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WILLIAM B. FISCH*

Constitutional Referendum in the United States of America

I. INTRODUCTION

The United States of America, as a federation of now 50 states each with its own constitution and legal system still enjoying a large degree of governmental autonomy within the national legal framework, presents a strikingly mixed picture regarding the use of direct democracy—the submission of proposed governmental action to a popular vote—in law- and constitution-making processes. At the national level, direct democracy has never been used for either type of enactment. At the state and local level, however, its use dates back to colonial times and has been increasing gradually (though still not universal) ever since. Since the mid-19th century, every new state admitted to the union has been required by Congress to submit its initial constitution to popular vote,¹ and all but one of the state constitutions now require a popular vote to ratify all constitutional changes proposed by the most commonly used methods.²

In the language of the Populist and Progressive movements of the late 19th and early 20th centuries, such direct democratic law-making takes two forms: *referendum*, which submits proposed statutes or constitutions or amendments thereof to a popular vote before they can take effect; and *initiative*, which permits a relatively small minority of citizens to frame proposals for legislative or constitutional change and have them submitted to popular vote for adoption or rejection. Once it was generally accepted in American law (by the early 19th Century) that constitutions are a form of law distinct from and hierarchically superior to ordinary legislation within a given system, one could distinguish four principal types of direct-democratic law-

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1. See WALTER F. DODD, *THE REVISION AND AMENDMENT OF STATES CONSTITUTIONS* (1910) (hereinafter *Dodd*) at 61f.

2. *I.e.*, by the legislature (provided for in all states) or by initiative (provided for in 18 states). Delaware is the lone exception. See COUNCIL OF STATE GOVERNMENTS, *THE BOOK OF THE STATES* (2005) (hereinafter *Book of the States*), tables 1.2 and 1.3 at pp. 12-14. The third method used by states, the constitutional convention, which is typically reserved for major revisions or new constitutions, is not governed in this respect by an explicit provision in the existing constitutions of about 1/3 of the states, and there may still be some room for discretion in those states. See part III.A.1 of this report below.

making for comparison in terms of the breadth of legal acceptance and the frequency of use: constitutional referendum (the most widely accepted), legislative referendum, legislative initiative and constitutional initiative (the least widely accepted).³ Nonetheless, the constitutional initiative is recognized in a number of important states and has produced a number of significant changes having impact both within and beyond the borders of the states where they have been adopted.

In this paper on direct democracy in constitution-making, I will review the situation at the national level first, in the light of the prevailing patterns in the newly independent states at the time of adoption of the federal constitution in 1788-9. I will then address the situation at the state level as it has evolved over the more than two centuries of the federation's existence.

II. THE FEDERAL CONSTITUTION

A. *Pre-Constitutional National Precedent: the Continental Congress and the Articles of Confederation*

The only common institution created by the American colonies on their own initiative in the revolutionary period was the Continental Congress, which first convened in the fall of 1774, and from its second convening in 1775 operated continuously, obtaining a more formal status under the Articles of Confederation in 1781, until the government created by the Constitution was formed in 1789. In this Congress the colonies as such—eventually to call themselves states—were the constituent units, acting through delegates sent by their legislatures;⁴ the institution's formal title under the Articles was "The United States in Congress assembled." The first Congress immediately adopted the rule that each colony had an equal vote in its

3. Austin Ranney, *The United States of America*, in DAVID BUTLER AND AUSTIN RANNEY, EDs., REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY (1978), at pp. 69-73. It appears that legislative referendum is the least used of the mechanisms, see David Magleby, *Direct Legislation in the United States*, in DAVID BUTLER AND AUSTIN RANNEY, EDs., REFERENDUMS AROUND THE WORLD (1994) (hereinafter *Magleby*) at p.222.

4. In the beginning, of course, it was (with the exceptions of Pennsylvania and Rhode Island) not the colonial governments sending delegates to the Congress, but rather assemblies, congresses and conventions formed by those within each colony who were seeking to end the abuses of British rule. See SAMUEL BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* (1993), at 197:

"If we are looking for comparisons to help us classify the Continental Congress as a political entity, we will be misled if we think of it as a meeting of governments. A more instructive analogue is the national convention of a political party."

It was only after the states adopted their own constitutions and formed governments under them, which occurred in a majority of states only after the Congress adopted the Declaration of Independence (1776), that the respective legislatures assumed the appointing role.

deliberations,⁵ and the two acts it produced having a fundamental or constitutional character embodied a principle of unanimity: the Declaration of Independence (1776) and the Articles of Confederation (1781). The Declaration was adopted unanimously, and the Articles of Confederation explicitly incorporated the rule of unanimity of states for ratification and taking effect both of the original Articles and of any amendments to them.⁶ In neither case was a direct popular vote called for, which is not surprising in light of the limited roles of the Congress, first primarily of conducting the war of independence and then, under the explicit authority of the Articles,⁷ more generally of conducting the external affairs of the confederation.

B. State Practice prior to the federal Constitutional Convention of 1787

1. Adoption of New Constitutions

The individual states showed some variation in approach to the process of establishing their own governments and constitutions after the onset of the Revolutionary War in 1775. In late 1775 the Congress itself, in responding to requests for advice from three colonies on the matter, advocated the indirect democratic or “convention” approach from which it derived its own legitimacy: it recommended that they consider the establishment of a new and suitable form of government, and that this be done by a “full and free representation of the people” called by the colonial conventions for the purpose, but it did not suggest a direct democratic ratification.⁸ In the first round of adoptions in 1776-77, under the pressure of the revolutionary war and the decision to declare independence, ten of the colonies followed this prescription without a popular vote, while two others simply adapted their colonial charters and operated under them well into the 19th century.⁹

5. Resolution of September 6, 1774, *JOURNALS OF THE CONTINENTAL CONGRESS* (hereinafter *JCC*) p. 25, accessed at Library of Congress, American Memory site, on Aug. 15, 2005: [http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field\(DOCID+@lit\(jc0019\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/hlaw:@field(DOCID+@lit(jc0019))).

“That in determining questions of this Congress, each Colony or Province shall have one Vote, the Congress not being possess’d of, or at present being able to procure proper materials for ascertaining the importance of each Colony.”

6. Article XIII: “No alteration should at any time be made in any of the Articles, unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the legislatures of every State.” In fact no amendment was ever proposed or adopted under this provision, no doubt due to the extreme difficulty of obtaining such unanimity.

7. The British army and navy surrendered in October 1781, less than 8 months after the effective date of the Articles.

8. Resolution of Nov. 3, 1775, *JCC* p. 319 (New Hampshire); Resolution of Nov. 4, 1775, *JCC* pp. 326-327 (South Carolina); Resolution of Dec. 4, 1775, *JCC* pp. 403-404 (Virginia).

9. For an overview of the process in the colonies see *Dodd* at 10-21.

The lone example of direct democracy in the adoption of an original constitution was Massachusetts, drawing on long-standing traditions of local government in the New England colonies. Its independently elected legislature recommended in 1776 that its two houses meet together in the following year as a "convention," which in turn adopted a form of constitution and submitted it to popular vote; it was rejected by the local constituencies in 1778. In the following year the legislature then submitted to popular vote the questions whether (i) a new constitution should be made, and (ii) the legislature should call a new convention for that purpose. The vote was affirmative on both questions, and the call for convention issued, the delegates to be popularly elected. In 1780 the convention agreed on a proposed constitution which was approved by the voters.¹⁰

In 1779, after much controversy had arisen over the lack of popular vote to ratify its 1776 constitution, New Hampshire followed Massachusetts' lead, obtaining popular approval for electing a convention to consider replacing the 1776 document, and submitting the convention's proposed replacement to a popular vote requiring a two-thirds majority for ratification; although the first vote failed, a second vote in 1783 was successful.¹¹

2. Provisions for Amendment

About half of the state constitutions adopted in the revolutionary period contained provisions regulating amendments. They followed several patterns: two simply required greater majorities in each house of their legislatures for amendments than for ordinary laws;¹² one required that amendments be proposed by the legislature, be published at least 3 months before the next legislative election, and then be confirmed by the next legislature;¹³ and four adopted variations on the Continental Congress's convention formula, of which only New Hampshire specifically provided for a popular vote on the convention's product.¹⁴

10. See the historical note appended by the Massachusetts official site for the Constitution of 1780, at <http://www.mass.gov/legis/const.htm#cart009.htm>, accessed 9/2/2005, and *Dodd* at pp. 8ff.

11. For a description of the New Hampshire process see *Dodd* at pp. 3-8.

12. Delaware Constitution of 1776, art. 30 (2/3 vote in each house); South Carolina Constitution of 1778, art. XLIV (absolute majority of the members of each house, rather than a majority of a quorum). Texts of the original constitutions accessed at the Avalon Project of Yale Law School (hereinafter *Avalon*) at <http://www.yale.edu/lawweb/avalon/18th.htm>.

13. Maryland Constitution of 1776, art. LIX.

14. Georgia Constitution of 1777, art. LXIII (proposals from county voters); Pennsylvania Constitution of 1776, sect. 47 (proposals from a Council of Censors); Massachusetts Constitution of 1780, Ch. VI, art. X (calling for a vote in 1795 on whether to hold a convention); New Hampshire Constitution of 1784, art. 99 (calling for a vote in 1791 on whether to hold a convention).

C. *The Federal Convention and the Constitution of 1787*

When the Congress became persuaded, soon after adoption of the Articles of Confederation, that revisions should be considered in order to strengthen its powers in relation to the states, it adopted the convention method for the purpose; but its 1787 resolution called for delegates to the Convention to be “appointed by the several states,” without requiring that they be chosen by a “full and free representation of the people.”¹⁵ In conformity to the Articles, the resolution did not call for the Convention to decide finally; rather, it would report to the Congress and the state legislatures who appointed its delegates, and its proposal would have to be approved by the Congress as well as by the states.

The delegates represented most positions on most of the issues that animated the call for constitutional change: large states versus small states, nationalists versus localists, republicans (government by representation) versus democrats (government by the people), slaveholders and opponents of slavery, and so on. The document they finally produced achieved at least the framework for a stronger central government; but it famously embodied a number of compromises, especially from the democratic perspective,¹⁶ and the prevailing view of the delegates toward popular democracy as practiced in the states was skeptical.¹⁷ In terms of the prospects for introducing direct democracy into the amendment process at the federal level, the most crucial of these compromises concern (a) the structure of the legislative branch and (b) the amendment process itself. In place of the Continental Congress as a unitary body operating under the principles of equality of states in voting and unanimity in constitutional decision-making, the delegates created a two-tiered legislature with one house popularly elected whose seats are allocated among the states according to population (House of Representatives) and the other appointed by the state legislatures with two seats for each state (Senate). In Article V governing the amendment process they expressly forbade any amendment depriving any state of its equal vote in the Senate without its consent. Many of the other “anti-democratic” compromises have been superseded by subsequent amendments and their interpretation—abolition of slavery (13th A.), gradual extension of the right to vote to all adult citizens regardless of race, gender or wealth (14th, 15th, 19th, 23rd and 26th As.), and

15. Resolution of February 21, 1787, *JCC* p. 74. In the end one state, Rhode Island, refused to participate in the Convention.

16. For an overview of the issues with an assessment of present possibilities for change, see ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2001) (hereinafter *Dahl, Democratic*).

17. See, for a discussion of the various ways in which this attitude influenced the Convention: THORNTON ANDERSON, *CREATING THE CONSTITUTION* ch. 5 (1993) (hereinafter *Anderson*).

direct popular election of senators (17th A.), for the most obvious examples—but no serious effort has been made (or seems likely to be made)¹⁸ to change the structure of the Senate or the process of amendment.

In Art V, two methods are provided for proposing constitutional amendments: by the Congress on a two-thirds vote of each house, or by a national convention to be called by Congress on application of two-thirds of the state legislatures. There are also two methods of ratification, both requiring approval by three-fourths of the states: by the state legislatures, or by conventions in the states, with Congress to make the choice between these two options. As far as the records of the Convention show, the article elicited relatively little debate and no proposals that would have called for a referendum or other direct democratic involvement in the process, or for any departure from the strict one-state-one-vote rule. There was no reference to the provisions for amendment in the state constitutions beyond the fact that they existed and had done no harm.¹⁹ On the other hand the method finally chosen by the Convention for state ratification of the original instrument—embodied in a recommendation which was delivered to the Congress along with the text and implemented by the Congress in its transmission to the states²⁰—imposed the more democratic convention process on the states. This process in turn produced a far-reaching and intensive public debate both in- and outside the state conventions, and an incomparably rich documentation on constitution-making.²¹

In practice under Article V a national convention has never been successfully invoked by the states to propose amendments, nor has Congress ever chosen to order conventions at the state level for ratification of the amendments it has proposed. The amendment process has been successfully invoked only 17 times in 216 years, producing 27 articles of amendment,²² and each time it has been Congress proposing and the state legislatures ratifying. Perhaps still more re-

18. *Dahl, Democratic* at 144 ff. makes this point persuasively.

19. *Anderson* at 158. See also relevant excerpts from the records and notes of various participants at PHILIP KURLAND AND RALPH LERNER, EDs., *THE FOUNDERS' CONSTITUTION*, Art. V section 2 (hereinafter *Founders*), accessed August 19, 2005 at <http://press-pubs.uchicago.edu/founders/documents/a5s2.html>.

20. Resolution of the Convention of September 17, 1787, para 1. Text reproduced by Yale Law School, Avalon Project, at <http://www.yale.edu/lawweb/avalon/const/ressub01.htm> accessed September 5, 2005.

21. For a recent compilation see BERNARD BAYLIN, ED., *THE DEBATE ON THE CONSTITUTION* (2 VOLS., LIBRARY OF AMERICA, 1993) (hereafter *Debate on the Constitution*).

22. The first effort, mounted in 1789 at the very first session of Congress in response to demands of the states in their ratifications of the original document, included 12 proposed amendments, of which 10 were ratified and took effect in 1791 (Amendments 1-10, the "Bill of Rights"), and another was finally ratified two centuries later and took effect in 1992 (Amendment 27). All the others (11-26) were adopted separately as single proposals.

vealing, Congress has made only five other proposals for amendment, which failed to obtain the required number of state ratifications.²³ Finally, in one of its rare decisions on the amendment process, the U.S. Supreme Court held that a state's constitutional provision, which called for a popular referendum on the state legislature's ratification of a proposed amendment to the federal constitution, was inconsistent with Art. V and therefore invalid.²⁴ The process has therefore proven to be at least as difficult as proponents probably intended,²⁵ though not impossible as some critics feared²⁶ and as it surely would have been if the Articles' rule of unanimity had been retained.

III. CONSTITUTIONAL REFERENDUM AND CITIZEN INITIATIVE IN THE STATES

A. *Referendum*

1. New, Original and Revised Constitution

As indicated above, Massachusetts was the first state to submit its proposed original constitution to a vote of the people, in 1778, and New Hampshire submitted its second constitution to a vote in 1780 and 1783. In each instance it appears that the decision to submit to a vote was made by the convention that drafted the document, without any binding rule of law requiring it to do so. Between 1789 and 1816, on the other hand, ten states adopted new or original constitutions without direct ratification by popular vote, the adopting authority being either a popularly elected convention called by the legislature²⁷ or

23. See MacMillan Law Library of Emory University School of Law, "Amendments Never Ratified of the United States Constitution," at <http://www.law.emory.edu/FEDERAL/usconst/notamend.html>, accessed August 20, 2005. These would have revoked the citizenship of anyone receiving a title of nobility from a foreign country (1801), precluded the granting of power to Congress to interfere with slavery (1861), granted Congress power to regulate child labor (1926), prohibited discrimination on the basis of sex (1972), and granted the District of Columbia (national capitol district) the rights of a state in respect of representation in Congress, electing the President and Vice President, and ratifying constitutional amendments (1978).

24. *Hawke v. Smith*, 253 U.S. 221 (1920).

25. See James Madison, in *The Federalist* No. 43:

"The mode [of introducing useful alterations] preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It moreover equally enables the general and the state governments to originate the amendment of errors as they may be pointed out by the experience on one side or on the other."

GEORGE W. CAREY AND JAMES McCLELLAN (EDS.), *THE FEDERALIST* at p. 228 (2001).

26. For a pessimistic example see An Old Whig (George Bryan, et al.), "No Amendments Will Ever Be Made Without Violent Convulsion or Civil War", in 1 *Debate on the Constitution* 122 ff. (letter to a newspaper published in 1787).

27. Pennsylvania (1790), Delaware (1792), Kentucky (1792 and 1799), Tennessee (1796), Georgia (1798), Ohio (1802), Louisiana (1812), and Indiana (1816). See *The*

such a convention passing only on proposals made by an unelected Council of Censors²⁸ or simply the legislature itself.²⁹

The next wave of true referenda on new constitutions began with two more New England states, Connecticut (1818) and Maine (1819).³⁰ New York (1821) was the first outside of New England to submit a proposed new constitution to popular vote, Virginia (1829) followed suit, and the practice became predominant in the course of the 19th century.³¹ Aside from Delaware, which has maintained its rejection of popular ratification throughout its history, the principal deviations from the norm were in some southern states during and after the civil war and in the late 19th century where issues of secession, post-war reconstruction and the "Jim Crow" disenfranchisement of black citizens were on the leadership agendas and probably made a full popular vote seem too risky.³² The last of these was Virginia in 1902, and no new or substantially revised state constitution has been adopted since then without a popular vote.

2. The Role of the Constitutional Convention

Historically, the preferred vehicle for major revisions of existing state constitutions and creation of new ones has been the popularly elected convention, which has often been called by a state legislature without explicit authority in the existing governing document.³³ The power to call a convention is understood to be inherent in the people and their representatives.³⁴ At the present, 41 of the 50 state constitutions explicitly provide for the calling of a convention. All but one of those provide for a call by the legislature,³⁵ but the degree of regulation of the process varies considerably from state to state. It is com-

Green Papers, Constitutions of the Several States, compiled at <http://www.thegreenpapers.com/slg/constitution.phtml> visited August 30, 2005.

28. Vermont (1793), pursuant to a provision in its original constitution requiring a Council of Censors to convene every 7 years and to submit its proposals, if any, to a popularly elected convention for ratification or rejection. See *Dodd* at p. 41.

29. South Carolina (1790), pursuant to a provision in the constitution of 1778 requiring an absolute majority of all members in each house of the legislature.

30. *Dodd* at p. 64. Rhode Island submitted a constitution to the people in 1824, which was rejected.

31. See *Dodd* at pp. 64 ff.

32. See *Dodd* at pp. 65 ff.

33. Among the more recent examples: New Jersey's convention of 1946, which produced a new Constitution, still in effect, which itself has no provision for constitutional conventions for purposes of amendment, see Constitution of 1947 Art. IX.

34. See *Dodd* at pp. 44 ff. See also *In re Opinion to the Governor*, 55 R.I. 56, 178 Atl. 433 (1935), which held that "the right of the people to make and alter their constitutions of government", acknowledged in the state's constitution, was sufficient authority for the legislature's power to enact laws calling for a convention in the absence of an explicit denial of such authority, provided that the people themselves approved; and, to the same effect, *Bennett v. Jackson*, 186 Ind. 533, 116 N.E. 921, 923 (Ind.1917).

35. Florida requires a popular initiative to propose a convention, Constitution of 1968 Art. XI sec. 4, resulting in a popular vote on whether to call one. Montana Con-

mon (though not universal) to require a supermajority in the legislature, a popular vote to approve the call for a convention, and a popular vote to ratify a convention's proposed changes.³⁶ The calling of a convention is clearly a major project under any of these provisions, and it is not a regular event. The most recent state convention was in Rhode Island in 1986, although serious discussion of it is currently taking place in a few states.³⁷ In any case, popular ratification has been the norm for the last century, whether or not the existing document explicitly requires it.

3. Provisions for Amendment: Proposals by the Legislature

By the mid-19th Century, essentially all state constitutions contained explicit provisions governing the process of amendment and/or revision, and all do so today. There are two sources of proposals for amendment, in addition to the traditional convention discussed above: the state legislature, and citizen initiative. Both are subject to varying regulations from state to state.

Proposals by the legislature are authorized by all and are the most common in most states. All require approval of both houses of the legislature (except for Nebraska, which has only one house), with two types of qualification: (a) thirty-two states require a supermajority vote in each house, most often two-thirds or less often three-fifths, and all but a few states define their majorities by the number of members elected and not merely by the number voting on the proposition; and (b) fourteen states require that proposals be approved by two successive legislatures, usually with an intervening general election during which the pending proposals would be known to the public but not appear on the ballot as such, although a few require the second vote only if the first did not receive a supermajority in each house.³⁸ South Carolina has an indirect variant (adopted in 1868): the first legislature proposes the amendment by a two-thirds majority, and submits it to the people in the next general election; if the popular vote is positive, the new legislature then must approve by the same supermajority in order for it to become

stitution Art. XIV sec. 2 permits such an initiative as an alternative method of getting the question on the election ballot.

36. See *Book of the States* (2005), Table 1.4 and notes, at pp. 15-16. In the seven states making no provision for a popular ratification of the convention's proposals, the convention itself is understood to have discretion to require it if the existing document doesn't explicitly foreclose it. *Dodd* at p. 92.

37. See Janice C. May, "State Constitutional Developments in 2004", in *Book of the States 2005* (hereinafter *May 2004*) at p. 3.

38. See *Book of the States* (2005), Table 1.2 at pp. 12-13. Two additional states which require a second legislative vote only if the first does not approve by a supermajority — Hawaii (Art. XVII sec. 3) and New Jersey (Art. IX sec. 1) — do not specify that the second approval be by a newly elected legislature, so long as it is in a subsequent session.

part of the constitution.³⁹ Thus South Carolina and Delaware (which does not require a popular vote at all) are the only two states in which popular approval is not the final validation of the legislature's proposals for amendment, although in South Carolina the electorate still has the power of binding rejection.

In sum, the constitutional referendum is constitutionally required—a prerequisite to validity and legal effectiveness—in 49 of the 50 states for amendment proposals by the legislature, and in 48 states that referendum is binding and final whether the vote is affirmative or negative.

B. Initiative

1. Proposals by Citizen Initiative Generally

The first provision in an American constitution calling for citizen initiative in proposing specific constitutional amendments was in the first Georgia constitution (1777), pursuant to which amendments could only be proposed by petitions signed by a majority of voters in each county, then to be ratified or rejected by a convention called by the legislature for the purpose.⁴⁰ The process whereby so many signatures could be obtained without an election as such was not specified. It was clearly impossible to meet, and it was dropped, unused, from the next Georgia constitution adopted just 12 years later.⁴¹ The idea then appears to have gone into hibernation everywhere for a century.

Citizen initiative as a direct means of proposing legislation or constitutional amendment was next publicly advocated in its modern form by reformers in South Dakota and New Jersey in 1885, responding to social and economic upheavals brought about by the Industrial Revolution and to widespread corruption of the legislative process of many if not most states that prevented the adoption of remedial laws.⁴² Another advocate came on the scene shortly thereafter, having visited Switzerland to study the workings of initiative and referendum in that country, and formed a group trying to persuade major national political parties to include these mechanisms in their party platforms.⁴³ While the major parties demurred, the Socialist Labor Party and the Populist Party did endorse direct democracy, and the increasingly powerful labor unions also took up the cause. The first state adoptions came in the Midwest where the Populists were

39. See *Dodd* at p. 123; current South Carolina Constitution art. XVI sec. 1.

40. Georgia Constitution of 1777, Art. LXVIII.

41. Georgia Constitution of 1789, Art. IV sec. 7; see *Dodd* at 42.

42. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* (1989)(hereinafter *Schmidt*) at p. 5.

43. *Schmidt* at pp. 6f., citing JAMES W. SULLIVAN, *DIRECT LEGISLATION THROUGH THE INITIATIVE AND REFERENDUM* (1892).

strongest: Nebraska adopted direct democracy for municipalities in 1897, and South Dakota was the first to adopt an amendment to its constitution providing for initiative and referendum of legislation on a state-wide basis (1898). Oregon (1902) was the first state to extend the initiative and referendum process to constitutional amendments, quickly using it to effect substantial constitutional reforms.⁴⁴

In the early 20th century the Progressive movement adopted much of the Populist and Socialist programs, with Initiative and Referendum at the forefront, thereby giving these reforms a broader national base under such major party leaders as Theodore Roosevelt and Woodrow Wilson.⁴⁵ By the time this movement ran its course toward the end of the First World War, 22 states had adopted some form of state-wide initiative process; 11 of these provided for direct initiative of constitutional amendments, while two others adopted so-called "indirect initiative" provisions which interpose legislative action regarding the proposals between the proponents and the voters.⁴⁶ The most notable of the latter is Massachusetts, which requires that a joint session of the legislature vote on any initiative proposal and that it receive the affirmative support of at least 25 percent of the membership, in each of two successive legislatures, before it can be put on the ballot; and it allows the legislature at either session to amend the proposal by a 75 percent vote.⁴⁷ This process has proven quite difficult to navigate: only three initiative amendments have succeeded in getting on the ballot in 87 years, and only two have been approved by the voters.⁴⁸

A revival of interest in the initiative after World War II brought five more states into the fold, including two authorizing direct and

44. *Schmidt* at pp. 8-9. In addition to adopting statutes requiring political parties to select their candidates through a primary election rather than through appointment by party leadership (1904) and establishing significant new taxes (1906), Oregonians amended their constitution to require a popular referendum on all amendments proposed by constitutional conventions and to allow initiative and referendum at the local government level (1906), as well as to introduce recall of elected officials (1908). See M. DANE WATERS, *INITIATIVE AND REFERENDUM ALMANAC* (2003) (hereinafter *Waters*) at p. 360.

45. *Schmidt* at 9-10; PHILIP L. DUBOIS AND FLOYD FEENEY, *LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS* (1998) (hereinafter *Dubois and Feeney*) at pp. 16f.

46. *Waters* at p. 12.

47. Massachusetts Constitution of 1780, Amendment XLVIII (1918). Section 2 of that amendment originally required that an initiative for constitutional amendment be signed by 25,000 voters; Amendment LXXXI, adopted in 1950, changed that requirement to the equivalent of 3% of the votes cast for governor in the previous general election. Nevada adopted a similar indirect initiative provision in 1912, which did not lead to a popular vote until 1958 (when an initiative stiffened the requirements for statutory initiatives), and which was repealed in 1962; see *Waters* at pp. 14 and 295. Colorado's Art. V sec. 1(5) requires that proposals be submitted to the legislature's research and drafting office, which is limited to making public comment on issues of drafting and form.

48. See the table of Massachusetts initiatives in *Waters* at pp. 217 ff.

one a modified form of indirect constitutional initiative;⁴⁹ and it persuaded three other states to extend their existing provisions to include direct constitutional initiatives.⁵⁰ Nonetheless, further expansion into other states now appears unlikely, even though use of the device in many of the states where it is authorized remains high.⁵¹

There are thus 18 states now authorizing constitutional amendment initiatives, all of which require a popular vote as the final ratifying act before any changes take effect. These are predominantly western and mid-western states—only one from the northeast (Massachusetts) and two from the southeast (Florida and Mississippi), and of these only Florida has been moderately active—but they include many of the most populous, fastest-growing or otherwise influential states (California, Ohio, Michigan, Missouri, Colorado, Arizona), and provide testing grounds for many issues of national political interest.

In the early years of initiative, government reforms and democratization of the political process were the primary focus of amendment proposals: openness and accountability of government, extension of the vote to women, democratization of the selection process for candidates for major offices, direct election of U.S. senators, reapportionment of seats in the legislature on the basis of population rather than elimination of taxes on the exercise of voting rights, and the like—many of which eventually became law nationwide by means of amendment or reinterpretation of the federal constitution.⁵² In the 1930's a Nebraska initiative created the only unicameral legislature in the country, and amendments in a number of states purporting to legalize the sale and consumption of liquor led to the repeal of the federal constitutional amendment imposing national prohibition (which itself had been anticipated by state initiatives).⁵³ In the 1970's and 1980's, tax reform and expenditure controls were common, led by passage of Proposition 13, the 1978 California initiative

49. Alaska (1956) and Wyoming (1968) adopted initiative and referendum for statutes only, while Florida (1972) and Illinois (1970) adopted provisions limited to constitutional initiative, *Waters* at p. 12. Mississippi indirect initiative provision (1992) guarantees that initiative proposals with sufficient signatures get on the ballot, but provides the legislature an opportunity to approve or disapprove an initiative proposal before the election in hopes of influencing the vote, or to propose amendments to an initiative proposal which would go on the ballot along with the original as options for the voters.

50. Montana (1972) and South Dakota (1972) extended their direct initiative provisions to constitutional amendments, see *Waters* at p. 12; Nevada (1962) replaced its indirect amendment provision with one allowing for direct initiative, Nevada Constitution Art. 19 sec. 4.

51. See *Magleby* at pp. 218-219.

52. See *Schmidt* at 15 ff. At the statutory level, much was enacted for the protection of workers and unions, provision of education and infrastructure services and welfare programs for the poor, disabled and elderly.

53. *Id.* at 18, 20.

amendment which imposed significant limits on property taxes.⁵⁴ Many initiatives in the late 1980's and 1990's limited the number of terms that legislators and other elected officials may serve.⁵⁵ More recently the hot-button issues have been mostly social ones, with criminal justice reform (more severe and predictable penalties including death, procedural rights for crime victims, and the like), affirmative action (also referred to as racial preferences), homosexuality⁵⁶ and gay marriage⁵⁷ among the prominent subjects.

The initiative has been controversial from the beginning, and there is a vast literature criticizing and defending the device. Prominent among the complaints particularly relevant to the constitutional initiative are that the cost of getting a proposal on the ballot is too high to be available to groups which cannot raise substantial amounts of money,⁵⁸ that initiative proposals are more likely to be badly drafted,⁵⁹ that proponents are likely to be "interest groups" whose interests are narrow and self-serving,⁶⁰ and that initiatives are susceptible to being used to exploit prejudice against minorities.⁶¹ These claims are disputed and difficult to evaluate as reasons for abandoning the initiative altogether, but can be cause enough for concern to justify imposing some limitations on the use of the device. The following review of requirements and restrictions adopted in various states will give some indication of the impact of such concerns.

2. Procedural Requirements

In all states allowing the constitutional initiative, proponents must submit petitions signed by a certain number of eligible voters

54. Now California Constitution Art. XIIIa. *Schmidt* ch. 6, "Tax Revolt", recounts the history of that campaign and its influence on other states. Only two other states adopted major tax cuts (Massachusetts and Idaho, by legislative initiative), and sixteen other major tax cut initiatives in eight states were all rejected by the voters in the six years after Proposition 13, *id.* at p. 39. See also Pete Sepp, "A Brief History of I&R and the Tax Revolt," in *Waters* at pp. 496 ff.

55. See Paul Jacob, "Term Limits and the I&R Process", in *Waters* at pp. 505 ff.

56. See Amy Pritchard, "A Brief History of Gay Rights Related Initiatives and Referendum," in *Waters* at 494 ff.

57. Thirteen state constitutional amendments banning gay marriage were before the voters in 2004, including six proposed by initiative, and all passed handily, see *May 2004* at pp. 4-5.

58. See, e.g., DAVID BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000), esp. ch.2; Comment, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1202 ff. (2005) (hereinafter *Lessons from Oregon*).

59. Compare *Dubois and Feeney* at pp. 113-114, and Richard Collins, *How Democratic Are Initiatives?*, 72 U.COLO.L.REV. 983, 996f. (2001) (hereinafter *Collins*), with *Schmidt* at p. 34-35.

60. See *Lessons from Oregon* at pp. 1206 ff.

61. Compare *Lessons from Oregon* at pp. 1209 ff., with John Gastil, Mark A. Smith, and Cindy Simmons, "There's More Than One Way to Legislate: An Integration of Representative, Direct, and Deliberative Approaches to Democratic Governance", 72 U.COLO.L.REV. 1005, 1009 ff. (2001).

endorsing their proposal. With the exception of North Dakota, which requires a number equal to four percent of the total population of the state at the last census, all of these states define the required number as a percentage of votes cast in the last previous general election: most use the votes for governor (the state's chief executive), but others use the state's secretary of state, national presidential candidates, the state office for which the greatest number of votes were cast, or all voters.⁶² The percentages vary from three percent in Massachusetts to 15 percent in Arizona and Oklahoma, and nine states also require some degree of geographic distribution of the residences of the signers.⁶³ The petitions must be submitted to a specified state officer (typically the secretary of state, who in most states is responsible for the administration of statewide elections), who will verify the qualifications of the signers and that the number of valid signatures meets the requirement. In some states a public official such as the attorney general is responsible for writing the ballot language describing the gist of the proposed amendment for the voter.

Several attempts at regulating the process of gathering signatures on initiative proposals have been successfully challenged before the U.S. Supreme Court as violations of the proponents' freedom of speech, on principles applicable to all election campaigns. The leading initiative case is *Meyer v. Grant*,⁶⁴ which held that a Colorado law prohibiting the gathering of signatures by paid workers constituted a limitation on political speech by limiting proponents' opportunities to communicate their message to voters, and was subject to "exacting scrutiny." This regulation failed because there was no showing that paid gatherers were more likely to commit fraud than volunteers. Subsequent cases invalidated Colorado's requirements that the gatherers themselves be registered voters and that they wear a badge with their name on it, and that petitioners report names and payments to gatherers;⁶⁵ and (in an initiative case) Ohio's general prohibition against distribution of anonymous campaign literature.⁶⁶

Finally, every state authorizing constitutional initiative requires a popular vote to ratify the proposal, and defines the majority required in the popular vote by one of a number of variations. Most simply require a majority of those who vote on the amendment, but many go further by requiring a simple majority vote in two successive general elections, or that the simple majority on the amendment also

62. See *Book of the States* (2005), Table 1.3 at p. 14.

63. *Id.*

64. 486 U.S. 414 (1988). It drew on the Supreme Court's groundbreaking decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), invalidating numerous provisions in a federal statute regulating campaigns for federal office. For a review of the initiative cases see *Lessons from Oregon* at 1212-1215.

65. *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999).

66. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995).

represent a minimum percentage (30-40 percent) of the total votes cast in the election, or either a majority of the total votes cast in the election or two-thirds of the votes cast on the amendment, or a two-thirds majority only on measures providing for new taxes or fees, or that an amendment proposing to impose a supermajority voting requirement for some future government act itself be approved by the same supermajority.⁶⁷

3. Requirements and Limitations as to Form and Scope

A number of states impose formal requirements which can have a substantial impact on how an initiative is presented and how ambitious it can be, and which have given rise to significant litigation. Three important types can be identified: (a) limiting initiative proposals to *amendment(s)*, as distinguished from *revisions* which can only be proposed by conventions or (in some cases) the legislature; (b) limiting each amendment proposal to a single subject; and (c) requiring each amendment proposed to be voted on separately. These restrictions are clearly related to each other by a common assumption about the capacity of the electorate and/or citizen proponents to deal with complex legislative issues, and require definition of "revision" and "(single) amendment," on which state courts have reached differing conclusions. All of these formal requirements first appear in state constitutions as applied to amendment proposals by the legislature, and continue to be applied in many non-initiative states, but they can have particular force in the case of initiatives because of the less deliberative process whereby many if not most initiative proposals are generated, and of the controversial subject-matter of many such proposals. Each has recently been interpreted by the courts in one or more of the most active initiative states as a barrier to a number of controversial initiative amendment proposals.

a. Amendment, but not revision

From its inception, the California provision governing amendments recognized two powers of the legislature: it could, by a majority vote in each house, propose "any amendment, or amendments to this Constitution,"⁶⁸ and it could, by a two-thirds vote in each house, recommend the calling of a convention to "revise and change this entire constitution."⁶⁹ In both instances the addressee of its action would be the electorate, voting either to ratify proposed amendments or to approve the calling of a convention. In 1894⁷⁰ the state supreme court

67. *Book of the States 2005*, Table 1.3 at p. 14.

68. Constitution of 1849, Art. X sec. 1; Constitution of 1879, Art. XVIII sec. 1.

69. Art. X sec. 2 (1849); Art. XVIII sec. 2 (1879).

70. *Livermore v. Waite*, 103 Cal. 113, 36 P. 424, 25 L.R.A. 312 (1894) (dictum, the case before it was decided on other grounds).

said that the provision was to be strictly construed and that the legislature could not "assume the function of a . . . convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment."⁷¹ In this connection it defined "amendment" as "an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."⁷² A series of subsequent decisions have given detailed content to this concept.

In 1911 the power of initiative was adopted, authorizing citizens to propose "statutes and amendments to the Constitution."⁷³ In 1948 the court invalidated a proposed initiative amendment that dealt with at least 12 distinct subjects affecting most areas of the existing constitution, contained more than a third as many new articles, sections and words as the entire existing constitution, and would have involved more extensive changes than those effected by the most recent revision by convention.⁷⁴

In 1962 an amendment proposed by the legislature responded to this line of decisions by specifically authorizing the legislature to propose revisions as well as amendments, while raising the legislative vote requirement to two-thirds in each house for either type of proposal. Almost 30 years later the supreme court reviewed an initiated provision—part of a comprehensive proposal designed to reform the criminal justice system to provide more protection to crime victims—which required that the state's constitutional provisions relating to rights of the accused in criminal cases (a) be interpreted in a manner consistent with the U.S. Constitution, and (b) not be interpreted to afford greater rights to accused persons (including juveniles) than those afforded by the U.S. Constitution. Here the court focused not on the number and variety of changes effected ("quantitative" revision, as in the *McFadden* case mentioned above) but on the fundamental nature of a single change ("qualitative" revision, affecting the "nature of our basic governmental plan"). It found that the second part of this proposal in effect delegated to the U.S. Supreme Court the function of interpreting the state constitution's fundamental criminal defense rights and was therefore invalid,⁷⁵ although the remainder was not affected by that invalidity.⁷⁶ On the other hand, in the following year the court upheld an initiative measure which (a)

71. 103 Cal. at 118, 36 P. at 426.

72. 103 Cal. at 118-119, 36 P. at 426. The Michigan supreme court, also in dictum interpreting similar but not identical language, embraced essentially the same distinction in *Carton v. Secretary of State*, 151 Mich. 337, 340, 115 N.W. 429, 430 (1908). See also *Dodd* at pp 260ff.

73. Constitution Art. 2 sec. 8(a).

74. *McFadden v. Jordan*, 32 Cal.2d 330, 196 P.2d 787 (1948).

75. *Raven v. Deukmejian*, 52 Cal.3d 336, 351f., 801 P.2d 1077, 1086f., 276 Cal.Rptr. 326, 335f. (1990).

76. 801 P. 2d at 1089f., giving effect to a severability clause in the initiative itself.

limited the number of terms in office that members of the legislature or the most important state-wide executive or administrative officers can serve, and (b) limited total government expenditures and expenditures specifically for the operation of the legislature; it found that opponents' claims of far-reaching consequences for the effective operation of government were too speculative to establish a qualitative revision.⁷⁷

Courts in other states with similarly worded constitutional amendment provisions—whether or not they include the power of initiative—have divided on whether their convention provisions are to be regarded as the exclusive method for revision. In Alabama and Oregon the provision was held to be exclusive,⁷⁸ while in Ohio, Georgia, Kentucky, and Idaho the courts take the position that the people retain the inherent power to revise their constitution by any means they wish.⁷⁹

b. Single-subject rule

Seven initiative states have adopted the rule—some specific to the initiative process, some applicable to all amendments—which limits any proposed constitutional amendment to a single subject.⁸⁰ In principle it means only that for each subject a separate amendment must be proposed, but in practice that can be a significant impediment to gaining approval for the proponents' goals in a proposal of any complexity, so that much depends on the breadth or narrowness of judicial interpretation of the rule.

We can begin again with California and the *Raven* case described above. California's constitutional article on the initiative contains the following provision, applicable to statutory as well as constitutional initiatives: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."⁸¹ Drawing on a number of prior decisions, the court said that a measure meets the single-subject requirement if, despite its varied collat-

77. *Legislature of the State of California v. Eu*, 54 Cal3d 492, 816 P.2d 1309, 286 Cal.Rptr. 283 (1991).

78. *State v. Manley*, 441 So.2d 864 (Ala. 1983); *Holmes v. Appling*, 237 Ore. 546, 392 P.2d 636 (1964).

79. *State ex rel. Hubbell v. Bettman*, 124 Ohio St. 24, 176 N.E. 664 (1931); *Wheeler v. Board of Trustees of Fargo Consol. Sch. Dist.*, 200 Ga. 323, 37 S.E.2d 322 (1946); *Gatewood v. Mathews*, 403 S.W.2d 716 (Ky. 1966); *Smith v. Cenarrusa*, 93 Idaho 818, 475 P.2d 11 (1970).

80. California Constitution Art. II sec. 8(d); Colorado Constitution Art. V sec. 1(5.5); Florida Constitution Art. XI sec. 3; Mississippi Constitution Section 272 paras. 2, 4; Missouri Constitution Art. XII sec. 2(b); Oklahoma Constitution Section XXIV-1; Oregon Constitution Art. IV sec. 1(d). The single-subject concept has a long history in many states of application to ordinary legislative acts.

81. Art. 2 sec. 8(d). The original, substantively identical version was first introduced into the initiative article in 1948 as an extension of the long-standing requirement for ordinary legislation, see *Perry v. Jordan*, 34 Cal.2d 87, 204 P.2d 47 (1949).

eral effects, all of its parts are 'reasonably germane' to each other and to the general purpose of the initiative.⁸² The court found that the measure before it constituted a "comprehensive criminal justice reform package" for the stated purpose of "strengthen[ing] procedural and substantive safeguards for victims," and sustained it.⁸³ It emphasized the essential legislative process of balancing competing interests, and found that the measure was not too complicated for the electorate to understand.⁸⁴

In some states the rule has been more stringently applied. In Colorado, where the rule was not extended to initiative measures until 1994 in response to a perceived pattern of abuses of the process, the state supreme court held that in a measure addressing various aspects of the procedure governing initiative petitions, a provision eliminating the single-subject requirement for initiatives was not sufficiently related to the procedural issues to be part of the same subject.⁸⁵ In doing so it identified two principal concerns underlying the rule: that measures incapable of passage on their own will be passed solely because they are joined with more popular ones ("log-rolling"), and that particular provisions will go unnoticed in the context of broad and complex proposals. In scarcely ten years of application the Colorado court has invalidated a half-dozen or more initiatives on this ground.⁸⁶

In other states the single-subject rule, otherwise liberally applied, has been held violated by a measure that has too great an impact on the core functions of more than one branch of government, which the California court might characterize as a "qualitative revision" not appropriate for initiative. Thus the Florida supreme court has declared invalid an initiative which would have required that 40 percent of all state appropriations (other than lottery proceeds and federal funds), be allocated to education, on the ground that it would substantially perform the legislature's fiscal appropriation function and preempt the governor's veto power, thereby effecting what an earlier decision characterized as "multiple 'precipitous' and 'cataclysmic' changes in the constitution" against which the single-subject

82. 52 Cal.3d 336, 346, 801 P.2d 1077, 1083 — citing in particular *Brosnahan v. Brown*, 32 Cal.3d 236, 651 P.2d 274, 186 Cal.Rptr. 30 (1982).

83. 52 Cal. Rptr. at 347f.

84. *Id.* At 348-9. The only case which has failed this test involved two distinct limitations on legislative power joined in a single measure, on the rationale that legislators should be more responsive to citizens than to their own interests; this was held too broad. *Senate of the State of California v. Jones*, 21 Cal. 4th 1142, 988 P. 2d 1089, 90 Cal.Rptr.2d 810 (1999).

85. *In the Matter of the Title, Ballot Title and Submissions Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438 (Colo. 2002).

86. Cases cited in *Initiative 2001-02 #43*, 46 P. 3d at pp. 443-445, and *In the Matter of the Title, Ballot Title and Submission Clause for 2003-2004 #32 and #33*, 76 P.3d 2003 (Colo. 2003).

rule was intended protect the voters.⁸⁷ It also invalidated on this ground a so-called “anti-affirmative action” proposal, which would have forbidden state and local government bodies from “treating people differently based on race, sex, color, ethnicity, or national origin in the operation of public education.”⁸⁸ The court found that this proposal would have drastically limited all three branches of government from taking otherwise appropriate action to remedy the effects of discrimination against certain disadvantaged minorities, without clearly indicating those implications as a series of separate proposals would have done.

c. Separate-vote requirement

Three initiative states (in common with a number of non-initiative states) have a separate vote requirement applicable to amendments generally, including the two (California and Oregon) in which constitutional initiative is most active and which also have a single-subject rule specifically for initiatives.⁸⁹ Of the three, only Oregon’s courts have found this requirement to have a meaning sharply distinct from the single-subject rule, and that is a quite recent development. In *Armatta v Kitzhaber*⁹⁰ the Oregon supreme court had before it a crime victims’ rights amendment initiative similar to that which was invalidated by the California court in *Raven* as an impermissible revision. The Oregon court, however, relied for the first time on a provision essentially retained from the original constitution of 1859: “When two or more amendments shall be submitted . . . to the voters of this state at the same election, they shall be so submitted that each amendment shall be voted on separately.”⁹¹ The court held that the particular role of the separate-vote requirement was to focus on the manner in which the proposal changes the existing constitution, and that the issue is whether “if adopted, the proposal would make two or more changes to the constitution that are substantive and that are not *closely* related.”⁹² The court then found that the measure before it would change multiple provisions in the state’s Bill of Rights, including at least three not specifically mentioned, and that these changes were related to one another only in so far as they affected rights that might be implicated during a criminal investigation or prosecution; that relationship was held not to be sufficiently

87. *Advisory Opinion to the Attorney General re Requirement for Adequate Public Education Funding*, 703 So.2d 446 (Fla. 1997).

88. *Advisory Opinion to the Attorney General re Amendment to Bar Government from Treating People Differently Based on Race in Public Education*, 778 So.2d 888 (Fla. 2000).

89. Arizona Constitution art. 21 sec. 1; California Constitution art. 18 sec. 1; Oregon Constitution art. 21 sec. 1, last sentence.

90. 327 Or. 250, 959 P.2d 49 (1998).

91. Oregon Constitution Art. XVII sec. 1, fourth sentence.

92. 327 Or at 277, 959 P.2d at 64 (emphasis added).

close to satisfy the requirement, where they involve “separate constitutional rights granted to different groups of persons.”⁹³ This decision had an immediate impact on the rate of rejection of proposed initiative amendments by the secretary of state, on advice from the attorney general, for failure to comply with this rule,⁹⁴ and predictably brought intense criticism from interest groups fearing substantial curtailment of the initiative’s use. Indeed an initiative amendment proposal was submitted shortly thereafter which would have reworded the single-subject and separate-vote requirements applicable to initiatives so as to overrule the decision, but it in turn was the subject of a successful challenge in the courts — not by opponents of the measure but by the petitioners, claiming that the “ballot title” provided by the state’s attorney general pursuant to law would fail to apprise the voters of the fact that two distinct constitutional requirements contained in different articles would be affected and would have to be voted on separately.⁹⁵ The rule of *Armatta* has since been applied to invalidate a measure which was approved by the voters ten years earlier, setting term limits for state officials and members of the national congress — one of the most important of Oregon’s initiatives which had led a nationwide trend toward term limits.⁹⁶

93. 327 Or at 283f., 959 P.2d at 67f.

94. See Phillip Bentley, *Armata v. Kitzhaber: A New Test Safeguarding the Oregon Constitution from Amendment by Initiative*, 78 ORE. L. REV. 1139, 1154f. (1999).

95. *Novick v. Myers*, 333 Or 154, 36 P.3d 486 (2001). While the court’s ruling simply sent the measure back to the attorney general for rewriting of the ballot title to conform to the existing requirements, it does not appear that the measure has yet reached the ballot in proper form.

96. *Lehman v. Bradbury*, 333 Or. 231, 37 P. 3d 989 (2002).