

Malleable Constitutions: Reflections on State Constitutional Reform

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I. Introduction

American federalism has produced curious and potentially significant differences in provisions for changing a constitution. Article V of the U.S. Constitution provides for only two procedures for amendment, both of which are difficult, and none for replacement.¹ Most state constitutions offer a variety of easier paths for both. But what are the political consequences of greater constitutional malleability? Constitutions with lower thresholds for amendment and revision should change more often, of course, but the implications for the content of the constitution are unclear. Does constitutional malleability mean that states with more malleable constitutions are more innovative and adapt more quickly to changing political circumstances and needs, or that the scope of constitutions simply expands to include issues that otherwise would be addressed in statutes? And does malleability affect important indicators of the quality of governance, such as policy outcomes, government efficiency (including freedom from corruption), and effective protection of individual rights?

Constitutions occupy the highest position in a hierarchy of law that also includes statutes, court decisions, and administrative rules and regulations. Although constitutions do not exist everywhere, where they do exist they typically are more difficult to change than other forms of law that are lower in the hierarchy.² Theoretically, the rationale for creating a hierarchy of laws in which laws at the top are more difficult to change has two elements. First is the idea that temporary majorities should not be able to pass amendments that weaken fundamental principles of governance, such as the existence of a

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1. By two-thirds majorities in both houses, Congress can propose an amendment, which must then be ratified by the legislature or a constitutional convention in three-quarters of the states. U.S. CONST. art. V. In addition, two-thirds of the state legislatures can request a constitutional convention to propose amendments, the results of which also must then be approved in three-quarters of the states. *Id.*

2. Not all constitutions require constitutional amendments to be substantially more difficult to pass than statutes. For example, in Brazil, constitutional amendments can be passed by a mere 60% majority in both houses of the National Congress. CONSTITUIÇÃO FEDERAL [C.F.] art. 60, para. 2 (Braz.), translated in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rüdiger Wolfrum & Rainer Grote eds., 2009).

democratic form of government or the basic rights of citizens.³ Second is the idea that society benefits if citizens can commit to and rely on stability in some aspects of governance, even if each citizen's independence of action is thereby limited.⁴ Both notions imply that constitutions should be made somewhat difficult to amend by requiring supermajorities, a deliberative process, a process with multiple veto gates, or a combination of these methods.

On the other side of the ledger, malleable constitutions more easily accommodate adjustment to changes in society. Examples of changes that might have implications for the content of a constitution are expansion of territory; population growth; economic restructuring; a new, external threat to sovereignty; and simple improvements in knowledge that have significant implications for designing governance institutions. The potential gains from periodic wholesale constitutional revisions motivated Jefferson's oft-cited view that constitutions should sunset every nineteen years to enable each generation to design the government that best suits its needs.⁵

The existence of state constitutions and, implicitly, a hierarchy of state law is problematic. Article IV, Section 4 of the Constitution stipulates that the federal government "shall guarantee to every State in this Union a Republican Form of Government," but it does not explicitly require that states adopt a constitution.⁶ Typically, Congress has required that a proposed state adopt a constitution prior to approval of statehood.⁷ Neither the U.S.

3. See, e.g., Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 6–7 (2006) (discussing the desirability of entrenching constitutional standards as a way to protect democratic practices and explaining the challenge of accomplishing entrenchment in Latin American governing regimes).

4. See *id.* at 29–30 ("The construction of the institutional infrastructure needed to cabin political power and effectuate republican government, however, is impossible without constitutional rules that are beyond the reach of ordinary politics. One of the lessons of Latin American constitutionalism is that long-term political stability is impossible without entrenched constitutional rules."); see also CLINTON ROSSITER, *SEEDTIME OF THE REPUBLIC: THE ORIGIN OF THE AMERICAN TRADITION OF POLITICAL LIBERTY* 382 (1953) ("Every man must surrender enough control over his original liberty to permit government to maintain an organized, stable, peaceful pattern of human relations.").

5. See Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 7 THE WRITINGS OF THOMAS JEFFERSON 454, 455–59 (Andrew A. Lipscomb & Albert Ellery Bergh eds., Memorial ed. 1903) (proposing nineteen years as the sunset period for a constitution because Jefferson believed that one generation should not impose its political values on the next and, according to mortality tables at the time, half of the adult population that was alive when a constitution was adopted would be dead approximately nineteen years later); see also Letter from Thomas Jefferson to Thomas Earle (Sept. 24, 1823), in 15 THE WRITINGS OF THOMAS JEFFERSON, *supra*, at 470, 470 (arguing that a past generation should not be allowed to bind a succeeding generation to its laws and contracts).

6. U.S. CONST. art. IV, § 4.

7. See Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119, 127–28 (2004) (noting that Congress has imposed specific admissions requirements on nearly all of the states admitted since the adoption of the Constitution and that these requirements generally included certain provisions that had to be included in a state constitution or "irrevocable" ordinance).

Constitution nor Congress limits the scope of state constitutions except for the requirements that they must establish a democratic form of government and not explicitly override the U.S. Constitution.⁸

As a practical matter, all state constitutions establish the governance institutions in the state and the powers and duties of government officials. Indeed, all states have adopted a government structure that very closely resembles the structure of the federal government, including separation of powers among three branches and subsidiary governments.⁹ State constitutions also contain provisions establishing the rights of citizens, including repetition and sometimes elaboration of rights in the U.S. Constitution as well as additional rights, such as guaranteeing a citizen's right to fish.¹⁰

The consequences of America's ongoing experiment in constitutional governance are not clear and deserve more study. From a purely quantitative perspective, malleability is important. While the U.S. Constitution has been amended only twenty-seven times, states have replaced and amended their constitutions much more frequently. Only nineteen states still have their original constitutions, and most states have adopted three or more.¹¹ Collectively, states have held more than 230 constitutional conventions and have adopted 146 constitutions.¹² They have added over 5,000 amendments (over 100 per state)¹³ and have been the first to adopt important innovations in government structure and political rights, including women's suffrage, the

8. See U.S. CONST. art. VI, cl. 2 (establishing the Constitution as "the supreme Law of the Land," regardless of any state law or constitution); Biber, *supra* note 7, at 129–31 (summarizing the various conditions Congress has historically imposed before admitting new states, none of which limited the scope of the prospective state's constitution).

9. See, e.g., ALA. CONST. art. III, § 42 ("The powers of the government of the State of Alabama shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."); ARK. CONST. art. IV, § 1 ("The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another."); N.J. CONST. art. III, § 1 ("The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.").

10. E.g., CAL. CONST. art. 1, § 25 ("The people shall have the right to fish upon and from the public lands of the State and in the waters thereof . . ."); R.I. CONST. art. 1, § 17 ("The people shall continue to enjoy and freely exercise all the rights of fishery . . ."); VT. CONST. ch. 2, § 67 ("The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed, and in like manner to fish . . .").

11. G. Alan Tarr, *Introduction to 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 1, 2 (G. Alan Tarr & Robert F. Williams eds., 2006).

12. Gerald Benjamin, *Constitutional Amendment and Revision*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 177, 180.

13. Tarr, *supra* note 11, at 2.

line-item veto, direct democracy, balanced budget requirements, and the direct election of upper houses in legislatures.¹⁴

Closer examination reveals that amendment and revision trends have diverged in recent years, and as a consequence, the differences between the federal and state constitutions with respect to fundamental revision are less sharp than they once were. State constitutional amendment activity continues at a high level (e.g., 689 amendments in the period 1994–2001 alone),¹⁵ but the pace of state constitutional revision (i.e., fundamental constitutional changes or total replacement) has slowed considerably. Consider the following. There were 144 constitutional conventions and 94 new state constitutions in the nineteenth century, only 64 conventions and 23 new constitutions in the twentieth, and no constitutional conventions and only one new constitution since 1984.¹⁶ Even in the fourteen states that provide for automatic consideration of whether to call a constitutional convention, voters have become less interested in utilizing this opportunity for fundamental reform: only four of twenty-five such referenda since 1970 have been successful and none in over a quarter century.¹⁷ Two-thirds of the states now operate with constitutions that are over 100 years old.¹⁸

The emerging pattern of hyperamendability combined with infrequent revision has significant political consequences. For legal, institutional, and political reasons that are explored in more depth here, successful amendments tend to be narrow in scope, specific, and less politically controversial than revisions. Ninety percent of amendments are proposed by legislatures, many under supermajority rules, which dampen the potential scope and controversy of the measures considerably.¹⁹ As a consequence, despite the widespread unpopularity of legislatures, legislative constitutional amendments (LCAs) ironically pass at the high rate of 77%.²⁰ Because many amendments attempt to alter very specific items in existing constitutions, the initial specificity of a state constitution breeds even more specificity, creating, in essence, a language and provision multiplier effect.

These trends raise important questions. First, why has the rate of state constitutional revision and replacement slowed down so dramatically? Second, what are the possible long-term political and policy consequences of higher amendment rates but lower revision rates? Third, what do the experiences of U.S. state constitutions teach us about constitutional adaptation?

14. *See id.* (observing that state constitutional initiatives have impacted national politics and reporting examples of this vertical federalism).

15. *Id.*

16. *Id.*

17. Benjamin, *supra* note 12, at 196.

18. Tarr, *supra* note 11, at 3.

19. Benjamin, *supra* note 12, at 181–82.

20. *See id.* at 181 (reporting that 664 of the 862 state constitutional amendments proposed from 1992 to 2000 were adopted, for a 77% adoption rate).

The general argument of this Article is as follows. Revision is more vulnerable to political derailment than amendment because its greater breadth unites a broader coalition of opponents and because the contemporary revision process has more veto points and veto players. By comparison, amendments are, for legal, political, and institutional reasons, more limited in scope and hence more feasible politically. Like legislative policy making, amendments have become expressions of interest group and partisan contestation in which groups seek to lock in a likely temporary advantage over their competitors. The consequence is a growing lack of constitutional coherence and flexibility, a majoritarian drift in rights policies, and an increasingly constrained legislative policy-making process, especially in states that rely heavily on the popular initiative (so-called hybrid democracies).²¹

II. Formal Opportunities and Malleability

The rules setting forth the procedures for amendment and revision structure the opportunities to propose or oppose potential constitutional reforms. While scholars debate whether most citizens are rational political actors,²² scholars generally agree that elected politicians and interest groups rationally pursue their objectives.²³ As repeat players with high stakes in the outcome of electoral contests and government decisions, political leaders and interest groups pay close attention to the rules of the game and play strategically, even if imperfectly. Because state constitutions cover, often in great detail, a wide variety of potentially crucial topics, including individual rights, government structure, tax policies, details of specific policies, and ceilings and floors on both total expenditures and spending on specific programs, policy skirmishes can escalate into constitutional battles.²⁴ The rules that govern amendment and revision shape the strategies of these repeat political actors in predictable ways.

For this reason, we need first to examine the rules governing revision and amendment to understand why one is in decline and the other is a growth industry. While no “bright line” separates revisions from amendments, revision is meant to be a more qualitatively and quantitatively substantial change in the constitution.²⁵ Revision can mean either the adoption of a new

21. See Elizabeth Garrett, *Hybrid Democracy*, 73 GEO. WASH. L. REV. 1096, 1097 (2005) (“Hybrid Democracy—neither wholly representative nor wholly direct, but rather a complex combination of both at the local and state levels, which in turn influences national politics.”).

22. See, e.g., DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* 47–48 (1994) (commenting on the sheer volume of rational choice literature on voter turnout).

23. See *id.* at 4 (discussing insights of rational choice scholarship on the actions and motivations of politicians and political organizations).

24. See Tarr, *supra* note 11, at 4–7 (describing the wide range of topics covered by state constitutions, often necessitating a need for constitutional reform).

25. See Benjamin, *supra* note 12, at 178–79 (pointing out that the term revision is only specifically referenced in the language of twenty-three state constitutions, and even then, the line is

constitution or a substantial alteration to the principles, rights, and governmental structures of an existing constitution. The revision process in most states is more lengthy and complex than the amendment process, typically requiring either a constitutional convention or a revision commission.²⁶ Only six states explicitly allow the legislature to propose revisions by themselves,²⁷ while in forty-one states, the legislature can call a convention²⁸ (over half require a supermajority vote to get the revision on the ballot).²⁹ Fourteen state constitutions require that the question of whether to call a convention be placed on the ballot periodically.³⁰ Only two states—Florida and South Dakota—permit the calling of a convention by popular initiative.³¹

Calling a convention usually requires majority approval by voters³² (in ten states, a majority of those voting in the election as opposed to a majority voting on the question).³³ Once approved, the process requires electing delegates, funding the convention's operations, establishing its rules and procedures, selecting leadership, and providing time for deliberation and the public dissemination of its results.³⁴ Convention proposals then must be ratified by the voters, in some states by supermajorities.³⁵

A few states provide for a constitutional commission, which can propose both amendments and revisions in a more expeditious fashion and without the expense of electing convention delegates.³⁶ Typically, elected

not clear and sharp). In California, the substantial change that might be considered a revision is acknowledged to have both quantitative and qualitative dimensions. Many amendments to many parts of the constitution can become a revision, or one single provision that profoundly alters the functions of a government branch could also qualify as a revision. *See* *Raven v. Deukmejian*, 801 P.2d 1077, 1085–86 (Cal. 1990) (noting that a substantial change in either the quantitative or qualitative effects of a measure on a constitutional scheme amounts to a “revision” rather than an amendment); *McFadden v. Jordan*, 196 P.2d 787, 788–89 (Cal. 1948) (noting that a purported amendment to the California constitution that would repeal or substantially alter at least the majority of the constitution's articles could not be submitted to electors as an “amendment” but rather was a “revision,” which must be proposed by convention).

26. *See* Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y SYMP. 27, 30 (1996) (discussing the differences between the typical state constitutional amendment process and the typical state constitutional revision process).

27. Benjamin, *supra* note 12, at 178; G. Alan Tarr & Robert F. Williams, *Foreword: Getting From Here to There: Twenty-first Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1082 (2005).

28. Benjamin, *supra* note 12, at 178.

29. Tarr & Williams, *supra* note 27, at 1079 (discussing majority and supermajority requirements in state constitutions to make a convention call).

30. *Id.*

31. Benjamin, *supra* note 12, at 192.

32. *Id.* at 193.

33. *Id.*

34. *See id.* at 194–99 (discussing the different methods of staffing, structuring, and operating a convention).

35. *Id.* at 199–200.

36. *See* Tarr & Williams, *supra* note 27, at 1083–84 (discussing the utility of the commission approach insofar as it circumvents at least some constitutional impediments to reform).

officials control appointments to revision commissions.³⁷ Florida gives its two commissions the right to place measures directly on the ballot, thereby bypassing the legislature entirely,³⁸ but most others, like Utah, New Mexico, and California, require that a commission's revision proposals be approved by the legislature before being submitted to a popular vote.³⁹

In sum, constitutional revision is normally a multistep process that requires approval by both elected officials and voters. Given the costs and professionalism associated with modern elections, constitutional conventions are particularly lengthy, expensive, and uncertain paths that are quite vulnerable to being derailed at critical points. In addition, elected officials are likely to be more suspicious of independently elected convention delegates than appointed members of a revision commission.

By comparison, there are typically more options and politically easier paths for making constitutional amendments. All states permit the state legislature to propose LCAs directly.⁴⁰ The path through the legislature is no sure thing and shapes the substance of what gets approved. Only nine states allow a simple majority of both chambers in a single session to pass an LCA,⁴¹ while fifteen require passage in two successive sessions and twenty-nine require supermajority approval.⁴² States with higher vote thresholds tend to produce larger proportions of technical, specific, and bipartisan amendments, which plausibly accounts for their higher rates of adoption by voters.⁴³ In all but one state, LCAs must be ratified by the electorate, usually by a majority of those voting on the measure.⁴⁴

In many states, some routes for passing constitutional amendments bypass the legislative hurdle. In some states, constitutional measures can be placed on the ballot directly by a constitutional revision commission or convention,⁴⁵ and in others, by popular initiative (sixteen states).⁴⁶ In states that allow them, an initiative constitutional amendment (ICA) makes the ballot if it successfully meets a minimum signature threshold (most commonly between 6% and 10% of the previous gubernatorial vote),⁴⁷ with some states also having geographic distribution requirements for qualifying

37. See Benjamin, *supra* note 12, at 191 (discussing the Florida commission scheme as an example).

38. *Id.*

39. *Id.* at 192.

40. See *id.* at 181–82 (describing the different approaches of all the states for allowing the legislature to pass an LCA).

41. *Id.* at 181.

42. *Id.* at 181–82.

43. See *id.* at 182 (“Provisions for size of majority and frequency of passage are often linked.”).

44. See *id.* at 185 (identifying Delaware as the sole exception).

45. *Id.*

46. *Id.* at 186.

47. *Id.* at 188–89.

signatures.⁴⁸ These states also typically allow initiative statutes to be placed on the ballot, with the difference between the requirements being that statutes require fewer valid signatures.⁴⁹

Some state constitutions limit the number of amendments that can be made per session; the number of times a measure can be resubmitted; and the number of subjects that can be covered by one amendment, and specify whether separate votes must be taken on each amendment.⁵⁰ Single-subject and separate-amendment regulations are meant to narrow the scope of proposed amendments and prevent them from becoming backdoor revisions.⁵¹ These requirements also protect voters from having to cast a take-it-or-leave-it vote on amendments that contain both popular and unpopular elements.

To summarize, most states offer several ways to amend their constitutions. While the hurdles for successful amendments are not trivial, they are lower than for amending the U.S. Constitution and not much higher than the hurdles for passing ordinary statutes. Successful amendment of the U.S. Constitution requires the approval of the legislatures of thirty-eight states, so it is not surprising that state constitutions are amended much more frequently than the U.S. Constitution. The process of amending state constitutions also is much easier than revising them, so it is also not surprising that states revise less frequently than they amend: rational political actors will seek the path of least institutional resistance and most likely success. And because an ICA is not a great deal more costly to qualify and pass than an initiative statute, not surprisingly, interest groups are likely to avail themselves of the constitutional option when feasible.

In theory, states that allow ICAs do not allow constitutional revision through the popular initiative process.⁵² Amendments that fundamentally change a state constitution or that are not confined to a single issue are, in theory, prohibited.⁵³ State courts decide whether an amendment is impermissibly fundamental or broad.⁵⁴ Nevertheless, amendments can still turn out to be very substantial reforms for two reasons.

First, because the line between a revision and an amendment is far from bright, amendments that are very substantial reforms often are deemed by the courts not to be revisions. For example, California's 1990 term-limits measure (Proposition 140) imposed extremely short terms for the state legislature and a lifetime ban on termed-out members, substantially weakening the legislature's leadership, institutional knowledge, oversight capability,

48. *Id.* at 189.

49. *Id.* at 188.

50. *Id.* at 183–84.

51. *See* Tarr, *supra* note 11, at 3 (discussing the general legislative desire to introduce needed changes without promoting fundamental reform).

52. Benjamin, *supra* note 12, at 178.

53. *Id.* at 183, 190; G. Alan Tarr, *The Judicial Branch*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 85, 92.

54. Tarr, *supra* note 53, at 92.

and committee system.⁵⁵ In so doing, the amendment shifted power from the legislature to the executive and increased lobbyists' influence on the legislative process. Yet the California Supreme Court did not deem this change to be substantial enough to qualify as a revision.⁵⁶

Second, even when a measure by itself is clearly an amendment and not a revision, the accumulation of separate amendments on a given subject passed at different times can equal a substantial revision. A good illustration is the long list of separately passed measures in California that limit taxes, cap total expenditures, and impose minimum expenditure requirements in many program areas.⁵⁷ The cumulative effect of these measures is to severely constrain the fiscal discretion of California's elected officials.⁵⁸ Each measure is narrow enough to fit under the single-subject rule, but taken together these measures effectively remove the constitutional authority of the legislature to construct the state's annual budget. California's fiscal process is an example of how to revise a constitution quite dramatically through the amendment process without raising objections on revision-versus-amendment grounds.

III. Taking Advantage of Constitutional Malleability

The changing conditions of modern American politics have shaped recent state constitutional trends. In particular, the growing number and sophistication of interest groups plus rising partisanship in American political parties have complicated the task of constitutional revision while stoking the fires of amendment. Constitutional reform, like lawmaking, has become a battleground in which political parties and competing interest groups seek to gain advantage by constitutional means. Labor unions, teachers, industry trade associations, tax-limitation groups, animal-rights activists, environmentalists, prison guards, and many other groups compete for favorable treatment, a bigger share of the state budget, or both. State constitutional amendments are an attractive means for achieving these ends. State constitutions do not limit their own content and contain many provisions that are virtually indistinguishable from normal legislation.⁵⁹ Unlike simple

55. For a discussion of the measure and its effects on the California legislature by the Policy Institute of California, see generally BRUCE E. CAIN & THAD KOUSSER, *ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS* (2004).

56. See *Legislature v. Eu*, 816 P.2d 1309, 1316–20 (Cal. 1991) (holding that an amendment creating legislative term limits left the fundamental state constitutional structure unchanged and thus was not an unconstitutional revision).

57. See Mathew D. McCubbins, *Putting the State Back in State Government: The Constitution and the Budget*, in *CONSTITUTIONAL REFORM IN CALIFORNIA* 353, 363–64 (Bruce E. Cain & Roger G. Noll eds., 1995) (describing the extensive and convoluted patchwork of constitutional limitations on legislators' taxing and spending powers and how such amendments often restrain legislators' abilities).

58. *Id.*

59. See Tarr, *supra* note 11, at 1–2 (detailing the various aspects of state constitutions that make them so comprehensive).

legislation, constitutional amendments cannot be repealed by subsequent elected officials, so a successful amendment makes a policy change more durable. In essence, the malleability and specificity of state constitutions invite political attention from political actors who otherwise would fight things out in the legislature.

Consider, for example, California's Proposition 98, which guarantees a fixed share of the annual budget for K–12 education except in fiscal emergencies.⁶⁰ K–12 must compete for its share of the budget with other important traditional state functions such as higher education, health care, social services, transportation, and corrections. Having a constitutional guarantee of a minimum level of spending, even if not ironclad, gives K–12 a priority in the budget process and reduces teachers' bargaining uncertainty in negotiating salaries and work rules. A constitutional provision of this sort is hard to repeal because opponents must qualify a new initiative and convince voters to reverse themselves. A statutory measure, by comparison, runs the risk of being amended at any time by the legislative majority and the governor.

Constitutional victories also can be valuable for gaining partisan advantage. Political reforms often differentially impact political parties and their constituents. Recent examples in California include term limits, campaign finance, redistricting, and the open primary.

Prior to the passage of term limits, Democrats enjoyed secure majorities in the state legislature, while Republican gubernatorial and presidential candidates normally received majority support.⁶¹ Many Republicans believed that Democratic incumbents were unfairly protected by unlimited incumbency, and even worse, that long-term incumbency corrupted elected officials and disposed them to spend more public money and to create more

60. The complexities of Proposition 98 funding include a guaranteed thirty-nine percent base of General Fund spending, with annual increases tied to a formula based on school attendance, per capita personal income, and General Fund revenues. ELIZABETH G. HILL, LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 98 PRIMER 3 (2005), http://www.lao.ca.gov/2005/prop_98_primer/prop_98_primer_020805.pdf. The legislature can suspend the Proposition 98 guarantee for one year by a two-thirds vote. *Id.* at 4.

61. See ANDREW L. ROTH, ROSE INST. OF STATE & LOCAL GOV'T, THE CALIFORNIA LEGISLATURE: SOME FACTS AND FIGURES 1 (2008), <https://www.policyarchive.org/bitstream/handle/10207/8134/CALeg.pdf> (reporting Democrats' advantages over Republicans in the California State Legislature in 1961 (47% to 33%), 1976 (55% to 25%) and 1988 (48% to 32%)); MORRIS P. FIORINA & SAMUEL J. ABRAMS, *Is California Really a Blue State?*, in THE NEW POLITICAL GEOGRAPHY OF CALIFORNIA 291, 293–94 (Frédéric Douzet et al. eds., 2008) (indicating that between 1943 and 2006, Republican governors served a total of forty-three years while Democratic governors served a total of twenty-one years; that between 1948 and 2006, Republican presidential candidates carried California in nine out of fifteen presidential elections; and that between 1944 and 2008, Democrats served seventy-four years in the U.S. Senate whereas Republicans served fifty-two years); see also California State Library, Governors of California—Biographies, http://www.californiagovernors.ca.gov/h/biography/index_party.html (listing governors of California by party: since 1900, there have been fifteen Republican governors and four Democratic governors).

government programs.⁶² Consequently, Republicans were substantially more supportive of term limits than were Democrats.⁶³

By comparison, Democrats have been more supportive of campaign finance reform than Republicans. Democrats are more likely to believe that moneyed interests favor conservative, business-friendly policies.⁶⁴ California Democrats have also been more skeptical of redistricting reform because they control both houses of the legislature, while Governor Schwarzenegger, a Republican, advocates redistricting reform in order to increase competition in legislative races and enhance the chances for moderate candidates who would be more likely to support his policies.⁶⁵ Meanwhile, moderate California Republicans support open primaries, such as the blanket ballot and the Louisiana runoff system, because they want to reduce the stranglehold that the conservative base has on its party's nominees.⁶⁶ The point of these examples is not to argue that political calculations are the sole or even primary motives for any of these reforms but only to make the point that partisan calculations often play a prominent role in the patterns of support and opposition for re-engineering governance institutions.

Another important motivation for locking positions into the constitution is to overturn an unpopular court decision. This motive figured prominently in California's recent Proposition 8 regarding gay marriage. Previous definitions of marriage were found in statutes,⁶⁷ which could be altered by normal legislative processes or overturned by the supreme court. Same-sex marriage

62. See BRUCE E. CAIN & THAD KOUSSER, ADAPTING TO TERM LIMITS: RECENT EXPERIENCES AND NEW DIRECTIONS 53 (2004) ("A primary motive behind Proposition 140, made explicit by its backers, was to rid Sacramento of the dictatorial leadership and extreme partisanship that, in their contention, characterized the 1980s.").

63. See Gary Moncrief et al., *Composition of Legislatures*, in INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS 22, 30 (Karl T. Kurtz et al. eds., 2007) ("The assumption was that the Republican Party, which was the 'out party' at the time the term limit movement emerged, would benefit."). The gap between Democratic and Republican support for term limits in recent years has been in the range of thirteen points. Mark DiCamillo & Mervin Field, *Smaller Majority Now Favoring Prop. 93, the Term Limits Initiative*, THE FIELD POLL 2247, Oct. 31, 2007, at 3 tbl.2, <http://www.field.com/fieldpollonline/subscribers/RIs2247.pdf>.

64. See, e.g., DEMOCRATIC NAT'L CONVENTION COMM., THE 2008 DEMOCRATIC NATIONAL PLATFORM: RENEWING AMERICA'S PROMISE 56 (2008), <http://www.democrats.org/a/party/platform.html> (decrying the influence of oil and insurance lobbyists and supporting campaign finance reform "to reduce the influence of moneyed special interests").

65. John M. Broder, *Schwarzenegger Proposes Overhaul of Redistricting*, N.Y. TIMES, Jan. 6, 2005, at A16 (commenting on the impending "collision" between Governor Schwarzenegger and the California Democrats who "will oppose the redistricting plans").

66. See John R. Petrocik, *Candidate Strategy, Voter Response, and Party Cohesion*, in VOTING AT THE POLITICAL FAULT LINE 270, 275 (Bruce E. Cain & Elizabeth R. Gerber eds., 2002) ("California's blanket primary was initially sponsored by Republican moderates as a solution to the presumed dominance of GOP nomination politics by ideological conservatives.").

67. See, e.g., CAL. FAM. CODE § 300 (West 2004) (defining marriage as "a personal relation arising out of a civil contract between a man and a woman").

bills were passed in both 2005 and 2007 but vetoed by the Governor.⁶⁸ Subsequently, the California Supreme Court overturned Proposition 22, which explicitly prohibited gay marriage, on equal protection grounds.⁶⁹ Opponents, seeking to overturn the Court's decision and to prevent any further legislative attempts to legalize gay marriage, qualified a constitutional amendment that defined marriage as only between a man and woman.⁷⁰ In effect, gay-marriage opponents used the constitution to override both the legislature and the courts.

All of the examples given so far are about actors seeking advantage through amendment activity. But these same groups and individuals are also players in the revision process—often in a more negative way. The success rate of California ICAs is typically less than 50%,⁷¹ but the success rate of constitutional-revision processes in California has been zero in the last quarter century,⁷² and for good reason. The logic of revisions is that they are inherently more vulnerable to death by coalescing opposition than single amendments are. Because revisions in California are meant to be fundamental, the stakes are higher and more players are affected by proposed changes. By seeking to make sweeping changes in the constitution, revisions make many enemies all at once. Eventually, the sum of all the groups that do not favor a particular provision can become an overwhelming coalition of veto minorities.

The analytic logic that constitutional commissions and conventions often employ (sometimes at the urging of well-meaning academics) ignores or downplays the task of winning public or legislative approval. A good illustration is the tortured history of the California Constitution Revision Commission in the early 1990s.⁷³ The goals of the commission were to rationalize California's governmental institutions, eliminate duplication, and increase accountability.⁷⁴ Like many states, California's 1879 Constitution

68. See Jill Tucker, *Governor Cites Prop. 22 As He Vetoes Leno Bill*, S.F. CHRON., Oct. 13, 2007, at B2 (explaining that in 2007 the Governor vetoed a “gender-neutral” marriage bill, after vetoing a similar bill in 2005).

69. See *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008) (holding that the right to marry encompasses “the core set of basic substantive legal rights and attributes traditionally associated with marriage that are so integral to an individual’s liberty and personal autonomy that they may not be eliminated or abrogated by the Legislature or by the electorate through the statutory initiative process”).

70. See *infra* Part IV.

71. See Bruce E. Cain et al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, in CONSTITUTIONAL REFORM IN CALIFORNIA, *supra* note 57, at 265, 269 (“[T]he average passage rate for ICAs since 1910 is 31 percent.”).

72. Bruce E. Cain, *Constitutional Revision in California: The Triumph of Amendment over Revision*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 59, 59 (noting how it is “almost impossible to revise the [California] state constitution”).

73. For a more complete discussion of the California situation, see *id.* at 59–71.

74. CAL. CONST. REVISION COMM’N, FINAL REPORT AND RECOMMENDATIONS TO THE GOVERNOR AND THE LEGISLATURE 1 (1996), <http://www.californiacityfinance.com/CCRCfinalrpt.pdf>.

provided for a plural executive system that now includes a separately elected Lieutenant Governor, controller, treasurer, attorney general, secretary of state, insurance commissioner, and superintendent of public instruction.⁷⁵ Because these offices have low visibility and cloud the lines of accountability, the Constitution Revision Commission recommended that three of these offices be appointed.⁷⁶ While this reform made sense from a rational analytical perspective, it had the unfortunate political byproduct of leaving three fewer opportunities for term-limited state legislators to stay in political office.

Legislators were not the only veto players who were worried about consolidation and simplification in the name of efficiency. K–12 teachers liked some of the budget reforms but would not sign off on eliminating the elected superintendent of public instruction and giving the duties of that office to the appointed secretary of education.⁷⁷ Special districts liked some proposed tax reforms but opposed consolidating local governments.⁷⁸ Taxpayer groups liked the commission's endorsement of a balanced state budget with a rainy day fund for recessions, but they would not accept local control over local revenue or a return to majority-rule referenda for increasing property taxes.⁷⁹

The critical strategic choice for a revision effort is whether to consider the full spectrum of potentially attractive changes or to restrict deliberations to what is politically feasible. A politically savvy agenda may be likely to succeed, but it risks being revisionist and incremental. A bold, politically blind revision is likely to make more enemies than friends. Aided by their lobbyists, most organized interests are able to follow politics and legislation with a high level of knowledge and sophistication. Once revision discussions are underway in earnest and everyone's preferred changes are revealed, the various interests can calculate whether any particular proposal is good or bad for them. They then decide whether they are, on balance, better off or worse off with the package as a whole. If they care more about what they might lose on one particular issue rather than what they might gain on the others, they will join the opposition, and when the sum of the disgruntled reaches a critical mass, the revision process grinds to a halt. The problem is an example of the classic case of concentrated costs and diffuse benefits. If each of

75. See CAL. CONST. art. IV, § 11 (providing for the election of the Lieutenant Governor, attorney general, controller, secretary of state, and treasurer); *id.* art. IX, § 2 (doing the same for the superintendent of public instruction); CAL. INS. CODE § 12900(a) (West 2005) (making the insurance commissioner also an elected position); see also CAL. CONST. of 1879, art. V, §§ 14, 17, art. IX, § 2 reprinted in CONSTITUTION OF THE STATE OF CALIFORNIA 188–89, 242 (W.F. Henning, ed., Chas. W. Palm Co. 2d ed. 1899) (establishing the original versions of these provisions, minus the insurance commissioner, which did not then exist).

76. CAL. CONST. REVISION COMM'N, *supra* note 74, at 3.

77. Cain, *supra* note 72, at 62–63.

78. *Id.* at 62.

79. *Id.* at 63.

the governance problems of a state also happens to create institutionalized protections and benefits for a particular interest group, an attempt at global reform through revision is likely to create a coalition of strange bedfellows that collectively can block the entire package of reforms. It is not much of an exaggeration to claim that the only revisions that are likely to succeed are Pareto improvements (i.e., changes that make no powerful group worse off). Only a drastic deterioration in the conditions of the status quo brings anything more politically complex into play.

By comparison, amendment politics are more politically manageable; there is no need to deal with the uncertainties and open agenda of a commission or convention. Constitutional change can be effected either through the legislature or the initiative process in the seventeen (including two by indirect initiative) states that allow it.⁸⁰ There is less danger of linkage with an unrelated issue or that the agenda will get out of control. Gaining public support is still a substantial hurdle, but popular, respected, organized interests like teachers, law enforcement, and firemen have a good shot at getting what they want without any major concessions, compromises, or expenditure of effort on issues that other groups want and might have successfully demanded in a convention or commission setting.

But what are the consequences of more constitutional change being channeled through the amendment processes rather than conventions and revision commissions? Is it merely an interesting story about evolving contemporary political strategies, or is this trend shaping the kinds of constitutional changes states have been adopting in recent years? Should the courts care about the distinction between revision and amendment, and try to enforce a tougher, clearer line between the two?

The Parts that follow argue that amendment and revision shape outcomes differently and that a new conception of the revision doctrine should incorporate different demarcations for altering rights than for changing institutions or policies: stricter for changes in fundamental rights and looser for institutions. States that do not allow for revisions except through their legislatures should consider creating alternative revision paths.

IV. Revision, Amendment, and Rights

Many states have rights provisions in their constitutions that seemingly duplicate guarantees in the U.S. Constitution.⁸¹ This has resulted in a form of

80. See Cain et al., *supra* note 71, at 265 (“Of the 23 states that have the popular initiative, only 17 permit constitutional amendment (ICAs.)”; see also INITIATIVE & REFERENDUM INST., SIGNATURE, GEOGRAPHIC DISTRIBUTION AND SINGLE SUBJECT (SS) REQUIREMENTS FOR INITIATIVE PETITIONS, <http://www.iandrinstute.org> (click on drop-down box “I&R Quick Facts”; then follow “States with the Initiative Process (PDF)”) (listing the seventeen states that allow constitutional amendment by initiative and describing their precise procedural requirements).

81. *E.g.*, ALA. CONST. art. I, §§ 4–7 (guaranteeing freedom of religion, speech, assembly, and due process); HAW. CONST. art. I, §§ 4, 5, 12 (providing freedoms analogous to the First Amendment of the U.S. Constitution, recognizing due process and equal protection rights, and

judicial federalism in which the federal courts define the floor for particular rights while the state courts are allowed to build up from the floor (i.e., enhance the protections) if they so choose.⁸² The trends of hyperamendability and revision blockage have increased the tension in hybrid democracies between the principles of popular sovereignty and deference to the majority will as expressed in initiative outcomes on the one hand and the state-supplemented federal rights and court review on the other. The failure to enforce the revision-versus-amendment distinction could over time significantly erode some of these above-the-floor protections and challenge the courts' role in interpreting them. While U.S. constitutional-rights guarantees are substantial, there is much to be said for preserving rights federalism.

A good illustration of this tension is the case of California's Proposition 8, an ICA placed on the November 2008 ballot. It defined marriage as being between a man and a woman, thereby invalidating same-sex marriages.⁸³ The story behind this measure fits the theme that amendment activity is an extension of political competition from the legislative to the constitutional realm. The struggle over defining marriage was primarily centered within the legislature until Proposition 22 in 2000.⁸⁴ Language clarifying that marriage was between a man and a woman was added to the state's civil code in 1977,⁸⁵ but by 2000, opponents of gay marriage feared that the law did not explicitly prohibit the recognition of out-of-state same-sex marriages.⁸⁶ Failing to persuade the Democrats who controlled the California legislature, opponents of same-sex marriage placed clarifying language in a statutory initiative in 2000, Proposition 22, which won by a

prohibiting excessive bail and cruel and unusual punishment); ME. CONST. art. I, §§ 5, 16, 23 (prohibiting unreasonable searches and seizures, guaranteeing the right to bear arms, and prohibiting titles of nobility); MISS. CONST. art. III, §§ 19, 21 (prohibiting quartering of soldiers, and guaranteeing habeas corpus); MONT. CONST. art. II, §§ 5–7, 25 (guaranteeing freedom of religion, assembly, speech, expression, and press, and prohibiting self-incrimination and double jeopardy).

82. For a full discussion of the relation between state courts and fundamental rights, see Robert F. Williams, *Rights*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 7, 7–35.

83. The proposed revision was to add a Section 7.5 to Article II of the California constitution that read: "Only marriage between a man and a woman is valid or recognized in California." Proposition 8, Official Voter Information Guide: Text of Proposed Laws 128 (Nov. 4, 2008) available at <http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>.

84. See *In re Marriage Cases*, 183 P.3d 384, 407–09 (Cal. 2008) (tracing the history of same-sex marriage laws in California).

85. See Amanda Alquist, Note, *The Honeymoon Is Over, Maybe for Good: The Same-Sex Marriage Issue Before the California Supreme Court*, 12 CHAP. L. REV. 23, 24 (2008) ("In 1977, the California Legislature . . . [added] gender-specific terms in order to prohibit same-sex marriage.")

86. See Laura E. Friedman, Comment, "*Wedlock Deadlock*": *Equal Protection Versus the Will of the Voters*, 38 MCGEORGE L. REV. 545, 554 (2007) (identifying the stated goal of Proposition 22 as ensuring that California did not recognize same-sex marriages performed in other states).

margin of 61.4% to 38.6%.⁸⁷ Subsequently, the legislature passed gay-marriage bills in 2005 and 2007 that were vetoed by Governor Schwarzenegger.⁸⁸ By that time, opponents of gay marriage realized that they were one gubernatorial election away from losing the legislative battle over same-sex marriage in an increasingly blue state. Adding fuel to the fire, the California Supreme Court overturned the statutory limitation in its *In re Marriage Cases* decision.⁸⁹ The explicit purpose of Proposition 8 was to bypass the legislature and overturn the California Supreme Court in order to lock in a heterosexual definition of marriage.⁹⁰ Just as importantly, the implication of the measure was that the initiative majority, not the courts, should ultimately decide whether rights can be extended above the federal guarantee.

The California Supreme Court has previously considered whether an ICA can eliminate rights accorded to citizens in the state constitution. Proposition 115, the Crime Victims Justice Reform Act, attempted to limit defendants' rights in California by stipulating that the California constitution could not be construed to give greater protections than those afforded by the U.S. Constitution.⁹¹ In its *Raven v. Deukmejian*⁹² decision, the California Supreme Court determined that the implementation of Proposition 115 would have amounted to a fundamental revision of the state constitution because it would have subordinated the judiciary's role in the governmental process.⁹³

Stepping back from the specifics of these two cases, the issue of who determines whether rights can be expanded seems to fall pretty clearly into the kind of fundamental constitutional reform that was intended for the revision process. Proponents of both Propositions 115 and 8 chose the constitutional amendment route because it was easier and more likely to succeed than the revision alternatives. Convincing the legislature to convene a commission or convention for these purposes would have been impossible, and the outcomes of commission or convention deliberations would be uncertain in any event. Quite likely, legal experts testifying before either body would have called attention to broader questions about the court's role in

87. CAL. SEC'Y OF STATE, STATEMENT OF VOTE: 2000 PRIMARY ELECTION, at xi (2000), http://www.sos.ca.gov/elections/sov/2000_primary/sum_measures.pdf (providing the final voting totals).

88. Tucker, *supra* note 68.

89. *See* 183 P.3d at 453 (holding that the statutory limitation of marriage to heterosexual relationships was unconstitutional).

90. *See* ProtectMarriage.com, Why Proposition 8 (2008), <http://www.protectmarriage.com/about/why> (stating that Proposition 8 was being advanced to overturn the California Supreme Court and amend the state constitution to restrict marriage to be between a man and a woman).

91. *See* Text of Proposition 115, § 3 (1990) available at <http://holmes.uchastings.edu/cgi-bin/starfinder/6153/calprop.txt> (amending Article I, Section 24 of the California constitution to include the following language: "This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States.").

92. 801 P.2d 1077 (Cal. 1990).

93. *Id.* at 1089.

interpreting rights, perhaps weakening support for proponents of limiting rights. Choosing the revision-by-amendment path was the obvious strategy, even given the risk that the court might overturn the measure after the election. The California Supreme Court's failure to articulate a clear line between revision and amendment, and its track record of mostly deciding against revision objections encourage proponents of changes in fundamental rights to take this risk.

California would be no less a democracy if it limited state constitutional rights to those delineated in the U.S. Constitution and curbed the review powers of the state judiciary, but with such a limitation the state would be a different type of democracy. The relevant question is how best to decide to make such a transition. Leaving aside the specific details, the underlying logic of revision in California and most other states is that fundamental changes should receive more scrutiny and be subjected to more serious deliberation than they would receive in normal legislative processes. In addition, this logic implies that the basis for a final judgment about whether to accept or reject fundamental changes should be stronger and more considered than normal legislative judgment. For these reasons, many states, like California, have supermajority or successive-vote requirements at some point in the revision process.⁹⁴ By comparison, approval for an initiative measure requires only a majority of those voting for a measure, and the merits are debated solely within the framework of normal electioneering (heavy dependence on paid media and poll- and focus-group-tested appeals geared to eliciting emotional responses, etc.). The initiative process does not include a prior deliberative stage, as in the convention or commission process. As a consequence, there is no basis for believing that voters give serious consideration to the long-term consequences of changing the state's equal protection doctrine, especially because the issue of gay marriage taps into strongly held religious and ideological beliefs.⁹⁵

So the key question is this: if a state constitutes itself on the assumption that constituents will adhere to certain core principles and rules of the game unless they are changed by a specified deliberative process, should it allow changes in fundamental rights by the easier route of amendment because the revision process has become more difficult politically in recent years? No doubt some believe that the answer is yes because democracy is about majority rule and, besides, the Federal Constitution provides a floor to fundamental rights; however, for several reasons, the better answer is no.

94. *E.g.*, VA. CONST. art. XII, § 2 (calling for a vote of two-thirds of each house of the general assembly to call a convention for the revision of the state constitution). Some state constitutions make no differentiation between amendments and revisions, and require supermajorities for any change to the constitution. *E.g.*, ALA. CONST. art. XVIII, § 284; MD. CONST. art. XIV, § 1.

95. *See* PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA'S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 16 (2009) (concluding that party identification, ideology, and religiosity played strong roles in determining the choice voters made on Proposition 8).

First is the social contract response that a promise is a promise, and the failure to live up to commitments has costs. If a particular fundamental right or rule can be altered by mere amendment, then all can, and commitments to constitutional rights become less stable than they were before. People who move to a state under certain assumptions about fairness or equal protection for historically-discriminated-against groups will be less certain of the durability of those rights in the future. The majority at least owes it to minorities that they will consider the larger implications of such a change in a more deliberative fashion before they act.

Second is the value of rights federalism to the nation. Regardless of its legal or normative merits, *Roe v. Wade*⁹⁶ demonstrated how an attempt to define baseline rights for all states can exacerbate political divisions and distort national politics.⁹⁷ Considerable scholarly evidence shows that Americans sort themselves geographically by lifestyle, income, religion, and ideology.⁹⁸ Deciding which rights should be nationalized is a complex and nuanced exercise, and one that is not undertaken here. But allowing some rights variations among the states gives more time to build a national consensus and avoids the tensions that can arise with an attempt to forge a national agreement prematurely. Moreover, other states can learn from the pioneering experiences of the innovator states. The latter argument, of course, is a variant of the traditional “laboratory of the states” argument for the American system of federalism.⁹⁹ But an increasingly mobile population also implies a Tiebout¹⁰⁰ “voting with your feet” argument for allowing states to have different conceptions of rights above the floor. Rights federalism allows people to choose where they live based on differences between available packages of public goods, including rights, in various states. California’s stronger package of fundamental rights very much suits its diverse population and provides an option for those who prefer to live under stronger protections. If California no longer wants to be at the forefront of stronger

96. 410 U.S. 113 (1973).

97. See DAVID BARNHIZER, *ROE V. WADE AND THE CONFLICT BETWEEN LEGAL, POLITICAL AND RELIGIOUS TRUTH* 69 (2006) (describing the holding in *Roe* as the Supreme Court dropping a “political bomb on America in 1973”).

98. See, e.g., Frédéric Douzet, *Residential Segregation and Political Balkanization*, in *THE NEW POLITICAL GEOGRAPHY OF CALIFORNIA*, *supra* note 61, at 45, 59 (noting the lifestyle considerations in California that drive affluent families to live in different areas than affluent individuals who are young with no children); *id.* at 46 (“[A]s the population grows and gets more diverse, voters are sorting themselves along socio-economic, racial, cultural, and political lines.”); Ariane Zambiras, *Shifts in the Religious Divide*, in *THE NEW POLITICAL GEOGRAPHY OF CALIFORNIA*, *supra* note 61, at 71, 77, 80 (discussing the relocation of California’s Evangelical Christian population and their resulting concentration in the Central Valley area).

99. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (praising the notion that one state may enact experimental laws without affecting the rest of the states as one of the benefits of federalism).

100. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956) (concluding that a fully mobile population of voters will be the determiner of the way in which the local government expends its resources).

protections, that choice, critical as it is, should be made deliberatively and with a full appreciation of what it means for the state and its citizens.

For a hybrid democracy like California, the commitment to popular sovereignty needs to be reconciled with its representative and republican institutions. There are two competing conceptions of governance by initiative: the populist ideal that subordinates representative institutions to the voice of the people as expressed through direct democracy and the progressive vision that sees the initiative process as a safety valve for and supplement to the normal legislative process.¹⁰¹ The balance of direct and representative democracy in a state's institutions can be consequential in terms of policy and representation. Because of differential voting rates among groups of citizens who are geographically separated—such is often the case with racial, religious, and even ideological groups—states often have two distinct controlling constituencies (i.e., different groups control the statewide voting majority and the elected representatives).¹⁰² In California, dual constituencies arise from the distribution of the population by age and citizenship rights.¹⁰³ White voters are the majority in the statewide electorate, but because districts are based on population (not the number of voters or citizens), nonwhites are better represented in the legislature.¹⁰⁴

The statewide voting majority already has a strong voice in determining rights. The voting majority elects the Governor, and the Governor has the power to appoint judges when vacancies initially occur.¹⁰⁵ Moreover, the voting majority has the right to remove judges in retention elections.¹⁰⁶ When the California Supreme Court refused to implement a reinstated death penalty in the 1970s, pro-death-penalty groups targeted Supreme Court Justice Rose Bird and two other justices, and the voters turned them out of

101. See Bruce E. Cain & Kenneth P. Miller, *The Populist Legacy: Initiatives and the Undermining of Representative Government*, in *DAANGEROUS DEMOCRACY?: THE BATTLE OVER BALLOT INITIATIVES IN AMERICA* 33, 38 (Larry Sabato et al. eds., 2001) (“In short, the Progressives sought to use the initiative to enhance the responsiveness, professionalism, competence, and expertise of government. By contrast, Populists sought, then as now, to substitute the wisdom of the people . . . for the deliberations of elected officials.”).

102. See Bruce E. Cain, *Epilogue: Seeking Consensus Among Conflicting Electorates*, in *GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE* 331, 338–40 (Gerald C. Lubenow & Bruce E. Cain eds., 1997) (noting that race and geography differences in the make-up of local constituencies versus the state-wide constituency creates two very distinct electorates, depending on whether a vote is local or statewide).

103. *Id.*; see also Cain & Miller, *supra* note 101, at 50–51 (“[T]he two constituencies problem . . . can currently be seen most clearly in California.”).

104. See Cain, *supra* note 102, at 337–40 (describing how the “two constituencies problem” in California results in a large minority influence in the legislature despite a predominantly white statewide electorate due to the way legislative districts are drawn).

105. CAL. CONST. art. VI, § 16.

106. See *id.* (“Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor.”).

office.¹⁰⁷ The voters could have responded in the same way after Proposition 115 was overturned but chose not to do so. They had that option with respect to the decision that gave rise to Proposition 8 as well, and they will have it again in response to the court's recent narrow decision on the legal challenge to Proposition 8 that pleased neither side of the controversy.¹⁰⁸

In sum, there are good reasons for more stringently enforcing the line between amendment and revision with respect to state-enhanced rights. Allowing groups to take their causes to the ballot box in the form of constitutional amendments can undermine a state's commitment to rights and to judicial review. Given federal guarantees, a state has room to reconsider the degree that it supplements national protections, but reversals of this sort should be regarded as fundamental and taken only after an appropriate level of deliberation and consensus.

V. Revision and Institutions

The question of malleability also applies to the institutional structures described in state constitutions. All state constitutions lay out the basic rules and structure of government. The motive for a change in governance institutions may be to make government more transparent, efficient, and honest, but this is not necessarily the case. Because governance institutions can transparently advantage interests and elected officials, political competition can lead to attempts to change the basic rules of government in order to gain political advantage. As with changes in rights, the critical issue is whether there can be too much malleability of institutional structure. In the extreme, excessive openness to constitutional change would lead to constant revision of the rules, particularly by groups or parties that happen to have the upper hand at a particular moment in time. This instability could weaken respect for government (i.e., reduce its legitimacy) and could encourage or enable those in power to try to lock in their positions or lock out opposition. But a constitution that sets the bar for constitutional change too high might not adapt itself to changing circumstances or new problems.

The example of the U.S. Constitution suggests that many governance reforms can be effective when they are enacted in statutes rather than by constitutional amendments. Consider the lobbying reforms recently adopted

107. See Todd S. Purdum, *Rose Bird, Once California's Chief Justice, Is Dead at 63*, N.Y. TIMES, Dec. 6, 1999, at B18 (noting that Bird's "resolute opposition to the death penalty later led voters to remove her as chief justice").

108. *Strauss v. Horton*, No. S168047, 2009 WL 1444594 (Cal. May 26, 2009). While the court ruled that Proposition 8 was a valid amendment, it also limited its scope to the use of the word marriage, thereby permitting same-sex couples to enjoy the same rights as married couples, and refused to invalidate existing same-sex marriages. *Id.* at *65.

by Congress, which are at least as stringent as those in many states.¹⁰⁹ But national reforms have important constitutional limits, as the ongoing concerns over the electoral college or the anomaly of the U.S. Senate in the post-*Reynolds v. Sims*¹¹⁰ era amply demonstrate.¹¹¹ Some institutional changes are so fundamental that they need to be embedded in a constitution even if only to fix an existing flawed provision. So it stands to reason that if revisions are increasingly difficult and amendments are not, fundamental institutional reforms will increasingly be crammed into the amendment process.

The leakage of institutional reform from revision into amendment has been accelerated by two related structural features. First, the path to revision in many states leads through the legislature. Second, the legislature has historically had a privileged position in state constitutions,¹¹² and hence many modern state reforms have attempted to limit legislative power.¹¹³ The first point, as discussed earlier, is that only two states allow citizens to call for a convention by the initiative process and only fourteen periodically ask their citizens whether they wish to hold a convention without the prior approval of the legislature.¹¹⁴ This means that most state legislatures can block attempts at fundamental reform by refusing to authorize a convention or commission. Although a few states like Alaska and Montana explicitly prevent their legislatures from restricting the convention agendas, most do not, and some (e.g., Kansas, Tennessee, and North Carolina) explicitly provide for conventions with limited agendas.¹¹⁵ Some states provide for constitutional commissions in lieu of conventions, but the commissioners are typically appointed by elected officials and the commissions' proposals usually have

109. See generally Dorie Apollonio, Bruce E. Cain & Lee Drutman, *Access and Lobbying: Looking Beyond the Corruption Paradigm*, 36 HASTINGS CONST. L.Q. 13 (2008) (describing recent congressional efforts in lobbying reform).

110. 377 U.S. 533 (1964).

111. See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 34 (2006) ("Such 'little federalism' systems were swept aside in the 1964 *Reynolds v. Sims* decision by the Supreme Court, which stated that the Equal Protection Clause of the Fourteenth Amendment required the application of the 'one-person, one-vote' metric to both houses of a state legislature, and all states now comply with that decision.").

112. See Gerald Benjamin, *The Mandatory Constitutional Convention Question Referendum*, in 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 145, 148 ("[L]egislatures began as the dominant governmental institutions in the separation-of-powers systems of the American states.").

113. See *id.* (asserting that a main thrust of state constitutional change in America has been "diminution of the role and powers of legislatures").

114. Benjamin, *supra* note 12, at 192.

115. *Id.* at 194.

to come back through the legislatures.¹¹⁶ Both provisions undercut the commissions' independence.¹¹⁷

The legislature's centrality to the revision process coincides with a second feature of state government. Many state constitutions still bear a legacy of mistrust of executive power that was derived from America's experience with colonial governors. A common example of this mistrust is the widespread adoption of the plural executive, which divides executive power among multiple elected offices.¹¹⁸ As of 2000, there were 305 separately elected state executive officials in twelve different offices, including forty-three attorneys general, twenty auditors, thirty-seven treasurers, thirty-five secretaries of state, thirteen secretaries of agriculture, fourteen education officials, five labor officials, and seven public utility officials.¹¹⁹ In many states, the lieutenant governor runs independently from the governor, resulting in awkward situations and occasional disputes when they belong to different political parties. As discussed earlier, attempts to consolidate these positions and focus accountability in a given policy area on one executive office have been consistently opposed by legislators who are loath to get rid of offices they might run for in the future.

Local governments also have tried to limit legislatures' power. On balance, the trend has been to strengthen the executive branch of state government over the last one hundred years, beginning with Progressive Era reforms that introduced civil service,¹²⁰ expanded governors' offices,¹²¹ and established independent regulatory commissions.¹²² According to an index applied by Professor Thad Beyle, governors have continued to consolidate power in recent years in every area except the budget (but that of course is a

116. 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, app. at 197 (describing the common features of state constitutional commissions).

117. See Benjamin, *supra* note 12, at 191–92 (noting that constitutional commissions without direct ballot access “are not effective mechanisms for bypassing the legislature to make constitutional changes opposed by those in control of the state government”).

118. See Thad Beyle, *The Executive Branch*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 67, 72–79 (enumerating the multiplicity of high executive officials in numerous states); see also *supra* note 75 and accompanying text (describing California's own plural executive system).

119. Beyle, *supra* note 118, at 74–82.

120. See Richard C. Schragger, Essay, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2547 (2006) (noting that the National Municipal League in its first Model Charter endorsed a centralized executive “with an independent civil-service commission operating to counter the old spoils system”).

121. See Rogan Kersh et al., “*More a Distinction of Words Than Things*”: *The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 29 (1998) (“With popular and elite support for legislative dominance eroding during the nineteenth century, calls for a greater gubernatorial role in state administration increased commensurately. Progressive reformers spearheaded most of these drives.”).

122. See Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1247 n.23 (2008) (noting that independent regulatory commissions emerged during the Progressive Era that valued the “institutional model of expertise and independence”).

huge exception).¹²³ A major source of contention between governors and legislatures is whether a governor should have the unilateral power to make cuts in enacted budgets, whether by spending less than is appropriated or through emergency powers in a fiscal crisis, and if so, whether those cuts should be across the board or can differ by program areas, such as through a line-item veto.¹²⁴ Legislators have strong and vested views about reforms in this realm.¹²⁵

Legislatures also face pressures from below. Local governments persistently press for more autonomy from the state legislature.¹²⁶ Defining the local and state spheres of government is an ongoing, contentious problem. In California, the boundaries between these spheres continue to blur, particularly as local sources of revenues, especially property taxes, have been restricted by ICAs.¹²⁷ State-versus-local tensions are also manifest in defining home rule for chartered cities and counties,¹²⁸ establishing rules to govern the creation of special governments,¹²⁹ determining the extent of local fiscal autonomy,¹³⁰ clarifying the limits to the legal presumption that local interests should be subordinated to state interests,¹³¹ and enabling local

123. See Beyle, *supra* note 118, at 69–72 (indicating that the gubernatorial budgetary power has decreased since the 1960s).

124. See, e.g., CAL. BUDGET PROJECT, SCHWARZENEGGER BUDGET PROPOSAL WOULD CAP SPENDING, GIVE GOVERNORS UNPRECEDENTED POWER TO CUT SPENDING 6 (2008), http://www.cbpp.org/pdfs/2008/080513_Gov_Budget_Proposal.pdf (analyzing a proposal to grant the California Governor the power to enact midyear reductions in funding for programs and concluding that this reform would “substantially shift the power of critical budget decisions from the Legislature to the governor”).

125. See Wes Clarke, *Divided Government and Budget Conflict in the U.S.*, 23 LEGIS. STUD. Q. 5, 11 (1998) (describing how gubernatorial line-item veto powers function to significantly reduce legislators’ ability to resist governors’ policy preferences).

126. See Michael E. Libonati, *Local Government*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 109, 110–32 (positing that the tension between local and state government is best viewed through four dimensions: structure, function, fiscal, and personnel).

127. See Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REFORM 511, 515 (2002) (observing that the so-called “voter revolution” was spurred on in California “as a tax revolt, directed against the property tax”).

128. See Frank S. Alexander, *Inherent Tensions Between Home Rule and Regional Planning*, 35 WAKE FOREST L. REV. 539, 540 (2000) (“Inherent tensions exist between the goals of regional planning embodied in smart growth and the basic proposition of home rule.”).

129. See, e.g., Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 375–76 (1990) (characterizing special government institutions as allowing non-municipal localities to retain autonomy while receiving crucial government services); Ronald F. Campbell, *The Control of American Schools*, 65 ELEMENTARY SCH. J. 120, 123 (1964) (describing the tension between a traditional cultural preference for local control and localities’ need for state assistance to fund educational institutions).

130. See Libonati, *supra* note 126, at 119 (indicating that a study “reveals that, for local government, financial management is a realm of constraint”).

131. See *id.* at 111 (noting that some state constitutions forbid the legislature from forcing a municipality to accept state-run utilities without its consent).

government units to enter into agreements with one another.¹³² Once again, legislatures generally want to preserve their powers in these matters rather than cede them.

Perhaps even more problematic are reforms that regulate the legislature and its members, such as term limits, campaign finance, the choice between a bicameral and a unicameral legislature, and above all, redistricting. Term limits have mostly been imposed on legislatures by initiatives and generally have not been adopted in states that preclude ICAs.¹³³ No reform has more drastically altered legislative functions in the last century than term limits (rivaled only by the professionalization of some large state legislatures in the 1960s and 1970s).¹³⁴ Term limits have weakened legislative leadership and undermined the expertise and oversight capacities of legislative committees.¹³⁵ But term limits have also increased turnover,¹³⁶ and for that reason alone, remain popular with voters. Legislatures have done a little better with respect to reforming campaign finance¹³⁷ and the initiative process.¹³⁸ For instance, when the California legislature realized that outside reformers might use the initiative process to regulate campaign finance, they created their own reforms with much more lenient contribution limits.¹³⁹

Redistricting reform is another area where legislative opposition has been intense. The right to draw district lines is close to sacred for many legislators. The way districts are constructed affects not only their reelection prospects but also how much money they need to spend in a campaign,¹⁴⁰ the

132. See *id.* at 112, 117–18 (pointing to Illinois as one state that guarantees local governments the right to contract with one another, but noting that, generally, such an express right is required for local governments to have such power); Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equality, and the New Regionalism*, 78 WASH. L. REV. 93, 97 (discussing how state statutes often frustrate the ability of local governments to enter into agreements with each other).

133. See Jennie Drage Bowser & Gary Moncrief, *Term Limits in State Legislatures*, in INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS 10, 10–15 (Karl T. Kurtz, Bruce Cain & Richard G. Niemi eds., 2007) (providing examples of states that have imposed term limits by initiatives, such as California, Colorado, and Oklahoma, and providing examples of states that preclude ICAs and do not have term limits, such as Massachusetts, Washington, and Wyoming).

134. Karl T. Kurtz, Richard G. Niemi & Bruce Cain, *Introduction* to INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS, *supra* note 133, at 1, 1.

135. See Thomas H. Little & Rick Farmer, *Legislative Leadership*, in INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS, *supra* note 133, at 55, 68 (showing the decrease in legislative leadership caused by term limits); Bruce Cain & Gerald Wright, *Committees*, in INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS, *supra* note 133, at 73, 79 (arguing that term limits have limited the effectiveness of legislative committees).

136. David R. Berman, *Legislative Climate*, in INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS, *supra* note 133, at 107, 108.

137. See Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997, 1018 (2005) (“[D]irect democracy is hardly necessary for passage of [campaign finance] reforms.”).

138. *Id.*

139. *Id.*

140. BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE 1 (1984).

projects and bills on which they must work in order to be responsive to their constituents,¹⁴¹ their ability to raise campaign contributions,¹⁴² the number of challengers they might face in a primary,¹⁴³ and even where they have to live.¹⁴⁴ Prior to the passage of Proposition 11 in 2008, all previous attempts to take the primary redistricting function away from the California legislature and give it to the courts or to a nonpartisan or bipartisan commission ended in defeat, in large measure because legislators and members of Congress united strongly against them.¹⁴⁵ Term limits, in the end, made redistricting reform possible in California because incumbency became less important and undermined the legislature's resolve to resist to the bitter end giving up their line-drawing powers.

Resistance is as high or higher to even more innovative reforms such as creating a unicameral legislature or introducing proportional representation. When the California Constitution Revision Commission met in the early 1990s, two former legislators advocated a unicameral legislature, believing that the reconciliation negotiations at the end of bill passage were nontransparent and too often used as a means to bypass normal legislature procedures for political advantage.¹⁴⁶ Special interests, they claimed, often won victories under the cover of legislative darkness that they could not win in earlier, more transparent stages of bill development.¹⁴⁷ But which house would be collapsed and whether legislators in a larger, combined body would have smaller budgets and staff became critical considerations, and the idea died a quick death.¹⁴⁸

In all these ways, legislative interests conflict with reform efforts, which makes the legislatures' ability to block revision through the convention or commission route all the more critical. The predictable effect has been that

141. *See id.* at 2 (suggesting that redistricting can affect the legislators' attentiveness to their constituencies).

142. *See id.* at 108 (explaining how one California legislator was unwilling to surrender "the smaller, wealthier, and white communities [that] were important to his fund-raising efforts").

143. *Id.* at 116.

144. *See id.* at 112 (discussing how another California legislator demanded that the lines for his party's proposed redistricting plan "be drawn so as to include the house that he had recently purchased . . . [because] [h]e was not prepared to move in order to keep his seat").

145. *See* Bill Stall, *State Panel Proposes Government Shakeup, One-House Legislature*, L.A. TIMES, Aug. 12, 1995, at A19 (stating the details of the unicameral legislature bill proposed); *State Panel Won't Push One-House Legislature*, S.F. CHRON., Feb. 7, 1996, at A17 (explaining why the Constitution Revision Commission abandoned its efforts "after some former supporters expressed fears that the proposal would undermine chances that the Legislature would pass its other recommendations").

146. *See* Cain, *supra* note 72, at 60–61 (discussing Senators Alquist and Keene's push for the adoption of a parliamentary system as a solution to "the requirement of deliberation by two houses [that] often delayed the passage of bills significantly").

147. *See id.* (suggesting that the deliberation requirement "sometimes led to game playing and secret deals in conference committees").

148. *See id.* at 62 ("Many in the State Senate . . . did not like the idea of only being one of 120 members, representing significantly smaller districts. Still others thought that they would get less staff resources if they were part of a larger house.").

reform groups have pressed for their changes through the amendment process, especially in the hybrid democracies.¹⁴⁹ Arguably, some of these amendments could be classified as revisions. Proposition 140, the term-limits initiative, is a good example, for its effects on weakening the legislature were predictable.¹⁵⁰ Nevertheless, the court was unwilling to strike the measure down on what seemed to them unproven speculations.¹⁵¹ Their concern was not unreasonable, but it was also not unreasonable to think that term limits, if they presented a significant risk of substantially weakening the legislature, were a revision, not a mere amendment.

Still, allowing revision by amendment with respect to legislative and executive branch reforms in light of the legislature's ability to veto revision seems justifiable. As compensation for the current legislative veto over the California constitutional convention and commission processes, the threshold for revision by amendment can be lower for institutional change (including judicial organization) in comparison to the threshold for matters involving rights and judicial review. Better yet, the revision process could be altered to allow, as some states do,¹⁵² for a convention or commission to be called by the people directly by initiative or through automatic, periodic referenda and for the commission or convention recommendations to go directly to the ballot without legislative or gubernatorial approval.

VI. Cumulative Revision

Although rarely if ever discussed, the cumulative effect of separate policy amendments can amount to important revisions of the constitution. State constitutions are grab bags of all sorts of items, including policies that would normally be found in statutes. The motive is usually to lock in a policy, prohibit an action, or assure a particular level of appropriations. Lawmakers then must follow a constitutional mandate irrespective of the political circumstances and needs of the moment. Constitutional specificity breeds inflexibility and hinders adaptation, and tempts more amendment activity to fix, adjust, or overturn what has already been added to the constitution.

In state fiscal areas especially, the cumulative effects of separately adopted policy initiatives can substantially alter a state government's powers

149. See, e.g., Bowser & Moncrief, *supra* note 133, at 10–11 (explaining how many term-limit proposals have been in the form of initiatives rather than statutes).

150. See Brian Weberg & Karl T. Kurtz, *Legislative Staff*, in *INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE OF TERM LIMITS*, *supra* note 132, at 90, 99–100 (explaining that Proposition 140 had a devastating impact on California's legislature through a combination of term limits and budget cuts).

151. See *Legislature v. Eu*, 816 P.2d 1309, 1336 (Cal. 1991) (upholding Proposition 140 as constitutional).

152. See, e.g., Joseph W. Little, *The Need to Revise the Florida Constitutional Revision Commission*, 52 U. FLA. L. REV. 475, 475 (2000) (describing the Florida commissions responsible for amending its constitution).

and capacities in ways that might not be foreseen by voters when each particular measure is passed. So, to come back to California, voters have at different times approved a string of measures that substantially limit the legislature's ability to raise and spend money. These include earmarked taxes, limits on property taxes, supermajority vote requirements for tax increases, and government-spending limits.¹⁵³ But while limiting taxes and total spending, voters also have adopted measures that directly or indirectly set minimum expenditure requirements in many areas of policy, such as criminal justice, education, environmental protection, and transportation.¹⁵⁴ In addition, interest and amortization of general-obligation bonds for specific types of public investments also must fit under the caps on taxation and expenditure.¹⁵⁵ In normal times, these collectively incompatible measures eliminate nearly all of the discretion of the legislature in constructing a budget.¹⁵⁶ In difficult financial periods, these measures mandate expenditures that exceed revenues, despite another constitutional provision that requires a balanced budget.¹⁵⁷

To expect the courts to police the cumulative effects of a long string of separately passed policy amendments is unrealistic. The key underlying problem is that a revision process to attempt to unravel the cumulative effects of numerous amendments is so difficult to initiate. A constitutional revision was not required to create California's fiscal mess, but a revision will be

153. See Richard Briffault, *State and Local Finance*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 11, at 213–28 (discussing some constitutional tools California and other states have used to restrict their legislatures' ability to raise and spend money, such as public purpose requirements for state spending, limitations on public debt for state and local governments, and limitations on state and local taxation); Revan Tranter, *Cities, Counties, and the State—From Prop. 13 to 218*, in GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE, *supra* note 102, at 63, 63–68 (discussing the passage of Proposition 13 as a means of cutting taxes and government spending).

154. See generally Cheri Lucas Jennings & Bruce H. Jennings, *Environment: California's Air, Water, and Land*, in GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE, *supra* note 102, at 227, 232–33 (observing the growing importance of environmentalism to California voters in the 1980s and the approval of seven statewide ballot initiatives that earmarked \$1.7 billion for environmental conservation programs); Joseph D. McNamara, *Criminal Justice: The Hottest Hot Button*, in GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE, *supra* note 102, at 205, 213–14 (discussing how the three-strikes laws and other criminal justice enactments significantly increased the total expenditures for criminal justice in California); Jordan Rau, *With Bonds Approved, the Line for Billions Forms*, L.A. TIMES, Nov. 9, 2006, at A1 (discussing the adoption of Proposition 1D, which, among other things, provided for \$10.4 billion to modernize classrooms, and also noting California voters' approval of Proposition 1B, which earmarked \$19.9 billion "to improve roads and public transit").

155. See CAL. CONST. art. XVI, § 1 (setting a maximum interest rate on all general-obligation bonds and limiting the legislature's ability to incur debts of over \$300,000 in a variety of ways).

156. See Cain, *supra* note 102, at 331 (observing the legislature's inability to pass budgets on time or resolve "[m]ajor issues of the day such as health care and tort reform").

157. See CAL. CONST. art. IV, § 12(f) (barring the legislature from sending the Governor a budget bill for a fiscal year that exceeds the state's revenues for that fiscal year and barring the Governor from signing such a budget bill into law).

required to fix it. This again argues for loosening current revision and amendment procedures to permit routes that bypass the legislature.

VII. Conclusions

The trend in state constitutional change is for more amendment and less revision. This trend has potentially serious consequences, particularly with respect to state constitutional rights and judicial review. Revision is hard in contemporary politics because interest groups and parties keep a close eye on rule changes and seek to lock advantages into the constitution. The uncontrolled agenda and cumbersome process of revision are not good options for them, so they naturally turn to the easier route of LCA or, in direct democracy states, ICA. The courts tend to allow considerable slippage in the line between revision and amendment, and sometimes this has led to changes that threaten state-enhanced rights, undercut the review power of the courts, and introduce inconsistent and incoherent structural reforms. The revision-versus-amendment distinction should be taken more seriously by the courts, and states should consider methods of revision that bypass their legislatures. Even so, revision will remain a difficult task because the gap between what is analytically desirable and politically feasible can be quite wide.