

***Ohio House Constitutional Resolutions Committee  
Testimony of Steven H. Steinglass  
House Joint Resolution 1  
135<sup>th</sup> General Assembly  
April 18, 2023***

Chairman Plummer, Vice-Chair Hillyer, Ranking Member Mohamed, Minority Leader Russo, and members of the House Constitutional Resolutions Committee, thank you for the opportunity to provide this written testimony on H.J.R. 1.

My name is Steven H. Steinglass, and I am Dean Emeritus and Professor Emeritus at the Cleveland State University College of Law, where I have studied, taught, lectured, and written about the Ohio Constitution for almost four decades. And my views of the Ohio Constitution have been informed by my service as Senior Policy Advisor for the *bipartisan* Ohio Constitutional Modernization Commission from 2013 until its untimely demise in 2017.

I submit this testimony to express my personal opposition to H.J.R. 1, which would increase the passing percentage for Ohio constitutional amendments from the current 50% to 60%. H.J.R. 1 makes major changes in the Ohio Constitution by abandoning a fundamental policy that has been part of the Ohio Constitution since 1912.

Constitutions are designed to endure, and one should not make major changes in fundamental constitutional arrangements unless the changes are supported by a careful understanding of the policies being changed and the consequences—intended or otherwise—of the proposed changes.

State constitutions and the U.S. Constitution are similar in many ways. They establish a framework for government, create a system of separation of powers, and contain Bills of Rights to protect citizens from the abuses of government.

But that is where the similarities end, and the Ohio Constitution has evolved differently from the U.S. Constitution and differently from the constitutions of other states. And the effectiveness of a state constitution can only be understood by looking to the history, traditions, and values of that state.

Put somewhat differently, as the National Municipal League noted in its 1963 Introduction to its final attempt to draft a Model State Constitution, “there can be no such thing as a ‘Model State Constitution’ because there is no model state.”

Major changes in state constitutions should only be made after deep thought and the opportunity for participation of those most affected by the constitution—the people.

So, let’s take a look at the Ohio history of constitutional revision.

Ohio's first constitution, which was drafted in less than 30 days in November 1802 in Chillicothe by 35 men, was never presented to the voters for approval. And that constitution—though it remained in effect during an unprecedented period of Ohio growth in the first half of the 19<sup>th</sup> century—was deeply flawed. By giving virtually all power to the General Assembly and virtually none to the governor, the framers of the 1802 Ohio Constitution adopted a system of legislative supremacy. And they gave the General Assembly the power to thwart future constitutional amendments by only permitting constitutional conventions to be used to change the constitution (after the General Assembly put a constitutional call on the ballot).

The delegates to the 1851 Ohio Constitution recognized the shortcomings of our first constitution and completely reorganized the state constitution and thus state government. They proposed an expansion of the power of the governor, they took the power to appoint judges away from the General Assembly, they gave the voters a direct role in selecting state officials, including judges, and they ended the ability of the General Assembly to block all constitutional revision.

The 1851 Constitution also limited the power of the General Assembly through procedural requirements (*e.g.*, the single subject rule, the three-readings requirement, and the requirement that the General Assembly act through general and not special or private legislation). It also placed substantive limitations on the ability of the General Assembly to incur debt, to extend the credit of the state to private entities, and to support internal improvements.

The voters approved the Ohio Constitution of 1851, our current constitution, on June 17, 1851, by a vote of 125,564 to 109,276, or a 53.5% margin, which was far less than the proponents of H.J.R. 1 have proposed for constitutional amendments.

Despite the limitations on the General Assembly, the General Assembly had clawed back much of the power it had lost by the early 20<sup>th</sup> century. But the Progressive Movement recognized that means must be found to get around the obstacles created by an unresponsive legislative branch. And they looked to the adoption in other states, including South Dakota and Oregon, of the constitutional initiative.

The crowning achievement of this movement was the work of the Ohio Constitutional Convention of 1912. As Hoyt Landon Warner, the foremost scholar of the Progressive era in Ohio, has told us, the convention call was supported by a broad array of Ohioans, including the Direct Legislation League, the Progressive Movement, Labor, Municipal home rule supporters, the Ohio State Board of Commerce (the precursor of the Ohio Chamber of Commerce), the Liquor interests, and Women's suffrage advocates.

The Convention was amazingly successful. Instead of proposing a new constitution and risking its rejection as happened to the proposed 1874 Constitution, the delegates recommended 42 separate amendments, and the voters approved 34 of them.

One cannot predict the future, but one can look to the past to see how today's "reforms" would have fared had they been adopted in earlier times. And an increase in the passing rate to 60% would have had a real-world negative impact on the governance of our state.

Under a 60% requirement:

- 19 of the 34 amendments proposed by the 1912 Constitutional Convention and approved by the voters would have failed, including the initiative and referendum, home rule, civil service reform, and the elimination of the supermajority requirement for amendments proposed by the General Assembly.
- 8 of the 16 constitutional amendments proposed by the General Assembly and approved by the voters in the 1970s (which had their origins in the work of the Ohio Constitutional Revision Commission) would have failed.
- Bond issues for economic development, conservation, and housing would have failed.

Much of the focus of supporters of H.J.R. 1 has been on constitutional amendments proposed through the initiative, but this focus may have misled some into thinking that initiated amendments have become commonplace and that the process has been captured by out-of-state special interests.

Indeed, the proposal to increase the passing percentage for Ohio constitutional amendments has some superficial appeal, but the proposal is deeply flawed, as is the decision to blame the citizen initiative process for the length and other flaws in our state constitution. And as U.S. Supreme Court Justice Oliver Wendell Holmes, Jr. reminded us before he joined the Court, "the life of the law has not been logic; it has been experience."

Here are some relevant aspects of that experience.

The Ohio Constitution has been amended 127 times since the voters approved the recommendation of the 1912 Constitutional Convention to adopt the initiative and referendum to create ways to get around an unresponsive General Assembly.

Ohioans have been very judicious about the use of the constitutional initiative; voters have approved only 19 amendments out of the 71 proposed by initiative. This 27% passing average can be contrasted with the 69% passing average of amendments proposed by the General Assembly as voters approved 108 of the 156 amendments proposed by the General Assembly.

Because the constitutional initiative is rarely used does not mean that it has not been important; key features of the Ohio Constitution and thus the lives of Ohioans owe their existence to the initiative but would not have been adopted under a 60% passing rate. These include county home rule, the 10 mill limitation on unvoted property taxes, the elimination of straight party ticket voting, and the minimum wage.

Different people will view those amendments differently, but the range of topics illustrates that the initiative is not a one-way ratchet designed to put any group's political preferences into the constitution. What these amendments have in common, however, is that they all represent instances in which Ohio electors determined that the General Assembly was not responsive to their concerns, and the initiative provided a means of amending the constitution to serve those interests.

Where the system has been subjected to abuse, the voters have approved amendments that place almost insurmountable obstacles in the way of objectionable amendments, as was done in 2015

with the adoption of an anti-monopoly amendment that would have blocked the 2009 casino gambling amendment.

The argument has also been made that the length of the Ohio Constitution, which at almost 60,000 words is the ninth longest in the nation (according to the authoritative Book of the States), is the result of the initiative. But only about 6,000 words or 10% of the Ohio Constitution is attributable to the initiative.

So, my conclusion is that the 60% issue is not ready for prime time. While some may see short-term political advantage in its adoption, the long-term implications for the health of Ohio is at best uncertain, and this uncertainty cautions strongly against any precipitous change in a policy that has remained in effect for 111 years.