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Forword

**\*1075** FOREWORD: GETTING FROM HERE TO THERE: TWENTY-FIRST CENTURY MECHANISMS AND OPPORTUNITIES IN STATE CONSTITUTIONAL REFORM [[FNd1]](#Document1zzFd1316252366)

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I. Introduction

      Formal constitutional change is easier at the state level than at the federal level. [[FN1]](#Document1zzF1316252366) [Article V of the United States Constitution](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTV&FindType=L) offers only two mechanisms for proposing constitutional amendments: proposal by two-thirds majorities in both houses of Congress or proposal by a convention specially called for that purpose. [[FN2]](#Document1zzF2316252366) Amendments proposed via either mechanism must win approval by three-quarters of the states, acting through **\*1076** their legislatures or through ratifying conventions. [[FN3]](#Document1zzF3316252366) These stringent requirements make both proposal and ratification of amendments difficult—in fact, commentators have suggested that some federal amendments have been adopted only by circumventing the requirements of [Article V](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTV&FindType=L). [[FN4]](#Document1zzF4316252366) The convention approach for proposing amendments has never been utilized, and proposal by Congress has been employed only rarely—since the adoption of the Bill of Rights in 1791, the U.S. Constitution has been amended only seventeen times in more than two centuries. Certainly the federal requirements are considerably more onerous than those imposed by most other national constitutions. [[FN5]](#Document1zzF5316252366)

      In contrast, state constitutions tend to facilitate constitutional change, and over time states have eased the requirements for introducing changes. [[FN6]](#Document1zzF6316252366) Many state constitutions expressly authorize constitutional revision (replacement), a topic not expressly dealt with by the Federal Constitution. [[FN7]](#Document1zzF7316252366) They also afford a variety of mechanisms by which amendments can be proposed. As at the federal level, amendments may originate in the legislature, though most state constitutions either do not impose a super-majority requirement or one as stringent as that found in the Federal Constitution. States may also call conventions to propose amendments, and once again the process for calling a convention is typically less demanding than at the federal level, where two-thirds of the states must petition for a convention. Eighteen states also permit constitutional amendments to be introduced via the constitutional initiative, and Florida has established appointed commissions for the express purpose of proposing amendments **\*1077** directly to the electorate. Once proposed, in all states except Delaware, amendments are submitted to voters for ratification via referendum, and most states permit ratification by a simple majority of those voting on the proposed amendment. [[FN8]](#Document1zzF8316252366)

      The multiplicity of mechanisms for introducing state constitutional change, each with its own distinct politics, increases the opportunities available to constitutional reformers for pursuing their objectives. Moreover, failure in one arena can spur activity in another. For example, should the state legislature refuse to propose a constitutional amendment, a group may be able to pursue its objective through the constitutional initiative, as occurred with campaign finance reform in Colorado. [[FN9]](#Document1zzF9316252366) Similarly, the legislature's refusal to act on a constitutional commission's recommendations or the voters' rejection of proposals by a constitutional convention may lead to piecemeal accomplishment of some or all of these changes through different mechanisms. [[FN10]](#Document1zzF10316252366)

      However, no catalogue of the mechanisms for state constitutional change can fully capture the richness or the variety of the approaches that have been used, or more importantly, that could be used, for state constitutional change. Such a catalogue obscures the distinctive practices with regard to constitutional change that developed in various states and the less familiar paths to constitutional reform pioneered by particular states. Nor can such a catalogue identify the methods developed beyond the nation's borders that could be adapted and employed by American state constitutional reformers.

**\*1078** This Foreword seeks to promote a broader perspective on state constitutional change, by encouraging constitution-makers and constitutional reformers to think more creatively about the myriad options available to them for promoting reform, for “getting from here to there.” Our concern throughout is to emphasize that instead of fitting their needs to the accepted and familiar structures and mechanisms of constitutional change, state constitutional reformers should begin to adapt such structures and mechanisms to their needs. [[FN11]](#Document1zzF11316252366) In fact, the processes of state constitutional change have evolved since the first state constitutions. This evolution continues today and will into the future. This Foreword seeks to contribute to that process of evolution. We begin our analysis with a review of the existing mechanisms for constitutional reform in the American states.

II. Existing Mechanisms of State Constitutional Change

A. Revision of State Constitutions

1. Constitutional Conventions

a. Constitutional Conventions Authorized by the State Legislature

      The constitutional convention is the time-honored mechanism for writing state constitutions, either to devise an initial constitution when a state enters the Union or to replace an existing constitution. The constitutions of forty-one states expressly detail processes for calling constitutional conventions. [[FN12]](#Document1zzF12316252366) **\*1079** Most state constitutions authorize the state legislature to propose a constitutional convention. But even in the absence of express authorization, state courts found in their constitutions an implied power to propose or call a convention. [[FN13]](#Document1zzF13316252366) In doing so, they typically rely on broad language in the state constitution recognizing the people as the source of all political power. [[FN14]](#Document1zzF14316252366) This power may be limited by the state constitution—the Tennessee Constitution, for example, limits the state to no more than one constitutional convention every six years—but such requirements channel rather than curtail the power to call conventions. [[FN15]](#Document1zzF15316252366)

      Some state constitutions require a simple majority in each house to submit the question of whether to call a convention to popular referendum. Other state constitutions require a super-majority for a convention call. This is particularly characteristic of those states that allow the state legislature to call a convention without a popular referendum.

b. Constitutional Conventions Authorized Through an Automatic Convention Call

      Fourteen state constitutions mandate that the question of whether to hold a convention be submitted to voters periodically. In eight of these states, the period is twenty years; in four states, it is ten years; in Michigan, it is sixteen years; and in Hawaii, it is nine years. [[FN16]](#Document1zzF16316252366) Voters, however, rarely avail themselves of the opportunity to call conventions pursuant to these periodic mechanisms. “In the quarter century between 1960 and 1985 automatic convention calls were approved only in New Hampshire, Rhode Island and Alaska In each of four states that provided for an automatic convention call during the early 1990'Fs—Alaska, New Hampshire, Ohio and Michigan— majorities have rejected the opportunity.” [[FN17]](#Document1zzF17316252366) Rhode Island's **\*1080** convention in 1985 was the most recent called through the automatic-question mechanism. [[FN18]](#Document1zzF18316252366)

      Still, the automatic character of these referenda has several advantages. It enables proponents of constitutional change to circumvent the legislature, when the legislature itself may be the problem to be solved. It also creates a level playing field between those advocating constitutional change and those resisting the calling of a convention. In addition, it encourages public scrutiny of and debate on the state's constitutional arrangements, [[FN19]](#Document1zzF19316252366) the “frequent recurrence to fundamental principles” crucial to maintaining “the blessings of a free government.” [[FN20]](#Document1zzF20316252366) Finally, the prospect of a convention vote may encourage legislators, as a matter of self-preservation, to address citizen concerns that could lead them to endorse a convention, lest a new constitution diminish their powers and prerogatives.

      Nevertheless, the usefulness of these automatic convention votes is open to question. [[FN21]](#Document1zzF21316252366) For one thing, the timing of the vote may be inconvenient, occurring when no constitutional problems are salient. The automatic referendum can thus become “a remedy in search of a problem.” [[FN22]](#Document1zzF22316252366) Timing may also be inconvenient because of political realities in the state. For example, Missouri had an automatic vote in 2002, but the convention issue generated almost no public debate, because political forces in the state were far more concerned with the accession of a new governor and the reapportionment of the state legislature. Finally, the periodic vote is for an unlimited constitutional convention, and even those who recognize that some constitutional changes are needed may hesitate to authorize an unlimited convention whose deliberations they cannot limit. Defeat of an automatic **\*1081** referendum may thus inaccurately suggest a popular satisfaction with the status quo. [[FN23]](#Document1zzF23316252366)

c. Constitutional Conventions Authorized via Initiative

      The Florida and Montana Constitutions allow voters to authorize a convention via the initiative, although in neither state have voters availed themselves of this option. This mechanism emphasizes the importance of popular support for constitutional change, while at the same time ensuring that any change is the result of a deliberative process.

      Although state constitutions emphasize popular support for and participation in constitution-making and constitutional change, this popular support must be channeled through constitutionally prescribed mechanisms. Thus, an Oregon court invalidated an attempt to revise the Oregon Constitution through the initiative, [[FN24]](#Document1zzF24316252366) and the Supreme Judicial Court of Massachusetts in 1970 blocked an attempt to call a limited constitutional convention via the indirect initiative. [[FN25]](#Document1zzF25316252366)

d. Ratification of Convention Proposals

      In every state, convention proposals—whether new constitutions or constitutional amendments [[FN26]](#Document1zzF26316252366)—are now subject to ratification via referendum. In most states, convention proposals can be submitted for ratification at either a general election or a special election. The Missouri and South Dakota Constitutions, however, require ratification of convention proposals at a special election. [[FN27]](#Document1zzF27316252366) The Florida and New Hampshire Constitutions mandate ratification at a general election, so ratification must also be in an even-numbered year. [[FN28]](#Document1zzF28316252366)

      The requirements for ratification vary from state to state. Twenty-three states require for ratification that a majority of those voting on constitutional convention proposals approve them. [[FN29]](#Document1zzF29316252366) New Hampshire demands a two-thirds **\*1082** vote in support of proposals, [[FN30]](#Document1zzF30316252366) and in recent years amendments have failed despite garnering more than sixty percent of the popular vote. [[FN31]](#Document1zzF31316252366) The Colorado Constitution requires approval by a majority of those voting in the election, so that a voter's failure to vote on a proposed constitution or amendment has the same effect as a negative vote. [[FN32]](#Document1zzF32316252366) In Hawaii, the requirement is at least fifty percent of those voting in a general election, or in a special election, the equivalent of thirty percent of those registered. [[FN33]](#Document1zzF33316252366) In other states ratification majorities are not constitutionally specified, a virtual invitation to litigation. In Hawaii, if a convention and the legislature propose amendments that are in conflict and both pass, the revisions proposed by a convention are given precedence. [[FN34]](#Document1zzF34316252366) Finally, most state constitutions specify an effective date for constitutional changes ratified by the voters.

2. Constitutional Revision Through the State Legislature

      Popularly authorized conventions are not the only means by which constitutional revision may be accomplished. At least six states allow constitutional revision through the legislature, and at times “sets of amendments” passed simultaneously have “substantially altered the character of state government.” [[FN35]](#Document1zzF35316252366) Moreover, in Idaho, Georgia, and Kentucky, courts have permitted legislatures to seek ratification of constitutions that they drafted even without explicit constitutional authority to do so. [[FN36]](#Document1zzF36316252366)

      In a few instances, state legislatures declared themselves conventions and sought to propose constitutions. [[FN37]](#Document1zzF37316252366) Yet because the state legislature is **\*1083** created by and subordinate to the state constitution, voters generally have not been sympathetic to legislative efforts to substitute for popularly elected conventions. [[FN38]](#Document1zzF38316252366) In New Jersey, the Legislature convened as a constitutional convention in 1944, but the voters rejected its proposed constitution. [[FN39]](#Document1zzF39316252366) And in Louisiana, the Governor apologized to the electorate after voters overwhelmingly rejected the constitutional reforms proposed by the Legislature after he called it into special session to revise the Louisiana Constitution. [[FN40]](#Document1zzF40316252366)

3. Constitutional Revision by the Legislature Based on Recommendations of a Constitutional Commission

      Constitutional commissions developed during the nineteenth century and were widely used in the twentieth century to furnish legislators with expert advice on constitutional problems, to draft constitutional amendments for legislative consideration, and to make preparations for a constitutional convention. [[FN41]](#Document1zzF41316252366) During the twentieth century, however, some states also employed commissions to draft new constitutions. Georgia pioneered this approach in 1945, in part to avoid the onerous constitutional requirement that conventions be called by a two-thirds vote of the total membership of both houses of the state legislature. [[FN42]](#Document1zzF42316252366) The Governor appointed a blue-ribbon commission, which included the leading officials in the state, to draft a constitution and submit its proposed constitution to the state legislature. [[FN43]](#Document1zzF43316252366) After holding public hearings, the legislature made several changes and then submitted the constitution to the public at the next general election, where it was ratified. [[FN44]](#Document1zzF44316252366)

**\*1084** Georgia's success provided a model for future reform efforts. Georgia appointed commissions to draft new constitutions in 1976 and 1983, and Virginia employed the commission approach in drafting its 1970 constitution. [[FN45]](#Document1zzF45316252366)

      Aside from its utility in circumventing at least some constitutional impediments to reform, the commission approach to constitutional revision is generally a less desirable substitute for the constitutional convention. Undoubtedly, there are some advantages: the commission's smaller size may facilitate quick action, and a commission is less costly than a convention. However, these are outweighed by several disadvantages. Those appointed to the commission are likely to share the political perspective of those who selected them, and they are unlikely to propose fundamental reforms to the existing political order. Beyond that, the commission system provides considerably less opportunity for popular input. The decision to hold a convention is made by the people, whereas the decision to appoint a commission is not; and the selection of convention delegates is by popular vote, whereas the members of the commission are appointed. Moreover, the commission's lack of public visibility means that it is unlikely to stimulate the same public interest and debate as would a convention. [[FN46]](#Document1zzF46316252366)

      As noted, commissions have been used for, among other things, both recommended revision and amendment of state constitutions. Their use in the process of amendment is considered in the next section.

B. Amendment of State Constitutions

      During the nineteenth century, constitutional revision via constitutional conventions was the predominant mode of constitutional change: ninety-four constitutions were adopted during the century, and several others were proposed but not ratified. [[FN47]](#Document1zzF47316252366) Beginning in the twentieth century and continuing to the present day, the preferred mode of constitutional change shifted from comprehensive to piecemeal reform. Constitutional revision **\*1085** declined in importance—only seventeen states adopted new constitutions during the twentieth century, and none during the twenty-first—and so did constitutional conventions. [[FN48]](#Document1zzF48316252366) In their place, states relied much more heavily on constitutional amendment, opting to fine-tune and alter their constitutions rather than to propose a comprehensive overhaul of their institutional arrangements. This section therefore describes the mechanisms for amending state constitutions and analyzes the issues arising out of their use.

1. Amendments Proposed by a Limited Constitutional Convention

      Concerns about unlimited conventions opening a “Pandora's box” have been used, sometimes sincerely, to argue against calling constitutional conventions. [[FN49]](#Document1zzF49316252366) This has proved particularly effective at the federal level, where there has been no experience with a limited constitutional convention, but it has succeeded in the states as well. In addition, powerful groups in state politics—for example, labor unions, tax limitation advocates, and public employees—often won inclusion in state constitutions of provisions that protect their interests; and they do not wish to see these put at risk of change or removal, however remote the political risk may be. This proved to be the case in New York in 1997 and Rhode Island in 2004, where automatic referenda on unlimited conventions were defeated. [[FN50]](#Document1zzF50316252366)

      To counter these and other sorts of opposition to constitutional conventions, states developed the limited constitutional convention, which limits the range of matters to be considered by the convention but allows delegates to propose amendments in those areas to the existing constitution. The act authorizing the convention, together with the public question approved by voters at the referendum, limits the delegates to consider only certain subjects and/or prohibits them from considering certain subjects. For example, the Constitutional Convention of 1966 in New Jersey was authorized to consider only the question of legislative apportionment, **\*1086** whereas the Constitutional Convention of 1947 in New Jersey was forbidden to address the state's system of apportionment. [[FN51]](#Document1zzF51316252366) Whatever form the limitation takes, the effect is to take certain politically-charged topics “off the table” at the convention and to calm fears about the convention's otherwise unlimited mandate to consider all aspects of a state's constitution. [[FN52]](#Document1zzF52316252366)

      The states have extensive experience with limited constitutional conventions: about fifteen percent of all state constitutional conventions were substantially limited, and the proportion increased since World War II. [[FN53]](#Document1zzF53316252366) Some state constitutions—for example, those in Kansas, North Carolina, and Tennessee—expressly provide for calling a constitutional convention with a limited agenda. [[FN54]](#Document1zzF54316252366) In Tennessee the legislature can limit a convention's substantive reach, but not how it may act on a specified subject once it is called. [[FN55]](#Document1zzF55316252366) Other state constitutions, such as Wisconsin's, provide for the calling of conventions but do not address whether the conventions can be limited. [[FN56]](#Document1zzF56316252366) Still other state constitutions, such as New Jersey's, contain no provisions whatsoever concerning constitutional conventions, which leaves maximum flexibility to the legislature and the people in deciding whether to call a limited or unlimited convention.

      Some state constitutions, however, prohibit limited conventions. For example, the Alaska Constitution refers to the power of a convention as “plenary,” and says: “No call for a constitutional convention shall limit these powers of the convention.” [[FN57]](#Document1zzF57316252366) Still others preclude calling limited conventions through particular mechanisms. For instance, the Montana Constitution **\*1087** specifies that a convention called through the use of the initiative must be unlimited. [[FN58]](#Document1zzF58316252366) Nine automatic referendum states specify the ballot question in their constitutions, thus precluding the imposition of limits on what a convention called through this procedure might consider. [[FN59]](#Document1zzF59316252366)

      Questions invariably arise about whether a constitutional convention can actually be limited, or whether the possibility exists of a “runaway” convention. There may indeed be a question as to whether a federal constitutional convention can be limited so as to consider only certain subjects or to exclude certain subjects from its consideration. [[FN60]](#Document1zzF60316252366) But one should recognize that this debate about a limited federal constitutional convention is based on different legal materials and thus does not pertain to the discussion of limited state constitutional conventions. When it comes to constitutional change, we really do have “dual constitutionalism“—two separate federal and state constitutional structures—in this country. [[FN61]](#Document1zzF61316252366) It seems clear, based on legal authorities and state court cases, that if the proper procedures are followed to impose limitations on a state constitutional convention, those limits are legally enforceable.

      A consensus on this issue emerged during the twentieth century. Prior to that time, respected authors of legal treatises on state constitutional conventions disagreed about whether limitations could be placed upon such conventions. [[FN62]](#Document1zzF62316252366) This debate was separate and distinct from the debate on the validity of state constitutional conventions that were approved by the people but that did not conform to the constitutional requirements for conventions. [[FN63]](#Document1zzF63316252366) The crux of this debate concerned whether the legislature itself could limit a state constitutional convention. When the question was reformulated to ask **\*1088** whether the voters could by referendum adopt limitations suggested by the legislature as to what their elected delegates could do at a state constitutional convention, a consensus emerged that this was a valid and legally-enforceable limit. [[FN64]](#Document1zzF64316252366) Dick Howard summarized the prevailing view:

       The prevailing view treats a convention as the agent of the people who have called it. Thus, where the people must vote to approve the calling of a convention the people are seen to have given their implicit approval to limitations on the convention's power contained in the enabling legislation that put the question of calling a convention to the people. [[FN65]](#Document1zzF65316252366)

      The majority of state judicial rulings tend to confirm this point. Thus, the Virginia Supreme Court in 1945 noted:

       [W]here the legislature, in the performance of its representative function, asks the electors if they desire a convention to amend or revise a certain part of the Constitution but not the whole Constitution, an affirmative vote of the people on such a question would have the binding effect of the people themselves limiting the scope of the convention to the very portion of the Constitution suggested to them by the legislature. The wishes of the people are supreme. [[FN66]](#Document1zzF66316252366)

**\*1089** The Pennsylvania Supreme Court took a similar position, as early as 1874. [[FN67]](#Document1zzF67316252366) And in an important 1947 decision, the Kentucky Supreme Court, relying on the fact that the state constitution did not limit the legislature's authority, upheld a “limit” on a constitutional convention that required it to submit its proposed revisions to the electorate for ratification. [[FN68]](#Document1zzF68316252366) The court relied on both the legislature's plenary authority and the directions of the voters to their delegates. [[FN69]](#Document1zzF69316252366) The Supreme Court of Tennessee reached a similar result in 1949, concluding that it was “[t]he people themselves who by their vote under the terms of this act limit the scope of the convention.” [[FN70]](#Document1zzF70316252366)

      Some states have constitutional provisions or judicial decisions that seem to prohibit the use of a limited constitutional convention. In Alabama's case, this is based on a 1955 advisory opinion, on a four-three vote, that utilized questionable reasoning and may well not command a current majority of the court. [[FN71]](#Document1zzF71316252366) Other states have similar judicial rulings. In such circumstances, of course, the state constitution could be amended to provide for the option of a limited constitutional convention. [[FN72]](#Document1zzF72316252366) Nevertheless, a leading modern commentator concluded:

**\*1090** The state rule, broadly speaking, is that the citizens of a state may limit a convention's agenda by approving limitations in a popular vote. The argument in support of the rule is that the citizens of a state are sovereign, and the sovereign has the power to amend the basic principles by which it has chosen to be governed. Since by definition the sovereign's amending power cannot be limited, the sovereign may delegate its entire amending power to a suitable agent, such as a convention. It follows that the sovereign may validly delegate only a portion of its amending power. [[FN73]](#Document1zzF73316252366)

      Finally, it is important to point out that in a few states whose constitutions contain no provisions whatsoever concerning constitutional conventions, there are no requirements and no restrictions. This leaves maximum flexibility to the legislature and the people. [[FN74]](#Document1zzF74316252366) The few states that have judicial rulings prohibiting limited state constitutional conventions reflect the enforcement of provisions restricting the way conventions take place.

      If states can impose limits on constitutional conventions, how might they do so? The legislation authorizing New Jersey's 1947 Constitutional Convention illustrates the array of mechanisms available. [[FN75]](#Document1zzF75316252366) First, the limitation was expressed in the title of the Act. [[FN76]](#Document1zzF76316252366) Second, in the Act's legislative findings, the authority for the limitation was expressed. [[FN77]](#Document1zzF77316252366) Third, **\*1091** the bill imposed a statutory restriction on the powers of the convention. [[FN78]](#Document1zzF78316252366) Fourth, the legislation specified that the public question to be presented to the voters contain within it the limitation [[FN79]](#Document1zzF79316252366) and required the Secretary of State to review the proposals, for conformity with the limitation before submission to the voters. [[FN80]](#Document1zzF80316252366) Finally, the legislation specified that the delegates' oath include their commitment to abide by the limitation. [[FN81]](#Document1zzF81316252366)

      An important, related question concerns the mechanisms available for enforcing limits imposed on state constitutional conventions if they exceed their authority. These are particularly significant because, for example, the Rhode Island Supreme Court ruled in 1975 that despite the valid limits on a constitutional convention proposed by the legislature and adopted by the voters, it was too late, as a matter of mootness, for judicial enforcement of the plaintiff's (a delegate to the convention) challenge after the voters had ratified the convention's proposals that exceeded the limit. [[FN82]](#Document1zzF82316252366) The court held that there was no longer a “live” controversy on which it could rule. [[FN83]](#Document1zzF83316252366) Although the cases, cited earlier, upholding convention limits adopted by the voters were brought prior to the convention's recommendations and their ratification by the people, this Rhode Island decision seems limited to its specifics, based on claims of a disgruntled former delegate. Of course, it will never be evident if a convention exceeds its limitations until it has completed its deliberations and made its recommendations to the voters. Challenges have been entertained after favorable popular vote, [[FN84]](#Document1zzF84316252366) but it is important to keep in mind the Rhode Island view that a favorable vote may “cure” a constitutional convention's recommendations beyond the limits. Those who **\*1092** contend that a convention has exceeded its authority probably should not risk waiting until after a vote.

2. Legislative Proposal of Amendments

      All state constitutions authorize state legislatures to propose amendments, and over the course of American history about ninety percent of state constitutional amendments have been proposed via this mechanism. Between 1996 and 2003, state legislatures proposed 847 constitutional amendments, and voters ratified 655, for an adoption rate of seventy-six percent. [[FN85]](#Document1zzF85316252366) Generally, amendments proposed by the legislature stand a better chance of ratification than do those proposed via the initiative, though they enjoy a lower success rate than do convention proposals. State constitutions regulate the legislative proposal of amendments to ensure that the process is manageable for voters and that they have the information about proposed amendments that they need to vote intelligently. Many of these limits apply as well to amendments proposed by other mechanisms, such as the initiative.

      Most state constitutions limit amendments to a single purpose (or in Louisiana, “object”), both to facilitate voter understanding of what is proposed and to prevent logrolling or combining popular and unpopular elements in a single proposal. Although a legislature cannot include disparate items in a single proposal, several state constitutions specifically allow a number of articles to be altered by an amendment pursuant to a single purpose. [[FN86]](#Document1zzF86316252366) But there are limits on this: the Alabama Supreme Court held that the legislature was not authorized to submit a revised constitution to the electorate as a single amendment. [[FN87]](#Document1zzF87316252366)

      Most state constitutions permit amendments to be considered at either general or special elections. A few states—Connecticut, Kentucky, New **\*1093** Jersey and New Hampshire are examples—allow submission of amendments only at general elections. [[FN88]](#Document1zzF88316252366) The aim is to ensure a sufficient turnout, so that the vote on ratification will adequately reflect the popular will. In West Virginia, if a special election is used for consideration of constitutional amendments, it may not also be used for another purpose. [[FN89]](#Document1zzF89316252366) This ensures that those who turn out and vote will be focused on the amendment, although the absence of candidates or additional issues may reduce turnout.

      Many state constitutions also impose limits on the resubmission of proposals to voters. Thus, once a proposed amendment fails of ratification, it cannot immediately be resubmitted to the voters by the next session of the state legislature. In New Jersey, for example, neither the same amendment nor a similar change can be submitted until two general elections have passed, [[FN90]](#Document1zzF90316252366) and in Pennsylvania five years must pass before resubmission. [[FN91]](#Document1zzF91316252366) Such provisions protect voters from repetitive proposals and prevent recently rejected proposals from clogging the ballot. The provisions also give appropriate respect to the formal expression of the popular will represented by a negative vote on ratification. Not all states impose such limits, however: Colorado's “taxpayers' bill of rights” amendment was adopted in 1992 after being rejected in 1988 and 1990. [[FN92]](#Document1zzF92316252366)

      Most state constitutions specify a minimum period of time that must pass after legislative approval—three months is common—before a vote on an amendment may occur. This requirement ensures an opportunity for public discussion and deliberation. To promote informed voter choice, many constitutions require publication of the text, of a summary description of the amendment or amendments, and of other information about them. The Missouri Constitution requires publication in “two newspapers of different political faiths” in each county. [[FN93]](#Document1zzF93316252366) In Georgia, a summary of any proposed amendment must be prepared by the Attorney General, the Legislative Counsel, and the Secretary of State and published throughout the state. [[FN94]](#Document1zzF94316252366) Idaho and Ohio both require publication of arguments for and against each **\*1094** amendment. [[FN95]](#Document1zzF95316252366) A unique provision in New Mexico requires publication in both English and Spanish, with the legislature also making “reasonable efforts” to communicate the substance of proposed constitutional amendments in indigenous languages and to minority language groups. [[FN96]](#Document1zzF96316252366) Three states—Arkansas, Kansas, and Kentucky—limit the number of amendments that the legislature can submit at any one time, in order that voters not be overwhelmed by the number of issues on which they have to decide. [[FN97]](#Document1zzF97316252366)

      Finally, it should be noted that as beneficiaries of the political and governmental status quo, legislators frequently resist change in the structure and processes of state government. To combat this problem, twenty-five state constitutions expressly provide methods for proposing amendments without legislative participation. [[FN98]](#Document1zzF98316252366) These mechanisms include the constitutional convention, [[FN99]](#Document1zzF99316252366) the constitutional commission, and the constitutional initiative. [[FN100]](#Document1zzF100316252366) We turn now to these latter two modes of amendment.

C. Constitutional Amendment Based on Recommendations by Commission

1. The Temporary Constitutional Commission

      States have long employed commissions to assist in the task of constitutional reform, either through revision or amendment. [[FN101]](#Document1zzF101316252366) Temporary commissions are “extra-constitutional” bodies, in the sense that they are not provided for in state constitutions, but instead are created either by the governor via executive order or by the legislature via statute. [[FN102]](#Document1zzF102316252366) Appointees to constitutional commissions typically include constitutional experts, officials, and notables in the state—the membership need not be “representative” of the people, because the commission can only recommend **\*1095** measures. [[FN103]](#Document1zzF103316252366) Commissions have served a variety of functions in the process of state constitutional change, including preparing for a constitutional convention, developing proposals for legislative consideration, or refining proposals defeated after an unsuccessful constitutional convention. Once they serve the purposes for which they were created, temporary commissions go out of existence.

      Constitutional commissions have also served an important political function by allowing ideas to be broached without legislators having to take responsibility for them. If the commission's proposals excite popular opposition, legislators can disavow them. If their proposals impinge unduly on legislative prerogatives or established interests, legislators can either ignore them or modify them. Such commissions thus do not compromise legislative control of the process of constitutional change, and so it is not surprising that the proliferation of state constitutional amendment and especially legislatively proposed amendments in the twentieth century coincided with an increasing use of constitutional commissions.

      In New York, the 1994-1995 Temporary Commission on Constitutional Revision appointed by Governor Mario Cuomo recommended a unique action-producing alternative to a state constitutional convention. [[FN104]](#Document1zzF104316252366)

       The Commission proposed the creation of four Action Panels designed to break the political/policy logjam in all of these issue areas. The panels would create integrated packages of legislation and constitutional amendments by the close of the 1996 legislative session. In creating these panels, the Commission also asked that the governor and legislature “clearly commit themselves to take definitive action on these final proposals by a date certain.” [[FN105]](#Document1zzF105316252366)

      This idea was based on the recent congressional approaches to taking certain controversial topics out of the ordinary political process such as the commission it created on military base closings. [[FN106]](#Document1zzF106316252366) The New York **\*1096** Commission made these recommendations under the threat of calling for a positive vote on the 1997 automatic referendum: “‘A large majority of the members of this Commission recommends a ‘yes' vote on the constitutional convention question in 1997’ ‘if the state fails to achieve far-reaching reform between now and that vote.”’ [[FN107]](#Document1zzF107316252366) The four areas for the Action Panels (actually constitutional commissions) were fiscal integrity, state and local relations, education, and public safety. [[FN108]](#Document1zzF108316252366) The New York Legislature ignored the recommendations, in an exercise of “passive aggression.” [[FN109]](#Document1zzF109316252366)

2. The Permanent Constitutional Commission

      In 1969, Utah developed a variant of the traditional commission, establishing a permanent Constitution Revision Study Commission. The Commission's sixteen members each serve a six-year term, and their mode of appointment ensures both bipartisanship and expertise. Three members are appointed by the Governor and three each by the Speaker of the House and the President of the Senate from their respective bodies. These nine then appoint an additional six, and the Legislative Research Director serves ex-officio. [[FN110]](#Document1zzF110316252366) The Commission selects its own chair.

      The Utah Commission is authorized both to undertake its own initiatives and to consider recommendations from state leaders and “responsible segments of the public.” [[FN111]](#Document1zzF111316252366) But its proposals for constitutional change do not go directly to the people. Rather, its function is “to make a comprehensive examination of the Constitution of the State of Utah, and of the amendments thereto, and thereafter to make recommendations to the governor and the legislature as to specific proposed constitutional amendments designed to carry out the commission's recommendations for changes in the **\*1097** constitution.” [[FN112]](#Document1zzF112316252366) In this respect, then, it resembles the temporary constitutional commission.

      The advantage of the permanent Commission is that it provides for “continuous revision” of the state constitution. Commission members can identify emerging problems and bring them to the attention of political officials, as well as provide expert advice on matters referred to them by those officials. Commentators have generally praised the Commission's contributions, particularly in areas where political controversy is muted. [[FN113]](#Document1zzF113316252366) In 1992, for example, the Commission proposed revisions of three articles of the Utah Constitution, and these revisions were referred by the legislature to the voters and were ratified. [[FN114]](#Document1zzF114316252366)

3. The Automatic, Periodic Constitutional Commission

      Florida has pioneered an altogether different sort of commission. The Florida Constitution of 1968 created the Florida Constitutional Revision Commission (“CRC”), which met ten years after the adoption of the constitution and meets every twenty years thereafter. Relying on that same model, Florida in 1988 by constitutional amendment established the Taxation and Budget Reform Commission (“TBRC”), which convenes every ten years and addresses the state's fiscal policies and budgetary processes. [[FN115]](#Document1zzF115316252366)

      Unlike commissions in other states, the Florida commissions are created by the constitution itself and convene automatically no more than thirty days after the close of the legislative session, so political forces in the government cannot block their operations. [[FN116]](#Document1zzF116316252366) Even more importantly, these commissions place their proposals for constitutional change directly on the ballot—neither the governor nor the legislature can veto or modify their submissions. As one commentator observed:

       The 1968 innovation was a leap of faith into the future, a license to later generations with no guarantees as to the substantive outcomes that would **\*1098** flow from the new process. At the operational level, it binds future generations to consider state constitutional revision without mandating that any change actually be approved. [[FN117]](#Document1zzF117316252366)

      In their automatic and periodic character, which circumvents legislative opposition to constitutional reform, and in their direct connection to voters, the Florida commissions resemble the holding of a periodic vote on whether to call a constitutional convention. There are two important differences, however. First, Florida's commission system allows for piecemeal rather than comprehensive reform—the commissions enjoy complete discretion as to the scope of the measures they recommend. [[FN118]](#Document1zzF118316252366) Second, unlike constitutional conventions, the commissions are appointive bodies. The CRC has thirty-seven members, with no single political actor controlling a majority: fifteen are appointed by the Governor, nine by the Speaker of the House, nine by the President of Senate, and three by the chief justice of the supreme court, with the Governor designating the Commission Chair. [[FN119]](#Document1zzF119316252366) The TBRC has twenty-nine members, with eleven selected by the Governor, seven by the Majority Leader, and seven by the Speaker. Interestingly, unlike on the CRC, there are no judicial appointees. Legislators may not be among these twenty-five appointees to the TBRC, but two members from each house—one from the majority party and one from the minority party—are appointed by the Speaker and Majority Leader to participate as non-voting members. The TBRC chooses its own chair, who cannot be a sitting legislator. [[FN120]](#Document1zzF120316252366) It requires a two-thirds vote of the full Commission, as well as a majority of those named by each of the appointing authorities, to put a proposal on the ballot. [[FN121]](#Document1zzF121316252366)

      Florida's innovative mechanism has been considered by only a few states and copied by none. [[FN122]](#Document1zzF122316252366) Nonetheless, the commission process in Florida has **\*1099** proved to be an effective method of bypassing the legislature to make reforms in state government structure or processes contrary to the interests of incumbent power holders. Critics have expressed concern about commissions that come into existence on a fixed schedule rather than in response to a felt political need. They have also challenged the legitimacy of this mode of constitutional change, noting that commission members, unlike legislators and constitution convention delegates, are not popularly elected. In response, proponents of the Florida commissions have argued that: (1) the commission mechanism was popularly ratified; (2) most commissioners are appointed by elected officials, so there is an indirect popular input; and (3) the commissions' proposals—like those of constitutional conventions and legislatures—are subject to popular ratification. In fact, the requirement of popular ratification has affected how Florida's commissions have operated. Studies of the CRC have traced its success in 1997-1998 to extensive preparatory work, outreach in agenda formation, a self-imposed super-majority rule for decision-making, and effective communication prior to the vote. [[FN123]](#Document1zzF123316252366) Finally, it should be noted that Florida voters in 1980 rejected an amendment proposed by the legislature that would have abolished the revision commission process, thereby attesting to the popular support for the commission mechanism. [[FN124]](#Document1zzF124316252366)

      Rhode Island's constitution provides for a somewhat different periodic commission. It authorizes an automatic, periodic (every ten years) public question on whether there should be a constitutional convention [[FN125]](#Document1zzF125316252366) and further provides: “Prior to the vote by the qualified electors on the holding of a convention, the general assembly, or the governor if the general assembly fails to act, shall provide for a bi-partisan preparatory commission to assemble information on constitutional questions for the electors.” [[FN126]](#Document1zzF126316252366) Prior to the 1986 Rhode Island Constitutional Convention the preparatory **\*1100** commission prepared a substantive report, [[FN127]](#Document1zzF127316252366) and that Convention was approved, and proposed changes were adopted. By contrast, in the early 1990s, despite the constitutional mandate, no commission was appointed, and in 2004, the Commission issued a distinctly negative report that estimated a constitutional convention would cost two million dollars. [[FN128]](#Document1zzF128316252366) The voters narrowly defeated the convention call in 2004, [[FN129]](#Document1zzF129316252366) most likely as a partial result of the Commission's opposition. [[FN130]](#Document1zzF130316252366)

D. Constitutional Change by Initiative

      Eighteen states, most of them west of the Mississippi River, currently authorize constitutional amendment via the constitutional initiative. Under this procedure, proponents of an amendment collect the signatures of voters on petitions to place a proposal on the ballot. The state constitution and/or state statutes determine the requisite number of signatures and the time frame during which they must be collected. Typically, the required number of signatures is a percentage of the total vote in a prior election—for example, in Arizona, it is fifteen percent of all votes for candidates for governor in the most recent gubernatorial election, and in Florida, it is eight percent of all votes cast for presidential electors in the last presidential election. [[FN131]](#Document1zzF131316252366) Several states also impose geographic-distribution requirements on the signature-gathering—for example, Arkansas requires five percent in fifteen of seventy-five counties, and Massachusetts allows no more than one quarter of the signatures from any one county. [[FN132]](#Document1zzF132316252366) Finally, most states impose a time period **\*1101** during which the signatures must be collected. [[FN133]](#Document1zzF133316252366) The range here is enormous, extending from sixty-four days in Massachusetts to four years in Florida, with the typical period for circulation of petitions being one year. [[FN134]](#Document1zzF134316252366)

      In direct initiative states, if the requisite number of signatures is gathered, the amendment proposed by the people is then placed on the ballot for voter ratification or rejection. In the two indirect initiative states—Massachusetts and Mississippi—amendments proposed by the people are submitted to the legislature for consideration before being placed on the ballot. The legislature can adopt the proposals, send them to the people for a vote, or revise them and put its own versions before the people for adoption. Ratification of the constitutional initiative, whether direct or indirect, typically requires the same popular majority as is required for the ratification of amendments proposed by other procedures. Thus, ratification of constitutional initiatives in most states is by a simple majority of those voting on the proposed amendment.

      A few states provide for only a limited constitutional initiative. For example, under the Illinois Constitution the initiative may be used only to amend the legislative article of the constitution, and it is further limited “to structural and procedural subjects contained in Article IV.” [[FN135]](#Document1zzF135316252366) The Illinois Supreme Court has enforced this limitation strictly. [[FN136]](#Document1zzF136316252366) In addition, most states restrict use of initiative only to the proposal of state constitutional “amendments” rather than “revisions,” and opponents of particular constitutional initiatives succeed occasionally in blocking them on this basis. [[FN137]](#Document1zzF137316252366) But by and large state constitutions impose few substantive limits on the types of amendments that can be adopted through the initiative process, [[FN138]](#Document1zzF138316252366) and federal constitutional challenges to state constitutional initiatives rarely succeed. [[FN139]](#Document1zzF139316252366) Despite some calls for judicially-imposed restrictions on the use of the initiative process to change state constitutions, **\*1102** this has not occurred. [[FN140]](#Document1zzF140316252366) And although Congress could conceivably impose limits, there is no reason to expect that it will do so. [[FN141]](#Document1zzF141316252366)

      Since the 1970s, voters made more extensive use of the constitutional initiative than in previous decades. However, the number of statewide initiatives declined in recent years. In 1996, there were ninety-three initiatives on the ballot; but in 1998 the number was fifty-three; in 2000, seventy-one; in 2002, fifty-three; and in 2004, sixty-two. [[FN142]](#Document1zzF142316252366) Whether this trend continues, the constitutional initiative is likely to remain controversial. A vast scholarly and polemical literature has developed on the advantages and disadvantages of the initiative process. [[FN143]](#Document1zzF143316252366)

III. Innovative Approaches to Constitutional Reform in New Jersey and Beyond

      Thus far, we reviewed the existing mechanisms for constitutional change in the American states. The remainder of this Foreword identifies new or less-considered approaches, possibilities suggested by isolated initiatives in some states, by procedures and practices outside the realm of constitutional reform, and by innovations in other countries.

      The existing processes for state constitutional revision and amendment have proven themselves, under some circumstances, to be inadequate for the development of needed reforms. Such circumstances include situations where the legislature cannot or will not act but necessary reform is **\*1103** sufficiently detailed as to require both constitutional and statutory change; and situations where state constitutional reform is necessary but the subject matter of the reform may be changeable so that, to avoid rigidity, the reforms should either be temporary or susceptible to modification or elimination through mechanisms that are not as difficult as those utilized to date.

      As a vehicle for considering alternative approaches to constitutional reform, we begin with a case study of the recent effort in New Jersey to craft a reform mechanism to deal with a problem that did not lend itself to resolution through the existing approaches. [[FN144]](#Document1zzF144316252366) Then, several other alternative approaches are considered.

A. The Nature of the Problem

      New Jersey has long suffered from fiscal problems, including an over-reliance on the property tax. Nevertheless, the state legislature proved either unwilling or incapable of addressing the problem, giving rise to talk of tax policy as being the “third rail” of New Jersey politics. As far back as the late 1990s, some proponents of fiscal reform concluded that what was necessary was a limited constitutional convention to deal with the problem. [[FN145]](#Document1zzF145316252366) However, even some proponents of reform were concerned that inserting tax and spending reforms into the state constitution would be unwise, because constitutionalizing tax and spending policy would introduce excessive rigidity into the system and make it difficult for the Legislature to adjust or change policy in response to changes in conditions. They therefore proposed that the Legislature propose a convention that would be authorized to recommend statutory changes, as well as constitutional amendments, for ratification by the people. [[FN146]](#Document1zzF146316252366)

      Yet despite its plenary power, the Legislature does not have the authority to confer on a constitutional convention the power to draft statutes that would become law upon ratification by the people. The New Jersey Constitution implicitly forbids this by expressly assigning the legislative power to the Legislature. Article IV of the New Jersey Constitution mandates that “the legislative power shall be vested in a Senate and General **\*1104** Assembly” and prescribes the procedure for the enactment of legislation. [[FN147]](#Document1zzF147316252366) The legislature could not divest itself of the legislative power, nor could it transfer that power to another body, not even to a constitutional convention. In the past, the New Jersey Supreme Court upheld broad legislative delegations of authority to the executive branch, provided that the legislature established standards to guide the exercise of administrative discretion. [[FN148]](#Document1zzF148316252366) But that was quite different from what was contemplated. The proposal to transfer the law-making power to another body (the constitutional convention) and to prescribe a new procedure for enactment of legislation (proposal by the convention and adoption by referendum) was simply beyond the power of the legislature.

      In the face of these constitutional problems, the legislature could have itself enacted the necessary reforms dealing with taxing and spending. But absent such an unlikely event, what options were available to the advocates of reform?

B. The Task Force—A New Approach

      In the summer of 2004, the New Jersey Legislature enacted a law creating a fifteen-person task force to report to the governor and the legislature on a property tax convention. [[FN149]](#Document1zzF149316252366) The Task Force was directed to make recommendations on delegate selection, the convention's scope and limitations, and how the convention's proposals should be considered. This process-focused task force, advising the legislature on how to call a constitutional convention, was a new idea in the over-two-centuries-old process of state constitution-making. The closest parallel is found in New York in the mid-1990s, when Governor Cuomo appointed a temporary commission to prepare materials prior to the (ultimately negative) automatic vote in 1997 on whether to call an unlimited constitutional convention. Yet New York's temporary commission dealt with substance as well as process and did not report to the legislature. The idea of an expert working-group advising the legislature on the details of calling a state constitutional convention is an innovation that may be particularly useful in preparing to call a limited state constitutional convention. One might even imagine a special session of the legislature, called specifically to frame constitutional convention legislation.

**\*1105** The members of the New Jersey Task Force were appointed; met a number of times; conducted public hearings around the state attended by hundreds of people; and took testimony from former government officials, including former governors, as well as academics from New Jersey and other states. [[FN150]](#Document1zzF150316252366) The Task Force submitted its report on December 31, 2004. [[FN151]](#Document1zzF151316252366)

C. Temporarily Constitutionalizing the Convention

      The solution that the Task Force eventually chose was to recommend that the legislature propose that the voters constitutionalize the convention, i.e., to amend the New Jersey Constitution to permit the calling in this single instance of a convention with the power to propose statutes. More specifically, the proposed amendment would: (1) authorize a convention to deal with issues of taxing and spending, (2) empower the delegates to the convention to propose both constitutional amendments and statutes, and (3) provide for those proposals to become law following popular ratification. Comparing the standard procedure for calling a convention in New Jersey with the process for constitutionalizing the convention suggests that this was not a far-fetched alternative. A bill for calling a convention to deal with fiscal matters would require a majority vote in each house of the legislature, with popular approval of the convention call by a majority of those voting on the question at the next general election. Under the constitutionalizing-the-convention alternative, the bill proposing a convention would take the form of an amendment to the New Jersey Constitution that would be in effect for just this one instance. If such a convention were proposed in the form of a constitutional amendment, the proposed amendment would require approval by three-fifths of all the members of each house of the legislature and approval by a majority of those voting on the question in a general election. [[FN152]](#Document1zzF152316252366) Most likely the popular vote in this case would also have **\*1106** occurred at the next general election, so constitutionalizing the convention would not have slowed the process of reform. [[FN153]](#Document1zzF153316252366) In sum, by reframing the bill as an amendment and obtaining the required super-majority in the legislature, the bill's sponsors could have avoided constitutional challenges and guaranteed the convention considerable flexibility in addressing New Jersey's spending and property-tax woes. Of course, under this alternative it would have been the convention delegates and the voters and not the legislators or the amendment's supporters who determined what fiscal matters would be enshrined in the state's constitution and what matters would be put into statutes.

      A bill providing for a constitutional amendment to allow the convention to propose statutes as well as constitutional amendments was introduced and considered in the New Jersey Legislature in 2005. It passed the general assembly but stalled in the senate. [[FN154]](#Document1zzF154316252366) Whether a similar bill will be introduced in the next session of the legislature remains unclear.

      The alternatives explored in New Jersey have application beyond the New Jersey context. Frequently constitutional reformers wish to address a particular problem without creating a mechanism that might have untoward and unanticipated effects in the future. As the New Jersey example shows, it is possible to avoid this difficulty by crafting a provision that creates a one-time-only mechanism, leaving it to future generations to determine whether the mechanism should be reinstituted to deal with the problems of their era.

IV. Alternative Mechanisms for Constitutional Reform

A. Mixing Constitutional and Statutory Reform

      The New Jersey case study highlights a problem that occurs with some regularity in the American states. States confront problems whose solution may require statutory changes, constitutional reforms, or a mix of both, and **\*1107** sometimes they do not know what the proper approach or mix of approaches should be. [[FN155]](#Document1zzF155316252366) How can states deal with such situations?

1. Authorization of Multiple Approaches

      One alternative is to authorize the same policy-maker to propose both statutory and constitutional changes. The New Jersey effort to constitutionalize the convention illustrates one instance of granting the same entity the authority to choose statutory and/or constitutional changes. However, this is not the only possible example. States adopting the periodic commission pioneered by Florida could authorize, in the state constitution, the commission to submit statutory as well as constitutional changes for popular approval. Indeed, some states already utilize a version of this approach. They allow the populace to undertake reforms via the constitutional initiative and the statutory initiative, leaving it up to the citizenry to determine which mechanism or mix of mechanisms best promotes a solution to the political problems they face.

2. Coordination of Approaches and Responsibilities

      It may be, however, that the same body will not be authorized to develop both constitutional and statutory law. In such circumstances, the need arises to coordinate bodies of law produced by different institutions. This is hardly a novel problem—it occurs regularly in federal systems, where law-making authority is divided between national and subnational institutions. The arrangements developed by those federal systems, together with under-appreciated alternatives currently employed within the states, suggest a **\*1108** variety of solutions for dealing with the need to employ both statutory and constitutional change to address problems.

a. Framework and Implementation

      The American federal system relies primarily, at least in theory, on a system of divided powers. Scholars debate the extent to which this dual federalism actually operates in practice. [[FN156]](#Document1zzF156316252366) However, many other federal systems emphasize shared or concurrent powers, and the fact that enactments dealing with the same policy concerns often emanate from more than one level of government requires a coordination of national and subnational law. [[FN157]](#Document1zzF157316252366) One widely used approach is for the national government to develop framework legislation—i.e., legislation that sets the general direction for public policy, while allowing the subnational units to develop law necessary to implement the framework legislation, taking into account the distinctive circumstances within the subnational unit. State constitutions can—and sometimes already do—employ that same approach for coordinating constitutional and statutory law.

b. Agenda-Setting Provisions: Goals and Their Implementation

      The Federal Constitution grants powers, distributes those powers among the departments of government, and limits the exercise of powers. However, state constitutions in addition set goals and assign responsibilities for their achievement, not only permitting government to act but requiring it to do so. Such state constitutional provisions establish an agenda for governmental action. Often these agenda-setting provisions not only require action but specify the end state that government must achieve. Perhaps the most familiar of these agenda-setting provisions are state education provisions. The New Jersey Constitution, for example, requires the state to “provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the **\*1109** ages of five and eighteen years.” [[FN158]](#Document1zzF158316252366) And the Montana Constitution announces a goal of “establish[ing] a system of education which will develop the full educational potential of each person” and requires the legislature “to provide a system of free quality public elementary and secondary schools.” [[FN159]](#Document1zzF159316252366) However, agenda-setting provisions are found throughout state constitutions, requiring government to meet goals with regard to the environment, housing, welfare, and other matters. [[FN160]](#Document1zzF160316252366)

      There are several advantages in using this approach in “getting from here to there.” Instead of constitutionalizing policy specifics, which might quickly become outdated, constitutional reformers can set a direction for public policy and rely on the state legislature to develop policy within the framework created by the constitutional provision. Moreover, inclusion of such provisions provides a basis for legal challenge, should state legislatures fail to meet their constitutional responsibilities. Those injured by this failure can seek legal redress, and courts in many states have been receptive to such claims. Challenges have been mounted in more than thirty states to state systems of public school finance, claiming that states had failed to meet their constitutional obligations. [[FN161]](#Document1zzF161316252366) In addition, litigants have relied on these agenda-setting provisions to challenge state failures to pursue in good faith constitutional mandates to provide citizens with basic subsistence, adequate housing, and a clean environment. [[FN162]](#Document1zzF162316252366)

**\*1110** c. Directive or Action-Forcing Provisions

      Many state constitutions contain, in addition to broad statement of goals, specific requirements for state legislatures to act. This is another method of avoiding rigidity in state constitutions, by identifying a topic and a “mandate” that the legislature, by law, deal with the topic. For example, the Louisiana Constitution states: “The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.” [[FN163]](#Document1zzF163316252366) These and similar provisions, however, proved difficult to enforce in the courts because of the separation-of-powers limitations on courts ordering the legislature to pass laws.

d. Quasi-Directive, Fallback Provisions

      Many state constitutions also include quasi-directive, fallback provisions. Such provisions establish a policy that will prevail if the legislature does not act, but invite the legislature to devise and implement its own policy. The constitution thus permits legislative policy to supersede the constitutionally mandated policy. For example, in Florida, the Legislature declined for a number of years to enact ethics in government legislation. Finally, in 1976, an initiative proposal to amend the state constitution [[FN164]](#Document1zzF164316252366) to provide for ethics rules was adopted. [[FN165]](#Document1zzF165316252366) Most of the provisions could not be amended by statute, but several provisions on financial disclosure took effect on “the effective date of this amendment and until changed by law.” [[FN166]](#Document1zzF166316252366) Thus, the constitutional provision served as fallback legislation unless—or until—the legislature addressed the issue.

e. Constitutional Legislation

      It is commonly thought that we do not utilize the European-style “constitutional legislation” in this country. By “constitutional legislation” we mean organic, relatively permanent legislation that exists somewhere between the constitution and ordinary statutory law. In fact, at least one state—New York—has experimented with this form of statutory law. In 1973, New York amended the local government article of its constitution to **\*1111** require the legislature to enact a statute implementing the local government powers granted in the constitution. The provision went on, however, to provide: “A power granted in such statute may be repealed, diminished, impaired or suspended only by enactment of a statute by the legislature with the approval of the governor at its regular session in one calendar year and the re-enactment and approval of such statute in the following calendar year.” [[FN167]](#Document1zzF167316252366)

      As noted by a commentator on the New York State Constitution: “The powers granted by this statute are accorded a special status in that once granted, they cannot be repealed, impaired, or suspended accept by the action of two successive legislatures with the concurrence of the governor.” [[FN168]](#Document1zzF168316252366)

3. Constitutional Rigidity

      New Jersey's consideration of authorizing a constitutional convention to propose both constitutional provisions and statutes was based on the understandable conclusion that much in the way of taxation and fiscal policy is too detailed, and policy-oriented, for inclusion in the state constitution. State constitutional rigidity can result from inserting matters in the state constitution where they may only be changed through the existing generally accepted processes of state constitutional revision. New Jersey's proposed approach, and the others discussed in the preceding subsection, represent some responses to this problem. There are, however, several other approaches.

      All constitutions contain provisions that over time become outdated by events or no longer serve their original purpose. Among the most obvious of these are specific salary figures, tax or debt exemption provisions, or debt ceilings that do not take inflation into account. [[FN169]](#Document1zzF169316252366) However, obsolescence is not limited to provisions that specify monetary figures—indeed, Richard Briffault has identified an entire “disfavored constitution” of state taxation and fiscal provisions. [[FN170]](#Document1zzF170316252366)

**\*1112** The most obvious way to deal with constitutional rigidity is to provide a relatively easy system of constitutional amendment. Virtually all states do so. Yet this does not automatically ensure that constitutional problems will be identified and addressed. It requires an expenditure of political capital to raise issues and to advance them through the process to popular ratification. Moreover, those in government who benefit from the existing arrangements may block efforts to introduce change, and it is always easier to impede than to initiate action. As noted previously, to deal with this latter concern, some states mandated that voters periodically be given the opportunity to vote on whether to call a constitutional convention. This helps equalize the situation for advocates of change and their opponents. But a convention allows delegates to address not just obsolescent provisions but all provisions, including the most fundamental protections; and risk-averse citizens may therefore shy away from authorizing a convention, even though they recognize that there are constitutional problems that require solution.

      Another oft-proposed way to deal with constitutional rigidity is to avoid putting in state constitutional provisions that are likely to become obsolete. [[FN171]](#Document1zzF171316252366) This of course may not be all that simple—one cannot always identify ahead of time those provisions likely to be outrun by events. Advocates of this view typically suggest that those drafting state constitutions should take as their model the Federal Constitution. Even if this were good advice, it would not help with obsolescent provisions already found in state constitutions. Moreover, it is highly questionable whether it is good advice at all. All state constitutions contain not only provisions that are fundamental, such as those safeguarding rights and allocating powers among the branches of government, but also provisions that address policy concerns and other more mundane matters. Instead of lamenting the inclusion of these “non-constitutional” provisions in state constitutions, one needs to recognize that state constitutions differ from the Federal Constitution in their underlying character, and that this difference—not an ineptitude in constitutional design—explains much of what is included in state constitutions. [[FN172]](#Document1zzF172316252366) Put differently, one cannot eliminate state constitutional provisions that will become obsolescent, or at least one cannot do so without radically rethinking the prevailing understanding of state constitutions.

**\*1113** We turn therefore to alternative approaches for dealing with the problems of constitutional rigidity and constitutional obsolescence. In addition, by easing rigidity and permanence, some of the following approaches may contribute to compromise on the substance of proposed state constitutional changes. In other words, those who oppose the substance of a proposal or are concerned about its consequences might temper such opposition or concern if they knew the proposal would not be permanent or might be easier to change than an ordinary state constitutional clause.

a. “Sunsetting” Provisions

      Often, changes or innovations in state constitutions are advocated and adopted on the promise of certain results or outcomes that are impossible to prove ahead of time. Such changes are, in a sense, experimental. They may, however, fail to succeed or even have unanticipated negative consequences. [[FN173]](#Document1zzF173316252366) To deal with this, constitutional reformers could provide that some of the provisions they propose would terminate after a period of time. Thus, just as statutes can contain “sunset” provisions that limit the period of their effectiveness or reauthorization requirements that have the same result, so too could state constitutional provisions.

      Most states already have experience with a version of this alternative. For when states replace one constitution with another, frequently they include temporary, transitional provisions that cease their operation either after a period of time or after a particular action has been taken. Such provisions are usually contained in an article entitled “Schedule.” But state constitutional use of sunsetting is not limited to periods of transition. For example, in 1984, the New Jersey Constitution was amended to earmark a certain portion of the gasoline tax for the state transportation system. [[FN174]](#Document1zzF174316252366) The last line of this amendment stated: “The provisions of this paragraph shall be of no effect after 17 years from the date on which this amendment becomes part of the Constitution.” [[FN175]](#Document1zzF175316252366) Thus, the provision would have, by its own terms, been removed from the state constitution at the end of the seventeen-year period. However, prior to the expiration of the seventeen years, the New **\*1114** Jersey Constitution was again amended to make this provision “permanent.” [[FN176]](#Document1zzF176316252366)

      The New Jersey earmarking example illustrates the usefulness of sunset provisions—they can meet an immediate need without necessarily committing the state beyond the period of their usefulness. Thus, sunset provisions might be particularly apt for the fiscal provisions of state constitutions, which can be complex, detailed, and subject to national and global economic factors that were not foreseeable when the provisions were included in the state constitution. Moreover, sunset provisions have important political implications. The sunset mechanism shifts the burden of initiating the constitutional amendment/revision process from those who wish to see a provision removed from the constitution, as is usually the case, to those who wish to see it retained. It would even be possible to build into such a provision an automatic, second referendum on retaining such a provision, one that would be held as the sunset date approaches. Given the difficulty of changing state constitutions, this might prove to be a useful mechanism. It would be a modern mechanism to implement, at least in part, Thomas Jefferson's vision of constitutions as being the product of the “living generation.“

b. Devising Special Amendment Procedures

      As an alternative to sunsetting provisions, convention delegates or proponents of constitutional amendments can prescribe that some of their proposals, if adopted, would be subject to amendment by a less onerous procedure than the current system of amendment. It is possible that the fiscal provisions of state constitutions [[FN177]](#Document1zzF177316252366) as well as other distinct kinds of matters, should be treated differently from the “great ordinances” contained in state constitutions. [[FN178]](#Document1zzF178316252366) Thus, this alternative would have dealt with the problem of excessive rigidity in constitutionalized fiscal policy by facilitating amendment of some parts of the constitution.

      An example drawn from the proposed property-tax convention in New Jersey may help to clarify this alternative. As it now stands, an amendment proposed by a constitutional convention and ratified by the people would **\*1115** become part of the New Jersey Constitution and could only be changed by (1) a vote by three-fifths of the members of each house (or by a majority of the members of each house in two consecutive legislative years), or a proposal by a constitutional convention, and (2) ratification by a majority of those voting on the question in a general election. Under the alternative under consideration, however, convention delegates could specify that some or all of their proposed amendments, if adopted, would be subject to amendment by a less onerous process. Thus, they might propose a particular amendment but, as part of the amendment itself, specify that after adoption it would be subject to amendment by a special procedure. The convention itself would devise that procedure. It might be amendment by a simple majority vote in the legislature, by a simple majority vote in the legislature and ratification by the people, or by some other option.

      Further variations on this alternative might also be considered. The convention could propose that a provision would be subject to easier amendment only after a period of time. This would balance the concern about excessive rigidity against the concern that too easy amendment might encourage the legislature to revert too quickly to the previous status quo. Some states already employ a variant of this approach with regard to statutory initiatives: the state legislature is prohibited from immediately altering what has been adopted by the voters, but after a period of time statutes enacted via the initiative can be changed in the same fashion as any other statute. [[FN179]](#Document1zzF179316252366) Alternatively, the constitution could permit amendment only after a period of time had elapsed, as the U.S. Constitution did with regard to the elimination of the slave trade. [[FN180]](#Document1zzF180316252366) But whatever the specifics of the variant chosen, the development of amendment procedures that differentiate among the various sorts of state constitutional provisions is an ingenious way of ensuring that state constitutions have both appropriate stability and appropriate malleability.

c. Transferring State Constitutional Provisions to Statutory Law

      One method of streamlining or simplifying state constitutions is to convert detailed or out-of-date provisions from the constitution to statutory law. The revised 1968 Florida Constitution, for example, contained the following clause:

**\*1116** All provisions of Articles I through IV, VII and IX through XX of the Constitution of 1885, as amended, not embraced herein which are not inconsistent with this revision shall become statutes subject to modification or repeal as are other statutes. [[FN181]](#Document1zzF181316252366)

      This directive took effect upon ratification of the new constitution by the voters. Problems developed, however, because its general approach left the courts to determine what actually became statutory law. [[FN182]](#Document1zzF182316252366) This left many questions to litigation, [[FN183]](#Document1zzF183316252366) including a decision declaring that a provision of the 1885 Constitution, which had never been codified, was in fact a statute. [[FN184]](#Document1zzF184316252366) This confusion can be avoided by making specific, rather than general, reference to the state constitutional provisions that are to be converted to statute. [[FN185]](#Document1zzF185316252366)

4. Recognizing the Diversity of State Constitutional Provisions

      The use of multiple mechanisms for constitutional amendment, tied to the various types of state constitutional provisions, has pertinence for more than combating constitutional rigidity. It may also protect more fundamental aspects of the constitution from change, while affording greater flexibility in updating less fundamental provisions. The idea that the procedure for amending the constitution should vary according to the provision being amended may seem strange initially. However, it is widely used. The U.S. Constitution, for example, provides for a more exacting standard for amendment in one instance: “Provided that no State, without its Consent, **\*1117** shall be deprived of its equal Suffrage in the Senate.” [[FN186]](#Document1zzF186316252366) The recent constitutions of other countries such as South Africa require extraordinary majorities to amend certain rights guarantees, and the Basic Law of Germany altogether exempts certain provisions from the normal amendment process, declaring them unamendable. [[FN187]](#Document1zzF187316252366) Moreover, the idea that some parts of a constitution are more fundamental than others and thus should be less subject to change makes intuitive sense. The issue is how the system of constitutional change should deal with this.

a. Considering a Two-Tiered Constitution in New York

      An early proposal to recognize the diversity of constitutional provisions was considered in 1966 during deliberations on reforming the New York Constitution. [[FN188]](#Document1zzF188316252366) The New York State Bar Association's Committee on the State Constitution recommended that

       various articles of the Constitution could properly be redrawn to separate fundamental provisions establishing the structure of state government and the rights of the citizens from the regulatory details. Provisions placed in the first and fundamental part of an article would be amended by the method presently provided for all sections of the Constitution Provisions of a regulatory character and placed in the second part would be amended by approval of two successive Legislatures followed on each occasion by approval of the Governor. [[FN189]](#Document1zzF189316252366)

      This proposal thus made some of the provisions of the state constitution easier to amend than through the regular state constitutional amendment process, but kept amendment of even these provisions more difficult than the enactment of an ordinary statute.

      The committee argued that while retaining stability for the most important state constitutional policy provisions, this mechanism would allow for a simpler method of changing the more detailed provisions of the state constitution. It would, however, provide a forum for opposition that could be felt over a two-year period, both in the legislature and in the governor's **\*1118** office. Because many detailed provisions are included in the state constitution to avoid easy change, this approach would support that motivation. Further, the electorate would not have to evaluate complex, detailed state constitutional amendments. Finally, in situations where it was unclear which category to put state constitutional provisions in, the constitutional framers could choose the mechanism they thought best.

      Yet this proposal raises broader issues that require consideration before one opts for a two-tiered constitution. First, does the new mechanism for changing the constitution in fact actually make alteration easier? For example, one might well view the New York State Bar Association's alternative method of constitutional change as a more difficult method, in that a single defeat in the legislature or a single veto could defeat a proposed amendment. Second, if different methods of change apply depending upon the type of constitutional provision, how does one distinguish between the two types of state constitutional provisions? Third, is there a reason to conclude that there are only two types of constitutional provisions, or might one distinguish a variety of types of provisions, such that one could contemplate a variety of mechanisms for constitutional change?

b. Provision-Specific Systems for Constitutional Amendment

      For these and perhaps other reasons as well, no state has altogether adopted the two-tiered constitution concept. However, some states differentiated the form of amendment appropriate for particular provisions in their constitutions.

      Some constitutions authorize different procedures for amendment based on the geographic area affected by the amendment. The Georgia Constitution of 1945 illustrates this. In addition to its regular amendment procedures, a 1952 amendment to the Georgia Constitution provided that “local amendments“—that is, amendments that applied to a particular city or county and did not have general applicability throughout the state-—required for ratification only a majority in the jurisdiction that was affected. A similar system currently operates in Alabama, where amendments of statewide impact require ratification through a statewide referendum, but those judged of local impact require the approval of only a local majority. [[FN190]](#Document1zzF190316252366) While the distinction between statewide and local amendments makes intuitive sense, **\*1119** in practice the Georgia and Alabama systems encourage using constitutional amendments to deal with local political issues and interfere with local self-government. For example, amendments 455-457 of the Alabama Constitution deal respectively with repeal of a school tax exemption in Madison County, with Hartsdale City school taxes, and with the Morgan County Sheriff's reserve funds. Georgia's experience illustrates the proliferation of local amendments such a system produces: from 1952 until its constitution of 1983 eliminated the system of local amendments, the state adopted 836 local amendments. [[FN191]](#Document1zzF191316252366)

      Other states require a distinctive mode of constitutional change for a particular issue. Alabama provides an interesting example, albeit one misconstrued by the state's courts. The Alabama Constitution provides that the population basis for the system of representation in the legislature “shall not be changed by constitutional Amendments.” [[FN192]](#Document1zzF192316252366) The purpose of this clause was not to create an unamendable provision but, as explained by one of the delegates to the 1901 Convention, to ensure that representation “should always remain upon a population basis until another Constitutional Convention shall be called, when it can then properly consider all these protections and provisions which are necessary.” [[FN193]](#Document1zzF193316252366) Despite this clear intent simply to limit the mechanism or procedure of an amendment to the population basis of legislative representation, rather than its substance, the Alabama Supreme Court, in a set of 4-3 advisory opinions, concluded that nothing in the state constitution was unamendable and therefore the legislature was free to propose an amendment dealing with the system of representation. [[FN194]](#Document1zzF194316252366)

c. State Goals or Directive Principles

      American state constitutions have not generally utilized the approach of including judicially unenforceable state goals or directive principles as constitutional provisions. In other federal systems, however, this approach has been utilized. In Germany, the constitutions of a number of the Länder (states) include state goals that do not create judicially-enforceable rights, but **\*1120** rather direct political and legislative policy-making. [[FN195]](#Document1zzF195316252366) The constitution of the South African province of Western Cape also includes similar provisions containing “directive principles.” [[FN196]](#Document1zzF196316252366) Such provisions provide direction in the drafting and implementation of laws, as well as in judicial interpretation. [[FN197]](#Document1zzF197316252366) It is important that drafters clearly distinguish such provisions from enforceable rights, an issue that may have to be left to judicial interpretation in Germany. [[FN198]](#Document1zzF198316252366) In other words, if a provision is not intended to be judicially enforceable, that should be clear in the text and not left to the courts to discern.

      One possible example of this approach is reflected in section 2 of amendment 68 to the Arkansas Constitution, adopted in 1990:

       Public Policy. The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the Federal Constitution. [[FN199]](#Document1zzF199316252366)

      Such expressions of “state goals,” “directive principles,” or “public policy” respond to the problem of constitution rigidity by not enshrining judicially enforceable rights within the constitution but providing constitutionally-sanctioned direction to the government (and possibly private) actors within the state.

5. “Non-Substantive” Constitutional Change

      In some instances, states wish to update their constitutions without introducing substantive changes in the basic law. Because this more technical form of constitutional change does not alter public policy or set a new direction for the state, popular involvement in the process is less important. **\*1121** What is important is that an expert, nonpartisan body recommend or introduce the changes.

      Illustrative of this is Vermont's 1994 constitutional amendment that empowered the Vermont Supreme Court to revise the state constitution to make it gender-neutral, without “alter[ing] the sense, meaning or effect” of the constitution. [[FN200]](#Document1zzF200316252366) The changes introduced by the court were incorporated into the constitution without popular ratification. This procedure in turn built upon a similar use of the supreme court in 1913 to recompile the state constitution to include new amendments and exclude superceded language. [[FN201]](#Document1zzF201316252366)

      Other states used different institutional paths to accomplish similar tasks. For example, at the direction of the state's governor, Georgia's Office of Legislative Counsel in 1976 prepared a reorganized version of the state constitution, without substantive changes, that was then revised by both houses of the state legislature and submitted to the voters for ratification. [[FN202]](#Document1zzF202316252366)

**\*1122** V. Relationship of State Constitutional Content and Judicial Interpretation

      Provisions included in state constitutions are, of course, intended to have real impact. In a number of circumstances, however, this real impact may be affected substantially by the way the provision is interpreted by the courts in the state. Judicial review of statutes under the state constitution, necessitating judicial interpretation of the state constitution, is a basic assumption in modern times. However, the language of the state constitution itself can have a direct impact on these questions. State constitutional drafters do not merely determine the content of the state constitution; they may also affect how—and by whom—that content will be interpreted. It is generally accepted that in cases of constitutional dispute, the state's courts provide the authoritative interpretation of the state constitution. Indeed, many of the technical barriers to judicial interpretation of the Federal Constitution—such as the political question doctrine, standing to sue requirements, and mootness—either do not apply or have a considerably circumscribed effect on judicial interpretation of the state constitution. [[FN203]](#Document1zzF203316252366) However, state constitutional drafters can expressly preclude judicial interpretation, and in recent years several states included provisions in their constitutions that they exempted from judicial review. The Michigan Constitution provides that the sufficiency of grounds for recall of a public official “shall be a political rather than a judicial question.” [[FN204]](#Document1zzF204316252366) The New Jersey Constitution was amended to bar legislative or administrative mandates to local government without the funding to perform such mandatory activities (“unfunded mandates”) and created an appointed Council on Local Mandates. The provision specified that the Council's decisions “shall be political and not judicial determinations.” [[FN205]](#Document1zzF205316252366) In 1986, the Texas electorate amended the provision in the legislative article of the Texas Constitution requiring a title to disclose the content of bills to specify that “the legislature is solely responsible for determining compliance with the rule” and that “a law may not be held void on the basis of an insufficient title.” [[FN206]](#Document1zzF206316252366)

**\*1123** On the other hand, unlike the Federal Constitution, some state constitutions mandate judicial review under certain circumstances. The Georgia Constitution specifies that: “Legislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.” [[FN207]](#Document1zzF207316252366) The “Taking Clause” of the Colorado Constitution provides that “the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.” [[FN208]](#Document1zzF208316252366)

      Finally, some state constitutions contain provisions relating to interpretation. For example, [article I, section 23 of the South Carolina Constitution](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1001530&DocName=SCCNARTIS23&FindType=L) provides: “The provisions of the Constitution shall be taken, deemed, and construed to be mandatory and prohibitory, and not merely directory, except where expressly made directory or permissory by its own terms.” [[FN209]](#Document1zzF209316252366)

[Article 4, section 7, paragraph 11 of the New Jersey Constitution](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART4S7P11&FindType=L) provides:

       The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law. [[FN210]](#Document1zzF210316252366)

      Illustrating a different approach, after some expansive state judicial interpretations, Florida's search and seizure clause was amended in 1982 to require the state courts to interpret the provision the same way as the United States Supreme Court interprets the federal clause. [[FN211]](#Document1zzF211316252366) This also happened in **\*1124** California to eliminate a line of state constitutional interpretations that went beyond the federal requirements in the area of school busing. [[FN212]](#Document1zzF212316252366) This Florida and California “lockstep” or “forced linkage” amendment approach can be seen as undesirable because it constitutes a blanket adoption, in futuro, of all interpretations of the United States Supreme Court, thereby abdicating a part of a state's sovereignty and judicial autonomy.

VI. Conclusion

      This Foreword is exploratory rather than comprehensive; nevertheless, it suggests that a rich array of mechanisms is available to state constitutional reformers. A number of the alternative approaches that we described may appear at first blush to be mere drafting choices. But in actuality these alternatives have major policy implications, facilitating or retarding state constitutional reform and influencing the direction that this reform takes. [[FN213]](#Document1zzF213316252366) The responsibility of state constitutional reformers is of course to use wisely the alternatives provided to make state constitutions better able to meet the challenges of the twenty-first century.

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[[FN1]](#Document1zzB1316252366). Like virtually all generalizations about the American states, this one is true in most, but not in all, instances. For example, Wisconsin has only one mechanism—proposal by the state legislature—for initiating the amendment process. See [WIS. CONST. art. XII, § 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000260&DocName=WICNART12S1&FindType=L).

       Not all constitutional change takes place through the formal mechanisms for change prescribed by constitutions. Change can also occur informally, through changes in constitutional interpretation, constitutional construction, or constitutional practice. For pertinent discussions, see generally RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995), and KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (1999). Such informal change is particularly likely when the formal avenues of change are difficult, but it has occurred at the state level as well. See Michael Besso, Constitutional Amendment Procedures and the Informal Political Construction of Constitutions, 67 J. POL. 69, 69-71 (2005); Christian G. Fritz, Popular Sovereignty, Vigilantism, and the Constitutional Right of Revolution, 63 PAC. HIST. REV. 39, 42, 47-53 (1994). The focus of this Foreword, however, is exclusively on formal mechanisms of constitutional change.

[[FN2]](#Document1zzB2316252366). [U.S. CONST. art. V](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTV&FindType=L). Akhil Amar has argued that formal constitutional change can also be undertaken outside the requirements of [Article V](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTV&FindType=L). See Akhil Reed Amar, [Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1055-56 (1988)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3039&FindType=Y&ReferencePositionType=S&SerialNum=0101628635&ReferencePosition=1055). For a critique of Amar's position, see JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS 97-125 (1993).

[[FN3]](#Document1zzB3316252366). [U.S. CONST. art. V](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTV&FindType=L).

[[FN4]](#Document1zzB4316252366). See, e.g., 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 45, 52-54 (1991).

[[FN5]](#Document1zzB5316252366). See Donald S. Lutz, Toward a Theory of Constitutional Amendment, 88 AM. POL. SCI. REV. 355, 362 (1994).

[[FN6]](#Document1zzB6316252366). See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 23-27, 29-31 (1998). For a review of the methods of amendment and revision, see generally Gerald Benjamin, Constitutional Revision and Amendment, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams eds., forthcoming 2006) [hereinafter STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY]; Michael Colantuono, Pathfinder: Methods of State Constitutional Revision, 7 LEGAL REFERENCE SERVICES Q. 45 (1987); Janice C. May, Amending State Constitutions 1996-97, [30 RUTGERS L.J. 1025 (1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&SerialNum=0115629724); Anne Permaloff, [Methods of Altering State Constitutions, 33 CUMB. L. REV. 217 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1125&FindType=Y&SerialNum=0294358627); Michael G. Colantuono, Comment, The [Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change, 75 CAL. L. REV. 1473 (1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1107&FindType=Y&SerialNum=0101992907) [hereinafter Colantuono, The Revision of American State Constitutions].

[[FN7]](#Document1zzB7316252366). See, e.g., [ILL. CONST. art. XIV, § 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000008&DocName=ILCNART14S1&FindType=L).

[[FN8]](#Document1zzB8316252366). For data on the mechanisms for constitutional change in the various states, see 35 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 10-18 (2003); Lutz, supra note 5, at 361.

[[FN9]](#Document1zzB9316252366). See Anne Campbell, Direct Democracy and Constitutional Reform: Campaign Finance Initiatives in Colorado, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, supra note 6, 175, 180.

[[FN10]](#Document1zzB10316252366). See Dan Friedman, [Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998, 58 MD. L. REV. 528, 529 (1999)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1187&FindType=Y&ReferencePositionType=S&SerialNum=0111342247&ReferencePosition=529) (“This Article assesses the success or failure of the Maryland Constitutional Convention in light of the later adoption—by constitutional amendment, statute, or regulation—of many of the important innovations proposed in the 1967-1968 constitution.”). See generally G. Theodore Mitau, Constitutional Change by Amendment: Recommendations of the Minnesota Constitutional Commission in Ten Years' Perspective, 44 MINN. L. REV. 461 (1960) (outlining recommendations made by the 1997-1998 Minnesota Constitutional Commission and subsequent attempts to implement these changes); Steven J. Uhlfelder & Robert A. McNeely, The [1978 Constitution Revision Commission: Florida's Blueprint for Change, 18 NOVA L. REV. 1489 (1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100363&FindType=Y&SerialNum=0103673664) (describing the adoption of many recommendations of the 1977-1978 Florida Constitutional Revision Commission after voter rejection of the same measures in 1978).

[[FN11]](#Document1zzB11316252366). See FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 7-8 (2006).

[[FN12]](#Document1zzB12316252366). Those that do not provide for calling conventions are Arkansas, Indiana, Massachusetts, Mississippi, New Jersey, North Dakota, Pennsylvania, Texas, and Vermont. 35 COUNCIL OF STATE GOVERNMENTS, supra note 8, at 15 tbl.1.4. The 1873 New Jersey Constitutional Commission considered detailed provisions for the calling of constitutional conventions but decided not to recommend them to the legislature. Peter J. Mazzei & Robert F. Williams, “[Traces of Its Labors“: The Constitutional Commission, The Legislature, and Their Influence on the New Jersey State Constitution, 1873-1875, 33 RUTGERS L.J. 1059, 1105 (2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0300115628&ReferencePosition=1105) (describing Proposal 100); see also Constitutional Commission, DAILY GAZETTE, Oct. 15, 1873, Nov. 12, 1873, Nov. 19, 1873. These newspapers are collected in a forthcoming book, tentatively titled “TRACES OF ITS LABORS“: THE CONTSTITUTIONAL COMMISSION AND STATE CONSTITUTIONAL REFORM IN NEW JERSEY, 1873-1875 (Peter J. Mazzei & Robert F. Williams eds., forthcoming 2006) [hereinafter TRACES OF ITS LABOR].

[[FN13]](#Document1zzB13316252366). See Colantuono, The Revision of American State Constitutions, supra note 6, at 1477-78, n.25, 1479 n.34, 1480.

[[FN14]](#Document1zzB14316252366). See, e.g., N.J. CONST. art. I, § II (“All political power is inherent in the people.”).

[[FN15]](#Document1zzB15316252366). See [TENN. CONST. art. XI, § 3](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000039&DocName=TNCNART11S3&FindType=L).

[[FN16]](#Document1zzB16316252366). Gerald Benjamin, The [Mandatory Constitutional Convention Question Referendum: The New York Experience in National Context, 65 ALB. L. REV. 1017, 1018-19 n.12 (2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3105&FindType=Y&ReferencePositionType=S&SerialNum=0289748366&ReferencePosition=1018).

[[FN17]](#Document1zzB17316252366). Gerald Benjamin & Thomas Gais, [Constitutional Conventionphobia, 1 HOFSTRA L. & POL'Y SYMP. 53, 69 (1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=114016&FindType=Y&ReferencePositionType=S&SerialNum=0107849741&ReferencePosition=69) [hereinafter Benjamin & Gais, Conventionphobia]. Benjamin and Gais had observed a year earlier:

       The number of active constitutional conventions has also dropped from seven between 1968 and 1969, to just two between 1978 and 1979, to none between 1990 and 1991. Moreover, all of the convention calls that some states are required to put on their ballots have gone down to defeat in recent years: New Hampshire, Alaska, and Montana placed such questions before the voters between 1990 and 1992, but all were defeated, as was Michigan's in 1994.

Thomas Gais & Gerald Benjamin, [Public Discontent and the Decline of Deliberation: A Dilemma in State Constitutional Reform, 68 TEMP. L. REV. 1291, 1303 (1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1566&FindType=Y&ReferencePositionType=S&SerialNum=0106052932&ReferencePosition=1303) [hereinafter Gais & Benjamin, Public Discontent]. For updated figures, see Benjamin, supra note 6.

[[FN18]](#Document1zzB18316252366). Benjamin, supra note 16, at 1020 n.24.

[[FN19]](#Document1zzB19316252366). See, e.g., [WIS. CONST. art. 1, § 22](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000260&DocName=WICNART1S22&FindType=L).

[[FN20]](#Document1zzB20316252366). Id.

[[FN21]](#Document1zzB21316252366). See generally Benjamin, supra note 16.

[[FN22]](#Document1zzB22316252366). Id. at 1024. New York's provision also specified many of the details of the convention's delegate selection process and procedures, leading to a number of other grounds of opposition. See id. at 1030-31.

[[FN23]](#Document1zzB23316252366). Id. at 1019.

[[FN24]](#Document1zzB24316252366). See Colantuono, The Revision of American State Constitutions, supra note 6, at 1480 n.42 (citing [Holmes v. Appling, 392 P.2d 636 (Or. 1964)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&SerialNum=1964123467)).

[[FN25]](#Document1zzB25316252366). See [Cohen v. Attorney General, 259 N.E.2d 539, 546 (Mass. 1970)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&ReferencePositionType=S&SerialNum=1970122834&ReferencePosition=546).

[[FN26]](#Document1zzB26316252366). See infra Part II.A.3.

[[FN27]](#Document1zzB27316252366). MO. CONST. art. XII, § 3(c); [S.D. CONST. art. XXIII, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000359&DocName=SDCNART23S2&FindType=L).

[[FN28]](#Document1zzB28316252366). FLA. CONST. art. XI, § 5, ¶ 1(a); [N.H. CONST. pt. 2, art. 100(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000864&DocName=NHCNPT2ART100&FindType=L).

[[FN29]](#Document1zzB29316252366). 35 THE COUNCIL OF STATE GOVERNMENTS, supra note 8, at 15 tbl.1.4.

[[FN30]](#Document1zzB30316252366). [N.H. CONST. pt. 2, art. 100(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000864&DocName=NHCNPT2ART100&FindType=L).

[[FN31]](#Document1zzB31316252366). See Kathryn Marchocki, Constitutional Amendment May Come Before Voters Again, UNION LEADER (MANCESTER, N.H.), Nov. 4, 2004, at A15; Garry Rayno, Record Election Turnout, UNION LEADER (MANCHESTER, N.H.), Nov. 6, 2004, at A1.

[[FN32]](#Document1zzB32316252366). See COLO. CONST. art. XIX, § 2, ¶ 1.

[[FN33]](#Document1zzB33316252366). [HAW. CONST. art. XVII, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000522&DocName=HICNART17S2&FindType=L).

[[FN34]](#Document1zzB34316252366). Id. [art. XVII, § 5](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000522&DocName=HICNART17S5&FindType=L).

[[FN35]](#Document1zzB35316252366). TARR, supra note 6, at 24. These six states are California, Florida, Hawaii, Georgia, North Carolina, and Oregon. Id. at 23-24; Colantuono, The Revision of American State Constitutions, supra note 6, at 1479 n.33.

[[FN36]](#Document1zzB36316252366). Colantuono, The Revision of American State Constitutions, supra note 6, at 1480. For detail on Georgia, see JOSEPH F. ZIMMERMAN, THE REFERENDUM: THE PEOPLE DECIDE PUBLIC POLICY 73-74 (2001) (citing [Wheeler v. Bd. of Trs. of Fargo Consol. Sch. Dist., 37 S.E.2d 322, 327 (Ga. 1946)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=711&FindType=Y&ReferencePositionType=S&SerialNum=1946103759&ReferencePosition=327)). For a critique of this process, as an improper method of bypassing popular sovereignty, see James A. Henretta, Foreword: Rethinking the State Constitutional Tradition, 22 RUTGERS L.J. 819, 829-31 (1991).

[[FN37]](#Document1zzB37316252366). See infra note 40 and accompanying text.

[[FN38]](#Document1zzB38316252366). Colantuono, The Revision of American State Constitutions, supra note 6, at 1488-89.

[[FN39]](#Document1zzB39316252366). RICHARD J. CONNORS, THE PROCESS OF CONSTITUTIONAL REVISION IN NEW JERSEY: 1940-1947, at 76-112 (1970).

[[FN40]](#Document1zzB40316252366). Janice C. May, State Constitutions and Constitutional Revision 1992-93, in 30 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2, 4 (1994-1995).

[[FN41]](#Document1zzB41316252366). See infra notes 101-30 and accompanying text.

[[FN42]](#Document1zzB42316252366). MELVIN B. HILL, JR., THE GEORGIA STATE CONSTITUTION: A REFERENCE GUIDE 13-14 (1994).

[[FN43]](#Document1zzB43316252366). Id. at 12-13. The members of the commission included the governor, the president of the Senate, the speaker of the House, five members of the House appointed by the speaker, three members of the Senate appointed by the president, a supreme court justice named by the court, a judge of the court of appeals named by the court, the attorney general, the state auditor, two judges of the superior court, three practicing attorneys, and three lay persons appointed by the governor. Id. at 12.

[[FN44]](#Document1zzB44316252366). Id. at 13.

[[FN45]](#Document1zzB45316252366). A.E. Dick Howard, Adopting a New Constitution: Lessons from Virginia, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, supra note 6, 73, 74-75.

[[FN46]](#Document1zzB46316252366). The arguments for and against the commission approach are summarized in ALBERT L. STURM, THIRTY YEARS OF STATE CONSTITUTION-MAKING: 1938-1968, at 93 (1970). See generally Robert F. Williams, Are State Constitutional Conventions Things of the Past? The Increasing Role of the Constitutional Commission in State Constitutional Change, 1 HOFSTRA L. & POL. SYMP. 1 (1996) (discussing the importance of constitutional commissions in “facilitating state constitutional change”).

[[FN47]](#Document1zzB47316252366). TARR, supra note 6, at 94.

[[FN48]](#Document1zzB48316252366). Id. at 136.

[[FN49]](#Document1zzB49316252366). See Peter J. Galie & Christopher Bopst, The [Constitutional Commission in New York: A Worthy Tradition, 64 ALB. L. REV. 1285, 1315 (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3105&FindType=Y&ReferencePositionType=S&SerialNum=0284376310&ReferencePosition=1315); see also Gais & Benjamin, Public Discontent, supra note 17, at 1304 (“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.”).

[[FN50]](#Document1zzB50316252366). See Galie & Bopst, supra note 49, at 1285-87. Apparently distrust of politicians, together with union and trial lawyer opposition, contributed to the defeat. See Richard Pérez-Peña, Voters Refuse to Take Chances on Bond Act and Convention, N.Y. TIMES, Nov. 6, 1997, at B3.

[[FN51]](#Document1zzB51316252366). Henry D. Levine, Note, Limited Federal Constitutional Conventions: Implications of the State Experience, 11 HARV. J. ON LEG. 127, 134 (1973). As the 1947 example makes clear, the line between constitutional revision and constitutional amendment can be hazy. Delegates at a limited constitutional convention may propose a new document, even though certain issues were taken off the table before the convention met. See CONNORS, supra note 39, at 139-86.

[[FN52]](#Document1zzB52316252366). Benjamin & Gais, Conventionphobia, supra note 17, at 73 (“The limited convention allays the ‘Pandora's Box’ fear .”).

[[FN53]](#Document1zzB53316252366). Levine, supra note 51, at 133 n.32.

[[FN54]](#Document1zzB54316252366). See, e.g., [KAN. CONST. art. XIV, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1001553&DocName=KSCNART14S2&FindType=L); [N.C. CONST. art. XIII, § 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000037&DocName=NCCNARTXIIIS1&FindType=L); [TENN. CONST. art. XI, § 3](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000039&DocName=TNCNART11S3&FindType=L).

[[FN55]](#Document1zzB55316252366). See [Snow v. City of Memphis, 527 S.W.2d 55, 63 (Tenn. 1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1975134934&ReferencePosition=63), appeal dismissed for want of substantial federal question, [423 U.S. 1083 (1976)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1976214517); [Cummings v. Beeler, 223 S.W.2d 913, 921-23 (Tenn. 1949)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1949102615&ReferencePosition=921).

[[FN56]](#Document1zzB56316252366). See [WIS. CONST. art. 12, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000260&DocName=WICNART12S2&FindType=L).

[[FN57]](#Document1zzB57316252366). [ALASKA CONST. art. XIII, § 4](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000003&DocName=AKCNART13S4&FindType=L).

[[FN58]](#Document1zzB58316252366). [MONT. CONST. art. XIV, § 2(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1002018&DocName=MTCNSTART14S2&FindType=L).

[[FN59]](#Document1zzB59316252366). Benjamin, supra note 16, at 1021 & n.31.

[[FN60]](#Document1zzB60316252366). See S. REP. NO. 98-594, at 1-3 (1984). See generally RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKSMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988); PAUL J. WEBER & BARBARA A. PERRY, UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION (1989); Michael Stokes Paulsen, [A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment, 103 YALE L.J. 677 (1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1292&FindType=Y&SerialNum=0103407808).

[[FN61]](#Document1zzB61316252366). Peter J. Galie & Christopher Bopst, Changing State Constitutions: Dual Constitutionalism and the Amending Process, [1 HOFSTRA L. & POL'Y SYMP. 27, 31 (1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=114016&FindType=Y&ReferencePositionType=S&SerialNum=0107849740&ReferencePosition=31).

[[FN62]](#Document1zzB62316252366). See Francis H. Heller, Limiting a Constitutional Convention: The State Precedents, 3 CARDOZO L. REV. 563, 565 (1982); Lawrence Schlam, State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation, [43 DEPAUL L. REV. 269, 347-48 (1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1126&FindType=Y&SerialNum=0104481267).

[[FN63]](#Document1zzB63316252366). Colantuono, The Revision of American State Constitutions, supra note 6, at 1475, 1481.

[[FN64]](#Document1zzB64316252366). Schlam, supra note 62, at 347-48.

[[FN65]](#Document1zzB65316252366). 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 1182 (1974); see also Galie & Bopst, supra note 61, at 39.

[[FN66]](#Document1zzB66316252366). [Staples v. Gilmer, 33 S.E.2d 49, 55 (Va. 1945)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=711&FindType=Y&ReferencePositionType=S&SerialNum=1945103415&ReferencePosition=55). This case, together with others, is discussed extensively in Heller, supra note 62, at 570-72; see also [In re Constitutional Convention, 178 A. 433, 452 (R.I. 1935)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=161&FindType=Y&ReferencePositionType=S&SerialNum=1935114681&ReferencePosition=452); R.K. Gooch, The Recent Limited Constitutional Convention in Virginia, 31 VA. L. REV. 708, 713-14 (1945).

[[FN67]](#Document1zzB67316252366). [Woods's Appeal, 75 Pa. 59, 71-72 (1874)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=651&FindType=Y&ReferencePositionType=S&SerialNum=1874021626&ReferencePosition=71), overruled in part by [Stander v. Kelley, 250 A.2d 474 (Pa. 1969)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=162&FindType=Y&SerialNum=1969109255).

       The people have the same right to limit the powers of their delegates that they have to bound the power of their representatives. Each are representatives, but only in a different sphere. It is simply evasive to affirm that the legislature cannot limit the right of the people to alter or reform their government. Certainly it cannot. The question is not upon the power of the legislature to restrain the people, but upon the right of the people, by the instrumentality of the law, to limit their delegates When a people act through a law the act is theirs, and the fact that they used the legislature as their instrument to confer their powers makes them the superiors and not the legislature.

Id. (emphasis added); see also [Quinlan v. Houston & Tex. Cent. Ry. Co., 34 S.W. 738, 744 (Tex. 1896)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=712&FindType=Y&ReferencePositionType=S&SerialNum=1896000145&ReferencePosition=744) (“The delegates to such a convention are but agents of the people and are restricted to the exercise of the powers conferred upon them by the law.”).

[[FN68]](#Document1zzB68316252366). [Gaines v. O'Connell, 204 S.W.2d 425, 431-32 (Ky. 1947)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1947120773&ReferencePosition=431); see Heller, supra note 62, at 572-74.

[[FN69]](#Document1zzB69316252366). [Gaines, 204 S.W.2d at 431-32](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1947120773&ReferencePosition=431).

[[FN70]](#Document1zzB70316252366). [Cummings v. Beeler, 223 S.W.2d 913, 921 (Tenn. 1949)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&ReferencePositionType=S&SerialNum=1949102615&ReferencePosition=921); see Heller, supra note 62, at 574-75; Comment, The Limited Constitutional Convention, 21 TENN. L. REV. 867, 869 (1951).

[[FN71]](#Document1zzB71316252366). See [Opinion of the Justices, 81 So. 2d 678, 679-83 (Ala. 1955)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1955107444&ReferencePosition=679). Advisory opinions are not entitled to precedential weight. See [Hamilton v. Antauga Co., 268 So. 2d 30, 41 (Ala. 1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1972136504&ReferencePosition=41); see also Howard P. Walthall, Sr., [Methods of Constitutional Revision in Alabama, 33 CUMB. L. REV. 195, 212-13 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1125&FindType=Y&ReferencePositionType=S&SerialNum=0294358626&ReferencePosition=212).

[[FN72]](#Document1zzB72316252366). See, e.g., [TENN. CONST. art. XI, § 3](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000039&DocName=TNCNART11S3&FindType=L).

[[FN73]](#Document1zzB73316252366). Heller, supra note 62, at 575-76. Both this Foreword and Levine, supra note 51, provide citations to many more cases.

[[FN74]](#Document1zzB74316252366). See Colantuono, The Revision of American State Constitutions, supra note 6, at 1479 n.34 (1987) (noting that forty-one state constitutions contain such provisions). The absence of any provisions in a state constitution concerning conventions further supports the theory that the legislature's plenary power may be used to propose limits that may be adopted by the voters. Heller, supra note 62, at 564, 567; see also Walter F. Dodd, State Constitutional Conventions and State Legislative Power, 2 VAND. L. REV. 27, 29-34 (1948) (referring to New Jersey's 1947 Convention as a favorable example); Note, State Constitutional Conventions: Limitations on Their Powers, 55 IOWA L. REV. 244, 264 (1969).

[[FN75]](#Document1zzB75316252366). See Act of Feb. 17, 1947, ch. 8, 1947 N.J. Laws 24-39.

[[FN76]](#Document1zzB76316252366). Id. at 24 (“An Act to provide for a State constitutional convention so instructed by the legal voters that it shall have no power to propose any change in the present basis of representation in the Legislature, providing for the nomination and election of delegates, at a special election, and for the submission of the proposals of the convention to the people for adoption or rejection, and making an appropriation therefore.”).

[[FN77]](#Document1zzB77316252366). Id. at 25 (“Whereas, The people in the exercise of their sovereign power may commit their delegates to binding restrictions on the scope and subject matter of such a constituent assembly .”).

[[FN78]](#Document1zzB78316252366). Id.; see also id. at 37-39.

[[FN79]](#Document1zzB79316252366). Id. at 29-39.

[[FN80]](#Document1zzB80316252366). Id. at 36-37.

[[FN81]](#Document1zzB81316252366). Id. at 35-36. After the 1947 Constitutional Convention convened, it adopted the following Rule 51, limiting itself:

       Rule 51. No proposal for revision, alteration or reformation of the present Constitution which does not comply with the Convention's instructions as voted by the people shall be introduced in, reported by any Committee to, or agreed upon by, the Convention.

II STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947: CONVENTION PROCEEDINGS 983, 989-90 (1951).

[[FN82]](#Document1zzB82316252366). [Malinou v. Powers, 333 A.2d 420, 422 (R.I. 1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=162&FindType=Y&ReferencePositionType=S&SerialNum=1975100488&ReferencePosition=422); cf. [Woods's Appeal, 75 Pa. 59, 69-75 (1874)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=651&FindType=Y&ReferencePositionType=S&SerialNum=1874021626&ReferencePosition=69), overruled in part by [Stander v. Kelley, 250 A.2d 474 (Pa. 1969)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=162&FindType=Y&SerialNum=1969109255).

[[FN83]](#Document1zzB83316252366). [Malinou, 333 A.2d at 422](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=162&FindType=Y&ReferencePositionType=S&SerialNum=1975100488&ReferencePosition=422).

[[FN84]](#Document1zzB84316252366). See, e.g., [Snow v. City of Memphis, 527 S.W.2d 55 (Tenn. 1975)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=713&FindType=Y&SerialNum=1975134934), appeal dismissed for want of substantial federal question, [423 U.S. 1083 (1976)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&SerialNum=1976214517).

[[FN85]](#Document1zzB85316252366). This percentage was calculated by the authors from the table in Janice C. May, State Constitutional Developments in 2003, in 36 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 3 tbl.A (2004).

[[FN86]](#Document1zzB86316252366). E.g., [LA. CONST. art. XIII, § 1(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000011&DocName=LACOART13S1&FindType=L). For information on the statutory single-subject rule, see generally Martha J. Dragich, [State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges, 38 HARV. J. ON LEGIS. 103 (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1155&FindType=Y&SerialNum=0283256466).

[[FN87]](#Document1zzB87316252366). [State v. Manley, 441 So. 2d 864, 866 (Ala. 1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1983152721&ReferencePosition=866); see William H. Stewart, The [Tortured History of Efforts to Revise the Alabama Constitution of 1901, 53 ALA. L. REV. 295, 314-15 (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1084&FindType=Y&ReferencePositionType=S&SerialNum=0287790410&ReferencePosition=314); H. Bailey Thomson, Constitutional Reform in Alabama: A Long Time in Coming, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, supra note 6, at 113, 124; Walthall, supra note 71, at 203-05.

[[FN88]](#Document1zzB88316252366). E.g., [CONN. CONST. art. XII](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000264&DocName=CTCNART12&FindType=L); [KY. CONST. § 256](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000010&DocName=KYCNS256&FindType=L); [N.H. CONST. pt. 2, art. 100(b)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000864&DocName=NHCNPT2ART100&FindType=L); [N.J. CONST. art. IX, ¶ 4](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART9P4&FindType=L).

[[FN89]](#Document1zzB89316252366). [W. VA. CONST. art. XIV, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000041&DocName=WVCNART14S2&FindType=L).

[[FN90]](#Document1zzB90316252366). N.J. CONST. art. IX, § 7.

[[FN91]](#Document1zzB91316252366). [PA. CONST. art. XI, § 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000262&DocName=PACNART11S1&FindType=L).

[[FN92]](#Document1zzB92316252366). [COLO. CONST. art. 10, § 20](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000517&DocName=COCNART10S20&FindType=L); see TARR, supra note 6, at 159-60.

[[FN93]](#Document1zzB93316252366). MO. CONST. art. XII, § 2(b).

[[FN94]](#Document1zzB94316252366). GA. CONST. art. X, § 1, ¶ 2.

[[FN95]](#Document1zzB95316252366). [IDAHO CONST. art. XX, § 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000007&DocName=IDCONSTARTXXS1&FindType=L); [OHIO CONST. art. XVI, § 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000279&DocName=OHCNARTXVIS1&FindType=L).

[[FN96]](#Document1zzB96316252366). N.M. CONST. art. XIX, § 1.

[[FN97]](#Document1zzB97316252366). 35 COUNCIL OF STATE GOVERNMENTS, supra note 8, at 12 tbl.1. 2.

[[FN98]](#Document1zzB98316252366). See Gerald Benjamin & Melissa Cusa, Constitutional Amendment Through the Legislature in New York, in CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 47, 50 tbl.3.1 (G. Alan Tarr ed., 1996).

[[FN99]](#Document1zzB99316252366). See supra Part II.A.1. a.

[[FN100]](#Document1zzB100316252366). See Benjamin & Cusa, supra note 98, at 50 tbl.3. 1; see also Galie & Bopst, supra note 61, at 32-35.

[[FN101]](#Document1zzB101316252366). Williams, supra note 46, at 23-24. For a detailed study of an important nineteenth-century New Jersey Commission, see TRACES OF ITS LABOR, supra note 12.

[[FN102]](#Document1zzB102316252366). Williams, supra note 46, at 2.

[[FN103]](#Document1zzB103316252366). Id.; see also Galie & Bopst, supra note 61, at 40-46.

[[FN104]](#Document1zzB104316252366). Benjamin, supra note 16, at 1027.

[[FN105]](#Document1zzB105316252366). Id. at 1034 (quoting [Documents, 26 RUTGERS L.J. 1355, 1394 (1995)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0105697672&ReferencePosition=1394)).

[[FN106]](#Document1zzB106316252366). See THE FINAL REPORT OF THE TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION, EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY: A REPORT TO THE PEOPLE, THE GOVERNOR, AND THE LEGISLATORS OF NEW YORK 11-21 (Feb. 1995); Peter G. Goldmark, Jr., Introduction to DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK, at xiii, xviii-xix (Gerald Benjamin & Henrik N. Dullea eds., 1997); Benjamin, supra note 16, at 1034-35 (“This gave the governor and the legislature one last chance .”); Documents, supra note 105, at 1384-95.

[[FN107]](#Document1zzB107316252366). Benjamin, supra note 16, at 1035 (quoting Documents, supra note 105, at 1396).

[[FN108]](#Document1zzB108316252366). Id. at 1034.

[[FN109]](#Document1zzB109316252366). Id. at 1023.

[[FN110]](#Document1zzB110316252366). Ch. 54, § 63-1, Laws of Utah. This seems to be the adoption of W. Brooke Graves's suggestion of “continuous revision” of state constitutions. See W. Brooke Graves, Current Trends in State Constitutional Revision, 40 NEB. L. REV. 560, 565-68 (1961). A similar recommendation has been made in Alaska. See May, supra note 40, at 4.

[[FN111]](#Document1zzB111316252366). Ch. 54, § 63-1, Laws of Utah.

[[FN112]](#Document1zzB112316252366). Id. § 63-3. For a discussion of the history of the commission, and its impact on the state constitution, see REPORT OF THE UTAH CONSTITUTIONAL REVISION COMMISSION (1994); see also REPORT OF THE UTAH CONSTITUTIONAL REVISION COMMISSION (1996).

[[FN113]](#Document1zzB113316252366). Galie & Bopst, supra note 61, at 1320.

[[FN114]](#Document1zzB114316252366). May, supra note 40, at 29; see also Galie & Bopst, supra note 49, at 1320-21 n.319.

[[FN115]](#Document1zzB115316252366). [FLA. CONST. art. XI, § 6](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART11S6&FindType=L). See generally Donna Blanton, The Taxation and Budget Reform Commission: Florida's Best Hope for the Future, 18 FLA. ST. U. L. REV. 437 (1991).

[[FN116]](#Document1zzB116316252366). Id. [art. XI, §§ 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART11S2&FindType=L), [6](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART11S6&FindType=L).

[[FN117]](#Document1zzB117316252366). Robert F. Williams, Is [Constitution Revision Success Worth Its Popular Sovereignty Price?, 52 FLA. L. REV. 249, 255 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100174&FindType=Y&ReferencePositionType=S&SerialNum=0117704097&ReferencePosition=255).

[[FN118]](#Document1zzB118316252366). See [FLA. CONST. art. XI, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART11S2&FindType=L).

[[FN119]](#Document1zzB119316252366). Id.

[[FN120]](#Document1zzB120316252366). Id. § 6(a)(3); see Galie & Bopst, supra note 49, at 1317-18.

[[FN121]](#Document1zzB121316252366). [FLA. CONST. art. XI, § 6(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART11S6&FindType=L).

[[FN122]](#Document1zzB122316252366). Williams, supra note 117, at 256-57. Although no other state has followed Florida's lead, its innovation has influenced thinking about constitutional design. For example, when the New Jersey's Property Tax Convention Task Force held public hearings, former Governor Florio proposed a variant of the Florida plan. Just as in Florida, political leaders would select those persons who would propose constitutional amendments, and just as in Florida, the amendments they proposed would be submitted directly to the voters for approval. However, Florio's plan was designed to select delegates for a convention, not a commission, and voters retained the opportunity to cast a yes-or-no vote on the entire slate of delegates.

[[FN123]](#Document1zzB123316252366). See generally Rebecca Mae Salokar, Constitutional Revision in Florida: Planning, Politics, Policy, and Publicity, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, supra note 6, at 19; Williams, supra note 117, at 249-73 (2000). For a range of opinions on the Florida experience, see other essays in the April, 2000, Symposium Issue of the Florida Law Review, supra note 117.

[[FN124]](#Document1zzB124316252366). TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION: A REFERENCE GUIDE 15 (G. Alan Tarr ed., 1991).

[[FN125]](#Document1zzB125316252366). [R.I. CONST. art. XIV, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000038&DocName=RICNART14S2&FindType=L); see Benjamin, supra note 16, at 1018-19 n.12.

[[FN126]](#Document1zzB126316252366). [R.I. CONST. art. XIV, § 2](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000038&DocName=RICNART14S2&FindType=L).

[[FN127]](#Document1zzB127316252366). STATE OF RHODE ISLAND, REPORT OF THE BI-PARTISAN PREPARATORY COMMISSION FOR A CONSTITUTIONAL CONVENTION (July 5, 1984).

[[FN128]](#Document1zzB128316252366). STATE OF RHODE ISLAND, REPORT OF THE BI-PARTISAN PREPARATORY COMMISSION FOR A CONSTITUTIONAL CONVENTION (2004).

[[FN129]](#Document1zzB129316252366). Peter B. Lord, Election 2004—Separation of Powers Wins by Big Margin, PROVIDENCE J. (RHODE ISLAND), Nov. 3, 2004, at A1 (noting that forty-eight percent voted in favor and fifty-two percent voted against the proposal to hold another constitutional convention).

[[FN130]](#Document1zzB130316252366). This may represent a sort of “passive aggression” by legislators on the Commission who oppose the calling of a convention pursuant to an automatic referendum. Benjamin, supra note 16, at 1023.

[[FN131]](#Document1zzB131316252366). For a summary of provisions, see 35 COUNCIL OF STATE GOVERNMENTS, supra note 8, at 14-15 tbl.1.3. Unlike other states, North Dakota bases the number of signatures it requires for initiative petitions on the population of state rather than on voting turnout. Id.

[[FN132]](#Document1zzB132316252366). Id.

[[FN133]](#Document1zzB133316252366). Id.

[[FN134]](#Document1zzB134316252366). Id.

[[FN135]](#Document1zzB135316252366). [ILL. CONST. art. XIV, § 3](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000008&DocName=ILCNART14S3&FindType=L).

[[FN136]](#Document1zzB136316252366). See Chi. [Bar Ass'n v. State Bd. of Elections, 561 N.E.2d 50, 55-56 (Ill. 1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&ReferencePositionType=S&SerialNum=1990124421&ReferencePosition=55); Coal. for [Political Honesty v. State Bd. of Elections, 359 N.E.2d 138, 142-47 (Ill. 1976)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&ReferencePositionType=S&SerialNum=1976141487&ReferencePosition=142).

[[FN137]](#Document1zzB137316252366). See [Raven v. Deukmejian, 801 P.2d 1077, 1087 (Cal. 1990)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&ReferencePositionType=S&SerialNum=1990181328&ReferencePosition=1087); [Adams v. Gunter, 238 So. 2d 824, 828-31 (Fla. 1970)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1970141958&ReferencePosition=828). But see [Weber v. Smathers, 338 So. 2d 819, 822-23 (Fla. 1976)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1976140004&ReferencePosition=822) (finding procedural restriction to “amendment” eased by 1972 constitutional amendment).

[[FN138]](#Document1zzB138316252366). See [Omaha Nat'l Bank v. Spire, 389 N.W.2d 269, 276 (Neb. 1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=595&FindType=Y&ReferencePositionType=S&SerialNum=1986133628&ReferencePosition=276).

[[FN139]](#Document1zzB139316252366). See [Romer v. Evans, 517 U.S. 620, 635 (1996)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1996118409&ReferencePosition=635); [Reitman v. Mulkey, 387 U.S. 369, 386-87 (1967)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=780&FindType=Y&ReferencePositionType=S&SerialNum=1967129529&ReferencePosition=386).

[[FN140]](#Document1zzB140316252366). See Hans A. Linde, On [Reconstituting “Republican Government,” 19 OKLA. CITY U. L. REV. 193, 198-99 (1994)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1217&FindType=Y&ReferencePositionType=S&SerialNum=0105732338&ReferencePosition=198); Hans A. Linde, [Practicing Theory: The Forgotten Law of Initiative Lawmaking, 45 UCLA L. REV. 1735, 1754-60 (1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3041&FindType=Y&ReferencePositionType=S&SerialNum=0109600989&ReferencePosition=1754); Hans A. Linde, [When Initiative Lawmaking Is Not “Republican Government“: The Campaign Against Homosexuality, 72 OR. L. REV. 19, 34-39 (1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1219&FindType=Y&ReferencePositionType=S&SerialNum=0102906710&ReferencePosition=34).

[[FN141]](#Document1zzB141316252366). See Catherine Engberg, Note, [Taking the Initiative: May Congress Reform State Initiative Lawmaking to Guarantee a Republican Form of Government?, 54 STAN. L. REV. 569, 572 (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1239&FindType=Y&ReferencePositionType=S&SerialNum=0288249650&ReferencePosition=572); Elizabeth R. Leong, Note, [Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress, 28 RUTGERS L.J. 677, 706 (1997)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0107892950&ReferencePosition=706).

[[FN142]](#Document1zzB142316252366). These data are drawn from the Initiative and Referendum Institute web site. See Initiative & Referendum Institute at the University of Southern California, http://www.iandrinstitute.org/statewide\_i .htm (last visited Jan. 17, 2004) [hereinafter Initiative & Referendum Institute]. These data include both constitutional and statutory initiatives.

[[FN143]](#Document1zzB143316252366). For an up-to-date bibliography of the social-science literature, see JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY 187-94 (2004). For a bibliography of pertinent legal literature, see Initiative & Referendum Institute, http:// www.iandrinstitute.org/Library.htm (last visited Jan. 17, 2004).

[[FN144]](#Document1zzB144316252366). See generally Robert J. Martin, [Calling in Heavy Artillery to Assault Politics as Usual: Past and Prospective Development of Constitutional Conventions in New Jersey, 29 RUTGERS L.J. 963 (1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&SerialNum=0110479766).

[[FN145]](#Document1zzB145316252366). [Id. at 1012-13.](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&FindType=Y&SerialNum=0110479766)

[[FN146]](#Document1zzB146316252366). Believing that a convention could not propose statutes, some political figures have also opposed the calling of a convention.

[[FN147]](#Document1zzB147316252366). [N.J. CONST. art. IV, § I, ¶ 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART4S1P1&FindType=L).

[[FN148]](#Document1zzB148316252366). See, e.g., [Brown v. Heymann, 297 A.2d 572, 577 (N.J. 1972)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=162&FindType=Y&ReferencePositionType=S&SerialNum=1972102327&ReferencePosition=577).

[[FN149]](#Document1zzB149316252366). Act of July 7, 2004, ch. 85, 2004 N.J. Laws 379, 380.

[[FN150]](#Document1zzB150316252366). Much of this information is available on the Task Force's website. See Property Tax Convention, http://www.nj.gov/convention (last visited Jan. 17, 2006).

[[FN151]](#Document1zzB151316252366). STATE OF NEW JERSEY, PROPERTY TAX CONVENTION TASK FORCE, THE REPORT OF THE PROPERTY TAX CONVENTION TASK FORCE TO THE GOVERNOR AND THE LEGISLATURE (2004).

[[FN152]](#Document1zzB152316252366). Article IX, section 1 offers an alternative procedure for proposal of amendments by the legislature:

       If the [proposed amendment or amendments] shall be agreed to by less than three-fifths but nevertheless by a majority of all the members of each of the respective houses, such proposed amendment or amendments shall be referred to the Legislature in the next legislative year; and if in that year the same or any of them shall be agreed to by a majority of each of the respective houses, then such amendment or amendments shall be submitted to the people.

[N.J. CONST. art. IX, ¶ 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART9P1&FindType=L).

[[FN153]](#Document1zzB153316252366). Article IX, section 3 requires that proposed amendments “be published at least once in one or more newspapers of each county, if any be published therein, not less than three months prior to submission to the people.” Id. § 3. This imposes a time requirement that would bind the legislature if it proposed to constitutionalize the convention.

[[FN154]](#Document1zzB154316252366). Assemb. Con. Res. 25, 211th Leg. (N.J. 2005) (2d reprint).

[[FN155]](#Document1zzB155316252366). This, of course, raises the question of the proper division between matters properly treated in the state constitution and those that should be left to statutory law. This is not a clear distinction. See GRAD & WILLIAMS, supra note 11, at 14-29.

       [A] consideration of the problems and criteria of constitutional inclusion and exclusion must concern itself with a balancing of the purposes of the constitution and the needs of government, rather than with an attempt to supply a fixed meaning for the valuative terms “fundamental” and “legislative.” Although there is a more or less agreed upon “core” area of constitutional content, criteria of inclusion and exclusion must take account of the needs of government as conditioned by time and place.

Id. at 15.       In any event, the limitation of a state constitution to “fundamental” matters is inevitably subject to political reality, constitutional past practice within the state, and the acknowledged additional function of a state constitution as a “tool of lawmaking.” See Robert F. Williams, [State Constitutional Law Processes, 24 WM. & MARY L. REV. 169, 175-77 (1983)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=2984&FindType=Y&ReferencePositionType=S&SerialNum=0101115943&ReferencePosition=175).

[[FN156]](#Document1zzB156316252366). See generally DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP (1962); MORTON GRODZINS, THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES (David J. Elazar ed., 1966); Harry N. Scheiber, Federalism and the American Economic Order, 1789-1910, 10 LAW & SOC'Y REV. 57 (1975).

[[FN157]](#Document1zzB157316252366). For a survey of how federal systems deal with the distribution of powers and competencies (responsibilities), see generally DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES (Akhtar Majeed et al. eds., 2005).

[[FN158]](#Document1zzB158316252366). [N.J. CONST. art. VIII, § IV, ¶ 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART8S4P1&FindType=L).

[[FN159]](#Document1zzB159316252366). [MONT. CONST. art. 10, §§ 1](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1002018&DocName=MTCNSTART10S1&FindType=L), [3](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1002018&DocName=MTCNSTART10S3&FindType=L). See generally Paul L. Tractenberg, Education, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM (G. Alan Tarr & Robert F. Williams eds., forthcoming 2006).

[[FN160]](#Document1zzB160316252366). For an overview and discussion of these “positive rights” provisions, see generally Helen Hershkoff, [Foreword: Positive Rights and the Evolution of State Constitutions, 33 RUTGERS L.J. 799 (2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&SerialNum=0300115624), and Burt Neuborne, Foreword: State Constitutions and the Evolution of Positive Rights, 20 RUTGERS L.J. 881 (1989). For an insightful discussion of state environmental provisions and how they might be implemented, see Barton Thompson, The Environment and Natural Resources, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, supra note 159.

[[FN161]](#Document1zzB161316252366). For overviews of this litigation and its consequences, see generally MATTHEW H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY (2001); DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY (2001); and Tractenberg, supra note 159.

[[FN162]](#Document1zzB162316252366). See, e.g., [Butte Cmty. Union v. Lewis, 712 P.2d 1309, 1310 (Mont. 1986)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=661&FindType=Y&ReferencePositionType=S&SerialNum=1986103272&ReferencePosition=1310) (noting that the Montana Constitution also “establishes a fundamental right to welfare”); [Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=578&FindType=Y&ReferencePositionType=S&SerialNum=1978144633&ReferencePosition=451) (noting that New York's constitution includes a provision for assistance to the needy).

[[FN163]](#Document1zzB163316252366). [LA. CONST. art. I, § 13](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000011&DocName=LACOART1S13&FindType=L).

[[FN164]](#Document1zzB164316252366). Florida does not have the initiative for the enactment of statutes.

[[FN165]](#Document1zzB165316252366). [FLA. CONST. art. II, § 8](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART2S8&FindType=L).

[[FN166]](#Document1zzB166316252366). Id. § 8(h) (emphasis added); see TALBOT D'ALEMBERTE, supra note 124, at 40.

[[FN167]](#Document1zzB167316252366). [N.Y. CONST. art. IX, § 2(b)(1)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000300&DocName=NYCNART9S2&FindType=L).

[[FN168]](#Document1zzB168316252366). PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 217 (1991); see also JOSEPH F. ZIMMERMAN, SUBNATIONAL POLITICS: READINGS IN STATE AND LOCAL GOVERNMENT 72-73 (2d ed. 1970).

[[FN169]](#Document1zzB169316252366). See, e.g., [FLA. CONST. art. X, § 4 (a)(2)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART10S4&FindType=L) (providing that $1000 in personal property is exempt from forced sale for debts, unchanged since 1868).

[[FN170]](#Document1zzB170316252366). Richard Briffault, [Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law, 34 RUTGERS L.J. 907, 910 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0297221936&ReferencePosition=910); see also Susan P. Fino, [A Cure Worse than the Disease? Taxation and Finance Provisions in State Constitutions, 34 RUTGERS L. J. 959, 1010-12 (2003)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0297221937&ReferencePosition=1010).

[[FN171]](#Document1zzB171316252366). NATIONAL MUNICIPAL LEAGUE, STATE CONSTITUTIONAL STUDIES PROJECT, MODEL STATE CONSTITUTION (6th ed. 1968) and 1950s literature supporting that perspective.

[[FN172]](#Document1zzB172316252366). TARR, supra note 6, at 6-28.

[[FN173]](#Document1zzB173316252366). GRAD & WILLIAMS, supra note 11, at 16.

[[FN174]](#Document1zzB174316252366). [N.J. CONST. art. VIII, § 2, ¶ 4](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART8S2P4&FindType=L) (amended 1995).

[[FN175]](#Document1zzB175316252366). Id.

[[FN176]](#Document1zzB176316252366). ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE, at xlii (1997).

[[FN177]](#Document1zzB177316252366). Briffault, supra note 170, at 910.

[[FN178]](#Document1zzB178316252366). James Gray Pope, An [Approach to State Constitutional Interpretation, 24 RUTGERS L.J. 985, 985-86 (1993)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0104454366&ReferencePosition=985).

[[FN179]](#Document1zzB179316252366). See, e.g., [Gibbons v. Cenarrusa, 92 P.3d 1063, 1067 (Idaho 2002)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4645&FindType=Y&ReferencePositionType=S&SerialNum=2002283748&ReferencePosition=1067).

[[FN180]](#Document1zzB180316252366). U.S. CONST. art. I, § 9 (providing that Congress could not prohibit or regulate slavery until after 1808).

[[FN181]](#Document1zzB181316252366). [FLA. CONST. art. XII, § 10](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART12S10&FindType=L) (emphasis added). Relegating detailed or outmoded provisions of state constitutions to ordinary statutory law is often a component of state constitutional revision. See, e.g., THE CONSTITUTION OF VIRGINIA: REPORT OF THE COMMISSION OF CONSTITUTIONAL REVISION 9-10, 13, 28 (1969).

[[FN182]](#Document1zzB182316252366). See generally William R. Woods, Article XII, Section 10: Formerly of the Florida Constitution, 17 FLA. ST. U.L. REV. 353 (1990).

[[FN183]](#Document1zzB183316252366). Id.

[[FN184]](#Document1zzB184316252366). [Flack v. Graham, 453 So. 2d 819, 820-21 (Fla. 1984)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1984137321&ReferencePosition=820). The Florida court later ruled that uncodified provisions of the old constitution had been repealed by comprehensive revisions of the statutes, which did not include such provisions. [Dade County v. Am. Hosp. of Miami, Inc., 502 So. 2d 1230, 1232 (Fla. 1987)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1987004219&ReferencePosition=1232).

[[FN185]](#Document1zzB185316252366). THE FLORIDA SENATE INTERIM PROJECT REPORT 2006-141 COMMITTEE ON THE JUDICIARY, OPTIONS FOR STREAMLINING THE STATE CONSTITUTION 7 (Jan. 2006), available at http:// www.flsenate.gov/data/Publications/2006/Senate/reports/interim\_ reports/pdf/2006-141ju.pdf.

[[FN186]](#Document1zzB186316252366). Id. [art. V](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000546&DocName=USCOARTV&FindType=L).

[[FN187]](#Document1zzB187316252366). S. AFR. CONST. ch. 2, § 37, ¶¶ 1-5; ch. 4, § 74, ¶¶ 1-3; BASIC LAW OF GERMANY art. 73, § 3.

[[FN188]](#Document1zzB188316252366). ZIMMERMAN, supra note 168, at 72-75.

[[FN189]](#Document1zzB189316252366). Id.

[[FN190]](#Document1zzB190316252366). WILLIAM H. STEWART, THE ALABAMA STATE CONSTITUTION: A REFERENCE GUIDE 2 (1994).

[[FN191]](#Document1zzB191316252366). HILL, supra note 42, at 20-22.

[[FN192]](#Document1zzB192316252366). [ALA. CONST. art. XVIII, § 284](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000002&DocName=ALCNARTXVIIIS284&FindType=L).

[[FN193]](#Document1zzB193316252366). 3 Official Proceedings, Constitutional Convention of 1901, State of Alabama, at 3913, quoted in [Opinion of the Justices, 81 So. 2d 881, 889 (Ala 1955)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1955107450&ReferencePosition=889).

[[FN194]](#Document1zzB194316252366). See [Opinion of the Justices, 81 So. 2d at 887, 893](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=735&FindType=Y&ReferencePositionType=S&SerialNum=1955107450&ReferencePosition=887).

[[FN195]](#Document1zzB195316252366). Arthur B. Gunlicks, [State (Land) Constitutions in Germany, 31 RUTGERS L.J. 971, 993-96 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0283051925&ReferencePosition=993).

[[FN196]](#Document1zzB196316252366). Dirk Brand, The [Western Cape Provinicial Constitution, 31 RUTGERS L.J. 961, 970 (2000)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1226&FindType=Y&ReferencePositionType=S&SerialNum=0283051924&ReferencePosition=970).

[[FN197]](#Document1zzB197316252366). Id.

[[FN198]](#Document1zzB198316252366). Gunlicks, supra note 195, at 994-95. Several national constitutions also utilize state goals or directive principles. See, e.g., INDIA CONST. arts. 36-51; IR. CONST., 1937, art. 45, available at http:// www.taoiseach.gov.ie/index.asp?docID=243 (last visited Jan. 25, 2006).

[[FN199]](#Document1zzB199316252366). KAY COLLETT GOSS, THE ARKANSAS STATE CONSTITUTION: A REFERENCE GUIDE 211 (1993); see also [Aka v. Jefferson Hosp. Ass'n, 42 S.W.3d 508, 517 (Ark. 2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=4644&FindType=Y&ReferencePositionType=S&SerialNum=2001402851&ReferencePosition=517) (”[T]he import of Amendment 68 remains a compelling expression of Arkansas's public policy to the extent it does not violate federal law.” (internal quotation marks omitted)).

[[FN200]](#Document1zzB200316252366). [VT. CONST. ch. II, § 76](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000883&DocName=VTCNCIIS76&FindType=L).

       The Justices of the Supreme Court are hereby authorized and directed to revise Chapters I and II of the Constitution in gender inclusive language. This revision shall not alter the sense, meaning or effect of the sections of the Constitution. When the revision is certified by the Justices or a majority thereof to the Secretary of State, it shall be a substitute for existing Chapters I and II of the Constitution.

Id.

[[FN201]](#Document1zzB201316252366). See id. § 75.

       The Justices of the Supreme Court are hereby authorized and directed to revise Chapter II of the Constitution by incorporating into said Chapter all amendments of the Constitution that are now or may be then in force and excluding therefrom all sections, clauses and words not in force and rearranged and renumbering the sections thereof under appropriate titles as in their judgement may be most logical and convenient; and said revised Chapter II as certified to the Secretary of State by said Justices or a majority thereof shall be a part of the Constitution of this State in substitution for existing Chapter II and all amendments thereof.

Id.; see also [ME. CONST. art. X, § 6](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000265&DocName=MECNART10S6&FindType=L).       A similar proposal was made for streamlining, or recompiling the Alabama Constitution without any substantive change. Such a draft is already in existence. See Public Affairs Research Council of Alabama, The PARCA Report (2004), http://parca.samford.edu/stconst.htm; see also Benjamin B. Spratling III, Revision: The Case for Recompilation, http:// accr.constitutionalreform.org/symposium/recomp.html. For a similar proposal with respect to the Federal Constitution, see generally Edward Hartnett, A “Uniform and Entire” Constitution; or, [What If Madison Had Won?, 15 CONST. COMMENT. 251 (1998)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=100699&FindType=Y&SerialNum=0109975236).

[[FN202]](#Document1zzB202316252366). HILL, supra note 42, at 15.

[[FN203]](#Document1zzB203316252366). G. ALAN TARR & MARY CORNELIA ALDIS PORTER, STATE SUPREME COURTS IN STATE AND NATION 42-46 (1988); Helen Hershkoff, [State Courts and the “Passive Virtues“: Rethinking the Judicial Function, 114 HARV. L. REV. 1833, 1881-82 (2001)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=3084&FindType=Y&ReferencePositionType=S&SerialNum=0284019260&ReferencePosition=1881).

[[FN204]](#Document1zzB204316252366). [MICH. CONST. art. II, § 8](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000043&DocName=MICOART2S8&FindType=L).

[[FN205]](#Document1zzB205316252366). [N.J. CONST. art. VIII, § 2, ¶ 5](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART8S2P5&FindType=L).

[[FN206]](#Document1zzB206316252366). [TEX. CONST. art. III, § 35 (b)-(c)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000301&DocName=TXCNART3S35&FindType=L).

[[FN207]](#Document1zzB207316252366). GA. CONST. art. I, § 2, ¶5.

[[FN208]](#Document1zzB208316252366). [COLO. CONST. art. II, §15](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000517&DocName=COCNART2S15&FindType=L); see also MO. CONST. art. I, § 28.

[[FN209]](#Document1zzB209316252366). This blanket approach is disapproved in GRAD & WILLIAMS, supra note 11, at 90-91.

[[FN210]](#Document1zzB210316252366). [N.J. CONST. art. IV, § VII, ¶ 11](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000045&DocName=NJCNART4S7P11&FindType=L).

[[FN211]](#Document1zzB211316252366). The Florida clause reads as follows:

       The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

[FLA. CONST. art. 1, § 12](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000006&DocName=FLCNART1S12&FindType=L) (emphasis added). See generally Christopher Slobogin, State Adoption of Federal Law: Exploring the Limits of Florida's “Forced Linkage” Amendment, 39 U. FLA. L. REV. 653 (1987).

[[FN212]](#Document1zzB212316252366). [CAL. CONST. art. I, § 7(a)](http://www.westlaw.com/Find/Default.wl?rs=dfa1.0&vr=2.0&DB=1000298&DocName=CACNART1S7&FindType=L).

[[FN213]](#Document1zzB213316252366). GRAD & WILLIAMS, supra note 11, at 33-34.