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# Constitutional Conventionphobia

*Gerald Benjamin\* and Thomas Gais\*\**

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The people who gave the world the written constitution seem to have forgotten how to write whole constitutions or to have lost the will to try. We Americans write amendments. We certainly engage in interpretation and reinterpretation. And we'll give somebody else a hand, if they're trying to write a constitution for somewhere else. In fact, this has recently become a booming cottage industry. But really new constitutions for ourselves? Not us. Not here. Not now.

## I. CONVENTIONPHOBIA AT THE NATIONAL LEVEL

Though calls for a national constitutional convention, often to achieve some specific goal, have been relatively frequent, we have not created an opportunity for partial or full reconsideration of the U.S. constitution by a group convened for this purpose since the "Miracle at Philadelphia" over two centuries ago.<sup>1</sup> Alternative constitutions have occasionally been drafted and published. But they generally have been dismissed as oddities, good stuff for scholarly musings, but not suitable for the attention of serious persons of affairs.<sup>2</sup> In recent years the mere prospect of a national constitutional convention even for a limited purpose (for example, to adopt a balanced budget amendment) provoked outraged resistance from judges, law professors and even presidents. "The most awful thing in the world," Supreme Court Justice William Brennan called it. "Constitutional Brinkmanship," constitutional law

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1. *See generally*, CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* (1966).

2. REXFORD TUGWELL, *MODEL FOR A NEW CONSTITUTION* (1970).

expert Gerald Gunther said.<sup>3</sup> “. . . [V]ery ill advised and contrary to the best interest of our country,” remarked President Jimmy Carter.<sup>4</sup>

Experts and politicians are not the only Americans who are conventionphobic. In 1995, two governors, Democrat E. Benjamin Nelson of Nebraska and Republican Mike Levitt of Utah, sought resolutions from state legislatures in support of a “Conference of the States.” Their plan was to maximize state clout on hot current issues in federalism by providing a visible national forum for position-taking for the governors and bipartisan delegations of six legislators from each state. Fifteen states acted in support, but then the plan came under attack from conservative groups and radio talk show hosts. They saw in it the potential for a “runaway” constitutional convention that might, for example, repeal the right to bear arms in the second amendment. They turned up the heat, and state legislative support evaporated.

All constitutions must face the question of how they may be changed or replaced. One common approach is to use existing governmental institutions to propose change, but with special rules — for example, extraordinary majorities and/or double passage requirements. Thus the U.S. constitution provides that amendments may be proposed by two thirds majorities in both houses of Congress.

But what if those in power resist a needed or desired change out of self-interest? As George Mason of Virginia remarked at the Constitutional Convention: “It would be improper to require the consent of the National Legislature, because they may abuse their power and refuse their consent on that very account.”<sup>5</sup>

Most constitutions anticipate this special problem by providing in their amending clauses for a second method for proposing changes, one that bypasses incumbent politicians and continuing institutions entirely. This is done in the states by use of the constitutional initiative, the automatic convention call, or (in Florida) the independent commission with direct access to the people. In the U.S. constitution this is done by the requirement - the word “shall” is used in Article V - that Congress call a special deliberative assembly to make changes in the basic

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3. Gunther, *Constitutional Brinkmanship; Stumbling Towards a Convention*, A.B.A. J. Vol. 65. (1979) p. 1046; Brennan (quoted in RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP*, viii, (1982).

4. Quoted in Frank J. Sorauf, *The Political Potential of an Amending Convention*, 117, KERMIT HALL, HAROLD M. HYMAN AND LEON V. SEGAL, EDs., *THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE* (1981).

5. CONGRESSIONAL QUARTERLY, *GUIDE TO CONGRESS*, 4TH ED., 312, (1991).

document, a constitutional convention, if two thirds of the state legislatures make "application" for one.

There is no national constitutional initiative procedure in the United States constitution. No automatic convention call. No continuing constitutional commission that can bypass the legislature. Thus if the constitutional convention procedure is unused, then as a practical matter the national constitution may be changed only with the consent of extraordinary majorities of those in power in both houses of Congress, the intent of the Founders notwithstanding. Or stated differently, national constitutional change can be blocked by one more than one third of the members of either house, currently 34 Senators or 146 Representatives.

The difficulty of altering the United States Constitution as a result of Congressional initiative has been widely noted. This is not only because proposal requires extraordinary majorities in both legislative houses, but also because of ratification requirements. Whatever method is used to propose amendments, to be finally implemented they must obtain support in three-quarters of the state legislatures or, if Congress chooses (as it did once for the 21st amendment repealing prohibition), in ratifying conventions in the same portion of the states.

Note that ratification procedures are entirely outside of the national political institutions established by the constitution. Note also that, unlike in all the states but Delaware, they require no return to the people, the ultimate source of political authority and legitimacy in a democracy. These ratification processes are federal, built on an equal role for states, whatever their size.

In the nation's first two hundred years, well over 9,000 constitutional amendments were introduced in Congress, more than 3,000 of these in the last third of a century. Twenty-six passed. Amendments that were given serious consideration in recent years but failed to pass touched such nerve-end subjects as abortion, school bussing, school prayer, and flag burning. Others that came close called for a balanced budget and direct election of president. Seven amendments that passed Congress failed of ratification, most recently the Equal Rights Amendment and one passed in 1978 giving the District of Columbia voting representation in Congress.<sup>6</sup>

When it comes to adding to or altering the language of the constitution, Congress is prudent about protecting its *de facto* monopoly. The threat of calling a constitutional convention has several times

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6. *Id.* at 315-316.

motivated serious congressional consideration of possible amendments. A mounting number of state petitions for a convention to require direct popular election of U.S. Senators forced the 17th amendment out of a reluctant Senate, where it had long languished. Petition campaigns preceded passage of amendments repealing prohibition (21st), limiting the president's term (22nd), and providing for presidential disability (25th). In the early 1980's, as the number of states calling for a convention on the subject passed 30, Congress took up a balanced budget amendment.<sup>7</sup>

Congress's control, however, is not plenary. Constitutional change also occurs through judicial interpretation (a very large subject that will not be explored in detail here). This is the reason Woodrow Wilson, while he was still a political science professor, described the U.S. Supreme Court as a "continuing constitutional convention." Recently, for example, attention has focused on the Supreme Court's renewed interest in the federal balance struck in the constitution, as witnessed by its five to four decisions finding limits on the expansion of federal power through the commerce clause in the *Lopez* case, but denying state authority to limit length of service in the national legislature.<sup>8</sup> The fact that court interpretation has become the easiest means of gaining constitutional change is probably part of the reason that battles over federal judicial nominations have lately become so fierce.

## II. THE NATIONAL ARGUMENT

Constitutional conventionphobia at the national level has three rationales. The first is that the territory is entirely uncharted. The second is that the constitution is important not only for its content, but also as a key symbolic source of national unity. The third is that single-function, federally based deliberative devices are inapposite for important decision making in modern American politics.

### A. UNCHARTED TERRITORY.

The current constitution's amending clause, Article V, provides only that a convention "shall" be called "on the Application of the Legislatures of two thirds of the several States." It provides no standard to

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7. Clement Vose, *Constitutional Change*, in Sorauf, *supra* note 4, at 115.

8. *United States v. Lopez*, 115 S. Ct. 1624 (1995); *U.S. Term Limits, Inc. v. Thornton*, and *Arkansas v. Hill* 115 S. Ct. 1842 (1995).

determine the validity of the states' action. There is no guidance as to whether a state can later change its mind about whether it wants a convention. Congress's discretion in calling a convention is undefined. It does not specify a basis of representation. It does not discuss means of delegate selection. And most important, it provides no method for limiting the reach of such a Convention, once it is convened.<sup>9</sup>

All this breeds uncertainty. And uncertainty in turn produces fear, fear of a "runaway" convention. Though most state calls for a national convention seek to limit its agenda, experts express great skepticism concerning the authority of Congress by statute or the states in their convention calls to constrain a convention empowered to alter that constitution itself.<sup>10</sup> The result might therefore be "... unlimited amendments which would change the basic thrust, the philosophy and the structure of our government," President Carter concluded.<sup>11</sup>

Certainly historic precedent offers no comfort in this area. After all, a convention that exceeded its mandate happened once before . . . in 1787.

In the late 1960's, encouraged by Senator Everett Dirksen of Illinois, the number of states petitioning Congress for a convention to overturn the U.S. Supreme Court's one-person-one-vote rulings approached two-thirds. Prospects for similar movements on other matters loomed. In reaction the Senate sought to reduce uncertainty by twice passing legislation, sponsored by Senator Sam Ervin of North Carolina, that limited the work of any convention to the subject of valid state applications, established standards to determine validity, apportioned to states the same representation at any convention that each had in the Electoral College, and defined procedures for transmission of amend-

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9. The major focus of debate has been on the authority of Congress to limit the scope of a national constitutional convention. See Charles L. Black, Jr., *Amending the Constitution: A Letter to a Congressman*, 82 YALE L. J. 189 - 215 (1972); American Bar Association. Special Constitutional Convention Study Committee. AMENDMENT OF THE CONSTITUTION BY THE CONVENTION METHOD UNDER ARTICLE V (Chicago: ABA, 1974); Walter E. Dellinger, *The Recurring Question of the "Limited" Constitutional Convention*, 88 YALE L. J. 1623 - 1306 (1979); *The Limited Constitutional Convention - The Recurring Answer*, 1979 DUKE L. J. 985 - 1001 (1979).

10. U.S. Congress. Senate. Committee on the Judiciary. REPORT: CONSTITUTIONAL CONVENTION IMPLEMENTATION ACT #1 98th Congress, 1st Session (See also same title, 99th Congress, 1st. Session); U.S. Congress. House of Representatives. Committee on the Judiciary. IS THERE A CONSTITUTIONAL CONVENTION IN AMERICA'S FUTURE? Committee. Print. Serial #1. 103rd Congress, 1st Session.

11. Sorauf, *supra* note 4, at 117.

ments to the states and their ratification.<sup>12</sup> When the number of states calling for a constitutional convention to consider a balanced budget amendment approached two thirds in the late 1970's and early 1980's, the Senate Judiciary Committee considered such legislation again, and once reported it unanimously.

On all these occasions the House took no action. Its philosophy seemed to be that reducing uncertainty would simply encourage convention advocates. A convention might occur. And once the dam was broken, Congress might permanently lose control of the amending process. "Anything that encourages this sort of use of Article V is unwise," said Congressman Don Edwards of California, Chairman of the House Judiciary Committee's Subcommittee on Civil and Constitutional Rights.<sup>13</sup>

If problems are severe enough, lack of experience with a process that might provide solutions is not by itself a sufficiently compelling reason to avoid it. There are severe problems with the national government. Trust and confidence in it have waned. Most citizens believe that leaders don't care what they think. Participation levels are low. Perennially imbalanced budgets, big-money politics, careerism in public office, government gridlock, all these have called forth proposals for constitutional change. But when combined with the absence of rules, procedures and limits - and with very severe questions about our institutional capacity to make any rules we make actually stick - the risks of an untested constitutional convention process to deal with these problems are likely to weigh more heavily than the potential gains, from almost any ideological perspective.

A national constitutional convention might limit its own agenda or might accept limits imposed by Congress or the states. Or it might not, and go on to actually produce a result. Before the smoke has cleared, basic rights might be redefined, the government in Washington fundamentally restructured, intergovernmental relations reordered, and centuries of law and precedent brought into question. All depends on who gets to participate and the processes used for reaching decisions.

Litigation might ensue on convention processes and results. But what would be the authority of courts created on constitutional authority to decide on actions of a convention? Uncertainty again.

Finally, given the diversity of modern American society, the time

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12. Sorauf, *supra* note 4, at 117-23.

13. Sorauf, *supra* note 4, at 122.

that a national convention and ratification process would require, and the rules under which we've become accustomed to functioning - remember, the 1787 convention was a *CLOSED* meeting - there is a very real prospect that there would be no usable result from a national constitutional convention. The broader the changes made the smaller the likelihood that ratification would occur by three quarters of the state legislatures or, if Congress chooses, state level ratifying conventions. A "Much Ado About Nothing" is far from impossible. Such an outcome would further undermine confidence in the governmental system's capacity to address its most fundamental problems.

### B. *THE SACRED SYMBOL.*

Consideration of the way we display the original constitution at the National Archives in Washington signals a second reason why a national convention is resisted. The setting is a shrine of our civil religion. The original constitution, now a sacred relic hydraulically lowered into a fifty-five ton bombproof vault deep in the ground to secure it from damage during a possible nuclear attack (a precaution of the 1950's) is displayed during fixed times on a raised platform. It is in a sealed helium and water vapor filled environment, under two levels of glass. Constant surveillance is maintained with space age cameras. During designated visiting times, enormous decorated steel doors are rolled back to admit the public. Under the eyes of security guards, velvet ropes guide more than a million curious and interested people a year along the sides of the room, up onto the platform for a quick viewing, and then down the other side.

In contrast with most writers on civil religion in America, Sanford Levinson rightly observes that religion has over the course of history "... served much more as a source of deep cleavage than of unity."<sup>14</sup> He therefore raises questions about the integrative effect of America's civil religion and its icons, the Declaration of Independence, the Flag, and the Constitution.<sup>15</sup> But these religious divisions are about differences of belief and interpretation, that is, about the meaning of the symbols rather than the symbols as physical objects. The objects themselves remain unifying, at least so long as they retain a connectedness with what

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14. CONSTITUTIONAL FAITH, 16 (1988).

15. See Irving Kristol, *The Spirit of '87*, PUBLIC INTEREST No. 86, 5 (1987). The intensity of the debate about a constitutional amendment barring flag burning may be explained in part by the clash it implicitly contains between two of the three most fundamental national symbols.

they symbolize, and are free of identity with a specific faction, cause or sect.<sup>16</sup>

A national constitutional convention is threatening to the very utility of the physical object, the relic, as a symbol of national continuity. The adoption of a substantially new constitution would render the original of the old one a curiosity, the "first constitution" now replaced. It would no longer be *THE* constitution, the oldest written basic document in continuous use in the world.

Our centuries old written constitution-as-symbol is a force that binds an increasingly polyglot nation in a time when the preservation of the United States may be more than a casual concern. "The constitution for a society like ours, which really has no nationality," Brown University historian Robert Wood observed, "became so important to our sense of ourselves as being a single people, that to tamper with it was to tamper with the nation itself."<sup>17</sup>

The twenty-first century will raise questions of "scale" that will challenge the large nation state. People in every corner of the globe of common ethnic background are exhibiting an enormous drive to live in their own nations, however small. At the same time, economic activity is increasingly organized on a world-wide basis. Europeans may demonstrate that political integration is no longer required before economic integration. Decentralizing tendencies in large democracies are everywhere apparent. In these circumstances it is far from foolish for Americans to value the constitution and its continuity as one of the few reinforcing symbols of our common nationhood, and therefore to abjure a national constitutional convention.

### C. *INAPPROPRIATE INSTRUMENTS FOR CHANGE.*

Interestingly, the U.S. constitution relies on two other single-function deliberative devices to deal with important matters the founders thought inappropriate to place in the hands of the governmental institutions they created in the U.S. constitution. Both, like the constitutional convention, have a federal character. Both too have fallen into desuetude. One is state ratifying conventions for constitutional amend-

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16. Thus the "capture" of the flag as a symbol by the right during the Vietnam war threatened to diminish its power as a national symbol. Ambiguities about the unifying value of the flag persist, and can be seen in the flag burning debate. In contrast, these are not evident in the constitution as object, perhaps because many who accept it as a symbol are unfamiliar with its contents.

17. Kermit L. Hall, et. al. 59 (1981).

ments. The other is the Electoral College for the selection of the president and vice president. As noted above, state ratifying conventions were used only once. And of course the Electoral College has long since lost any of the deliberative character that might have been intended for it and, as also noted, has itself been the object of major efforts at constitutional amendment.

Specialized deliberative assemblies have also fallen into disuse in our most important extra-constitutional political institutions, the major political parties. Direct primaries have been ascendant for almost half a century. No state has relied exclusively on a convention since 1955. Nominating conventions for statewide office remain important in only a handful of states.<sup>18</sup> And at the national level, conventions have become only slightly more than choreographed media shows, a place where the selection of the presidential candidate is ratified and his campaign launched before a nationwide television audience.<sup>19</sup>

These developments have led observers to conclude that such single-purpose deliberative bodies are an anachronism in modern, nationalized American politics. "[A] series of decisions independently made - parochially made, really, in some cases - by the separate states seems to be adding up to something that has no national deliberation or national discussion," Gordon Wood remarked at a conference on Article V in 1981. "And that runs so counter to the way in which we have come to conduct our national business that we are frightened by it."<sup>20</sup>

### III. CONVENTIONS AND AMENDMENT IN THE STATES

In a recent essay Wesley Horton, the attorney in Connecticut's landmark school finance case, noted that both the U.S. Constitution and the constitution of his state had been amended twenty-six times . . . but in the first instance it took over two hundred years, while in the second less than thirty. "Amending the United States Constitution is a nightmare," Horton wrote. "Amending the Connecticut Constitution is a breeze."<sup>21</sup>

There have been 234 constitutional conventions in American states, territories and the District of Columbia. The states have functioned under

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18. See MALCOLM JEWELL AND DAVID M. OLSON, *POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES* 3rd. ed., chapter 4 (1988).

19. ROBERT B. DISHMAN, *STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT*, (1960).

20. Hall, et. al., 156 (1981). See also the remarks of Frank Sorauf *supra* note 4, at 126.

21. *Memoirs of a Connecticut School Finance Lawyer*, 26 CONN. L. R. 709 n.14 (Spring, 1992).

146 separate constitutions. In the eight years between 1986 and 1993, 1007 amendments were offered to documents currently in force. Of these, 708 passed.<sup>22</sup>

There are at least five sets of reasons that constitutional conventions are more common and amendments more frequent at the state level.

#### A. NO SYMBOLS HERE.

First, state constitutions lack symbolic importance. Before there was a national constitution, legal historian Lawrence Friedman has written, state constitutions were "... a rallying point, a symbol of unity during the ... [revolutionary] ... war."<sup>23</sup> When Tocqueville travelled America, early in 1831, he observed that "Patriotism ... [was] ... still directed to the state ... There is a tendency of the ... people," he wrote, "to center political activity in the states in preference to the Union."<sup>24</sup>

The civil war preserved the union, and marked the moment of ascendance for national over state identity. Then there was another century and a third of growth and massive social and economic change - economic integration, immigration and internal migration. The south got its first post-civil war U.S. president in 1964, a final confirmation of full political integration in the nation. There are still state flags and other symbols, but few citizens know what they are, just as relatively few - 44% in a 1989 survey - know that there are state constitutions.<sup>25</sup> The state constitution lacks symbolic power because the function it may perform as a political symbol has been rendered irrelevant over more than one hundred years of history. And documents that lack symbolic power are easier to change.

#### B. PRACTICE, PRACTICE.

Second, states started fast and kept in practice. Georgia, South Carolina and Vermont each had three constitutions before 1800. Kentucky, New Hampshire and Pennsylvania had two. A constitution,

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22. Janice May, *State Constitutions and Constitutional Revision, 1992-93*. BOOK OF THE STATES 1993-94, 4 and Table 1.1, 19 (1994). The total for conventions includes the one held in the District of Columbia in 1982 and that called for 1994 in the Northern Marianas Commonwealth.

23. LAWRENCE M. FRIEDMAN, *HISTORY OF AMERICAN LAW*, 2nd. ed., 116 (1985).

24. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 386 (1945).

25. U.S. Advisory Commission on Intergovernmental Relations, *State Constitutions in the Federal System: Selected Opportunities for State Initiatives*, 17 ACIR BULLETIN 2 (July, 1989).

and forum to create it, was required as each new state entered the union. At different times during the first half of the nineteenth century, both the advocates for democracy and those who sought to limit its excesses calculated the potential risks of state level constitutional conventions far less than the probable gains. In addition to the three named above, fifteen states had at least two constitutions by 1850. Thus almost 60% of the states then in the union had experience with conventions and large scale constitutional change by the eve of the civil war.

The experience of the south with overall constitutional change is especially rich, reflecting the effect of massive political trauma. Fourteen southern and border states adopted thirty-seven constitutions (one quarter of the total adopted in all states over all of U.S. history) between the beginning of the civil war and the close of reconstruction. Alabama, Arkansas, Florida, Georgia and Texas each were governed under four different state constitutions during this period.

Outside the south after the civil war, and then later in the south as well, the impulse to change the fundamentals of state government through conventions came in waves, each with different goals: immediately after the civil war, to limit legislatures; in the populist era, to advance direct democracy and limit big business; early in this century, to create executive-centered governments modeled on the private corporation; and most recently, in the 1960's and 1970's, to modernize and professionalize legislatures and state government generally. In each era, leaders were able to draw on the history of conventions, established early and employed without cataclysmic effect; and on the crest of great movements for change, they could overcome resistant political forces.

Experience in the states with conventions means that there are or have been rules for calling, staffing and convening them in the state law or in the constitution itself (though "ancient history" tends to be discounted in the decision-making process). There are also records of fights about rules and their possible consequences, and outcomes that provide real evidence of consequences. This reduces the mystery that surrounds the relatively rare single-function forum that is a convention.

The capacity in some states to limit a convention's agenda in the convention call approved by the voters is another factor that may significantly reduce the perceived risks connected with holding one. As further detailed below, between 1938 and 1968, conventions with limited agendas were held in New Jersey, Pennsylvania, Rhode Island, Tennessee

and Virginia.<sup>26</sup>

### C. EASE OF AMENDMENT.

In some states, but far from all, the formal rules for changing state constitutions without conventions are easier than for changing the U.S. constitution. The Florida, Georgia and Oregon legislatures are explicitly authorized to adopt entirely new constitutions, certainly a sign that this kind of action is imaginable.<sup>27</sup>

More importantly, about a third of the states, unlike the United States, have a way to bypass the legislature to change the constitution that works: the constitutional initiative. (A second way around the legislature - the constitutional commission with direct access to the ballot - will be discussed in some detail below.)

#### 1. *Through the Legislature.*

There are two general means by which legislative initiative of constitutional change in the states may be made more difficult than the passage of simple legislation. The first is an extraordinary majority requirement for both houses (except, of course, in unicameral Nebraska). The second is passage more than once, often with an election intervening.

Twenty-nine states require extraordinary majorities with single passage, like the U.S. Constitution does for amendments that are initiated in Congress. Eleven mandate double passage, but by simple majorities. And four use both extraordinary majorities and double passage. Nine states use neither; they employ simple majorities and single passage.<sup>28</sup>

Double passage is the highest hurdle. Intervening elections change the composition of the legislative bodies. Time allows opposition to develop. In those states that provide more than one method, the one that requires single passage is almost exclusively used.<sup>29</sup>

All states experience more frequent constitutional amendment than

26. ALBERT STURM, *THIRTY YEARS OF CONSTITUTION MAKING: 1938-1968*, 65-66 (1970).

27. Albert L. Sturm and Janice C. May, *State Constitutions and Constitutional Revision: 1980-81 and the Past 50 Years*, in *BOOK OF THE STATES*, 119 (1982).

28. The number totals to more than 50 because the Connecticut, Hawaii and New Jersey constitutions, like that of the United States, use two methods. The Pennsylvania constitution provides for a second single-passage method as well, for emergency situations.

29. Gerald Benjamin and Melissa Cusa, *Amending the New York State Constitution Through the Legislature*, in GERALD BENJAMIN (ed.), *THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK*, 67 & 69 (1994).

does the United States. For those states in which the formal processes are least demanding, amendments are most frequent. But fifteen states have formal processes for proposing amendments through the legislature *that are more difficult* than that in the U.S. constitution, and still alter their constitution more frequently. Different formal arrangements are clearly only part of the answer.

## 2. *The Constitutional Initiative.*

The Constitutional initiative first appeared in Oregon in 1902. Currently, 18 states give their citizens the right to petition to alter the state constitution.<sup>30</sup> And where the opportunity is available, it is more and more being used. Constitutional changes that arrive on the ballot by the initiative still remain a small portion of all proposals, but the absolute number and proportion have both risen substantially in recent years. There were almost twice as many constitutional initiatives in 1992-93 (34) than in 1986-87 (18); the percentage of all proposals reaching the ballot by the initiative route in the later years was more than double (14.2%) that of the earlier ones (6.5%).

More important than the number of state constitutional changes made by this route is the character of these changes, deemed "historic" by two leading experts on the subject.<sup>31</sup> The constitutional initiative has brought tax limits to state governments and terms limits to state legislatures. Currently, 14 states have tax limits, 12 of them constitutional initiative states.<sup>32</sup> Term limits for the state legislature have been imposed in 18 states, all but four of those that have a constitutional initiative procedure. Clearly the initiative is a means of achieving constitutional change that can and does fundamentally alter governmental structures and processes, and therefore power relationships.

To cite just one dramatic example, term limits were adopted in California partly to break legendary Speaker Willie Brown's grip on the Assembly, a grip he held even after the Republicans won a bare majority of the seats in 1995. It worked. With Senate leader Dave Roberti, Brown

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30. David Kehler and Robert M. Stern, *Initiatives in the 1980's and 1990's*, in Council of State Governments, BOOK OF THE STATES 1994-95, 288, (Lexington, Ky.: The Council, 1994; See generally, THOMAS E. CRONIN, DIRECT DEMOCRACY, (1989); DAVID B. MAGLEBY, DIRECT LEGISLATION, (1984).

31. Sturm and May, *supra* note 27, at 120.

32. Scott Mackey, Remarks to the National Education Association School Finance Seminar, Atlanta Georgia, May 19, 1994, plus Nevada, adopted in 1994, *Revenue and Expenditure Limits*.

resisted the imposition of limits, and then litigated against them.<sup>33</sup> He lost twice. With his continuation in the Assembly decisively blocked, Brown ran for one more election as Mayor of San Francisco.

Seeing its effects, citizens in states without the constitutional initiative procedure are calling for its adoption. Amendments are being filed in state legislatures, though almost never by real powerholders.<sup>34</sup> Little wonder that political leaders in states without the constitutional initiative are vigorously resisting its imposition. Unlike the convention procedure at the national level, it does what it is designed to do: change the fundamentals of government without the consent or participation of those in power.

### 3. *Ratification.*

Except in Delaware, all states require ratification of amendments by a statewide referendum. A few have minimum vote or geographic distribution requirements for passage.<sup>35</sup> Between 1986 and 1993 voters ratified 73.3% of amendments sent to them by the legislature, and 37.2% of those placed on the ballot through the initiative.<sup>36</sup>

The ratification process for U.S. constitutional change is clearly far more difficult, especially in an era of rapid communication. It requires action in at least thirty-eight different places, by thirty-eight different groups of people. And that action is not simultaneous. It may be spread out over years, even if a deadline is set by Congress, as it was for the failed ERA and D.C. Representative Voting Rights measures mentioned earlier. Each state legislature or ratifying convention can therefore know who has acted earlier, and how many others must act before ratification occurs. And supporters and opponents from within and outside the state can concentrate resources and efforts at critical places in critical moments.<sup>37</sup>

### D. *THE SUBSTANCE.*

State constitutions are often remarked upon, and criticized, for their

33. Charles M. Price, *The Guillotine Comes to California*, in GERALD BENJAMIN AND MICHAEL MALBIN, *LIMITING LEGISLATIVE TERMS*, 117-138 (1992).

34. Michael Malbin and Gerald Benjamin, *Why is There No Real Term Limits Debate in New York?* EMPIRE STATE REPORT, 39-44, (Nov., 1992).

35. Benjamin and Cusa, *supra* note 29, at 69-70.

36. May, *supra* note 22, at 1, Table A.

37. On the change process at the national level see Gregory A. Caldiera, *Constitutional Change in America: Dynamics of Ratification Under Article V*, PUBLIUS, Vol. 15 (Fall, 1985) pp. 29-49.

"unconstitution-like" length and level of detail. The classic reformist position, often advocated but rarely achieved, is that the state constitutions should stick to fundamentals and avoid the "prolixity of a legal code."<sup>38</sup>

Legal historian Lawrence Friedman has even traced the roots of "inflated constitutions" to the late eighteenth century, though the founding era is one in which sticking to basics was thought to prevail. "Each one reflected the wishes of some faction or interest group, which tried to make its policies permanent by freezing them into the charter. Constitutions, like treaties, preserved the terms of the compromise between warring groups . . . . For very delicate issues, the tactics of constitutionalism appeared essential. Otherwise, slight changes in political power could upset the compromise."<sup>39</sup>

Additionally, a theoretical basis exists for state constitutions that are more extensive than the national document. Plenary governmental power transferred to the states from the British Crown as a result of revolution. Thus unlike that of the national government, the states' power is not "granted in" but is "structured and limited by" their constitutions. Under the federal arrangement, moreover, the responsibility of states and their derivative localities for daily governmental functions is very broad in scope. More detail is required to specify limits on a theoretically otherwise unlimited sovereign with broad responsibilities than to specify the limited powers and duties of a national government created from scratch.<sup>40</sup>

Their detailed content is a final reason that state constitutions are more frequently amended. State policy makers have been enormously artful about circumventing constitutional provisions designed to limit them, as even the most casual review of the history of state borrowing practices demonstrates. And one person's "fundamentals" is another's "excessive detail." But there is little doubt that constitutional amendment in the states is more frequent because of the needs that arise from ordinary policy making. This is one of the reasons such a large proportion of constitutional changes originate in the legislature, and most

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38. The phrase is Chief Justice John Marshall's, *McCulloch v. Maryland*, 17 U.S. (Wheaton) 316 (1819)(cited in ROBERT B. DISHMAN, *STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT*, 29 (1968).

39. Friedman, *supra* note 23, at 116.

40. Briffault (1994) 9-10,(citing Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 *PUBLIUS* 11 & 15 (Winter, 1982); G. Alan Tarr and Mary Cornelia Porter, *Introduction: State Constitutions and State Constitutional Law*, 17 *PUBLIUS* 4 (Winter, 1987).

of these pass at referendum; they are noncontroversial manifestations of business as usual.

#### IV. EMERGING CONVENTIONPHOBIA AT THE STATE LEVEL

All this evidence of frequent constitutional change in the states notwithstanding, there is considerable evidence that conventionphobia is reaching this level of government. Eighteen states are still functioning under their original constitutions. Far fewer than half as many conventions have been held in the twentieth century to date (63) than in the nineteenth (144), and the count for this century includes such non-states as Puerto Rico and Washington D.C..<sup>41</sup>

Between 1930 and 1981, of the 47 unlimited convention calls placed on the ballot 25 were defeated. The constitutions produced by seven unlimited conventions held during the 1960's and 1970's - in New York, Rhode Island, Maryland, New Mexico, North Dakota and Arkansas (twice) - were rejected at the polls. The 1974 unlimited convention in Texas failed to agree on a proposal at all.<sup>42</sup>

Fourteen state constitutions provide for automatic submission of ballot questions to the voters, asking if they wish to hold a constitutional convention as an alternative means of bypassing a potential legislative roadblock. In the quarter century between 1960 and 1985 automatic convention calls were approved only in New Hampshire, Rhode Island and Alaska.<sup>43</sup> Many who worked for the creation and adoption of the new Illinois constitution in 1970 saw no need for a convention when the next automatic vote arose in 1988. That call was defeated by a 3 to 1 margin.<sup>44</sup> In each of four states that provided for an automatic convention call during the early 1990's—Alaska, New Hampshire, Ohio and Michigan—majorities have rejected the opportunity. The most recently adopted state constitution is Georgia's, effected in 1982.

An announcement of the demise of unlimited state constitutional conventions would be premature.<sup>45</sup> But there is certainly a growing

41. Sturm, *supra* note 26, at 54; May, *supra* note 22, at 4.

42. Sturm and May, *supra* note 27, at 121.

43. Janice C. May, *Constitutional Amendment and Revision Revisited*, 17 PUBLIUS 156 n.16 (Winter, 1987). The Alaska convention call was voided by the courts.

44. Janice C. May, *State Constitutions and Constitutional Revision: 1988-89 and the 1980's*, in Council of State Governments, *BOOK OF THE STATES*, 1990-91, 22-23, (Lexington, Ky.: The Council, 1990).

45. As John Bebout has noted, this error was made in the 1930's, during a hiatus in convention use. *Recent Constitution Writing*, 35 TEX. L. R. 1071 (1957), (cited in Robert F. Williams, *Are State Constitutional Conventions a Thing of the Past?*, in this issue of *Hofstra Law & Policy Symposium*,

reluctance to employ them. When the prospect of a state convention is raised, the ensuing public debate is likely to lack subtlety. Appropriate or not, the arguments against national constitutional change find their way into it. The distinctions in function and character between state and national constitutions are blurred or lost on the assumption that the same arguments must apply to "things" with the same name.

The detail in state constitutions, as much as it attracts change, also provides a disincentive to the use of conventions, especially unlimited ones. Groups that have won protections in the past may fear losing them in new political circumstances, however remote the threat. Indeed, the prospects of a convention often induces traditionally liberal interests to take conservative stances.

Environmentalists and teachers in New York are already mobilizing against the calling of a convention there in 1997, when the automatic question will be on the ballot. Environmentalists fear alteration of the "Forever Wild" provision of the state constitution, added in 1894, that protects the Catskill and Adirondack Preserves. Teachers are concerned about possible threats to state constitutional guarantees of public employee pensions and the changes in the specific prohibition in the New York constitution against public support for parochial education. Interestingly, advocates of parochial education in the state no longer focus on constitutional change; they have found ways around the constitutional restrictions.<sup>46</sup>

As demonstrated at the national level, multiple amending processes are interactive, the use or potential use of one bearing upon the attractiveness of the other. A demonstrated capacity of the state legislature to make needed constitutional reforms provides powerful ammunition against the holding of a convention. In 1993 Michigan amended its constitution to make massive changes in its means of financing public schools. The next year, the state League of Women Voters argued against a "yes" vote on the mandatory convention ballot question. The League said that a convention was unneeded, because school finance reform proved that "... individual elements of the Constitution - even the most important ones - can be changed by elected officials and citizens without an open-ended effort at overall constitutional revision."

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n.6.

46. See Robert Stone, *Education* and William Ginsburg, *The Environment*, in Benjamin 177-194, and 221-230 (1994); Thomas Y. Hobart, Jr., *Opening Pandora's Box*, THE NEW YORK TEACHER, June 12, 1995.

Finally there is the argument that conventions are likely to be dominated by those in the "government industry," the political people and forces that already control the state government. If this is likely to be the case, there are two consequences. The pervasive public hostility to government institutions is automatically extended to conventions. And conventions become seen as useless for achieving fundamental changes opposed by those in power. That is, they don't work to do what they are intended to do. This argument has special force in states in which partisan election in already defined districts is specified for the election of convention delegates, as is the case in New York.

Interestingly these last two arguments contradict each other. One fears too much change in conventions; the other fears too little. Samuel Huntington's remark that "The American political experience is distinguished by frequent acts of creation but few, if any, of innovation," may be something of an overstatement.<sup>47</sup> But the record does show that conventions rarely make massive change. They alter what is already in place. They borrow provisions from other states, and from the U.S. constitution. For fear of generating opposition at ratification for the changes they wish to make, they are often respectful, perhaps too respectful, of clauses favored by powerful groups and interests. As Robert Dishman has noted, "... even the most trifling of measures tends to be accepted uncritically once it is made part of a constitution. When threatened it will be defended not only by the now vested interests which favored it in the first place but also by 'the considerable numbers of persons who distrust all constitutional change.'"<sup>48</sup>

## V. THE CONSEQUENCE OF CONVENTIONPHOBIA IN THE STATES

The advance of Conventionphobia at the state level creates two classes of states: those with the constitutional initiative and those without. In the latter group, about two thirds of the states (those where the convention call must be made by the legislature, and those with an automatic call provision that decline to use it), change in structure or process must pass through the legislature. Ideas are advanced that favor

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47. SAMUEL HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES*, 129-130 (1968).

48. Dishman 28 (1968) (quoting FRANK GRAD, *THE DRAFTING OF STATE CONSTITUTIONS: WORKING PAPERS FOR A MANUAL*, 1-19 (1967). On emulation in state constitutions see Dishman, *supra* note 38, at 8-9, and Friedman *supra* note 23, at 115-124, 346-355. On the validity of the Pandora's Box argument for New York, see Peter J. Galie, *A Pandora's Box? Holding A Constitutional Convention in New York*, in *New York State Temporary Commission on Constitutional Revision. EFFECTIVE GOVERNMENT NOW FOR THE NEW CENTURY*, 69-82 (1995).

those in power. An example is the four year term for governor, now almost universal. However, ideas that directly challenge legislative power - for example, term limits or unicameralism - go nowhere.

In the constitutional initiative states, in contrast, big structural changes are made, bypassing those in power. But they are made in the wrong way. Propositions are put on the ballot by advocates. Expensive campaigns are waged. Participation is limited. The vote is up or down. There is no real deliberation. There is no forum for exchange, no possibility for modification of proposals to make them more inclusive of a range of views. There is no consideration of the consequences of a major change in one part of the state constitution for provisions elsewhere. In fact, in some states a single subject rule, limits on the number of amendments on the ballot at any one time, and time limits on the reconsideration of failed proposals may positively bar dealing with the interactive effect of a wide-reaching proposal.<sup>49</sup>

## VI. CURING CONVENTIONPHOBIA

What is needed is a means of constitutional change that can bypass the legislature but is also deliberative. Several have been tried or proposed. The field is still wide open, however, for a good deal of institutional invention.

### A. *The Limited Convention.*

Limited calls may constrain a convention to consider specific subjects or alternatively allow general revisions while placing certain matters off limits. Thus the 1974 Texas convention was authorized to consider all matters except revision of the state bill of rights. For the 1977 convention in Tennessee, thirteen topics were specified in the call, including dates for legislative sessions and gubernatorial inauguration, homestead tax exemptions, school desegregation, and racially mixed marriages.<sup>50</sup>

Voters are more accepting of limited than unlimited convention calls. In the 1930-1981 period, a time in which almost half of the unlimited calls were rejected, only two of fifteen limited conventions met this fate. Most of the results of limited conventions that were held during

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49. Thomas Gais and Gerald Benjamin, *Public Discontent and the Decline of Deliberation*, 68 TEMPLE L. R. 29 (1995).

50. Leslie H. Southwick and C. Victor Welsh, III, *Methods of Constitutional Revision: Which Way Mississippi*, 56 MISS. L. J. 63-67 (1986).

this period were ratified by voters.<sup>51</sup>

The limited convention allays the "Pandora's Box" fear, and allows group support to more easily coalesce around goals for constitutional change. All constitutional change in Tennessee was blocked between 1870 and 1953, when a limited convention call occurred and eight amendments were passed. Subsequently there, several additional limited conventions were successful in advancing constitutional changes. Citing this example, Albert Sturm wrote in 1969, "Limitation of a convention's authority to specified matters approved by the voters in the call has enabled some states to accomplish constitutional changes after other methods have failed."<sup>52</sup>

As noted, it is precisely because a limited convention might be held that legislation that seemingly legitimizes such a convention is resisted in the U.S. Congress. Though a risky course, passage by two-thirds of the states of identical language petitioning for a convention for a specific purpose would in fact force a test on the question of the possibility of a limited national constitutional convention. As noted above, both reapportionment and the balanced budget movements brought us to the brink on this question. Russell Chapin has suggested that the states might take this course for another purpose, to recapture what he regards as their appropriate role in the federal system.<sup>53</sup>

In states like New York, where a broadly cast ballot question on a convention call is specified in the constitution itself, a limited call is clearly barred. Elsewhere, where the limited convention is now prevented by custom, practice or judicial decision, changes in interpretation may allow one. At the state level either a constitutional initiative (where possible) or action by the state legislature seeking a limited convention might join the question. Amendment of the constitution to specifically allow for a limited convention by these routes is also possible.

### B. *The Indirect Initiative.*

Nine states provide for the indirect initiative. It is used most often

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51. Sturm and May, *supra* note 27, at 122. Sturm, *supra* note 26, at 56-60. In Rhode Island in 1951 voters accepted 6 of 8 propositions for constitutional change, and 1955 1 of 3. In Virginia the results of limited conventions were "proclaimed" by the convention, not put to a vote.

52. Albert L. Sturm, *The Modernizing Procedure*, in RICHARD LEACH, *COMPACTS OF ANTIQUITY*, 99 (1970).

53. Russell Chapin, *Reinvigorating Federalism*, 19 *THE URBAN LAWYER* 523 - 537 (Summer, 1987).

for statutory rather than constitutional change, but is available for the latter in Massachusetts and Mississippi.<sup>54</sup> This procedure allows constitutional changes to be proposed for the ballot by petition, but then gives the legislature time to consider the matter and endorse it, or offer an alternative, before the referendum vote. Sometimes parallel questions may be asked of the voters on the same matter, one from the petitioners and one from the legislature. If both pass, the one with the most votes or largest majority is effected. In Alaska an action substantially similar to that sought by the initiative may forestall the referendum entirely.<sup>55</sup>

In states where both the direct and indirect initiative exist, petitioners have preferred going around rather than through the legislature. Often they are hostile to the legislature, or believe it has already proved itself unresponsive to their priorities. Direct ballot access leaves control of the question asked of the voters to them and preserves the "purity" of their effort. The Massachusetts legislature has used parliamentary legerdemain to compromise the constitutional indirect initiative procedure there. California abandoned the option in 1966 for want of use.

### *C. The Constitutional Commission With Direct Ballot Access.*

The Florida constitution has provided since 1968 for the creation of a constitutional revision commission at twenty year intervals to review the document with powers to directly recommend changes to the people of the state. The first such commission met in 1977-78, conducted a very wide-reaching and public process, but nevertheless saw its recommendations rejected at the polls. The voters, however, later refused to endorse a legislative proposal to abolish the commission.

A Tax and Budget Reform Commission with similar powers, but limited in the scope of its authority, was established in Florida in 1988. It had its recommendations on budget reform accepted in the election of 1992. A new Florida revision commission will be convened under the authority of the 1968 constitutional provision in 1997, and background work has begun for it.<sup>56</sup>

### *D. The Statutory Standing Constitutional Commission.*

Since 1969 Utah has employed a bipartisan standing constitutional

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54. Kehler and Stern, *supra* note 30, at 294.

55. Gais and Benjamin, *supra* note 49, at 1309.

56. Robert F. Williams, *The Role of the Constitutional Commission in State Constitutional Change*, in Benjamin, ed., *supra* note 29, at 78.

revision commission comprised of three appointees of the governor, three legislators from each house appointed by the leaders, and six members appointed by these nine. Its membership is prestigious and well rooted in the political branches; the commission's existence provides a continuing focus in the state on constitutional issues. It lacks constitutional status, however, and must report through the legislature. Nevertheless, it has had considerable success in advancing ideas for constitutional change. Between 1970 and 1994 twelve constitutional amendments reviewed or developed by the commission, many of them described as major, were adopted in the state.<sup>57</sup>

### *E. Action Panels.*

The New York State Constitutional Revision Commission recently called for four action panels to deal with critical governmental concerns in the state: fiscal integrity, education, state/local relations and public safety. The design of panels drew upon the model of the base closing commissions and the social security commission at the federal level. Members of high prestige and reputation were to be appointed by the governor and legislative leaders. Methods for broad consultation were to be specified in law. The elected state leaders were to commit to consideration of panel recommendations by a deadline specified in advance, in law.<sup>58</sup>

The action panel idea was a way of focusing on key areas of action, of interest to the citizens of the state, while avoiding the risks that many New Yorkers thought were embedded in an unlimited constitutional convention. The pending mandatory vote on a constitutional convention question in 1997 was seen as an incentive that might induce the governor and legislative leaders to act on this proposal.

Limited action panels appointed by the state's top elected officials for specific purposes, the commission reasoned, would have greater appeal for them than an unlimited convention, and might be seen as a way of forestalling a "yes" vote on the convention question. The commission expected that the action panels, if created, would propose packages of statutory and constitutional changes. It endorsed a "yes" vote on the convention question, however, if the state's top elected leaders took no action to address key problem areas in the state.

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57. UTAH CONSTITUTIONAL REVISION COMMISSION, 1994 ANNUAL REPORT,

58. THE TEMPORARY NEW YORK STATE COMMISSION ON CONSTITUTIONAL REVISION (The Goldmark Commission), EFFECTIVE GOVERNMENT NOW FOR A NEW CENTURY, (1995).

### *F. Building Deliberation into the Initiative Process.*

Qualifying constitutional initiatives for the ballot through a petition process simply aggregates individual actions, and involves no two-way communication. In a recent paper we argued that deliberation might be added to the initiative process by relying on open community or other institutional meetings to qualify initiatives. Within a general framework of simple rules, "These meetings could be sponsored by any institution, public or private . . . ." We also suggest the possible use of formal meetings of local government bodies to vote on ballot initiatives. "Instead of applying the analogy of candidate voting to initiative and referenda, perhaps we should instead apply the analogy of legislative voting, with meetings, time for debate, and public rather than secret votes."<sup>59</sup>

## VII. CONCLUSION - STRIKING MORE THAN ONE BALANCE

In a democracy the people rule. Through elections to representative institutions they hold accountable those they choose to govern. But what if this system of accountability through elections fails to work? Candidate elections reach only those governing, not the system within which they function. For system change, effective means of constitutional amendment are needed.

When citizens become deeply discontented with their government (not their governors), and have no thoughtful, intelligent deliberative means to alter it, negative consequences are likely. They may withdraw their support, by increments denying the government the legitimacy it needs to continue functioning effectively. Or, where the processes of direct democracy are available, they may use these to alter fundamentals of government in ways that are immediately appealing but fail to consider the range of views in the polity or anticipate potential damaging consequences as the effects of change ripple through the system.

Donald Lutz has recently argued that a real commitment to constitutionalism is reflected in amending processes that incorporate popular sovereignty, provide a highly deliberative decision-making environment and include a distinction between statutory and constitution-

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59. Thomas Gais and Gerald Benjamin, *Public Discontent and the Decline of Deliberation*, 68 TEMPLE L. R. 29 (1995).

al provisions.<sup>60</sup> This essay suggests the need to add an additional criterion, one known to the founders of the union and state constitution writers: a good amending process does not rely on the altruism of potential beneficiaries ( for example, legislators) of a perceived flaw in a polity's governing arrangements to produce a remedy.

Balance is needed: between ease and difficulty, to allow change while preserving continuity; and between "how" a constitution is amended and "who" does the amending, to allow deliberation while preserving legitimacy. At both the national and state levels striking both balances has often eluded us. We need to get to work.

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60. Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in G. ALAN TARR (ed.), *CONSTITUTIONAL POLITICS IN THE STATES*, (1996).

