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## CHANGING STATE CONSTITUTIONS: DUAL CONSTITUTIONALISM AND THE AMENDING PROCESS

*Peter J. Galie\* and Christopher Bopst\*\**

Providing formal, orderly and deliberate change in a constitutional regime - "Responding to Imperfection:"<sup>1</sup> - is one of America's major contributions to the theory and practice of constitutional government, a contribution which has come from the state as well as the national constitutional tradition. Unfortunately, the focus of scholarship has centered on the national constitution and national amendment at the expense of the rich amendment tradition at the state level. This neglect has impoverished our thinking about, and narrowed our horizons concerning constitutional reform. An examination of the modes of constitutional revision at the state level reveals a remarkably diverse and active reform tradition.

The consequences of this neglect can be illustrated by examining the question of how easy or difficult it should be to amend a constitution. Madison, in the *Federalist Papers* posed the dilemma clearly: "guard[ing] equally against that extreme facility, which would render the Constitution too mutable; and the extreme difficulty, which might perpetuate its discovered faults".<sup>2</sup> Beyond the belief that it should be more difficult than the process by which ordinary legislation is adopted, there is little agreement in theory or practice.

What are the hazards of making it too difficult? A constitution

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1. Sanford Levinson ed., *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL GOVERNMENT* (1995).

2. *THE FEDERALIST* No. 43, Isaac Krammick ed., *The Federalist Papers*, 284 (1987).

becomes irrelevant when needed change and rectification of mistakes becomes all but impossible; procedures will be devised to subvert or circumvent obsolete or constrictive constitutional provisions; and the judiciary will likely take on a hypertropic role. The prime example is the national Constitution. The difficulty of amending that Constitution has led to a regime dominated by Non-Article V constitutional change. The constitutional revolution effected by the Reconstruction Period was successful only by skirting the formal requirements of Article V<sup>3</sup>; and the constitutional transformation which legitimized the modern welfare state was engineered by the use of "transformative judicial appointments" and "transformative opinions",<sup>4</sup> opinions which are the functional equivalent of amendments. With good reason the Supreme Court has been called a continuing constitutional convention.<sup>5</sup> One consequence of reliance on Non-Article V change is that the text becomes less and less relevant and informative about the way government operates, as most change takes place "off-text".<sup>6</sup> These changes, particularly when fashioned by the judiciary, have created a "formulaic constitution".<sup>7</sup> The standard invidious contrast between the elegant parsimony of the national document and the dense, complex, indecipherable nature of state constitutions is misleading. The five hundred plus volumes of the United States Reports, the records of our continuing constitutional convention, reveal this formulaic constitution. The style is an amalgam of the academic and bureaucratic - "complex, layered and equivocal" - detailed and dense enough to compete with the constitutional language of the states.<sup>8</sup> Amending the national Constitution has become all but impossible, although some believe it unnecessary, as the Supreme Court and Congress accommodate the necessity of interpreting the constitutional text to adapt to the considered requirements of the times, and respond to the demands of persistent majorities.<sup>9</sup> The equal rights amendment,

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3. Bruce Ackerman, *Higher Lawmaking*, in Levinson, *supra* note 1, at 77-79.

4. *Id.* at 81-82.

5. Woodrow Wilson *quoted in*, Harold W. Chase and Craig R. Ducat, EDWARD S. CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY, 5 (1974).

6. Stephen M. Griffith, *Constitutionalism in the United States: From Theory to Politics*, in Levinson, *supra* note 1, at 56.

7. Robert Nagel, CONSTITUTIONAL CULTURES, 121, (1989).

8. *Id.* at 128.

9. Some would add, and unnecessary, as the Court and the Congress have accommodated the need to adapt the Constitution to the felt needs of the time and in response to the demands of persistent majorities. Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, VI, *Journal of Public Law*, 279, (Fall, 1957). After comparison with amendment rates in the fifty states and selected foreign countries, Donald Lutz concluded that the U.S.

flag protection amendment, electoral college reform amendment, and the balanced budget amendment, among others, all fell victim to the obstacle course that is Article V. If constitutional amendments can no longer be adopted under any but extreme circumstances, the country has come to the end of constitutionalism as a distinctive and meaningful idea "in the sense that Americans have lost the confidence, present in the late eighteenth century, that they have the ability rationally to diagnose fundamental problems of their political order, discuss those problems openly, and resolve them through a special political process that results in changes to the text of the Constitution".<sup>10</sup>

If such is the fate of the great experiment with constitutionalizing fundamental change at the national level, that fate is not shared at the state level. The tradition of state constitutionalism, though submerged by our fixation on the national Constitution perceived as a symbol of our success as a nation, is not only flourishing, but, in the variety of available procedures for constitutional reform, is "truly astonishing".<sup>11</sup>

State modes of constitutional reform are usually pointed to as an example of the second hazard, i.e., making it too easy to effect constitutional change. This charge has been a persistent one. "It takes no more effort [in Oregon] nor any greater care to amend a clause of the constitution than it does to enact, alter, or repeal a statute".<sup>12</sup> Some commentators go so far as to conclude: "since all law is reduced to one level . . . we no longer have any constitutional law".<sup>13</sup> Paradoxically, much of this literature simultaneously laments the fact that it is so difficult to achieve constitutional reform.<sup>14</sup>

The important lessons provided by state constitutional practice concerning contemporary issues related to the amendment process do not

Constitution is "unusually and probably excessively difficult to amend." Donald Lutz, *Towards a Theory of Constitutional Amendment*, in Levinson *supra* note 1, at 265.

10. Griffith, *supra* note 6, at 60-61.

11. W. Brooke Graves, *State Constitutional Law: A Twenty Five Year Summary*, WILLIAM & MARY L. REV. VIII (Fall, 1966) p. 6.

12. *State v. Schluer*, 59 Ore. 18, 25 (1811).

13. Margaret C. Klinglesmith, *Amending the Constitution of the United States*, 73, UNIV. OF PENN. L. REV., 355, 371. David Fellman, *What Should a Constitution Contain*, in W. BROOKE GRAVES, ED., MAJOR PROBLEMS IN STATE CONSTITUTIONAL REVISION, 139-150, (1960).

14. Ernest R. Bartley refers to the drafting of constitutional material in a form acceptable to the people as a task that frequently approaches the "impossible", *Methods of Constitutional Change in Graves, supra* note 11, at 36. See also TIP H. ALLEN & COLEMAN RANSOME JR., CONSTITUTIONAL REVISION IN THEORY AND PRACTICE, 16-20, (1962); ELMER E. CORNWELL JR., JAY S. GOODMAN AND WAYNE R. SWANSON, CONSTITUTIONAL CONVENTIONS: THE POLITICS OF REVISION, x-xii, (1974).

exhaust the value of the state constitutional tradition.

Questions concerning constitutional reform debated at the theoretical level in academic journals have been played out in the constitutional arenas of the states with instructive results. For example, recent scholarly attention has focused on the issue of whether amendments which materially change the pre-existing structure of government or offend human dignity would be unconstitutional. Is the power of amendment limited? This argument has been recently advanced, *inter alia*, by Walter Murphy.<sup>15</sup> In the former category would be an amendment to abolish constitutional democracy; in the latter an amendment to permit slavery. Murphy and others claim that the amendment process could not be employed constitutionally to allow either.<sup>16</sup>

Some state constitutions make a distinction between constitutional revision and constitutional amendment. When California adopted an amendment, through the referendum process, that would have required judges, when interpreting state constitutions, to follow the Supreme Court interpretation of comparably worded clauses in the national constitution, the California Supreme Court in *Raven v. Deukemejian* held that such an amendment effected so fundamental a transformation of the constitution as to constitute a revision rather than an amendment.<sup>17</sup> Since the California Constitution permitted revision only by special convention or legislative amendment, the constitutional initiative was invalid. Nevada permits revision as opposed to amendment only by conventions.<sup>18</sup> Typically, state amending clauses speak of amending when referring to legislative or popular initiation, and revision only when referring to conventions, implying that large scale or systematic changes in the document are to be undertaken only by convention. Though there is no bright line between amending and revising, and some states have combined commission recommendations with legislative amendments to accomplish what would qualify as systematic reform, the distinction does exist and continues to play a role in protecting fundamental law from being undermined by radical change in the guise of an amendment.

Another issue of recent scholarly debate concerns the question of

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15. Walter Murphy, *Merlin's Memory: The Past and Future Imperfect of the One and Future Polity*, in Levinson, *supra* note 1, at 163. The argument is not entirely new. For earlier versions see Lester Orfield, *Amending the Federal Constitution*, 87-88, (1942).

16. Murphy *supra* note 15, at 173-175. See also William F. Harris, II, *The Interpretable Constitution*, Chap. 4, (1993).

17. 801 P. 2d 1077 (Cal., 1990).

18. Nevada Const., Art. 16. sec. 2.

whether Article V is the exclusive method by which formal constitutional revision or amendment can be effected. Scholars such as Akhil Reed Amar have argued that the article should not be interpreted as saying that it provides the only means to amend the document. Further, "Article V nowhere prevents the people themselves, acting apart from ordinary government, from exercising their legal right to alter or abolish government, via the proper legal procedures".<sup>19</sup> For Amar a national referendum which obtained majority support would be sufficient to ratify amendments. Whether such majoritarian revision is permitted or consistent with the Federalist constitutional theory undergirding the national Constitution is problematic, but it is certainly not alien to the process of constitutional change at the state level where majoritarianism has played a more prominent role.<sup>20</sup> New York procedure is typical in that it requires a majority vote of two successive legislatures followed by a majority of those voting on the proposition at a general election.<sup>21</sup> More impressive is the evidence on the issue of the exclusivity of the amending process specified in the various state constitutions. The constitutional convention is a method common to all fifty states, although in a handful of them the constitutions are silent on the right to hold a convention. Courts in those states have generally held there to be a right to hold such a convention even though none is specified in the document, on the theory that a right to hold a constitutional convention is an inherent right of the people to alter their own form of government.<sup>22</sup>

#### *Dual Constitutionalism*

With respect to the methods of amending the national and state constitutions, the differences are so great that it is fair to speak of a dual constitutionalism in America.<sup>23</sup> The extent to which states permit, nay require, citizen participation and the extent to which this participation is majoritarian in character are the most striking differences between the national and state constitutional traditions. Direct citizen participation in the national amending process is restricted to one act, the electing of

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19. Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment*, in Levinson *supra* note 1, at 90.

20. For a view contrary to Amar's see David R. Dow, *The Plain Meaning of Article V*, in Levinson, *supra* note 1, at 117; and John Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanics*, CUMBERLAND L. REV. 21 (1991), 271-307.

21. N.Y. Const., Article XIX. Eighteen other states have similar majoritarian procedures.

22. Tip Allen & Coleman Ransome Jr., *supra* note 14, at 4.

23. Judith Kaye, *Dual Constitutionalism in Practice and Principle* 42 *Rec. A.B. City N.Y.* 3 (1987), reprinted in 61 ST. JOHN'S L. REV. 399 (1987).

convention delegates, should such a convention be authorized.<sup>24</sup> Four methods of constitutional change are employed by the states: legislative-initiated amendment, constitutional convention, constitutional commission, and popular initiative. Within each category there are numerous variations.<sup>25</sup> While the amending process of Article V has fallen into disuse, largely superseded by non-Article V, "constitutional change", formal constitutional revision at the state level has shown a remarkable vitality (CHART 1).

This has no doubt contributed to the legislative character of state constitutional politics and the lengthy policy oriented character of their respective documents. Congress has successfully deflected most proposals for amending the national Constitution. Of the approximately ten thousand proposals submitted to the Congress since 1789, only twenty seven have been successfully ratified, making the chances little better than one in six thousand. Whereas states have preferred to turn ordinary legislation into constitutional amendments, the Congress has preferred to turn potential constitutional amendments into legislation.<sup>26</sup>

### I. THE LEGISLATIVE INITIATIVE

Legislative initiative is the most commonly used and most successful means of constitutional change in the states. Of the 5,000 plus amendments adopted by the states as of 1993, over 90% were adopted by legislative initiative.<sup>27</sup> With the single exception of Delaware, where approval of two-thirds vote of two successive legislatures is sufficient to amend the constitution, all states require popular

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24. Proposals to amend the Constitution providing for more direct participation in the amendment process have been repeatedly made throughout this country's history. See Orfield, *supra* note 15, at 92.

25. Complete information on these these variations can be found in ALBERT STURM, THIRTY YEARS OF STATE CONSTITUTION MAKING, 1938-1968, pp. 118-155, (1970). For over fifty years, the late Albert Sturm has compiled the record of constitutional revision in the states in his annual summaries of state constitutional change in the Book of the States. Since the late 1980s that task has been taken up by Janice May. These compilations are convenient, reliable sources of state constitutional activity for which all students of state constitutional law are indebted.

26. CLEMENT VOSE, CONSTITUTIONAL CHANGE: AMENDMENT POLITICS AND SUPREME COURT LITIGATION SINCE 1900, 341-42, (1972). Vose gives as examples the Sherman Anti-Trust Act, the Wagner Act and the Civil Rights Act. A more recent addition would be the Americans with Disabilities Act 42 U.S.C. 12101 et. seq. (1990).

27. Figures adapted and updated from Sturm, *supra* note 25, at 29-31. If we exclude newly revised constitutions submitted to the voters by conventions, and include only the separate amendments, convention submissions have a slightly higher success rate, 68% versus 65% for legislative submissions.

CHART I

| Method of initiation             | 1964-65 | 1966-67 | 1968-69 | 1970-71 | 1972-73 | 1974-75 | 1976-77 | 1978-79 | 1980-81 | 1982-83 | 1984-85 | 1986-87 | 1988-89 | 1990-91 | 1992-93 | 1964-93 |
|----------------------------------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|---------|
| <b>All methods</b>               |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |
| Number of states involved        | 46      | 48      | 44      | 48      | 47      | 48      | 42      | 43      | 46      | 45      | 45      | 47      | 45      | 41      | 43      |         |
| Total proposals                  | 321     | 477     | 494     | 403     | 530     | 352     | 399     | 395     | 388     | 345     | 238     | 275     | 267     | 226     | 239     | 5349    |
| Total adopted                    | 229     | 378     | 372     | 224     | 368     | 257     | 280     | 277     | 272     | 258     | 158     | 204     | 199     | 145     | 160     | 3781    |
| Percentage adopted               | 70.093  | 78.197  | 74.494  | 54.591  | 69.057  | 72.727  | 70.175  | 69.367  | 70.10   | 73.043  | 65.546  | 73.455  | 73.783  | 63.274  | 66.109  | 69.957  |
| <b>Legislative proposal</b>      |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |
| Number of states involved        | 45      | 47      | 41      | 47      | 46      | 47      | 42      | 40      | 46      | 45      | 45      | 46      | 45      | 41      | 42      |         |
| Total proposals                  | 295     | 457     | 450     | 392     | 497     | 332     | 369     | 319     | 362     | 330     | 211     | 243     | 246     | 197     | 201     | 4901    |
| Total adopted                    | 217     | 360     | 340     | 222     | 356     | 245     | 273     | 223     | 265     | 255     | 144     | 191     | 188     | 134     | 137     | 3550    |
| Percentage adopted               | 72.20   | 77.681  | 74.667  | 55.612  | 71.227  | 73.494  | 73.984  | 68.966  | 73.20   | 75.455  | 67.30   | 77.778  | 75.61   | 67.005  | 67.164  | 71.638  |
| <b>Constitutional convention</b> |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |
| Number of states involved        | 2       | 4       | 5       | 2       | 4       | 2       | 1       | 3       | 2       | 0       | 1       | 1       | 0       | 0       | 1       |         |
| Total proposals                  | 9       | 18      | 37      | 6       | 17      | 7       | 12      | 51      | 8       | 0       | 10      | 14      | 0       | 0       | 1       | 190     |
| Total adopted                    | 5       | 16      | 32      | 1       | 9       | 4       | 4       | 48      | 2       | 0       | 6       | 8       | 0       | 0       | 0       | 135     |
| Percentage adopted               | 55.56   | 88.89   | 86.49   | 16.67   | 52.94   | 57.14   | 33.33   | 94.12   | 25.00   | 0       | 60.00   | 57.143  | 0       | 0       | 0       | 71.053  |
| <b>Constitutional commission</b> |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |
| Number of states involved        | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 1       | 0       | 0       | 0       | 0       | 0       | 0       | 1       |         |
| Total proposals                  | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 8       | 0       | 0       | 0       | 0       | 0       | 0       | 3       | 11      |
| Total adopted                    | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 2       | 2       |
| Percentage adopted               | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 0       | 66.667  | 18.182  |
| <b>Constitutional initiative</b> |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |         |
| Number of states involved        | 7       | 2       | 5       | 4       | 7       | 7       | 8       | 10      | 11      | 9       | 10      | 9       | 11      | 10      | 13      |         |
| Total proposals                  | 17      | 2       | 7       | 5       | 16      | 13      | 18      | 17      | 18      | 15      | 17      | 18      | 21      | 29      | 34      | 247     |
| Total adopted                    | 7       | 2       | 0       | 1       | 3       | 8       | 3       | 6       | 5       | 3       | 8       | 5       | 11      | 11      | 21      | 94      |
| Percentage adopted               | 41.176  | 100     | 0       | 20.00   | 18.75   | 61.54   | 16.67   | 35.29   | 27.78   | 20.00   | 47.06   | 27.78   | 52.38   | 37.93   | 61.76   | 38.06   |

ratification for each amendment proposed by the legislature. Beyond these common features state charters contain a variety of procedural requirements for initiation and ratification.<sup>28</sup>

TABLE I

*Frequency of Passage Required*

|                   | Ordinary             | Once | Twice |
|-------------------|----------------------|------|-------|
| Majority Required |                      | 9    | 11    |
|                   | <i>Extraordinary</i> | 29   | 4     |

Taken from Gerald Benjamin & Melissa Cusa, "Amending the New York State Constitution Through The Legislature", in Temporary State Commission on Constitutional Revision, *New York Constitution: A Briefing Book*, ed., Gerald Benjamin (Albany, New York 1994) pg. 67. Connecticut, Hawaii, and New Jersey are included twice as they each have two different methods of constitutional amendment.

Legislative initiative is ordinarily employed for limited change in the constitution and, in fact, some states prohibit more extensive revision by amendment. When the Florida legislature used a device known as a "Daisy-Chain", interlocking major constitutional revision such that if one amendment failed, all would fail, the Florida Supreme Court invalidated the proposal.<sup>29</sup> Wishing to avoid the problems usually associated with constitutional change by legislative action — a lengthy, confusing, chaotic document — the Florida legislature in 1964 offered an amendment allowing revision without a constitutional convention. That amendment was accepted by the voters. The Supreme Court in Alabama invalidated an attempt by the Alabama legislature to submit a new constitution to the voters on the grounds that the constitution provides for a convention.<sup>30</sup> Systematic revision by amendment is also prohibited in Delaware. Other states have employed the legislative amendment to present the electorate with revised constitutions. Georgia did so successfully in 1945 as did North Carolina in 1971.

The legislative method is the least controversial form of constitutional change. The fact that these amendments must have approval at least once, and/or extraordinary majorities of both houses, as well as approval by the people, indicates the amendment is likely to have the support of significant political forces in the state. Requiring more

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28. Sturm, *supra* note 25, at 118 - 127, provides fuller descriptions of these variations.

29. Rivera-Cruz v. Gray, 104 So.2d 510 (Fla. 1958).

30. State v. Manley, 441 So.2d 864 (Ala. 1983).

elaborate procedures for passage, as well as ratification by the voters, minimizes the possibility that radical constitutional measures will succeed.

In recent years the charge has been made that amendments to state bills of rights have reduced rights and threatened others. Of the legislative amendments adopted between 1970 and 1986, 40 were rights restrictive and 36 rights enhancing.<sup>31</sup> From 1986 to 1990 a similar pattern emerged with 20 restrictive and 19 expansive measures adopted. However, eight of the 20 rights reducing measures were passed by popular initiative rather than by legislative proposal. Subtracting those eight, the record stands at 12 restrictive and 19 expansive measures. Of the 40 restrictive measures 30 involved criminal justice. This diminution of rights is reason for concern, but it should be viewed in light of nationwide developments. These state amendments are consistent with the decisions of the Supreme Court, congressional legislation, and the pronouncements of the President concerning the criminal justice system.<sup>32</sup> On the positive side, seventeen "Little ERA's", the right of privacy, rights of the disabled, and environmental protections, to name a few, have been added by legislative amendment during the period under study.

Although valuable and desirable constitutional change has been accomplished by legislative initiative, it is not an adequate substitute for general and systematic constitutional revision. Legislative inertia, irreconcilable political divisions ("gridlock"), legislative self interest, and domination of the legislative assembly by pressure groups, are the other weaknesses associated with legislative initiative.

## II. STATE CONSTITUTIONAL CONVENTIONS

Subsequent to the establishment of the federal union, this country has never held a national constitutional convention; the states have held 233. Twenty-six of these were convened between 1960 and 1995, with the greatest concentration occurring in the 1960s when thirteen conventions were held. Between 1960 and 1974, thirty-two of the fifty states made some efforts to address the adequacy and effectiveness of their constitutions. Since 1960 four states have adopted a requirement that a

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31. Janice May, *Constitutional Amendment and Revision Revisited, Publius: The Journal of Federalism* 17, 174-175, (Winter, 1987). May reports 44 rights-restrictive measures but four of those passed by constitutional initiative dealt with *infra* pp.47ff.

32. May, *supra* note 31, at 178.

call for a constitutional convention be submitted periodically to the voters, bringing the total number so doing to fourteen.<sup>33</sup>

The constitutional convention continues to be the most efficacious method of conducting systematic constitutional reform. A convention is the most appropriate vehicle for reform, when: (1) a constitution has accumulated massive detail, obsolete provisions and inconsistent alterations have appeared; (2) social and economic transformations requiring significant constitutional modernization have transpired; (3) the legislature is indifferent or actively opposed to any constitutional change, especially relevant when the change involves reapportionment, term limits, unicameralism, the initiative and referendum and fiscal reform; and (4) issues are too complex to be dealt with by voters through amendment.

The issue of fiscal reform in New York is a case in point. Court decisions eviscerating sections of the debt and spending limitations in the state's constitution and the evasive tactics of the governor and legislature have created strong pressures for constitutional reform.<sup>34</sup> Should such reform be accomplished by legislative amendment or constitutional convention? The state legislature has proposed constitutional amendments addressing these issues which were rejected by the voters in 1995. Is the issue so complicated and fundamental as to require the full consideration of a convention? Has the legislature effectively confronted the problem? Or has it refused to submit the needed changes because they might jeopardize legislative prerogatives or those of the parties? Are there additional issues of sufficient importance needing attention? Former Governor Mario Cuomo's Temporary State Commission on Constitutional Revision suggested a series of "Action Panels" to propose constitutional reform in four areas. If these proposals are acted upon, the needed reform will have been achieved. If no action is taken, a majority of the Commission's members recommended a "yes" vote in 1997 when the question of calling a convention will be on the ballot.<sup>35</sup> The recommendation, it was hoped, would place the onus on politicians to address needed constitutional reform, with the constitutional convention functioning as a method of last resort.

The major objections to conventions are that they are cumbersome,

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33. The four are: Connecticut, Illinois, Montana and Rhode Island. The span of years runs from nine (Hawaii) to twenty in New York, Maryland, Mississippi, Montana, Ohio, and Oklahoma.

34. On this issue see Robert Kerker, *State Government Finance*, in GERALD BENJAMIN ED., *THE NEW YORK CONSTITUTION A BRIEFING BOOK*, 157-175, (1994).

35. *EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY*, 6-8, (1995).

expensive instruments which, even when successful in recommending meritorious proposals are, likely as not, to have their work rejected; and the possibility of a "runaway convention", the specter of "Pandora's Box".

A convention's success or failure depends on a number of variables, only some of which are under the control of proponents. Thorough preliminary preparation is necessary, and support from the press and prominent state and public figures must be obtained. Opposition from interests which may be threatened by a convention must be neutralized.

During the convention, moderate partisanship or bipartisanship has led to success more frequently than highly partisan conventions.<sup>36</sup> Careful consideration must be given as to how the revisions are to be submitted to the voters. A major decision confronting each convention concerns presentation. Should reforms be submitted as a package, on an all or nothing basis, or should voters be permitted to vote separately on the proposed reforms? Of the three unlimited conventions held in New York in the 20th century, two, held in 1915 and 1967, presented new constitutions to the voters for a yes or no vote. Those two were resoundly defeated. The third, convened in 1938, submitted its reforms separately and the voters approved nine of the twelve propositions.

Mobilization of supporters for a ratification campaign should not oversell the document nor raise suspicions beyond those inevitably accompanying constitutional change. The pitfalls are numerous and formidable: partisan division, opposition from threatened interest groups and conflict among supporters. Constitutional reform is an arduous struggle because it rarely engages voter attention, is greeted by a suspicious electorate which, when confronted with complex ballot issues, has tended to vote in the negative.<sup>37</sup>

The other danger associated with the calling of a convention is the Pandora's Box problem. The specter was raised recently when the question of calling a national convention was perceived by some as an invitation to provide a forum for "reactionary populism", i.e., an angry electorate in a resentful mood, inclined to insert into the constitution provisions for a balanced budget, the death penalty, abortion, a prohibition against flag burning and the like. Former Associate Justice William J. Brennan declared the prospect for a convention "The most awful thing

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36. Sturm, *supra* note 25, at 62; Cornwell, *supra* note 14, at 59-60.

37. Sturm, *supra* note 25, at xi.

in the world".<sup>38</sup> This statement reflects a distrust of the peoples' judgments in the context of contemporary movements to amend or revise our constitutions. On the question of calling a national convention, we have moved from "Gay Abandon" to "Cautious Resistance".<sup>39</sup>

Unlike the national government, states have extensive convention experience. Moreover, the governmental functions of state constitutions, and their symbolic import in the polity differ substantially from that of the national document, making at least some of the arguments raised against a national convention inapposite at the state level. Nevertheless, opponents of state conventions worry that such conventions might adopt extreme measures on the issues they were called to address, or address issues unrelated to those that gave rise to the convention, or both. What has been the record of state constitutional conventions held in this country? Ironically, the greatest charge leveled at constitutional conventions is not their inclination to experiment with change to propose extreme ideas or structures, but their conservatism. An examination of the proposals originating from these conventions provide little or no support for the view that state constitutional conventions constitute a danger to the values that comprise the American constitutional tradition. Most conventions held in the 20th century are more vulnerable to the criticism that they have been too cautious and unwilling to offer innovations.<sup>40</sup> A study of the record of the nine conventions held in New York reveals that they have remained near the center of the political spectrum, sometimes moving in the direction of pragmatic liberalism, other times towards a moderate conservatism. In New York, constitutional change has occurred incrementally, creating a tradition of continuity, and resulting in a heavily detailed, policy oriented document.<sup>41</sup> Even when theoretically unlimited, conventions are in fact limited by the constitutional tradition they inherit, the resistance of major parties to further political experimentation in the forms and techniques

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38. As quoted in Russell L. Kaplan, *CONSTITUTIONAL BRINKSMANSHIP*, Vii., (1982); see also Gerald Gunther's reaction in *Constitutional Brinkmanship: Stumbling Towards a Convention*, 65 *A. B. A. Journal*, 1046, (1979).

39. Linda Healy, *Past and Present Convention Calls: From Gay Abandon to Cautious Optimism*, paper presented at the Southwestern Political Science Association Meeting, Savannah Ga., November 1, 1984.

40. Ralph Earle Baker, *Constitutional Revision in Five States: Limited Versus Unlimited Conventions*, (Unpublished Ph.D. dissertation, University of Illinois (1970) (Urbana-Champaign). See also Paul J. Weber and Barbara A. Perry, *UNFOUNDED FEARS: MYTHS AND REALITIES OF A CONSTITUTIONAL CONVENTION*, 80-88, (1989).

41. Peter Galie, *A Pandora's Box: Holding a Constitutional Convention in New York*, in *EFFECTIVE GOVERNMENT NOW FOR NEW YORK*, *supra* note 35, at 80-81.

of government, and the particular configuration of interest groups pursuing their various objectives. "The empirical evidence . . . makes it clear that any convention functions within very effective practical limitations".<sup>42</sup>

Legal guarantees that a convention will not adopt extreme or divisive measures are not possible, but the record of past conventions, the states' constitutional traditions and the inevitable necessity for compromise, make the specter of Pandora's Box a theoretical possibility rather than a real probability.

One device for confronting the related problems of a runaway convention and the relatively high failure rate of unlimited conventions is the limited convention. Such a convention has the advantage that narrowly selected constitutional changes have a better chance of acceptance by the voters than do broader and more sweeping changes from an unlimited convention. Moreover, when voters select delegates, they will know with some certainty what the issues will be before the convention. The data support these putative advantages. Of the twenty-three unlimited conventions held between 1938 and 1968, twelve were approved and eleven were defeated. Of the nine limited conventions held during that period, the work of eight was approved.<sup>43</sup>

Although there is some controversy regarding the constitutionality of limiting a convention, the generally accepted state rule is that the citizens (but not necessarily the legislature) may limit a convention's agenda by approving the limitations in a popular vote.<sup>44</sup> There is no guarantee that a limited convention would abide by any limitations, as the 1787 Convention demonstrates. However, the state record suggests that danger is minimal. Of the 233 conventions held in America, only six overrode limitations placed on them. Since 1908, however, there is not a single example of a limited convention stepping outside its charge.<sup>45</sup> Not all states have this method as part of their constitutional order or political culture. For example, the wording of the New York Constitution can be read as denying the legislature the power to call a limited convention.<sup>46</sup> Regardless, it has not become a part of the state

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42. VERNON O'ROURKE AND DOUGLASS CAMPBELL, *CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE*, 26, (1943).

43. Sturm, *supra* note 25, at 65-66.

44. Francis H. Heller, *Limiting A Constitutional Convention: The State Precedents*, 3 *CARDOZO L. REV.* 575 (1982).

45. Weber & Perry, *supra* note 40, at 97.

46. N.Y. Const., Art. XIX; John Bebout, *Recent Constitution Writing*, 25 *TEXAS L. REV.* 1074 (1957).

constitutional culture despite the 1802 Convention called by the legislature for very limited purposes. Most likely, the 1802 precedent did not take root because it was called by the legislature at a time when no constitutional provisions existed for any amendment procedure. Of course a limited convention enables the state legislature to exercise considerable control over the character of a convention while assuming no responsibility for proposing amendments.

Although the record of state constitutional conventions is mixed, the proposed revisions which have been approved are fairly characterized as moderately progressive and have generally been applauded as valuable improvements over the status quo.

### III. THE CONSTITUTIONAL COMMISSION

The constitutional commission, unlike the convention and legislation initiative, is a method for achieving constitutional reform that is unprecedented at the national level. Thirty six states have made use of this procedure in the past thirty years.<sup>47</sup> Commissions have performed a number of tasks: studying constitutions, recommending changes, and preparing for constitutional conventions. Fifty-one of the sixty-two commissions functioning from 1964 to 1993 were primarily study commissions. Those of Idaho, Illinois, Ohio and Mississippi were also given some preparatory functions. The Florida commissions were granted authority to recommend constitutional change directly to the voters without the approval of a convention or the legislature.

Although some form of constitutional commission has been in existence since 1852, such bodies were not recognized in the constitution of any state until the 1968 Florida Constitution. This document created a thirty-seven member Constitution Revision Commission appointed by the leaders of the three branches of the government and mandated to convene in 1978 and every twentieth year thereafter. In 1988 Floridians approved a constitutional amendment creating a Tax and Budget Reform Commission, a twenty-five member body with jurisdiction limited to tax and budget matters. All other commissions have been created by statute, executive order, or legislative resolution. Of the sixty-two commissions operating during the last thirty years, thirty-five were statutory.

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47. Data collected on commissions was assembled from ALBERT STURM, THIRTY YEARS OF STATE CONSTITUTION MAKING, 1938-1968 *supra* note 25, at 36, and his biennial summaries of state constitutional revisions in the Book of the States, published by the Council of State Governments. Janice May assumed the task of compiling the data in the 1990-91 publication.

Legislative resolutions were responsible for the establishment of sixteen commissions; ten were formed by executive order; and one, the North Carolina Constitution Study Commission was created without an official mandate, by a joint steering committee of the North Carolina State Bar and the North Carolina Bar Association.

Membership on these commissions is appointed or ex officio, with appointment predominating. Although governors are the primary appointing authorities, leaders in the legislature and chief justices of the states high courts play a role. The smallest commission, established by Alaska, consisted of two members, while the largest, established in 1985, was Mississippi's 350 member Constitutional Study Commission.

Table II shows the number of constitutional conventions and commissions functioning from 1952 through 1993, subdivided by creation date and classified by type.

TABLE II  
USE OF CONSTITUTIONAL CONVENTIONS AND CONSTITUTIONAL COMMISSIONS 1952-1993  
(BY CREATION DATE)

| PERIOD    | CONSTITUTIONAL CONVENTIONS |         |       | CONSTITUTIONAL COMMISSIONS |             |       |
|-----------|----------------------------|---------|-------|----------------------------|-------------|-------|
|           | UNLIMITED                  | LIMITED | TOTAL | STUDY                      | PREPARATORY | TOTAL |
| 1952-1957 | 2                          | 3       | 5     | 6                          | 2           | 8     |
| 1958-1963 | 1                          | 2       | 3     | 20                         | 2           | 22    |
| 1964-1969 | 9                          | 3       | 12    | 26*                        | 6           | 32    |
| 1970-1975 | 3                          | 4       | 7     | 6                          | 1           | 7     |
| 1976-1981 | 2                          | 1       | 3     | 7                          | 1           | 8     |
| 1982-1987 | 2                          | 0       | 2     | 3                          | 1           | 4     |
| 1988-1993 | 0                          | 1       | 1     | 4                          | 1           | 5     |
| TOTALS    | 19                         | 14      | 33    | 72                         | 14          | 86    |

\*FOUR OF THESE COMMISSIONS HAD STUDY AND PREPARATORY DATES.

Resort to the use of conventions and commissions has increased steadily since the mid century, accelerating in the 1960's and reaching a peak in 1969, with the creation of nine commissions. Since then there has been a sharp decline in the resort to conventions, and a smaller decline in commissions. From 1976 to 1993 seventeen commissions

were created, as compared to six conventions. In the 1960's forty states attempted to revise their constitutions through avenues other than legislatively proposed amendments; in the following two decades sixteen states made such attempts. The commissions operating during this period, though fewer in number, were granted increased authority.

The range of authorizations for preparatory commissions varies widely. Some, such as the 1969 Illinois Constitutional Study Commission, and the 1968 Arkansas Constitutional Revision Study Commission, were authorized to examine their constitutions and to submit appropriate recommendations. The Montana Convention Commission of 1971 was directed to provide factual information to the convention but no recommendations. Other commissions, such as the 1965 Connecticut Commission to Prepare for the Constitutional Convention and the Pennsylvania Convention Preparatory Committee of 1967, were instructed to do no more than prepare the physical facilities, develop a budget, and establish convention rules.

A preparatory commission, when properly funded and given adequate time, can be an indispensable tool for a constitutional convention. New York established preparatory commissions for its last four conventions, with mixed results. In 1938, following legislative rejection of Governor Herbert Lehman's request for a preparatory commission in anticipation of the 1938 Convention, Lehman appointed a committee to provide delegates with information on critical issues. The committee produced twelve volumes, known as the Poletti Reports after its chair, Charles Poletti. These reports have remained to this day a comprehensive and reliable source of information on the New York Constitution.<sup>48</sup> In contrast to the quality of the Poletti Reports were the sixteen reports submitted by the New York Temporary State Commission on the Constitutional Convention, appointed in anticipation of the upcoming 1967 convention. The information was sparse, and submitted too late to be of much value to the delegates.<sup>49</sup>

Delegates to conventions are often ill equipped to address the broad spectrum of issues confronting them and much of what they will be expected to evaluate differs from the statutory matters to which politically oriented delegates are accustomed. These commissions, usually composed of members chosen for their non-partisan character as

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48. 12 N. Y. S. Constitutional Convention Committee, *Reports* (1938).

49. 16 N. Y. S. Temporary State Commission on the Constitutional Convention, *Reports* (1967).

well as their experience in state constitutional issues, can assist delegates in acclimatizing themselves to the issues.

Preparatory Commissions are not without their disadvantages. Since the governor generally plays the dominant if not exclusive role in their composition, they can be contaminated by the partisanship they are meant to avoid. Convention delegates can, and have, ignored the work of such commissions, leading critics to charge that they add unnecessarily to an already expensive convention process.

Whereas preparatory commissions play a supporting role in the process of constitutional reform, study commissions are primarily responsible for producing substantive document changes. As with preparatory bodies, their responsibilities vary, and can be categorized as narrow or broad. A commission with narrow authority is charged only to study the constitution, submit factual reports concerning the need for revision, and occasionally recommend changes in the document. The 1965 Illinois Constitutional Study Commission is an example. It was appointed to determine if revision was necessary and whether it should be accomplished by convention or amendment. The commission recommended a convention, and one was called in 1969. The Alaska Constitutional Revision Task Force is another example of a narrowly authorized body. It was mandated to study alternatives to the current methods of constitutional revision. The California Revision Commissions, established in 1993, were authorized to study and make recommendations on selected topics ranging from the budget process to community resources and delivery systems.

Three-fourths of the Commissions operating in the last thirty years have been granted broad authorizations including proposing entirely new documents. The Texas Constitutional Revision Commission of 1968 submitted a new constitution to the legislature but no action was taken. A similar fate befell the revised constitution submitted in 1979 by the Alabama commission. A new constitution recommended by the Idaho Commission on Constitutional Reform was accepted by the legislature but rejected by the voters.

Other commissions have been more successful. From 1963 to 1973 The California Constitutional Revision Commission achieved complete constitutional revision in three phases. The Ohio Constitutional Revision Commission fostered systematic revision of the Ohio constitution through a series of twelve reports issued between 1969 and 1977. The Utah Constitutional Revision Study Commission, created in 1969, is the only statutorily permanent commission achieving considerable success. The commission has made recommendations on, and voters have approved

amendments concerning seven articles. In the 1930's, although Georgia was in critical need of constitutional revision, reform by convention was at best a remote possibility. The existing constitution required a two-thirds vote in each house of the General Assembly to call a convention. Representation at such a convention would be based on population. Georgia's malapportioned assembly, fearing a reapportionment, blocked all attempts to convene a convention.<sup>50</sup> It was, however, willing to create a constitutional commission, knowing that all its recommendations required legislative approval. The commission shrewdly ignored the apportionment issue and recommended a new constitution subsequently accepted by the legislature and approved by the voters in 1945.

The Florida Constitution Revision Commission (CRC) is permitted to submit recommendations directly to the voters regarding all aspects of the constitution with the exception of the tax and budget provisions. In 1978 the CRC became the first commission to submit amendments directly to the electorate. However, its recommendations were rejected by the voters. The commission was later vindicated when most of its proposals were adopted through legislatively approved amendments. In 1980 Florida voters rejected a proposal abolishing the CRC, indicating continued support for the commission.

The Florida Taxation and Budget Reform Commission may submit tax and budgetary referendums to the people directly. It also may submit statutory recommendations on similar matters to the legislature. In 1992, Florida voters made constitutional history by becoming the first state to approve amendments submitted by a commission without legislative action.

Commissions have proved to be effective substitutes for constitutional conventions when voters refuse to approve their convening. Between 1891 and 1963, the voters of Pennsylvania, fearing the institution of a graduated income tax, rejected six attempts to convene constitutional conventions.<sup>51</sup> In 1963 Governor William Scranton appointed a Governor's Commission on Constitutional Revision. The commission submitted a report containing recommendations and resolutions to the legislature in January 1964. In 1967 voters approved a call for a limited convention to revise four articles. Eight amendments proposed by the commission were adopted at that convention.

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50. LEAH CHANIN, REFERENCE GUIDE TO GEORGIA LEGAL HISTORY AND LEGAL RESEARCH, 13, (1980).

51. Gustave G. Amsterdam, *A Constitutional Convention is not the Answer at the Present Time*, *PA. Bar Assn. Qlty.*, 37, 377-378, (June, 1966).

The commission offers a tempting alternative to the constitutional convention: talented, experienced citizens deliberating on a single task, in a group small enough for ordered, intimate discussion, but large enough to entertain a representative range of alternatives. Since the work must be approved by the legislature and ratified by the people, little if any popular control is lost. Additionally, commissions are less costly. The 1967 New York Commission, expensive at \$800,000, paled in comparison to the \$6.4 million spent by the 1967 convention.

Despite these advantages, study commissions have their weaknesses. The method of selection can lead to "political hand-picking and coloration".<sup>52</sup> More significant, as Albert Sturm as noted, commissions are preferred by state legislatures because they maintain control over proposals emanating from such bodies.<sup>53</sup> With the single exception of the Florida commissions, the great weakness of commissions is their complete dependence on the legislative branch for success. When the legislature is the obstacle course, commissions face two risks: independent recommendations which are rejected or ignored; or recommendations shaped to fit the anticipated demands of the the legislature. The latter danger is illustrated by the remarks of a member of the Vermont Constitutional Commission concerning the commission's final report to the legislature:

. . . mere fiddling with the past during a time which demands our creating a political framework necessary for our survival as a people. The goal has been subverted by the majority's attempt to shape its report in terms that it felt the General Assembly would accept.<sup>54</sup>

The only weapons such commissions wield are the prestige of their membership and the quality of their recommendations, weapons which in certain instances have proved to be effective levers in forcing action from recalcitrant legislatures.

Commissions bring important and necessary contributions to the process of constitutional reform, and they are likely to play an

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52. Sturm, *supra* note 25, at 93.

53. Albert Sturm, *The Development of American State Constitutions*, *Publius: The Journal of Federalism*, 12, 84-85, (Winter, 1982).

54. As quoted in Albert Sturm, *State Constitutional Modernization by Commission: 1966-1972*, *National Civic Review* 62, 357, (July, 1973).

increasingly important role in the process of constitutional reform in the states.

#### IV. POPULAR INITIATIVE

Eighteen states permit the proposing of amendments by popular initiative.<sup>55</sup> A percentage of voters, as designated by the constitution, are allowed to petition amendments which they deem desirable.<sup>56</sup> In Mississippi, regardless of legislative preference, the proposition will appear on the ballot. However, if the legislature amends the proposal, both the original and the amended version appear on the ballot. If the legislature proposes an alternative, both will appear on the ballot. In no state can the initiative be used to propose a new constitution or make extensive revisions in the existing one.

Although the constitutional initiative is as old as the nation, its greatest popularity was during the Progressive Era. It was part of a package of reforms designed to increase popular participation and the role of citizens in government policy making.<sup>57</sup> By the last quarter of the twentieth century, however, the procedure came to be identified as a means for well financed organizations and/or groups to obtain favorable laws and as a mechanism allowing a tyrannous majority, inflamed by prejudice or temporary hysteria, to deprive minorities of basic rights.<sup>58</sup> With renewed interest in the initiative and referendum in the last twenty five years, a lively debate has emerged among politicians and scholars

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55. They are: Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota.

56. In Massachusetts, the initiative must gain the support of at least 25% of the General Court (the legislative body) to appear on the ballot. In Mississippi, whatever the legislature does, the initiative will appear on the ballot.

57. JOHN D. HICKS, *THE POPULIST REVOLT*, 406-407, (1961); GEORGE MOWRY, *THE PROGRESSIVE ERA 1900-1920; THE REFORM PERSUASION*, (Washington D.C.: *American Historical Association*, Pamphlet nos. 212, 1958).

58. These dangers were recognized while the movement was at its peak by HERBERT CROLY, *PROGRESSIVE DEMOCRACY*, 307, (1914). The initiative continues to find little favor among academic commentators. See Stanley H. Friedelbaum, *The Initiative and Referendum in New Jersey: Bygone Pursuit or Newfound Quest for Popular Supremacy*, *State Constitutional Commentaries and Notes* 2 (Winter, 1991), p. 15; Dave Kehr, *I & R and Minority Rights*, *State Government* 93-94, 33, (1993); *A Tool For Democracy?* *National Civic Review*, 353, 6 Sept., (1978).

over the advantages and disadvantages of the procedure.<sup>59</sup>

The constitutional initiative has been the least used, least successful, and most controversial means of constitutional reform among the states. As of 1986 it accounted for only 19 percent of all the amendments proposed and 11 percent of those adopted.<sup>60</sup>

Between 1986 and 1993 initiatives constituted only 10 percent of all amendments adopted.<sup>61</sup>

TABLE III  
LEGISLATIVE AND POPULAR INITIATIVES  
1906-1986

|                  |       |
|------------------|-------|
| Frequency        |       |
| -----            |       |
| All methods      | 1,959 |
| Initiative       | 628   |
| Involving States |       |
| Bills of rights  | 57*   |
| -----            |       |
| Success          | 25    |
| -----            |       |

\*Janice May arrived at this figure under a broad definition of rights, one which includes rights concerning women and minorities. If a narrow definition is used, i.e., rights traditionally found in bills of rights, that number drops to 23. Figures computed from data presented by Janice May, "The Constitutional Initiative Initiative: A Threat to Rights?" in Stanley Friedelbaum, ed., *Human Rights in the States* (Westport, Conn.: Greenwood Press, 1988), 163-168; Janice May, "Amending State Bills of Rights: Do Voters Reduce Rights?" STATE GOVERNMENT 1992-93 (Washington, D.C.: CQ Inc. 1992).

Table III shows clearly that, with regards to rights, the initiative has been used sparingly. Resort to the constitutional initiative has increased in recent years, and the success rate has also risen slightly. The success rate in the biennium 1992-1993 for rights-related initiatives was 13%.

59. Two works which focus on the pros and cons of this resurgent populism are: DAVID MAGLEBY, *DIRECT LEGISLATION VOTING ON BALLOTS IN THE UNITED STATES*, (1984); and JOSEPH F. ZIMMERMAN, *PARTICIPATORY DEMOCRACY POPULISM REVISITED*, (1986).

60. Janice May, *The Constitutional Initiative: A Threat to Rights?* in STANLEY FRIEDELBAUM ED. *HUMAN RIGHTS IN THE STATES*, 166-167, (1988).

61. Figures computed from data provided in the Book of the States from the years 1986-1993.

Does the constitutional initiative constitute a threat to civil liberties and constitutional values as well as create constitutional confusion?<sup>62</sup> In a series of articles, Janice May has addressed this question in systematic, empirical fashion.<sup>63</sup> Her findings are instructive. For the 1900-1986 period, twenty-five rights-related initiatives were adopted. Ten promoted womens' rights (nine granted the suffrage and one involved jury service); three extended criminal rights by abolishing the death penalty and requiring a grand jury indictment and speedy trial. Two removed the poll tax, and one extended property rights to aliens, for a total of 16 rights-extending decisions.<sup>64</sup> With regard to rights-restricting amendments, May concluded: "There is considerable evidence that, although not numerous, more of the electorally successful constitutional initiatives have reduced rather than expanded rights".<sup>65</sup>

These include, *inter alia*, repeal of fair housing, anti-busing, anti-desegregation, restoration of the death penalty, propositions limiting the rights of the accused, mandatory referendum on fair housing, and making English the official language of the states. Contrariwise, voters rejected a variety of rights-restricting measures, including denying rights to "subversives"; state aid to private schools; two anti-abortion measures; repeal of ERA measures; and measures regarding freedom of religion or expression.

The data gathered from the five year period, 1986 through 1990, also provide further support for the conclusion that the constitutional initiative has become the most rights restrictive mode of constitutional reform. Of the amendments adopted by all methods, 20 were restrictive and 19 rights expanding. Of the 11 constitutional initiatives adopted, 72% percent (8), were rights restrictive, contributing disproportionately

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62. The general impression created by commentators is one of rights reduction. See, e.g., Donald Wilkes, *First Things Last: Amendomania and State Bills of Rights*, MISS. L. J. 54 (1984), 223; William E. Adams Jr., *Pre-Election Anti-Gay Ballot Initiative Challenges: Issues of Electoral Fairness, Majoritarian Tyranny and Direct Democracy*, OHIO ST. L. J. 55 (1994), p. 628.

63. May, *supra* note 60; *Amending State Bills of Rights: Do Voters Reduce Rights*, State Government 1992-93 (Washington, D.C.: CQ Inc., 1992).

64. May had understandable difficulty in classifying some of the measures. For example the eleven "right to work" amendments can be viewed as "union busting" or giving individuals the right of choice and association; tort reforms and other miscellaneous provisions were treated as neither rights expanding nor rights reducing. The handful of states which added a right to bear arms present the most interesting case. Surely they are, on the face of it, rights expanding; on the other hand liberals have never thought much of a right to bear arms and by and large would not see these initiatives as rights expanding. Thus does ideology intrude on the question of what counts as right expanding and what as rights restricting. May, *supra* note 31, at 168-69.

65. *Id.* at 169.

to rights reducing amendments.<sup>66</sup>

The largest number of amendments, nearly half, concern crime. James M. Fischer has argued that except for criminal justice and certain racial questions, voters either support or leave other civil rights alone.<sup>67</sup> This conclusion is supported by May:

. . . the question of whether voters can be trusted to protect rights is misguided. The desire to narrow the rights of the accused is pervasive, reaching into the Congress, the White House and the U.S. Supreme Court. In other words voters thus far have not been out of step with many political leaders and judges . . .<sup>68</sup>

Although the record of the constitutional initiative is more positive than earlier research has suggested, it is a fair conclusion that among the modes of constitutional reform the constitutional initiative is the most susceptible to misuse and demagoguery. There are, however, a variety of constraints on this procedure which have reduced the danger.

All propositions, initiative or otherwise, must conform to the national constitution. On a number of occasions the Supreme Court has invalidated state amendments as violations of the national constitution. *Reitman v. Mulkey*<sup>69</sup> is illustrative. A constitutional initiative repealing California's fair housing law and privatizing decisions on the sale, rental or purchase of real estate was held in violation of the equal protection clause of the 14th Amendment.<sup>70</sup>

Federal courts protect the national constitution; state courts have the dual responsibility to uphold both national and state constitutions. In *Strumpf v. Lau* and *In Re Initiative Petition No. 349*, state high courts in Nevada and Colorado invalidated measures imposing term limits on members of the Congress.<sup>71</sup> State courts have also been willing to strike down amendments which do not meet state constitutional requirements. In the most prominent case, *Raven v. Deukmejian*,<sup>72</sup> the California Supreme Court held an initiative to be a "revision" of the

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66. May, *supra* note 31, at 32.

67. *Ballot Proposition: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, *Hastings Const. L. Q.*, 11, 44, (Fall, 1983).

68. May, *supra* note 31, at 32.

69. 387 U.S. 386 (1967).

70. Two other decisions invalidating initiatives were *Guinn v. U.S.*, 238 U.S. 347 (1915), (voiding grandfather clause protecting white votes from illiteracy test); *Lucas v. Colorado General Assembly*, 377 U.S. 713 (1964) (voiding initiative allowing representation on non-population basis).

71. 839 P.2d 129 (Nev. 1992); 838 P. 2d 1 (Okla. 1992).

72. 801 P.2d 1077 (Cal. 1990).

constitution rather than an amendment, and as such, in violation of Article 18 of the state constitution, requiring revisions of the constitution to be initiated by convention or legislature prior to submission to the voters.

Other challenges arise when it is asserted that the ballot proposition does not fall within the proper subject matter for direct legislation. In 1984, the Montana Supreme Court removed from the ballot a proposition compelling the state legislature to petition Congress to call a constitutional convention to pass a balanced budget amendment on the grounds that it was not an amendment to the Constitution.<sup>73</sup>

Another limitation on constitutional initiative in a number of state documents is the single subject rule, requiring that the material contained in the proposition be reasonably germane, and functionally related to a single subject. The Florida courts have been particularly stringent in enforcing this provision as well as other procedural requirements. In *Re Advisory Opinion to the Attorney General-Restricts Laws Related to Discrimination*<sup>74</sup>, the Florida Supreme Court found numerous flaws in a proposition aimed at preventing the state from adopting laws protecting groups from discrimination. The measure was struck down on, *inter alia*, equal protection grounds as violative of the single-subject rule.<sup>75</sup> State courts are generally willing to permit pre-election review of challenges based on procedural limitations such as failure to meet the minimum number of qualified signatures, timeliness of filing, the form of the petition, its title and the summary<sup>76</sup> Even when state courts sustain an initiative, they retain the responsibility for interpreting these amendments. In *People v. Anderson*<sup>77</sup> the California Supreme Court struck down the death penalty on state constitutional grounds. In 1982 California voters approved a constitutional initiative overruling *Anderson* and restoring the death penalty. In *People v. Superior Court of Santa Clara County*, the California Supreme Court voided (on due process grounds for vagueness) an initiative which applied the death penalty in aggravating circumstances.<sup>78</sup> Finally, the electoral process serves as a

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73. State ex rel *Harper v. Waltermire*, 691 P.2d 836 (Mont. 1984).

74. 632 So. 2d 1018 (Fla. 1994).

75. *Id.*, at 1020-21. See also, *In Re Petition No.344*, 797 P.2d 326 (Okla. 1990); *Legislature of California v. Eu*, 816 P.2d 1309 (Cal. 1991); and Robert W. Lee, *Pre-Election Initiative Review in Florida: A Framework for Analysis*, *FLA. B. J.*, 69 (March, 1995), 14.

76. James D. Gordon III and David B. Magelby, *Pre-Election Judicial Review of Initiatives and Referendums*, *NOTRE DAME L. REV.* 64 (1989), pp. 302-304.

77. 493 P.2d 880 (Cal.), cert. den. 409 U.S. 958 (1972).

78. 647 P.2d 796 (Cal. 1982).

check on the constitutional initiative. As noted earlier, voters have rejected a fair number of rights-restrictive propositions.

Though there are a variety of checks operating to reduce the likelihood that rash or dangerous proposals will be adopted, the record indicates that, of the four modes of constitutional change, the constitutional initiative is the most susceptible to abuse.

In response to these abuses, some states have limited the constitutional initiative so that amendments proposed by popular initiative do not alter fundamental provisions of the constitution. Mississippi places the Bill of Rights off limits to amendment by initiative, and Massachusetts excepts its Declaration of Rights, the judiciary and matters relating to religion or religious institutions. Illinois permits the initiative only with regard to the legislative article. Missouri's constitution stipulates that the initiative "shall not be used . . . for any other purpose prohibited by the Constitution".<sup>79</sup> It is not coincidental that none of the dubious initiatives have arisen in these states.

States also attempt to limit frivolous use of the initiative by requiring a minimum number of signatures for placement on the ballot. Arizona mandates 15% of the total votes cast for all gubernatorial candidates in the last election; Oklahoma stipulates 15% of the votes cast for the office receiving the greatest number of votes.<sup>80</sup> In addition, half the states providing for the initiative require a geographic distribution of signatures. The requirement is meant to insure that only issues of statewide importance are placed on the ballot. Typical in this respect is Florida, whose requirement of 8% of the total vote cast in the last presidential election, must be obtained in 50% of the congressional districts. For ratification, Illinois requires either a majority of those voting in the election or three-fifths of those voting on the amendment. Mississippi mandates a majority vote on the amendment, which must be at least 40% of the total vote cast in the election. Initiatives in Nevada require a majority vote in two successive general elections.

If there is a place for a constitutional initiative, limits such as those found in Mississippi, Massachusetts, and Nevada offer a middle ground between those who wish to see the procedure abolished, and those who wish it to be as accessible and majoritarian as possible.

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79. Art. III, Sec. 51. The section does not distinguish between statutory and constitutional initiatives.

80. The smallest percentage, Massachusetts, is 3% of the total votes cast for governor at the preceding biennial election, but not less than 25,000.

## V. CONCLUSION

Comparing state and national amending processes reveals a number of striking differences. At the state level the formal amending procedures are majoritarian and participatory, used more frequently and are more numerous and varied. These characteristics have contributed to the shape of state charters - lengthy, detailed, policy-oriented and a bit on the chaotic side. What is more noteworthy is that these participatory and majoritarian processes have produced over 5,800 amendments, 150 new constitutions, and have done so, by and large, within the boundaries of the national political consensus. Radical or dangerous amendments have been the exception; and some of those did not survive a screening process consisting of the procedural requirements in the constitutions, the electorate, and the national and state judiciaries.

Given a political landscape punctuated with the inflammatory appeals of politicians, populated with stridently ideological one-issue groups, and suffused with a frustrated and angry electorate - conditions not new or unique to contemporary America - the wonder is that these majoritarian and participatory amending processes have not been vehicles for wholesale, radical change in the fundamental law of the states.

As an "incomplete" document, the survival of the Constitution of the United States, is predicated on the continued existence and vitality of state constitutions.<sup>81</sup> The national Constitution is silent on such fundamental matters as local government and finance, education and state government, to name a few. Along with the standard contents of a constitution (Bill of Rights, suffrage, distribution of powers), state constitutions must contain provisions germane to these other areas of responsibility. In addition, state documents must be flexible, able to accommodate changing economic and social conditions, as well as new areas of responsibility. Home rule, strengthened executive management, and social welfare are all 20th century additions to state constitutions. The difficulty of amendment at the national level, coupled with the political and constitutional limits on national power, have placed the continued vitality of the American constitutional system on the states' ability to respond to the demands of the 21st century. The willingness of states to amend and revise their fundamental documents augurs well for that vitality.

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81. Donald S. Lutz, *The Purposes of American State Constitutions*. *Publius: The Journal of Federalism*, 12, 27-44, (Winter, 1982).