also* David M. Farrell, *The 2013 Irish Constitutional Convention: A Bold Step or a Damp Squib?*, in 75 YEARS OF THE CONSTITUTION OF IRELAND: AN IRISH-ITALIAN DIALOGUE 191, 194–95 (Giuseppe Franco

used to augment the capacity of citizen assemblies to collectively decide important questions. For instance, many conveners of citizen assemblies involve experts to summarize and augment the findings of assemblies, and moderators to guide the work of the assembly.¹⁷⁸

The key to establishing constitutional legitimacy through participatory tools and processes hinges on moving from mere consultation of the public to active involvement, so that a sense of public ownership of the draft builds.¹⁷⁹ More deliberative constitution-making processes can result in constitutions more likely to strengthen democracy and ensure constitutional stability—two common assessments of constitutional quality.¹⁸⁰ These deliberative processes also assist with constitutional longevity by expanding common knowledge of the constitution, thereby creating a public attachment to and stake in the success of the constitution.¹⁸¹ Finally, deliberative processes can renew the public's collective democratic spirit by providing a means to participate that goes beyond merely casting a vote in a standard election—a typical idea of what it means to democratically participate.¹⁸²

That is why twenty-first century constitution-makers have often layered their use of participatory tools. For example, rather than rely on elections that tend to reflect the will of a narrow set of voters to select delegates, convention organizers can use another participatory tool—quasi-random selection—to identify the assembly members.¹⁸³ The resulting assembly is more reflective of the public and less biased by the process of having to earn election.¹⁸⁴

Another participatory tool is crowdsourcing, which amounts to facilitating a massive deliberative feedback exercise. Crowdsourcing involves the collection of a broad array of views from a range of members of civil society, the expression of particularly important interests, and an exchange related to those views and interests between constitution makers and the public.¹⁸⁵ These aspects align with how the founding fathers thought about the proper process for constitutional reform: one

Ferrari & John O'Dowd eds., 2014) (enumerating a longer list of typical aspects of constitutional conventions reliant on citizen assemblies).

178. See H el ene Landemore, *Inclusive Constitution-Making: The Icelandic Experiment*, 23 J. POL. PHIL. 166, 181–82 (2015) [hereinafter *Icelandic Experiment*] (noting the involvement of experts in Icelandic processes).

179. See *id.* at 174.

180. See Suteu, *supra* note 9, at 255–56.

181. See *id.* at 256.

182. See *id.* at 256–57.

183. *Id.* at 258–59.

184. *Id.*

185. See Scheuerman, *supra* note 74, at 388.

that guarantees a “fair hearing to a rich diversity of views.”¹⁸⁶ Crowdsourcing in constitution-making may include soliciting real-time feedback from the public on drafts from the convention and creating means for the public to have a role in identifying the topics and values they would like the convention to prioritize, as well as the delegates that will form that convention body.

According to Silvia Suteu’s analysis of international constitutional reforms, “Iceland and Ireland are often hailed as trailblazers in marrying technology and direct democracy in their respective constitutional reform processes.”¹⁸⁷ While neither process met the full expectations of the most ardent advocates of participatory constitutional reform,¹⁸⁸ both reveal important lessons for states considering constitutional conventions.

The following sections review the Iceland and Ireland constitutional revision efforts to assist state constitutional convention organizers with learning about participatory tools as applied to specific aspects of revision. These aspects include the topic selection process, the level of specificity for selected topics, the means for selecting delegates, the process for reviewing drafts from the conventions, and the process of approving the final draft.

A. *Iceland as a Case Study*

Iceland implemented a number of participatory tools in their constitutional revision process. An assembly of elected laypersons drafted a constitution that addressed topics vetted by a randomly selected group of Icelanders that participated in a deliberative dialogue moderated by experts.¹⁸⁹ The randomly-selected Icelanders formed the First National Forum—a day-long “exercise that consisted of articulating the values and priorities that should guide the renewal of government and public administration.”¹⁹⁰ A total of 1,500 Icelanders selected from the National Population Register participated.¹⁹¹ Hundreds of representatives from interest groups and institutions also joined the First National Forum.¹⁹² Jointly, these Icelanders agreed on Icelandic societal values, which were then shared with and debated by the

186. *Id.* at 372–73.

187. Suteu, *supra* note 9, at 252.

188. *See id.* at 253.

189. Landemore, *supra* note 61, at 187–88.

190. *Icelandic Experiment*, *supra* note 167, at 169.

191. *Id.*

192. *See* Suteu, *supra* note 9, at 261 (“The forum was made up of 1,200 randomly selected citizens and 300 representatives of interest groups and institutions[.]”).

public.¹⁹³ Another forum, the Second National Forum, this time with 950 quasi-randomly selected citizens, formed to produce a report meant to guide the Iceland Constitutional Convention based on the public's response to the First National Forum.¹⁹⁴ Twenty-five elected delegates, none of whom were currently elected officials, operated the Convention as the Constitutional Council.¹⁹⁵ The delegate election involved 522 candidates, thereby creating yet another opportunity for the Icelandic public to see their neighbors, colleagues, and leaders striving to become even more involved participants in the constitutional process.¹⁹⁶

Once the Convention got underway, the public's role did not cease, which aligned with the country's narrative that it was producing a crowdsourced constitution.¹⁹⁷ Council members maintained the public's engagement with the process by using social media platforms, a website, and a digital newsletter to inform them of their progress and solicit their input.¹⁹⁸ More precisely, the public could comment on a "progress document" that contained the Convention's latest work by going to the council's website and using Facebook's reply system.¹⁹⁹ This feedback and engagement mechanism, among others, resulted in hundreds of proposals and thousands of comments.²⁰⁰ However, the Constitutional Council's participants did not form a statistically representative group of Iceland.²⁰¹ Still, the joint editing of the progress document marked a form of deliberation²⁰²—albeit imperfect.

From this robust public participation, delegates advanced a number of important democratic mechanisms within the draft constitution. Such ideas included specifying a relatively low threshold—ten percent of voters—for subjecting laws passed by the Icelandic Parliament to a nationwide referendum,²⁰³ and an even lower threshold—two percent—for the public to present an issue to Parliament.²⁰⁴ Reviewers of the draft constitution regarded it "as one of the most inclusive in history and well-

193. See *Icelandic Experiment*, *supra* note 178, at 169.

194. See Suteu, *supra* note 9, at 261.

195. See *Icelandic Experiment*, *supra* note 178, at 178.

196. See *id.*

197. See *id.* at 179–80; see also Bjarki Valtýsson, *Democracy in Disguise: The Use of Social Media in Reviewing the Icelandic Constitution*, 36 MEDIA CULTURE & SOC'Y 52, 53 (2014); Landemore, *supra* note 61, at 189–90.

198. See Valtýsson, *supra* note 197, at 53.

199. *Id.* at 55–56.

200. See *Icelandic Experiment*, *supra* note 178, at 182.

201. See *id.* at 178–79.

202. See Valtýsson, *supra* note 197, at 57, 66.

203. See Suteu, *supra* note 9, at 262–63.

204. See *id.*

above the mean of contemporary constitutions.”²⁰⁵ Iceland’s experiences make clear that a deliberative process can help a state constitution fulfill its dual purpose as a “document[] of aspiration as well as of government.”²⁰⁶

1. Topic Selection Process

Two processes can assist with identifying the topics on a convention’s agenda. One leans on public engagement to source the topics. The other relies on political elites, including experts, academics, and civil society, to prune potential topics into a final agenda. Both processes can have deliberative features that set the convention up for success. Which process to follow depends on the conditions in the state that led to the convention as well as the dynamic between political elites and the public.

The Icelandic process for topic selection relied on randomly selected individuals participating in the First and Second National Forums.²⁰⁷ The First National Forum was “a one-day exercise that consisted of articulating the values and priorities that should guide the renewal of government and public administration,”²⁰⁸ organized by a grassroots organization named “the Anthill.”²⁰⁹ A total of 1,200 quasi-randomly selected citizens joined 300 representatives of interest groups and institutions at the First National Forum.²¹⁰ As an aside, quasi-random selection means randomly selecting individuals from certain demographic and geographic communities so as to produce a more representative sample of society.²¹¹ The Anthill, for example, randomly sampled the Icelandic public “with due regard to a reasonable distribution of participants across the country and an equal division between genders, to the extent possible.”²¹² They also considered age.²¹³

Once the selected delegates were gathered, they separated into tables, at which moderators helped the participants zero in on their

205. Zachary Elkins et al., *A Review of Iceland’s Draft Constitution*, COMPAR. CONSTS. PROJECT 3 (Oct. 14, 2012), <http://comparativeconstitutionsproject.org/wp-content/uploads/CCP-Iceland-Report.pdf>.

206. A.E. Dick Howard, *Introduction: A Frequent Recurrence to Fundamental Principles*, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW xi, xxiii (Bradley D. McGraw ed., 1985).

207. See Suteu, *supra* note 9, at 261.

208. *Icelandic Experiment*, *supra* note 178, at 169.

209. *Id.*

210. See Suteu, *supra* note 9, at 261.

211. See generally *Icelandic Experiment*, *supra* note 178, at 176–79 (discussing quasi-random selection in practice by the Icelandic National Forum and Constitutional Council and its effects on representation therein).

212. *Id.* at 177.

213. *Id.*

avored values and priorities.²¹⁴ Generally, moderators can do the important work of categorizing ideas, condensing those ideas into a digestible format for public consumption, and gathering feedback responsive to those ideas.²¹⁵ That is the role Icelandic moderators and experts played in transmitting the knowledge collected at the First National Forum to the Second National Forum, and from the Second National Forum to the Constitutional Assembly.²¹⁶

The Second National Forum came about through collaboration between the Iceland Constitutional Convention—appointed by Parliament—and two organizations, Anthill and Gallup Iceland, which oversaw the selection of participants.²¹⁷ They jointly brought together 950 randomly selected Icelanders to establish “the principal viewpoints and points of emphasis of the public concerning the organization of the country’s government and its constitution.”²¹⁸ Experts distilled and disseminated the work of the Second National Forum via an extensive report.²¹⁹ Importantly, the activities and discussions of the Forum were available for public viewing, though the Forum did not record how many members of the public actually made use of that transparency by, for instance, watching the proceedings.²²⁰

Though this crowdsourcing may seem likely to produce too many topics capable of disrupting the country’s political norms, Convention organizers ensured popular support for the selected values through two means: first, members of the public (the randomly selected individuals) were the creators of these values and priorities; and second, members of the public at large had a chance to review the results of the First Forum because their work product was published for popular consumption.²²¹ And, as mentioned, similar opportunities for public review occurred during the Second Forum as well.²²²

The Second National Forum resulted in a meaningful report to guide Convention delegates, in part, because the Forum contained a structure designed to assist the constitutional effort. Where means for public input on topic selection have lacked guardrails imposed by moderators, those

214. *See id.* at 183–84 (stating that some moderation techniques foster more deliberation than others, however, the techniques used in Iceland may have stifled some deliberation by giving moderators too much time to speak themselves).

215. *See* Noveck, *supra* note 173, at 48–49.

216. *See* Suteu, *supra* note 9, at 271; Landemore, *supra* note 61, at 188.

217. *See Icelandic Experiment*, *supra* note 178, at 169, 177.

218. *See Icelandic National Forum 2010*, PARTICIPEDIA (Apr. 1, 2021), <https://participedia.net/case/130> [hereinafter *National Forum*].

219. *See Icelandic Experiment*, *supra* note 178, at 181–82.

220. *Id.* at 180.

221. *National Forum*, *supra* note 218.

222. *See Icelandic Experiment*, *supra* note 178, at 180.

processes have not been very productive. For example, an Estonian website designed to solicit legislative ideas from the public drew only a few quality proposals.²²³ The website contained little to no instructions on what ideas should be prioritized nor on how to structure ideas to increase the odds of legislative action.²²⁴ Therefore, the Estonian government ended up with “short and incomplete” proposals that often repeated untenable proposals already offered (and denied).²²⁵ Guidance from moderators distinguished the Iceland National Forum from Estonia’s website.

Iceland also strategically included experts in their process. The expert report that emanated from the Second National Forum was specifically meant to serve as a starting point for the Iceland Constitutional Convention.²²⁶ With the key values identified, the Icelandic Parliament then called for the creation of a Constitutional Council to turn these aspirations into a reality via a new Constitution.²²⁷ The Council was able to quickly get to work thanks to the report from the Second National Forum and general popular support for the effort.

2. Specificity of Selected Topics

The people deserve to know, with specificity, the purpose of a proposed constitutional convention.²²⁸ Identifying that purpose requires a “state-wide conversation” about what qualifies as a constitutional problem and forming a consensus around the qualifying issues.²²⁹ This conversation should be done through “[a] legitimate mechanism . . . [that is] somewhat independent of the permanent government” so as to give “normal” citizens a chance to shape the convention’s topical agenda, as well as to limit the popular skepticism that could arise if political elites determined the agenda.²³⁰ Gais and Benjamin argue that “[d]irect citizen control over the agenda . . . is most likely crucial in order for any constitutional procedures to be accepted as legitimate.”²³¹

Topic selection could be done by identifying values or issues. A values-based agenda will likely result in more aspirational and principles-based conversations across society. Such a broad conversation

223. See Noveck, *supra* note 173, at 52–53.

224. *See id.*

225. *Id.*

226. Suteu, *supra* note 9, at 261.

227. See Landemore, *supra* note 61, at 188.

228. See Lousin, *supra* note 17, at 607.

229. *See id.* at 607, 613 (listing “initiatives, referenda, and recall” as “truly constitutional issues”).

230. See Gais & Benjamin, *supra* note 18, at 1308.

231. *Id.* at 1309.

carries benefits and potential pitfalls. The broader conversation may make it easier to involve a diverse range of stakeholders in the convention process. However, the somewhat vague agenda could incite worry among members of the public and civil society that want certain aspects of the current constitution to remain untouched.

An issues-oriented convention offers a different set of pros and cons. The more specific agenda may put certain parts of civil society on notice, in terms of making sure they mobilize their respective communities to engage with the convention process. This limited agenda, however, may not inspire a new sense of optimism within the public that the reform will truly solve more foundational issues with their democracy.

Iceland, via the First National Forum, focused on identifying “values and priorities” to guide the renewal of the government.²³² As discussed above, the public then reviewed these values and priorities before having the Second National Forum fine tune them for the Constitutional Assembly.²³³

Icelandic economic and political turmoil preceding the First and Second National Forums and the Iceland Constitutional Convention help explain why they opted for a values-based agenda, rather than one zeroed-in on specific issues. The 2008 financial crash disrupted Iceland’s stability.²³⁴ A “pots and pans” revolution emerged and suddenly pre-existing mutterings about the need for constitutional change became a relevant matter to the public and politicians.²³⁵ It was the people, not politicians, that started the long road toward constitutional reform. The First National Forum was organized by a grassroots organization, not the government.²³⁶

It follows then that this was not a constitutional change effort designed to merely resolve long-standing issues.²³⁷ Instead, it was perceived as an opportunity to reimagine the relationship between the Icelandic people and their founding document.²³⁸ This opportunity was also picked up by groups across civil society. As mentioned above, the

232. *Icelandic Experiment*, *supra* note 178, at 169.

233. *See* Suteu, *supra* note 9, at 261.

234. *Icelandic Experiment*, *supra* note 178, at 168 (describing Iceland as entering “a deep financial and economic crisis”).

235. *See* Suteu, *supra* note 9, at 260; *Icelandic Experiment*, *supra* note 178, at 168–69 (“[T]he topic of constitutional change had been discussed for many years . . . [, and the next election] brought to power proponents of such a constitutional change and gave the topic political momentum.”).

236. Suteu, *supra* note 9, at 261.

237. *See* *Icelandic Experiment*, *supra* note 178, at 180 (“The Icelandic people had clearly expressed a desire to break with the shady deals and corrupt ways of the pre-crisis era (which is not to say that the new ways are so different).”).

238. *See id.* at 169.

Anthill played a leading role in getting the constitutional change process underway.²³⁹ Other groups from different parts of civil society, such as the Ministry of Ideas—a think tank—also propelled the effort by bringing in entrepreneurs, small business owners, and other members of civil society.²⁴⁰

With many different entities holding a vested stake in the process and outcome of the Convention, the Constitutional Council focused on transparency, responsibility, and distribution of power.²⁴¹ The alternative, excluding robust public participation, would not have been possible. Because the movement started “outside of the official political institutions” it had to remain on the outside and to center on the concerns of those outsiders.²⁴² The Second National Forum aided with that effort by specifying those values deemed to “reflect[] the views of the population of Iceland.”²⁴³ The specific values included “the importance of human rights, democracy, transparency, equal access to healthcare and education, as well as a desire for a more strongly regulated financial sector[,] and for putting Iceland’s natural resources under public control.”²⁴⁴ And, though some of these values skew closer to being issues when compared with the specificity of the issues addressed in the Irish context, the Icelandic agenda is best thought of as being predominantly values-driven.

3. Means for Selecting Delegates

State conventions usually consist of convention bodies made up of delegates elected from geographical districts.²⁴⁵ Some states do not specify how delegates ought to be chosen.²⁴⁶ In some cases, the selection of delegates depends on the process specified by the enabling legislation creating the convention and passed by the state legislature.²⁴⁷ Though elections are common practice, “[t]here is surprisingly little federal constitutional law concerning the selection of delegates to a state

239. *See id.*

240. *Id.* at 172.

241. *See* Suteu, *supra* note 9, at 262.

242. *See Icelandic Experiment, supra* note 178, at 172.

243. *See id.*

244. *Id.* at 173.

245. *See, e.g.,* Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 GEO. L.J. 819, 821 (1984).

246. *See, e.g.,* Richard Briffault, *Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 RUTGERS L.J. 1125, 1125 (2005).

247. *See* Permaloff, *supra* note 7, at 226.

constitutional convention.”²⁴⁸ The result is that elections for delegates that are unlike those held for U.S. Congress and most state legislatures would likely pass legal muster.²⁴⁹ This general uncertainty may open the door for states with fewer or no guidelines for the selection of delegates, such as in New Jersey, to experiment with the stratified random selection (“SRS”) of delegates.²⁵⁰

Delegate selection in Iceland followed the traditional path: hosting elections for the delegates. Though a relatively large number of Icelanders opted to run, the winners tended to come from urban areas and were disproportionately male and affluent.²⁵¹ Moreover, only a handful of professions were represented.²⁵² The group was “extremely educated and counted a disproportionate number of professors and students of politics.”²⁵³ The working class had very little representation among the Constitutional Council.²⁵⁴

However, the winners were certainly not members of the political elite. Landemore described them as “obscure” and “having little to no prior political experience.”²⁵⁵ Still, the election failed on the first goal—a representative group of winners.²⁵⁶ The election also only engaged less than thirty-six percent of the population—the remainder did not vote.²⁵⁷ Only the most passionate individuals likely participated in these elections and, while those who did participated did so in a meaningful way,²⁵⁸ those on the sidelines were greater in number.

Iceland demonstrated the issues with isolating current lawmakers yet relying on elections to identify Convention members. Excluded from participating, current officials questioned the legitimacy of the elections. The limited public participation in the elections only heightened those

248. Briffault, *supra* note 246, at 1125–27 (pointing out that “it is not clear whether the one person, one vote doctrine applies to the election of constitutional convention delegates”).

249. *See id.*

250. *Id.* at 1125 (listing New Jersey as among the “many” states with no constitutional guidance on how to select delegates).

251. *See Icelandic Experiment, supra* note 178, at 178–79 (“[O]nly three out of the twenty-five members were from outside of Reykjavik, compared to a little less than 2/3 of the Icelandic population.”).

252. *See id.* at 178.

253. *Id.*

254. *See id.*

255. *Id.* at 166.

256. *See id.* at 178 (admitting that the process used to select National Forum participants was “undeniably more statistically representative than the participants to a regular referendum” and, presumably, the winners of an election).

257. *See Valtysson, supra* note 197, at 55.

258. Beyond likely voting, a sliver of extremely democratically engaged Icelanders assisted in the nominating process for one of the 522 candidates—nine percent of the population signed letters of commendation for candidates. *Id.*

legitimacy concerns. Whatever Icelanders would have changed in hindsight to increase the representativeness and political support of the assembly may not have been possible. Bjarki Valtýsson notes that “[t]he general population of Iceland was skeptical of the ‘upper’ political spheres, and trust in Parliament [and] the government . . . was extremely low” in the wake of the economic collapse of 2008.²⁵⁹ Too much formal participation by politicians could have undermined the efforts in Iceland. Other approaches, such as the quasi-random selection of delegates, may have been perceived as too centralized and insufficiently participatory.

4. Process for Reviewing Drafts

The inclusion of processes for the public to review and provide feedback on drafts of constitutional revisions significantly differentiates the idea of a crowdsourced revision process from other, less deliberative means for change. Through draft review, the public can partner with the constitution-makers in a two-way dialogue about the proposed changes. The case studies of Iceland and Ireland show that realizing this dialogue is easier in theory than in practice. States should pay attention to the faults with the systems employed by these countries and heed the guidance of Lousin when it comes to making key civic institutions a part of draft review.

Some stakeholders should have a larger role than others in reviewing the draft. Lousin focuses on academic centers and questions the perspectives of organizations that would produce a skewed analysis based on their positions.²⁶⁰ The ideal convention system for Lousin, then, involves partisan actors and special interests in the outreach and awareness process but not in the analysis process.²⁶¹ In fact, Lousin stresses that conventions must operate independently, without any staff tied to the legislature.²⁶²

In Lousin’s ideal convention, the research staff, press corps, and committee council should be separated from the regular legislature apparatus.²⁶³ To provide the public with neutral assessments of each draft and to pass along public sentiment to the delegates, such a level of independence is a must.²⁶⁴ This independence can help with the participatory nature of the convention by bringing new professionals into the process.

259. *See id.* at 52–53.

260. *See* Lousin, *supra* note 17, at 614.

261. *See id.*

262. *Id.* at 615.

263. *See id.* at 615–16.

264. *See id.* (highlighting the value of such a staff to the Illinois convention).

Several opportunities for draft review by the public will also reduce the odds of drafters slipping any “bad” provisions through. A review process will not “eliminate tradeoffs.”²⁶⁵ Any comprehensive proposal and singular proposals will include tradeoffs with provisions that some groups prefer to others. Still, opportunities for the public to review these compromises may increase the odds of their acceptance.

Landemore refers to the Council’s involvement of the Icelandic public in its drafting process as “[t]he most open and directly participatory part of the Icelandic constitutional process.”²⁶⁶ The Council’s drafts were posted online for the public to read and send back comments and feedback.²⁶⁷ The public had the chance to review twelve drafts and could submit their responses via a Constitutional Council website and through social media websites.²⁶⁸ The Constitutional Council also reviewed submissions via email and mail.²⁶⁹ Analog efforts to solicit engagement included working with the media to publish updates and creating advertisements around the country.²⁷⁰

A fault was that the Constitutional Council did not have a specific process for how this content would be reviewed and, if ever, responded to.²⁷¹ Because the response process was not “properly institutionalized and funded,” Council members could ignore, respond to, and incorporate into the draft (potentially without any sort of attribution) the comments they received.²⁷² A more deliberative process would have specifically outlined how public participation was informing the next draft. Yet, the public’s comments proved useful in the Icelandic context. A total of 360 proposals came in from an Icelandic population of about 320,000.²⁷³ The Constitutional Council also received more than 3,600 comments on its Facebook page, some of which jumpstarted long comment threads.²⁷⁴ Comments deemed “necessary or useful” led to changes in the next

265. See Colantuono, *supra* note 69, at 1507.

266. *Icelandic Experiment*, *supra* note 178, at 174.

267. *Id.*

268. *Id.*

269. *Id.*

270. Suteu, *supra* note 9, at 262.

271. See *Icelandic Experiment*, *supra* note 178, at 174 (“While there was no conscious intention on the part of the Council members to establish a systematic back and forth between them and the crowd, something close to such a feedback loop seemed to have emerged from the very first draft onwards.” (footnote omitted)).

272. See *id.* at 182.

273. *Id.*

274. *Id.*

draft.²⁷⁵ In total, it is estimated that about ten percent of comments had a causal impact on the final draft.²⁷⁶

From these mechanisms, Landemore regarded the draft proposal as having been “written with the more or less direct participation of its people.”²⁷⁷ And, in many ways, it was. Comments from the public led directly to the right to the Internet being included in the final draft.²⁷⁸ It is possible that the members of the public simply knowing that they could contribute to the drafting stage provided them with a sense of ownership over the document (even if they never took advantage of the opportunity to comment).²⁷⁹ Landemore speculates that even the perception of ownership could help explain why the public so robustly supported the constitution in the advisory referendum.²⁸⁰ Commenters and observers of comment threads likely felt a particular tie to the referendum and may have developed deeper civic knowledge by virtue of learning from other commenters, rather than just the Constitutional Council members.²⁸¹

The Icelandic process aspired for a level of deliberation that was not attained in practice. The process left room for improvement in terms of a truly deliberative and participatory writing process. Overall, the tools meant to facilitate deliberation between the public and the Convention merely resulted in the former making statements that generally had no substantive impact on the work of the latter.²⁸²

Despite operating several platforms to disseminate information, the Convention did not always do so in a timely nor comprehensive manner. For instance, the Convention only published transcripts from *open* Convention meetings and publication often came weeks after the meeting.²⁸³ To add to the participatory hurdle, the transcripts arrived in PDF format and exceeded 1,000 pages.²⁸⁴ And, though the Convention aimed to deliberate with the public, the reality was that Convention members often provided “irregular, informal, and limited” feedback to the public’s comments.²⁸⁵

Other factors also decreased the value of the deliberation. Individuals likely lacked the information and expertise to provide actionable

275. *Id.* at 174.

276. Landemore, *supra* note 61, at 190.

277. *See Icelandic Experiment*, *supra* note 178, at 167.

278. *See id.* at 176.

279. *Id.*

280. *Id.*

281. *Id.* at 180.

282. *See Suteu*, *supra* note 9, at 274.

283. *See Icelandic Experiment*, *supra* note 178, at 182.

284. *Id.*

285. *Id.*

feedback to the Constitutional Council. And, to the extent any individuals had the requisite background knowledge, those individuals likely were not representative of the Icelandic public, diminishing the value of their feedback. Convention delegates responding to the “uninformed and non-deliberative will of the people” creates a sort of “[p]ush-button democracy” that does not really foster deliberation.²⁸⁶ Icelanders that did opt to use the Convention’s largely online deliberation mechanisms tended to be younger and more tech-savvy than the public at large.²⁸⁷ In short, though “the crowd” had access to the means to shape the final draft of the Convention, those means may not have been as robust as hoped for nor as widely used as planned.²⁸⁸

Finally, meaningful draft review also requires transparency in terms of authorship. Yet, experts involved with the Convention often went beyond rewording the initial language.²⁸⁹ Those changes could not be reversed by the assembly, and the experts never publicly explained their rationale for the changes.²⁹⁰ In such cases, the public had their means for deliberating on the language of the constitution disrupted. Experts were not accountable nor responsive to the public.

B. Ireland as a Case Study

Like in Iceland, constitutional convention designers in Ireland employed a number of deliberative tools to turn the public into constitution-makers. Encouraged by the support of political stakeholders, civic groups took hold of the idea of a citizen assembly shaping the next Irish constitution by launching the “We the Citizens” initiative.²⁹¹ Organizers of the initiative thought of it as an experiment meant to show that deliberative processes can lead to robust outcomes.²⁹² The initiative equipped all one hundred members of a representative sample of the Irish public with expert reports on the constitution and then facilitated deliberation on those reports.²⁹³ A report issued in the aftermath of the experiment detailed the successes of the effort and may have pushed stakeholders in the Irish government to move forward with

286. See Noveck, *supra* note 173, at 34 n.118.

287. See *Icelandic Experiment*, *supra* note 178, at 182–83.

288. See *id.* at 175–176.

289. See Suteu, *supra* note 9, at 271.

290. *Id.*

291. See *id.* at 264–65 (noting the support of political stakeholders in Ireland for citizen-driven changes to the constitution); see also David M. Farrell et al., *Deliberative Democracy in Action Irish-Style: The 2011 We the Citizens Pilot Citizens’ Assembly*, 28 IRISH POL. STUD. 99, 99–100 (2013) [hereinafter *Deliberative Democracy*].

292. *Deliberative Democracy*, *supra* note 291, at 99–100.

293. *Id.* at 103–04.

an Ireland Constitutional Convention led by a citizen assembly, despite concerns that Ireland may have been “too different or unique for citizen assemblies to work there.”²⁹⁴

Parliament moved forward with a Constitutional Convention that leaned even more heavily on laypeople than the effort in Iceland. Rather than use random selection only for agenda-setting bodies, like the National Forums in Iceland, the Irish made sixty-six randomly selected individuals a part of a one-hundred-person body charged with reforming the constitution.²⁹⁵ The remainder of the convention body came from members of Parliament, ensuring that each of the political parties that accepted an invitation from the government had a representative at the table.²⁹⁶

Though the Irish gave traditional political stakeholders a larger role in the process than in Iceland, they still managed to make the public a part of the Convention’s work.²⁹⁷ One example: the Irish actively solicited feedback on proposals from underrepresented groups and groups unlikely to participate without deliberate solicitation, such as Irish citizens living abroad.²⁹⁸ Another example: the Irish also provided in-person and online options for the public to identify issues for consideration by the Convention and to provide feedback on the work of the Convention.²⁹⁹ Civic institutions also had a role in the Convention through the opportunity to give presentations on topics to the Convention.³⁰⁰ Not all political stakeholders in Ireland thought these mechanisms went far enough, but the process has generally received “favorable reviews.”³⁰¹

1. Topic Selection Process

The Irish pursued a different route to topic selection than Iceland, one that relied less on crowdsourcing techniques but still provided civic society a meaningful role. As opposed to a grassroots movement jumpstarting the conversation about which topics to focus on, a committee of the Parliament arguably launched that conversation in Ireland.³⁰² And though the public did not form this list of issues, a

294. See Suteu, *supra* note 9, at 265.

295. 216 No. 12 Seanad Deb., Constitutional Convention: Motion (July 12, 2012) (Ir.), <https://www.oireachtas.ie/en/debates/debate/seanad/2012-07-12/25/>.

296. *See id.*

297. See Suteu, *supra* note 9, at 266–67.

298. *Id.*

299. *See id.*

300. *Id.*

301. *Id.*

302. *Id.* at 264.

grassroots movement formed to assist with readying the Convention.³⁰³ The “We the Citizens” initiative hosted a pilot citizen assembly in which one hundred randomly selected citizens relied on expert reports to deliberate specific policy topics.³⁰⁴

The involvement of such civic institutions and stakeholders reinforced the importance of giving members of the public at-large a seat at the table in reviewing these issues and formulating the proper response.³⁰⁵ The experiment achieved its goal of demonstrating the “value of citizen-oriented, deliberative approaches to achieving large-scale political reform.”³⁰⁶ This success may have compelled the coalition government to stick with their plan to make the majority of the Constitutional Assembly members of the public. In response, it is possible that the Irish people felt as though they had sufficient say over the process of how the issues identified by the government would be resolved that they did not need to contest not having their own version of Iceland’s National Forums.

The early success of the “We the Citizens” initiative, paired with the success of the citizen delegates in helping the Convention move through its agenda, likely created space for more consultation with the public on topic selection as the Convention looked for additional agenda items. When moving beyond the seven items originally set forth by the government, the Convention opted to ask the people for what issues to tackle next.³⁰⁷ This sort of proactive engagement with the people likely stymied concerns that the Convention was uncontrollably expanding its mandate. By hosting regional meetings around the country, the Convention made people feel more like sovereigns in the reformation of their constitution.³⁰⁸ Of course, the Convention could have tried something akin to their own National Forum to source their next issue areas, but the regional meeting method likely better reflected their country’s civic culture.

2. Specificity of Selected Topics

Though the financial crisis of 2008 incited conversations about constitutional reform in Ireland, as in Iceland, the Irish mapped out a more issues-driven response to the crisis. Whereas the crisis sparked

303. *See id.* at 264–65.

304. *Id.*

305. *See id.* at 270.

306. *Deliberative Democracy*, *supra* note 291, at 100.

307. Suteu, *supra* note 9, at 267.

308. *See id.*

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more foundational democratic questions in Iceland,³⁰⁹ for the Irish it provoked thoughts about specific proposals for increasing accountability and encouraging economic growth.³¹⁰

This more pragmatic lens to constitutional reform resulted in government entities taking the lead in topic selection.³¹¹ After a report on the potential for electoral reform by the Parliament Joint Committee on the Constitution, the Irish government eventually moved forward with a citizen assembly meant to address seven major issues in a constitutional convention.³¹² Notably, this outline for constitutional change received backing from the two parties that formed the governing coalition at the time—a coalition that had been elected after the publication of the Committee’s report and, thus, in the middle of a public discourse on the potential for constitutional change.³¹³ The fact that the public had a chance to vote for the governing coalition, with at least some idea of the possibility that they would pursue constitutional change, added a degree of representativeness to the Irish process of issue selection.

3. Means for Selecting Delegates

Ireland offered another mix of how to think through the variables related to delegate selection. They opted to include elected officials as well as a quasi-random selection of delegates—meant to be “broadly representative of Irish society”—in their Constitutional Assembly.³¹⁴ Some commentators speculate that the direct inclusion of elected officials in the Irish Convention helped prevent the sort of disconnect between the public and political classes that emerged in Iceland.³¹⁵ It is possible that because the push for the Convention originated in the Parliament, that the inclusion of elected officials was unavoidable. The issue-specific focus of the Convention, which may require more expertise than an effort revolving around values and priorities, justified the inclusion of officials with experience in those issues.

The Irish example helped dispel some concerns that participation by politicians in a convention assembly would crowd out the opinions of “lay”

309. See *Icelandic Experiment*, *supra* note 178, at 168 (mentioning that the crisis sparked questions about incompetence and corruption within the government).

310. See Suteu, *supra* note 9, at 264.

311. See *id.* at 264–65.

312. *Id.*

313. *Id.* at 264; see also *Deliberative Democracy*, *supra* note 291, at 99.

314. 216 No. 12 Seanad Deb., Constitutional Convention: Motion (July 12, 2012) (Ir.), <https://www.oireachtas.ie/en/debates/debate/seanad/2012-07-12/25/>.

315. *Id.*; see also Farrell, *supra* note 177, at 198.

participants. Partlett is one scholar who has worried about citizen assemblies being dominated by “charismatic politicians.”³¹⁶ Some civic society organizations in Ireland also feared that politicians would diminish the voices of the randomly selected citizens.³¹⁷ To the extent those fears were realized in the opinions of some Irish, the general consensus was that the Constitutional Convention performed well, despite (or because of) its mix of elected officials and laypersons.³¹⁸

4. Process for Reviewing Drafts

The Irish had fewer processes for draft review built into its convention effort than Iceland. Like Iceland, it crossed off the low hanging fruit in terms of openness and opportunities for engagement by uploading its work onto a website, as well as by using Facebook, YouTube, and Twitter.³¹⁹ Unlike Iceland, the Irish did not provide the public with several iterations of drafts nor regular opportunities to actually correspond with the delegates.³²⁰ Still, as the Convention matured and moved methodically through its agenda, it came to recognize the value of public feedback. The Convention invited the public, including Irish citizens living abroad, to submit comments on the initial seven topics.³²¹ Thousands of submissions came in, especially in relation to the most controversial topics on the agenda.³²² Members of civil society were also made a part of the review process.³²³ Civic organizations had the opportunity to make presentations directly to the Convention.³²⁴ This opportunity did not appease all civic organizations, especially those concerned that quasi-random sampling would not adequately bring voices of marginalized and vulnerable communities to the fore.³²⁵ It is also not clear how input from the public and civic society shaped the Convention’s work, if it did at all.³²⁶

Like Iceland, experts played a role in helping draft the final language, but their involvement was made public in the Convention’s

316. Landemore, *supra* note 61, at 200.

317. Suteu, *supra* note 9, at 267–68.

318. *Id.*

319. *See id.* at 267.

320. *See id.* at 264–71.

321. *Id.* at 266–67.

322. *Id.* at 267.

323. *Id.* at 265–67.

324. *See id.* at 267.

325. *Id.*

326. *See id.* at 274.

reports.³²⁷ This limited role for experts aligns with best practices as set forth by theorists of deliberative democracy and constitution-making.³²⁸

C. Upshot for State Convention Organizers

1. Topic Selection Process

Whether the legislature or the public plays the dominant role in selecting the topics, convention organizers should ensure that those conversations take place as far in advance of the convention as is reasonable and feasible.³²⁹ By way of example, the Temporary New York State Commission on Constitutional Revision started a whole four years before New Yorkers would confront the opportunity to vote for a convention on their ballots.³³⁰ The Commission engaged in a slew of pre-election activities, including hosting public hearings, spreading research materials, sponsoring TV discussions, and otherwise taking the pulse of New Yorkers on the topic.³³¹ This public engagement must be sustained and comprehensive.

The jurisdictions that opt to prioritize the public's input when zeroing-in on their agenda have the opportunity to build a strong sense of ownership within the public and the actual outcomes related to the topics they selected. To increase this sense of ownership, "citizens must have adequate and equal opportunities for placing questions on the agenda."³³² Those opportunities, though, will not be adequate, nor equal, if people do not have the requisite knowledge of their state's political environment and, in particular, the strengths and weaknesses of their state's constitution.

In the nineteenth century, ordinary Americans and chosen convention delegates alike had access to the information required to participate in constitution-making—consequently, "[c]onstitution-making was hardly an activity confined to experts or requiring

327. *See id.* at 271.

328. *See* Jon Elster, *Conclusion*, in *COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS* 395 (Hélène Landemore and Jon Elster eds., 2012); *see also Icelandic Experiment*, *supra* note 178, at 171.

329. *See* Gais & Benjamin, *supra* note 18, at 1308; *see also* Schrag, *supra* note 245, at 851 (noting that historically, state constitutional conventions have been "preceded by months or years of staff work, so that the delegates could be briefed on arrival and could make policy decisions from among designated alternatives.").

330. *See* Gais & Benjamin, *supra* note 18, at 1308.

331. *Id.*

332. Robert A. Dahl, *Procedural Democracy*, in *CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY*, 109, 111–12 (Robert E. Goodin & Philip Pettit eds., 1997).

specialized information.”³³³ Since then, few would agree that constitution-making does not require specialized knowledge. One factor that may influence which topics come before the convention may hinge on the knowledge of the public and delegates. If either group lacks substantive knowledge about a particular topic, then that topic will likely be left for another day. That is why state convention organizers in the early nineteenth century often ensured that every delegate to a convention received a comprehensive compilation of constitutions.³³⁴ This allowed delegates to quickly study up on the topics and issues that came before them.³³⁵ A similar mentality should be applied with respect to preparing members of the public to sort through which topics to place on the convention agenda.

The traditional approach to educating voters about democratic issues will not suffice in the context of weighing which constitutional topics to include in the convention’s agenda. Though states have rightfully been applauded for producing voter pamphlets to increase information available to voters, some researchers have questioned the adequacy of these materials.³³⁶ Others have found that adequate or not, only already-informed voters, which make up a small slice of the electorate, tend to read the materials.³³⁷ The more likely source of information for voters is mass media,³³⁸ which further evidences the need for convention organizers to begin introducing the public and the media to potential convention topics as early as possible.

Regardless of if the public or a smaller group of experts select the topics, experts have a role to play in educating the public. Experts on policy matters can help the people select the topics for the convention, or evaluate the topics identified by experts. The use of such experts for this very purpose is not new. Lousin calls for having university centers, such as the Institute of Government and Public Affairs of the University of Illinois, to prepare studies on potential constitutional topics, as far in advance of the convention as a decade.³³⁹ Absent such studies, conventions may struggle to function and live up to expectations.³⁴⁰

333. See Baum & Fritz, *supra* note 20, at 212.

334. *Id.* at 215–17.

335. *Id.*

336. Gais & Benjamin, *supra* note 18, at 1312.

337. See DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 130–44 (1984).

338. Colantuono, *supra* note 69, at 1505–06.

339. Lousin, *supra* note 17, at 609.

340. See *id.* (“It would be an understatement to say that [the Institute of Government and Public Affairs] studies were invaluable [to the Illinois convention]; truly, the convention could not have functioned at all without the preparatory work by these scholars.”).

So, when weighing whether to rely on the public or experts for topic selection, state convention organizers should consider a couple of factors. One would be the current state of public education with respect to constitutional topics. Another would be the willingness of mass media to assist with the education of the public. One last factor would be the capacity of civil society to ready the public (or a subset of the public) for such an important and intellectual task.

Based on these factors, organizers should emulate the Icelandic or Irish model. The more participatory and deliberative approach would be to crowdsource the topics for consideration, á la Ireland. Whether to lean more into the model suggested by Iceland or by Ireland may depend on what single event or series of events sparks the push for constitutional change. In Iceland, the people perceived their constitution as being at “the root of their current political and economic troubles.”³⁴¹ In Ireland, the legislature identified some key issue areas in response to general national concerns.³⁴² The combination of the COVID-19 calamity and a racial awakening could lead a state’s public to look more like Icelanders than the Irish. That said, the general lack of state constitutional knowledge may mean that any grassroots effort to revise a constitution will require too much educational work to get off the ground, which means the legislature will likely have to initiate the process.

2. Specificity of Selected Topics

Regardless of whether a state takes a value-based or issue-based approach, organizers need to perform serious studies of the state’s problems and how those problems relate to the constitution. Typically, states have used constitutional revision mechanisms as a means to address certain issues.³⁴³ However, the state setting has also been the stage for more thematic reform efforts, such as “confronting . . . principles and institutions of governance.”³⁴⁴

Organizers that pursue either route will also have to address well-founded fears of a “run-away . . . convention.”³⁴⁵ Citizens and politicians alike fear “unlimited” state constitutional conventions.³⁴⁶ From a legal

341. See, e.g., Elkins et al., *supra* note 205, at 1.

342. See Suteu, *supra* note 9, at 263–64.

343. See Dinan, *supra* note 2, at 935.

344. See *id.* at 937.

345. See Gais & Benjamin, *supra* note 18, at 1304–05 (“Citizens may fear that constitutional conventions would open up a ‘Pandora’s box’ or ‘can of worms’ in which delegates would make enormous constitutional changes with little or no public accountability.”).

346. Williams, *supra* note 33, at 568.

perspective, a state constitutional convention encounters few barriers, making a runaway effort possible. The federal government specifies very few requirements for how states should organize their government—with the exception of maintaining a republican form of government.³⁴⁷ Marshfield pointed out that “[t]here seem to be no limits on what can pass through state constitutional amendment procedures.”³⁴⁸ The likelihood of runaway conventions is diminished by a few federal laws, explicit state procedural requirements, and the need for approval from the public.³⁴⁹

Political norms may act as another block to a runaway convention. Absent such norms, both progressive and conservative voters may oppose the convention. “State amendments have targeted vulnerable minorities, deeply entrenched specific fiscal strategies, and profoundly restructured institutions.”³⁵⁰ More conservative community members may also fear that a convention could leap toward recognizing rights that do not align with a more incremental approach to such guarantees. For instance, more conservative residents of Washington D.C. likely questioned their Convention’s proposals for rights to employment and to strike.³⁵¹ Similarly, both progressive and conservative thinkers should worry about special interests taking hold of an agenda-less convention. Without agenda limitations, special interests may dictate how the convention spends its time and steer the final proposal toward solutions that have received minimal public vetting.³⁵²

Though some aspects of politics in the United States would suggest that vested interests would push to assert their own agenda, other scholars and examples point to a countervailing norm of political sensibility that pulls convention efforts toward topical moderation. For example, the *Repair California* effort, to alter portions of the state’s constitution, planned to operate on a limited topical agenda.³⁵³ This act of self-moderation by the *Repair* organizers suggests that constitutional convention planners may have a sense of how expansive an agenda is, and what kind of agenda (issues or values) is politically feasible based on their state’s culture.

347. Gais & Benjamin, *supra* note 18, at 1305 (mentioning that the U.S. Supreme Court has interpreted what requirements do exist as allowing states a wide range of possible institutional arrangements).

348. Marshfield, *supra* note 6, at 65.

349. *Id.* at 143.

350. *Id.* at 65.

351. See Schrag, *supra* note 245, at 822.

352. See Marshfield, *supra* note 6, at 65.

353. Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CAL. L. REV. 69, 108 (2012).

Neither a values-based nor issues-based approach to topic selection will foreclose the odds of a runaway convention. A values-oriented approach to agenda-setting could quickly stoke fears of a runaway convention. The guidance provided by the National Forums to the Icelandic Constitutional Council, by way of example, was “so general as to have very little constraining power on the Council members.”³⁵⁴ Though even the Icelandic Forums contained some limits, the “structure, length, organization, and selection mode” of the Forums were left outside of the public’s control, perhaps constraining some of the possible values that could emerge.³⁵⁵

An issues-oriented approach could also stoke concerns of overreach, potentially inciting fears within very specific and very powerful civic stakeholders. For instance, if issues related to the right to work were placed on the agenda, organized labor would likely try to quash the convention effort for fear of that agenda item producing a constitution that significantly undermined the power of labor unions. Regardless of the approach taken, state constitutional organizers may lessen fears by explicitly taking certain “hot button” issues off the table.³⁵⁶ This strategy has limited the inducement of fear in several settings.³⁵⁷

3. Means for Selecting Delegates

Convention organizers should resist the temptation to follow the traditional approach for selecting delegates. Delegate elections suffer from several democratic flaws that could undermine the quality of a constitutional convention and the legitimacy of its outcomes. For one, the electorates in most states are not representative.³⁵⁸ The communities that tend to vote are also the communities that tend to have the greatest sway over legislators as well.³⁵⁹ Furthermore, relying on individuals to volunteer themselves for participation is unlikely to result in a diverse set of candidates. Given the partisan nature of U.S. politics, and the resource intensive aspects of running for office, it is unlikely that merely hoping for a pluralistic group of delegates will actually produce such a group.

354. *Icelandic Experiment*, *supra* note 178, at 175–76.

355. *See id.* at 181.

356. *See Williams*, *supra* note 33, at 568.

357. *See id.* at 568–69 (noting that the majority of state courts have ruled in favor of this sort of limitation).

358. *See, e.g.*, Colantuono, *supra* note 69, at 1501–02 (noting that lower socioeconomic groups, such as people of color, the poor, and those with less education, tend to vote in smaller numbers than wealthier, whiter, and older voters).

359. *Id.* at 1502.

That hope did not manifest in the Washington D.C. Convention effort. Of the 103 candidates that ran for the forty-five seats in the District of Columbia, few were current or former politicians.³⁶⁰ And, of the five seats allocated to represent the entire District of Columbia, all five went to current or former politicians.³⁶¹ Cumulatively, the candidate pool and eventual winners of the Washington D.C. delegate election make clear that as long as electoral success is a function of money raised, free time available, and name recognition, average Joes and Janes will likely not have a chance of electoral success.³⁶² Using normal election mechanisms to select delegates will only increase the already excessive influence exerted by wealthier, whiter, and older community members. That process will not inspire a sense of legitimacy among communities typically left on the democratic sidelines.

Efforts to level the electoral playing field to increase the legitimacy of winners may backfire—further bringing into question the use of elections to select delegates. By virtue of the Washington D.C. Convention creating so many delegate seats, it is true that a number of atypical political candidates entered the election.³⁶³ These candidates, though, often lacked the means to earnestly campaign.³⁶⁴ So, they placed “leaflets on trees and lamp posts, [hosted] neighborhood house parties, and [relied on] word-of-mouth recommendations.”³⁶⁵ The public did not view these amateur efforts as signs of the Convention’s legitimacy and significance.³⁶⁶

Reliance on typical election mechanisms for the selection of delegates could also result in the election of delegates likely to support constitutional proposals that merely reinforce the status quo, or even worse, reinforce the advantages afforded to communities more likely to participate.³⁶⁷ This may be especially true if already elected officials are allowed to participate. In that case, it will be in the interest of the officials to appease voters that they will count on for support in subsequent elections. The resulting “identity of interest” between the electorate and the selected delegates will undermine the ability of the constitution to

360. See Schrag, *supra* note 245, at 848.

361. *Id.* at 865. Of the forty-five seats in the District of Columbia, five of the seats were to represent the District of Columbia at large, whereas the remaining forty seats were to represent individual neighborhoods within the District of Columbia. *Id.* at 848, 865. There were nine candidates running for the five at-large positions. *Id.* at 865.

362. See *id.* at 848.

363. See *id.* at 849.

364. See *id.*

365. *Id.*

366. See *id.*

367. See Colantuono, *supra* note 69, at 1502.

consider and act on the interests of “discrete and insular minorities,” often thought to be the most in need of greater judicial and constitutional protection.³⁶⁸

A low turnout in the delegate election could thwart the legitimacy of the convention. Even the novelty of voting for delegates to a constitutional convention may not generate a robust turnout. And, even among those who do turnout, a lack of familiarity with delegate candidates may result in voters simply skipping over those races.³⁶⁹ Both a low turnout and a high rate of “skipping” took place in the Washington D.C. election for delegates.³⁷⁰ Only thirty-one percent of registered voters participated in the election and, of those voters, only half cast ballots in the delegate race.³⁷¹ Consequently, a mere six percent of the District’s population had a say in who attended the Convention.³⁷²

The random selection of delegates via SRS counters many of the negatives of electing delegates. SRS is “obtained by separating the population elements into nonoverlapping groups, called *strata*, and then selecting a simple random sample from each stratum.”³⁷³ In the Iceland context, the population for the SRS used for the National Forums came from the National Population Register.³⁷⁴ The strata included age, gender, and geographic location.³⁷⁵ Though an SRS can identify a perfect descriptively-representative sample of society (based on the selected strata), in practice an SRS might not return such a sample.³⁷⁶

Even if an SRS were to reproduce a perfect microcosm of society, some stakeholders may not feel as though the selected body should control the constitution-making process. As occurred in the Irish context, some organizers may believe that marginalized and vulnerable communities deserve more than proportional representation, given the particular relevance of constitutional protections for these groups.³⁷⁷ That is why

368. *Id.*

369. Schrag, *supra* note 245, at 849. This lack of familiarity may result from the media’s disinterest in the delegate elections. Consider that the *Washington Post*, the District’s only daily newspaper at the time of their election for convention delegates, failed to “stimulate wider interest in the [delegate] election.” *Id.* at 848.

370. *Id.* at 849.

371. *Id.*

372. *Id.*

373. RICHARD L. SCHEAFFER ET AL., *ELEMENTARY SURVEY SAMPLING* 116 (Michelle Julet, et al. eds., 7th ed. 2012).

374. *Icelandic Experiment*, *supra* note 178, at 169, 177–78.

375. *Id.* at 177.

376. See Chris B. Murphy, *Stratified Random Sampling: Advantages and Disadvantages*, INVESTOPEDIA (Oct. 13, 2021), <https://www.investopedia.com/ask/answers/041615/what-are-advantages-and-disadvantages-stratified-random-sampling.asp>.

377. See Suteu, *supra* note 9, at 270–71.

convention organizers may want to think beyond merely holding up a mirror to society and instead consider how to weigh the representation based on likely constitutional impact.³⁷⁸

Some may challenge replacing elections with what could be perceived as lotteries, especially given that elections theoretically provide extensive deliberative opportunities. Skeptics of delegates that are selected by random selection rightfully question the capacity of members of the public to understand complex constitutional issues.³⁷⁹ Studies show that members of the public frequently struggle to make rational electoral choices.³⁸⁰

Two distinctions between decision processes of voters and delegates should assuage the concerns of the capacity of randomly selected delegates to rise to the occasion of a constitutional convention. First, these delegates will receive more time to review more informational materials and with greater assistance than voters in a typical election.³⁸¹ Iceland's methodical efforts to educate the public generally and delegates in particular evidence that average Joes and Janes can be turned into constitution-makers.³⁸² SRS-selected delegates will also likely receive more robust guidance from experts and politicians to inform their conversations.³⁸³ One potential means for that guidance could be an advisory body of political elites. For instance, the *Repair California* proposal for a constitutional convention planned to have members of the major parties provide delegates with important background information so as to "root their thinking in reality."³⁸⁴

Second, the diversity of delegates that will result from a quasi-random sample is shown to raise the general competence of participating members.³⁸⁵ Even if selected delegates demonstrate lower degrees of competence, the collective cognitive diversity of the group could overcome those shortages.³⁸⁶ In fact, up to a point, "[t]he more cognitive diversity,

378. *See id.*

379. *See* Colantuono, *supra* note 69, at 1504.

380. *See id.* at 1503–05.

381. *Icelandic Experiment*, *supra* note 178, at 187.

382. *See* Suteu, *supra* note 9, at 271. Though, as noted by Suteu, constitution organizers must pay attention to just how much influence experts may exert on a convention's work product. *Id.* Where experts exceed mere rewording of the convention's initial language, the public will likely want to be aware of those changes. *Id.*

383. *See Icelandic Experiment*, *supra* note 178, at 183 (explaining that in a "gold-standard" random selection Deliberative Poll, committee members are able to take part in plenary assemblies, where they may ask questions from panels of experts).

384. *See* Leib & Elmendorf, *supra* note 353, at 75.

385. *See Icelandic Experiment*, *supra* note 178, at 177–78.

386. Landemore, *supra* note 61, at 197–98.

the smarter the group.”³⁸⁷ Several factors contribute to the deliberative benefits of a randomly-selected assembly. For one, there is no better way to maximize cognitive diversity in a sample of the public than a random sample, unless, of course, you happen to have detailed information about the cognitive profiles of the public prior to the sample.³⁸⁸ Additionally, the inclusion of regular people, rather than typical civic participants, brings new competences and perspectives into the process.³⁸⁹ For instance, reliance on elections to select delegates would likely never allow “shy . . . not-so-well spoken, [and] quiet people” to have a seat at the table.³⁹⁰

A randomly-selected assembly may also provide the convention with more legitimacy in the eyes of a public that has increasingly become skeptical of partisan politics.³⁹¹ Elections will likely fail to produce a body that reflects the full diversity of the state’s population. Comparatively, a body selected by SRS will be capable of a “more rational, coherent, and inclusive ‘public voice,’ resulting in more representative policy suggestions.”³⁹² Similarly, elections will fall short of engaging a broad range of society in selecting those relatively homogeneous election winners.³⁹³ Iceland experienced both of these shortcomings.³⁹⁴

How many individuals to include in the assembly also presents a tricky deliberative question. Though Landemore pointed out that cognitive diversity requires a number of perspectives, too many delegates trying to shape the constitution may inhibit “the ability of [individuals] to exchange ideas.”³⁹⁵ Breaking delegates into committees and subgroups is one way to ensure that when discussions occur on various proposals, delegates can actually meaningfully talk with one another.

No magical number of delegates exists. Iceland had twenty-five.³⁹⁶ Constitutional Scholar, Jon Elster, thinks that between fifty and one

387. *Icelandic Experiment*, *supra* note 178, at 176.

388. *Id.* at 177.

389. *Id.*

390. *Id.*

391. *Battleground Poll*, GEO. UNIV. INST. OF POL. & PUB. SERV., <https://politics.georgetown.edu/battleground-poll/> (last visited July 1, 2022).

392. See Gais & Benjamin, *supra* note 18, at 1313.

393. *Cf. id.* at 1313 (arguing that “a more deliberative, coherent, and inclusive ‘public voice’ can be realized in practice only with the help of special institutions, specifically, those that nurture a strong civil society or civic space to stand between the public and private sectors—and have elements of both”).

394. *Icelandic Experiment*, *supra* note 178, at 178 (explaining that the majority of Iceland’s Constitutional Council was made up of urban professionals, and that even though politicians were prohibited from running to be on the council, the cognitive diversity was narrowed by the ultimate makeup of the council).

395. Noveck, *supra* note 173, at 50.

396. *Icelandic Experiment*, *supra* note 178, at 185.

hundred marks the sweet spot because that range reduces the likelihood of too much strategic behavior by the delegates while also mitigating the probability of informational free riding.³⁹⁷ Whichever number organizers select, they should have a rationale for that number. Perhaps a minimum number should reflect what size body would be required to minimally provide descriptive representativeness, a notion that led Landemore to ponder if the Icelandic organizers should have had at least one hundred people.³⁹⁸ The lack of explanation surrounding Iceland's selection of twenty-five brought arbitrariness into a process that could not afford the skepticism that comes from randomness.³⁹⁹

Even though the benefits of SRS in selecting delegates may be clear to convention organizers, efforts to rally public support behind the concept should still take place. Absent finding ways to make the public feel comfortable with SRS, they may regard it as “exotic[,]” a notion that could decrease the legitimacy of the convention.⁴⁰⁰ Previous “exotic” voting mechanisms only gained acceptance once the public had a chance to study them and participate in them.⁴⁰¹ This importance of prior exposure may explain why a proposal to randomly select Iceland's delegates never caught hold.⁴⁰²

The willingness of any state to try something as novel as the random selection of “ordinary” individuals to write something as significant as a new constitution depends on several factors. More specifically, the dynamic between the public and political elites, the representativeness of the selection method (with a particular focus on representation of vulnerable and minority communities), and the public's familiarity (and comfort) with the proposed selection mechanism, all factor into the extent to which a state can venture away from traditional means of selecting delegates.

4. Process for Reviewing Drafts

Draft review is critical to constitutional revision procedures that are “deliberative as well as legitimate.”⁴⁰³ From a deliberative standpoint, the process of having experts, the public, and representatives of specific

397. See Jon Elster, *The Optimal Design of a Constituent Assembly*, in COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS 158 (Hélène Landemore and Jon Elster eds., 2012) [hereinafter COLLECTIVE WISDOM].

398. See *Icelandic Experiment*, *supra* note 178, at 186–87.

399. See *id.* at 185–86.

400. See Briffault, *supra* note 246, at 1153.

401. See *id.* at 1152–53.

402. See *Icelandic Experiment*, *supra* note 178, at 186.

403. Williams, *supra* note 33, at 574.

civil interest review drafts will ensure that constitution-makers have the best information available and that they adequately consider the likely effects of their draft.⁴⁰⁴ So long as the constitution-makers actually act on that deliberative process, then the draft review will contribute to the legitimacy of the final document by “providing for direct citizen participation and control.”⁴⁰⁵ That legitimacy will only increase if convention organizers succeed in demonstrating the independence of the draft review and the revision effort as a whole.⁴⁰⁶ Unchecked interventions by experts, too great of an influence by elected officials, and the use of current legislative staff, all threaten that independence. The draft review process should make clear who is responsible for what content and how those drafters will be engaging with the collected feedback.

Actual feedback on iterations of the constitution may be the most important target of participatory tools. The public’s engagement with the actual substance of the document will allow the convention to become an occasion for “expressing ultimate public aims and concepts of democratic government” and for the eventually ratified constitution to “reflect the aspirations of people and their views on the use of public power to achieve their goals.”⁴⁰⁷ Every state but one requires the electorate to assent to changes to the state constitution.⁴⁰⁸ Whether that assent carries with it popular legitimacy will likely depend on the extent to which the public had a chance to influence the content of the revised constitution.

D. Limits to the Efficacy of Participatory Tools

The mere use of tools associated with public participation, like social media, does not guarantee a constitution-making process will meet its deliberative goals. True deliberation must go beyond one-way conversations,⁴⁰⁹ yet not all tools and processes allow for two-way conversations. A deeper review of Iceland’s approach to draft review brings some of these issues to the forefront. Most of the means through which Icelanders could inform the Constitutional Council did not require

404. *Id.* at 574–75.

405. *Id.*

406. See Gais & Benjamin, *supra* note 18, at 1298–99.

407. Schrag, *supra* note 245, at 822.

408. See John Dinan, *State Constitutional Developments in 2008*, in 41 THE BOOK OF THE STATES 3, 13 (Audrey S. Wall & Heather M. Perkins eds., 2009).

409. In the words of Habermas, communicative action takes place when “participants in communication encounter one another in a horizon of unrestricted possibilities of mutual understanding.” See 2 JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON 149 (Thomas McCarthy trans., Beacon Press 1987) (1981).

real-time responses, nor did they carry the possibility of meaningful change. For instance, the Council used many social media posts merely to share video updates from Council members or update the public on how to view an upcoming session.⁴¹⁰ According to Valtysson, “the [fifty-one] videos uploaded on YouTube [by the Council] cannot be said to have generated much communication, discussion, or deliberation.”⁴¹¹ Likewise, photos posted to Flickr by the Council, “did not generate a single comment and therefore did not facilitate any kind of conversation, let alone deliberation or antagonism.”⁴¹² Even the Council’s tweets did not result in a meaningful discourse with Icelanders.⁴¹³

Social media sites struggle to “facilitate lengthy deliberations”⁴¹⁴ but, in some cases, these sites can create new encounters and conversations that carry deliberative benefits. Despite deliberative limits associated with the mediums through which Constitutional Council messages were disseminated, as well as the issues with the content of those messages, new sorts of deliberation took place in the Icelandic process. About a third of the Council members, for instance, took the time to regularly and thoroughly respond to myriad Facebook comments.⁴¹⁵ That sort of exchange was certainly never imagined by the likes of James Madison and Thomas Jefferson in Philadelphia.

To engage as many parts of civil society, convention planners should resist the urge to over rely on digital means to solicit engagement. The “old” ways of gathering that input—in-person events, print media, etc.—should still be employed.⁴¹⁶ The Illinois Constitutional Convention planners, for instance, held open-mic hearings around the state to provide residents with a chance to make their voice heard, as well as to be heard by important decision makers.⁴¹⁷ The combination of new participatory tools that permit more residents to respond in more detail and with a higher likelihood of impact and the “old” ways of gathering community input will result in the most representative and thorough collection of ideas. To the extent “old” ways are employed, modern improvements to those ways should be adhered to.

410. See Valtysson, *supra* note 197, at 62.

411. *Id.* at 61.

412. *Id.*

413. *Id.* (noting that the Council only tweeted 171 times to 522 followers during the rewriting process).

414. *Id.*

415. *Id.* at 62.

416. See Lousin, *supra* note 17, at 610 (“There is no substitute . . . for face-to-face meetings.”).

417. See *id.* at 610–11.

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If the public is not invited and nudged to participate in shaping the convention, then there is a chance lobbying groups and other organizations representing special interests may offer biased opinions based on their niche take on an issue.⁴¹⁸ That is why Suteu recommends a proactive approach to bringing people into the convention process.⁴¹⁹ Her conception of making a convention representative means ensuring that all interests affected by a convention have a way to make their voice heard.⁴²⁰

One proactive approach is to lean on trusted messengers to share deliberative opportunities. Rather than dispatch a stranger to a community to introduce something as large as a constitutional convention, convention organizers should identify and empower “trusted messengers” to run these sessions.⁴²¹ These trusted messengers are community members with some, if not all, of the following traits: opinion leadership (i.e., people listen to them), deep community roots and knowledge, capacity to reach and educate individuals with low-trust in the government, and well-versed in communicating in a culturally and linguistically appropriate manner.⁴²² Trusted messengers have become an increasingly important part of efforts to distribute time-sensitive and important information to diverse communities. For example, researchers urged the Census Bureau to lean on trusted messengers to help increase response rates in hard-to-reach communities.⁴²³

Trusted messengers can be a vast improvement from relying on public officials to connect with hard-to-reach communities. Public officials often have little to no knowledge of the conditions of these communities, one of the core attributes of a good messenger.⁴²⁴ A “Constitution Convention Corps” made up of trusted messengers can ensure that residents in all communities are aware not only of the face-to-face opportunities to provide their feedback on convention topics but also the online mechanisms. The take-aways from all forms of community engagement should be distributed to delegates for their consideration.

418. See *id.* at 614.

419. See Suteu, *supra* note 9, at 270–71.

420. *Id.*

421. See Kyla Fullenwider & Greg Fischer, *Can Cities Save the Census? A Local Framework for Our Nation’s First Digital Count*, SHORENSTEIN CTR. (Apr. 1, 2019), <https://shorensteincenter.org/can-cities-save-census/>.

422. *Id.*

423. See, e.g., *id.*

424. See Lousin, *supra* note 17, at 610.

The sum of all these conversations will help delegates see issues from a statewide perspective.⁴²⁵

Certain participatory tools can only succeed in concert with other tools. Crowdsourcing only works if you can gather a large crowd and make sure the members of that crowd have the information and capacity required to participate. Though technology has made the exchange of information easier, it may also have diminished the capacity of individuals to engage in meaningful discussions about that information. Authors such as Jeremy Rifkin and Neil Postman have long worried that new mediums, such as television and a generally faster pace of life, have hindered our collective ability to consume, understand, and debate information.⁴²⁶ Convention organizers should engage with experts in media studies to analyze how best to produce content and design processes in a way that accounts for our seemingly ever shortening attention spans.

The creation of new means to participate does not guarantee representative participation. For instance, when the Environmental Protection Agency (“EPA”) offered citizens the opportunity to join a policy review panel, the resulting participants had important characteristics for convention organizers to note.⁴²⁷ First, this new means of participation did bring a higher number of participants into the fold.⁴²⁸ Second, many of the participants were engaging with the EPA for their first time.⁴²⁹ Third, and most importantly, it was not clear that this expanded pool of participants was any more representative than the usual, smaller pool of repeat participants.⁴³⁰ Still, those that did join the EPA’s efforts “not only contributed comments, but [also] listened and responded to one another’s points of view, thereby engaging in a deliberative and reflective process of dialogue.”⁴³¹ This last point should encourage convention organizers because it illustrates that once people opt to participate, they will likely contribute in a meaningful way.

When it comes to soliciting online input from across society, particular attention may need to be paid to older individuals and individuals from communities of color. Younger and more highly

425. *See id.* at 610–11 (summarizing that the delegates participating in a statewide “road show” helped them “see Illinois as one state”).

426. *See generally* JEREMY RIFKIN, *TIME WARS: THE PRIMARY CONFLICT IN HUMAN HISTORY* (1987); NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* (1985).

427. Noveck, *supra* note 173, at 51.

428. *Id.*

429. *Id.*

430. *Id.* at 51–52.

431. *Id.* at 52.

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educated Americans tend to adopt new technological tools to engage with the government faster than the rest of the public.⁴³² These disparities should not push convention organizers away from digital tools. Research indicates that analog tools may actually result in even greater disparities in participation.⁴³³ In both the analog and digital context, participation likely hinges on the extent to which the individual trusts the government.⁴³⁴

Convention organizers must work to overcome some of the concerns related to the public's growing lack of trust in the government and general lack of faith in new technologies applied in a government context. Surveys on related government uses of new technology reveal that a sizable portion of the public remains skeptical.⁴³⁵ For instance, only fifty-three percent of respondents thought that open data sharing would make government officials more accountable to the public.⁴³⁶ Likewise, only forty-eight percent thought open data sharing would allow citizens to better impact government affairs.⁴³⁷ If convention organizers want to engage as many people as possible via predominately online forums, then they will have to address this skepticism head on. They will also have to recognize and respond to the fact that some Americans just are not willing to engage in politics in online settings. Pre-pandemic, the Pew Research Center conducted a survey and concluded that: "[o]n an 'every day' level, Americans are three times as likely to discuss politics or public affairs with others through offline channels (in person, by phone call, or by letter) as they are through online channels."⁴³⁸

The upshot is that crowdsourcing cannot rely on a single means for public participation. Due to the wide divergence in trust in government and digital literacy, convention organizers should explore in-person as well as digital means to proactively solicit engagement from across society.

432. See John B. Horrigan & Lee Rainie, *Users' Views on Potential Impacts of Open Data and Open Government*, PEW RSCH. CTR. (Apr. 21, 2015), <https://www.pewresearch.org/internet/2015/04/21/users-views-on-potential-impacts-of-open-data-and-open-government/>.

433. See Aaron Smith, *Civic Engagement in the Digital Age*, PEW RSCH. CTR. (Apr. 25, 2013), <https://www.pewresearch.org/internet/2013/04/25/civic-engagement-in-the-digital-age/>.

434. See Horrigan & Rainie, *supra* note 432.

435. See *id.*

436. *Id.*

437. *Id.*

438. See Smith, *supra* note 433.

Another limit to participatory tools is that the ensuing deliberation requires time.⁴³⁹ In other words, “speed sacrifices deliberation.”⁴⁴⁰ The short attention span of the public and the pressing need for constitutional change in light of technological, social, and economic changes weigh against too much deliberation and too many participatory tools when pursuing constitutional change. The public legitimacy of a constitution, though, tips the scales toward more deliberative exercises. And, with the inclusion of modern technology and crowdsourcing techniques, deliberation need not be as slow as it was in previous generations.⁴⁴¹

A slew of other faults exists with some crowdsourcing tools, all of which cannot be covered here. Briefly, Elster likely would find the transparency associated with crowdsourcing to be excessive because some degree of secrecy in assembly discussions can have deliberative benefits within that group.⁴⁴² Another fault stems from failing to address the fact that only the most motivated and well-off can afford to participate in deliberative exercises that offer little to no financial support.

Still, as pointed out by Landemore, even the imperfect use of crowdsourcing tools can drastically improve a constitution-making process.⁴⁴³ These innovations can introduce delegates to new ideas, engender a great sense of ownership over the constitution within the public, and encourage the public to perceive their government as a more faithful executor of the people’s sovereign power.

E. General Research on Participatory Tools and Constitution Quality

Where these tools are employed, the quality of democratic inputs and outputs increase. Generally, where high quality deliberative opportunities exist, and those opportunities occur on a frequent basis, the democratic institutions facilitating those deliberations receive better quality and higher quantity input.⁴⁴⁴ This sort of deliberation is especially important with respect to constitution-making given the need

439. See Scheuerman, *supra* note 74, at 388 (noting the widely shared presupposition among liberal democratic theorists that “deliberation involving anything more than a small number of individuals is necessarily time-consuming”).

440. Colantuono, *supra* note 69, at 1509.

441. See Scheuerman, *supra* note 74, at 389 (citing new technologies that allow large numbers of people to rapidly exchange views as evidence that “[t]he association of popular deliberation with ‘slowness’ no longer deserves the self-evident character that it possessed for so many of our historical predecessors”).

442. COLLECTIVE WISDOM, *supra* note 397, at 167–68.

443. See generally *Icelandic Experiment*, *supra* note 178.

444. See Noveck, *supra* note 173, at 5.

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to establish a high degree of public confidence in the document.⁴⁴⁵ Landemore determined that the same general idea about quality participation leading to quality democratic inputs and outputs applied to constitution-making, in which he stated: “the more participatory a constitutional process is, the more rights and mechanisms for popular participation it should include.”⁴⁴⁶

A review of the draft constitution that emerged from Iceland’s participatory process reinforced this finding.⁴⁴⁷ The power of greater participation to improve governance outcomes has received attention outside of Iceland. European foreign ministers, for instance, issued a joint declaration recognizing “the importance of increasing participation in local, regional, national and European democratic processes.”⁴⁴⁸ Similarly, the Council of Europe’s Congress on Local and Regional Authorities encouraged national governments to develop and implement strategies to enhance civic participation on important regulatory issues.⁴⁴⁹ The Council specifically prodded governments to leverage new information and communication technologies as a means to “strengthen democratic governance and its legitimacy, to promote values like openness, transparency and accountability of administration[,]” as well as to foster “public debate and communication.”⁴⁵⁰

445. See Gais & Benjamin, *supra* note 18, at 1301 (“If we want people to view a constitution as legitimate, we must be sure they believe the rules and institutions it prescribes to be reasonable and fair.”).

446. See Landemore, *supra* note 61, at 192.

447. See *id.* at 204.

448. EGOVERNMENT MINISTERIAL CONFERENCE, MINISTERIAL DECLARATION: BRUSSELS, 29–30 NOVEMBER 2001 (Nov. 29, 2001), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwib1O-CjPf2AhUKTd8KHRupCygQFnoECAQQAQ&url=https%3A%2F%2Fadministracionelectrónica.gob.es%2Fpae_Home%2Fdam%2Fjcr%3Aa41fbada-03ef-4c82-8e38-5c13e1593986%2FAdministracion_Electronica_Declaracion_Ministerial_Bruselas.pdf&usg=AOvVaw0wa7zI48Zi1-BLKRJ2dHBh.

449. CONG. OF LOC. & REG’L AUTHS. OF EUR., RECOMMENDATION 54 (1999) ON LOCAL AND REGIONAL INFORMATION SOCIETY (June 16, 1999),

https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjVl4LXqfD2AhUhmeAKHaBdDwEQFnoECAkQAQ&url=https%3A%2F%2Frm.coe.int%2Flocal-and-regional-information-society-rapporteur-mr-r-koivisto%2F1680719074&usg=AOvVaw1_G7eCB7g0d45OdJs5dcor.

450. *Id.*

IV. OTHER FACTORS RELATED TO THE SUCCESS OF A CONSTITUTIONAL REVISION EFFORT

The use of participatory tools is not a sufficient condition to actually revise a state constitution. Convention organizers must address other modern democratic shortcomings to earn the participation and, later, support of the public.

A. *Media Coverage*

A sizable gap exists between the increasing importance of state constitutions and coverage by the popular press.⁴⁵¹ It is essential to have popular media share updates on and opportunities related to the convention. That is why Lousin calls for a public relations department to create “an Internet framework, as well as communications with the print and electronic media outlets.”⁴⁵² And, the more participatory and innovative the process, the more the press will need to assist with informing the public of the process and the means to get involved.⁴⁵³

The absence of favorable and frequent media coverage did not help convention organizers in Washington D.C., and some papers came out early in direct opposition.⁴⁵⁴ Others merely did not cover the effort at all, neglecting to even amplify messages from trusted institutions related to the convention. The *Washington Post*, for instance, did not inform their readers about the various races for delegate seats and opted not to publish the Women Voters’ Annual Voters Guide, which contained helpful information about the convention.⁴⁵⁵

The Icelandic elections for convention delegates also struggled to receive media attention.⁴⁵⁶ Landemore goes as far as to wonder if “incompetence” among the Icelandic press resulted in their lack of knowledge as to how to cover an election of more than five hundred people and, due to that lack of knowledge, opting to provide no coverage at all.⁴⁵⁷ The media may have also helped sink the proposed constitution. The Icelandic media amplified concerns of the constitutional scholars that the proposed constitution lacked coherence.⁴⁵⁸

451. See Devins, *supra* note 41, at 1637.

452. Lousin, *supra* note 17, at 616.

453. See *Icelandic Experiment*, *supra* note 178, at 185–86.

454. See Schrag, *supra* note 245, at 842 (referring to the *Washington Star*).

455. See *id.* at 849.

456. See *Icelandic Experiment*, *supra* note 178, at 186.

457. See *id.*

458. Landemore, *supra* note 61, at 191.

Even favorable press coverage, though, cannot guarantee that a convention will get underway or that its proposals will receive popular support. For example, even though the *Los Angeles Times* “enthusiastically endorsed” a recent call for a constitutional convention in California, that effort floundered.⁴⁵⁹ The larger problem may be that the people are “averse to debating fundamental questions of governance.”⁴⁶⁰ The media may be able to diminish that aversion by specifying how exactly constitutional change could alter the day-to-day lives of residents. The writing of a constitution requires that citizens “imagine their state in its future life. In other words, they [have] to engage in a kind of (political) science fiction.”⁴⁶¹ Journalists seem to be well-suited for at least consolidating and disseminating ideas about what that future life could be.

B. Support Among the Political Elite

Members of the political elite can signal to other officials, and to the public at large, that a process merits their support and participation. The sidelining of the political elite in Iceland’s process may have been part of its demise. Landemore queries if so substantially limiting the role of the political elite made them less willing to publicly fight for the passage of the popularly-created constitution.⁴⁶² In Iceland and elsewhere, political elite and certain special interests may effectively wield a veto over any constitutional revision effort. A failure to meaningfully incorporate groups that may hold formal or informal veto power over the constitutional revision process may sink the prospects of actualizing that change.

Lousin would advise convention proponents to prioritize speaking with the state’s governor and state legislators in order to bring them on board.⁴⁶³ Without their support, these political elites may form a “rival body” capable of delegitimizing the convention and undermining its prospects from the outset.⁴⁶⁴ That is why, rather than try to have “the people” steal a constitutional convention process from elites, Lousin recommends allowing political parties and political actors to “play a

459. See Vladimir Kogan, *The Irony of Comprehensive State Constitutional Reform*, 41 RUTGERS L.J. 881, 883 (2010).

460. See Henry M. Greenberg, *Hope vs. Fear: The Debate Over a State Constitutional Convention*, 38 PACE L. REV. 1, 8–9 (2017).

461. BETHEL SALER, *THE SETTLERS’ EMPIRE: COLONIALISM AND STATE FORMATION IN AMERICA’S OLD NORTHWEST* 249 (Daniel K. Richter et al. eds., 2015).

462. See *Icelandic Experiment*, *supra* note 178, at 186.

463. Lousin, *supra* note 17, at 605.

464. *Id.*

leading role,” and to tap into their ability to validate and distribute information about the convention.⁴⁶⁵ If their support cannot be won, then convention advocates should aspire to leave legislators feeling a sort of “benign neglect” toward the convention.⁴⁶⁶

Political elites can popularize the reasons for a constitutional convention and provide its outcomes with a degree of legitimacy. In Iceland, political leaders fulfilled the former role but not the latter. Years prior to the Icelandic people moving into the weeds of constitutional revision, the prime minister “had for many years fought for a total review of the constitution,” including during her time as a Member of Parliament.⁴⁶⁷ That sort of recurring drum-beating for a substantial revision can increase public support for constitutional reforms, even if members of the political elite are not fully on board or even are in opposition.⁴⁶⁸

In Ireland, political stakeholders similarly helped lay the foundation for constitution revision. Years before the revision effort formally got underway, a Joint Committee of Parliament debated the merits of constitutional reform and issued a report calling for the formation of a citizen assembly to study the issue.⁴⁶⁹ The major political parties supported these efforts, lending further political legitimacy to the idea of reform.⁴⁷⁰

The effort in Washington D.C., by contrast, lacked sustained political support for the duration of their convention effort. At the outset, major political leaders, including the District’s non-voting Delegate to Congress, were opposed to the effort.⁴⁷¹ Eventually, some officials, such as the Mayor, indicated their support.⁴⁷² However, those supporting officials stopped short of taking actions that would more convincingly convey their support to members of the public. This absence “made the venture seem flaky,” which set off a sort of death spiral of doubt—political elites questioned the legitimacy of the convention, and political elites not running for delegate seats reinforced that doubt and made other civic community members question the project, and so on.⁴⁷³

465. *Id.* at 611; *see also Icelandic Experiment, supra* note 178, at 186 (noting the skepticism of Iceland’s political class).

466. *See* Lousin, *supra* note 17, at 605.

467. Á. Th. Arnason, *A Review of the Icelandic Constitution—Popular Sovereignty or Political Confusion*, 2011 *TJDSCHRIFT VOOR CONSTITUTIONEEL RECHT* 342, 342 (2011).

468. *See* Suteu, *supra* note 9, at 260–61.

469. *Id.* at 264.

470. *Id.*

471. *See* Schrag, *supra* note 245, at 842.

472. *See id.* at 843.

473. *See id.* at 847–49.

Of course, the support of the political elite does not guarantee that a convention will produce a high-quality constitution that earns popular support. Research by Gais and Benjamin indicates that high-ranking government officials, such as governors, “have often been the catalyst for constitutional conventions in the past, but their efforts have not fared well in recent years.”⁴⁷⁴ Finding the right role for the political elite has become trickier in a world in which distrust of the political class has grown. The popularity of the official, and public faith in their democratic system as a whole, may impact the extent to which engagement by an official can actually propel a convention effort forward. Still, convention organizers should work to obtain some level of engagement from officials and, especially, prevent their active opposition.

Organizers have to worry about more than just politicians undermining their work. Members of academia and other civil society organizations can also throw the process into question. In Iceland, “[m]any well-known political scientists” made repeated appearances on national television and wondered aloud if the Icelandic process was too complicated.⁴⁷⁵ Crucially, these assessments came before the election of delegates, which means that the expert skepticism could have diminished electoral turnout, and thus the legitimacy of the results (akin to evidencing a sort of spiral of doubt).⁴⁷⁶

When leaders stop championing the effort or even cease to assist it, the effort may stall. So, the effort to earn the backing of key leaders must be sustained throughout the convention.

C. *A Clear Deadline for the Convention*

The convention process typically takes up a lot of time and financial resources only to result in no change.⁴⁷⁷ One of the pitfalls of the Illinois 1969 Constitutional Convention may have been that voters did not appreciate “delegates simply ‘debat[ing]’ instead of preparing for a convention and hammering out proposals during the convention.”⁴⁷⁸ Because a convention “is a serious and expensive business,” Lousin suggests that voters will want to see meaningful progress between iterations of drafts, without spending too much time diving into every comment generated through the review mechanisms.⁴⁷⁹ Some states,

474. See Gais & Benjamin, *supra* note 18, at 1303.

475. *Icelandic Experiment*, *supra* note 178, at 186.

476. See *id.* (stating that the expert comments amount to “damning ahead of time the legitimacy of the process and probably affecting voter turnout”).

477. Colantuono, *supra* note 69, at 1479.

478. Lousin, *supra* note 17, at 615.

479. See *id.*

such as New York, do not place a time limit on the work of their Convention, letting them “remain in session for as long as it takes the delegates to present their recommendations to the people.”⁴⁸⁰

The Washington D.C. Convention attempted to heed Lousin’s advice, limiting itself to ninety days.⁴⁸¹ Washington D.C. organizers also limited the Convention to one revision effort—delegates could return a new draft to the public if the first version did not succeed.⁴⁸² Though this might create some questionable incentives (the full scope of which are outside the ambit of this section), this clear limitation may have helped the public and the delegates take their work more seriously.

The Irish Convention specified deadlines for its internal and external processes. Internally, the Convention gave itself sixteen months to complete its work.⁴⁸³ Externally, “the government committed to respond to the Convention’s reports [on the specified issues] within four months and to . . . indicate” when the Convention’s resolution would go before the public as a referendum.⁴⁸⁴ Though the internal deadlines were met, the government struggled to comply with some of its temporal expectations. On some issues, the government failed to respond to the Convention within four months.⁴⁸⁵

Iceland’s processes also neglected to precisely label temporal timelines, which likely had ramifications in terms of public support for the work. The Council had to adhere to a “rushed and arbitrary” timeline of three months, to which a month extension got added.⁴⁸⁶ A “clear timetable and delineation of the forthcoming steps” may have resulted in the public taking the process more seriously and grasping at the “meaning and importance of every step.”⁴⁸⁷

V. NEXT STEPS FOR STATES WITH RECURRING CONSTITUTIONAL CONVENTION INITIATIVES

Residents of every state can and should act on the lessons learned by Iceland and Ireland. Every state constitution makes at least one procedure for change possible, setting a pathway for amendments or

480. See Greenberg, *supra* note 460, at 10.

481. Schrag, *supra* note 245, at 846.

482. *Id.* at 847.

483. See Suteu, *supra* note 9, at 266.

484. *See id.*

485. *See id.*

486. See *Icelandic Experiment*, *supra* note 178, at 187.

487. *Id.* at 186.

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revisions.⁴⁸⁸ For a revision, most states set the bar high—requiring a constitutional convention.⁴⁸⁹ Nearly every state has provisions in their constitution for how to initiate and run constitutional conventions.⁴⁹⁰ For some states, this opportunity is on the immediate horizon. Voters in Rhode Island, Michigan, and Connecticut will have the chance to vote on the creation of constitutional conventions in their states in 2024, 2026, and 2028, respectively.⁴⁹¹

This Section will not explore all of the mechanisms for constitutional conventions, but rather encourage readers to see which bodies, and in what manners, political actors in their states can pursue constitutional revision. If after that review, the reader finds no guidance, ambiguous guidance, or guidance that would require reliance on bodies unlikely to ever pursue constitutional change, then the public may consider extra-legal routes to launching a constitutional convention process that incorporates the best aspects of the two aforementioned countries.

Extra-legal action may be especially necessary in states where, despite the “wishes of the people [being] supreme,” only the legislature has the ability to call a convention.⁴⁹² In that situation, if the legislature is the body causing some of the constitutional problems in need of resolution, then the people may have to take unprecedented action. This may be true in states with recurring opportunities for voters to call a constitutional convention, but with no self-executing means to start that convention in the event of a successful vote. In such a situation, the state legislature may acknowledge that the people voted to launch a convention but refuse to pass enabling legislation.⁴⁹³

Extra-legal justification for crowdsourcing a constitution can come from several sources. A number of states have constitutional provisions that stress the sovereignty of the people and, in some cases, a right to reform the government at any time.⁴⁹⁴ Convention advocates may lean on those provisions as they launch their crowdsourcing efforts. Some scholars may justify an extra-legal route on the fact that in many states, their respective state court has identified an implied power within the

488. See Colantuono, *supra* note 69, at 1478.

489. *Id.* at 1479.

490. See Permaloff, *supra* note 7, at 226.

491. *State Constitutional Conventions*, BALLOTPEDIA, https://ballotpedia.org/State_constitutional_conventions#Automatic.2Fmandatory_ballot_referrals (last visited July 1, 2022).

492. See Williams, *supra* note 33, at 569–70.

493. See Permaloff, *supra* note 7, at 228.

494. Colantuono, *supra* note 69, at 1479–80 (referring to the Oregon Constitution and the Kentucky Constitution).

state legislature to propose or call a convention,⁴⁹⁵ arguably that power could and should be extended to the people as sovereigns.

Extra-legal changes may also proceed solely by following democratic best practices, even if those are not the practices specified in a state constitution. Extra-legal constitutions were approved in Kentucky and Georgia where the people had “due and proper notice and opportunity to acquaint themselves with any revision, and make their choice directly by a free and popular election,” which meant their decision to approve the constitution had to be respected because the will of the people is “supreme.”⁴⁹⁶ Extra-legal means to change constitutions have also been permitted where a sufficient degree of assent from the people was identified.⁴⁹⁷ It follows that all convention organizers should strive to find clear signs of public support for their efforts.

Finally, advocates that require extra-legal mechanisms to realize their convention plans can cite historically significant reformers as supporters of their efforts. Teddy Roosevelt, for instance, backed extra-legal mechanisms. He declared it:

[F]alse constitutionalism, a false statesmanship, to endeavor by the exercise of a perverted ingenuity to seem to give to the people full power and at the same time to trick them out of it. Yet this is precisely what is done in every case where the state permits its representatives, whether on the bench or in the legislature or in executive office, to declare that it has not the power to right grave social wrongs.⁴⁹⁸

Whichever justification constitutional convention organizers rely on, they will have their work cut out for them. Still, it is work worth pursuing. State constitutions are underused by state courts, broadly unanalyzed by the legal community, and underappreciated by the public as a means to realize the transformative goals they hope to see in politics. These documents also receive too little attention from the press, and they rely on too many of the same broken tools applied to other aspects of our democracy. A new wave of constitutional conventions can make these

495. See G. Alan Tarr & Robert F. Williams, *Getting From Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1079 (2005); see also Colantuono, *supra* note 69, at 1480 (Speculating that “[s]ome courts have found an unstated legislative power to call a convention” because “the people, as popular sovereign, [can] give such a proposal constitutional force by adopting it at the polls”).

496. See *Gatewood v. Matthews*, 403 S.W.2d 716, 718–21 (Ky. 1966).

497. See Colantuono, *supra* note 69, at 1491.

498. 1 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO 379 (1912).

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documents stronger protectors of key rights and more central components of our democracies and state identities.

For too long, the realm of constitution-making has been viewed as “political business” to be conducted by traditional government stakeholders.⁴⁹⁹ This attitude has reduced the public’s appetite for constitutional conventions despite their increasing dissatisfaction with state government.⁵⁰⁰ This marks an ironic twist on the historical norm of constitutional conventions evoking fear in politicians and special interests worried about the people seizing revision opportunities.⁵⁰¹

Only by running a constitutional revision through a series of lengthy tests can those changes possess the level of democratic legitimacy required by a constitution.⁵⁰² A constitutional convention that incorporates the mechanisms used and lessons learned by the Icelandic and Irish people will likely suffice as such a test. A convention based on these two models will result in a proposal that received substantive participation from across civil society and survived a number of time-consuming tests that ensure a sufficient amount of deliberation.⁵⁰³

Groundwork must occur to ready these states for the proper use of new deliberative tools. States that want to use these tools have to work on developing a civic culture that is responsive to the opportunity to use such tools. “A number of political observers,” according to Gais and Benjamin, argue that “the real obstacle to a more deliberative democracy in the United States is the decline of civil society.”⁵⁰⁴ This argument receives support from a review of constitutional efforts abroad. A reliance on participatory processes has helped fend off communal fragmentation in Switzerland, according to Landemore.⁵⁰⁵ Robert Putnam theorized that civic awareness in Italy assisted with that country’s capacity to pursue constitutional reforms.⁵⁰⁶

A strong civic culture replete with strong civic institutions, rather than just a homogeneous community, allowed Iceland to experience relative success with these tools. Skeptics of deliberative practices in diverse U.S. states wrongly read the Iceland case study as being only

499. See Williams, *supra* note 33, at 574.

500. See *id.*

501. See *id.*

502. See Scheuerman, *supra* note 74, at 373. *But cf.* Colantuono, *supra* note 69, at 1480–81 (describing the steps required to achieve constitutional change through a convention as a “cumbersome means of constitutional amendment and revision,” suggesting that lower hurdles may be a positive).

503. See Scheuerman, *supra* note 74, at 373.

504. Gais & Benjamin, *supra* note 18, at 1313.

505. See Landemore, *supra* note 61, at 203.

506. See ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 182 (1993).

applicable to small islands. Landemore contests this interpretation by pointing out that Iceland's perceived homogeneity is the result of focused efforts to bring a diverse community, perhaps not as diverse as some U.S. states (certainly not as racially diverse), around shared processes and goals.⁵⁰⁷ Nevertheless, even in defending Iceland as less of an outlier than made out by critics, she acknowledges that the work done there was only possible after decades of cultural work.⁵⁰⁸

Once such a civic culture exists and after one crowdsourced constitutional convention has occurred, leaders should also think about means to make sure their constitutions do not again become insufficiently functional and aspirational. Scheuerman convincingly shows that constitutions must do a better job of keeping pace with the rapidly accelerating changes to our social and economic environments.⁵⁰⁹ By specifying automatic triggers for when constitutional conventions must occur, contemporary political leaders can ensure that the people of tomorrow have a way to update their constitution when necessary, without expending too much time, money, and energy just to get the process started.

Relying on less democratic means of constitutional alteration will hinder the democratic legitimacy of the state constitution. That's why states ought to think through not only how to host a constitutional convention in the near future but, in doing so, how that process can be replicated again when required by social and economic changes. By way of example, once the Irish identified that its convention mechanism could produce quality reforms, it did not close down the effort merely because the Convention finished its initial agenda.⁵¹⁰ Instead, the Irish empowered their Convention and public to continue the improvement effort and bring new issues before the Convention,⁵¹¹ perhaps giving rise to a new phrase: if it's broke, keep fixing it.

Ultimately, the push for a constitutional convention hinges on hope versus fear.⁵¹² Fear has generally won the day in recent decades. Interests fearful of losing the few advantages they have enshrined in the constitution do not want to risk a constitution that could contain unknown harms. Hope, though, has been on the verge of victory elsewhere and can take place in the states. The people can hope for a more responsive document as well as for a revival of their civic culture.

507. See Landemore, *supra* note 61, at 201–05.

508. See *id.*

509. See Scheuerman, *supra* note 74, at 390.

510. See Suteu, *supra* note 9, at 266–67.

511. See *id.* at 267.

512. See Greenberg, *supra* note 460, at 12.